



# REVISED DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards—Annual leave**

(AM2014/47)

### **MOBILE CRANE HIRING AWARD 2010**

[MA000032]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER HAMPTON

MELBOURNE, XX FEBRUARY 2017

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

A. Further to the Full Bench decisions issued by the Fair Work Commission on 22 September 2016<sup>1</sup> and 20 December 2016<sup>2</sup>, the above award is varied as follows:

1. By deleting clause 25.2 and inserting the following:

#### **25.2 Arrangements for taking leave**

- (a) The annual leave will be given and taken in one or two continuous periods. If given in two separate periods, then one of those two periods must be at least 21 consecutive days, including non-working days.
- (b) If the employer and an employee so agree, an annual leave entitlement may be given and taken in two separate periods, neither of which is of at least 21 consecutive days, including non-working days, or on three separate periods.
- (c) Notwithstanding the provision of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods or part of a single day not exceeding a total of five days in any calendar year at a time or times agreed between them.
- (d) An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least five consecutive annual leave days are taken.

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<sup>1</sup> [\[2016\] FWCFB 6836](#)

<sup>2</sup> [\[2016\] FWCFB 9074](#)

2. By inserting new clauses 25.8 to 25.10 as follows:

**25.8 Excessive leave accruals: general provision**

Note: Clauses 25.8 to 25.10 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 25.1(b)).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause 25.9 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 25.10 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

**25.9 Excessive leave accruals: direction by employer that leave be taken**

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 25.8(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.
- (b) However, a direction by the employer under paragraph (a):
  - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 25.8, 25.9 or 25.10 or otherwise agreed by the employer and employee) are taken into account; and
  - (ii) must not require the employee to take any period of paid annual leave of less than one week; and
  - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
  - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.

- (c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.
- (d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 25.9(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

### **25.10 Excessive leave accruals: request by employee for leave**

- (a) Clause 25.10 comes into operation from XX February 2018.
- (b) If an employee has genuinely tried to reach agreement with an employer under clause 25.8(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (c) However, an employee may only give a notice to the employer under paragraph (b) if:
  - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
  - (ii) the employee has not been given a direction under clause 25.9(a) that, when any other paid annual leave arrangements (whether made under clause 25.8, 25.9 or 25.10 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (d) A notice given by an employee under paragraph (b) must not:
  - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 25.8, 25.9 or 25.10 or otherwise agreed by the employer and employee) are taken into account; or
  - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
  - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
  - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.

- (e) An employee is not entitled to request by a notice under paragraph (b) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 25.1(b)) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (b).

3. By updating the cross-references accordingly.

4. By deleting clause 25.10 and inserting the following:

**25.4 Excessive leave accruals: request by employee for leave**

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 25.8(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under paragraph (a) if:
  - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
  - (ii) the employee has not been given a direction under clause 25.9(a) that, when any other paid annual leave arrangements (whether made under clause 25.8, 25.9 or 25.10 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (c) A notice given by an employee under paragraph (a) must not:
  - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 25.8, 25.9 or 25.10 or otherwise agreed by the employer and employee) are taken into account; or
  - (ii) provide for the employee to take any period of paid annual leave of less than one week; or
  - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
  - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.

- (d) An employee is not entitled to request by a notice under paragraph (a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 25.1(b)) in any period of 12 months.
- (e) The employer must grant paid annual leave requested by a notice under paragraph (a).

B. Items 1 to 3 of this determination come into operation from XX February 2017. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX February 2017.

C. Item 4 of this determination comes into operation from XX February 2018. In accordance with s.165(3) of the *Fair Work Act 2009* this item does not take effect until the start of the first full pay period that starts on or after XX February 2018.

PRESIDENT