



# REVISED DRAFT DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—Award flexibility**

(AM2014/300)

### **PASTORAL AWARD 2010**

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER LEE

MELBOURNE, XX NOVEMBER 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 9 November 2017<sup>1</sup> the above award is varied as follows:

1. By deleting clause 31.3.
2. By renumbering clauses 31.4 and 31.5 as 31.3 and 31.4 respectively.
3. By inserting a new clause 31.5 as follows:

#### **31.5 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~~ is worked by the employee under this agreement.
- (b) An agreement made under clause 31.5 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 31.5 must be in writing and must state each of the following:

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<sup>1</sup> [2017] FWCFB 5788, see also [2016] FWCFB 4258 and [2016] FWCFB 7737.

- (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;
- (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 G. There is no requirement to use the form of agreement set out at Schedule G. An agreement under clause 31.5 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 31.5 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 unless the employer agrees to pay out the accrued overtime earlier.
- (g) The employer must keep a copy of any agreement under clause 31.5 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 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 31.5 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 31.5 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 31.5.

4. By inserting a new clause 36.12 as follows:

**36.12 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~~ is worked by the employee under this agreement.
- (b) An agreement made under clause 36.12 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 36.12 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;
  - (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 G. There is no requirement to use the form of agreement set out at Schedule G. An agreement under clause 36.12 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 36.12 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 unless the employer agrees to pay out the accrued overtime earlier.
- (g) The employer must keep a copy of any agreement under clause 36.12 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 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 the clause 36.12 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 36.12 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 36.12.

5. By deleting clause 42.2.
6. By renumbering clause 42.3 as 42.2.
7. By inserting a new clause 42.3 as follows:

**42.3 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~~ is worked by the employee under this agreement.
- (b) An agreement made under clause 42.3 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 42.3 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;
  - (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 G. There is no requirement to use the form of agreement set out at Schedule G. An agreement under clause 42.3 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 42.3 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 unless the employer agrees to pay out the accrued overtime earlier.
- (g) The employer must keep a copy of any agreement under clause 42.3 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 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 the clause 42.3 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 42.3 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 42.3.

8. By inserting Schedule G as follows:

**Schedule G—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 is~~ worked by the employee under this agreement.
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. If time off is not taken within 6 months of it being worked then 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, unless the employer agrees to pay out the accrued overtime earlier.
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\_\_\_

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

B. This determination comes into operation from xx November 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 November 2017.

PRESIDENT