

4. SINGLE DAY ANNUAL LEAVE

Summary of Core Contentions

- The utility of access to single day absences for family purposes is clear. This includes the contribution agreed single day annual leave can make to:
 - Meeting familial exigencies and emergencies arising with little or no notice.
 - Meeting familial exigencies and emergencies for which there may be more notice (e.g. scheduled medical appointments, curriculum days etc).
- The contribution single day access to annual leave can play in employee work family balance has already been clearly accepted by the Commission in the previous 1994 Personal Leave Test Case.
- However, many awards do not in practice provide meaningful and straightforward access to single day annual leave, or any access at all.
- Residual bureaucratic and administrative hurdles for the agreed use of annual leave on a single day basis are inconsistent with balancing work and family in contemporary Australia:
 - The original rationale for such hurdles and controls is no longer relevant.
 - They are not required to protect employee interests.
 - On balance, there is no basis to retain them.
- Fresh test case validation of agreed single day annual leave, and a revised test case provision will deliver real work and family benefits and allow more employees greater access to single day absences, without additional costs to the employer.
- There is a genuine demand from employees for access to accrued leave on a single day basis by agreement with their employers.
- Experience during the last decade indicates that employees are capable of making their own elections on the use of their accrued annual leave, and that employers are capable of assessing these against operational imperatives.

- Previous cautions, caveats and procedures are, with the benefits of a decade’s consideration, no longer merited and serve only to retard access by parents and those with caring responsibilities to a key work and family flexibility.
- There has been a change in the statute during the past decade towards greater empowerment of employees and employers in workplaces, greater scope for agreed approaches, and awards operating as a facilitative safety net.
- ACCI proposes no loss of or variation to annual leave entitlements.
- The additional flexibility proposed by ACCI/NFF will clearly operate:
 - Only on the initiation / election of the employee.
 - Only by agreement at all times.
 - Only for the purposes of assisting employees in balancing their work and family responsibilities.
- In the absence of employee election and employer consent, the status quo will clearly and ambiguously prevail.
- The additional flexibility proposed by ACCI/NFF is able to be delivered without (significant) additional damaging labour costs to employers. It stands as a superior approach under the *Workplace Relations Act 1996* to other alternatives under consideration in this matter.

ACCI/NFF ’s Proposed Clause

[4.1] A proportion of federal awards provide some capacity¹ for employees to access accrued annual leave as single days off work (or as a combination of days less than may otherwise have been historically provided for under the award).

[4.2] However:

- a. Access to single day annual leave is in practice often limited. This important practical measure which can assist employees in managing both their working and family lives is not sufficiently accessible to employees (with the agreement of their employers) in many Australian workplaces.

- b. Many awards have simply not been varied to incorporate any capacity to access to single day annual leave in the wake of the personal leave test cases of the 1990s. They retain unaltered the often inherently anti-family, paternalistic, traditional strictures on the use of annual leave. These strictures were arbitrated into awards prior to the mass movement of women into the Australian workforce, and prior to the changes to Australian society from the 1960s onwards. A significant percentage of awards either make no express provision for single day annual leave, or alternatively only imply single day annual leave so that the entitlement is not necessarily visible to the employee.
- c. Other awards contain nominal or theoretical capacity to access annual leave on a single day basis; however in practice this is not sufficiently accessible to employees in workplaces. Controls, caveats and procedures which the Commission previously attached to the taking of annual leave on a single day basis now (with the benefit of a decade's experience) operate solely as an unmerited barrier to employers and employees agreeing approaches to the day to day management of employee family priorities.
- d. The previous policy rational for caveats and procedures for the use of annual leave on a single day basis:
 - i) Do not remain merited in light of fundamental changes in workplaces and in workplace relations during the past decade, including but not limited to changes in the role of awards and the bargaining system.
 - ii) Are now outweighed by the strengthening imperative to provide employees and employers with greater capacity to effectively and creatively address the interaction of work and family.

[4.3] ACCI/NFF therefore seek the inclusion of the following clause in awards as a test case standard of the Commission within the meaning of Principle 10², and as an indivisible part of any package of work and family award variations arising from these proceedings/from any fresh Test Case decision during 2004/2005:

¹ Which may in practice be quite limited, for the reasons outlined in this section.

² Print PR002003

Annual Leave – Single Day Absences

- a) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to take annual leave in separate periods, including single days.

How this would work in practice – I

[4.4] Consistent with the terms in which it is drafted, and consistent with the majority of the propositions advanced by ACCI/NFF in this matter, this clause would only provide access to single days annual leave:

- a. For the purposes of assisting employees in balancing their work and family responsibilities. ACCI/NFF are not advancing the proposition that all awards should contain avenues to use annual leave on a single day basis for all and any agreed purposes. This is however a perfectly legitimate approach and ACCI/NFF proposes no variation to any award which already contains capacities to use annual leave on such a basis.
- b. At the employee's election, with the consent of the employer. This clause is designed to operate at all times at the initiation of the employee, where the employer agrees to an employee request.
 - i) ACCI is not advancing this proposition to in any way deliver additional scope for employers to direct the taking of annual leave on any particular basis beyond that which already exists under the award system.
 - ii) This formulation is fundamental. Any approach which operates other than by employer agreement is not supported.³

How this would work in practice – II

[4.5] ACCI/NFF advances this clause for inclusion in federal awards on a very specific basis, and solely on that basis, as follows:

³ This caveat applies to all ACCI /NFF proposals advanced on the basis of employee election and employer agreement.

[4.6] Awards not including any capacities to access single day annual leave/ any reference to the use of annual leave on a single day basis. Where such awards are to be varied to give effect to any ‘test case’ package of variations arising out of this matter, this should include the above variation proposed by ACCI/NFF regarding single day annual leave.

[4.7] Awards including reference to single day annual leave, but not containing meaningful capacity to actually access annual leave on a single day basis at this time. Some awards contain references to single day annual leave but fail to actually provide any meaningful and usable capacity to access annual leave on a single day basis. This may be on the basis of access to single day leave being possible only where a collective decision has been made to specifically endorse scope to use leave in this manner at specific workplaces.

[4.8] For example, the *Furnishing Industry National Award 2003*⁴ provides for annual leave to be taken in a period of 28 consecutive days. It further provides:

33.8 Broken leave

- 33.8.1 The annual leave shall be given and taken in one or two continuous periods, then one of those two periods must be of at least 21 consecutive days, including non-working days.
- 33.8.2 Provided that, if the employer and an employee so agree, the annual leave entitlement may be given and taken in two separate periods, neither of which is at least 21 consecutive days including non-working days, or in three separate periods.
- 33.8.3 Provided further that an employee may, with the consent of their employer, take short term annual leave, not exceeding four days in any calendar year at a time or times separate from any of the periods determined in accordance with this sub clause.

[4.9] The award enables some level of facilitation / scope for agreement between employer and employee but not so as to permit single day leave. Single day leave must be agreed under the enterprise flexibility measures contained in section 10 of the award and must be subject to the approval of the AIRC.

[4.10] A further example is the *Building Services (Victoria) Award 2003*⁵:

⁴ Award [AW825280]

⁵ Award [AW822844]

28.4.1 An employee may take annual leave at a time agreed with the employer within twelve months of accrual, unless alternative arrangements are agreed. Provided that the annual leave shall be given and taken as directed by the employer on the following basis:

28.4.1(a) in one continuous period; or

28.4.1(b) in two separate periods, one of which shall be of at least three weeks' duration.

28.4.2 Except where the provisions of 28.4.1 are applied, the annual leave may be taken by agreement between the employer and the employee on the following basis:

28.4.2(a) in two separate periods, both of which may be of less than three weeks' duration; or

28.4.2(b) in three separate periods.

[4.11] Again, whilst some level of facilitation does exist for the individual, they are limited to the extent as provided for by 28.4.1 and 28.4.2. Further variations must be agreed under the enterprise flexibility provisions in the award.

[4.12] This is simply no longer good enough. With the perspective of a 2004 analysis, this represents an unwarranted excess of caution, which on balance now unjustifiably serves to retard the capacities of employees to balance their work and their family lives by agreement with their employers. Award provisions such as these above are unnecessarily restrictive and limit the capacity of employers and their employees to use single day leave to meet work and family requirements

[4.13] In such cases, ACCI seeks to have the existing award provisions which require collective endorsement or a bureaucratic discursive procedure prior to employees being able to access this essential work and family measure, replaced with an actual avenue for direct access to single day annual leave by agreement. Existing award provisions of the form outlined in the preceding paragraph should be deleted and replaced with the formulation proposed by ACCI/NFF.

[4.14] Awards more flexible than ACCI proposal: The above ACCI clause is not however advanced for inclusion in awards which already provide scope for the use of annual leave in a less restrictive manner. Where the existing terms of awards operate on a more flexible or less restrictive basis than that sought by ACCI/NFF, no change to the award is proposed.

[4.15] For example, the *Contract Call Centre Industry Award 2003*⁶ contains the following in regard to annual leave usage, and would not be varied under the outcomes sought by ACCI/NFF:

25.4 Taking of annual leave

- 25.4.1 Annual leave shall be taken in a manner that is agreed to between the employer and the employee. Leave can be broken up into any number of periods.

[4.16] More flexibility, but on a capped or restricted basis: Some other awards provide access to single day annual leave by agreement without setting out any specific purpose or trigger to the use of annual leave, but do so on a capped or restricted basis (e.g. only up to 5 or 10 days of annual leave may be taken as single days). For example, the *Metal, Engineering and Associated Industries Award 1999* sets out the following in regard to using annual leave:

7.1.7 Annual Leave in one or more Separate Periods

- 7.1.7(a) Annual leave is to be given by the employer and taken by the employee in up to four separate periods.
- 7.1.7(b) If the employer and an employee so agree the annual leave entitlement may be given and taken in more than four separate periods including up to a maximum of 10 single days.

However, one period of annual leave must be of at least seven consecutive days, including non-working days.

[4.17] For such awards, it is proposed that the ACCI clause be added as specific additional avenue to operate by agreement for the purposes of assisting employees in balancing their work and family responsibilities. Thus, an employer and employer and employee could agree to the use of (for example) 5 or 10 days annual leave as already set out in the award, and may agree to access days above this through the additional avenue advanced by ACCI. In the above example, this would translate into the above award as follows:

7.1.7 Annual Leave in one or more Separate Periods

- 7.1.7(a) Annual leave is to be given by the employer and taken by the employee in up to four separate periods.
- 7.1.7(b) If the employer and an employee so agree the annual leave entitlement may be given and taken in more than four separate periods including up to a maximum of 10 single days.

⁶ Award [AW827785]

- 7.1.7(c) However, one period of annual leave must be of at least seven consecutive days, including non-working days.
- 7.1.7(d) Provided that, to assist employees in balancing their work and family responsibilities, an employee may additionally elect, with the consent of the employer, to take further annual leave in separate periods, including single days.

[4.18] There may be other scenarios under the award system in the application of single day annual leave to specific awards. ACCI will address these as appropriate to the extent they arise during these proceedings.

Family Leave Test Cases

[4.19] As part of its Family Leave Test Case - Stage I (1994)⁸ decision, the Commission found that:

“..a majority of couples with dependent children no longer conform to the “traditional” model of the male wage earner and the female partner in a full time caring role in the home. The number of single parent families has increased markedly over recent decades. Further as a consequence of the ageing of the population it has been predicted that more employees will have dependent elders in the twenty –first century than dependent children. Accompanying these trends have been changes in attitudes to gender roles⁹.”

[4.20] As part of the Stage 1 decision, facilitative provisions were introduced to enable agreement at enterprise level to determine the manner in which that clause is applied at the enterprise, either by individual or collective agreement.

[4.21] Amongst those facilitative provisions was a provision to allow an employer and an employee in an enterprise or part of an enterprise to agree to allow up to one week’s annual leave to be taken in single days. This was both

- a. In response to ACCI’s submissions at that time, that awards inhibited the capacity of employers and employees to reconcile work and family responsibilities.
- b. (Also) in response to a number of studies examined in the case which reported that employees saw additional flexibility as the primary means of

⁸Decision Dec 2200/94 M Print L6900

⁹ above at 8 – Conclusion, paragraph 1.

reconciling work and family responsibilities.¹⁰

[4.22] The model clause arising from the 1994 decision was as follows:

“3. Annual Leave

3.1 Notwithstanding the provision of this clause, an employee may elect, with the consent of the employer, to take annual leave in single day periods not exceeding five days in any calendar year at a time or times agreed between them.

3.2 Access to annual leave, as prescribed in paragraph 3.1 above, shall be exclusive of any shutdown period provided for elsewhere under this award.

3.3 An employee and employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least 5 consecutive annual leave days are taken.”

[4.23] Examination of award provisions since the introduction of facilitation provisions show that many awards have not introduced the envisaged facilitation¹¹.

Bureaucratic Hurdles are Inconsistent with the *Workplace Relations Act 1996*

[4.24] Since the 1994 test case decision, there has been substantial statutory reform including the creation of the *Workplace Relations Act 1996*. In addition to s.93A in the Act which has been in place since 1994, there are now significantly re-articulated and revised duties on the system and on awards in particular.

[4.25] Section 143(1B) and (1C) now require the Commission to ensure that awards and their provisions:

1B....

(a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level; and

(b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work;

1C.....

(c) is expressed in plain English and is easy to understand in structure and content; and

¹⁰ Above at Two Stage Approach, Stage 1, second last paragraph.

¹¹ Below at paragraph 28.

¹³ Drawn from www.wagenet.gov.au, Victorian Minimum Wage Orders excluded.

(d) does not contain provisions that are obsolete or that need updating;

[4.26] Proper consideration of these and other guiding provisions of the *Workplace Relations Act 1996* further supports the variation proposed by ACCI. In particular:

- a. Bureaucratic and complicated mechanisms to access single day annual leave prescribe matters of unnecessary detail and process. In addition to no longer being merited, such detail serves to retard award compliance and hinders employees in their attempts to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.
- b. Bureaucratic and complicated mechanisms to access single day annual leave prescribe matters of unnecessary detail and process and can also be very hard to read and comply with. There is no basis for this given that the original rationale for such detail is no longer valid, or alternatively is outweighed by the need to provide more employees with more scope to balance work and family.
- c. Existing annual leave provisions which do not provide for single day annual leave effectively need updating. If this is not occurring under existing determinations this mitigates in favour of a fresh determination.

[4.27] Also relevant to consideration of the ACCI / NFF proposition is consideration of the objects of the Act, and s.93A.

The Status Quo

What Awards Currently Provide For

[4.28] Current awards provide for a variety of mechanisms by which annual leave can be taken and single days can be accessed. A large number of awards still provide for the taking of annual leave only in specified “blocks” or minimum periods. This may provide that the 4 weeks annual leave may be taken in prescribed manners (and only in prescribed manners) ranging from a single period to up to four periods. Many of them are unnecessarily complex and restrictive.

[4.29] A significant number of awards make no express provision for single day periods. A further series of awards only provide for single day periods in clauses other than the annual leave clause or only provide for single day leave by implication, which does not assist individuals reading and seeking to apply the award. Some awards have specific facilitative mechanisms for single days for either individual employees or collectively. ACCI has briefly examined 79 of the top 100 awards¹³ in this respect and the findings are summarised below.

	No. of Awards	Total	Percentage
No Single Day provision	13	79	16.5%
Single Day provision implied by agreement	12	79	15.2%
Single Day provision implied by facilitative agreement	8	79	10.1%
5 single days provision	35	79	44.3%
10 single days provisions	2	79	2.5%
Complete flexibility by agreement	9	79	11.4%

[4.30] In summary, 16.5% of awards examined made no provision for single days annual leave and a further 25.2% of awards did not make express provision for single days. This latter group of awards does not specify single days. It may be argued that there is some implied scope for single day usage, however in some cases there would remain a clear apprehension that an employer may breach an award in adopting such an approach.

[4.31] This examination shows that many major awards still do not make express provision for single day leave. Of those that do, many of the annual leave provisions are also unnecessarily complex and bureaucratic in limiting the ability of employers and employees to agree to access annual leave entitlements in a manner which will meet business needs and maximise work and family flexibility.

Experiences from Bargaining

[4.32] The Department of Employment and Workplace Relations (DEWR) has found that the incidence of flexible annual leave provisions in Certified Agreements has increased from 4.4% in 1999/2000 to 8.4% in 2002/2003¹⁴. Incidence of access to single day leave has remained reasonably constant over the same period with between 12.1% to 13.2% of certified agreements providing for single day annual leave.

[4.33] Notwithstanding the above, a wide variety of annual leave provisions is evidenced in Certified Agreements. An example of a flexible leave provision is the following:

5. Annual leave may be taken by mutual agreement in any number of periods providing one of the periods is of at least seven consecutive days, inclusive of non working days¹⁵.

[4.34] Another example is the following:

iv) Annual leave shall be taken at a time which is mutually agreeable to the employee and the Company. However annual leave shall be taken within six (6) months of it becoming due, unless otherwise mutually agreed between the Company and the employee.

v) Annual leave shall be given and taken in a continuous period, or if mutually agreed in separate periods¹⁶

[4.35] A further example which specifically permits single day leave is as follows:

iii) Provided further, Annual Leave may be taken by mutual agreement in such number of periods of not less than one day¹⁷

[4.36] Clearly unions and employees in some Australian workplaces consider employees are capable of managing their annual leave on a single day basis by agreement with their employers. It is difficult to see how they can sustainably maintain that all employees are not capable of doing so.

¹⁴ Annual Report 2002/3 Table 17

¹⁵ Agreement between AWU and Castalloy Manufacturing Pty Ltd [AG810861]

¹⁶ LK Agreement [AG823931]

¹⁷ LJ Agreement ANF and Epworth Foundation [AG807594]

Employees Are Capable of Making Their Own Decisions

[4.37] The uses of annual leave have changed substantially since the original introduction of annual leave in 1936¹⁸. Employees travel abroad more, have greater accessibility to paid leave and workforce demographics have also changed dramatically since the days in which the then Court examined the labour code of the then USSR in deciding whether an annual leave entitlement should be granted or not¹⁹. Accordingly, it is now appropriate to recognise that the uses to which annual leave may be put have also changed and adjust the award system accordingly to reflect this.

[4.38] The approach sought by ACCI/NFF has been endorsed by the unions. It is included in various awards and agreements and it is recognised by such inclusion that employers and employees are capable of agreeing and managing their own affairs. Accordingly, it is now appropriate that such capability be recognised throughout the award system.

[4.39] Since the 1994 decision, the award system has also changed dramatically. There has been a decade of enterprise bargaining arrangements and awards now operate as a “safety net” in a modified regulatory framework. Awards are not required to be paternalistic but rather set up a minimum standard of protection. Accordingly, it is appropriate and consistent with that approach that awards in annual leave provisions regulate obligations and capacities rather than entire processes.

Restrictions on Single Day Annual Leave Are No Longer Relevant Nor Appropriate

[4.40] In most areas of employment the taking of leave remains ultimately at the direction of the employer. ACCI/NFF is not proposing to alter this. Notwithstanding this however, many awards still do not permit an employer and employee to agree to take single day annual leave. What ACCI/NFF is proposing is that an employee be entitled to elect, with the consent of his or her employer to take annual leave in single day periods to meet work and family requirements.

¹⁸ Printing Industry Employees Case (1936) 36CAR 738

¹⁹ above at page 746.

[4.41] Annual leave clauses in awards which unnecessarily restrict the ability of employers and employees to agree the taking of annual leave no longer accord with the demographics, expectations and preferences of the Australian workforce.

[4.42] Amongst the original rationales for the introduction of a minimum block of 14 days consecutive of annual leave in the 1940s, was that

“the physical and mental health of employees and the social need for providing ample time for the breadwinner to spend in leisure with his family, make it desirable that a minimum annual holiday of two continuous weeks, with pay, should be instituted throughout industry”²⁰

[4.43] In 2004, notwithstanding the ongoing need of employees for rest and recreation, the demographics, leisure expectations and priorities of Australian society are entirely different from the rationale for not less than 2 weeks consecutive annual leave being set in 1945.

[4.44] It is no longer appropriate that such a one size fits all approach should be the only approach to the taking of annual leave in any industry. The married male breadwinner model and societal assumptions upon which it was based are no longer valid.

[4.45] Although the 1994 decision allowed for flexibility to a limited extent, practice over the succeeding ten years shows that the level of implementation of these provisions has been to a significant extent limited. We retain an annual leave approach in many industries which is based on an arbitration undertaken during the Second World War, based on a male married breadwinner, a society with unbelievably limited and homogenised leisure options, and with an almost alien ethic, religious and social homogeneity compared to today.

Demand For Access To Single Day Annual Leave

[4.46] ABS survey results²¹ show that the ability of employees to choose when annual leave is taken is not affected by whether or not they have children under 12, although it does also show a clear level of demand for periodic time off from working parents.

²⁰ AEU v. MTEA (1945) 55 CAR 595 at 597 quoting a report of the Institute of Public Affairs in Victoria.

²¹ Table 13 Working Arrangements Australia ABS 6342

[4.47] ACCI/NFF consider that such demand can best be met by allowing existing provisions and mechanisms to be utilised as effectively as possible as an alternative to increasing costs on employers. This is a key theme which ACCI/NFF will further develop as this case proceeds – the agreement based approach propose by ACCI/NFF is superior to those advanced by the ACTU, will deliver superior work and family outcomes, will deliver superior productivity, efficiency and operational outcomes, and will properly (and best) accord with the statutory framework under which this mater must be determined.

[4.48] At the same time, it should be recognised that granting employees access to single days annual leave carries a cost to employers. This includes not only replacement costs and any loss of productivity, efficiency and timeliness, but also additional transactional and administration costs.

Work+Family benefits of agreed single day leave are clear

[4.49] Improved capacities for employees and employers to agree approaches to the taking of annual leave will see the accommodation of more work and family based requests. It is a core measure identified by employers to assist in addressing a key element of day-to-day work and family requests in workplaces.

[4.50] The Family Leave Test case established flexibility as a core element of balancing work and family responsibilities and stated that employees saw additional flexibility as the primary means of reconciling work and family responsibilities.

[4.51] ACCI/NFF do not intend to separately add to this material at this time. We say that the following has been established and need not be revisited:

- a. Flexibility in approach is still the core means of balancing work and family responsibilities.
- b. Notwithstanding the 1994 decision, many barriers still exist to the accessing of single day leave for the purposes of balancing work and family responsibilities. Amongst these barriers include awards which have not incorporated the provision, awards which do not expressly provide for the provision, or awards which through their structure or complexity do

not assist individuals in understanding and applying the award.

[4.52] The question currently before the Commission is not whether scope to access single days of paid leave by agreement can contribute to the balance of work and family – this has already been determined. It is how this should operate in the award system and whether there should be barriers in specific industries to the capacities of employers and employees to access such a clearly beneficial measure, where agreeable to both parties.