Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Annual Leave – The Excessive Leave Model Term (AM2014/47)

7 DECEMBER 2015

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/47 ANNUAL LEAVE

1. INTRODUCTION

1. On 11 June 2015, the Fair Work Commission (Commission) handed down its decision[1] (June 2015 Decision) with respect to a number of issues concerning annual leave, as part of the 4 Yearly Review of Modern Awards. The matters there dealt with have previously been the subject of numerous written submissions, evidence and hearings before the Commission over a period exceeding 12 months.

2. Proposals pursued by the Australian Industry Group (Ai Group) and other employer associations (Employer Group) were granted in respect of:

    - The cashing out of annual leave;
    - The ability to direct an employee to take annual leave where there is an excessive accrual;
    - Granting annual leave in advance of the entitlement accruing; and
    - Payment for annual leave by electronic funds transfer (EFT).

3. On 15 September 2015 (September 2015 Decision), the Commission issued a further decision[2] finalising the model terms to be inserted. Pursuant to the Commission's directions of the same date, we filed submissions dated 26 October 2015, addressing whether particular modern awards should not be varied to incorporate the 'excessive leave' model term.

4. This submission deals with the following additional issues in respect of the model excessive leave clause:

    - Transitional arrangements;

[1] [2015] FWCFB 3406.
[2] [2015] FWCFB 5771.

- The specific awards that we submit should not be varied to include the model term; and

- Current award terms that require the taking of leave.

2. TRANSITIONAL ARRANGEMENTS

5. Clause 1.2(c) of the model excessive leave clause gives employees the ability to require that they be granted annual leave. Ai Group has previously submitted that it should not come into force until 12 months after the commencement of the balance of the clause. The basis for this proposal was that it would address situations where a significant proportion of an employer's workforce currently has excessive leave accruals.

6. In its September 2015 Decision, the Full Bench accepted our proposal:

> [148] The second limitation proposed has merit. We acknowledge that a provision such as subclause 1.2(c) is a significant change to the modern award system and it is appropriate that employers are provided with some lead time to adjust. Subclause 1.2(c) will commence operation 12 months after the commencement of subclauses 1.2(a) and (b).[3]

7. The final form of the model term is set out at paragraph [172] of the decision. Despite the above comments, it does not contemplate a delayed commencement date in respect of clause 1.2(c). It has recently come to our attention that similarly, the draft determinations published by the Commission on 30 September 2015 do not contain such a provision either.

8. Consistent with the above passage from the September 2015 Decision, the model clause 1.2(c) should be amended by inserting a new subclause (i) in the following terms:

> **(i)** Clause 1.2(c) comes into operation from [insert date 12 months after the commencement date of clauses 1.2(a) and (b)].

[3] [2015] FWCFB 5771 at [148].

3. AWARDS THAT SHOULD NOT BE VARIED

9. We refer again to a submission we filed dated 26 October 2015. The gravamen of that submission was that existing flexibilities should not be removed from awards that presently contain excessive leave provisions. Rather, the model clause regarded as the *minimum* level of flexibility that employers should have access to with regard to excessive leave accruals. Thus, where there is a pre-existing approach in an award that presently affords greater flexibility, a more restrictive provision should not be inserted.

10. In response to the 'questions on notice for Ai Group' published earlier today, we here identify the awards that, consistent with our earlier submission, should not be varied:

- *Aboriginal Community Controlled Health Services Award 2010*;
- *Aircraft Cabin Crew Award 2010;*
- *Airline Operations—Ground Staff Award 2010;*
- *Airport Employees Award 2010;*
- *Alpine Resorts Award 2010*;
- *Aluminium Industry Award 2010;*
- *Banking, Finance and Insurance Award 2010;*
- *Business Equipment Award 2010;*
- *Car Parking Award 2010;*
- *Cemetery Industry Award 2010;*
- *Clerks—Private Sector Award 2010;*
- *Coal Export Terminals Award 2010;*
- *Commercial Sales Award 2010;*

- *Concrete Products Award 2010;*
- *Contract Call Centres Award 2010;*
- *Electrical Power Industry Award 2010;*
- *Electrical, Electronic and Communications Contracting Award 2010;*
- *Food, Beverage and Tobacco Manufacturing Award 2010;*
- *General Retail Industry Award 2010;*
- *Graphic Arts, Printing and Publishing Award 2010;*
- *Horticulture Award 2010;*
- *Hospitality Industry (General) Award 2010;*
- *Hydrocarbons Industry (Upstream) Award 2010;*
- *Joinery and Building Trades Award 2010;*
- *Legal Services Award 2010;*
- *Local Government Industry Award 2010;*
- *Manufacturing and Associated Industries and Occupations Award 2010;*
- *Marine Tourism and Charter Vessels Award 2010;*
- *Mining Industry Award 2010;*
- *Nursery Award 2010;*
- *Oil Refining and Manufacturing Award 2010;*
- *Passenger Vehicle Transportation Award 2010;*
- *Pastoral Award 2010;*

- *Pest Control Industry Award 2010;*
- *Pharmaceutical Industry Award 2010;*
- *Port Authorities Award 2010;*
- *Poultry Processing Award 2010;*
- *Rail Industry Award 2010;*
- *Real Estate Industry Award 2010;*
- *Registered and Licensed Clubs Award 2010;*
- *Restaurant Industry Award 2010;*
- *Road Transport (Long Distance Operations) Award 2010;*
- *Road Transport and Distribution Award 2010;*
- *Salt Industry Award 2010;*
- *Seafood Processing Award 2010;*
- *Sugar Industry Award 2010;*
- *Supported Employment Services Award 2010;*
- *Telecommunications Services Award 2010;*
- *Textile, Clothing, Footwear and Associated Industries Award 2010;*
- *Timber Industry Award 2010;*
- *Transport (Cash in Transit) Award 2010;*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010;*
- *Water Industry Award 2010;*
- *Wine Industry Award 2010;* and

- *Wool Storage, Sampling and Testing Award 2010.*

4. AWARD TERMS THAT REQUIRE THE TAKING OF ANNUAL LEAVE

11. We refer to the Commission's directions of 15 September 2015. The Full Bench there required the filing of submissions and evidence in respect of any contention that a particular modern award should not be varied to incorporate one or more of the annual leave model terms. That is, whether as a matter of merit, any of the model terms (including that dealing with excessive leave accruals) should not be inserted in a modern award. The directions did not call for comments in respect of the draft determinations that were published shortly afterwards or the proposed deletion of terms that deal with the taking of annual leave.

12. Since the filing of those submissions, we have undertaken the task of reviewing the draft determinations, ahead of the proceedings listed before the Full Bench on 8 December 2015. During the course of that exercise, an additional matter has come to our attention that we respectfully seek leave to raise.

13. Several modern awards presently contain provisions that relate to the taking of annual leave. In many instances, they operate to mandate the taking of leave within a specified period of time and where this does not occur by agreement, the employer is granted the ability to direct an employee to take accrued leave. The application of these provisions is not contingent upon the accrual of an excessive amount (however defined). Rather they appear to have been crafted to *prevent* an excessive accrual of paid annual leave; or would at least have that effect.

14. We have identified the existence of such a provision in the following awards:

    - *Air Pilots Award 2010;*
    - *Aircraft Cabin Crew Award 2010;*

- *Ambulance and Patient Transport Industry Award 2010;*
- *Aquaculture Industry Award 2010;*
- *Architects Award 2010;*
- *Asphalt Industry Award 2010;*
- *Black Coal Mining Industry Award 2010;*
- *Broadcasting and Recorded Entertainment Award 2010;*
- *Cement and Lime Award 2010;*
- *Gardening and Landscaping Services Award 2010;*
- *Gas Industry Award 2010;*
- *Horse and Greyhound Industry Award 2010;*
- *Mobile Crane Hiring Award 2010;*
- *Nursery Award 2010;*
- *Nurses Award 2010;*
- *Premixed Concrete Award 2010;*
- *Quarrying Award 2010;*
- *Racing Clubs Events Award 2010;*
- *Racing Industry Ground Maintenance Award 2010;*
- *Security Services Industry Award 2010;*
- *Silviculture Award 2010;* and
- *Sporting Organisations Award 2010*.

15. Whilst we deal with the terms of the specific provisions in greater detail below, our central contention is that in the awards nominated above, the model excessive leave term should not be inserted and the relevant provision that requires the taking of annual leave should be retained. This is because those provisions, on their face, may be incompatible with the model excessive leave term. Alternatively, it would appear that if the model term were inserted, it would have no work to do and so cannot be considered *necessary* in the sense contemplated by s.138.

16. Some of the draft determinations not only propose to incorporate the model excessive leave term, but also propose to delete existing clauses dealing with the taking of annual leave generally, rather than just addressing excessive leave accruals. To the extent that any draft determination proposes to delete a provision that is of the nature that we have here described, that would constitute a substantive variation to the current award, which has not been explicitly considered or ruled upon by the Commission.

17. The deletion of provisions that deal with the *taking* of leave generally have not been the subject of proceedings before the Commission, nor has the Full Bench made a decision in this regard. Such variations were not sought by the Employer Group as part of their originating claim, nor were they proposed by the Commission, apart from through the publication of the draft determinations on 30 September 2015.

18. We therefore proceed on the basis that the Commission's proposal to insert the model excessive leave term in all modern awards is to be considered in light of the terms of the award as they presently appear. That is the appropriate starting point. This includes any clauses that currently deal with the taking of annual leave and/or *require* that annual leave be taken in prescribed circumstances. The process now being undertaken by the Commission provides an appropriate opportunity to determine whether the model excessive leave clause should or should not be inserted in the relevant awards and if so, how they might interact with other pre-existing provisions. We do not consider this to be a matter that has previously been decided.

The Draft Determinations

19. Curiously, the draft determinations published do not appear to take a consistent approach in respect of this matter. Whilst in many instances, provisions such as that which we have described above have been deleted and substituted with the model term, in other cases they have been retained.

20. For instance, the draft determination published in respect of the *Asphalt Industry Award 2010* proposes to delete clause 25.5, and replace it with the model term. Clause 25.5 is in the following terms:

> **25.5 Leave must be taken within 18 months**
>
> Annual leave will be taken within 18 months of the entitlement accruing. For the purpose of ensuring accrued annual leave is taken within that period and in the absence of agreement as provided for in s.88 of the Act, an 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.

21. A provision in substantially similar terms appears at clause 23.4 of the *Horse and Greyhound Training Award 2010:*

> **23.4** Annual leave is to be taken within 18 months of the entitlement accruing. For the purpose of ensuring accrued annual leave is taken within that period and in the absence of agreement as provided for in s.88 of the Act, 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.

22. The draft determination published in respect of that award does not seek to delete the above provision. The same can be said of clause 29.5 of the *Quarrying Award 2010,* which would also be retained if a determination in the same terms as the draft were issued.

23. The rationale for the differing approach taken is not clear and in our view, warrants consideration.

The Commission's June 2015 Decision

24. The Commission's June 2015 Decision did not explicitly consider the matter we here raise. This is unsurprising, given that the claim made by the Employer Group was for the insertion of a term that was directed towards addressing excessive leave accruals, rather than the taking of leave generally.

25. The Employer Groups sought to vary 70 modern awards in respect of excessive leave. We refer to Attachment D of the June 2015 Decision, which lists the awards in which we sought the insertion of the clause proposed. The awards we have identified above as containing a provision that goes to the taking of leave do not appear in the list at Attachment D.

26. The employer groups also sought to substitute pre-existing excessive leave clauses in certain awards with the model term we had proposed. Attachment E of the June 2015 Decision identifies the relevant awards and those provisions that we sought to replace. Only two of the awards there identified also appear in the above list: the *Aircraft Cabin Crew Award 2010* and the *Nursery Award 2010*. In each instance, however, the proposal was to delete the pre-existing excessive leave provision and replace it with the proposed clause. The intention was not to disturb any other award clauses that deal with the taking of leave generally.

27. The case mounted by the Employer Groups did not call upon the Commission to consider those award terms that require the taking of annual leave or how they might interact with a provision dealing with excessive leave. Indeed there was no evidence before the Commission that would, in our view, have enabled such a course of action to be undertaken.

28. When summarising the Employer Groups' claim, the Commission provided an analysis of those awards that it considered already contained 'excessive leave provisions'. In so doing, it identified 22 awards as presently requiring that

annual leave must be taken within a specified period of time.[4] That list is broadly consistent with the awards that we have earlier identified.

29. With respect, however, the award provisions identified by the Commission cannot be characterised as 'excessive leave clauses'. They are not provisions of the sort proposed by the Employer Group or that which has been crafted by the Commission. They are not *reactive* provisions, in the sense that their application is not triggered upon the excessive accrual of leave. Rather, they mandate the taking of leave within a specified period of time, so as to *prevent* an excessive amount from accruing.

30. The Commission ultimately determined in its June 2015 Decision, based on the material before it, that awards should contain a mechanism for dealing with excessive leave accruals and then went on to develop the terms of the model clause:

> [139] Based on the material before us and the findings set out at paragraphs [11] and [138] we are persuaded that modern awards should include a mechanism for dealing with "excessive leave". …[5]

31. In deciding that modern awards should include an excessive leave provision, the Commission made various findings based on the evidence before it, which are also relevant to a consideration of the matter now before the Commission; namely:

- most employees do not use their full paid annual leave entitlements;[6]
- the lack of annual leave utilisation is broadly consistent with family type, life stage and household income;[7]
- not taking a reasonable portion of leave can give rise to a serious threat to health and safety of the employees concerned;[8]
- excessive annual leave accruals are a significant issue for employers;[9] and

[4] [2015] FWCFB 3406 at [151].
[5] [2015] FWCFB 3406 at [139].
[6] [2015] FWCFB 3406 at [116].
[7] [2015] FWCFB 3406 at [116].
[8] [2015] FWCFB 3406 at [138].

- the taking of accrued paid annual leave can have mutual benefits for employers and employees.[10]

32. The Full Bench went on to state their provisional view that all modern awards would be varied to include the model excessive leave clause on the following bases:

> [214] Our provisional view is that the variation of modern awards to incorporate the model term is necessary to ensure that each modern award provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant) and would also be consistent with the objects of the Act. This is so because of the various safeguards provided within the term itself and because it facilitates the making of mutually beneficial arrangements between an employer and employee.
>
> [215] When leave is taken so as to reduce or eliminate excessive leave accruals, employees will benefit from a period of rest and recovery from work, which has significant positive implications for employee health and wellbeing. Reducing fatigue at work and improving workplace health and safety is also of benefit to employers, and the evidence indicates that absenteeism is also reduced after a period of leave. In addition, there is employer evidence that excessive leave accruals represent a significant financial liability and can give rise to cash flow problems (particularly for small businesses) when paid out on termination. Employers therefore benefit from a mechanism to reduce their contingent liabilities.
>
> [216] Section 134(1)(d) of the modern awards objective requires the Commission to take into account the need to promote flexible modern work practices and the efficient and productive performance of work, and under s.134(1)(f) the Commission must also take into account the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.
>
> [217] The issue of excessive leave accruals and untaken annual leave is of significance to both employers and employees. For the reasons outlined above, the insertion of the model term would assist in ensuring that modern awards are relevant to the needs of the modern workplace, and would assist businesses.
>
> [218] Finally, the insertion of the model term into modern awards is also consistent with the objects of the Act by: providing workplace relations laws that are fair to working Australians and are flexible for businesses (s.3(a)); ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the NES and modern awards (s.3(b)); assisting employees to balance their work and family responsibilities by providing for flexible working arrangements (s.3(d)); and acknowledging the special circumstances of small and medium-sized businesses (s.3(g)). In respect of s.3(g), as relatively few employees employed in small businesses are covered by a collective agreement, a modern award variation of the

[9] [2015] FWCFB 3406 at [138].

[10] [2015] FWCFB 3406 at [138].

type proposed would ensure that all such businesses have capacity to deal with excessive leave accruals.[11]

33. As can be seen from a review of the Commission's decision, it did not give consideration to the work that the model excessive leave clause would do in those awards that currently contain a provision that requires the taking of annual leave. The matter was not one that was put to or dealt with by the Full Bench. Indeed it was contemplated that a separate process would be established for award specific considerations, which would provide an appropriate opportunity to deal with such issues.

34. The provisions we have identified in the above awards are directed towards ameliorating the very issues canvassed in the June 2015 Decision. They do so by *requiring* an employee to take annual leave within a particular period of time and thereby, circumvent the need for a provision that addresses excessive leave accruals. On the face of the relevant provisions, there would be virtually no utility for an excessive leave clause in those awards. Hence such awards were generally not identified by the Employer Group as requiring variation. In circumstances where an excessive leave clause, if inserted, would have no work to do, the model term cannot be considered *necessary* to achieve the modern awards objective.

35. We also observe that the relevant awards already contain provisions that are aligned with the Commission's desire to ensure that employees take their annual leave. The provisions generally mandate that employees take leave within a period of time that is less than that which would lapse before the model excessive leave clause would have any application. That is, in most cases, the current clauses require employees to take their leave in a period of time that is less than two years. Therefore, such a clause obviates the need for the model excessive leave clause that applies once an employee (unless defined by the award as a shiftworker for the purposes of the NES) has accrued eight weeks of annual leave.

[11] [2015] FWCFB 3406 at [214] – [218].

36. It is for this reason that we contend that the relevant award provisions that we deal with below be retained and the model excessive leave clause not be inserted.

The Removal of Existing Employer Rights to Manage Leave

37. In Ai Group's view, removing a broad employer right to direct the taking of leave (where it currently exists) and replacing it with a much narrower capacity to manage the taking of leave in circumstances of excessive leave would be a significant and generally unwarranted change. There is no specific evidence of any difficulty with such current award provisions and, on the material before it, the Commission cannot be certain of what implications might flow from the deletion of such clauses. The Commission should not make such a significant change in an evidentiary vacuum.

42. In our view, there is an insufficient evidentiary basis for the inclusion of additional restrictions on the existing employer rights relating to the management of annual leave currently provided for under modern awards, as would result from the replacement of current award terms that facilitate the management of annual leave with the model clause. There is nothing to establish that, in a factual sense, the current award terms could be accommodated. Such restrictions include:

- Preventing an employer from addressing leave accruals until an excessive balance (as defined) has accrued.

- Restricting the ability to direct employees to take periods of less than one week.

- Restricting the ability to direct employees to take leave when it would result in their having less than six weeks (an amount that equates to the maximum balance ever previously applicable in some of these industries).

- Mandating the giving of twice the period of notice than was traditionally or commonly required. It is clear that in drafting terms currently dealing

with the taking of annual leave, the AIRC Full Bench determined that four weeks was sufficient notice of the need to take annual leave, and there is no evidence to suggest a different approach is now necessary in these awards.

- Exposing businesses to needing to accommodate employees taking leave at a time entirely at their discretion, even in circumstances where it may be unreasonable. In this last regard we note that the provisions of the awards identified as already regulating the taking of annual leave do not generally preclude the operation of s.88. Accordingly they already permit employees to exert a level of control over the taking of leave.

- Restricting the window in which employers can manage the time at which leave is to be taken to, in effect, a six month period before the employee can mandate when they take the leave.

43. The imposition of the more restrictive form regulation constituted by the model excessive leave term in awards already regulating the taking of leave, or to put it another way, the weakening of employer capacity to manage leave as endorsed by the AIRC Full Bench, would be plainly contrary to s.134(1)(f). That is, it is foreseeable that it would have an adverse impact on business, including on productivity, employment costs and the regulatory burden. While the negative consequences are difficult to identify precisely (and may vary between industries), it is similarly arguable that the changes may, at least to some degree, have an adverse impact on s.134(1) considerations.

44. The relative benefits that would flow from creating a simpler modern award system by aligning award terms relating to the taking of annual leave must also be weighed against the maintenance of a stable system through retention of award clauses determined during the Part 10A process. Moreover, where there is already a very simple and easy to understand clause dealing with the taking of annual leave, ease of understanding and simplicity will not be better achieved through its replacement with a far more complicated provision.

45. The pursuit of a uniform approach to the regulation of the taking of annual leave must also be tempered by the AIRC's previous acknowledgement that there may be "different approaches" to affording employers the ability to address leave liabilities. Moreover, the Full Bench, as currently constituted, has already decided that a number of awards will not include the model annual leave terms.[12]

46. The deletion of current award terms regulating the taking of leave, in a general sense, could also necessitate a reconsideration of the content of other award specific annual leave provisions in order to ensure that they continue to strike a balance and support the needs of relevant industries. For example, the removal of a general right to direct employees to take leave could mean that the inclusion of 'shutdown' provisions will need to be considered.

47. Similarly, in awards that provide additional annual leave or for payment of the leave at a rate higher than the base rate of pay (as defined by s.16 of the Act), there would be an argument for the reconsideration of such benefits if there is to be less capacity for employers to manage leave liabilities, in order to strike a fair balance between the needs of employers and employees.

48. In circumstances where awards already provide an effective means of addressing leave liabilities, the Full Bench should not seek to alter this without giving consideration to the operation of such pre-existing annual leave provisions.

49. It must also be borne in mind that the Full Bench is not proposing that all elements of the modern awards system dealing with the regulation of annual leave be consistent. It is merely contemplating model terms dealing with discrete issues. Consequently, there should remain scope for awards to retain divergent approaches to the broader regulation of the taking of annual leave. The pursuit of greater simplicity in the award system is a powerful argument for the alignment of award terms, but not an objective that should be pursued

[12] [2015] FWCFB 8408 at [6].

at all costs, or to the exclusion of the other considerations identified in s.134(1).

Category One: Annual Leave Must be Taken within 18 Months

50. The following awards contain a provision that requires that annual leave must be taken within 18 months of it accruing. The clauses go on to state that for the purposes of ensuring accrued annual leave is taken within those 18 months and in the absence of agreement as provided for in s.88 of the *Fair Work Act 2009* (the Act), 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:

- *Aquaculture Industry Award 2010* – clause 23.4;
- *Asphalt Industry Award 2010* – clause 25.5;
- *Broadcasting and Recorded Entertainment Award 2010* – clause 23.6;
- *Cement and Lime Award 2010* – clause 24.5;
- *Gardening and Landscaping Services Award 2010* – clause 24.4;
- *Gas Industry Award 2010* – clause 25.4;
- *Horse and Greyhound Training Award 2010* – clause 23.4;
- *Premixed Concrete Award 2010* – clause 24.5;
- *Quarrying Award 2010* – clause 29.5;
- *Racing Clubs Events Award 2010* – clause 30.4;
- *Racing Industry Ground Maintenance Award 2010* – clause 24.3;
- *Silviculture Award 2010* – clause 29.4;
- *Sporting Organisations Award 2010* – clause 25.4.

51. Clause 23.4 of the *Aquaculture Industry Award 2010* is set out below as an example of the specific terms of the clause:

> **23.4** Annual leave is to be taken within 18 months of the entitlement accruing. For the purpose of ensuring accrued annual leave is taken within that period, and in the absence of agreement as provided for in s.88 of the Act, 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.

52. The provisions identified in the remaining awards are in substantially similar if not identical terms.

Is the model excessive leave clause necessary in this category of awards?

53. We have earlier set out why, in general terms, we contend that the model excessive leave clause is not *necessary* in awards such as those listed above, which already contain a mechanism for preventing an excessive accrual of annual leave. We here briefly examine the precise terms of the clauses in the awards allocated to category one.

54. The clauses found in the above awards mandate that annual leave be taken within 18 months of it accruing. This may occur by way of an agreement between the employer and employee as per s.88 of the Act, or by direction from the employer as contemplated by the award clause. In either event, the leave must be taken within the specified period.

55. Putting to one side the mechanics of the clause, if applied literally such that every unit of annual leave must be taken within 18 months of accrual, an employee could never accumulate eight weeks of annual leave such that the model excessive leave clause would be triggered. On the face of it, we cannot identify any circumstance in which the model excessive leave clause would in fact apply.

56. In such circumstances, s.138 does not permit the inclusion of the model excessive leave clause as a modern award can only include terms to the extent necessary to achieve the modern awards objective.

Do the current clauses satisfy s.93(3) of the Act?

57. We acknowledge that in considering the terms of the relevant provisions, a question might arise as to whether the clause satisfies s.93(3) of the Act. That provision permits the inclusion of an award term requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

58. In its September 2015 Decision, the Commission considered the operation of s.93(3) in some detail, with reference to clause 1.2(b) of the model term: (emphasis added)

> [88] The Full Bench in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* (the *Air Pilots decision*) observed that in assessing the reasonableness of a 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". The Explanatory Memorandum at paragraphs 381-382 states:
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> > '381. Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.
> >
> > 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.'
>
> [89] In the *Air Pilots decision*, the Full Bench noted that:
>
> > 'It is apparent that the nature of these considerations, so far as they concern an employee, is personal to the employee the subject of the direction. It follows that generalised assessments about the impact of a requirement on employees will be insufficient. Moreover, the reasonableness of a requirement is to be assessed at the time that the requirement is to be fulfilled

> because self evidently the factual circumstances which underpin any consideration will change, as for example, the needs of both the employer and the employee are subject to change.'

[90] Finally, as noted in the *Air Pilots decision*:

> '[29] Section 55(1) of the Act prohibits an enterprise agreement excluding the NES or any provision of the NES. A provision of an enterprise agreement need not expressly exclude the NES in order to fall foul of s.55(1). A provision of an enterprise agreement which in its operation results in an employee not receiving the full benefit of the NES also contravenes the prohibition.'

[91] Similarly, s.55(1) prohibits an award term excluding the NES or any provision of the NES. Under s.56 of the Act an award term permitting an employer to direct that leave be taken would be of no effect to the extent that it purported to permit a direction to be given that was not reasonable for the purposes of s.93(3). The operation of s.55 is considered in more detail later in this decision.

[92] Pursuant to s.93(3) of the Act, the power of the Commission to include a provision in modern awards which facilitates an employer directing an employee to take accrued annual leave is conditioned on that direction being reasonable. In determining what is reasonable, all relevant considerations, including those set out in paragraph 382 of the Explanatory Memorandum, must be taken into account. It can be assumed that in formulating a direction to take leave, the employer will have considered the needs and circumstances of the employer's business. But to ensure that the direction is reasonable in terms of s.93(3), the needs and circumstances of the individual employee must also be taken into account.[13]

59. The clauses that we are here considering are of the sort contemplated by s.93(3) to the extent that they allow for an employee to be required to take annual leave by their employer.

60. Pursuant to s.136(1), a modern award must only include terms that are permitted or required to be included pursuant to variations parts or provisions of the Act. Section 136(1)(d) allows for the inclusion of terms permitted by Part 2-2 of the Act, which sets out the NES. Section 93(3) forms part of the NES. If an award term does not meet the requirements of s.93(3), its inclusion is not permitted by s.136(1).

61. We acknowledge the Full Bench's observations as to the operation of s.93(3) and the need to consider the circumstances of a particular case in determining whether a requirement to take annual leave pursuant to an award term is in fact *reasonable*. The Commission noted in its decision that even if an award term were to specify that a direction from an employer to take leave

[13] [2015] FWCFB 5771 at [88] – [92].

must be reasonable, this may give rise to "significant uncertainty and potential disputation"[14].

62. The Commission expressed its preference for an award term that contains procedural requirements and constraints that would necessarily result in a direction to take leave that is reasonable and thus satisfy s.93(3).[15] It would seem to us that if a direction were issued consistent with the provisions that we are here considering, the requirement to take annual leave would be reasonable. This is because the provision itself requires that annual leave be taken within a reasonable period of time (that is, 18 months of the entitlement accruing). The ability to direct an employee arises 'for the purposes of ensuring accrued annual leave is taken within that period'. That is, the requirement to take leave is available for the express purpose of guaranteeing that accrued annual leave is in fact taken within the stipulated timeframe. That the award mandates the taking of leave within 18 months colours the assessment of whether a requirement to take leave pursuant to the provision is reasonable.

63. Further, an employer may only direct an employee to take annual leave under these clauses 'in the absence of agreement as provided for in s.88'. That is, the right to direct an employee to take leave only arises if the employer and employee are unable to reach agreement about taking annual leave under s.88(1), noting that by virtue of s.88(2), an employer must not unreasonably refuse a request by the employee to take annual leave. This in and of itself provides an important safeguard. In addition, any direction to take annual leave must be given with at least four weeks of notice.

64. If the Commission forms the view that the relevant provisions may not satisfy s.93(3), it is open to it to consider a redrafting of the clause as part of these proceedings or during the award stage of the review. However, parties should be given an opportunity to be heard on any proposed amendment.

[14] [2015] FWCFB 5771 at [94].

[15] [2015] FWCFB 5771 at [95].

What do the draft determinations propose in respect of the category one awards?

65. The draft determinations prepared by the Commission propose to vary the following awards by deleting the relevant clause identified above and inserting the model excessive clause in the following awards:

- *Aquaculture Industry Award 2010;*
- *Asphalt Industry Award 2010;*
- *Broadcasting and Recorded Entertainment Award 2010;*
- *Cement and Lime Award 2010;*
- *Gardening and Landscaping Services Award 2010;*
- *Gas Industry Award 2010;*
- *Premixed Concrete Award 2010;*
- *Racing Clubs Events Award 2010;*
- *Racing Industry Ground Maintenance Award 2010;*
- *Silviculture Award 2010;* and
- *Sporting Organisations Award 2010.*

66. The draft determinations propose the retention of the relevant current award term and the insertion of the model excessive leave clause in the following awards:

- *Horse and Greyhound Training Award 2010;* and
- *Quarrying Award 2010*.

67. As we have earlier stated, this approach is clearly inconsistent and should be rectified in the manner we have proposed.

Category Two: Other Iterations of the 'Category One' Clause

68. A number of modern awards contain provisions that are, in their effect, substantially similar to those we have examined above. We do not propose to deal with them in detail, as our concerns and proposals in respect of those awards are consistent with that which we have raised in respect of the first category of awards.

69. Those awards are:

- *Ambulance and Patient Transport Industry Award 2010* – clause 30.8;
- *Architects Award 2010* – clause 20.2;
- *Black Coal Mining Industry Award 2010* – clause 25.4;
- *Mobile Crane Hiring Award 2010* – clause 25.2(a);
- *Nursery Award 2010* – clause 27.8(a);
- *Nurses Award 2010* – clause 31.2;
- *Security Services Industry Award 2010* – clause 24.3.

70. With the exception of the *Nurses Award 2010*, the draft determinations published in respect of each of the above awards propose to retain the provisions identified above and insert the model excessive leave clause.

Category Three: Airline Industry Awards

71. Ai Group has concerns regarding the interaction between the following airline industry award provisions and the model excessive leave clause:

- *Air Pilots Award 2010* – clause 27.4; and
- *Aircraft Cabin Crew Award 2010* – clause 25.5.

72. It has very recently been brought to our attention that the particular employment arrangements in these sectors may not be amenable to the

model excessive leave clause and there may be issues arising from the interaction between the above clauses and the model term.

73. We hold a genuine concern that the watering down of employer's existing capacity to actively manage leave arrangements in these industries may be problematic. This is in part a product of, what we understand to be the practical implications of regulation governing staffing of aircraft and the reality that both pilots and cabin crew are skilled occupations that require, to differing degrees, industry specific training and knowledge. Employers in this sector cannot necessarily easily accommodate unplanned or uncoordinated staff absences. Accordingly, a provision that affords an employee a right to dictate when they will be absent from work (a situation which is only otherwise possible in the context of protected industrial action) would potentially be problematic in this sector.

74. We also note that these awards provide for a much more beneficial regime in relation to the accrual of annual leave. Accordingly the negative consequences of inserting the model term may be magnified.

75. Ai Group respectfully requests that a determination as to whether the above awards are varied to include the model excessive leave clause be deferred until the award stage of the review. The airline industry awards form part of group 4. This would provide us with an opportunity to make further relevant enquiries in order to assess whether the insertion of the model excessive leave provision in the above awards would in fact be problematic.