

## 7. LEAVE LOADING FLEXIBILITY

### Summary of Core Contentions

- One size does not fit all. Some employees may prioritise and prefer additional payment at the time of taking annual leave, as is presently provided for. However:
  - In our increasing heterogeneous society, other employees may have different priorities and seek to access this current award benefit in different ways, particularly where this can assist in balancing their work and family responsibilities
  - Just as families are increasingly diverse, the manner in which working Australians seek to manage the interface between work and family must be diverse and personal. Employees should be provided with more options to agree approaches with their employers.
- Access to additional leave through a consensual exchange of the standard monetary Annual Leave Loading (LL) payment for additional leave can positively impact the capacities of employees to balance their work and family responsibilities.
- Scope to exchange LL payments for equivalent additional annual leave would provide additional scope to address family based exigencies which can see workers seek to spend time out of the workplace to meet familial priorities.
- Scope to exchange LL payments for equivalent additional leave would also provide scope to accommodate family based priorities for additional periods of longer leave, and for foreseeable familial priorities (e.g. extended holidays, curriculum days etc).
- Taking the money will remain the norm and the default position unless the employee exercises a choice to the contrary. There is nothing in the ACCI/NFF proposition which in any way detracts from the capacities of employees wishing to continue to take LL as a monetary bonus.

- There is no detriment to employees in allowing them to convert, at their election and free from any coercion, a monetary entitlement into additional leave where this can be agreed with the employer. ACCI proposes an exchange strictly on a 1:1 basis, with a 17½% loading (for example) being converted into a strictly equivalent period of leave.
- This is not a zero sum game. Any change to the way employees access an entitlement such as LL does not automatically dictate a gain to the employer. Any attempt to paint the ACCI proposition in this light would be a disingenuous misrepresentation and will be strongly contested.
- ACCI proposes no diminution or derogation from the current LL standard in awards. Where an employee has an entitlement to an additional
- The ACCI/NFF proposed clause is:
  - Firstly, consistent with the purposes for which LL has been included in, and retained in awards.
  - In the alternative, is of such merit that on balance it should be given effect to despite the particular terms of any former decisions or approaches on LL.
- There is no saving to employers in the proposal – this is simply the exchange of annual leave loading as an additional payment for an equivalent benefit by way of additional leave. (Employers will in fact assume some additional administrative costs under this proposal).
- No loss of LL entitlement (or indeed any variation to LL entitlements) would be rendered by the proposed clause. Rather the proposed variations would merely create additional options in how LL is used and accessed by employees.
- The additional flexibility proposed by ACCI/NFF will clearly operate:
  - Only on the initiation / election of the employee.
  - Only by agreement at LL times.

- Only for the purposes of assisting employees in balancing their work and family responsibilities.

## ACCI/NFF 's Proposed Clause

[7.1] ACCI/NFF seek the inclusion of the following clause in awards as a test case standard of the Commission within the meaning of Principle 10<sup>1</sup>, 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. The proposed ACCI/NFF clause following conciliation is as follows:

### Use of leave loading to purchase additional annual leave

- X.1 An employee may elect, with the consent of the employer, to exchange annual leave loading payable under clause XX, for an equivalent amount of additional annual leave. In such circumstances, most full-time employees under the award would accrue an additional 26.6 hours of leave per year.
- X.2 The following additional payments under subclause XX may also be exchanged for equivalent additional annual leave :
  - X.2.1 Any weekend penalty rates payable on annual leave, or
  - X.2.2 Any shift Allowance payable on annual leave.
- X.3 Where an agreement is reached in accordance with this sub-clause, the agreement must be recorded in the time and wages records.

[7.2] In the case of the standard 17½% annual leave, this converts to an additional 26.6 hours (or 3½ × 7.6 hour days) of annual leave per year. This is calculated as follows:  $(38 \times 4) \times 17\frac{1}{2}\% = 26.6$  hours.

## Annual Leave Loading (LL) Clauses

[7.3] LL clauses appear in most awards, and provide for the payment of an additional 17½% loading on top of any period of annual leave (with some awards providing higher loading entitlements for shift and some other workers as an exceptional circumstance).

[7.4] LL provisions appear in awards only as additional dollar entitlements. For example:

<sup>1</sup> Print PR002003, pending the 2004 Safety Net Decision.

#### 7.1.4 Loading on Annual Leave<sup>2</sup>

During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed by subclause 7.1.3.

The loading shall be as follows:

- 7.1.4(a) Day Workers - employees who would have worked on day work only had they not been on leave - a loading of 17 1/2 per cent or the relevant weekend penalty rates, whichever is greater but not both.
- 7.1.4(b) Shift Workers - employees who would have worked on shift work had they not been on leave - a loading of 17 1/2 per cent or the shift loading (including relevant weekend penalty rates) whichever is the greater but not both.

The loading prescribed by this subclause does not apply to proportionate leave on termination.

[7.5] At present, there is no flexibility for the existing LL provisions to be accessed in other equivalent forms, even where this would assist employees to balance their work and family responsibilities more effectively than an additional 17½% payment on annual leave.

### **Some employees may prioritise leave over money for family reasons**

[7.6] The essential *Raison d'être* of the ACCI/NFF proposal for additional LL flexibility is that the diversity of familial commitments and priorities will create a prioritisation of additional leave over additional pay for some employees in some circumstances.

[7.7] For some employees in some families, additional leave will offer additional familial opportunities (for extended holidays, extended opportunities to reconcile their leave with that of a spouse or partner, etc). An additional 3½ days leave (where able to be agreed between employer and employees) can provide some interested families with more leave upon which to base their recreational, familial activities. – It would in no way force families who were not interested away from taking LL as an additional payment.

[7.8] Additional leave need not be used solely for longer term recreation (holidays) nor for foreseeable absences. For some employees it would provide

<sup>2</sup> Metal, Engineering and Associated Industries Award, 1998 Part I, [AW789529]

additional opportunities to access leave for ad hoc purposes and to meet work and family exigencies and emergencies. For example an employee responsible for the care of a child of pre-school age may wish as a matter of prudence and forward thinking to up their leave balance by 3½ days to provide a larger pool of paid leave for unscheduled (but nevertheless anticipated) childhood illnesses.

## **This is consistent with the rationale for LL – however conceived...**

[7.9] The paper by *Kelly, Plowman and Watson*<sup>3</sup> in Volume II of this submission addresses in some detail the development of and rationale for the inclusion of LL in awards of this Commission. Kelly et al describe the original arbitral rationale for the creation of LL thus:

Annual leave loading entitlements were originally intended to ensure that employees were not financially disadvantaged during their annual vacation. That is, they were intended to compensate employees for their inability to obtain overtime, other penalties and Allowances that contribute to their usual weekly pay. In many instances, annual leave loadings have moved beyond this principle and now represent an extraneous payment, something over and above normal weekly earnings.<sup>4</sup>

[7.10] Kelly et al go on in their paper to examine in particular the prosecution of the initial LL cases in the early 1970s, and in particular arguments that: *“employees’ financial commitments continued during their annual leave and that it would “be unjust to allow a significant fall in income during that period”.*

[7.11] LL was originally prosecuted as a measure linked to employees’ (then conceived of solely as male breadwinners) family commitments. In major proceedings in 1970, the Commission found that *“... if annual leave is to be a period of relaxation and recuperation, a worker, particularly a family man, may well wish to spend more on entertainment of one kind or another. If he desires to go away on his leave he finds even greater difficulty”.*

[7.12] To the extent the flares and sideburns era thinking which gave rise to the inclusion of LL in awards remains relevant, it is in no way detracted from by the ACCI/NFF proposal. Any employees using their LL to ensure maintenance of

<sup>3</sup> (2002) Kelly, R., Plowman, D., and Watson, R. *“Flexibility In Annual Leave Loadings”*, Centre for Labour Market Research Discussion Paper

<sup>4</sup> (2002) Kelly, R., Plowman, D., and Watson, R. *“Flexibility In Annual Leave Loadings”*, Centre for Labour Market Research Discussion Paper, p.2

incomes in moving from periods of work into leave, and back again, would remain entirely free to do so. Under the ACCI/NFF clause, they would not chose to pursue their newfound capacity to treat LL more flexibly, and would continue with the 1970s model of an additional bonus payment at the time of proceeding on leave. Any employee believing that a period of annual leave at an ordinary award rate of pay would not allow for recreation would have the opportunity to take home an additional 17.5% for that period.

[7.13] However, to the extent that some other employees may have differing priorities, the ACCI/NFF proposal would enable them to have more options in regard to this entitlement. They would gain scope to consider (where open for agreement with their employer) whether additional leave would better meet their work and family priorities than an additional 17½ % payment at the time of accessing leave. As ACCI argues throughout this submission – people differ, families differ and priorities differ. The system should strive accommodate this diversity where it can, and can provide employers an employees with more options without detriment – exactly what the ACCI/NFF clause will deliver.

[7.14] Alternatively, taking into consideration the conclusion of *Kelly et al*, that “*in many cases annual leave loadings are by way of a bonus or extraneous payment.*” – the ACCI/NFF proposal would in no way preclude empowering employees to access the bonus payment LL has become, as they best consider it would contribute to their familial circumstances and priorities.

## **The ACCI/NFF proposal is consistent with the original union claims**

[7.15] Kelly et al also outline the union claims which gave rise to the original arbitration of LL into Australian awards. These were claims from applicant unions for an additional week’s annual leave. They describe the development of LL as follows:

Annual leave loadings were first introduced in Australia in 1970. In that year the Waterside Workers’ Federation made claims for an extra week’s annual leave. The compromise agreed to by employers was the payment of an annual leave loading of 17.5 per cent (Interview, Commissioner Gregor, 15/11/00. See also 134 CAR).<sup>5</sup>

<sup>5</sup> (2002) Kelly, R., Plowman, D., and Watson, R. “Flexibility In Annual Leave Loadings”, Centre for Labour Market Research Discussion Paper, p.4

[7.16] Thus the 17½% LL arose as a compromise solution to a union claim for additional annual leave in some atypical industries. It could be argued that the current ACCI proposition merely provides to employees additional options to pursue the original relief sought by agreement. The ACCI/NFF approach appears to clearly be consistent with the settlement of the original disputation which gave rise to LL in its present form.

## **Incomes are already exchanged for leave**

[7.17] Exchanging income for additional leave is a concept which the workplace relations system is already very familiar with and which operates widely across Australian workplaces.

[7.18] Indeed it is so commonly operating that the ACTU have picked it up and proposed it in this matter. The concept of purchased leave is directly comparable to the ACCI/NFF proposal for LL. Both approaches essentially seek to provide options to exchange award incomes (wages or LL) for additional leave / time off.

[7.19] ACCI/NFF cannot understand how the most fundamental employment entitlement (remuneration) could legitimately be open for exchange for additional time off, whilst an inherently marginal or periodic consideration such as LL could any way be considered inviolate, and not open for employees to manage as they see fit (by agreement with their employer).

[7.20] This appears a manifest inconsistency in the ACTU position. In Safety Net Wages proceedings since 1997, the ACTU consistently argues that with the effluxion of a period of mere months, minimum award wages inherently cease to provide a living income. Yet under its purchased leave claim in this matter, the ACTU would empower employees to reduce these minimum award wages by up to 11½% (6 ÷ 52) in exchange for comparable additional leave.

[7.21] However, we understand that the ACTU opposes our proposal to provide comparable capacities to employees to make choices in regard to LL, which equates to a mere 1.3 to 1.7% of any award employees annual income<sup>6</sup>.

<sup>6</sup> Kelly et LL report the 1.7% figure, however ACCI calculates an additional 1.3% as follows:

1. 4 weeks AL @ 38 hours per week = 152 hours
2. 17½% of 152 hours = 26.6 hours
3. 52 weeks @ 38 hours per week = 1976 hours per year
4. + 26.6 hours LL = 2002.6 hours paid annually.

[7.22] This is quite a fundamental question. How can it be that the ACTU can accept that employees are mature and intelligent enough to exchange a very substantial proportion of their wages for additional time off (taking their weekly wages well below minimum award or minimum wage levels in some cases), but cannot accept that the same employees are mature and intelligent enough to exchange an annual leave loading of between, perhaps \$300 and \$600 per year for an additional couple of days leave?

## **LL is regularly cashed out in agreements – it is not inviolate**

[7.23] It is also relevant to consider how ACTU affiliates regularly treat LL in bargaining. It is well understood that a wide variety of certified agreements, across industries, made with unions and not made with unions - significantly alter the operation of award LL provisions.

[7.24] In particular, a wide variety of certified agreements roll LL into annual salaries, ensuring that when an employee proceeds on annual leave they receive their ordinary remuneration and not some additionally loaded rate. This was one of the first agreement reforms agreed to in many workplaces, including in agreements made prior to the creation of the *Workplace Relations Act 1996*.

[7.25] For example, the following agreement was certified with the Finance Sector Union (FSU) as a party:

### **5.2. Annual Leave Loading<sup>7</sup>**

#### Annual Leave Loading Payout

Effective the pay period ending 10th November 1996, the annual leave loading on LL annual leave balances (entitlement plus pro-rata) will be paid as a one-off lump sum to LL staff.

The lump sum annual leave loading payment for staff will be calculated on:

- (a) For staff on or below \$48,642 per annum: current salaries.
- (b) For staff above \$48,642 per annum: the annual Australian Bureau of Statistics average weekly earnings figure applicable to the year in which the leave was accrued.

#### Incorporation of Annual Leave Loading

Effective the pay period beginning 11<sup>th</sup> November 1996, salaries will be increased by the annual leave loading payment. That is, the equivalent of 4

5. 26.6 hours LL ÷ 2002.6 hours p.a. = 1.3%

<sup>7</sup> NZI Enterprise Agreement, N0550 Cas S Doc N6613.

weeks annual leave loading will be incorporated into annual salaries for LL staff.

The annual leave loading payment for staff is calculated on:

(a) For staff on or below \$48,642 per annum: 17.5% of four weeks annual leave (or the pro rata equivalent for permanent part-time staff) calculated on current base salaries.

(b) For staff above \$48,642 per annum: 17.5% of four weeks' annual leave (or the pro rate equivalent for permanent part-time staff) calculated on the annual Australian Bureau of Statistics average weekly earnings figure for 1996.

#### Future Annual Leave Loading

Effectively, leave loading will no longer be a separate component of the remuneration system as it has been added in to annual salaries.

[7.26] *Kelly et al* found that 15% of certified agreements provided for the incorporation of LL into annual remuneration.<sup>8</sup> They also find that of employees who are paid LL in each weeks pay (rather than as an additional loading at the time of taking leave), 67.6% or 50,000 were covered by agreements made with trade unions.<sup>9</sup> - Clearly, LL is not inviolate at the workplace level in contemporary Australia, nor when ACTU affiliates undertake bargaining with employers.

[7.27] ACCI/NFF can see no basis upon which it would not be appropriate to empower employees in workplace to access this condition flexibility, if they wish, subject to appropriate protections (which ACCI/NFF clearly propose), and subject to employer agreement (and assessment of their capacities and priorities).

## **No loss, diminution or detriment will result**

[7.28] The proposed exchange of LL for leave will always operate on a 1:1, totally equivalent basis. The form of the proposed clause is as follows:

An employee may elect, with the consent of the employer, to exchange annual leave loading payable under clause XX, for an equivalent amount of additional annual leave.

[7.29] The clause will clearly operate on the basis of equivalence, and on the basis of LL being exchanged only for an equivalent amount of additional annual leave.

[7.30] Thus, there will be no loss of LL or any diminution of the entitlement. It

<sup>8</sup> (2002) Kelly, R., Plowman, D., and Watson, R. "Flexibility In Annual Leave Loadings", Centre for Labour Market Research Discussion Paper, p.14

<sup>9</sup> (2002) Kelly, R., Plowman, D., and Watson, R. "Flexibility In Annual Leave Loadings", Centre for Labour Market Research Discussion Paper, p.17

would clearly be inaccurate to in any way characterise the ACCI/NFF proposal as diminishing LL entitlements in awards.

## **This will only ever operate by agreement**

[7.31] 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 scope to exchange LL for equivalent additional leave:

- a. For the purposes of assisting employees in balancing their work and family responsibilities. ACCI/NFF are not advancing the proposition that awards should contain avenues to take LL as additional leave for any and LL agreed purposes.
- b. At the employee's election, with the consent of the employer. This clause is designed to operate at LL times at the initiation of the employee, where the employer agrees to an employee request. ACCI is not advancing this proposition to in any way deliver scope for employers to unilaterally vary the established operation of LL under awards.