Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Gas Industry Award 2010
(AM2018/10)

8 November 2018

4 YEARLY REVIEW OF MODERN AWARDS
AM2018/10 GAS INDUSTRY AWARD 2010

INTRODUCTION

1. On 11 October 2018, the Fair Work Commission (**Commission**) issued directions concerning the 4 yearly review of the *Gas Industry Award 2010* (**Gas Award** or **Award**). Specifically, the directions relate to an issue arising from clauses 22.2 and 22.3 of the Gas Award (**Impugned Clauses**), as explained in a recent decision (**Decision**) of the Commission.

2. This submission is filed by the Australian Industry Group (**Ai Group**) in response to the aforementioned directions. It wholly replaces our submission of 16 July 2018.

THE IMPUGNED CLAUSES

3. Clause 22 of the Award deals with meal breaks and includes the Impugned Clauses. It is in the following terms: (our emphasis)

> **22. Meal breaks**
>
> **22.1** A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.
>
> **22.2** Employees required to work for more than five hours without a suitable interval for a meal as provided for in clause 22.1 must, for all time worked in excess of the five hours before being allowed such interval, be paid at <u>double time</u>.
>
> **22.3** Employees required to continue or resume work during the meal break, must for the time of continuance or resumption until the full meal break is given, be paid at <u>time and a half</u>.

4. The Impugned Clauses require that an employee who is required to work for more than five hours without a meal break or is required to continue or resume work during a meal break must be paid the rate prescribed by those clauses.

5. In Ai Group's submission, the Impugned Clauses wholly regulate the amount payable to employees in the circumstances described. Other penalties are not payable during such time. Accordingly:

- Where an employee is required to work more than 5 hours without a meal break provided for in clause 22.1, the employee must be paid at 200% of the minimum hourly rate prescribed by the Award for all time worked in excess of five hours until a meal break is allowed.

- Where an employee is required to continue or resume work during a meal break, the employee must be paid at 150% of the minimum hourly rate prescribed by the Award for the time of continuance or resumption until a full meal break is taken.

6. In most circumstances, an employee who is required to work without a meal break or to continue or resume work during a meal break will receive a higher rate of pay for the time so worked than the rate of pay that applies to the ordinary hours of work otherwise being performed by the employee during that day or shift. For example: (see highlighted cells)

	Ordinary Hours	**Under Clause 22.2**	**Under Clause 22.3**
Day work on Monday – Friday	100%	200%	150%
Afternoon shift on Monday – Friday	115%	200%	150%
Night shift on Monday – Friday	130%	200%	150%
Ordinary hours on Saturday	150%	200%	150%

7. In some cases, an employee who is required to continue work without a meal break or continue or resume work during a meal break will receive the same rate of pay for the time so worked as the rate of pay that applies to the ordinary hours of work otherwise being performed by the employee during that day or shift. For example, where an employee works:

    a) Ordinary hours on a Saturday and clause 22.3 applies; and

    b) On a Sunday and clause 22.2 applies.

8. There are only very limited circumstances in which an employee who is required to continue work without a meal break and an employee who is required to continue or resume work during a meal break will receive a lower rate of pay for the time so worked than the rate of pay that applies to the ordinary hours of work otherwise being performed by the employee during that day or shift. For example, this would arise where an employee works:

    a) On a Sunday and clause 22.3 applies; and

    b) On a public holiday and clause 22.2 or clause 22.3 applies.

THE DECISION

9. In the Decision, the Commission said the following about the Impugned Clauses: (our emphasis; footnotes excluded)

> **[45]** In the *June 2018 decision*, we dealt with an issue raised by Ai Group in relation to meal breaks. Ai Group submitted that, consistent with the *July 2015 decision*, the Exposure Draft should be amended so that the words 'of the minimum hourly rate' appear after each reference to a percentage appearing in clauses 9.1(b), 9.1(c) and 9.1(d). The proposed amendment would take the following form:
>
> **9.1 Meal breaks**
>
> (a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.
>
> (b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200% of the minimum hourly rate.

(c) Employees required to continue work during the meal break must be paid at 150% of the minimum hourly rate for all hours worked from the beginning of the scheduled meal break until the full meal break is given.

(d) Employees required to resume work during the meal break must be paid at 150% of the minimum hourly rate for all hours worked from resuming work until the full meal break is given.

[46] Business SA supported Ai Group's submission.

[47] The AWU submitted that in the *October 2015 decision* a similar issue arose in respect of the Manufacturing Award and the term 'minimum hourly rate' was replaced with 'applicable hourly rate'. The AWU submitted that the term 'applicable hourly rate' also be used in the Gas Award, and stressed that if the term was not used there would be an incentive for employers to direct employees to continue or resume work during a meal break on Sundays and public holidays because they would be paid less.

[48] In the *June 2018 decision*, we agreed with the AWU that the effect of the term 'minimum hourly rate' would mean that an employee entitled to higher weekend or public holiday penalties would be entitled to a lesser amount under the circumstances contemplated by clause 9.1 of the Exposure Draft. We stated that the intention of the clause is to create a disincentive for employers to delay or interrupt employees' meal breaks. In order to achieve this, the rates under clause 9.1 must be in excess of that which employees are otherwise entitled.

[49] Despite agreeing with the AWU, we expressed a *provisional* view that a definition of 'applicable hourly rate' would not be inserted into the Exposure Draft for the Gas Award as this may cause confusion and add an unnecessary level of complexity. We proposed to use the term 'minimum hourly rate' as suggested by Ai Group, and clarify this by adding the words 'plus penalties and relevant loadings,' as follows:

9.1 Meal breaks

(a) A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.

(b) Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200% of the minimum hourly rate, plus penalties and relevant loadings.

(c) Employees required to continue work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from the beginning of the scheduled meal break until the full meal break is given.

(d) Employees required to resume work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from resuming work until the full meal break is given

[50] Interested parties were invited to comment on our *provisional* view.

[51] Submissions were received from the AWU, the AMWU, and Ai Group. No other party commented on the issue.

[52] Neither the AWU nor the AMWU opposed the *provisional* view. Ai Group opposed the *provisional* view.

[53] Ai Group submit the *provisional* view represents a substantive change to the award. Ai Group submit clauses 22.2 and 22.3 of the current award stipulate the rate that is to be paid to an employee who is not given a meal break after more than five hours of work or is required to continue or resume work during a meal break. Ai Group submit these clauses wholly regulate the amount that is payable in such circumstances. Clause 22 of the current award is set out as follows:

> **22. Meal breaks**
>
> **22.1** A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.
>
> **22.2** Employees required to work for more than five hours without a suitable interval for a meal as provided for in clause 22.1 must, for all time worked in excess of the five hours before being allowed such interval, be paid at double time.
>
> **22.3** Employees required to continue or resume work during the meal break, must for the time of continuance or resumption until the full meal break is given, be paid at time and a half.

[54] Ai Group submits the proposed changes to clause 9.1 of the Exposure Draft would have the effect of requiring the payment of weekend penalties, public holiday penalties and shift loadings in addition to the penalty prescribed by clause 22 of the award for working during a meal break.

[55] Ai Group contends the changes proposed would lead to a substantial increase to employment costs, and provides an example of an employee who is required to work for more than five ordinary hours on a Sunday being entitled to 200% of their minimum hourly rate pursuant to clause 22.2 of the award. Under the *provisional* view, the employee would instead be entitled to 400% of the minimum hourly rate.

[56] Ai Group contends that the basis for the proposed amendments was only provided in the last two sentences of paragraph 181 of the *June 2018 decision* and submits the decision does not identify any basis for the findings that the intention of the relevant provisions is to create a disincentive for employers to delay or interrupt an employee's meal break, or the rates payable in the relevant circumstances must be in excess of what employees are already entitled to. Ai Group further submits the intention of the clause "might equally be to simply provide employees in such circumstances with some compensation for working during a meal break", and that there is no evidence before the Commission that establishes the proposition that a further increase to the entitlement due to employees will create a disincentive for employers to delay or interrupt their meal breaks.

[57] Ai Group identifies the following example of an employee working ordinary hours on a Saturday is to be paid 150% of the minimum hourly rate. If that employee is required to work for more than five hours without a meal break, clause 22.2 of the award entitles the employee to 200% of the minimum hourly rate. Under the Commission's proposed changes, the employee would instead be entitled to 350% of the minimum hourly rate.

[58] Ai Group submits the proposition 'an employee entitled to the higher weekend or public holiday penalties would be entitled to a lesser amount under the circumstances contemplated by clause 9.1 of the Exposure Draft' should not be overstated, and highlights it is likely to arise only in very limited circumstances such as:

a) Where an employee is working on a public holiday; and

b) Where the employee is working on a Sunday and clauses 9.1(c) or (d) apply.

[59] Ai Group submits that a consideration of the relevant factors listed at section 134(1) of the Act does not lend support to the proposed variations and that the changes proposed are not necessary to ensure that the award achieves the modern awards objective. Ai Group maintains its view that clause 9.1 of the Exposure Draft be amended by inserting the words "minimum hourly rate" after each percentage penalty rate prescribed by it.

[60] If its primary position is rejected, Ai Group submit that any variations made to clause 9.1 of the Exposure Draft should extend no further than to *maintain* an employee's rate of pay where an employee is working on a weekend or public holiday and therefore entitled to a higher rate of pay for time worked on that day. That is, the higher rate of pay would be payable in the circumstances in clauses 9.1(b) – (d) in lieu of the penalty rate prescribed by those clauses.

[61] We accept that the *provisional* view represents a substantive change to the award. However, the objective of the current award term is to provide a disincentive for employers to delay or interrupt employee's meal breaks. That objective is not met in circumstances where the rate paid when an employee is required to continue working during a meal break (or to interrupt a meal break) is not greater than that which would otherwise apply.

[62] This matter will be given further consideration by a separately constituted Full Bench.[1]

10. As can be seen from the passage of the Decision extracted above, the matter here before the Commission has its genesis in an issue that arose from the Commission's redraft of the Gas Award. The purpose of that redrafting process was, as we understand it, to make the Award simpler and easier to understand. Its purpose was *not* to introduce substantive changes to the Award.

[1] *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 5602 at [45] – [62].

11. The matter has since evolved into a consideration of the merits of the Impugned Clauses. This is because the Commission expressed a view that:

    a) The object of the Impugned Clauses is to provide a disincentive for employers to delay or interrupt an employee's meal break.

    b) That object is not met where the rate paid when an employee is required to continue working during a meal break or to interrupt a meal break is not greater than what would otherwise apply.

    (the **Commission's Central Proposition**)

12. Accordingly, as we understand it, the Full Bench as presently constituted is here considering the rate of pay to which employees *should* be entitled pursuant to the Impugned Clauses.

13. It is Ai Group's position that the Impugned Clauses should not be varied and clause 9.1 of the exposure draft to the Award (**Exposure Draft**) should be amended to reflect the Award as set out at paragraph [45] of the Decision.

THE COMMISSION'S PROPOSAL

14. The Commission's Central Proposition led the Full Bench to propose that the Impugned Clauses should require the payment of "penalties and relevant loadings" in addition to the amounts prescribed by the Impugned Clauses (**Commission's Proposal**).

15. We note firstly that the amount that would in fact be payable pursuant to the Commission's Proposal is somewhat unclear. For example, rates of pay applying to work on a weekend are not expressed in the Award (or the Exposure Draft) as separately identifiable penalties. Rather, both instruments prescribe a *rate* that is payable to employees, which includes their minimum hourly rate and an additional component to compensate them for the performance of work on a weekend.

16. Therefore, it is unclear whether, for instance, pursuant to clause 22.2 of the Award (or clause 9.1(b) of the Exposure Draft), an employee working on a Sunday would be entitled to:

a) 300% of the minimum hourly rate (i.e. the amount due under clause 22.2 of the Award, plus a 100% penalty for working on Sunday); or

b) 400% of the minimum hourly rate (i.e. the amount due under clause 22.2 of the Award, plus the amount due under clause 24.2 of the Award.

17. Taking the examples provided earlier and adopting the more conservative of the two possible interpretations identified above; the Commission's Proposal would alter the effect of the Impugned Clauses as set out in the table below.

	Ordinary Hours	**Under Clause 22.2**	**Under Clause 22.2 as Proposed**	**Under Clause 22.3**	**Under Clause 22.3 as Proposed**
Day work, ordinary hours on Monday – Friday	100%	200%	200%	150%	150%
Afternoon shift, ordinary hours on Monday – Friday	115%	200%	215%	150%	165%
Night shift, ordinary hours on Monday – Friday	130%	200%	230%	150%	180%
Ordinary hours on Saturday	150%	200%	250%	150%	200%
Ordinary hours on Sunday	200%	200%	300%	150%	250%
Ordinary hours on a Public Holiday	250%	200%	350%	150%	300%

18. If, however, the more generous of the two potential interpretations canvassed above is intended, the Commission's proposed changes would apply as set out below:

	Ordinary Hours	Under Clause 22.2	Under Clause 22.2 as Proposed	Under Clause 22.3	Under Clause 22.3 as Proposed
Day work, ordinary hours on Monday – Friday	100%	200%	200%	150%	150%
Afternoon shift, ordinary hours on Monday – Friday	115%	200%	315%	150%	265%
Night shift, ordinary hours on Monday – Friday	130%	200%	330%	150%	280%
Ordinary hours on Saturday	150%	200%	350%	150%	300%
Ordinary hours on Sunday	200%	200%	400%	150%	350%
Ordinary hours on a Public Holiday	250%	200%	450%	150%	400%

19. The highlighted cells in both of the above tables highlight instances in which the Impugned Clauses currently provide employees with an entitlement to a higher rate of pay than the rate otherwise applying to their performance of ordinary hours on the relevant day or shift; however the Commission's Proposal would *further* increase their entitlement under the Impugned Clauses.

20. The Commission's Central Proposition does not support this outcome, nor is there any other material before the Commission that justifies what is clearly a windfall gain for such employees. In each of those instances, the Impugned

Clauses already grant employees a higher rate of pay than the ordinary performance of work during that day or shift. Applying the logic of the Commission's Central Proposition, it cannot be said that the purported object of the Impugned Clauses is not met in those instances. Rather, the changes proposed by the Commission would unjustifiably increase employment costs in such cases absent any justification for doing so.

21. Self-evidently, there is no basis for making any amendment to the Impugned Clauses in respect of the circumstances corresponding with the highlighted cells in the tables above.

22. The Commission's Central Proposition also does not justify increasing the penalty rates payable pursuant to the Impugned Clauses to the amounts set out in the tables above. There is no material before the Commission that establishes that in order to achieve the purported outcome of the Impugned Clauses, employers must be required, for example, to pay employees in the order of 300% or 400% of the minimum hourly rate prescribed by the Award. There is certainly no basis for the proposition that increases of that magnitude are *necessary* to ensure that the Award achieves the modern awards objective.

THE COMMISSION'S CENTRAL PROPOSITION

23. Further and in any event, respectfully, Ai Group contends that there is no basis for the Commission's Central Proposition.

24. ***Firstly***, we note that the Commission did not hear from interested parties before reaching its view about the purported object of the Impugned Clauses. Accordingly, Ai Group did not have an opportunity to make any submissions about the Commission's Central Proposition before it was first articulated by the Full Bench in its decision[2] of June 2018.

25. ***Secondly,*** the Commission did not point to any arbitral history concerning the Impugned Clauses (in the context of the Award or any pre-modern awards that preceded its making) that might lend support to the Commission's Central

[2] *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [181].

Proposition. Furthermore, we have not been able to identify any arbitral history concerning the Gas Award or any other modern award that establishes the Commission's Central Proposition.

26. ***Thirdly,*** the Decision does not appear to consider whether the intention of the Impugned Clauses might instead simply be to provide employees in the relevant circumstances with compensation for working during a meal break.

27. That is, the purpose of the Impugned Clauses may be said to be to compensate employees who are required to work without a meal break or during a meal break. The achievement of that purpose is not contingent upon there being an entitlement to a rate of pay that is higher than the rate otherwise payable to the employee for the relevant day or shift. It simply requires that the Award prescribes a rate of pay that appropriately remunerates an employee for the disutility of working without or during a meal break. We consider that the Impugned Clauses achieve that purpose and there is no evidence or material before the Commission that might so much as suggest otherwise.

28. It is also important to note that the Impugned Clauses afford employers an ability to require employees to continue work without a break or to work during a break, notwithstanding the requirement at clause 22.1. That flexibility and the purpose it serves (that is, to be able to require employees to work despite clause 22.1) is particularly important when regard is had to the nature of the work undertaken by employees and employers covered by the Gas Award and the potential need to attend to it urgently (and indeed, in an emergency). It should not be undermined by the imposition of penalty rates that effectively render the application of the clauses cost prohibitive. We return to this issue later in our submission.

29. ***Fourthly***, the Decision does not explain the basis for the Commission's conclusion that in order to achieve the clauses' alleged purpose, the Award must prescribe rates payable in the relevant circumstances that are in excess of what employees are already entitled to.

30. In our experience, employers are generally disinclined to require employees to work during their meal breaks because they recognise the importance of ensuring that employees have a break from work for the purposes of managing their fatigue, ensuring their safety and the safety of others, as well as maintaining their productivity. Save for circumstances in which there are operational imperatives for requiring employees to work during a break, in our experience, there are numerous factors *other than* the prescription of penalty rates that of themselves act as a disincentive to requiring employees to work during a meal break.

31. ***Fifthly,*** there is also no evidence or material in support of the proposition that the imposition of a higher rate of pay for employees required to work during what would otherwise be a meal break does (or *will*) in fact act as a disincentive to employers from requiring employees to work in those circumstances. That is, there was no evidence or material before the Commission when it issued the Decision (nor is there now) that might have supported the proposition that employers will be disincentivised (or *are* disincentivised) from requiring employees to work during a period that would otherwise be a meal break to the extent that the Award requires the payment of a higher rate to employees in such circumstances.

32. This is relevant because the circumstances in which an employer requires employees covered by the Gas Award may, in many cases, be such that the imposition of a higher penalty rate does not in fact disincentivise an employer from requiring the employee to work during a meal break because of the essential nature of the work. It is our understanding that the Impugned Clauses typically apply where employees are required to attend an emergency incident such as a gas leak or an issue with the supply of gas that requires an urgent response. There is certainly no evidence to suggest that employers require employees to work during meal breaks without legitimate cause.

33. Accordingly, to the extent that the Commission's Central Contention hinges on the notion that a higher rate of pay *will* or *does* disincentivise employers from requiring employers to work during their meal breaks; there is no evidence of

this, notwithstanding that the Award has required the payment of a higher rate of pay to employees who work during a meal break in various circumstances for over eight years.

34. ***Sixthly***, the Commission's reasoning also does not acknowledge that in many circumstances, the current clauses already create an entitlement to a higher rate of pay. The proposed changes would simply result in a windfall gain for such employees and there is no evidence before the Commission that might establish the proposition that a further increase to the entitlement due to them is justifiable. We have dealt with this issue in greater detail above.

35. For the reasons here stated, respectfully, the Commission's Central Proposition has not been made out in the context of the Impugned Clauses and the Full Bench as presently constituted should not proceed to increase the entitlement of employees pursuant to those clauses on the basis of that proposition.

THE RELEVANT STATUTORY FRAMEWORK

36. This matter is being considered in the context of the Commission's 4 yearly review of modern awards (**Review**), which is conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

37. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

38. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

39. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act. This includes any exercise of the Commission's powers on its own motion.

40. For the reasons explained in this submission, the legislative framework applying to the Review does not provide a proper basis for the Commission exercising its discretion to vary the Impugned Clauses to increase the penalty rates payable pursuant to them.

THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

41. At the commencement of the Review, a Full Bench dealt with various preliminary issues, including the aforementioned legislative provisions (the **Preliminary Jurisdictional Issues Decision**[3]).

42. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[4]

43. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

> Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[5]

44. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance"[6] and that "no particular primacy is attached to any of the s.134 considerations"[7]. The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net"[8]: (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[9]

45. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.[10]

46. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010* (**Security Award Decision**), the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

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[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31].

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

[8] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

[9] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

[10] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [46].

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[11]

47. Having regard to the Preliminary Jurisdictional Issues Decision and the Security Award Decision, the Commission should not proceed to vary the Impugned Clauses in the manner contemplated by the Decision or by otherwise increasing the amounts payable under them because:

a) The changes contemplated involve increasing penalty rates payable to employees under the Award. This necessarily constitutes a 'significant change' of the sort contemplated by the Preliminary Jurisdictional Issues Decision at paragraph [23] (cited above). Notwithstanding this, there is no probative evidence before the Commission that is directed towards demonstrating any factual proposition that might support the variations.

b) There is no cogent reason for departing from the proposition that the Gas Award achieved the modern awards objective when it was made. There is also no cogent reason for finding that that position has since changed such that an increase to the penalty rates payable pursuant to the Impugned Clauses is justified.

[11] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

c) As we further develop in the submissions that follow, a consideration of the factors identified at s.134(1) of the Act makes clear that if the Impugned Clauses are varied as contemplated, the clauses contained in the Award will not be limited to those that are necessary to ensure that the Award achieves the modern awards objective.

d) There is no "detailed evidence of the operation of the [A]ward, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes"[12]. Nor is there "sound and balanced reasoning supporting a change"[13].

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

48. As a product of the manner in which this matter has unfolded, there is no specific proposal for varying the Impugned Clauses before the Full Bench for its consideration, other than the Commission's Proposal. Accordingly, the submissions that follow are expressly directed towards the Commission's Proposal. However, they have equal application to any proposed change to the Impugned Clauses that would result in an increase to the penalty rates payable pursuant to them.

49. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

50. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

[12] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

[13] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

51. That an increase to the penalty rates payable pursuant to the Impugned Clauses may not adversely affect all employers covered by the Award is not the test to be applied in determining whether the Impugned Clauses should be so varied. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific types of businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

52. Employer organisations such as Ai Group do not bear any onus to demonstrate that an increase to the penalty rates payable pursuant to the Impugned Clauses will result in increased employment costs or undermine flexibility or productivity for employers covered by the Award. No adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that a potential variation of the nature here being contemplates will affect all or most employers in an industry. This is because the conduct of the Review differs from an inter-party dispute.

A 'Fair' Safety Net

53. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[14]

[14] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

54. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[15]

55. An increase to the penalty rates payable pursuant to the Impugned Clauses would be unfair to employers in various ways.

56. ***Firstly***, the imposition of an additional financial liability on employers in the absence of any sound merit basis for it is entirely unfair. No serious foundation for increasing the amounts due under the Impugned Clauses has been established. On this basis alone, we consider that the Commission should not act of its own motion to amend the Impugned Clauses to increase the penalty rates payable pursuant to them.

57. ***Secondly***, it is entirely unfair that certain employees receive a windfall gain in circumstances where the Impugned Clauses already deliver a higher rate of pay to them in the relevant circumstances.

[15] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

58. ***Thirdly***, it is unfair to impose a requirement to pay higher penalty rates based on the Commission's Central Proposition in circumstances where there has been no examination of whether employers can in fact be disincentivised from requiring employees to work without or during a meal break in the gas industry (so as to avoid the higher employment costs that would otherwise flow), having regard to the circumstances that typically give rise to a requirement to so work.

59. ***Fourthly***, it is unfair to impose a requirement to pay higher penalty rates where there is no evidence that employers are unfairly or illegitimately requiring employees to work without or during a meal break.

60. ***Fifthly*****,** it is trite to observe that the Award already provides the payment of a penalty rate where an employee is required to work without or during a meal break. There is no evidence in these proceedings that establishes that the entitlement afforded by the Impugned Clauses is in any way insufficient or inadequate. In such circumstances, it would be unfair to employers if the safety net was further improved for the benefit of employees.

61. ***Sixthly***, the Commission's Proposal does not balance the needs and interests of employees and employers. We make this submission particularly in light of the problematic way in which it would operate. When consideration is given to the circumstances in which the Commission's Proposal would apply, it has the potential to operate in ways that are particularly unfair to employers.

62. The introduction of the Commission's Proposal would not be in keeping with the provision of a *fair* safety net.

A 'Minimum' Safety Net

63. Modern awards are intended to afford employees with a minimum safety net, which is to include the basic entitlements to be provided to employees covered by the Award, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)). The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the essential rights and protections that must be afforded to all employees and employers.

64. We do not consider that increases to the penalty rates payable pursuant to the Impugned Clauses (and indeed of the magnitude contemplated) are characteristic of a *minimum* safety net.

A 'Relevant' Safety Net

65. In a recent decision of the Commission, the Full Bench expressed the view that: (emphasis added)

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. …[16]

66. A modern award will suit contemporary circumstances if it reflects modern work practices, working arrangements and operational requirements. Further, it will be drafted having regard to other existing parts of the safety net.

67. We shortly turn to the potential implications that the Commission's Proposal would have, with reference to s.134(1)(d), which requires that the Commission take into account the need to promote flexible modern work practices and the efficient and productive performance of work. Having regard to the issues that we there raise, and the pre-existence of penalty rates that are payable to employees who are required to work without or during a meal break, the Commission's Proposal cannot properly form part of a relevant safety net.

68. Relevance may also be assessed by having regard to the safety net applying to other award-covered industries and occupations. We note in this regard that the Commission's Proposal is out of step with the very vast majority of similar award provisions, which typically require the payment of 150% - 200% of the minimum hourly rate prescribed by the relevant award. We set out a number of such clauses at **Attachment A** to demonstrates this.

[16] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

69. The Commission's decision concerning various claims to vary penalty rates in certain awards (**Penalty Rates Decision**) comprehensively considered the proper interpretation and application of s.134(1)(a) of the Act as follows:

> **[165]** Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. This consideration incorporates two related, but different, concepts. As explained in the *2012–13 Annual Wage Review* decision:
>
> > 'The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.'
>
> **[166]** In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The surveys that provide the information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages (and, accordingly, what constitutes two-thirds of those values). The two main Australian Bureau of Statistics (ABS) surveys of the distribution of earnings are the '*Employee Earnings, Benefits and Trade Unions Membership* (the 'EEBTUM') and the survey of *Employee Earnings and Hours* (the 'EEH'). We note that the EEBTUM is no longer published and the relevant data is now produced as part of the *Characteristics of Employment Survey* (the 'CoE'). Some data is also available from the HILDA survey.
>
> …
>
> **[168]** The most recent data for the 'low paid' threshold is set out below:
>
> | *Two-thirds of median full-time earnings* | *$/week* |
> |---|---|
> | Characteristics of Employment survey (Aug. 2015) | 818.67 |
> | Employee Earnings and Hours survey (May 2016) | 917.33 |
>
> **[169]** The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers. As noted in the 2015–16 Annual Wage Review decision:
>
> > 'There is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally over the past two decades, whether on the basis of wage income or household income.'

> **[170]** Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee and not above that rate. Table 4.8 from the *2015–16 Annual Wage Review* decision sets out the extent of award reliance by industry. Relevantly for present purposes, the most recent data identify the Accommodation and food services and Retail trade industries as among the most award reliant in that they are the industries in which the highest proportion of employees are award reliant (42.7 per cent and 34.5 per cent, respectively)
>
> **[171]** The relative living standard of employees is affected by the level of wages they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live. As a general proposition, around two-thirds of low-paid employees are found in low income households (i.e. in the bottom half of the distribution of employee households) and have lower living standards than other employees. Many low-paid employees live in households with low or very low disposable incomes.[17]

70. There is no evidence, analysis or other material before the Commission that establishes that employees covered by the Gas Award are "low paid" in the relevant sense. Nor is there any material that goes to the impact of the Impugned Clauses or the Commission's Proposal on the relative living standards or needs of any "low paid" employees.

71. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the Commission's Proposal.

72. Further and in any event, even if the Commission were to so conclude, it is but one of many factors that must be taken into account, none of which are to be attributed any particular primacy[18]. As the submissions that follow will demonstrate, a consideration of those factors collectively tells against the grant of the claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

73. Section 134(1)(b) requires that the Commission have regard to the need to encourage collective bargaining. We submit that this factor lends support to the proposition that the Impugned Clauses should not be varied.

[17] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [165] – [171].

[18] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

74. A perceived need for higher penalty rates where employees are required to work without or during a meal break may create an incentive for employees to engage in collective bargaining. The Commission's Proposal would remove any such incentive.

75. More generally, a rise in the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

76. We make this submission in the context of the current Review, as a result of which a number of variations have been or will be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

77. For instance, in addition to the matter here before the Commission, the Award has recently been varied to introduce new casual conversion provisions, restrictions on payment on termination, family and domestic violence leave, additional requirements where an employee makes a request for flexible working arrangements pursuant to s.65 of the Act and more. As a result, the minimum safety net has been significantly lifted, which will undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

78. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many variations made to the Award through this process.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

79. The grant of the claim will not promote social inclusion through increased workforce participation.

80. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[19]

81. These comments were echoed in the more recent Penalty Rates Decision: (emphasis added)

> **[179]** Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[20]

82. There is no material before the Commission to suggest that the Commission's Proposal would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

83. The imposition of a penalty rate for work requiring without or during a meal break that is cost prohibitive is inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work.

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[19] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

[20] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [179].

84. The Impugned Clauses should strike a balance between the interests of employers and employees. A requirement to pay an amount that effectively prohibits an employer from being able to require an employee to work without or during a meal break despite the essential nature of the work would undermine the consideration listed at s.134(1)(d) of the FW Act.

85. The very fact that the Impugned Clauses enable an employer to require an employee to work without or during a meal break demonstrates a recognition of the fact that such circumstances may legitimately arise for employers and employees covered by an Award. Such is the operational reality of working in the gas industry. The ability to require an employee to so work is undermined if the penalty rates imposed by the clause are unreasonably increased.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

86. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

87. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

88. The Commission's Proposal would adversely impact business in various ways. It is important to note that s.134(1)(f) involves microeconomic considerations in relation to individual businesses, as well as consideration of the likely impact of the claim on industry at large.

89. It is self evident that the Commission's proposal would significantly increase employment costs. Further, for the reasons we have set out above in relation to s.134(1)(d), the proposed clause may adversely impact productivity.

The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

90. The need to ensure a stable system tells against varying the Impugned Clauses in the absence of a sound evidentiary and meritorious case.

91. As earlier noted, there is no probative evidence that might establish any factual propositions that might lend support to the claim and the Commission's Central Proposition is not made out in the context of the gas Award.

The Likely Impact on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

92. To the extent that the Commission's Proposal is at odds with ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

93. For all of the reasons set out in this submission, the Impugned Clauses should not be varied.

94. If, however, our primary position is not accepted by the Commission, we submit that the Commission should not vary the Impugned Clauses other than to require that an employee's hourly rate will not be *less than* the rate otherwise applying to the performance of work by them during that day or shift.

Award	Relevant Clause(s)
Airline Operations-Ground Staff Award 2010	**29.1 Meal break—day work** (b) An employee must not be required to work for more than five hours (or, by agreement, six hours) without a meal break. If a meal break is not so allowed, all time worked after the commencement time of the regular meal break until the meal break is allowed must be paid for at overtime rates. An employer and employees may agree to stagger meal breaks to meet the operational requirements instead of this provision. **29.2 Meal break—shiftwork** (c) The meal break must be allowed no later than five hours (or, by agreement, six hours) after commencing an ordinary shift. If a meal break is not so allowed, all time worked after the commencement time of the regular meal break until the meal break is allowed must be paid for at overtime rates. An employer and employees may agree to stagger meal breaks to meet the operational requirements instead of this provision.
Airport Employees Award 2010	**27.3 Ordinary hours of work – shiftworkers** (b)(iii) The ordinary hours must be worked continuously except for meal breaks at the discretion of the employer. An employee must not be required to work more than five hours without a break for a meal without payment of overtime. Except at regular changeover of shifts an employee must not be required to work more than one shift in each 24 hours. **29.3 Breaks** Except as provided in clause 29.4, all work done during meal periods and thereafter until a meal break is allowed must be paid at the rate of time and a half.
Alpine Resorts Award 2010	24.5 If an employee is not given a meal break in accordance with clauses 24.1 or 24.4 the employer must pay the employee overtime rates from the end of six hours until either the meal break is given or the shift ends.
Aluminium Industry Award 2010	20.4 An employee must not be required to work for more than five hours without a meal break. Where the employee agrees to work for more than five hours without a meal break, the employee will be paid at overtime rates until the meal break is taken.

Amusement, Events and Recreation Award 2010	**22.1 Meal breaks—other than casual employees** (b) Special meal break provisions Where an employee is instructed by their employer to remain on call during their meal period, that period will be paid for at the ordinary rate of pay.
Asphalt Industry Award 2010	**23.5 Working during meal breaks** Employees called to work during recognised meal breaks will be paid at overtime rates for all time worked until they receive a meal break of the usual period. Provided that where it is necessary to alter the time of the recognised meal break employees may be called upon to work for not more than one hour beyond such recognised meal break without additional rates of pay provided that they receive the equivalent meal time.
Black Coal Mining Industry Award 2010	24.3 Where the employer and employee agree that the employee will work for more than five hours without a break, then the employee will, unless otherwise agreed, be paid for any work beyond five hours at the applicable overtime rates until a meal break is taken.
Building and Construction General On-site Award 2010	36.5 If an employer requires an employee to work during the time prescribed by clause 35.1 for finishing of work, the employee must be paid at the rate of double time for the period worked between the prescribed time of finishing and the beginning of the time allowed in substitution for the meal break. If the finishing time is shortened at the request of the employee to the minimum of 30 minutes prescribed in clause 35.1 or to any other extent (not being less than 30 minutes) the employer will not be required to pay more than the ordinary time hourly rate of pay for the time worked as a result of such shortening, but such time will form part of the ordinary working time of the day.
Car Parking Award 2010	**22.1 Meal breaks** An employee will be entitled to an unpaid meal break of not less than 30 minutes per day or shift. The break must be commenced not later than five hours after the start of the employee's ordinary working hours. Where the employee is not permitted to leave their work station for the meal break the break will be counted as time worked and paid at the ordinary rate of pay.

Cement and Lime Award 2010	**21.5 Working through a meal break** Except as provided for in clauses 21.1 and 21.2, the employee must be paid at the rate of time and a half of ordinary time for all work done during their meal break and thereafter until a meal break is taken.
Children's Services Award 2010	**22.1 Meal breaks** (b) A meal break must be uninterrupted. Where there is an interruption to the meal break and this is occasioned by the employer, overtime will be paid until an uninterrupted break is taken. The minimum overtime payment will be as for 15 minutes with any time in excess of 15 minutes being paid in minimum blocks of 15 minutes.
Cleaning Services Award 2010	**26.3 All employees** (a) If an employee is interrupted during their normal meal break and directed to work, the employee will be paid at overtime rates for all work done until such time as the meal break is resumed.
Clerks—Private Sector Award 2010	**26.1 Meal break** Subject to the provisions of clause 28—Shiftwork of this award, a meal period of not less than 30 minutes and not more than 60 minutes must be allowed to each employee. Such meal period must be taken not later than five hours after commencing work and after the resumption of work from a previous meal break. Employees required to work through meal breaks must be paid double time for all time so worked until a meal break is allowed.
Concrete Products Award 2010	23.3 An employee required to defer the meal break beyond the sixth hour of the shift will be paid at the rate of time and a half until the meal break is taken or the end of the shift, whichever first occurs.
Contract Call Centres Award 2010	25.3 An employee directed by the employer to work in excess of five hours without a meal (or such period as extended in accordance with clause 25.2(a)) must be paid at the rate of time and a half for the meal period and the employee must be permitted to have the employee's usual meal period without deduction from the employee's wage as soon as possible after the prescribed meal period.
Corrections and Detention (Private Sector) Award 2010	21.4 When the employee is required by their supervisor to work through their meal break in accordance with clause 21.3, time off at ordinary rates will be approved in accordance with this award.

Dredging Industry Award 2010	**21.1 Employees on other than dredging operations** Employees on other than dredging operations must be allowed a meal break of not less than 45 minutes between the hours of 11.30 am and 1.30 pm, provided that if in an emergency decided by the master/engineer or their representative the meal break cannot be taken, a paid meal time of 30 minutes will be allowed later and payment for the 45 minute meal break will be made at overtime rates. **21.2 Employees on dredging operations** Employees on dredging operations must be allowed a meal break of 30 minutes, which is to be taken within five hours from the commencement of the shift or at a time otherwise agreed upon. The meal breaks prescribed in this subclause are to be counted as time worked. Provided that if in any emergency decided by the master/engineer or their representative the meal break cannot be taken, payment for the 30 minutes will be made at overtime rates. Provided further that the incidence of meal time will not interrupt the working of the dredge and attendant craft. Where a dredge and attendant craft are in continuous operation and it is impracticable on any shift to allow the meal break, employees must be paid one hour at ordinary time rates.
Dry Cleaning and Laundry Industry Award 2010	**24.1 Meal breaks** (a) Where an employer requires an employee to work during their meal break, the period worked will be treated as time worked and paid at the rate of time and a half until released for the meal.
Educational Services (Post-Secondary Education) Award 2010	**22.3 All employees** (c) If an employee is required to work through their normal meal break the employee will be paid double time for all time so worked until such time as the meal break is given.
Educational Services (Teachers) Award 2010	**B.3.1 Meal break** (b) Where an employee is called back to perform any duties within the centre or the break is interrupted for any reason the employee will be paid at time and a half for a minimum of 15 minutes and thereafter to the nearest quarter hour until an uninterrupted break, or the balance of the break, is taken.

Electrical Power Industry Award 2010	**25.3 Working without a meal/crib break** (b) If at the direction of the employer: (i) a day worker is required to work during the normal meal break; or (ii) a shiftworker is required to work more than five hours without a crib break, then the employee will be paid at time and half until a meal/crib break is allowed.
Electrical, Electronic and Communications Contracting Award 2010	**27.2 Payment for work during meal break** (a) Except as provided in clause 27.2(b), for all work done during the normal meal break and thereafter until a meal break is allowed, time and a half rates must be paid.
Fitness Industry Award 2010	**25.1 Meal break** An employee must be given an unpaid meal break of not less than 30 minutes and not more than 60 minutes no later than five hours after commencing work and five hours after the resumption of work from a previous meal break. An employee required to work through a meal break must be paid double time for all time so worked until a meal break is allowed.
Food, Beverage and Tobacco Manufacturing Award 2010	32.5 Except as otherwise provided in clause 32—Meal breaks and except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, the rate of 150% must be paid for all work done during meal hours and thereafter until a meal break is taken.
Funeral Industry Award 2010	**23.3 Meal break** (b) An employee required to work during their normal midday meal break will be paid at the rate of 150% of their ordinary rate for all time worked.

Gardening and Landscaping Services Award 2010	**23.1 Meal break** (b) An employee required to work through their normal meal break will be paid at the rate of time and a half until such time as they receive a meal break of the customary duration.
Horticulture Award 2010	**23.1 Meal break** (b) All work performed on the instruction of the employer during a recognised meal break will be paid for at 200% of the appropriate minimum wage. Such payment will continue until the employee is released for a meal break of not less than 30 minutes.
Hospitality Industry (General) Award 2010	**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 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.
Joinery and Building Trades Award 2010	**29.1 Meal breaks** An employee is entitled to a meal break on each day of work of not less than 30 minutes to be taken no less than four hours and no later than six hours after the commencement of work where the employee is a day worker and no less than five hours after the commencement of work where the employee is a shiftworker. Except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, the rate of 200% must be paid for all work done during a meal break and thereafter until a meal break is taken.
Legal Services Award 2010	**33.1 Meal breaks** (b) An employee directed by an employer to work in excess of five hours without a meal break must be paid at the rate of time and a half for the meal break and the employee must be permitted to have the employee's usual meal break without deduction from the employee's wage as soon as possible after the prescribed meal break.

Live Performance Award 2010	**46.3 All employees** (a) In the event an employee is required to work more than five continuous hours without a suitable meal interval, the employee will be paid for the period which should be allowed as the meal interval at the rate of double time. This clause will not apply to employees engaged to work on a continuous shift roster.
Manufacturing and Associated Industries and Occupations Award 2010	38.4 Subject to clause 38.1, an employee must work during meal breaks at the ordinary time rate whenever instructed to do so for the purpose of making good any breakdown of plant or for routine maintenance of plant which can only be done while the plant is idle. 38.5 Except as otherwise provided in clause 38—Meal breaks and except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, time and a half rates must be paid for all work done during meal hours and thereafter until a meal break is taken.
Meat Industry Award 2010	**32.1 Meal breaks** (b) Any employee called upon to work during a meal break will be paid at overtime rates for that period.
Mobile Crane Hiring Award 2010	**23.1 Meal interval** (b) An employee may be required to change the meal break to suit the requirements of the employer or client, provided that an employee who has not completed the meal break after six hours from the normal starting time on any day to suit the requirements of the employer or the client will be paid at the overtime rates prescribed in clause 24—Overtime for the period from six hours after normal starting time until a meal break is allowed.
Nursery Award 2010	25.2 All work performed on the instruction of the employer during a meal break will be paid for at the rate of 200% of the appropriate minimum wage. Such payment will continue until the employee is released for a meal break of not less than 30 minutes.
Nurses Award 2010	**27.1 Meal breaks** (b) Where an employee is required to remain available or on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

Pastoral Award 2010	**15.1 Meal break** (b) All work performed on the instruction of the employer during a recognised meal break will be paid for at double time rates. Such payment will continue until the employee is released for a meal break of not less than 30 minutes.
Pest Control Industry Award 2010	**22.1 Overtime** (c) An employee required to work during their meal break will be paid at overtime rates until the meal break is taken.
Pharmacy Industry Award 2010	**19.2 On-premise meal allowance (Pharmacists only)** An employee who is required to take their meal break on the premises for the purpose of attending to urgent matters requiring the input of a qualified pharmacist will be paid at time and a half for the period of the meal break, regardless of other penalties that apply on that day.
Plumbing and Fire Sprinklers Award 2010	**33.4 Working during meal break** If an employer requires an employee to work through their normal meal break the employee must be paid at the rate: (a) Plumbing and mechanical services employees—200%; (b) Sprinkler fitter employees—150%, until the employee is allowed to take such break. Where the meal break is shortened by agreement, the employer will pay for the period by which the meal break is shortened, which will then form part of ordinary time hours.
Ports, Harbours and Enclosed Water Vessels Award 2010	19.2 Double time will be paid for all work done during the breakfast, lunch and tea breaks specified above, such double time to continue until the employees are granted a meal break or are released from duty. This provision has no application to establishments or jobs where, in accordance with this clause, it is customary for paid rest periods to be taken instead of the breakfast and or tea breaks, and such rest periods are allowed and taken.
Quarrying Award 2010	**26.5 Working through a meal break** Except as provided for in clauses 26.1 and 26.2, the employee must be paid at the rate of time and one half of ordinary time for all work done during their meal break and thereafter until a meal break is taken.

Racing Clubs Events Award 2010	**27.2 Meal breaks – other than casual employees** (b) An employee other than a casual employee required to work through their normal meal break must be paid at the rate of 150% of the relevant minimum wage until such time as they receive a meal break of the customary duration.
Racing Industry Ground Maintenance Award 2010	**22.1 Meal breaks** (b) An employee required to work through their normal meal break must be paid at the rate of 150% of the appropriate minimum wage calculated hourly until such time as they receive a meal break of the customary duration.
Registered and Licensed Clubs Award 2010	24.2 If an employee is not given a meal break in accordance with clause 24.1 the employer must pay the employee an extra hourly or part thereof payment at the rate of 50% of the ordinary hourly rate from the end of five hours until either the meal break is given or the shift ends.
Restaurant Industry Award 2010	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. 32.4 If clause 32.3 does not apply and an employee is not given a meal break in accordance with clause 32.1 the employer must pay the employee 150% of the employee's ordinary base rate of pay from the end of six hours until either the meal break is given or the shift ends
Road Transport and Distribution Award 2010	**26.1 Regular meal break** (c) If the meal break is not allowed, all time worked after the commencement time of the regular meal break until a break without pay for a meal time is allowed must be paid for at double the minimum hourly rate in clause 15.2.
Salt Industry Award 2010	**22.1 Meal breaks and rest breaks** (e) Employees required to attend or repair a breakdown may be required to work during a regular meal break at ordinary rates of pay for the purposes of repairing a breakdown, or conducting routine maintenance that can only be done while the plant is idle.

Seafood Processing Award 2010	25.4 Subject to clause 25.1, an employee must work during meal breaks at the ordinary time rate whenever instructed to do so for the purpose of making good any breakdown of plant or for routine maintenance of plant which can only be done while the plant is idle. 25.5 Except as otherwise provided in clause 25—Meal breaks and except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, the rate of 150% must be paid for all work done during meal hours and thereafter until a meal break is taken.
Sugar Industry Award 2010	**30.1 Meal breaks** (a) For day workers, a meal period of not less than 30 minutes and not more than 60 minutes must be allowed to each employee. Such meal period must be commenced not later than five hours after commencing work or after the resumption of work from a previous meal break. Employees required to work through meal breaks must be paid double time for all time so worked until a meal break is allowed. Where agreed between the employer and the majority of employees directly affected meal times may be altered or staggered.
Telecommunications Services Award 2010	22.3 An employee directed by the employer to work in excess of five hours without a meal break (or such period as extended in accordance with clause 22.2) will be paid at the rate of time and a half for the meal period and the employee will be permitted to have the employee's usual meal period without deduction from the employee's wage as soon as possible after the prescribed meal period.
Textile, Clothing, Footwear and Associated Industries Award 2010	**38.1 Meal break** (b) If the employer requires an employee (other than a maintenance employee who is required to work through a meal break to rectify a mechanical breakdown) to work through a meal break, the employee must be paid at overtime rates (clause 39) until the break is taken.
Timber Industry Award 2010	**29.2 Payment for work done during meal breaks** All work done during an employee's lunch break must be paid for at double time. For work performed thereafter until a lunch break is allowed time and a half rates, or in the case of a worker in the Pulp and Paper Stream double time, will be paid.

Transport (Cash in Transit) Award 2010	**26.1 Regular meal break** (c) If a meal break is not allowed to an employee, the time worked after five and a half hours after the fixed starting time until the break is allowed, will be paid at the rate of ordinary time, the payment to be in addition to any payment due in respect of a weekly or casual wage. (d) The obligation to pay ordinary time under this clause in addition to weekly or other wages and overtime under any other clause is not cumulative, and the employee in cases coming within this clause is entitled only to the higher payment.
Vehicle Manufacturing, Repair, Services and Retail Award 2010	26.3 Subject to the exceptions provided below, an employee will not be required to work more than five hours without a break for a meal. An employee will be paid at the rate of time and one half for all time worked: (a) where the employee is required to work beyond five hours without a break for a meal; or (b) during meal breaks and thereafter until a meal break is allowed. 26.5 An employee required to perform regular maintenance will work at the ordinary rates during meal breaks whenever instructed to do so for the purposes of making good breakdowns of plant or upon routine maintenance of plant which can only be done while such plant is idle.
Wine Industry Award 2010	29.4 An employee not given a meal break in accordance with clauses 29.1, 29.2 and 29.3 must be paid from then on a loading of 50% until the meal break is given.