



Australian Government
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Regulatory Impact Statement: Part-time flexibility

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The problem

Modern awards (awards), along with the National Employment Standards (NES), constitute the industrial relations safety net that underpins the wages and conditions of national system employees in Australia. Awards are instruments of the *Fair Work Act 2009* (the Fair Work Act) that may only be varied by the Fair Work Commission (FWC) consistent with the modern awards objective.¹ There are currently 121 awards, each covering defined industries and occupations. Awards contain mandatory content prescribed by the Fair Work Act and additional non-prohibited terms.² The content of each award varies to reflect the industry and work it covers.

Part-time employment is typified by the employee being eligible for the same benefits as a permanent full-time employee on a *pro rata* basis. For example, a part-time employee working half the time of a full-time employee would be entitled to accrue annual leave at half the amount. There has long been a recognition that arrangements relating to part-time employees should not act to discourage employers from offering additional hours to part-time employees nor encourage the use of casual employment to address this inflexibility.³ While casual employment offers flexibility that business genuinely needs, there are some businesses that indicate they use casual employment rather than navigate some parts of awards that regulate part-time employment. To this extent, award complexity contributes to the adoption of casual employment.

The concept of ordinary hours of work exists in the industrial relations framework to discourage overwork and establish appropriate safeguards for employees.⁴ A full-time employee's ordinary hours are defined in their award and if they exceed their ordinary hours they are entitled to overtime. Overtime is generally 150 per cent of the base rate of pay for the first 2 or 3 hours and then 200 per cent afterwards. An employee does not accrue leave or superannuation for overtime, meaning a component part of the premium the employer pays for an employee working beyond ordinary hours is to compensate for lost accruals.

A similar practice extends to part-time employees. A part-time employee's ordinary hours are normally defined by what they agree with their employer as their regular pattern of work (and/or roster). Each award has different rules about how patterns of work (and/or rosters) can be agreed upon and altered. Most awards contain provisions that allow part-time employees to work additional hours, including at ordinary rates, either by varying their regular pattern of work (and/or roster) or by allowing them work ordinary hours outside their agreed work pattern (and/or roster). However these provisions differ in their complexity and efficacy in meeting the business needs where employers commonly need to respond to ad hoc demand, especially in service-based industries, and adjust their operations quickly.

Under some awards it can be impracticable for businesses to offer additional hours to part-time employees even if both employers and employees agree on the arrangement. Instead, businesses advise they either do not offer these additional hours or instead opt to use casual employment. Inhibiting mutual agreement

¹ Fair Work Act 2009 (Cth), s. 134

² Fair Work Act 2009 (Cth), Part 2-3, Division 3, Subdivision C

³ See the Award Modernisation Request relating to overtime penalty rates for part-time work at para 53, 26 August 2009

⁴ Fair Work Act 2009 (Cth), s. 139(1)(f)

to work additional hours disadvantages part-time employees, of who almost one quarter would prefer to work more hours.⁵

For example, employers face uncertainty when they offer their part-time employees additional hours under the General Retail Industry Award (GRIA). While a part-time employee can agree to change their roster to work additional hours, this cannot change their total number of hours worked in a week. If the employee wants to temporarily increase the number of hours per week they can work, they need to make a separate written agreement with their employer. The award is unclear whether this can be a temporary agreement, so to avoid doubt, the employer and employee may need to make another written agreement to return to their previously agreed number of hours.

More usable part-time flexibility measures can be attained through enterprise bargaining. For example, Woolworths enterprise agreements contain provisions that allow part-time employees' hours to be adjusted upwards more flexibly. Unlocking additional flexibly is less accessible to small business employers who find the enterprise bargaining process burdensome.

As a result of varied and inconsistent provisions under awards, the mechanisms to provide additional hours to part-time employees are unclear. For employers the uncertainty about how to agree to additional hours of work with part-time employees can make engaging casual workers more attractive. This attraction towards casual employment disadvantages part-time employees by preventing them from receiving additional hours and reducing the choices prospective employees have in how they are employed. Part-time employees in retail and hospitality consistently report they would work more hours if they were available.⁶ The current arrangements are not meeting the operational needs of employees and modern, flexible businesses.

The need for government action

The modern award system has a long history. Stakeholders, particularly small business, regularly raise concerns about the impact of award complexity on business. Small businesses are less likely to have the resources to devote to understanding how awards operate, and in some cases, this can result in employers avoiding having to engage with the system by not employing new staff or relying on contract employment.⁷

According to ABS Survey of Employee Earnings and Hours in (May 2018), more than half of employees working in small businesses in Accommodation and Food Services (58.9 per cent) and Retail Trade (53.9 per cent) were covered by awards.⁸ The Fair Work Commission mapped 12 awards to these two distressed sectors which are the focus of this policy due to their high proportion of small business employers and award reliance. In total, around 670,000 employees have their pay set directly by an award in these industries. A further 530,000 employees have their pay set under individual arrangements and many of those arrangements are underpinned and impacted by award conditions.

⁵ ABS, Participation, Job Search and Mobility, Australia, February 2020.

⁶ ABS, Characteristics of Employment, 2014 to 2019

⁷ Sweeney Research on behalf of the Fair Work Commission, *A Qualitative Research Report on Citizen Co-Design with Small Business Owners*, August 2014, p.25.

⁸ [Information note – Small businesses and modern awards](#), Fair Work Commission, 31 August 2020

Employers indicate award complexity is leading to them delaying or reconsidering hiring decisions.⁹ A successful economic recovery from COVID-19 hinges on employers having the confidence to provide more jobs and more hours. Stakeholders have identified a series of broad issues in the awards system that could be simplified to support this outcome.

The COVID-19 pandemic highlighted particular limitations in the award system. Businesses have had to rapidly change their existing operating arrangements as a result of changed business conditions and trading restrictions. Some industries, namely the hospitality and retail industries, were severely impacted. Between February and May 2020, the Accommodation and food service industry reported a net decrease of 294,100 workers (or a 31.4 per cent decrease) and the Retail trade industry reported a net decrease of 60,000 workers (or a 4.8 per cent decrease).

Awards have been found too restrictive to respond effectively to the COVID-19 pandemic, and had to be addressed by expedited, temporary award variations by the Fair Work Commission (COVID schedules) and JobKeeper flexibilities in the Fair Work Act. The JobKeeper flexibilities and COVID schedules were critical to helping businesses survive the crisis. Providing options for employers to deploy their workforce more flexibly will be just as important in giving employers the confidence to bring forward hiring decisions during the recovery. Related reforms in distressed industries needs to be progressed as a priority. The retail and hospitality are particularly award-reliant. Businesses operating in these sectors are sensitive to demand-side impacts. These sectors also have high rates of casual and part-time employment and underemployment.

One reform area that has been considered particularly relevant to these two industries is providing employers and employees who operate under an award in the hospitality and retail industries with a consistent process to agree to work additional hours without attracting overtime rates, subject to appropriate safeguards. Under the current arrangements, while an employee can agree to work additional hours at ordinary rates, they must do so under systems that can be complex, time consuming and potentially ambiguous. This policy would provide employers with the confidence to engage part-time employees, and to offer them additional hours where agreed and appropriate.

Addressing award complexity remains important. Combined with other reform measures, this policy would provide impetus and a workable model for continuous improvements to the industrial relations system.

Policy Options

Options for consideration

Option one

Option one would maintain the status quo. This would mean that employers and employees could only agree to additional hours in accordance with their award, which can be problematic for the reasons outlined above.

⁹ See the Office of the Australian Small Business Commissioner's submission to the Productivity Commission review in to the Workplace Relations Framework, [ASBFEO Submission to PC inquiry](#), p.7

Option two

Option two would introduce a set of provisions into the Fair Work Act to legislate a process for part-time flexibility applying to awards covering the hospitality and retail industries. These provisions would facilitate agreement between employers and employees to undertake additional work beyond their nominal part-time hours. This option would not displace any pre-existing award-based arrangements. Employers could continue to use existing arrangements if it meets their needs. Instead, it would provide a separate, uniform approach across awards that employers could opt to use instead of existing award-based mechanisms available to them. Employees would be provided with appropriate safeguards:

- Only employees who are engaged for a minimum of 16 hours per week and 3 hours per shift where additional flexible hours are agreed could agree to work additional hours.
- Employers will be required to notify the employee on what basis they are being offered the additional hours.
- Employees would have the right to refuse an additional hours agreement. This right would be considered a workplace right for the purposes of the general protections, making it a contravention of the Fair Work Act for employers to take adverse action against an employee who refuses an offer to work additional hours on this basis.
- An employee would continue to receive overtime and penalty rates that would otherwise be payable. This includes:
 - Overtime payable for working more than a maximum daily/weekly hours, or working outside a span/spread of hours.
 - Additional amounts like penalty rates, incentive-based payments and bonuses, loadings and monetary allowances.
- Employers would be required to retain the agreement with their employee, which could be done verbally when the agreement is made and subsequently recorded electronically prior to the end of the additional work.

Option three

Option three would create a new statutory form of employment – Flexible Part-Time. This form of employment would be made mandatory content in modern awards to encourage the FWC and industrial organisations to vary awards to accommodate it. Option three would provide similar rights and entitlements to that of option two, like minimum engagement periods, maximum weekly hours, the right to refuse additional hours, leave accrual for additional hours, an entitlement to superannuation payments on additional hours, and overtime/penalty rates where they would otherwise be payable.

The object of part-time flexibility is to provide consistency and simplicity for employers who employ part-time employees. Option three would disproportionately complicate the already complex industrial relation framework by creating a new category of employment. The creation of a new form of employment may also result in compliance issues concerning the inadvertent misclassification of employees.

Significant work by the Fair Work Commission would be required to vary affected awards to clarify whether and how other award entitlements and provisions apply to this new form of employment in general. This may lead to delays in the adoption of legislated flexibility for part-time employees.

Net benefits of policy options

It is difficult to quantify the regulatory impact of each option as there is no precise information collected on the employees and businesses directly affected. The analysis below is based on the limited available data and relies on a number of assumptions including the number of award reliant business, the use of existing award provisions and the potential take up of any new provisions.

Table 1 sets out employing businesses in the relevant ANZSIC divisions using counts from 2018-19 ABS Counts of Australian businesses. The Department assumes that 40 per cent of these businesses are award-reliant and employ part-time employees.

Table 1 – Counts of Australian businesses

	Operating at start of financial year 2018-19	Entries	Total businesses
Retail Trade	131,478	19,416	150,894
Accommodation and Food Services	94,584	16,536	111,120
Combined	226,062	35,952	262,014
<i>Estimated award-reliant businesses that employ part time employees</i>	<i>90,425</i>	<i>14,381</i>	<i>104,806</i>

Source: ABS Counts of Australian Businesses, 2018-19.

Table 2 provides estimated employee numbers at the ANZSIC divisional level using ABS Characteristics of Employment and ABS Employee Earnings and Hours data. The Department estimated the numbers of existing and new part-time employees by using the tenure of that employee with their current employer: employees with tenure greater than 12 months were considered as existing part-time employees, while employees with tenure less than 12 months were considered new. This estimation does not take into account switching from full-time to part-time employment.

Table 2 - Part-time employees

	At start of financial year 2018-19 ('000)
Retail Trade	
new part-time employee	51.7
existing part-time employee	126.6
Accommodation and Food Services	
new part-time employee	99.7
existing part-time employee	139.0
Combined	
new part-time employee	143.3
existing part-time employee	265.2

Source: ABS Characteristics of employment, August 2019 and ABS Employee Earnings and Hours, May 2018.

Option one – Status quo

Maintaining the status quo will mean that employer concerns about the practicality of the application of existing award provisions relating to additional hours will remain un-resolved. Without the ability to easily interpret and apply these award provisions, employers are unlikely to use them due to their inherent

limitations. This barrier to using award flexibilities prevents part-time employees from receiving the opportunity to work additional hours. They may also provide perverse incentives to favour offering casual over part-time employment.

Administrative costs

In-scope administrative costs relevant to the maintenance of a business includes the time taken for business and employees to understand and comply with existing provisions in awards. As outlined above, the existing part-time flexibility award provisions can be complex to navigate. The Department assumes that an employer or part-time employee will take 30 minutes to understand and implement their existing award provisions. The Department also estimates that of the relevant businesses, 20 to 50 per cent have attempted to use part-time flexibility provisions.¹⁰

Table 3 show the total administrative burden associated with the continual compliance with existing award provisions, ranging between \$5.6 million (based on 20 per cent usage rate) and \$14.1 million (based on 50 per cent usage rate) over ten years.

Table 3 – Estimated regulatory cost of option 1 (status quo)

Item	Calculation*	Cost[‡]
Year 1 – 10 (per year)		
Businesses – New award-reliant businesses	Unit labour cost x 0.5 hour x Number of new award-reliant businesses x Rate of use of part-time flexibility in awards \$73.05 x 0.5 x 14,381 x (0.2 and 0.5)	\$105,052 – \$262,629
Employees – New part-time award-reliant employees	Unit labour cost x 0.5 hour x Number of new part-time employees x Rate of use of part-time flexibility in awards \$32.00 x 0.5 x 143,300 x (0.2 and 0.5)	\$458,560 – \$1,146,400
Total over 10 years		\$5.6 million – \$14.1 million

*Employee and business numbers are from the data in table 1 and table 2.

‡Costs are expressed as a range depending on take-up (20% - 50%).

Option two

Option two is to provide a more viable option in order to facilitate mutually-beneficial arrangements between employers and employees. Simplified and uniform provisions will also reduce the amount of time it might take for an employer or employee to understand their rights and obligations.

¹⁰ A range is provided to test the analysis sensitivities as required by OBPR under the regulatory cost framework.

Business impact

This option would provide a uniform approach across awards in these industries under which employers could offer part-time employees additional hours at their ordinary rate of pay where certain overtime rates would otherwise have been triggered. This option:

- provides additional flexibilities that take into account the operational realities in modern workplaces, including those which involve customer service,
- introduces consistency of available mechanisms to manage the hours of part-time employees across awards, and
- is expected to support Australia's economic recovery by increasing hours worked.

The hourly wage cost for employing a casual employee is generally higher than employing an equivalent full-time or part-time employee due to the casual loading. This option not only encourages the attractiveness of using part-time employment, it also removes a major disincentive to engage part-time employees: rigid and inflexible award provisions and concern about making inadvertent errors as a result of potential ambiguity.

Employee impact

This option is supported by a number of important safeguards to ensure employees are not exploited or coerced into unwanted arrangements, including:

- allows employees who wish to work additional hours at ordinary rates an clear mechanism to do so, resulting in an increase in their take home pay,
- creates an explicit right to refuse to enter into an additional hours agreement with an employer, and
- protects the right of employees to receive overtime where they are *directed* by their employer to do so.

Further, under this option, for these additional hours worked, employees would:

- accrue annual leave, personal leave, and superannuation contributions (contrast with normal overtime hours, where these entitlements do not accrue),
- continue to receive overtime payment should the hours exceed the maximum hours contained in the award, and
- continue to receive penalty rates and other payments that would apply for those hours worked.

Administrative costs

Where there is agreement between an employer and part-time employee, this option alters arrangements relating to wage entitlements as well as superannuation contributions and leave accruals for additional hours worked. These are outside the regulatory cost framework. In-scope regulatory cost would include the time taken for businesses and employees to understand and comply with the legislation.

The Department assumes that the new simplified, uniform provisions would take 15 minutes to read, understand and implement. It is expected the part-time flexibility provisions under this option will be viewed as more efficient and usable than the existing award provisions, while those employees who want more hours are more likely to agree to these arrangements. The usage rate of the provisions will therefore be higher than option 1, ranging from 40 to 60 per cent, with the corresponding estimated regulatory cost ranging between \$6.6 million and \$9.9 million (Table 4).

Table 4 – Estimated regulatory cost – Option 2

Item	Calculation*	Cost[§]
Year 1		
Businesses – Award-reliant businesses	Unit labour cost x 0.25 hours x Number of award-reliant businesses x Rate of use of new legislated provisions \$73.05 x 0.25 x 90,425 x (0.4 and 0.6)	\$660,553 – \$990,830
Employees – Part-time award-reliant employees	Unit labour cost x 0.25 hours x Number of part-time employees x Rate of use of new legislated provisions \$32.00 x 0.25 x 265,200 x (0.4 and 0.6)	\$848,640 – \$1,272,960
Years 2-10 (per year)		
Businesses – New award-reliant businesses	Unit labour cost x 0.25 hours x Number of new award-reliant businesses x Rate of use of new legislated provisions \$73.05 x 0.25 x 14,381 x (0.4 and 0.6)	\$105,052 – \$157,578
Employees – New part-time award-reliant employees	Unit labour cost x 0.25 hour x Number of new part-time employees x Rate of use of new legislated provisions \$32.00 x 0.25 x 143,300 x (0.4 and 0.6)	\$458,560 – \$687,840
Total	Year 1 + 9 x (Years 2-10)	\$6.6 million – \$9.9 million

*Employee numbers are from the data in table 1 and table 2.

§Costs are expressed as a range depending on take-up (40% - 60%).

Option three

Option three would have an effect on the same cohort of employers and employees as option two. An employer seeking to apply option three would be engaging an employee in a new form of work (Flexible Part-Time), meaning that the existing part-time provisions of awards would not apply to them. Significant variation in affected awards may be necessary to fully accommodate this new type of part-time employees in the award system.

While we note award variations made by the Fair Work Commission generally are outside of scope of regulatory cost framework, this option could result in an entirely new section in these awards, a considerable increase in the length of awards, and mechanisms created to distinguish regular part-time employees and Flexible Part-Time employees. Further, interaction with other provisions in the awards would also need to be carefully examined by the Commission to eliminate any unintended consequence. For these reasons, stakeholders would prefer the certainty of option two.

While option 3 creates a new form of work, complexity is consequential to the legislation which is in scope under the regulatory cost framework. Administrative costs associated with understanding and applying the new legislative provisions are estimated to be same as option two.

Consultation

On 11 June 2020, the Australian Government commissioned five working groups to consider how to improve the operation of the industrial relations system, one of which related to award simplification. The purpose of the Award Simplification Working Group was to simplifying the award system in key distressed sectors, especially for small businesses. This working group met formally six times and engaged nine third-party experts to inform their work.

Membership of the working group

- **Employer organisations:** Australian Chamber of Commerce and Industry (ACCI), Australian Industry Group (Ai Group), Council of Small Business Organisations Australia (COSBOA), Australian Hotels Association (AHA), National Retail Association (NRA).
- **Unions:** Australian Council of Trade Unions (ACTU), United Workers' Union (UWU), Australian Workers' Union (AWU), Shop, Distributive and Allied Employees' Association (SDA).

The consultations undertaken as part of the working groups were held in-confidence to promote increased cooperation between parties. While parties had varying assessments of the level of complexities and flexibilities in the award system, it was generally acknowledged that the need to support business and job creation post-COVID and additional flexibilities to business must be balanced with strong safeguards to protect employee entitlements.

Preferred Option

Award complexity is a long-standing issue and there have been successive attempts to simplify and refine the award system over time. Despite these efforts there is broad acknowledgement that system usability and complexity needs further reform.¹¹ Option two (the preferred option) makes changes consistent with concurrent government reforms to the industrial relations system by ensuring that the reforms are targeted and proportionate.

Employers advise that the current situation materially impacts on the flexibility of business operations and the opportunity for part-time employees to gain more hours. The status quo does not recognise the reality of contemporary employment practices, and it imposes unnecessary complexity to business operations caused by businesses needing to navigate various provisions in the award to identify a pathway. Providing uniform and streamlined provisions will improve the ability for employees to understand their rights and lower the transactions costs for businesses in their day-to-day management of their workforce.

Simplification of the award system is a necessary and ongoing process. The award system requires continual refinements to ensure its operation promotes flexible modern work practices and the efficient and productive performance of work. The status quo is not meeting this objective in respect to part-time employment, and this is why the status quo is not the preferred option.

¹¹ Productivity Commission, Workplace Relations Framework Inquiry Report, 30 November 2015.

While option three would largely achieve the same objectives, it represents a disproportionate response to the problem that may necessitate significant and unwarranted variation in awards to accommodate a new statutory form of employment.

By comparison, option two represents a proportionate response to a known problem. It provides relevant and material benefit for economic recovery, without introducing further unnecessary complexity into the award system. The consistent and streamlined process would reduce administrative burden imposed on employers and employees.

Acknowledging the continuing role of the Fair Work Commission in setting pay and conditions in awards, this option would only introduce part time flexibilities into awards in the hospitality and retail industries. This measured step gives primary focus to award reliant business in priority industries, but also demonstrates a workable model to address complexity, inconsistency and inflexibility in the awards system.

In contrast to the status quo, after taking into account an anticipated higher rate of employers using these provisions, the overall net regulatory saving is estimated to be up to around \$4 million over 10 years.

For reasons outlined above, option two is the preferred option.

Implementation and Evaluation of Options

Implementation of the preferred option will require legislative amendments to the Fair Work Act.

Implementation risks

The most significant risk to successful implementation is that the necessary legislative amendments may not obtain passage through Parliament. The risk to legislative passage has been partly addressed through the industrial relations reform consultation process, which involved extensive consultation with key stakeholders.

The preferred option also carries the risk that drafted provisions will have unintended effects when applied to each of the identified awards. As awards construct part-time employment, ordinary hours, rostering and overtime in different ways, there is the possibility that some permutation of a part-time employment arrangement will not operate as intended. This risk will be mitigated by providing the Fair Work Commission with the power to vary awards where the legislated provisions create uncertainty or difficulty. This would ensure that the award can be varied to ensure effective integration with the legislation.

Transitional arrangements

The amendments will apply prospectively to employment relationships where the employee is engaged under one of the identified awards. The amendments may change existing arrangements but this could only be done with the agreement of the employee. Existing arrangements will also be preserved. There will be no requirement for specific transitional arrangements.

Monitoring and evaluation

Consultation on the operation of the provisions will be undertaken through the regular meetings of the National Workplace Relations Consultative Council (NWRCC). The NWRCC is a forum for employer and

employee representatives to consult on workplace relations and labour market matters of national concern, and meetings are chaired by the Minister for Industrial Relations.

Data is currently not collected concerning the use of specific industrial relations provisions at the award level. The level of specificity required to undertake a reliable quantitative analysis of the impact of option one is not feasible. Therefore, overall evaluation of the provisions will be undertaken through forums established for the purpose of consulting with industrial relations stakeholders.

The government recognises that there are multiple forms of work in Australia and they provide meaningful employment suited to individuals circumstances. The purpose of this reform is to ensure that employers and employees have better choice in the type of employment they use. This is difficult to evaluate in its own right.