

SALARIES, HOURS, VISAS & THE FAIR WORK ACT

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The information contained in this document is of a general nature and not intended as legal advice for any specific situation



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We acknowledge the Traditional Custodians of the land on which we meet today and their ongoing connections to land, sea and community.

We pay our respect to Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander peoples here today.

Why we are here

The Core Skills Income Threshold is defined in regulation 1.03 as AUD \$73,150

*The applicant has indicated **in the Nomination** that the monetary component of the nominee's annual earnings will be AUD \$73,840 for 40 hours.*

This works out to be \$35.50 per hour for every hour including the additional hours.

The relevant industry award stipulates at clause 24.3(c)(i) that “an employee required to work outside the ordinary hours as prescribed by the award on any other day (excluding Sundays and public holidays), will be paid 150% of the minimum hourly rate for the first three hours.”

*The relevant award, does, however, provide flexibility as stipulated at clause 5.1(b) for “an employer and an individual employee to vary the application of the terms of this award relating to the overtime rate”. However, clause 5.5 indicates that such “an agreement must result in the employee **being better off overall** at the time the agreement is made than if the agreement had not been made”. This would not be the case with respect to the current overtime rate of \$35.50 per hour. Consequently, the remuneration offered to the nominee, excluding the additional/overtime hours is below the CSIT.*

The applicant submitted a remuneration survey from Salary Expert and two job advertisements from Workforce Australia to demonstrate their new determination of the AMSR for the nominated occupation. While the updated proposed salary for the nominee may be consistent with the salaries as shown on the evidence, there is no mention of overtime or additional hours to be worked by an equivalent Australian employee and/or any applicable loading rates on any of the documents submitted by the applicant.

*This raises concerns that the overtime hours stipulated in the nominee’s employment contract are being used to inflate the annual salary to meet the CSIT value of AUD \$73,150. **Without the additional/overtime hours the annual salary of the nominee would be AUD \$70,158, which falls below the CSIT.***

Therefore, the applicant has failed to establish that the additional 2 hours of overtime a week is an industry norm, and therefore, does not demonstrate equivalency to the current Australian market.

	Fair Work Act/Employment law	Immigration/Australian Border Force
Coverage	Most Pty Ltd workers are covered by the FWA A lot are covered by awards What if you are not?	Complying with the FWA does not mean complying with the Migration Act
Occupation	Award Coverage > industry vs occupation Classification or Award-free	ANZSCO - majority of tasks Lists - temptation to make one job another
Earnings	National Minimum Wage Award/EA Annualising -	Market rate Core Skills Income Threshold Specialist Skills Income Threshold
Ordinary Hours	38 - National Employment Standards Award may allow more (rare)	Nominated hours (the form & the contract)
Additional hours	Reasonable s60 of the FWA Award-free annualised (offsetting clause)	Reasonable according to the ABF officer
Labour Market Testing	Find the right person	Must advertise in specific way

Where is the risk?

Nominated Salary/ Actual hours worked	Well above award, CSMIT or SSMIT	Just above award, CSMIT or SSMIT	At or close to award, CSMIT or SSMIT
38 hours + no or occasional overtime	VERY LOW	LOW	MODERATE
38 + some regular overtime	LOW	MODERATE	HIGH
38 + a lot of overtime	MODERATE	HIGH	EXTREME

Visa approval is not the same as compliance

A few weeks after a ‘friendly’ ABF visit your company receives a Notice of Intention to Take Action alleging that four sponsored workers had worked 42 -45 hours per week every week and therefore had:

- earned less than what was guaranteed in their visa nomination; and
 - earned less than the CSIT (\$76,515) or the SSIT (\$141,210); and
 - earned less than what they were entitled to under the relevant award (or EA); and
 - the additional hours worked were unreasonable and a breach of the Fair Work Act has occurred.
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- What would Fair Work say and how would they approach the same issue?
 - How has the ABF reached these conclusions?
 - How serious is this?

Ouch that hurts a lot

	Repayment	Administrative	Civil Penalty	Criminal
Fair Work Act	Five years back - payback of any / all underpayments plus superannuation plus interest	Responding to a compliance or cooperation agreement. Improving after response.	Standard and serious contravention civil penalties. Anywhere from \$18,700 (individual) to \$4,695,000 (non-small business corps)	Criminal Conviction: Individuals - 10 years prison and/or fines of \$1.65m (or x3 underpayment amount). Corporations - fines up to \$8.25m (or x3 underpayment)
Migration Act	To reduce penalty			
Company Employer / Sponsor	Allowing unlawful work; breaching sponsorship duties	Sponsor approval suspended or cancelled	Up to 1,200 penalty units A\$396,000 per breach	Up to 2 yrs jail and/or 1,800 penalty units A\$594,000 per breach
Directors / Officers	Failing to prevent or take reasonable steps to prevent company breaches		Up to 240 penalty units A\$79,200 per breach	Up to 2 yrs jail if reckless or complicit (s 245AT)
Visa Holders	Working without permission; false info	Visa cancelled or deportation	Limited (most are admin/criminal, not civil)	Up to 2 yrs jail or fine (varies by offence)

Questions



Thank you