

**4 yearly review of modern awards - annual leave common issue**

**Matter No. AM2014/47**

**OUTLINE OF SUBMISSIONS**

**NATIONAL FARMERS' FEDERATION**

Date: 20 June 2014

1. The National Farmers' Federation (NFF) supports the common position of employers in these proceedings, filed in the Fair Work Commission on 21 May 2014, in relation to the inclusion of new annual leave terms in modern awards.
2. The NFF does not support the proposal of the Australian Council of Trade Unions (ACTU), also filed in the Fair Work Commission on 21 May 2014, which would vary modern award annual leave clauses in relation to payment for annual leave on termination of employment. Further submissions on this issue will be filed in response to the proposition on 1 August 2014.

**The modern awards objective**

3. Under section 156 of the *Fair Work Act 2009* (FW Act), the Fair Work Commission is required to review each modern award in its own right every four years.
4. A modern award may only include terms to the extent necessary to achieve the modern awards objective (section 138).
5. Section 134 of the FW Act contains the modern awards objective. Modern awards must provide a 'fair and relevant minimum safety net of terms and conditions' of employment, taking into account criteria including:
  - a. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
  - b. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f)); and
  - c. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h)).

**Cashing out annual leave**

6. In these proceedings, it is proposed that modern awards, including the Pastoral Award 2010 and the Horticulture Award 2010, be varied to provide for the cashing out of annual leave by agreement.

7. Section 93 of the FW Act provides that modern awards may include terms providing for the cashing out of paid annual leave by an employee. Section 92 prohibits the cashing out of annual leave other than in accordance with 'cashing out terms' contemplated by section 93. Failure to comply with this provision contravenes the FW Act and risks the imposition of civil penalties (section 44 and Part 4-1).
8. 'Cashing out terms' must require that employees retain a minimum balance of four weeks accrued annual leave, that each cashing out is done separately by agreement in writing, and that the amount 'cashed out' is the amount that would have been paid had the leave been taken as annual leave (subsection 93(2)).
9. The proposed clause meets each of these requirements. It provides as follows:  
  
*"X.X Cashing out of Annual Leave*  
  
*With the agreement of the employer, an employee may cash out an amount of accrued paid annual leave provided that:*
  - (a) *the employee retains at least four (4) weeks of accrued annual leave immediately after the agreed amount is cashed out;*
  - (b) *each cashing out of a particular amount of accrued paid annual leave must be agreed by a separate agreement in writing; and*
  - (c) *the employee must be paid the full amount that would have been payable had the employee taken the leave at the time that it is cashed out."*
10. The clause is facilitative in nature. It enables employees to cash out some of their accrued paid leave, but only if they want to do so and only if their employer agrees. There is no obligation on either an employee (to cash out their leave) or an employer (to agree to the cashing out of leave).
11. The clause is one that is contemplated by section 93 of the FW Act. In this respect, it is relevant that federal workplace relations legislation now provides for the inclusion of such terms in modern awards.
12. As identified in the Background Paper<sup>1</sup>, cashing out of annual leave was first introduced as a concept in Commonwealth legislation in 2006 in relation enterprise agreements. From 1 January 2010, the concept was extended in relation to modern awards when the National Employment Standards commenced operation.
13. In recognition of the importance of employees taking leave for the purposes of rest and recreation, the cashing out of annual leave was made subject to the criteria outlined in paragraph 8 above.<sup>2</sup> In addition, the general protections in Part 3-1 operate

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<sup>1</sup> Fair Work Commission, *Background paper: 4 yearly review of modern awards – annual leave common issue*, 30 May 2014

<sup>2</sup> Explanatory Memorandum to the *Fair Work Bill 2008* at para 378.

to protect employees from conduct including coercion, undue influence or pressure and misrepresentation.

14. As long as these safeguards remain intact, the FW Act evidences an intention that modern awards may deal with the cashing out of annual leave. This is notwithstanding any misgivings that may exist as to the appropriateness of such a policy.

*Would the proposed clause provide for minimum terms and conditions of employment that are fair and relevant?*

15. The proposed clause meets the modern awards objective insofar as it would ensure that modern awards provide fair and relevant minimum safety net terms and conditions. That is, including a cashing out term in all modern awards would address the current unfair operation of all but one modern award in this respect.
16. Employees who choose not to take their full annual leave entitlement each year and would benefit from cashing out some of their entitlement instead should be entitled to make this choice. Research contained in the Background Paper suggests that more than 60% of full-time employees take less than four weeks annual leave each year.<sup>3</sup> 43.5% of respondents indicated a preference for higher pay and reduced annual leave.<sup>4</sup> The Background Paper does not disclose the demographic represented in this research.
17. Importantly, respondents do not appear to have been asked about circumstances in which cashing out terms might be beneficial. In 2009-10, 15.4% of Australians reported that they were unable to raise \$2000 in a week for something important, and 27.1% could not afford a holiday of more than one week.<sup>5</sup> For these individuals, the option to cash out annual leave could assist in meeting unforeseen financial needs. Interestingly, the Employer Annual Leave Survey conducted for the purposes of these proceedings indicates that 45% of employer respondents have been asked by employees to cash out a portion of their annual leave since January 2010. This confirms that for many employees, cashing out of leave can be an attractive option.
18. Particularly in remote areas, employees often live at the workplace. Taking annual leave means a choice between staying at work (but not working) or travelling long distances and incurring significant travel and accommodation costs.
19. Employers are also unfairly disadvantaged by the inability to grant employee requests to cash out annual leave. If employees are covered by an award, employers cannot agree to a request of this nature unless permitted to do so under a modern award or enterprise agreement. If they do, they contravene the FW Act (section 92). No such penalty applies to employees.
20. Employers carry the contingent liability for untaken, accrued annual leave entitlements on their books until such time as employees agree to take annual leave.

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<sup>3</sup> Fair Work Commission, *Background paper: 4 yearly review of modern awards – annual leave common issue*, 30 May 2014, paragraph 32.

<sup>4</sup> *ibid*, paragraph 34.

<sup>5</sup> Australian Bureau of Statistics *Household Expenditure Survey, Summary of Results* Catalog. 6530.0, 2009–10

Under the National Employment Standards, the default position is that annual leave can only be taken by agreement of the employee and employer (section 88) and there is no capacity for employers to direct employees to take annual leave other than in accordance with a modern award or enterprise agreement term (subsection 93(3)).

21. If an employee approaches an employer because they need the extra money, have plenty of accrued leave and want to cash some of it in, why should the employer not be able to agree to the request, given the safeguards contained in the FW Act? Put another way, is it fair that in such circumstances, the employer contravenes the FW Act because the modern award does not permit this choice?
22. The proposed clause would ensure fairer minimum terms and conditions of employment by addressing these issues and providing the flexibility for employers and employees to reach agreement on cashing out annual leave in accordance with the FW Act. It would ensure employers who agreed to such a request did not contravene the FW Act. It would mean nationally uniform terms and conditions of employment for all employers and award covered employees in relation to the cashing out of annual leave.
23. Including the proposed clause in modern awards would recognize and give effect to the policy of facilitating cashing out of annual leave by agreement, implicit in the National Employment Standards. In this way, the inclusion of such a clause would promote more flexible, modern work practices and would improve the position of farm businesses by providing a legitimate mechanism through which to reach agreement on the issue, subject to the various safeguards which Parliament saw fit to implement.
24. The fact that cashing out terms could be negotiated in individual workplaces through enterprise bargaining does not displace the intention that such provisions might become available on a wider industry or occupational basis. For many industry sectors, enterprise bargaining is not widespread and award reliance is high. In agriculture, forestry and fishing, only 546 enterprise agreements covering a total of 16,000 employees were current as at December 2013<sup>6</sup>. Yet there are approximately 135,000 farm businesses in Australia and more than 319,000 employees.<sup>7</sup>
25. For the more than 134,000 employers and 300,000 employees who are not covered by enterprise agreements, the practical reality is that bargaining will not deliver wider access to cashing out terms. Bargaining is a voluntary mechanism, while modern awards form part of the legislative safety net. In *Re Wine Industry Award 2010*, Hampton C recognised that the capacity to deal with issues through enterprise bargaining does not obviate the need to ensure that “modern awards are themselves fair and relevant”.<sup>8</sup> Where barriers to bargaining exist, the modern award should be sufficiently flexible that employers and employees can agree on matters that suit them, within the parameters of the FW Act. In such circumstances, an approach that

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<sup>6</sup> Department of Employment, *Trends in Federal Enterprise Bargaining*, December Quarter 2013 (Table 5).

<sup>7</sup> Australian Bureau of Statistics, *Agricultural Census, Australia, 2010-11*; Department of Employment, *Industry Employment Projections*, 2014 Report

<sup>8</sup> [2013] FWC 7751 at paragraph 46.

promotes flexible work practices should be preferred over one that restricts access to them.

### **Excessive leave**

26. The employers propose that existing annual leave clauses providing for employers to require employees to take annual leave accrued if the accrual is excessive ('excessive leave term') should be replaced.
27. Subsection 93(3) of the FW Act permits the inclusion of terms in modern awards that enable employers to require employees to take paid annual leave in particular circumstances, as long as the requirement is reasonable.
28. The Pastoral Award 2010 contains an excessive leave term at subclause 23.5. It provides as follows:

#### ***Excessive leave***

*[23.5 varied by PR994545 from 01Jan10]*

*Notwithstanding s.88 of the Act, if an employer has genuinely tried to reach agreement with an employee as to the timing of taking annual leave, the employer can require the employee to take annual leave by giving not less than four weeks' notice of the time when such leave is to be taken if:*

- (a)** *at the time the direction is given, the employee has eight weeks or more of annual leave accrued; and*
- (b)** *the amount of annual leave the employee is directed to take is less than or equal to a quarter of the amount of leave accrued.*

29. The Horticulture Award 2010 contains an excessive leave term at subclause 25.7 in the same terms:

#### ***Excessive leave***

*[25.7 substituted by PR994305 from 01Jan10]*

*Notwithstanding s.88 of the Act, if an employer has genuinely tried to reach agreement with an employee as to the timing of taking annual leave, the employer can require the employee to take annual leave by giving not less than four weeks notice of the time when such leave is to be taken if:*

- (c)** *at the time the direction is given, the employee has eight weeks or more of annual leave accrued; and*
- (d)** *the amount of annual leave the employee is directed to take is less than or equal to a quarter of the amount of leave accrued.*

30. The proposed variation would allow employers to impose a reasonable requirement on employees to take annual leave if they have not done so for a period of 18 months or more. In this respect, it complies with subsection 93(3) of the FW Act.

*Would the proposed clause provide for minimum terms and conditions of employment that are fair and relevant?*

31. While the Pastoral Award 2010 and the Horticulture Award 2010 currently permit employers to direct employees to take annual leave once they have accrued eight weeks leave, a lesser minimum accrual of six weeks would assist farm businesses to manage their contingent liabilities by directing the taking of annual leave during periods when there is limited work available because of seasonal variations or natural weather events.
32. In addition, ensuring that employees who have not sought to take annual leave at their own initiative for at least 18 months do actually take a period of rest and recreation will promote the efficient and productive performance of work.
33. The NFF supports a variation to these clauses to ensure that as far as possible, annual leave terms in modern awards provide nationally uniform terms and conditions.

#### **Annual close-down**

34. It is proposed that modern awards, including the Pastoral Award 2010 and the Horticulture Award 2010, be varied to provide for an 'annual close-down'.
35. The proposed 'annual close-down term' would enable employers to close down their business for a period while employees take annual leave, or if they have no annual leave entitlement, unpaid leave. There is currently no capacity to do this under either the National Employment Standards, the Pastoral Award 2010 or the Horticulture Award 2010.
36. As discussed above, subsection 93(3) of the FW Act permits modern awards to include terms about reasonable requirements for employees to take paid annual leave. In addition, subsection 139(1)(h) provides that modern awards may include terms about leave, leave loadings and arrangements for taking leave.
37. Subsection 94(5) permits employers of award/agreement free employees to require them to take annual leave as long as the requirement is reasonable. A note to the provision explains that requirement may be reasonable if, for example, a business shuts down for a period.
38. Section 524 of the FW Act, which deals with stand down, provides for employers to stand down employees without pay, but only in circumstances of industrial action, breakdown of machinery or equipment or other work stoppage for which the employer cannot reasonably be held responsible. The scope of this provision is narrow – not only must one of the above circumstances exist but also an employee must be unable to be usefully employed as a result.
39. Scheduling annual leave so that it is taken at times when there is not much work to be done is an inherently reasonable proposition. It gives employees their entitlements and reduces labour costs as well as contingent liabilities when business funds are limited.

Accordingly, the proposed annual close-down term is capable of inclusion in modern awards.

*Would the proposed clause provide for minimum terms and conditions of employment that are fair and relevant?*

40. Many businesses have variable workflows over a year. The Employer Annual Leave Survey shows that almost half of employer respondents (46.6%) have closed their business at least once since 1 January 2010. Almost one third of employer respondents (29.9%) had done so on at least three occasions (suggesting that for those businesses, there is an annual close-down).
41. In agriculture, work patterns are mostly determined on the basis of predicted seasonal conditions or events over a year. In the warmer months (typically from September to May), there is a lot of work to be done and demand for labour is high. This demand is significantly reduced over winter and for many it is not a viable proposition to retain employees if there is insufficient work for them to do.
42. In response to such variable work patterns, many farm businesses use predominately casual or contract labour. In the agriculture, forestry and fishing industry, only 49% of the workforce is employed and of these, 43.2% are casual employees.<sup>9</sup> Independent contractors account for 8.5% of total employed persons.<sup>10</sup>
43. Having the capacity to close down the business for a period while employees take annual leave is likely to promote greater use of permanent employment in agriculture. This is because it will reduce the ongoing need for recruitment and training of workers each year and address concerns about the consequences that may arise from having to terminate employment at the end of the work season.
44. It is fair that employers should have the ability to direct employees to take annual leave during quiet periods of the year. Employers are responsible for the payment of wages and associated employee costs and in the case of permanent employees, this applies even if there is no productive work for employees to do.
45. Including an annual close-down term in the Pastoral Award 2010 and the Horticulture Award 2010 would create the opportunity to align business operational needs with employee needs for rest and recreation. This would mean more efficient and productive work over the year.
46. It would encourage greater use of permanent employment by farm businesses while keeping labour costs down when there is no money to pay wages that would otherwise be required.
47. Employees overall would not be disadvantaged as a result of the inclusion of such a clause. Any annual close-down must be for purposes including that employees (or a majority of employees) can take annual leave at the same time. For employees whose accrued annual leave is not sufficient to cover the period of closure, there would be

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<sup>9</sup> Australian Bureau of Statistics, *Forms of Employment, Australia, November 2013*

<sup>10</sup> *ibid.*

two options available: the employer and employee could agree to the employee taking annual leave in advance of accrual<sup>11</sup> or the employee could take unpaid leave. For all employees, improved prospects of permanent employment would ameliorate any perceived disadvantage.

48. According to the Background Paper<sup>12</sup>, two thirds of current awards contain such a clause. Adopting a common approach to the inclusion of annual close-down terms in modern awards would promote nationally uniform terms and conditions of employment.
49. Similarly, according the same flexibility to employers of award covered employees as is available to those of award/agreement free employees would ensure that the FW Act applies in the same way in this respect to all employers covered by its terms.
50. Accordingly, the NFF supports the inclusion of an annual close-down term in both the Pastoral Award 2010 and the Horticulture Award 2010.

#### **Electronic transfer payment of annual leave**

51. Finally, it is proposed that modern awards, including the Pastoral Award 2010 and the Horticulture Award 2010, be varied to provide for the electronic transfer payment of annual leave to employees. The proposal would operate in relation to employees whose wages are already paid electronically into their bank account.
52. Section 142 of the FW Act permits modern awards to include terms that are incidental to a term that is required or permitted to be in the modern award and that are essential for the purpose of making the term operate in a practical way.
53. As discussed above, modern awards can include terms about annual leave (subsection 139(1)(h)). A term about the means by which payments for annual leave are made to employees is both incidental to a modern award term about annual leave and essential for the purpose of making the term operate in a practical way. As such, terms of the kind proposed are capable of inclusion in modern awards.

*Would the proposed clause provide for minimum terms and conditions of employment that are fair and relevant?*

54. Section 323 of the FW Act requires employers to pay their employees in relation to the performance work. Subsection 323(2)(c) expressly contemplates the use of electronic funds transfer systems to credit employee accounts. Subsection 323(2)(d) permits any method authorized under a modern award or enterprise agreement.
55. According to the Employer Annual Leave Survey, at least 76.5% of employer respondents pay their employees by electronic means. That is, it is a common practice among industry generally in relation to the payment of wages.

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<sup>11</sup> Both the Pastoral Award 2010 (s.23.6) and the Horticulture Award 2010 (25.8) provide for annual leave in advance of accrued entitlements.

<sup>12</sup> Fair Work Commission, *Background paper: 4 yearly review of modern awards – annual leave common issue*, 30 May 2014, paragraph 65.



56. For those employees who are paid on a regular pay cycle via electronic means, it makes sense that payment of annual leave is dealt with in the same way as wages and paid in the regular pay cycle. Paying for all leave up front, particularly for employees who are taking a period of annual leave of more than two weeks, means that employees receive more money than they usually would at the beginning of the leave period and no additional money until the next pay is due after their return from work.
57. Volatility in cash flow is an issue for most farms in Australia at one time or another.<sup>13</sup> At times when funds are limited, business will have made provision for the regular pay cycle but may not have accounted for additional upfront payments required to comply with the modern award requirement to pay for all annual leave at the time the leave is taken.
58. The requirement to pay annual leave in advance at the beginning of the leave period adds to the administrative cost and regulatory burden on employers by requiring a separate manual pay run to be undertaken each time an employee takes annual leave.
59. For employees, the requirement can operate unfairly if it places them in a position where because of a failure to budget across the leave period, they spend all of the leave payment at the beginning of the leave period. Once the money is spent, the employee must wait for the next pay cycle after they return from work to be paid again. This could be more than a month later. In the meantime, bills still have to be paid.
60. The NFF supports the inclusion of a term in both the Pastoral Award 2010 and the Horticulture Award 2010 dealing with electronic transfer payment of annual leave.

**Signature**

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<b>Date</b>	20 June 2014

<sup>13</sup> Australian Government, *Agricultural Competitiveness Issues Paper*, 2014

