



7 October 2016

Associate to Justice Ross  
Fair Work Commission  
11 Exhibition Street  
Melbourne VIC 3000

Email: [amod@fwc.gov.au](mailto:amod@fwc.gov.au)

Dear Associate to Justice Ross,

**Re: 4 yearly review of modern awards – Annual Leave (AM2014/47)**

1. We refer to the decision issued by the Full Bench on the above matter [2016] FWCFB 6836 where at [158] interested parties are asked to notify the Commission of an intention to contest the Full Bench's provisional views on:
  - a. The deletion of clause 22.4 of from the Ports, Harbours and Enclosed Water Vessels Award 2010 (not opposed).
  - b. The variation of the Marine Towing Award 2010; to insert the cashing out and leave in advance model terms (see paragraphs [145], [148] and [153] (not further opposed)
  - c. The variation of the Maritime Offshore Oil and Gas Award 2010; to insert the cashing out and leave in advance model terms (see paragraphs [145], [148] and [153] (not further opposed)
  - d. The variation of the Seagoing Industry Award 2010 to insert the cashing out and leave in advance model terms (see paragraphs [145], [148] and [153] (not further opposed)
  - e. The variation of the Professional Diving (Industrial) Industry Award 2010; to insert the cashing out and leave in advance model terms and apply them to both inshore and offshore divers (see paragraphs [145], [148] and [153] (not further opposing for offshore divers and not previously opposed for inshore divers).
2. MIAL and AMMA wish to make joint submissions in relation to the above provisional views. MIAL was not part of the employers group referenced at [142]. MIAL's membership includes over 30 employers performing work in the industries covered by the above awards. The feedback from members has consistently been that the existing annual leave provisions (which have been the subject of extensive negotiations) meet the modern awards objective and it is on that basis that MIAL has opposed the inclusion of the model annual leave clauses in the modern award up until this stage.
3. The Full Bench has observed that AMMA was previously party to an Employer Group submission that approved the cashing out clauses and leave in advance clauses for inclusion

in some of the maritime industry awards subject to this submission. Prompted by the Full Bench's observations, AMMA has sought additional feedback from members and further reviewed (a) the Full Bench decision and model clauses, and (b) the extant award provisions. On this basis, AMMA's position on each award is clarified throughout this additional submission, as shared with MIAL, and we trust this clarification will assist the Commission.

4. MIAL/AMMA's positions in relation to the provisional decisions of the Full Bench are as follows:

#### **The deletion of clause 22.4 of from the Ports, Harbours and Enclosed Water Vessels Award 2010**

5. At [130] the Full Bench expresses the provisional view that clause 22.4 of the above award should be deleted and that the three model annual leave clauses (cashing out, leave in advance, excessive leave) be inserted. This is not opposed by MIAL/AMMA.

#### **Annual leave in advance - Marine Towage Award 2010**

6. As evidenced by clause 23.5 in the above award, the giving of leave in advance to employees is currently contemplated in the award. As with other parts of the maritime industry, this is necessarily a result of the operational requirements of the marine environment.
7. MIAL members all presently operate under an enterprise agreement and on this basis MIAL/AMMA does not further oppose the inclusion of the model annual leave in advance clauses. This is on the basis that it is not intended that the model annual clauses would interact with the existing leave factor clauses.

#### **Annual leave in advance – Maritime Offshore Oil and Gas Award 2010**

8. The Full Bench decision does not appear to contemplate removing the existing annual leave clauses in the above award. Those clauses, discussed at [136] to [137] currently operate to provide employers with necessary operational flexibility to schedule employees' rosters, including managing 'leave factor'.
9. In particular, clause 19(b) states: *'The extent to which the leave granted is more or less than that actually due will be debited or credited to the employee as less or additional leave.'* and 19(3) which states that *'the employee may not be required to take more than seven days of leave in advance.'*
10. On the basis that the Full Bench appears to have proposed no changes to existing clauses in the *Maritime Offshore Oil and Gas Award 2010* dealing with leave or to current industry practice in relation to employer-directed leave, MIAL/AMMA do not further oppose the inclusion of the model annual leave in advance clause. Having said that, AMMA/MIAL would like to note for the record that the clause will have little work to do and may cause confusion for employees when read together with existing clauses related to the leave factor.

### **Annual leave in advance - Professional Diving (Industrial) Industry Award 2010**

11. The clause in this award related to offshore divers and which deals with the taking of leave in advance (based on leave factor and distinct from annual leave) is 22.14 which relevantly states:

#### *22.14 Imbalance of off-duty leave days owed and actually taken*

*(a) Subject to clause 22, an employee may accrue more off-duty leave days than are taken or take more off-duty leave days than have been accrued.*

*(b) Where the employee accrues more off-duty leave days than are taken the balance will be recorded and taken at another time.*

*(c) Where the employee takes more off-duty leave days than are accrued they will be deducted from any balance of off-duty days yet to be taken. Where that results in a negative balance of off-duty leave days that number of days will be subtracted from the employee's pay for that month.*

*(d) A positive balance of off-duty days owed to the employee on termination will be paid to the employee at that time.*

12. This clause operates to provide for a monthly reconciliation where offshore divers have taken more time off duty than has been accrued. It provides certainty to both employees and employers.
13. It is wholly unclear how the model annual leave in advance clause will operate in conjunction with these existing clauses which provide both employees and employers with a high degree of flexibility in taking the leave factor (not annual leave). Notably there is no requirement for written agreement, which may at times be highly impractical for employees in this industry.
14. MIAL/AMMA do not further oppose the inclusion of this clause on the basis that there is no intention for it to interact with or change current clauses in relation to the leave factor for offshore divers.
15. MIAL/AMMA did not previously oppose the three annual leave clauses applying to inshore divers and so also do not press any objections in that regard.

### **Annual leave in advance - Seagoing Industry Award 2010**

16. The Full Bench decision does not appear to contemplate removing the existing leave in advance clauses which are discussed at [132] to [140] in relation to the annual leave model clauses. These clauses currently operate to provide employers with necessary operational flexibility to schedule employee rosters, including managing 'leave factor.'
17. In particular, clause 20.4 provides employers with the ability to direct employees to take up to 14 days of leave in advance, having regard to considerations set out in 20.4(b).
18. On the basis that no change has been proposed to existing leave clauses in the *Seagoing Industry Award 2010* dealing with leave, MIAL/AMMA do not further oppose the inclusion of the model annual leave in advance clause. Again, MIAL/AMMA note that the clause will have

little work to do and may cause confusion for employees when read together with existing clauses.

**Cashing out of annual leave – Marine Towage Award 2010, Maritime Offshore Oil and Gas Award 2010, Seagoing Industry Award 2010, Professional Diving Industry (Industrial) Award 2010**

19. MIAL/AMMA notes that the accrual of excessive annual leave by employees covered by the above awards is unlikely such that it would enliven the proposed model cashing out provisions. MIAL/AMMA maintain that the challenges associated with portioning out annual leave from the leave factor and the resulting perversion of the intention of the leave factor to act as an aggregated entitlement means that the clauses are likely to have little work to do.
20. MIAL/AMMA therefore do not further oppose the inclusion of those clauses but wish to record concerns in relation to the impact of those clauses in an environment where they are unlikely to be utilised.
21. While MIAL/AMMA note that the Full Bench in its decision says that negative impacts of the clauses will be minimised due to their facilitative nature [144], MIAL/AMMA believe that the inclusion of these clauses will go beyond merely being facilitative and may impact negatively on the industrial environment.
  - a. Where employers operate under enterprise agreements, the employers seeking to negotiate the removal of a clause that requires employee and employer agreement such as the model annual leave in advance and cashing out of annual leave clauses may impact on the bargaining process in ways that are challenging to predict with certainty.
  - b. Where an enterprise agreement, as a result of bargaining, does not include a clause that confers a right for an employee to make a request, there could be potential for this to impact the BOOT.
  - c. Where employers are covered by an award and are unable to accommodate requests to process annual leave separately to the leave factor in order to be cashed out, this may impact negatively on the employment relationship. This is compounded by the potential for employees to be unaware that annual leave is distinct from the leave factor that they accrue. An employee would not be able to request annual leave cashing out with four weeks of leave factor accrued, because the annual leave component of this would be far less.
  - d. The model clause for the cashing out of annual leave includes reference to not exerting undue influence or undue pressure on an employee to make, or not make an agreement. It is unclear how this sits with the Full Bench's expressed position that the clause is facilitative only. While this would likely be resolved over time, it creates a layer of complexity and confusion that is unhelpful.

Yours sincerely,

Isabelle Guaran

Industry Employee Relations Manager

**Maritime Industry Australia Limited**