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**Sent:** Monday, 12 September 2016 2:26 PM  
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**Subject:** AM2014/47 - Annual Leave

Dear Parties,

The above matter has been listed for hearing at **10.00am on Tuesday 13 September 2016** in Sydney.

The attached document – Questions on Notice - has been prepared to facilitate the hearing before the Full Bench. Parties will be asked to address the questions identified in the document during the course of the hearing on Tuesday.

The document will be published on the Commission's website.

Kind regards,

**Mirella Franceschini**  
**Associate to The Hon. Justice IJK Ross**  
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***Please note: my telephone number has changed. My new phone number is 03-8656 4520. Please update your records accordingly.***

## AM2014/47 – Annual leave

### **Questions on Notice for the NSW Farmers' (Industrial) Association**

The NSWFIA opposes the insertion of the excessive leave model term into the *Aquaculture Industry Award 2010* (the NSWFIA Award).

This matter is the subject of a hearing at 10am on Tuesday 13 September 2016. To facilitate the efficient conduct of the hearing the NSWFIA is put on notice that the Full Bench will be seeking answers to the following questions.

Clause 23.4 of the Aquaculture Award provides that annual leave is to be taken within 18 months of accrual and for the purpose of ensuring that accrued annual leave is taken within 18 months of accrual an employer may require an employee to 'take a period of annual leave from a particular date provided the employee is given at least 28 days' notice'.

Two issues arise in respect of clause 23.4.

#### **ISSUE 1:**

Section 87(2) of the *Fair Work Act 2009 (Cth)* (FW Act) provides that an employee's entitlement to paid annual leave 'accrues progressively during a year of service according to the employee's ordinary hours of work'. In other words, an employee does not need to complete a year of service before they accrue an entitlement to paid annual leave.

#### ***How does clause 23.4 operate in these circumstances?***

On its face, a requirement to take annual leave 'within 18 months of accrual' may mean that an employee could be required to take a period of accrued paid leave each week.

#### ***What purpose does clause 23.4 serve?***

#### ***Why is it necessary to include clause 23.4 in the Aquaculture Award to achieve the modern awards objective?***

2. Clause 23.4 of the Aquaculture Award provides that the employer may direct an employee to 'take a period of annual leave from a particular date provided the employee is given at least 28 days' notice'.

***Is it accepted that the jurisdictional basis for a modern award term requiring an employee to take paid annual leave in particular circumstances, (ie. a term such as clause 23.4), is s.93(3) of the FW Act? If not, what is the jurisdictional basis for clause 23.4)?***

Section 93(3) provides that a term of this type – ie requiring an employee to take paid annual leave – is subject to the legislative direction that such a requirement ‘is reasonable’.

In *Australian Federation of air Pilots v HNZ Australia Pty Ltd* ([\[2015\] FWCFB 3124 at \[25\]](#)) a Full Bench observed that in assessing the reasonableness of any employer requirement to take leave ‘all relevant considerations needed to be taken into account including those which are set out in paragraph [382] of the Explanatory Memorandum to the *Fair Work Bill 2008*’.

Paragraph 382 of the Explanatory Memorandum states:

‘382. In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:

- the needs of both the employee and the employer’s business;
- any agreed arrangement with the employee;
- the custom and practice in the business;
- the timing of the requirement or direction to take leave; and
- the reasonableness of the period of notice given to the employee to take leave.’

***Does the NSW FIA submit that the requirement to take paid annual leave in clause 23.4 ‘reasonable’ within the meaning of s.93(3)? If so, how are the matters mentioned in paragraph 382 of the Explanatory Memorandum taken into account?***