

Fair Work Act 2009
s.156—4 yearly review of modern awards
4 yearly review of modern awards – Overtime for
casuals (AM2016/15)
Hair & Beauty Industry Award 2010

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INTRODUCTION

1. The SDA makes these submissions in response to paragraph 12 and 13 of the Full Bench Decision¹ dated 5 March 2021. These submissions concern the overtime provisions the *Hair and Beauty Industry Award 2010 (HBIA)*.

Response to the proposed variations

2. In paragraph 10 of the Decision, the Full Bench proposed a variation of clause 31.2 that rectifies the erroneous deletion of clause 13.3 and addresses some remaining uncertainties about how clause 13.3 interacts with clauses 28.2 and 31.2.
3. The SDA is supportive of the provisional view proposed by the Full Bench in paragraph 10. The revised wording provides greater clarity around the entitlement to overtime, and resolves the issues referenced above (paragraph 2).
4. In paragraph 11 of the Decision, the Full Bench provided a provisional view of a modification to clause 13.3. The SDA does not oppose the suggested modification. The SDA notes that it seems to clarify and point to the specific rates outlined in clause 31.2.

Response to Full Bench's request in paragraph 13

5. In paragraph 13 the Full Bench requested parties' views on which rates apply when a full-time or part-time employee works outside the span of hours specified in clause 28.2(a) or in excess of the maximum daily hours specified in clause 28.3.
6. The SDA makes the following submissions in response to paragraph 13.

Work done outside the spread of hours

7. The SDA strongly supports that the HBIA clearly prescribes a rate to work done outside the spread of hours by full-time and part-time employees. Work done outside the spread of hours specified in clause 28.2(a) are not ordinary hours and should attract payment at the overtime rate. The SDA submits that work done that is not

¹ [2021] FWCFB 1121.

within the spread of hours incurs overtime, however we agree that the current provision of the HBIA is not clearly drafted.

8. In discussions relating to Plain Language re-drafting – *Hair and Beauty Industry Award* (AM2016/15, currently before Ross P) the AIG, SDA and AWU have reached consensus that the HBIA should expressly state that overtime is payable for work done outside the span of hours.

Work done in excess of the maximum daily hours

9. The SDA also submits that work done by permanent employees in excess of the maximum daily hours specified in clause 28.3 should clearly attract overtime payment.
10. This approach will provide internal consistency within the award with regards to how casuals are treated, per clause 31.2(b)(ii):

31.2 Overtime and penalty rates

(b) Overtime – casual employees

Hours worked by casual employees:

(ii) in excess of 10 ½ hours per day;

are overtime hours and shall be paid 175% of the ordinary hourly rate of pay for a full-time employee for the first three hours and 225% of the ordinary hourly rate of pay for a full-time employee after three hours.

11. The HBIA is anomalous in that it does not prescribe an overtime rate to be paid for work done in excess of the maximum daily hours for permanent employees. As such under the current award conditions, work in excess of the daily maximum hours is an award breach. The HBIA should be rectified to bring it in line with other modern awards.
12. In discussions with the unions, AIG has not agreed to this change.
13. Examples of other awards that refers to the applicability of overtime in this circumstance is the *General Retail Industry Award 2020 (GRIA)* and the *Fast Food Industry Award 2010 (FFIA)*.

14. The GRIA provides for an overtime rate to be payable for permanent employees who work in excess of the maximum daily hours by specifying that overtime is payable for hours worked 'in excess of the ordinary hours of work' or 'outside the roster conditions prescribed in clause 15':

21.1 Payment of overtime

(a) An employer must pay a full-time employee for hours worked *in excess of the ordinary hours of work* or outside the span of hours (excluding shiftwork) or *outside the roster conditions prescribed in clause 15*—Ordinary hours of work at the overtime rate specified in column 2 of Table 10—Overtime rates (emphasis added).

15. Where the ordinary hours are specified in clause 15.4 and 15.5:

15. Ordinary hours of work and rostering arrangements

15.4 Subject to clause 15.5, the maximum number of ordinary hours that can be worked on any day is 9.

15.5 An employer may roster an employee to work up to 11 ordinary hours on one day per week.

16. The *Fast Food Industry Award (FFIA)* also provides for overtime to be payable for permanent employees working in excess of the maximum hours on a day (clause 26.2(a)(iii)):

26.2 A full-time or part-time 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;

Additional issues identified by the Unions

17. The SDA has identified that there are further issues with the current overtime clause beyond the two identified by the Full Bench of work outside the ordinary spread of hours

and maximum daily hours.² The Award currently does not have an overtime provision for work done outside the rostering conditions.

18. The Decision³ and the submissions above address the issues of working outside the span of hours and work in excess of maximum daily hours but the issues such as working 7 consecutive days remain outside the overtime provision of the award.
19. The SDA suggests that the HBIA would greatly benefit from a clause that captures all the circumstances where overtime would apply for permanent employees. This will provide much-needed clarity over the conditions that attract additional payments.
20. To give effect to the submissions above the SDA proposes a provision varying clause 31.2(a), to the effect of:

XX Payment of overtime for full-time employees

Hours worked by a full-time employee in excess of ordinary hours or outside the ordinary hours of work (span of hours) or outside the hours of work provisions or outside the rostering principles, are overtime hours and are to be paid at 150% of the ordinary hourly rate of pay for the first three hours and 200% of the ordinary hourly rate of pay after three hours.

XX Payment of overtime for part-time employees

- (a) Hours worked by a part-time employee in excess of ordinary hours or outside the ordinary hours of work (span of hours) or outside the hours of work provisions or outside the rostering principles; or
- (b) Any hours worked at the direction of the employer in excess of the number of ordinary hours agreed under clause 12.2, as varied under clause 12.3, are overtime hours and are to be paid at 150% of the ordinary hourly rate of pay for the first three hours and 200% of the ordinary hourly rate of pay after three hours.

21. Such a provision would ensure employers are not in breach of the award. It would also ensure employees are compensated fairly for working outside the rostering conditions that are set by the award.
22. A consideration of the modern award objective, particularly s 134(da)(i) – the need to provide additional remuneration for employees working overtime – is particularly

²[2021] FWCFB 1121, paragraph 13.

³ [2021] FWCFB 1121.

persuasive in reinforcing the SDA's submissions. Ensuring that overtime entitlements are appropriately captured will promote the achievement of this objective.

23. This issue has been raised with the AIG but agreement could not be reached on such a change.

24. The SDA notes that the GRIA had its overtime clause varied in the past⁴ to ensure that work outside the roster conditions was to be compensated by the payment of overtime and not left as an award breach issue.

⁴ [2010] FWA 8806, see paragraphs 3, 4, 22.