



Federal government opens way to cashing out annual leave under WorkChoices

On 22 September 2006, the federal government amended the *Workplace Relations Regulations 2006* (Cth) (**the Regulations**). The amendments have clarified the operation of the *Workplace Relations Act 1996* (Cth) (**the Act**) and make it clear that the Australian Fair Pay and Conditions Standard (AFPCS), which all employees must receive as a minimum, does not apply to annual leave accrued before WorkChoices came into effect on 27 March 2006 (called **pre-reform annual leave**). This opens the way for employees and employers to agree to cash out most of an employee's current accrued annual leave balance.

The amendments to the Regulations now draw a clear distinction between pre-reform annual leave and post-reform annual leave (which is annual leave accrued after 27 March 2006).

Post-reform annual leave must be dealt with in accordance with the AFPCS. The AFPCS provides a mechanism by which an employer and an employee may agree that the employee will cash out post-reform annual leave, but only where the following requirements are complied with:

- there is a workplace agreement binding on the employer and the employee that provides for cashing out post-reform annual leave, with payment in lieu at no less than the employee's basic periodic rate of pay at the time the election to cash out is made;
- the employee elects in writing to cash out the post-reform annual leave;

- the employer authorises the cashing out;
- no more than half of the employee's yearly accrual of annual leave can be cashed out every 12 months.

Pre-reform annual leave does not need to be dealt with in accordance with the AFPCS. As the AFPCS does not apply to pre-reform annual leave, the above requirements do not apply to cashing it out. Accordingly, there is no limit on the amount of pre-reform annual leave that an employer and employee may agree the employee can cash out.

Employers should note that the Regulations do require that an employee provide their employer with a written election to cash out their annual leave.

Employers should also note that a workplace agreement, such as an Australian Workplace Agreement (**AWA**), will generally be necessary to facilitate cashing out pre-reform annual leave. This will depend upon the instrument that applied to the employment of the employee cashing out at the time the employee accrued the pre-reform annual leave.

However, employers should exercise caution in entering into workplace agreements with employees to provide for cashing out pre-reform annual leave and/or post-reform annual leave. This might give access to the unfair dismissal jurisdiction for an employee who was otherwise excluded. This risk can be minimised by making a single issue AWA with an employee that has a short period of duration.

Deacons has created a single issue AWA that is specifically designed to facilitate cashing out pre-reform and/or post-reform annual leave. By tailoring the AWA to your business, Deacons can identify and minimise the risks associated with entering into AWA's (including creation of access to the unfair dismissal jurisdiction) whilst maximising operational opportunities for the business.

If you want to make an AWA with an employee to provide for cashing out pre-reform annual leave and/or post-reform annual leave, please contact Deacons to discuss your options.

For more information, please contact:

Brisbane	Martin Osborne	martin.osborne@deacons.com.au	+61 (0) 7 3309 0230
Canberra	Alan Grinsell-Jones	alan.grinsell-jones@deacons.com.au	+61 (0) 2 6272 0410
Melbourne	Stuart Kollmorgen	stuart.kollmorgen@deacons.com.au	+61 (0) 3 8686 6561
Perth	Leanne Nickels	leanne.nickels@deacons.com.au	+61 (0) 8 9426 3294
Sydney	Wayne Spanner	wayne.spanner@deacons.com.au	+61 (0) 2 9330 8262

This Publication is intended to provide a general summary only and should not be relied on as a substitute for legal advice.

Under the Privacy Act, we need to tell you that we collect information about you to assist in performing and promoting our legal services. We do not disclose information about you to any person except as required in the course of providing legal services or for the ordinary administration of our business. If you do not want to receive promotional material from us, then please let us know. You can also request access to information we hold about you by making a written request to our Privacy Manager.