

3 February 2017

Fair Work Commission  
Terrace Tower, 80 William Street  
East Sydney NSW 2011  
By email: amod@fwc.gov.au

**Re: AM2014/300 – award flexibility – time off in lieu of payment for overtime –  
AWU comments on the draft determinations for the Horticulture Award and the  
Pastoral Award**

**Background**

1. Following the 13 December 2016 Full Bench Decision in these proceedings, draft determinations were published in regards to the *Horticulture Award 2010* and the *Pastoral Award 2010* on 20 January 2016.
2. Correspondence from the Award Modernisation Team explained the draft determinations are based on the agreed drafts provided by the parties<sup>1</sup> with any changes to wording highlighted in red.
3. The Australian Workers' Union are required to provide any comments on these draft determinations by 3 February 2017.
4. The National Farmers Federation (NFF) provided comments on 25 January 2017.
5. References to the 'Model TOIL Term' in this submission refer to the version published as 'Attachment C' to the Full Bench Decision of 8 July 2016.<sup>2</sup>

**Comments on the draft determinations**

6. While most changes to the parties' agreed draft determinations were marked up in red, some were not.
7. The AWU opposes the 'unmarked' changes identified below. It is unclear if these changes were made unintentionally.
8. These same changes appear in the draft determinations for both awards. For ease of reference however, we refer to Commission's draft determination for

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<sup>1</sup> NFF Correspondence to AMOD 7 December 2016 in AM2014/300.

<sup>2</sup> *4 yearly review of modern awards – Award flexibility* [2016] FWCFB 4258.

the *Horticulture Award* and the parties' agreed draft determination for the *Horticulture Award*. Our submissions apply equally in relation to both Awards.

Clause 24.1(f) (FWC draft) / Clause 24.2(g) (parties' draft) – cashing out TOIL

9. The Commission has removed the end of the final sentence at this clause, which reads: "...unless the employer agrees to pay out the accrued overtime earlier". This sentence was included as an agreed compromise between the parties. The AWU have previously submitted that the option to elect to be paid for accrued TOIL (as is provided for in the Model TOIL Term) should be maintained for these awards.<sup>3</sup> The AWU relied on the earlier Full Bench Decision in these proceedings on 06 October 2015 at paragraphs [52] and [53].
10. However, the parties agreed upon a compromise whereby the payment of overtime on request would at least be a clear option should the employer agree to pay the accrued overtime (without creating a mandatory payment of wages). We submit the agreed wording should be retained.

Schedule H (FWC draft) / Schedule X (parties' draft) – agreement template

11. We suggest the following change to clarify the meaning of clause 1 of the FWC draft Schedule G:

*1. The employer and employee agree that the employee will take time off instead of being paid for all overtime that ~~has been~~ is worked by the employee under this agreement.*

This is consistent with the parties' agreed wording and also removes the past tense expression.

12. The FWC version has removed the following critical paragraph that appears in the agreed Schedule X:

*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.*

13. The Model TOIL term 'agreement template' similarly provides:

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

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<sup>3</sup> See AWU Submission 30 November 2016 in AM2015/300 at [15] and [16].

*when worked and must be made in the next pay period following the request.*

14. We submit that the wording must be retained to ensure it is clear at the point the agreement is made that the employee will either be able to take time off in lieu within 6 months, or otherwise be paid for it in the next pay period following the expiration of 6 months. This reflects the operation of clause 24.1(f) of the FWC draft determination.
15. The Commission have determined that a template agreement will assist employers and employees and the AWU agree. However, it is likely that the templates will often be viewed and the Award will not. For that reason, to ensure the operative clause is observed and understood, the wording should be retained in accordance with the parties' draft.

NFF comments on the draft determinations

16. The NFF have proposed a change to paragraph 4 of Schedule H of the Commission's draft determinations for both awards to include the words 'after that time'. We do not oppose this change.
17. The AWU agree with the NFF's comments in regards to the location of the proposed term in the *Pastoral Award*.

**Summary of proposed changes:**

Proposed Change	Affected clause in FWC draft determination	
	Horticulture Award	Pastoral Award.
The words "...unless the employer agrees to pay out the accrued overtime earlier" to appear	24.1(f)	31.5(f), 36.12(f), 42.3(f)  (Note, the parties agree these clauses should be merged as a new clause 18. <sup>4</sup> )
The wording to be amended as follows:  <i>The employer and employee agree that the employee will take time off instead of being paid for all overtime that <del>has been</del> is worked by the employee under this agreement.</i>	Paragraph 1 of Schedule H	Paragraph 1 of Schedule G

<sup>4</sup> See NFF Correspondence to AMOD 7 December 2016 in AM2014/300.

<p>The following wording to be included as paragraph 5:</p> <p><i>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.</i></p>	Schedule H	Schedule G
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**END.**



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**Australian Workers' Union**  
3 February 2017