

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Supplementary Budget Estimates 2011-2012**

Agency - Fair Work Australia

DEEWR Question No. EW0721_12

Senator Abetz asked on 19 October 2011 , Hansard page 11

Question

Reviewing aspects

Senator ABETZ: Yes, not personally—and, as a result, whether Fair Work Australia is giving consideration to reviewing aspects. Also in other areas of industry, not only in housing but let us say in the baking section, where I understand there are real concerns. If you are a baker working for a retail baker, as opposed to a wholesale baker doing exactly the same sort of baking work, your award says something different in relation to hours and when penalty rates kick in. It is exactly the same work other than that you happen to be a baker for a retailer as opposed to a wholesaler and some confusions arise, especially if the baker happens to be doing both wholesale and retail work. How do you classify them? If you could take that on notice—

Answer

Fair Work Australia has provided the following response:

The following extracts from the Award Modernisation Full Bench Decision dated 19 March 2010 [[\[2010\] FWAFB 1958](#)], provide background as to the approach adopted by the tribunal in establishing shift penalties in modern awards that affect the baking industry.

The Full Bench Decision dealt with an application by the Baking Manufacturers' Industry Association of Australia (BMIAA) in AM2009/180 to vary the *General Retail Industry Award 2010* [[MA000004](#)] (the Retail award) in relation to early start allowances for bakery shops covered by this award.

'Early start allowance'

[10] The BMIAA seeks to remove the shift allowance payable for the entire shift for bakery shop production employees who start shifts in the early hours of the morning and to replace it with an early start allowance payable from the start of work until 4am. The application is supported by the NRA and the Australian Federation of Employers and Industries (AFEI) who submit that the outcome should apply to bakery production employees in all retail establishments including supermarkets. The application is opposed by the SDA.

[11] The application arises from the integration of bakery shops into the general retail award and the formulation of hours of work provisions for that award from a range of

different provisions in award-based transitional instruments applying in the retail industry. The general retail award provides for a spread of ordinary hours from 7am to 9pm Monday to Friday and a shift work arrangement with a 30% shift allowance for shifts commencing between 6pm and 5am. Ordinary hours for newsagencies can be worked from 5am. Ordinary hours for video shops can extend to midnight.

[12] The BMIAA did not make submissions on these matters in the award modernisation process. It is unfortunate that it did not do so. As a consequence, this is the first time the hours provisions for retail baking employees have been specifically considered. Their circumstances include some unique features.

[13] Bakery production employees in retail establishments commonly commence work between 2am and 4am in order to bake fresh bread to be ready for the opening of the shop later that morning. A range of instruments applied to bakers prior to 2010. In all cases, however, regulation was specific to the baking industry and often included coverage of manufacturing establishments. Only in South Australia and Western Australia did the State award provide for a shift loading to be paid for the entire shift. All other instruments provided for an allowance for the hours worked prior to a particular time, as outlined in the table below:

State	Loading	Loading payable on shifts commencing after	Loading payable until
ACT	30%	5pm	5am
NSW [^]	20%	6pm	4am
NSW ^{^^}	30%	6pm	5am
QLD	25%	6pm	6am
SA [*]	30%	12am	End of shift
VIC [^]	25%	5pm	6:30am
VIC ^{^^}	30%	6pm	6am
WA ^{**}	25%	3am	End of shift
WA ^{***}	36%	6pm	End of shift

[^] Pastrycooks

^{^^} Bread trades

^{*} 15% loading payable between 5pm and 12am

^{**} Where an employee commences ordinary daily hours after 3am and before 6am

^{***} Where ordinary hours commence after 6pm and before 3am

[14] The effect of applying the general shift work penalty from the general retail industry of 30% for an entire shift which commences between 6pm and 5am is therefore significant. We are satisfied that we should reconsider the matter in the light of the current application.

[15] The general approach of the Commission in relation to penalty rates in modern awards was to endeavour to reflect the critical mass of previously applicable instruments. Special arrangements were accommodated where there had been a history of doing so for industries which had special operational requirements. As noted above, the spread of ordinary hours in newsagencies and video shops are examples. The ordinary hours applying in butcher shops are another example.

Although originally included within the general retail award exposure draft, butchers shops were excluded from coverage of that award and included in the *Meat Industry Award 2010*. 5 Ordinary hours of work in butchers shops can commence at 4am. There is no early start or shift allowance payable if the shift continues beyond 9am.

[16] The *Food, Beverage and Tobacco Manufacturing Award 2010* 6 which, amongst other types of employees, covers bakers employed in a bread manufacturing establishment, has an early morning shift allowance of 12.5% for shifts commencing between 3am and 6am.

[17] The method adopted by the Commission to recognise the operational requirements for butchers shops, newsagencies and video shops in modern awards was to modify the starting or commencement time for ordinary hours for the particular type of establishment rather than to provide for a modified shift allowance. People seeking employment as bakers in the retail industry or the manufacturing industry know that an early start and an early finish are almost inevitable. Early morning starts are effectively part and parcel of the trade as well as being an operational necessity. In our view that is a factor in considering the nature of penalty payments which should apply.

[18] We consider that the penalty payments for baking production employees should be consistent with the penalty payments for baking production employees in manufacturing instruments. Many pre-existing awards applied to bakers in both industries. The general retail award covers retail and trades employees in shops. There was no opposition during the award modernisation process to the inclusion of baking production employees in retail establishments. Nevertheless, the application of the general retail provisions brings changes to penalty payments which have a significant impact. We consider that this impact should be modified for baking production employees for the reasons above.

[19] In our view it is appropriate to consider baking production employees who commence work prior to 6am as shiftworkers for the purposes of the award and to permit them to work their ordinary hours from the start of their shift. In our view they should be entitled to an early morning shift allowance of 12.5% for the entire shift if their shift commences at or after 2am. If they commence prior to 2am they are not sufficiently distinguishable from night shiftworkers and therefore should be entitled to the night shift allowance for their shift. The casual loading should apply to casuals in addition to the early morning shift allowance.

[20] We will make an order reflecting the conclusions reached in this decision.'

An order [\[PR994820\]](#) was subsequently issued which inserted early morning shift provisions in the Retail award to reflect those provisions in the *Food, Beverage and Tobacco Manufacturing Award 2010* [\[MA000073\]](#). From 19 March 2010 baking production employees working under both awards (i.e. regardless of whether they are in a retail or wholesale setting) are entitled to the same 12.5% early morning shift allowance for a shift that commences on or after 2.00 am and before 6.00 am.