

4 yearly review of modern awards - Award flexibility common issue

AM2014/300 and 301

NATIONAL FARMERS' FEDERATION

**SUBMISSION ON PROPOSED MODEL TERM FOR
TIME OFF IN LIEU OF OVERTIME**

Date: 9 November 2015

Introduction

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, a Full Bench of the Fair Work Commission (**Commission**) issued its decision in *4 yearly review of modern awards—award flexibility common issue—time off in lieu – finalisation of model term* [2015] FWCFB 6847 (**the decision**).
3. In directions issued on the same day, the Commission invited parties to make submissions on whether the model time off in lieu term (**model TOIL term**) should be incorporated into particular modern awards.
4. The NFF submits that the model TOIL term should not be inserted into modern awards covering the agriculture sector which currently contain flexible hours of work and TOIL provisions. In particular, the NFF submits that neither the Pastoral Award 2010 (Pastoral Award) nor the Horticulture Award 2010 (Horticulture Award) should be varied to include the model term.
5. In the alternative, the NFF submits that in relation to the Pastoral Award and the Horticulture Award, interested parties should be given the opportunity during the award stage of this review to refine the model TOIL term to accommodate the particular circumstances and needs of the agriculture sector.

The model TOIL term

6. The final version of the model TOIL term is as follows¹:

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 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.

¹ *4 yearly review of modern awards—award flexibility common issue—time off in lieu – finalisation of model term* [2015] FWCFB 6847, 6 October 2015, Attachment 3

(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.

7. The model TOIL term is likely to be unworkable in many agricultural businesses because their capacity to supervise, reach and record daily overtime agreements is limited by the nature of work in the industry.
8. Elements of the term that can continue to work effectively include:
 - a) The requirement for employees to elect to take TOIL at a time agreed (clause 1.1);
 - b) The provision for TOIL on an 'hour for hour' basis (subclause 1.2(b));
 - c) The requirement for accrued TOIL to be paid out on termination at overtime rates (subclause 1.2(e)).
9. Elements of the term that are likely to be unworkable include:
 - 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

- 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));

The Pastoral Award

- 10. The Pastoral Award contains provisions relating to TOIL at clause 31 (farm and livestock hands) and clause 42 (poultry workers). Limited provision for TOIL in connection with public holidays is made at clause 38.3 in relation to piggery workers.
- 11. Clause 31 of the Pastoral Award applies to farm and livestock hands, and provides for TOIL as follows:
 - “31. Overtime**
 - 31.1 All time worked by an employee in excess of the ordinary hours in clause 30.1 will be regarded as overtime.
 - 31.2 The rate of pay for overtime for a Farm and livestock hand will be time and a half, except on Sunday when the rate will be double time, except in the case of feeding and watering stock when such work will be paid for at the rate of time and a half.
 - 31.3 An employee may elect to take time off duty, with pay, for a period equal to the overtime worked.
 - 31.4 No employee will be entitled to payment for overtime, or equivalent time off instead, unless the employee makes a claim to the employer or their authorised representative either within two weeks after the overtime is alleged to have been performed or by the next date of payment of the employee’s wages, whichever is the later.
 - 31.5 For the purpose of computing payment for overtime work for an employee engaged on ‘with keep’ terms, the cash value of such employee’s wages must be deemed to be not less than the wage prescribed in this award for a similar class of employee with the value of keep added.”
- 12. A new provision for overtime for poultry workers was inserted into the Pastoral Award:

“42. Overtime

42.1 All time worked by an employee in excess of the ordinary hours in clause 41.1 must be overtime.

42.2 An employee may elect to take time off duty, with pay, for a period equal to the overtime worked.

42.3 The rate of pay for overtime will be time and a half, provided that double time will be paid for all work performed on Sunday except in the case of feeding or watering the stock when such work will be paid for at the rate of time and a half.”

13. No equivalent provision was made in relation to piggery workers (clause 36 otherwise deals with overtime and penalty rates in the piggery industry). However, under clause 38.3 of the Pastoral Award, public holiday penalties can be substituted for time off in lieu by agreement between the employer and employees.

14. In the substantive proceedings in this matter, no claim was made to vary these provisions. Accordingly, the NFF did not file any evidence or submissions in the matter in relation to TOIL. It was never contemplated that the TOIL provisions of the Pastoral Award would be affected by claims made in the proceedings.

Work in the agriculture sector

15. The Pastoral Award has a long history of tailoring award conditions to the unique circumstances of the agriculture sector. The hours of work and overtime provisions for farm and livestock hands reflect this long history.

16. Workers in the pastoral industry operate on large properties, often unsupervised or in remote locations, dictated to in terms of their working hours by the number of daylight hours, the heat or cool of the day and variable weather conditions.

17. Animal care and other emergency situations can arise at any time. Many employees live in residence on the property, with their own animals to look after in addition to those in their care.

18. The unsupervised nature of a significant amount of work undertaken in the agriculture sector makes it very difficult for employers to keep track of where their employees are, what work they are doing and the number of hours they are working each day.

Limited internet and mobile coverage is a reality for many. Hours of work can vary significantly, influenced by the seasons, the weather, daylight hours and animal husbandry needs. Technology only goes so far in resolving these issues.

19. While technology has increased the productive capacity of farming operations, hourly record keeping and supervision of employees at all times remains impracticable for many farm businesses.
20. During peak times, on farm labour needs are high. Long hours are an unavoidable incident of agricultural employment, whether in the dairy industry or on a broadacre farm. Both employers and employees accept that long hours are a feature of the industry at certain times of the year. In many cases it works well for employees to take TOIL during the quiet times of the year, whether that is two weeks after the event or at the end of a busy year.
21. For these reasons, a high degree of flexibility is required in relation to hours of work in the agriculture sector. Duties requiring response to urgent situations, often in circumstances that the employer may not become aware of until later notified by the employee when the work is complete, means that an obligation on the employee to reach a written agreement for any overtime worked in advance is impracticable.

The history of TOIL in the Pastoral Award

22. Reflecting the need for ‘give and take’ in the pastoral industry, TOIL provisions were first introduced in the Pastoral Award in 1957.²
23. In a case dealing with claims for a 40 hour working week for station employees, Commissioner Donovan of the Commonwealth Conciliation and Arbitration Commission summarised the position of employers in relation to standard hours of work as follows:

“Mr Cole strongly opposed the claim for a 40 hour week for station employees. He said that the hours of work for station hands have always been longer than the recognised standard hours in other industries. This was because the care and handling of stock was governed by the needs and dictates of nature and it was impossible to adhere to a schedule of hours for the performance of a station hand’s work. Seasonal

² *Federal Pastoral Award* (1957) 88 CAR 66.

conditions had to be taken into consideration. For that reason, there had never been a “spread of hours” provision in this award nor had meal times been specified. The fact that unregulated hours were permitted for station hands working away from the homestead demonstrated that conditions of employment in this industry were different to those of other industries. All State station hands’ awards, including the Queensland State award, provide for a longer working week than is observed in secondary industries. He contended that the duties of station hands working away from the homestead could not be supervised as suggested by Mr Dougherty, especially on big pastoral properties.”³

24. Donovan C agreed with the position put by the employers, finding as follows:

“Some employees live and work at the homestead, while others live and work on outback parts of properties under isolated conditions. Many employees work alone and without supervision. Those who attend to stock must, if necessary, be prepared to carry out their duties in all kinds of weather.”⁴

25. He went on to vary the Federal Pastoral Award to fix a 44 hour working week for station hands, with a new provision for TOIL:

“58 – HOURS OF WORK ...

“(b) If a station hand (other than a cook) is required to work for more than forty-four hours in any week he shall be entitled to receive and the employer shall give equivalent time off at any time mutually convenient within the succeeding three weeks: Provided that in lieu of giving time off the employer may elect to pay overtime for the time worked in excess of forty-four hours in any week at the rate prescribed by sub-clause (a) of clause 59 of this award.”

26. In 1967⁵, Donovan C revised the hours of work and overtime provisions of the Federal Pastoral Award to settle ongoing disputation between the parties. Noting the “somewhat unusual circumstances of this industry”, he restored provisions which had previously been deleted, and which required claims for overtime to be made within two weeks after the overtime is alleged to have been performed or by the next date of payment of the employee’s wages, whichever is the later.”

³ (1957) 88 CAR 66, page 68.

⁴ (1957) 88 CAR 66, page 68.

⁵ (1967) 121 CAR 454

27. While the form of the TOIL provision was varied, its terms remained largely unchanged:

“56 – HOURS OF WORK, OVERTIME AND SUNDAY WORK...

(a)(ii) If the employee is required to work for more than 44 hours in any week he shall be entitled to receive and the employer shall give equivalent time off at any time within the succeeding three weeks. Provided that in lieu of giving time off the employer may elect to pay for the overtime worked at the rate of time and a half.”

28. In 1971⁶, a Full Bench of the Commonwealth Conciliation and Arbitration Commission varied the TOIL provisions to:

- a) clarify the position about Sunday work;
- b) give the option for payment instead of TOIL to the employee; and
- c) allow time off to accumulate by mutual agreement.

29. The Full Bench stated as follows:

“The evidence in this matter was quite extensive. Some employers allow time off in lieu of overtime, some pay for it and some mix the two methods. In certain cases, particularly the pastoral zone, the time off is allowed to accumulate and is given in terms of whole days off, sometimes as an addition to annual leave. In our view it may well be a greater benefit to an employee to have time off in lieu of payment and accordingly we are not prepared to delete the concept of time off from the award although as appears later we give the option to the employees.” ...

...“Under the present award it is mandatory that time off shall be taken within three weeks of it being worked. There was ample evidence that this is not adhered to. We were told of mutually satisfactory arrangements that time off in lieu of overtime was granted at times convenient either to the employer or to the employee long after the time worked. We accordingly agree with the employer’s claim that time off should be given and taken within the next succeeding three weeks unless the employer and the employee mutually agree that it be taken at some other time.”

...“The present award requires that an employee must make a claim for overtime before he becomes entitled to payment or time off. We think in the peculiar

⁶ (1971) 139 CAR 212

circumstances of this industry this is desirable from the point of view of both the employee and the employer. This is not an industry in which the work of the station hand is or can be closely supervised nor can an employer tell whether or not an employee has worked overtime, and in any event it is desirable that such claims should be made known within a reasonable time to the employer so that there can be no dispute thereafter.”

30. The TOIL provisions of the award were varied as follows:

“56 – HOURS OF WORK, OVERTIME AND SUNDAY WORK...

(a)(iii) Overtime shall be adjusted as follows:

- a) The employee shall be allowed off duty, with pay, for a period equal to the overtime worked. Such time allowed off duty shall be given and taken within the succeeding three weeks unless the employer and the employee mutually agree that it be taken at some other time; or
- b) In lieu of taking time off duty, the employee may elect to be paid for the overtime worked;
- c) The rate of pay for overtime shall be time and a half, provided that double time shall be paid for all work performed on Sunday except in the case of feeding or watering the stock when such work shall be paid for at the rate of time and a half.”

31. These provisions remained in the same form until 1998 when award simplification saw the term refined further, and the three week period for taking TOIL removed by consent⁷. In December 2000 the term was renumbered as 36.1.3⁸:

“36.1.3 Overtime shall be adjusted as follows:

- The employee shall be allowed time off duty, with pay, for a period equal to the overtime worked; or
- In lieu of taking time off duty, the employee may elect to be paid for the overtime worked; or

⁷ *Pastoral Industry Award 1986* P0143 Con M Print Q2650 per Merriman C, 30 June 1998.

⁸ *Pastoral Industry Award 1986*, PR900617, 23 January 2001

- The rate of pay for overtime shall be time and a half, provided that double time shall be paid for all work performed on Sunday except in the case of feeding or watering the stock when such work shall be paid for at the rate of time and a half.”

32. Award modernisation during 2009 resulted in a comprehensive review and streamlining of both federal and State awards. In answers to questions in writing in the House of Representatives on 19 October 2009, the then Minister for Employment and Workplace Relations, Julia Gillard MP stated as follows in relation to the award modernisation process then underway:

“The Government also encouraged the Commission in its submission of 13 February 2009 to pay careful attention to previous longstanding arrangements and to the requirement of the award modernisation request that the making of a modern award should not increase costs for employers when determining the final shape of ordinary hours for each sector in the Pastoral Industry Award 2010.”⁹

33. From 1 January 2010, as a result of award modernisation, the new Pastoral Award commenced operation in a substantially revised form. Despite a number of significant changes, the overtime provisions remained largely the same, as set out above.

The Horticulture Award

34. The Horticulture Award provides for TOIL in clause 24.1:

24.1 Time off instead of payment for overtime

- (a) An employee will be allowed time off duty, with pay for a period equal to the overtime worked. Such time allowed off duty will be given and taken within the succeeding three weeks unless the employer and employee mutually agree that it be taken at some other time; or
- (b) instead of taking time off duty the employee may elect to be paid for the overtime worked provided that this election is made clear to the employer or the employer’s representative at the time that overtime is offered.

⁹ House of Representatives *Questions in Writing Education, Employment and Workplace Relations: Awards and Building Regulations* Question 837 Monday 19 October 2009, page 10309.

35. As the term makes clear, TOIL is the default mechanism by which full time and part-time employees are compensated for overtime in the horticulture industry. Casual employees have no entitlement to overtime. There is no requirement for the employer to agree to the time off, as long as it is taken within three weeks of its accrual. By mutual agreement, accrued TOIL can be taken at ‘some other time’.
36. An employee may elect to be paid overtime rather than take time off duty, as long as this is advised to the employer in advance. In this way, a balance is struck between the needs of the employer to manage labour costs and fair compensation for employees for hours worked.
37. The current TOIL clause was inserted into the Horticulture Award following a variation to the consolidated Award Modernisation Request (AMR) on 26 August 2009. The terms of the AMR variation were as follows:

“Horticulture Industry

50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.
51. Where a modern award covers horticultural work, the Commission should:
- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
 - provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.”

38. In answers to questions in writing in the House of Representatives on 19 October 2009, the then Minister for Employment and Workplace Relations, Julia Gillard MP stated as follows”

“...I varied my award modernisation request to provide that the Commission should include conditions in modern awards that, as far as possible, allow the continuation of roster arrangements presently in practice for work in remote locations.¹⁰

39. As a result of the AMR variation, the hours of work and overtime clauses in the Horticulture Award were varied to reflect the previous longstanding position under

¹⁰ House of Representatives *Questions in Writing Education, Employment and Workplace Relations: Awards and Building Regulations* Question 837 Monday 19 October 2009, page 10309.

Schedules B and C of the *Horticulture Industry (AWU) Award 2000*.¹¹ This was the consent position of the NFF, the Australian Industry Group and the Australian Workers' Union at the time, and was put forward as necessary "to better reflect current regulation and to restore necessary flexibility".¹²

40. The *Horticulture Industry (AWU) Award 2000* was the only pre-reform award covering the horticulture industry. Its terms were separated into two parts – provisions applicable to employees covered by Schedule A (in relation to the dried fruits and canning fruits industry in Victoria, South Australia and New South Wales) and provisions applicable to employees covered by Schedules B and C (in relation to the fruit and vegetable growing industry in Victoria, fruit and vegetable growers who were members of either the TFGA Industrial Association in Tasmania or the Australian Industry Group). During award modernisation, Schedules B and C were accepted as having the most extensive geographic and industrial application in the horticulture industry.¹³

41. As with the Pastoral Award, the hours of work and overtime provisions adopted in the Horticulture Award following award modernisation reflect the unique circumstances of an industry that requires a high degree of flexibility in terms of hours of work, because of the combined effect of seasonal variability and perishable produce.

The requirement for a separate written agreement to be made each time overtime is worked (subclause 1.2(a))

42. Under the Pastoral Award, TOIL is available to employees at their election, and there is no requirement to seek the agreement of the employer. The only condition is that the claim for overtime, or TOIL, be made within a two week period.

43. Under the Horticulture Award, TOIL is the default mechanism for dealing with overtime.

44. The requirement for there to be a separate written agreement on each occasion is unworkable for many farm businesses. On large remote properties, the employer and employee may be in different places for days or weeks at a time, with no capacity to

¹¹ *Horticulture Award 2010* [2009] AIRCFB 966, 23 December 2009

¹² *Horticulture Award 2010* [2009] AIRCFB 966, 23 December 2009

¹³ *Horticulture Award 2010* [2009] AIRCFB 966, 23 December 2009

enter into daily written agreements. In other cases, work may have nominally finished for the day and an urgent situation arises to which the employee responds. The employer may be unaware until the next day what has happened and so unable to have entered into an agreement for TOIL the night before.

45. Unlike their urban counterparts, agricultural employers and employees are not always guaranteed access to internet, email and phone facilities to assist in compliance with the term. It is not simply a matter of exchanging emails to achieve the prescribed written agreement. Broadband internet and mobile phone coverage is limited in rural and remote Australia¹⁴, and it is a common experience to drive long distances to ‘town’ or at least to an area where there is some reception.
46. The effect of the requirement for a separate written agreement on each occasion will be to effectively nullify TOIL as an option for many employers and employees in a sector, despite it having long been considered a mutually beneficial arrangement for both employers and employees. This is despite there being no evidence of that the current provision for TOIL is not working well.
47. The current approach strikes a balance between flexibility and fairness for both employees and employers. It ensures that employees retain control over whether they access TOIL or paid overtime, able to decide whether they should accrue additional time off to be taken at a later time, or receive higher wages in the ordinary course. It prevents overtime from accumulating in a manner outside both the control and knowledge of the employer and reducing the opportunity for unanticipated liabilities to accrue over a long period of time.
48. As was the case in 1971, mutually satisfactory arrangements can be, and are commonly, made where TOIL is granted at times convenient either to the employer or to the employee long after the time worked. Rather than taking an hour here or there, TOIL can accrue as whole days to be taken in conjunction with annual leave for a longer break after a busy harvest.

¹⁴ The database of reported broadband coverage and mobile black spot locations is available on the National Map: www.nationalmap.gov.au

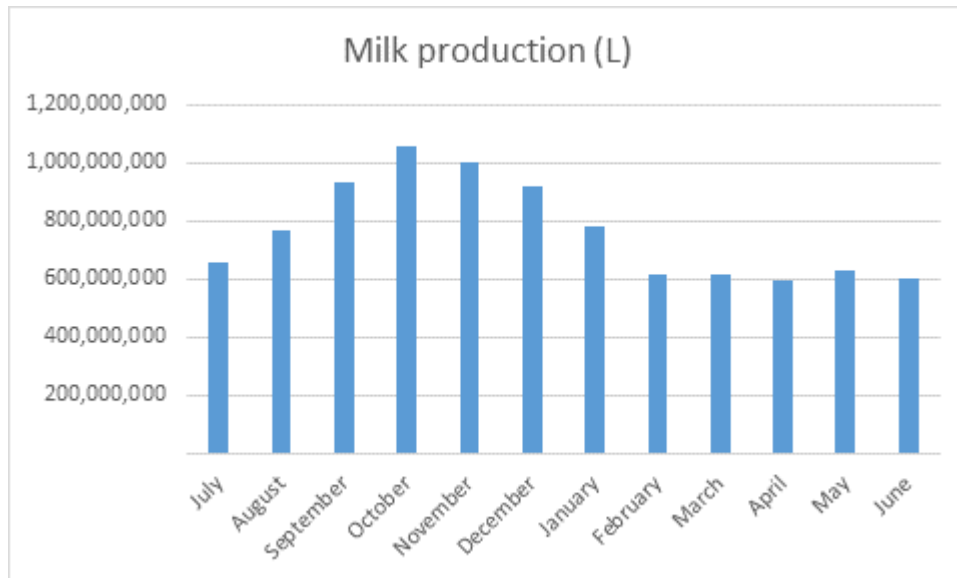
The requirement for the written agreement to be in a prescribed form (subclause 1.2(a))

49. Historically, there has been no requirement for a written agreement in relation to TOIL. The requirement that not only there be a written agreement on each occasion, but that it contain certain prescribed content, including specified text, will increase the administrative burden on employers and employees in the agriculture sector unreasonably.
50. As discussed above, the requirement is likely to have the effect of nullifying TOIL as an option for many farm businesses and their employees in rural and remote Australia. This is because without a written agreement in compliance with the model TOIL term, TOIL will not have been taken 'in accordance with' the term.
51. There is no evidence that the current provisions are either not effective or fair. In our submission, the findings of the Full Bench in 1971 at paragraph 29 above are as applicable today as they were then. Imposing new regulatory barriers on access to TOIL, which in many cases simply cannot be met, will operate unfairly because it will deny employees the choice of additional time off, and will force employers to rethink their approach to employment by either rostering to avoid overtime if possible (thereby reducing employee's take home pay) or wearing a significant increase in labour costs on each occasion that overtime is worked.

The requirement that TOIL be agreed and taken within 6 months (subclause 1.2(c))

52. In our submission, setting a finite period after which accrued TOIL converts to overtime is too restrictive in the agriculture sector. A good example is in relation to dairy employees. The seasonal nature of work in the dairy industry means that the busiest times of the year occur in sequence over seven to eight months.
53. Milk production is linked to calving. At the time when the herd is at peak milk production, the farm has the added labour demand of caring for calves who have been weaned off their mothers. This means farmers will have already worked for long hours with their herds while calving over the preceding three or four weeks leading into the peak milking period.
54. Calving requires 24 hour monitoring, with farmers going out every hour or two through the night as well as the day to check on cows in labour in the nursery

paddocks. Calves need to be separated from their mothers within a few hours of birth for various reasons including disease control, and they are then fed by hand for the next few weeks. The graph below demonstrates the peak times of the year for milk production in 2012/13¹⁵:



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

55. The exercise of a choice by the employee to accrue TOIL or earn overtime has a direct bearing on farm viability.
56. The long history TOIL in the agriculture sector means that it is a concept that is well entrenched and well understood. Employees have the choice, and once that choice is made, decisions about productive capacity, staffing levels and rostering can be made.
57. Farmers make strategic decisions at planting time about how much they are likely to be able to harvest in the short window between when a crop is ready to be picked and when it perishes. Availability of labour, and the cost of labour, are key influencing factors.
58. Importantly, farmers are generally ‘price takers’, rather than ‘price makers’. They do not set the price for their own produce: commodity prices are imposed down through

¹⁵ Dairy Australia, *Seasonality of milk production in the Australian dairy industry, 2012/13*.

the supply chain in both global and domestic markets. This affects the capacity of the farm to absorb any labour cost increase: for many farmers, labour is their single biggest cost.

59. During peak periods, labour demands are high and rostering to avoid overtime is not an option. ‘Getting the crop off’ means working until the job is done, with as many hands on deck as can be found. Many farmers rely on overseas workers to fill what would otherwise be significant labour shortages in rural and regional areas. In 2013/14, 41,319 working holiday makers undertook regional agricultural work to qualify for a second year visa.¹⁶

60. If employees elect to accrue TOIL, hours of work are costed on an ordinary time basis. Allowing this choice to be undone at any time, with retrospective effect, undermines the capacity of farm businesses to plan effectively and can mean significantly higher labour costs than anticipated when a choice to accrue TOIL is made.

61. The alternative for farm businesses is to simply disregard the possibility of TOIL and assume that all overtime will be paid for at overtime rates. On a fixed budget, higher labour costs mean less working hours and ultimately, a smaller area under crop and a lower annual yield.

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

62. As discussed above, a change of mind requiring payment of overtime rather than TOIL can impose a significant and unanticipated cost on employers. Where this cost has not been factored into the budget, and the demand is made at a time when cash flow is limited, this can place an additional strain on the farm business. The only way of managing this risk is to assume that all overtime will be paid at overtime rates and to reduce the number of working hours of the business accordingly.

¹⁶ Working Holiday Maker visa programme report, 30 June 2014

Conclusion

63. The insertion of the proposed model TOIL term into both the Pastoral Award and the Horticulture Award would displace arrangements which have evolved over many years and which are tailored to the industries they cover.
64. There is no evidence that the existing TOIL provisions are not operating as intended, or that the modern awards objective is not being met in relation to TOIL. Certainly no evidence to that effect was before the Full Bench in these proceedings, given that both the Pastoral Award and Horticulture Award were excluded from the list of awards in respect of which a claim for TOIL was made.
65. In our submission, the unique circumstances of the agriculture sector and the history of the Pastoral Award in particular tend strongly against the insertion of the model TOIL term into either the Pastoral Award or the Horticulture Award. In each case, the nature of industry is seasonal, variable and vulnerable to weather patterns beyond its control. At harvest time, labour needs are high and the work continues until it is done.
66. Faced with a choice of limiting a farm's productive capacity or covering unbudgeted labour costs at the end of a busy period, farmers will generally choose the lower risk, lower production option. Ultimately, this will have a dampening effect on the economy.

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9 November 2015