TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER HAMPTON

AM2014/47

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2014/47)
Annual Leave – common issue

Sydney

10.03 AM, TUESDAY, 13 SEPTEMBER 2016

PN1

JUSTICE ROSS: Can I have the appearances, please. In Sydney?

PN2

MR P SEBBENS: If the Commission, pleases, my name is Sebbens, initial P, solicitor. I seek permission to appear for the coal mining industry employer group.

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JUSTICE ROSS: Thank you, Mr Sebbens.

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MR SEBBENS: I have with me Mr Gunsberg, who is the convenor of that group.

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JUSTICE ROSS: Thank you.

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MS G KUSUMA: If the Commission pleases, it's Kusuma, initial G, for the New South Wales Farmers Industrial Association.

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JUSTICE ROSS: Thank you.

PN8

MR A THOMAS: If the Commission pleases, I appear on behalf of the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union. My name is Thomas, initial A.

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JUSTICE ROSS: And your interest is in the - - -

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MR THOMAS: It's in the Black Coal Mining Industry Award.

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JUSTICE ROSS: Thank you, Mr Thomas.

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MR T PACEY: If the Commission please, it's Pacey, initial T. I'm from the Professionals Australia Collieries Division, also the Black Coal Award.

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JUSTICE ROSS: And the Black Coal? That's your interest?

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MR PACEY: Yes.

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JUSTICE ROSS: Thank you.

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MR S CRAWFORD: Crawford, initial S from the AWU for the Agriculture Award.

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JUSTICE ROSS: Thank you, Mr Crawford. And in Melbourne?

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MR S BARKLAMB: Yes, your Honour, it's Barklamb, initial S, appearing for AMMA and our interest is also in Black Coal. If I may, while I'm on my feet your Honour - - -

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JUSTICE ROSS: I might just get you to resume your seat for a moment, Mr Barklamb. Just so - can you just speak into the microphone? We are just having a little trouble picking you up.

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MR BARKLAMB: Yes. Thank you, your Honour. I'll do this semi-seated. It's Barklamb, initial S. I am with the Australian Mines and Metals Association, AMMA. Our interest is in the Black Coal Award and just if I may, your Honour, while I'm on my feet on audio matters, we had a difficulty in hearing down in Melbourne a number of people at the ends of the Bar Table in Sydney.

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JUSTICE ROSS: All right. Well, I will ask them to speak up and I think if everyone remains seated an speaks into a microphone, that might assist. If at any time you have any trouble, Mr Barklamb, just let us know.

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MR BARKLAMB: Thank you, your Honour.

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JUSTICE ROSS: All right. Is there any objection to the application for permission to appear by Mr Sebbens? Having regard to the complexity of the matter, we think it will be dealt with more efficiently if permission is granted. Permission is granted on that basis, Mr Sebbens.

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We might turn first to the Black Coal matter. We provided some questions on notice, Mr Sebbens. Can you deal with those first and then to the extent you wish to amplify whatever you wish to say in relation to your written submissions.

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MR SEBBENS: Yes. Thank you, your Honour. Yes, I can deal with those three questions in particular and then perhaps as I go along, perhaps I will be able to amplify some of the submissions, your Honour, as I go along.

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JUSTICE ROSS: That's fine.

PN27

MR SEBBENS: There's probably a final additional item which is just a question about the interaction of the proposed model term on excessive annual leave with the existing terms, which we make by way of submission as to why the model term ought not go into the award, but perhaps should also be had regard to if the Commission was minded to insert the model term into the award.

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JUSTICE ROSS: Certainly. I think you dealt with the interaction issue in your written submissions of last year.

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MR SEBBENS: Yes, we did.

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JUSTICE ROSS: But the additional point being if it does go in, how might that work?

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MR SEBBENS: Yes. Thank you, your Honour.

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JUSTICE ROSS: Thank you.

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MR SEBBENS: If I can turn firstly to issue 1, which concerns clause 25.4. We took it that was (b), which is the clause that reads:

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> *Unless otherwise agreed, annual leave will be taken within 12 months of the date the employee received the annual leave entitlement.*

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And we have been asked the question what purpose does that particular subclause serve and why is it necessary to include it to achieve the modern awards objective. It's worth just noting at the outset that clause 25.4(b) appears to be a vestige of predecessor awards that provided for annual leave to be credited to an employee upon an anniversary date, so clause 29 of the predecessor Coal Mining Industry (Production and Engineering) Consolidated Award 1997 at clause 29.1 provided for annual leave to be so credited upon each anniversary, and then provided in a clause 29.3.2, a clause very similar to the existing 25.4(b), which read:

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> *Annual leave will be taken within 12 months from the date it was credited to the employee.*

PN37

Similarly, there was a staff award which applied, the Coal Mining Industry (Staff) Award 2004, and clause 26.1 of that award similarly provided for annual leave to be credited to an employee upon an anniversary date, although it appears that there was no corresponding provision requiring the taking of that leave within

12 months. But it is apparent that that clause, when the modern award was drafted by the parties, that there was an attempt effectively to synthesise the terms of the National Employment Standard with the predecessor clauses. It's accepted that the way in which the clause is worded creates a slightly unusual circumstance that because annual leave accrues as time progresses that the 12-month requirement effectively is an ongoing requirement, and therefore would presumably as one of the questions asked require leave to be taken on a week-by-week basis. That's clearly not what was intended; the drafting could have been improved.

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In practice, on my instructions, the practice is that employers treat it effectively as though there were an anniversary date, and that it's primarily used really for the purpose of having discussions with employees and creating an expectation with them that they will take their effectively yearly quota of leave within the space of the relevant year, and that that has provided a benefit to employers to assist them in annual leave planning, and also in having discussions with employees in relation to agreeing to take leave within a particular year if they have an excessive amount of leave which is accrued but untaken. Perhaps within the context of the clause 25.4 as a whole, it then perhaps creates also a foundation for the employer to then exercise their right under clause 25.4(c) to then so direct an employee to take leave.

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JUSTICE ROSS: It doesn't actually.

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MR SEBBENS: It's not connected in that way - - -

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JUSTICE ROSS: No, it's not connected at all.

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MR SEBBENS: - - - expressly.

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JUSTICE ROSS: Or implicitly. It's a separate provision provided the employer may direct. It doesn't relate to (b) or (a). It's in the same subclause but they seem to operate separately, and the three subclauses seem to provide for different things.

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MR SEBBENS: I accept that they do and they're certainly capable of doing that. Perhaps in a practical way I'm illustrating that - - -

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JUSTICE ROSS: I'm slightly troubled by the proposition that the way these clauses are treated in practice - and we have to construe them as safety net instruments.

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MR SEBBENS: Yes, your Honour.

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JUSTICE ROSS: And on its face I think you agree with the proposition that subclause (b) provides that annual leave will be taken within - absent an agreement - within 12 months of the date the employee received the entitlement.

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MR SEBBENS: Yes.

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JUSTICE ROSS: And the way that provision would operate and interact with the NES in a legal sense, leave aside how it might be applied, but as to what it actually means and can require would be you'd have to take leave almost on a weekly basis because that's the progressive accrual rule.

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MR SEBBENS: Yes.

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JUSTICE ROSS: Well, what do we do about that?

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MR SEBBENS: I accept that's the way it's certainly constructed and that would be - - -

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JUSTICE ROSS: I understand the history and how we've got to this point.

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MR SEBBENS: Yes.

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JUSTICE ROSS: It's that it sort of reflects provisions and awards of the past, well for that matter legislative frameworks of the past, where leave didn't accrue progressively in accordance with their weekly cycle or ordinary hours, but rather it was on the anniversary date after 12 months' service, and it's just we're in a different environment now, so what do we do in relation to that provision?

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MR SEBBENS: Your Honour, I think the potential solution to it is is that - well, the clause would require some significant re-drafting - but to effectively reflect what the intent, I think, of the parties was, and perhaps the intent of the predecessor clauses, is that a clause to the effect of that an employee would not, or should not rather, accrue annual leave equivalent to a two-yearly entitlement as provided for in 25.2, or words to that effect, might be a way in which the matter could be dealt with. There might then be challenges about whether or not that's merely aspirational and what work it has to do, but my instructions - clauses of this nature have aided significantly employers in managing leave and planning for it, and if it is possible to draft a similar provision that has the effect, or something like the effect, of what the predecessor clauses had, then that would be the preferred approach of the coal mining industry employer group.

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JUSTICE ROSS: The model term defines excessive leave as in terms of a two-year entitlement as well.

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MR SEBBENS: Yes, it does.

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JUSTICE ROSS: And then it gives rise to a right by the employer to direct, which is what you seek here.

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MR SEBBENS: Well, it triggers the right to then direct. We say though that if the model term was to be inserted that either if it was by replacement it would remove the existing rights of both employees and employers under 25.4(a) for employees, and 25.4(c) for employers, which effectively are without the relevant fetters, if I can describe them in that way, of the model term. The model term provides certain thresholds to be met, in the way that your Honour has described; excessive annual leave to be accrued as defined and for certain notice to be given. In the model term that's eight weeks. In the current award it's 28 days on both sides of the ledger, and there are limitations to how much leave can then be directed to be taken by both sides. Here there's no limitation on whether it's the entirety of the accrued leave or not either by the employee for the employer, so we would say that would effectively result in either if the clause was to be inserted together with the existing clause 25.4, perhaps some confusion about which applied in which circumstances, or if it was in replacement would effectively be a deletion and removal of those existing rights of both employers and employees under the existing 25.4(a) and (c).

PN61

So in respect of (b), to answer your Honour's question I think the alternatives are either a clause in words to the effect of as I suggested, that is, potentially an aspirational clause that refers to an employee ought not accrue more than two years' equivalent of the entitlement in 25.2, or the alternative obviously open to the tribunal is to delete subclause (b) altogether.

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JUSTICE ROSS: All right.

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MR SEBBENS: I'm happy to move the issue to your Honour.

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JUSTICE ROSS: Yes, that's fine. Thank you.

PN65

MR SEBBENS: Issue 2 then concerns clause 25.4(c), so that's the right of the employer to direct the employee to take leave either in whole or in part upon the giving of 28 days' notice, and we've been asked the question what's the jurisdictional basis for that, is that section 93(3), and if not what is the jurisdictional basis. We do accept that the jurisdictional basis of that particular

provision in the award is section 93(3) of the Act, and that that provision requires that, to the extent that a modern award does include a term requiring or allowing for an employee to be required to take paid annual leave, that that only be in circumstances of the requirement being reasonable.

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The Full Bench has drawn our attention to the decision of Australian Federation of Air Pilots v HNZ, and the explanatory memorandum for the 2008 Bill, which then sets out some criteria of matters that would be or were considered by the government when drafting the legislation to be matters that would be taken into account. Now, it's accepted again, that clause 25.4(c) does not include the words "reasonable" within the express terms of that provision.

PN67

It is perhaps able to be considered though in exercising any rights under an award that any party who has such a right would act reasonably in doing so, even in the absence of express words to that effect. Now, I don't think the jurisprudence in this place has got to the point of where the courts have on good faith implied obligations in respect of exercising rights under contracts, but - - -

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JUSTICE ROSS: Well, neither has the High Court.

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MR SEBBENS: Yes.

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JUSTICE ROSS: Yes.

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MR SEBBENS: However, it might be considered that a party would exercise their right reasonably and to the extent that it did not, that a dispute could be raised by the other party or, in this case, a relevant employee - an affected employee under the dispute-settling procedure within the award. Now, an alternative, of course, to that is to just make express the requirement of reasonableness and we would suggest that some words could be added, perhaps at the end of the clause, to add the words "and the direction to the employee is reasonable".

PN72

We say that simple addition would then meet the requirements of section 93(3) which requires any such direction to be only if the requirement is reasonable. We accept that the model term does set out, of course, an alternative and effectively elucidate within the body of the model term the types of things that would make such a direction reasonable.

PN73

It is noted, however, that the Full Bench in HNZ has said that what is considered to be reasonable will be assessed at the relevant time and I think this Full Bench has also accepted within its September 2015 decision, at paragraph 94, that there

is an alternative to these sorts of provisions. At paragraph 94, the Full Bench said:

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> *The first and perhaps obvious approach would be to expressly require in the award term itself that any employer direction to take leave must be reasonable, taking into account all relevant considerations, including those identified in the explanatory memorandum.*

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JUSTICE ROSS: Which would be a slightly longer version than what you have suggested.

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MR SEBBENS: It would be, your Honour. We would say, however, that it may be unnecessary to certainly add the words "including those identified at the explanatory memorandum" as the Full Bench in HNZ has identified.

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What would be reasonable in the relevant circumstances at the time may differ, depending upon those circumstances, both of the employer and the employee at the particular point in time, at which the direction might be given and, you know, such circumstances in addition to the ones perhaps that are set out in the explanatory memorandum might include, for example - although they be interests of potentially for business - but things such as the roster arrangements in place, which the employee was working at the time, the leave taken or planned to be taken by other employees who are on the same roster or who were on the same crew, any planned leave or request of the employee themselves to save up leave and any particular exigencies of the business or operations at the time, such as those that we've set out in our submissions in October 2015, such as whether there's geological or technical issues occurring at the mine; whether there might be other production issues such as failure of equipment; what the status of stockpiles might be or what the financial position of the employer might be and whether or not this is a particular program to effectively avoid redundancies or stand downs.

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Now, those things are obviously perhaps able to be read into some of the points in the explanatory memorandum at paragraph 382, but we think it's not necessary to make that express reference.

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We consider if that particular addition was added to the end of subclause (c) that then would meet, of course, the requirements of section 93(3) and the modern award's objective.

PN80

I'm happy to turn to issue 3, your Honour, if you wish. Issue 3 then concerns whether or not the Coal Mining Industry employer group has any comment to make in respect of the issues raised by the CFMEU.

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JUSTICE ROSS: Look, the only reason I raised this is I couldn't find in your - you do comment on some earlier - - -

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MR SEBBENS: Yes.

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JUSTICE ROSS: And if you don't wish to, I'm not - you know - - -

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MR SEBBENS: No. No, that's okay. I think those submissions were a reply to our data.

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JUSTICE ROSS: They were, yes.

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MR SEBBENS: And we didn't take it that we needed to or perhaps even were given leave to reply, but in any event, we would make these comments in relation to these submissions of the CFMEU. The first is that the CFMEU places some emphasis on its analysis of the data the CMIEG has filed to draw the conclusion that 15 per cent of employees have greater than 10 weeks of leave accrued across the data set.

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Now, of course, the corollary to that is that there are 85 per cent of employees who have less than 10 weeks accrued and close to 50 per cent within the data set that's indicated have five weeks or less.

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JUSTICE ROSS: I think because of the bands you choose, they've taken everyone in a band.

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MR SEBBENS: Yes.

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JUSTICE ROSS: Rather than perhaps the midpoint of the band.

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MR SEBBENS: That's correct, and perhaps in our data we've chosen bands of zero to five, and then in five week increments after that, but it should be recognised however, that if there are shift workers who are employed within that data set - certainly there no doubt will be within the 20,000-odd employees to whom that data relates, they would be entitled under the award to six weeks' annual leave. So the - - -

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JUSTICE ROSS: Do we have any idea what proportion of the employees in this data would be shift workers? Would it be a normal - - -

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MR SEBBENS: The substantial majority of operational employees would be shift workers across each of the employers that we represent. I might just get some instructions.

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JUSTICE ROSS: Sure.

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MR SEBBENS: We would only be guessing or speculating, your Honour.

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JUSTICE ROSS: No, that's fine.

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MR SEBBENS: But perhaps suffice to say that the vast majority of a coal mining employer's workforce is operational and maintenance employees and then, similarly, the majority of those would be shift workers.

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JUSTICE ROSS: Yes.

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MR SEBBENS: That's as good as I can get, unfortunately.

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JUSTICE ROSS: No, that's fine.

PN101

MR SEBBENS: SO we note those two points. Thirdly, it should also just be noted that there is a cohort generally within employers in the coal mining industry who will have a longer period of service. Employees do tend to attach themselves to a particular mine or in some cases a region, but there are substantial numbers who attach themselves to one mine and it might be expected then, over the course of time, there's a residual amount of - small amount in some cases - of leave year on year tends to build up. They will start to creep into brackets of what might otherwise be considered to be people with excessive leave, but they are actually taking the vast majority of their entitlement on a year-by-year basis.

PN102

The last point that we would just make is that the CFMEU makes a submission - the table shows that 32 per cent of employees are heading in the direction of having two years' worth of accrued leave; that nearly half of them will cross the line into an excessive leave situation. Now, that needs to be seen in the light of the fact that some employees will be shift workers and that won't be the case for them. The fact that the data is banded and, in addition to that, the fact that the data is truly a snapshot at a point in time and it might be expected that employees will not just sit on their accrual and continue to accrue into the course of the next year, but they will actually plan to take and would take leave over the course of time.

PN103

So there is really nothing to indicate, it seems to us, that there is any indication that this is a growing problem within the industry. It is accepted there are some people in that higher band, but there's nothing to indicate as the CFMEU seems to submit that that is a growing problem if you like.

PN104

In respect of the CFMEU's own anecdotal evidence, which it refers to in its submissions at paragraph 6, from the February 2016 submissions - we note that that evidence effectively is in its best an impressionistic way of indicating that there are some employees on some occasions who are not able to take their leave at a preferred time. That might be expected in any industry. It might also be something that is just completely reasonable, particularly when one has regard to clause 25.4(a) where it refers to employees generally being granted leave unless in the employer's opinion the operations of the mine will be affected, and the anecdotal evidence is indeed that employees get turned down in relation to their requests when the employer forms the view that operations might be affected. That's something clearly expressly provided for. We actually can't see that that demonstrates any particular problem. Those are the things that we wanted to say in respect of issue 3. I'm happy to then turn to some of the interaction issues, if the Full Bench wishes.

PN105

COMMISSIONER HAMPTON: Just before you go, Mr Sebbens, I think it's reasonably clear that the majority of the industry is covered by enterprise agreements, is that a fair - - -?

PN106

MR SEBBENS: In respect of production and engineering employees, that would be correct. Mr Pacey might wish to be heard about professional, technical and supervisory staff. The vast majority would not be covered by enterprise agreements and would be covered by this award.

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COMMISSIONER HAMPTON: But in relation to - I suspect then the majority of employees are covered by agreements?

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MR SEBBENS: Yes.

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COMMISSIONER HAMPTON: So the survey in relation to annual leave practice is effectively influenced at least, if not directed, by the provisions of enterprise agreements.

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MR SEBBENS: That is correct.

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COMMISSIONER HAMPTON: What do we know about enterprise agreement provisions compared with the modern award?

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MR SEBBENS: Enterprise agreement provisions in my knowledge and experience, and Mr Thomas will no doubt be heard on this, but they do tend to be based upon, in respect of these types of provisions, the award provisions themselves. Mr Thomas in some of his submissions has indicated there are some additional facilitative provisions in relation to taking of annual leave that there be percentages of employees that ought not be exceeded who can be off on leave at any one particular point in time, but they are really being supplementary to or ancillary to the provisions in the Black Coal Mining Industry Award, and certainly that's my understanding and experience as well.

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COMMISSIONER HAMPTON: Very well. Thank you, Mr Sebbens.

PN114

MR SEBBENS: Perhaps if I can then turn to the interaction between the existing clauses, and of course there's a choice here to be made between replacing the existing clause 25.4 and merely adding a new subclause. I think the things that I will say in that regard apply effectively to both of those scenarios, obviously with some minor variations, but we note that the CFMEU contends that it would be possible for the model excessive leave term to be inserted into the existing clause and that that would not require clause 25.4 to be deleted. We accept that that might be possible, but we think that would actually give rise to some problems of construction and the interaction between that clause 25.4, as it stands, as well as the shutdown clause 25.10 and any new excessive annual leave clause. I think in the draft determination it was to be 25.1.3.

PN115

What the CFMEU says is that effectively each of the clauses would have their own purpose and there would be no interlap, overlap or interaction between the two. We don't actually think that that would be what occurs on a proper construction if the model term were just to be inserted. Firstly, there would be a question of construction as to whether or not, if the model term were just to be inserted, whether or not the existing rights under 25.4(a) and (c) were then to be read down, that is, that they were only to apply in circumstances where an employee was not yet in the circumstance of having excessive leave, as so defined. So there might be a right of the employee to direct the employer that they were going to take notice on 28 days until they reached that threshold, but thereafter they then fall into the regime of the model term.

PN116

We say that's going to impose a regulatory burden on all parties, is not to be desired. It would also create potentially a scenario where an employee had, for example, 10 weeks of leave, determined to be excessive leave, would have to follow the regime, would only be able to direct the employer that they were going to take the leave upon the giving of eight weeks' notice; they'd only be able to take four of the weeks that they had accrued, but if they were just below the threshold at nine weeks or nine-and-a-part weeks, they could direct the employer on four weeks' notice that they intended to take the entirety of the nine-and-part weeks. We say that that difference is not to be desired. Secondly, the ability of the employer then to give a direction to the employees similarly

would be arguably fettered, and there might also be a question that arises if the excessive leave clause was to be inserted whether or not the provision in 25.10 shutdown was to be read in a particular way, that is, whether or not there ought to be catered for an interaction of, if an employee had, for example, given a direction they wished to take leave under the excessive leave clause, was that to be superseded in some way if the employer gave a direction about a shutdown, how will those - - -

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JUSTICE ROSS: So the interaction between the operation of the shutdown provisions?

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MR SEBBENS: Correct.

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JUSTICE ROSS: And the model term would need to be addressed in some way?

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MR SEBBENS: Yes, your Honour.

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JUSTICE ROSS: So the one has primacy or - - -

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MR SEBBENS: Yes. If the clause 25.4 were to be deleted and replaced by the model term, we say that would effectively be the removal of existing rights of both employers and employees, and that if completely replaced would obviously prevent an employer from addressing leave accruals until they reached the threshold point, which is not what's currently provided. They'd restrict the ability to obviously direct employees to take periods of less than one week, which in some particular circumstances - - -

PN123

JUSTICE ROSS: Can I just go back to that first point?

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MR SEBBENS: Sure.

PN125

JUSTICE ROSS: That it would remove the right of the employer to address excessive leave until some threshold point, how does that fit with your proposition that (b) be replaced by - I think you described it as an aspirational clause - - -

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MR SEBBENS: Potentially aspirational, yes.

PN127

JUSTICE ROSS: - - - that they should not accrue more than the equivalent of a two-year entitlement? How does all that mesh?

PN128

MR SEBBENS: Sure, here I'm addressing primarily, your Honour, if 25.4, including that proposed amendment to it, were to be completely replaced. So that provision I talked about earlier would not be included at all, and only the model term would exist.

PN129

JUSTICE ROSS: But I think you accept that something has to happen with (b)?

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MR SEBBENS: Yes, I do.

PN131

JUSTICE ROSS: And if we were to do something and adopt your primary submission and retain it, then we would adopt, on your submission, an aspirational provision. Would that operate so that the direction relates to the aspiration, that is, that the direction in (c) can be made in the event that an employee accrues more than two years and that accrued entitlement?

PN132

MR SEBBENS: That's not what would be preferred by the CMIEG and not what's proposed. I understand what your Honour's saying.

PN133

JUSTICE ROSS: Yes, doesn't it sort of look odd? I mean, you've got on one hand an aspirational provision you shouldn't accrue more than two years, and then you've got one that says but if you accrue - well in fact it's not related to your accrual at all.

PN134

MR SEBBENS: No, it's not.

PN135

JUSTICE ROSS: But you can be directed to take it, any or all?

PN136

MR SEBBENS: As we've set out in our submissions from October of last year, we say that the utility of 25.4(c) is not just in relation to excessive leave but in relation to a series of other events that may occur with particular employers in this industry, including things such as geotechnical or geological issues where a mine just can't be run anymore from a mine for a period of time.

PN137

JUSTICE ROSS: Yes.

PN138

MR SEBBENS: You direct employees onto leave rather than stand them down; you've got a long wall that's collapsed and buried the shear arm, you direct employees onto leave rather than stand them down; you're in a financial difficulty, as occurred with Glencore a few years ago, and it decided to direct employees onto leave, including on a rotating basis to avoid the need for redundancies. All

of those things would effectively be not capable of being done anymore if there were to be that interlink between the re-drafted subclause (b) and (c).

PN139

We would just make the final point perhaps, your Honour, that in respect of the complete removal of 25.4, if that were to occur, it could not be known at this point what effect that might have on employers in this industry or employees. The effect might be counterintuitive to do so, given that there is effectively an unfettered right of employees subject to the employer forming the opinion that operations at the mine might be affected for employees to direct that they are going to take leave with one that then has various limitations upon them about when they can so give that direction to an employer and what the quantum of the leave is that might then be taken. Similarly, the same applies in respect of (c).

PN140

Now, if it might be accepted, as my friend suggests, there appears to be a problem with excessive annual leave, it's not apparent to the CMIEG what merely having a clause with those various limitations being inserted in an award with a particular title would have, when there's already an effectively unfettered right for both parties already in clause 25.4.

PN141

Those are the primary submissions that we had to make, your Honours. I'm happy to take any further questions if you wish.

PN142

JUSTICE ROSS: Well, I suppose in relation to the last point, leave aside the characterisation and there's a debate about that, to the extent there is an excessive leave issue in the industry and I accept what you say about that and the CFMEU takes a different position on the data, if there was such a problem then that would rather suggest that the current provisions aren't working.

PN143

MR SEBBENS: That may be the case, your Honour, but the solution may not be the model term.

PN144

JUSTICE ROSS: Yes. As for the unintended effects et cetera, I mean, I think you accepted in response to a question from Hampton C that the vast majority of employees here are covered by enterprise agreements?

PN145

MR SEBBENS: Yes, that's correct. It obviously, as all modern awards do though, sets a base for bargaining.

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JUSTICE ROSS: Yes. I understand, yes.

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MR SEBBENS: Yes.

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JUSTICE ROSS: All right. Thank you.

PN149

MR SEBBENS: Thank you.

PN150

JUSTICE ROSS: Mr Barklamb, was there anything you want to add to those submissions?

PN151

MR BARKLAMB: Thank you, your Honour. Firstly, to support and adopt the submissions made on behalf of the CMIEG in regard to the issues of detail and practicality today, particularly to retain the capacity for employers and employees to deal with leave accruals over the minimum for each year and also the importance of a practical approach to the overlap with annual shut down arrangements.

PN152

The main thing I want to add very briefly, your Honour, was at various points. Mr Sebbens alluded to the possibility of redrafting various provisions to address the practical issues both raised by the Bench and as set out in his submissions. I would merely signal that we would be very willing to take part in any further work jointly by parties to try and address those issues of practicality and wording, and to lend our support to solutions along the lines of those raised. If the Commission pleases.

PN153

JUSTICE ROSS: All right. Thank you, Mr Barklamb. Mr Thomas?

PN154

MR THOMAS: Yes. Thank you, your Honour. The CFMEU has, in this matter, already filed a number of submissions and don't intend to rehash those, other than to say that our submissions to date have stated that the model clause should be inserted as an additional clause into the current award and in our latest submission we raise a point about whether or not it should refer to four weeks or eight weeks or five weeks or - sorry - or six and 12, I think.

PN155

JUSTICE ROSS: Yes. I think you could take it that if we were minded to insert the model term, leave aside for the moment the interaction issues and the other questions, then as we have done in other awards, given the high level of leave entitlement of this award, that would need to be reflected in the definition of excessive leave.

PN156

MR THOMAS: Yes. Thank you, your Honour.

PN157

JUSTICE ROSS: And I don't think any different view is taken about that, from the employers.

PN158

MR SEBBENS: No, your Honour.

PN159

MR THOMAS: Thank you, your Honour. It has become clear, your Honour, that following the questions raised by the Bench yesterday and a more deeper consideration of the National Employment Standards that subclause 25.4, I think, in its entirety is problematic. If we look at the three subclauses, the first subclause covers the right or entitlement of an employee to take leave on 28 days' notice with a caveat applying to the employer's operations.

PN160

Subclause (b) is, as has been well discussed this morning, is an indication of 12 months, and subclause (3) if the right of the employer to direct an employee to take leave on 28 days' notice.

PN161

Your Honour, we accept that subclause 25.4(b)

PN162

is very difficult to reconcile with the National Employment Standards and whilst somebody may wish to attempt to do that, we think it is going to be a very difficult thing to do.

PN163

The other two subclauses, your Honour, we see have an interaction with the National Employment Standards. I think the section 88(2) of the Act provides that:

PN164

The employer must not unreasonably refuse to agree to a request by the employee to take annual leave

PN165

and, of course, subclause - I think it was 93(3), is the employers right. And both of those are couched in the terms of reasonableness, and it is acknowledged by all that the National Employment Standards trumps the award provisions.

PN166

So in that sense, your Honour, it seems to us that the way that you could vary subclause 25.4(a) and (c) to make it consistent with the NES was to put in some terms going to reasonableness. But that, in turn, only takes you back to the NES and begs the question that if that is what the NES says, why do you have to have it in an award?

PN167

Now, it may be wise to have it in the awards so that people can actually see it and for that - - -

PN168

JUSTICE ROSS: The general view taken by parties in this review though, including the unions and the employers has been not to replicate in an award what is in the NES.

PN169

MR THOMAS: I agree, your Honour, and I was just going to point out that subclause 25.1 of the award already states that annual leave entitlements are provided in the NES.

PN170

JUSTICE ROSS: Yes.

PN171

MR THOMAS: So in that sense, you know, it may well be a mere replication.

PN172

JUSTICE ROSS: Yes.

PN173

MR THOMAS: So your Honour - - -

PN174

JUSTICE ROSS: I think the issue about (c) though is different, because whereas in (a) there's a provision that employee requests should be dealt with reasonably, et cetera in 88(2), the NES itself does not provide a right for an employer to direct. It permits such a term to go into a modern award. So I think that issue is addressed in the NES, but only in a facilitative way.

PN175

So if, for example, we were to - if one was simply to delete 25.4(c) and not put in the model term - I don't know what is asking to do that and I am not suggesting that's a path we are going down, but if that was done then there would be no right under the NES for the employer to direct the taking of leave.

PN176

So I think it is in a different position to (a), is really the point.

PN177

MR THOMAS: Yes. No, I accept that.

PN178

JUSTICE ROSS: Okay.

PN179

MR THOMAS: It may well be worth some further contemplation being given to.

PN180

JUSTICE ROSS: We will certainly give it further contemplation.

PN181

MR THOMAS: So that, your Honours, is our submission going to the interaction of all the problems within subclause 25.4. There is only a few other - - -

PN182

COMMISSIONER HAMPTON: Mr Thomas, are you going to put to us therefore what the union says we should do with 25.4? I accept you say it's problematic. Are you saying we should not include it?

PN183

MR THOMAS: Well, look, I think the alternatives are to not include it or to vary it in a way that makes it consistent with the NES. That's the only - because if it's not consistent with the NES it doesn't apply anyway.

PN184

COMMISSIONER HAMPTON: Yes, but you are not putting a particular view on which of those two alternatives?

PN185

MR THOMAS: Look, we would be content with either, I think.

PN186

COMMISSIONER HAMPTON: All right. Thank you.

PN187

MR THOMAS: There are just a couple of other matters that I would wish to raise. That goes to the data that was provided by the CMIEG and, your Honour, in looking at it and listening to this morning, it does remind me of that saying about, "Lies, damned lies and statistics" that they can be very much in the eyes of the beholder, but we would maintain our view that it does lend support for the view that the model clause should be inserted and we think that that is reinforced by the data, albeit to a general mining industry, that the Commission distributed on, I think, 8 July.

PN188

If you look at those two together, I think they do provide support and when considered in the context of the other reasons for the model clause given by the Full Bench, somewhat extensively over time, the case becomes even more powerful.

PN189

Your Honour, there is a reference to the substantial majority of the employees in the industry being shift workers. We would accept that that's the case, certainly in the production and engineering area. However, it needs to be noted that the six weeks' annual leave does not apply to all shift workers. The definition in the annual leave clause applies to two categories of shift worker and that can be found in subclause 25.2(b), that being a seven-day roster employee or an employee who works a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays.

PN190

JUSTICE ROSS: Do we know what the breakdown is or do we have a sense of what the breakdown would be? Would most of the employees who are shift workers in this industry be entitled to the additional leave payment?

PN191

MR THOMAS: I would be hazarding a guess. I am aware that there are a lot again who do work a six or seven - a seven-day roster, but there are others, probably more so in underground mines who, for example, would work Monday to Thursday afternoon shift or something - a shift of that nature, but there are others such as - they call them "weekend warriors" who work Friday, Saturday and Sunday, but they would fall into the (b)(2) category I would think.

PN192

JUSTICE ROSS: Yes.

PN193

MR THOMAS: But I - my guesstimate is that of the shift workers, most of them would probably fall within that criteria, but I couldn't swear to it.

PN194

JUSTICE ROSS: No. So where we are is we think - I'll test you with this Mr Sebbens as well - that a substantial majority of the employees in the production and engineering area, which is the substantial majority of employees, are shift workers, and that the likelihood is that the additional leave requirement would apply to most of them. Is that a fair summary of what each of you think is likely to be the position?

PN195

MR SEBBENS: Yes, your Honour.

PN196

MR THOMAS: Yes, I think that's correct.

PN197

JUSTICE ROSS: All right. Okay. Look, for our purposes, I am not sure we need to get too much more precise than that, really.

PN198

MR THOMAS: Your Honour, a couple of other matters going to the interaction between the model clause and the existing provisions - we don't accept that inserting the current - sorry, inserting the model clause in with the existing provision would create some sort of regulatory burden. I think in many cases it tends to be overstated, the regulatory burden notion - - -

PN199

JUSTICE ROSS: But if we take the shutdown provision, on the face of it there would need to be some provision that deals with the interaction and it may be that, you know, in the shut down clause it simply says despite what may be - you know, despite the terms of - and it refers to the model term and then it - then you lead into the shutdown provision.

PN200

It seems to me at the moment it is put as an interaction problem - well, to the extent that there is an interaction problem, can't it just be dealt with that way?

PN201

MR THOMAS: To the extent that there is an interaction problem I would agree, your Honour.

PN202

JUSTICE ROSS: Yes.

PN203

MR THOMAS: I am not sure there is an interaction problem.

PN204

JUSTICE ROSS: No, I understand what you say, but I suppose you can deal with that out of an abundance of caution to remove doubt in respect of any potential problem, but it does seem to me that, at least, looking at it at the moment that that is one way of dealing with any potential problem.

PN205

MR THOMAS: Yes, your Honour. Shutdowns tend to be planned well in advance.

PN206

JUSTICE ROSS: Yes. Exactly, yes.

PN207

MR THOMAS: And the requirements for people to work, whether they be maintenance - perhaps maintenance in particular - but the production employees over a shutdown are fairly well known in advance.

PN208

JUSTICE ROSS: Yes.

PN209

MR THOMAS: There was a list of examples given by Mr Sebbens of difficulties that may create. Those examples were given in the submissions - earlier submissions by the CMIEG and we did - we have addressed those also in our response. All industries at times, your Honour, have unplanned for events whether it be a product of nature or a breakdown in equipment and they tend to be dealt with on a case-by-case basis and always have been and always will be and I don't see how the insertion of the model clause, which is and probably most awards in industries that will deal with similar type problems, would create any unreasonable burden upon the employer.

PN210

In the event that they wish employees to take leave; in the event that there is, for example - they talk about a longwall collapse or something of that nature - the parties get together, they sit down and they sort it out. That's what has happened in the past. That is what happened when Glencore, I think last year, shut down for a week. Presumably, that is what will happen in the future. The Glencore matter, to my knowledge, wasn't a subject of any at least major disputation. There might have been a few people who were not happy, but we don't see that as an insurmountable hurdle.

PN211

Your Honour, in summary, relying on the submissions that we have already put which are sort of consolidated into that document sent in last week, the CFMEU would support the model clause going in to the Black Coal Mining Industry Award. It needs some interaction with other clauses then that can be addressed and the issue of subclause 25.4 to the extent that the issues have been raised, there are the two alternatives, I think, the Commission has. If the Commission please.

PN212

JUSTICE ROSS: Thank you, Mr Thomas. Mr Pacey?

PN213

MR PACEY: We support the CFMEU's submissions in its entirety and I think we provided on 13 November last year a comment that we support those submissions.

PN214

JUSTICE ROSS: Thank you. Anything in reply?

PN215

MR SEBBENS: No, your Honour.

PN216

JUSTICE ROSS: No. All right.

PN217

MR THOMAS: Your Honour, can I just - sorry - - -

PN218

JUSTICE ROSS: That's all right, Mr Thomas.

PN219

MR THOMAS: I just want to come back to subclause 25.4. In subclause (a), it does refer to the employee giving 28 days' notice. If the Commission was to, sort of, retain some provisions - retain existing provisions and include some reference to reasonableness, we would seek to have that 28 days' notice retained if possible.

PN220

JUSTICE ROSS: Yes, all right, nothing further in relation to black coal? All right. Those who don't have an interest in aquaculture needn't remain. You're free to, but there's no need to. Ms Kusuma, can I just go to your submission and the material in support? I thought we might mark separately the statements of Mr Zipple, Mr Troop and Mr Poke as exhibits NSW Farmers 1, 2 and 3?

PN221

MS KUSUMA: Sure.

EXHIBIT #NSW FARMERS 1 STATEMENT OF MR ZIPPLE

EXHIBIT #NSW FARMERS 2 STATEMENT OF MR TROOP

EXHIBIT #NSW FARMERS 3 STATEMENT OF MR POKE

PN222

JUSTICE ROSS: Is there any cross-examination sought of those witnesses?

PN223

MR CRAWFORD: No, there's not, your Honour.

PN224

JUSTICE ROSS: And we've put some questions on notice to you, Ms Kusuma. If you want to address those and anything you wish to say by way of amplifying the submissions that you've made?

PN225

MS KUSUMA: Yes, sure, your Honour. If I may just address the first issue, and it seems like it's similar questions that have been put to the matter earlier as well.

PN226

JUSTICE ROSS: Yes.

PN227

MS KUSUMA: In terms of how we have interpreted clause 23.4 to date is that it acts as a strong encouragement for employees to take their leave and to keep their leave balance below six weeks' accrual for full-time employees, and also it's an encouragement for these employees to take the leave during the low seasons, considering that the oyster-growing industry is very much highly seasonal, where the summer season is considered as the high season and then the colder, winter season is considered as low season. How it applies in terms of leave accruing progressively during the year of service, the way it has been applied is that annual, if that is first accrued, then is considered to be those that are first taken, so then in an 18-month period for a full-time employee they accrue six weeks of leave, so if the employee has more than six weeks of leave balance it means that the leave exceeding the six weeks, if it's six weeks and one day, then that one day is the leave has been accrued outside of the 18-month period.

PN228

JUSTICE ROSS: The problem is the clause doesn't really relate to six weeks. It doesn't deal with that issue. It relates to the - - -

PN229

MS KUSUMA: 18-month accrual.

PN230

JUSTICE ROSS: Yes, that's right, within 18 months of accrual. So for example, you may have taken your four weeks' leave over a course of 12 months, but you've been there for 18 months and it would seem then as you accrue successive periods of leave, albeit you may have no leave balance, if you like, approaching six weeks then you'd be required to take it. I think that's the - it's a similar issue that arose in the black coal matter that it seems to be a clause that was reflective of an earlier time when you accrued your four weeks' leave on 12 months.

PN231

MS KUSUMA: Yes.

PN232

JUSTICE ROSS: And from what you're indicating, you're saying that, well, whilst it has the legal effect that I've suggested, really what the purpose or the desire was was that if someone had accrued more than six weeks' leave then they should be encouraged to take it.

PN233

MS KUSUMA: Yes, exactly, and then obviously we accept that the period of six weeks, that'll defer for part-time employees, because they accrue pro rata - on a pro rata basis.

PN234

JUSTICE ROSS: Certainly, yes.

PN235

MS KUSUMA: So for the industry really, the purpose of the clause is to act as an instigator to have the discussions with employees and to know that the ability is there if it is needed; however, it's more to commence the discussion with employees, to encourage employees to take annual leave during the low season. The other question that was posed to us was whether clause 23.4 achieved a modern award objective. With that, our view is that it provides sufficient flexibility as it currently stands to accommodate for the seasonality of the industry, as well as operation of each business during high season in that there's certainty where they still have the ability to require full staff to work during those high seasons. It also provides the ability for employees - in one of the decisions of the Full Bench, one of the concerns is for employees who want to accrue longer annual leave for a longer period, but then the reference back into section 88 of the Fair Work Act, that enables an employee and employer to always come to an agreement. So if the employer and employee agree that the employee can take longer annual leave and if, for example, the employee wants to take eight weeks of annual leave, that is permissible provided that it's done in the low season period rather than the high season period. Other than that, we'd also like to outline - the other concern - - -

PN236

JUSTICE ROSS: The other issue we have raised is just the jurisdictional basis for the provision in 23.4 where the employer can direct that a period of annual leave be taken from a particular date on the giving of 28 days' notice.

PN237

MS KUSUMA: Yes, we accept the basis of the jurisdiction in that it is section 93.3 of the Fair Work Act.

PN238

JUSTICE ROSS: Yes, okay.

PN239

MS KUSUMA: And the question then refers us to how the direction relates to the reasonableness requirement.

PN240

JUSTICE ROSS: Yes.

PN241

MS KUSUMA: I understand one of the concerns that's been put forward - and also my colleague, Mr Crawford, has also alerted us to the provisional view of the Bench, and that's outlined in the Bench decision dated May 2016, paragraph 562 - so it outlines four concerns that the Full Bench has, and the first one is what are employees' rights for the employee to take leave when no direction is made. That protection for employees to make an application for leave has always been provided under section 88(2) of the Fair Work Act, in that an employer must not unreasonably request to agree to a request by an employee to take paid annual leave. And I think that provision also sufficiently deals with the concern of an employee being required to take small chunks of annual leave as they accrue a little bit more, whether it's an hour or more a day, more that they will be required and there's no minimum amount of annual leave that can be directed. But then section 88(2) doesn't stop an employee to then start an application for a longer period once the employee has been directed to take leave. The employee can always take longer leave and make application for longer leave if the employee wishes to.

PN242

We accept that there is probably in the current provision of clause 23.4, there are particular issues. One is as your Honour has mentioned in terms of the attraction with the progressive accrual. The other thing is the lack of requirement to put the direction in writing, and I think that can be easily ameliorated by providing additional provision in the current clause by requiring that the direction to take leave has to be done in writing. So that's our response in terms of the questions posed. Would your Honour like me to go through our submissions and the alternative position?

PN243

JUSTICE ROSS: Well, we've had the opportunity to read those. It's really only if there's an aspect of it that you wanted to add to or supplement. We would take the same view with the AWU. They put their submission in writing, unless there is something you want to add, you don't need to repeat it.

PN244

MS KUSUMA: Yes, sure. Then I would probably just address the AWU's response, if that's okay.

PN245

JUSTICE ROSS: Yes, certainly.

PN246

MS KUSUMA: The AWU - one of the comments that has been made is that the proposed amendment would curtail the benefit intended by the model clause, dramatically confining the clause's operation. We submit that it is not a dramatic curtailment, but rather it is just a clarification, because it is really contemplated in the model clause anyway and it is not it is only one clarification and in the industry there is a common operation where the employees would be notified of

the busy period, or the high season when leave cannot be granted due to repercussions if they are understaffed.

PN247

So that is outlined beforehand to the employees and the employees' ability to require leave to be taken can be taken and they will be given first priority compared to other employees who are applying for leave for the period outside of this high season.

PN248

So the main concern for the industry is really the risk of not being fully staffed during the high season.

PN249

JUSTICE ROSS: And that risk arises or would arise in circumstances where, under the model term, an employee has a period of excessive accrued leave and you reach that point where they're able to require the employer to approve the leave.

PN250

MS KUSUMA: Yes. That's right, your Honour. The main concern - and I think for industries with large operators, it is probably easier to manage and review and monitor leave accrual at any point in time. However, the majority of operators in oyster growing are small operators with a handful of employees.

PN251

JUSTICE ROSS: Yes.

PN252

MS KUSUMA: And for them to continually monitor their employees' leave accrual, it is quite burdensome because it means - it means really three months before their - effectively, three months before their busy period the business owner would need to go through all of the employees' leave accrual to ensure that none of them have more than eight weeks accrued.

PN253

JUSTICE ROSS: Why would they need to do that three months before? Doesn't the way the model term works, that the employee makes a request, it seems, that triggers this and then the employer has an opportunity to direct the employee to take leave at a particular time.

PN254

MS KUSUMA: By the time - my understanding of the model term is by the time the employee has the right to direct, it means they have six months - sorry, they have accrued eight weeks' worth for longer than six months and then they can make the request. The concern in the industry is also because the high season generally falls in the holiday period.

PN255

JUSTICE ROSS: Yes.

PN256

MS KUSUMA: So obviously there is that incentive for employees not to bring the issue up until they have the right to request.

PN257

JUSTICE ROSS: All right.

PN258

MS KUSUMA: And by the time the employee can make the request, it is already an absolute right, in a way, by that time.

PN259

JUSTICE ROSS: Just in relation to the provision that deals with what might be referred to in other awards as a shutdown provision - - -

PN260

MS KUSUMA: Yes. The Aquaculture Award also has a shutdown provision, your Honour.

PN261

JUSTICE ROSS: Yes. I mean, it's a slightly curiously worded - can you take me to where that - - -

PN262

MS KUSUMA: The actual provision, your Honour?

PN263

JUSTICE ROSS: Yes. Is that in clause 23.3?

PN264

MS KUSUMA: Clause 23.3, your Honour.

PN265

JUSTICE ROSS: Yes

PN266

MS KUSUMA: And it is outlined in our submission at page 5 as well.

PN267

JUSTICE ROSS: Yes, it is. And is that the provision that's utilised when you are in the low season in the winter months, that that would - the intention is to be able to utilise a provision like that in order to reduce leave balances and also because the employer needs fewer people at that time of the year, because it's not as busy?

PN268

MS KUSUMA: It's not a common occurrence, as in it's not generally relied on, because it is - again, it's generally small businesses. SO employers would like - if they can, they try to avoid directing the employees to take leave. The approach is quite flexible, as in the employers would then say, "We are coming up to a low season. If you was to take leave, please volunteer." It's not a closedown. There are still works to be done, like maintenance works.

PN269

JUSTICE ROSS: Yes. It's more of a partial - - -

PN270

MS KUSUMA: Yes.

PN271

JUSTICE ROSS: And that's the reference to the nucleus of the business.

PN272

MS KUSUMA: Nucleus operation. Yes, your Honour. It is the - if I can clarify, that provision probably would be relevant for the industry when there is disease. So certain parts of the industry was affected by disease about two or three years - actually, in Queensland I think - sorry, not Queensland. I will need to clarify. But there has been - - -

PN273

JUSTICE ROSS: I can recall there as an outbreak.

PN274

MS KUSUMA: - - -an outbreak of disease and when there is really no work, that's when it's been relied on, just to manage staffing costs during that time.

PN275

JUSTICE ROSS: I see. There is not much material in - or the witness material doesn't suggest that there would be a high proportion of employees who would have excess of leave accruals in the sector.

PN276

MS KUSUMA: That's right, your Honour.

PN277

JUSTICE ROSS: Yes.

PN278

MS KUSUMA: Even though I understand there has been information tendered about primary industry, fishing and forestry - but then that is very - that information is very general.

PN279

JUSTICE ROSS: It's much broader.

PN280

MS KUSUMA: Much, much broader, including agribusiness.

PN281

JUSTICE ROSS: Yes.

PN282

MS KUSUMA: But that is not the case, for just this sector, oyster growing.

PN283

JUSTICE ROSS: Yes. Is that because, as you've indicated, that the parties essentially manage the leave issue through direct discussions?

PN284

MS KUSUMA: Definitely.

PN285

JUSTICE ROSS: Yes.

PN286

MS KUSUMA: It is a small business, so it is in the employer's best interest to keep the employees happy.

PN287

JUSTICE ROSS: Yes. No, I understand. Thank you. Was there anything else you wanted to say?

PN288

MS KUSUMA: That's all, your Honour, unless there's further questions.

PN289

JUSTICE ROSS: All right. Thank you. Mr Crawford, was there anything in response?

PN290

MR CRAWFORD: Not really, your Honour. I think I am pretty content to rely largely on our submission, that of 9 September.

PN291

JUSTICE ROSS: All right.

PN292

MR CRAWFORD: Just briefly, I think, based on previous decisions by this same Full Bench, it seems reasonably clear that clause 23.4 will have to go. This Full Bench is already determined, I think, in relation to the agricultural awards previously that the existing provisions in those awards are not reasonable in the context of the act and the provisions in the agricultural awards actually contain more safeguards than the existing provision in this award. So seeming it must follow that that clause 23.4 is also not reasonable in the context of the Act.

PN293

As we have indicated, we are not attracted by the amendment to the model term proposed by the New South Wales Farmers Industrial Association. I mean, we do have a little bit of sympathy, obviously, for employers not wanting to have a shortage of staff when they have their busy periods of the year, but I do think as we mentioned in our submission, the danger is that if there is an amendment for this award, the same argument could be made in most industries. In most industries there is a busy period of the year and the evidence that's been filed by the industrial association, we don't think is sufficient to warrant a departure from the model term.

PN294

I mean, it does sound like there is a relatively collaborative approach to the taking of leave in this industry at the moment and we're sure that will probably continue into the future. But despite the fact that based on the discussion before, it does appear that excessive leave is not a massive problem in the industry. We do still think that there is justification for the model term to go in, I guess, for all the reasons that this Full Bench is identified previously and we are just not satisfied that there is enough industry-specific evidence in relation to this industry to warrant a departure from the standard approach.

PN295

JUSTICE ROSS: Nothing further? All right. Thank you both for you submissions. We will adjourn and we will reserve our decision and issue it in due course. Thank you.

ADJOURNED INDEFINITELY **[11.18 AM]**

LIST OF WITNESSES, EXHIBITS AND MFIs