

**FAIR WORK COMMISSION**

Matter No: AM2014/1 Four yearly review of modern awards  
AM2016/15 Plain language redrafting  
AM2014/253 Aircraft Cabin Crew Award 2010  
Re: Flight Attendants' Association of Australia

**Submission of the Flight Attendants' Association of Australia on the plain language 'light touch' process**

**Introduction**

1. The Flight Attendants' Association of Australia (FAAA) makes the following submission in response to the Statement published by the full bench on 28 February 2019 [\[2019\] FWCFB 1255](#), which outlined the proposed updates to the exposure drafts via the 'light touch' process. Parties were invited to make submissions regarding the proposed updates. The FAAA has been granted an extension to provide submissions.<sup>1</sup>
2. The FAAA wishes to make submissions regarding the model term at Attachment D<sup>2</sup> which the Commission proposes to include in modern awards with shutdown provisions.

**Inclusion of model term in modern awards**

3. The FAAA does not agree that that the model term at Attachment D of the Statement should be inserted into modern awards that currently contain shutdown provisions. The Aircraft Cabin Crew Award 2010 (the Award) is the relevant modern award concerning the members of the FAAA.
4. The Award does not currently include a provision about leave without pay during close down periods. We understand the Fair Work Commission

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<sup>1</sup> The FAAA requested an extension on 29 April 2019 and [was granted an extension by President Ross](#) until 4pm 3 May 2019.

<sup>2</sup> See attachment D of full bench Statement dated 28 February 2019, [\[2019\] FWCFB 1255](#)

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rejected the Coal Mining Industry Employer Group’s proposal for a specific clause that allowed employers to direct unpaid leave during a shut down period.<sup>3</sup> However, an Award reliant employee is most likely not going to have that knowledge at their fingertips to utilise. For this reason, we are concerned that the model term provides an opportunity for employers, with stronger bargaining power than Award reliant employees, to effectively manipulate an employee into having no other option to choose but to take leave without pay (thereby essentially directing an employee to take unpaid leave). The bargaining position of Award reliant employees should be a strong consideration in the drafting of provisions which purport to provide options for “agreement.”

5. The FAAA submits that such a term within a modern award enabling an employer to compel an employee to take unpaid leave during a shutdown period is not a term that is permitted under the *Fair Work Act 2009* (Cth) (the Act). It is our position that directing an employee to take unpaid leave amounts to standing down an employee and note that s.139 of the Act does not allow for any stand down or stand-down provisions in modern awards. On the relationships between a term allowing an employer to “direct unpaid leave” and a term “directing stand down”, we adopt the submissions of the Australian Manufacturers Workers Union dated 11 April 2017<sup>4</sup> and 3 October 2017.<sup>5</sup> The relevant extracts of these two submissions are attached to this submission at Attachment A.

### **Submissions in the alternative**

6. Whilst the FAAA’s primary position is that we oppose the inclusion of the model term for the reasons outlined above, if the Commission determines that the model clause should be included, we make the following submissions:

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<sup>3</sup> [\[2017\] FWCFB 5394](#)

<sup>4</sup> [AMWU Submissions 11 April 2017](#), paragraphs 13 – 30.

<sup>5</sup> [AMWU Submissions 3 October 2017](#), paragraphs 40 – 47.

- (i) The model clause is unclear as to what would occur if an employee refuses to elect any option that is available for the temporary shutdown period per XX.XX (d)(i) and does not have any annual leave accrued. This could then lead to the scenario where the employee indicates they wish to work and the employer refuses to allow them to work despite the employee turning up and being prepared to work. In addition to causing tension on the employer and employee relationship, this places an unfair onus on the employee to seek an underpayment order to resolve the issue.
  
- (ii) It is our position that in such a circumstance, an employee should be able to attend work during the shutdown period and be paid. Alternatively, should the employer not be in a position to provide the work, the employee should be paid at their ordinary rate of pay for the period. We submit that the model term should be varied to this effect.

#### **Unpaid leave & continuity of service during shutdown period**

- 7. The FAAA supports the submissions of the Construction Forestry, Maritime, Mining and Energy Union (CFMMEU) dated 29 March 2019<sup>6</sup> regarding the continuity of service for all periods of leave taken during shutdown periods, including unpaid leave. It is inherently unfair for an employee to be penalised for a decision to shutdown, the timing of which is at the sole discretion of the employer. The relevant extract of the CFMMEU's submissions are attached to this submission at Attachment B.

END

3 May 2019

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<sup>6</sup> [CFMMEU Submissions 22 March 2019](#) , paragraphs 7 -10

## Attachment A – Extracts from AMWU Submissions about Unpaid Leave and Stand Down

### [AMWU Submissions 11 April 2017](#)

“...

***There is no difference between an employer direction to an employee to take Unpaid Leave and an employer power to Stand Down an employee without pay***

13. There is no difference between an employer directing an employee to take unpaid leave and an employer seeking to stand down an employee without pay. Providing an employer with a right to direct an employee to take unpaid leave amounts to the employer having an unfettered power to avoid obligations to provide full time or part time work and make payments to permanent employees on this basis. Employees have a reasonable expectation of work and regular payments that should be subject to an unfettered employer discretion to shutdown a workplace. This would make the employment very similar to casual employment in terms of the employer's ability to call an employee in for work or suspend them without regard for any expectations that they may have for ongoing work.
14. The concept of leave is that it is requested by and taken by an employee and that the leave is for the employee's benefit. When it comes to unpaid leave, whether or not the employee has requested to take the leave is an important characteristic to consider. Conversely, an employer stand down of an employee without pay does not involve any role on the part of the employee, except to either accept or challenge the validity of the stand down. Irregular Casual employees for example are not able to challenge the validity of an employer direction not to come to work for a period. While a permanent employee would be entitled to ask the question why they are being stood down.
15. If an employer doesn't want to pay an employee, they must meet the very specific requirements of the Stand Down provisions, or Protected Industrial Action provisions in the Act.
16. There is no functional distinction between unpaid leave or stand down initiated by the employer. However, there is a distinction between unpaid leave requested and taken by an employee and unpaid leave which is directed and initiated by an employer. This distinction is reinforced in the treatment of unpaid leave, as compared to Stand Down when it comes to accrual of Service in s.22 of the Act. An employee's unpaid leave does not count as service. However, a stand down period does count as service.
17. This recognises that unpaid leave at the request of an employee is for the employee's benefit and they should not be allowed to accrue service related

entitlements where they have requested unpaid leave with the intention of returning to work. Whereas Stand Down is for the employer's benefit to assist in unforeseeable or uncontrollable circumstances. This benefit to the employer and detriment to the employee is recognised by s.22 which attempts to ameliorate this detriment to the employee which is also outside of their control by preventing the accrual of service related entitlements from being paused during the period of a stand down.

18. In summary, unpaid leave should be requested by the employee, otherwise it amounts to a stand down by the employer or industrial action by the employer which is not allowed under the Act.
19. A Modern Award which provides for a de facto stand down clause in the form of a clause allowing for employers to direct unpaid leave to be taken would be inconsistent with the legislative framework which deals with Stand Down. It cannot be justified as necessary for a fair and relevant minimum safety net in the circumstances of the Black Coal Mining Industry.

***Stand Down is dealt with specifically in the Fair Work Act 2009***

20. Stand Down is dealt with specifically in the Fair Work Act 2009 at s.524. This provision provides the important legislative cover for an employer to avoid payments to an employee at subsection 524(3):

“524(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.”

21. It is also important to note that the Stand Down sections in the Act, explicitly states that an employer cannot stand down an employee under the Act, if there is a Stand Down provision in an enterprise agreement or contract of employment. The legislation does not concede any space for Modern Awards to contain Stand Down clauses. This omission to allow for Modern Awards to contain stand down clauses which override s.524 is consistent with the changes to allowable matters in awards.
22. This decision to remove Stand Down from the list of Allowable Matters is reinforced by the history of the allowable matters.
23. The Workplace Relations Act 1996, at 5 September 2005 contained as an allowable matter in s.89A(2)(o) stand-down provisions.
24. The Workplace Relations Act 1996, at 5 December 2006 contained as an allowable matter in s.513(1)(l) stand-down provisions.

25. The present s.139 of the Fair Work Act 2009, does not allow for any stand down or stand-down provisions in Modern Awards.
26. While there is a provision for the FWC to provide for circumstances where an employer may direct paid leave in s.93(3), this is very specifically confined to “paid leave.” There is significance in there existing this very specific section to allow for a Modern Award to include clauses that allow an employer to direct paid leave.
27. Comparing the two types of clauses; a power to direct employees to take paid annual leave, is much less punitive in nature to a power for an employer to stand down an employee. Given the punitive nature of stand downs, there should be a specific provision to allow for these types of provisions to exist. That specific provision exists in the form of s.524 which limits the extent to which an employer can stand down an employee without pay.
28. This contrasts with the alternative position, which would be that s.139(1)(h) provides a power for stand down under “leave.” In order for this interpretation of the legislation to be correct, it would require the FWC to determine that an employer power to direct unpaid leave, is different to a power to stand down without pay.
29. For these reasons, the AMWU submits that there is no power for the FWC to include a clause which allows an employer to direct the taking of unpaid leave which is essentially the same thing as a power to stand down without pay.
30. If the FWC is of a mind to find that there is some distinction between an employer directing an employee to take unpaid leave, and an ability to stand down an employee without pay, the AMWU submits that there is a serious question to be answered about whether an employer should have a power to stand down an employee for reasons other than those provided for by the legislature and whether this can be part of a fair and relevant safety net.

...”

#### [AMWU Submissions 3 Oct 2017](#)

“...

#### ***Unpaid leave and Stand down***

40. The CMIEG proposed clause d (ii) seeks to reinstate the right of the employer to direct the taking of leave by employees. Coupled with the clause d (iii) the effect of the clause is a mechanism to enact a stand down.<sup>22</sup> It removes the individual focus mandated by section 93(3) of the Act and enables the employer to direct, that regardless of the individual circumstances of the employee, leave be taken.

41. The direction to compel an employee to take time off from work without pay is not reasonable within the context of s93 (3). It strips the employee of any consent they may have in exercising their discretion over their leave entitlements.
42. Employees who are available to work have the reasonable expectation that they will be paid for the work. Employers who choose to avoid this obligation by deeming an employee to be on unpaid leave are utilising a stand down without satisfying the requirements of the stand down provisions of the Fair Work Act at section 524.
43. The clause gives the authority to the employer to direct an employee to not attend work as there is no useful employment for the period of the shutdown and will not be paid for the period of the shutdown. This amounts to a stand down as was raised submissions of the AMWU and the CFMEU.
44. The relevant section of the Fair Work relating to stand down is section 524, which states:

*“Employer may stand down employees in certain circumstances*

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

- (a) industrial action (other than industrial action organised or engaged in by the employer);
- (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
- (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

- (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
- (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.”

45. Section 524 sets out the difference between an employee being stood down pursuant to section 524(1) and taking "leave" whether paid or unpaid. It states:

“Employee not stood down during a period of authorised leave or absence  
An employee is not taken to be stood down under subsection 524(1) during a period when the employee:

(a) **is taking** paid or unpaid leave that is authorised by the employer;

or

(b) is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).”

**Emphasis added.**

46. The section rests on the right of the employee to “take” leave , that is an employee availing of their entitlement to leave. In this instance, the proposed clause of the CMIEG, takes away this right of the employee to have any discretion of how the leave is utilised in both directing the taking of the leave and in deeming that the employee is on unpaid leave.

47. Where the employee loses their discretion over how their leave is to be used any benefit that may flow from time off from work is tainted. In the instance of shutdown over Christmas break, where the employee has been directed to take leave without pay, the benefit is likely to be to the employer alone.

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## Attachment B – Extracts from CFMMEU Submission about Continuity of Service during a Shutdown Period

### [CFMMEU Submissions 22 March](#)

“ ...

#### ***Continuity of service during a shutdown period***

7. The CFMMEU’s Earlier Submissions submitted, relevantly, that unpaid leave taken during a shutdown period should have that period of leave counted as service. This position was advanced in respect of the BCMI Award as was relevant to those submissions.
8. The CFMMEU maintains that position in respect of the BCMI Award. Further, the CFMMEU seeks to repeat that position in respect of the Mining Award and the Terminals Award.
9. The Earlier Submissions submitted that it was fair and reasonable that an employee taking leave without pay to accommodate a shutdown period, the direction of which is at the unilateral discretion of the employer, should not incur any other penalty. This submission was made on the basis that such leave was markedly distinct from a situation where an employee approaches their employer to take leave without pay. The CFMMEU continues to rely on this submission.
10. That an employee can be denied payment in circumstances where they are ready to serve is, of itself, acutely unfair. The legislation allows it in extremely specific circumstances,<sup>3</sup> and there is no common law right to require an employee to take unpaid leave in any circumstance.<sup>4</sup> That unpaid leave taken during a shutdown period, at the behest of an employer, would not count as service enhances the notion of unfairness that attaches to such a request. It is a position that should not be accepted when considering the modern awards objective.

...”