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Sent: Monday, 12 September 2016 2:24 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 Coal Mining Industry Employer Group (the CMIEG)

The CMIEG opposes the insertion of the excessive leave model term into the Black Coal Mining Industry Award 2010 (the BCMI Award) and submits that current clauses 25.4 and 25.10 adequately deal with the matter of excessive leave and should be retained.

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

ISSUE 1: Clause 25.4(a)

Clause 25.4(a) of the BCMI Award provides that ‘annual leave will be taken within 12 months of the date the employee received the annual leave entitlement’.

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 25.4(a) operate in these circumstances?

On its face, a requirement to take annual leave ‘within 12 months of the date the employee received the annual leave entitlement’ may mean that an employee could be required to take a period of accrued paid leave each week.

What purpose does clause 25.4(a) serve?

Why is it necessary to include clause 25.4(a) in the BCMI Award to achieve the modern awards objective?

ISSUE 2: clause 25.4(c)

Clause 25.4(c) of the BCMI Award provides that the employer ‘may direct an employee to take all or part’ of their annual leave entitlement on the giving of 28 days’ notice in writing.

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 25.4(c)), is s.93(3) of the FW Act? If not, what is the jurisdictional basis for clause 25.4(c)?

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 CMIEG submit that the requirement to take paid annual leave in clause 25.4(c) ‘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?

ISSUE 3: Data provided by CMIEG

Does the CMIEG have any comment to make in respect to the issues raised by the CFMEU in its submission dated 19 February 2016 (at paragraphs 3-6)? The CFMEU submission relates to the data provided by CMIEG concerning the accrual of annual leave by employees of various employers in the black coal mining industry.