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**Australian Hotels Association**

## **Definition of 'Shiftworker'**

for the purposes of complying with the  
**Hospitality Industry (General) Award 2010**

**4 November 2010**

## Shiftworker Definition

### Hospitality Industry (General) Award 2010

The introduction of the *Hospitality Industry (General) Award 2010* (“HIGA”) as the relevant modern award for incorporated hospitality employers from 1 January 2010 introduced a new definition of shiftworker for the purposes of a fifth week of annual leave.

The definition, at clause 34.1 of HIGA reads:

**”34.1 Leave entitlement**

*Annual leave is provided for in the NES. It does not apply to casual employees.*

*For the purpose of the additional week of leave provided by the NES, a **shiftworker** is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week.”*

This Position Statement provides an interpretation to clause 34.1 of the HIGA for the benefit of AHA and state AHA branch members covered by this modern award.

#### **AHA POSITION**

As can be noted from the definition of a shiftworker, there are several elements to determining whether an employee is a shiftworker or otherwise.

The AHA interpretation of clause 34.1 is:

**1. SEVEN DAY SHIFTWORKER**

In order for an employee to be considered a seven day shiftworker, the business must operate seven days a week and operate 24 hours a day, the employee must actually work across the seven days of the week and not simply be available to work across the seven days of the week. For example, where an employee does not work on a Sunday, that is they always have Sundays free from work, the employee is a six day shift worker, not a seven day shiftworker;

**2. BUSINESS WITH SHIFTS CONTINUOUSLY ROSTERED**

The business must roster shifts continuously over 24 hours a day and over 7 days per week. A business will be viewed as having shifts rostered continuously over 24 hours a day over 7 days per week only where the entire business, as distinct from a Department or section within the business meets this rostering requirement.

**3. EMPLOYEE REGULARLY ROSTERED TO WORK**

With respect to an employee being regularly rostered to work on Sundays and public holidays, AHA is of the view that the employee must work a minimum of 34 Sundays and 6 public holidays in a year. The basis of this view stems from the decision of Commissioner Mansfield in *Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation* PR 944613 (the “Western Power Case”).

## **FAIR WORK OMBUDSMAN POSITION**

The AHA presented the definition on page 1 to the Office of the Fair Work Ombudsman (“FWO”).

With regard to AHA’s definition of a Seven Day Shiftworker, FWO has confirmed in its correspondence of 4 May 2010:

*“The assessment of work performed will be based on shifts actually worked, not just on occasions where employees make themselves available for a shift.”*

With regard to the other two elements, the FWO has stated and provided further interpretation:

*“We are of the view that an employee is entitled to the shiftworker annual leave entitlement when they have worked a combined total of 34 Sundays and public holidays.*

*The FW Act and the HIGA do not define the ‘regularly’ requirement in regards to the shiftworker annual leave entitlement.*

*We are of the view that;*

- *In determining what constitutes ‘shiftwork’ or ‘shiftworkers’, the emphasis in the FW Act and many modern awards is on the nature of the workplace (i.e. that it operate 24 hours a day, 7 days a week) and the requirement that the employee works regularly on Sundays and public holidays.*
- *When the term ‘regularly’ is given its ordinary meaning, it can be argued that the main consideration is that the employee works shifts including Sundays and public holidays, on a systematic basis.*
- *In the absence of a specific figure, it would still be likely that ‘regularly’ would need to be a meaningful number of Sundays and public holidays worked.*

*We (the FWO) note that there is an interpretation within some industries, including the hospitality industry that there is a requirement for an employee to work rotating shifts to be considered a shiftworker.*

*We are of the view that, for an employee to be considered a shiftworker, they are not required to work rotating shifts (i.e. to work each of the two or three shifts rostered in each 24 hour period), and that an employee who works the ‘day shift’ in a 24/7 roster can be considered a shiftworker.*

*Whilst there is reference in s87(3)9a)(ii) of the Fair Work Act 2009 to a shiftworker having to regularly work those shifts, this is only in relation to award/agreement free employees. It does not have application to an employee that is covered by the HIGA.*

*As stated above, we are of the view that an employee is entitled to the additional week of annual leave when they have worked a combined total of 34 Sundays and public holidays.*

*It would be open for a court to examine individual cases, including reviewing an employee’s working patterns/rosters, to determine whether they would qualify for the shiftworker annual leave entitlement if a dispute arose.”*

## **CONCLUSION**

As stated on page 1 of this Position Statement, the AHA does not support the FWO's position of a combined 34 Sundays and public holidays.

The AHA's position is based on current case law arising from the following decision:

*Australian Municipal, Administrative, Clerical and Services Union – Western Australian Branch v Western Power Corporation* PR 944613 (the "Western Power Case") and has developed this position after rigorous consideration of the case points.

AHA also acknowledges the HIGA's definition of a shiftworker has not been tested and therefore there is no case law to confirm its interpretation or the FWO's interpretation - it is still open to be tested through the courts. Until tested, AHA's position is provided as a guide to members based on the determination of the aforementioned Western Power case.

## **DISCLAIMER**

The information provided by the AHA's Position Statement, Shiftworker Definition, is provided as part of the AHA's function to encourage compliance with the *Fair Work Act 2009* by providing education, assistance and advice (but not legal or professional service advice) to AHA members.

While the AHA makes every effort to ensure the accuracy of the information provided in its publications, the accuracy may be affected by changes to law and policy, or by judicial consideration or interpretation.

Persons are not entitled to rely upon this information as a basis for action that may expose that person or other persons to a legal liability, injury, loss or damage. Rather, it is recommended that independent legal advice or other professional service or expert assistance be sought relevant to particular circumstances.