

**4 yearly review of modern awards - Award flexibility common issue**

**AM2014/300**

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

Date: 23 May 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 24 April 2016, the Full Bench of the Fair Work Commission (**Commission**) issued its decision in *4 yearly review of modern awards—Common issue—Award Flexibility* [20164] FWCFB 2602 (**the decision**).
3. In the decision, the Commission determined a model time off in lieu of overtime (**TOIL**) term for insertion in the majority of modern awards.
4. On 9 May 2016, the Commission published a further 'plain English' draft model term for comment. This submission responds to the request for comments by 23 May 2016.

**The statutory framework**

5. Section 156 of Part 2-3 of the *Fair Work Act 2009* (**FW Act**) requires the Commission to conduct a 4 yearly review of modern awards. Each modern award must be reviewed in its own right.
6. In a 4 yearly review of modern awards, the Commission can make, vary and revoke modern awards (subsection 156(2)(b)).
7. A decision to make, vary or revoke a modern award under Part 2-3 of the FW Act can only be made if the Commission is satisfied that it is necessary to achieve the modern awards objective.

8. Section 134 of the FW Act contains the modern awards objective. Modern awards must provide a 'fair and relevant minimum safety net of terms and conditions' of employment, taking into account the following criteria:
  - a. relative living standards and the needs of the low paid (subsection 134(1)(a));
  - b. the need to encourage collective bargaining (subsection 134(1)(b));
  - c. the need to promote social inclusion through increased workforce participation (subsection 134(1)(c));
  - d. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
  - e. the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; or shifts (subsection 134(1)(da));
  - f. the principle of equal remuneration for work of equal or comparable value (subsection 134(1)(e));
  - g. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f));
  - h. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)); and
  - i. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h)).
9. Under section 136, a modern award can only include terms that are permitted or required by:
  - a. Subdivision B of Part 2-3 (terms that may be included in modern awards)
  - b. Subdivision C of Part 2-3 (terms that must be included in modern awards)
  - c. Section 55 (interaction between the National Employment Standards (**NES**) and modern awards or enterprise agreements); or

d. Part 2-2 (NES).

10. Section 138 of the FW Act provides for modern awards to include terms that are either permitted or required to be included, but only to the extent necessary to achieve the modern awards objective and the minimum wages objective.
11. Modern award terms must not exclude the NES, or any provision of the NES (subsection 55(1)).
12. Once a decision is made under Part 2-3 of the FW Act, it cannot be varied or revoked (section 603(3) of Part 5-1 of the FW Act).

### **The October model TOIL term**

13. In a decision on 6 October 2016<sup>1</sup>, the Full Bench determined the final version of the model TOIL term.
14. Attachment 3 to the Full Bench decision of 6 October 2015 set out the model TOIL term, as follows:

#### ***Attachment 3 – final version of the model TOIL term***

##### ***1. Time off in lieu of payment for overtime***

*1.1 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 this clause.*

*1.2 The following requirements apply to time off in lieu of payment for overtime:*

*(a) 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. Each such agreement must be retained as an employee record and must:*

*(i) state when the employee started and ceased working the overtime hours;*

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

*(iii) include a note in the following terms:*

*'If requested by the employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime which the*

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<sup>1</sup> [2015] FWCFB 6847

*employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request.'*

*(b) 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.*

*(c) 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. Otherwise, payment for the overtime must be made to the employee at overtime rates in the next pay period after that six month period.*

*(d) Notwithstanding any other provision of clause 1.2, if requested by an employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request for payment.*

*(e) 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.*

*1.3 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. This clause 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.*

*1.4 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 employee's workplace rights under this award clause.*

15. Following further submissions, the Commission agreed to minor changes to the proposed model TOIL term so that one written agreement could cover a number of periods of overtime in a single pay cycle.

### **The 'plain English' model TOIL term**

16. On 24 April 2016, a Full Bench of the Commission issued a further decision<sup>2</sup> in the proceedings dealing with the form of the proposed model TOIL term.

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<sup>2</sup> [2016] FWCFB 2602

17. Attachment B to the Full Bench decision of 24 April 2016 sets out a modified, plain English version of the term:

***A.1 Time off instead of payment for overtime***

*(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.*

*(b) 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 under clause A.1.*

*(c) An agreement must state each of the following:*

*(i) the number of overtime hours to which it applies and when those hours were worked;*

*(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;*

*(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 pay period immediately following the request.*

*Note: An example of the type of TOIL agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of TOIL agreement set out at Schedule [x]. A TOIL agreement can also be made by an exchange of emails between the employee and employer, or by other electronic means.*

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

*EXAMPLE: An employee who worked 2 overtime hours is entitled to time off of 2 hours.*

*(e) Time off must be taken:*

*(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.*

*(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the*

*employee for the overtime, in the pay period immediately following the request, at the overtime rate applicable to the overtime when worked.*

*(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the pay period immediately following those 6 months, at the overtime rate applicable to the overtime when worked.*

*(h) The employer must keep a copy of any agreement under clause A.1 as an employee record.*

*(i) An employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause A.1.*

*(j) An employee may, under section 65 of the Fair Work Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. Clause A.1 applies to any such time off granted by the employer as if it were time off covered by an agreement under clause A.1.*

*Note: If an employee makes a request under section 65 of the Fair Work Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Fair Work Act).*

*(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.*

*Note: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.*

### **Comments on the proposed plain English model term**

18. The NFF cautions against the making of changes to the wording of modern awards, which are legal instruments that determine workplace rights and responsibilities. Even the smallest changes can have inadvertent consequences, and in many cases these will not be known until a later time when a claim arises in relation to the modern award.

19. Some instances where there is potential for change in meaning include:

(a) the use of examples which create potential to misstate the legal position or to misrepresent it to the reader;

(b) where key elements of a term are unintentionally lost in translation (such as proposed clause (e) of the model term, which does not deal with the amount of

time to be taken in the same way as clause (c) of the October 2015 model term does);

(c) where the effect of a term is narrowed in scope (such as proposed clause (i) of the plain English version of the term).

20. The word “notwithstanding” may be considered archaic and no longer appropriate for inclusion in modern awards. However, the word has a particular legal meaning and affects how the interaction of particular terms is construed. It should be replaced (for example, with ‘despite’) rather than removed entirely.
21. In some respects, the plain English model term is more complex than the original term. In our view, this outcome should be avoided and the original wording retained if simpler and easier to understand.
22. As an overarching comment, replacing the words “in lieu” with the words “instead” means that the abbreviation “TOIL” is no longer correct. This abbreviation is also used throughout the term and in the proposed template “TOIL Agreement”. The change may create confusion among stakeholders familiar with the term TOIL, which is a generally well understood concept. Payroll systems which currently use the expression TOIL on payslips will require adjustment and this will create an administrative burden on business.
23. The attached table provides a detailed summary of our views on the proposed plain English model TOIL term.
24. Finally, while we appreciate the opportunity to comment on the proposed model term, we note that no decision has yet been made in relation to time off in lieu provisions in the Horticulture Award 2010 and the Pastoral Award 2010. This submission should not be taken as indicating our support for any change to either modern award.

**Sarah McKinnon**

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**23 May 2016**

**Summary of NFF comments in relation to the proposed plain English model TOIL term**

<i>October 2015 model term</i>	<i>April 2016 model term</i>	<i>NFF Comment</i>
<b>1. Time off in lieu of payment for overtime</b>	<b>A.1 Time off instead of payment for overtime</b>	“in lieu” replaced with “instead” – can no longer use term TOIL
1.1 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 this clause.	(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.	Plain English term introduces new concepts to the introductory para:  - Must be in writing; - Agreement must be for a particular amount of overtime; - Does not deal with when the time off can be taken (moved to (e)(ii))
1.2 The following requirements apply to time off in lieu of payment for overtime:		Removed
(a) 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.	(b) 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 under clause A.1.	The plain English term is more complex than the original term. Suggest as follows:  A separate written agreement must be made by the employee and employer for each pay period during which time off is taken instead of payment for overtime.
Each such agreement must be retained as an employee record and must:  (i) state when the employee started and ceased working the overtime hours;  (ii) state that the employee and employer agree that the employee may take time off in lieu of payment for the overtime; and  (iii) include a note in the following terms:  ‘If requested by the employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime	(c) An agreement must state each of the following:  (i) the number of overtime hours to which it applies and when those hours were worked;  (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;  (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	Opening line moved to (h) in plain English term  (iv) should specify that it is the ‘employee’s request’, as follows:  (iv) that any payment mentioned in subparagraph (iii) must be made in the pay period immediately following the <i>employee’s</i> request.



<i>October 2015 model term</i>	<i>April 2016 model term</i>	<i>NFF Comment</i>
which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request.’	overtime rate applicable to the overtime when worked;  <b>(iv)</b> that any payment mentioned in subparagraph (iii) must be made in the pay period immediately following the request.	
	Note: An example of the type of TOIL agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of TOIL agreement set out at Schedule [x]. A TOIL agreement can also be made by an exchange of emails between the employee and employer, or by other electronic means.	Reference to TOIL will need to be removed in the Note and in the proposed Schedule.
(b) 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.	<b>(d)</b> The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.	The plain English term is more complex than the original term and could result in a change of meaning. Suggest leaving as is, perhaps replacing “ordinary time rate” with “ordinary hourly rate” or equivalent term used in the relevant modern award.
	EXAMPLE: An employee who worked 2 overtime hours is entitled to time off of 2 hours.	As the entitlement only operates where there is agreement, this should be reflected in the example if it is to be included:  EXAMPLE: An employee who worked 2 overtime hours can agree to take 2 hours’ time off.
(c) 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. Otherwise, payment for the overtime must be made to the employee at overtime rates in the next pay period after that six month period.	<b>(e)</b> Time off must be taken:  <b>(i)</b> within the period of 6 months after the overtime is worked; and  <b>(ii)</b> at a time or times within that period of 6 months agreed by the employee and employer.	The plain English version of this clause does not deal with the amount of time to be taken, and it is not necessary to always refer to “the/that period of 6 months”.  Suggest rewording:  <b>(e)</b> The agreed amount of time off must be taken:  <b>(i)</b> at a time or times agreed between the employee and employer; and  <b>(ii)</b> within 6 months of the overtime being worked.

<i>October 2015 model term</i>	<i>April 2016 model term</i>	<i>NFF Comment</i>
(d) Notwithstanding any other provision of clause 1.2, if requested by an employee at any time, the employer must pay the employee for any accrued entitlement to take time off in lieu of payment for overtime which the employee has not yet used. Payment must be made at the overtime rate applying to the overtime worked and must be made in the next pay period following the request for payment.	(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the employee for the overtime, in the pay period immediately following the request, at the overtime rate applicable to the overtime when worked.	While the word ‘notwithstanding’ may be considered archaic, it does have legal meaning. To avoid potentially inadvertent consequences from its omission, consideration could be given to replacing the term with the term “despite”.
Second sentence of (c) above:  Otherwise, payment for the overtime must be made to the employee at overtime rates in the next pay period after that six month period.	(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the pay period immediately following those 6 months, at the overtime rate applicable to the overtime when worked.	
	(h) The employer must keep a copy of any agreement under clause A.1 as an employee record.	Note relocation from 1.2(a) to stand alone clause.
1.4 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.	(i) An employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause A.1.	The plain English version of this clause is narrower scope than the October 2015 model term.
1.3 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. This clause 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.	(j) An employee may, under section 65 of the Fair Work Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. Clause A.1 applies to any such time off granted by the employer as if it were time off covered by an agreement under clause A.1.	As the Act is a defined term in all modern awards, it does not need to be referenced in full.  The words “as if it were time off covered by an agreement under...” could be removed, given that despite the request being made under section 65, it will also be covered by a written agreement under proposed clause.
	Note: If an employee makes a request under section 65 of the Fair Work Act for a change in	As above, the Act is a defined term and does not need to be referenced in full. The word

<i>October 2015 model term</i>	<i>April 2016 model term</i>	<i>NFF Comment</i>
	working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Fair Work Act).	“only” appears before the word “on” in section 65(5) of the Act.
(e) 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.	(k) If, on the termination of the employee’s employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.	The phrase “applicable to the overtime when worked” is slightly different to the phrase “applying to the overtime worked” and could inadvertently change meaning if construed to introduce a new ‘point in time’ element to the clause.
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 employee’s workplace rights under this award clause.	Note: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.	