



BACKGROUND PAPER

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Live Performance Award 2010* (AM2019/17)

MELBOURNE, 25 NOVEMBER 2019

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

1. Introduction

[1] The Fair Work Commission (Commission) has produced this background paper in order to facilitate discussions at the conference scheduled by providing background information about the contested casual overtime issue in the *Live Performance Award 2010* (the Award).

[2] Interested parties are asked to consider the material contained in this background paper and be prepared to advance a proposed resolution at the conference.

[3] On 2 September 2019, the Full Bench in AM2019/17 issued a decision setting out a timetable for the finalisation of the exposure drafts produced during the 4 yearly review of modern awards (the Review). The 122 modern awards were divided into 3 tranches for the finalisation process.¹ In a further decision issued on 14 October 2019, the Award was moved from tranche 2 to tranche 3 and will be finalised in accordance with the timetable below.²

Date

29 January 2020	Publish final exposure drafts and draft variation determinations
4 March 2020	Parties to file submissions on final exposure drafts draft variation determinations
27 March 2020	Parties to file submissions in reply
6/7 April 2020	Full Bench Hearing (if required)

¹ [2019] FWCFB 6077

² [2019] FWCFB 6861

[4] An [Exposure Draft](#) for the Award was last published by the Commission on 5 April 2019. Two submissions were received following the publication of the Exposure Draft:

- Live Performance Australia dated 29 April 2019 ([LPA](#))
- Media, Entertainment and Arts Alliance dated 30 May 2019 ([MEAA](#))

[5] The MEAA objected strongly to the Exposure Draft published on 5 April 2019 as the parties had been engaged in conferences before Deputy President Gostencnik in 2017 and had submitted an agreed draft award following these conferences which was not reflect in the 5 April 2019 publication.³

[6] LPA did not object to the 5 April 2019 Exposure Draft but made a submission about a number clauses that it said required further amendment. LPA also submitted the issue of TOIL had not been addressed during the award stage of the review as envisaged in paragraph [35] of the Full Bench decision [\[2016\] FWCFB 7737](#).

2. AM2019/3 - Substantive issues

[7] In a Statement issued on 12 February 2019, the following substantive issues were referred to a separately constituted Full Bench for determination:⁴

- (a) Live Performance Australia's (LPA) application about casual performers; and
- (b) Queensland Ballet's objection about the drafting of the General Employment Conditions in the exposure draft which removed the option for musicians to be employed on a full-time basis and required that all Musicians are engaged on a casual, weekly or part-time basis only.

[8] LPA submitted that it would be pursuing item S7 in the [summary of submissions](#), to amend the clause relating to casual employees who perform in a performance up to one hour. LPA also submitted further amendments to clause 31.6 of the Live Performance Award 2010 (the Award) were required to ensure that the provisions take into account short term project-based work.⁵

[9] Queensland Ballet noted that removing the ability in clauses to employ Musicians on a full-time basis will in practice, seriously impact the ability of Queensland Ballet and other companies who engage Musicians in this manner.

[10] Queensland Ballet submitted that full-time employment continues to be a secure and desirable employment structure for Musicians and request the Award be redrafted to provide clarity around the ongoing terms of full-time employment, including applicable minimum wage, rather than removing that option for both employers and employees.⁶

³ MEAA [submission](#), 30 April 2019.

⁴ Statement – [\[2019\] FWC 851](#) at [2].

⁵ LPA [submission](#), 29 April 2019 at para. 8; Decision – [\[2019\] FWCFB 6920](#) at [1].

⁶ Queensland Ballet [submission](#), 21 August 2018; Queensland Ballet [submission](#), 15 October 2018; Statement [\[2019\] FWC 851](#) at [2].

[11] Interested parties were provided with opportunities to respond to the Queensland Ballet's submissions in decisions dated 7 August 2018 [\[2018\] FWCFB 4175](#)⁷ and 13 November 2018 [\[2018\] FWCFB 6852](#)). No responses were received.

[12] Following a report back conference on 13 June 2019, the Presiding Member of the AM2019/3 Full Bench advised parties that the finalisation process for the Award will be subject to the timeline set by the Full Bench decision in [\[2019\] FWCFB 6077](#) at [36].⁸

[13] On 27 June 2019, MEAA submitted the [draft award](#) agreed to by MEAA and LPA (the parties' draft award).⁹ This draft award does not appear to have resolved the issue raised by Queensland Ballet. It also does not include:

- all common issues determined by the Commission during the course of the Review.
- the plain language restructure in accordance with Attachment A.
- the amendments made to exposure drafts during the exposure draft finalisation processes.¹⁰

[14] In correspondence, the Presiding Member formed the preliminary view of the Full Bench the parties' draft award should be accepted and invited comments from LPA, MEAA and Queensland Ballet.¹¹ LPA and MEAA supported the preliminary view.¹² No other interested party responded.

[15] On 9 October 2019, the Full Bench in AM2019/3 issued a Statement "including the resolution of the substantive issues raised earlier by the parties met the modern awards objective". It stated an exposure draft will be published on the Commission's website arising from the timetable set by the Full Bench Finalisation Decision of 2 September 2019.

[16] Following the Full Bench Decision [\[2019\] FWCFB 6935](#) at [204], the award has been listed for a conference on **Tuesday, 26 November 2019 at 2:00 pm** before the President.¹³ At the conference the parties will be asked to clarify:

- If the substantive issues referred to AM2019/3 have been finally determined.
- If the TOIL provisions have been dealt with.

3. AM2017/51 - Overtime for casuals issue

[17] The issue of overtime for casual employees also remains outstanding. A Full Bench Statement issued on 4 December 2017 identified the Live Performance Award as ambiguous

⁷ Decision [\[2018\] FWCFB 4175](#) at [312] to [316].

⁸ [Correspondence](#), 4 October 2019.

⁹ MEAA [submission](#), 27 June 2019.

¹⁰ See [\[2019\] FWCFB 7173](#).

¹¹ [Correspondence](#), 15 July 2019.

¹² LPA [submission](#), 11 September 2019; MEAA [submission](#), 12 September 2019.

¹³ [Notice of listing](#) issued 24 October 2019.

in relation to whether overtime is payable to casuals, when overtime commences and at what rate overtime is payable.¹⁴

[18] In a submission dated 11 December 2017, LPA submits the issue has been addressed during the award review process for the Live Performance Award and this will provide sufficient clarity on determining when a casual employee is entitled to overtime.¹⁵

[19] The FWC published an Issues Paper on 5 February 2019 making several observations on casual overtime provisions in the Live Performance Award.¹⁶

[20] In a submission dated 5 July 2019, ABI and NSWBC submit that the 25% casual loading is not applied when calculating overtime for casual employees in the Live Performance Award.¹⁷

[21] In correspondence, ABI and NSWBC submitted that casual loading is payable on overtime and the casual loading is cumulative but have not heard back from other parties to date.¹⁸

[22] A Full Bench Statement [\[2019\] FWC 7087](#) issued on 14 October 2019 identified the Award as the subject of discussion between the parties.

[23] Parties were directed to continue discussions and report back to VP Hatcher.¹⁹ A report back conference has been listed for **9:00am on 26 November 2019**.²⁰ Parties will be asked to provide an update on this conference at the conference before the President.

¹⁴ [\[2017\] FWCFB 6417](#) at Attachment A.

¹⁵ LPA [submission](#), 11 December 2017.

¹⁶ [Issues paper](#), 5 February 2019, at 22 – 24.

¹⁷ [ABI and NSWBC submission](#), 5 July 2019 in Attachment—Overtime for Casual Summary Table.

¹⁸ [ABI and NSWBC correspondence](#), 10 October 2019 at [2].

¹⁹ [\[2019\] FWCFB 7087](#) at [11].

²⁰ [Notice of listing](#) issued 21 November 2019.

Attachment A – comparison showing how awards have been restructured

Plain Language Exposure Draft – Table of Contents

The plain language exposure draft table of contents was originally published as [Attachment B](#) of the 2016 Plain Language Pilot Report and based on the Pharmacy PLED⁽¹⁾ in April 2016.

The table of contents has been modified since the original publication.

CURRENT EXPOSURE DRAFTS ⁽²⁾

Part 1—Application and Operation

1. Title and commencement
2. The National Employment Standards and this award
3. Coverage
4. Award flexibility
5. Facilitative provisions

Part 2—Types of Employment and Classifications

6. Types of employment
7. Classifications

Part 3—Hours of Work

8. Ordinary hours of work and rostering
9. Breaks

Part 4—Wages and Allowances

Proposed exposure drafts

Part 1—Application and Operation of this Award

- Title and commencement
- Definitions (moved from Schedule G)
- The National Employment Standards and this award
- Coverage
- ~~Effect of variations made by the Fair Work Commission~~ (moved to clause 1.3)
- Individual flexibility arrangements – standard clause
- Requests for flexible working arrangements – new model clause

Facilitative provisions for flexible working practices

Part 2—Types of Employment and Classifications

- Types of employment
- Full-time employment (moved from Types of employment)
- Part-time employment (moved from Types of employment)
- Casual employment (moved from Types of employment)
- Apprentices (if applicable) (moved from Minimum wages)
- Junior employees (if applicable)

Classifications

Part 3—Hours of Work

- Ordinary hours of work
- Rostering arrangements (if applicable) (or award specific heading)
- Breaks

Part 4—Wages and Allowances

10. Minimum wages	<p>Minimum rates includes:</p> <ul style="list-style-type: none"> • School-based apprentices (if applicable) • Higher duties (if applicable) • Supported wage system (if applicable) • National training wage (if applicable) <p>Payment of wages (moved from Minimum wages)</p> <p>Annualised salary (if applicable)</p>
11. Allowances	Allowances
12. Superannuation	Superannuation
Part 5—Penalties and Overtime	Part 5—Overtime and Penalty Rates
13. Overtime	Overtime
14. Penalties	Penalty rates
Part 6—Leave, Public Holidays and Other NES Entitlements	Part 6—Leave and Public Holidays
15. Annual leave	Annual leave
16. Personal/carer’s leave and compassionate leave	Personal/carer’s leave and compassionate leave
17. Parental leave and related entitlements	<p>Parental leave and related entitlements</p> <p>Leave to deal with family and domestic violence – new model clause</p> <p>Community service leave (moved from below Public holidays)</p>
18. Public holidays	Public holidays
19. Community service leave	
20. Termination of employment	
21. Redundancy	
	Part X—Industry Specific Provisions (if applicable)
Part 7—Consultation and Dispute Resolution	Part 7—Consultation and Dispute Resolution
22. Consultation	<p>Consultation about major workplace change – standard clause</p> <p>Consultation about changes to rosters or hours of work – standard clause</p> <p>Dispute resolution – standard clause</p>
23. Dispute resolution	<p>Part 8—Termination of Employment and Redundancy</p> <p>Termination of employment – standard clause (moved from Part 6)</p> <p>Redundancy – standard clause (moved from Part 6)</p> <p>Transfer to lower paid job on redundancy (merged with Redundancy)</p>

	Employee leaving during redundancy notice period (merged with Redundancy)
	Job search entitlement (merged with Redundancy)
Schedules	Schedules
Schedule A—Classification Definitions	Schedule A—Classification Definitions (or award-specific heading)
Schedule B—Summary of Hourly Rates of Pay	Schedule B—Summary of Hourly Rates of Pay
Schedule C—Summary of Monetary Allowances	Schedule C—Summary of Monetary Allowances
	Schedule D—School-based Apprentices (if applicable)
Schedule D—Supported Wage System	Schedule E—Supported Wage System
Schedule E—National Training Wage	Schedule X—National Training Wage (deleted in 113 awards)⁽³⁾
	Schedule F—Agreement for Time Off Instead of Payment for Overtime (if applicable)
	Schedule G—Agreement to Take Leave in Advance (if applicable)
	Schedule H—Agreement to Cash Out Annual Leave (if applicable)
Schedule F—2014 Part-day public holidays	Schedule I—Part-day Public Holidays
Schedule G—Definitions	Schedule G—Definitions (moved to clause 2)

⁽¹⁾ See [Attachment B](#) of the 2016 Plain Language Pilot Report. This Table of contents was proposed for the plain language exposure draft for the *pharmacy Industry Award 2014*.

⁽²⁾ The current exposure draft Table of contents is taken from the current Group 1 to 3 exposure drafts.