

9. TIME OFF IN LIEU (TOIL)

Summary of Core Contentions

- ACCI seeks a revised test case clause in relation to time off in lieu of overtime, and an extension of that clause to cover other penalty rates.
- The clause proposed clause would improve the operation of time off in lieu arrangements and make it easier for employees to access these provisions to assist in balancing work and family responsibilities, where agreed with their employers.
- Overtime and other penalties compensate employees for working undesirable and unsociable hours.
- In the decade since the POFL decision, improved versions of the time off in lieu clause have emerged both within awards and within bargaining. The imperatives for majority facilitation on this issue have eroded.
- Renewed Full Bench endorsement of time off in lieu in the manner sought would provide an impetus for parties to include the clause where it does not exist, and to improve the operation of clauses where they are already contained in awards.

ACCI/NFF Proposed Clause

[9.1] ACCI/NFF proposes two separate clauses in relation to time off in lieu - a clause relating to overtime and a clause relating to penalty rates.

Time off in lieu of overtime - Proposed Variation

[9.2] ACCI/NFF seeks endorsement of the following time off in lieu of overtime clause:

To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to take time in lieu of payment for overtime at an agreed time or times.

Overtime taken as time off shall be taken at the ordinary time rate, that is an hour for each hour worked.

[9.3] The revised test clause in relation to time off in lieu of overtime would:

- a. Simplify the clause and remove a role for majority facilitation.
- b. Provide endorsement for the time for time model, and
- c. Specifically link time off in lieu to the purpose of assisting employees to balance their work and family responsibilities by agreement with their employers.

[9.4] The ACCI/NFF clause is restricted to work and family. It is therefore more limited than the general time off in lieu clause. In awards where there is already generalised access to time off in lieu of overtime, it would not be appropriate for that to now be further restricted. However it would be open to parties to seek to include a more limited form of the clause, based around work and family balance, in awards which do not currently contain such a clause.

[9.5] ACCI seeks endorsement of the 'time for time' model of time off in lieu of overtime. This model, which calculates the amount of leave the employee is entitled to by reference to the amount of overtime worked, has been introduced into many awards. It is the most appropriate model because:

- a. It is fair, when overtime is compensated by the provision of leave, that it be calculated in this manner.
- b. It provides the best basis for facilitating employer agreement to requests to take time off in lieu of overtime.

[9.6] ACCI also seeks the removal of a role for majority facilitation on the grounds that:

- a. It is not appropriate for the majority of employees to have a veto over the working preferences of an individual, particularly in relation to their family responsibilities, and
- b. In a practical sense, such requirements mean that this option cannot be effectively accessed by employees.

Time off in lieu of other penalty rates - Proposed Variation

[9.7] ACCI also seeks to extend capacities to take time off in lieu to other penalty rates. Principally, time off in lieu arrangements could also be applied to weekend and public holiday penalty rates and provide additional sources of leave for employees by agreement with their employers.

[9.8] ACCI/NFF seek the following clause:

Time Off In Lieu Of Payment For Penalty Rates

To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to take time off at the penalty equivalent, or any part of it, in lieu of penalty rates otherwise payable for work performed during ordinary hours.

This clause does not apply to penalties / additional payments for shift work or overtime.

Such time off shall be taken within 28 days or is accumulated and added to the period of annual leave.

[9.9] Such a provision is already contained in a federal award, the *Shop, Distributive and Allied Employees Association - Victorian Pharmacy Assistants Award 2000*, and the ACCI/NFF clause closely follows this existing model:

23.8 Penalty rates for ordinary time

23.8.1 The following penalty rates shall be paid to all permanent employees in respect to ordinary hours of work:

- **Monday to Friday inclusive** - between 6.00 p.m. and 9.00 p.m. - the ordinary rate of pay plus 25%
- **Saturday** - between 8.00 a.m. and 12 noon - the ordinary rate of pay plus 25%

23.8.2 An employee shall be entitled to payment of the additional amount as for three hours.

23.8.3 Time off in lieu of payment for penalty rates

Where an employer and employee agree, time off at the penalty equivalent, or any part of it, may be taken in lieu of penalty payments. Provided that such time off is taken within 28 days or is accumulated and added to the period of annual leave.

[9.10] The ACCI application is based on this model, but specifies that:

- a. The clause does not apply to shift work or overtime and
- b. Is directed to assisting employees in balancing their work and family responsibilities.

How this would work in practice

[9.11] The work and family utility of time off in lieu is well understood and accepted. The ACCI/NFF proposal would provide employees with scope to request to be compensated with either proportionate leave for work performed on weekends, public holidays, or through overtime.

[9.12] For example, an employee may work 8 hours overtime in a week, and request to take a day's leave the following week. Particularly for full-time employees who regularly work overtime, such flexibility in how to best be compensated for overtime (or penalty rate) work performed can result in a variety of positive outcomes for balancing work with family responsibilities.

Appropriate evolution of the system

[9.13] Given the work and family challenge, it is appropriate that employees receive greater capacity to agree with their employers how to be best compensated for penalties they receive. Some employees will prioritise time over financial compensation and allowing employees to be compensated in such a manner will assist work and family balance.

[9.14] The ACCI/NFF application does not disturb the rationale for the payment of penalty rates or overtime penalties. It is merely about providing employees with greater options to make best use of award entitlements.

[9.15] Arguably, much greater use can be made of TOIL arrangements in the award system. In many awards, the original facilitative as contained in the POFL decision has been discarded in favour of simpler, more effective clauses, without any significant problems arising. An example of such a clause is contained in the *Insurance Industry Award 1998*:

19.7 Time off in lieu of payment

19.7.1 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.

19.7.2 Alternatively, by agreement with the employer, the employee may elect to be paid at ordinary rates for the time worked and take time off at the rate of one half hour or one hour for each hour of overtime worked as the case may be.

19.7.3 An employer must, if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed in 19.5, for any overtime worked under this subclause where such time has not been taken within four weeks of accrual.

[9.16] Notwithstanding these best practice iterations of time off in lieu clauses, inappropriate and bureaucratic versions persist. As an example, consider the form of the clause as contained in the *Timber and Allied Industries Award 1998*:

32. TIME OFF INSTEAD OF OVERTIME PAYMENT

Notwithstanding provisions elsewhere in the award, the employer and the majority of employees as provided for in clause 10 – Facilitative provisions, of this award may agree to establish a system of time off in lieu of overtime provided that:

32.1 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.

32.2 An employer shall, if requested by an employee, provide payment at the rate provided for the payment of overtime as prescribed in clause 31 - Overtime, Saturday, Sunday and holiday payments - day work, of this award, for any overtime worked under this clause where such time has not been taken within four weeks of accrual.

32.3 This clause is subject to the employer informing each union which has members employed at the particular enterprise of its intention to introduce an enterprise system of time off in lieu of overtime flexibility, and providing a reasonable opportunity for the union to participate in negotiations.

32.4 Once a decision has been taken to introduce an enterprise system of time off in lieu, in accordance with this clause, its terms must be set out in the time and wages records kept pursuant to regulations 131A - 131R of the Industrial Relations Regulations.

32.5 An employer shall record time off in lieu arrangements in the time and wages book as prescribed in 22.9 of this award, at each time this provision is used.

[9.17] This version of the clause places a variety of hurdles in the way of quick and effective access to time off in lieu arrangements. As stated earlier, the role of the majority in determining such decisions is also questionable.

Incidence

[9.18] Nine years after the POFL decision, there is also patchy and insufficient take-up of TOIL provisions in particular awards. ACCI/NFF analysed the incidence of TOIL provisions in Wagenet's Most Requested Awards and found the following:

- a. Out of a relevant subset of 77 awards, 40 – just over half, contained TOIL provisions.

- b. Of those 40 awards, 3 remain subject to majority facilitation. In the remainder, the clauses had discarded with majority facilitation approaches.

[9.19] This provides further support for ACCI's application. The system has moved on from the original POFL model, and it is appropriate that a new contemporary approach enjoys Full Bench endorsement. It also demonstrates that there remain a significant number of awards without any TOIL capacities whatsoever.

Bargaining

[9.20] Enterprise bargaining provides additional support for the ACCI application. Through the bargaining system, employers and employees are more aware of such arrangements and more comfortable with how they operate in practice.

[9.21] The DEWR *Annual Report 2002-2003* states that 68.1% of federal certified agreements in 2002-2003 contained 'flexible working hours' provisions, including time off in lieu of overtime¹.

[9.22] Further information regarding bargaining on TOIL is also contained the ADAM *Special Report into Work and Family Measures*. Some key results from this report include:

- a. In both the federal and Queensland jurisdictions, time off on a 'time for time' basis is more prevalent than time off at the overtime equivalent. This demonstrates that the model sought by ACCI is a mainstream approach to TOIL regularly endorsed by employees as part of agreement provisions.
- b. 66% of agreements in the Queensland jurisdiction, and 62.7% of agreements in the federal jurisdiction, contained 'flexible hours of work' provisions, which include TOIL².

[9.23] The ADAM report provides further evidence of far greater community awareness and use of such arrangements and the popularity of such provisions with employees. It is appropriate that more employees who are reliant on federal awards have access to such provisions.

¹ DEWR Annual Report 2002-2003, p. 126.

² ACIRRT, *ADAM Special Report: Examination of work and family measures in Queensland and Federal enterprise agreements: the current state of play*, May 2002.

