

5. ANNUAL LEAVE – CARRY FORWARD

Summary of Core Contentions

- Under most awards, the capacity of employers and employees to carry forward periods of annual leave is tightly restricted.
- Whatever their intended purposes of award controls on the scheduling of annual leave serve to retard the capacities of some employees to manage their work and family lives by agreement with their employers.
- In practice, restrictive award provisions on the carrying forward of annual leave appear to be widely non observed, often at the behest of employees rather than employers.
- Carrying forward annual leave by agreement is a legitimate mechanism to assist the balancing of work and family responsibilities. There is a genuine opportunity for the award system to accommodate the contemporary employee expectations where able to be agreed with employers.
- Many awards, as currently drafted, act as barriers to the ability of employers and employees to carry forward annual leave by agreement to assist in balancing work and family responsibilities.
- Experience over the past decade has shown that employers and employees are capable of agreeing their own flexible arrangements. The award system should not limit the capacity of employers and employees to develop mutually beneficial work practices in this way.
- ACCI/NFF propose a clause which would allow employees to elect to carry forward annual leave, with the agreement of their employer, to assist in balancing their work and family responsibilities. The proposed clause, is worded to preclude exploitation or unilateral action by either employers or employees.
- Unrestricted carrying forward of annual leave remains a questionable accounting and human resource practice. There is no commercial or operational imperative for employers to allow this new provision to operate unchecked or extensively.

Background

[5.1] Under most federal awards, the capacity of employees to allow employees to carry forward periods of annual leave is very tightly restricted.

[5.2] Awards provide for example that:

- a. Annual leave must be used within a certain period of falling due.
- b. Annual leave must be taken before a fresh accrual (i.e. within 12 months on an employee's anniversary date).

[5.3] In practice this appears to be a very widely non-observed award provision. Some employees seek to carry forward annual leave for a variety of personal reasons, including purposes fundamentally geared to their familial obligations and preferences, including family commencements, building and bonding, or travelling overseas to visit extended family (see below).

- a. Many, perhaps most, contemporary employees do not consistently choose to use their full 4 week annual leave balance in all calendar years/years of service.
- b. It is very common for employees to have annual leave balances which are inconsistent with strict compliance with the annual leave usage provisions in awards.
- c. For example, on termination of employment employees are commonly owed outstanding annual leave balances which are inconsistent with the strict "use it all each year" approach prescribed under awards.

[5.4] This can in no way be interpreted as an employer driven "exploitative" phenomena.

- a. Commercial and accounting imperatives often strongly militate against allowing one's employees to carry forward annual leave balances.
- b. Annual leave is paid at the wage level prevailing at the time of usage, not of accrual. Allowing employees to carry forward annual leave is effectively rendering any year's total leave bill ultimately more expensive to the employer.

- c. Many employers seek, on accounting advice, to reduce annual leave accruals. This can be a source of acrimony between employers and employees, who may seek to maintain 4 weeks plus of outstanding leave¹.
- d. Some enterprise agreements seek to reduce accruals through paying out annual leave where it exceeds certain balance levels subject to various criteria². Others allow employees to cash out an amount of leave per annum subject to various criteria³.

[5.5] However, in many cases, and within reasonable boundaries and limits (that is “reasonable” based on the commercial and financial imperatives for the employer and the familial and recreational imperatives for the employee) – employers and employees already demonstrate a capacity to agree to the carrying forward of leave.

[5.6] However, a strict observation of the award is still legally required and substantial penalties remain in place for employers breaching awards, even where this is the specific request of an employee. A strict observance of existing award provisions as is required under the law:

- a. Would force employees to take annual leave at a time which may not be personally convenient, or accord with the family purposes the employee was seeking to meet.
- b. Would force employees to take annual leave at a time which (for example) may not accord with that accessible to a working partner (precluding the effective capacity of the employee to have any holiday or activity as a family).
- c. Would preclude employees carrying forward a period of annual leave for planned family purposes (see below).
- d. Would potentially cause acrimony with employees expecting an accommodation of their work and family based requests.

¹ e.g. *CEPU v. Westrail* (1996) 77WAIG 526

² e.g. LJ Agreement DEWR [AG820592]

³ e.g. LJ Agreement Customs Service [AG815939]

- e. Would demand scheduling of annual leave in a manner which would meet the needs and preferences of neither employees nor employers.
- f. Would expose employers to prosecution merely for meeting specific employee requests which can accord with their commercial and operational imperatives.

ACCI/NFF's Proposed Clause

[5.7] ACCI/NFF consider that the award system can do better in this area and better meet, for example, the requirements of s.93A.

[5.8] There is a genuine opportunity for the award system to accommodate the contemporary preferences of some employees (where able to be agreed with the employer). By giving effect to the clause proposed by ACCI/NFF, this opportunity can be grasped without detriment to employees and without detracting from existing award protections in regard to annual leave.

[5.9] ACCI/NFF seek the inclusion of the following clause in awards as a test case standard of the Commission within the meaning of Principle 10⁴, 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.

Annual Leave Accrual / Carrying Forward

To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward any amount of annual leave.

How this would work in practice

[5.10] 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 carrying forward 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 carry forward annual leave for any and all purposes. (This is however a perfectly legitimate approach and ACCI/NFF proposes no variation to any award which 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 employees to carry forward annual leave nor to remove provisions from awards which seek to guarantee scope for the taking of leave within defined periods (where this is what the employee wants).
 - ii) This formulation advanced is fundamental. Any approach which operates other than by employer agreement is not supported.

[5.11] The clause would be inserted into awards in addition to, and without variation to, existing provisions on the timing of annual leave. In the absence of employer and employee agreement, the existing provisions would operate to ensure that leave must be used up within a defined period as has traditionally been the case.

The Status Quo

[5.12] Current awards provide for a variety of mechanisms around the carrying forward of annual leave. These vary from little or no flexibility in the carrying forward of leave, no restrictions on the ability of employees to carry leave forward by agreement. ACCI has briefly examined 78 of the top 100 awards⁵ in this respect and the findings are summarised below.

⁵ Drawn from www.wagenet.gov.au , Victorian Minimum Wage Orders excluded.

	No. of Awards	Total	Percentage
No carry forward provision or silent	5	80	6.25%
Carry forward max three to four months	6	80	7.5%
Carry forward max six to 12 months	34	80	42.5%
Carry forward max 2 years	6	80	7.5%
Restricted postponement	5	80	6.25%
No restrictions on carrying forward by agreement	24	80	30%

[5.13] The above table shows that the majority of awards examined allow leave to be “carried forward” for between six and twelve months. In some awards, carrying forward was at the employee’s request, in others to facilitate the employer. Some awards examined provided for further postponement with the approval of the AIRC⁶ or with written agreement of the “Chief Industrial Officer of the Department of Labour”.⁷

[5.14] Approval mechanisms which require the approval of a third party are inherently bureaucratic. They amount to administrative barriers to the carrying forward of annual leave by agreement and are inconsistent with balancing work and family in contemporary Australia. Such processes are also inconsistent with the aims and requirements of the contemporary statute, the *Workplace Relations Act 1996*.

[5.15] In addition, three to six months is not in fact any valid period for carrying forward leave in many cases. This effectively equates merely to a period in which annual leave is scheduled as it falls due – carrying forward is about something else, the compiling of an agreed bank of leave for a work and family purpose.

⁶ Award [AW796250] at 32.4.6(a)

⁷ Award [AW790805] at 17.7.7(a)

Awards Which Offer No Flexibility

[5.16] The *Dry Cleaning Industry Award, 2000* which offers no flexibility to employees in respect of annual leave. Its annual leave clause provides

22.9 Time of Taking Leave

Annual leave will be given at a time fixed by the employer within a period not exceeding three months from the date when the right to annual leave accrued and after not less than one months' notice to the employee.

[5.17] The *National Building and Construction Industry Award 2000*⁸ provides:

32.2.1 Either 28 consecutive days, or two separate periods of not less than seven consecutive days (in all cases exclusive of any public holidays occurring therein), shall be given and taken within six months from the date when the right to annual leave accrued.

[5.18] The ACCI/NFF would be applied to this award as follows:

32.2.1 Either 28 consecutive days, or two separate periods of not less than seven consecutive days (in all cases exclusive of any public holidays occurring therein), shall be given and taken within six months from the date when the right to annual leave accrued.

32.2. 1(b) To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward any amount of annual leave.
(New Provision)

Awards Which Provide Limited Flexibility

[5.19] The *Security Industry (Northern Territory) Award 2002*⁹:

27.8 Time of taking leave

27.8.1 Annual leave shall be given at a mutually agreed upon time and failing agreement at a time fixed by the employer within a period not exceeding six months from the date of it becoming due and after not less than four weeks' notice to the employee.

⁸ Award [AW790741]

⁹ Award [AW819072]

27.8.1(a) Provided that by agreement between an employer and an employee, annual leave may be taken at any time within a period of twelve months from the date at which it falls due and with less than four weeks notice to the employee.

[5.20] As another example, ACCI's proposal would recast the annual leave provisions of the *Rubber, Plastic And Cable Making Industry - General - Award 1998*¹⁰ as follows:

34.4 When to take annual leave

34.4.1 The employee must be allowed to take annual leave, at a time fixed by the employer, within nine months after it is due. The employer and the employee may agree to extend this period to twelve months.

34.4.2 The employer and the employee should seek to reach agreement on the time for taking the leave. In the absence of agreement, the employer may give at least one month's notice of the commencement of leave or part of the leave which is due to the employee.

34.4.3 To assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to accrue and carry forward any amount of annual leave. (New Provision)

[5.21] Thus:

- a. In the ordinary run of the mill situation, annual leave would need to be used within 9 months of it falling due.
- b. By agreement, for any purpose at all, this may be carried forward for up to 12 months.
- c. However, ACCI/NFF would add additional scope to carry forward any amount of annual leave, including for periods over 12 months, where this is for an agreed work and family purpose.

Awards Which Already Provide Full Flexibility

[5.22] Some awards already allow the flexibility sought by ACCI/NFF, e.g.:

¹⁰Award [AW794720]

27.1.4 The annual holiday shall be given by the employer and shall be taken by the worker before the expiration of a period of six months after the date upon which the right to such holiday accrues. Provided that the employer and employee may agree to postpone the giving and taking of the whole or any separate period of such annual holiday¹¹.

[5.23] These awards are already more flexible than proposed by ACCI/NFF, allowing employers and employees to agree to carry forward leave for any purpose. It is not proposed that awards in this more flexible form be varied as a result of the ACCI proposal.

What types of work and family demands will be met

[5.24] How then would additional scope to carry forward annual leave by agreement add to employee capacities to reconcile work and family?

[5.25] The key to understanding this element of the ACCI/NFF proposals is that it seeks to address longer term work and family based leave priorities than the other provisions. Other elements of this case focus on work and family exigencies and emergencies, on accommodations across short periods, or options to address regularly arising leave priorities (e.g. school holidays).

[5.26] This proposal is about something different. It recognises that another important facet of the multi-faceted work and family concept is longer term leave priorities and usages. For example:

- a. Employees may seek to time their leave to coincide with the birth of a child. For example, a man may seek to pool his leave to spend a paid time off work at the time of the birth of a child. Scope to carry forward leave in such circumstances would not only allow the male partner to take this leave at the time of the birth of the child, but it would also provide a period of paid leave precisely when the spouse may have ceased paid work and proceeded onto maternity leave.

¹¹ Award [AW818390]

- i) The existing award strictures which ACCI/NFF seeks to replace would preclude this and would force a male employee planning a family to comprehensively use up all his annual leave annually regardless of his work and family priorities and the views of his employer.
 - ii) In practice many employers would say yes to such requests, but in doing so would expose themselves to prosecution for breaching the award.
- b. Holidays also play an important role in family life – ACCI apprehends a trend in contemporary Australia towards the taking of longer, higher value holidays on a less frequent basis than in the past. Employees may for example see to save up for an extended holiday overseas and may seek to carry forward a store of annual leave to facilitate this:
- i) Australia is a long way for example from Europe or the US and travel remains costly. It is perfectly understandable that an employee may want to spend a more substantial period of time on such an international holiday than the current 1940s era award approaches to the taking of annual leave would allow (i.e. more than 4 weeks off).
 - ii) Such holidays would not only allow for the work and family bonding with spouses and children, it would also play an important family role for families with relatives overseas. Multicultural Australia, combined with more affordable international travel, make planned overseas holidays an important part of doing better for employees' work and family considerations in contemporary Australia.
 - iii) This is a pretty simply concept – everyone is familiar with the notion of employees seeking to carry forward annual leave for planned international travel. They should be empowered to do this at their election with the agreement of their employers.
- c. Reconciling the leave of spouses working in different workplaces (or even in the same workplace) can also be a challenge in contemporary families in which both partners work. The inherent difficulty in reconciling annual

leave between employer and employee interests is multiplied in such cases, and the competing leave priorities of two sets of workmates also come into play. The ACCI/NFF proposal to empower employees to “time-slip” their leave by agreement will provide additional capacities to reconcile the leave of partners.

- d. Allowing more scope to carry forward annual leave by agreement will also empower more employees to better address school holiday periods.

[5.27] Consistent with one of the key themes of this outline, there is a greater heterogeneity in the annual leave priorities of Australians than there was at the time of the creation of existing arrangements for the taking of annual leave in the 1940s. The ACCI/NFF proposal is about providing employees and their employers with more work and families capacities and options.

Experiences from Bargaining

[5.28] (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 2002/3¹². Certified Agreements appear to incorporate a wide variety of practices in regard to carrying forward annual leave. Some agreements provide for annual leave to be taken by agreement subject to operational requirements. An example of this is as follows:

Employees are entitled to four weeks annual leave, not including public holidays, for each completed year of service with SCC.

Leave will be taken at a time, and in a manner which is mutually convenient to the parties having regard to SCC's operational requirements. By agreement leave may be taken in advance of entitlement. SCC may require an employee to take any accrued but untaken annual leave in excess of 20 days at a time as agreed.

Both parties undertake to give at least one month's notice of leave to be taken, but where hardship/exceptional circumstances arise, this lead time may be varied¹³

¹² Annual Report 2002/3 Table 17 Flexible Annual Leave provisions are defined in the Workplace Agreements database as “the use of and access to annual leave is not limited and is negotiated between the employer and employee”

¹³ LK Agreement [AG832237]

[5.29] An alternative example is where accrual is only permitted for a specified period is as follows:

Employees who have more than four weeks accrued annual leave at the beginning of each year will be encouraged to utilise such leave within that year. Consideration will be given to requests for leave to be carried forward to the next year for a specific purpose (for example, travel). These requests should be submitted when rosters are set¹⁴.

[5.30] Employee demographics, preferences for the usage of annual leave, and manner in which leave is taken, have also changed substantially since the original annual leave decisions in 1936.

[5.31] For example, cheap airline travel, together with the now multicultural nature of the Australian workforce, mean that more Australian employees want to travel abroad for family purposes for family purposes more frequently than in previous generations.

[5.32] Such trends show no signs of slowing...The most recent ABS data shows that short term departures of Australian residents in February 2004 were up 23.9% on the same period last year¹⁵.

[5.33] The Department of Immigration and Multicultural and Indigenous Affairs has noted that over the past 25 years, the contribution of net overseas migration to population growth has averaged around 39% per year, but has been increasing in recent years¹⁶. Indeed the ABS has recently noted that the preliminary net overseas migration in the September quarter 2003, increased 46% from the June quarter 2003 and a 25% increase on the September quarter 2002¹⁷.

Employee Preferences

[5.34] A recent study showed that 57% of employees did not take all their annual leave in 2002¹⁸. Amongst employees in the 35-49 year age group, this rose to 60%. 39% stated that they were saving leave for a future holiday and 42% cited work

¹⁴ LJ Agreement [AG817390]

¹⁵ ABS. Overseas Arrivals and Departures 3401, February 2004.

¹⁶ DIMMIA Fact Sheet No. 15, Population Projections

¹⁷ ABS Australian Demographic Statistics 3101 released 18 March 2004

¹⁸ Richard Dennis, Australia Institute: Annual Leave in Australia An analysis of entitlements, usages and preferences Discussion Paper Number 56 July 2003, Table S1.

related difficulties (some respondents gave more than one reason). (When these figures are examined by income levels 67% of respondents in the \$100,000 plus category cited work related difficulties).¹⁹

[5.35] Clearly these figures show a preference amongst employees for flexibility in “saving” and carrying forward annual leave. The clause proposed by ACCI/NFF will assist in providing greater flexibility to meet such preferences at the workplace level where this can be reconciled with the commercial, operational and functional requirements of the company.

Other considerations

[5.36] At no stage would this operate to preclude any employee from accessing leave which they want access.

[5.37] Employer duties under OHS laws will not be altered in any way. An employer would continue to need to provide scope for recreation and recuperation to the extent this fell within their duty of care.

[5.38] Where an employer felt that an employee was seeking to carry forward an excessive amount of leave, either on an accounting or welfare basis, that employer could decline an employee request under the proposed clause.

[5.39] In summary therefore, the carrying forward of leave by agreement, is a legitimate mechanism to assist the balancing of work and family responsibilities. There is a genuine opportunity for the award system to accommodate the contemporary expectations of employees where this can be agreed with employers.

[5.40] ACCI/NFF propose a clause which would allow employees to elect to carry forward annual leave, with the agreement of their employer, to assist in balancing their work and family responsibilities. The proposed clause, as worded would provide greater flexibility in balancing work and family responsibilities whilst absolutely and unambiguously precluding scope for abuse by either employers or employees.

¹⁹ Above at Table S2.