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Subject: Consultation Sessions - AM2023/21 - Modern Awards Review - Making Awards Easier to Use

OFFICIAL

Dear Associate

I refer to the above proceedings, which are listed for a consultation in Sydney tomorrow.

To facilitate discussions pertaining to the common issue surrounding excessive annual leave accruals, I **attach** two judgments of the Full Bench of the Commission:

- [2015] FWCFB 3406
- [2015] FWCFB 5771

These judgments will likely provide some helpful background pertaining to the excessive annual leave award provisions that are subject to simplification proposals and, subject to the process to be adopted tomorrow, ABI/BNSW may wish to refer to passages of these judgments during the consultation session tomorrow.

Yours faithfully

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FairWork Commission

DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Annual leave
(AM2014/47)

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT HARRISON
COMMISSIONER HAMPTON MELBOURNE, 11 JUNE 2015

4 yearly review of modern awards - annual leave common issue - excessive annual leave - cashing out of annual leave - close-down - granting leave in advance - payment of annual leave entitlements on termination - electronic funds transfer and paid annual leave - purchased leave.

CONTENTS

ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACCI	Australian Chamber of Commerce and Industry
Act	*Fair Work Act 2009* (Cth)
ACTU	Australian Council of Trade Unions
AFPCS	Australian Fair Pay and Conditions Standard
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AMWU	"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
AWALI 2010	Australian Work and Life Index 2010
2008 Award Modernisation decision	Award Modernisation decision of 19 December 2008 re making of priority modern awards
CFMEU	Construction, Forestry, Mining and Energy Union
Commission	Fair Work Commission
EFT	Electronic Funds Transfer
Employer Group	See Group of employers listed at Attachment A
FWC	Fair Work Commission
HILDA	Household, Income and Labour Dynamics in Australia survey
NAPSA	Notional Agreement Preserving State Award
NES	National Employment Standards
Review	4 yearly review of modern awards under s.156 of the *Fair Work Act 2009*
SDA	Shop, Distributive and Allied Employees Association
TAI 2002	The Australia Institute Survey, 2002
TCFUA	Textile, Clothing and Footwear Union of Australia
Transitional Review	Transitional (or 2 year) review of modern awards under Item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
Transitional Review—Annual Leave decision	*Modern Awards Review 2012—Annual Leave* decision
Work Choices Act	*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)
WR Act	*Workplace Relations Act 1996* (Cth)

1. Introduction

[1] The *Fair Work Act 2009* (Cth) (the Act) provides that the Fair Work Commission (the Commission) must ensure that modern awards together with the National Employment Standards (NES) provide a fair and relevant minimum safety net of terms and conditions. Modern awards and the NES interact in different ways. A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 of the Act (which deals with the NES). A modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or that supplement the NES. One of the minimum standards in the NES is paid annual leave. This decision is part of the 4 yearly review of modern awards and it deals with the variation of modern awards in relation to a number of issues regarding paid annual leave.[1]

Background

[2] Section 156 of the Act provides that the Commission must conduct a 4 yearly review of modern awards (the Review) as soon as practicable after 1 January 2014.

[3] As detailed in a statement issued on 6 February 2014,[2] the Review consists of an Initial stage, dealing with jurisdictional issues, a Common issues stage and an Award stage.

[4] What constitutes a "common issue" was defined in a statement issued on 17 March 2014[3] in terms of a proposal for a significant variation or change across the award system, such as applications which seek to change a common or core provision in most, if not all, modern awards. A matter identified as a common issue will be referred to a Full Bench for determination in a "stand alone" proceeding, as distinct from having the issue determined on an award-by-award basis during the Award stage of the Review. After a consultation process the Commission determined the matters which would be dealt with as "common issues" during the Review; one of those matters was annual leave. [4]

[5] The scope of the matters to be considered in the context of the annual leave common issue was published in a statement on 7 April 2014 as follows:

(i) cashing out of annual leave;
(ii) excessive annual leave;
(iii) annual close-down;
(iv) granting leave in advance;
(v) purchased leave;
(vi) payment of annual leave entitlements on termination; and
(vii) electronic funds transfer (EFT) and paid annual leave. [5]

[6] This decision deals with the above matters.

[7] In relation to the issue of purchased leave, the Australian Industry Group (Ai Group) initially proposed a model clause to be inserted into each modern award that would allow employees additional annual leave in a year with a corresponding reduction in salary, either for the period of their annual leave (such as half pay for twice the standard annual leave period) or throughout the year.[6] This claim was not pressed further during these proceedings and we return to the matter later in this decision.

[8] Interested parties were directed to file proposed variation determinations and a list of awards to which the proposed variations would apply. Directions were also issued regarding the filing of comprehensive written submissions and any evidence to be relied upon in support of the propositions advanced. Hearings took place on 20 and 21 August 2014, 16 October 2014 and 1 December 2014. Ai Group and the Australian Chamber of Commerce and Industry (ACCI) coordinated discussions with various employer groups (the Employer Group)[7] and presented a common position in respect of proposed variations relating to each of the matters addressed in this decision. The full list of organisations making up the Employer Group is at Attachment A.

[9] A series of conciliation conferences took place in conjunction with the hearings outlined above, but ultimately a consent position could not be reached and all of the matters were contested.

[10] We propose to deal with some contextual issues first, before turning to the particular claims before us.

2. The Context

[11] We begin by making some brief observations about the legislative context for the Review. We note that these issues are canvassed in more detail in the *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision[8] and we adopt and apply that decision.

[12] The Act provides that the Commission must conduct a 4 yearly review of modern awards (s.156(1)). Section 156(2) deals with what has to be done in a Review:

> "(2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:
>
> (i) one or more determinations varying modern awards; and
>
> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards; and
>
> (c) must not review, or make a determination to vary, a default fund term of a modern award.
>
> Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
>
> Note 2: For reviews of default fund terms of modern awards, see Division 4A."

[13] Subsections 156(3) and (4) deal with the variation of modern award minimum wages in a Review and are not relevant for present purposes.

[14] Section 156(5) provides that in a review each modern award is reviewed in its own right, however, this does not prevent the Commission from reviewing two or more modern awards at the same time.

[15] The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).

[16] The modern awards objective is central to the Review. The modern awards objective applies to the performance or exercise of the Commission's "modern award powers", which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is in Part 2-3 of the Act and so will involve the performance or exercise of the Commission's "modern award powers". It follows that the modern awards objective applies to the Review.

[17] The modern awards objective is set out in s.134 of the Act, as follows:

> **"134 The modern awards objective**
>
> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective.***

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2–6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[18] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a "fair and relevant minimum safety net of terms and conditions" taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). The objective is very broadly expressed.[9] The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision-making process.[10]

[19] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant to a particular proposal to vary a modern award.

[20] There is a degree of tension between some s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

[21] The modern awards objective requires the Commission to take into account, among other things, the need to ensure a "stable" modern award system (s.134(1)(g)). The need for a "stable" modern award system supports the proposition that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of the merit argument required will depend on the variation sought. As the Full Bench observed in the *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision:

> "Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."[11]

[22] The Review is broader in scope than the transitional (or 2 year) review (Transitional Review) of modern awards provided for in Item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, and is the first full opportunity to consider the content of modern awards. However, the broad scope of the Review does not obviate the need for a merit argument to be advanced in support of a proposed variation. As the Full Bench in *Re Security Services Industry Award 2010* recently observed:

> "[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations."[12]

[23] In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.[13] The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is "necessary" in a particular case is a value judgment based on an assessment of the s.134 considerations having regard to the submissions and evidence directed to those considerations.[14]

[24] In performing functions and exercising powers under a part of the Act (including Part 2-3—Modern Awards) the Commission must take into account the objects of the Act and any particular objects of the relevant part (see s.578(a)). The object of Part 2-3 is expressed in s.134 (the modern awards objective) to which we have already referred. The object of the Act is set out in s.3 as follows:

> **"3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual

employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses."

[25] We now turn to the provisions of the Act relating to annual leave.

[26] As we have mentioned, the Act provides that modern awards, together with the NES, are intended to provide a fair and relevant minimum safety net of terms and conditions of employment. The NES are minimum standards that apply to the employment of national system employees. The NES are set out in Part 2-2 of the Act. Division 6 of Part 2-2 (ss.86–94) deals with annual leave.

[27] Part 2-1 of the Act provides that the NES cannot be excluded by modern awards or enterprise agreements. Section 55 deals with the interaction between the NES and a modern award or enterprise agreement:

"**55 Interaction between the National Employment Standards and a modern award or enterprise agreement**

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2–2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2–2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56)."

[28] A term of a modern award or enterprise agreement has no effect to the extent that it contravenes s.55 of the Act.

[29] Relevantly, for the purpose of s.55(2), Part 2-2 provides that a modern award is expressly permitted to include terms:

- providing for the cashing out of annual leave (ss.93(1) and (2));
- 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 (s.93(3)); and
- otherwise dealing with the taking of paid annual leave (s.93(4)).

[30] We deal with these provisions later.

[31] A modern award may also include terms that are incidental or ancillary to the operation of NES entitlements and terms that supplement the NES, provided that the effect of those terms is not detrimental to an employee in any respect when compared to the NES (s.55(4)).

[32] In dealing with matters arising in the Review, the Commission will have regard to the relevant historical context and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also be considered.

[33] The annual leave provisions in modern awards have been the subject of consideration by the Commission and its predecessors over many years. On 30 May 2014, the Commission released a background paper[15] which sets out the legislative basis of the annual leave provisions in modern awards and the history of annual leave entitlements in awards.

[34] During the award modernisation process conducted by the Australian Industrial Relations Commission (AIRC) under Part 10A of the *Workplace Relations Act 1996* (WR Act) a number of employer organisations sought to have cashing out provisions included in modern awards. The Award Modernisation Full Bench deemed that cashing out provisions would "undermine the purpose of annual leave and give rise to questions about the amount of annual leave to be prescribed".[16]

[35] The substance of a number of the matters before us were also the subject of claims during the Transitional Review.

[36] In the *Modern Awards Review 2012—Annual Leave* decision (*Transitional Review—Annual Leave* decision)[17] the Full Bench, by majority, rejected a range of applications to vary the annual leave provisions in various modern awards. The majority's decision turned on the limited nature of the Commission's task in the Transitional Review. The scope of the Transitional Review was the subject of detailed consideration by a five member Full Bench in the *Modern Awards Review 2012* decision.[18] The Full Bench said:

> "To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others."[19]

[37] In the *Transitional Review—Annual Leave* decision the majority applied the above statement and dismissed the applications.[20]

[38] Of course, as we have mentioned, this Review is broader in scope than the Transitional Review and provides the first full opportunity to consider the content of modern awards.

3. The Evidence

[39] Ai Group, ACCI and other employer bodies conducted a joint employer survey in May 2014 about matters relating to annual leave (the Employer Survey).[21]

[40] The Ai Group's submission notes that the scope of the Employer Survey was limited to Ai Group, ACCI and affiliate organisation members.[22] The survey instrument was distributed by the employer organisations to their membership lists together with a covering email which, in neutral terms, requested employers to complete the survey.[23] Some 4137 employers responded to the survey, consisting of 3713 full responses and 424 incomplete responses. Responses varied according to the survey question, with partial responses for certain questions.[24] The number of responses to the Employer Survey was significantly larger than other employer surveys, such as the ACCI Small Business Survey, which only had around 1500 responses.[25]

[41] The Australian Council of Trade Unions (ACTU) and a number of individual unions advanced a number of criticisms of the Employer Survey, including:

- it lacked methodological rigour;
- the Employer Survey was not sent to a random, stratified population of employers and so cannot be said to be representative of employers as a whole;
- some of the questions were leading, in the sense that they suggested answers; and
- on analysis, the responses to the Employer Survey did not support the contentions advanced by the Employer Group.[26]

[42] The ACTU submitted that the Employer Survey should be given *no* weight in the Commission's consideration of the Employer Group's claims.[27]

[43] There is some force to a number of the criticisms made of the Employer Survey.

[44] The Employer Survey is not a stratified random sample of the Australian business population,[28] nor does it purport to be.[29] However, the Employer Survey was said to be broadly representative of the population of employers in each state and territory.[30] At least one of the survey questions (Question 8) may be regarded as leading, but we do not regard this as a substantive criticism. The questions predominantly allowed for objective responses and, where a question appeared to assume a particular state of affairs, that was explained by the sequencing of the questions. For example, Questions 5 and 6 asked:

> "*Since 1 January 2010, have any of your organisation's employees asked to cash out a portion of their annual leave? Choose one of the following answers.*
>
> - Yes
> - No
> - Unsure"
>
> "*If yes, how many requests have you received?*
>
> - 1
> - 2–5
> - 5–20
> - 20+"

[45] The Employer Survey was completed online and Question 6 was only asked if there was an affirmative response to Question 5.[31]

[46] Some difficulty arises from the fact that the Employer Survey did not ask businesses whether their workforce comprised employees to whom modern awards apply (or the extent of use of modern award application in that workplace). As a consequence, it is difficult to determine whether a response recorded by a business was in reference to an employee's modern award or enterprise agreement. For example, Question 8 of the Employer Survey asked "... what has been the reason or reasons giving rise to the refusal [of a request to cash out a portion of an employee's annual leave]?" The respondent had four responses to consider, with one response being "we were unable to agree because our award or agreement does not permit ..." This response does not make clear whether a business was referring to a modern award or enterprise agreement.

[47] Taking account of all these issues we are satisfied that the Employer Survey provides a valuable insight into the practical issues facing employers in the management of the existing annual leave arrangements and we will take the Employer Survey responses into account. The Employer Survey utilised the available databases in order to maximise the number of responses. A substantial number of responses were received (relative to other employment surveys) and the respondents were reasonably representative of the population of employers in each state and territory. The methodological limitations with the survey (i.e. it was not a random stratified sample) mean that the results cannot be extrapolated such that they can be said to be representative of all employers.

[48] In addition to the Employer Survey, various employer bodies and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) tendered witness statements during the course of the proceedings:

Ai Group	Ms Kristina Flynn Mr Ben Waugh
ACCI	Ms Fiona Corbett Mr Julian Frederick Arndt
Ai Group and ACCI	Mr Eugene Kalenjuk
Accommodation Association of Australia	Mr Stuart Lamont Ms Nicki Passanisi Ms Joyce Lawson
Restaurant & Catering Australia	Mr David Murrie Mr Antonio D'Arienzo
Master Builders Australia Limited	Mr Geoffrey Charles Thomas
Housing Industry Association	Ms Melissa Adler
AMWU	Mr Warren Butler

[49] We propose to make some general observations about some of this evidence now and we refer to it in more detail in our consideration of the particular claims.

[50] ACCI and Ai Group filed a joint expert accounting report by Mr Eugene Kalenjuk, a partner at PricewaterhouseCoopers, which dealt with the financial impact of employees accruing substantial leave balances.

[51] The evidence of Mr Ben Waugh related to the Employer Survey and the evidence of Ms Kristina Flynn, Ms Fiona Corbett and Ms Melissa Adler dealt with issues raised by employer members of their respective organisations.

[52] The statements of Mr Stuart Lamont, Ms Nicki Passanisi, Ms Joyce Lawson, Mr David Murrie and Mr Antonio D'Arienzo (tendered by the Accommodation Association of Australia and Restaurant & Catering Australia) were in the form of a common template and all asserted that:

- annual leave liability and excessive accrual of leave is an ongoing issue for their respective companies;
- they believe that the cashing out of annual leave would be beneficial for their companies and employees; and
- they support the applications by their respective organisations.

[53] Evidence of this character is of very little assistance. It is plainly in a template form and expresses the witnesses' belief as to the benefits of a cashing out provision, but not the factual basis for that belief. Statements by five employers that they support the claims made by their association on their behalf adds nothing to the substance of the arguments advanced in support of the employer claims.

[54] A similar observation may be made about much of Mr Geoffrey Charles Thomas' statement. Mr Thomas' statement was largely in the form of a submission in support of the claims sought by the Employer Group. He expressed a range of opinions said to be based on his "experience as outlined in paragraph 1" of his statement, as follows:

> "I make this statement based on my experience as an industrial relations practitioner in the Departments of Navy (1973 to 1975) and Defence (1975 to 1985), the Australian Nuclear Science and Technology Organisation (1988 to 1996) and the Master Builders Association of New South Wales (1998 to 2013)."[32]

[55] This statement does not qualify Mr Thomas as an expert, in the sense of qualifying him to give opinion evidence.

[56] The AMWU (Vehicle Division) filed two witness statements from Mr Warren Butler. The majority of Mr Butler's evidence related to close-down provisions and the manufacturing and vehicle repair, service and retail industries.

[57] In addition to the Employer Survey and the witness evidence, the submissions referred to other research relevant to the determination of the claims. We deal with this material later in our consideration of the specific claims before us. We also note that during the course of oral submissions a number of parties made a range of factual assertions from the bar table,[33] which were challenged by other parties.[34] We have not had regard to any of the challenged assertions.

[58] We now turn to deal with each of the specific claims before us.

4. The Claims

4.1 Excessive annual leave

[59] The Employer Group sought to insert the following clause into 70 modern awards:

> **"Excessive Annual Leave**
>
> Despite anything else in this clause, an employer may direct an employee to take paid annual leave if:
>
> (a) the employee has accrued at least six (6) weeks of annual leave;
>
> (b) the employer gives the employee four (4) weeks' notice to take the annual leave; and
>
> (c) the employee retains at least four (4) weeks of accrued annual leave after the direction is given by the employer."[35]

[60] The ACCI and Ai Group submissions advanced a number of arguments in support of their proposal. It is convenient to deal first with the propositions which relate to the various matters the Commission must take into account pursuant to s.134(1) of the Act.

Promoting the efficient and productive performance of work (s.134(1)(d))

[61] ACCI relied on a number of research reports[36] in support of the proposition that taking annual leave is critical to preventing burnout and poor health[37] and that such leave assists in maintaining job safety and satisfaction.[38] In addition to the academic research, ACCI relied on a number of arbitral decisions which have accepted that the actual taking of leave increases productivity as a result of a more balanced and rested workforce. It is contended that allowing employers to direct the taking of annual leave "should ensure a more balanced, rested and (accordingly) productive workforce"[39] and that such an outcome advances the objectives of s.134(1)(d).

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

[62] Ai Group and ACCI submitted that excessive leave accruals create substantial contingent liabilities for businesses and give rise to cash flow problems when accrued annual leave is paid upon the termination of employment. ACCI submitted that:

> " By allowing employers to direct employees to reduce excessive leave accruals, the model clause reduces the regulatory burden on employers. It allows employers to positively manage their finances, allowing for investment in other profit-generating aspects of a business."[40]

[63] It was contended that allowing employers to direct employees to reduce excessive leave accruals by taking leave advances the objectives of s.134(1)(f).

A simple, easy to understand, stable and sustainable modern award system (s.134(1)(g))

[64] ACCI submitted that prior to 2006 (when the responsibility for annual leave broadly shifted to the federal jurisdiction) employers had the ability to direct employees to take annual leave, subject to adequate notice (said to be "typically but not invariably two weeks").[41] On this basis ACCI advanced the following submission:

> "7.26 There is no indication on the face of the FW Act or elsewhere that Parliament intended to depart from this prevailing position. Rather, and as discussed at section 4 above, it should be understood from the structure of Division 6 of Part 2-2 of the FW Act that Parliament expected the Commission to establish industry-specific machinery in awards to allow for the continued directing of annual leave by employers (particularly where agreement cannot be reached for the taking of leave).
>
> 7.27 The history that has allowed employers to direct employees to take excessive annual leave suggests that the Australian population generally has an appreciation and understanding of this machinery within industrial regulation. It is not a concept that would be confusing or difficult for the population to adapt to. Rather, it has been in existence for the majority of recent history.
>
> 7.28 In such circumstances, allowing employers to direct employees to take excessive annual leave does not conflict with section 134(1)(g) and, in many ways, advances the objectives of the section."[42]

[65] It was also submitted that granting the Employer Group's claim would reduce the potential for disputes about the taking of annual leave.

Employment growth and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

[66] ACCI submitted that granting the Employer Group's claim would advance the objectives of s.134(1)(h) by reducing the regulatory burden on employers and through the positive impact the increased taking of leave will have on the Australian tourism industry:

> "7.29 For the reasons already outlined at paragraphs 7.16 to 7.23, the model clause will reduce the regulatory burden on businesses and allow them to divert funds currently set aside for excessive leave accruals to profit generating investments.
>
> 7.30 Additionally, however, compelling employees to take leave is directly supportive of a major industry within the economy – Australian tourism. If employees take leave, one of the most likely outcomes is that such employees will travel on holidays. Although some travel may occur overseas, one of the key beneficiaries of employee travel will likely be the Australian tourism industry. It is for this reason that Tourism Australia is currently running a campaign, 'No Leave No Life', encouraging employees to take their annual leave. Campaign materials have been filed as ACCI Exhibit D."[43]

[67] In addition to the submissions set out above, Ai Group pointed to the fact that the Act places no restriction on the time period during which accrued annual leave entitlements must be taken:

> "This means that, absent an award provision, many employees may simply elect to perpetually accrue their annual leave and only ever receive the benefits of the entitlement as a payment on termination."[44]

[68] Ai Group submitted that granting the Employer Group's claim would encourage employees to take their accrued leave consistent with the traditional justification for annual leave entitlements:

> "It is trite to observe that taking a break through a period of annual leave will have benefits for employees and for their families. However, it will also have positive effects for businesses such as increased productivity and workforce morale, and reduced work health and safety risks."[45]

[69] The ACTU accepted that it was desirable that employees take, rather than excessively accrue, their entitlement to paid annual leave:

> "We strongly agree that employees should be taking leave for their rest and recreation and also for occupational health and safety reasons ... It is clear that employees should be taking leave: it is beneficial for them personally but also it makes them more productive employees and reduces the risk of workplace illness."[46]

[70] However, the ACTU opposed the Employer Group's claim—both at a conceptual level and in relation to the elements of the model term proposed.

[71] At a conceptual level, the ACTU submitted that the problem of excessive annual leave accruals "substantially lies not with employees seeking to hoard annual leave, but rather that despite section 88 of the FW Act, employers are unwilling to grant annual leave at times that suit the employee".[47] The ACTU submitted that employers should not have "the ultimate or

default say in when annual leave is taken"[48] and that the Employer Group's model term was unlikely to achieve its objectives:

> "The proposed clause is unlikely to achieve the benefits espoused by the employer groups because it fails to provide an employee with any autonomy as to when they take their annual leave. The proposal fails to foster any positive interaction between the employer and employee; rather, it simply provides an employer with the ability to dictate to an employee who has accrued six weeks' annual leave to take it with four weeks' notice."[49]

[72] While the ACTU criticised the model advanced by the Employer Group it did not advance any viable alternative means of addressing the problem of excessive accruals of paid annual leave. The ACTU did, however, propose a number of "additional safeguards" in the event that the Commission was minded to adopt an excessive leave term.[50] We have had regard to these submissions, and the employer submissions in reply, in framing a proposed model clause.

[73] As to the particular elements of the Employer Group's model clause, the ACTU advanced the following criticisms:

- the proposed model clause fails to include any obligation on an employer to first seek to reach agreement with an employee before directing that a period of accrued leave be taken;[51]

- six weeks' annual leave is not an excessive accrual[52], and two years of accrued leave was proposed as a definition of "excessive" accrued leave[53]; and

- four weeks' notice is inadequate for an employee to get his or her affairs in order to take a period of paid annual leave[54] and at least eight weeks' notice is required.[55]

[74] While there is some force in the ACTU's criticisms, they ultimately go to the content of any model term rather than mounting a persuasive case that it is not appropriate to make any variations to modern awards to address the problem of excessive accruals of paid annual leave.

[75] We propose to deal with the relevant historical and legislative context first before turning to the merits of the claim.

[76] Prior to the commencement of the NES and modern awards, federal and state legislation and awards commonly provided employers with a right to direct employees to take annual leave.

[77] For example, the pre-modern *Metal, Engineering and Associated Industries Award 1998* provided:

> **"7.1.9 Time of taking leave**
>
> 7.1.9(a) Annual leave shall be given at a time fixed by the employer within a period not exceeding six months from the date when the right to leave accrued.
>
> 7.1.9(b) An employer can require an employee to take annual leave by giving not less than four weeks' notice of the time when such leave is to be taken.

7.1.9(c) By agreement between an employer and an employee, annual leave may be taken at any time provided it is done within two years from the date when the right to leave accrued."

[78] In New South Wales, s.3 of the *Annual Holidays Act 1944* (NSW) provides:

"(4) The annual holiday shall be given by the employer and shall be taken by the worker before the expiration of a period of six months after the date upon which the right to such holiday accrues: Provided that the giving and taking of the whole or any separate period of such annual holiday may, with the consent in writing of the Industrial Registrar, or Deputy Industrial Registrar appointed under the *Industrial Relations Act 1996*, be postponed for a period to be specified by such Registrar in any case where he or she is of opinion that circumstances render such postponement necessary or desirable. ...

(6)(a) The employer shall give each worker at least one month's notice of the date from which the worker's annual holiday shall be taken."

[79] The capacity to postpone a period of annual leave by application to the Industrial Registrar, envisaged by s.3(4) of the *Annual Holidays Act 1944* (NSW), is rarely utilised.[56]

[80] Section 12 of the Queensland *Industrial Relations Act 1999* deals with taking of annual leave:

"12 Taking annual leave

(1) An employee and employer may agree when the employee is to take annual leave.

(2) If the employee and employer cannot agree, the employer —

(a) may decide when the employee is to take leave; and

(b) must give the employee at least 14 days written notice of the starting date of the leave."

[81] A joint Ai Group, ACCI and ACTU document setting out the legislative provisions relating to annual leave in the WR Act and relevant state and territory legislation is at Attachment J (the Joint Exhibit).[57]

[82] The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act) shifted the vast majority of the workforce[58] to the federal system and introduced a statutory set of minimum conditions, the Australian Fair Pay and Conditions Standard (the AFPCS), which applied to all federal system employees. The Work Choices Act also inserted s.16(1) into the WR Act which, relevantly for present purposes, had the effect of excluding any state or territory law which dealt with annual leave. Section 16(1) had the effect of creating an "exclusion zone"[59] for federal system employers and employees from the operation of state and territory annual leave laws.

[83] The AFPCS is a legislative antecedent to what is now the NES. Section 236 of the WR Act dealt with the taking of leave, as follows:

"236 Rules about taking annual leave

General rules

(1) Subject to this section and section 233, an employee is entitled to take an amount of annual leave during a particular period if:

(a) at least that amount of annual leave is credited to the employee; and

(b) the employee's employer has authorised the employee to take the annual leave during that period.

(2) To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take.

(3) Any authorisation given by an employer enabling an employee to take annual leave during a particular period is subject to the operational requirements of the workplace or enterprise in respect of which the employee is employed.

(4) An employer must not unreasonably:

(a) refuse to authorise an employee to take an amount of annual leave that is credited to the employee; or

(b) revoke an authorisation enabling an employee to take annual leave during a particular period.

Shut downs

(5) An employee must take an amount of annual leave during a particular period if:

(a) the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and

(b) at least that amount of annual leave is credited to the employee.

Extensive accumulated annual leave

(6) An employee must take an amount of annual leave during a particular period if:

(a) the employee is directed to do so by his or her employer; and

(b) at the time that the direction is given, the employee has annual leave credited to him or her of more than $^{1}/_{13}$ of the number of nominal hours worked by the employee for the employer during the period of 104 weeks ending at the time that the direction is given; and

(c) the amount of annual leave that the employee is directed to take is less than, or equal to, ¼ of the amount of credited annual leave of the employee at the time that the direction is given."

[84] The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* states:

> **"533.** Section 92H(6) [which became s.236] would enable an employer to direct an employee to take a period of paid annual leave if the employee has an annual leave credit greater than $^{1}/_{13}$ of the number of nominal hours worked over a two year period (an amount equivalent to 8 weeks for an employee working 38 hours per week over that period). In this situation, the employer may direct the employee to take up to ¼ of his or her annual leave credit. The intention of this provision is to ensure that:
>
> - employees regularly take periods of leave for rest and recreation, and
> - employers are not required to pay out excessive untaken leave accruals when an employee's employment ends.
>
> Illustrative Example
>
> Lucas has been employed by Chocolates Galore Pty Ltd for four and a half years, working 38 nominal hours each week. In that time, he has accrued 684 hours (the equivalent of 90 days) of annual leave, of which he has taken 228 hours (the equivalent of 30 days), leaving a balance of 456 hours (or 60 days).
>
> As Lucas enjoys his job he's only ever taken a week or two of his annual leave each year to go surfing.
>
> Lucas's current balance of annual leave is more than 304 hours (or 40 days), which is what he would normally accrue over a 24 month period.
>
> In this case, his employer could direct him to take up to one quarter (or 76 hours) of his accrued annual leave balance."

[85] Section 236(6) of the WR Act provided that an employer could direct an employee to take an amount of annual leave during a particular period if the employee had "extensive accumulated annual leave". "Extensive accumulated annual leave" was defined by s.236(6)(b) and generally amounted to eight weeks' accrued leave for full-time employees. There was no notice requirement for an employer directing an employee to take excessive leave, but there was a limit to the quantum of leave that the employee could be directed to take, being 25 per cent of the employee's balance. So if an employee had eight weeks' accrued leave the employee could be directed to take up to two weeks' leave.

[86] We now turn to the relevant provisions of the Act.

[87] The Act does not require an employee to take their accrued paid annual leave within any particular timeframe. Section 88, which deals with the taking of annual leave, states:

> **"88 Taking paid annual leave**
>
> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave."

[88] Sections 93 and 139(1) are relevant insofar as they deal with the terms which may be included in a modern award.

[89] Subsections 93(3) and (4) of the Act are relevant in the context of this claim and provide as follows:

> *"Terms about requirements to take paid annual leave*
>
> (3) A modern award or enterprise agreement may include terms 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.
>
> *Terms about taking paid annual leave*
>
> (4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave." (emphasis added)

[90] Section 139(1)(h) provides that a modern award may include terms about any of the following matters:

> "(h) leave, leave loadings and arrangements for taking leave." (emphasis added)

[91] Subject to the requirement to take leave being reasonable, it seems to us that a modern award term which provides that an employee can be required to take a period of annual leave to reduce the employee's excessive level of accrued paid annual leave is a term of the type contemplated by s.93(3) of the Act. We are fortified in this conclusion by the terms of the Explanatory Memorandum to the Fair Work Bill 2008 which states:

> "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."

[92] As to s.93(4), the words "*otherwise dealing with* the taking of annual leave" (emphasis added) is a reference to a term for dealing with the taking of annual leave other than a term of the type contemplated by s.93(3). The relevant extract from the Explanatory Memorandum provides as follows:

> "Subclause 93(4) enables an award or agreement to include other terms about the taking of paid annual leave – e.g., the taking of paid annual leave in advance of accrual."[60]

[93] We also note that different arrangements apply in relation to award/agreement free employees. Subsections 94(5) and (6) provide as follows:

> *"Requirements to take paid annual leave*
>
> (5) An employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.
>
> Note: A requirement to take paid annual leave may be reasonable if, for example:
>
> (a) the employee has accrued an excessive amount of paid annual leave; or
>
> (b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).
>
> *Agreements about taking paid annual leave*
>
> (6) An employer and an award/agreement free employee may agree on when and how paid annual leave may be taken by the employee.
>
> Note: Matters that could be agreed include, for example, the following:
>
> (a) that paid annual leave may be taken in advance of accrual;
> (b) that paid annual leave must be taken within a fixed period of time after it is accrued;
> (c) the form of application for paid annual leave;
> (d) that a specified period of notice must be given before taking paid annual leave."

[94] The award modernisation process conducted by the AIRC under Part 10A of the WR Act also provides part of the historical context. The process took place from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the AIRC. The award modernisation process was completed in four stages, each stage focussing on different industries and occupations. All stakeholders and interested parties were invited to make submissions on what should be included in modern awards for a particular industry or occupation. Separate processes, including the provision of submissions, hearings and release of draft awards, were undertaken in respect of the creation of each modern award to ensure parties were able to make submissions and raise matters of concern in relation to particular awards. By the end of 2009 the AIRC had reviewed more than 1500 state and federal awards and created 122 industry- and occupation-based modern awards.

[95] In its 19 December 2008 *Award Modernisation* decision (2008 Award Modernisation decision), the Award Modernisation Full Bench made some observations about the right of an employer to direct an employee to take accrued leave, as set out below:

> "[95] As we noted in our statement of 12 September 2008, it has not been possible to develop a single model clause for annual leave. While some parties have sought greater uniformity in the area, there is a wide range of differing provisions in the awards and NAPSAs that we are dealing with. In many cases the provisions are more generous to employees than the provisions of the NES. Areas in which this can be observed are the quantum of holiday pay, leave loading and the definition of shift worker. In considering what should be included in the modern award on each of these matters we have attempted to identify or formulate a standard entitlement in the area covered by the modern award rather than preserving a range of differing entitlements.

This involves a degree of rationalisation at the award level only and will not result in standard provisions across all awards.

[96] There are also some issues concerning the time of taking leave. The time of taking leave is referred to in para.33 of the consolidated request and s.36(1)(b) of the NES. Section 36(1)(b) reads:

'36 Modern awards may include certain kinds of provisions

(1) A modern award may include provisions of any of the following kinds:

…

(b) provisions requiring an employee (or allowing for an employee to be required) to take paid annual leave in particular circumstances;

...'

[98] One issue that has arisen repeatedly, and is provided for in the NES, is the right of an employer to require that an employee take arrears of annual leave. We think that an employer should have the ability to reduce annual leave liability by compelling employees to take annual leave provided appropriate notice is given. While there may be different approaches to this question, in each of the awards there will be some provision which will give the employer the ability to take action to reduce arrears."[61]

[96] In 2010, the Award Modernisation Full Bench considered seven applications to vary the *General Retail Industry Award 2010*.[62] In relation to excessive leave, it considered an application by the Shop, Distributive and Allied Employees Association (SDA) which sought to limit the ability of an employer to compel an employee to take leave where more than eight weeks' leave had accrued.[63] The Full Bench dismissed the application stating that the SDA had not made an appropriate case to support the application.[64]

[97] The Full Bench also considered three applications to vary the *Fast Food Industry Award 2010*.[65] One application, which was jointly filed by the National Retail Association Ltd and Ai Group, sought to include a provision permitting an employer to direct an employee to take annual leave where more than eight weeks' leave was accrued. The SDA opposed the variation.[66] The Full Bench denied the application to vary the award to include a provision in relation to excessive leave on the grounds that no history of such provisions had been established and the variation was opposed.[67]

[98] At present, 79 modern awards contain excessive leave provisions.[68] We deal with these provisions and the awards that the Employer Group is seeking to vary later in our decision.

[99] We now turn to the merits of the Employer Group's claim. We deal first with the extent to which employees do not utilise their full paid leave entitlement and the issues associated with the accrual of "excessive leave".

[100] The evidence clearly establishes that most employees accrue a portion of their paid annual leave entitlement and that a significant proportion of employees have six weeks or more of such accrued leave.

[101] A paper by Skinner and Pocock examined, among other things, the utilisation of paid leave and the reasons why employees did not utilise their full paid entitlement.[69] It presents data which is a subset of the Australian Work and Life Index 2010 (AWALI 2010) survey. The AWALI 2010 survey is a national stratified random survey of 2803 Australian workers conducted using computer assisted telephone interviews over four weekends in March and April 2010. The survey asked questions about the use of paid annual leave in 2009. The authors' study replicates and extends a study conducted by The Australia Institute in 2002 (TAI 2002) on Australian's uptake of paid leave.[70]

[102] Skinner and Pocock found that in 2009, only 40.3 per cent of full-time employees used all of their paid leave, leaving about 60 per cent who had not taken some portion of their leave. Similar results were obtained in the TAI 2002 survey (only 38.8 per cent of employees used all their paid leave).

[103] As shown in Table 1, women and men reported that they utilised their full leave entitlement at similar levels. As to the uptake of leave by reference to employee circumstances, Skinner and Pocock noted:

> "Uptake of leave, or the lack thereof, is consistent across family type, life stage and household income, although there are some differences in the rate of leave uptake, with more of those who are older, single parents and middle-income earners using all of their leave (data available upon request). It is interesting to note that the presence of children under 18 is not associated with a higher rate of leave use."[71]

Table 1: Used all paid leave by gender, age and parenting status, AWALI 2010 and TAI 2002

	AWALI 2010			TAI 2002		
	Men (%)	**Women (%)**	**All (%)**	**Men (%)**	**Women (%)**	**All (%)**
All	41.0	39.2	40.3	37.7	41.2	38.8
Age						
18–24 years	34.3	37.3*	35.3	-	-	-
25–34 years	40.1	31.9	37.5	-	-	37.2
35–49 years	41.1	42.9	41.7	-	-	35.8
50–59 years	45.6	43.6	44.6	-	-	50.2
60+ years	44.9	38.5	43.2	-	-	-
Parenting responsibility						
Children < 18 years	40.5	39.6	40.3	-	-	43.5
No Children < 18 years	41.4	38.9	40.3	-	-	35.7
Household composition						
Single parent	57.9*	42.9*	47.5	-	-	
Couple with children	41.7	40.4	41.5	-	-	
Couple without children	40.7	41.0	40.8	-	-	
Single without children	42.0	36.0	40.0	-	-	
Household income						
< $30,000	**	**	**	-	-	**
$30,000–$59,999	44.2	39.6	42.5	-	-	42.1
$60,000+	40.1	39.0	39.7	-	-	38.5

Notes: *Estimates unreliable due to insufficient sample size; **Estimate not provided due to inadequate sample size "-" data not available. TAI data only included those aged 25–59 years.
Source: Skinner N and Pocock B (2013), 'Paid annual leave in Australia: Who gets it, who takes it and implications for work-life interference', *Journal of Industrial Relations* 55(5), p.686.

[104] The Skinner and Pocock findings are consistent with three other research papers[72] and the results from the Employer Survey.

[105] Wooden and Warren reported on the extent of usage of paid annual leave in Australia using new data collected in Wave 5 of the Household, Income and Labour Dynamics in Australia (HILDA) survey, and concluded that the majority of employees do not take their full annual leave entitlement each year.[73]

[106] The HILDA survey is a household panel survey that began in 2001, with a large nationally representative sample of Australian households. All members of responding households from Wave 1 form the basis of the panel to be followed over time, though interviews are only conducted with persons aged 15 years or older. The data on annual leave comes from responses to two questions. The first identifies whether a respondent has spent any time on paid annual leave during the 12 months preceding the interview. All persons answering in the affirmative are then asked how many days (or weeks) they spent on paid annual leave during that 12 month period. These questions were included for the first time in Wave 5 and so we only have information about patterns of leave usage over a single one year period.

[107] Table 2 presents summary statistics on both the proportion of workers taking any paid annual leave and the average number of days taken by persons employed at the date of interview. The table shows that just over half of all employed persons took at least one day of paid annual leave during the one year reference period and on average, just nine days of annual leave were taken.

Table 2: Paid annual leave by current employment status, HILDA survey Wave 5

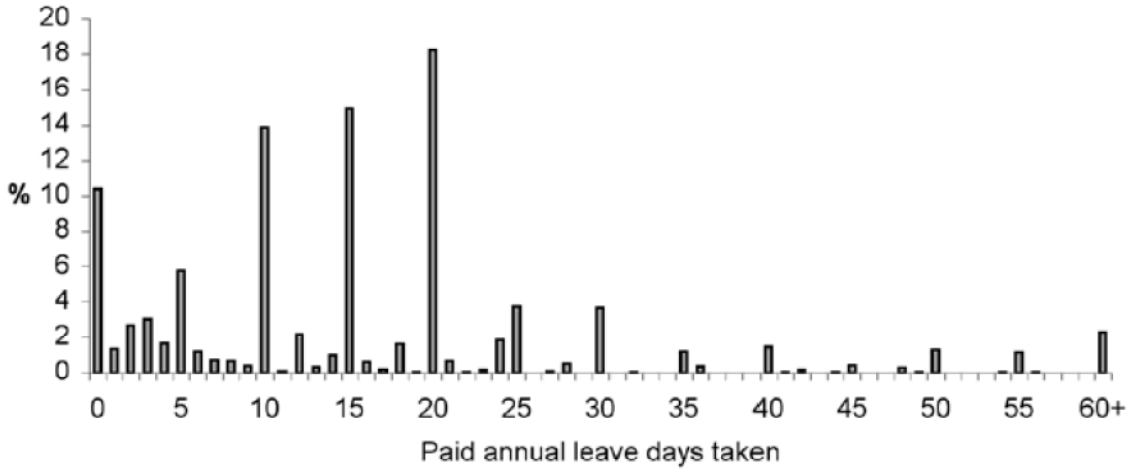
Employment status	% taking any paid leave	Mean leave days	Mean leave days taken by those who took leave
Employees	60.2	10.0	16.7
Employees of own business	39.9	6.9	17.4
Own account workers	12.4	1.7	14.0
All employed	53.8	8.9	16.6

Source: Wooden M and Warren D (2008), 'Paid Annual Leave and Working Hours: Evidence from the HILDA Survey', *Journal of Industrial Relations* 50(4), p.666.

[108] Table 2 shows that a large proportion of employees did not take any paid annual leave in the one year reference period, and that average leave usage was only half of the entitlement of most full-time employees (i.e. four weeks). But, as Wooden and Warren noted, the data presented in the above table does not provide a good guide to how usage of leave compares with entitlements.[74] There are a number of reasons for this, including that: over one-quarter of the employee workforce are employed on a casual basis and so do not have any annual leave entitlements; part-time employees will typically be entitled to less than 20 days' paid annual leave; and some workers covered by the data in Table 2 will have been employed with their current employer for less than one year and so will not have accrued four weeks' leave.

[109] A better guide to the extent to which leave entitlements are being used is provided by focusing on the sub-sample of employees who state that their employer provides them with paid annual leave, they have been employed with their current employer for at least one year, and report usual weekly working hours of 35 or more. Wooden and Warren stated that almost 90 per cent of this group reported taking at least one day of paid annual leave during the year, with the mean leave taken being 16.1 days. Further information on the pattern of leave usage for this group is provided in Chart 1, which reveals a wide distribution around the mean.

Chart 1: Distribution of paid annual leave days—Full-time employees with leave entitlements and at least one year's service



Source: Wooden M and Warren D (2008), 'Paid Annual Leave and Working Hours: Evidence from the HILDA Survey', *Journal of Industrial Relations* 50(4), pp.667.

[110] On the basis of the data set out in Chart 1, Wooden and Warren concluded as follows:

> "While 20 days (or 4 weeks) is the most common response, the majority (63%) reported taking less than 20 annual leave days during the year."[75]

[111] Cameron and Denniss report on the results of a survey conducted by the Australian Institute and beyondblue. The relevant aspects of their findings and conclusions are set out below:

> "Over half of the respondents (52 per cent), equating to six million workers, did not take all their leave in 2012. Higher earners, with incomes over $80,000, are less likely to take all their leave and those in large workplaces (with more than 100 employees) are less likely to take their full annual leave: 69 per cent of respondents working in organisations of 100–200 employees and 59 per cent in organisations with more than 200 employees, compared to an average 48 per cent of respondents across all other workplaces. It is worth noting, however, that half of respondents in all workplaces with up to 100 employees reported that they did not take all their annual leave entitlement in 2012."[76]

[112] ACCI also tendered material produced by Tourism Australia for the "No leave, No life" campaign. This material included research findings—about annual leave accrual in Australia. For the purpose of this research, "leave stockpilers" were defined as employees

with 25 days or more of accrued annual leave. The "Key Facts" reported from the research are set out below:

"Key Facts

1. Australia has 129 million days of accrued annual leave by full-time employees. This equates to $33.3 billion in wages as of September 2011 (Roy Morgan Research)

2. Annual leave accrual by full-time employees has grown by 11% from December 2006 to December 2008 (Roy Morgan Research)

3. Annual leave accrual is endemic across all sizes of business and industries. No business is too big or small to feel the impact of accrued leave. Annual leave stockpiling has become entrenched workplace behaviour potentially affecting every business regardless of size or type

4. 1 in 4 of Australian full-time employees are leave stockpilers (Roy Morgan Research)

5. 73% of stockpilers consider work/life balance (WLB) an important aspect of their life
    - Female stockpilers place greater importance on WLB [80%] compared to males [69%]

6. 70% of stockpilers agree that annual leave positively impacts work/life balance (WLB)
    - Stronger amongst females (78%) than males (67%)

7. Only 56% of stockpilers believe that their employer is generally supportive of leave taking
    - Highest amongst government employees [60%] and lowest amongst SME (49%)
    - Stockpilers who believe their employer is supportive of leave-taking have higher intention to take an Australian holiday [64%) than those who do not (51%)

8. 80% of stockpilers cite personal barriers to leave-taking
    - Availability of funds is the biggest concern (40%)
    - Fitting around partner's availability is also difficult (28%)
    - Deliberate accrual for emergencies (26%) or big trip (24%) is third most common reason

9. 57% of stockpilers consider work related barriers prevent them from taking leave compared to 48% of non stockpilers
    - Concern about workload before and after leave is the main barrier (30%)
    - Lack of resources for cover is second (26%)
    - Difficulty of scheduling leave when desired [21%] or around projects (21%) rank third

10. Stockpilers' strongest perceived benefits of annual leave are passive in nature
    - Relaxation (75%)
    - Quality time with family and friends (73%)
    - Long term health (69%)

11. Females are more likely to have sole responsibility for decisions about leave taking (47%) compared to males (34%)

12. Whilst over half of leave stockpilers are employed in private industry, employees in the public sector are more likely to accrue leave than their private sector counterparts."

[113] The Tourism Australia material tendered provides little information about the methodology used and for that reason we do not place much weight on the above findings, other than to note that they are consistent with the other research.

[114] The data from the Employer Survey show similar results to that in the research to which we have referred. Questions 11–14 of the Employer Survey are directed at the issue of excessive leave accrual. We deal with Questions 12–14 later; Question 11 was as follows:

"11. What percentage of your employees have annual leave balances of 6 or more weeks:

- none
- 1–20%
- 21–50%
- 51–70%
- 70%+
- Unsure"

[115] Some 2552 employers (about 68 per cent of all responses) had at least one employee with an accrued paid annual leave balance of six weeks or more. Of these employers, 683 reported that over 20 per cent of their employees had accrued paid annual leave balances of six weeks or more.[77]

[116] The evidence canvassed above (at paragraphs [99]–[115]) supports the following findings:

(i) most employees do not use their full paid annual leave entitlement (the NES provides that non-casual employees are entitled to four weeks' paid annual leave (shiftworkers as referred to in s.87(1) are entitled to five weeks)); and

(ii) the lack of annual leave utilisation is broadly consistent across family type, life stage and household income; and

(iii) a significant proportion of employees have six weeks or more accrued annual leave.

[117] As we have mentioned, the purpose of annual leave is to provide employees with a period of rest and recreation. A corollary of excessive accrual of annual leave is that employees are not receiving the benefit for which the leave was intended. In the proceedings before us it was generally accepted that not taking a reasonable portion of leave can give rise to a serious threat to the health and safety of the employees concerned. This consensus is reflected in the academic research.

[118] Skinner and Pocock cite existing research which suggests that not taking paid leave represents a serious risk to the health and wellbeing of the employees concerned and they summarised the relevant research in the following terms:

"There is also a physiological and psychological need for opportunities for rest and recovery from periods of sustained daily and weekly effort at work (Van Hooff et al., 2007).

The issue of paid annual leave is less frequently discussed in working time research and in wider public policy discourse. Longer breaks from work in the form of paid leave are a crucial aspect of working time that have significant implications for health and well-being. Breaks from work of more than a day or two provide the opportunity for more substantial rest and recovery from work demands than a lunch break, evening at home or weekend can provide (Trenberth and Dewe, 2002). This is especially the case in typically busy dual-earner or sole-parent/-worker households, in which weekdays and weekends are often busy and tightly scheduled, and especially so for parents.

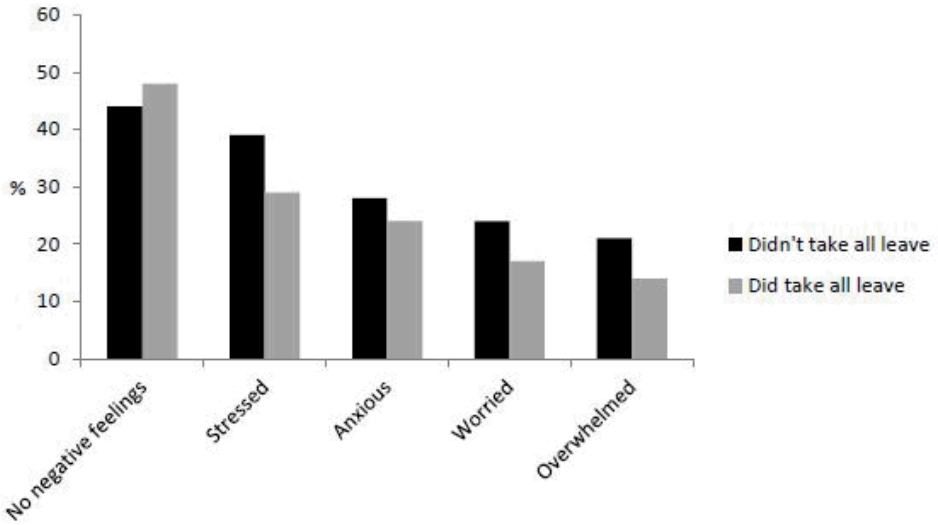
Not taking paid leave is a serious threat to health. Middle-aged men at risk of cardiovascular disease significantly reduce their risk of death from this disease and other causes when they take more annual vacations (Gump and Matthews, 2000). In a large longitudinal cohort study of healthy women, it was found that infrequent vacations and tension increase the risk of both heart attack and coronary death (Eaker et al., 1992). Paid leave often provides greater opportunities to engage in enjoyable and meaningful leisure activities, which have been shown to be an effective therapy for depression, anxiety and burnout."[78]

[119] The adverse impact of not taking annual leave is canvassed by Cameron and Denniss who state that the results of the survey they conducted indicate a strong correlation between work-related stress and anxiety and not taking leave breaks:

> "... respondents who did not take all their annual leave in 2012 were markedly more likely to report having negative feelings about work than those who did take all their leave entitlement."[79]

[120] Chart 2 shows that of the group who did not take their full leave entitlement, 39 per cent felt stressed about work; 28 per cent felt anxious; 24 per cent were worried and 21 per cent were overwhelmed by their work. By comparison, of those who did take their full annual leave, 29 per cent were stressed; 24 per cent were anxious; 17 per cent were worried and 14 per cent felt overwhelmed by their work.

Chart 2: Taking full annual leave and feelings about work



Source: Cameron P and Denniss R (2013), 'Hard to get a break? Hours, leave and barriers to re-entering the Australian workforce', The Australia Institute, Institute Paper No. 13, November 2013 at p. 27.

[121] Cairncross and Waller surveyed the implications of employees working longer hours and not taking their full annual leave entitlements. The authors expressed some tentative conclusions and identified a need for further research:

> "In light of the data pertaining to the impost on the Australian economy of workplace accidents and occupational stress, it is currently guesswork to surmise what the benefits may be of holidays in terms of increased productivity and decreased accident and illness costs in Australia. However, it is reasonable to assume given the value of a holiday to the tourism and hospitality industry (Bureau of Tourism Research), and the physical (Dennis 2003) and psychological costs of long working hours (Bent 1998) together with the value of a holiday in reducing stress (Etzion 2003), there is value in further research establishing the true economic value of taking full annual leave entitlement each year. ...
>
> The examination of the literature suggests that in-depth research is required into the psychological and economic reasons for Australians not taking their holidays Etzion (2003), for example, has established that people who take their leave are more productive and exhibit fewer symptoms of workplace stress. The potential social and physical cost to individuals and the potential cost to the economy of the current low uptake of annual leave makes it imperative to see if a lower workplace accident rate can be obtained by those employees who do have a reasonable holiday break each year. If this is the case then it may be that there is some value in compulsory leave clauses being negotiated into employment instruments."[80]

[122] There is little doubt that not taking annual leave gives rise to a risk of fatigue at work. Safe Work Australia describes fatigue as "a state of mental and/or physical exhaustion which reduces a person's ability to perform work safely and effectively". Fatigue can adversely affect health and safety at the workplace—it reduces alertness which may lead to errors and an increase in incidents and injuries.[81] Safe Work Australia observed that the best way to control the health and safety risks arising from fatigue is to eliminate the factors causing fatigue at the source. One of the control measures for fatigue risks which Safe Work Australia suggests can be built into a work schedule is:

> " ... implementing processes to manage accrued leave balances and requests for leave, for example setting maximum limits of leave accrual to encourage workers to use it."[82]

[123] The accumulation of leave is also a significant issue for employers.

[124] As mentioned earlier, ACCI and Ai Group filed a joint expert accounting report by Mr Eugene Kalenjuk, a partner at PricewaterhouseCoopers. No objection was taken to this evidence and no party sought to cross-examine Mr Kalenjuk.

[125] In the course of his statement Mr Kalenjuk expressed the following opinion about the commercial implications that arise for employers where employees accrue substantial annual leave balances (i.e. balances in excess of six weeks). Mr Kalenjuk provided a series of examples (which we need not set out) to support the following opinions:

> "In general terms, the financial impact of an employee accruing a substantial annual leave balance is that there is a reduction in the reported profitability of the employers business (all else being equal) where an employee's annual leave accrual increases. The other side of the entry is to increase the liability thereby decreasing the net assets of the business."[83]

[126] The Employer Survey also highlighted some of the difficulties associated with accrued leave. Questions 12 and 13 from the Employer Survey provided as follows:

"*12. Does your* organisation *have a view about employees accruing more than 6 weeks of annual leave?*

- No particular view
- It is not really an issue in our organisation
- We do not like employees accruing more than 6 weeks of leave

13. If you answered that your organisation does not like employees accruing more than 6 weeks' annual leave, why does it not?

Please specify: _____"

[127] As to Question 12, some 2031 employers (over half of those who responded to this question) stated that they "do not like employees accruing more than 6 weeks of leave". Some 948 employers stated that employees accruing more than six weeks' paid annual leave was "not really an issue" in their organisation, and 781 employer responses had "no particular view" on the issue.[84]

[128] Question 13 was set up to receive an open field response from the respondent. This means that the respondent was invited to type in their answer to the question rather than selecting between specified options. Question 13 was conditional on the respondent having answered the previous question by indicating that their organisation did not like employees accruing more than six weeks' leave.

[129] There were a significant number of responses to Question 13. The raw data is extracted in Attachment F to ACCI's written submission of 20 June 2014. It represents the responses of 2026 respondents and constitutes approximately 44 000 words. Table 3 summarises the prevalence of certain commonly raised terms contained in the raw data to the question:

Table 3: Summary of terms used in response to survey Question 13

Search term	Number of hits
Cost	353
Cashflow/cash flow	153
Liability	434
Balance sheet	83
Budget	41
Life balance	77
Health	153
Fatigue	18
Cover (i.e. cover employee while on leave)	143
Small business	176

[130] The Employer Survey also canvassed whether employers sought the right to direct employees to take accrued leave. Question 14 provided as follows:

"*14. Does your organisation wish to have the right to direct employees who have accrued more than 6 weeks to take annual leave?*

- Yes
- No
- No view"

[131] In response to Question 14, 2859 employers (about 76 per cent of those who responded to this question) said that their organisation wanted to have the right to direct employees who have accrued more than six weeks' paid annual leave to take annual leave. Some 413 employers did not seek such a right and 487 answered "unsure".

[132] Consistent with the survey responses to Question 13, Skinner and Pocock also noted that the accumulation of leave is "a significant issue for employers as unused leave represents a significant financial liability and tax disadvantage, for paid leave cannot be claimed as a tax deduction until it is paid out".[85] Skinner and Pocock also explored the implications of their research for policy and practice, and in that context made the following observation:

> "Unused leave also represents a significant financial liability for enterprises; hence, there are substantial benefits to employers for ensuring uptake of paid leave. Organisational policies related to the management of paid leave, including monitoring paid leave uptake and ensuring that a minimum number of paid leave days are taken over 12 to 24 months, would also appear beneficial."[86]

[133] As well as the financial cost associated with leave accruals, ACCI submitted that providing a mechanism to reduce excessive leave accruals "should ensure a more balanced, rested and (accordingly) productive workforce".[87]

[134] Historically, industrial tribunals have accepted that taking annual leave can give rise to an increase in productivity. ACCI referred to two decisions in support of this proposition. In *Re Professional and Shopworkers No.2 Award,*[88] Heydon J dealt with an appeal concerning the jurisdiction of a wages board (the Professional and Shopkeepers' Group No. 2 Board) to grant a claim for "three weeks holiday on full pay". The claim was not opposed by the employers but the Board held that it had no power to grant the claim. In upholding the appeal Heydon J made the following observation about benefits of a provision of the type sought:

> "... the result of investigations by expert students into the whole question of rest for workers of all classes indicated that it is assuming enormous importance, and it has been shown in occupations of the most varied character that a diminution of the time worked by granting longer and more frequent intervals of rest has resulted in greater and better production of work."[89]

[135] The judgment of Dethridge CJ (of the Commonwealth Court of Conciliation and Arbitration) in *The Printing and Allied Trades Employers Federation of Australia & Anor v The Printing Industry Employees Union of Australia & Ors*[90] was one of the earliest arbitrated decisions to grant a period of annual leave. In awarding one week's paid leave, his Honour made the following observation:

> "Unless an industry is finding difficulty in maintaining itself, in my opinion the institution of paid annual leave is a very desirable boon for employers. Although at first it might cause some increase in labour cost, this probably would not be commensurate with the shortening of the

working year and ultimately might be virtually balanced by increased vigour and zeal of employees. The publication already referred to (International Labour Office (1935) 'Holidays with Pay at p 82) has the following passage 'It would undoubtedly be a fallacy, even from a purely economic point of view, to regard paid holidays as a burden to the employer for which he receives no return. On the contrary, he obtains a very real return by finding his employees fresh and eager for work when they return from their holidays. He reaps an advantage in higher output, fewer spoilt goods, less absence, less sickness and fewer accidents.'" [91]

[136] The evidence on whether paid leave improves productivity appears to be somewhat mixed and inconclusive.[92] However, there is evidence that absenteeism is reduced after a period of paid annual leave. Westman and Etzion,[93] found that absenteeism for non-health reasons "remained lower than before vacation even six weeks after returning from vacation". Westman and Etzion also reported other benefits associated with taking vacations:

> "... vacation relief decreases psychological and behavioural strains caused by job stress ...
>
> The vacation alleviated perceived job stress and thus also the experience of burnout as predicted, replicating findings that a respite from work has the effect of lessening strain ...
>
> Measuring job stress and burnout three times enabled us to discover that vacation has an abrupt, positive impact that fades gradually."[94]

[137] A subsequent study included a control group of comparable employees who did not experience a vacation and concluded that:

> "Taking a vacation was found to affect stress and burnout. Upon return from vacation there was a significant drop in stress compared with the initial pre-vacation level. However, approximately three weeks after the return to work, the level of stress had reverted to its initial pre-vacation level. Among the comparison group members, no change in levels of stress occurred over time. The level of burnout also fell significantly after the vacation, and had still retained its low level 3 weeks after returning to work ...
>
> Employees who took long vacations reported lower levels of stress than those who took short vacations ... and the length of the vacation tended to moderate the relationship between satisfaction with the vacation and stress and burnout ...
>
> It seems that the effects of taking a vacation are also positive when the employees are able to determine its dates and duration voluntarily. Employees return from their vacation less stressed and burned out, and — it may be reasonably assumed, although we have no direct proof — their productivity increases, at least for the short term."[95]

[138] The evidence canvassed above (at paragraphs [118]–[137]) supports the following findings:

(i) Not taking a reasonable portion of leave can give rise to a serious threat to the health and safety of the employees concerned.

(ii) Excessive annual leave accruals are a significant issue for employers. Such accruals represent a significant financial liability and can give rise to cash flow problems (particularly for small businesses) when paid out on termination.

(iii) The taking of accrued paid annual leave can have mutual benefits for employees and employers:

(a) Taking paid annual leave provides employees with a period of rest and recovery from work and has significant positive implications for employee health and wellbeing. As well as providing an opportunity for rest and recovery, taking paid annual leave also provides employees with the time and opportunity to attend to their family and other commitments and to engage in social, community and personal interests.

(b) While the evidence on whether taking paid leave improves productivity appears to be somewhat mixed and inconclusive, there is evidence that absenteeism is reduced after a period of leave and of a strong correlation between workplace stress and anxiety and not taking leave breaks. A period of paid leave is also likely to reduce fatigue at work and improve workplace health and safety.

[139] Based on the material before us and the findings set out at paragraphs [116] and [138], we are persuaded that modern awards should include a mechanism for dealing with "excessive leave". We now turn to the form and content of that mechanism.

[140] In considering an appropriate response to the issue of 'excessive' paid annual leave accruals it is important to consider the reasons why employees do not fully utilise their accrued paid leave. We propose to consider this issue first before turning to the Employer Group claim.

Reasons for excessive annual leave accruals

[141] As shown in Table 4 below, Skinner and Pocock found that the most common reason given by employees for not taking their full leave entitlement was 'saving it for a future holiday'. This reason was indicated by 41 per cent of all workers in both 2002 and 2010. However, 30 per cent of employees said they were too busy at work to take all of their leave. This was very close to the proportion who provided this response in the 2002 survey (29.1 per cent). A larger proportion of women said that they were too busy to take leave in 2009 than in 2002, while there was no change for men. A total of 13 per cent of employees in 2010 said that they could not get the time off that suited them, and a similar proportion (12.5 per cent) provided such a response in 2002. That is, they could not reach agreement with their employer to take leave at a time of their choosing.[96]

[142] These were also the dominant reasons, in the above order, among parents and those without children. Younger workers were more likely to say that they were saving their leave for a future holiday, while older workers were more likely to say that they were too busy to take leave.[97]

Table 4: Reasons for not taking full leave entitlement—AWALI 2010 and TAI 2002

	AWALI 2010			TAI 2002		
	Men (%)	Women (%)	All (%)	Men (%)	Women (%)	All (%)
Saving leave for future holiday	41.8	39.5	41.0	39.5	37.3	38.8
Could not get time off that suited you	13.1	13.5	13.2	11.3	15.1	12.5

Too busy at work	29.1	33.8	30.7	29.4	28.2	29.1
Rather have the money than extra holidays	8.1	5.4*	7.2	3.9	3.2	3.7
Preferred to work rather than take holidays	10.0	6.8	8.9	8.1	5.7	7.4
Leave paid out when changed jobs	6.4	4.0*	5.6	8.3	2.7	6.6
Other reason	17.2	15.6	16.6	2.2*	7.3	3.7

Note: *Estimate unreliable due to insufficient sample size.
Source: Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p. 688.

[143] Table 5 shows workers' reasons for not taking their full leave entitlement by various employment characteristics. Those working long hours (45 or more) were much more likely than those working 35–44 hours to say that they were too busy to take leave. They were also less likely to say that they were saving their leave for a future holiday. Skinner and Pocock suggested that "it appears that those working long hours struggle to take paid leave in the face of work demands" and that "those working long hours are affected by a compounding work–life disadvantage: their long hours are associated with much worse work–life interference compared to other workers ... as is their lower rate of annual leave-taking".[98]

Table 5: Reasons for not taking full leave entitlement by work hours, employment contract and occupation—AWALI 2010

	Work hours		**Contract**		**Occupation**	
	35–44 (%)	**45+ (%)**	**Ongoing (%)**	**Fixed-term (%)**	**Prof. (%)**	**Other (%)**
Saving leave for future holiday	45.6	35.6	42.3	28.0	39.0	42.1
Could not get time off that suited you	13.4	13.1	12.8	17.1*	11.5	14.5
Too busy at work	22.5	40.3	29.8	39.0	36.9	25.4
Rather have the money than extra holidays	81.0	5.9	6.8	**	3.3*	10.4
Preferred to work rather than take holidays	10.0	7.7	9.1	**	6.4	11.3
Leave paid out when changed jobs	6.6	4.2*	5.0	**	4.3*	6.2
Other reason	18.3	14.6	16.2	20.7*	16.0	17.5

Source : (Skinner & Pocock 2013, p. 689)
Notes: *Estimate unreliable due to insufficient sample size; **Estimate not provided due to inadequate sample size. Multiple responses were allowed on this item.

[144] The above data suggest that a significant barrier to the use of leave entitlements by employees is work pressures, with 43.9 per cent of employees in the AWALI survey being either too busy at work (30.7 per cent) or unable to take leave at a time that suited them (13.2 per cent). This suggests that employers are not creating workplaces that allow for employees to use their entitlements.

[145] Skinner and Pocock argued that these findings create a case for "renovating" Australia's annual leave system to ensure that more Australians have access to paid leave, including:

> "[T]o address the barriers that appear to affect taking leave in the year in which it is accumulated. Work pressures are clearly a significant factor affecting almost a third of full-timers. Although the Fair Work Act 2009 states that employers must not unreasonably refuse to grant an employee's request for paid leave, this has not prevented a widespread problem of reluctant leave deferral. It seems that managerial and cultural barriers to the uptake of paid leave, such as intense and demanding work, now affect many workers."[99]

[146] We now turn to the Employer Group's claim.

The Employer Group's claim

[147] The Employer Group seek to insert a standard "excessive annual leave" model term in 70 modern awards (see paragraph [59]).

[148] We now deal with the content of such a model term and whether *all* modern awards should be varied to insert the model term. It is convenient to deal with the second issue first.

[149] The Employer Group was not seeking to insert its model "excessive annual leave" clause into *all* modern awards. Rather it was proposed that the Employer Group's model clause be inserted into 70 modern awards.[100] The proposed variations are split into two categories:

(i) the 39 modern awards which do not currently contain any provisions allowing employers to direct employees to take excessive annual leave (see Attachment D); and

(ii) the 31 modern awards which do currently contain provisions regarding excessive leave but those provisions do not provide the same ability to direct the taking of excessive leave as is proposed in the Employer Group's claim (see Attachment E).

[150] The Employer Group does not seek to vary the 52 modern awards that already contain provisions allowing employers to direct the taking of excessive leave in a manner similar to (or in some circumstances more flexible than) the model clause proposed. To understand the practical effect of the Employer Group's claim we need to say something about those modern awards which already contain excessive leave provisions.

[151] Some 79 modern awards already contain "excessive leave" provisions[101] and these can be summarised as follows:

- 52 awards (67 per cent) provide that the employer's right to direct an employee to take annual leave is only enlivened once the employee has accrued eight weeks' or more annual leave. A further 17 awards have the threshold at six weeks' accrued leave.[102]

- 25 awards (32 per cent) provide that an employee can only be directed to take a period of annual leave after "the employer has genuinely tried to reach agreement with an employee as to the timing of taking annual leave".

- 22 awards (28 per cent) provide that annual leave must be taken within a specified period after accrual. [103] Most of these awards (14) provide that annual leave must be

taken "within 18 months of the entitlement accruing"[104] and four provide that leave must be taken within six months of accrual.

- 75 awards (95 per cent) provide that an employer must give at least four weeks' notice of the time when such leave is to be taken; two of these awards provide for eight weeks' notice.[105]

- 33 awards (42 per cent) limit the amount of accrued paid annual leave that an employer can direct an employee to take: 28 of these awards limit the amount to 25 per cent of the employee's accrued paid annual leave balance and four awards provide that the employee must retain an entitlement to at least four weeks' accrued paid leave *after* taking the leave as directed.

[152] The practical effect of the Employer Group's proposal, if granted, would be to provide some greater consistency in relation to the mechanisms in modern awards for dealing with excessive accruals of paid annual leave (70 awards would contain consistent provisions).

[153] However, in many of the 31 modern awards which presently contain excessive leave provisions, and which the Employer Group sought to vary to insert its model term, such consistency would have the consequence of reducing the existing safeguards in those awards. Some 30 of the modern awards the Employer Group sought to vary presently limit an employer's right to direct an employee to take paid annual leave to circumstances where the employee has at least eight weeks' accrued paid annual leave. The Employer Group's claim sought to reduce this threshold to six weeks' accrued leave.

[154] Further, if the Employer Group's claim was granted, some 52 of the 122 modern awards would not contain the model term. In many of these modern awards there is an existing term which allows an employer to direct an employee to take *all* of their accrued annual leave, such that the employee does not have the right to retain a minimum amount of accrued paid leave. Under the Employer Group's claim the employee would retain at least four weeks' accrued annual leave *after* the direction is given by the employer.

[155] We are not bound by either the terms of the relief sought by a party nor by the scope (i.e. the awards to be varied) of the variations proposed. Context is important in this regard.

[156] These issues arise in the 4 yearly review of all modern awards. The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is *not* creating an arbitral award in settlement of an *inter partes* industrial dispute—it is reviewing a regulatory instrument.

[157] In considering whether a particular term should *prima facie* be consistently inserted into all modern awards it is important to consider the subject matter of the term itself.

[158] Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (s.55(2)).[106]

- A modern award may include terms that:

    (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or

    (ii) terms that supplement the NES (s.55(4)).

[159] The statutory notes to s.55(4) provide examples. Note 1 states:

> "Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
>
> (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
>
> (b) that specify when payment under section 90 for paid annual leave must be made."

[160] Note 2 states:

> "Supplementary terms permitted by paragraph (b) include (for example) terms:
>
> (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
>
> (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99)."

[161] Note 3 states:

> "Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74."

[162] Section 139(1)(h) is also relevant, it provides:

> "A modern award may include terms about any of the following matters:
>
> . . .(h) leave, leave loadings and arrangements for taking leave."

[163] Annual leave is one of the minimum standards specified in the NES. The NES is intended to provide a consistent set of minimum standards that apply to the employment of national system employees. The NES annual leave provisions provide both a consistent set of substantive rights (e.g. quantum of leave; method of accrual; and payment for leave) as well as a degree of conditional flexibility.

[164] Section 93(3) is an example of what we mean by conditional flexibility (see paragraph [89]). It provides, relevantly, that a modern award may include terms "requiring an employee ... to take paid annual leave in particular circumstances". However, such flexibility is conditional; an employee can only be required to take leave "if the requirement is reasonable".

[165] A model term dealing with the taking of paid annual leave to address the excessive accrual of such leave is plainly a term of the type contemplated by ss.93(3) and (4). That is, the model term is a term that is expressly permitted to be included in a modern award. It seems to us that it will generally be desirable for greater consistency in respect of terms of this character. This is particularly so in circumstances where the regulatory boundary between the NES and modern awards is clearly delineated and the legislature has plainly contemplated (by permitting such terms) that the terms of a modern award may provide some conditional flexibility to the provisions of the NES.

[166] This may be contrasted with terms which supplement the NES, for example by providing an additional period of paid leave. Ordinarily one would expect such supplementation to reflect the circumstances applicable to particular modern awards, with the desirability of consistency across modern awards a less important consideration.

[167] In its 20 June 2014 submission, Ai Group highlighted the benefits of greater consistency in modern award provisions pertaining to annual leave:

> "There is substantial merit in the Commission seeking to achieve a greater level of consistency in award provisions pertaining to annual leave. There is also merit in seeking to achieve a level of consistency in the rules governing the operation of annual leave entitlements for award covered and award/agreement free employees.
>
> We do not suggest that it is necessarily appropriate for all awards to have exactly the same provisions (the Commission has always provided for deviations from model award clauses if industry-specific circumstances warrant this) but there is nonetheless scope for much greater consistency. The Employer proposals represent an important and timely step in the right direction ...
>
> Achieving a level of consistency in award entitlements relating to annual leave is consistent with the obligation under the modern awards objective for the FWC to ensure modern awards, together with the NES, provide a fair and relevant safety net taking into account "… *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia* …". Achieving greater uniformity between individual awards will make the system simpler and easier to understand.
>
> A reduction in variances between award entitlements will, in itself, reduce the regulatory burden on businesses that are required to apply multiple awards, consistent with paragraph 134(1)(g) of the modern awards objective. These benefits will be magnified where such amendments provide employers with greater flexibility or control in relation to the management of annual leave or where incompatible provisions relating to matters such as close-downs are addressed. There are obvious benefits that flow from enabling employers to adopt a uniform approach to the management of annual leave across their workforce, regardless of the award coverage of particular groups of workers."[107]

[168] We agree with these observations. It seems to us that the effectiveness of any safety net is substantially dependent upon those who are covered by it being able to know and understand their rights and obligations. Greater consistency in the provisions governing the taking of annual leave will make the safety net simpler and easier to understand.

[169] It follows from the foregoing that our provisional view is that a model term dealing with the taking of annual leave should be consistently inserted in all modern awards. We accept, of course, that some modern awards have particular leave provisions necessitating a

degree of "tailoring" to the model term. But, that said, our provisional view is that the model term should be inserted in all modern awards.

[170] As to the issue of content, the Employer Group sought a term which provides that in certain circumstances an employer may direct an employee to take paid annual leave. Such a direction may only be made if:

(i) the employee has accrued at least six weeks of annual leave;

(ii) the employer gives the employee four weeks' notice to take the annual leave; and

(iii) the employee retains at least four weeks' accrued leave after the direction is given by the employer.

[171] Two general observations may be made about the model term sought.

[172] The first observation relates to the "safeguards" (at (i), (ii) and (iii) above) which condition an employer's power to direct an employee to take a period of paid annual leave. The Employer Group's claim essentially characterised the accrual of six weeks' paid annual leave as "excessive" thereby enlivening the power to direct the employee to take annual leave (subject to (ii) and (iii)). We are not persuaded that the adoption of a threshold of six weeks' accrued annual leave is appropriate, for three reasons.

[173] First, the adoption of a six week threshold ignores the fact that different annual leave entitlements accrue to different categories of employees. Specifically, shiftworkers (as referred to in s.87(1)(b) of the Act) are entitled to five weeks' paid annual leave for each year of service, whereas employees other than shiftworkers are entitled to four weeks. Any definition of excessive accrued leave should take account of this difference.

[174] Second, over two-thirds (52) of the 79 modern awards which presently contain excessive leave provisions provide that an employer's right to direct an employee to take annual leave is only enlivened once the employee has accrued an entitlement to *eight weeks' or more* paid annual leave.

[175] Third, the adoption of a six week threshold unfairly limits the capacity for employees to accrue leave for a later, longer, holiday. It will be recalled that Skinner and Pocock found that the most common reason given by employees for not taking leave was saving it for a future holiday.

[176] Later in this decision we return to the proposed safeguards dealing with notice (at (ii)) and the quantum of retained leave after a direction has been given and implemented (at (iii)).

[177] We also observe that the Employer Group's model term does not require an employer to enter into any dialogue with an employee before directing them to take part of their annual leave. In particular, the employer is under no obligation to discuss the issue of excessive annual leave accrual with the employee or to seek to reach an agreement with the employee about the time for taking such leave. It is plainly preferable if these matters can be resolved by agreement between the employer and employee, without the need for a direction. We note that about one-third (25) of the 79 modern awards which presently contain excessive leave

provisions provide that an employee can only be directed to take a period of annual leave *after* the "employer has genuinely tried to reach agreement with an employee as to the timing of taking annual leave".

[178] We now turn to the second general observation about the Employer Group's model term. This observation concerns the limited capacity of the model term to address the problem to which it is directed.

[179] It will be recalled that s.88 of the Act deals with the taking of paid annual leave, as follows:

> **"Taking paid annual leave**
>
> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave."

[180] The Skinner and Pocock research suggests that the excessive accrual of paid annual leave is predominantly a consequence of:

(i) employee choice (i.e. employees choosing to accrue leave, usually to save it for a future holiday);

(ii) employees being too busy at work to take all of their leave; or

(iii) employees not being able to take their leave at a time that suited them (i.e. they could not reach agreement with their employer to take leave at a time of their choosing).

[181] The Employer Group's model term only partially addresses the reasons for the accrual of excessive leave. It will provide a mechanism for dealing with the voluntary leave hoarder ((i) above) and may address circumstance (iii), by requiring employees to take leave at a time that may not suit them, but it does not address circumstance (ii).

[182] Circumstance (ii) is, essentially, where work pressure prevents an employee from taking all of their paid annual leave. It is the reason nominated by 30 per cent of employees in the Skinner and Pocock survey for not taking all of their leave. It is a significant factor in the excessive accrual of annual leave and it was not addressed in the Employer Group's model term.

[183] The Employer Group's claim, understandably enough, provided a mechanism to address employer concerns about the accumulation of leave—that is, it provides a means of reducing a significant financial liability.

[184] But the Employer Group's model term provided no avenue for an employee to exercise any control over the time at which their leave is to be taken.

[185] In this context it is important to observe that the Employer Group's claim simply sought to replicate (in form if not substance) previous legislative and award mechanisms to

address excessive annual leave accruals. As we have mentioned, before the Work Choices Act amendments, some state and territory annual leave laws provided employers with a right to direct employees to take their annual leave. Further, some 79 modern awards also contain "excessive leave" provisions.

[186] But, importantly, experience has shown that providing employers with a right to direct employees to take their annual leave has *not* provided a complete solution to the issue of excessive annual leave accruals.

[187] Skinner and Pocock found that in 2009 only 40.3 per cent of full-time employees used all of their paid annual leave. Hence, about 60 per cent of full-time employees accrued a portion of their leave. Similar results were obtained in a 2002 survey (only 38.8 per cent of employees used all of their paid leave). As a result, most employees accrued annual leave despite the fact that employers had the right to direct them to take that leave.

[188] Ai Group described the Employer Group's claim as "a modest step towards restoring employers" capacity to manage leave accruals'.[108] But the Employer Group's claim sought to "restore" a right of direction which has only had, at best, limited success in the past in addressing the issues associated with excessive annual leave accruals.

[189] We are not persuaded that the variation of modern awards to insert the Employer Group's proposed model term is appropriate, nor will it be sufficient to address the problems of excessive accrued paid annual leave. We have redrafted the Employer Group's proposed model term to provide a model term dealing with the taking of annual leave. The model term incorporates the employer's right to direct—which is the central feature of the Employer Group's claim—but also makes provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made.

The model term—Excessive Annual Leave Accruals

1. Excessive Annual Leave Accruals

This clause contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

1.1 Definitions

Shiftworker means [*insert definition*]

An employee has an **excessive leave accrual** if:

(a) the employee is not a shiftworker and has accrued more than eight weeks' paid annual leave; or

(b) the employee is a shiftworker and has accrued more than 10 weeks' paid annual leave.

1.2 Eliminating excessive leave accruals

(a) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under subclause 1.2(b) or an employee can give notice of leave to be granted under subclause 1.2(c), the employer or employee must request a meeting and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

(b) Employer may direct that leave be taken

This subclause applies if an employee has an excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. The direction must state that it is a direction given under subclause 1.2(b) of this award.

Such a direction must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));

(ii) require the employee to take any period of leave of less than one week;

(iii) require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;

(iv) require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or

(v) be inconsistent with any leave arrangement agreed between the employer and employee.

An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given. The employer is not to take the direction into account in deciding whether to agree to such a request.

Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.

The employee must take paid annual leave in accordance with a direction complying with this subclause.

(c) Employee may require that leave be granted

This subclause applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under subclause 1.2(b) that will eliminate the employee's excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. The notice must state that it is a notice given under subclause 1.2(c) of this award.

Such a notice must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);

(ii) provide for the employee to take any period of leave of less than one week;

(iii) provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;

(iv) provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or

(v) be inconsistent with any leave arrangement agreed between the employer and employee.

The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause.

(d) Dispute resolution

Without limiting the dispute resolution clause of this award, an employer or an employee may refer the following matters to the Fair Work Commission under the dispute resolution clause:

(i) a dispute about whether the employer or employee has requested a meeting and genuinely tried to reach agreement under subclause 1.2(a);

(ii) a dispute about whether the employer has unreasonably refused to agree to a request by the employee to take paid annual leave; and

(iii) a dispute about whether a direction to take leave complies with subclause 1.2(b) or whether a notice requiring leave to be granted complies with subclause 1.2(c).

[190] The model term is intended to establish mechanisms to assist both employers and employees to reduce or eliminate "excessive leave accruals" consistent with the statutory framework and subject to appropriate safeguards. It incorporates both terms requiring an employee to take leave in particular circumstances (s.93(3)) and terms otherwise dealing with the taking of paid annual leave (s.93(4)).

[191] Subclause 1.1 defines "excessive leave accrual" as more than eight weeks' paid annual leave, or 10 weeks' paid annual leave in the case of a "shiftworker" (as defined in the modern award for the purposes of the additional week of annual leave provided for in the NES). This threshold of eight weeks is consistent with s.236(6) of the former WR Act and with the majority of current modern award clauses which contain excessive leave provisions (see further the discussion at paragraphs [172]–[175] above). As with paid annual leave entitlements under the NES generally, the eight or 10 week threshold is based upon an employee's ordinary weekly hours of work (see s.87(2) of the Act).

[192] Where an employee has an excessive leave accrual, the model term requires the employer or employee firstly to request a meeting to try to resolve the matter by agreement. If agreement cannot be reached, the model term provides for the employer to issue a direction that certain leave be taken and/or for the employee to give the employer a written notice requiring that certain leave be granted.

[193] Subclause 1.2(a) provides that, before an employer can issue such a direction or an employee can give such a notice, the employer or employee must:

- request a meeting; and
- genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

[194] An excessive leave accrual would be eliminated if, immediately after all of the agreed steps had been taken, the employee's accrued leave entitlement would be less than eight weeks for a non-shiftworker or 10 weeks for a shiftworker. This might be achieved in a number of stages, through the employee taking a number of agreed periods of annual leave. The employee might also choose to cash out some annual leave in accordance with the award's cashing out provisions.

Example

Brendan is a part-time employee not working shifts whose ordinary hours of work are 19 per week. Brendan usually takes four weeks' annual leave at Christmas (76 hours), but for the past three years has taken only one week and at the start of the year has an accrued entitlement to nine weeks' paid annual leave.

Brendan and his supervisor meet to discuss Brendan's excessive leave accrual. Brendan explains that he is hoping to take six weeks' annual leave to travel overseas in the middle of the year and then to resume taking four weeks' leave at Christmas. This leave can be readily accommodated by the employer, but Brendan's supervisor requests that Brendan take an additional week's leave on top of the six weeks and again at Christmas so as to reduce his leave accrual at the start of the following year to one week. Brendan and his supervisor agree to these arrangements and no direction to take leave is issued by the employer.

[195] Subclause 1.2(a) requires the employer or employee to *genuinely* try to reach an agreement. The notion of genuinely trying to reach agreement appears in a number of contexts in the Act, including: determining whether there is pattern bargaining (ss.412(2)–(5)); industrial action being protected (s.413(3)); suspension or termination of protected industrial action (s.423(4)(f)); and an application for a protected action ballot order (s.443(1)(b)).

[196] Where an employer and employee are unable to agree on steps to eliminate the employee's excessive leave accrual, subclause 1.2(b) provides for the employer to give the employee a written direction to take a specified period or specified periods of paid annual leave. The employee must take paid annual leave in accordance with an employer direction that complies with the requirements of this subclause.

[197] As a procedural safeguard, the direction must be in writing, and must state that it is given under subclause 1.2(b) of the modern award. This will assist in ensuring that the employee is aware of his or her obligation to comply with the direction and of the limitations on such a direction. These limitations are intended to ensure that a requirement to take leave under the model term is "reasonable" in terms of s.93(3) of the Act. The Full Bench in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* recently observed that in assessing the reasonableness of such a requirement, "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*"[109] (see paragraph [89] above).

[198] Paragraphs (i) to (iv) of subclause 1.2(b) set out limitations on the period or periods of leave that may be required under the direction.

[199] Paragraph 1.2(b)(i) limits the amount of leave that the employee may be directed to take, by requiring that the direction must not result in the employee's remaining accrued leave entitlement at any time being less than six weeks.

[200] Maintenance of a six week minimum is consistent with s.236(6) of the former WR Act and with the majority of current modern award clauses which limit the amount of accrued paid annual leave that an employer can direct an employee to take. It also accommodates the circumstance of an employee seeking to accrue leave so that he or she can take a reasonable extended holiday. The minimum is applied by considering the effect on the employee's leave accrual of the directed leave being taken, taking into account all previously agreed paid annual leave, any previous directions to take leave and any previous notices given by the employee under subclause 1.2(c).

[201] Paragraph 1.2(b)(ii) requires the minimum length of any period of directed leave to be one week. This is to avoid an employee being required to take leave in a series of single days or clusters of a small number of days.

[202] Paragraph 1.2(b)(iii) requires that the employee be given at least eight weeks' notice of the commencement of the directed leave. This is intended to ensure that the employee has a reasonable amount of time to make arrangements for activities during the leave period and/or to coordinate his or her leave with family members. The same notice period applies in circumstances where an employee gives written notice to the employer, pursuant to subclause 1.2(c).

[203] Paragraph 1.2(b)(iv) requires that the directed leave commence in not more than 12 months. This is intended to ensure that the excessive leave accrual is dealt with reasonably promptly, but still allow sufficient scope for the leave to occur at a time that is suitable to both the employer and the employee.

[204] Paragraph 1.2(b)(v) requires that the direction not be inconsistent with any leave arrangement agreed to by the employer and employee. For example, general arrangements for taking leave might have been agreed in the employee's contract of employment, or there may have been a one-off agreement between the employer and employee that the employee could accrue excessive leave for a particular purpose.

[205] A further limitation intended to ensure that a requirement to take leave under the model clause is reasonable is that a direction under subclause 1.2(b) operates subject to s.88(2) of the Act. Subclause 1.2(b) provides that an employee given a direction to take leave may make a request to take paid annual leave as if the direction had not been given. Under the NES (s.88(2)) the employer must not unreasonably refuse such a request. Further, the giving of the direction will not be a relevant factor in determining whether refusal of such a subsequent leave request is unreasonable. If leave is agreed after a direction is issued and the direction in combination with the agreed leave would then result in the employee's leave accrual at any time being reduced below six weeks, the direction will be deemed to have been withdrawn.

[206] In effect, this limitation means that the employee retains his or her entitlement under s.88 of the Act to take accrued paid annual leave, notwithstanding a direction to take leave under subclause 1.2(b). For example, the employee might request to take some or all of the directed leave at a time or times that better suit the needs of the employee and if such a request is made it cannot be unreasonably refused by the employer.

[207] This limitation has been provided to make clear how this arrangement enables the particular circumstances of the employee and employer at the time (including matters personal to the employee) to be taken into account. (See *Australian Federation of Air Pilots v HNZ Australia Pty Ltd*.)[110]

[208] The note regarding the NES in subclause 1.2(b) is an incidental term within the meaning of s.142 of the Act and/or an ancillary or incidental term within the meaning of s.55(4), and will assist in ensuring that the operation of the modern award clause is easy to understand in terms of s.134(1)(g).

Example

Sam is a full-time shiftworker who has not taken any annual leave in the three years she has worked for her employer and so has an accrued entitlement to 15 weeks' leave after three years. Sam's employer encourages its employees to take their full five weeks of annual leave each year in two periods—one during the middle of the year and one towards the end of the year.

Sam's supervisor meets with her to propose that she take seven weeks' leave at midyear and a further seven weeks towards the end of the year, so as to reduce her leave accrual to six weeks by the end of the fourth year. However, the only leave that Sam will agree to is one period of five weeks before the middle of the year and no agreement is reached. Sam's supervisor issues a direction that she is to take the two leave periods the supervisor had proposed.

After the direction is issued, Sam applies to take five weeks' leave before the middle of the year. While this is not the most convenient time for the employer, it can accommodate this leave period without significant additional cost or disruption to its business. As the employer is aware that it must not unreasonably refuse the requested leave, and that the issuing of the direction is not a relevant factor to take into account, the employer approves the leave.

As the direction would require Sam to take a further 14 weeks' leave and this would reduce her accrued entitlement at the end of the year to one week, the direction is deemed to be withdrawn. However, as Sam will not agree to take any further leave even though she has been granted the leave she requested, the employer issues a new direction requiring her to take a further five week leave period during the middle of the year and a further four week period towards the end of the year. This will leave Sam with at least six weeks' accrued leave at the end of the fourth year, after she has taken the agreed leave and the two directed periods of leave.

[209] Subclause 1.2(c) provides for an employee to give a written notice to the employer that the employee wishes to take paid annual leave. This is intended to address circumstances such as where an employee's requests to take his or her full leave accrual have repeatedly been refused by the employer, or the employee has repeatedly been dissuaded from applying to take his or her full leave accrual. The proposed subclause provides that the employer must grant the employee paid annual leave in accordance with a notice complying with this subclause. While subclause 1.2(c) may be characterised as supplementing the NES (within the meaning of s.55(4)), we acknowledge that there may be some tension between the proposed subclause and s.88. These issues can be canvassed in the opportunity provided to make further submissions (see paragraph [219]).

[210] Such a notice can only be given by the employee if the employee has had an excessive leave accrual for at least six months. This provides the employer with a reasonable opportunity to deal with the employee's excessive leave accrual before the employee is able to require that leave to be granted. If the employer has already given the employee a direction complying with subclause 1.2(b) to take leave and the directed leave will eliminate the employee's excessive leave accrual, then the employee cannot issue any notice. If a direction has been given but after the directed leave is taken the employee will still have an excessive leave accrual, the employee could issue a notice under this subclause.

[211] Similarly to an employer direction to take leave, the model term requires the employee first to request a meeting and to genuinely try to resolve the employee's excessive leave accrual by agreement.

[212] The procedural safeguards and limitations on the period or periods of leave that can be specified in a notice under subclause 1.2(c) mirror those that apply to an employer direction to take leave under paragraphs (i) to (v) of subclause 1.2(b), as outlined above.

Example

Ramesh is a full-time employee not working shifts in a busy, small workplace. Ramesh has sought to take his full leave entitlement to spend time with his family each year for the previous four years, but his employer has granted him only one week's leave each year, on the basis that the business is too busy to cover a longer absence.

Ramesh has an accrued entitlement to 12 weeks' leave and wishes to take at least four weeks' leave in six months time. Ramesh meets with his employer and requests the leave, but the employer will only agree to him taking one week's leave at the usual time.

As Ramesh has had an excessive leave accrual for over six months and has not been given a direction by the employer that would eliminate his excessive leave accrual, Ramesh may issue a notice to his employer requiring the employer to grant the four week leave period he wishes to take.

[213] Subclause 1.2(d) of the model term draws attention to the capacity of the employer or the employee to refer a dispute about a matter arising under the model term to the Commission. As subclause 1.2(a) requires discussion between the employer and employee, it is not necessary for there to be further discussions under the terms of the dispute resolution clause before the dispute can be referred to the Commission.

[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

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

[219] The model term outlined only reflects our provisional view as to the type of provision which may be suitable for insertion into modern awards. We propose to provide interested parties with an opportunity to make further submissions—directed at both the model term and the proposition that *all* modern awards be varied to insert the model term. Submissions should also address the modern awards objective. The process for filing further submissions is dealt with in Chapter 6 of this decision. We will only reach a concluded view in respect of these issues after considering all of the further submissions filed.

4.2 Cashing out of annual leave

[220] The claim advanced by the Employer Group sought to insert the following clause into 120 modern awards:

> "**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."[111]

[221] We propose to deal with the relevant historical and legislative context before turning to the merits of the claim advanced.

[222] Under previous legislative regimes, predecessor bodies to the Commission consistently rejected proposals for the cashing out of annual leave on the basis that such provisions undermined the purpose of annual leave, namely, "to provide a reasonable period of physical and mental respite from work".[112] Enterprise agreement provisions providing for the cashing out of annual leave were regarded as being contrary to the public interest as they constituted a reduction in a "well established and accepted community standard".[113]

[223] The Work Choices Act amended the WR Act to provide that employees could cash out their annual leave in certain circumstances. The Work Choices Act inserted s.233 into the WR Act, which provided that an employee could "cash out" an accrued annual leave entitlement by written election and, with the agreement of their employer, provided that the workplace agreement binding upon the employee and his or her employer made provision for the cashing out of annual leave. The quantum of accrued annual leave that could be cashed out in any 12 month period was limited by s.233(2), which was in the following terms:

> "(2) However, during each 12 month period, an employee is not entitled to forgo an amount of accrued leave credited to the employee by an employer that is equal to more than 1/26 of the nominal hours worked by the employee for the employer during the period."

[224] The practical effect of s.233(2) of the WR Act was that most full-time employees could only cash out two weeks' accrued annual leave in each 12 month period. Section 233(3) provided additional safeguards, as follows:

> "(3) An employer must not:
>
> (a) require an employee to forgo an entitlement to take an amount of annual leave; or
>
> (b) exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of annual leave."

[225] We have earlier described the award modernisation process which marked the transition from the WR Act to the Act (see paragraph [94]).

[226] During the award modernisation process a number of employer organisations sought to have provisions for cashing out annual leave included in modern awards. In its 2008 Award Modernisation decision, the Award Modernisation Full Bench rejected these submissions on the following basis:

> "[99] A number of employer interests sought provisions for cashing out of annual leave by agreement. Such arrangements are apparently included in many Australian Workplace Agreements (AWAs) and workplace agreements. Should cashing out of annual leave become widespread it would undermine the purpose of annual leave and give rise to questions about the amount of annual leave to be prescribed. We think some caution is appropriate when dealing with this issue at the safety net level. We do not intend to adopt a model provision. Consistent with our approach to annual leave provisions generally we shall be influenced mainly by prevailing industry standards, and the views of the parties, in addressing this issue.
>
> [100] It has also been suggested that if awards do not provide for cashing out of annual leave it will not be legally permissible to make workplace agreements which provide for cashing out. In our opinion cashing out arrangements are an appropriate matter for bargaining. If, when the legislative regime is settled, it is apparent that workplace agreements cannot provide for cashing out of annual leave unless there is a relevant provision in a modern award it may be necessary to revisit the question."[114]

[227] It is important that the above observation be placed in the context of the sequence of the various iterations of the award modernisation request. The original request was made by the Minister on 28 March 2008. On 16 June 2008 the request was varied to include the following paragraph:

> "33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to deal with, among other things:
>
> - provision for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;
> - averaging of hours of work;
> - cashing out of paid annual leave – provided that modern awards contain a prohibition on undue influence or undue pressure and require payment of cashed out leave at full value;

- the taking of paid annual leave;
- particular circumstances in which an employee may be required to take paid annual leave;
- cashing out of paid personal/carer's leave – provided that modern awards contain a prohibition on undue influence or undue pressure and require payment of cashed out leave at full value;
- the kind of evidence required to be provided by an employee when taking paid personal/carer's leave, unpaid carer's leave or compassionate leave;
- substitution of public holidays; and
- the amount of notice an employee may be required to provide when terminating their employment."

[228] On 18 December 2008, a further variation was made which replaced the above with the following:

"33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:

- provide for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;

- enable the averaging of hours of work over a specified period;

- provide for the cashing out of paid annual leave by an employee, provided that such terms require:

  - the retention of a minimum balance of 4 weeks' leave after the leave is cashed out;

  - the cashing out of each amount be by separate agreement in writing; and

  - payment of cashed out leave be at at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;

- require employees, or allow employees to be required, to take paid annual leave, but only if the requirement is reasonable;

- otherwise deal with the taking of paid annual leave;

- provide for the cashing out of paid personal/carer's leave, provided that such terms require:

  - the retention of a minimum balance of 15 days' leave after the leave is cashed out;

  - the cashing out of each particular amount be by separate agreement in writing; and

  - the payment of cashed out leave be at least at the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;

- relate to the kind of evidence required to be provided by an employee when taking paid personal/carer's leave, unpaid carer's leave or compassionate leave;

- provide for the substitution of public holidays by agreement between an employer and employee; and

- specify the period of notice an employee may be required to give when terminating their employment."

[229] It is apparent from a subsequent statement on 23 January 2009 and a decision on 3 April 2009, that the 18 December 2008 variation to the award modernisation request was *not* taken into account in the Full Bench's 2008 Award Modernisation decision of 19 December 2008. In a statement issued on 23 January 2009[115] the Award Modernisation Full Bench said:

> "[3] The Commission made 17 modern awards in the priority stage of award modernisation on 19 December 2008. Some matters were not finally dealt with in those awards and some matters have arisen since which require further consideration in conjunction with Stage 2 of the process.
>
> **Coverage, award flexibility and annual leave**
>
> [4] The award modernisation process was initiated by a request signed by the Minister for Employment and Workplace Relations (the Minister) on 28 March 2008 pursuant to s.576C(1) of the *Workplace Relations Act 1996* (the Act). The Minister varied the request on 16 June 2008 and 18 December 2008 pursuant to s.576C(4) of the Act. We shall refer to the request as amended as the consolidated request. The variations to the consolidated request made on 16 June 2008 were taken into account in the proceedings leading to the making of the priority modern awards and do not require any further comment at this stage. The variations to the consolidated request made on 18 December 2008, however, have not been considered in the award modernisation process so far. They have the potential to affect a number of terms of the priority modern awards which the Commission made on 19 December 2008. Those terms are, at least, the coverage clause, the award flexibility clause and the annual leave clause. ...
>
> [8] Clause 33 of the amended request provides that modern awards may require employees, or allow employees to be required, to take paid annual leave but only if the requirement is reasonable. The requirement for reasonableness was not part of cl.33 prior to the variations on 18 December 2008. Similarly, it was not taken into account in the making of the priority modern awards.
>
> [9] We intend to deal with these variations to the consolidated request, and any others that might be relevant, in making the Stage 2 awards, provided it is practical to do so. We encourage interested parties to bring forward proposals and submissions as to how these new requirements should be reflected in the coverage, award flexibility and annual leave clauses. The Stage 2 exposure drafts do not attempt to take account of the 18 December variations."

[230] We note that while the above statement referred to variations to the consolidated request made on 18 December 2008, no specific reference was made to the cashing out of annual leave.

[231] The following observation was made in the *Award Modernisation Full Bench* decision of 3 April 2009:

> "The award modernisation process is governed by the provisions in Part 10A of the *Workplace Relations Act 1996* (the Act) and a request made by the Minister for Employment and Workplace Relations (the Minister) pursuant to s.576C(4) of the Act. The Minister's request

was made on 28 March 2008 and subsequently amended on 16 June and 18 December 2008. We shall refer to the request as amended as the consolidated request. The priority modern awards were made by the Commission on 19 December 2008. Because of the timing there was no opportunity to take the amendment to the request made on 18 December 2008 into account before publishing the priority modern awards. In its statement of 23 January 2009 the Commission sought views on how the amendment might affect the terms of modern awards. It appears that there are three main areas in which the 18 December amendment might have effect. Those areas are: coverage, award flexibility and annual leave. We deal first with coverage."[116] (emphasis added)

[232] In a number of subsequent decisions the Award Modernisation Full Bench rejected proposals to insert cashing out provisions in modern awards, consistent with the views it had expressed in its 2008 Award Modernisation decision.[117] The Award Modernisation Full Bench did not give any detailed consideration to that part of the 18 December 2008 variation to the award modernisation request which dealt with the NES provisions in respect of the cashing out of annual leave.

[233] The *Seafood Processing Award 2010* is the only modern award made in the award modernisation process that contains a provision for cashing out annual leave.[118] The clause was contained in draft awards provided by the Seafood Processors and Exporters Council and others.[119] The clause was not opposed by the relevant unions and was not the subject of any particular comment in the Full Bench decision which made the award.

[234] The Act now makes specific provision for the cashing out of annual leave. Section 92 provides that paid annual leave "must not be cashed out", except in accordance with the cashing out terms included in a modern award or enterprise agreement pursuant to s.93, or an agreement between an employer and an award/agreement free employee under s.94(1).

[235] Section 93 of the Act provides as follows:

> **"93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave**
>
> *Terms about cashing out paid annual leave*
>
> (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.
>
> (2) The terms must require that:
>
> (a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and
>
> (b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and
>
> (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.
>
> ..."

[236] The model clause proposed by the Employer Group meets the requirements of s.93(2) of the Act.

[237] Three particular observations may be made about s.93. The first is that it is evident from the terms of s.93(1) that it was within the contemplation of the legislature that the Commission may include in modern awards a term providing for the cashing out of paid annual leave, subject to the inclusion of the prescribed safeguards. In our view the legislative determination of appropriate safeguards is significant because it represents an important contextual consideration which was not present when cashing out provisions were considered during the award modernisation process.

[238] The second observation we would make is that any term providing for the cashing out of paid annual leave must include the safeguards set out in s.93(2), as a minimum, but a modern award may also include terms that supplement the NES (see s.55(4)(b)). Accordingly, if we were persuaded to include a term in modern awards providing for the cashing out of paid annual leave by an employee, then we could prescribe additional safeguards that are in addition to the requirements of s.93(2).

[239] The final observation we would make about s.93 is that, subject to the requirements of s.93(2), an enterprise agreement can include terms providing for the cashing out of paid annual leave by an employee. The inclusion of such a term in enterprise agreements was considered by a Full Bench in *Armacell Australia Pty Ltd and others*.[120] The Full Bench dealt with three appeals against decisions refusing applications for approval of an enterprise agreement. Each agreement contained terms dealing with the cashing out of annual leave. At first instance the Commission decided, in each case, that the cashing out of leave provision was an obstacle to the approval of the agreement. The Commission reasoned that although the provisions were consistent with s.93, their operation was a matter to be considered when applying the better off overall test (see ss.186(2)(d) and 193) and, on a proper application of that test, the cashing out of annual leave was such a significant disadvantage that the agreement did not meet the better off overall test. The Full Bench held that the Commission made an error in concluding that the terms of the agreement which met the requirements of s.93 and did not contravene s.55, nevertheless resulted in the agreement failing to pass the better off overall test. In short, the Full Bench held that there was no basis for concluding that the agreement failed the better off overall test because of the annual leave cashing out provisions. The Full Bench stated that:

> "[13] ...While an enterprise agreement may include terms providing for the cashing out of paid annual leave, the matters in s.93(2) are in the nature of protections for employees and could be described as safeguards. Annual leave cannot be cashed out if the leave balance would be less than four weeks, each cashing out must be the subject of a written agreement and there must be no discounting of the payment. It seems clear, as a matter of interpretation, that the legislature considered the question of safeguards and that it intended the ones specified in s.93(2) to be sufficient. It would be inconsistent with that intention to hold that the safeguards are inadequate and that more or other safeguards should be applied.
>
> [14] The Commissioner was concerned that although the relevant term complied with s.93(2), situations could occur in which employees might not take annual leave and the purpose of annual leave might be frustrated. This was an error. Whether the Commissioner's concern is a valid one is beside the point. The legislation makes it plain that an enterprise agreement may include a term for cashing out providing it complies with s.93."[121]

[240] It needs to be borne in mind that the above observations were made in the context of an appeal from a decision refusing to approve an enterprise agreement. The Act contains significant procedural and substantive safeguards to facilitate the making of a democratic and informed decision on whether an enterprise agreement should be made.[122] The question of whether to insert a cashing out term into modern awards, and if so the features of such a term, give rise to different considerations. The safeguards provided in s.93(2) set out the *minimum* requirements of such a term, they do not constitute a code, and modern awards may also include terms that supplement the NES. In our view these differences warrant the imposition of additional safeguards in the modern award context.

[241] We also note that award/agreement free employees are able to enter into arrangements to cash out their accrued annual leave consistent with s.94 of the Act. Section 94 is in the following terms:

> "**94 Cashing out and taking paid annual leave for award/agreement free employees**
>
> *Agreements to cash out paid annual leave*
>
> (1) An employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave.
>
> (2) The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
>
> (3) Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing.
>
> (4) The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.
> ..."

[242] Arrangements which facilitate the cashing out of accrued annual leave (pursuant to either s.93(1) or s.94(1)) appear to be a relatively common feature of employment conditions set by enterprise agreements or by individual agreement between an employer and an award/agreement free employee.

[243] The Workplace Agreement Database contains information on the incidence and coverage of provisions dealing with the cashing out of annual leave. The Workplace Agreement Database is a census database compiled by the Department of Employment that contains information about federal enterprise agreements that have been certified or approved by the relevant statutory authority since the introduction of enterprise bargaining in 1991.[123] On average about 8000 agreements are added by staff of the Department of Employment to the Workplace Agreement Database each year with around 200 separate data fields coded.

[244] The Workplace Agreement Database shows that of the enterprise agreements approved between 1 March 2011 and 31 March 2014, about one-third (covering 62.9 per cent of employees covered by a federal agreement) contained provisions which permit the cashing out of paid annual leave.

[245] On 21 November 2014, the Commission released a background paper which outlined the parties' submissions in relation to the cashing out of annual leave and examined the extent to which such provisions currently exist in enterprise agreements approved by the Commission. Parties were invited to make submissions on the background paper and a number did so.[124] The background paper included the results of a review by the Commission of the types of cashing out of annual leave provisions currently found in enterprise agreements approved by the Commission in the six month period from 1 January to 30 June 2014. In this six month period, 2555 agreements were approved and over one-quarter of these agreements (26.6 per cent) contained cashing out provisions.

[246] The cashing out provisions in these agreements have generally been drafted to include the minimum entitlements outlined in the NES, namely that:

- each instance of cashing out of annual leave must be by mutual agreement between the parties and in writing;
- the employee's total accrued annual leave must not be reduced below four weeks as a result of the cashing out; and
- the employee must be paid at least the full amount that would have been paid had the employee taken the leave.

[247] However a significant proportion of the enterprise agreements which include a term permitting the cashing out of annual leave contain additional limitations. Of the 118 provisions identified within the March quarter of 2014, 28 (or 23.7 per cent) include safeguard provisions in excess of those prescribed in the NES. The most common supplementary safeguard (in 12.7 per cent of agreements) prevent employees from cashing out more than two weeks of accrued annual leave in any 12 month period, in addition to the NES requirement that employees maintain an accrued entitlement to four weeks' leave after cashing out.

[248] For example, the *Joyce Foam Pty Ltd Trading as Joyce Foam Products, Moorebank Enterprise Agreement 2013*[125] contains the following clause:

> **"5.5.2** Employees may request to cash out up to two weeks of their credited annual leave entitlement every twelve (12) months (or the pro-rata equivalent for part-time employees). Approval of such requests is at the discretion of the company ..."

[249] Some agreements permit cashing out of annual leave contingent upon particular circumstances such as financial or personal hardship.[126] Some agreements only permit cashing out when an employee has reached a threshold duration period of employment.[127]

[250] A further seven of the 118 agreements which provide for the cashing out of annual leave (5.9 per cent) provide that employees must use a minimum amount of annual leave before they can cash out any additional leave, or must take an equal amount of leave to that leave which is being cashed out.[128]

[251] It is apparent that provisions permitting the cashing out of annual leave are a relatively common feature of enterprise agreements approved by the Commission. Further, while most of these terms simply reflect the minimum requirements in s.93, a significant proportion contain additional limitations, the most common being that employees cannot cash out more than two weeks' accrued annual leave in any 12 month period.

[252] The provisions in enterprise agreements show that there is some demand for provisions of this type and illustrate the range of safeguards which may be provided. However, we are conscious of the need to exercise care when assessing the provisions in enterprise agreements in the context of a review of modern awards. Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. The legislative context relevant to the review of modern awards is quite different. As the Full Bench in the *Modern Awards Review 2012—Penalty Rates* decision observed:

> "... in approving agreements the Commission is not making an assessment as to whether the instrument meets the modern awards objective or would be appropriate in circumstances other than those applying at the enterprise concerned."[129]

[253] The Employer Group contended that the inclusion of cashing out provisions in modern awards would:

- create equity between award and non-award/agreement employees; and
- promote workplace flexibility and the modern awards objective.

[254] We note that the unions opposed the insertion of cashing out of annual leave provisions in modern awards and we will address their submissions later in this decision.

[255] We are persuaded that the Employer Group's claim should be granted, subject to some modifications. The model term will permit the cashing out of annual leave, subject to a number of safeguards as follows:

1. Cashing Out of Annual Leave

1.1 Paid annual leave must not be cashed out except in accordance with this clause.

1.2 An employer and an employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave provided that the following requirements are met:

(a) each cashing out of a particular amount of accrued paid annual leave must be by a separate agreement between the employer and the employee which must:

(i) be in writing and retained as an employee record;

(ii) state the amount of accrued leave to be cashed out and the payment to be made to the employee;

(iii) state the date on which the payment is to be made, and

(iv) be signed by the employer and employee and, if the employee is under 18 years of age, the employees' parent or guardian;

(b) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave at the time that it is cashed out;

(c) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

(d) employees may not cash out more than two weeks' accrued annual leave in any 12 month period.

Note 1: Under s.344 of the *Fair Work Act 2009*, an employer must not exert undue influence or undue pressure on an employee to make an agreement to cash out paid annual leave under this award clause.

Note 2: Under s.345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employee's workplace rights under this award clause.

[256] The model term meets the requirements of s.93(2) of the Act. A modern award may also include terms that supplement the NES (see s.55(4)(b)), and on that basis the model term incorporates four additional safeguards, that are in addition to the requirements of s.93(2).

[257] First, a maximum of two weeks' paid annual leave can be cashed out in any 12 month period. In the case of part-time employees, the two weeks' leave is based on the employees' weekly ordinary hours (see s.87(2) of the Act). As noted earlier, the most common supplementary safeguard in enterprise agreements which permit the cashing out of annual leave is a limitation upon the amount of leave which can be cashed out in any 12 month period. Such a limitation is directed at ensuring that employees take at least half of their accrued annual leave, as leave.

[258] Second, there are requirements in the model term about the content of any agreement to cash out accrued annual leave (subclause 1.2(a)) and the employer's obligation to keep such agreements as an employee record (subclause 1.2(a)(i)). These requirements are consistent with an employer's existing obligations under Regulation 3.36(2) of the *Fair Work Regulations 2009*. Regulation 3.36(2) states:

"If an employer and employee agree to cash out an accrued amount of leave:

(a) a copy of the agreement is a kind of employee record that the employer must make and keep; and

(b) a kind of employee record that the employer must make and keep is a record that sets out:

(i) the rate of payment for the amount of leave that was cashed out; and

(ii) when the payment was made ..."

[259] Third, if the employee is under 18 years of age the agreement to cash out a particular amount of accrued paid annual leave must be signed by the employees' parent or guardian. A safeguard of this type was proposed by the ACTU and CFMEU. Ai Group and ACCI submitted that such a provision was unnecessary,[130] however, other employer representatives, from the hospitality sector, either had no objection to the inclusion of such a safeguard or endorsed it as an appropriate protection for young workers.[131] There is a similar safeguard in the model flexibility term in modern awards and it is appropriate that such a safeguard be included in the model term dealing with the cashing out of annual leave.

[260] Finally, the two notes at the end of the model term draw attention to the general protections in Part 3-1 of the Act against undue employer influence and misrepresentation in relation to rights under the clause. As observed earlier, such notes can be considered incidental terms within the meaning of s.142 of the Act and/or terms that are ancillary or incidental within the meaning of s.55(4), and assist in ensuring that the operation of the modern award clause is easy to understand (s.134(1)(g)). As we have also observed earlier, it seems to us that the effectiveness of any safety net is substantially dependent upon those who are covered by it being able to know and understand their rights and obligations.

[261] The general protections provisions apply to an agreement to cash out annual leave in accordance with a term of a modern award. In particular s.344 provides, relevantly:

> "An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:
>
> ... (b) make, or not make, an agreement or arrangement under a term of a modern award...that is permitted to be included in the award...under subsection 55(2)..."

[262] In addition, s.345 provides:

> "(1) A person must not knowingly or recklessly make a false or misleading representation about:
>
> (a) the workplace rights of another person; or
>
> (b) the exercise, or the effect of the exercise, of a workplace right by another person; or
>
> ...
>
> (2) Subsection (1) does not apply if the person to whom the representation was made would not be expected to rely upon it."

[263] Relevantly for present purposes, under s.341(1) of the Act, a person has a "workplace right" if the person is entitled to the benefit of, or has a role or responsibility under, a modern award.

[264] Sections 344 and 345(1) are civil remedy provisions (see s.539).

[265] The variation of modern awards to incorporate the model term will ensure that each modern award provides a fair and relevant minimum safety net. In so deciding we have taken into account the s.134 considerations, insofar as they are relevant, and we are satisfied that such a variation is necessary to achieve the modern awards objective. We are also satisfied that the model term is consistent with the objects of the Act. We propose to address the relevant statutory considerations before dealing with the submissions of those who opposed the Employer Group's claim.

[266] As we have mentioned, the insertion of the model term will ensure that each modern award provides a "*fair and relevant* minimum safety net". The model term is "fair" because of the various safeguards provided within the term itself and because it facilitates the making of mutually beneficial agreements between an employee and his or her employer. Employees benefit by being able to exercise a preference they may have to receive cash rather than take leave and employers benefit by being able to reduce their contingent liabilities. The mutual

benefits which may flow from such arrangements provide an explanation for why such provisions are a relatively common feature of enterprise agreements approved by the Commission.

[267] The insertion of the model term will ensure that modern awards are "relevant" to the needs of the modern workplace. The evidence indicates that there is a significant demand for a provision which facilitates the cashing out of accrued leave.

[268] Questions 5–8 of the Employer Survey are directed at the cashing out of annual leave, as follows:

> "*Since 1 January 2010, have any of your organisation's employees asked to cash out a portion of their annual leave? Choose one of the following answers.*
>
> - Yes
> - No
> - Unsure
>
> *If yes, how many requests have you received?*
>
> - 1
> - 2–4
> - 5–20
> - 20+
>
> *What percentage of these requests have been granted?*
>
> - none
> - 1–25%
> - 26–50%
> - 51–75%
> - 75%+
> - Unsure
>
> *If requests have been refused, what has been the reason or reasons giving rise to the refusal? Tick each appropriate box:*
>
> - The employee had less than 4 weeks of annual leave accrued.
> - We were unable to agree because of our award or agreement does not permit cashing out of leave.
> - The Company does not wish to allow employees to cash out annual leave.
> - Other. Please specify: _____"

[269] Some 1863 employers (45 per cent of all responses) stated that since 1 January 2010 they had received at least one employee request to cash out a portion of their annual leave. Of those employers who had received at least one such request, over 1412 employers had received between 2 and 20 requests and 153 employers had received over 20 such requests.

[270] A significant number of the requests to cash out annual leave were not granted.[132]

[271] The responses to Question 8 of the Employer Survey are set out below:

If requests have been refused, what was the reason or reasons for the refusal?

	Count	%
The employee had less than 4 weeks of annual leave accrued	651	15.74
We were unable to agree because our award or agreement did not permit cashing out of leave	499	12.06
The Company does not wish to allow employees to cash out annual leave	160	3.87
Other	700	16.92

[272] We have already mentioned the practical problem which arises in relation to the responses to Question 8 (see paragraph [46] above) but it is apparent that in a significant proportion of cases a request to cash out annual leave was refused because the relevant award or agreement did not expressly permit it. The evidence of Ms Kristina Flynn, Ms Fiona Corbett and Ms Melissa Adler dealt with issues raised by employer members of their respective organisations.

[273] Ms Kristina Flynn is the National Manager of BIZassistInfoline, Ai Group's national workplace relations telephone advisory service for Ai Group members. The BIZassistInfoline is operated by 15 workplace advisers who provide advice on all workplace related issues, including leave entitlements. The BIZassistInfoline has received about 199 740 calls since 1 January 2010. The details of each call are logged. A report of all calls to the BIZassistInfoline since 1 January 2010 showed that 5794 calls were about annual leave, of which 1058 were about the cashing out of annual leave. Approximately half (521) of the calls about the cashing out of annual leave concerned employees in circumstances where an award applied to their employment. In her evidence Ms Flynn stated:

> "In my experience it is not uncommon for employers to call the BIZassistInfoline to ask whether they can agree to requests from employees, to whom a modern award applies, to cash out their annual leave." [133]

[274] Ms Fiona Corbett gave evidence about the operation of the Workplace Advice Unit operated by Australian Business Lawyers & Advisors Pty Ltd on behalf of Australian Business Industrial and the NSW Business Chamber. The Workplace Advice Unit performs essentially the same function as Ai Group's BIZassistInfoline for the members of the employer organisations mentioned. In the 12 month period 1 June 2013 to 31 May 2014, the Workplace Advice Unit in Sydney took 511 calls relating to annual leave and of these 91 were about the cashing out of annual leave. The majority of such calls were about "whether an award covered employee was able to cash out their annual leave". In her evidence Ms Corbett stated:

> "Based on the enquiries that I have answered in relation to cashing out annual leave whilst working in the Workplace Advice Unit answering queries on numerous awards and from enquiries that the other advisors have received, I have found that:
>
> (a) most calls follow an employee's request to cash out their annual leave;
> in a large number of cases, the employee's request is made as the result of a financial or personal hardship."[134]

[275] In terms of the particular matters referred to in the modern awards objective, we are persuaded that the model term meets the needs of the low paid (consistent with s.134(1)(a)).

[276] As noted in the *Annual Wage Review 2013–14* decision, a sizeable proportion of award-reliant workers are low paid and low-wage households typically report more financial stress than higher wage households.[135] The ability to cash out up to two weeks' accrued annual leave each year will provide low-paid employees with some additional capacity to meet unexpected financial demands and may also provide the money to enable them to take a holiday.

[277] In its submission of 27 November 2014 the ACTU contended that "concerns about award-dependent employees facing financial hardship could be easily addressed through an increase in the minimum wage and not by including cashing out provisions in modern awards".[136] The adjustment of minimum wages is not as simple as the ACTU submission might suggest. The Act requires the Expert Panel to take into account a number of considerations in reviewing modern award minimum wages and the national minimum wage order. As the Expert Panel observed in the *Annual Wage Review 2013–14* decision:

> "It is important to appreciate that there is often a degree of tension between the economic, social and other considerations which the Panel must take into account. For example, a substantial wage increase may better address the needs of the low paid and improve the relative living standards of award-reliant employees, but it may (depending upon the prevailing economic circumstances) also reduce the capacity to employ the marginalised and hence reduce social cohesion. It is this complexity that has led the Panel to reject a mechanistic or decision rule approach to wage fixation, such as the adoption of real wage maintenance. The real wages of award-reliant employees are relevant to our task, but not determinative. The range of considerations we are required to take into account calls for the exercise of broad judgment rather than a mechanistic approach to fixing minimum wages."[137] (references omitted)

[278] We deal with the need to promote collective bargaining (s.134(1)(b)) later in addressing the submissions opposing the Employer Group's claim.

[279] We are also satisfied that the model term reflects flexible modern work practices and accordingly the insertion of such a term in modern awards will promote such practices, consistent with s.134(1)(d).

[280] Section 134(1)(f) is also relevant. It provides that we must take into account:

> "the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden ..."

[281] As the model term will facilitate agreements to cash out accrued leave it will, when utilised, reduce the employer's contingent liabilities. ACCI and others[138] submitted that a term which permits the cashing out of accrued leave will reduce employment costs and the regulatory burden on employers. We accept that the insertion of the model term in modern awards will have such an impact.

[282] A number of parties supporting the Employer Group's claim asserted that granting the claim would improve productivity. No merit argument was advanced in support of such assertions and the connection between an award provision permitting the cashing out of accrued annual leave and productivity is not obvious to us.

[283] "Productivity" is not defined in the Act, but given the context in which the word appears it is clear that it is being used to signify an economic concept. It may be regarded as a technical word and hence evidence may be admitted to interpret its meaning.[139]

[284] The legislative context is also important. The modern awards objective provides that the Commission must take into account the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.[140] The reference to both "productivity" and "employment costs" within the same provision recognises that the cost of labour constitutes a separate and distinct statutory consideration to productivity.

[285] As noted in the *Annual Wage Review 2012–13* decision:

> "... the term productivity, as used in the Act, is directed to the economic concept of the quantity of output relative to the quantity of inputs.[141] Considerations of the price of inputs, including the cost of labour, raise separate statutory considerations relating to the performance and competitiveness of the national economy and other economic considerations, such as inflation."[142]

[286] On the limited material before us we are not persuaded that either the Employer Group's claim or the model term will have any positive impact on productivity.

[287] The insertion of the model term into modern awards is also consistent with the objects of the Act. In particular the model term acknowledges "the special circumstances of small and medium-sized businesses" (s.3(g)). Absent the insertion of the model term, such businesses could only permit their modern award covered employees to cash out their accrued paid annual leave by entering into an enterprise agreement. In this context we acknowledge the force of ACCI's submission that the reluctance of particular businesses to collectively bargain can arise from various factors including "small business employers lacking the expertise and resources to implement an enterprise agreement".[143]

[288] The ACTU rejected the proposition that small businesses encountered difficulties in engaging in collective bargaining and pointed to the extent of small businesses who utilised Australian Workplace Agreements (AWAs) introduced by the WR Act. In support of this submission the ACTU relied on a report by Mitchell and Fetter.

[289] Mitchell and Fetter found that "most employers with AWAs were small and medium size businesses".[144] However, as the authors note, this understates the importance big business is the utilisation of AWAs: 'whilst big business constitutes only the smaller proportion of businesses with AWAs, they nevertheless cover the largest proportion of employees with AWA coverage'. It is also relevant to observe that the use of AWAs tended to be concentrated in particular sectors of the economy. As Mitchell and Fetter noted:

> "Despite the increasing trend in the rate of approvals, AWAs statistically constitute only a very minor aspect of Australian industrial regulation, covering a tiny proportion of the workforce (1.9%). Whilst the uptake of AWAs has reached into most parts of the economy to some degree, they tend to be only of importance in terms of concentration (by employee) in communication services, government, mining cultural and recreational services, and electricity, gas and water. Key areas of industry such as construction retail, transport and

manufacturing by contrast have relatively low levels of AWA penetration".[145] (references omitted)

[290] We are not persuaded that the Mitchell and Fetter report supports the ACTU's contention. As the report states, key areas of the economy—including award reliant sectors—had low levels of AWA penetration. Further, there are significant differences between the legislative framework which applied to AWAs[146] and Part 2-4 of the FW Act dealing with enterprise agreements.

[291] During these proceedings the Commission produced an information note entitled 'Bargaining by business size'. The note was available on the Review section of the Commission's website and interested parties were able to comment on the note and its relevance to these proceedings. The note indicated that the Australian Bureau of Statistics (ABS) Employee Earnings and Hours publication collects information on a range of data including the number of employees by method of setting pay and in what sized business they are employed in Australia. The methods of pay collected are:

- Award only;
- Collective agreement;
- Individual arrangement; and
- Owner manager of incorporated enterprise.

[292] The ABS definition of a "collective agreement" encompasses collective agreements registered at the state or federal level as well as unregistered written or verbal collective agreements.[147]

[293] Employees are allocated to the collective agreement category if they had the main part of their pay set by a registered or unregistered collective agreement or enterprise award.[148]

[294] The ABS definition of individual arrangements includes individual contracts, letters of offer and common law contracts (which also includes overaward payments).[149]

[295] The ABS definition of an award-only arrangement is where a state or federal award is the predominate mechanism used to set the pay and/or conditions and where that employee is paid at exactly the rate of pay specified in the award.[150]

[296] An "owner manager of incorporated enterprise" is defined as:

> "A person who works in their own incorporated enterprise - that is, a business entity which is registered as a separate legal entity to its members or owners (also known as a limited liability company) ..."[151]

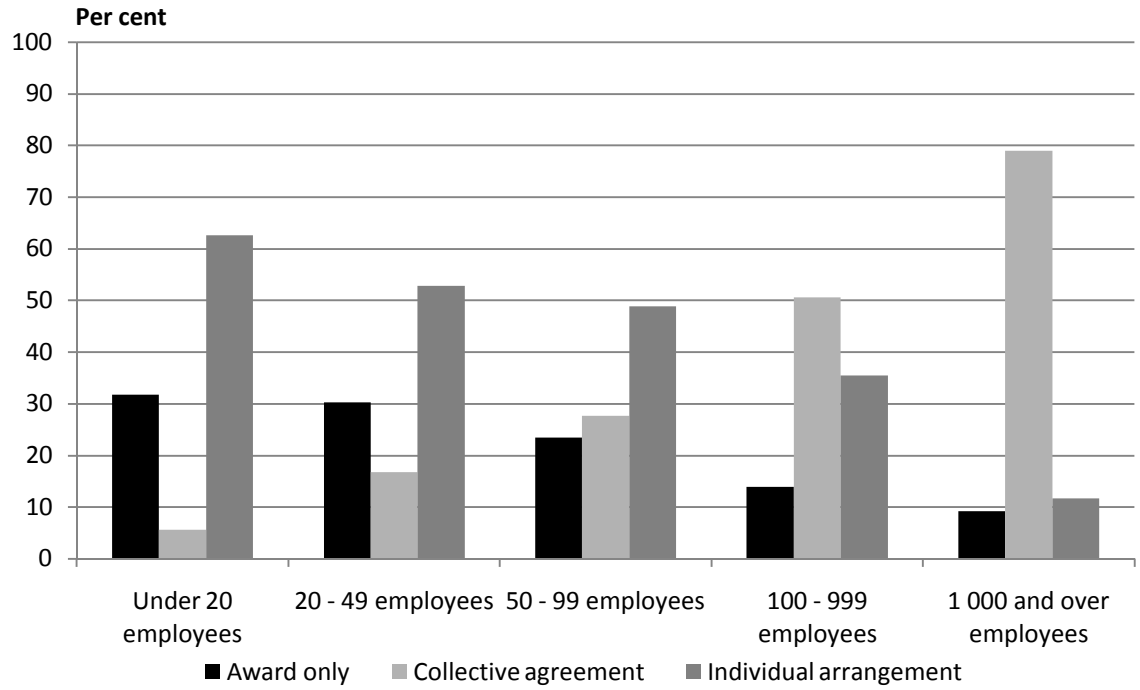
[297] The ABS Employee Earnings and Hours publication collects business size data according to the following splits:

- Under 20 employees;
- 20–49 employees;
- 50–99 employees;
- 100–999 employees; and
- 1000 and over employees.

[298] The size splits collected reflect the ABS definition of a small business, which is a business that employs fewer than 20 persons.[152]

[299] The most recent data show that, in May 2014, the majority of employees in small businesses were employed on individual arrangements, with a small proportion of employees on collective agreements (see Chart 3). The number of employees in small businesses on collective agreements and individual arrangements were 126 700 and 1 393 200 respectively.[153]

Chart 3: Proportion of employees with their pay set by method of setting pay and business size—May 2014



Note: Data on method of setting pay by business size exclude owner managers of incorporated businesses.
Source: ABS, *Employee Earnings and Hours, Australia*, *May 2014*, Catalogue No. 6306.0.

[300] Chart 3 demonstrates that there is a positive correlation between business size and collective agreements, with an increase in business size associated with an increase in the proportion of employees on collective agreements.

[301] Relatively few employees employed in small businesses are covered by a collective agreement. This supports our earlier observation about the practical impediments facing small businesses that wish to enter into such agreements. A modern award variation of the type we propose will ensure that all employees have access to cashing out arrangements.

[302] It seems to us to be somewhat anomalous that award-free employees and agreement-covered employees can negotiate arrangements permitting the cashing out of accrued annual leave, but employees whose terms and conditions of employment are regulated by a modern award cannot. Some of the practical difficulties which may arise from this differential treatment are highlighted in BHP Billiton's submission of 27 November 2014:[154]

"BHP Billiton has a large collective agreement-covered workforce who are entitled to have cashing out of annual leave terms included in enterprise agreements through bargaining. BHP Billiton also employs managerial, professional and administrative staff whose employment is generally not the subject of any collective agreement. These staff members may be covered by one or other modern award. They have no equivalent access to cashing out of annual leave in the absence of any modern award term dealing with the matter.

BHP Billiton submits that it was not Parliament's intention for the type of industrial instrument governing an employee's employment to dictate whether or not the employee can exercise a choice to cash out annual leave. It is anomalous that, within a workforce, an employer could offer one group of employees the ability to access this choice through enterprise bargaining but would not be able to offer the facility to another group, or even accept individual requests from within that group, because the modern award lacks a provision dealing with cashing out."

[303] In this context we note that the ACTU submitted that the major difference between award-covered employees and award-free or agreement-covered employees is that the latter typically have "significantly more industrial 'power' than their colleagues who are award reliant"; award/agreement free employees are "likely to have significantly more bargaining power due to their personal or individual status" which enables them to achieve positive industrial outcomes, and agreement covered employees "achieve their industrial 'power' through collective bargaining". Therefore, the ACTU submitted that arguments based on providing parity or equity are "misconceived".[155] We acknowledge that such a distinction can be made, but, even if this is so, that does not make the current situation any less anomalous, and we have addressed the difference in bargaining power by the additional safeguards provided in the model term.

[304] The union parties opposed the claim advanced by the Employer Group on two broad bases:

- if granted the claim would undermine the purpose of annual leave; and
- granting the claim would be inconsistent with the encouragement of enterprise bargaining.

Undermining the purpose of annual leave

[305] The ACTU's fundamental objection to the insertion of *any* provision in modern awards which facilitates the cashing out of annual leave was that such a provision would undermine the NES minimum entitlement to annual leave by converting annual leave into "a financial figure, rather than an entitlement". The essence of the ACTU's submission is set out in its submission in reply:[156]

"Frustrating the purpose of a safety net entitlement such as annual leave in a modern award has the potential to do significant damage to the basic rights and entitlements of employees. Regardless of whether or not the safeguards in sections 92 and 93 are applied, the purpose of annual leave will be frustrated; it will become nothing more than a payment to employees and will lose its long established importance and benefit as a break from work ...

We submit that no matter which or how many safeguards apply, the cashing out of annual leave in the safety net will do significant damage to the entitlement."

[306] The AMWU also contended that cashing out eliminates annual leave taken for rest and recreation and does not address the underlying reasons for the accumulation of large leave balances.[157] The AMWU further submitted that the proposed Employer Group's claim "can result in serial cashing out of annual leave, and thus eliminate the taking of leave altogether" and that:

> "The employer group proposal gives only a safeguard of requiring a leave balance of four weeks, but would not stop an employee from cashing out all leave accrued thereafter. The possibility of such an outcome should be avoided. Any acceptable safety net must require that a minimum amount of leave has actually been granted by the employer and taken by the employee."[158]

[307] The Construction, Forestry, Mining and Energy Union (CFMEU)[159] and the Textile, Clothing and Footwear Union of Australia (TCFUA)[160] also raised concerns about the potential for serial cashing out in the event that the Employer Group's claim was granted.

[308] The ACTU's submissions also addressed what it characterised as the "failings" of the Employer Group's proposed clause. In particular:

- the clause has no safeguard to ensure that employees ever actually take a period of rest and recreation;
- there are no protections to ensure that employees are not pressured into cashing out annual leave; and
- requiring a written agreement for each cashing out is a mere formality and offers no real protection against abuse.[161]

[309] In relation to the last of the points made about the Employer Group's proposed clause, the ACTU asserted that it is unlikely that a written agreement will actually be entered into on each occasion that leave is cashed out. In support of its contention that the Employer Group's proposed clause could be abused, the ACTU relied on a single enquiry received by its Member Connect service sometime in 2012–13.[162]

[310] We do not find these submissions persuasive.

[311] We turn first now to the proposition that facilitating the cashing out of annual leave would undermine the NES entitlement to leave. In our view this submission is misconceived.

[312] We acknowledge that the purpose of annual leave is to provide a period of rest and recovery from work and, from a work-life perspective, employees need the time and opportunity to attend to their family and other commitments and to engage in social, community and personal interests. We also agree with the proposition that it is important that employees take their accrued annual leave and we have dealt with measures to facilitate the taking of leave in the previous part of this decision. But it is important to appreciate that the relevant standard is set by the NES.

[313] The NES provisions relating to annual leave (ss.86–94) set out the minimum entitlement to annual leave for employees (other than casual employees) and expressly permit the cashing out of such an entitlement in ss.93 and 94. As the ACTU correctly observed, the inclusion of such a facilitative provision in a modern award is *permitted* rather than *mandated*. But such a distinction misses the point. The enactment of s.93 is a clear legislative statement

that a modern award term which permits the cashing out of accrued annual leave, and meets the minimum requirements of s.93(2), is consistent with the NES entitlement to annual leave. Far from frustrating the purpose of a safety net entitlement, as asserted by the ACTU, the legislature has clearly contemplated that a modern award provision such as the cashing out model term may be part of the safety net.

[314] In support of its general proposition that a modern award provision which facilitates cashing out would undermine the NES, the ACTU relied on the observations of the Award Modernisation Full Bench in its 2008 Award Modernisation decision, when it decided not to adopt a model provision to permit the cashing out of annual leave.[163] As we have already observed, because of the timing of the 18 December 2008 variation to the award modernisation request (which set out the safeguards which now appear in s.93(2)), that variation was not taken into account in the 2008 Award Modernisation decision of 19 December 2008.

[315] The ACTU also submitted that a subsequent decision by the Award Modernisation Full Bench to refuse to vary the *Meat Industry Award 2010*[164] (the Meat Award) to provide for cashing out of annual leave supports this proposition, as the Full Bench in that matter "had seen and/or considered the safeguards that are replicated in the provisions of the Act ...".[165] An examination of the decision does not support this contention. After referring to the observations made in the 2008 Award Modernisation decision, the Full Bench dismissed an application by the Australian Meat Industry Council to vary the Meat Award to include a provision for cashing out of annual leave. The Full Bench's reasons are encapsulated in the following passage from its decision:

> "[11] We have consistently expressed misgivings about cashing out of annual leave being included in safety net awards. Those misgivings are heightened in circumstances where there is no argument advanced in support and opposition exists to its inclusion. No such provision is contained in any of the awards which were considered in the modernisation process. In all the circumstances we have decided not to grant the application."[166]

[316] The decision contains no reference to the safeguards now contained in s.93(2) and on that basis it cannot be assumed that they were the subject of any consideration by the Full Bench.

[317] The decisions of the Award Modernisation Full Bench must be considered in context. When viewed in this way it is apparent that, for various reasons, the safeguards which are now set out in s.93(2) were not the subject of any particular consideration by that Full Bench.

[318] That said, we acknowledge and agree with the observation of the Award Modernisation Full Bench that some caution is appropriate when dealing with this issue at the award safety net level. We accept the proposition that there are significant differences between the modern award context and enterprise bargaining. As noted earlier, the Act contains significant procedural and substantive safeguards to facilitate the making of a democratic and informed decision on whether an enterprise agreement should be made.[167] In our view these differences warrant the imposition of additional safeguards in the modern award context and that is the course we have adopted.

[319] We acknowledge that the ACTU sought a number of further safeguards—that is in addition to the safeguards we have incorporated into the model term. In particular the ACTU proposed five further safeguards:

> (i) that any provision should have a "sunset date" of 31 December 2018 so that the provisions can be considered and reviewed during the next 4 yearly review of modern awards;
>
> (ii) there must only be the possibility of cashing out annual leave once every three years;
>
> (iii) an employee who elects to cash out annual leave must have taken annual leave of "at least four weeks, or five or six or another amount if the employee is a non-standard worker, in the 12 months prior to cashing out";
>
> (iv) cashing out cannot be a condition of employment; and
>
> (v) cashing out provisions should not be inserted into modern awards which contain other mechanisms for reducing annual leave balances, such as excessive leave terms or close down provisions.[168]

[320] We are not persuaded to adopt any of these proposals. The first and fourth proposed safeguards are unnecessary. Any interested party can seek to vary or revoke the cashing out model term in the context of the next 4 yearly review. Cashing out cannot be a 'condition of employment', as the model makes clear each cashing out of a particular amount must be the subject of a separate agreement.

[321] The second and third proposed safeguards would place unwarranted restrictions on the ability to cash out paid annual leave and no persuasive merit argument was advanced in support of the restrictions proposed. We note that the model term we have determined includes a limitation on the amount of paid annual leave which can be cashed out in any 12 month period.

[322] As to the final proposal, it proceeds on a false premise in that it assumes that the only purpose of inserting the model term is to reduce excessive leave balances—that is not the case. As we have mentioned, the model term facilitates the making of mutually beneficial agreements. While such agreements enable employers to reduce their contingent liabilities, employees obtain the benefit of being able to exercise a preference they may have to receive cash rather than take leave.

[323] We now turn to the ACTU's submissions about the "failings" of the Employer Group's proposed clause (see paragraph [308] above).

[324] It is convenient to deal with the ACTU's last point first. The Member Connect enquiry does not support the ACTU's contention. If the facts asserted are correct, and the employee concerned was a national system employee, then the employer concerned was clearly acting unlawfully. Paid annual leave can only be cashed out in accordance with the terms of a modern award or enterprise agreement, or by an agreement between an employer and an award/agreement free employee (s.92). Each cashing out of a particular amount of paid leave must be by a separate agreement in writing, between the employer and employee (see

ss.93(2)(b), 94(1) and (3) and reg.3.36(2)). The insertion of the model term will not make such unlawful behaviour more prevalent. Indeed, by clearly spelling out the circumstances in which accrued annual leave may be cashed out, the model term is more likely to promote compliance with the statutory scheme rather than non-compliance.

[325] Nor is there any evidentiary basis for the ACTU's assertion that it is unlikely that a written agreement will actually be entered into. There was no suggestion of any non-compliance with the cashing out provisions in existing enterprise agreements or with the terms of s.94 in relation to award/agreement free employees. Nor did the ACTU point to any compliance problems in relation to the cashing out provisions under s.233 of the WR Act.

[326] As to the other two asserted "failings" of the Employer Group's proposed clause, these issues have been adequately addressed in the model term. The model term limits the amount of annual leave which may be cashed out in any 12 month period. For a full-time employee only two weeks' may be cashed out every 12 months, and hence such an employee will either accrue or take at least two weeks' paid annual leave every 12 months (clause 1.2(d)). This safeguard is directed at preventing what the AMWU and others described as the potential for serial cashing out. The model term does not compel employees to take a minimum period of paid annual leave each year, but neither does the NES.

[327] The two notes at the end of the model term refer to the general protections in the Act which prevent employees from being pressured into cashing out their paid annual leave entitlements.

Incentive to bargain

[328] The ACTU contended that inserting cashing out provisions into the modern awards will remove an incentive to bargain:

> "[T]he provisions of the FW Act which provide for enterprise bargaining assume that certain flexibilities or conditions of employment are not appropriate for inclusion in the safety net ... Bargained outcomes should only be included in modern awards where this is necessary to achieve the MAO of providing a fair and relevant safety net and not simply because of the difficulties or perceived difficulties faced by parties engaged in collective bargaining."[169]

[329] The ACTU also submitted that inserting a cashing out provision in modern awards would undermine the objects of the Act (particularly s.3(f)) as it would act as a disincentive for an employer to engage in enterprise-level collective bargaining and that the safety net must be set at a level which encourages parties to collectively bargain to seek provisions which differ from the safety net. [170]

[330] We acknowledge that one of the particular matters we are required to take into account is "the need to encourage collective bargaining" (s.134(1)(b)).

[331] However, as we have mentioned, no particular primacy is attached to any of the matters the Commission is required to take into account in paragraphs 134(1)(a)–(h). The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. An award term of the type we propose will not necessarily discourage collective bargaining. The setting of an appropriate safety net provision may create an incentive to enter into an enterprise agreement in order to tailor the provision to better meet the needs of a

particular enterprise, subject to meeting the minimum requirements set out in s.93(2). We acknowledge that the insertion of the model term in modern awards may impact upon the incentive to bargain about the cashing out of annual leave. This is a relevant consideration, and we have taken it into account, but it is not determinative. In our view the considerations in favour of inserting the model term into modern awards outweigh any potential reduction in the incentive to bargain about this issue.

[332] For the reasons given we are satisfied that the variation of all modern awards to insert the model term is necessary to achieve the modern awards objective.

[333] We note that the Employer Group's claim sought to vary 120 of the 122 modern awards to insert a provision to facilitate the cashing out of annual leave. The *Seafood Processing Award 2010* was not sought to be varied as it already contains a cashing out provision (it is the only modern award that does so). The *Passenger Vehicle Transportation Award 2010* was also omitted from the Employer Group's list of modern awards to be varied. This award does not currently contain a cashing out provision and no reason was provided for its omission. During the course of oral argument Ai Group were seeking to insert the model cashing out term in all modern awards except the *Seafood Processing Award 2010*.[171] We also note that the Australian Public Transport Industrial Association appeared in the proceedings and supported the position put by ACCI and Ai Group in respect of the ACTU claim regarding the payment of annual leave entitlements on termination.

[334] During the course of these proceedings all parties were put on notice as to the Commission's concerns regarding the adequacy of the safeguards in the Employer Group's claim. Subject to the requirements of procedural fairness, we are not bound by either the terms of the relief sought by a party or by the scope of the variations proposed.

[335] We see no reason for excluding the awards mentioned from the variations we propose. The cashing out provision in the *Seafood Processing Award 2010* does not contain sufficient safeguards and a variation is necessary to meet the modern awards objective. On the material before us the omission of the *Passenger Vehicle Transportation Award 2010* from the awards sought to be varied by the Employer Group was simply an error.

4.3 Annual close-down

[336] The Employer Group sought to insert a model "close-down" clause into 65 modern awards (see Attachment G for the list of modern awards). The proposed model clause is in the following terms:

> **"Annual Leave Close-Down**
>
> (a) An employer may close down (or reduce to a nucleus) an enterprise or a part of it for the purpose of allowing paid annual leave to all or a majority of employees in the enterprise or part of it, provided that:
>
> (i) the employer gives the employees at least four (4) weeks' notice of its intention to close down;
>
> (ii) in the case of any employee employed after notice has been given, notice must be given to that employee on the date they are offered employment.

(b) Where an employee has been given notice pursuant to clauses X.X(a)(i) or (ii) above and the employee has:

(i) accrued sufficient annual leave to cover the full period of closing, the employee must take paid annual leave for the full period of closing;

(ii) insufficient accrued annual leave to cover the full period of closing, the employee must take paid annual leave to the full amount accrued and leave without pay for the remaining period of the closing; or

(iii) no accrued annual leave, the employee must take leave without pay for the full period of closing.

(c) Public holidays that fall within the period of close down will not count as a day of annual leave or leave without pay. Employees will be paid for any absence on such days in accordance with the NES." [172]

[337] In relation to subclause (c) of the proposed clause, the Employer Group confirmed that this was not intended to reduce any existing entitlements concerning public holidays and it was conceded that the provision may need to be modified to achieve that end.[173]

[338] The 65 modern awards sought to be varied are, in effect, split into two categories:

- 41 modern awards that do not presently contain any provisions allowing employers to implement an annual close-down;[174] and
- 24 modern awards that do contain provisions regarding an annual close-down, but the existing modern award provisions do not provide the same level of flexibility as the model clause.

[339] The purpose of the proposed provision is said to be to enable businesses to shut down and require annual leave to be taken at the best time in terms of production or service delivery fluctuations. It is on that basis that it was submitted that the "close-down" proposal is not directed at the same issue being canvassed by the variations proposed to address excessive leave balances and should not be seen as an alternative to that claim.[175]

[340] The 57 modern awards that are not subject of the proposed variations already contain provisions allowing employers to implement annual close-downs and no variations are proposed in those awards.

[341] The ACTU and a number of individual unions opposed the Employer Group's claim.

[342] We propose to deal with the relevant historical and legislative context before turning to the merits of the claim.

[343] An annual close-down provision (also referred to as a "shut down") was introduced into the WR Act by the Work Choices Act in 2006. The AFPCS provided that an employer had a right to direct employees to take leave during a shut down for the whole, or part, of its business. Section 236(5) of the WR Act provided:

"Shut downs

(5) An employee must take an amount of annual leave during a particular period if:

(a) the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and

(b) at least that amount of annual leave is credited to the employee."

[344] Annual close-down provisions were also in some awards prior to the Work Choices Act amendments. For example the *Metal Industry Award 1971* was varied in 1977 to include such a provision.[176]

[345] During the award modernisation process, the Award Modernisation Full Bench, in its 2008 Award Modernisation decision, stated that the "provisions in awards and NAPSAs governing annual close-downs vary significantly".[177] The Full Bench went on to say it had "adopted the approach of attempting to identify an industry standard in each case" which is why there may be "some variation in the close-down provisions".[178]

[346] An example of how the Award Modernisation Full Bench decided to include a close-down provision is in the pest control industry. In making the *Pest Control Industry Award 2010* the Full Bench decided to include an annual close-down provision.[179] Prior to the making of the modern award, three of the six pre-reform federal awards and NAPSAs in this industry contained close-down provisions. These included the South Australian and New South Wales NAPSAs and the Victorian pre-reform federal award. The South Australian NAPSA, the *Pest Control Award*, required an employer to give an employee six weeks' notice before closing down for a period of time.[180] The modern award provision for annual close-down, however, reflects the Victorian pre-reform federal award and requires four weeks' notice.

[347] At present, 81 modern awards contain provisions for close-down and 41 modern awards do not.[181]

[348] The Act does not contain a specific provision in relation to "shut downs" or "close-downs", but s.93(3) provides that a close-down provision may be included in modern awards and enterprise agreements; it reads:

"Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms 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."

[349] The Explanatory Memorandum to the Fair Work Bill 2008 makes it clear that the subsection was intended to encompass close-down provisions. One of the examples provided in the Explanatory Memorandum was a term which enabled an employer to require an employee to take a period of leave in circumstances where the employer decided to "shut down the workplace over the Christmas/New Year period" (see paragraph [91] above). We return to s.93(3) shortly.

[350] We also note that s.139(1)(h) provides that a modern award may include terms about "leave, leave loadings and *arrangements for taking leave*".

[351] We now turn to the submissions advanced in respect of the Employer Group's claim.

[352] The ACCI and Ai Group submissions advanced a number of arguments in support of the Employer Group's claim. These submissions can be conveniently distilled into seven broad lines of argument.

[353] First, it was contended that provisions similar to the proposed model close-down term are already contained in many modern awards, including the *Asphalt Industry Award 2010*, and were adopted by the Full Bench of the Commission during the Transitional Review in varying 18 awards.[182]

[354] In relation to this point we would observe that the *Transitional Review—Annual Leave* decision did not endorse the close-down provision in the *Asphalt Industry Award 2010* as an appropriate model term. The Full Bench simply dealt with an anomaly or technical problem arising from the Part 10A award modernisation process. The issue at the heart of the Full Bench decision was that the obligation under the NES to accrue annual leave progressively and make payment at the employee's base rate of pay gave rise to an argument that the existing award provision provided for an additional payment over and above the amount that would otherwise be payable for an absence on annual leave. Such an additional payment was unintended and the variations made resolved this anomaly.[183]

[355] Second, it was contended that prior to the Act, the right of an employer to direct employees to take annual leave during a close-down of the employer's business was clearly recognised and provided through federal and state legislation and pre-modern award terms. In addition to the legislative changes introduced by the Work Choices Act (to which we have already referred) it was submitted that state legislation, such as the *Annual Holidays Act 1944* (NSW) at s.4A, provided for the right of an employer to implement a close-down of its business, in whole or in part, and enabled an employer to direct an employee to take a period of unpaid leave to cover the close-down period, when the employee had insufficient leave accrued. It was submitted that these and other statutory arrangements applied to employees generally and, as such, the safety net provided by modern awards should also now reflect this position.[184] It was also submitted that unless there was good reason to do otherwise, a uniform approach should be adopted across all modern awards on the close-down provisions.

[356] For our part, we note that a number of the earlier provisions to which reference was made by those supporting the Employer Group's claim contained a range of limitations upon an employer's right to direct an employee to take annual leave. For example:

- the *Annual Holidays Act 1944* (NSW) specifies that an employer can only give an employee notice of a close-down once annually; and
- awards and agreements also set parameters around these provisions. For example the *Clerks' (South Australia) Award* and the *Retail Industry (South Australia) Award* provided that there could be no more than two close-downs in any one year.

[357] Third, it was submitted that the variation is supported by the fact that many employers close their operations, or part of them, over the Christmas/New Year period and/or at other times of the year. The inclusion of close-down provisions in the relevant modern award would ensure that an employer has the right to direct employees to take leave during a close-down.

[358] Fourth, it was submitted that a close-down provision benefits both employees and employers. A close-down enables employees to take periods of annual leave for rest and recreation, particularly during holiday seasons where they can spend time with family and friends. It enables employees to take leave without employers having to secure replacement labour for the leave period.[185] An annual close-down also benefits employers by providing a mechanism through which employers may reduce leave liability and better manage staff absences.[186]

[359] Fifth, it was submitted that many employers must observe different award provisions for different employees, in addition to observing the NES provisions governing the taking of leave during close-downs for award/agreement free employees.[187]

[360] This is said to make the safety net confusing, burdensome, unfair for employers, and in some cases, unworkable where the employer has to deal with varying award provisions, or in some cases no close-down provisions within the same enterprise.[188]

[361] Sixth, it was submitted that the results of the Employer Survey support the claim. Questions 9–10A of the Employer Survey are directed at the close-down issue, as follows:

> "9. Since 1 January 2010, has your organisation closed down all or part of its operations at any time during the year to allow employees to take leave? Choose one of the following answers.
>
> - Yes
> - No
> - Unsure
>
> 10. If so, on how many occasions since December 2009 has your organisation closed down all or part of its operations?
>
> - 1–2
> - 3–4
> - 5+"

[362] Some 1928 employers (46.5 per cent of all responses) stated that since 1 January 2010 their organisation closed down all or part of its operations during the year to allow employees to take leave. As to the number of occasions since December 2009 the organisation had closed down all or part of its operations, the responses were as follows:

Answer	Count	%
1–2 occasions	477	23.8
3–4 occasions	1237	61.8
5+ occasions	215	10.7
No answer	72	3.6

Note: Percentages shown do not total 100 due to rounding.

[363] We will deal with Question 10A from the Employer Survey shortly.

[364] Finally, it was submitted that the modern awards to be varied do not meet the modern awards objective and that the variations proposed are necessary to achieve that objective.[189]

Promoting the efficient and productive performance of work (s.134(1)(d))

[365] ACCI submitted that the model clause provides a mechanism whereby employers can ensure that employees actually take their leave and that such an outcome is beneficial to both employees and employers as it serves to:

(i) reduce the prospects of employee "burnout" and poor health;

(ii) assist in maintaining job safety and satisfaction; and

(iii) ultimately help to ensure a more balanced, rested and (accordingly) productive workforce.[190]

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(g))

[366] Allowing employers to close down their businesses on a periodic basis was said to allow an employer to reduce its annual leave liability thereby reducing the regulatory burden on employers.[191]

A simple easy to understand and sustainable modern award system (s.134(1)(g)

[367] ACCI submitted that the practice of closing down all or part of a business' operation is widespread and well known. It is not a new concept and, prior to the introduction of the Act, historically there had been a relatively uniform approach to annual close-down provisions. Allowing employers to close down their premises on a periodic basis advances the objectives of s.134(1)(g).[192]

Employment growth and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

[368] It was contended that the model clause will reduce the regulatory burden on businesses and allow them to divert funds currently set aside for excessive leave accruals on profit generating investments. Compelling employees to take leave is also directly supportive of a major sector of the economy—tourism.[193]

[369] The ACTU and a number of individual unions opposed the Employer Group's claim and contended that the Commission cannot be satisfied that it is necessary to grant the claim in order to ensure that modern awards are meeting the modern awards objective. For reasons which will become apparent, it is not necessary to canvass these submissions in any detail.

[370] We are not persuaded to grant the Employer Group's claim for three reasons.

[371] First, while we accept that a close-down provision may be included in modern awards, it is clear from the terms of s.93(3) that an award provision requiring an employee to take paid annual leave in such circumstances is only permitted "if the requirement is reasonable". We are not satisfied that the model term proposed is "reasonable" in the sense contemplated by s.93(3).

[372] The model term is very broadly expressed and is capable of being applied in a manner not contemplated in the type of annual close-down provisions traditionally provided in awards, in particular:

(i) there is no restriction on the number of times a close-down can occur in a 12 month period; and

(ii) there is no restriction on the duration of the close-down—it could be for a single day, a week or a number of weeks.

[373] Further, given the breadth of the model term we are not persuaded that a four week notice period is reasonable.

[374] Second, while we generally agree with the proposition that it is desirable that provisions dealing with the taking of annual leave be uniform across modern awards, it seems to us that close-down provisions are an exception to this general proposition and warrant consideration on an award-by-award basis.

[375] Some 81 modern awards already contain close-down provisions and the nature of the provisions varies considerably. In its 2008 Award Modernisation decision, the Award Modernisation Full Bench considered a number of general issues and standard clauses in respect of modern awards. In respect of close-down related annual leave arrangements, the Full Bench said:

> "[97] The provisions in awards and NAPSAs governing annual close-downs vary significantly. It is preferable that we do not alter provisions which have been specifically developed for particular industries. We have adopted the approach of attempting to identify an industry standard in each case. This means there may be some variation in the close-down provisions." [194]

[376] We have reviewed the existing range of modern award provisions and the basis upon which they were established in the Award Modernisation process and have considered the case put forward to establish a common provision. We are not persuaded that it is appropriate to adopt a common provision across the modern awards which are the subject of the Employer Group's claim. The circumstances in the industries covered by modern awards and the need for such a provision vary considerably. Accordingly, claims to vary existing close-down provisions or to insert such a provision are more appropriately made and determined on an award-by-award basis.

[377] In this context we also note that the Employer Survey does not support the proposition that there is a need for the variations proposed. The Employer Survey provided that if an organisation answered "no" to Question 9 (i.e. since 1 January 2010 has the organisation closed down all or part of its operations at any time during the year to allow employees to take leave) then they were directed to Question 10A, which was in the following terms:

> "10A. If you answered no to question 9, what was the reason for your organisation not closing down?
>
> - There was no operational reason for our business to close down.
> - We were unable to close down because it was not permitted by our award or agreement"

[378] The responses to Question 10A were as follows:

Answer	Count	%
There was no operational reason for our business to close down	1642	87.3
We were unable to close down because it was not permitted by our award or agreement	67	3.6
No answer	172	9.1

[379] It is notable that less than 4 per cent of those employers who answered this question responded that the reason why they had not closed down all or part of their operations since 1 January 2010 was that it was not permitted by their award or agreement. This does not suggest that the absence of a close-down provision in the 41 modern awards which do not presently have such a provision is creating particular difficulties for employers.

[380] Third, in support of the Employer Group's claim, Ai Group and ACCI pointed to the desirability of employees taking leave and that the proposed model term would provide a mechanism by which employers can reduce their leave liability. We have addressed these issues in the context of our consideration of the Employer Group's "excessive leave" claim.

[381] On the material before us, we are not satisfied that the variations proposed are necessary to ensure that the modern awards sought to be varied meet the modern awards objective. In short, the proponents of the claim have not established a merit case sufficient to warrant the granting of the claim.

[382] We leave open the capacity for interested parties to seek a variation to a modern award to either vary an existing close-down provision or to insert an appropriate provision. Such applications should be made during the Award stage of the Review on an individual award basis. Any proposed variation will need to be supported by cogent evidence of industry circumstances requiring such a provision or variation.

[383] We do accept that there may be potential difficulties created by circumstances where an enterprise has access to a modern award close-down provision for most of its employees but other applicable modern awards do not contain such a provision. The application of occupational awards may be particularly relevant in that context. It seems to us that such issues may be addressed by the insertion of a majority clause[195] in applicable occupational-based awards. We invite any interested party to make such applications and they will be dealt with as part of the Award stage of the Review.

4.4 Granting leave in advance

[384] The Employer Group sought to vary 48 modern awards to include a provision allowing for the taking of annual leave in advance of an entitlement to such leave accruing.[196] The proposed clause is in the following terms:

> **"Annual Leave in Advance**
>
> By agreement between an employer and employee, a period of paid annual leave may be taken in advance of the entitlement accruing. However, if paid annual leave is taken in advance and the employee's employment terminates before the employee has accrued

the entitlement the employer may make a corresponding deduction from any money due to the employee on termination."[197]

[385] The ACTU and a number of individual unions opposed the Employer Group's claim.[198]

[386] We propose to deal with the relevant historical and legislative context before turning to the merits of the claim.

[387] The issue of whether modern awards should contain provisions for granting leave in advance was not expressly addressed during the Part 10A award modernisation process. When dealing with the matter of annual leave generally, the Award Modernisation Full Bench indicated that it was not possible to develop a single model clause due to the wide range of provisions contained in pre-modern awards and NAPSAs.[199] In considering the terms to include in modern awards, the Full Bench decided upon an appropriate entitlement for a particular modern award rather than attempting to preserve the many different entitlements which previously applied. The approach taken was described as involving a "degree of rationalisation at the award level only" and not the insertion of a standard annual leave provision across all awards.[200] We note that some 74 modern awards contain a clause permitting the taking of annual leave in advance of the entitlement accruing.[201]

[388] The Joint Exhibit (referred to at paragraph [81] above) contained details of legislation, both federal and state, which deals with annual leave entitlements and related matters. It identified provisions which expressly deal with an employee taking annual leave in advance of an entitlement to that leave accruing. It appears that federal legislation has not expressly dealt with the issue but it has been dealt with in New South Wales, Queensland and Northern Territory legislation.[202] In this respect, we note that s.3(3) of the *Annual Holidays Act 1944* (NSW) provides that, if an employee and employer agree, annual leave may be taken in advance of the employee becoming entitled to the leave. Section 12 of the *Industrial Relations Act 1999* (Qld) and s.8 of the *Annual Leave Act* (NT) contain similar provisions.

[389] We have earlier noted that s.139(1)(h) of the Act allows a modern award to contain provisions dealing with leave and "*arrangements for taking leave*". Section 93(4) of the Act which is also relevant to this matter, is in the following terms:

"Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave."

[390] It is apparent from the Explanatory Memorandum to the Fair Work Bill 2008 that the proposed clause is a term of the type envisaged by s.93(4). The Explanatory Memorandum provides as follows:

"383. Subclause 93(4) enables an award or agreement to include other terms about the taking of paid annual leave – e.g., the taking of paid annual leave in advance of accrual."

[391] Section 94 of the Act deals with annual leave entitlements of award and agreement free employees and a note contained in s.94(6) refers to a similar issue to the matter before us. It provides:

"Agreements about taking paid annual leave

(6) An employer and an award/agreement free employee may agree on when and how paid annual leave may be taken by the employee.

Note: Matters that could be agreed include, for example, the following:
(a) that paid annual leave may be taken in advance of accrual;
(b) that paid annual leave must be taken within a fixed period of time after it is accrued;
(c) the form of application for paid annual leave;
(d) that a specified period of notice must be given before taking paid annual leave."

(emphasis added)

[392] Section 55(4) of the Act deals with ancillary and supplementary terms which may be included in a modern award. It provides as follows:

"Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74."

[393] Sections 323 and 324 were identified by the Employer Group as being relevant to that part of the proposed clause which provides an employer with the right to make a deduction of monies at the time of termination of employment. Section 323 deals with the method and frequency of payment. One requirement is that it provides that an employee must be paid, in full, in relation to the performance of work. However the section also refers to an exception to

this requirement as provided for in s.324. That section deals with deductions that can be made to payments which an employer is obliged to make to an employee. It reads:

> **"324 Permitted deductions**
>
> (1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:
>
> (a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or
>
> (b) the deduction is authorised by the employee in accordance with an enterprise agreement; or
>
> (c) the deduction is authorised by or under a modern award or an FWC order; or
>
> (d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court."

[394] Section 324(1)(c) was relied upon by the Employer Group in respect of that part of the variation they sought which concerns the deduction of monies from an employee's termination payments.

[395] We now turn to the submissions advanced in respect of the Employer Group's claim.

[396] It is convenient to refer to the evidence first. Those supporting the Employer Group's claim rely on the Employer Survey discussed earlier in this decision. Questions 15–17 of the Employer Survey deal with the issue of leave in advance, as follows:[203]

> "15. Since 1 January 2010, have any of your employees requested a period of annual leave in advance (ie before they have sufficient accrued leave to cover the request)?
>
> - Yes
> - No
> - Unsure
>
> 16. If you answered 'yes' to Question 15, on what percentage of occasions have you agreed to these requests?
>
> - None
> - 1–10%
> - 11–25%
> - 26–50%
> - 51–75%
> - 75+%
> - All
> - Unsure
>
> 17. If, in the future, an employee was to request a period of annual leave in advance, would you be willing to grant such leave?
>
> - Yes

- Depends on the circumstances
- No
- Unsure"

[397] The responses to Question 15 are particularly relevant:

Answer	Count	%
Yes	2289	61.2
No	1360	36.3
Unsure	92	2.5
No answer	0	–

[398] Further, the responses to Question 16 indicated that the majority of requests to grant leave in advance were agreed to by 42 per cent of the employers who answered that question.[204]

Answer	Count
None	206
1–10%	812
11–25%	153
26–50%	127
51–75%	128
75%	247
All occasions	576
No answer	17

[399] The Employer Group's submissions relied on the terms of s.139(1)(h) in support of the proposition that a modern award may contain a clause in the terms sought. They also relied on s.55(4)(b) of the Act and submitted that the proposed clause can properly be characterised as a clause which supplements the NES.

[400] The clause was described as having two components. The first makes it clear it will only apply where there is agreement between the employer and employee for the taking of annual leave in advance of it having accrued. The second component allows an employer to make a deduction from monies payable to an employee upon termination of employment.

[401] Ai Group pointed to the fact that there are similar provisions in 74 modern awards and that there was no evidence those provisions have operated in a way that is disadvantageous or unfair to employees. They asserted that the absence of an express provision in a modern award dealing with the granting of annual leave in advance, and the right to make a relevant deduction from monies owing to an employee, discourages employers from granting such leave. They acknowledged that s.324(1)(a) of the Act provides that an employer may deduct an amount from an employee's pay if "the deduction is authorised in writing by the employee and is principally for the employee's benefit" but submitted that is not an adequate provision for an employer as such an authorisation can be withdrawn by the employee at any time.[205]

[402] Ai Group also submitted that the absence of a clause in many modern awards in similar terms to that proposed operates against the interests of employees who may wish to take annual leave in circumstances where an entitlement to do so has not accrued. They provided examples of such circumstances:

- where an employee needs to take annual leave for unexpected family reasons and the employee does not have sufficient leave accrued; or

- where the employer closes down its operations for a period and an employee does not have sufficient annual leave accrued.[206]

[403] ACCI submitted that the proposed clause is principally focussed upon facilitating the taking of employee entitlements at times that are most convenient to employees. It is submitted that the self-evident reason why employees wish to take leave in advance is that they wish to take leave at a particular time that suits them, however their leave accruals at the relevant time do not permit the taking of the leave.[207] In this regard ACCI relied on the finding by Skinner and Pocock that a reason given by employees for not taking their full leave entitlement was that they had their leave paid out when they changed jobs and hence had no accrued entitlement.[208] (see Table 4 at paragraph [142] above.)

[404] ACCI and Ai Group submitted that the proposed clause would be consistent with the modern awards objective in s.134 of the Act. The submissions advanced in this regard may be summarised as follows:

(i) The clause would promote social inclusion through increased workforce participation as is referred to in s.134(1)(c).

(ii) The clause will promote flexible modern work practices and the efficient and productive performance of work. The proposed variation increases the likelihood of employees actually taking leave. In turn, the taking of leave should ensure a more balanced, rested and productive workforce. This will help to ensure the efficient and productive performance of work, advancing the objective in s.134(1)(d).

(iii) The clause will not increase the regulatory burden on employers or increase their employment costs. By ensuring more leave is taken, the proposed variation is likely to result in fewer employees accruing excessive leave balances. This is likely to reduce the regulatory burden and employment costs associated with employment, advancing the objective in s.134(l)(f) of the Act.

(iv) The taking of leave in advance is already widespread. Fifty-five per cent of employers have received requests since 1 January 2010 from employees seeking to take annual leave in advance. Of these requests, the vast majority of employers have acceded to them at some point in time. The implementation of the proposed clause will, accordingly, ensure that modern awards provide a framework for a practice that is already widespread, thus giving rise to a simple, understandable and relevant modern award. This will advance the objective in s.134(l)(g) of the Act.

(v) By providing employees with greater opportunities to take leave, Australian tourism will be supported, thus contributing to the sustainability and performance of the national economy, advancing the objective in s.134(1)(h).[209]

[405] As we have mentioned, the ACTU and a number of individual unions opposed the variations sought by the Employer Group. While acknowledging that the Act allows for such a term to be inserted in modern awards in the form sought, the unions advanced a range of reasons why the Employer Group's claim should be rejected.

[406] The ACTU submitted that any benefit to the small minority of employees who seek to take annual leave in advance is outweighed by the potential for the provision to be abused. It was contended that employers could exert pressure on employees to take a period of annual leave in advance and that the proposed clause would allow employers to "pre-emptively reduce leave balances" and ensure that employees are "in debt to their employer in terms of the annual leave they owe upon the termination of employment".[210] It was also contended that employees will be forced to take their leave in advance or be threatened with termination of employment. It was submitted that in these circumstances, the concept of "agreement" or "consent" to the arrangement in this context is illusory.[211]

[407] The ACTU referred to the legislation which governed annual leave prior to modern awards being made and the commencement of the Act and submitted that, generally, employees were not entitled to take annual leave until a full year's entitlement had accrued, that is, until the anniversary of each year of employment. Now, under s.87(2) of the Act, employees can take annual leave when and as it accrues. On this basis it was submitted that the imperative for a provision granting leave in advance is greatly reduced.[212]

[408] We are satisfied that the proposed clause is one which can be included in a modern award. We have earlier reproduced s.93(4), which deals with the taking of paid annual leave. The proposed clause is a term envisaged by that section. We also accept that the proposed clause can properly be described as a provision supplementary to the NES. In this respect, nothing in the evidence or submissions has persuaded us that the effect of the clause would be detrimental to an employee when compared with the NES, a consideration raised by s.55(4).

[409] The ACTU and individual unions challenged the contention that the proposed clause would be beneficial to employees and submitted that the motivation for the proposed clause was to enhance an employer's opportunity to pressure an employee to take leave for reasons beneficial to the employer. In particular, they submitted that employers will use the provision to force employees to take annual leave at a time which suits an employer rather than at a time which suits an employee. But these submissions amounted to little more than a series of assertions without any evidentiary foundation. No evidence was led by the ACTU or any of the individual unions to establish, or even suggest, that the existence of comparable clauses in some 74[213] modern awards had operated to the disadvantage of an employee. Nor was there any evidence employers had misused such clauses in the manner suggested.

[410] The ACTU also submitted that we should place little weight on the submission that employers had frequently been asked by their employees to take a period of annual leave in advance of an entitlement to such leave accruing. Despite the limitations of the Employer Survey, we accept that it does establish that such requests are commonplace.

[411] We are persuaded an award term which facilitates agreements to take leave in advance will be beneficial to employees. It will allow an employee to take paid annual leave, albeit with the agreement of their employer, at a time when they may not otherwise be able to. Further, there seems no good reason why the capacity to take leave in advance of accrual should be available to award/agreement free employees and not to employees covered by a modern award. The insertion of such a term into modern awards will align the entitlements of modern award covered employees with those of award/agreement free employees.

[412] We have redrafted the proposed Employer Group clause to provide a model term dealing with the provision of paid annual leave in advance of accruing an entitlement to such leave. The model term is set out below:

> **"1 Annual leave in advance**
>
> 1.1 An employer and employee may agree to the employee taking a period of paid annual leave in advance of the employee accruing an entitlement to such leave provided that the agreement meets the following requirements:
>
> (a) it is in writing and signed by the employee and employer;
> (b) it states the amount of leave to be taken in advance and the date on which the leave is to commence; and
> (c) it is retained as an employee record.
>
> 1.2 This subclause applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause 1.1. If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination."

[413] The main difference between the model term we have determined and the Employer Group's claim are the requirements regarding the content and form of any agreement to provide leave in advance (subclause 1.1(a)) and the employer's obligation to keep such agreements as an employee record (subclause 1.1(c)). These requirements are consistent with an employer's existing obligations under Regulation 3.36 of the *Fair Work Regulations 2009*.[214]

[414] We are also persuaded that the model term will further the modern awards objective of ensuring that modern awards, together with the NES, provide a fair and relevant minimum safety net. The provision will allow employees to take annual leave at a time when they may be faced with circumstances obliging them to take a period of leave. It will also allow them to take leave at a time which aligns with their personal preference to do so. As such it is likely that such a provision will encourage employees to take their annual leave. In these respects it can be said to be consistent with ss.134(1)(a), (c) and (d) of the Act. By aligning the annual leave entitlement of modern award covered employees with their award/agreement free counterparts in an industry, and expressly providing for the right of an employer to make a relevant deduction from termination pay, the model term is likely to make a modern award simpler and easier to understand. At the same time, it will not impact negatively on business costs nor an employer's regulatory burden. These considerations are consistent with ss.134(1)(f) and (g).

[415] The Employer Group's claim is only directed at 48 modern awards. We are satisfied that the variation of those modern awards to incorporate the model term is necessary to meet the modern awards objective. Further, for the reasons given earlier (at paragraphs [156]–[168]) greater consistency in the provisions governing the taking of annual leave will make the modern award safety net simpler and easier to understand. Accordingly, our provisional view is that it is necessary to vary *all* modern awards to insert the model term in order to achieve the modern awards objective. Any interested party who wishes to advance a contrary view will have an opportunity to do so, in response to the draft variation determinations arising from this decision.

4.5 Payment of annual leave entitlements on termination

[416] The ACTU sought to vary 118 modern awards in relation to the payment of annual leave entitlements on termination. The variations sought to insert a common term, as follows:

> "Payment on termination
>
> If, when the employment of an employee ends, the employee has a period of untaken annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave."[215]

[417] Depending on the circumstances in a particular modern award, the variation would ensure that the payment for annual leave on termination of employment included annual leave loading and other payments made to the employee if they had actually taken annual leave.

[418] It was contended that the variations proposed are necessary to remove inconsistency with the NES, and s.90(2) in particular. In essence, the ACTU contended that the current provisions in a number of modern awards are inconsistent with s.90(2) of the Act. Section 90 of the Act is as follows:

> **"90 Payment for annual leave**
>
> (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.
>
> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave."

[419] The ACTU submitted that the effect of the variations proposed is simply to re-state the obligation that arises under s.90(2) of the Act and that the proposed variations do not create a fresh obligation that does not currently arise under the Act.

[420] Ai Group and a number of other employer bodies opposed the ACTU's claim.

[421] For reasons which will become apparent, it is unnecessary to canvass the merit of the ACTU's claim or the arguments advanced in support and opposition.

[422] The merit of the ACTU's claim turns on the proper construction of s.90(2).[216] This issue was the subject of a recent judgment of the Federal Court (Buchanan J) in *Centennial*

Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No.2).[217] The central practical issue between the parties was whether payment for accrued annual leave on termination of employment under the relevant enterprise agreement must include payment of "annual leave loading" or alternatively, rostered overtime, shift and weekend penalty payments, in circumstances where such payments must be made for a period of annual leave actually taken during employment.

[423] In the proceedings before Buchanan J, the applicant argued that the entitlement to be paid for accrued leave on termination was referable to the obligation arising under s.90(1), that is the base rate of pay for ordinary hours which would have been worked during the period of annual leave. The respondent argued that s.90(2) requires payment of the whole amount which would actually have been payable during a period of leave, that is the amount as calculated under clause 19.6 of the agreement. His Honour dealt with the competing arguments at paragraphs 23–26 of his judgment and concluded in the following terms:

> "Owing to the context (award or enterprise agreement or private agreement) and the statutory language ("at least the full amount") it does not appear that s 93 or s 94 refer back to any minimum entitlement stated by s 90(1). What then of s 90(2), where the phrase at issue is:
>
> > the amount that would have been payable to the employee had the employee taken that period of leave.
>
> A construction to the effect that s 90(2) protects the whole entitlement to annual leave certainly cannot be excluded. This appears to me to be a case where reference to extraneous material would assist.
>
> The Explanatory Memorandum to the FW Bill stated:
>
> > **Clause 90 – Payment for annual leave**
> >
> > 370. Subclause 90(1) entitles an employee to be paid at their base rate of pay (as defined in clause 16) for the employee's ordinary hours of work for the period of their absence on leave.
> > (The meaning of ordinary hours of work and base rate of pay are outlined at the beginning of this Part.)
> >
> > 371. This is a minimum entitlement and would not prevent an employer and employee from agreeing to, or an award or enterprise agreement providing for, more generous payment terms.
> >
> > 372. Subclause 90(2) provides that, on termination of employment, an employee is entitled to receive a payment in respect of any untaken paid annual leave. **The payment will be equivalent to the amount that the employee *would have been paid* if the employee had taken the annual leave.** (emphasis added.)
>
> In my view, this lends support to the argument that s 90(2) (unlike s 90(1)) is not confined to a statement of a minimum obligation, but is a statement to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if employment comes to an end while paid annual leave remains untaken.
>
> I therefore reject the construction argued by the applicant. I am not prepared, in effect, to read down s 90(2) in the face of the expectation stated in the Explanatory Memorandum when that construction is plainly open on the terms of s 90(2) itself.

That does not mean necessarily that this aspect of the application should be dismissed, although that may be the result.

Section 55(1) prohibits an enterprise agreement from excluding any provision of the National Employment Standards. Section 55(2) allows an enterprise agreement to include some expressly permitted terms. Clause 19.5 is not such a term. Section 55(4), (5) and (6) permit ancillary and supplementary terms and terms which have the same effect as provisions of the National Employment Standards. Terms which give the same entitlement operate in parallel with the National Employment Standards, which operate as minimum standards (s 55(6)).

The provisions of cl 19.5 purport to state an entitlement which is less than the entitlement I have determined is granted by s 90(2), when read with cl 19.6. In my view, although there may be some argument to the contrary (i.e. that there is no necessary inconsistency), cl 19.5 does operate on its face ("an employee *is* paid") in a way which excludes the operation of s 90(2). Clause 19.5, therefore, has no effect (s 56)."[218]

[424] On 19 March 2015 a Notice of Appeal was filed in respect of His Honour's decision alleging, in part, that His Honour erred in finding that s.90(2) of the Act is not confined to a statement of minimum obligation and is a statement to the effect that an employee should not suffer a reduction in the value of unpaid annual leave if employment comes to an end while paid annual leave remains untaken. The appeal is yet to be determined.

[425] We also note that issues associated with the interaction of modern award terms and s.90 were canvassed in the report of the Fair Work Act Review Panel.[219] At section 5.27 of the report the Review Panel stated:

"5.2.7 Annual leave loading on termination

A principal concern raised by stakeholders about annual leave provisions under the NES is the payment of annual leave loading on termination, an issue that has received some public attention recently and was raised in many submissions and meetings with the Panel. The concern arises with the interpretation of s. 90(2), which provides:

> (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

The provision has been interpreted by the FWO, based on advice from Senior Counsel, as requiring the payment of an annual leave loading entitlement, even where award or agreement provisions specifically preclude payment of the loading. Stakeholders including the ACCI and the Ai Group propose amendment to the legislation to clarify that leave loading is only payable on termination if provided for in the relevant industrial instrument.

The provision of annual leave loading was originally to compensate employees for the notional loss of overtime earnings while on leave, although the benefit then spread to most sectors of the workforce, including areas not generally subject to overtime payments. A common feature of award leave loading provisions historically was that leave loading was not payable on termination. Advice tendered to the Senate's Education, Employment and Workplace Relations Committee by the FWO was that 112 modern awards include provision for annual leave loading, 29 of which either explicitly or implicitly provide that the loading is not payable on termination of employment, a further nine provide that it is payable and 74 are silent on the issue.

While it is not clear beyond doubt whether s. 90(2) was intended to preserve existing arrangements for the payment of leave loading on termination, the interpretation of the provision by the FWO, in contradistinction to the interpretation by many employer representatives, has meant that longstanding arrangements under awards and enterprise agreements have been disturbed.

For employers who traditionally have not had to pay annual leave loading on termination, they have incurred an additional cost in paying out the annual leave on termination. Leave loading typically amounts to 17.5 per cent on the base rate of pay, depending on the relevant modern award or enterprise agreement. It is impossible to quantify the cost of this change to the economy overall, as there is no way to gauge how much leave is owed to employees whose employment has been terminated, what their base rate of pay is, what the relevant leave loading is, how many employees are covered by awards or agreements that provide leave loading and whether all employers have been meeting the new requirement. It is, however, noted that the interpretation of the requirement would have the most negative impact on affected small businesses. The benefit to employees covered by instruments that previously had not attracted leave loading on separation is that they are entitled to be paid leave loading on top of leave owed to them when leaving their employment.

Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees.

Recommendation 6: The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect." (references omitted)

[426] The Fair Work Amendment Bill 2014 responded to a number of outstanding recommendations from the Fair Work Review Panel's June 2012 report, including the recommendation relating to the payment of annual leave entitlements on termination. The bill proposes to repeal section 90(2) and provide as follows, in substitution:

"(2) If, at the time (the ***termination time***) when the employment of an employee ends, the employee has a period of untaken paid annual leave:

(a) the employer must pay the employee a rate for each hour of the employee's untaken paid annual leave; and

(b) that rate must not be less than the rate that, immediately before the termination time, is the employee's base rate of pay (expressed as an hourly rate).

Note: See also section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement)."

[427] The amendment was described in the Second Reading Speech for the bill as a change to "restore the longstanding position, that employees are only entitled to annual leave loading when their employment ends if it is expressly provided for in their award or workplace agreement".[220] The bill is yet to be passed by the Senate.

[428] There is plainly a degree of uncertainty surrounding the statutory provision at the centre of this issue. The proper construction of s.90(2) is to be considered by a Full Court of

the Federal Court at some time (presumably) this year and the fate of the amendments proposed in the bill is unknown.

[429] In these circumstances we propose to adjourn our consideration of the ACTU's claim at this stage. Any interested party may seek to have the matter called back on for further programming and submissions.

4.6 Electronic funds transfer and paid annual leave

[430] The Employer Group sought to insert the following clause into 51 modern awards:

> **"Electronic Transfer Payment of Annual Leave**
>
> Despite anything else in this clause, an employee paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave."[221]

[431] The 51 awards sought to be varied (see Attachment I) currently contain a term which requires the employer to pay an employee for annual leave *prior to* the employee taking the leave. For example, clause 34.4(a) of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides:

> **"34.4 Payment for period of annual leave**
>
> **(a)** Instead of the **base rate of pay** as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period." (emphasis added)

[432] The effect of the proposed variation is that where employees are paid by EFT they may be paid their annual leave in accordance with their usual pay cycle, rather than being paid prior to commencing their period of annual leave. The Employer Group's claim did not seek to change the status quo (i.e. payment for leave being made in advance of taking the leave) in respect of employees who are paid by cash or cheque.

[433] The Employer Group contended that the proposed variations are necessary to ensure that the 51 modern awards which are the subject of the claim meet the modern awards objective by:

- ensuring that modern awards provide a relevant minimum safety net; and
- reducing the regulatory burden on employers.

[434] The union parties opposed the Employer Group's claim.

[435] The ACTU submitted that the Employer Group had not made out a case for changing a long standing award entitlement. While the ACTU conceded that cash payments are less common than they used to be, it advanced the following submissions in support of its contention that "there are sound reasons for ensuring that all employees receive payment for annual leave in advance":

"a. Payment in advance is a long standing award entitlement. The regulatory burden and administrative costs associated with the provisions are not new.

b. Annual leave accrues progressively throughout a year of service and at the time an employee intends to take his or her annual leave it is an entitlement they have already earned by providing service to their employer throughout the year. Annual leave is an entitlement vested in an employee and it is unfair to deny an employee access to the payment that is due to them.

c. There are significant leave-related costs that employees incur prior to and throughout the period of leave. Employees would be significantly disadvantaged if the long-standing award entitlement to payment in advance was removed.

d. The additional costs incurred by employers as a result of the requirement to pay employees in advance are likely to be minimal as businesses can comply with the provision by making payments in the ordinary pay cycle preceding the period of annual leave. Electronic payment processes have also substantially reduced general administrative costs.

e. The applicant's claim may produce inequitable outcomes for employees paid by EFT vis a vis employees that receive cash payment in advance of taking the leave. It is also possible that some employees will not receive cash payments to which they are entitled if the award provision is altered to create two different sets of obligations."[222]

[436] The existing award provisions which require annual leave to be paid prior to taking leave do not appear to have been the subject of any detailed arbitral consideration. It is likely that they simply reflect the position as it was in some pre-modernised awards and in state and territory legislation.[223] During the award modernisation process these provisions were then simply translated into the existing 51 modern awards which are the subject of the Employer Group's claim, without any consideration of the merits of the provisions.

[437] Modern award terms requiring the payment of annual leave at or prior to the commencement of leave relate back to a time when employees were predominantly paid by either cash or cheque, usually with an associated requirement to attend the workplace to receive payment. In such circumstances a requirement for the payment of annual leave at the commencement of the leave makes sense—it avoids the need for the employee to attend work (during their annual leave) simply for the purpose of collecting their pay. But the question is whether such a provision is still relevant in contemporary circumstances.

[438] Questions 18–21 of the Employer Survey are directed at this claim. Question 18 provided as follows:

"18. Do you pay any of your permanent employees by cash or cheque (or some other non-electronic transfer method) on a regular basis?"[224]

[439] Some 3166 employers (about 85 per cent of all responses) answered no to this question (528 answered yes and 19 were unsure). Hence a substantial majority of respondents pay their employees by EFT. It is also apparent from the responses to Question 20 that a significant number of survey respondents said that they were charged extra fees for processing payroll outside their usual pay period—as may be the case if leave was paid at the commencement of the leave as opposed to during the usual pay cycle.[225]

[440] Changes in consumer behaviour are also relevant. ACCI tendered the May 2014 'HP-RFI Australian Payments Research Report'.[226] The report indicates that only 35 per cent of consumer transactions are now undertaken in cash, with the remainder being by a variety of methods including credit cards, charge cards, BPAY, store gift cards and other transactions. By dollar value, credit card transactions represent a far greater proportion of consumer expenditure (27 per cent) than cash transactions (16 per cent).

[441] The data in the report show a trend away from cash-based transactions and towards either credit card usage or direct transfer and BPAY methods.

[442] The variety of payment methods available and the data as to usage suggest that employees are now more likely to rely on payments made in advance of taking leave (i.e. BPAY and direct transfers) or credit card usage during annual leave in order to meet leave related expenses. Cash payments during the course of leave are unlikely to be the main source of payment used for leave related expenses.

[443] We are persuaded that the Employer Group's claim should be granted.

[444] The variation of modern awards to incorporate the model term will ensure that each modern award provides a fair and relevant minimum safety net. In so deciding we have taken into account the s.134 considerations, insofar as they are relevant, and we are satisfied that such a variation is necessary to achieve the modern awards objective.

[445] The variation of the relevant modern awards will ensure that each of these modern awards provides a "fair and *relevant* minimum safety net". The variations will ensure that these modern awards are "relevant" to the needs of the modern workplace.

[446] We are also satisfied that the model term reflects flexible modern work practices and, accordingly, the insertion of such a term in modern awards will promote such practices, consistent with s.134(1)(d).

[447] Section 134(1)(f) is also relevant in that the variations will reduce employment costs and the regulatory burden on business.

[448] As to the arguments advanced by the ACTU, while we accept that the variations proposed will remove an existing employee entitlement, we are not persuaded that employees will be "significantly disadvantaged" by such an outcome. The suggestion seems to be that employees require payment in advance in order to meet "significant leave-related costs that employees incur prior to ... the period of leave".[227] Contrary to the ACTU's assertion we think it is more likely that employees either save money over time to pay for a holiday or use credit. The lump-sum payment immediately prior to the commencement of leave is unlikely to assist as employees will continue to incur their usual living expenses (e.g. rent, mortgage, other interest payments, utilities etc.) during their period of leave. Paid annual leave provides a respite from work, but does not generally provide any additional income (unless a leave loading is payable).

[449] The ACTU also submitted that removing the existing entitlement would disadvantage employees in two further respects:

- an employee who travels overseas or to a remote domestic location may have difficulty contacting their employer to resolve any problems with their pay; and

- an employer may become insolvent while the employee is on leave.

[450] Neither of these arguments is particularly persuasive. Given modern communications and the extent of internet connectivity the first issue is unlikely to be a common problem. As to the second point, insolvency can arise at any time and result in employee disadvantage, for example between pay cycles. There are statutory and administrative mechanisms for employees to recover the payments owed to them in such circumstances.

[451] For completeness, we note that during the course of the ACTU's oral submissions it argued that s.90 *required* annual leave to be paid in advance.[228] If this is the argument put, we do not think it correct.

[452] There is no legislative requirement that the payment for annual leave be made prior to taking the leave. Section 90(1) of the Act provides:

> **"90 Payment for annual leave**
>
> (1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period."

[453] By the use of the word *if* at its commencement s.90(1) identifies a condition or contingency upon the satisfaction or occurrence of which a specified requirement applies. The condition or contingency is that "an employee takes a period of paid annual leave" and the requirement is that "the employer must pay the employee's base rate of pay for the employee's ordinary hours of work in the period". It follows that the requirement to make payment in respect of paid annual leave arises when the employee actually takes the annual leave.[229]

[454] Section 323 of the Act deals with the method and frequency of payment of certain employment entitlements:

> **"323 Method and frequency of payment**
>
> (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
>
> (a) in full (except as provided by section 324); and
>
> (b) in money by one, or a combination, of the methods referred to in subsection (2); and
>
> (c) at least monthly.
>
> Note 1: This subsection is a civil remedy provision (see Part 4–1).
> Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:
> (a) incentive-based payments and bonuses;
> (b) loadings;

(c) monetary allowances;
(d) overtime or penalty rates;
(e) leave payments.

(2) The methods are as follows:

(a) cash;

(b) cheque, money order, postal order or similar order, payable to the employee;

(c) the use of an electronic funds transfer system to credit an account held by the employee;

(d) a method authorised under a modern award or an enterprise agreement.

(3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

Note: This subsection is a civil remedy provision (see Part 4–1)."

[455] In *Re Canavan Building Pty Ltd Enterprise Agreement 2013*[230] a Full Bench considered the interaction between s.90(1) and s.323:

"Section 90(1) therefore confirms that the statutory scheme is founded on there being a temporal connection between the taking of annual leave and the payment for such leave. Section 323(1)(c), which deals with the frequency of payment for amounts payable to employees in relation to the performance of work - including, as the accompanying statutory note indicates, leave payments - further confirms this, in that such payments must be made "*at least monthly*". In relation to annual leave, this provision only makes sense if read as a requirement for employers to pay for annual leave within the pay cycle that the leave is taken, such pay cycle being at least monthly in frequency. Paragraph 1283 of the Explanatory Memorandum for the *Fair Work Bill* supports s.323(1)(c) together with the statutory note being read in this way (underlining added):

'The legislative note after this subclause makes clear that the payment rule covers a wide range of payments, <u>where they fall due during the relevant payment period</u> - including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments.'"

[456] Finally, we are satisfied that a variation of the type proposed is an ancillary or incidental term within the meaning of s.55(4) of the Act. The statutory notes to s.55(4) provide examples of terms that are "ancillary", "incidental" or "supplementary". Note 1 is relevant in the present context:

"Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

...

(b) that specify when payment under section 90 for paid annual leave must be made."

[457] The variations proposed are of the type contemplated by s.55(4)(a) and the effect of such a variation is not detrimental to an employee, in any respect, when compared to the NES.

5. Purchased Leave

[458] As we have mentioned, Ai Group initially advanced a claim in respect of "purchased leave". It was proposed that a model term be inserted into all modern awards, in the following terms:

> **"X.4 Purchased leave**
>
> By agreement between an employer and an employee, a "purchased leave" arrangement may be implemented under which the employee chooses to forgo an amount payable to the employee in relation to the performance of work but receives a corresponding additional amount of annual leave."[231]

[459] The model term would allow, by agreement, additional annual leave each year in exchange for a corresponding reduction in salary. Ai Group later decided not to pursue its "purchased leave" proposal during these Common issue proceedings, but reserved its right to pursue the matter in one or more individual Group 3 or Group 4 awards.[232]

[460] It seems to us that a provision of the type proposed by Ai Group can be properly characterised as an ancillary or incidental term within the meaning of s.55(4)(a). It is a term of the type contemplated in Note 1 to s.55(4), which states:

> "Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
>
> (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; ..."

[461] The material before us suggests that there is a level of interest in providing arrangements which facilitate the "purchase" of additional annual leave. Skinner and Pocock explored this issue, to some extent. One of their survey questions asked respondents to choose between more paid leave and a pay rise: "Bearing in mind that two weeks is about 4% of a full year. If you had a choice between a 4% pay rise or an additional two weeks of paid leave each year, which one would you prefer to have?"[233] These questions replicated a 2002 survey.[234] Table 6 compares the 2002 and 2010 results.

Table 6: Full-time employees' preference for a pay rise or additional two weeks' paid leave by gender, age and parenting status—AWALI 2010 and TAI 2002

	AWALI 2010						TAI 2002	
	4% pay rise			2 weeks' paid leave			4%	2 weeks
	Men (%)	Women (%)	All (%)	Men (%)	Women (%)	All (%)	All (%)	All (%)
All	43.4	43.5	43.4	56.6	56.5	56.6	44.7	51.6
Age								
18–24 years	51.4	44.4	49.0	48.6	55.6	51.0	-	-
25–34 years	45.5	47.8	46.2	54.5	52.2	53.8	39.7	57.2
35–49 years	38.5	40.0	38.9	61.5	60.0	61.1	47.1	48.6
50–59 years	43.5	45.0	44.1	56.5	55.0	55.9	48.9	47.6
60+ years	57.1	44.0*	52.1	42.9	56.0*	47.9	-	-
Parenting responsibility								

Children < 18 years	40.1	42.3	40.7	59.9	57.7	59.3	47.8	47.9
No Children < 18 years	46.8	44.0	45.6	53.2	56.0	54.4	42.5	54.1
Household composition								
Single parent	**	42.1	41.5	**	57.9	58.5	-	-
Couple with children	38.3	39.6	38.7	61.7	60.4	61.3	-	-
Couple without children	48.7	46.0	47.5	51.3	54.0	52.5	-	-
Single without children	44.9	41.0	43.6	55.1	59.0	56.4	-	-
Household income								
$30 000–$59 999	53.1	42.3	48.8	46.9	57.7	51.2	53.7	43.7
$60 000+	41.5	43.7	42.2	58.5	56.3	57.8	41.1	56.2

Notes: *Estimate unreliable due to insufficient sample size; **Estimate not provided due to inadequate sample size.
TAI data only included those aged 25–59 years. TAI data not available for gendersocio-demographic categories. Insufficient sample size for household income<$30,000.

[462] In 2002, 51.6 per cent of respondents said that they would prefer a two week holiday to an equivalent pay rise of 4 per cent.[235] In 2010, the preference for paid leave over money was slightly more pronounced, with 56.6 per cent of respondents saying that they would choose more paid leave over a pay rise.

[463] In a logistic regression analysis with work hours, employment contract and occupation as predictors, whether or not workers had taken their full leave entitlement in the previous year was associated with different preferences for more time than more money. Skinner and Pocock provide the following commentary on these matters:

> "Whether or not workers had taken their full leave entitlement in the previous year was also associated with different preferences for more time or money. Those who had taken their full leave entitlement in 2009 were more likely to prefer an additional two weeks' leave (62.1%) compared to those who had not taken their full leave entitlement (53.6%) ($x^2(1)=10.61$, $p<.01$). Those who had not taken all their paid leave were more likely to prefer a pay rise (46.4%, compared to 37.9% of those who had taken all their leave). In a logistic regression controlling for occupation, those who had taken all their leave (Yes =1) were more likely to prefer additional leave (OR =1.41, CI 1.13–1.75, $p=.002$). Indeed, considering all the employment predictors (hours, contract, occupation), workers' leave-taking behaviour (took all leave or not) in the past year was the only statistically significant predictor of preferences for more time or money...
>
> ... It is not surprising that those who use up all their paid leave are more likely to want more, while those who do not are more likely to choose a pay rise over additional leave. However, it is interesting to note that when asked to choose, more than half (53.6%) of those who do not use all their leave would like more of it over more money; these represent a group of 'unholidayed holiday-preferers'. A seeming contradiction between deferring paid leave and yet preferring more might be explained by the fact that most workers (83.5%) can carry over their leave and take it later: the 'unholidayed holiday-preferers' appear to value accumulating a bank of leave over having more money in their hand." [236]

[464] An ACTU claim for "purchased leave" was considered in the *Family Provisions Case 2003–05*.[237] Ai Group advanced its own purchased leave claim and also agreed with some elements of the ACTU's claim, but disputed other aspects. Ultimately the AIRC rejected both claims, largely on the ground of complexity:

> "[218] It seems to us that this claim while having some acceptable aspects, also has some negatives. The ACTU has not made out its case for a right to an additional six weeks of unpaid

leave. Even though the purpose of the leave is to be confined, it would be an unwarranted imposition on employers. Furthermore the process to be followed in the event of disagreement as to the timing of the leave is unnecessarily cumbersome and time-consuming. In addition, the purchase element of the claim is too complex. Like the AiG proposal we deal with later, the provision is unnecessarily detailed and has the potential to create confusion over a relatively simple matter. Averaging over a longer period of pay foregone during a period of unpaid leave could assist employees with their budgeting and can be done in ways which are unlikely to disadvantage employers greatly if at all. In this area a significant amount could be achieved by agreement without the need for award variation."[238]

[465] The AIRC later observed that "a simpler approach is needed"[239] and urged the parties to enter into further discussions with a view to developing such an approach. It appears that subsequent discussions were unsuccessful and the issue was then overtaken by legislative events.

[466] It seems to us that a facilitative provision dealing with purchased leave is worthy of further consideration. It appears that the Act may permit such a provision to be inserted in modern awards and, on the face of it, such a provision may meet the objective of "assisting employees to balance their work and family responsibilities by providing for flexible working arrangements" (s.3(d)). Depending on the form of such a provision, consideration may need to be given as to whether a purchased leave arrangement constitutes a "permitted deduction" within the meaning of s.324. We propose to publish a discussion paper on the issue of purchased leave shortly.

6. Next Steps

[467] The outcomes of this decision will be applied in accordance with the following steps.

[468] Where a claim has been granted in part or in full, the Commission will prepare draft determinations varying each of the affected awards for comment. As outlined in the statement issued on 7 April 2014:

"[4] It is proposed that once the Annual Leave Common Issue proceedings are completed, the Full Bench will issue an in principle decision, along with any draft determinations for all modern awards. Interested parties will then have the opportunity to comment upon the draft determinations as they relate to each individual modern award, and make submissions related to tailoring any provisions to specific awards ...

[5] ... [T]his phase will be used for tailoring clauses to suit particular awards and should not be viewed as an opportunity to re-agitate issues already determined by the Annual Leave Full Bench." [240]

6.1 Excessive annual leave

[469] As outlined in paragraph [219], the model term set out in paragraph [189] only reflects our provisional view. Interested parties will be provided with an opportunity to make further submissions directed at both the model term and the proposition that *all* modern awards be varied to insert the model term. Directions will be issued in relation to the filing of further submissions and a final oral hearing. Submissions filed in accordance with those directions

should also address the modern awards objective. We will only reach a concluded view in respect of these issues after considering all of the further submissions.

6.2 Cashing out of annual leave

[470] A standard clause will be inserted into all modern awards in the form outlined at paragraph [255]. Draft determinations will be prepared and published on the Commission's website for comment.

6.3 Close-down

[471] This claim was rejected. Parties who wish to pursue a claim to insert or vary close-down provisions should do so on an award-by-award basis through the Award stage of the Review.

6.4 Granting leave in advance

[472] A standard clause will be inserted into the 48 modern awards which were the subject of this claim, as detailed at Attachment H, in the form set out at paragraph [384]. Draft determinations will be prepared and published on the Commission's website for comment. Further, for the reasons given at paragraph [415], draft determinations will be prepared and published on the Commission's website in respect of the remaining 74 modern awards which already contain similar provisions. Interested parties will have an opportunity to comment on the draft determination.

6.5 Payment of annual leave entitlements on termination

[473] For the reasons given at paragraphs [428]-[429] we have adjourned our consideration of this claim. Any interested party may seek to have the matter called back on for further programming and submissions.

6.6 Electronic funds transfer and paid annual leave

[474] A standard clause will be inserted into each modern award listed in Attachment I in the form outlined at paragraph [430]. Draft determinations will be prepared and published on the Commission's website for comment.

6.7 Purchased leave

[475] Interested parties are asked to consider whether a provision for purchased leave should be included in modern awards. Submissions should be made in accordance with the directions to be issued and focus on what a purchased leave provision would contain and whether such a provision should be inserted into all modern awards.

6.8 Enterprise awards

[476] Since these applications were made, a number of modern awards applying to only one enterprise have been made. Parties to those enterprise awards may make submissions in

accordance with the directions issued to outline their views as to how this decision should apply to each modern enterprise award.

PRESIDENT

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Appearances:

T Clarke, J Dolan and *R Carter* for the Australian Council of Trade Unions.

S Maxwell and *G Nabor* for the Construction, Forestry, Mining and Energy Union.

S Smith, B Ferguson and R Bhatt for The Australian Industry Group.

L Izzo, D Grozier and *A Matheson* for the Australian Chamber of Commerce and Industry.

L Izzo for the New South Wales Business Chamber and Australian Business Industrial.

L Izzo and *R Calver* for Master Builders Australia Limited.

S Crawford for The Australian Workers' Union.

J Sweetman and *T Evans* for the Australian Hotels Association.

W Chesterman for the Victorian Automobile Chamber of Commerce and Motor Trades Associations.

S Elliffe for the National Retail Association.

K McCosh for the National Electrical Contractors Association.

J Moriarty and M Nguyen for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

L Weber for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)—Vehicle Division.

D De Martino for the Shop, Distributive and Allied Employees Association.

V Wiles for the Textile, Clothing and Footwear Union of Australia.

L Svendsen for the Health Services Union of Australia.

J Nucifora and *J Knight* for the Australian Municipal, Administrative, Clerical and Services Union.

M Adler for the Housing Industry Association.

G Parkes for the Accommodation Association of Australia, Restaurant & Catering Australia and the Motor Inn, Motel and Accommodation Association.

T Angelopoulos for the Horticulture Taskforce.

B Hodgson for the Fair Work Ombudsman.

P Eberhard for The Master Plumbers' and Mechanical Services Association of Australia.

G Johnston for the Australian Meat Industry Council.

C McElroy for Local Government New South Wales and the State and Territory Local Government Associations.

S Forster for the Australian Federation of Employers and Industries.

J Shingles and *E Larkin* for the Australian Childcare Alliance and Australian Childcare Centres Association.

M Burns and *W McNally* for The Maritime Union of Australia.

J O'Dwyer for Master Electricians Australia.

G Liggins for the Aged and Community Services Association.

M Roddam and *A Breen* for the Minister for Employment on behalf of the Commonwealth.

K Mark for the Pharmacy Guild of Australia.

S McKinnon and *R Martin* for the National Farmers' Federation.

I McDonald for the Australian Public Transport Industrial Association.

M Diamond for the Building Services Contractors Association of Australia.

D Harris for the South Australian Chamber of Commerce and Industry trading as Business SA.

Hearing details:

2014.

Sydney, Melbourne, Adelaide, Brisbane and Canberra (video hearing
August 20, 21.
October 16.
December 1.

[1] This decision also deals with unpaid annual leave in the context of close-down.

[2] [2014] FWCFB 916.

[3] [2014] FWC 1790 at paras 5–6.

[4] [2013] FWC 10195, [2014] FWC 1790.

[5] [2014] FWC 2279 at para 2.

[6] Ai Group submission, 20 March 2014 at para 2.19.

[7] ACCI correspondence, 21 May 2014.

[8] [2014] FWCFB 1788.

[9] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J.

[10] *Friends of Hichinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836.

[11] [2014] FWCFB 1788 at para 60.

[12] [2015] FWCFB 620 at para 8.

[13] *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at para 24.

[14] *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at paras 35–36.

[15] Fair Work Commission Background paper—Annual leave common issue, 30 May 2014.

[16] [2008] AIRCFB 1000 at para 99.

[17] [2013] FWCFB 6266.

[18] [2012] FWAFB 5600.

[19] [2012] FWAFB 5600 at para 99.

[20] Also see *Modern Awards Review 2012 - Award Flexibility* [2013] FWCFB 2170 at para 10–12.

[21] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment A.

[22] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, paras 14-15.

[23] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment C.

[24] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, para 19.

[25] ACCI *Small Business Survey*, August 2014.

[26] ACTU submissions in reply, 1 August 2014, paras 42–55; AMWU outline of submission in reply, 1 August 2014 at para 3.

[27] Transcript at para 1181.

[28] Transcript at para 1041; The ABS defines a stratified random sample as a sample that first identifies relevant subgroups from within the population and random samples are selected from within each strata. ABS *Statistical Language - Census and Sample,* July 2013, http://www.abs.gov.au/websitedbs/a3121120.nsf/home/statistical+language+-+census+and+sample, accessed 12 September 2014.

[29] Transcript at para 1041.

[30] ACCI's correspondence and outline of submissions, 20 June 2014 at para 5.3.

[31] Transcript at paras 1048–1059.

[32] Master Builders Australia submission and witness statement, 20 June 2014, Witness statement of Geoffrey Charles Thomas at p. 3.

[33] See for example, Transcript at paras 1129–1131, 1152 and 1223–1225.

[34] See for example, Transcript at paras 1176 and 1281.

[35] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014.

[36] See Exhibits A, D, E, G and H to ACCI correspondence and outline of submissions, 20 June 2014.

[37] Denniss R (2003) *Annual Leave in Australia: An Analysis of Entitlements Usage and Preferences.* The Australia Institute Discussion Paper No. 56 Canberra: The Australia Institute.

[38] Cameron P and Denniss R (2013), 'Hard to get a break? Hours, leave and barriers to re-entering the Australian workforce', The Australia Institute, Institute Paper No. 13, November 2013, pp. 26–27.

[39] ACCI outline of submissions, 20 June 2014 at para 7.14.

[40] ACCI outline of submissions, 20 June 2014 at para 7.22.

[41] ACCI outline of submissions, 20 June 2014 at para 7.24.

[42] ACCI outline of submissions, 20 June 2014 at paras 7.26–7.28.

[43] ACCI outline of submissions, 20 June 2014 at paras 7.29–7.30.

[44] Ai Group submission and witness statements, 20 June 2014, p. 12 at para 34.

[45] Ai Group submission and witness statements, 20 June 2014, p. 18 at para 47.

[46] ACTU reply submission, 1 August 2014, pp. 25–26 at paras 109 and 111.

[47] ACTU reply submission, 1 August 2014, p. 23 at para 93.

[48] ACTU reply submission, 1 August 2014, p. 27 at para 120.

[49] ACTU reply submission, 1 August 2014, p. 26 at para 113.

[50] Transcript at paras 1877–1889.

[51] ACTU reply submission, 1 August 2014, p. 20 at paras 81–82 and pp. 29–30 at paras 132–133.

[52] ACTU reply submission, 1 August 2014, pp. 28–29 at paras 125–128.

[53] Transcript at paras 1877–1881.

[54] ACTU reply submission, 1 August 2014, p. 29 at paras 129–131.

[55] Transcript at para 1886.

[56] See generally ACCI further submission, 28 October 2014, Affidavit of Julian Fredrick Arndt: 218 such applications were made in the period 30 August 1998 to 4 November 2010.

[57] Also see *Fair Work Act 1994* (SA): Schedule 4; *Industrial Relations Act 1984* (Tas): s.47AE(5)–(7); *Annual Leave Act 1973* (ACT): s.10; *Annual Leave Act* (NT): s.6(9).

[58] When the Work Choices Act was introduced the Commonwealth Government suggested that the resulting system would cover 85 per cent of all Australian employees: see Work Choices: A New Workplace Relations System, Australian Government, Canberra 2005 p.11, citing unpublished ABS data. Attempts since the Work Choices Act to estimate the respective coverage of federal and state laws have produced conflicting results. Research conducted for the Queensland Government suggested that the new federal system would cover 76 per cent of employees: Queensland Government, 'The Coverage and Characteristics of the State Jurisdiction under a New Industrial Relations System', Submission to Queensland Industrial Relations Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers, Appendix 1, Queensland Government, Brisbane, 2006. A subsequent analysis published by the ABS found that the federal system covered at least 79 per cent of all Australian employees, compared with 12 per cent in the state systems and 9 per cent being uncertain: ABS (2008) 'Jurisdictional Coverage of Pay-Setting Arrangements', Australian Labour Market Statistics 2008, ABS Cat 6105.0. See generally Peetz D 'How Wide is the Impact of Work Choices?' in Abbott K et al (eds) Work Choices: Evolution or Revolution, Heidelberg Press, pp.23–41.

[59] See Stewart A 'Testing the Boundaries: Towards a National System of Labour Regulation' in Forsyth A and Stewart A (eds) 'Fairwork: The New Workplace Laws and the Work Choices Legacy', Federation Press, 2009, pp.19–39, p.24.

[60] Explanatory Memorandum to the *Fair Work Bill 2008* at para 383.

[61] [2008] AIRCFB 1000.

[62] *Re General Retail Industry Award 2010* [2010] FWAFB 305 at para 1.

[63] *Re General Retail Industry Award 2010* [2010] FWAFB 305 at para 30.

[64] *Re General Retail Industry Award 2010* [2010] FWAFB 305 at para 30.

[65] *Re Fast Food Industry Award 2010* [2010] FWAFB 379 at para 1.

[66] *Re Fast Food Industry Award 2010* [2010] FWAFB 379 at para 28.

[67] *Re Fast Food Industry Award 2010* [2010] FWAFB 379 at para 28.

[68] Fair Work Commission Background paper—Annual leave common issue, 30 May 2014, Attachment C at p.33. Note the figure of 82 modern awards in this paper includes 3 awards that provide that an employer can direct an employee to take leave but this is not restricted to excessive leave.

[69] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55, p.82. at p. 685.

[70] Denniss R (2003) *Annual Leave in Australia: An Analysis of Entitlements Usage and Preferences.* The Australia Institute Discussion Paper No. 56 Canberra: The Australia Institute.

[71] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55, p.82. at p.686.

[72] Wooden M and Warren D (2008) Paid annual leave and working hours: Evidence from the HILDA survey, *Journal of Industrial Relations* 50(4); Cameron P and Denniss R (2013), 'Hard to get a break? Hours, leave and barriers to re-entering the Australian workforce', The Australia Institute, Institute Paper No. 13, November 2013, pp. 26–27; and Tourism Australia (2012).

[73] Wooden M and Warren D (2008) Paid annual leave and working hours: Evidence from the HILDA survey, *Journal of Industrial Relations* 50(4) at p. 666.

[74] Wooden M and Warren D (2008) Paid annual leave and working hours: Evidence from the HILDA survey, *Journal of Industrial Relations* 50(4) at p. 666.

[75] Wooden M and Warren D (2008) Paid annual leave and working hours: Evidence from the HILDA survey, *Journal of Industrial Relations* 50(4) at p. 666.

[76] Cameron P and Denniss R (2013), 'Hard to get a break? Hours, leave and barriers to re-entering the Australian workforce', The Australia Institute, Institute Paper No. 13, November 2013, pp. 26–27.

[77] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment E at p. 25.

[78] Joudrey A and Wallace J (2009) Leisure as a coping resource: A test of the job demand-control-support model. Human Relations 62(2): 195–217; Walsh R (2011) Lifestyle and mental health. American Psychologist, advance online publication, 17 January at p. 682.

[79] Cameron P and Denniss R (2013), 'Hard to get a break? Hours, leave and barriers to re-entering the Australian workforce', The Australia Institute, Institute Paper No. 13, November 2013 at p. 27.

[80] Cairncross G and Waller I (2004) 'Not taking Annual Leave: What Could it Cost Australia', *Journal of Economic and Social Policy*, Vol: 9, Issue 1, Article 3.

[81] Safe Work Australia 'Guide for Managing the Risk of Fatigue at Work', November 2013 at p. 2.

[82] Safe Work Australia 'Guide for Managing the Risk of Fatigue at Work', November 2013 at p. 9.

[83] ACCI, Expert accounting report of Mr Eugene Kalenjuk, 2 July 2014 at p. 4.

[84] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment E at p. 27.

[85] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p. 682.

[86] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p.694.

[87] ACCI outline of submissions, 20 June 2014 at para 7.14.

[88] [1915] AR 235 at [237]–[238].

[89] [1915] AR 235 at [237]–[238].

[90] (1936) 36 CAR 738.

[91] (1936) 36 CAR 738 at [747].

[92] Eden D (2001), 'Vacations and other respites: Studying stress on and off the job', in Robertson I (eds) *International Review of Industrial and Organisational Psychology,* Vol 16, New York, John Wiley & Sons pp 121-146, cited in Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p.682

[93] Cited in Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55, p.82. at pp. 682–683

[94] Westman & Etzion (2001) at pp. 595, 602–603, cited in Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55, at p.682

[95] Etzion, D. 2003, '*Annual vacation: duration of relief from job stressors and burnout.*' Anxiety, Stress and Coping, 16(2), at pp. 223–224.

[96] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at pp. 688–689

[97] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p.689

[98] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p. 689.

[99] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at p. 695.

[100] Ai Group correspondence, 21 May 2014, Attachment A at p. 1; varied by Ai Group correspondence, 15 October 2014, Attachment A at p. 1.

[101] See also Attachment F; figure amended from 83 in the 30 May 2014 Background Paper.

[102] Sometimes described as '18 months of annual leave accrued': *Cemetery Industry Award 2010* at clause 24.3.

[103] *Nurses Award 2010*, cl.31.2; *Security Services Industry Award 2010*, cl.24.3; *Asphalt Industry Award 2010*, cl.25.5; *Broadcasting and Recorded Entertainment Award 2010,* cl.23.6; *Cement and Lime Award 2010*, cl. 24.5; *Gardening and Landscaping Services Award 2010*, cl. 24.4; *Gas Industry Award 2010*, cl.25.4; *Horse and Greyhound Training Award 2010,* cl. 23.4; *Premixed Concrete Award 2010*, cl. 24.5; *Quarrying Award 2010*, cl.29.5; *Racing Clubs Events Award 2010,* cl.30.4; *Racing Industry Ground Maintenance Award 2010*, cl.24.3; *Silviculture Award 2010*, cl.29.4; *Sporting Organisations Award 2010*, cl.25.4; *Textile, Clothing, Footwear and Associated Industries Award 2010*, cl.41.4; *Black Coal Mining Industry Award 2010,* cl.25.4; *Air Pilots Award 2010*, cl.27.4; *Architects Award 2010,* cl.20.2; *Ambulance and Patient Transport Industry Award 2010*, cl.30.8; *Mobile Crane Hiring Award 2010*, cl.25.2; *Ports, Harbours and Enclosed Water Vessels Award 2010*, cl.22.4; *Aquaculture Industry Award 2010*, cl. 23.4.

[104] The *Nurses Award 2010* (cl.31.2) provides that 'Annual leave will be given and taken within six months of the employee becoming entitled to annual leave of more than five weeks'; Also see the *Black Coal Mining Industry Award 2010*, cl.25.4 ('unless otherwise agreed, annual leave will be taken within 12 months of the date the employee received the annual leave entitlement'); *Air Pilots Award 2010*, cl.27.4 ('Normally, annual leave will be granted and will be taken within 12 months from the date on which it falls due or alternatively 15 months from the date of commencement of the preceding period of leave'); *Architects Award 2010*, cl.20.2 ('The employee must be allowed to take annual leave at a time agreed with the employer, within four months after it is due'); *Ambulance and Patient Transport Industry Award 2010*, cl.30.8 ('Annual leave will be taken within six months of the employee becoming entitled to take it unless alternative arrangements are agreed between the employer and employee'); *Mobile Crane Hiring Award 2010*, cl. 25.2 ('Leave will be given and will be taken within six months from the date when the right to annual leave occurred and after not less than four weeks notice to the employees'); *Ports, Harbours and Enclosed Water Vessels Award 2010*, cl.22.4 ('Annual leave must be taken within six months of the entitlement accruing').

[105] *Higher Education Industry—General Staff—Award 2010,* cl.30.1(a) and *Higher Education Industry—Academic Staff—Award 2010*, cl.23.1 ('at least two months prior to the date on which the employee is to take the leave'); Also note that the *Ports, Harbours and Enclosed Water Vessels Award 2010*, cl. 22.4 provides that 'An employer may require an employee to take a period of annual leave provided the employee is given at least 14 days' notice'.

[106] Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made.

[107] Ai Group submission and witness statements, 20 June 2014 at paras 17–18 and 20–21.

[108] Ai Group submission and witness statements, 20 June 2014 at para 33.

[109] [2015] FWCFB 3124 at para 25.

[110] [2015] FWCFB 3124 at paras 25–28.

[111] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014.

[112] *Re Just Cuts (Canberra and Queanbeyan) Agreement 2000-2003,* Print T3829, 30 November 2000 at para 16.

[113] *Review of Wage Fixing Principles – October 1993* (1993) 50 IR 285 at [320]; *Enterprise Flexibility Test Case* (1995) 59 IR 430 at [457].

[114] [2008] AIRCFB 1000 at paras 99–100.

[115] [2009] AIRCFB 50 at paras 3–4 and 8–9.

[116] [2009] AIRCFB 345 at para 4.

[117] For example see *Re Journalists Published Media Award 2010* (2009) 187 IR 192 at [116]; *Re Commercial Sales Award 2010* [2009] AIRCFB 826 at [276]; *Re Meat Industry Award 2010* [2009] AIRCFB 942 at [11].

[118] *Seafood Processing Award 2010* at clause 27.8.

[119] Seafood Processors and Exporters Council and others Parties' Draft awards—Seafood Processing Industry Award, 6 April 2009.

[120] [2010] FWAFB 9985.

[121] [2010] FWAFB 9985.

[122] *CFMEU v Fair Work Australia and Newlands Coal Pty Ltd* [2011] FCA 719 at [83].

[123] Enterprise bargaining commenced in October 1991 through the 'Prices and Incomes Accord Mark VII' however note the principle of enterprise bargaining was federally legislated in 1993 via the *Industrial Relations Reform Act 1993* (Cth).

[124] ACCI submission, 27 November 2014; ACTU submission, 27 November 2014; TCFUA submission, 27 November 2014; Ai Group submission, 27 November 2014; BHP Billiton correspondence and submission, 27 November 2014; Housing Industry Association correspondence, 27 November 2014.

[125] AE406974.

[126] For example clause 33.4 the *Downer EDI Engineering Electrical Pty Ltd (Tasmania) Greenfield Agreement 2013* [AE406442].

[127] For example clause 9.15.6 of the *Diver Consolidated Industries (DCI) Enterprise Agreement 2013* [AE407170] which provides for cashing out of annual leave only once an employee has been with the employer for 10 years or more.

[128] For example clause 20.3 of *The Westin Melbourne Enterprise Agreement 2012* [AE407158].

[129] [2013] FWCFB 1635 at para 229.

[130] Transcript at paras 1506 and 1522.

[131] Transcript at paras 1527 and 1532.

[132] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment E at p. 15.

[133] Ai Group submission and witness statements, 20 June 2014, Witness statement of Ms Kristina Flynn at para 21.

[134] ACCI outline of submissions, 20 June 2014, Witness statement of Ms Fiona Corbett at para 7.

[135] [2014] FWCFB 3500 at paras 392 and 400.

[136] ACTU submission, 27 November 2014 at para 35.

[137] [2014] FWCFB 3500 at para 72.

[138] ACCI outline of submissions, 20 June 2014 at paras 6.24–6.26; Ai Group submission and witness statements, 20 June 2014 at para 126.

[139] *Pepsi Seven-Up Bottlers Perth Pty Ltd v FCT* (1995) 62 FCR 289 at [298]–[299] per Hill J.

[140] *Fair Work Act 2009,* s.134(f).

[141] [2012] FWAFB 7858 at paras 38–45.

[142] [2013] FWCFB 4000 at para 140.

[143] ACCI outline of submissions, 20 June 2014 at para 6.9.

[144] Mitchell R and Fetter J (2003) 'The individualisation of employment relationships and the adoption of high performance work practices: Final Report', University of Melbourne at p. 9.

[145] Mitchell R and Fetter J (2003) 'The individualisation of employment relationships and the adoption of high performance work practices: Final Report', University of Melbourne at p. 9.

[146] Mitchell R and Fetter J (2003) 'The individualisation of employment relationships and the adoption of high performance work practices: Final Report', University of Melbourne at pp. 6–8.

[147] ABS, *Employee Earnings and Hours, Australia, May 2014*, unpublished survey instrument, glossary.

[148] ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No, 6306.0, glossary.

[149] ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No, 6306.0, glossary.

[150] ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No, 6306.0, glossary.

[151] ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No, 6306.0, glossary. Data on owner managers of incorporated enterprises were not available and hence excluded from the analysis such that proportions calculated reflect the total of collective agreements, individual arrangements and 'award only' arrangements.

[152] It is noted that s.23 of the FW Act defines a small business (national system employer) as an employer that employs fewer than 15 employees.

[153] The chart in the background paper set out the 2012 data (which was the most recent data at the time the background paper was released). The May 2014 data shows the same pattern as the 2012 data.

[154] BHP Billiton's submission, 27 November 2014 at paras 8–9.

[155] ACTU submission in reply, 1 August 2014, p. 11 at paras 37–39.

[156] ACTU submission in reply, 1 August 2014 at paras 270 and 272.

[157] AMWU outline of submissions in reply, 1 August 2014, p. 6 at para. 4.3.

[158] AMWU outline of submissions in reply, 1 August 2014, p. 7 at para 4.3.5.

[159] Transcript at para 1196.

[160] Transcript at para 1236.

[161] ACTU submission in reply, 1 August 2014, pp. 58 and 60 at paras 288, 297 and 298.

[162] ACTU submission in reply, 1 August 2014, p. 61 at para 299.

[163] [2008] AIRCFB 1000 at paras 99–100.

[164] [2009] AIRCFB 942.

[165] Transcript at para 1190; ACTU submission in reply, 1 August 2014. p. 56 at para 269.

[166] [2009] AIRCFB 942 at para 11.

[167] *Construction, Forestry, Mining and Energy Union v Fair Work Australia and Newlands Coal Pty Ltd* [2011] FCA 719 at [83].

[168] Transcript at paras 1418–1420.

[169] ACTU submission in reply, 1 August 2014, p. 5 at para 15.

[170] ACTU submission in reply, 1 August 2014, pp. 54–55 at para 261.

[171] Transcript at para 860.

[172] ACCI correspondence, 21 May 2014.

[173] Transcript at para 2539.

[174] The Ai Group claim notes that there are 44 modern awards that do not presently contain any provision allowing employers to implement an annual close down. It seems to us that there are 41 modern awards that do not presently contain the provision. See Attachment G for explanation of discrepancies.

[175] Transcript at paras 2139–2140.

[176] *Re Metal Industry Award 1971* (1977) 191 CAR 598.

[177] [2008] AIRCFB 1000 at para 97.

[178] [2008] AIRCFB 1000 at para 97.

[179] [2009] AIRCFB 945 at para 27.

[180] *Pest Control Award* [AN150106] at clause 15(k).

[181] Fair Work Commission Background paper—Annual leave common issue, 30 May 2014, Attachment C at p.33.

[182] [2014] FWCFB 255. See Ai Group submission and witness statements, 20 June 2014, p. 50 at para 50.

[183] Ai Group submission 20 March 2014, p. 4 at para 2.10; Ai Group submission and witness statements, 20 June 2014, p. 20 at para 51.

[184] Ai Group submission and witness statements, 20 June 2014, pp. 24–26 at paras 71–74.

[185] Ai Group submission and witness statements, 20 June 2014, p. 20 at para 52.

[186] Ai Group submission and witness statements, 20 June 2014, p. 20 at para 53.

[187] Ai Group submission and witness statements, 20 June 2014, p. 21–23 at paras 58, 61 and 66–70.

[188] Ai Group submission and witness statements, 20 June 2014, p. 21 at para 60.

[189] See generally Ai Group submission 20 June 2014 at paragraph 76.

[190] ACCI outline of submissions, 20 June 2014 at paras 8.5–8.7.

[191] ACCI outline of submissions, 20 June 2014 at paras 8.8–8.11.

[192] ACCI outline of submissions, 20 June 2014 at paras 8.12–8.17.

[193] ACCI outline of submissions, 20 June 2014 at paras 8.18–8.20.

[194] [2008] AIRCFB 1000 at para 97.

[195] For an example of a majority clause, see Print M5600 at pp. 31–34.

[196] Ai Group correspondence, 21 May 2014, p. 11 at Schedule 6.

[197]Ai Group further submission, 19 September 2014, p. 4 at para 6; ACCI correspondence, 19 September 2014 at p. 2.

[198] The TCFUA addressed this variation in some detail and the AMWU and CFMEU did so in brief submissions.

[199] [2008] AIRCFB 717 at para 30; [2008] AIRCFB 1000 at para 95.

[200] [2008] AIRCFB 1000 at para 95.

[201] Fair Work Commission Background paper—Annual leave common issue, 30 May 2014, Attachment C. (Note the Background paper identified two additional awards as containing limited provision allowing for taking annual leave in advance of accrual - see Attachment H).

[202] Joint document filed by Ai Group, ACCI and ACTU, Legislative provisions relating to annual leave, 14 November 2014 (Attachment I); ACCI outline of submissions, 20 June 2014, p. 20 at para 9.4 refers to sections from this legislation.

[203] ACCI outline of submissions, 20 June 2014, Annexure F; Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh, Attachments A–G.

[204] Of the 2249 employers who answered Question 16, 951 (42 per cent) said that they agreed to such requests on 51 per cent or more occasions.

[205] Ai Group submission and witness statements, 20 June 2014, p. 28 at para 81.

[206] Ai Group submission and witness statements, 20 June 2014, p. 28 at para 82.

[207] ACCI outline of submissions, 20 June 2014, p.20 at paras 9.5, 9.9 and 9.10.

[208] Transcript at paragraphs 2176-2177.

[209] Ai Group submission and witness statements, 20 June 2014, p. 28 at paras 81–84; ACCI outline of submissions, 20 June 2014, p. 21–22 at paras 9.12–9.19.

[210] ACTU reply submissions, 1 August 2014, p. 46 at para 216.

[211] TCFUA submission, 4 August 2014, p. 21 at para 7.10.

[212] ACTU reply submission, 1 August 2014, p. 49 at para 231.

[213] The Commission's background paper of 30 May 2014 noted this as 76.

[214] Transcript at paras 2185–2186.

[215] ACTU correspondence, 21 May 2014; ACTU submission, 20 June 2014.

[216] A point acknowledged by the ACTU, Transcript at paragraphs 86 and 281-282.

[217] [2015] FCA 136.

[218] [2015] FCA 136 at [31]-[38].

[219] 'Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation' (2012) at pp. 99–100

[220] Commonwealth, Parliamentary Debates, House of Representatives, *Fair Work Amendment Bill 2014*—Second Reading Speech (the Hon. Christopher Pyne), 27 February 2014, p. 1086.

[221] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014.

[222] ACTU reply submission, 1 August 2014, pp. 69–70 at para 345.

[223] See for example s.3(6)(b) of the *Annual Holidays Act 1944* (NSW); s.8 of the *Annual Leave Act 1973* (ACT); s.9 of the *Annual Leave Act* (NT); s.13 of the *Industrial Relations Act 1999* (Qld); s.235 of the *Workplace Relations Act 1996* (Cth); clause 7.1.3 of the *Metal, Engineering and Associated Industries Award 1998;* clause 37.12 of the *Timber and Allied Industries Award 1999*; clause 7.1.2(a) of the *Graphic Arts—General—Award 2000;* clause 27(k)(i) of the *Vehicle Industry—Repair, Services and Retail—Award 2002.*

[224] Ai Group submission and witness statements, 20 June 2014, Witness statement of Mr Ben Waugh at Attachment A.

[225] Question 20 asked: 'Are you charged extra fees for processing payroll outside the usual pay period?' 563 employees answered 'yes', 1940 answered 'no' and 662 were 'unsure'; Ai Group submission, 20 June 2014, Witness statement of Mr Ben Waugh, Attachment E.

[226] ACCI outline of submissions, 20 June 2014 at Exhibit F.

[227] ACTU reply submission, 1 August 2014, p. 69 at para 345.

[228] Transcript at paras 1898–1922.

[229] [2014] FWCFB 3202 at para 43.

[230] [2014] FWCFB 3202 at para 44.

[231] Ai Group submission, 20 March 2014.

[232] Ai Group correspondence, 21 May 2014.

[233] Skinner N and Pocock B (2013), 'Paid annual leave in Australia: Who gets it, who takes it and implications for work-life interference', *Journal of Industrial Relations* 55(5), pp.681–698 and p. 685.

[234] See Denniss R (2003) *Annual Leave in Australia: An Analysis of Entitlements Usage and Preferences.* The Australia Institute Discussion Paper No. 56 Canberra: The Australia Institute.

[235] Denniss R (2003) *Annual Leave in Australia: An Analysis of Entitlements Usage and Preferences.* The Australia Institute Discussion Paper No. 56 Canberra: The Australia Institute.

[236] Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance,* Journal of Industrial Relations, 21 August 2013, Vol. 55 at pp. 690–691.

[237] PR082005.

[238] PR082005 at para 218.

[239] PR082005 at para 400.

[240] [2014] FWC 2279.

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Attachment A—Employer Group Parties

In addition to ACCI and the Ai Group, the joint employer parties supporting the proposed variations include:

- Accommodation Association of Australia
- Aged and Community Services
- Australian Business Industrial and the NSW Business Chamber
- Australian Child Care Association
- Australian Childcare Centres Association
- Australian Federation of Employers and Industries
- Australian Hotels Association
- Australian Meat Industry Council
- Australian Mines and Metals Association
- Australian Public Transport Industrial Association
- Chamber of Commerce and Industry Queensland
- Chamber of Commerce and Industry, Western Australia
- Clubs Australia Industrial
- Hair and Beauty Industry Association
- Horticulture Taskforce
- Leading Age Services Australia
- Live Performance Australia
- Local Government Association of Northern Territory
- Local Government Association of Queensland
- Local Government Association of South Australia
- Local Government Association of Tasmania
- Local Government New South Wales
- Municipal Association of Victoria
- National Farmers' Federation
- National Retailers Association
- Printing Industries Association of Australia
- Pharmacy Guild of Australia, The
- Queensland Hospitality Association
- Restaurant & Catering Australia
- Victorian Employer's Chamber of Commerce and Industry
- Victorian Automobile Chamber of Commerce
- Western Australian Local Government Association

Attachment B—Index of Material

BACKGROUND PAPERS/RESEARCH MATERIAL	
Background paper—Cashing out of annual leave	21 November 2014
Background paper—Annual leave common issue	30 May 2014
Background paper—Scope of annual leave common issue	25 March 2014
Analysis of bargaining by business size	20 August 2014
STATEMENTS	
[2014] FWCFB 6891	1 October 2014
[2014] FWCFB 5362	7 August 2014
[2014] FWC 2279	7 April 2014
REPORTS	
The individualisation of employment relationships and the adoption of high performance work practices—final report (filed by the Australian Council of Trade Unions)	21 October 2014
Report to Full Bench of Conciliation	15 August 2014
PWC expert accounting report (joint document of the Australian Chamber of Commerce and Industry and the Australian Industry Group—see also Mr Eugene Kalenjuk witness evidence)	2 July 2014

SUBMISSIONS AND CORRESPONDENCE		
Accommodation Association of Australia	Correspondence	19 June 2014
	Submission	20 March 2014
"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)	Outline of submissions in reply	1 August 2014
"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)—Vehicle Division	Submissions in reply	1 August 2014
The Association for Payroll Specialists	Correspondence	29 July 2014
The Australasian Railway Association	Submission	1 August 2014
Australian Chamber of Commerce and Industry	Correspondence	2 March 2015
	Further submission	19 December 2014
	Submission	27 November 2014
	Legislative provisions relating to annual leave (joint document)	14 November 2014
	Small business statistics (joint document)	12 November 2014
	Submission	28 October 2014
	Correspondence	15 October 2014
	Submission	19 September 2014
	Correspondence	19 September 2014
	Correspondence	5 August 2014
	Submissions in reply	1 August 2014
	Correspondence and outline of submissions	20 June 2014
	Correspondence	21 May 2014
	Correspondence	11 April 2014
	Submission	19 March 2014
Australian Childcare Centres Association and Australian Childcare Alliance	Submission	20 June 2014

Australian Council of Trade Unions	Submission	27 November 2014
	Legislative provisions relating to annual leave (joint document)	14 November 2014
	Small business statistics (joint document)	12 November 2014
	Correspondence	9 October 2014
	Correspondence	6 October 2014
	Submission	19 September 2014
	Correspondence	6 August 2014
	Submissions in reply	1 August 2014
	Correspondence	23 July 2014
	Submission	20 June 2014
	Correspondence	21 May 2014
	Correspondence	11 April 2014
	Submission	20 March 2014
Australian Government (Department of Employment)	Response	19 September 2014
	Correspondence	21 August 2014
Australian Hotels Association	Submission	20 March 2014
Australian Industry Group	Submission	27 November 2014
	Legislative provisions relating to annual leave (joint document)	14 November 2014
	Small business statistics (joint document)	12 November 2014
	Submission	28 October 2014
	Correspondence	15 October 2014
	Correspondence and chart detailing accumulation of annual leave	14 October 2014
	Submission in reply	7 October 2014
	Submission	19 September 2014
	Reply submission	1 August 2014
	Submission	20 June 2014
	Correspondence	21 May 2014
	Submission	20 March 2014
Australian Meat Industry Council	Submission	20 March 2014

Australian Mines and Metals Association Inc.	Outline of submissions	20 June 2014
Australian Public Transport Industrial Association	Submission in reply	1 August 2014
	Correspondence	29 May 2014
BHP Billiton	Correspondence and submission	27 November 2014
Construction, Forestry, Mining and Energy Union—Construction and General Division	Correspondence	7 August 2014
	Submission in reply	1 August 2014
Construction, Forestry, Mining and Energy Union—Forestry and Furnishing Products Division	Submission	20 June 2014
	Correspondence	21 May 2014
Clubs Australia Industrial	Submission	19 June 2014
	Correspondence	2 June 2014
Coal Mining Industry Employer Group	Submission	9 July 2014
Communications, Electrical and Plumbing Union	Correspondence	17 October 2014
Horticulture Taskforce	Outline of submissions	1 August 2014
	Correspondence	23 June 2014
Housing Industry Association Limited	Correspondence	27 November 2014
	Submission	20 June 2014
	Correspondence	26 May 2014
	Correspondence	20 March 2014
Australian Entertainment Industry Association t/as Live Performance Australia	Submission	27 November 2014
Local Government Associations	Submission	20 March 2014
Master Builders Australia Limited	Submission	20 June 2014
	Correspondence	23 May 2014
	Correspondence	11 April 2014
Master Electricians Australia	Correspondence	20 October 2014
	Correspondence	27 May 2014
Maritime Union of Australia, The	Submissions	20 June 2014
Media, Entertainment and Arts Alliance	Correspondence	21 November 2014

National Farmers' Federation	Correspondence	9 October 2014
	Submissions in reply	1 August 2014
	Outline of submissions	20 June 2014
Queensland Funeral Directors' Association Ltd and Funeral Directors Association of New South Wales Ltd	Submissions	20 March 2014
Pharmacy Guild of Australia	Submissions	20 March 2014
Restaurant & Catering Australia	Submission in reply	1 August 2014
	Correspondence	20 June 2014
	Submission	20 March 2014
Shop, Distributive and Allied Employees' Association	Correspondence and deactivation guidelines	1 December 2014
Textile Clothing and Footwear Union of Australia	Submission	27 November 2014
	Submission	1 August 2014
LIST OF AUTHORITIES		
Australian Industry Group	List of authorities and materials	22 August 2014
Australian Council of Trade Unions	List of authorities	20 August 2014

Attachment C—Witness Statements

NAME	FILED BY	DATE
Mr Stuart Lamont	Accommodation Association of Australia	19 June 2014
Ms Nicki Passanisi	Accommodation Association of Australia	5 June 2014
Ms Joyce Lawson	Accommodation Association of Australia	7 August 2014
Ms Joyce Lawson	Accommodation Association of Australia	14 August 2014
Ms Fiona Corbett	Australian Chamber of Commerce and Industry	20 June 2014
Mr Julian Frederick Arndt	Australian Chamber of Commerce and Industry	28 October 2014
Mr Ben Waugh	Australian Industry Group	20 June 2014
Ms Kristina Flynn	Australian Industry Group	18 June 2014
Mr Eugene Kalenjuk (see also PWC expert accounting report)	Australian Chamber of Commerce and Industry and the Australian Industry Group	2 July 2014
Mr Warren Butler	"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)—Vehicle Division	1 August 2014
Mr Warren Butler	"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)—Vehicle Division	18 August 2014
Ms Melissa Adler	Housing Industry Association Limited	19 June 2014
Ms Melissa Adler	Housing Industry Association Limited	6 August 2014
Mr Geoffrey Charles Thomas	Master Builders Australia Limited	18 June 2014
Mr David Murrie	Restaurant & Catering Australia	18 June 2014
Mr Antonio D'Arienzo	Restaurant & Catering Australia	5 June 2014

Attachment D—New Subclause for Excessive Annual Leave

The awards the Employer Group proposes to be varied to include the new subclause relating to excessive annual leave (Employer Group propose insertion of new provision (Schedule 2))[1]

Award title
Aged Care Award 2010
Amusement, Events and Recreation Award 2010
Animal Care and Veterinary Services Award 2010
Book Industry Award 2010
Building and Construction General On-site Award 2010
Cleaning Services Award 2010
Corrections and Detention (Private Sector) Award 2010
Cotton Ginning Award 2010
Dredging Industry Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Post-Secondary Education) Award 2010
Fast Food Industry Award 2010
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Funeral Industry Award 2010
Hair and Beauty Industry Award 2010
Health Professionals and Support Services Award 2010
Hydrocarbons Field Geologists Award 2010
Labour Market Assistance Industry Award 2010
Live Performance Award 2010
Mannequins and Models Award 2010
Maritime Offshore Oil and Gas Award 2010
Market and Social Research Award 2010
Meat Industry Award 2010
Medical Practitioners Award 2010
Miscellaneous Award 2010
Pharmacy Industry Award 2010
Plumbing and Fire Sprinklers Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Professional Employees Award 2010
Seagoing Industry Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
State Government Agencies Administration Award 2010
Stevedoring Industry Award 2010
Storage Services and Wholesale Industry Award 2010
Surveying Award 2010
Travelling Shows Award 2010
Waste Management Award 2010

[1] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014; Ai Group correspondence, 15 October 2014.

Attachment E—Replacement Subclause for Excessive Annual Leave

The awards the Employer Group proposes to be varied to include the new subclause relating to excessive annual leave (Employer Group propose replacing current provision (Schedule 3))[2]

Award title	Existing clause
Aircraft Cabin Crew Award 2010	25.4
Airport Employees Award 2010	31.5
Aluminium Industry Award 2010	22.6
Business Equipment Award 2010	31.7
Car Parking Award 2010	25.5
Cemetery Industry Award 2010	24.3
Coal Export Terminals Award 2010	19.7
Concrete Products Award 2010	26.5
Contract Call Centres Award 2010	27.5
Electrical, Electronic and Communications Contracting Award 2010	28.5
Food, Beverage and Tobacco Manufacturing Award 2010	34.7
Graphic Arts, Printing and Publishing Award 2010	37.7
Horticulture Award 2010	25.7
Joinery and Building Trades Award 2010	32.5
Manufacturing and Associated Industries and Occupations Award 2010	41.6
Marine Tourism and Charter Vessels Award 2010	23.4
Nursery Award 2010	27.5
Oil Refining and Manufacturing Award 2010	26.7
Pastoral Award 2010	23.5
Pest Control Industry Award 2010	24.4
Pharmaceutical Industry Award 2010	26.5
Poultry Processing Award 2010	27.5
Road Transport and Distribution Award 2010	29.4
Road Transport (Long Distance Operations) Award 2010	23.3
Seafood Processing Award 2010	27.6
Telecommunications Services Award 2010	23.4
Timber Industry Award 2010	33.6
Transport (Cash in Transit) Award 2010	29.5
Vehicle Manufacturing, Repair, Services and Retail Award 2010	29.4
Water Industry Award 2010	27.4
Wine Industry Award 2010	30.5

[2] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014; Ai Group correspondence, 15 October 2014.

Attachment F—Analysis of Excessive Annual Leave Provisions in Awards

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Aboriginal Community Controlled Health Services Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Aged Care Award 2010	*No excessive leave provision*					2
Air Pilots Award 2010	Within 12 months of accrual or 15 months of the start of the last period of leave	-	-	-	-	*n/a*
Aircraft Cabin Crew Award 2010	>8 wks	>=4 wks	=25% of balance	-	-	3
Airline Operations—Ground Staff Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Airport Employees Award 2010	>=8 wks	>=4 wks	<= 25% of balance	-	Y	3
Alpine Resorts Award 2010	>30 days	>=4 wks	-	-	-	*n/a*
Aluminium Industry Award 2010	>8 wks (>10 wks)*	>= 4 wks	-	>=8 wks	-	3
Ambulance and Patient Transport Industry Award 2010	Within 6 months of accrual or other by agreement	>=4 wks (or 7 days^)	4 wks, or other amount by agreement	-	Y	*n/a*
Amusement, Events and Recreation Award 2010	*No excessive leave provision*					2
Animal Care and Veterinary Services Award 2010	*No excessive leave provision*					2
Aquaculture Industry Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Architects Award 2010	Within 4 months of accrual or 12 months by agreement	>=1 month	<=2 wks	-	Y	*n/a*
Asphalt Industry Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Banking, Finance and Insurance Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Black Coal Mining Industry Award 2010	Within 12 months of accrual unless otherwise agreed	>=4 wks	-	-	-	*n/a*
Book Industry Award 2010	*No excessive leave provision*					2
Broadcasting and Recorded Entertainment Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Building and Construction General On-site Award 2010	*No excessive leave provision*					2
Business Equipment Award 2010	>8 wks	>=4 wks	<=25% of balance	-	Y	3
Car Parking Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Cement and Lime Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Cemetery Industry Award 2010	>= 18 months	-	-	-	-	3
Children's Services Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Cleaning Services Award 2010	*No excessive leave provision*					2
Clerks—Private Sector Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Coal Export Terminals Award 2010	>=8 wks (>=10 wks)*	>=4 wks	<=25% of balance	-	Y	3
Commercial Sales Award 2010	>8 wks (or a proportionate amount for a PT employee)	>=4 wks	-	-	-	*n/a*
Concrete Products Award 2010	>=8 wks	>=4 wks	<= 25% of balance	-	Y	3
Contract Call Centres Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Corrections and Detention (Private Sector) Award 2010	*No excessive leave provision*					2
Cotton Ginning Award 2010	*No excessive leave provision*					2
Dredging Industry Award 2010	*No excessive leave provision*					2
Dry Cleaning and Laundry Industry Award 2010	*No excessive leave provision*					2
Educational Services (Post-Secondary Education) Award 2010	*No excessive leave provision*					2
Educational Services (Schools) General Staff Award 2010	*No excessive leave provision*					*n/a*
Educational Services (Teachers) Award 2010	*No excessive leave provision*					*n/a*

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Electrical Power Industry Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	*n/a*
Electrical, Electronic and Communications Contracting Award 2010	>8 wks (>10 wks)*	>=4 wks	<=25% of balance	-	Y	3
Fast Food Industry Award 2010	*No excessive leave provision*					2
Fire Fighting Industry Award 2010	*No excessive leave provision*					2
Fitness Industry Award 2010	*No excessive leave provision*					2
Food, Beverage and Tobacco Manufacturing Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Funeral Industry Award 2010	*No excessive leave provision*					2
Gardening and Landscaping Services Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Gas Industry Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
General Retail Industry Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Graphic Arts, Printing and Publishing Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Hair and Beauty Industry Award 2010	*No excessive leave provision*					2
Health Professionals and Support Services Award 2010	*No excessive leave provision*					2
Higher Education Industry—Academic Staff—Award 2010	>=30 days	>=2 months	-	-	-	*n/a*
Higher Education Industry—General Staff—Award 2010	>=30 days	>=2 months	<=20 days	-	-	*n/a*
Horse and Greyhound Training Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Horticulture Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Hospitality Industry (General) Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Hydrocarbons Field Geologists Award 2010	*No excessive leave provision*					2
Hydrocarbons Industry (Upstream) Award 2010	>8 wks (>10 wks)*	>=4 wks	-	-	Y	*n/a*
Joinery and Building Trades Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Journalists Published Media Award 2010	*No excessive leave provision* (but may direct employee to take leave)					***n/a***
Labour Market Assistance Industry Award 2010	*No excessive leave provision*					2
Legal Services Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Live Performance Award 2010	*No excessive leave provision*					2
Local Government Industry Award 2010	> 8 wks	>=4 wks	-	>=8 wks	-	*n/a*

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Mannequins and Models Award 2010	*No excessive leave provision*					2
Manufacturing and Associated Industries and Occupations Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Marine Tourism and Charter Vessels Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Marine Towage Award 2010	*No excessive leave provision*					***n/a***
Maritime Offshore Oil and Gas Award 2010	*No excessive leave provision*					2
Market and Social Research Award 2010	*No excessive leave provision*					2
Meat Industry Award 2010	*No excessive leave provision*					2
Medical Practitioners Award 2010	*No excessive leave provision*					2
Mining Industry Award 2010	>8 wks (>10 wks)*	>=4 wks	-	-	Y	*n/a*
Miscellaneous Award 2010	*No excessive leave provision*					2
Mobile Crane Hiring Award 2010	Within 6 months of accrual	>= 4 wks				*n/a*
Nursery Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Nurses Award 2010	Within 6 months of accrual					*n/a*
Oil Refining and Manufacturing Award 2010	>8 wks (>10 wks)*	>=4 wks	-	>=1 year's accrual	Y	3
Passenger Vehicle Transportation Award 2010	>8 wks	>=4 wks	-	-	Y	*n/a*
Pastoral Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Pest Control Industry Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Pharmaceutical Industry Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Pharmacy Industry Award 2010	*No excessive leave provision*					2
Plumbing and Fire Sprinklers Award 2010	*No excessive leave provision*					2
Port Authorities Award 2010	>8 wks	>=4 wks	-	-	Y	*n/a*
Ports, Harbours and Enclosed Water Vessels Award 2010	Within 6 months of accrual	>=14 days	-	-	-	*n/a*
Poultry Processing Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Premixed Concrete Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Professional Diving Industry (Industrial) Award 2010	*No excessive leave provision*					2

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Professional Diving Industry (Recreational) Award 2010	*No excessive leave provision*					2
Professional Employees Award 2010	*No excessive leave provision*					2
Quarrying Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Racing Clubs Events Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Racing Industry Ground Maintenance Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Rail Industry Award 2010	>8 wks	>=4 wks	-	-	Y	*n/a*
Real Estate Industry Award 2010	>4 wks	>=4 wks	-	-	-	*n/a*
Registered and Licensed Clubs Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Restaurant Industry Award 2010	>8 wks	>=4 wks	-	Employee can retain at least 4 wks	-	*n/a*
Road Transport (Long Distance Operations) Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Road Transport and Distribution Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Salt Industry Award 2010	>8 wks (>10 wks)*	>=4 wks	-	-	Y	*n/a*
Seafood Processing Award 2010	>=8 wks	>=4 wks	<= 25% of balance	-	Y	3
Seagoing Industry Award 2010	*No excessive leave provision*					2
Security Services Industry Award 2010	Within 24 months of accrual	>=28 days	-	-	Y	*n/a*
Silviculture Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Social, Community, Home Care and Disability Services Industry Award 2010	*No excessive leave provision*					2
Sporting Organisations Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
State Government Agencies Administration Award 2010	*No excessive leave provision*					2
Stevedoring Industry Award 2010	*No excessive leave provision*					2
Storage Services and Wholesale Award 2010	*No excessive leave provision*					2
Sugar Industry Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*
Supported Employment Services Award 2010	>8 wks	>=4 wks	-	-	-	*n/a*

Modern award	Amount of leave accrued	Notice to be given by employer	Maximum amount of leave to be taken	Retained balance of leave after leave taken	Employer and employee unable to reach agreement	Ai Group schedule 2 = insert 3 = replace n/a = not in submission
Surveying Award 2010	*No excessive leave provision*					2
Telecommunications Services Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Textile, Clothing, Footwear and Associated Industries Award 2010	Within 18 months of accrual	>=4 wks	-	-	Y	*n/a*
Timber Industry Award 2010	>=8 wks	>=4 wks	<= 25% of balance	-	Y	3
Transport (Cash in Transit) Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Travelling Shows Award 2010	*No excessive leave provision*					2
Vehicle Manufacturing, Repair, Services and Retail Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Waste Management Award 2010	*No excessive leave provision*					2
Water Industry Award 2010	>8 wks	>=4 wks	-	>= 8 wks	-	3
Wine Industry Award 2010	>=8 wks	>=4 wks	<=25% of balance	-	Y	3
Wool Storage, Sampling and Testing Award 2010	>8 wks (>10 wks)*	>=4 wks	-	-	Y	*n/a*

* Employees who are entitled to 5 weeks' annual leave may accrue up to 10 weeks' leave.
^ In unforeseen circumstances only.

Attachment G—New Subclause for Close-Down

The 44 awards the Employer Group proposes to be varied to include the new subclause relating to close down (Employer Group propose insertion of new provision).[3]

Award title
Aged Care Award 2010
Air Pilots Award 2010
Airport Employees Award 2010
Amusement, Events and Recreation Award 2010
Architects Award 2010
Book Industry Award 2010
Clerks—Private Sector Award 2010 ^
Commercial Sales Award 2010 ^
Corrections and Detention (Private Sector) Award 2010
Cotton Ginning Award 2010
Dredging Industry Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Schools) General Staff Award 2010 ^
Educational Services (Teachers) Award 2010 ^
Fast Food Industry Award 2010
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Funeral Industry Award 2010
Health Professionals and Support Services Award 2010 ^
Horticulture Award 2010
Hydrocarbons Field Geologists Award 2010
Labour Market Assistance Industry Award 2010
Live Performance Award 2010
Mannequins and Models Award 2010
Marine Tourism and Charter Vessels Award 2010
Marine Towage Award 2010
Maritime Offshore Oil and Gas Award 2010
Market and Social Research Award 2010
Medical Practitioners Award 2010
Pastoral Award 2010
Pharmacy Industry Award 2010
Port Authorities Award 2010
Ports, Harbours and Enclosed Water Vessels Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Rail Industry Award 2010
Seagoing Industry Award 2010

[3] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014; Ai Group correspondence, 15 October 2014.

Award title
Social, Community, Home Care and Disability Services Industry Award 2010
Sporting Organisations Award 2010
State Government Agencies Administration Award 2010
Stevedoring Industry Award 2010
Transport (Cash in Transit) Award 2010
Travelling Shows Award 2010
Waste Management Award 2010

Notes:
^ These five awards currently contain close-down provisions.
Two awards that do not contain close-down provision were not the subject of the Ai Group claim:

- *Higher Education Industry—Academic Staff—Award 2010*
- *Passenger Vehicle Transportation Award 2010*

21 awards to be varied to include the new subclause relating to close-down (Employer Group propose insertion of new provision).[4]

Award title
Airline Operations—Ground Staff Award 2010
Building and Construction General On-site Award 2010
Cleaning Services Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010
Graphic Arts, Printing and Publishing Award 2010
Joinery and Building Trades Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Meat Industry Award 2010
Mobile Crane Hiring Award 2010
Pharmaceutical Award 2010
Plumbing and Fire Sprinklers Award 2010
Poultry Processing Award 2010
Professional Employees A ward 2010
Seafood Processing Award 2010
Telecommunications Services Award 2010
Textile, Clothing, Footwear and Associated Industries Award 2010
Timber Industry Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010
Water Industry Award 2010
Wine Industry Award 2010

[4] ACCI submission, 21 May 2014 at Schedule 5; Ai Group correspondence, 21 May 2014.

Attachment H—New Subclause for Annual Leave in Advance

The 48 awards the Employer Group proposes to be varied to include the new subclause relating to taking annual leave in advance of accrual (Employer Group propose insertion of new provision (Schedule 6)).[5]

Award title
Aboriginal Community Controlled Health Services Award 2010
Aged Care Award
Air Pilots Award 2010
Aircraft Cabin Crew Award 2010
Ambulance and Patient Transport Industry Award 2010
Amusement, Events and Recreation Award 2010
Architects Award 2010
Book Industry Award 2010
Building and Construction General On-site Award 2010
Cemetery Industry Award 2010
Coal Export Terminals Award 2010
Corrections and Detention (Private Sector) Award 2010
Cotton Ginning Award 2010
Dredging Industry Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Teachers) Award 2010
Electrical Power Industry Award 2010
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Funeral Industry Award 2010
Higher Education Industry—Academic Staff—Award 2010
Higher Education Industry—General Staff—Award 2010
Hospitality Industry (General) Award 2010
Hydrocarbons Field Geologists Award 2010
Labour Market Assistance Industry Award 2010
Mannequins and Models Award 2010
Maritime Offshore Oil and Gas Award 2010
Medical Practitioners Award 2010
Miscellaneous Award 2010
Nurses Award 2010
Plumbing and Fire Sprinklers Award 2010

[5] Ai Group correspondence, 21 May 2014; ACCI correspondence, 21 May 2014.

Ports, Harbours and Enclosed Water Vessels Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Professional Employees Award 2010
Registered and Licensed Clubs Award 2010
Restaurant Industry Award 2010
Seagoing Industry Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
Sporting Organisations Award 2010
State Government Agencies Administration Award 2010
Stevedoring Industry Award 2010
Storage Services and Wholesale Industry Award 2010
Supported Employment Services Award 2010
Surveying Award 2010
Textile, Clothing, Footwear and Associated Industries Award 2010
Travelling Shows Award 2010
Waste Management Award 2010

Note: Attachment C of the Fair Work Commission Background paper—Annual leave common issue, 30 May 2014 included the following additional awards in the 76 modern awards classified as containing limited provisions permitting taking leave in advance of accrual:

- *Maritime Offshore Oil and Gas Award 2010*
- *Nurses Award 2010*

Attachment I—New Subclause for EFT Payment

The 51 awards the Employer Group proposes to be varied by inserting new subclause relating to the electronic transfer payment (EFT) of annual leave.

Award title
Air Pilots Award 2010
Aircraft Cabin Crew Award 2010
Airline Operations—Ground Staff Award 2010
Airport Employees Award 2010
Ambulance and Patient Transport Industry Award 2010
Aquaculture Industry Award 2010
Asphalt Industry Award 2010
Black Coal Mining Industry Award 2010
Broadcasting and Recorded Entertainment Award 2010
Building and Construction General On-site Award 2010
Car Parking Award 2010
Cement and Lime Award 2010
Coal Export Terminals Award 2010
Concrete Products Award 2010
Contract Call Centres Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Food, Beverage and Tobacco Manufacturing Award 2010
Gardening and Landscaping Services Award 2010
Graphic Arts, Printing and Publishing Award 2010
Horse and Greyhound Training Award 2010
Horticulture Award 2010
Hydrocarbons Industry (Upstream) Award 2010
Joinery and Building Trades Award 2010
Legal Services Award 2010
Live Performance Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Market and Social Research Award 2010
Meat Industry Award 2010
Mining Industry Award 2010
Nursery Award 2010
Nurses Award 2010
Oil Refining and Manufacturing Award 2010
Pastoral Award 2010
Pest Control Industry Award 2010
Pharmaceutical Industry Award 2010

Premixed Concrete Award 2010
Professional Diving Industry (Industrial) Award 2010
Quarrying Award 2010
Racing Clubs Events Award 2010
Racing Industry Ground Maintenance Award 2010
Real Estate Industry Award 2010
Road Transport (Long Distance Operations) Award 2010
Salt Industry Award 2010
Seafood Processing Award 2010
Security Services Industry Award 2010
Silviculture Award 2010
Storage Services and Wholesale Award 2010
Telecommunications Services Award 2010
Timber Industry Award 2010
Transport (Cash in Transit) Award 2010
Vehicle Manufacturing, Repair, Services and Retail Award 2010

Attachment J—Legislative Provisions Relating to Annual Leave

During proceedings before a Full Bench of the Fair Work Commission on 16 October 2014, His Honour, Justice Ross, directed the Ai Group, the ACCI and the ACTU to file a joint document that summarises the legislative provisions contained in the *Workplace Relations Act 1996* and state/territory legislation regarding annual leave. The table below contains the key legislative provisions regarding annual leave, as agreed between the aforementioned parties, extracted from the joint submission provided on 14 November 2014. The table also indicates where the relevant legislation has been repealed. State/territory legislation that has not been repealed only has application to employees of employers who are not national system employers.

General Rules regarding Taking Annual Leave	**Accrual and Accumulation**	**Close-Down**	**Right of Employer to Direct Employee to Take Annual Leave**	**Cashing Out**	**Payment for Annual Leave`**	**Leave in Advance**
Federal: *Workplace Relations Act 1996* (repealed) Section 172 Operation of the Australian Fair Pay and Conditions Standard & Section 230 Agreement between employees and employers						
Section 236(1) – (4) Rules about taking annual leave	Section 234(1) and (4) Annual leave – accrual, crediting and accumulation rules	Section 236(5) Rules about taking annual leave	Section 236(6) Rules about taking annual leave	Section 233 Entitlement to cash out annual leave	Section 235 Annual leave – payment rules	
New South Wales: *Annual Holidays Act 1944* Section 5(1)(a) Special provisions-annual holidays otherwise than under this Act						
Section 3(2) - (4) Annual holidays with pay	Section 3(1) Annual holidays with pay	Section 4A(2)-(7) Annual close-down	Section 3 (6)(a) Annual holidays with pay	Section 3(5) Annual holidays with pay	Section 3(6)(b) Annual holidays with pay	Section 3(3) and (7) Annual holidays with pay
Queensland: *Industrial Relations Act 1999* Section 41 Relationship to other rights and industrial instruments & Section 71CA Queensland Employment Standards subject to provisions of modern industrial instrument						
Section 12(1) Taking annual leave Section 71EC(1)	Section 11(2) and (7) Entitlement Section 71EA(1) and (4)		Section 12(2) Taking annual leave Section 71EC(2)	Section 71EG Requirements for cashing out annual leave	13 Payment for annual leave Section 71EE	Section 12(3) - (4) Taking annual leave Section 71AE(3) – (4)

General Rules regarding Taking Annual Leave	Accrual and Accumulation	Close-Down	Right of Employer to Direct Employee to Take Annual Leave	Cashing Out	Payment for Annual Leave`	Leave in Advance
South Australia: ***Fair Work Act 1994***						
Schedule 4 Minimum standard for annual leave 4(1)—Taking annual leave	Schedule 4 Minimum standard for annual leave 3—Accrual of annual leave entitlement	Schedule 4 Minimum standard for annual leave 4(2)(b)—Taking annual leave	Schedule 4 Minimum standard for annual leave 4(2)(a) and (3)—Taking annual leave		Schedule 4 Minimum standard for annual leave 5 – Annual leave to be on full pay	
Western Australia: ***Minimum Conditions of Employment Act 1993***						
25(1) and (2) Annual leave, when may be taken	23(1), (2) and (2a) Paid annual leave, entitlement to			8 Limited contracting-out of annual leave conditions	24(1) Annual leave payments, when to be made	
Tasmania: ***Industrial Relations Act 1984*** Section 47AA(2) Division 2A - Minimum conditions of employment relating to all employees - Purpose and application of Division						
47AE(4)-(6) Annual leave	47AE(1) and (8) Annual leave		Section 47AE(7) Annual leave			
Victoria: ***Industrial Relations Act 1979*** **(repealed)** Section 59(1)(a)						
Section 58(1)(a) and (d)		Section 58(1)(b)	Section 58(1)(d)		Section 58(1)(d)	
Australian Capital Territory: ***Annual Leave Act 1973*** **(repealed)** Section 14(2) No contracting out						
Section 4(1) Annual Leave Section 7Leave to be taken within 6 months	Section 4(1) and 5	Section 12 Close-down	Section 10 Employer may require employee to take annual leave	Section 11(1) No payment instead of leave	Section 8 Payment of leave pay	
Northern Territory: ***Annual Leave Act*** Section 15 Exemptions						
Section 6(1)- (3) and (8) -(9) Annual leave		Section 12 Close down	Section 6(9) Annual leave	Section 6(4) Annual leave	Section 9 Pay for annual leave Section 14 When payment to be made	Section 8 Annual leave taken before due

[2015] FWCFB 5771

The attached document replaces the document previously issued with the above code on 15 September 2015.

The appearance for the New South Wales Business Chamber and Australian Business Industrial has been corrected to *J Arndt*.

Miriam Henry
Associate to Justice Ross

Dated: 3 March 2016

DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Annual leave
(AM2014/47)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT KOVACIC
COMMISSIONER HAMPTON

SYDNEY, 15 SEPTEMBER 2015

4 yearly review of modern awards - annual leave common issue - finalisation of model terms - excessive annual leave - cashing out of annual leave - granting leave in advance - purchased leave.

CONTENTS

ABBREVIATIONS

AAA	Accommodation Association of Australia
ABI	Australian Business Industrial
ACCI	Australian Chamber of Commerce and Industry
Act	*Fair Work Act 2009* (Cth)
ACTU	Australian Council of Trade Unions
AHA	Australian Hotels Association
AHEIA	Australian Higher Education Industrial Association
Ai Group	Australian Industry Group
Air Pilots decision	*Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124
AIS	Associations of Independent Schools
AMIC	Australian Meat Industry Council
AMMA	Australian Mines and Metals Association
AMWU	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union
APTIA	Australian Public Transport Industrial Association
ARA	The Australian Retailers Association
ASMOF	Australian Salaried Medical Officers Federation
CAI	Clubs Australia Industrial
CFMEU	Construction, Forestry, Mining and Energy Union
Commission	Fair Work Commission
EFT	Electronic Funds Transfer
FDA NSW	Funeral Directors Association of New South Wales
HIA	Housing Industry Association
IEU	Independent Education Union of Australia
June 2015 decision	*Annual Leave 4 Yearly Review decision* [2015] FWCFB 3406
MBA	Master Builders Australia
MIAL	Mining Industry Australia Limited
MPA of NSW	Master Plumbers Association of New South Wales
MTA	Motor Traders' Association of New South Wales
NES	National Employment Standards
NFF	National Farmers' Federation
NSWBC	New South Wales Business Chamber
QFDA	Queensland Funeral Directors Association
Regulations	*Fair Work Regulations 2009*
Review	4 yearly review of modern awards under s.156 of the *Fair Work Act 2009*

TAPS	The Association of Payroll Specialists
TCFUA	Textile, Clothing and Footwear Union of Australia

1. Introduction

[1] This decision deals with the variation of modern awards in relation to a number of matters regarding paid annual leave. The decision is issued as part of the first 4 yearly review of modern awards (the Review). The Review includes a Common issues stage and an Award stage. A common issue was defined in the initial stage of the Review as a proposal for significant variation or change across the award system, such as applications which seek to change a common or core provision in most, if not all, modern awards.[1] Following a period of consultation it was decided that the annual leave provisions in modern awards would be dealt with as a "common issue".

[2] The scope of the matters to be considered in the context of the annual leave common issue was published in a Statement on 7 April 2014[2] as follows:

(i) cashing out annual leave;

(ii) excessive annual leave;

(iii) annual close-down;

(iv) granting annual leave in advance;

(v) purchased leave;

(vi) payment of annual leave entitlements on termination; and

(vii) EFT and paid annual leave.

[3] Claims were made by interested parties relating to each of the matters outlined above. The ACTU advanced a claim in respect of the payment of annual leave entitlements on termination. Ai Group and ACCI coordinated discussions with various employer groups (the Employer Group) and presented a common position in respect of the matters under consideration.

[4] The *4 Yearly Review of Modern Awards – Annual Leave decision*[3] (the *June 2015 decision*) dealt with claims in respect of the issues set out at paragraph [2] above. The *June 2015 decision* stated that interested parties would be provided with an opportunity to make further submissions directed at the issue of purchased leave,[4] the provisional excessive annual leave model term, and the proposition that *all* modern awards be varied to insert the model term.[5] Directions were issued[6] in relation to the filing of written submissions and a further oral hearing was held on 7 August 2015. It is convenient to summarise the *June 2015 decision* before turning to the issues which are the subject of this decision.

2. The *June 2015 decision*

[5] The *June 2015 decision* begins with a consideration of the legislative context for the Review, noting that the Review is broader in scope than the Transitional Review of modern awards which took place in 2012–2013. The Full Bench also observed that the Review proceedings provided the first full opportunity to consider the content of modern awards.[7] The

June 2015 decision then deals with the evidence adduced in the proceedings[8] before turning to the specific claims advanced. The Full Bench's consideration of the specific claims is set out below, albeit in summary terms.

(i) Excessive leave

[6] The Employer Group sought to insert a standard clause relating to "excessive" annual leave into 70 modern awards. The ACTU and a number of individual unions opposed the claim. The proposed clause provided that an employer may direct an employee to take paid annual leave if they had accrued at least six weeks of annual leave, provided that the employer gives the employee four weeks' notice and the employee retains at least four weeks of accrued annual leave once the direction is given.[9]

[7] The *June 2015 decision* deals with the relevant historical and legislative context noting that prior to the commencement of the National Employment Standards (NES) and modern awards, "federal and State legislation and awards commonly provided employers with a right to direct employees to take annual leave".[10] The Full Bench noted that the evidence before it "clearly establishes that most employees accrue a portion of their paid annual leave entitlement and that a significant proportion of employees have six weeks or more of such accrued leave".[11] The evidence tendered by the Employer Group in support of their claim was in the form of the Employer Survey and various reports and academic articles relating to paid leave and why employees do not utilise their leave entitlements. We deal later with the findings made on the basis of that evidence.

[8] In the *June 2015 decision* the Full Bench redrafted the Employer Group clause to create a provisional model term dealing with the taking of excessive annual leave, as follows:

'**The model term—Excessive Annual Leave Accruals**

1. Excessive Annual Leave Accruals

This clause contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

1.1 Definitions

Shiftworker means [*insert definition*]

An employee has an excessive leave accrual if:

(a) the employee is not a shiftworker and has accrued more than eight weeks' paid annual leave; or

(b) the employee is a shiftworker and has accrued more than 10 weeks' paid annual leave.

1.2 Eliminating excessive leave accruals

(a) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under subclause 1.2(b) or an employee can give notice of leave to be granted under subclause 1.2(c), the employer

or employee must request a meeting and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

(b) Employer may direct that leave be taken

This subclause applies if an employee has an excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. The direction must state that it is a direction given under subclause 1.2(b) of this award.

Such a direction must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));

(ii) require the employee to take any period of leave of less than one week;

(iii) require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;

(iv) require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or

be inconsistent with any leave arrangement agreed between the employer and employee.

An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given. The employer is not to take the direction into account in deciding whether to agree to such a request.

Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.

The employee must take paid annual leave in accordance with a direction complying with this subclause.

(c) Employee may require that leave be granted

This subclause applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under subclause 1.2(b) that will eliminate the employee's excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. The notice must state that it is a notice given under subclause 1.2(c) of this award.

Such a notice must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);

(ii) provide for the employee to take any period of leave of less than one week;

(iii) provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;

(iv) provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or

(v) be inconsistent with any leave arrangement agreed between the employer and employee.

The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause.

(d) Dispute resolution

Without limiting the dispute resolution clause of this award, an employer or an employee may refer the following matters to the Fair Work Commission under the dispute resolution clause:

(i) a dispute about whether the employer or employee has requested a meeting and genuinely tried to reach agreement under subclause 1.2(a);

(ii) a dispute about whether the employer has unreasonably refused to agree to a request by the employee to take paid annual leave; and

(iii) a dispute about whether a direction to take leave complies with subclause 1.2(b) or whether a notice requiring leave to be granted complies with subclause 1.2(c).'

[9] Consistent with the Employer Group's claim the provisional model term incorporates the employer's right to direct an employee to take their excessive annual leave, but also makes provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made. The provisional model term provides an avenue for an employee to exercise control over the time at which their leave is to be taken. The *June 2015 decision* details the operation of the clause and provides examples as to how the model term is intended to operate.[12]

[10] The Full Bench expressed the provisional view that a variation of modern awards to incorporate the model term was necessary to achieve the modern awards objective. The Full Bench also observed that "greater consistency in the provisions governing the taking of annual leave will make the safety net simpler and easier to understand" and on that basis

formed the provisional view that a model term dealing with excessive leave should be inserted into *all* modern awards.[13]

[11] The terms of the provisional model term were the focal point of the present proceedings and we return to them shortly.

(ii) Cashing out of annual leave

[12] The Employer Group sought to insert a standard clause relating to cashing out of annual leave into 120 modern awards reflecting the requirements of s.93(2) of the Act.[14] The union parties opposed the insertion of cashing out provisions in modern awards.

[13] The Full Bench noted that under previous legislative regimes, predecessor bodies to the Commission consistently rejected proposals for the cashing out of annual leave on the basis that they undermined the purpose of annual leave. However, the Act now makes specific provision for the cashing out of annual leave (at ss.92–94). Based on the evidence, the Full Bench observed that provisions permitting the cashing out of annual leave are a relatively common feature of enterprise agreements approved by the Commission, and that while most of these terms simply reflect the requirements in s.93, a significant proportion contain additional safeguards. The Full Bench stated that while the safeguards provided in s.93(2) set out the *minimum* requirements of such a term, they do not constitute a code and modern awards may also include terms that supplement the NES.[15]

[14] The Full Bench granted the Employer Group's claim in relation to cashing out of annual leave, subject to the incorporation of four additional safeguards as follows:

- a maximum of two weeks' paid annual leave can be cashed out in any 12 month period (in the case of part-time employees, this is based on the employee's weekly ordinary hours);
- specific requirements relating to record keeping and the content of any agreement relating to cashing out accrued annual leave;
- if the employee is under 18 years of age, the agreement to cash out a particular amount of accrued paid annual leave must be signed by the employee's parent or guardian; and
- notes are inserted at the end of the model term drawing attention to the general protections in Part 3-1 of the Act against undue employer influence and misrepresentation in relation to rights under the clause.[16]

[15] The Full Bench held that the variation of *all* modern awards to incorporate the model term would ensure that each modern award provides a fair and relevant minimum safety net; is necessary to achieve the modern awards objective; and is consistent with the objects of the Act.[17]

[16] The model cashing out term provides as follows:

> **'1. Cashing Out of Annual Leave**
>
> 1.1 Paid annual leave must not be cashed out except in accordance with this clause.

1.2 An employer and an employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave provided that the following requirements are met:

(a) each cashing out of a particular amount of accrued paid annual leave must be by a separate agreement between the employer and the employee which must:

(i) be in writing and retained as an employee record;

(ii) state the amount of accrued leave to be cashed out and the payment to be made to the employee;

(iii) state the date on which the payment is to be made, and

(iv) be signed by the employer and employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave at the time that it is cashed out;

(c) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than four weeks; and

(d) employees may not cash out more than two weeks' accrued annual leave in any 12 month period.

Note 1: Under s.344 of the *Fair Work Act 2009*, an employer must not exert undue influence or undue pressure on an employee to make an agreement to cash out paid annual leave under this award clause.

Note 2: Under s.345 of the *Fair Work Act 2009*, a person must not knowingly or recklessly make a false or misleading representation about an employee's workplace rights under this award clause.'

[17] In the present proceedings a number of employer organisations sought a variation to clause 1.2(a)(i) of the cashing out model term and we return to that matter shortly.

(iii) Annual close-down

[18] The Employer Group sought to insert a model "close-down" clause into 65 modern awards. The ACTU and a number of individual unions opposed the claim.

[19] In the *June 2015 decision* the Full Bench was not persuaded to grant the Employer Group claim for three reasons. Firstly, the Full Bench was not satisfied that the model term proposed was "reasonable" in the sense contemplated by s.93(3), due to the broad nature of the provision and the limited notice period required. Secondly, while the Full Bench generally agreed with the proposition that it is desirable for provisions dealing with taking annual leave to be uniform across modern awards, it found that close-down provisions are an exception to this general proposition and warrant consideration on an award by award basis. The Full Bench observed that the circumstances in the industries covered by existing award close-down provisions, and the need for such provisions, vary considerably. Thirdly, the

Employer Group submitted that it is desirable for employees to take leave and that the proposed model close-down clause would provide a mechanism by which employers could reduce their leave liability. The Full Bench noted that these issues associated with the accrual of excessive leave have been addressed in the consideration of the 'excessive leave' claim.[18]

[20] Interested parties who wish to seek a variation to a modern award to either vary an existing close-down provision, or to insert a close-down provision may do so during the award stage of the Review.[19]

(iv) Granting leave in advance

[21] The Employer Group sought to vary 48 modern awards to include a provision allowing for the taking of annual leave in advance of an entitlement to such leave accruing, by agreement between an employer and employee. The claimed provision also allowed an employer to make a deduction from monies payable to an employee on termination of employment. The ACTU and a number of individual unions opposed the claim.[20]

[22] The Full Bench was persuaded that an award term which facilitates agreements to take leave in advance will operate in a mutually beneficial manner and was appropriate. It would allow an employee, with the agreement of their employer, to take paid annual leave at a time when they may not otherwise be able to do so and will align the entitlements of modern award covered employees with those of award/agreement free employees. The main differences between the model term and the Employer Group claim are the requirements regarding the content and form of any agreement to provide leave in advance and the employer's obligation to keep such agreements as an employee record.[21]

[23] The model term is set out below:

'**1 Annual leave in advance**

1.1 An employer and employee may agree to the employee taking a period of paid annual leave in advance of the employee accruing an entitlement to such leave provided that the agreement meets the following requirements:

(a) it is in writing and signed by the employee and employer;

(b) it states the amount of leave to be taken in advance and the date on which the leave is to commence; and

(c) it is retained as an employee record.

1.2 This subclause applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause 1.1. If the employee's employment is terminated before they have accrued all of the entitlement to paid annual leave which they have taken then the employer may deduct an amount equal to the difference between the employee's accrued annual leave entitlement and the leave taken in advance, from any monies due to the employee on termination.'

[24] The Employer Group claim was directed at 48 modern awards and the Full Bench was satisfied that the variation of those modern awards to incorporate the model term was necessary to meet the modern awards objective. The Full Bench also expressed the

provisional view that it was necessary to vary *all* modern awards to insert the model term, in order to achieve the modern awards objective.[22]

[25] In the present proceedings a number of employer organisations sought a variation to the model term to delete clause 1.1(c) and we return to that matter shortly.

(v) Payment of annual leave entitlements on termination

[26] The ACTU sought to vary 118 modern awards in relation to the payment of annual leave entitlements on termination, to provide that an employer must pay an employee the amount that would have been payable to the employee had the employee taken that period of leave. Ai Group and a number of other employer bodies opposed the ACTU claim.[23]

[27] The merit of the ACTU's claim turns on the proper construction of s.90(2) of the Act and at the time of the hearing that issue was the subject of an appeal before the Full Court of the Federal Court and was yet to be determined. At that time the *Fair Work Amendment Bill* 2014 also incorporated a proposed amendment to s.90(2). Having regard to these considerations the Full Bench concluded as follows:[24]

> '[428] There is plainly a degree of uncertainty surrounding the statutory provision at the centre of this issue. The proper construction of s.90(2) is to be considered by a Full Court of the Federal Court at some time (presumably) this year and the fate of the amendments proposed in the bill is unknown.
>
> [429] In these circumstances we propose to adjourn our consideration of the ACTU's claim at this stage. Any interested party may seek to have the matter called back on for further programming and submissions.'

[28] The judgment of the Full Court of the Federal Court on the proper construction of s.90(2) has now been handed down.[25] The ACTU wrote to the Commission on 31 August 2015 in the light of that decision[26], stating that the programming of this issue can be revisited during the course of the next hearing, now scheduled for 23 November 2015.

(vi) Electronic funds transfer (EFT) and paid annual leave

[29] The Employer Group sought to vary 51 modern awards, which currently require the employer to pay an employee for annual leave *prior* to the employee taking the leave. The effect of the proposed variation is that when employees are paid by electronic funds transfer (EFT) they may be paid in accordance with their usual pay cycle while on paid annual leave. The union parties opposed the Employer Group claim.[27]

[30] The Employer Group sought to insert the following clause into 51 modern awards:

> **'Electronic Transfer Payment of Annual Leave**
>
> Despite anything else in this clause, an employee paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave.'[28]

[31] The 51 awards sought to be varied currently contain a term which requires the employer to pay an employee for annual leave *prior to* the employee taking the leave.

[32] The Full Bench noted that the existing award provisions which require annual leave to be paid prior to taking leave do not appear to have been the subject of any detailed arbitral consideration. In considering whether such a requirement is still relevant in contemporary circumstances, the Full Bench relied on evidence that a substantial majority of respondents pay their employees by EFT and data showing a trend away from cash based transactions towards either credit card usage or direct transfer and BPAY methods.[29]

[33] The Full Bench granted the Employer Group claim and was satisfied that the variation will ensure modern awards provide a fair and relevant minimum safety net, taking into account the particular considerations set out in paragraphs 134(1)(a) to (h) of the Act. The Full Bench rejected the argument that s.90 requires annual leave to be paid in advance and was satisfied that the proposed clause is an ancillary or incidental term within the meaning of s.55(4) of the Act.[30]

(vii) Purchased leave

[34] In relation to purchased leave, Ai Group initially proposed a model clause to be inserted into each modern award that would allow employees additional annual leave in a year with a corresponding reduction in salary, either for the period of their annual leave (such as half pay for twice the standard annual leave period) or throughout the year.[31] This claim was not pressed further during these proceedings and we return to the matter later in this decision.

[35] Based on the material before it, the Full Bench noted that there seemed to be a level of interest in providing arrangements which facilitate the 'purchase' of additional annual leave, the Act permitted such a provision to be inserted in modern awards, and on its face, such a provision may meet the objective in s.3(d) of the Act. These considerations led the Full Bench to be following conclusion:[32]

> 'It seems to us that a facilitative provision dealing with purchased leave is worthy of further consideration. It appears that the Act may permit such a provision to be inserted in modern awards and, on the face of it, such a provision may meet the objective of "assisting employees to balance their work and family responsibilities by providing for flexible working arrangements" (s.3(d)). Depending on the form of such a provision, consideration may need to be given as to whether a purchased leave arrangement constitutes a "permitted deduction" within the meaning of s.324. We propose to publish a discussion paper on the issue of purchased leave shortly.'

[36] We now turn to matters presently before us.

3. The issues

[37] As we have mentioned, directions were issued for the filing of written submissions and an oral hearing was held on 7 August 2015. A total of 42 submissions were received. A list of all submissions received is set out in Attachment A. The submissions canvassed the following issues:

(i) the terms of the provisional excessive annual leave model term;

(ii) issues in relation to the model terms in respect of the cashing out of annual leave and leave in advance;

(iii) purchased leave; and

(iv) a number of specific issues in relation to particular draft determinations.

[38] A Statement issued on 31 July 2015 attached a draft summary of the submissions relating to matters (i), (ii), (iii) and (iv) above and parties were invited to comment upon the draft summary during the course of their oral submissions at the hearing held on 7 August 2015.

[39] A number of parties[33] made submissions regarding whether particular modern awards should be varied to insert model terms. The submissions made are directed at the following awards:

- *Aquaculture Industry Award 2010*
- *Black Coal Mining Industry Award 2010*
- *Broadcasting and Recording Entertainment Award 2010*
- *Cemetery Industry Award 2010*
- *Dredging Industry Award 2010*
- *Educational Services (Schools) General Staff Award 2010*
- *Educational Services (Teachers) Award 2010*
- *Gardening and Landscaping Services Award 2010*
- *Gas Industry Award 2010*
- *General Retail Industry Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Higher Education Industry–Academic Staff–Award 2010*
- *Higher Education Industry–General Staff–Award 2010*
- *Horticulture Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Hydrocarbons Industry (Upstream Award) 2010*
- *Marine Towage Award 2010*
- *Maritime Offshore Oil and Gas Award 2010*
- *Medical Practitioners Award 2010*
- *Mining Industry Modern Award 2010*
- *Oil Refining and Manufacturing Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Pastoral Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Professional Diving (Industrial) Industry Award 2010*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2010*
- *Real Estate Industry Award 2010*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*
- *Salt Industry Award 2010*

- *Seagoing Industry Award 2010*
- *Sports Organisations Award 2010*
- *Textile Clothing, Footwear and Associated Industries Award 2010*
- *Vehicle Manufacturing Repair, Services and Retail Award 2010*
- *Wine Industry Award 2010*

[40] The hearing which took place on 7 August 2015 did *not* deal with the submissions referred to at paragraph [39] above. We decided to split the hearings so that the terms of the various model terms are finalised prior to any consideration of the insertion of those model terms into the particular modern awards concerned. These matters, along with any other objections to the insertion of the model provisions in other modern awards, will be dealt with at a hearing to be held on Tuesday, 23 November 2015.

[41] We now turn to the issues which were the subject of the proceedings on 7 August 2015.

3.1 Excessive Annual Leave

[42] As we have mentioned, in the *June 2015 decision* the Commission set out a model term reflecting its provisional view as to the type of term which may be suitable for insertion into modern awards.

[43] Interested parties were provided with an opportunity to make further submissions – directed at both the model term and the proposition that *all* modern awards be varied to insert the model term.

[44] ACCI[34] and Ai Group[35] advanced the most comprehensive submissions in relation to particular elements of the provisional model term. AAA, ABI/NSWBC, AHA, ARA, MIMA, MTA, VACC and the Voice of Horticulture supported ACCI's submissions. The AHEIA, AMMA, AMIC and Business SA generally supported the submissions made by ACCI and Ai Group.

[45] The ACTU made no written submissions on the wording of the provisional model term but did respond to the submissions advanced by the various employer associations. The ACTU's written submission was directed at the view provisionally expressed in the *June 2015 decision* that a model excessive leave term should be inserted in all modern awards. As we have mentioned the insertion of the model term in particular modern awards will be the subject of the second phase of the implementation proceeding.

[46] The AMWU submitted that the provisional model term be varied to provide as follows:

(i) to give employees the power to direct in the first instance, once an excessive amount of leave has accrued;

(ii) to give the employer the power to direct 6 months after an excessive amount of leave has accrued; and

(iii) to remove the limit on the amount of leave an employee can direct.

[47] The AMWU Vehicle Division supported the AMWU's submission.

[48] The TCFUA supported the inclusion of the provisional model term in the *Dry Cleaning and Laundry Industry Award 2010* and the *Textile Clothing and Laundry Industry Award 2010*, albeit with the inclusion of some additional safeguards.

[49] It is convenient to deal with the submissions by reference to the particular components of the provisional model term, beginning with subclause 1.1.

Clause 1.1 Definitions

Shiftworker means [*insert definition*]

An employee has an **excessive leave accrual** if:

(a) the employee is not a shiftworker and has accrued more than eight weeks' paid annual leave; or

(b) the employee is a shiftworker and has accrued more than 10 weeks' paid annual leave.

[50] ACCI and a number of other employer organisations submit that the proposed definition of shiftworker be deleted, noting that awards already contain a definition or description of a shiftworker when relevant.

[51] During the course of the oral submissions a broad consensus emerged in support of the proposition that the definition of a shiftworker for the purpose of this clause should be dealt with on an award by award basis.[36] As a general proposition the definition of 'shiftworker' for the purpose of this clause will be the same as the definition in the relevant award which entitles a shiftworker to additional paid annual leave in accordance with the NES.

[52] Business SA also submits that the definition of excessive leave accrual should be reviewed on the basis that the proposed threshold of eight weeks (for a non-shiftworker) reduces the flexibility of the provision and the potential productivity gains for business. It was proposed that a threshold of six weeks accrued leave be adopted. A similar submission is advanced in respect of the period of retained leave under paragraphs 1.2(b)(i) and 1.2(c)(i) of the provisional model term. Business SA submits:

> 'Potential productivity gains will be less due to the significant reduction in the potential period of restorative leave to be taken by the employee …'[37]

[53] The *June 2015 decision* rejected the adoption of a six weeks' accrued annual leave threshold – as had been proposed by the Employer Group – for three reasons:

> 'First, the adoption of a six week threshold ignores the fact that different annual leave entitlements accrue to different categories of employees. Specifically, shiftworkers (as referred to in s.87(1)(b) of the Act) are entitled to five weeks' paid annual leave for each year of

> service, whereas employees other than shiftworkers are entitled to four weeks. Any definition of excessive accrued leave should take account of this difference.
>
> Second, over two-thirds (52) of the 79 modern awards which presently contain excessive leave provisions provide that an employer's right to direct an employee to take annual leave is only enlivened once the employee has accrued an entitlement to *eight weeks' or more* paid annual leave.
>
> Third, the adoption of a six week threshold unfairly limits the capacity for employees to accrue leave for a later, longer, holiday. It will be recalled that Skinner and Pocock found that the most common reason given by employees for not taking leave was saving it for a future holiday.'[38]

[54] Nothing has been put in the present proceedings which persuades us to depart from the view expressed in the *June 2015 decision*. We propose to retain the definition of excessive leave accrual and the safeguards in paragraphs 1.2(b)(i) and 1.2(c)(i) of the provisional model term.

[55] We now turn to subclause 1.2(a).

> *Clause 1.2(a) Dealing with excessive leave accruals by agreement*
>
> Before an employer can direct that leave be taken under subclause 1.2(b) or an employee can give notice of leave to be granted under subclause 1.2(c), the employer or employee must request a meeting and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

[56] HIA, MPA of NSW and NFF submit that subclause 1.2(a) should be deleted in its entirety on the basis that it is unnecessary, overly prescriptive and will increase the regulatory burden on employers.

[57] Ai Group submits[39] that the mandatory requirement for a "meeting" is unnecessarily prescriptive. It submits that in practice, employers and employees often use a range of methods to communicate and that the parties should be left to determine the most appropriate means of seeking to reach an agreement on the steps to be taken to reduce or eliminate an employee's excessive leave accrual. The Group of Eight advance a similar point, submitting that the concept of a physical meeting is outdated and inflexible:

> 'It is commonly the case that supervisors and the staff they supervise may be located at different locations. They may well be overseas, they may be meeting electronically. The clarification that we would seek is that it is an obligation to confer …'[40]

[58] If the Commission is of the view that the requirement to genuinely try to reach agreement is not sufficient then Ai Group submits that all that should be required is that the relevant party has made "a reasonable attempt to initiate a discussion for the relevant purpose". It is submitted that such a requirement would address the possibility of parties simply seeking a meeting or discussion at a time that could not be accommodated by the other.

[59] Subclause 1.2(a) provides that before an employer can issue a direction or an employee can give a notice, the employer or employee must:

(i) request a meeting; and

(ii) genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrued.

[60] Contrary to the submissions of some of the employer parties we are not persuaded that subclause 1.2(a) should be deleted in its entirety. As observed in the *June 2015 decision* it is plainly preferable if issues associated with excessive leave can be resolved by agreement between the employer and employee concerned, without the need for a direction.[41] We are satisfied that an award term which requires the parties to confer and genuinely try to agree upon steps to reduce or eliminate an employee's excessive leave accrual is necessary to achieve the modern awards objective.

[61] We acknowledge that the requirement that the employer or employee "must request a meeting" is inapt and unduly prescriptive. It is intended that the employer and employee discuss how to reduce or eliminate the employee's excessive leave accrual (and genuinely try to reach agreement). Such discussions need not be confined to face to face meetings.

[62] To better reflect the intent of the provision we will delete the words "request a meeting" and insert the words "seek to confer" where the previous words appeared.

[63] We now turn to subclause 1.2(b). Four aspects of the subclause (underlined below) were the subject of submissions.

Clause 1.2(b) Employer may direct that leave be taken

This subclause applies if an employee has an excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. <u>The direction must state that it is a direction given under subclause 1.2(b) of this award</u>.

Such a direction must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));

(ii) <u>require the employee to take any period of leave of less than one week</u>;

(iii) require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;

(iv) <u>require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or</u>

> (v) be inconsistent with any leave arrangement agreed between the employer and employee.
>
> An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given. The employer is not to take the direction into account in deciding whether to agree to such a request.
>
> **Note:** The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.
>
> If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.
>
> The employee must take paid annual leave in accordance with a direction complying with this subclause.

[64] First, ACCI, MPA of NSW and the NFF submit that the words "*The direction must state that it is a direction given under subclause 1.2(b) of this award*" be deleted. ACCI submits that it is a requirement going to form, with no practical effect and that it would be a regrettable outcome if a direction that complied with subclause 1.2(b) in every other respect could be said to be in breach of an award term because it did not include the statement referred to in subclause 1.2(b). The MPA of NSW submits that the requirement imposes an unnecessary regulatory burden on employers and exposes them to a liability for award breach. It is submitted that the removal of subclause 1.2(b) will assist in simplifying the model term and will remove a potential liability.

[65] The ACTU and a number of individual unions opposed the deletion of the words sought to be removed by ACCI and others. The ACTU submitted that in the context of a new provision that will have an impact across the award system such a provision is important in order "to explain to people what it is they need to do to comply so that people on both sides of the employment relationship actually understand what is happening … it provides clarity so that people can refer back to the clause and understand what it is exactly they're being asked to do or are required to do".[42]

[66] We agree with submissions advanced by ACCI and others and will delete the words in question, from subclauses 1.2(b) and 1.2(c). We acknowledge the force of the argument put by the ACTU but in our view the issue it raises can be addressed in other ways, such as through the provision of information by the Fair Work Ombudsman and others.

[67] We now turn to the requirement that any direction must not require the employee to take any period of leave of less than one week (clause 1.2(b)(ii)).

[68] ACCI submits that subclause 1.2(b)(ii) be deleted on the basis that imposing a requirement that an employee cannot be directed to take a period of leave of less than one week "may have a negative impact on both employers and employees because of a loss of potential flexibility".[43] Business SA submits that subclause 1.2(b)(ii) is "overly prescriptive

and inflexible".[44] The potential impact on employers and employees is dealt with at paragraphs 8.2–8.8 of ACCI's submission. For example, at paragraph 8.5 ACCI submits:

> 'A direction to take leave at times complimentary to the days on which public holidays fall (provided the employer does not have peak times of trade coinciding with public holidays) can actually have benefits for both employers and employees. The Christmas period in 2014 is a good example. With Christmas Day and Boxing Day falling on a Thursday and Friday, there was an opportunity to direct 3 days' leave on the preceding Monday-Wednesday. Similarly the opportunity also existed the following week, when the New Year's Day public holiday fell on a Thursday. Directions of less than a week can operate in a complimentary manner to particular working patterns and rostering arrangements and enable more efficient management of absences.'

[69] ACCI submits that subclause 1.2(b)(ii) limits employer flexibility in relation to the management of leave liabilities, which in turn:

(i) compromises flexible modern work practices (s.134(1)(d)); and

(ii) has a negative impact on employment costs and increases the regulatory burden (s.134(1)(f)).

[70] During the course of oral argument ACCI conceded that the submitted increase in regulatory burden was "indirect" and that any employee preference for a period of less than a week – to align with a public holiday or a weekend – could be accommodated by agreement during the pre-direction discussion stage mandated by subclause 1.2(a). The central argument advanced in support of the deletion of subclause 1.2(b)(ii) was that such a limitation may not suit the operational requirements of some employers.

[71] We acknowledge that the limitation in subclause 1.2(b)(ii) may not suit particular businesses, but that is not the only consideration. It is desirable that some minimum period of leave be prescribed in circumstances where the employee concerned has an excessive leave accrual and may not have had the benefit of any paid annual leave for a period of more than two years. Subclause 1.2(b)(ii) of the provisional model term will be retained.

[72] Business SA submitted that subclause 1.2(b)(iv) should be deleted on the basis that it is "unnecessary and overly prescriptive" and that employees are sufficiently protected by access to the dispute resolution clause in the award.[45] Little detail is provided in Business SA's written submission and this issue was not the subject of any elaboration during the course of oral argument. The proposed deletion of subclause 1.2(b)(iv) was not supported by any other party.

[73] As expressed in the *June 2015 decision* the rationale for paragraph 1.2(b)(iv) is "to ensure that the excessive leave accrual is dealt with reasonably promptly, but still allow sufficient scope for the leave to occur at a time that is suitable to both the employer and employee".[46] Nothing put in these proceedings persuades us to depart from the view expressed in the *June 2015 decision*. Subclause 1.2(b)(iv) of the provisional model term will be retained.

[74] We now turn to the last component of subclause 1.2(b) which was the subject of submissions.

[75] ACCI, Ai Group[47] and the NFF submit that the following part of subclause 1.2(b) be deleted:

> *'An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given. The employer is not to take the direction into account in deciding whether to agree to such a request.*
>
> *Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.*
>
> *If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.'*

[76] It is submitted that the provisions are unnecessary given the requirement in subclause 1.2(a) for the parties to "*genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual*" and that the dispute resolution provisions within awards can be enlivened to deal with any potential problem.

[77] ACCI submits that it is desirable to avoid provisions that could operate as a source of disputation by encouraging the making of requests for annual leave only after the direction has been made by the employer rather than in an earlier process of genuinely trying to agree upon steps that would reduce or eliminate the employee's excessive leave accrual.

[78] ACCI notes that the inclusion of clause 1.2(b) within awards will not prevent an employee making requests for annual leave either prior to or after the direction nor will it displace the requirement that an employer must not unreasonably refuse a request. ACCI submits that "at the very least", the text providing that the "*employer is not to take the direction into account in deciding whether to agree to such a request*" should be removed from the model term.

[79] In addition, NFF submits that the deeming provision which effectively withdraws a direction that would otherwise result in leave accruals falling below six weeks, duplicates subclause 1.2(b)(i). A direction which does not comply with the safeguard in subclause 1.2(b)(i) would be invalid to that extent. This deeming provision is discussed further at paragraph [169] of this decision.

[80] The rationale for the insertion of the provision which is the subject of the ACCI, Ai Group and NFF submissions is set out at paragraphs [205]–[208] of the *June 2015 decision*, as follows:

> '[205] A further limitation intended to ensure that a requirement to take leave under the model clause is reasonable is that a direction under subclause 1.2(b) operates subject to s.88(2) of the Act. Subclause 1.2(b) provides that an employee given a direction to take leave may make a request to take paid annual leave as if the direction had not been given. Under the NES (s.88(2)) the employer must not unreasonably refuse such a request … If leave is agreed after a direction is issued and the direction in combination with the agreed leave would then result in the employee's leave accrual at any time being reduced below six weeks, the direction will be deemed to have been withdrawn.
>
> [206] In effect, this limitation means that the employee retains his or her entitlement under s.88 of the Act to take accrued paid annual leave, notwithstanding a direction to take leave

under subclause 1.2(b). For example, the employee might request to take some or all of the directed leave at a time or times that better suit the needs of the employee and if such a request is made it cannot be unreasonably refused by the employer.

[207] This limitation has been provided to make clear how this arrangement enables the particular circumstances of the employee and employer at the time (including matters personal to the employee) to be taken into account. (See *Australian Federation of Air Pilots v HNZ Australia Pty Ltd.*)[48]

[208] The note regarding the NES in subclause 1.2(b) is an incidental term within the meaning of s.142 of the Act and/or an ancillary or incidental term within the meaning of s.55(4), and will assist in ensuring that the operation of the modern award clause is easy to understand in terms of s.134(1)(g).'

[81] During the course of oral argument it was generally accepted that the making of a direction under subclause 1.2(b) did not prevent an employee from making a request to take paid annual leave, and that in conformity with s.88(2), the employer must not unreasonably refuse to agree to such a request. Section 88 of the Act provides:

'88 Taking paid annual leave

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.'

[82] A direction to take leave clearly does not prevent an employee requesting paid leave *additional to* the leave he or she has been directed to take, or affect the employer's obligation not to unreasonably refuse a request for additional leave. However, absent express words in the model clause to the contrary, a direction to an employee to take leave could well be treated as excluding any subsequent request to take some or all of the leave covered by the direction at a different time or times to that directed. Further, as discussed later in this decision, it seems to us that as a matter of statutory construction a direction to take leave pursuant to s.93(3) need not operate subject to s.88.

[83] The central issue for the various employer organisations was the retention of the sentence: "The employer is not to take the direction into account in deciding whether to agree to such a request". A degree of consensus also emerged in relation to this issue. In the course of oral argument the ACTU submitted:

'In relation to the interface between a direction and a subsequent request, and the notion of how one deals with it in a section 88 sense about not unreasonably refusing request. I mean it strikes us as correct that one of the circumstances which an employer might take into account is the fact that a direction has already been given, and that there has been a certain amount of planning around that because in a sense the manner in which, in the ordinary course, leave is agreed to or not agreed to involves some consideration of whether or not the leave could be accommodated.

But we would not like to see that issue dealt with in a mechanistic way so that the granting of a - the issuing of a direction in all cases defeats the capacity to make an alternative agreement. And I'm not hearing that that's what the intention is from this side of the table, but I haven't got

> - try as I might, I haven't got a set of words to put up around that but just to exercise caution in ensuring that it's not a mechanical relationship that results from the wording.'[49]

[84] Dealing with this issue first, we propose to amend the part of subclause 1.2(b) set out at paragraph [75] above by deleting the second sentence. The fact that a direction to take leave has been given would not of itself defeat any subsequent employee request to take leave covered by the direction at a different time. But, depending on the circumstances, it may be appropriate for the employer to take into account the reasons for giving the direction and consequences that have flowed from the giving of the direction in deciding whether to agree to the employee's request. For example, if before the employee's request is received the employer has already engaged short-term replacement labour to cover the employee's absence during the directed leave, that may be relevant for the purposes of determining whether it would be unreasonable to refuse the requested leave.

[85] We are not persuaded, however, that any further text should be deleted from subclause 1.2(b).

[86] The employer arguments against retention of the remaining text set out at paragraph [75] appear to proceed on a misunderstanding of the requirements of s.93(3) of the Act and the operation of the provisional model term. Section 93 is in Division 6 of Part 2-2 and hence forms part of the NES. Subsection 93(3) is as follows:

> *'Terms about requirements to take paid annual leave*
>
> (3) A modern award or enterprise agreement may include terms 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.'

[87] Subclause 1.2(b) of the provisional model term is plainly a term of the type contemplated by s.93(3). Subclause 1.2(b) provides that an employer may direct an employee to take a period or periods of paid annual leave in particular circumstances (i.e. where the employee has an excessive leave accrual). The power to issue such a direction is constrained by the requirement in subclause 1.2(a) firstly to seek to confer with the employee and to genuinely try to agree upon steps to reduce or eliminate the employee's excessive leave accrual. The power is also constrained by the particular requirements set out in paragraphs (i) to (v) of subclause 1.2(b). However, for reasons explained below these constraints are not sufficient to ensure that the direction will be "reasonable" as required by s.93(3) of the Act.

[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".[50] The Explanatory Memorandum at paragraphs 381-382 states:

> '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.'[51]

[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.'[52]

[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.

[93] It seems to us that two different approaches might be taken in crafting an award term to deal with requirements to take leave in a way that satisfies s.93(3).

[94] The first and perhaps most 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. However, that approach would give rise to significant uncertainty and potential disputation, as the status of any employer direction would be open to challenge on the basis that the individual needs and circumstances of the employee had not properly been considered and that the direction was not reasonable.

[95] The better approach, it seems to us, is the one adopted in the provisional model term. The model term establishes a number of procedural requirements for any direction to take leave (that the parties first seek to confer, that the direction be in writing etc.) and broad constraints on the quantum and timing of the directed leave. These procedural requirements and constraints go some way to ensuring that any direction to an employee to take excessive accrued leave will be reasonable in terms of s.93(3), but they will not necessarily ensure proper consideration of the individual needs and circumstances of the employee so far as the timing of the directed leave is concerned. In order to address that issue, the model term enables the employee to make a subsequent request to take some or all of the leave covered by the direction at a different time or times (and the employer may not unreasonably refuse such a request). This approach provides greater certainty than the alternative approach outlined above as it minimises the scope for disputes as to the reasonableness of the direction. This is because, pursuant to the model term, the employee must comply with a direction to take excessive accrued leave meeting the requisite procedural requirements and constraints unless:

- the employee makes a subsequent request for leave;
- that request is agreed to by the employer; and
- taking both the directed leave and the agreed leave would at any time reduce the employee's accrued leave balance below six weeks (taking into account any other leave that is also to be taken).

[96] Under the terms of the provisional model term, an employee to whom a direction has been given may make a request to take paid annual leave as if the direction had not been given, and if that leave is agreed and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn. Giving primacy to the right of an employee to request to take accrued annual leave (and not to have that request unreasonably refused by the employer) over the right of an employer to direct that leave be taken, provides a means of ensuring that the personal needs and circumstances of the employee are taken into account. These aspects of the operation of the model term were illustrated by the following example in the *June 2015 decision*:

> **Example**
>
> Sam is a full-time shiftworker who has not taken any annual leave in the three years she has worked for her employer and so has an accrued entitlement to 15 weeks' leave after three years. Sam's employer encourages its employees to take their full five weeks of annual leave each year in two periods—one during the middle of the year and one towards the end of the year.
>
> Sam's supervisor meets with her to propose that she take seven weeks' leave at midyear and a further seven weeks towards the end of the year, so as to reduce her leave accrual to six weeks by the end of the fourth year. However, the only leave that Sam will agree to is one period of

five weeks before the middle of the year and no agreement is reached. Sam's supervisor issues a direction that she is to take the two leave periods the supervisor had proposed.

After the direction is issued, Sam applies to take five weeks' leave before the middle of the year. While this is not the most convenient time for the employer, it can accommodate this leave period without significant additional cost or disruption to its business. As the employer is aware that it must not unreasonably refuse the requested leave … the employer approves the leave.

As the direction would require Sam to take a further 14 weeks' leave and this would reduce her accrued entitlement at the end of the year to one week, the direction is deemed to be withdrawn. However, as Sam will not agree to take any further leave even though she has been granted the leave she requested, the employer issues a new direction requiring her to take a further five week leave period during the middle of the year and a further four week period towards the end of the year. This will leave Sam with at least six weeks' accrued leave at the end of the fourth year, after she has taken the agreed leave and the two directed periods of leave.

[97] We now turn to subclause 1.2(c).

Clause 1.2(c) Employee may require that leave be granted

This subclause applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under subclause 1.2(b) that will eliminate the employee's excessive leave accrual.

If agreement is not reached under subclause 1.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. The notice must state that it is a notice given under subclause 1.2(c) of this award.

Such a notice must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);

(ii) provide for the employee to take any period of leave of less than one week;

(iii) provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;

(iv) provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or

(v) be inconsistent with any leave arrangement agreed between the employer and employee.

> The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause.

[98] ACCI, Ai Group and a number of other employer organisations submit that subclause 1.2(c) should be deleted.

[99] ACCI submits that subclause 1.2(c) represents a substantial departure from the existing provisions of the Act and the modern award system. It is submitted that the notion that employees can effectively direct the taking of leave is foreign to the current regulatory system and the various Federal and State based annual leave legislation that existed prior to 2010.

[100] ACCI identifies three particular issues in respect of clause 1.2(c):

> (i) it confers on employees a right to take leave without having to have regard for a business' most productive periods, impairing the efficient and productive performance of work (see s.134(1)(d) of the Act);
>
> (ii) it confers on employees a right to take leave which could be exercised without regard for the impact of the leave on business or employment costs, thus negatively impacting upon business and increasing employment costs and the regulatory burden (see s.134(1)(f)); and
>
> (iii) it incentivises employers to direct the taking of all excessive leave by employees, even when this does not suit the needs of either party if they fear the impact of employee-directed leave. This would negatively impact business and the regulatory burden (see s.134(1)(f)) …[53]

[101] Ai Group also submits that subclause 1.2(c) of the model term should be deleted in its entirety. If the Commission is not persuaded to delete subclause 1.2(c) in its entirety, then Ai Group submits that the last sentence of clause 1.2(c) should be amended to state:

> 'The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause, unless the employer has reasonable business grounds for not granting the leave and the employer advises the employee of such grounds.'[54]

[102] Ai Group also submits that it would be appropriate to insert a transitional arrangement to address situations where a significant proportion of an employer's workforce currently has excessive leave accruals or that it would be appropriate for subclause 1.2(c) to not commence operation until 12 months after the remainder of the clause.

[103] In support of its primary submission Ai Group submits[55] that subclause 1.2(c) is not necessary (within the meaning of s.128) to achieve the modern awards objective having regard to the significant protection afforded by s.88(2). It is also submitted that the proposed subclause risks imposing unfair and unworkable arrangements on employers. In particular, it is contended that the disruption and cost that may flow from affording employees an absolute right to take leave could be disproportionate to the benefits which would flow from reduced leave accruals.

[104] Further, Ai Group submits that it will be very difficult for smaller employers to accommodate a mandatory requirement to grant leave as such employers often have very limited capacity to cover employee absences. On this basis it is submitted that the model clause fails to acknowledge the special circumstances of small business and as such is inconsistent with the objects of the Act (s.3(g)).

[105] Ai Group also submits that subclause 1.2(c) would reduce an employer's capacity to manage leave arrangements, and in particular employee absences, and on this basis would be contrary to a number of the s.134 considerations, in particular:

(i) the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d));

(ii) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and

(iii) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

[106] Ai Group contends that affording employees an absolute right to require that leave be granted is likely to impose a significant burden, or be completely unworkable, where employers are faced with challenges such as:

(i) labour shortages at times when appropriate replacement labour to cover for annual leave cannot be sourced (e.g. in remote locations);

(ii) seasonal fluctuations in demand for services or products;

(iii) contractual arrangements that may not be able to be met if employees are able to unilaterally control when leave is taken;

(iv) dealing with excessive leave entitlements of multiple employees; and

(v) accommodating unexpected absences of other employees that are beyond the employer's control. This is particularly significant where an employee's absence is authorised by the Act or other legislation.

[107] Ai Group advances three additional points in support of its primary submission:

(i) subclause 1.2(c) would operate to undermine the presumption in s.88 that an employer must agree to the taking of annual leave and would circumvent s.88(2) by removing the ability of employers to refuse a leave request when doing so would be reasonable;

(ii) deleting subclause 1.2(c) would be consistent with maintaining an incentive for employees to bargain (s.134(1)(b)); and

(iii) not affording employees an absolute right to give notice of the time at which they access leave would be consistent with the less prescriptive approach adopted in s.94(6) in relation to award free provisions and hence would promote greater consistency in the safety net applicable to all employees.

[108] HIA submits that subclause 1.2(c) ignores the ability of current dispute resolution processes in modern awards to manage disagreements in relation to the granting of leave and is 'nullified' by the operation of s.56. In relation to the second point it is submitted that subclause 1.2(c) excludes the operation of part of the NES (namely s.88(2)) and accordingly has no effect because of the operation of s.56.[56]

[109] The NFF submits that subclause 1.2(c) is inconsistent with the NES (s.88(2)) because it removes the right of an employer to refuse a request for leave on reasonable grounds. Business SA put a similar submission contending that subclause 1.2(c) "is contrary to s.88 of the *Fair Work Act 2009* as it does not allow for reasonable refusal by the employer".[57]

[110] As is apparent from the above summary the various employer parties submitted that subclause 1.2(c) should be deleted, on both jurisdictional and merits grounds. It is convenient to deal with the jurisdictional arguments first.

[111] The essence of the jurisdictional argument is that a modern award term which allows an employee to determine the time at which he or she may take a period of paid annual leave (such as subclause 1.2(c)) of the provisional model term) excludes a provision of the NES (namely s.88(2)) and has no effect (because of s.56). It is submitted that a term which has no effect should not be included in a modern award. As part of the argument advanced it is also submitted that a provision such as subclause 1.2(c) is not a term of the type contemplated by subsections 93(3) or (4) and hence is not a term which the Commission is permitted to include in a modern award.

[112] The jurisdictional argument put by Business SA, HIA and NFF was not supported by Ai Group, ACCI or any other employer organisation and was opposed by the ACTU and a number of individual unions.

[113] We are satisfied that a provision such as clause 1.2(c) may be inserted into a modern award and we reject the jurisdictional argument advanced by Business SA, HIA and NFF.

[114] Section 55 deals with the interaction between the NES and a modern award or enterprise agreement:

> **'55 Interaction between the National Employment Standards and a modern award or enterprise agreement**
>
> *National Employment Standards must not be excluded*
>
> (1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.
>
> *Terms expressly permitted by Part 2–2 or regulations may be included*
>
> (2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2–2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).'

[115] A term of a modern award has no effect to the extent that it contravenes s.55 (see s.56). Three aspects of s.55 are relevant for present purposes:

(i) s.55(1) provides that a modern award must not exclude any provision of the NES;

(ii) s.55(2)(a) provides that a modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES); and

(iii) s.55(4)(b) provides that a modern award may include terms that 'supplement' the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES.

[116] The NES is contained in Part 2-2 of the Act and comprises ss.62–125. Section 59, which is described as a guide to Part 2-2, states:

'59 Guide to this Part

This Part contains the National Employment Standards.

Division 2 identifies the National Employment Standards, the detail of which is set out in Divisions 3 to 12.

Division 13 contains miscellaneous provisions relating to the National Employment Standards.

The National Employment Standards are minimum standards that apply to the employment of national system employees. Part 2-1 (which deals with the core provisions for this Chapter) contains the obligation for employers to comply with the National Employment Standards (see section 44).

The National Employment Standards also underpin what can be included in modern awards and enterprise agreements. Part 2-1 provides that the National Employment Standards cannot be excluded by modern awards or enterprise agreements, and contains other provisions about the interaction between the National Employment Standards and modern awards or enterprise agreements (see sections 55 and 56).

Divisions 2 and 3 of Part 6-3 extend the operation of the parental leave and notice of termination provisions of the National Employment Standards to employees who are not national system employees.'

[117] As we have mentioned, Business SA, HIA and NFF contend that subclause 1.2(c) of the provisional model term excludes a provision of the NES (s.88(2)) because it removes the right of an employer to refuse a request for leave on reasonable grounds.

[118] Contrary to the submission advanced, s.88(2) does not confer any rights on an employer. Subsection 88(1) provides that paid annual leave may be taken at a time agreed between an employee and his or her employer. Subsection 88(2) provides that an employee's request to take paid annual leave at a particular time must not be unreasonably refused by his or her employer. Properly construed, s.88(2) confers a conditional right on an employee to take paid annual leave in accordance with the employee's request. The obligation upon the employer is to not unreasonably refuse to agree to such a request. Construed in this way the provisional model term cannot be said to exclude a provision of the NES.

[119] Even if we are wrong about the construction of s.88(2), and Business SA, HIA and NFF are correct, that is not the end of the matter. Section 88 forms part of the NES and it must be read in the context of the NES as a whole.

[120] Section 93 is in Part 2-2 and hence forms part of the NES. Subsections 93(3) and (4) provide as follows:

'Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms 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.

Terms about taking paid annual leave

> (4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.'

[121] The NFF submits that s.93(3) does not permit an award term to provide that an employee can require the taking of paid annual leave. This is clearly correct. The NFF then continues that s.93(4) must be read together with s.88, such that a modern award cannot deal with the "taking of leave" in such a way that the employer loses the right conferred by s.88(2) to refuse to agree to a request by an employee to take paid annual leave.

[122] Ascertaining the proper construction of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose.[58] The apparent scope of a statutory provision (such as s.93(4)) may be limited by other sections of the Act. The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.[59]

[123] It is important to appreciate that s.88 sets out a *minimum standard* in relation to the taking of paid annual leave. Section 93(4) provides that a modern award may include terms "*otherwise dealing with* the taking of paid annual leave". The expression "otherwise dealing with" in s.93(4) must be given some work to do and it seems to us that it is an expression of broad import. Read in context this expression means a term dealing with the taking of paid annual leave other than a term of the type contemplated by s.93(3).

[124] We reject the NFF's contention that s.93(4) must be read down such that a modern award cannot deal with the taking of leave in such a way that the employer loses the right, said to be conferred by s.88(2), to "refuse to agree to a request by an employee to take paid annual leave"

[125] Leaving aside the correct characterisation of s.88(2), there is no warrant for limiting the scope of s.93(4) in the manner contended. Had the legislature intended the power conferred to be so limited then one would have expected that such a limitation would have been made explicitly – as is the case in s.93(3), in that an award term by which an employee may be directed to take paid annual leave must be reasonable. Elsewhere in the NES there are also express limitations on powers to include certain terms in modern awards (e.g. see s.63, s.93(2) and s.101(2)).

[126] We note that if the NFF was correct then it would seem to follow that a similar implied limitation would apply to s.93(3) and hence it should be read subject to s.88, in particular s.88(1) which provides that the taking of paid annual leave is by agreement between an employee and his or her employer. This would be manifestly absurd given that s.93(3) provides for award or enterprise agreement terms that require an employee or allow for an employee to be required to take paid annual leave.

[127] Further, the statutory scheme provides that the provisions of the NES, such as s.88, have affect "*subject to*" terms included in a modern award pursuant to a provision of Part 2-2, such as s.93(4) (see s.55(3)). The language of s.55(3) suggests a legislative precedence which is contrary to the submission advanced by the NFF.

[128] We are satisfied that subclause 1.2(c) is an award term which is expressly permitted by a provision of Part 2-2, namely s.93(4). It follows that such a term may be included in a modern award (see s.55(2)(a)).

[129] For completeness, we are also satisfied that subclause 1.2(c) may properly be characterised as a term which supplements the NES. Subclause 1.2(c) supplements s.88(2) by extending the circumstances in which an employer must comply with an employee's request to take paid annual leave. The effect of subclause 1.2(c) is not detrimental to an employee in any respect, when compared to the NES, and hence may be included in a modern award pursuant to s.55(4)(b).

[130] We now turn to the merit arguments advanced by the various employer parties advocating the deletion of subclause 1.2(c). The essence of the arguments put is that an award term which gives an employee the right to determine when he or she takes paid annual leave will have an adverse impact on business and may impair the efficient and productive performance of work. On this basis it is submitted that the matters set out in paragraphs 134(1)(d) and (f) of the modern awards objective are relevant and tell against the insertion of a term such as 1.2(c) in a modern award.

[131] We also note that the NFF, in the course of presenting its jurisdictional objections in relation to this provision, raised the suggestion that the draft model provision might encourage employees to accrue excess leave with a view to ultimately being able to issue a direction that would override their employer's capacity to refuse leave on reasonable grounds.[60] Such a submission takes insufficient account of the fact that under the model term the employer has the option to issue a direction, before an employee may issue a notice under subclause 1.2(c).

[132] The modern awards objective is central to the Review. It is directed at ensuring that modern awards, together with the NES, provide a "fair and relevant minimum safety net of terms and conditions" taking into account the particular considerations in paragraphs 134(1)(a)–(h). The objective is very broadly expressed. There is a degree of tension between some of the s.134 considerations with no particular primacy attached to any of the matters set out in paragraphs 134(1)(a)–(h). The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions.

[133] The employer submissions focus on the effect of subclause 1.2(c) on business, understandably so. But it is important that the debate on this issue be seen in its broader context. In the *June 2015 decision* the Commission made a number of findings on the basis of the evidence adduced (primarily by the Employer Group). Three sets of findings are particularly relevant for present purposes.

[134] The first set of findings deal with the extent of excessive annual leave accruals. In that regard the Commission made the following findings:

> '(i) most employees do not use their full paid annual leave entitlement (the NES provides that non-casual employees are entitled to four weeks' paid annual leave (shiftworkers as referred to in s.87(1) are entitled to five weeks));
>
> (ii) the lack of annual leave utilisation is broadly consistent across family type, life stage and household income; and

(iii) a significant proportion of employees have six weeks or more accrued annual leave.'[61]

[135] The second set of findings concern the impact of excessive annul leave accruals on employees and employers. In that regard the Commission made the following findings:

'(i) Not taking a reasonable portion of leave can give rise to a serious threat to the health and safety of the employees concerned.

(ii) Excessive annual leave accruals are a significant issue for employers. Such accruals represent a significant financial liability and can give rise to cash flow problems (particularly for small businesses) when paid out on termination.

(iii) The taking of accrued paid annual leave can have mutual benefits for employees and employers:

(a) Taking paid annual leave provides employees with a period of rest and recovery from work and has significant positive implications for employee health and wellbeing. As well as providing an opportunity for rest and recovery, taking paid annual leave also provides employees with the time and opportunity to attend to their family and other commitments and to engage in social, community and personal interests.

(b) While the evidence on whether taking paid leave improves productivity appears to be somewhat mixed and inconclusive, there is evidence that absenteeism is reduced after a period of leave and of a strong correlation between workplace stress and anxiety and not taking leave breaks. A period of paid leave is also likely to reduce fatigue at work and improve workplace health and safety.' [62]

[136] On the basis of the findings set out at paragraphs [134] and [135] above the Commission was persuaded that modern awards should include a mechanism for dealing with "excessive leave".[63] In considering the form and content of an appropriate award term the Commission examined the reasons why employees do not fully utilise their accrued paid leave.

[137] The third finding relevant for present purposes concerns the reasons why employees do not fully utilise their accrued paid leave. At paragraph [144] of the *June 2015 decision* the Commission stated:

'The above data suggest that a significant barrier to the use of leave entitlements by employees is work pressures, with 43.9 per cent of employees in the AWALI survey being either too busy at work (30.7 per cent) or unable to take leave at a time that suited them (13.2 per cent). This suggests that employers are not creating workplaces that allow for employees to use their entitlements.'

[138] The three sets of findings referred to above underpinned the decision to reject the Employer Group claim and to formulate the provisional model term. So much is clear from paragraphs [180]–[189] of the *June 2015 decision*:

'[180] The Skinner and Pocock research suggests that the excessive accrual of paid annual leave is predominantly a consequence of:

(i) employee choice (i.e. employees choosing to accrue leave, usually to save it for a future holiday);

(ii) employees being too busy at work to take all of their leave; or

(iii) employees not being able to take their leave at a time that suited them (i.e. they could not reach agreement with their employer to take leave at a time of their choosing).

[181] The Employer Group's model term only partially addresses the reasons for the accrual of excessive leave. It will provide a mechanism for dealing with the voluntary leave hoarder ((i) above) and may address circumstance (iii), by requiring employees to take leave at a time that may not suit them, but it does not address circumstance (ii).

[182] Circumstance (ii) is, essentially, where work pressure prevents an employee from taking all of their paid annual leave. It is the reason nominated by 30 per cent of employees in the Skinner and Pocock survey for not taking all of their leave. It is a significant factor in the excessive accrual of annual leave and it was not addressed in the Employer Group's model term.

[183] The Employer Group's claim, understandably enough, provided a mechanism to address employer concerns about the accumulation of leave—that is, it provides a means of reducing a significant financial liability.

[184] But the Employer Group's model term provided no avenue for an employee to exercise any control over the time at which their leave is to be taken.

[185] In this context it is important to observe that the Employer Group's claim simply sought to replicate (in form if not substance) previous legislative and award mechanisms to address excessive annual leave accruals. As we have mentioned, before the Work Choices Act amendments, some state and territory annual leave laws provided employers with a right to direct employees to take their annual leave. Further, some 79 modern awards also contain "excessive leave" provisions.

[186] But, importantly, experience has shown that providing employers with a right to direct employees to take their annual leave has *not* provided a complete solution to the issue of excessive annual leave accruals.

[187] Skinner and Pocock found that in 2009 only 40.3 per cent of full-time employees used all of their paid annual leave. Hence, about 60 per cent of full-time employees accrued a portion of their leave. Similar results were obtained in a 2002 survey (only 38.8 per cent of employees used all of their paid leave). As a result, most employees accrued annual leave despite the fact that employers had the right to direct them to take that leave.

[188] Ai Group described the Employer Group's claim as 'a modest step towards restoring employers' capacity to manage leave accruals'.[64] But the Employer Group's claim sought to "restore" a right of direction which has only had, at best, limited success in the past in addressing the issues associated with excessive annual leave accruals.

[189] We are not persuaded that the variation of modern awards to insert the Employer Group's proposed model term is appropriate, nor will it be sufficient to address the problems of excessive accrued paid annual leave. We have redrafted the Employer Group's proposed model term to provide a model term dealing with the taking of annual leave. The model term incorporates the employer's right to direct—which is the central feature of the Employer Group's claim—but also makes provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made.'

[139] In short, the Employer Group claim sought to replicate previous mechanisms to address excessive leave accruals. Such mechanisms have had, at best, limited success in the past in addressing the issues associated with excessive annual leave accruals. The claim did not address a significant factor in the excessive accrual of annual leave – where work pressure prevents an employee from taking all of their paid annual leave. It was on this basis that the Commission concluded that granting the claim would not be sufficient to address the problems of excessive accrued paid annual leave and went on to formulate the provisional model term.

[140] Nothing put in the present proceedings has persuaded us to depart from the view expressed in the *June 2015 decision* that the model term should make provision for the circumstance where an employee accrues excessive paid annual leave but no employer direction is made. The problem that the model term is seeking to address is the accrual of excessive annual leave and the negative impacts this may have on employees and employers. The Act does not require that this problem only be addressed by way of employer directions to take leave.

[141] We now turn to consider whether we should vary any aspect of subclause 1.2(c) in order to address the concerns raised by the employer parties.

[142] We observe at the outset that the submissions put about the impact of subclause 1.2(c) are, necessarily, speculative and somewhat overstated. For instance, it is relevant to note that prior to the commencement of the NES and modern awards the *Annual Holidays Act 1944* (NSW) provided that an annual holiday had to be taken "before the expiry of a period of six months after the date upon which the right to such a holiday accrues". There was a capacity to postpone a period of annual leave by application to the Industrial Registrar, but it was rarely utilised[65]. There is no evidence that a legislative requirement that annual leave be taken within six months of accrual adversely affected business and subclause 1.2(c) is not as restrictive as the provisions of the *Annual Holidays Act 1944* (NSW).

[143] The right of an employee to require that a period of leave be granted pursuant to subclause 1.2(c) is subject to a number of preconditions, in particular:

(i) the employee must have had an excessive leave accrual (eight weeks' paid annual leave, for most employees) for more than six months;

(ii) the employee must seek to confer with the employer and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual; and

(iii) the employer has not given a direction under subclause 1.2(b) that will eliminate the employee's excessive leave accrual.

[144] Further, any notice to the employer that the employee wishes to take a period of paid annual leave is subject to the additional safeguards in paragraphs 1.2(c)(i)–(v). In particular the notice must:

(i) not result in the employee's remaining accrued entitlements to paid annual leave at any time being less than six weeks;

(ii) give the employer at least eight weeks' notice of the commencement of leave; and

(iii) not be inconsistent with any leave arrangement agreed between the employer and employee.

[145] We emphasise that we intend the different elements of the model term to deal with the various causes of excessive annual leave and to operate with appropriate checks and balances to directly encourage the taking of leave for its intended purpose by agreement where possible.

[146] Three additional limitations were canvassed during the course of these proceedings:

(i) an amendment to subclause 1.2(c) to provide an exception to the requirement that the employer must grant the employee paid annual leave in accordance with the notice by inserting the following words:

> 'unless the employer has reasonable business grounds for not granting the leave and the employer advises the employee of such grounds';

(ii) a transitional arrangement such that subclause 1.2(c) not commence until 12 months after the commencement of the balance of the clause, in order to address situations where a significant proportion of an employer's workforce currently has excessive leave accruals; and

(iii) a limitation on the period of annual leave that may be the subject of a notice under subclause 1.2(c).

[147] The first limitation was proposed by Ai Group, but opposed by ACCI and the ACTU. We are not persuaded that such a limitation is appropriate. If the proposed words were inserted then subclause 1.2(c) would add little to an employee's existing rights under s.88(2). We accept that there are some differences between the proposed wording and s.88(2), Ai Group's proposal refers to the employer having "reasonable business grounds" for not granting the leave sought and s.88(2) provides that an employer must not 'unreasonably' refuse an employee's request to take leave. Ai Group's proposal also requires the employer to advise the employee of the grounds for refusing leave and there is no comparable requirement in s.88. Despite these differences there is a considerable conceptual overlap between Ai Group's proposal and s.88(2) and the differences are apt to confuse.

[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).

[149] We are also satisfied that limiting the period of annual leave which may be the subject of a notice under subclause 1.2(c) will assist in ameliorating any adverse effects on business. We will amend the model term such that the maximum period of paid annual leave that may be the subject of a notice by an employee in any 12 month period will be four weeks' leave if the employee is not a shiftworker and five weeks' leave if the employee is a shiftworker. If an employee could not take paid annual leave except by giving a notice under subclause

1.2(c), this would at least allow the employee to take their yearly leave accrual so that their excessive leave accrual does not continue to grow from year to year.

[150] We now turn to subclause 1.2(d).

> *Clause 1.2(d) Dispute resolution*
>
> Without limiting the dispute resolution clause of this award, an employer or an employee may refer the following matters to the Fair Work Commission under the dispute resolution clause:
>
> (i) a dispute about whether the employer or employee has requested a meeting and genuinely tried to reach agreement under subclause 1.2(a);
>
> (ii) a dispute about whether the employer has unreasonably refused to agree to a request by the employee to take paid annual leave; and
>
> (iii) a dispute about whether a direction to take leave complies with subclause 1.2(b) or whether a notice requiring leave to be granted complies with subclause 1.2(c).

[151] ACCI, Ai Group and a number of other employer organisations submit that subclause 1.2(d) is unnecessary because the dispute resolution clause in all 122 modern awards already allows employees to raise a dispute about any matters "arising under the award" (also see s.146 of the Act).

[152] In addition ACCI submits that subclause 1.2(d):

(i) increases the possibility of employer or employee confusion which is inconsistent with ensuring a simple and easy to understand modern award system (see s.134(1)(g)); and

(ii) increases the regulatory burden – at least marginally – in the sense that it requires parties to read and understand additional provisions which are not necessary to give effect to the substantive dispute resolution rights referred to in the clause (see s.134(1)(f)).[66]

[153] Ai Group notes that subclause 1.2(d) suggests that any dispute about the matters identified in paragraphs (d)(i)–(iii) can be referred directly to the Commission without going through the antecedent steps prescribed in the dispute settlement clause in the relevant award.[67]

[154] During the course of oral argument the ACTU submitted that when introducing a change to the award system it makes sense to explain how the new provision operates within the context of the award. On this basis the ACTU supported the retention of subclause 1.2(d),[68] whilst acknowledging that there may be alternate ways of directing attention to the dispute settlement clause in the relevant award, such as a note to that effect.[69]

[155] The *June 2015 decision* indicated that as subclause 1.2(a) required discussion between the employer and employee, it was not necessary for there to be further discussions under the

terms of the award dispute resolution clause before a dispute could be referred to the Commission under subclause 1.2(d).[70] However, on reflection we are not persuaded that it is necessary to include a detailed dispute resolution provision in the model term.

[156] Given that the model term is a substantive change to the modern award system it is appropriate that attention be directed to the dispute settlement clause in the award. A note to this effect will be inserted at the commencement of the model term.

[157] There are three final matters in relation to the form of the excessive leave model term.

[158] First, as mentioned earlier the AMWU submitted that the provisional model term be varied to provide as follows:

(i) to give employees the power to direct in the first instance, once an excessive amount of leave has accrued;

(ii) to give the employer the power to direct 6 months after an excessive amount of leave has accrued; and

(iii) to remove the limit on the amount of leave an employee can direct.

[159] The essence of the AMWU's proposal is that the excessive annual leave model term should be varied to provide employees with the right to give notice of their intention to take leave, in the first instance, that is before any employer direction to take such leave. The AMWU submits as follows:

> 'The excessive leave clause proposed by the AMWU continues to allow the Commission to provide an avenue through which an employer can reduce their excessive leave liabilities.
>
> If an employer had had a year within which to make arrangements for an employee to take extended leave, but have been declining because the employee's workload is too high for effective relief or because they don't agree with the time period, they should not be given the right to exert those reasons in the context of Excessive leave through a power to direct.
>
> Providing the employee with the right to give notice of taking leave first ensures that where the right is not exercised there is a basis upon which an employer's direction is reasonable and directed towards genuine excessive leave accruals.
>
> This also ensures that any employee wanting to save leave for a vacation is given the certainty that they will have at least 8 weeks of leave to give notice about where an employer refused to agree and unreasonably refused after a year for work related reasons. Whereas under the current clause if the employer was given the right to direct first, an employee would only have the certainty that they could continue to have six weeks to negotiate about, and with still not certainty that they may ever be able to take their extended vacation.
>
> It also allows for employees wanting to take leave for other unexpected reasons or for parental related responsibilities. …
>
> The AMWU proposes that if an employee has failed to take up the opportunity to give notice of their own leave after six months, an employer can then direct their employee to take leave.

> The six months ensures that the employee has some control over the time when they take their annual leave before that control is delivered to the employer.
>
> It should not be considered reasonable for an employer to direct leave where they have refused to grant leave for reasons which are work related. Employers should be making reasonable accommodations to ensure that work is not an impediment to taking annual leave entitlement at annual intervals.'[71]

[160] The AMWU also proposes that an employee's notice to take paid annual leave should not be subject to the retention of an accrued entitlement to six weeks' paid leave. In support of this proposition the AMWU submits that:

> 'If an employee is saving up leave to take an extended holiday, requiring that 6 weeks is retained removes that ability to save leave for an extended vacation.
>
> The forced break up of their leave entitlement also reinforces or supports any intransigence on the part of the employer when it comes to extended leave approvals.'[72]

[161] A revised draft model term is attached to the AMWU's submission.

[162] We do not propose to make the changes sought by the AMWU. In our view the management of excessive annual leave accruals should remain primarily an employer responsibility. Under the model term an employee's right to issue a notice in relation to the taking of annual leave only arises where they have had an excessive leave accrual for more than six months and their employer has not issued a direction to reduce or eliminate their excessive leave accrual. In our view this sequencing of rights is an appropriate response to the issue of excessive annual leave accruals and appropriately balances the interests of employers and employees.

[163] The second matter we wish to refer to was raised by the ACTU during the course of oral argument:

> '… I thought I would just kick off with, I suppose, a technical issue before I forget which I admit I haven't thought through entirely, but I might just raise it. In terms of the definition of "excessive leave accruals". So it deals with an excessive leave existing where a certain amount has accrued, but a question has arisen in my mind as to whether you need to provide some exclusion to that in relation to, you know, any extent of the leave balance that has been agreed for some future period of leave.
>
> Because you wouldn't want to be put in a position where there has been an agreement for leave to be taken that has not yet been acquitted, but then triggers a right in the employer or someone else to issue a direction because as at today the balance is above eight weeks. That might have some cross-flow issues in terms of the way the rest of the clause works. My initial thinking of it is that the exclusion would most appropriately capture only those situations where there was an agreement for leave, that that would be the exclusion. But I am throwing it out there.'[73]

[164] The safeguards in paragraphs 1.2(b)(i) and (v) and 1.2(c)(i) and (v) of the provisional model term are directed at the issue raised by the ACTU. These provisions provide that a direction or notice must not:

(i) result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));

…

(v) be inconsistent with any leave arrangement agreed between the employer and employee.

[165] In the *June 2015 decision* the Full Bench made the following observations about these safeguards:

'[199] Paragraph 1.2(b)(i) limits the amount of leave that the employee may be directed to take, by requiring that the direction must not result in the employee's remaining accrued leave entitlement at any time being less than six weeks.

[200] Maintenance of a six week minimum is consistent with s.236(6) of the former WR Act and with the majority of current modern award clauses which limit the amount of accrued paid annual leave that an employer can direct an employee to take. It also accommodates the circumstance of an employee seeking to accrue leave so that he or she can take a reasonable extended holiday. The minimum is applied by considering the effect on the employee's leave accrual of the directed leave being taken, taking into account all previously agreed paid annual leave, any previous directions to take leave and any previous notices given by the employee under subclause 1.2(c).

…

[204] Paragraph 1.2(b)(v) requires that the direction not be inconsistent with any leave arrangement agreed to by the employer and employee. For example, general arrangements for taking leave might have been agreed in the employee's contract of employment, or there may have been a one-off agreement between the employer and employee that the employee could accrue excessive leave for a particular purpose.'[74]

[166] It seems to us that paragraphs 1.2(b)(i) and (v) and 1.2(c)(i) and (v) of the provisional model term address the issue raised by the ACTU and no further amendment or clarification is required.

[167] Paragraphs 1.2(b)(i) and 1.2(c)(i) were also the subject of submissions by HIA. HIA submits that:

'Of particular difficulty is the proposition outlined at Item (i) of the subsection that being, that the remaining annual leave balance at any time be not less than six weeks.

The certainty sought, and efficacy of, the ability of an employer to direct an employee to take annual leave in circumstances of an excessive leave accrual is severely compromised when the 'point in time test' currently contained in a number of existing provisions is removed.

For example under the current provision in the Joinery Award an employer can direct the taking of annual leave when: 'at the time the direction is given, the employee has eight weeks or more of annual leave accrued'.'[75]

[168] The point in time test proposed by HIA fails to take into account paid leave that has been agreed but not taken at the time a direction or notice is given. That test also would not give primacy to the right of an employee to request leave (see paragraph [96] above), as once a direction was given the amount of leave covered by a direction would no longer be available to the employee for the purposes of any subsequent request for leave. Paragraph 1.2(b)(i) accommodates these matters by requiring that a direction to take leave not result in an employee's leave balance *at any time* being less than six weeks. All other leave is to be taken into account for the purposes of determining this minimum leave balance – that is: any leave agreed (whether agreed prior or subsequent to the direction being given); any other leave that the employee has been directed to take under subclause 1.2(b), and any leave that the employee has given notice of under subclause 1.2(c).

[169] As noted in paragraph [79] above, the NFF submitted that the deeming provision in subclause 1.2(b) of the provisional model term (the penultimate paragraph in subclause 1.2(b)) duplicates subclause 1.2(b)(i). This deeming provision is to the effect that a direction to take leave is deemed to be withdrawn if leave is agreed after a direction has been issued and the direction would then result in the employee's leave balance at any time being less than six weeks. Whilst, strictly, this deeming provision may be unnecessary, it will be retained so as to make clear that a direction complying with subclause 1.2(b)(i) at the time that it is given may subsequently cease to operate if the taking of further leave is agreed between the employer and employee.

[170] The final general matter concerns the drafting of paragraphs 1.2(b)(i)-(v) and 1.2(c)(i)-(v). HIA proposes that these provisions be redrafted in positive rather than negative terms in order to avoid confusion and add clarity.[76] HIA submits that paragraphs 1.2(b)(ii)–(iv) could be improved by redrafting, as follows:

> 'If a direction to take annual leave is given:
>
> (ii) Any direction must be for at least one week of leave.
>
> (iii) An employer must notify an employee of a direction to take leave at least eight weeks prior to the time when the leave is to be taken.
>
> (iv) An employer cannot direct an employee to take leave more than 12 months from when the direction is given.'

[171] While the HIA's submission has some merit, on further consideration we are of the view that redrafting the provisions in positive terms would not in this case improve clarity.

[172] For the reasons given we have decided to vary the provisional model term in a number of respects. The final version of the excessive leave model term is as follows:

> **The model term—Excessive Annual Leave Accruals**
>
> **Note**: A dispute in relation to the operation of this clause may be dealt with in accordance with the dispute resolution clause of this award [insert clause number]
>
> **1. Excessive Annual Leave Accruals**
>
> This clause contains provisions additional to the NES about taking paid annual leave, to deal with excessive paid annual leave accruals.

1.1 Definitions

Shiftworker means [insert definition]

An employee has an **excessive leave accrual** if:

(a) the employee is not a shiftworker and has accrued more than eight weeks' paid annual leave; or

(b) the employee is a shiftworker and has accrued more than 10 weeks' paid annual leave.

1.2 Eliminating excessive leave accruals

(a) Dealing with excessive leave accruals by agreement

Before an employer can direct that leave be taken under subclause 1.2(b) or an employee can give notice of leave to be granted under subclause 1.2(c), the employer or employee must seek to confer and must genuinely try to agree upon steps that will be taken to reduce or eliminate the employee's excessive leave accrual.

(b) Employer may direct that leave be taken

(i) This subclause applies if an employee has an excessive leave accrual.

(ii) If agreement is not reached under subclause 1.2(a), the employer may give a written direction to the employee to take a period or periods of paid annual leave. Such a direction must not:

- result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under subclause 1.2(c));
- require the employee to take any period of leave of less than one week;
- require the employee to take any period of leave commencing less than eight weeks after the day the direction is given to the employee;
- require the employee to take any period of leave commencing more than 12 months after the day the direction is given to the employee; or

- be inconsistent with any leave arrangement agreed between the employer and employee.

(iii) An employee to whom a direction has been given under this subclause may make a request to take paid annual leave as if the direction had not been given.

Note: The NES state that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

(iv) If leave is agreed after a direction is issued and the direction would then result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks, the direction will be deemed to have been withdrawn.

(v) The employee must take paid annual leave in accordance with a direction complying with this subclause.

(c) Employee may require that leave be granted

(i) This subclause applies if an employee has had an excessive leave accrual for more than six months and the employer has not given a direction under subclause 1.2(b) that will eliminate the employee's excessive leave accrual.

(ii) If agreement is not reached under subclause 1.2(a), the employee may give a written notice to the employer that the employee wishes to take a period or periods of paid annual leave. Such a notice must not:

- result in the employee's remaining accrued entitlement to paid annual leave at any time being less than six weeks (taking into account all other paid annual leave that has been agreed, that the employee has been directed to take or that the employee has given notice of under this subclause);

- provide for the employee to take any period of leave of less than one week;

- provide for the employee to take any period of leave commencing less than eight weeks after the day the notice is given to the employer;

- provide for the employee to take any period of leave commencing more than 12 months after the day the notice is given to the employer; or

- be inconsistent with any leave arrangement agreed between the employer and employee.

(iii) The maximum amount of leave that an employee can give notice of under this subclause is: four weeks' leave in any 12 month period if the employee is not a shiftworker, and five weeks' leave in any 12 month period if the employee is a shiftworker.

(iv) The employer must grant the employee paid annual leave in accordance with a notice complying with this subclause.

[173] Subject to what may be put about the circumstances pertaining to a particular modern award our general 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.

[174] The taking of accrued paid annual leave can have mutual benefits for employers and employees. Yet most employees do not use their full paid annual leave entitlement and a significant proportion of employees have six weeks or more accrued paid annual leave. The excessive accumulation of leave has significant adverse consequences. Not taking a reasonable portion of leave can give rise to a serious threat to the health and safety of the employees concerned and excessive annual leave accruals represent a significant financial liability for employers which can give rise to cash flow problems (particular for small businesses) when paid out on termination. 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.

[175] The model term facilitates the making of mutually beneficial arrangements between an employer and employee and provides an effective mechanism to address excessive annual leave accruals. It provides an employer with a reasonable opportunity to deal with an employee's excessive leave accrual before the employee is able to issue a notice requiring of leave be granted. The various safeguards incorporated into the model term seek to protect the interest of both employees and employers.

[176] 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. 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.

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

[178] As mentioned earlier, we propose to provide interested parties with an opportunity to make submissions about the insertion of the model term into particular modern awards. The process for filing further submissions is dealt with in chapter four of this decision.

3.2 Cashing Out of Annual Leave

[179] The model term in respect of the cashing out of annual leave is set out at paragraph [16] above.

[180] The submissions in the present proceeding were directed at subclause 1.2(a) and (b) of the model term, which provides as follows:

> (a) each cashing out of a particular amount of accrued paid annual leave must be by a separate agreement between the employer and the employee which must:
>
> (i) be in writing and retained as an employee record …
>
> (b) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave at the time that it is cashed out …
>
> (d) employees may not cash out more than two weeks accrued annual leave in any twelve month period.

[181] ACCI and a number of other employer organisations submit that the text "*and retained as an employee record*" in subclause 1.2(a)(i) of the model term is not necessary having regard to the terms of Regulation 3.36 of the *Fair Work Regulations 2009* (Cth) (the Regulations).

[182] ACCI submits there is no need for there to be two separate requirements for an employer to keep a record of an agreement for the cashing out of leave and if two are created, employers could find themselves in breach of both an award term and the record keeping requirements under the Regulations in respect of the same administrative error.

[183] The AMWU submits that the model term should explicitly provide for leave loading to be paid. For example, clause 41.12(ii) of the draft determination for the *Manufacturing and Associated Industries and Occupations Award 2010* should read:

> '(ii) the employee must be paid at least the full amount that would have been payable to the employee has they [sic] employee taken the leave at the time that it is cashed out, including but not limited to any entitlement at clause 41.6 Annual leave loading.'

[184] The AMWU submission is supported by the AMWU–Vehicle Division and the TCFUA.

[185] TAPS seeks clarification in relation to the meaning of "in any 12 month period" in paragraph 1.2(d) of the model term. TAPS notes that its members have canvassed two alternate formulations, either "in each calendar year" or "in each financial year".

[186] We turn first to the proposition that the text "and retained as an employee record" in subclause 1.2(a)(i) is not necessary. Regulation 3.36 provides:

> **'3.36 Records—leave**
>
> (1) For subsection 535(1) of the Act, if an employee is entitled to leave, a kind of employee record that the employer must make and keep is a record that sets out:
>
> (a) any leave that the employee takes; and
>
> (b) the balance (if any) of the employee's entitlement to that leave from time to time.
>
> (2) If an employer and employee agree to cash out an accrued amount of leave:
>
> (a) a copy of the agreement is a kind of employee record that the employer must make and keep; and
>
> (b) a kind of employee record that the employer must make and keep is a record that sets out:
>
> (i) the rate of payment for the amount of leave that was cashed out; and
>
> (ii) when the payment was made.
>
> Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.'

[187] The requirement in subclause 1.2(a)(i) that an agreement to cash out accrued paid annual leave be retained as an employee record is consistent with the obligation imposed by Regulation 3.36(2)(a). We are satisfied that in the context of such a substantive change to the modern award system it is necessary to include a provision in these terms.

[188] We acknowledge that the retention of this provision means that an employer may find itself in breach of both an award term and Regulation 3.36(2)(a) in respect of the same conduct. However, it is important to appreciate that an employer will not face a double penalty for such a single course of conduct: see generally ss.556–557 and *R v Hoar* (1981) 148 CLR 32 at 38; *CFMEU v Director of the Fair Work Building Industry Inspectorate* (2014) 225 FCR 210 and *Director of the Fair Work Building Industry Inspectorate v CFMEU (No.2)* [2015] FCA 407.

[189] As to the AMWU's proposal that the model term should explicitly provide for leave loading to be paid – that is a matter best dealt with on an award by award basis. Subclause 1.2(b) of the model term makes it clear that the employee must be paid "at least the full amount that would have been payable to the employee had the employee taken the leave at the

time that it is cashed out". It follows that if the employee is entitled to be paid leave loading when taking annual leave then the leave loading must be paid when such leave is cashed out.

[190] As to the submission by TAPS, we confirm that the intention of paragraph 1.2(d) is to limit the amount of accrued annual leave which may be cashed out in any 12 month period. In the *June 2015 decision* the Commission said:

> '[256] The model term meets the requirements of s.93(2) of the Act. A modern award may also include terms that supplement the NES (see s.55(4)(b)), and on that basis the model term incorporates four additional safeguards, that are in addition to the requirements of s.93(2).
>
> [257] First, a maximum of two weeks' paid annual leave can be cashed out in any 12 month period. In the case of part-time employees, the two weeks' leave is based on the employees' weekly ordinary hours (see s.87(2) of the Act). As noted earlier, the most common supplementary safeguard in enterprise agreements which permit the cashing out of annual leave is a limitation upon the amount of leave which can be cashed out in any 12 month period. Such a limitation is directed at ensuring that employees take at least half of their accrued annual leave, as leave.'[77]

[191] In the present proceedings no party supported a variation to paragraph 1.2(d) and it will be retained in its current form.

3.3 Granting Leave in Advance

[192] The model term in respect of the granting of annual leave in advance is set out at paragraph [23] above.

[193] The submissions in the present proceeding were directed at subclause 1.1(c) of the model term. Subclause 1.1 provides as follows:

> 1.1 An employer and employee may agree to the employee taking a period of paid annual leave in advance of the employee accruing an entitlement to such leave provided that the agreement meets the following requirements:
>
> (a) it is in writing and signed by the employee and employer;
>
> (b) it states the amount of leave to be taken in advance and the date on which the leave is to commence; and
>
> (c) it is retained as an employee record.

[194] ACCI submits that on the whole it has no significant concerns with the form of the model term but that it could be enhanced by removing subclause 1.1(c) on the basis that record keeping requirements with regard to leave are already set out within Regulation 3.36 of the Regulations. Submissions to similar effect were advanced by a number of other employer organisations.

[195] ACCI contends, in essence, that Regulation 3.36(1) requires an employer to make and keep an employee record in respect of a period of paid leave taken in advance of the employee accruing an entitlement to such leave. On this basis it is submitted that subclause 1.1(c) of the model term is unnecessary and, further, it may expose an employer to multiple prosecutions in

respect of the same conduct (namely the failure to make and keep a record in respect of paid leave taken in advance pursuant to the model term).

[196] For our part we doubt that Regulation 3.36 requires an employer to make and keep an employee record in respect of paid leave granted in advance pursuant to the model term. Regulation 3.36 relates to the circumstance where "*an employee is entitled to leave"*. The model term facilitates agreements between an employer and employee "*to the employee taking a period of paid annual leave in advance of the employee accruing an entitlement to such leave*". Hence the model term operates in circumstances where there is no entitlement to leave. At the very least there is some uncertainty as to the application of Regulation 3.36 to agreements in respect of the granting of leave in advance.

[197] We are satisfied that in the context of such a substantive change to the modern award system, and given the uncertain application of Regulation 3.36, it is necessary to include subclause 1.1(c) in the model term. Our earlier observations about the prospects of an employer facing a double penalty (see paragraph [188] above) are also apposite in this context.

3.4 Purchased Leave

[198] Ai Group initially proposed a model clause to be inserted into each modern award that would allow an employer and an employee to agree to a "purchased leave" arrangement under which the employee could choose to forgo an amount payable in relation to the performance of work but would receive a corresponding additional amount of annual leave. This claim was not pressed during the proceedings.

[199] In the *June 2015 decision* the Commission noted that there seemed to be a level of interest in providing arrangements which facilitate the "purchase" of additional annual leave; the Act permits such a provision to be inserted in modern awards and, on its face, such a provision may meet the objective in s.3(d) of the Act.

[200] As foreshadowed in the *June 2015 decision*, a Background paper[78] was published on 1 July 2015 summarising the earlier submissions and providing a number of examples of purchased leave provisions from enterprise agreements. Interested parties were asked to consider whether a provision for purchased leave should be included in some or all modern awards and if so, what form it should take. Submissions were received from ABI, ACCI, ACTU, Ai Group, APTIA, HIA, MBA, TCFUA and the Voice of Horticulture.

[201] None of the submissions filed support the development of a model term dealing with purchased leave. In the Statement issued on 31 July 2015[79], the Commission expressed the provisional view that any proposal in respect of purchased leave will be dealt with on an award by award basis, during the award stage of the review. Any interested party who wished to advance a different view to the one provisionally expressed was invited to attend the hearing on 7 August 2015 and make oral submissions in support of the course for which they contend. No party made submissions advancing a different view to the one provisionally expressed in the 31 July 2015 Statement.

[202] In the circumstances we do not propose to take any further steps in relation to the development of a model term dealing with purchased leave. Any proposal in respect of

purchased leave will be dealt with on an award by award basis, during the award stage of the review.

3.5 Draft determinations

[203] A number of parties raised specific issues with the draft determinations published on the Commission's website on 29 June 2015. The issues raised generally concerned the interaction between a model term and other award provisions, some technical and drafting issues and the removal of obsolete provisions. The various submissions are summarised at paragraphs [57]–[59] of the Summary of Submissions attached to the Statement issued on 31 July 2015. There was no opposition to the specific variations proposed and subject to three exceptions we propose to make the variations suggested.

[204] The first exception relates to the *Airport Employees Award 2010*. Clause 31.4 presently prohibits payments instead of annual leave:

> **'31.4 Leave to be taken**
>
> Except as provided in clause 31.9, payment must not be made or accepted instead of annual leave.'

[205] Clause 31.9 currently states:

> **'31.9 Proportionate leave on termination**
>
> On termination of employment, an employee, other than a casual employee, must be paid for leave accrued that has not been taken at the appropriate salary calculated in accordance with clauses 31.7 and 31.8.'

[206] Ai Group submits that an additional exemption should be included in clause 31.4 to refer to the new provision in relation to the cashing out of annual leave.[80] Rather than adopt the Ai Group suggestion we propose to simply delete clause 31.4.

[207] The second exception relates to the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010.*

[208] MBA submits that the word "this" be inserted at the beginning of clause 38.4(b) of the *Building and Construction General On-site Award 2010* so the clause would read:

> '**(b)** <u>This</u> clause 38.4(b) applies if an employee takes a period of paid annual leave in advance pursuant to an agreement made in accordance with clause 38.4(a). …' (emphasis added)

[209] A similar amendment is proposed to clause 32.7(b) of the *Joinery and Building Trades Award 2010*.

[210] Throughout these and other modern awards, current drafting practice is that the word "this" is not used when a clause is cited by number. We are not persuaded that the amendments proposed are necessary and we do not propose to make them.

[211] Finally, we also note that MSS Security (MSS) propose[81] amending the wording of the cashing out provision in the *Security Services Industry Award 2010* in a number of respects.

The submission made does not provide any grounds for the changes proposed. If MSS wishes to press the changes sought it may do so in the next stage of these proceedings.

4. Next steps

[212] Revised draft determinations incorporating the changes outlined in this decision will be published on the Commission's website.

[213] We have now finalised the terms of the various model terms. The next phase of these proceedings will deal with the insertion of the model terms into modern awards. We propose to provide all interested parties with an opportunity to make submissions and adduce evidence in relation to whether the various model terms we have determined should now be inserted into particular modern awards. Directions in relation to the next phase of these proceedings will be issued shortly. The matter will be listed for further hearing before the Full Bench at 9.30 am on 23 November 2015 in Sydney.

PRESIDENT

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Appearances:

T Clarke for the Australian Council of Trade Unions.

V Wiles for the Textile, Clothing and Footwear Union of Australia.

B Ferguson for the Australian Industry Group.

L Izzo for the Australian Chamber of Commerce and Industry and the Pharmacy Guild of Australia.

W Chesterman for the Victorian Automobile Chamber of Commerce and Motor Trades Associations.

S Pill for the Group of Eight Universities.

J Arndt for the New South Wales Business Chamber and Australian Business Industrial.

M Adler for the Housing Industry Association.

S Maxwell for the Construction, Forestry, Mining and Energy Union.

M Nguyen for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) and the (AMWU)—Vehicle Division.

M Burns for the Maritime Union of Australia.

S Crawford for The Australian Workers' Union.

M Davecis for the Australian Salaried Medical Officers Federation.

L Carroll for The Australian Mines and Metals Association.

S McKinnon for the National Farmers' Federation.

R Sostarko for Master Builders Australia Limited.

C Pugsley for the Australian Higher Education Industrial Association.

T Evans for the Australian Hotels Association and the Accommodation Association of Australia.

E Van Der Linden for the South Australian Chamber of Commerce and Industry trading as Business SA.

Hearing details:

2014.
Sydney, Melbourne, Adelaide, Brisbane and Canberra (video hearing)
August 20, 21.
October 16.
December 1.

2015.
Sydney, Melbourne, Adelaide, Brisbane, Canberra and Perth (video hearing)
August 7.

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[1] [2013] FWC 10195; [2014] FWC 1790

[2] [2014] FWC 2279

[3] [2015] FWCFB 3406

[4] Ibid at [475]

[5] Ibid at [469]

[6] Directions, 11 June 2015, AM2014/47 – Annual leave

[7] [2015] FWCFB 3406 at [36] and [38]

[8] Ibid at [39]-[58]

[9] Ibid at [59]

[10] Ibid at [76]

[11] Ibid at [100]
[12] Ibid at [190]-[213]
[13] Ibid at [149]-[169]
[14] Ibid at [220]
[15] Ibid at [222]-[240]
[16] Ibid at [255]-[264]
[17] Ibid at [264]-[267]
[18] Ibid at [380]
[19] Ibid at [382]
[20] Ibid at [384]-[385]
[21] Ibid at [411]-[413]
[22] Ibid at [415]
[23] Ibid at [416]-[420]
[24] Ibid at [428]-[429]
[25] *Centennial Northern Mining Services Pty Ltd* v CFMEU [2015] FCAFC 100
[26] ACTU correspondence, 31 August 2015
[27] [2015] FWCFB 3406 at [430]-[434]
[28] Ibid at [431]
[29] Ibid at [436]-[442]
[30] Ibid at [443]-[457]
[31] Ai Group submission, 20 March 2014 at [2.19]
[32] [2015] FWCFB 3406 at [466]
[33] Ai Group, AAA, AHA, AHEIAAIS, AMMA (see Transcript at PN400), Business SA & MIAL, APTIA, ARA, ASMOF, CAI, IEU, Group of Eight Universities, MPA, NFF, MTA
[34] ACCI Submission, 13 July 2015
[35] Ai Group Submission, 14 July 2015
[36] See for example PN 68-74 and 514-516 of the Transcript, 7 August 2015
[37] Business SA submission, 13 July 2015 at p 3
[38] [2015] FWCFB 3406 at [173]-[175]
[39] See Ai Group submission, 14 July 2015 at [124]-[127]
[40] Transcript, 7 August 2015 at PN 324
[41] [2015] FWCFB 3406 at [177]
[42] Transcript, 7 August 2015 at PN434-435
[43] ACCI submission, 13 July 2015 at [8.1]
[44] Business SA submission, 13 July 2014 at p 4
[45] Ibid
[46] [2015] FWCFB 3406 at [203]
[47] Ai Group submission, 14 July 2015 at [128]-[129]
[48] [2015] FWCFB 3124 at [25]-[28]
[49] Transcript,7 August 2015 at [438]-[439]
[50] [2015] FWCFB 3124 at [25]
[51] Ibid at [26]
[52] Ibid at [27]
[53] ACCI submission, 13 July 2015 at [9.15]
[54] Ai Group submission, 14 July 2015 at [118]
[55] Ibid at [130]-[135]
[56] HIA submission, 13 July 2015 at [2.5.7]-[2.5.12]

[57] Business SA submission, 13 July 2015 at p 4

[58] See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at [408]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]

[59] *Ross v R* (1979) 141 CLR 432 at paragraph 440; *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at [479]

[60] Transcript, 7 August 2015 at PN375

[61] [2015] FWCFB 3406 at [116]

[62] Ibid at [138]

[63] Ibid at [139]

[64] Ai Group submission and witness statements, 20 June 2014 at [33]

[65] [2015] FWCFB 3406 at [78]-[79]

[66] ACCI submission, 13 July 2015 at [10.1]-[10.6]

[67] Ai Group submission, 14 July 2015 at [130]-[135]

[68] Transcript, 7 August 2015 at PN467

[69] Ibid at PN 472-475

[70] [2015] FWCFB 3406 at [213]

[71] AMWU submission, 13 July 2015 at [16]-[20] and [22]-[24]

[72] Ibid at [27]-[28]

[73] Transcript, 7 August 2015 at PN424

[74] [2015] FWCFB 3406 at [199]-[200] and [204]

[75] HIA submission, 13 July 2015 at [2.4.4]-[2.4.6]

[76] Ibid at [2.4.2]-[2.4.3]

[77] [2015] FWCFB 3406 at [256]-[257]

[78] Background Paper – Purchased annual leave, 1 July 2015

[79] [2015] FWCFB 5219

[80] Ai Group submission, 14 July 2015 at [15]-[17]

[81] MSS Security submission, 13 July 2015

Attachment A—Index of material

Accommodation Association of Australia and another	Submission	14 July 2015
Associations of Independent Schools	Submission	10 July 2015
	Submission	10 July 2015
Australian Business Industrial and the NSW Business Chamber	Submission	13 July 2015
Australian Chamber of Commerce and Industry	Submission	13 July 2015
Australian Council of Trade Unions	Correspondence	24 July 2015
Australian Council of Trade Unions	Submission	13 July 2015
Australian Higher Education Industrial Association	Submission	13 July 2015
Australian Hotels Association	Submission	13 July 2015
Australian Industry Group	Submission	13 July 2015
Australian Manufacturing Workers' Union	Submission	13 July 2015
Australian Manufacturing Workers' Union – Vehicle Division	Submission	17 July 2015
Australian Meat Industry Council	Submission	17 July 2015
Australian Mines and Metals Association	Submission	17 July 2015
Australian Mines and Metals Association and the Maritime Industry Australia Ltd	Submission	17 July 2015
Australian Public Transport Industrial Association	Submission	13 July 2015
Australian Retailers Association	Submission	13 July 2015
Australian Salaried Medical Officers' Federation	Submission	17 July 2015
Business SA	Submission	13 July 2015
Clubs Australia Industrial	Submission	10 July 2015
Construction, Forestry, Mining and Energy Union – Construction and General Division	Submission	13 July 2015
Housing Industry Association	Submission	13 July 2015
Independent Education Union of Australia	Submission	13 July 2015
Master Builders Australia	Submission	13 July 2015
Master Plumbers Association of NSW	Submission	17 July 2015
Motor Traders' Association of NSW and others	Submission	17 July 2015
MSS Security	Submission	13 July 2015
National Farmers' Federation	Submission	13 July 2015
Printing Industries Association of Australia	Submission	13 July 2015
Queensland Funeral Directors Association and Funeral Directors Association of New South Wales	Submission	17 July 2015
Restaurant and Catering Australia	Submission	13 July 2015
Textile Clothing and Footwear Union of Australia	Submission	17 July 2015
The Association for Payroll Specialists	Submission	10 July 2015

University of Western Australia and others	Submission	17 July 2015
Voice of Horticulture	Submission	14 July 2015

Index of material—Purchased leave

Australian Business Industrial and the NSW Business Chamber	Submission	13 July 2015
Australian Chamber of Commerce and Industry	Submission	21 July 2015
Australian Council of Trade Unions	Submission	20 July 2015
Australian Industry Group	Submission	20 July 2015
Australian Public Transport Industrial Association	Submission	13 July 2015
Housing Industry Association	Submission	20 July 2015
Master Builders Australia	Correspondence	20 July 2015
Textile, Clothing and Footwear Union of Australia	Submission	22 July 2015
Voice of Horticulture	Submission	23 July 2015