

**From:** [Kimberly Pearsall](#)  
**To:** [AMOD](#)  
**Cc:** [Sarah McKinnon](#); [Roushan Walsh](#)  
**Subject:** AM2014/300 & 301 - Award Flexibility  
**Date:** Wednesday, 7 December 2016 11:16:56 AM  
**Attachments:** [Final TOIL Draft Determination NFF & AWU.docx](#)

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Dear Sir/Madam,

During the hearing in the above matter on Monday 5 December 2016, the NFF undertook to file a draft determination reflecting the consent position between the NFF and the AWU. Accordingly, please find the draft determination attached.

Kind Regards,  
Kimberly

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# DRAFT DETERMINATION

*Fair Work Act 2009*  
s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—Award flexibility** (AM2014/300)

### **PASTORAL AWARD 2010**

[MA000035] Agricultural industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER ROBERTS

SYDNEY, XX DECEMBER 2016

A. Further to the Full Bench decision issued by the Fair Work Commission on XX XX XX, the above award is to be varied as follows:

1. By deleting clauses 31.3; 38.3 and 42.2 and inserting a new clause 8A as follows:

#### **8A Time off in lieu of payment for overtime**

This clause applies to Part 4 – Broadacre Farming and Livestock Operations; Part 5 - Pig Breeding and Raising and Part 6 – Poultry Farming of the Award.

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for all overtime that will be worked by the employee.

(b) An agreement made under clause 8A will remain in place unless the agreement is terminated. The agreement can be terminated at any time by notice in writing.

(c) An agreement made under clause 8A must be in writing.

(d) An agreement must state each of the following:

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

(ii) that the agreement can be terminated at any time by notice in writing;

(iii) that overtime worked after the agreement is terminated will be paid at the overtime rate applicable to the overtime when worked;

(iv) that time off instead of overtime must be taken within 6 months of it being worked, at a time or times agreed by the employee and employer.

**(v)** that if time off is not taken as mentioned in paragraph (iv), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. Agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

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

EXAMPLE: By making an agreement under this clause an employee who worked 2 overtime hours is entitled to time off 2 hours' time off.

**(f)** 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.

**(g)** If time off for overtime that has been worked under an agreement mentioned in paragraph (a) is not taken within the period of 6 months mentioned in paragraph (f), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked, unless the employer agrees to pay out the accrued overtime earlier.

**(h)** The employer must keep a copy of any agreement under clause 8A as an employee record.

**(i)** The employer must keep a record of the number of overtime hours worked by the employee, when those hours were worked and an updated record of the employee's time off in lieu balance.

**(j)** 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 instead of payment for overtime.

**(k)** An employee may, under section 65 of the 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. If the employer agrees to the request then clause 8A will apply.

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

**(l)** If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 8A 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 8A.

## **Schedule X**

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

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

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

**The employer and employee agree that the employee will take paid time off instead of being paid at overtime rates for overtime worked by the employee under this agreement. The period of time off that an employee can take is the same as the number of overtime hours worked.**

**Time off instead of overtime must be taken within 6 months of the overtime being worked, at a time agreed between the employer and employee.**

**If time off is not taken within 6 months of it being worked, the employer must pay the employer for the overtime in the next pay period following those 6 months. Payment of overtime will be at the overtime rate applicable to the overtime when worked.**

**This agreement can be terminated at any time by notice in writing.**

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

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

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

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

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

# DRAFT DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—Award flexibility**

(AM2014/300)

### **HORTICULTURE AWARD 2010**

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER ROBERTS

SYDNEY, XX OCTOBER 2016

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

A. Further to the Full Bench decision issued by the Fair Work Commission on XX XX XX, the above award is to be varied as follows:

1. By deleting clause “24.1 – Time off instead of payment for overtime” and inserting the following:

#### **24.2 Time off in lieu of payment for overtime**

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for all overtime that will be worked by the employee.

(b) An agreement made under clause 24.2 will remain in place unless the agreement is terminated. The agreement can be terminated at any time by notice in writing.

(c) An agreement made under clause 24.2 must be in writing.

(d) An agreement must state each of the following:

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

(ii) that the agreement can be terminated at any time by notice in writing;

**(iii)** that overtime worked after the agreement is terminated will be paid at the overtime rate applicable to the overtime when worked;

**(iv)** that time off instead of overtime must be taken within 6 months of it being worked, at a time or times agreed by the employee and employer.

**(v)** that if time off is not taken as mentioned in paragraph (iv), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. Agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

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

EXAMPLE: By making an agreement under this clause an employee who worked 2 overtime hours is entitled to time off 2 hours' time off.

**(f)** 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.

**(g)** If time off for overtime that has been worked under an agreement mentioned in paragraph (a) is not taken within the period of 6 months mentioned in paragraph (f), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked, unless the employer agrees to pay out the accrued overtime earlier.

**(h)** The employer must keep a copy of any agreement under clause 24.2 as an employee record.

**(i)** The employer must keep a record of the number of overtime hours worked by the employee, when those hours were worked and an updated record of the employee's time off in lieu balance.

**(j)** 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 instead of payment for overtime.

**(k)** An employee may, under section 65 of the 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. If the employer agrees to the request then clause 8A will apply.

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

**(I)** If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 24.2 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 24.2.

## **Schedule X**

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

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

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

**The employer and employee agree that the employee will take paid time off instead of being paid at overtime rates for overtime worked by the employee under this agreement. The period of time off that an employee can take is the same as the number of overtime hours worked.**

**Time off instead of overtime must be taken within 6 months of the overtime being worked, at a time agreed between the employer and employee.**

**If time off is not taken within 6 months of it being worked, the employer must pay the employer for the overtime in the next pay period following those 6 months. Payment of overtime will be at the overtime rate applicable to the overtime when worked.**

**This agreement can be terminated at any time by notice in writing.**

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

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

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

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

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