

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

**Response to April Model TOIL Term  
Award Flexibility  
(AM2014/300)**

**23 May 2016**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS

### AM2014/300 – AWARD FLEXIBILITY

#### Introduction

1. The Australian Industry Group (**Ai Group**) makes this brief submission following the 24 April 2016 Decision<sup>1</sup> of the Fair Work Commission (**Commission**) in respect of:
  - a. The proposed plain language model TOIL term<sup>2</sup> (**the April model TOIL term**) and;
  - b. The Schedule of Draft Determinations incorporating the proposed April model TOIL term in 26 modern awards that do not presently contain a TOIL clause.<sup>3</sup>

#### The proposed April model TOIL term

2. In principle, Ai Group does not oppose the Commission's re-drafting in plain language of the model TOIL term determined in the Commission's October 2015 decision.<sup>4</sup> Award provisions should be easy to understand and apply.
3. However, to ensure that this is achieved, Ai Group suggests the following amendments to the April model TOIL term to remove uncertainty:

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

- (a) An employee and employer may agree in writing to the employee taking time off instead in lieu 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 in lieu of the employee being paid

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<sup>1</sup> [2016] FWCFB 2602

<sup>2</sup> [2016] FWCFB 2602 at [47]

<sup>3</sup> 2016] FWCFB 2602 at [48]

<sup>4</sup> [2015] FWCFB 6843, Attachment 3

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 in lieu 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 next 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 next 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 next 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.

## 2. Schedule X—TOIL template agreement

### AGREEMENT FOR TIME OFF **INSTEAD IN LIEU** OF PAYMENT FOR OVERTIME

Name of employee: \_\_\_\_\_

Name of employer: \_\_\_\_\_

**The employer and employee agree that the employee may take time off **instead in lieu** of being paid for the following amount of overtime that has been worked by the employee:**

Date and time overtime started: \_\_\_/\_\_\_/20\_\_\_ am/pm

Date and time overtime ended: \_\_\_/\_\_\_/20\_\_\_ am/pm

Amount of overtime worked: \_\_\_\_\_ hours and \_\_\_\_\_ minutes

**The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period immediately following the request.**

Signature of employee: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_

Name of employer representative: \_\_\_\_\_

Signature of employer representative: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_

### **“Next” pay period**

4. The TOIL clause determined by the Commission in its October 2015 decision<sup>5</sup> contained, in equivalent sub-clauses, a reference to the “*next pay period*” in respect of employer obligations to pay the employee for the overtime worked but not taken as time off.
5. For instance, sub-clause 1.2(a)(iii) of the final October 2015 TOIL term read:

‘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 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.’
6. Consistent with the Commission’s October 2015 decision, any obligation upon an employer to pay an employee overtime for TOIL not taken should not be imposed before the *next* pay period following the employee’s request to be paid overtime.

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<sup>5</sup> [2015] FWCFB 6843, Attachment 3

7. The April model term could be interpreted so that the employer's obligation to pay overtime is imposed in the same pay period as the employee's request. This is because typically part of the current pay period would immediately follow the employee's request.

### **“Time Off in Lieu”**

8. The very widely used and understood abbreviation “TOIL” relates to the phrase “Time Off in Lieu”.
9. The notion of changing the wording of the phrase, but continuing to use the abbreviation “TOIL” is bound to confuse readers of awards.
10. The phrase “Time Off in Lieu” should be retained.

### **Conclusion**

11. The amendments to the April TOIL terms, as outlined above, would:
  - a. Remove uncertainty as to whether or not an employer was obliged to pay for the overtime in the same pay period following the employee's request to be paid overtime, or obliged to pay no later than the subsequent pay period that followed the employee's request;
  - b. Remove uncertainty associated with the abbreviation “TOIL”;
  - c. Create an award term that is consistent with the modern awards objective factor in s.134(1)(g) regarding the need to ensure a simple, easy to understand modern award system;
  - d. Create an award term that considers the impact on business, including the regulatory burden; and
  - e. Continues the effect of the Commission's October 2015 decision and the intended operation of the October TOIL term.

## **Schedule of Draft Determinations**

12. Other than the amendments referred above, Ai Group has not identified any issues or concern regarding the Draft Determinations in respect of the 26 modern awards that do not presently contain a term for TOIL.