

**IN THE FAIR WORK COMMISSION
MATTER NO: AM2014/47**

**4 YEARLY REVIEW OF MODERN AWARDS
COMMON ISSUE – ANNUAL LEAVE**

OUTLINE OF SUBMISSIONS ON BEHALF OF:

**THE AUSTRALIAN MINES AND METALS ASSOCIATION INC
and
MARITIME INDUSTRY AUSTRALIA LTD**

A. INTRODUCTION

1. The Australian Mines and Metals Association Inc. (AMMA) and Maritime Industry Australia Ltd. (**MIAL**) pursuant to Directions issued by Justice Ross on 8 July 2016 have prepared this submission in relation to the following modern awards (**Maritime Industry Awards**):
 - a) *Dredging Industry Award 2010*;
 - b) *Ports, Harbours and Enclosed Water Vessels Award 2010*;
 - c) *Professional Diving (Industrial) Industry Award 2010*;
 - d) *Maritime Offshore Oil and Gas Award 2010*;
 - e) *Marine Towage Award 2010*; and
 - f) *Seagoing Industry Award 2010*.
2. AMMA/MIAL make this submission as a replacement of previous submissions put to the Fair Work Commission (**FWC**) including as AMMA as part of the Employer Group in respect to these Maritime Industry Awards.

Background Paper 28 June 2016 (Report)

3. The Background Report deals with data on paid annual leave for Non-Casual employees covered by the Maritime Industry Awards. These awards were mapped to the Australian and New Zealand Standard Industrial Classification (**ANZSIC**) in the Mining, Construction and Transport, Postal and Warehousing Division.
4. The data was obtained from the Household, Income and Labour Dynamics in Australia survey which asked respondents if they had taken paid annual leave and the amount of paid annual leave in the preceding 12 months.
5. The Report suggests that employees under the awards are not currently taking all their accrued annual leave. For the reason outlined below, AMMA/MIAL disagree with this assessment as it relates to employees covered by maritime awards.
6. When we examine **Part B – Award Assessment** of this submission, annual leave is included as part of the “leave factor” where employees accrue approximately one day’s leave for every day worked and which is then built into the roster as “off days”. The leave factor accrued accounts for a range of issues and entitlements including amongst other things:
 - (a) leave with pay for weekends and public holidays worked;
 - (b) annual leave with pay of five weeks per year;

- (c) personal/carer's leave;
 - (d) compassionate leave; and
 - (e) time spent travelling in the off duty time.
7. The survey does not identify if respondents had taken annual leave as part of their leave factor and rostered "off days" or the number of average days of paid annual leave taken under the leave factor system, and to calculate the amount of paid annual leave taken under this system would require a detailed knowledge both of entitlements and the execution of a series of calculations.
 8. In view of the above, while the Report is useful to inform employers and the FWC for other industries, we believe it is not as useful for the maritime industry for the reasons outlined above and Part B - Award Assessment of this submission.

B. AWARD ASSESSMENT

Dredging Industry Award 2010

9. AMMA and MIAL do not oppose the introduction of the proposed draft model annual leave clauses in either the *Dredging Industry Award 2010 (DIA)* and *Ports Harbours and Enclosed Water Vessels Award 2010 (PHEWA)*.
10. The DIA provides at clause 23 that "Annual leave is provided for in the NES". Further, the DIA provides for overtime and penalties for work performed outside ordinary hours and does not have a leave factor (unlike the other Maritime Industry Awards). In that sense, it is no different to other modern awards the Fair Work Commission (**FWC**) is considering in the draft annual leave clause in this modern award review.
11. Employees that would be covered by the DIA are currently generally engaged on a casual basis. Accordingly, these provisions have little practical application.
12. Further, AMMA's member companies have enterprise agreements in place that typically provide for:
 - (a) Rosters comprising of a four or five week "on duty period" followed by a four or five week "off duty period";
 - (b) 12 hours of work per day;
 - (c) A leave factor that takes into account weekends, public holidays, holidays occurring during leave and annual leave of five weeks per year; and
 - (d) Employees accrue one day's paid leave for each "on duty" day, cumulative from year to year.

Ports Harbours and Enclosed Water Vessels Award 2010

13. In general terms, the PHEWA applies to vessels that operate in ports and that are normally on short-term operations.
14. Part 5 – "Hours of Work and Related Matters" of the PHEWA applies Division 3 of the National Employment Standards (**NES**) which deals with maximum weekly hours. Clause 20 – "Overtime and penalty rates" of the PHEWA provides similar conditions to other modern awards. Clause 18.3 – "Rostering" provides employees' rostered days off to be arranged so employees have two consecutive days off each week except where the employer and the employee agree otherwise.

15. The PHEWA does not have a leave factor (unlike other Maritime Industry Awards). In that sense, it is no different to other modern awards the FWC is considering in this modern award review.
16. AMMA and MIAL consider the draft model annual leave clauses can be introduced to the DIA and PHEWA without significant inconvenience to the employers and employees in industry.

Maritime Offshore Oil and Gas Award 2010 (MOGA), Marine Towing Award 2010 (MTA); and Seagoing Industry Award 2010 (SIA)

17. These three awards contain a “leave factor” that operates in conjunction with the NES and they apply annual leave and other provisions of the NES on an industry specific basis. They are designed, in part, to reflect the unique circumstances of working in the maritime industry. They were created after years of negotiations and arbitration, are well understood within the industry and were also made in the context of the Part 10A award modernisation proceedings.
18. The leave factor gives employers the necessary flexibility to manage rosters by working to a “swing system” e.g. four or five weeks on duty followed by four or five weeks off duty. This work pattern is adopted due to the specific nature of the work being undertaken. In order to effectively implement the swing system and to build viable rosters, annual leave cannot be accommodated for employees during the on duty period.

Leave factors, excessive leave and leave in advance

19. The *Maritime Offshore Oil and Gas Award 2010 (MOGA)* and *Seagoing Industry Award 2010 (SIA)* each contain combined leave factors compensating for numerous safety net plus other entitlements (i.e. not only annual leave). Specifically:
 - (a) the MOGA provides for 1.153 days’ paid leave for each day worked; and
 - (b) The SIA provides for 0.926 days’ paid leave for each day worked.
20. The leave factors provided for in the MOGA and SIA give effect to:
 - (a) leave with pay for weekends and public holidays worked;
 - (b) annual leave with pay of five weeks per year;
 - (c) personal/carer’s leave;
 - (d) compassionate leave;
 - (e) time spent travelling in the off duty time¹; and
 - (f) exclusive to the SIA only, a 35-hour week.
21. The *Marine Towing Award 2010 (MTA)* provides for 168 days free of duty for each year of continuous service.
22. The calculation of the leave on an annual basis provided for in the MTA gives effect to:
 - (a) 104 days of leave, being instead of weekends, which are worked through;
 - (b) five weeks of paid annual leave for shift workers under the NES (all MTA employees are considered to be shift workers);
 - (c) public holiday entitlements; and
 - (d) an additional 28 days’ leave to give effect to a 35-hour week.

¹ See clause 19.2 MOGA “Calculation of leave entitlement”; clause 23.2 MTA “Entitlement to leave” and clause 20.2 SIA “Calculation of leave entitlement”.

23. These awards provide for the ability to accrue excess leave and to take leave in advance (although not in a manner consistent with the FWC draft annual leave clause) which operate harmoniously with the specific leave factors provided for in the relevant award.²
24. Together, the leave factor, excessive leave and leave in advance provisions, give employers the necessary flexibility to manage rosters by working in sync with the “swing system” e.g. four or five weeks on duty followed by four or five weeks off duty. In order to effectively implement the swing system, annual leave cannot be accommodated for employees during the on duty period. Further, allowing annual leave during an on duty period would create practical and commercial issues in the MOGA, for example:
 - (a) Compliance with vessel flag state crew numbers;
 - (b) Compliance with the contracted and operational crew numbers;
 - (c) The significant cost of employees being transported to and from a vessel of approximately \$30,000 per crew member;
 - (d) The responsibility and cost of relief crew and the employee being repatriated back to Australia or their home port;
 - (e) The safety risk of an employee taking annual leave during the work cycle leaving the crew short; and
 - (f) The awards are based on a two crew duty system. If the employer was required to replace crew members within the roster cycle it could cause potential difficulty in the additional training of crew members (if they weren't ready available), in case they were required for a particular vessel.

Similar issues (although not identical) also apply to SIA and MTA.

25. Instead, employees have extended periods off as part of the swing system arrangement (e.g. four or five weeks off duty) and the leave factor compensates for this unique arrangement by rolling up various numerous safety net plus other entitlements, not only annual leave, which are paid for as part of the salary.

Impact of cashing out

26. None of these awards provide for cashing out of annual leave.
27. As the leave factor compensates for numerous award conditions and NES items (i.e. not just annual leave), employers would need to individually calculate each of the components of the accrued leave factor every time an employee wanted to cash out the annual leave.
28. By way of example, the leave factor under the MOGA is 1.153. Extracting the annual leave component 0.192³ would result in a residual leave factor of approximately 0.960 which would impact on rosters. For example, on a four week swing 5.376 days annual leave will accrue per swing (28 x 0.192). On a five-week swing 6.72 days' annual leave will accrue per swing. The same will occur for the other two awards albeit to a different extent.
29. Accordingly, the FWC (if it were to incorporate the draft model annual leave clause) would need to alter the leave factor in each of the awards.
30. Extracting the annual leave component would impose an unduly complex administrative burden on employers as it would alter employees' leave factor accrual rates at different

² See MOGA clause 19.1(b); 19.2(d); 19.3(c); SIA clause 20.1(b); 20.3; 20.4; MTA: clause 23.2; 23.4; 23.5.

³ 35 days (annual leave entitlement) divided by 364 (days in a year) divided by 2 (account for even time roster).

points in time. Further, and given the leave factor accrues based on time worked but also compensated for time in the off duty period (which is the rostered time off and annual leave) (e.g. 1.153 per duty day), changing the accrual rate would consequently impact on rostering arrangements.

31. For example, if an employee under the MOGA was working a 5 week (35 day) roster and their annual leave component was extracted, they would only accrue 33.63 off duty days (leave days) instead of 35. If the employer was operating a 5 week (35 day) swing, the employee would obviously be required to return to work after 35 days off duty. This would mean the employee would have approximately 1.4 days without pay, unless the employer paid them leave in advance (however the roster would never allow the employee to pay that back because every swing they would have negative leave) or returned them to work early (which would affect the employee's back-to-back colleague working the alternate swing as they would only be able to work 33 days and accrue approximately 31.68 days' leave).
32. While the annual leave component of the leave factor can be excluded and quantified, AMMA/MIAL submit that there would not be any benefit from doing so.
33. Further, if employees could cash out the annual leave component, it would be complex and costly for employers because separating annual leave from the leave factor would potentially enable employees to take leave during an on duty period in their work cycle. The issues associated with this are discussed at paragraph 24. Were the model annual leave clause not used for this purpose then AMMA/MIAL submit that it would be redundant.
34. Cashing out annual leave could be a short-term benefit during industry peak periods of work, as the employee could return to work sooner and the employer would not need to employ and train new employees in order to manage the roster requirements. However, when the industry is off-peak, employers can manage employees by utilising accrued leave; if leave was cashed out, termination options may need to be considered and utilised in order to manage business requirements.
35. These three Modern Awards provide employers the operational flexibility needed to manage industries which are impacted by weather, client demands, remote locations and requirement for 24/7 operations. For the employees, it provides the benefit of ongoing employment which could otherwise be uncertain and fragmented. Because of these factors, rosters in this industry are not able to operate like "clockwork" and there needs to be some flexibility with rosters which can be managed via a leave factor incorporating annual leave.
36. Simply inserting the model draft annual leave clauses as proposed into the current draft determinations will, in some cases, cause a conflict with the current clauses in these awards. Accordingly, inserting the clauses would fail the modern awards objective contained in section 134(1) of the *Fair Work Act 2009*, specifically:
 - (a) the need to promote flexible modern work practices and the efficient and productive performance of work;
 - (b) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (c) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

Professional Diving (Industrial) Industry Award 2010

37. The *Professional Diving (Industrial) Industry Award 2010* (PDIA) provides different leave entitlements for inshore and offshore diving operations.

Inshore Diving

38. For inshore diving operations, the PDIA provides leave in accordance with the NES. In that sense, it is no different to other modern awards the FWC is considering in this modern award review.
39. Accordingly, AMMA/MIAL believe the draft model annual leave clauses can be introduced to the inshore diving operations provisions of the PDIA without significant inconvenience or causing issues to the employers and employees in industry.

Offshore Diving

40. Although it is not expressed in as clear terms as the other maritime industry awards that provide for a leave factor, for offshore diving operations the PDIA contains a leave factor of one paid day off duty for each on-duty day worked. Further, the PDIA provides for the ability to accrue excessive leave and take leave in advance (although not in a manner consistent with the FWC draft annual leave clause) which operates harmoniously with the leave factor provided for in the PDIA.⁴
41. The inclusion of the proposed draft annual leave clauses has the potential to cause issues for both employees and employers where a swing system is currently employed for reasons outlined above.
42. As a result of the unique industry-specific features of maritime industry awards, there are cogent reasons for maintaining these differences. It is possible that the insertion of the proposed model draft annual leave clauses, even with substantial modifications or tailoring, may create potential administrative difficulties and additional complexity for employers and employees.
43. AMMA and MIAL reiterate that this would be counter to the modern awards objective contained in section 134 of the *Fair Work Act 2009*, particularly in relation to subparagraphs 134(1)(d) (f) and (g).

Impact on enterprise agreement negotiations

44. Most AMMA/MIAL members have enterprise agreements in place that replicate the awards in the sense they include a leave factor that manages the leave and rosters in a manner that suits operations (including leave in advance and excessive leave). These have been drafted and developed taking into account the unique nature of the industry.
45. AMMA/MIAL has concern with the proposed draft model annual leave amendments due to the importance of the leave factor currently in place in these modern awards, any such variation to the modern award may create unforeseen difficulty with negotiations between employees and employers.

⁴ See PDIA clause 22.14

Summary

46. The inclusion of proposed draft model annual leave clauses has the potential to cause confusion to both employees and employers where a “swing system” or leave factor is currently employed.
47. As a result of the unique industry-specific features of maritime industry awards, there are cogent reasons for maintaining these differences. The insertion of the proposed model draft annual leave clauses, even with substantive modifications or tailoring, is likely to create administrative difficulties and additional complexity for employers and employees.
48. AMMA and MIAL reiterate that this would be counter to the modern awards objective contained in section 134 of the *Fair Work Act 2009*, particularly in relation to subparagraphs 134(1)(d) (f) and (g).
49. AMMA and MIAL submit that the model annual leave clauses not be adopted into the MOGA; SIA; MTA; PDIA (offshore) for the reasons outlined in these submissions. AMMA and MIAL submit it is critical that unintended consequences are avoided.

Submitted on behalf of:

Australian Mines and Metals Association Inc.
Maritime Industry Australia Ltd.
12 August 2016