

4 yearly review of modern awards - Award Flexibility

AM2014/300

NATIONAL FARMERS' FEDERATION
SUBMISSION ON PROPOSED MODEL TERM FOR
TIME OFF IN LIEU OF OVERTIME

Date: 26 October 2016

1. The National Farmers' Federation (NFF) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. On 6 October 2015, the Full Bench of the Fair Work Commission (**Commission**) issued a decision in *4 yearly review of modern awards—Common issue—Award Flexibility* and set out a model time off in lieu of overtime (**TOIL**) term for insertion into the majority of modern awards.
3. On 24 April 2016, the Commission published a further 'plain English' draft model term for comment. The NFF filed our response to the 'plain English' model term on 23 March 2016.
4. This submission responds to Directions issued by the Commission on 26 September 2016, instructing parties opposed to a variation of the *Pastoral Award 2010* and the *Horticulture Award 2010* to insert the model TOIL term to file further submissions and evidence in support of their position by 26 October 2016.
5. The NFF's position has not changed since the 'plain English' model term was modified on 24 April 2016.

The 'plain English' model term

6. In our submission of 9 November 2016 the NFF raised the following concerns with the form of the TOIL model term set out by the Commission in their decision of 6 October 2016:
 - (a) The requirement for a separate written agreement to be made each time overtime is worked (subclause 1.2(a));
 - (b) The requirement for the written agreement to be in a prescribed form (subclause 1.2(a));
 - (c) The requirement that TOIL be agreed and taken within 6 months (subclause 1.2(c)); and

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(d) The right of the employee to demand payment for overtime at any time after, and despite, reaching agreement for TOIL (subclause 1.2(d));

(e) The requirement to pay overtime in the next pay period after an employee demand for payment is made (subclause 1.2(d));

7. The 'plain English' model term made one change of relevance to the above concerns:

TOIL model term of 6 October 2015	TOIL model term of 24 April 2016
A separate written agreement must be made by the employee and employer for each occasion on which overtime that has been worked is to be taken as time off in lieu.	Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement.

8. The later version of the term still requires a separate written agreement to be made each time overtime that has been worked in a particular pay period is to be taken as TOIL. In other words, a detailed written agreement must still be made each time TOIL is to be taken.
9. Work in the agriculture sector does not conform to standard business arrangements that apply in many other sectors. Employees on large, remote properties may work largely unsupervised for days or weeks at a time and with limited access to internet, email and phone facilities entering into a separate written agreement is impractical.
10. The agriculture sector is dictated to by seasons and the needs of livestock and plants. Hours of work have a strong element of unpredictability and, overtime is common at certain times of the year, while at other times there is less productive work required and employees can use this opportunity to take time off.
11. Reflecting this position, agricultural awards currently provide for TOIL as the 'default' mechanism to compensate employees when overtime is worked – while reserving the choice to be paid instead of taking time off to employees. This approach accommodates the need for flexibility, and delivers consistency of pay for employees during quieter periods.
12. Use of TOIL arrangements are common in the agriculture sector, and TOIL is often used by employees to attend family commitments, sometimes requiring extensive travel in rural and remote areas.
13. The requirement for a separate written agreement to be made in the agriculture sector is impractical and likely to place a substantial number of businesses in breach of the award. It will mean a separate written agreement is required each week or fortnight in businesses where TOIL is common practice. In circumstances where employees do not have any access to a phone or internet in that period of time, compliance will be

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impossible. While email can be used where possible, text message will not be available due to the prescribed content requirements for each agreement. A text message would be rendered 'no agreement' and create an overtime entitlement despite time off being taken in the meantime.

14. The current practice of entering into standing agreements for TOIL to be taken where overtime is worked unless otherwise advised by the employee is fair, relevant and appropriate for the agriculture sector. It will maintain existing flexibility in dealing of hours, while continuing to permit employees to opt for TOIL or paid overtime for all occasions where overtime is worked.

Conclusion

15. The NFF does not support the current model TOIL term in connection with the *Pastoral Award 2010* and the *Horticulture Award 2010*.
16. The NFF would support a modified TOIL term that continues the capacity to make standing agreements in relation to TOIL. Draft determinations providing for this approach are attached to this submission.
17. The draft determinations largely reflect the position agreed with the AWU in discussions recorded at PN1233 to PN1246 of the transcript of 10 December 2015. However, they adopt the model term's six month period within which time off must be taken, which is necessary to accommodate seasonal peaks in industries such as the dairy industry, which has peak milking and calving periods.

Sarah McKinnon

General Manager, Workplace Relations and Legal Affairs

26 October 2016

DRAFT DETERMINATION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award flexibility (AM2014/300)

PASTORAL AWARD 2010

[MA000035] Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROBERTS

MELBOURNE, XX OCTOBER 2015

A. Further to the Full Bench decision issued by the Fair Work Commission on XX XX XX, the above award is to be varied as follows:

1. By deleting clause 31.3 and inserting a new clause 31.3 as follows:

31.3 Time off in lieu of payment for overtime

(a) An employee may elect with the consent of the employer to take time off in lieu of payment for overtime at a time or times agreed with the employer, in accordance with clause 31.3.

(b) The following requirements apply to time off in lieu of payment for overtime:

(i) A written agreement must be made by the employee and employer if the employee elects, and the employer agrees, that time off in lieu will be given to the employee for overtime worked. The agreement must be retained as an employee record and must:

(A) state that the employee and employer agree that the employee may take time off in lieu of payment for overtime; and

(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. If time off in lieu of overtime is not taken within six months, and no agreement is reached for it to be taken at another mutually agreed time, the employee may request the employer to make payment to the employee at overtime rates in the next pay period after that six month period.”

(C) state that the agreement can be terminated in writing with immediate effect by either the employer or the employee. If the agreement is terminated, the employee will be paid for all overtime worked from that date.

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(ii) 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.

(iii) The employer must keep a record of overtime hours worked by the employee and an updated record of the employee's time off in lieu balance.

(iv) The time to be taken off in lieu of overtime must be agreed between the employee and employer and must be taken within six months of the overtime being worked, or as otherwise mutually agreed. Otherwise, the employee may request the employer to make payment for the overtime to the employee at overtime rates in the next pay period after that six month period.

(iv) If, upon termination of employment, an employee has an accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used, the employee must be paid for the overtime at the overtime rate applying to the overtime worked.

(c) An employee who is entitled to request a change in working arrangements under section 65 of the *Fair Work Act 2009* may make a request under that section for time off in lieu of payment for overtime at a time or times specified in the request or at a time or times to be subsequently agreed with the employer. Clause 31.3 will apply to such time off in lieu. Pursuant to section 65(5) of the *Fair Work Act 2009*, the employer may refuse such a request only on reasonable business grounds.

(d) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment for overtime.

Note: under s 345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employees workplace rights under clause 31.3

2. By inserting a new clause 36.12 as follows:

36.12 Time off in lieu of payment for overtime

(a) An employee may elect with the consent of the employer to take time off in lieu of payment for overtime at a time or times agreed with the employer, in accordance with clause 36.12.

(b) The following requirements apply to time off in lieu of payment for overtime:

(i) A written agreement must be made by the employee and employer if the employee elects, and the employer agrees, that time off in lieu will be given to the employee for overtime worked. The agreement must be retained as an employee record and must:

(B) state that the employee and employer agree that the employee may take time off in lieu of payment for overtime; and

(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. If time off in lieu of overtime is not taken within six months, and no agreement is reached for it to be taken at another mutually agreed time, the employee may request the employer to make payment to the employee at overtime rates in the next pay period after that six month period.”

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(C) state that the agreement can be terminated in writing with immediate effect by either the employer or the employee. If the agreement is terminated, the employee will be paid for all overtime worked from that date.

(ii) 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.

(iii) The employer must keep a record of overtime hours worked by the employee and an updated record of the employee's time off in lieu balance.

(iv) The time to be taken off in lieu of overtime must be agreed between the employee and employer and must be taken within six months of the overtime being worked, or as otherwise mutually agreed. Otherwise, the employee may request the employer to make payment for the overtime to the employee at overtime rates in the next pay period after that six month period.

(iv) If, upon termination of employment, an employee has an accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used, the employee must be paid for the overtime at the overtime rate applying to the overtime worked.

(c) An employee who is entitled to request a change in working arrangements under section 65 of the *Fair Work Act 2009* may make a request under that section for time off in lieu of payment for overtime at a time or times specified in the request or at a time or times to be subsequently agreed with the employer. Clause 36.12 will apply to such time off in lieu. Pursuant to section 65(5) of the *Fair Work Act 2009*, the employer may refuse such a request only on reasonable business grounds.

(d) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment for overtime.

Note: under s 345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employees workplace rights under clause 36.12.

3. By deleting clause 42.2 and inserting a new clause 42.2 as follows:

42.2 Time off in lieu of payment for overtime

(a) An employee may elect with the consent of the employer to take time off in lieu of payment for overtime at a time or times agreed with the employer, in accordance with clause 42.2.

(b) The following requirements apply to time off in lieu of payment for overtime:

(i) A written agreement must be made by the employee and employer if the employee elects, and the employer agrees, that time off in lieu will be given to the employee for overtime worked. The agreement must be retained as an employee record and must:

(A) state that the employee and employer agree that the employee may take time off in lieu of payment for overtime; and

(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. If time off in lieu of overtime is not taken within six months, and no agreement is reached for it to be taken at another mutually agreed time, the employee

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may request the employer to make payment to the employee at overtime rates in the next pay period after that six month period.”

(C) state that the agreement can be terminated in writing with immediate effect by either the employer or the employee. If the agreement is terminated, the employee will be paid for all overtime worked from that date.

(ii) 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.

(iii) The employer must keep a record of overtime hours worked by the employee and an updated record of the employee’s time off in lieu balance.

(iv) The time to be taken off in lieu of overtime must be agreed between the employee and employer and must be taken within six months of the overtime being worked, or as otherwise mutually agreed. Otherwise, the employee may request the employer to make payment for the overtime to the employee at overtime rates in the next pay period after that six month period.

(iv) If, upon termination of employment, an employee has an accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used, the employee must be paid for the overtime at the overtime rate applying to the overtime worked.

(c) An employee who is entitled to request a change in working arrangements under section 65 of the *Fair Work Act 2009* may make a request under that section for time off in lieu of payment for overtime at a time or times specified in the request or at a time or times to be subsequently agreed with the employer. Clause 42.2 will apply to such time off in lieu. Pursuant to section 65(5) of the *Fair Work Act 2009*, the employer may refuse such a request only on reasonable business grounds.

(d) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment for overtime.

Note: under s 345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employees workplace rights under clause 42.2

DRAFT DETERMINATION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Award flexibility (AM2014/300)

HORTICULTURE AWARD 2010

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROBERTS

MELBOURNE, XX OCTOBER 2015

4 yearly review of modern awards - award flexibility - time off in lieu of payment for overtime.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX XX XX, the above award is to be varied as follows:

1. 1. By deleting clause “24.1 – Time off instead of payment for overtime” and inserting the following:

24.2 Time off in lieu of payment for overtime

(a) An employee may elect with the consent of the employer to take time off in lieu of payment for overtime at a time or times agreed with the employer, in accordance with clause 24.2.

(b) The following requirements apply to time off in lieu of payment for overtime:

(i) A written agreement must be made by the employee and employer if the employee elects, and the employer agrees, that time off in lieu will be given to the employee for overtime worked. The agreement must be retained as an employee record and must:

(A) state that the employee and employer agree that the employee may take time off in lieu of payment for overtime; and

(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. If time off in lieu of overtime is not taken within six months, and no agreement is reached for it to be taken at another mutually agreed time, the employee

IN THE FAIR WORK COMMISSION

may request the employer to make payment to the employee at overtime rates in the next pay period after that six month period.”

(C) state that the agreement can be terminated in writing with immediate effect by either the employer or the employee. If the agreement is terminated, the employee will be paid for all overtime worked from that date.

(ii) 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.

(iii) The employer must keep a record of overtime hours worked by the employee and an updated record of the employee’s time off in lieu balance.

(iv) The time to be taken off in lieu of overtime must be agreed between the employee and employer and must be taken within six months of the overtime being worked, or as otherwise mutually agreed. Otherwise, the employee may request the employer to make payment for the overtime to the employee at overtime rates in the next pay period after that six month period.

(iv) If, upon termination of employment, an employee has an accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used, the employee must be paid for the overtime at the overtime rate applying to the overtime worked.

(c) An employee who is entitled to request a change in working arrangements under section 65 of the *Fair Work Act 2009* may make a request under that section for time off in lieu of payment for overtime at a time or times specified in the request or at a time or times to be subsequently agreed with the employer. Clause 24.2 will apply to such time off in lieu. Pursuant to section 65(5) of the *Fair Work Act 2009*, the employer may refuse such a request only on reasonable business grounds.

(d) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off in lieu of payment for overtime.

Note: under s 345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employees workplace rights under clause 24.2.

IN THE FAIR WORK COMMISSION

Matter No.: 2014/300

Re: s.156 4 yearly review of modern awards – Award Flexibility

STATEMENT OF GRACIA KUSUMA

On the 26th of October 2016, I, Gracia Kusuma, [REDACTED] in the State of New South Wales, state as follows:

1. I have been employed as the Industrial Relations Manager with NSW Farmers Association for approximately 5 years.
2. As part of my role, I manage two other team members within the Industrial Relation (IR) department.
3. There are around 4500 members who have access to the industrial relations service with NSW Farmers.
4. The majority of farming operations are small businesses. In the case of our membership, around 99% of our members employ 10 or less full time equivalent employees.
5. Amongst several other functions, the IR department's main role is delivering advice and assistance to members on their workplace relations matters, including award interpretation. This involves my team members and I engaging with farmers on a daily basis on how the award provisions affect their farming enterprise.
6. In relation to time off in lieu arrangements, a common practice for farmers is to have a standing agreement with their employees. To track employees' time off in lieu balance, farmers generally keep a running tally of time worked and time taken off as time off in lieu. Record of time worked is reliant upon roster or time sheet completed by the employees.
7. The process to take time off in most farming enterprises is fairly flexible, doing away with the need of submitting a leave form. Frequently, a verbal notification or text message exchange is acceptable by most farmers.
8. Time off in lieu arrangements are preferred by a large proportion of farming enterprises due to the flexibility that it affords both the employers and employees. Employees are able to attend to their family commitments or attend medical appointments without having to access their accrued annual leave when they have sufficient accrued time off in lieu. It also provides consistency of pay for employees during quieter periods. Due to seasonality nature of farming, there would always be

several periods over a year when long work days will be involved, for example harvesting, sowing, calving, lambing. By the same token, there would be periods when there are less work available, such as during the wet spell we have just experienced in New South Wales.

9. Specifically with the *Pastoral Award 2010*, ordinary hours of work can be averaged over a 4 week consecutive period. In farming, there could be significant fluctuations of work hours between each day due to weather conditions or time of the season such as sowing, harvesting, lambing, etc. When work hours tick over to overtime is often unknown until after the event once work hours reported on timesheets are calculated prior to pay day.
10. Farming enterprises will be placed on excessive administrative burden if a separate written agreement is required for every single occasion overtime is agreed to be taken as time off in lieu. It will require farmers to continually manage each employee's work hours. Considering most farming enterprises are small business operator with stretched resources for administrative work, it is a requirement that won't be operationally viable.


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Gracia Kusuma

26 October 2016
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Date

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/300

Re: s.156 4 yearly review of modern awards – Award Flexibility

STATEMENT OF JENNIFER CORKHILL

On 26 October 2016, I, Jennifer Corkhill of [REDACTED] in the State of South Australia, state as follows:

1. I am a solicitor admitted to practice in the State of South Australia.
2. I have 16 years of experience in industrial relations in the farming industry.
3. My practice predominantly provides industrial relations advice to the grain and livestock industries and in particular the dairy industry.
4. I have reviewed the Time Off in Lieu (**TOIL**) model terms set out by the Commission in their decision of 6 October 2015 and 24 April 2016.
5. Both versions of the model term are too onerous and will create an unreasonable regulatory burden for employers in the agricultural industries.
6. TOIL entitlements have been a part of the agricultural industry for many years and have operated well without the additional requirements imposed by the model term such as the requirement for separate written agreements, and the requirement that time off must be taken within six months.
7. The requirement for a separate written agreement each time the TOIL is worked under both the October model term and the plain English model term will be so onerous as to create a significant risk of non-compliance. Given the irregularity of hours in the sector and the need to work large amounts of overtime at certain times of the year this will be extremely burdensome for employers.
8. For large employees, this will amount to a ‘paper war’ and for small employees it will be unnecessary and significant red tape. This is particularly so given that the current arrangements for TOIL under the awards have been effective to date.
9. As an example, a large dairy farm with staff working overtime most if not every day during the calving season and fodder conservation season would be required to complete forms every day for over 80 farm staff under the proposed model term.
10. The requirement to take TOIL within a six month period of time does not align well with the seasonal nature of the industry. For example, peak labour times requiring longer hours of work in the dairy industry can be up to six months.
11. The requirement to take TOIL within a six month period will necessarily mean significant record keeping and constant review and reconciliation to ensure that the relevant hours worked are taken within the six month period.

12. The need to reduce red tape should be a priority as unnecessary regulatory burden will weigh heavily on employers in the agricultural industry, putting at risk their capacity to comply with award requirements.
13. A substantial education program would be necessary to ensure that the over 120,000 farmers who employ staff across Australia are made aware of these changes.

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Jennifer Corkhill

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Date