



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award flexibility

(AM2014/300)

HORTICULTURE AWARD 2010

[MA000028]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER LEE

MELBOURNE, XX JANUARY 2017

4 yearly review of modern awards - award flexibility - time off instead of payment for overtime.

A. Further to the Full Bench decision issued by the Fair Work Commission on 13 December 2016¹ the above award is varied as follows:

1. By deleting clause 24.1 and inserting the following:

24.1 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for all overtime that has been worked by the employee.
- (b) An agreement made under clause 24.1 will remain in place unless the agreement is terminated. The agreement can be terminated **by the employer or employee** at any time by notice in writing.
- (c) An agreement made under clause 24.1 must be in writing and must state each of the following:
 - (i) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - (ii) that the agreement can be terminated at any time by notice in writing;

¹ [2016] FWCFCB 7737, see also [2016] FWCFCB 4258.

- (iii) that overtime worked after the agreement is terminated will be paid at the overtime rate applicable to the overtime when worked;
- (iv) that time off instead of overtime must be taken within 6 months of it being worked, at a time or times agreed by the employee and employer;
- (v) that, if time off is not taken as mentioned in paragraph (iv), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

Note: An example of the type of agreement required by this clause is set out at Schedule H. There is no requirement to use the form of agreement set out at Schedule H. An agreement under clause 24.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

- (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 24.1 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

- (e) Time off must be taken:
 - (i) within the period of 6 months after the overtime is worked; and
 - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (g) The employer must keep a copy of any agreement under clause 24.1 as an employee record.
- (h) The employer must keep a record of the number of overtime hours worked by the employee, when those hours were worked and an updated record of the employee's time off ~~in lieu~~ instead of payment for overtime balance.
- (i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 24.1 will apply,

including the requirement for a written agreement under paragraph (c) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 24.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 24.1.

2. By inserting Schedule H as follows:

Schedule H—Agreement for time off instead of payment for overtime

Name of employee: _____

Name of employer: _____

1. The employer and employee agree that the employee will take time off instead of being paid for all overtime that has been worked by the employee.
2. Time off must be taken within 6 months of the overtime being worked at a time or times agreed by the employee and employer.
3. This agreement will remain in place until the agreement is terminated. The agreement may be terminated by the employer or employee at any time by notice in writing.
4. If the agreement is terminated, the employer must pay the employee for overtime worked at the overtime rate applicable to the overtime when it was worked.

Signature of employee: _____

Date signed: ___/___/20___

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ___/___/20___

3. By updating the Table of contents and cross-references accordingly.

B. This determination comes into operation from xx January 2017. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after xx January 2017.

PRESIDENT