

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

30 June 2016

Re: AM2014/300 AWU submissions regarding the model TOIL term for the Resource Industry and Maritime modern awards

Background

1. On 15 June 2016 the Award Flexibility Full Bench issued a Statement regarding its approach to dealing with the potential inclusion of a model time off in lieu of overtime (TOIL) clause for the following awards:

Resource Industry modern awards

- *Hydrocarbons Industry (Upstream) Award 2010*
- *Mining Industry Award 2010*
- *Oil Refining and Manufacturing Award 2010*
- *Salt Industry Award 2010*

Maritime modern awards

- *Marine Towage Award 2010*
 - *Ports, Harbours and Enclosed Water Vessels Award 2010*
 - *Professional Diving Industry (Industrial) Award 2010*
 - *Dredging Industry Award 2010*
2. The Statement provides interested parties with an opportunity to make any further submissions by 4pm on 30 June 2016 and to provide an indication of whether they wish to be heard on their submissions.
 3. The Australian Workers' Union (AWU) has an interest in all the named awards aside from the *Marine Towage Award 2010*.
 4. The Statement accurately records that the AWU has not opposed the position of other affected parties that there is no need to insert the model TOIL term

into the *Dredging Industry Award 2010* and the *Professional Diving Industry (Industrial) Award 2010*.

5. The AWU supports the inclusion of the model TOIL term into the Resource Industry modern awards and the *Ports, Harbours and Enclosed Water Vessels Award 2010* (Ports Award) for the reasons set out below.

Current provisions

6. The Resource Industry modern awards and the Ports Award all currently contain a TOIL provision in the following terms¹:
 - (a) An employee may elect, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer.
 - (b) The employee may take one hour of time off for each hour of overtime, paid at the employee's ordinary hourly base rate of pay.

Model TOIL term

7. The latest version of the model TOIL term developed by the Full Bench was published on 9 May 2016.²
8. The current TOIL provision in the Resource Industry modern awards and the Ports Award lacks a number of safeguards for employees that the Full Bench has included in the model TOIL term including:
 - The requirement for a separate written agreement for each TOIL arrangement;
 - The ability for an employee to require payment for overtime previously accrued as TOIL at any time;
 - A prohibition on an employer exerting undue influence or undue pressure on an employee to make a TOIL arrangement; and

¹ See clause 26.4 of the *Hydrocarbons Industry (Upstream) Award 2010*; clause 20.4 of the *Mining Industry Award 2010*; clause 24.4 of the *Oil Refining and Manufacturing Award 2010*; clause 23.4 of the *Salt Industry Award 2010* and clause 20.2 of the *Ports, Harbours and Enclosed Water Vessels Award 2010*

² See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/april-2016-model-toil-term.pdf>

- A requirement for accrued TOIL to be paid at overtime rates on termination of employment.
9. The Full Bench confirmed these provisions are *necessary* for inclusion in the model TOIL term in its 6 October 2016 Decision.³
 10. The Australian Mines and Metals Association (AMMA) and Maritime Industry Australia Limited (MIAL) have not identified any compelling reason why these safeguards should not operate for employees to which the Resource Industry modern awards and the Ports Award apply.
 11. The argument advanced by AMMA and MIAL is essentially that there is no reason to change the existing TOIL provisions in the respective awards.
 12. This position is flawed. There is a compelling reason to change the existing TOIL provisions in these awards.
 13. The reason is that the Commission has extensively considered what provisions should be included in a TOIL term in order for it to form part of a fair and relevant safety net of terms and conditions. The model TOIL term has been developed for the specific purpose of satisfying the modern awards objective.
 14. It must follow that the current TOIL provision in the Resource Industry modern awards and the Ports Award is deficient and not consistent with the modern awards objective and hence should be replaced with the model TOIL term developed by the Commission in these proceedings.

Opportunity to be heard

15. We are content to rely upon these written submissions and do not request an opportunity to be heard on this issue.



Stephen Crawford
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³ 4 *yearly review of modern awards – Award flexibility common issue – time off in lieu of payment for overtime – model term* [2015] FWCFB 6847 at [34], [51], [54] and [61]