

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

**Final Reply Submissions –
Fast Food Industry Award 2010**

Casual Employment
(AM2014/197)

10 October 2016

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/197 CASUAL EMPLOYMENT

1. INTRODUCTION

1. A claim has been made by the Shop, Distributive and Allied Employees' Association (**SDA**) to vary four awards¹ in relation to the entitlement of casual employees to overtime rates. On 9 September 2016, the Fair Work Commission (**Commission**) issued directions requiring any party opposing the SDA's claim to file submissions and any evidence in reply.
2. The Australian Industry Group (**Ai Group**) has a significant interest in the *Fast Food Industry Award 2010* (**Fast Food Award** or **Award**); that being one of the four awards that the SDA seeks to vary. This submission relates specifically to the SDA's claim in relation to that Award. It is filed in response to the SDA's material of 17 July 2015 and 13 May 2016.

¹ The *Pharmacy Industry Award 2010*; the *General Retail Industry Award 2010*; the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010*.

2. THE STATUTORY FRAMEWORK

3. The SDA's claim is pursued in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**Act**).
4. 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).
5. The modern awards objective is set out at s.134(1) of the 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). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

3. THE COMMISSION'S GENERAL APPROACH TO THE 4 YEARLY REVIEW

6. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision*² provides the framework within which the Review is to proceed.
7. 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 AB'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.³

8. 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 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.⁴

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

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

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

9. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*):

“Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.⁵

10. 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” and that “no particular primacy is attached to any of the s.134 considerations”. 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”.

⁵ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

11. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (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.⁶

12. 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.

13. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

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

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

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

[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.⁷

15. The SDA's claim conflicts with the principles outlined in the aforementioned decisions and accordingly should be rejected.

⁷ Re *Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

4. THE SDA'S CLAIM

The Variation Sought

16. Clause 26.1 of the Award prescribes the circumstances in which an employee is to be paid at overtime rates. It is in the following terms:

26.1 An employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's rostered commencing time on any one day; or

(c) After an employee's rostered ceasing time on any one day; or

(d) Outside the ordinary hours of work; or

(e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3.

17. The variation sought by the SDA is set out in its material of 17 July 2015. If granted, the SDA's claim would have the effect of replacing clause 26.1 with the following: (proposed changes marked)

26.1 ~~An~~ Full-time, part-time and casual employees shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period for full-time and part-time employees; or

(ii) 38 hours per week for casual employees; or

(iii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days) for full-time and part-time employees; or

(iv) five days per week for casual employees; or

(v) eleven hours on any one day for full-time, part-time and casual employees; or

- (b) Before an employee's rostered commencing time on any one day; or
- (c) After an employee's rostered ceasing time on any one day; or
- (d) Outside the ordinary hours of work; or
- (e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3.

18. The union also seeks the following amended clause 26.2:

26.2 Where an full-time, part-time or casual employee works overtime on a Sunday and that work is not immediately preceding or immediately following ordinary hours, then that employee must be paid double time with a minimum payment of four hours at such rate.

19. The effect of the SDA's claim is to:

- express the entitlements provided by clauses 26.1 and 26.2 as applying to all types of employees; full-time, part-time and casual; and
- in certain instances, differentiate between permanent employees and casual employees in relation to the circumstances in which overtime rates are payable.

The SDA's Case

20. The SDA has not advanced any submissions regarding the proper interpretation of the current provisions, nor does it appear to allege any ambiguity arising from them. We therefore proceed on the basis that the union's case is mounted on the basis that, as a matter of merit, casual employees covered by the Fast Food Award should be entitled to overtime rates in the circumstances prescribed by the proposed clause.

21. The gravamen of the SDA's submission in support of its claim is that:

- the 25% casual loading does not adequately compensate a casual employee for working overtime;
- the absence of an entitlement to overtime rates for casual employees can be causally linked to increased casualisation;

- s.134(1)(da) of the Act is not satisfied by the current award provisions;
- the absence of an entitlement to overtime rates for casual employees undermines the integrity of the 38 hour week; and
- casual employees cannot refuse to work overtime.

22. We deal with each of these propositions in turn.

The Casual Loading

23. The SDA submits that “the casual loading is not a ‘magic pudding’ which can be used to justify the absorption of penalties and loadings applicable for other incidents if employment, such as working long, inconvenient and/or unsociable hours”⁸.

24. The SDA’s argument oversimplifies the Commission’s task, which involves a consideration of the many relevant factors to which the Commission must have regard when determining whether a particular award entitlement should be extended to apply to casual employees. An assessment as to whether the casual loading compensates an employee for working in excess of ordinary hours and if so, whether it does so adequately, is beside the point.

A Causal Link with Increased Casualisation

25. The SDA makes only the following brief submission regarding the alleged increase in reliance on casual employment:

The non-payment of overtime rates of pay ... creates a perverse incentive for some employers to increase casual employment to the detriment of permanent positions because work at these times and for longer hours becomes relatively cheaper.⁹

26. There is no evidence before the Commission to substantiate the proposition that the absence of an entitlement to overtime rates for casual employees encourages the engagement of employees on a casual basis in the fast food industry or in any other. Furthermore, the SDA’s submissions proceed on the

⁸ SDA submission dated 13 May 2016 at paragraph 27.

⁹ SDA submission dated 13 May 2016 at paragraph 28.

basis that such an outcome would be an adverse one, without establishing that this is in fact so.

27. The SDA may seek to argue that their claim is consistent with s.134(1)(c) of the Act, which requires that the Commission take into account the need to promote social inclusion through increased workforce participation. However, casual employment is vital in furthering this objective for the reasons that Ai Group has argued in detail in the main casual and part-time common issues proceedings. Significantly increasing the cost of employing casuals would no doubt have a negative impact on employment and hence would run counter to s.134(1)(c).

Section 134(1)(da) of the Act

28. Section 134(1) of the Act requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. In making the requisite assessment, the Commission is to take into account specific factors identified by the legislature, which includes the following at s.134(1)(da):

(da) the need to provide additional remuneration for:

- (i) employees working overtime; or
- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts; and

29. The SDA's contention regarding s.134(1)(da) is summarised in the following paragraph of its submissions:

The SDA submits that award provisions which do not provide for overtime rates of pay for casual employees for work in excess of 38 hours in any week or outside ordinary hours or which absorb part of a penalty rate because the employee is casual ipso facto do not satisfy this modern award objective.¹⁰

30. With respect, s.134(1)(da) is not, of itself, a "modern award objective"; it is but one of many considerations which the Commission must take into account in

¹⁰ SDA submission dated 13 May 2016 at paragraph 16.

determining whether an award is providing a fair and relevant minimum safety net of terms and conditions; that being the “modern awards objective”. The Act does not, however, require that s.134(1)(da), or any of the other matters there listed, be treated as absolute requirements or minimum standards that must necessarily be expressly provided for in an award. Further, as the Commission acknowledged in its *Preliminary Jurisdictional Issues Decision*: (emphasis added)

[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’ *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

“To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.”

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.¹¹

31. Whilst we acknowledge that s.134(1)(da)(i) requires that the Commission must take into account the need to provide additional remuneration for employees working overtime, that consideration must be balanced against the many others identified at s.134(1), including the need to encourage collective bargaining

¹¹ 4 Yearly Review of Modern Awards: *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31] – [34].

(s.134(1)(b)); the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); the likely impact on business including on employment costs (s.134(1)(f)) and the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

32. Section 134(1)(da) does not mandate the inclusion of overtime rates for casual employees or those engaged on any other basis. It does not require that an award provide additional remuneration for work performed in the circumstances specified, nor does its recent inclusion in the Act render an award inconsistent with s.138 and the modern awards objective in the absence provisions that provide for additional remuneration for employees working overtime or in any of the other circumstances there described. Rather, to the extent that s.134(1)(da) lends support to the SDA's claim, it must be balanced against the aforementioned matters listed at s.134(1) that run contrary to it. Its application is by no means determinative of the matter.

The 38 Hour Week

33. We do not agree with the SDA's proposition that award provisions that provide no additional remuneration for overtime "undermine the integrity of the 38 hour week"¹². This is particularly so in circumstances where an employer cannot require an employee to work overtime under the Fast Food Award (see section below). We also note that the SDA's claim would require the payment of overtime rates in many circumstances apart from work in excess of 38 hours in a week; that is, the union's proposal is far broader in scope.

An Ability to Refuse to Work Overtime

34. Having referred to ss.62(2) and 62(3) of the Act, the SDA submits: (emphasis added)

The SDA notes that reading the relevant award provisions in conjunction with the statutory framework do not, unfortunately, confer an unqualified right to a casual employee to refuse to work overtime on the basis there is no additional remuneration.

¹² SDA submission dated 13 May 2016 at paragraph 29.

Whilst Section 62(3)(d) of the Act requires that the payment of overtime rates etc. be a criteria to determine if the additional hours are reasonable, it is not the sole criteria.¹³

35. The SDA's submissions disregard clause 26.4(a) of the Fast Food Award and accordingly, its complaint is misplaced. Clause 26.4 states:

26.4 Reasonable overtime

(a) An employer may require an employee other than a casual to work reasonable overtime in accordance with the provisions of this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

(v) any other relevant matter.

36. Clause 26.4(a) presents itself as an award-derived barrier to requiring casual employees to work reasonable overtime. That is, an employer cannot unilaterally direct a casual employee to perform overtime. Rather, a casual employee to whom the Fast Food Award applies may only work overtime if they so agree. This may eventuate by virtue of an employer requesting a casual employee to work overtime and the employee agreeing, or a casual employee may volunteer or express an interest in working overtime. Absent the employee's agreement, however, he or she cannot be required to work overtime.

37. Accordingly, this aspect of the SDA's submissions should be disregarded.

¹³ SDA submission dated 13 May 2016 at paragraph 38.

Section 138 and the Modern Awards Objective

38. A modern award must only include provisions that are necessary to ensure that it is achieving the modern awards objective. In the matter here before the Commission, the SDA has not so much as attempted to establish that the amended clauses 26.1 and 26.2 it seeks are necessary in the relevant sense.
39. The employer parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or have any other adverse impact. No adverse inference can or should be drawn from the absence of evidence called by employer parties.
40. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is “necessary” in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, flexible work practices and the potential impact on engagement in collective bargaining. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of individual businesses as well as industry at large.
41. It is trite to observe that the grant of the SDA’s claim is at odds with the following considerations which the Commission must take into account:
- the need to encourage collective bargaining (s.134(1)(b));
 - the need to need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d));
 - the likely impact on business, including employment costs (s.134(1)(f));
- and

- the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).
42. It is relevant to note that the Fair Work Ombudsman (**FWO**) interprets the current award provisions as providing an entitlement to overtime rates to permanent employees, however its advice is that casual employees covered by the Fast Food Award are not entitled to overtime rates. A copy of the FWO's position, as published on its website, can be found at **Attachment A** to this submission.
43. During the financial year ending 30 June 2015, the Fair Work Infoline answered a total of 468,754 calls, of which 135,775 were received by the Small Business Helpline.¹⁴ The pay tools available on its website were accessed over 2 million times.¹⁵
44. The FWO provides advice to a very significant number of employers and employees each year regarding terms and conditions contained in modern awards. It is reasonable to infer that, as a result of its advice regarding the issue here relevant, a significant proportion of the industry does not currently pay casual employees overtime rates. It can also reasonably be assumed that those employers are more likely to be small, award reliant businesses. This is a matter that goes squarely to the potential impact of the claim.
45. We also observe that the basis upon which the SDA seeks to differentiate between the circumstances in which a permanent employee is entitled to overtime rates as compared to those in which a casual employee would be entitled to overtime rates is entirely unclear. The SDA does not provide any justification for this.
46. For instance, clause 25.2(a) enables an employer to average the ordinary hours of an employee (including a casual employee) over a period of no more than four weeks. Pursuant to clause 26.1(a)(i), a permanent employee's entitlement to overtime is to be calculated having regard to any such averaging.

¹⁴ Fair Work Ombudsman Annual Report 2014 – 15 at page 13.

¹⁵ Fair Work Ombudsman Annual Report 2014 – 15 at page 12.

The SDA provides no basis upon which an employer should not similarly be permitted to consider the averaging of a casual employee's ordinary hours. This is an important flexibility in circumstances where a casual employee's ordinary hours may fluctuate considerably each week.

47. Similarly, clause 26.1(a)(ii) is in the following terms:

26.1 An employee shall be paid overtime for all work as follows:

(a) In excess of:

...

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); ...

48. The SDA seeks the insertion of a less flexible provision in relation to casual employees:

26.1 An employee shall be paid overtime for all work as follows:

(a) In excess of:

...

(iii) five days per week for casual employees; ...

49. As a result, whilst an employer may require permanent employees to six days in one week without the payment of overtime rates if in the following week the employee is not required to work ordinary hours on more than four days, this would not be extended to casual employees. Rather, a casual employee would be entitled to overtime rates if required to work more than five days, absent any merit basis or justification for this approach.

50. The SDA has not made out a case for introducing the award terms that it has proposed. The material before the Commission cannot lead it to conclude that the clauses sought are necessary to achieve the modern awards objective. Accordingly, its claim must be dismissed.

When overtime applies

Overtime is when an employee works extra time. It can include work done:

- beyond their ordinary hours of work
- outside the agreed number of hours
- outside the spread of ordinary hours.

The spread of hours is the times of the day ordinary hours can be worked (eg. between 7am - 7pm).

When overtime rates apply

An award, enterprise agreement or other registered agreement (<http://www.fairwork.gov.au/Dictionary.aspx?TermID=2034>) will set out when overtime rates apply.

Find information about when overtime applies in your award by selecting from the list below.

Based on what you've told us, it looks like you're covered by the Fast Food Industry Award 2010 [MA000003].

Overtime - Full-time employees

Full-time employees get overtime rates if they work:

- more than the maximum number of ordinary hours of work (per day or per week)
- before or after their rostered hours.

Overtime - Part-time employees

Part-time employees get overtime rates if they work:

- more than the maximum number of ordinary hours of work (per day or per week)
- outside their agreed times of work or
- more than their agreed hours.

For the maximum number of ordinary hours in your award, go to Hours of work (<https://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/Hours-of-work/default>).

Overtime - Casual employees

Casual employees don't get overtime rates. They get paid their ordinary hourly rate for all hours worked.

Minimum hours for overtime shift

Employees who work overtime on a Sunday have to be given at least 4 hours of work. If they don't work these hours, they still have to be paid a minimum 4 hours at overtime rates.

This doesn't apply to employees who work overtime immediately before or after ordinary hours on a Sunday.

Check the Fast Food Award for full information on overtime including meal allowances that can apply when working overtime.

To find out more about who this award applies to, go to the Fast Food Award summary (<https://www.fairwork.gov.au/awards-and-agreements/awards/award-summary/ma000003-summary>).

Source reference: Fast Food Industry Award 2010 [MA000003] clauses 12, 19 and 26 (<http://awardviewer.fwo.gov.au/award/show/MA000003>)


Reasonable overtime

An employer can request that an employee works reasonable overtime. Overtime can be reasonable so long as the following things are taken into account:

- any risk to health and safety from working the extra hours
- the employee's personal situation, including their family responsibilities
- the needs of the workplace

- if the employee is entitled to receive overtime payments or penalty rates for working the extra hours
- if they are paid at a higher rate on the understanding that they work some overtime
- if the employee was given enough notice that they may have to work overtime
- if the employee has already stated they can't ever work overtime
- the usual patterns of work in the industry.

An employee can refuse to work overtime, if the request is unreasonable.

It is important that health and safety issues are considered and managed if an employee has to work overtime. A guide to help you consider the health and safety implications of an employee working long hours is available on the [Safework Australia](http://www.safeworkaustralia.gov.au/sites/SWA)  (<http://www.safeworkaustralia.gov.au/sites/SWA>) website.

Source reference: [Fair Work Act 2009 \(Cth\) section 62](http://www.comlaw.gov.au/Series/C2009A00028)  (<http://www.comlaw.gov.au/Series/C2009A00028>).

Think a mistake might have been made?

Mistakes can happen. The best way to fix them usually starts with talking.

Check out our [Help resolving workplace issues](http://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/default) (<http://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/default>) section for practical advice on:

- figuring out if a mistake has been made
- talking to your employer or employee about fixing it
- getting help from us if you can't resolve it.

What to do next

- Calculate overtime rates using our [Pay Calculator](http://calculate.fairwork.gov.au/FindYourAward) (<http://calculate.fairwork.gov.au/FindYourAward>)
- Check for alternative overtime payments in [Overtime pay](http://www.fairwork.gov.au/pay/penalty-rates-and-allowances/overtime-pay) (<http://www.fairwork.gov.au/pay/penalty-rates-and-allowances/overtime-pay>)
- Download the [Time sheet \(DOC 76KB\)](http://www.fairwork.gov.au/ArticleDocuments/766/Timesheet-template.doc.aspx) (<http://www.fairwork.gov.au/ArticleDocuments/766/Timesheet-template.doc.aspx>) template to record hours of work
- Learn about maximum hours and spread of hours at [Hours of work](http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/Hours-of-work/default) (<http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/Hours-of-work/default>)

Help for small business

- Find tools, resources and information you might need on our [Small business page](http://www.fairwork.gov.au/Find-help-for/Small-business/default) (<http://www.fairwork.gov.au/Find-help-for/Small-business/default>).

You might also be interested in

- Minimum breaks between shifts in [Breaks](http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/breaks) (<http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/breaks>)
- [Rosters](http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/rosters) (<http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/rosters>)
- [Rostered days off](http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/rostered-days-off) (<http://www.fairwork.gov.au/Employee-entitlements/hours-of-work-breaks-and-rosters/rostered-days-off>)
- [Flexibility in the workplace](http://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/default) (<http://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/default>)

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The Fair Work Ombudsman is committed to providing advice that you can rely on.

The information contained on this website is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or workplace relations professional.

Visitors are warned that this site may inadvertently contain names or pictures of Aboriginal and Torres Strait Islander people who have recently died.

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www.fairwork.gov.au
Small Business Helpline – 13 13 94



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