



# **DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

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

(AM2014/300)

### **BROADCASTING, RECORDED ENTERTAINMENT AND CINEMAS**

#### **AWARD 2010**

[MA000091]

Broadcasting and recorded entertainment industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER LEE

MELBOURNE, X JUNE 2018

*4 yearly review of modern awards –award flexibility–time off in lieu of payment for overtime–insertion of clause 22A and Schedule N, variation to clause 29, 40, 52 and 58.*

A. Further to the Full Bench Decision issued by the Fair Work Commission on 1 June 2018<sup>1</sup> the above award is varied as follows:

1. By inserting clause 22A—Time off instead of overtime in Part 4—Minimum Wages and Related Matters as follows:

#### **22A Time off instead of payment for overtime**

**22A.1** An employee and employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

**22A.2** Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 22A.

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<sup>1</sup> [2018] FWCFCB 3085; see also [\[2015\] FWCFCB 4466](#), [\[2015\] FWCFCB 6847](#), [\[2016\] FWCFCB 2602](#), [\[2016\] FWCFCB 4258](#), [\[2016\] FWCFCB 4579](#), [\[2016\] FWCFCB 6178](#), [\[2016\] FWCFCB 6333](#), [\[2016\] FWCFCB 6591](#), [\[2016\] FWCFCB 7737](#) and [\[2018\] FWCFCB770](#)

**22A.3** For employees other than cinema workers (where the relevant overtime is performed on a Sunday or public holidays) an agreement under clause 22A must be made in writing and must state each of the following:

- (a) the number of overtime hours to which it applies and when those hours were worked;
- (b) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
- (c) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
- (d) that any payment mentioned in paragraph (c) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule N. There is no requirement to use the form of agreement set out at Schedule N. An agreement under clause 22A can also be made by an exchange of emails between the employee and employer, or by other electronic means.

**22A.4** The period of time off that an employee is entitled to take is:

- (a) for cinema workers (where the relevant overtime is performed on a Sunday or public holidays) and radio broadcasting technical staff—equivalent to the overtime payment that would have been made; and

EXAMPLE: By making an agreement under clause 22A an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

- (b) for all other employees and cinema workers (where the relevant overtime is performed other than on a Sunday or public holidays)—the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 22A an employee who worked 2 overtime hours is entitled to 2 hours' time off.

**22A.5** Time off must be taken:

- (a) within the period of 6 months after the overtime is worked; and
- (b) at a time or times within that period of 6 months agreed by the employee and employer.

**22A.6** If the employee requests at any time, to be paid for overtime covered by an agreement under clause 22A but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

**22A.7** If time off for overtime that has been worked is not taken within the period of 6 months mentioned in clause 22A.5, 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.

**22A.8** The employer must keep a copy of any agreement under clause 22A as an employee record.

**22A.9** 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.

**22A.10** 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 22A will apply, including the requirement for separate written agreements under clause 22A.2 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).

**22A.11** If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 22A 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 22A.

2. By deleting clause 29.5 and renumbering clauses 29.6 to 29.9 as clauses 29.5 to 29.8, respectively.

3. By deleting clause 40.4.

4. By deleting clauses 52.3(a) to 52.3(d).

5. By inserting a new clause 52.3(a) as follows:

(a) Overtime will be paid for at the rate of time and a half for the first two hours and double time after that.

6. By renumbering clause 52.3(e) as clause 52.3(b).

7. By deleting clause 58.4.

8. By inserting Schedule N—Agreement for Time Off Instead of Payment for Overtime as follows:

**Schedule N—Agreement for Time Off Instead of Payment for Overtime**

Name of employee: \_\_\_\_\_

Name of employer: \_\_\_\_\_

**The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:**

Date and time overtime started: \_\_\_/\_\_\_/20\_\_\_ am/pm

Date and time overtime ended: \_\_\_/\_\_\_/20\_\_\_ am/pm

Amount of overtime worked: \_\_\_\_\_ hours and \_\_\_\_\_ minutes

**The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period following the request.**

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 1 July 2018. 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 1 July 2018.

PRESIDENT