

## MODERN AWARD REVIEW: A SUMMARY OF COMMON CHANGES

A lot has happened since the Fair Work Commission (FWC) commenced its review of modern awards in 2014. Now, six years later, the FWC is close to completing the mammoth task of reviewing the operation of each modern award and making variations to ensure that they comply with the “modern awards objective”. Businesses should confirm that these variations were made to the particular award or awards that apply to them and their employees. The variations set out below are the common variations which were, in most cases, made to the majority of awards.

### Overtime for Casual Employees - Still to be Determined

The FWC is still considering, for the majority of modern awards, the following questions:

- Are casual employees entitled to overtime rates?
- What hours are “overtime” for casual employees?
- How do overtime rates interact with the casual loading?

While some casual employees in some industries may not be entitled to overtime rates, it seems likely that in many industries the default will be that casuals are entitled to overtime, at least when they work over 38 hours per week, and they will be paid a 25% loading on top of the overtime rate.

Eg, if a full-time employee receives 150% of the ordinary rate for overtime, we expect in most industries a casual will be paid 175% of the ordinary rate.

### “Excessive” Annual Leave - Effective 29 July 2016

The model term for dealing with “excessive” annual leave - ie, where an employee has accrued more than eight weeks, requires that employers and employees first seek to agree on how to reduce excessive leave.

If agreement cannot be reached, either the employee or employer may give notice that the leave will be taken if:

- The employee has had “excessive leave” for more than six months

- They have given eight weeks’ notice
- The leave will be taken within 12 months of the notice
- The employee will still have six weeks’ leave after taking the directed leave.

The majority of this term was effective 29 July 2016, with the right for an employee to unilaterally take leave effective 29 July 2017.

### Abandonment of Employment - Effective 20 December 2018

The FWC has deleted all “abandonment of employment” clauses from modern awards - ie, clauses which allowed that an employee who was absent for a set period of time without reasonable explanation was deemed to have abandoned his employment.

This decision affected six modern awards, including the Manufacturing and Associated Industries and Occupations Award. It has also led to the FWC rejecting a number of enterprise agreements which contain such terms.

### Cashing Out Annual Leave - Effective 29 July 2016

The model term for cashing out annual leave requires that:

- A maximum of two weeks can be cashed out in any 12 month period
- Written records of any agreement to cash out leave be retained
- Employees must retain four weeks’ leave after the cashing out
- The parent/guardian of an under 18 employee must approve the cashing out.

### Annual Leave in Advance - Effective 29 July 2016

The model term for annual leave in advance requires that:

- Agreement must be made in writing
- Leave in advance may be deducted from outstanding entitlements on termination.



## Annualised Salaries - Effective 1 March 2020

The FWC has created two standard terms for “annualised wage arrangements” in approximately 21 modern awards, including awards with wide coverage such as the Manufacturing and Associated Occupations Award (**Manufacturing Award**) and the Clerks-Private Sector Award (**Clerks Award**).

These clauses allow for the averaging of award entitlements over a 12 month period. They are similar to, but distinct from, common law “offset” arrangements in individual contracts of employment.

**Clause 1** (which affects the Clerks Award) allows the employer to unilaterally advise an employee they will be paid by annualised salary.

**Clause 2** (which affects the Manufacturing Award) requires the employer and employee to agree to the annualised salary.

Both new standard clauses require, if the employer is relying on an annualised wage arrangement that employers:

- Set a limit of the amount of hours which are overtime, outside the ordinary span of hours or on weekends, which employees may work. If they work over that amount, they must be paid overtime or penalty rates on top of the annualised salary
- Keep detailed records of all hours worked, start and finish times and unpaid breaks, which must be signed by the employee each roster cycle
- Requires a reconciliation every 12 months to confirm that the employee received more than they would otherwise have been entitled to under the award.

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## Casual Conversion - Majority Effective 1 October 2018

“Regular” casual employees now have a right to request to convert to permanent part-time or full-time employment, and the circumstances in which this can be refused are limited.

Regular casuals are those who have worked a pattern of hours on an ongoing basis over the preceding 12 months which could be performed as part-time or full-time without significant adjustment.

Employers may only refuse a request on “reasonable business grounds”, which include (but are not limited to):

- The conversion would require a significant adjustment to the casual employee’s hours (ie, they are not truly a “regular casual employee”)
- It is known or reasonably foreseeable the employee’s position will:
  - » Cease to exist within the next 12 months
  - » Require a significant reduction in hours in the next 12 months
  - » Require a significant change in the days and/or times of work in the next 12 months which cannot be accommodated within the employee’s available days/hours.

The employer must provide its reasons for refusing a request within 21 days of the request being made, and a dispute about such a request may be dealt with by the FWC.

If the employer agrees to a request, the employer and employee will document the new form of employment and hours of work in writing. The employee may only revert to casual employment by written agreement from the employer.

Employees are not obliged to convert to full-time or part-time employment, and employers are not obliged to increase an employee’s hours as part of casual conversion.

Casual employees who were already employed in October 2018 were required to be provided with the casual conversion clause by 1 January 2019. All other casual employees are now required to be provided with a copy of the clause within the first 12 months of their employment.



## Time Off in Lieu of Overtime (TOIL) - Effective Various Dates from 2016

The FWC has introduced standard terms for dealing with time off in lieu of overtime, or “TOIL”.

The employer and employee must agree that overtime will be taken as TOIL in writing on each occasion the employee works overtime.

Further, TOIL must be paid out on any of the following occasions:

- On termination of employment
- If requested by the employee at any time
- Within six months of the overtime being worked.

Different awards provide for different TOIL rates. Eg, some provide that it is 1:1 (one hour of overtime = one hour of TOIL); others require it be at the overtime rate of 1:1.5 or 1:2 (one hour of overtime = 1.5 or 2 hours of TOIL).

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## Family Friendly Work Arrangements - Effective 1 December 2018

The FWC has introduced additional obligations for employers responding to a request for flexible working arrangements permitted by s 65 of the Fair Work Act. These include that:

- Employers must discuss the request with the employee and genuinely try to reach agreement on a change which will reasonably accommodate the employee’s circumstances.
- If an employer refuses the request, the written response required by the Fair Work Act must include:
  - » The reasons for refusal, including the business grounds and how such grounds apply
  - » State whether there are any changes that the employer can offer which may better accommodate the employee’s circumstances, and set out such changes if any
- A dispute about such a change can be dealt with by the FWC.

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## Minimum Casual Engagement - Majority Effective 1 October 2018

Many awards which did not already contain a minimum engagement period for casual employees were varied to require that casual employees be engaged for a minimum of two hours per shift.

## Family and Domestic Violence Leave - Effective 1 August 2018

The FWC introduced a new standard clause providing for five days of unpaid family and domestic violence leave. This was then adopted into the National Employment Standards and now applies to all national system employees.

The terms include that:

- Employees are permitted to access paid personal/carers’ leave for family and domestic violence leave purposes
- The entitlement is available to all employees including casual employees, and will be five days for all employees (not pro-rated for part-time and casual employees)
- The entitlement will be available in full at the commencement of each 12 month period, but will not accumulate from year to year
- Employers are required to take steps to ensure that information provided by an employee taking family and domestic violence leave is treated confidentially.

While the FWC determined it was not yet prepared to introduce paid family and domestic violence leave, it intends to review and may expand the term in June 2021.

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## Payments on Termination of Employment - Majority Effective 1 November 2018

The majority of awards have been varied to provide that any entitlements payable on termination of employment must be paid within seven days of the effective date of termination.

Some awards have been varied to provide for longer periods, eg 14 days.

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## Substitution of Public Holidays - Effective 4 October 2019

The FWC has found that many awards which allowed for public holidays to be substituted either unilaterally, or by agreement with the majority of employees, are inconsistent with the National Employment Standards.

Accordingly, it has varied all awards so that public holidays may only be substituted for another day by individual agreement with the specific employee or employees affected.

## Deductions on Termination - Majority Effective 30 August 2019

The FWC has limited the circumstances in which employers may make deductions from an employee's entitlements when an employee gives "short notice" of resignation.

For most awards, this means that employers may now only make deductions of up to one week's pay, and only from the wages of employees who are over 18 years old.

This standard may vary in specific industries such as school education.

The FWC has also clarified that deductions on termination may only be made from the employee's outstanding wages, and not from accrued leave, redundancy or other entitlements.

## Redundancy Provisions - Effective 30 August 2019

The FWC has implemented a standardised plain language redundancy clause.

In the majority of cases, where an award did not previously provide common entitlements, such as a "job search" entitlement or provisions relating to a transfer to lower paying duties, these provisions have not been introduced into those awards.

Similarly, those awards with industry-specific redundancy schemes have retained those schemes.

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