

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Annual Leave

Revised Draft Determinations

(AM2014/47)

20 OCTOBER 2016

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GROUP

1. INTRODUCTION

1. In its decision handed down on 22 September 2016,¹ the Fair Work Commission (**Commission**) finalised the model terms in relation to cashing out annual leave, leave in advance, EFT, annual leave payments and excessive leave for 26 modern awards. These include 20 modern awards which contain existing provisions that require accrued annual leave to be taken within a certain period of time and six modern awards in the maritime industry.
2. On 13 October 2016, the Commission published revised draft determinations giving effect to its decision. On that same date, parties were asked to comment on the form of the determinations.
3. Ai Group has reviewed the 26 draft determinations and wishes to comment on the determinations with respect to the following awards:
 - *Aquaculture Industry Award 2010*;
 - *Mobile Crane Hiring Award 2010*;
 - *Pre-mixed Concrete Award 2010*.
4. We also note that the renumbering of pre-existing award provisions may necessitate amendments to cross-references contained in other terms of the awards. However, these have not been identified in the draft determinations published.

¹ [2016] FWCFB 6836.

2. REVISED DRAFT DETERMINATION - AQUACULTURE INDUSTRY AWARD 2010

5. The Commission has re-drafted clause 23.3 (the close down provision) of the *Aquaculture Industry Award 2010 (Aquaculture Award)* in plain language. However, it appears to us that the proposed re-draft of clause 23.3 no longer specifies how much leave is to be taken during a period of close down when employees have annual leave accrued.

6. Clause 23.3(a) of the Aquaculture Award, as presently drafted, clearly specifies how much leave employees with accrued annual leave need to take if they are given notice of a close down. It provides as follows:

23.3(a) When an employee has been given notice pursuant to clause 23.2 and the employee has:

- (i) accrued sufficient annual leave to cover the full period of closing, the employee must take paid annual leave for the full period of closing;
- (ii) insufficient accrued annual leave to cover the full period of closing, the employee must take paid annual leave to the full amount accrued and leave without pay for the remaining period of the closing; or
- (iii) no accrued annual leave, the employee must take leave without pay for the full period of closing.

7. In contrast, clauses 23.3(c) and 23.3(d) of the proposed re-draft provide as follows:

23.3(c) An employee must take annual leave if they have accrued an entitlement to annual leave that covers all or part of the close-down.

23.3(d) An employee who has not accrued an entitlement to annual leave for all or part of the period of close-down must take any annual leave they have accrued and leave without pay for the rest of the close-down.

8. It is not clear from the proposed clause 23.3(c) how much annual leave an employee who has accrued annual leave must take during the close down. In particular, unlike the current clause, the proposed clause 23.3(c) does not specify that an employee who has accrued sufficient annual leave to cover the full period of the close down needs to take annual leave for the full period of the close down. The re-draft simply says that an employee who has

accrued annual leave to cover all or part of the close down must “take annual leave.”

9. The re-drafted clause also does not clearly specify that an employee who has not accrued sufficient annual leave to cover the full period of the close down needs to take whatever annual leave they have accrued and leave without pay for the remaining period of the closing. The words “for all or part of the period of close down” in the proposed clauses 23.3(c) and 23.3(d) are ambiguous and seem to give employees with accrued annual leave the ability to only take annual leave for part of the period of close down.
10. For the above reasons, we submit that the wording in the current clause 23.3(a) should be retained in the re-draft. Alternatively, the proposed clauses 23.3(c) and 23.3(d) should be amended to make it clear that employees with sufficient annual leave to cover the full close down period must take leave for the full period of close down, and those with insufficient annual leave accrued to cover the full period of the close down need to take whatever period of annual leave they have accrued (if any) and leave without pay for the remainder of the period.
11. If clauses 23.3(c) and 23.3(d) are amended, suggested wording could be as follows:

23.3(c) An employee who has accrued sufficient annual leave to cover all of the close down must take annual leave for all of the close down.

23.3(d) An employee who has not accrued sufficient annual leave to cover all of the close down must take any annual leave they have accrued and leave without pay for the rest of the close down.

3. REVISED DRAFT DETERMINATION – MOBILE CRANE HIRING AWARD 2010

12. We submit that there is a tension between the excessive leave provisions and the broken leave provisions in the proposed re-draft of the annual leave provisions in the *Mobile Crane Hiring Award 2010 (MCH Award)*.
13. The broken leave provisions, which are currently at clause 25.2(b) of the MCH Award, have been retained in the proposed re-draft in the new clause 25.5 proposed at item 5 of the draft determination. The proposed clause 25.5 provides as follows:

25.5 Broken leave

- (a) The annual leave will be given and taken in one or two continuous periods. If given in two separate periods, then one of those two periods must be at least 21 consecutive days, including non-working days.
- (b) If the employer and an employee so agree, an annual leave entitlement may be given and taken in two separate periods, neither of which is of at least 21 consecutive days, including non-working days, or on three separate periods.
- (c) Notwithstanding the provision of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods or part of a single day not exceeding a total of five days in any calendar year at a time or times agreed between them.
- (d) An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least five consecutive annual leave days are taken.
- (e) The annual leave provided by this clause will be allowed and will be taken, and except in relation to proportionate leave entitlements upon termination, payment will not be made or accepted instead of annual leave.
14. The provisions in the proposed clause 25.5 (which are identical to the provisions of clause 25.2(b) of the existing MCH Award) contain a number of restrictions regarding the manner in which annual leave can be given and taken. For example, section 25.5(a) provides that annual leave must be given and taken in one or two separate periods, and if in two separate periods that one of those periods must be at least 21 consecutive days.

15. Given this, and the fact that the broken leave provisions in the proposed re-draft immediately follow the excessive leave provisions, it is possible that the restrictions contained in the proposed clause 25.5 could be seen as effecting the operation of the excessive leave provisions in the proposed clauses 25.2, 25.3 and 25.4. This is because it is unclear from the current drafting as to whether or not the clauses are intended to be read together and whether or not the broken leave provisions are to apply to the excessive leave provisions.
16. We also note that the words “payment will not be made or accepted instead of annual leave” in the proposed clause 25.5(e) appear to prohibit the cashing out of annual leave. This is clearly inconsistent with the cashing out provisions inserted into the MCH Award on 29 July 2016.
17. For the above reasons, we submit that the proposed clause 25.5(e) should be deleted and that clause 25.5 as a whole should be amended to make it clear that the broken leave provisions in clause 25.5 do not restrict the operation of the excessive leave provisions (or any other provisions in clause 25).
18. Alternatively, we propose that the broken leave provisions in the proposed clause 25.5 should be deleted in their entirety, subject to the retention of 25.5(d). Clause 25.5(d) affords employers and employees flexibility and should therefore be retained.

4. REVISED DRAFT DETERMINATION - PREMIXED CONCRETE AWARD 2010

19. In relation to the draft determination for the *Premixed Concrete Award 2010*, there appears to be a typographical error at item 6.
20. It appears to us that the reference to 'clause 24.6(b)' in clause 24.7(a) at item 6 should in fact be to 'clause 24.5(b).' This is because clause 24.7(a) refers to an employee genuinely trying to reach agreement with an employer around reducing excessive leave and it is clause 24.5(b), not clause 24.6(b), that sets out the ability for an employee and employer to try to reach such agreement.