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| Case Name:  | Application for Crown Employees (Office of the Director of Public Prosecutions, Flexible Working Hours) Award 2022 |
| Medium Neutral Citation:  | [2023] NSWIRComm 1106 |
| Hearing Date(s):  | 17, 18, 19 October 2022, 17 November 2022, 19 January 2023, 16 August 2023 |
| Date of Orders: | 27 October 2023 |
| Decision Date:  | 27 October 2023 |
| Jurisdiction:  | Industrial Relations Commission |
| Before:  | Chief Commissioner Constant, Commissioner Sloan and Commissioner Muir |
| Decision:  | New award to be made on terms to be determined |
| Catchwords:  | EMPLOYMENT AND INDUSTRIAL LAW – Awards and enterprise agreements – Approval and creation – application for new award – forfeiture of “flex hours” by lawyers working in the Office of the Director of Public Prosecutions – consideration of the circumstances in which the lawyers work – consideration of extent of “flex hours” forfeiture – whether proposed award would be effective to prevent forfeiture – consideration of other issues arising – whether intervention of Commission warranted |
| Legislation Cited:  | Industrial Relations Act 1996 s 10 |
| Cases Cited:  | Applications for Variations to Crown Employees (Police Officers – 2017) Award and Paramedics and Control Centre Officers (State) Award [2021] NSWIRComm 1040 |
| Texts Cited:  | Nil |
| Category:  | Principal judgment |
| Parties:  | Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (Applicant)Industrial Relations Secretary (Respondent) |
| Representation:  | Counsel:P Lowson (Applicant)D Mahendra (Respondent)Solicitors:Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (Applicant)Herbert Smith Freehills (Respondent) |
| File Number(s):  | 2022/00112772 |
| Publication Restriction:  | No |

DECISION

1. The Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales (“PSA”) has applied to the Commission for the making of a new award to be known as the “Crown Employees (Office of the Director of Public Prosecutions, Flexible Working Hours) Award 2022” (“Proposed Award”). The PSA contends that the Proposed Award is necessary to put a stop to lawyers working in the Office of the Director of Public Prosecutions (“ODPP”) (“Lawyers”) routinely forfeiting “flex hours” that they have accrued.

Background

The ODPP

1. The structure of the ODPP was conveniently summarised by Nicholas Leach, a Level 2 Lawyer in the Public Sector Prosecutions Unit of the ODPP in Sydney, who was called to give evidence by the PSA. He provided the following uncontested evidence:[[1]](#footnote-1)

“6   The ODPP contains specialised units including the Appellate Litigation and Legal Resources Group, Drug Court Unit, Public Sector Prosecutions, Specialised Prosecutions, and the Witness Assistance Service. …

7.   Matters that are not managed by the specialised units are handled by Operational Groups, which report into the relevant Deputy Solicitor attached to the Solicitor’s Office. The ODPP has offices in Sydney, Parramatta, Penrith, Campbelltown, Wollongong, Wagga Wagga, Dubbo, Gosford, Lismore, and Newcastle.

8.   Each office has ‘Operational Groups’ of solicitors. The number of Operational Group per office depends on the size of the office. Each Group has a Managing Solicitor who the solicitors in the group report to. In Sydney there are approximately 15 to 20 solicitors in each Operational Group including Senior Solicitors and Solicitor Advocates.

9.   The ODPP is responsible for the prosecution of all serious offences committed against the laws of the State on behalf of the people of NSW, including serious personal violence offences such as murder and manslaughter, sexual offences, child abuse offence, large-scale drug supply, and serious driving offences such as dangerous driving occasioning death.

10.   The principal functions of the ODPP are to institute and conduct prosecutions for indictable offences in the Local, District and Supreme Court; and to conduct appeals arising from those prosecutions, including as the responding party, in any court.”

Relevant terms of employment

1. The Lawyers fall under the Crown Employees – Legal Officers (Crown Solicitor’s Office, Legal Aid Commission Staff Agency, Office of the Director of Public Prosecutions and Parliamentary Counsel’s Office) Reviewed Award (“Legal Officers Award”). Clause 10(1) of that award provides (in so far as it is relevant to these proceedings) that, unless varied by the Legal Officers Award, the conditions of employment for the legal officers to whom it applies will be those contained in the Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009 (“Conditions Award”).
2. Clause 10.1 of the Conditions Award permits a “Department Head” and the PSA to enter into “[l]ocal arrangements…in relation to any matter contained in the award”. On 27 May 2015, the ODPP and the PSA entered into an agreement pursuant to  cl 10.1 named “Flexible Working Hours Agreement” (“Agreement”). On its terms, the purpose of the Agreement was to modify cl 21 of the Conditions Award, which is titled “Flexible Working Hours”, in its application to the ODPP.
3. Through the operation of the Conditions Award and the Agreement:
4. the “contract hours” for a Lawyer engaged on a full-time basis are 35 hours per week;
5. hours worked beyond contract hours in a six week “settlement period”, and which are worked during a “bandwidth” of 7.00am to 7.00pm, Monday to Friday, give rise to a “flexible working hours credit” (which for convenience and consistency with the terminology adopted by the parties we will refer to as “flex hours”);
6. subject to the terms of the Agreement, an employee can apply their accrued flex hours to the taking of “flex leave”;
7. there is a limit to the number of flex hours that may be carried forward at the completion of any settlement period. In this regard the Agreement provides:

“7.6   A staff member is entitled to carry forward up to a maximum of 50 flexible working hours credit at the completion of any settlement period. Any accrued hours above 50 are forfeited at the completion of the settlement period.

7.7   Hours worked are to be monitored by the staff member and supervisor throughout the 6 week period…and supervisors and staff members will work together to ensure that staff members do not exceed more than 50 working hours credit in a settlement period.

7.8   Once the staff member has accrued 50 hours of flexible working hours credit:

7.8.1   The supervisor and staff member shall devise a strategy in writing to ensure that the staff member is able to take the approved hours to ensure that hours are not continually forfeited.

7.8.2   Methods to ensure the reduction of excess credit hours may include reducing he hours worked during the remainder of the settlement period or the taking of flex leave to prevent the hours being forfeited.

7.8.3   The identified strategy must be reported to and authorised by the Supervisor’s Manager.”

and,

1. an employee is entitled to be paid overtime for hours worked outside the bandwidth in accordance with the Conditions Award, provided that the employee is “directed to work outside the agreed bandwidth”.

The forfeiture of flex hours

1. Under the Agreement, forfeiture of flex hours will only occur where a Lawyer has more than 50 flex hours accrued at the end of a settlement period. The PSA led evidence from eight Lawyers, each of whom deposed to having forfeited flex leave during their employment. In particular:
2. Mr Leach stated that in the period 27 August 2018 to 24 April 2022 he forfeited 772.08 flex hours;
3. Vanessa Chan, a Senior Legal Adviser, Director’s Chambers in the Sydney Head Office, stated that in the period 30 October 2017 to 24 April 2022 she forfeited 256.4 flex hours;
4. James Staples, a Level 2 Lawyer in Operational Group 1 in the Sydney Office, stated that in the period 20 August 2018 to 24 April 2022 he forfeited 1,115 flex hours;
5. Maryanne Rogers, a Level 2 Lawyer in Operational Group 5 in the Sydney Office, stated that in the period 20 August 2018 to 24 April 2022 she forfeited 576.27 flex hours;
6. Peter Clayton, a Level 2 Lawyer in the Parramatta Office, stated that in the period 20 August 2018 to 24 April 2022 he forfeited 362.45 flex hours;
7. Adam Brown, a Level 2 Lawyer in Operational Group 5 in the Sydney Office, stated that in the period 20 August 2018 to 24 April 2022 he forfeited 323.31 flex hours;
8. Alison Graylin, whose position with the ODPP is unclear, stated that over the period 22 January 2018 to 23 December 2018 she forfeited over 167 flex hours; and
9. Nicholas Lawrence, a Level 2 Lawyer in Operations Group 8 in the Sydney Office (working on the Broken Hill circuit), stated that in the period 12 June 2017 to 28 August 2022 he forfeited 954.5 flex hours.
10. Dean Allen, an Industrial Officer employed by the PSA, gave the following unchallenged evidence:[[2]](#footnote-2)

“7.   On 19 November 2020, Ms Monika Wunderlin, Industrial Officer of the Applicant sent an email to Mr Nigel Richardson, Director Human Resources of the ODPP requesting the flexible leave data for ODPP employees broken down by flex period which included the amount of hours worked, the flex leave accrued, flex leave taken, and flex hours forfeited. This data was requested for the period of 1 July 2019 until the date of the email.

8.   On 7 December 2020, Mr Richardson emailed Ms Wunderlin attaching an excel spreadsheet providing the requested data from the period of 21 July 2019 until 25 November 2020. …

…

10.   Based on the data provided in the spread sheet, solicitors who were contracted to work 210 hours in a six-week flex period worked on average an additional 20 hours during this six-week period. 14% of solicitors who were contracted to work 210 hours over a flex period worked an additional 40 hours or more during this six-week period. From the document, it appears that during the 15-month period, over 44,193.76 flex leave hours were forfeited by solicitors working full time. Every flex sheet submitted by an employee has to be approved by their manager.”

1. The PSA also led into evidence a bundle of documents, each titled “Flex Hours Forfeit”, covering the period 19 December 2021 to 5 June 2022. Those documents suggest that Lawyers forfeited approximately 14,300 flex hours in that period.
2. Paula McNamara, Deputy Solicitor for Public Prosecutions (Operations) for the ODPP, who was called to give evidence by the Industrial Relations Secretary (“Secretary”), deposed that in the areas for which she has supervisory responsibility, “there is always some forfeited flex”.[[3]](#footnote-3)
3. In his closing oral submissions, the Secretary accepted that 39% of timesheets for the period 31 January 2022 to 17 July 2022 reflected the forfeiture of some flex hours, with 23% indicating forfeiture of more than two and a half flex hours a week.

Alleged lack of compliance with the Agreement

1. Clauses 7.7 and 7.8 of the Agreement set out steps to be taken by a Lawyer and their supervisor to ensure that flex hours are not “continually forfeited”. Despite the evidence of forfeiture of flex hours, there is no evidence of a Lawyer and their supervisor ever “devising a written strategy” of the kind contemplated by cl 7.8.1 of the Agreement.
2. The PSA contends that the ODPP has failed, and is failing, to comply with the Agreement. It submits that the Proposed Award is necessary to ensure such compliance.
3. The Secretary opposes the PSA’s application.

The Proposed Award

1. The Proposed Award includes the following provisions:

“**3.   Definitions**

3.1***Contracted hours*** includes authorised paid or unpaid leave, including flex leave.

3.2***Employed solicitor*** means every person employed at the ODPP as a legal officer (however described).

3.3***Flexible Working Hours Credit*** means the time which exceeds the contract hours for a settlement period.

3.4***ODPP*** means the Office of the Director of Public Prosecutions.

3.5***Overtime*** means hours of work performed outside of the bandwidth that an employed solicitor has pre-approval to work and to be paid as overtime in accordance with the Award.

3.6***PSA*** means the Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales

3.7   ***Settlement period*** refers to each six-week period commencing from the first Monday after this Award is made, with eight settlement periods to be subject to this Award.

3.8***Safe Practice Workload*** means a workload that does not require an employed solicitor working hours in addition to their weekly contracted hours of work, unless the additional hours are reasonable.

In determining whether additional hours are reasonable, the ODPP must take the following into account:

i.   any risk to the employed solicitor’s health and safety,

ii.   the employed solicitor’s personal circumstances, including family responsibilities,

iii.   the operational needs of the ODPP,

iv.   the nature of the employed solicitor’s role and level of responsibility, and

v.   and any other relevant matter.

Additional hours will be unreasonable if they involve the employed solicitor forfeiting flexible working hours credit.

**4.   Health and Safety**

4.1The ODPP must ensure the health and safety of employed solicitors by maintaining a *Safe Practice Workload.*

**5.   Written strategy**

5.1If the employed solicitor has 40 or more flexible working hours credit at the beginning of any settlement period, the supervisor and the employed solicitor are to devise a written strategy to ensure that the employed solicitor does not exceed 50 flexible working hours credit at the end of the settlement period.

5.2The written strategy must be reported to and authorised by the Supervisor’s Manager.

5.3The supervisor is to monitor the written strategy to ensure that it is complied with.

5.4The written strategy must not have the effect of causing any other employed solicitor to exceed more than 50 flexible working hours credit in any settlement period.

**6.   Accountability**

6.1At the end of each settlement period, the ODPP is to provide a document to the PSA, de­identified so as to preserve the anonymity of employed solicitors: -

i.   Identifying the number of employed solicitors who have accrued at least 40 flexible working hours credit during the settlement period

ii.   Confirming that a written strategy was put in place for each of the said employed solicitors

iii.   Identifying the number of employed solicitors, if any, who forfeited flexible working hours credit during the settlement period, and the quantum of such hours that were forfeited.

**7.**   **Forfeited Hours**

7.1Where an employed solicitor has forfeited flexible working hour credits in circumstances where their supervisor had not entered in to a written strategy, the forfeited hours will be re-credited to the employee.

**8.   Incidence and Duration**

8.1The Award applies to all persons employed by the Office of the Director of Public Prosecutions as Legal Officers under the Crown Employees – Legal Officers (Crown Solicitor’s Office, Legal Aid Commission Staff Agency, Office of the Director of Public Prosecutions and Parliamentary Counsel’s Office) Reviewed Award, and will apply for a period of 12 months from the date it is made by the Industrial Relations Commission of NSW.”

Applicable legislation and principles

1. The PSA’s application for the Proposed Award is brought pursuant to s 10 of the *Industrial Relations Act 1996* (“Act”). There was no controversy as to the principles that the Full Bench ought to apply in determining the application. Consequently, we will not reiterate those principles or reproduce extracts from the authorities from which they are derived. We limit ourselves to drawing attention to the observations of the Full Bench in *Applications for Variations to Crown Employees (Police Officers – 2017) Award and Paramedics and Control Centre Officers (State) Award* [2021] NSWIRComm 1040 (“*Police and Paramedics*”) at [17]-[32].

The existing terms of employment

1. The Secretary submitted:[[4]](#footnote-4)

“1.4   For the reasons set out below, the above summary of the PSA’s case is sufficient to dispose of the Application as:

(a)   it demonstrates that the PSA has fundamentally misconstrued (or simply ignored) the relevant principles concerning applications for new awards; and

(b)   the allegations advanced by each of the PSA’s solicitor witnesses constitute claims for alleged breaches of the Award as opposed to providing a proper basis to make a new award.

…

3.1   The PSA’s evidence and submissions entirely fail to address the relevant legal principles set out above. In particular, there is no evidence (or even an assertion) that:

(a)   the existing Award no longer provides fair and reasonable conditions of employment; or

(b)   that the new award is ‘necessary to establish fair and reasonable conditions of employment’.

3.2   To the contrary, the PSA’s case proceeds on the basis that the Award provides fair and reasonable conditions of employment insofar as hours of work and overtime are concerned and its real complaint is that, at least as far as the solicitor witnesses in the present matter are concerned, the ODPP is allegedly failing to comply with those conditions. That is not a proper basis on which the new award should be made.

3.3   Further, there is no evidence or submission advanced that the matter in question has special attributes or is ‘out of the ordinary’ so to take the matter outside the restrictions which otherwise apply. In this regard, the PSA’s case appears to be fatally flawed.”

1. In closing oral submissions, the Secretary contended:[[5]](#footnote-5)

“One of the important features of this case, of course, is the fact that underpinning the flexible working arrangement is the award itself. And, when one goes to the award there are a number of provisions that are particularly important. The starting point, of course, is cl 10 which contemplates local arrangements being in place in so far as flexible work practices are concerned. But, that has to be read together with what is then contemplated by cl 11, and in particular 11.3, which provides a prohibition, effectively, on employees performing hours that are not reasonable.

That is, it allows the employee to refuse to work additional hours in circumstances where the working of such hours would result in the employee working unreasonable hours, and there are various factors set out in 11.3 which must be taken into account when determining whether hours are unreasonable. That, of course, is part of the framework in which we’re operating. The other important factor to take into account…is the fact that cl 21, and 21.11 in particular, contemplates forfeiture. That is because you can only carry through a maximum of 10 hours credit when it comes to flex leave into the next settlement period.

…

…I’m simply saying on our reading of the award, both for the award as well as the Flexible Working Agreement, contemplate the idea that flex hours will be forfeited. And that’s important in so far as the industrial framework that we’re working in for this application. …And what this obviously bears in mind is the environment that we’re in and the types of employees that we’re dealing with, in that there are going to be as a matter of pragmatism periods of time where there are repeated forfeitures of flex leave. And what the Flexible Working Agreement at is devising strategies where that does not continually occur.

…

But I think the parties are in agreement in so far as saying, the Flexible Working Agreement works in so far as the respondent’s business is concerned. The forfeiture of flex leave, as contemplated by the Flexible Working Agreement, is a natural consequence of the nature of the work that solicitors perform.”

1. Under the Conditions Award, the contract hours for a full-time lawyer are 35 hours per week. The rates payable to Lawyers can be presumed to be predicated on them working such hours, with overtime available for hours that they are directed to work outside the bandwidth. There is no suggestion that the Lawyers are in receipt of remuneration that is intended to compensate them for working in excess of their contract hours. Indeed, the Secretary made it clear during the proceedings that he was not running an argument “to say these people are so well paid that they should be working excessive hours”.[[6]](#footnote-6)
2. As the PSA submitted, “the award requirement is 35 hours a week, and the responsibility of the employer is to ensure that employees work 35 hours a week, irrespective of their commitment or any other aspect of the work”.[[7]](#footnote-7) It further submitted:[[8]](#footnote-8)

“And, ultimately, the employer has contracted with these employees that they work 35 hours a week. That’s, fundamentally, the starting point, and at one level the end point, and the employer has to make it work.”

1. The Agreement contemplates a Lawyer working, in a given week, more than the 35 hours for which the Conditions Award provides. In return for doing so, they accrue flex hours which can be taken as flex leave. The clear intention of the Agreement is that a Lawyer’s hours average out at 35 per week. The effect of forfeiting flex hours is that a Lawyer is not being paid for all of the work that they perform.
2. Clause 21 of the Conditions Award is titled “Flexible Working Hours”. There is nothing in that clause that permits an employer to require an employee to work hours for which they will not be paid. The clause includes the following provisions:

“21.1   The parties to this award are committed to fostering flexible work practices *with the intention of providing greater flexibility in dealing with workloads, work deadlines and the balance between work and family life*. All parties are committed to managing time worked *to prevent any forfeiture of credit hours* accumulated under a Flexible Working Hours arrangement.

…

21.11   Flexible working hours credit – an employee may carry a maximum of 10 hours credit into the next settlement period. …

21.12   Weekly hours worked during the settlement period are to be monitored by the employee and their supervisor. If it appears that the employee may exceed an accumulated work time of 150 hours in a settlement period; or if the total hours of work in a settlement period with the credit hour carry over from the previous settlement period may exceed 150 hours, the supervisor and employee will develop a strategy *to ensure that the employee does not forfeit any of the credit hours accumulated*, or likely to be accumulated.”

(Emphasis added)

1. We do not read these provisions as “contemplating forfeiture” of flex leave. To the contrary, they reflect a commitment that forfeiture does not occur.
2. In contrast, the Agreement does not contain such an express commitment. This can be seen in the language of cl 7.6 – “Any accrued hours above 50 *are forfeited* at the completion of the settlement period” – and in the reference in cl 7.8.1 to ensuring “that hours are not *continually* forfeited” (our emphasis).
3. The Secretary placed significant weight on the reference to “continually forfeited” in cl 7.8.1 of the Agreement. Nigel Richardson, the Director of Human Resources for the ODPP, stated that the use of the word “continually” suggested that the Agreement “still contemplated that forfeiture may occur from time to time”.[[9]](#footnote-9) The Secretary submitted:[[10]](#footnote-10)

“Part of my submission in closing will be, given the evidence that has been led by the applicant in the manner that it’s been led by the applicant, it’s entirely unclear and it has been unclear to me from the start of this case as to whether we’re talking about the same solicitors forfeiting leave, that is, continually, because, of course, our case is, under the flexible work agreement solicitors are going to forfeit flex leave. It’s going to happen. It’s the nature of legal work that you’re going to have busy periods where forfeiture occurs, and the intention of the agreement is that it doesn’t happen continually to the same solicitors.

1. Although the Secretary repeatedly emphasised the use of the word “continually”, little assistance was provided to the Commission as to what the word means in the context of the Agreement. Under cross-examination, Mr Richardson sought to draw a distinction between “continual” on the one hand and “ongoing” or “multiple” on the other. We did not find this of assistance.
2. Clause 2 of the Agreement includes the following:

“**2.   Principles**

2.1   This agreement will apply to all ODPP staff members…and will operate in conjunction with the following principles:

…

2.1.2   The introduction of the Agreement is intended to improve the Office’s organisational performance and increase flexibility for all staff members to ensure that there is an appropriate balance between work and personal commitments. The Office acknowledges that the Agreement will provide the capacity for a staff member to increase their hours of work at times to meet high volumes of work and/or deadlines whilst enabling staff to take additional time off or work shorter hours during times which are less demanding.

…

2.1.5   That staff members and supervisors shall take all reasonable steps to ensure that a staff member does not constantly accrue excess credit hours at the conclusion of settlement periods.”

1. Nothing in these “principles”, or otherwise in the terms of the Agreement, reflect an acceptance by the parties when entering into the Agreement that “the forfeiture of flex leave…is a natural consequence of the nature of the work that solicitors perform”.
2. In our view, in light of the Agreement as a whole, and in particular the principles in cl 2 to which we have referred, the word “continual” should not be construed as meaning “always” or “invariably”. The mechanisms in the Agreement are not being applied if Lawyers are regularly or routinely forfeiting flex hours, whether or not that is the case in every settlement period.
3. We have summarised at [[6](#_Ref148448324)]-[[10](#_Ref148448329)] above the evidence of forfeiture of flex hours. We are persuaded that this evidence reveals that for some Lawyers the forfeiture of flex hours has been “continual”.
4. Further, the Legal Officers Award was presumably made having regard to “the nature of work that solicitors perform”. As we have already observed, it largely incorporates the terms of the Conditions Award. There can be no proper basis to suggest that the awards contemplate an employee working hours for which they are not paid. The Secretary has failed to convince us that we should construe the Agreement as permitting such an outcome.
5. We accept the following submissions of the PSA:[[11]](#footnote-11)

“Any accrued hours above 50 are forfeited at the completion of the settlement period. That is, the respondent gets the benefit of that labour and the employee gets no benefit. That’s the effect of that clause. Plainly, that is only fair and reasonable if there is a protection against that actually happening, because this commission wouldn’t countenance employees working for free.”

The obligations under the Agreement

1. The PSA contends that the Proposed Award is necessary in order to compel compliance by the ODPP with its obligations under the Agreement. It emphasised, in particular, that there was no evidence that a supervisor had at any time taken steps to comply with that the obligations imposed by cll 7.7 and 7.8 of the Agreement. It submitted:[[12]](#footnote-12)

“Hours worked - so, this is 7.7, this is the protection. ‘Hours worked are to be monitored by the staff member and supervisor throughout the six week period through the use of [CASES] flexitime records’ - and I think there was evidence that that’s now SAP, not [CASES], that the record keeping process or computer system changed from [CASES] to SAPs – ‘And supervisors and staff members will work together to ensure that staff members do not exceed more than 50 working hours credit in a settlement period.’

So, under this agreement it’s not meant to happen that people actually accrue more than 50 hours, so it’s not meant to happen that they lose it. 7.8 is the provision that specifically is intended to prevent it.

…

Let me remind the commission there is no evidence before this commission of any written strategy ever having been entered into at all by any employee with their manager. Who could have best brought forward that evidence? The respondent. Which category of employees would have been best placed to bring forward evidence of written strategies? Managing solicitors. How many managing solicitors did the respondent call in these proceedings? None. Could the evidence of managing solicitors elucidated matters for this commission? Well, yes, it could.

They could have come forward and said written strategies they’d engaged in, what they’d done, written strategies they’d tried to engage in. Nothing.”

1. The Secretary’s evidence and submissions emphasised the mutuality of the obligations in the Agreement. That is, the requirement in cl 7.7 that the supervisor and staff member “work together”, and the expectation that the written strategy contemplated by cl 7.8 will be jointly devised by the supervisor and the staff member. The Secretary submitted:[[13]](#footnote-13)

“What the data seems to suggest is that there are, and we would say a small group of people who are working beyond what we say a Flexible Working Agreement really does contemplate. And no one wants that, even on our side. We wholeheartedly agree that it’s regrettable that there are employees who have repeatedly forfeited flex leave. And as evidenced in these proceedings, the ODPP is working towards implementing measures to ensure that doesn’t occur, which I’ll come to a little bit later. But when we come back to employees who are in fact repeatedly forfeiting flex leave, and this came out in terms of the cross-examination of some of the witnesses put forward by the PSA, it seems to be accepted that if they asked, their managers would in fact reallocate work. But they did not genuinely seek to have these matters reallocated. And when they did ask for matters to be reallocated they in fact were.

Now the criticism that’s made against the ODPP in that respect is to say, well this should all be on the managers, that is it’s their responsibility to monitor, to work out, and to do everything that’s required in so far as making sure no one is forfeiting even one hour of flex leave. Now we say, well firstly, that’s not actually what the Flexible Work Agreement contemplates. But secondly, whilst we appreciate that there is a requirement on managers to monitor that situation, there is a requirement on managers to work together, it’s on staff as well, and so when you look at clause 7.7 of the flexible work agreement what it requires is that hours are to be monitored by the staff member and supervisor throughout the six week period and supervisors and staff members will work together to ensure that staff members do not exceed more than 50 hours ‑ 50 working hours in a settlement period. It’s a mutual obligation.”

1. While the Secretary sought to emphasise that under the Agreement the management of flex hours was a responsibility shared by Lawyers and their supervisors, he principally relied on assertions that Lawyers had failed to meet their side of the bargain.
2. In that regard, there is some force to the Secretary’s submissions that Lawyers are unwilling to request that work be reallocated to others. A number of the PSA’s witnesses deposed that they had not sought to have their work reallocated, and put forward a number of reasons for that. These included:
3. Operational and efficiency considerations. For example, Mr Leach referred to the ODPP’s policy that “continuity of matters should be maintained…so that [victims] have a single point of contact and that…contact is maintained from the institution of the prosecution right through to finalisation, whether that be trial or sentence”.[[14]](#footnote-14) Mr Clayton referred to the “obvious benefit in having a single solicitor deal with a matter from start to finish”[[15]](#footnote-15) and described the handing over of files as “a waste of resources, because I’ve already done the time. I’ve already invested all of that. I’ve already got pretty much everything mapped out ready to go.”[[16]](#footnote-16)
4. Concerns as to how a request for work to be reallocated would be perceived. Mr Leach stated that he resisted the reallocation of work as he “did not want to give the appearance that I was struggling with my workload”[[17]](#footnote-17) and wanted to “prove himself”.[[18]](#footnote-18) Mr Clayton gave evidence to a similar effect.
5. Professional pride. Mr Clayton stated that once he is given a matter he would “like to see it through – I want to try and do the work that is allocated to me”.[[19]](#footnote-19) Mr Staples deposed that he had not raised with his Managing Solicitor the forfeiture of flex hours or his workload as he would:

“…prefer to complete the work to a high standard; it is work that I enjoy and feel strongly about, and to me [it] would be a disservice to the office as a prosecution service, and the individual stakeholders in matters I have dealt with, to not put such time and effort into the conduct of each matter.”[[20]](#footnote-20)

1. Concerns about creating more work for other Lawyers. Mr Staples stated that asking for work to be reallocated “would just have been shifting the burden from myself to one of my colleagues”.[[21]](#footnote-21)
2. Where Lawyers had sought to engage with their supervisors to manage their workload, the results were mixed. Ms Rogers and Mr Brown stated that their attempts to have work reallocated were to no avail. By contrast, Ms Graylin was successful in having no further work allocated to her during a particularly busy period. Ms Chan described instances where she had raised concerns about her workload with her managers, who were “understanding and reasonably responsive to workload pressures”.[[22]](#footnote-22) Mr Clayton stated that although he had not sought to have work reallocated, he had “no doubt” that his Managing Solicitor would do so if requested as she is “incredibly supportive and understanding”.[[23]](#footnote-23)
3. The Secretary is also correct that there is little evidence of Lawyers seeking to engage proactively with their supervisors to manage their flex hours accruals, much less in the context of invoking cll 7.7 or 7.8 of the Agreement.
4. However, there is equally little evidence as to steps taken by supervisors to limit the forfeiture of flex hours by Lawyers, and certainly none led by the Secretary. As already observed, there is no evidence that a written strategy of the kind contemplated by cl 7.8.1 of the Agreement has ever been prepared. Attempts by supervisors to otherwise manage the forfeiture of flex leave is confined to the evidence of the PSA’s witnesses, which revealed varying experiences.
5. Ms Chan, Mr Staples and Mr Clayton could not recall their supervisor speaking with them to address the forfeiture of flex hours, or working with them to formulate a plan to do so. Ms Rogers described some conversations and email communications she had had with her Managing Solicitor, but stated that there was “no substantive follow up”.[[24]](#footnote-24) Mr Lawrence deposed that his supervisor first raised the question of forfeiture of flex hours during his performance review in September 2022. He accepted under cross-examination that his discussion with his Managing Solicitor was directed to avoiding the forfeiture of flex hours; that his Managing Solicitor expressed the view that they did not want him forfeiting flex hours; and, that he should take flex leave when he could.
6. By contrast, Mr Brown stated that his Managing Solicitor had approached him on at least three occasions regarding the forfeiture of flex hours. Although he deposed that there was never any concrete proposal as to how his work was to be managed were he to take flex leave, Mr Brown accepted under cross-examination that his Managing Solicitor actively encouraged him to take flex leave and that when he had applied for such leave it had been approved.
7. Mr Leach produced two emails he had received from his Managing Solicitor noting his forfeiture of flex hours. In the first, the Managing Solicitor suggested a discussion to enable them to “lighten the load a bit”. Mr Leach did not respond. In the second, the Managing Solicitor referred to the forfeiture of flex hours as “very concerning” and Mr Leach’s response was: “All good – I’ll let you know if I need any assistance/someone to pick up a matter, but I suspect it will be fine from here on in.”
8. The apparent lack of consistent and proactive engagement by supervisors on the question of forfeiture of flex hours, and the consequential failure to invoke the terms of the Agreement, is difficult to understand, as it is a matter about which they regularly receive information. Ms McNamara deposed that Managing Solicitors receive “Flex Hours Forfeit” forms (as referred to at [[8](#_Ref148448421)] above) for their teams at the end of each settlement period. Those forms contain the following notation:

“Flex hours accrued beyond 50 hours are forfeit at the end of the flex period. Staff and Managers are required to take all reasonable steps to ensure that staff do not consistantly *[sic]* forfeit excess flex hours at the conclusion of flex periods.”

1. The only evidence led by the Secretary of steps taken by ODPP management to address the forfeiture of flex hours was a document titled “Managers’ Guide – Forfeited Flex” (“Guide”). The Guide provides as follows:

“The ODPP is committed to the wellbeing, health and safety of our staff, and managers have a key role to play in ensuring this commitment is implemented across all levels of the Office. The ODPP recognises that sustained and ongoing excessive work hours may have an impact on staff wellbeing.

In recognition of these risks, the ODPP has in place a series of strategies for assisting and addressing wellbeing issues. This includes a flexible and supportive approach to managing workload and working hours. One of the strategies is the ODPP Flexible Working Hours Agreement (FWHA) which provides a number of actions to ensure working hours are monitored and managed.

…

It is acknowledged that levels of accrued flexitime are not the only indicators of a high workload. Whilst a mutual obligation exists in relation to managing accruals, as managers we are expected to initiate action to address the situation.

Further to the provisions from the FWHA noted above, the ODPP requires the following action of all managers on a regular and ongoing basis:

•   Monthly monitoring of levels of flexitime accrual… Monthly monitoring allows time within the fixed period to address the possible forfeiture of flexitime before it occurs.

•   Having a targeted discussion with any staff who have forfeited flex time or have accrued flexitime which may lead to forfeiture. …

•   Following the targeted discussion, the Forfeited Flex Form (the Form) is to be sent to the staff member confirming the discussion and a strategy to be implemented to address the excess flexitime. …”

1. There are three observations to make about the Guide. First, it was promulgated in July 2022, more than two months after these proceedings had been commenced. This does not reflect a proactive commitment to the management of flex hours.
2. Second, there is no evidence that the Guide has made any difference. Ms Chan and Mr Staples each deposed that in the period June to September 2022 they had continued to forfeit flex hours. Further, in the absence of evidence that a strategy under cl 7.8.1 of the Agreement has ever been developed, whether before or after July 2022, the Guide has obviously had no impact in that regard.
3. Third, and of the most concern, the Guide allows for Lawyers to “opt out” of the protections under the Agreement. The Guide provides:

“**Employees willing to forgo their flex hours**

The ODPP’s preference is for staff not to work hours which result in flex leave being forfeited at the end of a settlement period, however some staff voluntarily choose to work the hours they work and want to continue in this regard. In these circumstances we do not want to diminish staff choice and commitment nor impact on individual professionalism. However this must be balanced with our mutual obligation to monitor and ensure staff wellbeing.”

1. The “Forfeited Flex Form” referred to in the Guide has a series of “agreed actions”, one or more of which can be selected as applying by ticking a box. One of the “agreed actions” is in these terms:

“I am managing my workload and am content working my current hours and do not seek any adjustments be made. I confirm that my current excess **flexitime is not negatively impacting on my wellbeing**. I undertake to notify my manager should my position change and discuss alternative arrangements.”

(Emphasis in original)

1. The language of the Forfeited Flex Form is concerning. It appears to place the onus on an individual Lawyer to raise concerns as to their working hours. The Guide offers little assistance to a supervisor as to how they are to fulfil their side of the “mutual obligation to monitor and ensure staff wellbeing”. This focus on the responsibility of the Lawyer, as opposed to their supervisor, is consistent with the way in which the Secretary conducted these proceedings.
2. What is of particular concern in this regard is that a number of the PSA’s witnesses described a working culture which discouraged, even if only tacitly, complaints about working hours. There was evidence of Lawyers under- recording their hours, particularly those worked outside the bandwidth. The PSA’s witnesses described themselves as often being required to work outside the bandwidth and yet overtime has only been paid on a few occasions. With few exceptions, the evidence revealed a culture which discouraged the making of overtime claims and in which requests to be paid overtime have been rejected.
3. In this context, and where the Secretary has run a case to the effect that it is a Lawyer’s lot to work more hours than those for which they are paid, a “guide” which effectively allows for a Lawyer to opt out of the Agreement is ripe for exploitation.

Does the Proposed Award provide the solution?

1. The Secretary raised a number of concerns regarding the terms of the Proposed Award (as reproduced at [[15](#_Ref148453250)] above). He submitted that they went beyond what should properly be included in an award, are inconsistent and confusing and would lead to further disputation.
2. We accept that there are difficulties in the terms of the Proposed Award. For example, cl 7 is predicated on a Lawyer having forfeited flex hours. This cannot be reconciled with cll 3.8 and 5.1, the combined operation of which is to “ensure” that that does not occur, or with cl 4, which provides that forfeiture would amount to a failure to ensure the health and safety of Lawyers.
3. We also observe that the Proposed Award is intended to operate in conjunction with, and augment the operation of, the Agreement. However, there is no reference to the Agreement in the Proposed Award.
4. We are also mindful that the effect of cl 7 of the Proposed Award is that a Lawyer who has forfeited flex hours will not be entitled to have them re-credited if a written strategy has been developed in accordance with cl 5.1. That is, the Proposed Award contemplates that the written strategy may not necessarily be effective in preventing the forfeiture of flex hours. To that extent, it would envisage Lawyers working hours for which they may not be paid. The PSA correctly challenged the Secretary’s construction of the Agreement which would allow that result. We do not see why the Commission would make an award with a similar failing.
5. Beyond these difficulties with the terms sought by the PSA, we have doubts as to whether the Proposed Award would provide a solution to the forfeiture of flex hours.
6. The Agreement assumes that there will be “peaks and troughs” in a Lawyer’s work. Extra hours might be worked in busy periods, particularly during trials or when a Lawyer is on circuit, leading to the accrual of flex hours. In quieter periods, flex leave might be taken. Mr Brown accepted under cross-examination that work comes in peaks and troughs, but Ms Rogers deposed that “there’s not really any troughs”.[[25]](#footnote-25)
7. A number of the PSA’s witnesses referred to the difficulty in taking flex leave due to work demands. Ms Chan stated:[[26]](#footnote-26)

“35.   …While some employees would choose to work extra hours given their passion or interest in their field of work, this needs to be put in the context of the large workloads given to solicitors and LDP clerks, the serious and important nature of the work, a solicitor’s duties to the Court and our professional obligation to comply with the Prosecution Guidelines and the Victim’s Charter of Rights. When the choice given to staff is between breaching their duties to the court, for instance by missing a court ordered deadline but keeping to the contracted hours or complying with the court duties and working extra time, it is not a true choice. Similarly, when the choice between working my contracted hours and failing to comply with the Victim’s Charter of Rights, breaching the Prosecution Guidelines and providing sub-standard service to a victim; or working longer hours unpaid to comply with those solemn professional obligations that is no genuine choice.”

1. Mr Clayton deposed:[[27]](#footnote-27)

“19.   I always intend to take Flex Leave, especially after a trial. However, inevitably after a trial or a busy week of appearances, I have to catch up on other work not done as I was in the trial or other court work, such as perusing new briefs, conferencing stakeholders. That work has taken a lower priority given my trial obligations, which effectively renders me unavailable between 09:00am and 4:30pm for the duration of the trial, the same for short matters or Local Court list days.”

1. Mr Staples stated that “[d]ue to the ongoing and often unrelenting nature of the workload in my substantive role it can be difficult to regularly take Flex Leave to offset the hours accrued”.[[28]](#footnote-28) He further stated:[[29]](#footnote-29)

“21.   I also note that, as a legal practitioner and prosecutor, I have additional duties that must be recognised. These include fundamental duties as an Officer of the Court to meet Court orders and deadlines, and obligations to victims pursuant to the Victim’s Charter. If my practice has more matters than can comfortably be attended to in a 7-hour work day, then meeting these obligations will invariably result in the accrual of additional hours, whether specifically directed by ODPP management or not. From my point of view, doing substandard work on a matter which might then negatively affect the prosecution or a complainant’s experience in a prosecution, or being underprepared for court appearances, is more likely to negative *[sic]* impact on my wellbeing than forfeited flex hours as such.”

1. Mr Lawrence is one of two solicitors working on the Broken Hill circuit. He stated that work related to the Broken Hill District Court is allocated to either him or his colleague. He further stated:[[30]](#footnote-30)

“19.    As a circuit solicitor, it is difficult to take flex leave or any other type of leave as it means that the other circuit solicitor for the Broken Hill circuit will have to take on the full committal practice for the area including travelling for all the list days and other matters in Court. Therefore, I often find myself working while I am on leave to make sure matters are still progressing and I do not fall behind in my own practice or to avoid creating extra work for the other solicitor who already has a full practice load. …”

1. Ms McNamara accepted under cross-examination that solicitors working on circuit face difficulties managing the accrual of flex hours to avoid forfeiture. In relation to the workforce more generally, she had the following exchange with Counsel for the PSA:[[31]](#footnote-31)

“Q. This is the difficulty, Ms McNamara. On the one hand, you say that you are constantly thinking and working about it, and we might accept that to be true, but unless it shows up in data of reduced forfeited flex leave, then anything that you’re trying isn’t working. Would you accept that?

A. I accept that [we’re] involved in litigation, we go to court, that we have certain obligations. We try and manage those obligations with the - to the Court, as well as managing those flex hours, and we are trying ways in which to manage that, but we have to acknowledge that if somebody is in a long trial or long sittings, then it’s difficult.

Q. Do you also have obligations to your employees who have contracted to work for you 35 hours a week?

A. Yes, we do.”

1. The terms of the Agreement themselves may present an impediment to the management of flex hours to avoid forfeiture. It provides that flex leave cannot be taken if a Lawyer has more than 30 days of accrued recreation (annual) leave; a Lawyer cannot take more than 30 days of flex leave in a year; and, no more than five days of flex leave may be taken at the one time.
2. Against this background, it is surprising that the PSA resisted suggestions from the Full Bench that the terms of the Agreement, and in particular the bandwidth, be reviewed, much less that the Proposed Award replace the Agreement. On the case presented by the PSA, an argument could be made that the Agreement, and cl 21 of the Conditions Award, are inapt for the circumstances in which the Lawyers work.
3. We will not, however, explore that thesis. While the forfeiture of flex hours is prevalent and significant, we are unable to conclude that it is universal. Some Lawyers may be able to take advantage of the Agreement and not experience any issues with the forfeiture of leave.
4. The question remains whether an award to the effect of the Proposed Award, after addressing the particular difficulties with its terms as identified above, would address the concerns that prompted the PSA’s application in the first place.
5. The PSA contended that the Proposed Award would compel the ODPP to meet its obligations under the Agreement to develop written strategies to prevent the forfeiture of flex hours. It would also enable the PSA to enforce those obligations, which it is presently unable to do.
6. The PSA submitted:[[32]](#footnote-32)

“We want to see if that written strategy will be put in place and can work, and we want to have the accountability to the PSA so that we have some oversight as to what’s happening. Because the numbers are large, the hours are big. And so a 12-month period will allow for those accountabilities to take place, for those written strategies to be entered into. And for there to be some evidence one way or another of a reduction in the forfeiture of flex. That’s what this is aimed at. And that’s why it’s contemplated to be a 12-month period. It’s an award application. The commission can deliver its reasons and say, these are our reasons, these are some aspects of the award that we think need some tweaking and direct the parties to come back to the commission about them. But the award as framed is intended to address the problems for a period of time with a view to seeing whether this flexible work hours agreement can work in a way that doesn’t impact adversely on the staff.

…

[The Proposed Award] contemplates two options. One is that the written strategy preferably is entered into, and if it’s entered into then there is an expectation it be adhered to and there won’t be forfeiture. Of course there may technically be forfeiture even if a written strategy is entered into. But since we had no evidence of how this might work we haven’t attempted to seek recrediting of forfeited flex where a written strategy is entered into. Because our primary position is, if the written strategy process works then there shouldn’t be forfeiture of flex. So we want to focus on that being potentially workable.”

1. It might be presumed that an award compelling the creation of strategies to prevent the forfeiture of flex hours, bringing with it a greater focus on the accrual of flex hours and the taking of flex leave, would have an impact on the level of forfeiture. There is no way of assessing the extent of that impact. It is sufficiently clear, though, from the terms of the Proposed Award, the evidence led by the PSA and the PSA’s submissions that some level of forfeiture would still occur. That is, the Proposed Award might ameliorate but would not solve the problem of the forfeiture of flex hours.
2. We have accepted the PSA’s submissions that the forfeiture of flex hours should not be seen as part and parcel of employment as a Lawyer in the ODPP, and that the Commission would not countenance employees performing work for which they are not paid. For the same reasons we are not persuaded to make the Proposed Award.
3. It follows that it is not necessary to traverse the question as to whether the PSA had made out the case for making the Proposed Award in accordance with the principles in *Police and Paramedics*.

The way forward

1. While we are not persuaded to make the Proposed Award, we do not consider that the *status quo* should be maintained. It is apparent from all that has gone before that that would not be a fair and reasonable outcome.
2. Reducing the matter to first principles, the Lawyers are award-covered employees. They are contracted to perform 35 hours of work a week. The Agreement allows for those hours to be worked “flexibly”, but has resulted in practice in a significant amount of flex hours forfeiture. In effect, the Lawyers are working hours for which they are not being paid. This is to be considered in light of the PSA’s evidence that Lawyers regularly work outside bandwidth hours but generally do not receive payment of overtime.

A reduction in the bandwidth?

1. During the hearing, the Full Bench explored with the PSA whether the extent of the bandwidth (7.00am to 7.00pm) was contributing to the higher level of flex leave accrual and forfeiture. That is, if overtime became payable for work performed later than 7.00am or earlier than 7.00pm, would that reduce flex leave accruals? The PSA’s response was that it would be unfair to reduce the bandwidth “unless the Commission was satisfied that overtime would be paid”.[[33]](#footnote-33)
2. The evidence demonstrates that Lawyers regularly work outside the bandwidth. Only two of the PSA’s witnesses stated that they had been paid overtime for doing so. Ms Chan deposed that in nine years of working for the ODPP, and despite often working outside bandwidth hours, she had received approval to do so on six occasions, four of which related to travel to regional Local Courts and were approved as excess travel time. Ms Graylin stated that overtime applications that she had made in 2018 had all been approved.
3. A number of the PSA’s witnesses accepted under cross-examination that they had not sought pre-approval from their supervisors to work overtime. In some cases, this was explained on the basis that it is not always possible to know in advance when and how much overtime will be required to be worked. Others referred to being deterred from seeking approval for overtime due to a perception of organisational or cultural resistance to overtime being paid. Mr Staples, for example, deposed that it is “not the culture of the ODPP to take overtime”.[[34]](#footnote-34) Under cross-examination he stated that he had not sought approval for overtime as “it would have been futile”.[[35]](#footnote-35)
4. The PSA led into evidence an email of 21 April 2017 from John Kemp, HR Project Officer, Human Resources in the ODPP addressed to “All Managing Lawyers” and “Managing Clerks – All”. It included the following:[[36]](#footnote-36)

“As has always been the case OT should be approved in advance and in extraordinary circumstances only…”

1. The Secretary did not lead evidence to directly challenge that of the PSA that there is resistance in the ODPP to the payment of overtime. In fact, Ms McNamara stated under cross-examination that she was “anecdotally” aware of solicitors working outside bandwidth hours.[[37]](#footnote-37) To a similar effect, Mr Richardson stated that he “had heard anecdotes” that Lawyers were “working outside of bandwidth hours, working unpaid work”.[[38]](#footnote-38)
2. Clause 10.1.1 of the Agreement (which should properly be numbered 10.2.1) provides that “overtime will apply where a staff member is directed to work outside the agreed bandwidth” (emphasis in original). This is consistent with cl 88.2 of the Conditions Award. However, it is this requirement for a direction, and what that means in the context of the work required by Lawyers, which appears to be at the heart of the controversy between the parties in respect of the payment of overtime.
3. There is no evidence of Lawyers being expressly “directed” to work overtime. In their evidence, the Lawyers called by the PSA generally presented the need to work outside of bandwidth hours as a necessity of the work required of them. For example, Ms Graylin deposed:[[39]](#footnote-39)

“94.   An ODPP solicitor being entitled to Overtime only when they are ‘directed’ to work Overtime is an inapt description of what I experienced. Frankly, it is rare for a Managing Solicitor to direct me to do anything at all. I was, and am, allocated work, told any applicable timeframes and expected to use my best efforts to complete the work within those timeframes with the resources available to me. I discuss with my Managing Solicitor legal issues that arise and how to address them. Occasionally a Managing Solicitor directs me as to the correct course to follow on a legal issue.

95.   In the course of managing my own workload, it was usually left to me to assess whether the only way a necessary work task could be completed within the required timeframe (which was not imposed by me) was for me to progress it on a non-working day or outside bandwidth. I cannot recall a Managing Solicitor ever expressly asking me to complete work out of bandwidth or on a non-working day, or conversely, asking me how late I planned to work on a particular task or directing me not to work past a particular time or not to undertake a particular task. To my mind, a ‘direction’ is implied if they Managing Solicitor knows a solicitor is completing necessary work out of bandwidth and the Managing Solicitor does not take active steps to prevent that situation occurring or continuing.”

1. There is some suggestion that the Secretary would concur with a broad construction of the concept of “direction”. During the hearing he submitted:[[40]](#footnote-40)

“So there’s a requirement for a direction and the point I’m making is, well, that concept of ‘direction’, I say, is a fairly broad one, if an employee says, ‘Look, I need to work beyond 7 pm, can I have overtime for this?’ and they’ve said ‘no’ but you still need to complete the task. My point is that would still constitute a direction to perform overtime, because they’re still being directed to perform the work beyond 7 pm.”

1. However, in light of all of the evidence, we do not consider that it could be assumed that if the Commission sought to manage the accrual of flex hours by reducing the bandwidth, with nothing more, a Lawyer would necessarily be paid overtime for hours worked outside the bandwidth.

Conclusions

1. Having regard to all of the evidence and submissions, and to encapsulate the views already expressed in this decision, we have reached the following conclusions:
2. A significant number of Lawyers are regularly forfeiting flex leave, in considerable amounts.
3. Nothing in the Legal Officers Award or the Conditions Award suggests that the rates of pay for Lawyers are set at a level to compensate them for the forfeiture of flex hours.
4. It follows that the effect of flex hour forfeiture is that Lawyers are not being paid for all of the hours they work.
5. Nothing in cl 10 of the Conditions Award allows for a local arrangement to require a Lawyer to perform work for which they are not being paid.
6. To the extent that the Agreement is construed as permitting such an outcome, the existing arrangements do not set fair and reasonable conditions of employment.
7. The forfeiture of flex hours is the consequence of the accrual of excess flex hours in a settlement period.
8. The accrual of flex hours is exacerbated by:
9. the professional demands on Lawyers, including those imposed by courts, counsel, other stakeholders, the Prosecution Guidelines and the Victim’s Charter of Rights;
10. related and consequential difficulties in taking flex leave;
11. the limitations imposed by the Agreement on the taking of flex leave; and
12. the breadth of the bandwidth.
13. The creation of written strategies to prevent the forfeiture of flex hours, as contemplated by cl 7.8.1 of the Agreement, would ameliorate some of these issues. However, some level of forfeiture would still be expected.
14. The Proposed Award might, as a consequence, result in a reduction in the forfeiture of flex leave, but would not prevent it.
15. It follows that the Proposed Award would not ensure fair and reasonable conditions of employment. As such, we are not persuaded that the Proposed Award ought to be made.
16. There is an organisational resistance within the ODPP to the approval and payment of overtime. This manifests itself in the requirement that overtime be “directed”.
17. The Commission cannot condone the maintenance of the *status quo*.

An alternative award

1. Having regard to these conclusions, we consider that the Commission’s intervention is warranted, albeit not in the terms sought by the PSA. The circumstances call for a new award for Lawyers to address the concerns we have identified.
2. That award is to provide as follows:
3. The bandwidth be reduced to 7.30am to 6.30pm, Monday to Friday.
4. The restrictions in the Agreement on the taking of flex leave will not apply where their application would result in a lawyer accruing more than 50 flex hours in a settlement period. This includes flex leave taken either at the request of the Lawyer or as directed by their supervisor.
5. There will be no forfeiture of flex hours.
6. If at the end of a settlement period a Lawyer has more than 50 accrued flex hours, there will be a discussion between the Lawyer and their supervisor with a view to agreeing whether the hours will be carried over into the next settlement period, or be paid as overtime. As a general principle, hours should not be carried over unless the Lawyer and their supervisor have devised a strategy in accordance with cl 7.8.1 of the Agreement that will allow the Lawyer to use the flex hours as flex leave.
7. In the absence of agreement between the Lawyer and their supervisor, any flex hours above 50 at the end of a settlement period will be paid as overtime.
8. The requirement that a Lawyer must be directed to work outside bandwidth hours to be entitled to be paid overtime would be removed. Instead, all hours worked outside of the bandwidth would be paid as overtime subject to the following:
9. The hours worked outside of the bandwidth must be reasonable and necessary for the proper performance of the Lawyer’s duties.
10. A lawyer must take all reasonable steps to obtain prior approval from their supervisor to work overtime. Approval to work overtime will not unreasonably be withheld. A failure by a supervisor to respond to a request for approval, provided that it is made in a timely manner, will be taken to be approval. A supervisor must provide reasons for any refusal to approve overtime.
11. Prior approval to work overtime will not be required in the case of unforeseen or exceptional circumstances, which preclude a Lawyer seeking such approval. In that case, the Lawyer must endeavour to notify their supervisor that they will be required to work overtime and as soon as practicable after having done so explain to their supervisor why it was not possible to obtain prior approval.
12. If a Lawyer routinely seeks approval to work overtime, their supervisor should meet with them to discuss their workload and why their work is unable to be performed during contract hours.
13. A consultative committee comprising representatives of the PSA and ODPP management would be formed. It would meet at least six monthly to explore the impact of the award on the hours of work and workload of Lawyers.
14. The matter will be listed for directions so that the parties can be heard on how to take the proceedings forward.

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1. Affidavit, Nicholas Leach, 10 June 2022 [↑](#footnote-ref-1)
2. Affidavit, Dean Allen, 9 June 2022 [↑](#footnote-ref-2)
3. Tcpt, 18 October 2022, p 137(28-29) [↑](#footnote-ref-3)
4. Respondent’s Outline of Submissions, 27 July 2022 [↑](#footnote-ref-4)
5. Tcpt, 16 August 2023, p 36(1)-37(36) [↑](#footnote-ref-5)
6. Tcpt, 19 January 2023, p 254(14-15) [↑](#footnote-ref-6)
7. Tcpt, 16 August 2023, p 15(4-7) [↑](#footnote-ref-7)
8. Tcpt, 16 August 2023, p 26(24-26) [↑](#footnote-ref-8)
9. Tcpt, 19 October 2022, p 162(41-42) [↑](#footnote-ref-9)
10. Tcpt, 19 October 2023, p 172(38-46) [↑](#footnote-ref-10)
11. Tcpt, 16 August 2023, p 7(20-25) [↑](#footnote-ref-11)
12. Tcpt, 16 August 2023, pp 7(27)-8(7) [↑](#footnote-ref-12)
13. Tcpt, 16 August 2023, p 38(20-45) [↑](#footnote-ref-13)
14. Tcpt, 17 October 2022, p 32(20-26) [↑](#footnote-ref-14)
15. Statement, Peter Clayton, 10 June 2022 at par 18 [↑](#footnote-ref-15)
16. Tcpt, 18 October 2022, p 83(6-8) [↑](#footnote-ref-16)
17. Affidavit, Nicholas Leach, 10 June 2022 at par 26 [↑](#footnote-ref-17)
18. Tcpt, 17 October 2022, p 27(39-40) [↑](#footnote-ref-18)
19. Tcpt, 18 October 2022, p 82(25-27) [↑](#footnote-ref-19)
20. Statement, James Staples, 10 June 2022 at par 18 [↑](#footnote-ref-20)
21. Tcpt, 17 October 2022, p 41(17-18) [↑](#footnote-ref-21)
22. Statement, Vanessa Chan, 10 June 2022 at par 15 [↑](#footnote-ref-22)
23. Statement, Peter Clayton, 10 June 2022 at par 24 [↑](#footnote-ref-23)
24. Statement, Maryanne Rogers, 10 June 2022 at par 15 [↑](#footnote-ref-24)
25. Tcpt, 17 October 2023, p 54(37) [↑](#footnote-ref-25)
26. Affidavit, Vanessa Chan, 30 September 2022 [↑](#footnote-ref-26)
27. Statement, Peter Clayton, 10 June 2022 [↑](#footnote-ref-27)
28. Statement, James Staples, 10 June 2022 at par 10 [↑](#footnote-ref-28)
29. Statement, James Staples, 29 September 2022 [↑](#footnote-ref-29)
30. Statement, Nicholas Lawrence, 29 September 2022 [↑](#footnote-ref-30)
31. Tcpt, 18 October 2022, p 136(22-34) [↑](#footnote-ref-31)
32. Tcpt, 16 August 2023, p 16(6)-17(8) [↑](#footnote-ref-32)
33. Tcpt, 10 January 2023, p 261(17-18) [↑](#footnote-ref-33)
34. Statement, James Staples, 29 September 2022 at par 19 [↑](#footnote-ref-34)
35. Tcpt, 17 October 2022, p 41(2) [↑](#footnote-ref-35)
36. Affidavit, Vanessa Chan, 30 September 2022, Exhibit VC-06, Tab 7 [↑](#footnote-ref-36)
37. Tcpt, 18 October 2022, p 137(1) [↑](#footnote-ref-37)
38. Tcpt, 17 November 2022, p 235(42-48) [↑](#footnote-ref-38)
39. Statement, Alison Graylin, 30 September 2022 [↑](#footnote-ref-39)
40. Tcpt, 18 October 2022, pp 100(48)-101(3) [↑](#footnote-ref-40)