

Fair Work Act 2009

s. 156 – 4 yearly review of modern awards

Casual Employment and Part-time Employment

Pharmacy Industry Award 2010

FURTHER SUBMISSIONS OF THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION
CASUAL ENTITLEMENT TO OVERTIME PENALTIES AND RELATED MATTERS

INTRODUCTION

1. These further submissions are filed by the Shop, Distributive and Allied Employees' Association (the "SDA") consistent with the Directions issued by the Full Bench on 15 July 2016.
2. The submissions supplement those filed on 13 May 2016 in support of the Draft Determination filed on 17 July 2015 to vary the *Pharmacy Industry Award 2010* with respect to casual overtime entitlements, attached hereto and marked "A".
3. The Draft Determination was filed in these proceedings arising from the Directions of the Full Bench on 29 June 2015 with respect to "*miscellaneous issues concerning award casual employment provisions raised by various parties*".¹ For ease of reference the variation sought by the SDA is as follows:

Item	Award	Matter
1.4.8	Pharmacy Industry Award 2010	Sub-group 2B -AM2014/209

¹ Directions AM2014/196 and AM2014/197 Sydney, 29 June 2015 Paragraph 1(1.6)

PLAIN LANGUAGE DRAFTING PROCESS

4. Since the Draft Determination was filed the *Pharmacy Industry Award 2010* has been subject to a plain language revision process² and a number of exposure drafts have been published by the Commission for the review and comment of the parties. As a consequence, the claim made by the SDA which is the subject of these proceedings may be described as “fluid”.
5. At different stages of the plain language drafting process, the specific words relevant to our claim have been revised as part of exposures drafts and clause references have changed.
6. Most recently a new Exposure Draft³ and Comparison of the Exposure Draft to the Modern Award⁴ were published by the Commission for further review and comment of the parties on 22 July 2016.
7. Lest there be any misapprehension, the SDA presses its claims with respect to this Award. However, the precise wording of the claim and in which set of proceedings the claim is resolved in practice will depend on the final form of the plain language draft or the outcome of these proceedings, as appropriate.
8. The SDA notes that we have previously noted the challenge presented by this set of facts in correspondence to the Commission in these proceedings on 17 July 2015, *“The Union trusts that the Commission understands the conundrum presented by having an Exposure Draft on foot in related but separate proceedings at the same time as a claim which has been imported from those proceedings now before this Full Bench.”*
9. Notwithstanding this difficulty the SDA advises the Revised Exposure Draft (22 July 2016) addresses this claim as follows:

“20.3 Application of overtime for casual employees

- (a) An employer must pay a casual employee at the overtime rate for any hours worked at the direction of the employer:*

² [Matter AM2014/209](#)

³ [Exposure Draft - Pharmacy Industry Award - revised - 22 July 2016](#)

⁴ [Comparison of exposure draft to modern award – revised – 22 July 2016](#)

- (i) *in excess of the number of hours specified in 13.3 (maximum daily hours);*
- (ii) *between midnight and 7.00 am.*

(b) *The casual loading prescribed in clause 11—Casual employment is not payable on overtime worked by a casual employee.”*

10. The SDA submits that the net effect of the current Revised Exposure Draft is that casual employees shall be entitled to the payment of overtime rates for:

- (a) Hours worked in excess of 12 hours per day⁵; and
- (b) Hours worked outside the ‘Ordinary hours of work’⁶.

11. There are four (4) limbs to the SDA claim. The SDA claim⁷ is for the payment of overtime rates of pay to casuals in the following circumstances:

- (a) For hours of work performed between midnight and 7.00 am , Monday to Sunday;
- (b) For hours of work on any day which is not continuous, except for rest breaks and meal breaks;
- (c) For hours of work in excess of 12 hours per day; and
- (d) For hours of work in excess of 38 hours per week.

12. The current state of play in the revised Exposure Draft is that items 11(a) and 11(c) above have been satisfactorily addressed. However, items 11(b) and 11(d) have not been resolved.

OVERTIME IS PAYABLE WHEN WORK IS NOT CONTINUOUS

13. The SDA submits that the claim for casuals to be paid overtime rates of pay when work is not continuous should be, in our respectful view, “self evident and can be determined with little formality”.⁸

⁵ Clause 13.3 of the revised Exposure Draft – 22 July 2016

⁶ Clause 13.1 of the revised Exposure Draft – 22 July 2016

⁷ Consistent with the Draft Determination filed on 17 July 2015

⁸ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision [2014] FWCFB 1788 at [60](3)

14. The provision would operate as a prohibition on 'split shifts' unless such split shifts on a single day are specifically allowed.
15. The effect of the provision is that casual workers would (and should) be paid overtime rates of pay for a second shift on any single day.

OVERTIME FOR WORK IN EXCESS OF 38 HOURS IN A WEEK

16. The other gap left between the Revised Exposure Draft – 22 July 2016 and the SDA claim in these proceedings is that casual employees working in excess of 38 hours per week are currently not entitled to overtime rates of pay. We rely upon our submissions of 13 May 2016 and make this further observation.
17. In February 2011 the Fair Work Ombudsman and the Pharmacy Guild of Australia distributed a "SIAP Fact sheet – PIA Clauses Explained – Overtime", attached hereto and marked "B".
18. The SDA understands that this Fact sheet was made available to members of the Guild and reflected a common view of the interpretation of the Pharmacy Industry Award 2010.
19. Relevantly, the Fact Sheet states:

"Casual

A casual employee should not be working significant hours. However, as with other status of employee, overtime is payable to casual employees after 12 hours per day or 38 hours per week (or 76 hours per fortnight), as well as any hours worked between 12 midnight and 7am.

The casual loading is not payable on overtime." (underlining added)

20. The SDA strongly urges the Full Bench to reflect this shared understanding in the language of the Award to reflect this entitlement. Lest there be any further cause for confusion due to the current gap appearing in the Revised Exposure Draft – 22 July 2016.

CONCLUSION

21. In all other respects the SDA relies upon its previous submissions in this matter.

22. The relevant award provision does not provide a “fair and relevant minimum safety net of terms and conditions” taking into account the criteria of s.134 of the Act and the variation sought is, in our respectful view, “self evident and can be determined with little formality”.
23. The SDA submits that the Commission may, on the basis of these submissions safely determine that the existing provisions are not achieving the modern awards objective.
24. The SDA commends the Draft Determination and urges the Commission to vary the relevant Award in the terms sought.

David Bliss

Assistant Secretary and Industrial Officer

SDA Newcastle and Northern Branch

29 July 2016

"A"

MA000012 PRXXXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s156 – 4 Yearly reviews of modern awards

4 yearly review of modern awards – Casual employment
(AM2014/197)

PHARMACY INDUSTRY AWARD 2010

MA000012

Pharmacy operations

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL

MELBOURNE, DD MM 2016

Review of modern awards to be conducted.

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Pharmacy Industry Award 2010* be varied as follows.

1. Delete Clause 13.2 of the Exposure Draft issued by the Commission on 8 December 2015 and insert in lieu thereof the following:

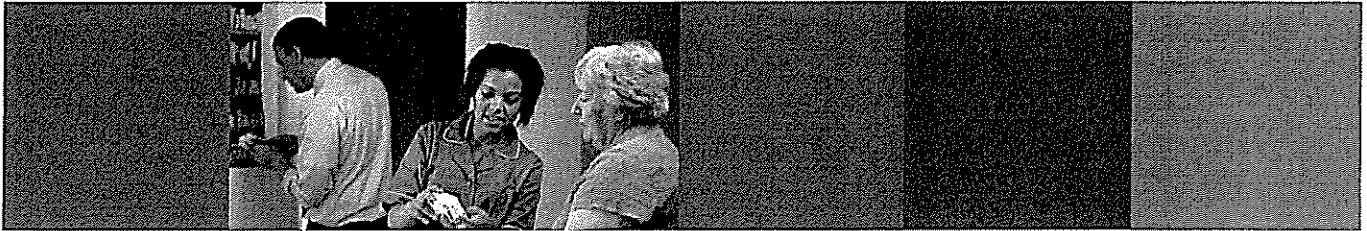
13.2 Definition of overtime

- (a) For a full-time employee, overtime is paid for additional hours worked at the direction of the employer in excess of the ordinary number of hours prescribed in clause 8.2 and outside the rostering provisions contained in 8.3.
- (b) For a part-time employee, overtime is paid for additional hours worked at the direction of the employer in excess of the ordinary number of hours prescribed in clause 8.2 or as prescribed in 6.4, and outside the rostering provisions contained in clause 8.3.

- (c) For a casual employee, overtime is paid for hours worked at the direction of the employer in excess of the ordinary number of hours prescribed in clause 8.2(a), 8.2(b), 8.2(c).
- (d) Casual employees shall receive overtime payments for work in excess of 38 hours per week.

B. This determination comes into force on and from DD MM 2016.

PRESIDING MEMBER



SIAP Fact sheet - PIA Clauses Explained

Overtime

Ordinary hours

Under the *Pharmacy Industry Award 2010* (PIA), ordinary hours can be worked:

- from Monday to Sunday between 7am and 12 midnight
- for a maximum of 12 hours in one day
- for a maximum of 38 hours in one week, or 76 hours in two weeks

Certain hours within the ordinary hours spread attract an additional penalty loading that is not overtime.

Overtime

Under the PIA, overtime is payable at the rate of 150% for the first two hours, and double time thereafter, unless the overtime is worked on a Sunday (payable at 200%) or a public holiday (payable at 250%).

Ordinary time penalty loadings are not payable in addition to overtime; an employee shall receive one or the other. Casual employees do not receive the casual loading on overtime.

Casual

A casual employee should not be working significant hours. However, as with other status of employee, overtime is payable to casual employees after 12 hours per day or 38 hours per week (or 76 hours per fortnight), as well as any hours worked between 12 midnight and 7am.

The casual loading is not payable on overtime.

Part-time employees

The ordinary hours of a part-time employee must be documented on engagement. An employee may agree to work additional hours outside of this documented work pattern.

Additional hours required by the employer are paid at overtime rates, as is hours in excess of 12 hours in one day, 38 hours in one week or 76 hours in a fortnight. Overtime is also payable for all hours worked between 12 midnight and 7am.

Leave accrual

Permanent employees will only accrue leave entitlements on their ordinary hours. Leave does not accrue on hours that are paid as overtime.



Varying a part-time employee's roster

Example – Variation to part-time hours

Agreement to additional ordinary hours

Stacey has an exam she needs to study for, and has asked Frank if he will swap two shifts with her. Frank agrees, and they note the arrangements on the roster posted on the staffroom notice board, having previously obtained their manager's agreement to allow the swap in shifts.

Agreement to additional hours at casual rates

Stacey's sister is visiting from interstate, so Stacey would like Donna to take her normal Saturday shift so Stacey can spend time with her sister. Donna doesn't normally work on weekends, so asks you if she can work the additional shift at casual rates. Stacey works one shift less that pay cycle than she would normally.

You make sure the agreement of both employees is documented.

No agreement to additional ordinary hours

You are called away from the pharmacy for a family emergency. To prevent the pharmacy from closing for 3 hours, Frank must stay at work past his normal knock-off time of 12 noon and keep working until Hanna starts her daily shift at 3pm. Frank will be paid those three hours at overtime rates.

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