

BLACK COAL MINING INDUSTRY AWARD 2010

Consolidated Clause 25 Annual leave for consultation purposes

25. Annual leave

25.1 Annual leave entitlements are provided for in the NES. This clause supplements those entitlements and provides industry specific detail.

25.2 Entitlement to annual leave

(a) An employee is entitled to annual leave, in addition to the amount provided for in the NES, such that the employee's total entitlement to annual leave pursuant to the NES and this award for each year of employment is a cumulative total of 175 ordinary hours (five weeks).

(b) An employee who:

(i) is a seven day roster employee; or

(ii) works a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays,

is entitled annually to an additional 35 ordinary hours (one week) of annual leave.

25.3 Accrual of annual leave

Employees, other than casual employees, accrue annual leave at the following rate:

For employees who would be entitled to annual leave of:	Hours of annual leave for each completed week of employment:
175 hours (5 weeks)	3.3654
210 hours (6 weeks)	4.0385

25.4 Excessive leave accruals: general provision

Note: Clauses 25.4 to 25.6 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 350 hours (10 weeks) paid annual leave (or 420 hours (12 weeks) paid annual leave for a shiftworker, as defined by clause 25.2(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 25.5 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 25.6 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

25.5 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 25.4(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 210 hours (6 weeks) when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 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 35 hours (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 25.5(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.

25.6 Excessive leave accruals: request by employee for leave

- (a) Clause 25.6 comes into operation from XX November 2018.
- (b) If an employee has genuinely tried to reach agreement with an employer under clause 25.4(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 25.5(a) that, when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 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 210 hour (6 weeks) when any other paid annual leave arrangements (whether made under clause 25.4, 25.5 or 25.6 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 35 hours (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 175 hours (5 weeks) paid annual leave (or 210 hours (6 weeks) paid annual leave for a shiftworker, as defined by clause 25.2(b)) in any period of 12 months.
- (f) The employer must grant paid annual leave requested by a notice under paragraph (b).

25.7 Deduction of annual leave

For each period of annual leave taken the ordinary hours of rostered shifts that would have been worked by an employee will be deducted from the employee's accrued annual leave entitlement.

25.8 Amount of annual leave to be taken

Unless otherwise agreed between the employer and employee, annual leave will be given and taken in not more than three periods, one of which will be of at least three weeks' duration.

25.9 Payment for annual leave

An employee taking annual leave must be paid either:

- (a) the employee's ordinary rate of pay plus a loading of 20% of that rate; or
- (b) the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at double time), but does not include shift allowances, other than for seven day roster employees;

whichever is the greater.

25.10 When payment will be made for annual leave for employees paid by cheque.

An employee who is usually paid by cheque will be paid for a period of annual leave in accordance with the employee's normal pay period(s), unless an employee requests that payment of the entire period of annual leave be made prior to the employee commencing leave.

25.11 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
 - (i) state the amount of leave to be taken in advance and the date on which leave is to commence; and
 - (ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

Note: An example of the type of agreement required by clause 25.11 is set out at **Error! Reference source not found.** There is no requirement to use the form of agreement set out at **Error! Reference source not found.**

- (c) The employer must keep a copy of any agreement under clause 25.11 as an employee record.
- (d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in

accordance with an agreement under clause 25.11, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

25.12 Shutdown

- (a)** Despite the terms of clauses 25.4 to 25.6, clause 25.12 applies if an employer intends to shutdown all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take leave during that period.
- (b)** The employer must give the affected employees 28 days' written notice of a temporary shutdown period, or any shorter period agreed between them and the employer.
- (c)** The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under paragraph (b) and who will be affected by that period, as soon as reasonably practicable after the employee is engaged.
- (d)** The following applies to any affected employee during a temporary shutdown period:
 - (i)** the employee may elect to cover the temporary shutdown period by doing one, or a combination of 2 or more, of the following:
 - taking paid annual leave if the employee has accrued an entitlement to such leave;
 - taking leave without pay;
 - taking annual leave in advance in accordance with an agreement under clause 25.9;
 - (ii)** if the employee does not make an election under subparagraph (i) that covers the whole of the temporary shutdown period, then the employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.
- (e)** A direction by the employer under clause 25.12(d)(ii):
 - (i)** must be in writing; and
 - (ii)** must be reasonable.
- (f)** The employee must take paid annual leave in accordance with a direction under clause 25.12(d)(ii).
- (g)** In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause 25.9, to which an entitlement has not been accrued is to be taken into account.

- (h) If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause 25.10, the employee is taken not to be on leave on that day or part-day.
- (i) Clauses 25.4 to 25.6 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause 25.12.

25.13 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 25.12.
- (b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 25.12.
- (c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.
- (d) An agreement under clause 25.12 must state:
 - (i) the amount of leave to be cashed out and the payment to be made to the employee for it; and
 - (ii) the date on which the payment is to be made.
- (e) An agreement under clause 25.12 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- (f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
- (g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
- (i) The employer must keep a copy of any agreement under clause 25.12 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 25.12.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 25.12.

Note 3: An example of the type of agreement required by clause 25.12 is set out at Schedule X. There is no requirement to use the form of agreement set out at Schedule X **Error! Reference source not found.**

25.14 Electronic funds transfer (EFT) 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.