



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

1053689

**COMMISSIONER HAMPTON**

**AM2014/47**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2014/47)  
Aquaculture Industry Award 2010  
Asphalt Industry Award 2010  
Broadcasting and Recorded Entertainment Award 2010  
Cement and Lime Award 2010  
Gardening and Landscaping Services Award 2010  
Gas Industry Award 2010  
Horse and Greyhound Training Award 2010  
Premixed Concrete Award 2010  
Quarrying Award 2010  
Racing Clubs Events Award 2010  
Racing Industry Ground Maintenance Award 2010  
Silviculture Award 2010  
Sporting Organisations Award 2010**

**Ambulance and Patient Transport Industry Award 2010  
Architects Award 2010  
Black Coal Mining Industry Award 2010  
Mobile Crane Hiring Award 2010  
Nursery Award 2010  
Nurses Award 2010  
Security Services Industry Award 2010**

**Sydney**

**9.34 AM, FRIDAY, 1 JULY 2016**

PN1

THE COMMISSIONER: Good afternoon all. Please be seated. All right, this is a conference that I have convened on behalf of the full bench. Because of the nature of these proceedings and in particular because they concern modern awards and public interest, we propose to maintain a transcript of the conference. So for that purpose I will ask the parties to make appearances. So perhaps starting in Sydney. Please feel free to remain seated.

PN2

MR ROBSON: Thank you. Robson, initial M for United Voice and the Health Services Union.

PN3

THE COMMISSIONER: Thank you.

PN4

MR KENTISH: If it pleases, Kentish, initial A appearing for the CFMEU Mining and Energy Division. Our interest is confined to Black Coal.

PN5

THE COMMISSIONER: I understand.

PN6

MR CRAWFORD: Crawford, initial S from the AWU.

PN7

MR FERGUSON: Ferguson, initial B from the Australian Industry Group with Ms Barton, initial R.

PN8

MR SEBBENS: Mr Sebbens for the Coal Mining Industry Employer Group.

PN9

THE COMMISSIONER: Thank you.

PN10

MR KUSAMA: Kusama, initial G for New South Wales Farmer's and our interest particularly lies in aquaculture.

PN11

THE COMMISSIONER: Thank you.

PN12

MR ARNDT: Arndt, initial J for the New South Wales Business Chamber and ABI.

PN13

THE COMMISSIONER: Thank you. Okay, and in Melbourne?

PN14

MR BLAKE: Commissioner. Blake, initial N for the Nursing and Midwifery Federation in relation to the nurse's award.

PN15

THE COMMISSIONER: Thank you.

PN16

MR GUNSBURG: Gunsberg, D. I appear along with Mr Sebbens on behalf of the Coal Mining Industry Employer Group.

PN17

THE COMMISSIONER: Thank you.

PN18

MR HAMILTON: If the Commission pleases, Hamilton, initial D for Live Performance Australia.

PN19

THE COMMISSIONER: Thank you. That's it for Melbourne? Yes? All right. The purpose of the conference is set out – or at least arises from paragraph 123 and related paragraphs of the full benches, 23 May 2016 decision. The parties will be appreciative that the full bench identified or at least relied on the identification of a number of classes of awards, primarily in AIG's submission.

PN20

I will for convenience call them the group of 13 and the group of seven. Nothing intended by that but the group of thirteen – at least from my reading – are in almost identical terms. They adopt the same model. There's slightly different language but effectively they require leave be taken within 18 months of an entitlement accruing and then in the absence of agreement, they contemplate the employer giving 28 days' notice by the employer.

PN21

The group of seven – there are of course some award by award differences. All set a form of deadline to the taking of leave. I think four of them have a six month benchmark. One has four, one has 12 and one has 24 months. Each of those benchmarks – if that's an appropriate expression – relate to when the entitlement becomes due. They also each contemplate the employer giving notice. There are of course other arrangements that appear in and around those general provisions.

PN22

So given the nature of those 20 awards, it seems to me that there are a number of common issues – and that's why I've convened the conference together at this stage at least. There are some particular factors for each of the awards. So those issues that arise that are common to the 20 awards are – include – or do these provisions sit with the national employment standards and in particular the concept in the NES of annual leave accruing progressively.

PN23

By that I mean that whilst the language does vary, the benchmark – the term that I have used at least – is made by reference to entitlements or accruals or leave being due. Now, in the context of the NES which effectively contemplates leave accruing through each year, the question is how those provisions relate to the national employment standards.

PN24

The second issue is of course the difference in approach between those provisions and the model terms that the full bench has determined and recently confirmed in the 24 June decision.

PN25

Then thirdly – these are of course all related – are the current models effective in managing excessive leave. Now, in terms of the award by award issues, the questions would include, “Are there factors in the awards?” That is, are there particular provisions in the awards themselves or are there particular circumstances in the industries that would warrant a different approach. And are there entitlements or elements of the existing clauses that should be retained even if there is a variation made to the annual leave provisions of those award?

PN26

So having put you on notice about those things, what I propose to do is hear the general positions in relation to the group of 13 and then the group of seven and depending upon what emerges from that, I’ll then have to make a decision about how the conference should be conducted.

PN27

What you do need to know is ultimately I have been requested by the full bench to issue some directions which will allow the finalisation of all these matters and I’m not sure that any of you were involved in this morning’s proceedings – I don’t think so. In which case I should let you know that arising from the – what might be called the maritime group of awards – the Commission is going to issue some directions requiring – well, allowing for further submissions, ultimately leading to a determination on those matters. The likelihood is that the directions arising in these matters will be coordinated with those and the Commission will issue some consolidated directions.

PN28

That’s the purpose of this afternoon. Let’s deal with the group of 13. Mr Ferguson, it might be appropriate if we start with you.

PN29

MR FERGUSON: Yes, Commissioner. I suppose our position arose out of the fact that we obviously observed that there’s going to be a tension between the model clause if you will be observed and the retention of these provisions.

PN30

THE COMMISSIONER: Yes.

PN31

MR FERGUSON: In saying that, we don't necessarily have a fixed view at this point about what the remedy for that is or that a single remedy need to be applied across all the award. We take your point that there might be some industry specific considerations and award specific considerations. I suppose in general terms, we obviously have some reservations with the removal of what is currently a very broad employer right across the board as direct the taking of leave and we have some reservations about that being removed the absence there not catering to the needs of those particular sectors as the award remains otherwise.

PN32

What we had envisaged today was that we I suppose hear from the unions in part as to what their view about this is because our position might be shaped by that and I anticipate there may be desire by many to delete these relevant clauses. But apart from that, we thought there'd probably be some utility in the employer parties having some discussions amongst themselves to see whether a consensus view to some degree could be reached.

PN33

THE COMMISSIONER: Okay.

PN34

MR FERGUSON: We were going to suggest that that might be – it might be beneficial that happen with Commissioner, your assistance today and maybe off record if that was possible as well.

PN35

THE COMMISSIONER: Well subject to the views of others I would see that as being an option.

PN36

MR FERGUSON: Yes. Then from that we may be able to develop a process moving forward as well.

PN37

THE COMMISSIONER: Mr Ferguson, would you contemplate a separate process then for the group of 13 as against the group of 7?

PN38

MR FERGUSON: Not necessarily.

PN39

THE COMMISSIONER: Okay. All right. Who would like to go next?

PN40

MR CRAWFORD: I can, Commissioner. The AWU has an interest in terms of the group of 13 or the group of 13 awards and all of those awards except for broadcasting and recorded entertainment. Our view is that the contentious provisions should just be deleted and the model excessive leave term should be inserted to replace those provisions. That is largely on the basis of the matters that you've already identified today being that we don't think the current provision is workable if a system of progressive accrual of leave – although the

AIG might see some potential benefit, an employee is being – I guess able to require that leave be taken in a certain period, I would think the administrative burden of actually working out when each piece of leave falls due and when that 18 month period for each piece of leave then has to be enforced would be virtually impossible from an administrative perspective.

PN41

We also have concerns about the enforcement of that provision. I guess the effect that if leave is not taken within 18 months then can the employee be prosecuted for breaching the award or is the employer that would be prosecuted? We just think that's another example of why the provision isn't workable. We just think it's a relic of the past when probably leave accrued on an anniversary date and it's probably just been picked up and put into a number of these award.

PN42

They are mostly AWU awards so it's likely that similar people were drafting the exposure drafts for a lot of these awards. Our strong view is that it has no purpose to serve. It is problematic with the NES. It would be impossible to administer and we just think it should be deleted and we'd be satisfied with the model term going in.

PN43

THE COMMISSIONER: Okay. Thank you.

PN44

MR ROBSON: For United Voice and the HSU. All the awards – the HSU has an interest in the nurse's award and the ambulances award. United Voice has an interest in the nurse's award, the ambulance award and the security services award. I think each of those falls into the group of seven. Our position is similar to the AWU's. We think the contentious clauses should be deleted and we think the model clause should be inserted and that should be enough. Thank you.

PN45

THE COMMISSIONER: Just in relation to the nurse's award, I think one issue that was flagged during the earlier proceedings was because it has – I think it has five and six weeks leave – five is the standard grant of leave and six is the shift worker grant. The question is whether or not the – based on your position of the model, should be inserted? Whether or not there should be an adaptation. I'm not therefore suggesting that there should be but I believe one of the parties at least has raised that in the earlier proceedings. I don't know if you have a view about that.

PN46

MR ROBSON: I apologise, Commissioner. I don't have a view on that. The official dealing with this is on leave and I've come to this at quite short notice.

PN47

THE COMMISSIONER: For what it is worth, it seems to me the two options are to leave – assuming the model clause went in, to leave the existing benchmark which would mean that the benchmark would be achieved earlier or more often in

the nurse's award or alternatively, adjust it on a proportionate basis for the additional leave.

PN48

As I said, I'm not foreshadowing a position on that, merely saying that it is an issue that arises. I'll note that is something that we'll probably need to hear from you at some stage about.

PN49

MR ROBSON: Thank you.

PN50

THE COMMISSIONER: All right. Thank you. Mr Kentish.

PN51

MR KENTISH: Commissioner, with respect to the black coal award, the CFMEU Mining and Energy Division's submissions to date as the Commission might be aware have sought that the model clause be inserted into the award and that would be the position that I would be putting to you today.

PN52

The union is willing to enter into off the record discussions about concerns which the employers may have as to how that fits but certainly on the record to date we've asked and made submissions in support of the model clause. If it pleases.

PN53

THE COMMISSIONER: Anyone else?

PN54

MR SEBBENS: Commissioner, in relation to the black coal mining industry award – the coal mining industry

PN55

THE COMMISSIONER: I appreciate we crossed from the 13 to the seven but so be it.

PN56

MR SEBBENS: The Coal Mining Industry Employer Group – its position is that the model term on existing leave is unnecessary and considers that clause 25.4 adequately provides for a right of employees to take leave on 28 days' notice. It's similarly a right of the employer to direct an employee to take such leave.

PN57

There is a significant tension if that clause was to be retained with the model clause going in. Similarly, a tension with the shutdown clause in 25.10. In respect of the question of progressive accrual, I'm not sure whether that is an issue that applies to this particular award. The award is based upon an assumption – so it seems – from clauses 25.3 as well as 25.6 and 25.5 that leave accrues progressively and is accrued on an hours type basis for each completed work of service. So I'm not sure if that is an issue that arises for us.

PN58

THE COMMISSIONER: It might arise in 25.4(b). That is that at 12 months to the date the employee receives the annual leave entitlement. I mean, at least on face value it looks like that would operate progressively through each year and I'd be reasonably sure that that wasn't what was at least originally intended.

PN59

MR SEBBENS: Yes. The leading words of course are, "unless otherwise agrees." I take your point, Commissioner. We have set out in our submissions that have already been filed to date – including on 26 October of last year and 21 December – detailed reasons for why we say the existing clause 25.4 should be retained as opposed to the model clause going in. We've also provided data demonstrating that excessive leave is not an issue of any particular significance in the industry. In fact, excessive accruals seem not to be a problem at all based upon the data we provided the Commission on 21 December.

PN60

THE COMMISSIONER: Thank you.

PN61

MS KUSUMA: Commissioner, if we can jump back to the group of 13 now - - -

PN62

THE COMMISSIONER: Yes.

PN63

MS KUSUMA: - - - and the aquaculture award. We believe that the award is working fine with the current provision of clause 23.4 and that clause accommodates the arrangement of leave – well, and now the issue has arisen in the aquaculture industry, especially with the oyster growing, we share the same concern with AIG in terms of – the same concern with the model provision enabling an employee to dictate when leave is to be taken once a certain amount of leave has been approved.

PN64

In the context of the nature aquaculture industry, it is very seasonal and if that falls on a particularly busy season then it makes it very difficult operationally for the business to run. We don't share the view in terms of how that – the correct provision is difficult to align with progressive accrual within NES. It works fine and essentially what the current provision is saying is that once 30 weeks' annual leave has been accrued, then that will trigger the particular provision.

PN65

THE COMMISSIONER: I mean the question might be where – that might be how it is applied but the question might be how you reach that point based on the wording of the current provision.

PN66

MS KUSUMA: Yes, certainly. In terms of – we are not opposed to the process that the AIG has proposed.

PN67



THE COMMISSIONER: Thank you.

PN68

MR ARNDT: ABI is very much in accordance with AIG's proposal. We don't have a global position on how all this should be dealt with, only that it should be dealt with on an award by award basis as each award is reviewed in its own right as the Act requires. The submissions put by ABI and the New South Wales Business Chamber previously have been very, very confined and very likely didn't contemplate the particular issue that has arisen in the two groups of awards. So it's a position we would appreciate a further look and perhaps a further opportunity to provide submissions on specific awards.

PN69

THE COMMISSIONER: Thank you. That's all from Sydney. Melbourne?

PN70

MR BLAKE: Commissioner, Nick Blake. My comments are confined to the nurse's award. We support the inclusion of the model provisions. The nurse's award is in the group of seven. It's not clear to us what the AIG are suggesting in their submissions but we understand that they propose that the existing provisions in the award continue. A draft examination of that and issued by the Commission proposes the deletion of existing clause 31.2. That provision, Commissioner if I can just quote it states:

PN71

*Annual leave will be given and taken within six months of the employee becoming entitled to annual leave of more than five weeks.*

PN72

We think there are a number of issues in relation to the retaining of that type of provision. It's not clear, Commissioner to us whether the purpose of that provision is solely for the managing of excessive leave. We think that whatever it is intended to do, it doesn't meet the requirements of section 93 of the Act in that it doesn't prevent the accrual of excessive leave and it certainly doesn't provide reasonable arrangements for excessive leave to be managed.

PN73

The current award – this is in our submission, Commissioner – don't provide for any quantum of leave to be taken. It doesn't provide any details as to when the leave is to be taken within the six month period. For example, what if there is disagreement between the employer and employee about the timing in that six month period to when the excessive leave should be taken. There's no notice periods for example and certainly the provision as it currently stands is uncertain as to its – what it is intended to do. So on that basis, Commissioner, we would support the model provisions being inserted into the award.

PN74

With regard to your earlier question I think to the HSU or United Voice in relation to the observations of the full bench, no decision regarding the additional leave that is available to nurses and shift workers under the nurse's award – we believe it would make sense that for there to be an adjustment to the cap in relation to the

model clause. We're happy to provide the Commission with our views about how the change should work in the event of the model clause being incorporated into the award. Thank you.

PN75

THE COMMISSIONER: Thank you.

PN76

MR HAMILTON: Commissioner, David Hamilton for Live Performance Australia. Our main interest is in the broadcasting and recorded entertainment awards. Specifically, with independent cinema operation. My instructions from members at the moment is that clause 23.6 in the award is not related to us effectively and we have not had any discussions with the union about this clause and I think that probably would be an appropriate course. We would go along with the AIG's submissions about having further discussions, if the Commission pleases.

PN77

THE COMMISSIONER: Very well, thank you. All right. I'll just make a couple of observations. It would seem to me that – well, to the extent to which propositions are advanced that, you know, there isn't – there hasn't been a, you know, a problem with the clause. I'd just be a little careful with that. Only that I think the attitude that the full bench has taken to date has been – in light of the decision that – the decisions that have been made, the Commission has tended to look towards, you know, circumstances in an industry or in an award that might mean that the fundamentals of the model won't operate.

PN78

Secondly, I'm not sure that anyone is actually suggesting that the model would settle alongside the existing clauses and for what it is worth I think that would be quite problematic but I don't understand anyone to actually be contemplating that. That doesn't mean there might not be elements – particularly in the group of seven where there are at least apparently some industry specific provisions but that could sit alongside. It does strike me that the basic choice would be an either or rather than both. But look, we'll take that as it comes.

PN79

In relation to the black coal mining award, look, I think it is probably fair to say that that is a different model. It does start from a slightly different proposition than any of the other 19 and I think that should be recognised and there is also some evidence about the practice of annual leave in that industry whereas I'm not sure that is the case more generally. Other than was presented during the original case of course, but no specific information beyond that.

PN80

For what it's worth, they are my initial observations of what I've heard. It seems to me that the parties have either supported or at least are not opposed to the idea. Mr Ferguson has articulated that there might be some private discussions – at least initially amongst the employer groups and then perhaps amongst the unions and then possibly amongst the group collectively. But that should occur off the

record. So unless anyone tells me at the moment they have an objection to that, then that is the course of action I'll follow.

PN81

That does create a slight logistics issue in relation to the black coal mining award but we'll talk about that. There being no objection, then I think we'll follow that course of action and we'll go off the record.

**OFF THE RECORD** [2.30 PM]

**ON THE RECORD** [3.09 PM]

PN82

THE COMMISSIONER: Having consulted with the parties, the Commission has had put to it a – firstly, by the employers but secondly having consulted with the unions about that – a proposal has been advanced to in effect provide an opportunity for those parties who seek to resist the flow of the model clause into the relevant awards in the context of the proposed deletion of the current clause to confirm that opposition. Also in that context, noting they might advance alternatives which will fall in a sense between the two approaches. That is in the context that by and large, the unions who have an interest in the awards have indicated a preference for the flow of the model determined by the full bench.

PN83

Secondly, an opportunity for the parties that are opposing the flow of the full bench model to file materials – so evidence and submissions in support of that opposition and or any material they propose. Lastly, an opportunity for those parties that also have an interest to file any material evidence and submissions in response leading ultimately to either a determination on the papers or more likely I suspect a hearing to determine the matter.

PN84

It is noted that the black coal award may be in a different position in the sense that the current provision isn't the same as the other models. Secondly, at least on face value, more material has been advanced in support of the retention of the current provisions specifically directed to black coal. Whether ultimately that award is dealt with as an outlier is something that the full bench will have to consider, noting the slightly different starting point.

PN85

So unless there is any clarification proposed on what has been provided about that, I will make a report to the full bench and you expect some directions to be settled and issued in the next week or so, possibly earlier than that. Having regard to the directions that were also made in the maritime awards, a consolidated set of directions is likely to arise.

PN86

All right. The Commission will be adjourned but I would like to thank the parties for their frankness and openness in their position and appreciate you assisting the full bench to ultimately achieve the objective of reviewing this part of the award. Very well, good afternoon.

**ADJOURNED INDEFINITELY**

**[3.13 PM]**