

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/300 - Award flexibility - TOIL of payment for overtime

Submission on behalf of the Group of Eight Universities

1. We act on behalf of the Group of Eight Universities comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland. These universities together employ approximately half of the staff in the university sector.
2. These submissions address the issue of the potential incorporation of the model term in relation to time off in lieu of payment for overtime (**TOIL Model Term**) into the Higher Education-General Staff- Award 2010 (MA00007) (**General Staff Award**), (as set out in the Draft Determination issued for the General Staff Award for comment on 16 October 2015 as part of the schedule of draft determinations). That draft determination followed the decisions of the Full Bench on 16 July 2015 [2015] FWCFB 4466 and on 6 October 2015 [2015] FWCFB 6847 (**TOIL Full Bench**).

Summary

3. The Group of Eight Universities oppose the Draft Determination being made and oppose the TOIL Model Term being included in the General Staff Award for the reasons set out in these submissions. In the alternative the Draft Determination should be modified and adopted in the form of **Attachment 1**.
4. The Draft Determination should not be adopted for a number of reasons:
 - (a) The adoption of the Draft Determination will effectively introduce a new entitlement to overtime pay for employees at classifications above Higher Education Worker (HEW) 6 in circumstances where:
 - (i) This is inconsistent with the current award regulation, which provides that employees at HEW 7 and above are expressly not eligible for overtime payments, but have certain access to time off in lieu of additional hours worked;
 - (ii) It goes beyond the scope of what was considered and determined by the TOIL Full Bench. The TOIL Full Bench was considering and determined provisions regarding time off in lieu of overtime provisions for employees who had an existing award entitlement to overtime pay. The TOIL Full Bench was not considering, was not addressed on, did not hear any

evidence or application about introducing new overtime pay entitlements in any award, including the General Staff Award and did not make such a determination;

- (iii) It would be a substantive change from the existing General Staff Award in circumstances where no application was made for additional overtime payment entitlements in respect of the General Staff Award, whether as part of the TOIL Full Bench matters or as part of the award stream. No merit determination has been made requiring departure from the existing scope of employees who have eligibility for overtime pay under the General Staff Award. Varying the General Staff Award in the manner proposed in those circumstances would be inconsistent with the FWC Full Bench view expressed in the Preliminary Jurisdictional Issues decision¹; and
 - (iv) It would also be inconsistent with and have no regard to the award entitlements considered and included by the AIRC in historical awards for general staff in the sector, including predecessor awards that were considered in establishing the current Modern General Staff Award.
- (b) The existing award provisions already provide for TOIL, but with a different paradigm, which includes for those staff that have no entitlement to overtime pay, a right to TOIL (as of right for staff at Levels HEW 7 and 8) and where it would be unreasonable not to provide, for the very senior classifications of HEW 9 and above. The existing award provisions concerning overtime pay and TOIL were the subject of specific submissions and determination by the AIRC Full Bench in making the Modern General Staff Award and no clear basis has been made out for adoption of different provisions. Further, to adopt different provisions in the absence of any evidence that the particular award provisions in the General Staff Award are not meeting the modern awards objective, would be contrary to the views of the Full Bench of this Commission² and the Federal Court³;
- (c) The Commission has already recognised and accepted that a uniform set of TOIL provisions across all awards is not being adopted and in doing so has given weight to existing award provisions and history of the existing award provisions over uniformity. For example those awards not containing overtime entitlements will not include the model clause and some awards in construction and seafaring have

¹ [2014] FWCFB 1788

² As observed in the Preliminary Decision, the TOIL Full Bench is to proceed on the basis that *prima facie* the General Staff Award (including the existing TOIL provisions) meets the modern award objectives in section 134(1) of the Fair Work Act 2009 (Cth) (**FW Act**).

³ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*, [2012] FCA 480 at 46.

been referred to the award stream. More generally, awards with existing TOIL at overtime rates are having their historical award treatment maintained and will not be amended to provide for TOIL at time for time;

- (d) Adopting, the Draft Determination would undermine enterprise bargaining in the sector and undermine the Modern Awards objective which includes a "relevant" safety net and the need to encourage collective bargaining⁴. The existing General Staff Award provisions have been broadly reflected in and formed the basis of enterprise bargaining across the sector resulting in overtime entitlements and TOIL entitlements for particular classifications of employees and not for others. The adoption of a new TOIL and overtime payment regime would undermine the bargained outcomes in the sector and would not reflect a relevant safety net, departing from the approach and outcomes in the sector .
- (e) If required to be applied in practice by Universities, the Draft Determination would require overtime payments to senior and managerial staff, both:
 - (i) imposing additional restrictive award regulation on and in respect of groups of senior, generally self-managed employees;
 - (ii) result in increased cost to University's requiring not only the payment of salaries that previously were set to accommodate such senior and managerial staff, but separately to pay overtime payments upon election of the staff member and otherwise on termination (as provided in the model clause); and
- (f) The Draft Determination is inconsistent and confusing.

5. In the alternative, for the reasons set out below, given the unique history of the overtime and TOIL provisions in the General Staff Award, and that the provisions are not typical of other TOIL provisions in awards, the determination of whether the Model Term be adopted and the appropriate formulation of that determination should be considered as part of the award stream that will more fully be considering the higher education awards (and evidence). A Full Bench has already been allocated the education awards including the General Staff Award, in AM2015/6 (**Education Full Bench**).

6. In the further alternative, if the model clause is to be adopted now in some way for the General Staff Award without such hearing and consideration by the Education Full Bench, it should clearly only be in respect of those employees that currently have an entitlement to overtime pay, being those employees identified in clause 26.1(a) of the General Staff Award, and the Draft Determination should be amended accordingly. A Draft Determination to this effect is set out at **Attachment 1** to these submissions.

⁴ S.134(1)(b)

The context of the four yearly review and any proposal to vary a modern award

7. The Full Bench in the Preliminary Jurisdictional Issues decision made some important observations about the Review and any proposal to vary a modern award, which are relevant to these submissions.
8. At paragraph [60], the Full Bench states “*The need for a “stable” modern awards systems suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances... However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*”
9. Further, parties seeking a variation (although in this case there have not been any seeking to vary the TOIL or overtime provisions) must demonstrate it is necessary to achieve the modern awards objective and also noting that the Commission will start from the premise that the Modern Awards made 4 years ago did meet the modern awards objective.
10. All of those matters weigh against the substantive change in the General Staff Award provisions reflected in the Draft Determination.

Existing TOIL Provisions in the General Staff Award

11. The existing provisions in General Staff Award already regulate overtime and provide an entitlement to TOIL (clause 26). In summary, the existing TOIL clause provides that:

An employee will be paid overtime or provided with time off instead of overtime payment for all authorised work performed outside of, or in excess of, the ordinary or rostered hours as follows:

- (a) *An employee classified at HEW 6 or below will be eligible to receive paid overtime or, where requested by the employee and approved by the employer, may take time off instead of overtime payment calculated in accordance with the relevant overtime rate (which is set out in clause 23);*
- (b) *An employee classified at HEW 7 or HEW 8 is not eligible for any entitlement to paid overtime, but may take time off instead of overtime payment, at a mutually agreed time, calculated at time and a half; and*
- (c) *An employee classified at HEW 9 is not eligible for paid overtime or TOIL generally, but an entitlement to TOIL is provided only if the employee is specifically required to work additional hours and it would be unreasonable for TOIL not to be provided, calculated at hour for hour.*

12. With the exception of the HEW 6 or below category, these provisions do not provide an entitlement to overtime payment and specifically provide that the employees are not eligible for any overtime payment. Further for employees at HEW 7 and above, they do not provide TOIL of an overtime payment in the true sense but rather provide a separate entitlement or flexibility which allow entitles staff in higher classification levels to take time off at an agreed time, for working additional required hours, notwithstanding no entitlement to paid overtime exists.

TOIL Model Term is confusing and creates overtime entitlement that otherwise does not exist

13. The inclusion of the TOIL Model Term in the General Staff Award in substitution for the existing TOIL provisions is not necessary to meet the modern awards objectives but rather the inclusion of such a term would be inconsistent with the modern awards objective. In particular, the existing simple and easy to understand provision that is adopted widely within the industry will be replaced with a more complex and internally inconsistent provision, contrary to section 134(1)(g) of the FW Act.
14. For example, sub-clause 26.2(c) of the Draft Determination states that an employee classified as HEW 7 or HEW 8 will not be eligible for paid overtime but can take TOIL (reflecting the existing provisions). However, the process provisions in sub-clauses 26(2)(e) to (g) provide for paid overtime in the circumstances described (eg upon notification by the employee), including, as it seems for HEW 7 and 8 employees. As noted above, the effect of these provisions is to substantively introduce an entitlement to paid overtime for HEW 7 and 8 employees that did not otherwise exist. It is also not clear from the wording of sub-clause 26.2(d) whether HEW 9 and HEW 10 employees are entitled to overtime pay as there is no express exclusion as is the case in the existing clause. Regardless, as is the case for HEW 7 and 8 employees, the effect of sub-clauses 26(2)(e) to (g) is to substantively introduce an entitlement to paid overtime for HEW 9 and 10 employees that did not otherwise exist. Sub-clause 26.2(d) also provides TOIL for HEW 9 and 10 employees as of right rather in the limited circumstances described in the existing TOIL provisions.
15. Not only is the introduction of a substantive entitlement to overtime pay for HEW 7 to HEW 10 employees (and TOIL for HEW 9 and 10 employees) inconsistent with the existing TOIL provisions and the long standing practice in the Industry, it is also not consistent with the TOIL Full Bench's decisions. The TOIL Full Bench states that the TOIL Model Term is "intended to provide employees with a means of trading overtime pay for time off at a time which assists them to balance their work and non-work commitments"⁵ and has proposed that "all modern awards which provide for overtime be varied to insert the model term" [our emphasis]. Therefore, the intention of the TOIL Model Term is not to extend entitlements or introduce new overtime entitlements but rather is to provide flexibilities in the form of TOIL where the modern awards already provide an overtime entitlement to employees.

⁵ 16 July 2015 [2015] FWCFB 4466, at 273.

16. Further, clause 26.2(a)(iv) refers to the written agreement including a note that “*payment must be made at the overtime rate...*”. However, this does not make sense in the context of the HEW 9 and 10 employees as TOIL is taken at the “*ordinary time rate*” (see 26.2(d)).

Historical context including Part 10A award modernisation process

17. The existing unique TOIL provisions reflect the historical award regulation and long-standing practice in the Higher Education industry.
18. That historical award regulation in part reflected the public sector awards from which many groups of general staff were drawn and the features of the higher education industry, including that given the seniority of staff who are covered by higher classifications in the awards, those staff were not entitled to overtime pay. Like many awards in (or drawn from) the public sector the award coverage extends to more senior employees and classifications (including various managerial, supervisory and self-managed senior employees) than would commonly be the case. Reflecting this, employees above a certain level were not provided with overtime and in the majority of original underpinning awards also had not entitlement to time in lieu.
19. A summary of the TOIL provisions in a number of pre-reform awards and pre-reform enterprise agreements is attached to these submissions at **Attachment 2**.
20. There were a number of significant award review processes that ultimately lead to the overtime and TOIL provisions in the key pre-reform awards, including:
- (a) Following the Structural Efficiency Principles arising from the 1988 National Wage Case, which resulted in or lead to the creation of the:
 - (i) Higher Education General and Salaried Staff (Interim) Award 1989, which incorporated some 117 previous awards and instruments by reference in Schedule C, which to the best of our knowledge, did not provide overtime for the higher classifications and had limited TOIL provisions;
 - (ii) The Higher Education Workers Victoria (Interim) Award 1993, which did not provide overtime for the higher classifications and had limited TOIL provisions; and
 - (b) the review pursuant to Item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth)*, (see for example print *PR965511*) resulting in the creation of, amongst other awards the following pre-reform awards which did not provide for overtime at the more senior classifications, but a right to TOIL for such employees:
 - (i) Higher Education Workers Victoria Award 2005 (AP844616);

- (ii) Queensland Universities (General Staff) Award 2000 (AP817728);
- (iii) Western Australia Universities General Staff Award 2002 (AP819322);
and
- (iv) Higher Education General Staff Salaries and Classifications Award 2002 and continuation of the Higher Education General and Salaried Staff (Interim) Award 1989.

21. As can be seen from Attachment 2, in the pre-reform awards in place and taken into account prior to the making of the General Staff Award, depending upon the award and the classification level of staff, some staff had no entitlement to overtime pay but an entitlement to TOIL and some had no overtime or TOIL entitlements at all. For example, in the four key pre-reform awards employees at HEW 8, HEW 9 and HEW 10 generally had no entitlement to overtime pay and only limited entitlements to TOIL. Further, generally TOIL was time for time for employees that did not have an overtime entitlement.
22. The existing TOIL provisions were then developed during the Part 10A award modernisation process for the General Staff Award (AM2008/3) where industry stakeholders recognised that in order to achieve the modern award objectives in relation to the higher education awards, such measures would be included so as to appropriately reflect the working arrangements prevalent in the industry and taking into account the diversity in the existing award provisions. Specifically, the Group of Eight Universities made submissions⁶ about the unique TOIL provisions existing in Federal Awards for Universities and EBAs at the time and, in particular, the fact that staff in higher classifications were not entitled to overtime. The NTEU and the CPSU also made submissions⁷ about the TOIL provisions acknowledging that staff in higher classifications were not entitled to overtime. The only difference between the parties' positions was whether TOIL at the various levels was at time and half (NTEU/CPSU) or whether it was on an hour for hour basis (Group of Eight Universities).
23. Historically staff in higher classifications have generally been staff in "senior" or "managerial" positions including staff with significant autonomy and managerial, budgetary and staffing responsibilities and capture self-managed and management staff at Universities. This is evident from the classification descriptors in the General Staff Award (which were taken from the underlying pre-reform awards, which had been the subject of specific arbitration by Duncan DP in 2002 in PR 924691. For example, the classification levels for HEW 7 and above all make reference to staff having "*extensive experience and management expertise*" or "*proven management expertise*" and the occupational equivalents all include "*senior*" or "*manager*" positions. The higher the classification level the more autonomy and management responsibility the staff generally have. For example at HEW 8, staff will work with "*a degree of*

⁶ See written submissions filed by the Group of Eight Universities on 10 October 2008, paras 14.5-14.6 and transcript of hearing on 28 October 2008, PN1384.

⁷ See transcript of hearing on 28 October 2008, PN1290 and 1294, and Exhibit HI6.

autonomy” and at HEW 10 staff will operate with a “*high degree of autonomy*”. Staff at HEW 9 and HEW 10, have as typical activities identified in the classification descriptors - “*Manage a large functional unit with a diverse or complex set of functions and significant resources*”.

24. The above matters were considered by DP Smith in formulating the exposure drafts of the General Staff Award and by the Full Bench in making the current Award. This is not a case where the existing TOIL provisions were included in the General Staff Award without any specific consideration from the Full Bench but rather the provisions were adopted by the Full Bench in the context of the Part 10A award modernisation proceedings following submissions by industry stakeholders and with particular regard to the industrial history of those provisions.
25. For example, in the Full Bench decision [2008] AIRCFB 1000, PN176 – Full Bench stated specifically in respect of the General Staff Award... “*Finally, we have considered the submission that the award (or parts of it) should not apply to persons who earn salary in excess of a particular classification level. Some adjustments have been made in relation to higher level classifications particularly in relation to time off instead of overtime in the general staff area. However, we are not prepared to provide a blanket exemption when the foreshadowed legislation will exempt employees either based upon the class of employee or their earnings.*”
26. Having regard to the historical context of the existing TOIL provisions and the fact that they were created following specific consideration in the context of the Part 10A award modernisation proceedings, the TOIL Full Bench should not include the TOIL Model Term in the General Staff Award.

Bargaining and TOIL provisions in Enterprise Agreements

27. The TOIL Model Term should not be included in the General Staff Award as the existing unique TOIL provisions that currently exist in the General Staff Award reflect what has been bargained for between employers and employee representatives in the higher education industry both currently and historically. A summary of the TOIL provisions contained in the current enterprise agreements for each of the Group of Eight Universities is attached to these Submissions at **Attachment 3**.
28. As is evident from the table, no employees at HEW 10 are entitled to overtime and in all but two enterprise agreements employees above HEW 7 are not entitled to overtime pay and are generally not entitled to TOIL.
29. The existing unique TOIL provisions in the General Staff Award have been broadly adopted and operate satisfactorily in the industry. The imposition of the Draft Determination has the potential to unnecessarily disrupt the current arrangements in place and cause disputation where there has otherwise been none.

30. Adopting the Draft Determination would undermine enterprise bargaining in the sector and undermine the Modern Awards objective which includes the need to encourage collective bargaining⁸.

Existing TOIL provisions already meet modern awards objectives

31. As observed in the Preliminary Jurisdictional Decision, the TOIL Full Bench is to proceed on the basis that prima facie the General Staff Award (including the existing TOIL provisions) meets the modern award objectives in section 134(1) of the *Fair Work Act 2009* (Cth) (**FW Act**).
32. In the context of existing industry specific provisions such as the TOIL provisions, there needs to be probative evidence to demonstrate that (a) the current term is no longer meeting the modern awards objective and (b) a substitute term is required because it is necessary, as opposed to being desirable, to meet the modern awards objective (Tracey J, in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*, [2012] FCA 480 at 46).
33. There is no evidence that has been put before the Commission regarding the General Staff Award to suggest that the existing General Staff Award provisions no longer meet the modern awards objectives.
34. Further, the flexibilities contained in the existing TOIL provisions, including for staff in higher classification levels that do not have an entitlement to overtime, promote social inclusion through increased workforce participation (section 134(1)(c) of the FW Act) and promote flexible work practices and the efficient and productive performance of work (section 134(1)(d) of the FW Act). The existing TOIL provisions continue to operate successfully within the industry without disputation and are simple, easy to understand and stable provisions within the industry (section 134(1)(g) of the FW Act).

Different Modern Awards and differently worded provisions

35. It is clear that different modern awards can have differently worded provisions dealing with the same subject matter. In the Preliminary Decision, the Full Bench of the Commission identified at paragraphs [33] –[34]:

“... The need to balance the competing considerations in s. 134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards... there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations of provisions may meet the modern awards objective.”

⁸ S.134(1)(b)

36. This issue is reflected in the TOIL Full Bench's own decisions. Despite the TOIL Full Bench proposing to include the TOIL Model Term in "*all modern awards which provide for overtime*"⁹ (our emphasis), it has not taken this approach. For example, the TOIL Full Bench declined to vary the existing TOIL provisions in the five modern awards the subject of the AMWU's application and the 10 modern awards the subject of the AiG's application¹⁰. There are some modern awards that will provide for TOIL at overtime rates and others that will provide for TOIL at ordinary time¹¹. The TOIL Full Bench also decided that the most expeditious course for dealing with any application to include the TOIL Model Term in two construction awards (*Building and Construction General On-Site Award 2010* and the *Joinery and Building Trades Award 2010*) and the *Seagoing Industry Award 2010* was during the award stage¹².

37. In relation to the 10 modern awards the subject of the AiG's application, the TOIL Full Bench stated:

"We are not persuaded that it is appropriate to vary any of the 10 modern awards sought to be varied by the Ai Group. Each of the awards contains a TOIL provision and Ai Group has not advanced any cogent submission in support of the variations sought. Further, Ai Group's application is inconsistent with the approach adopted in the Family Leave Test Case in which existing TOIL provisions, which provided time off to be calculated at overtime rates, were preserved and not varied to insert the model TOIL facilitative provision. We are not persuaded that the variations proposed are necessary to achieve the modern awards objective."

38. The TOIL Full Bench should adopt the same approach in relation to the General Staff Award. It already contains existing TOIL provisions, which provide for time off to be calculated at overtime rates, and these provisions in their totality could be preserved rather than cherry picking parts of the TOIL Model Term and parts of the existing provisions.

Alternate Position - Reference by the Education Full Bench

39. The General Staff Award was not one of the awards the subject of employer or union applications before the TOIL Full Bench and was not being considered by it. The higher education overtime and TOIL provisions, their appropriate wording and extent of the entitlements has been the subject of previous consideration by the AIRC in making historical awards in the sector and in making the current Modern Award.

40. In the alternative to simply rejecting the Draft Determination as sought above, given the unique history of the overtime and TOIL provisions in the General Staff Award, and that the provisions

⁹ 16 July 2015 [2015] FWCFB 4466, at 281

¹⁰ 16 July 2015 [2015] FWCFB 4466, at 294

¹¹ 16 July 2015 [2015] FWCFB 4466, at 255 and 6 October 2015 [2015] FWCFB 6847, at 8 and 11

¹² 16 July 2015 [2015] FWCFB 4466, at 307 and 308

are not typical of other TOIL provisions in awards, any determination of whether the TOIL Model Term should be adopted and the appropriate formulation of that determination should be considered by the Education Full Bench which has already been allocated the education awards in the award stream in AM2015/6. Not only is this a more appropriate manner of considering a substantive change within a particular industry award, referring consideration of the appropriate adoption or otherwise of the TOIL Model Term to the award stream is also consistent with the approach adopted by the TOIL Full Bench with respect to the two construction awards (*Building and Construction General On-Site Award 2010* and the *Joinery and Building Trades Award 2010*) and the *Seagoing Industry Award 2010*.¹³

Further Alternative

41. In the further alternative, if the model clause is to be adopted now in some way for the General Staff Award without such hearing and consideration by the Education Full Bench, it should clearly only be in respect of those employees that currently have an entitlement to overtime pay, being those employees identified in clause 26.1(a) of the General Staff Award, and the Draft Determination should be amended accordingly.
42. A Draft Determination to this effect is set out at **Attachment 1** to these submissions.

Clayton Utz
Solicitors for the Group of Eight
11 November 2015

¹³ [2015] FWCFB 4466, at [307] and [308]

Attachment 1

MA000007 PRxxxxxxx

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

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

HIGHER EDUCATION INDUSTRY - GENERAL STAFF - AWARD 2010 [MA000007]

Educational services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROBERTS

MELBOURNE,

2015

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

A. Further to the Full Bench decisions issued by the Fair Work Commission on 16 July 2015¹ and 6 October 2015², the above award is varied as follows:

1. By inserting after clause 26 a new clause "26A - Time off in lieu of payment for overtime - requirements" as follows:

26A. Time off in lieu of payment for overtime - requirements

26A.1 This clause 26A only applies in respect of employees who are eligible to receive paid overtime, being employees under clause 26.1(a).

26A.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:

¹ [2015] FWCFB 4466.

² [2015] FWCFB 6847.

- (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 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) 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.
- (c) Notwithstanding any other provision of clause 26A.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.
- (d) 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.

26A.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. Clause 26A 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.

26A.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 clause 26A.

2. By updating cross-references accordingly.

B. This determination comes into operation from xx October 2015. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after xx October 2015.

PRESIDENT

Attachment 2 - Table of TOIL provisions from select Higher Education pre-reform Awards

Award	Classification of Employee	Entitlement
Pre-Reform Awards		
Higher Education Workers Victoria Award 2005 - Part 2A	Employees whose salary is greater than the top subdivision of: -HEW 6 (La Trobe University (Bendigo)); -HEW 7 (Swinburne University; Monash University; Deakin University; Victoria University; RMIT); -HEW 7.4 (Ballarat University); -HEW 8 (Victorian College of the Arts).	TOIL at a mutually agreed time (but no paid overtime). TOIL calculated on hour for hour basis.
	Employees whose salary is at or below the top of the subdivisions referred to above.	Paid overtime or TOIL at a mutually agreed time calculated on hour for hour basis.
Higher Education Workers Victoria Award 2005 - Part 2B	Employee whose salary level is at or below the salary for HEW 6.	Eligible for paid overtime.
	Employee whose salary level is above that of HEW 6.	No entitlement to overtime or TOIL.
Queensland Universities (General Staff) Award 2000	Up to HEW Level 5.5	Paid overtime at the employee's respective rate of pay.
	Greater than Hew 5.5 but less than HEW Level 7.4	Paid overtime at the HEW Level 5.5 rate of pay
	HEW 7.4	TOIL at a mutually agreed time (but no paid overtime)
Western Australia Universities General Award 2002	Where maximum annual salary, including allowances, is greater than \$44,999 (equivalent to Level 7.1 except for Murdoch University where level 7.2)	No entitlement to overtime or TOIL above 7.1
Higher Education General Staff Salaries and Classifications Award 2002 (HEGSS Award)	Example: Employee's whose salaries exceed the maximum salary for a Clerk Grade 8 (as defined in the <i>New South Wales Universities (Admin and Clerical Staff - Salaries) (State) Award</i>) by \$1.00 pa	No entitlement to overtime or TOIL.
Victorian Universities (Controlled Entities and Affiliated Organisations) Employees' Award 2004	Up to level 7	Paid overtime or TOIL.
	Greater than or equal to salary for level 7	No paid overtime but TOIL calculated on an hour for hour basis.

Pre-Reform Enterprise Awards		
Australian Catholic University National General Staff Award 2003	Up to HEW 7	Paid overtime or TOIL calculated at overtime rate.
	Greater than or equal to minimum salary for HEW 8	No paid overtime but TOIL equivalent to the period of overtime worked.
Charles Darwin University General Staff Award 2004	Up to HEW 6	Paid overtime no TOIL
	HEW 7 and above	No overtime no TOIL
Flinders University General Staff Award 2003	Employees receiving up to \$49,993 per annum	Paid overtime or TOIL at a mutually agreed time calculated at overtime rate
	Employees above \$49,993	No paid overtime no TOIL
University of Adelaide General Staff (Interim) Award 2000	Salary below the maximum salary for a Senior Industrial Officer or equivalent	Paid overtime or TOIL at a mutually agreed time calculated at overtime rate
	Salary exceeds the maximum salary for a Senior Industrial Officer or equivalent	No entitlement to overtime payment or TOIL
University of Canberra General Staff Award 2001	Up to Academic Level A	Paid overtime no TOIL
	Greater than Academic Level A	No overtime payment no TOIL
The University of Queensland General Staff Award 2003	Below Level 8	Paid overtime or TOIL calculated at overtime/penalty rate up to 5 working days
	Greater than or at Level 8	No paid overtime and no TOIL unless additional hours have been explicitly agreed in advance then eligible for either paid overtime or TOIL calculated on a time-for-time basis.
University of Tasmania General Staff Award 2006	Below HEO Level 7	Paid overtime
	HEO Level 7 salaries and above	No paid overtime but TOIL calculated on time-for-time basis
The University of Western Australia General Staff Award 2005	Salary below Level 7	Paid overtime and TOIL by agreement calculated at the overtime rate
	Salary greater than Level 7	No paid overtime no TOIL unless VC approval
University of Western Sydney General Staff Award 1999	Salary less than or equal to a Faculty Officer (as classified in Dec 1999)	Paid overtime or TOIL calculated at the overtime rate
	Salary above Faculty Officer	No Paid overtime or TOIL

ATTACHMENT 3 - SUMMARY OF CURRENT OVERTIME AND TOIL PROVISIONS

GROUP OF 8 ENTERPRISE AGREEMENTS

Agreement	Clause	Classification	Entitlement
The University of Melbourne Enterprise Agreement 2013	57	Salary at HEW 7 and above	No paid overtime but TOIL calculated at time and a half.
		Salary level at or below salary fixed for HEW 6	Eligible for paid overtime or TOIL, by agreement, at a mutually agreed time calculated at overtime rate.
Monash University Enterprise Agreement (Academic And Professional Staff) 2014	75	Salary in excess of the top of the scale for HEW 7	No paid overtime but TOIL calculated on a time-for-time basis. No entitlement to be paid any accrued but untaken TOIL on termination of employment. TOIL must be taken within 6 months of accrual.
		Salary not exceeding the top of scale for HEW 7	Paid overtime or TOIL by mutual agreement calculated at overtime rate. No entitlement to be paid any accrued but untaken TOIL on termination of employment. TOIL must be taken within 6 months of accrual.
The University Of Western Australia Professional And General Staff Agreement 2014	24 Schedule E	Maximum salary below Level 7	Paid overtime or TOIL where employee elects in writing, at rate calculated by dividing the overtime rate by the employee's normal hourly rate of pay. All accumulated or bank flexitime that cannot be cleared to be paid on termination by redundancy.
		Maximum salary, or maximum salary and allowance in the nature of salary, exceeding	No paid overtime or TOIL (unless just and reasonable and with

		Level 7	special approval of the VC).
		Employee whose work is not subject to close supervision	No paid overtime or TOIL (unless just and reasonable and with special approval of the VC) or where directed by the Head or by a duly authorised senior employee to carry out specific duties.
The University Of Queensland Enterprise Agreement 2014-2017	70.3	HEW 8 and above staff.	Overtime payments (at time for time) or TOIL (at time for time) by agreement.
	70.7	Staff classified below HEW 8	Paid overtime or TOIL at overtime rate.
University Of Sydney Enterprise Agreement 2013-2017	Schedule 4	Salary does not exceed the maximum Salary for HEO 9	Overtime or TOIL (at overtime rates) to be taken at a mutually agreed time. Employee may accrue up to 3 weeks' TOIL within a 6 month period. Time not taken by the end of the 6 month period is paid out at overtime rates.
		Salary in excess of the maximum Salary for a HEO 9	No current entitlement (except in special circumstances the University may provide)
The Australian National University Enterprise Agreement 2013 - 2016	28	Staff member is employed at ANU08 level or above	No paid overtime (but may be eligible for overtime allowance with approval)
		Staff member is employed below level ANU08	Paid overtime or TOIL (at overtime rate) by agreement.
University Of Adelaide Enterprise Agreement 2014-2017	3.6	Classified below HE08	Paid overtime or TOIL (at overtime rate) by agreement
		Classified or acting at the level of HE08 or above	No paid overtime (any payment at University's discretion) or TOIL