

Fair Work Commission
Terrace Tower, 80 William Street
East Sydney NSW 2011
By email: amod@fwc.gov.au

30 November 2016

Re: AM2014/300 – award flexibility – time off in lieu of payment for overtime – AWU submission regarding the model TOIL term for the Horticulture Award and Pastoral Award

BACKGROUND

1. On 6 October 2015 a Full Bench issued a Decision and model time off in lieu of overtime (TOIL) term to be inserted into the majority of modern awards.
2. On 24 April 2015, further modifications were made, and a 'plain language' redraft of the model TOIL term was published for comment.
3. The final version of the model TOIL term was published as 'Attachment C' to the Full Bench Decision of 8 July 2016.
4. This Submission of the Australian Workers' Union responds to the Directions issued by the Commission on 26 September 2016, and the 26 October Submission of the National Farmers' Federation (NFF).
5. The NFF oppose the insertion of the model TOIL term, and propose a modified TOIL term to appear in the form for both the *Horticulture Award 2010* and the *Pastoral Award 2010*.
6. The AWU does not oppose the primary modification advanced by the NFF to create a TOIL 'standing arrangement'; however, there are some features of the Commission's model term that have been omitted without justification.
7. Our submissions in this respect appear below, and apply equally to both awards. However, for ease of reference, we refer to the draft clauses appearing in the NFF 26 October 2016 Draft Determination for the *Horticulture Award 2010* ('NFF Draft Determination').
8. References below to the 'model TOIL term' refer to the final 8 July 2016 version.

DEPARTURE FROM THE MODEL TOIL TERM

9. The AWU support the inclusion of the provisions contained in the Commission's model TOIL term for insertion into both the *Horticulture Award 2010* and the *Pastoral Award 2010*.
10. However, the AWU do not oppose the modification advanced by the NFF to the extent that a standing TOIL arrangement is proposed, rather than an arrangement to apply to each pay period. The AWU would consent to a TOIL term that accommodates a standing written arrangement, provided other components of the model TOIL term are preserved.
11. The model TOIL term has been carefully developed on the basis that its inclusion in the majority of modern awards will form a fair and relevant safety net of terms and conditions. For this reason, the language and terms appearing in an alternative proposal should reflect the model TOIL term as much as possible.
12. For example, the NFF proposed clause 24.2(b)(ii) reads:

Overtime taken as time off during ordinary time hours shall be taken at the ordinary time rate; that is, an hour for each overtime hour worked.

The model TOIL term at A.1(d) appears as follows:

The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause A.1 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

13. The wording contained in the model TOIL term as above is preferred for clarity, and promotes consistency across modern awards. The effect of the alternate clauses is the same.
14. With regard to payment of overtime, the NFF have replaced the phrase 'at the overtime rate applicable to the overtime when worked'¹ with the phrase 'at overtime rates'.² It is clear in the 8 July 2016 Decision that the intention of the chosen phrase was to introduce a 'point in time' element.³ This phrase should be preserved.
15. The NFF have removed the option to cash-out accrued TOIL on request. Clauses A.1(c)(iii) and (iv) of the model TOIL term reads:

¹ See Model TOIL term, clauses A.1 (c)(iii), (f), (g) and (k)

² See NFF Draft Determination, clause 24.1(b)(i)(B).

³ See paragraphs [60] and [61].

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

16. The NFF proposal only allows an employee to terminate a TOIL agreement thereby reverting to an arrangement of payment of overtime. There is no provision for the payment of accrued TOIL.⁴ The AWU is concerned that the NFF proposal significantly limits an employee's ability to access payment for overtime – which is the primary entitlement. If an employee is unable to find a time or reach an agreement to take TOIL, the option to otherwise be paid is entirely sensible. This issue has already been considered. The option to cash-out should be retained. We refer to the Full Bench Decision of 06 October 2015 at paragraphs [52] to [53] in this regard:

[52] Subclause 1.2(e) of the provisional model TOIL term provides that if requested by an employee the employer must pay the employee for any accrued but unused TOIL entitlement. The subclause specifies that such a payment "must be made in the first pay period following the request for payment". NFF submit this request is too restrictive and that it would be appropriate to provide some flexibility as to when the payment is to be made, such as within 14 days following the request for payment.

[53] We are not persuaded to make the amendment proposed by NFF. In the usual course overtime payments would be made in the following pay period and we see no reason for prescribing a different approach in relation to accrued but unused TOIL entitlements. We also note that the employer will have had the benefit of the employee's overtime and will have benefitted from any delay between the working of that overtime and the time at which payment for it is made.

17. The NFF proposed clause 24.1(b)(i)(B) appears as follows:

(B) include a note in the following terms:

"Time off in lieu of overtime is paid at the ordinary time rate and must be taken within six months of overtime being worked unless otherwise agreed..."

The model term at A.1(e) appears as follows:

(e) Time off must be taken:

⁴ See NFF Draft Determination, clause 24.1(b)(i)(C).

(i) *within the period of 6 months after the overtime is worked;
and*

(ii) *at a time or times within that period of 6 months agreed by the
employee and employer.*

18. The NFF have removed the requirement for the taking of TOIL within 6 months to be by mutual agreement (our emphasis) and have added the option of extending the period to take TOIL beyond 6 months (by agreement). In regards to these changes, the AWU submit the following:

18.1. that subclause (e)(ii) of the model TOIL term be preserved; and

18.2. the option of an extended period to take TOIL is acceptable provided clause 24.2(b)(i)(C) of the NFF draft determination accommodates the employees ability to 'cash-out' their accrued TOIL on request.

19. The NFF's proposed clause 24.2(b)(iii) should be amended per the underlined and strikethrough to accommodate the 'point in time' component of the accrued overtime as follows:

iii) The employer must keep a record of the employee's number of overtime hours worked, when those hours were worked ~~by the employee~~ and an updated record of the employee's time off in lieu balance.

CONCLUSION

20. The AWU does not oppose the NFF proposal to include a standing written TOIL arrangement nor do we oppose the extended period within which TOIL can be taken by agreement.

21. However, the AWU only support this proposal on the basis that the language and safeguards contained in the model TOIL term are otherwise preserved.

22. In particular, the phrase 'at the overtime rate applicable to the overtime when worked' and the ability to cash-out accrued TOIL should each be included in the alternative TOIL terms for the *Horticulture Award 2010* and *Pastoral Award 2010*.

END.



Roushan Walsh
NATIONAL LEGAL OFFICER