BACKGROUND PAPER

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

4 yearly review of modern awards – *Restaurant Industry Award 2010*
(AM2019/17)

MELBOURNE, 29 APRIL 2020

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

Introduction

[1] The Commission has produced this background paper in order to facilitate discussions at the conference listed on 30 April 2020 (see notice of listing) by providing background information about the outstanding issues in the *Restaurant Industry Award 2010* (Restaurant Award).

[2] A Statement [[2020] FWCFB 788] was issued on 14 February 2020 dealing with the finalisation of the exposure draft and variation of the Restaurant Award, which noted that a significant number of drafting changes were required to be incorporated into the draft award variation determination arising out of the substantive issues matter in the Restaurant Award (AM2017/57).

[3] A draft award variation determination was published by the Finalisation Full Bench on 14 February 2020. Interested parties were invited to provide comments on the draft award variation determination by 28 February 2020.

[4] A submission was received by United Workers Union (UWU) on 28 February 2020. A further submission was filed by UWU on 13 March 2020 which raised an issue regarding an entitlement to a break within a long duration of work at clause 16.2 of the draft award variation determination.

[5] In a decision issued on 23 March 2020[1] (the March 2020 decision) in relation to the Tranche 2 awards, the Finalisation Full Bench expressed their provisional view at [50] that the amendments proposed by UWU (in their submission dated 28 February 2020) be adopted.[2] The

[1] [2020] FWCFB 1541.

[2] [2020] FWCFB 1541 at [49]-[50].

Full Bench also noted at [52] that a conference will be convened to discuss the issue raised by UWU in their further submission dated 13 March 2020.[3]

[6] A further decision was issued on 27 April 2020 by the Finalisation Full Bench[4] (the April 2020 decision) in relation to the outstanding awards in Tranche 2.

[7] At paragraph [5] of the April 2020 decision, the Full Bench again noted that a conference will be convened to discuss the issue raised by UWU regarding the entitlement to a break within a long duration of work with respect to the Restaurant Award.[5]

Outstanding issue

[8] The outstanding issue relates to the provisions surrounding the entitlement to meal and rest breaks.

[9] The current award and the draft award variation determination use the terminology of 'ordinary hours' as opposed to 'hours' with respect to break entitlements, and it is contended by UWU that the current terminology of 'ordinary hours' in the breaks clause may not entitle an employee to a break when a shift was comprised of overtime hours or where less than 5 ordinary hours are worked and subsequent overtime is worked,[6] as the breaks seemingly only provide for 'ordinary hours'.

AM2019/17 – Final stage proceedings

[10] As noted earlier, a Statement [[2020] FWCFB 788] was issued on 14 February 2020 by the Finalisation Full Bench which outlined the process for finalisation the variation determination for the Restaurant Award. The draft variation determination for the Restaurant Award was issued on the same day.

[11] In the March 2020 decision[7] the Finalisation Full Bench made note of the additional submission filed by UWU at [51] and confirmed the issue will be the subject of a conference.[8]

[12] In the April 2020 decision, the Finalisation Full Bench again noted that a conference would be convened to discuss the issue regarding the entitlements to meal and rest breaks in respect of the variation determination of the Restaurant Award.[9]

AM2017/57 – Substantive issues in relation to the Restaurant Award

[13] In a decision [[2019] FWCFB 7035] issued on 23 October 2019 by the substantive Full Bench, at [4] – [20], the Full Bench adopted the proposal by Australian Hotels Association (AHA) to insert the words 'ordinary hours' in the draft determination.

[14] The relevant paragraphs from the substantive Full Bench decision are below:[10]

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[3] [2020] FWCFB 1541 at [52].

[4] [2020] FWCFB 1814.

[5] [2020] FWCFB 1814 at [5].

[6] United Workers Union submission, 13 March 2020.

[7] [2020] FWCFB 1541.

[8] [2020] FWCFB 1541 at [52].

[9] [2020] FWCFB 1814 at [5].

[10] [2019] FWCFB 7035.

'Restaurant Award – Clause 32 – Breaks

[4] In a Decision[11] issued 12 December 2018 (the *December 2018 decision*) we proposed that clause 32 of the Restaurant Award be replaced with a provision in the terms set out in that decision at paragraph [211]. United Voice filed a submission raising several matters in response to the proposed variation of clause 32 and on 30 September 2019, the Australian Hotels Association (AHA) filed a submission in reply to United Voice. Most matters are agreed between the parties, save for the introduction of the facilitative provision at redrafted clause 32.4.

[5] An amended draft variation determination incorporating the agreed matters was attached to a Statement[12] issued on 7 October 2019.

[6] At the hearing on 10 October 2019, parties were asked to:

- confirm whether the agreed matters are accurately reflected in the attached amended draft variation determination; and

- make submissions in respect of the *provisional* view to insert a facilitative provision into clause 32 (at redrafted clause 32.4)

[7] All parties confirmed that the agreed matters are accurately reflected in the amended draft variation determination set out at Attachment 1. The sole issue in contention concerns the proposal to insert a facilitative provision into clause 32.

[8] Before turning to the submissions in relation to the issue in contention we propose to provide some context.

[9] In the *December 2018 Decision* we rejected an application by RCI to amend the meal breaks provision to allow breaks to be the subject of individual flexibility agreements. The evidence advanced in support of RCI's claim is canvassed at [172] – [177] of the *December 2018 Decision.* Two things led us to conclude that the RCI's claim lacked merit:

> '[185] … The first concerns the 'breadth' of the claim, in light of the evidence regarding the issue to which the claim is intended to address. The short point is that the issues identified in the evidence are much narrower in compass than the resolution proposed. To use the vernacular, the claim amounts to using a sledgehammer to crack a walnut.
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> [186] The variation sought by RCI would make it clear that an employer and an individual employee may agree to an IFA which varies the meal break provisions in clause 32 of the Restaurant Award. Conceivably such an IFA could:
>
> (i) Remove the 'penalties' that apply in the event that an employee is not provided with a break within the timeframes prescribed in clause 32, that is:
>
> - an employee is not given an unpaid break at the time the employer has told the employee that it will be given (in which case the employee is to be paid 150% of their ordinary rate of pay until the break is given, or the shift ends: clause 32.3)
>
> - an employee is not given an unpaid break in accordance with clause 32.1 (i.e. no earlier than one hour and no later than six hours after starting work;

[11] [2018] FWCFB 7263.

[12] [2019] FWCFB 6898.

in which case the employee is to be paid 150% of their ordinary rate of pay until the break is given or the shift ends: clause 32.4)

(ii) Remove the entitlement to an additional 20 minute paid meal break in the event that:

- The unpaid meal break is rostered to be taken after five hours after starting work: clause 32.2.
- The employee is required to work more than five hours after the employee is given an unpaid meal break: clause 32.5.
- A full time or regular part-time employee is required to work more than 10 ordinary hours in the day: clause 32.6.
- An employee is required to work more than two hours' overtime after the completion of their rostered hours: clause 32.7.

(iii) Significantly extend the maximum period of work to be performed before an employee must be provided with a 30 minute unpaid meal break.

[187] In relation to the latter possibility ((iii) above) it is conceivable that an IFA could vary clause 32 such that an unpaid 30 minute meal break was to be taken after 7 ½ hours work (rather than no later than 6 hours after starting work: clause 32.1). The IFA term would apply without regard to the context. For example, such a provision would apply irrespective of whether, following a period of particularly high work intensity, an employee became more fatigued than normal.

…

[189] The breadth of the variations to meal breaks which may be the subject of an IFA in the event the claim is granted stand in stark contrast to the issues that the variation purports to address (as described in the evidence).

[190] Mr Bunder's evidence was that the meal break provisions were not an issue in respect of those employees working split shifts. The issue only arose for those employees who worked straight shifts: 'It's the breakfast shift and the evening shift or the afternoon shift that requires the breaks'. As to how he would apply the IFA provisions in practice Mr Bunder made it clear he would not make his employees work seven hours straight without a break.

[191**]** Mr Brailey made it clear that while he was seeking some limited flexibility regarding the requirement in clause 32.1 that an unpaid meal break be given no later than six hours after starting work, but 'not very far past six hours'. Mr Brailey's evidence was:

> ' So - you know - if I said six and a half hours I think that would be reasonable. That would encompass the outer limits of what the flexibility that we'd probably need.'

[192] Plainly the extent of the flexibility sought by the witnesses is much more limited than that permitted by the variation RCI proposes. Neither Mr Bunder nor Mr Brailey suggested they needed to utilise the IFA provisions to vary clause 32 in the manner set out at (i) and (ii) of [189] above.

[193] The second point we would make concerns the evidence as to the understanding of the IFA processes by employees in the restaurant industry and compliance issues generally. Neither Mr Bunder, nor Mr Brailey had any IFA's in place in their businesses.

Mr Bunder's evidence also disclosed an erroneous assumption about the implementation (or 'approval') of an IFA. Mr Bunder was under the impression that an IFA would have to be approved by the Commission:

> 'So what we're saying is that it would be flexible between the employer and employee and again that would need to be signed off by I imagine Fair Work Australia so that the employee isn't exploited. I know for a fact, and I can honestly sit here and say I would not expect my staff to work seven or eight hours straight without a break.'[13]

[10] While we rejected the claim by RCI, we went on to note (at [203]) that we proposed to review clause 32, in light of the evidence given in the proceedings regarding the need for additional flexibility in the operation of the provision. We dealt with the notion of a facilitative provision at [208] – [210] of the *December 2018 Decision*:

> '[208] … the evidence in these proceedings points to the need to provide some additional flexibility regarding the timing of the breaks required by clause 32.1. As set out earlier clause 32.1 provides:
>
> > ' 32.1 If an employee, including a casual employee, is required to work for five or more hours in a day the employee must be given an unpaid meal break of no less than 30 minutes. The break must be given no earlier than one hour after starting work and no later than six hours after starting work.' (emphasis added)
>
> [209] The flexibility sought by the witnesses concerned the requirement that the meal break required by clause 32.1 be taken 'no later than six hours after starting work'. It will be recalled that Mr Bunder's evidence was that he would not make his employees work seven hours straight without a break. Mr Brailey made it clear that he sought some additional flexibility regarding the requirement that a break be given no later than six hours after starting work, but that the break should be taken 'not very far past six hours' and that 'six and a half hours … would be reasonable'.
>
> [210] We propose to vary clause 32 to insert an individual facilitative provision whereby an individual employee and employer may agree that the unpaid meal break required by clause 32.1 may be taken 'no later than six and a half hours after starting work.''

[11] The *provisional* view expressed above then became the individual facilitative provision which is set out at redrafted clause 32.4, as follows:

> '**32.4 Agreement as to time of unpaid meal break**
>
> (a) An employer and an employee may agree that an unpaid meal break is to be taken after the first hour of work and within the first 6 and a half hours of work.
>
> (b) An agreement must be made after the start of the employee's shift and within the first 5 hours of the work to which it applies.
>
> (c) The agreement may be reviewed at any time.'
>
> Note: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make an agreement under clause 32.4.

[12] In its written submissions, United Voice opposed the proposed introduction of individual facilitation, for the following reasons:

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[13] [2018] FWCFB 7263 at [185] – [193].

'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.'

[13] The AHA and ABI support the introduction of a facilitative provision as proposed in clause 32.4 above. The AHA submits that given clause 34 has been excluded from the scope of Individual Flexibility Agreements the facilitative provision 'provides a limited degree of flexibility … that meets the … need to promote flexible modern work practices and efficient productive performance at work'[14] (s.134(1)(d)).

[14] We confirm our *provisional* view that the redrafted clause 32.4 contain an individual facilitative provision. We now turn to the terms of that provision.

[15] During the course of the hearing on 10 October 2019 the Commission drew the parties' attention to what may be regarded as a lack of clarity as to proposed clause 32.4(c), which states:

'(c) The agreement may be reviewed at any time.'

[16] The concept of 'reviewing' a facilitation agreement 'at any time' seems somewhat nebulous. The intention of clause 32.4(c) was to provide a safeguard in the event that, for example, an employee who had agreed to defer their break subsequently becomes fatigued and needs a break. In such circumstances the employee could, in essence, change their mind and revert back to the default position in the award. The converse would also apply.

[17] An employer may have an operational reason for wishing to withdraw from such an agreement. In the event that either party withdraws from a facilitation agreement, the break should be taken in accordance with the default, award, provision.

[18] United Voice supported some clarification of proposed clause 32.4(c) to reflect the stated intention. The AHA did not oppose the clarification of proposed clause 32.4(c) subject to a time limitation being imposed, that is any right to withdraw from an agreement must be exercised before the penalty provisions in the clause become operative. We agree and propose that proposed clause 32.4(c) be amended to read:

[14] Transcript PN75.

‘**32.4 Agreement as to time of unpaid meal break**

(a) An employer and an employee may agree that an unpaid meal break is to be taken after the first hour of work and within the first 6 and a half hours of work (a ‘facilitation agreement’).

(b) An agreement must be made after the start of the employee’s shift and within the first 5 hours of the work to which it applies.

(c) The employee or the employer may withdraw from an agreement within the first 5 hours of the work to which it applies.’

Note: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make an agreement under clause 32.4.

[19] During the course of the hearing on 10 October 2019 Mr Ryan, on behalf of the AHA, raised a further issue with the draft variation determination for the Restaurant Award, which is Attachment 1 to the *October 2019 Statement*. The issue concerns the expression ‘150% of the employees minimum hourly rate’ in subclauses 32.5 and 32.6. Mr Ryan submitted that, for clarity and consistency with the current term, this expression should be deleted and replaced with ‘50% of the employee’s ordinary hourly rate extra’, such that the amended subclauses read:

‘**32.5 Employer to pay higher rate if break not allowed at rostered time**

If the employer does not allow the employee to take an unpaid meal break at the rostered time (or at the time agreed under clause 32.4), then the employer must pay the employee ~~150%~~ 50% of the employee’s ~~minimum~~ ordinary hourly rate extra:

(a) from when the meal break was due to be taken;

(b) until either the employee is allowed to take the break or the shift ends.

32.6 Employer to pay higher rate if break not allowed and no rostered time

If the employer does not allow the employee to take an unpaid meal break and there is no rostered time for the break, then the employer must pay the employee ~~150%~~ 50% of the employee’s ~~minimum~~ ordinary hourly rate extra:

(a) unless an agreement under clause 32.4 applies, from the end of 6 hours after starting work until either the employee is allowed to take the break or the shift ends; or

(b) if an agreement under clause 32.4 applies, from the end of 6 and a half hours after starting work until either the employee is allowed to take the break or the shift ends.’

[20] There was no opposition to the course proposed by Mr Ryan and we will amend the draft variation determination accordingly.’

Submissions

Submission filed by UWU – 28 February 2020

[21] UWU filed a submission on 28 February 2020 in relation to the Restaurant Award and submitted that similar amendments to the notes at clause 23.4 (dealing with overtime) and

clause 24 (dealing with penalty rates) clarifying that these clauses apply to junior employees and apprentices may be useful to adopt.[15]

[22] As noted earlier, the Full Bench expressed their provisional view that the amendments proposed by UWU be adopted.[16]

Submission filed by UWU – 13 March 2020

[23] In UWU's further submission dated 13 March 2020, it is submitted that the terminology of the use of 'ordinary hours' as opposed to 'hours' with respect to break entitlements may not entitle an employee to a break when a shift is comprised of overtime hours, or where less than 5 ordinary hours are worked and subsequently when overtime hours are worked.[17]

[24] UWU submits that the proposed use of 'hours' is more consistent with the modern awards objective as all employees covered by the Restaurant Award now have ordinary hours, whereas previously it could be said that all hours worked by a casual employee were ordinary hours.[18]

[25] UWU submits, as a result, the use of 'ordinary hours', when it comes to the meal and breaks entitlement clause, seem as though they only apply to 'ordinary hours' worked. Consequently, once 'ordinary hours' have been exhausted and the employee works shifts which are entirely comprised of overtime hours, the current clause 16.2 would not entitle an employee to a break when their shift is comprised of overtime hours, or where less than 5 ordinary hours are worked and subsequent overtime hours are worked.[19]

[26] UWU notes that a strict reading of the current draft award variation determination states that an employee is not entitled to a break for the later overtime shift.[20]

[27] In their submission, UWU refers to the conference[21] before the substantive Full Bench on 10 October 2019 in respect of the Restaurant Award, in which the words 'ordinary hours' were proposed by the AHA to be inserted in the draft so as to make the breaks clause clearer.[22]

[28] The relevant clauses in the draft award variation determinatinon are below:[23]

> **'16.2 Frequency of breaks**
>
> An employee who works the number of hours in any one shift specified in column 1 of Table 2—Entitlements to meal and rest break(s) is entitled to a break or breaks as specified in column 2.
>
> **Table 2—Entitlements to meal and rest break(s)**

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[15] [2020] FWCFB 1541 at [49].

[16] [2020] FWCFB 1541 at [50].

[17] United Workers Union submission, 13 March 2020.

[18] United Workers Union submission, 13 March 2020.

[19] United Workers Union submission, 13 March 2020.

[20] United Workers Union submission, 13 March 2020.

[21] See transcript of conference of 10 October 2019.

[22] United Workers Union submission, 13 March 2020.

[23] Draft award variation determination – *Restaurant Industry Award 2010* – published 14 February 2020.

Column 1 Ordinary Hours worked per day	Column 2 Breaks
5 hours or more and up to 10 hours	An unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work or in accordance with clause 16.4). If the employee is rostered to take an unpaid meal break later than 5 hours after starting work, one additional 20 minute paid meal break (to be taken after the first 2 hours of work and within the first 5 hours of work).
More than 10 hours	An unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work or in accordance with clause 16.4). If the employee is rostered to take an unpaid meal break later than 5 hours after starting work, one additional 20 minute paid meal break (to be taken after the first 2 hours of work and within the first 5 hours of work). 2 additional 20 minute paid rest breaks.

…

16.8 Additional rest break after overtime

An employer must give an employee an additional 20 minute paid rest break if the employer requires the employee to work more than 2 hours' overtime after completion of the employee's rostered hours.'

[29] The relevant clause in the current award is below:[24]

'32.2 Frequency of breaks

An employee who works the number of hours in any one shift specified in column 1 of **Table 2—Entitlements to meal and rest break(s)** is entitled to a break or breaks as specified in column 2.

Table 2—Entitlements to meal and rest break(s)

Column 1 Ordinary Hours worked per day	Column 2 Breaks
5 or more and up to 10	An unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work or in accordance with clause 32.4). If the employee is rostered to take an unpaid meal break later than 5 hours after starting work, one additional 20 minute paid meal break (to be taken after the first 2 hours of work and within the first 5 hours of work).
More than 10	An unpaid meal break of at least 30 minutes (to be taken after the first hour of work and within the first 6 hours of work or in accordance with clause 32.4).

[24] MA000119.

	If the employee is rostered to take an unpaid meal break later than 5 hours after starting work, one additional 20 minute paid meal break (to be taken after the first 2 hours of work and within the first 5 hours of work). 2 additional 20 minute paid rest breaks.'

[30] In their submission, UWU recognises that the insertion of the word 'ordinary' by the substantive Full Bench[25] was made for the purposes of adding clarity to the provision and the insertion is aligned with the terminology used in the current award, however UWU notes that the initial use of the term '*hours*' is now more appropriate.[26]

[31] In relation to the entitlement to an additional rest break after overtime has commenced at clause 16.8 (of the draft award variation determination), where there may be a conflict with the general break entitlement at clause 16.2, UWU propose to resolve this by inserting '*Provided that the employee is not entitled to a break under clause 16.2…*'. Alternatively, to substitute '*ordinary hours*' for '*rostered hours*' in clause 16.8.[27]

[25] [2019] FWCFB 7035.

[26] United Workers Union submission, 13 March 2020.

[27] United Workers Union submission, 13 March 2020.