

IN THE FAIR WORK COMMISSION

4 yearly review of modern awards – AM2014/47 Annual leave

NSW Farmers (Industrial) Association

Submission on proposed model term for excessive annual leave

1. The NSW Farmers (Industrial) Association (NSWFIA) represents the interests of farmers across NSW. We are the peak state farming organisation in NSW with members growing food and fiber, ranging from livestock, wool, grains, cotton, horticulture, dairy and including oysters.
2. The NSWFIA provides representation on behalf of its oyster producer members who have material interests in the *Aquaculture Industry Award 2010* (the Aquaculture Award).
3. On 23 May 2016, the Full Bench of the Fair Work Commission (Commission) issues its decision in *4 yearly review of modern awards – Annual leave [2016]* FWCFB 3177 (the May 2016 decision).
4. In the May 2016 decision, the Commission determined a model excessive leave term for insertion in the majority of modern awards except for a number of awards. The Aquaculture Award and a number of other awards containing a provision that requires annual leave be taken within a specified period were referred for conference.
5. A conference was held by Commissioner Hampton on 1 July 2016.
6. The NSWFIA makes this submission in response to the Statement and Directions issued by the Full Bench on 8 July 2016 regarding a list of Modern Awards, including the Aquaculture Award, that contain provision requiring that leave be taken within a specified period.
7. In summary, the NSWFIA submits that:
 - a. the proposed model term should not be inserted into the Aquaculture Award; or
 - b. in the alternative that the Commission considers it necessary to insert the model provision into the Aquaculture Award, the NSWFIA propose to amend clause 1.5(e) of the model provision by inserting the following words:

‘except if the period of annual leave being requested falls within high season as advised by the employer previously.’

The statutory framework

8. Under section 156 of the *Fair Work Act 2009* (FW Act), the Commission is required to review each modern award in its own right every four years.

9. Section 138 of the FW Act specified a modern award may only include terms to the extent necessary to achieve the modern awards objective.
10. Section 134 of the FW Act contains the modern award objective. Modern awards must provide a 'fair and relevant minimum safety net of terms and conditions' of employment, taking into account criteria including:
 - a. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
 - b. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f)); and
 - c. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)); and
 - d. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h)).

The excessive leave model provision

11. Attachment 4 of the decision set out the model excessive leave provision as follows:

1.3 Excessive leave accruals: general provision

NOTE: Clauses 1.3 to 1.5 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 1.x).*

(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 1.4 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.

(d) Clause 1.5 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

1.4 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 1.3(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 leave arrangements (whether made under clause 1.3, 1.4 or 1.5 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 1.4(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.

1.5 Excessive leave accruals: request by employee for leave

(a) If an employee has genuinely tried to reach agreement with an employer under clause 1.3(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 1.4(a) that, when any other paid leave arrangements (whether made under clause 1.3, 1.4 or 1.5 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 leave arrangements (whether made under clause 1.3, 1.4 or 1.5 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 1.x) in any period of 12 months.*

(e) *The employer must grant paid annual leave requested by a notice under paragraph (a).*

Taking of annual leave provision currently specified in the Aquaculture Award should be preserved

12. Clause 23.4 of the Aquaculture Award provides:

'Annual leave is to be taken within 18 months of the entitlement accruing. For the purpose of ensuring accrued annual leave is taken within that period, and in the absence of agreement as provided for in s.88 of the FW Act, an employer may require an employee to take a period of annual leave from a particular date provided the employee is given at least 28 days' notice.'

13. In our submission, the current clause 23.4 should be preserved instead of inserting the model excessive leave provision into the Aquaculture Award

14. The current clause 23.4 sufficiently deals with the issue of excessive leave by discouraging annual leave accrual of more than 6 weeks. Reference to section 88 of the FW Act provides the ability for employer and employee to agree for the accrued annual leave to be taken at a later date should the employee wish to take longer holiday.

15. Clause 23.3 of the Aquaculture Award provides:

23.3 *Where an employer intends temporarily to close (or reduce to nucleus) the place of employment or a section of it for the purpose, amongst others, of allowing annual leave to the employees concerned or a majority of them, the employer may give those employees one month's notice in writing of an intention to apply the provisions of this clause. In the case of any employee engaged after notice has been given, notice must be given to that employee on the date of their engagement.*

(a) *Where an employee has been given notice pursuant to clause 23.2 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.*

(b) *Public holidays that fall within the period of close down will be paid as provided for in this award and will not count as a day of annual leave or leave without pay.*

16. There is a clear alignment of the operation of clause 23.4 with clause 23.3. The two provisions require the same minimum notice period for an employer's direction to take leave.

17. The inclusion of the model excessive leave provision would create difficulties in its interaction with the operation of clause 23.3. For example, in a shut down situation, an employer is required to give a minimum of one month notice. However if one of the employees in the operation being shut down has more than 8 weeks accrued annual leave, it is open for argument that a minimum of 8 weeks notice is triggered when the excessive leave model provision should not be affecting the mechanics of a shut down provision set out in the award.

18. The inclusion of the model excessive leave provision would not be consistent with the modern awards objective that modern awards be "simple" and "easy to understand" (subsection 134(1)(g) of the FW Act)

Australian Oyster industry

19. In 2014 Australian production of oysters was estimated at 11,402 tones with a farm gate value of production of \$90,293,000¹.

20. There are around 814 license holders that make up the Australian oyster industry located mostly in three states², NSW, South Australia and Tasmania. The industry primarily consists of family owned, owner operated small businesses.

21. Oyster farming is a labour intensive and seasonal operation. Oyster growth is relative to water temperatures. Growers will handle oysters more when they are actively growing

¹ Australian Bureau of Agricultural and resource Economics and Sciences *Australian fisheries and aquaculture statistics 2014* Ibid p.74.

http://data.daff.gov.au/data/warehouse/9aam/afstad9aamd003/2014/AustFishAquacStats_2014_v1.0.0.pdf

² Ibid, p.55-60.

during summer. The demand for oysters is also seasonal, with the month leading up to Christmas and around Easter being the busiest.

22. It is during the Christmas and Easter holiday seasons that oyster farming is generally at its peak and oyster farming businesses require all employees to be available during these times to maximise capacity of production and fulfill sales demand.
23. The busiest period for oyster farming operation covers a popular holiday season and it is attractive for employees to take annual leave during this period. It is crucial for employers in the industry to retain the ability to refuse an annual leave application during their high season, even if the employee has accrued excessive leave.

Proposed amendment to the excessive leave model provision

24. In the alternative that the Full Bench decides to insert the excessive leave model provision despite our submissions, the NSWFA propose to amend the excessive leave model provision by inserting the following words to the end of clause 1.5(e):

‘except if the period of annual leave being requested falls within high season as advised by the employer previously.’

25. Clause 1.5(e) of the excessive leave model provision creates an absolute right for an employee to take annual leave at any time once the employee has accrued more than 8 weeks for more than 6 months.
26. For oyster growers, having an employee being absent on annual leave during their busy period can potentially be disastrous. This is especially so in the context of oyster growers being small businesses with only a handful of employees that they can rely on. Being one employee short during the busy period may mean outstanding work being compounded affecting their ability to prepare and grade oyster for sales while they are in ‘condition’.
27. The NSWFA understands that there are pre-conditions stipulated in the excessive leave model provision before a request under clause 1.5(a) can be made and must be granted in accordance with clause 1.5(e) and it is acknowledged that employers have a six months window to direct the employee to take annual leave first. However, in practice small businesses do not have the resources to continually monitor their employees’ leave accrual.
28. The NSWFA notes the Full Bench have considered a proposal to amend Clause 1.5(e) of the excessive leave provision made by the AI Group in paragraph 147 of the *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3177 (the September 2015 decision) where the Full bench rejected the proposed amendment to be applied to the model provision that is to be inserted to the majority of modern awards.
29. The NSWFA submits that our application should be distinguished from the AI Group’s proposal. Our proposal is specific to the Aquaculture Award due to the particular nature of the industry that is highly seasonal and consists mostly of small businesses. It is crucial for the oyster growers to retain the ability to refuse annual leave being taken during high season.

30. Clause 1.4(b)(iv) of the model provision provides that a direction to take leave by an employer must not be inconsistent with any leave arrangement agreed by the employer and employee.
31. The same condition was repeated in clause 1.5(c)(iv), whereby a request to take leave by an employee under clause 1.5(a) must not be inconsistent with any leave arrangement agreed by the employer and employee.
32. The Full Bench in paragraph 204 of the *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 (the June 2015 decision) elaborated on clause 1.4(b)(iv) (previously numbered as 1.2(b)(v)) of the excessive leave model provision:
- Paragraph 1.2(b)(v) requires that the direction not be inconsistent with any leave arrangement agreed to by the employer and the 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.*
33. The amendment we are proposing is merely a further clarification based on clause 1.4(b)(iv). When there is an arrangement between an employer and their employees not to take annual leave during high season, an employee right to request under clause 1.5(a) cannot be inconsistent with this arrangement.
34. While the NSW FIA supports a consistent approach in relation to modern awards, each award is required to be reviewed in its own right (FW Act s.156(5)). Appropriate consideration should be given to the particular nature of the industry covered by the award, as well as the modern awards objectives, and in particular:
- a. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
 - b. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f)); and
 - c. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)).
35. Together, these criteria weigh in favour of amending the model provision as proposed should the Commission decide that the model provision should be inserted into the Aquaculture Award.

Gracia Kusuma
Industrial Relations Manager
26 August 2016

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/47 Annual leave

Statement of Bruce Zippel

1. I have been in oyster farming for 27 years and we are based in South Australia.
2. I am the current president of Oysters Australia. Oysters Australia is a national body formed by Australia's community of oyster growers for advocacy, research and development.
3. New South Wales, South Australia and Tasmania are the main oyster producing states in Australia.
4. Oyster farming is typically a small to medium family focussed business. Usually employing between 1 to 10 employees. Turnover usually less than \$1 million for average sized business.
5. Oyster farming requires the continual handling of oysters from small sizes. Oysters are usually sold from about 18 months to 2.5 years for Pacific oysters or up to double that for Sydney Rock oysters. Growers will work their oysters more when they are actively growing in warmer months and all oyster farming states work hard to prepare their oysters for the difficulties of winter. Growers will work hard at differing times of the year to prepare stock for the heavy selling times.
6. It is understood that in excess of 25% of total annual oyster production is normally sold in the month leading up to Christmas. For some growers, it can be as high as 50% as it is such a high demand time of the year. It is common for employers to insist that all staff are available for this very busy time of year.


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Bruce Zippel

25/8/2016
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Date

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IN THE FAIR WORK COMMISSION

Matter No.: AM2014/47 Annual leave

Statement of Tony Troup

1. I have been farming oysters for 36 years and we are based in NSW.
2. We currently employ 2 permanent employees.
3. I am a member of the NSW Farmers' Oyster Committee and NSW Shellfish Committee. I am also a member of Select Oyster Co Board, NSW Aquaculture Research Advisory Board and Oysters Australia Board.
4. Oyster production varies slightly throughout NSW but generally the peak periods for sales are Easter and Christmas. There are other busy periods for growers depending on their type of operation. For example, catching slats are put out in the early months of the year and timing of this can be critical for some growers.
5. In my own operation, down times in an oyster operation are during the winter months when oysters are not being sold and growth is slow so there is little grading to be done. During this period we catch up on maintenance and have some time off.
6. The summer months are the busiest period for our business. It is during this period when there is high sales volume to market and we have good growth so there is much grading to do to so oysters don't get overstocked and start to die. The months around Christmas and Easter are particularly busy.
7. We only have a small team of employees and every member of staff counts. If there is an employee who takes leave during the busy period it will impact on our operation and the business profitability. Oyster growing is a seasonal operation and oysters can only be sold when they are in condition. We may miss opportunities to sell our oysters while they are still in condition and if we get behind in the grading then oysters can become overstocked and fouled with nuisance organisms creating much more work or even death of stock.

Lodged by NSW Farmers (Industrial) Association Telephone: 02 9478 1083

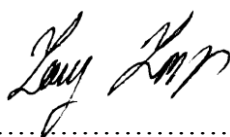
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- 8. We don't currently have any employee with annual leave accrual of more than 8 weeks at the moment, however in the past we did.
- 9. We try to avoid having to direct employees to take leave, and instead use the ability to convince employees to not take time off at inappropriate times.



26/8/16

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Tony Troup

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Date

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/47 Annual leave

Statement of Jonathon Poke

1. I have been involved in oyster growing for 37 years and my operation is based in Tasmania.
2. We currently employ 22 permanent employees.
3. Oyster farming is a very labour intensive operation. Oyster growth is relative to water temperatures so the majority of labour required for grading and rehousing is in the period from September through to June.
4. Oyster farming is very much dependent on weather condition and market demands. In periods where we have had storm damage or high sale volumes to deliver we may work some 12 hour shifts if necessary.
5. The highest volume of sales of oysters for consumption through the fresh fish market is from October through until May. The period of lowest labour requirements or our down time is from July through to September each year.
6. All staff members are required from the start of November through until the end of April. No leave is available during this period. Special consideration is given for extenuating circumstances.
7. If employees were to take leave during our high growth and sales periods and our stock is not graded on schedule, it can be ruined and be unsaleable.
8. We don't have any award covered employees who currently have more than 6 weeks of accrued annual leave.

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- 9. The way we approach the issue is that every May or June we advise employees that leave is to be taken between particular period, usually from the start of July to the end of September, and they can complete a leave request form to take their leave between these dates. They are advised that there can be no more than 50% of the production staff on leave at any one time and it is first in has priority. We allow them to take leave in 2 blocks if they wish.


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Jonathon Poke

29/ 8/2016
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Date