



Business SA Submission

4 yearly review of
modern awards – *Plain
language re-drafting –
Hospitality Industry
(General) Award and
Restaurant Industry
Award*

**(AM2017/57 and
AM2017/59)**

30 May 2018

Introduction

1. Business SA provides these submissions in response to two decisions of the Fair Work Commission Full Bench. The first decision¹ regarded the plain language re-drafting of the *Hospitality Industry (General) Award 2010*. The second decision² concerned the plain language re-drafting of the *Restaurant Industry Award 2010*. Business SA has an interest in both of these awards.
2. This submission is split into two sections, one for each decision. Paragraph references refer to the paragraph in the relevant decision, while clause references refer to the clause as it appears in the relevant revised exposure draft as published on 22 May 2018, unless otherwise stated.

[2018] FWCFB 2710 - *Hospitality Industry (General) Award 2010*

Item 46

3. In response to [15], Business SA does not object to insertion of 'at the employee's election' in clause 23.5 of the PLED.

Item 69

4. In response to [19], Business SA does not object to the changes proposed for clause 30.5 of the PLED.

Item PTC-1 (Attachment A)

5. In response to [23], Business SA has not identified any outstanding issues in Attachment A.

Items 33-35 (Attachment B)

6. Business SA makes the following submissions in response to [39].

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

7. Business SA submits the provisions setting out an employee's election to take an unpaid meal break where the employee is required to work a shift of more than 5 hours and up to 6 hours could be more clearly expressed.
8. Revised clause 16 in Attachment B sets out the requirements within Table 2 – Entitlements to meal and rest break(s). Previously, the revised PLED published on 22 January 2018 set out the relevant provisions in clauses 16.4 and 16.5. The current award also sets out these requirements in numbered clauses (clauses 31.1 and 31.3).
9. Business SA submits placing substantive content regarding how the employee elects to take an unpaid meal break in a single cell in Table 2 is less clear than providing the content in numbered clauses. Rather than having the ability to specifically refer to a clause or subclause to identify entitlements/obligations, the reader must glean this entirely from the table. This approach also differs from the other rows in Table 2, which simply set out what entitlements arise for a given number of hours worked.
10. Business SA submits clause 16 be amended to ensure Table 2 simply provide information regarding what meal and rest break entitlements arise in various circumstances and that any further detail, such as how to access

¹ [2018] FWCFB 2710.

² [2018] FWCFB 2559.

entitlements, be provided in subsequent numbered clauses and referred to by cross reference. In making this submission Business SA notes the transcript of 23 February 2018 where this award was discussed. We agree with the AHA at [PN172] that clause 16.4 (of the earlier exposure draft) neatly summarises the entitlements/obligation. Business SA provides the following wording as an example:

Table 2 – Entitlement to meal and rest breaks

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

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

16.4 Request for unpaid meal break

- (a) *An employee working a shift of more than 5 and up to 6 hours who elects to take an unpaid meal break must request the break in writing no later than the start of their shift. The employer must not unreasonably refuse the employee’s request.*
- (b) *A request under clause 16.3 applies to all shifts of more than 5 hours worked by that employee unless otherwise agreed between the employee and the employer.*
- (c) *The arrangement may be reviewed at any time.*

[Remaining Attachment B clauses renumbered].

Clause 16.5(a)

11. Business SA is concerned with the wording in clause 16.5(a), particularly regarding the applicable rate where a meal break has not been allowed. We submit the re-drafted clause has different legal effect compared to the current provision.
12. The current award, at clause 31.4 requires that where an employee is working a shift of more than six hours, and employer does not release an employee for an unpaid meal break, the employee will be paid an extra 50% of the ordinary hourly rate for each hour or part of an hour from six hours after the employee started work until the employer gives the employee the unpaid meal break or the shift ends.
13. Clause 16.5(a) by comparison, states the employer must pay the employee ‘the rate the employer was paying the employee at the end of the 6th hour of work on that shift, and 50% of the employee’s ordinary hourly rate.’ (emphasis added) Business SA submits the emphasised portion above differs from the current award in certain circumstances. For example, where an employee would become entitled to a penalty rate payment (such as working overnight Friday and into Saturday).

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

Clause 16.5 examples

15. Business SA has significant concerns regarding the inclusion and content of examples provided at clause 16.5. Business SA is concerned that examples, particularly those drafted while the award itself is being re-drafted, may not accurately represent the award’s operation and will mislead readers. Business SA identifies two such instances in the clause 16.5 examples.
16. Business SA submits the sentence ‘Under **Table 2 – Entitlements to meal and rest break(s)**, she is entitled to an “unpaid meal break (to be taken after the first 2 hours of work and within the first 6 hours of work)” (emphasis in original) is misleading. In circumstances where an employee is working an 8 hour shift, Table 2 states the employee is entitled to a 30 minute unpaid meal break. The example does not clearly state the unpaid meal break is for 30 minutes. Business SA submits that where an example is provided, it must fully reflect the award.
17. Business SA also submits the ‘Sunday shift example’ is misleading. This example states: ‘*If the shift is a Sunday shift* on which Mary is paid 150% of her ordinary hourly rate of \$20.00, then from when she has worked 6 hours until she is allowed to take a break or her shift ends, the employer is to pay her: her Saturday shift rate...’. Business SA submits this example should refer to her Sunday shift rate.

[\[2018\] FWCFB 2559 - Restaurant Industry Award 2010](#)

18. In response to [15], Business SA advises that we do not pursue the proposed amendment.
19. Business SA makes the following submissions in response to [36].

Clause 10.13 Payment rates

20. Business SA submits clause 10.13(b) should direct the reader to the clause containing Table 5 – Overtime rates, rather than only directing the reader to Table 5.
21. Clause 10.13(b) states: ‘An employer must pay a part-time employee at the rates prescribed in **Table 5–Overtime rates** for all time worked in excess of:...’ To find Table 5, the reader must either refer to clause 2 – Definitions or read through the entire award until they come across the fifth table.
22. We recognise ‘Table 5 – Overtime rates’ is bolded, indicating it is a defined term, however we submit having to jump to the definitions clause and then to clause 26.4 adds an unnecessary step for the reader. Award navigation will be improved by clause 10.13(b) directly referencing clause 26.4. This is not to say that clause 10.13 should not also refer to Table 5, simply that clause reference gives the reader greater assistance.
23. In providing this submission, Business SA makes three observations. We note clause 10.13(a) does not refer the reader to Table 2 – Minimum rates, instead clause 10.13(a) refers readers to clause 18. We also note clause 11.6

refers the reader directly to clause 26.4 when considering overtime rates for casual employees, rather than to Table 5. We further note the Determinations PR598487 and PR599064 both directly reference the overtime rates clause (clause 33.2 of the current award).

Clause 11.6

24. Business SA notes what appears to be a drafting error in clause 11.6. Clause 11.6 states: 'An employee must pay a casual employee at the rates prescribed in clause 26.4-Overtime rate for all time worked in excess of the hours prescribed in clause 11.3' (emphasis added). Business SA submits the first reference to 'employee' in clause 11.6 be amended to 'employer'.

Conclusion

25. Business SA thanks the Fair Work Commission for accepting these submissions.

For further information from Business SA's policy team in relation to this matter, please contact Chris Klepper, Policy Adviser, (08) 8300 0000 or chrisk@business-sa.com.