

MEMORANDUM OF ADVICE

For the Fair Work Ombudsman
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ANNUAL HOLIDAY LOADING UNDER THE *FAIR WORK ACT*

1. The Fair Work Ombudsman (FWO) is seeking advice from Senior Counsel on the question of interpretation of s.90 of the *Fair Work Act 2009* (hereinafter referred to as "the Act"). The question can be briefly put as follows:

"Does the amount that must be paid pursuant to s.90(2) of the Act mean the employee's base rate of pay for the employee's ordinary hours of work in the period, or is it the amount that is payable under the relevant awards/agreement/contract for the period (being an amount greater than or equal to the employees base rate of pay)?"

2. In particular, the answer is relevant in relation to whether annual leave loading provided in a modern award is payable on accrued leave on termination of employment.
3. In my opinion, **annual leave loading** pursuant to s.90(2), if that annual leave loading is payable pursuant to an award, agreement or contract for any annual leave period taken, **is also payable on accrued annual leave on termination of employment.**

Background

4. FWO has already received advice in relation to this issue from the Australian Government Solicitor (AGS) in two sets of advices, one dated 11 October 2010 and the second one dated 30 November 2010. I have read both those advices and I agree with the advice provided by the AGS. The advice dated 30 November 2010 repeats aspects of the earlier advice and also comments upon opinions received from various industry and trade union groups commenting upon this same issue. I have read those advices as well and I prefer the advice given by the AGS. Let me explain why.

Reasoning

5. Section 90 of the Act is as follows:

"90 Payment for Annual Leave

(1) [Payment is at base rate for ordinary hours of work]

If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) [Employer must pay untaken annual leave when employment ceases]

If, when the employment of an employee ends, the employer has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave."

6. Section 90 is found within Division 6 of the Act. Division 6 relates to "Annual Leave". It is found within chapter 2 of the Act entitled "Terms and Conditions of Employment". In order to gather a proper interpretation of s.90(2), one needs to consider the scheme of the Act in relation to the

interplay between the National Employment Standards modern awards and enterprise agreements. The National Employment Standards provide a minimum terms and conditions for employees. S.55(3) of the Act says as follows:

“(3) National Employment Standards subject to modern award or enterprise agreement

The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

NOTE: *Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:*

(a) under which, instead of taking paid annual leave at the rate of pay required by s.90, an employee may take twice as much leave at half that rate of pay; or

(b) that specified when payment under s.90 for paid annual leave must be made.

NOTE 2: *Supplementary terms permitted by paragraph (b) include (for example) terms:*

- (a) *that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under s.87; or*
- (b) *that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by ss.90 and 99).*

NOTE 3: *Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the undertaking of unpaid parental leave and is required by s.74.*

- (5) *An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).*
- (6) *To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5) then, to the extent that the terms given to an employee an entitlement (the award or agreement entitlement) that is the same as an entitlement (the NES entitlement) of the employer under the National Employment Standards:*
 - (a) *those terms operate in parallel with the employee's NES entitlement but not so as to give the employee a double benefit; and*
 - (b) *the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.*

NOTE: *For example, if the award or agreement entitlement is to six weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to four weeks of that leave."*

7. It is clear, particularly by s.55(4)(b) that modern awards or enterprise agreements may provide for better terms and conditions than what are applied by the National Employment Standards.
8. The National Employment Standards are found in Part 2-2 of the Act, within which part is found s.90.
9. Consequently, the National Employment Standards are what is applicable for the payment of the base rate of pay for an employee's ordinary hours of work in the period of the taking of paid annual leave pursuant to s.90(1). Such a minimum provision can be supplemented by an award, enterprise agreement or contractual provision so long as it is not detrimental to the employee(see ss55(4)(b) referred to above) An additional payment could hardly be said to be detrimental to an employee. The provisions in subsection (2) could have been expressed in the same way were it the case that annual leave loading was not to be paid on untaken annual leave. However, it is instructive to note that the provision is expressed in quite different terms to what is to be found in subsection (1) of s.90. Subsection (2) has no reference to the expression "employee's base rate of pay". What is to be found in subsection(2), is that an employee on termination who has a period of untaken paid annual leave must be paid by the employer the amount that the employee "would have been payable had the employee taken that period of leave." In these circumstances, if there is an award or an enterprise agreement or a contract which permits the taking of annual leave upon which is paid an annual leave loading, then in my view that is the amount which would be payable as untaken paid annual leave to an employee on termination.
10. Those who contend that untaken paid annual leave is to be paid at the base rate of pay on termination without any amount of annual leave loading added to it, neglect the words used in the subsection. In order to bolster their case they need in effect to add words to the subsection which are not there. In order to make good their argument, they would need to have the same provision of the expression "employee's base rate of pay" as found in subsection(1) repeated in subsection (2) . Perhaps

also to add the words "only will be paid the employee's base rate of pay for untaken paid annual leave on termination of employment." It is not permissible in effect to add such words to the Act. This is particularly so when the words in subsection (2), in my opinion, are clear on their ordinary English meaning and in the context of the Act.

JEFFREY PHILLIPS SC
Denman Chambers
17 December 2010