

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 - 4 yearly review of modern awards

AM2014/300

COMMON ISSUE – AWARD FLEXIBILITY

**SUBMISSIONS FROM THE AUSTRALIAN WORKERS' UNION REGARDING MODEL
TOIL CLAUSE**

1. The Full Bench issued a decision on 6 October 2015 ([2015] FWCFB 6847) and released a schedule of draft determinations on 16 October 2015, calling on those interested parties who objected to the insertion of the model TOIL clause into the 113 awards listed in that schedule to provide submissions by 9 November 2015. A number of employer groups and some unions provided submissions contending that particular individual awards should not be varied to include the model TOIL clause. Parties who wished to provide submissions in reply were also invited to do so, which is the purpose of this submission by the Australian Workers' Union (AWU).
2. The AWU supports the insertion of the model clauses developed by the Full Bench into all awards as proposed in the draft determinations, as this will lead to greater protection for all employees through increased consistency, accountability and predictability across all industries. The model term has been carefully considered by the Full Bench and provides a number of important safeguards for employees, including the requirement of written agreement prior to the work being undertaken, the obligation to pay the overtime at overtime rates if the TOIL is not taken within a specified period, and the right of employees to request overtime payments instead of TOIL.
3. The AWU does not agree with the submissions of the National Farmers' Federation (NFF) in relation to the *Horticulture Award 2010* (Horticulture Award) and the *Pastoral Award 2010* (Pastoral Award). While the AWU acknowledges that there is a history to the provisions dealing with TOIL and overtime in the pastoral and horticultural industries, the proposed model TOIL term is superior to the current TOIL provisions in both awards, and will provide greater certainty, security and protection for those employees. The AWU is particularly supportive of the use of written agreement and prescribed timeframes, and does not believe that agricultural and farming employment situations are unable to accommodate these increased protections for the rights of employees.
4. The AWU has previously raised concerns about the current TOIL clause in the Horticulture Award, as due to TOIL being the default position under this Award, clause 24.2 requires employees to inform employers at the time that overtime is offered that they would like to be

paid overtime rather than be granted TOIL. The NFF does not provide the history of this part of the clause in their submission, or any indication of how this clause works in practice, despite their claims that this clause is unique to this industry and was developed particularly for horticulture employers and employees. However, the clause presumably allows employers to decide whether to continue with overtime or not if the employee asks to be paid rather than have TOIL accrued.

5. The AWU submits that this provision raises some immediate concern about compliance with section 340 of the *Fair Work Act 2009* (Cth) (the Act), in that it appears to contemplate an employee suffering detriment (the removal of overtime entirely) because they exercise a workplace right in electing to be paid overtime rates. The insertion of the model TOIL term would remove this problematic provision and provide greater protection and certainty for all employees as to their rights to have TOIL or overtime provided for working additional hours.
6. In relation to the Pastoral Award, which is divided into four streams of employees, the model TOIL provision will only replace one section of the overtime provisions in relation to the Livestock and Poultry streams of employees. Consideration should also be given as to what should occur in relation to the overtime provisions for the Pig Breeding and Raising stream (there is no TOIL provision in clause 36) and the Shearing stream (there is no TOIL provision for shed hands in clause 50). The AWU submits that the model TOIL term should be added to clause 36 and clause 50 to ensure consistency across all employees in the pastoral industry.
7. The AWU submits that a troubling provision still remains in the Pastoral Award even with the addition of the model TOIL term, as clause 31.4 currently provides that an employee can lose their overtime entitlements entirely if they do not advise their employer that they have worked overtime within 2 weeks or before their next pay day, whichever is the later, and the AWU is aware of many employees being affected by this clause. The question is whether this term should be deleted because it has no effect due to the operation of section 326 of the Act, on the basis that the term allows an employer to deduct an amount from that which would otherwise be payable for the performance of work and the deduction is for the benefit of the employer. If this is correct, the issue would become whether the deduction is reasonable in the circumstance. The AWU would welcome the opportunity to discuss this issue further.
8. On the whole, the model TOIL term provides superior protection for employees who choose to accrue time off instead of being paid for working additional hours for their employer, and as the safeguards that are proposed in the model term are appropriate and workable, the model TOIL term should be inserted into all modern awards as proposed.

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