

Employer Guidance Note – March 2024
Shiftworkers and additional annual leave

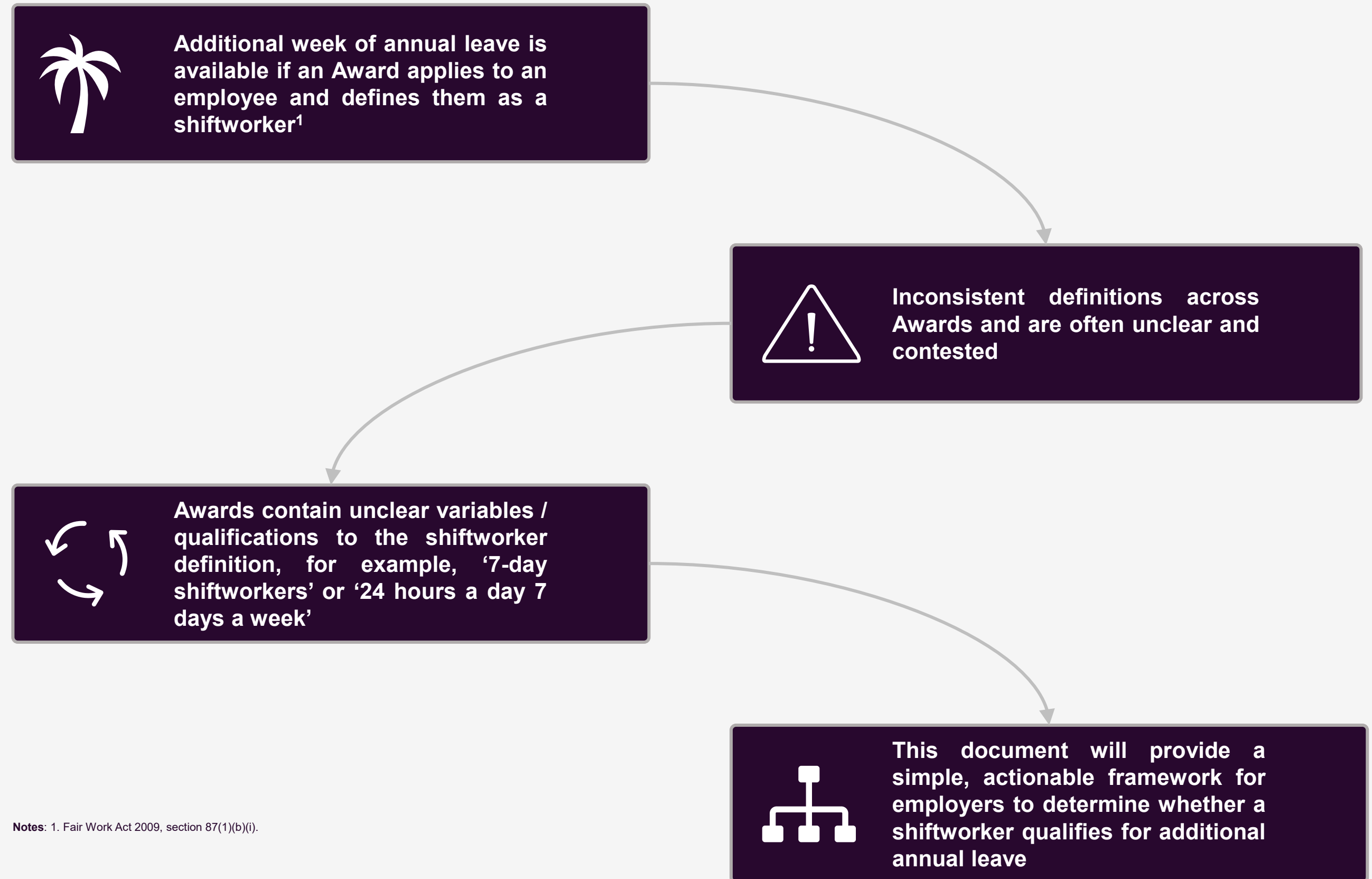
Guide to the meaning of ‘shiftworkers’ in Awards / EBAs

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The meaning of shiftworker is often unclear and disputed

There are multiple definitions of shiftworker in different Awards



Notes: 1. Fair Work Act 2009, section 87(1)(b)(i).

Problem:
there are
inconsistent
and unclear
shiftworker
definitions
across
Awards

Variations in shiftworker terms / definitions for the purpose of the NES

Definition of shiftworker for purpose of NES additional AL	Relevant Award
① An employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work specified for a day worker	→ Aged Care Award 2010
② Seven-day shiftworker who is regularly rostered to work on Sundays and public holidays	→ Storage Services Award 2020 + many others
③ 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 7 days a week	→ General Retail Industry Award 2020 + many others

Most common definition - focus of this document



Not plain English



Not straightforward



Highly ambiguous

These definitions are fundamentally unclear. Various cases have considered the meaning of seven-day shiftworker and related definitions for the purpose of NES additional annual leave.

What does 7-day shiftworker actually mean? What does it not mean?

7-day shiftworker

Who is not (or not necessarily) a 7-day shiftworker

- An employee who is not a dayworker or who simply works hours outside the normal span of hours.¹
- A shiftworker who works regular fixed shifts that include Sundays and / or public holidays.²
- Shiftworkers whose shifts are not spread over seven days of the week but are fixed shifts confined to the same five (or three or four) days of the week, including Sundays, who may or may not be required to work on public holidays.³
- Shiftworkers whose shifts are spread over the seven days of the week and whose rosters require them to work irregularly on Sundays (i.e. they work less than 1/7th of their working days on Sundays), irrespective of whether they are required to work on public holidays, which may fall on working days under the roster.⁴

Who is a 7-day shiftworker

- Shiftworkers whose ordinary hours are spread regularly (and evenly) over seven days of the week including Sundays and public holidays for each given year of employment. The focus is on the shifts worked (retrospectively), not those rostered. The employee must regularly (i.e. evenly) work across all seven days and Sundays and public holidays.⁵
- Generally, a minimum of 34 Sunday shifts and 6 public holidays per annum is required.
- Both full time and part time employees can be 7-day shiftworkers. The term does not have a different meaning across different industries (except where further express words in an Award / EBA define, limit, qualify or extend the meaning of 7-day shiftworker).

Notes: 1. *Bega Dairy and Drinks Pty Ltd v United Worker's Union* [2024] FWC 171 [41]. 2. Ibid. 3. Ibid [44]. 4. Ibid. 5. Ibid [55].

What does 7-day shiftworker actually mean? What does it not mean?

7-day shiftworker (cont.)

Is continuous 24/7 rostering required for seven-day shiftworkers (i.e. for example definition (2) on page 3 above)?

- No. This is only required if the definition in the relevant Award / EBA requires shiftworkers to be continuously rostered 24 hours a day for 7 days a week (as per example (3) on page 3).
- The relevant shift or rostering system needs to be continuous across all seven days of the week including Sundays and public holidays.

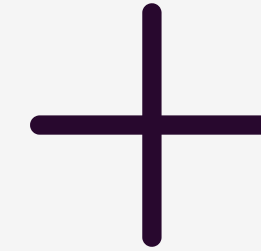
What happens if an employee is a seven-day shiftworker for part of a year?

Additional unhelpful complexity



Ordinary Annual Leave

- Accrues progressively throughout the course of a year (s 87(2) FW Act) according to ordinary hours of work.
- Accumulates from year to year (s 87(2)).
- Cannot be reduced by the terms of an Award / EBA.



Additional shiftworker annual leave

- The additional week can accrue in a pro rata manner (such that an employee can become entitled to additional annual leave that is less than a week's additional annual leave) by virtue of section 87(2).
- For example, a worker may be a seven-day shiftworker for part of a year.¹

Notes: 1. Four yearly review of modern awards – Alleged NES Inconsistencies [2015] FWCFC 3023

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Our team



Jasmine O'Brien

Principal

jobrien@sladen.com.au

03 9611 0149

0401 926 108

sladen.com.au

<https://www.linkedin.com/in/jasmine-obrien-sladen/>



Stephan Hill

Associate

shill@sladen.com.au

03 9611 0165

sladen.com.au

<https://www.linkedin.com/in/stephan-hill-27476a159/>