



SUBMISSION TO THE FAIR WORK COMMISSION

RE: 4 YEARLY REVIEW OF MODERN AWARDS

ANNUAL LEAVE COMMON ISSUE

INTRODUCTION

1. The Accommodation Association of Australia (the “**Association**”) welcomes the opportunity to make a submission to Fair Work Commission (“**FWC**”) about the scope of the annual leave common issue in response to the Draft Statement and Directions issued by Justice Ross on 7 March 2014 (the “**Directions**”).

ABOUT THE ACCOMMODATION ASSOCIATION OF AUSTRALIA

2. The Association is the national industry body for the Australian accommodation industry.
3. Members of the Association include major hotels, resorts, motels, motor inns, serviced and holiday apartments, bed and breakfasts, guesthouses, backpackers and timeshare establishments in metropolitan, regional and rural Australia across all states and territories.
4. The Association is the only organisation which represents this full range of accommodation types and interests both nationally and in rural and regional Australia, as well as within major cities.
5. The Association’s membership base includes almost 2000 properties and more than 110,000 guest rooms.
6. Over 80 per cent of the Association’s members operate small businesses which form part of Australia’s “services” sector.

LEGISLATIVE CONTEXT

7. The legislative context for the review is set out in section 156 of the 4 yearly reviews of modern awards to be conducted

Timing of 4 yearly reviews

- (1) The FWC must conduct a 4 yearly review of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

What has to be done in a 4 yearly review?

- (2) In a 4 yearly review of modern awards, the FWC:

- (a) must review all modern awards; and

- (b) may make:

- (i) one or more determinations varying modern awards; and modern

- (ii) one or more awards; and

- (iii) one or more determinations revoking modern awards ; and

- (c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A.

Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time

VARIATIONS SOUGHT TO THE HOSPITALITY INDUSTRY (GENERAL) AWARD 2010

8. The Association proposes the insertion of a cashing out of annual leave clause in the Hospitality Industry (General) Award 2010 as follows.
9. Inserting new sub clause:

34.5 - Cashing out of annual leave

By mutual agreement with the employee an employer may agree to make, a payment in lieu of part of an employee's annual leave balance.

(a) A request may be made and accepted only if the employee has a leave balance of greater than four weeks' annual leave accrued.

(b) If the employee is affected by special circumstances involving a pressing need or financial hardship such request will not be unreasonably refused by the employer.

(c) The payment made in lieu of the annual leave entitlement must be at least the full amount that would have been payable to the employee had the employee taken the leave.

(d) Each cashing out of a particular amount of paid annual leave must be subject of a separate agreement in writing between the employer and the employee.

This Determination shall operate on and from 1 July 2014

GROUND ON WHICH VARIATIONS SOUGHT

10. The Association agrees that annual leave is a necessary entitlement, and encourages employees to use annual leave from a life-style perspective.

11. However, it has been the experiences of Association members that employees' request the option to cash out their annual leave to assist manage their financial and personal affairs.
12. This is especially the case when employees have accrued a significant annual leave balance. Typically, these employees request to be availed of part of their annual leave entitlement, and concurrently cash out a remaining part of their annual leave entitlement.
13. The Association's submission seeks to be able to facilitate this cash out request, and at the same time preserve an entitlement to leave for life-style purposes.
14. The capacity to pay out leave also enables businesses to better manage their contingent liabilities.
15. A cashing out provision would entitle award covered employees a similar right afforded to award/agreement free employees under section 94 of the *Fair Work Act 2009*:

Cashing out and taking paid annual leave for award/agreement free employees

Agreements to cash out paid annual leave

(1) *An employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave.*

(2) *The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.*

(3) *Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing.*

(4) *The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.*

16. The *Fair Work Act 2009* permits cashing out terms by virtue of section 92

Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

Paid annual leave must not be cashed out, except in accordance with:

(a) *cashing out terms included in a modern award or enterprise agreement under section 93, or*

(b) *an agreement between an employer and an award/agreement free employee under subsection 94(1).*

- a. The *Fair Work Act 2009* permits modern awards to include terms relating to cashing out terms. Section 93:

Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

Terms about cashing out paid annual leave

(1) *A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.*

(2) *The terms must require that:*

(a) *paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and*

(b) *each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and*

(c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

17. The variation sought is consistent with modern awards objectives.
18. Vice President Watson's dissenting arguments expressed in the Modern Awards Review 2012— Annual Leave Decision [2013] FWCFB 6266, are supportive of the Association's stance in respect of including a provision for cashing out annual leave, are worthy of note.
19. At [230], Vice President Watson stated:

In my view the plea by many employers for a facility for flexibility in taking annual leave and cashing out of annual leave is a powerful one and directly raises various provisions of the modern awards objective. There is currently an anomaly in the classes of employees who can access such arrangements. Agreement between an employer and a single award covered employee is the only combination not currently permitted to access this flexibility. Award-free employees and agreement-covered employees can negotiate this flexibility. Cashing out of leave can have advantages for employees and employers. If safeguards exist, there can be confidence that the mechanism will not lead to avoidance of the purpose of an annual leave entitlement. The legislature has endorsed the concept of cashing out and established safeguards for its application. The absence of those safeguards was clearly a factor for the cautionary approach of the AIRC in 2008. The reasons for opposition reflect an approach inconsistent with the proper statutory test and Full Bench cases on the scope of this review. If the modern awards objectives can be furthered by providing this additional flexibility and an appropriate merit case is established, the test under this 2 year review is satisfied. In my view such a case has been made out. The more restrictive test advocated by the ACTU, and effectively adopted by the majority, is a re-run of arguments rejected by the June 2012 Full Bench and all but slams the window shut for award reforms arising from the 2 year review

MODERN AWARD OBJECTIVES

FAIR WORK ACT 2009 - SECT 134

The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective .

CONCLUSION

The Association submits that the award variation sought in this submission will provide flexible contemporary workplace relations and is beneficial to employers and employees.

Notwithstanding, cashing out provisions will have positive productivity and efficiency benefits for the accommodation sector.

Witness statements supporting this variation will be filed in due course.