

FAIR WORK COMMISSION

Four yearly review of modern awards – Annual leave **AM2014/47**

Submissions - Coal Mining Industry Employer Group

1. These submissions are made for the Coal Mining Industry Employer Group (**CMIEG**) in respect of the provisional views expressed by the Full Bench in its Decision issued on 27 March 2017 ([2017] FWCFB 959) (**March 2017 Decision**) at [34]-[38], and in response to the submissions filed by the AMWU, CFMEU and AiGroup.
2. The CMIEG refers to and relies upon its submissions of 11 April 2017 in respect of proposed amendments to the revised clause proposed by the Full Bench (at [34] of the **March 2017 Decision**) for inclusion in the Black Coal Mining Industry Award 2010 (**BCMI Award**).
3. As noted in the submissions of the CMIEG dated 30 January 2017, the decision of the Full Bench to delete clause 25.4 of the BCMI Award in its entirety (**September 2016 Decision** ([2016] FWCFB 6836) at [84]) has led to uncertainty about the operation of clause 25.10 concerning shutdowns. So much is recognised in the **March 2017 Decision** at [20].
4. It was on this basis that the CMIEG sought a variation to clause 25.10 to provide for amendments to clarify the ability of employers covered by the BCMI Award to direct employees to take leave during a shutdown.
5. The CMIEG refers to and relies upon its submissions of 30 January 2017 in respect of the reasons why clause 25.10 ought to be amended in the manner of the proposed shutdown clause (set out at [34] of the **March 2017 Decision**).

Proposed shutdown clause is compliant with the FW Act

6. In the **March 2017 Decision**, the Full Bench expressed the view (at [29]) that:

... a term permitting different arrangements for annual leave during a period of shutdown or close down may be consistent with statutory framework (sic), depending on the terms of such a provision.¹

¹ Referring to the **September 2016 Decision** ([2016] FWCFB 6836).

Lodged on behalf of:
Address for Service:
Ashurst Australia
Level 11, 5 Martin Place
Sydney NSW 2000

Coal Mining Industry Employer Group (CMIEG)
Tel: (02) 9258 6025 / 6313
Fax: (02) 9258 6666
Email: adrian.morris@ashurst.com /
trent.sebbens@ashurst.com
Ref: AGM TZS 02 3000 0722

7. The term proposed by the Full Bench is compliant with the *Fair Work Act 2009* (Cth) (**FW Act**).
8. **First**, the Full Bench has considered that shutdown clauses are contemplated by the regime of the FW Act.² The Full Bench has subsequently, in its *December 2016 Decision* ([2016] FWCFB 9074) determined to include a shutdown clause in 18 modern awards, that includes a requirement for employees to take annual leave upon notice by an employer (see Draft Determination issued on 23 December 2016). Further, there are 81 modern awards that have been made by the Commission which contain a provision for shutdown or close-down.³
9. While a range of approaches are taken in shutdown clauses in modern awards, it is completely orthodox for such clauses to expressly provide for the requirement of employees affected by a shutdown to take annual leave accrued, or in advance, or otherwise be on unpaid leave.⁴
10. **Second**, the proposed shutdown clause is a term that is permissible to be included in the BCMI Award. Section 139(1)(h) of the FW Act provides for modern awards to include terms about:

(h) leave, leave loading and arrangements for taking leave;

Further, section 142 of the FW Act provides that a modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award:

² *March 2017 Decision* at [24]-[26], citing the *June 2015 Decision* ([2015] FWCFB 3406) at [347]-[350], [370]-[374].

³ See *March 2017 Decision* at [24], [29], Attachment A; see also *June 2015 Decision* [2015] FWCFB 3406 at [336]-[383].

⁴ See for example, the modern awards referred to in the CMIEG submissions of 30 January 2017 at [11]. See also, in respect of "unpaid leave"/"leave without pay", in Attachment A to the *March 2017 Decision* the relevant shutdown clauses in the Ambulance and Patient Transport Industry Award 2010, Ambulance and Patient Transport Industry Award 2010, Aquaculture Industry Award 2010, Asphalt Industry Award 2010, Broadcasting and Recorded Entertainment Award 2010, Building and Construction General On-site Award 2010, Cement and Lime Award 2010, **Children's Services Award 2010**, Cleaning Services Award 2010, Coal Export Terminals Award 2010, Concrete Products Award 2010, Contract Call Centre Award 2010, Electrical Power Industry Award 2010, Food, Beverage and Tobacco Manufacturing Award 2010, Gardening and Landscaping Services Award 2010, Gas Industry Award 2010, Graphic Arts, Printing and Publishing Award 2010, Higher Education Industry—General Staff—Award 2010, Hydrocarbons Industry (Upstream) Award 2010, Joinery and Building Trades Award 2010, Journalists Published Media Award 2010, Manufacturing and Associated Industries and Occupations Award 2010, Mining Industry Award 2010, Miscellaneous Award 2010, Oil Refining and Manufacturing Award 2010, Pest Control Industry Award 2010, Plumbing and Fire Sprinklers Award 2010, Pharmaceutical Industry Award 2010, Poultry Processing Award 2010, Premixed Concrete Award 2010, Racing Clubs Events Award 2010, Racing Industry Ground Maintenance Award 2010, Road Transport (Long Distance Operations) Award 2010, Road Transport and Distribution Award 2010, Salt Industry Award 2010, Seafood Processing Award 2010, Security Services Industry Award 2010, Storage Services and Wholesale Award 2010, Surveying Award 2010, Telecommunications Services Award 2010, Timber Industry Award 2010, Vehicle Manufacturing, Repair, Services and Retail Award 2010, Wine Industry Award 2010, Wool Storage, Sampling and Testing Award 2010.

In addition, section 55(4) of the FW Act permits a modern award to include:

- (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
- (b) terms that supplement the National Employment Standards;

The proposed annual leave shutdown clause clearly comes within the description of these provisions.⁵

11. **Third**, the proposed shutdown clause is consistent with section 93(3) of the FW Act. The inclusion of the phrase "must be reasonable" in proposed sub-clause 25.10(e)(ii) expressly complies with the provision. On one view, the inclusion of such words in the clause may not be necessary,⁶ because requiring employees to take annual leave in the circumstance of an annual leave shutdown is, of itself, reasonable. In that regard:

- (a) the Explanatory Memorandum to what is now section 93(3) expressly considered the requirement for a shutdown of the workplace over the Christmas/New Year period, as a circumstance contemplated by section 93(3);⁷ and
- (b) the circumstance of a shutdown is included in the "Note" to section 94(5), as an example of an instance in which an employer requiring an award/agreement free employee to take a period of paid leave would be reasonable, indicating a Parliamentary intention that such circumstances would be ones in which a requirement to take annual leave would be reasonable (for that class of employees).

In any event, the inclusion of the phrase echoing the statutory requirement in section 93(3), means that the proposed shutdown clause will operate in a way compliant with the provision.

12. Further, the contention⁸ that section 93(3) only permits clauses relating to the taking of "paid leave" and thereby does not permit clauses dealing with "unpaid leave", does not have proper regard to section 139(1)(h) which deals with "leave" and "arrangements for taking leave" whether paid or unpaid. Section 93(3) places no fetters on terms dealing with the taking of unpaid leave.⁹

⁵ See the *June 2015 Decision* [2015] FWCFB 3406 at [350]; see also the AMWU submissions dated 11 April 2017 at [12], [28]-[30] where this is conceded.

⁶ See AiGroup submissions of 18 April 2017 at [11]-[12], [15]-[17], [23]; see also the CMIEG's submissions of 30 January 2017 at [12].

⁷ See *March 2017 Decision* at [36], citing the Explanatory Memorandum at paragraph 381; see also *June 2015 Decision* [2015] FWCFB 3406 at [349].

⁸ AMWU submissions at [26].

⁹ See also the AiGroup submissions at [26]-[28].

13. **Fourth**, the proposed clause meets the modern awards objective. The starting point, of course, is that *prima facie* the existing shutdown clause in the BCMI Award meets the modern awards objective.¹⁰
14. The proposed shutdown clause is "simple" and "easy to understand" (section 134(1)(g), FW Act),¹¹ and would, correspondingly, lessen the likelihood of disputation between parties covered by the award, in instances of shutdowns.
15. **Fifth**, the proposed clause does not amount to a "stand down" of employees.¹² The circumstances of stand downs are clearly dealt with in section 524 of the FW Act and the circumstances there described. The proposed shutdown clause is directed towards different circumstances. The aspect of the proposed shutdown clause dealing with employees which insufficient leave being placed on unpaid leave, namely sub-clause 25.10(d)(iii), is a clause dealing with an "arrangement for taking leave" under section 139(1)(h) of the FW Act and/or an incidental provision to sub-clauses 25.10(d)(i) and (ii) (in particular) to enable the clause to "operate in a practical way" conformably with section 142(2) of the FW Act.
16. Even if it were accepted that the "unpaid leave" sub-clause amounts to a "stand down" clause, the Commission has not previously determined that stand down clauses are not permitted terms in modern awards.¹³ Rather, the Commission has eschewed including such clauses due to the operation of section 524 of the FW Act, as that provision makes unnecessary the traditional form of stand down clauses.¹⁴
17. If the Commission formed a preliminary view that the "unpaid leave" aspect of the proposed shutdown clause may amount to a "stand down" clause, the CMIEG would wish to be heard further on this point. Indeed, such terms may be capable of coming within section 139(1)(c) of the FW Act, being an arrangement for when work is performed.

Circumstances in which the shutdown clause may be utilised

18. The CMIEG has previously filed submissions on 26 October 2015 that *inter alia* set out the circumstances in which employers covered by BCMI Award have utilised clause 25.10 (in conjunction with the provisions of clause 25.4) (see [17]-[23], [26]-[29]).

¹⁰ See *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788; (2014) 241 IR 189 at [60 (Item 3)] (209-211).

¹¹ See also *March 2017 Decision* at [38].

¹² Cf AMWU submissions at [2], [12]-[25], [27]-[29]; CFMEU submissions dated 11 April 2017 at [5]-[6].

¹³ See [2008] AIRCFB 1000; (2008) 177 IR 364 at [109].

¹⁴ See for example, the form of a "stand down" clause in the predecessor to the BCMI Award, namely clause 15 of the Production and Engineering Consolidated Award 1997 (AP774609).

19. A number of practical operational exigencies peculiar to the black coal mining industry were set out at [26]-[29] of those submissions, which remain apposite to the proposed shutdown clause. Those operational exigencies include the following:
- (a) Geological or geotechnical circumstances may require that one or more sections of a mine cease operation for a period. As a result, if coal is not being produced, part of the mining workforce and the employees operating the coal handling and preparation plant at the mine may have no useful work for a period. In these circumstances, the employer or the employee may sensibly see the taking of annual leave as the best course. The alternative of standing down employees without pay may be available but would be onerous and reasonably avoided by the granting and taking of annual leave, or shutting down the operations, or part of the operations.
 - (b) There have been instances where mines have had to stop because of a underground longwall shearing machine being put out of action by being buried due to the collapse of the strata in the coal seam. The operations, or part of the operations could be shutdown while the longwall shearing machine is recovered.
 - (c) Market considerations including the cyclical nature of black coal markets, may cause a mine operator to choose to shut down all or part of an operation for a period. (A recent example of this was the shutting down of a number of Glencore group mines for a three week period in December 2014 and January 2015, due to oversupply of coal in the market.) Shutting down operations in such circumstances can be distinctly beneficial to employees, in so far as it may mitigate the need for an employer to reduce workforce numbers through retrenchment.
 - (d) Another circumstance that can arise is that the product coal stockpile at a mine reaches full capacity, and the extraction of coal therefore needs to be stopped or slowed. This may also be a circumstances where the operations, or part of the operations could be shutdown while the stockpile is reduced.
20. In each situation described above, employers covered by the BCMI Award could utilise the shutdown clause. The operation of such a term may, having regard to each of those situations described, be considered to be "mutually beneficial" (see *June 2015 Decision* [2015] FWCFB 3406 at [214]; *September 2015 Decision* [2015] FWCFB 5771 at [175]).
21. That the shutdown clause in the BCMI Award may be used in such circumstances was acknowledged by the Full Bench in the *September 2016 Decision* at [77].
22. In addition, a shutdown clause may be utilised for a shutdown of the operations, or a part of the operations, in the circumstances of a maintenance shut (for example to permit major maintenance work or overhaul of equipment), or a closure over the Christmas/New

Year or Easter periods. The instances of utilising shutdowns are not, however, limited to only maintenance shuts.¹⁵

23. It is also relevant to note that shutdown clauses have been included in predecessor awards to the BCMI Award, in the black coal mining industry for a significant period. Shutdown clauses were included in The Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (AP774609) (1997 Award) (clause 29.11),¹⁶ the Coal Mining Industry (Staff) Award 2004 (AP835164) (clause 26.11), and The Coal Mining Industry Award (Deputies and Shotfirers), 2002 (clause 17(k)). The terms of those black coal mining industry awards were subsequently incorporated in the BCMI Award when it was made. That is, their terms were used as the models for the BCMI Award.
24. Those clauses have their origin in decisions of the Coal Industry Tribunal, most notably the decision in 1988 granting a claim by employers for production to be permitted during 52 weeks of the year.¹⁷ Prior to that time, since the granting of annual leave provisions in black coal mining awards commencing in 1938 by the Commonwealth Court of Conciliation and Arbitration,¹⁸ for the period through to 1988, annual leave was only generally permitted to be taken during a "time to be fixed by the management", which in practice was for periods of shutdowns, generally at Christmas, Easter and in August/September.¹⁹

Amendments proposed by the AMWU and CFMEU to the proposed shutdown clause

25. The CFMEU and AMWU have proposed potential amendments to the proposed shutdown clause.
26. The CMIEG opposes the amendments sought by the AMWU and CFMEU. In summary:
- (a) in respect of "service" during a period of a shutdown,²⁰ section 22 of the FW Act already deals with "service" and "continuous service";

¹⁵ Cf AMWU submissions at [4]-[10], [32]-[34], [36]; CFMEU submissions at [9].

¹⁶ Noting clause 29.3.3 also provided the ability of an employer to direct the taking of leave.

¹⁷ [The Australasian Coal and Shale Employees Federation and Queensland Coal Association \[1988\] ACIndT 4076](#) and see also [Federated Engine Drivers & Firemen's Association of Australasia and Queensland Coal Association \[1988\] ACIndT 4080](#).

¹⁸ See *The Australasian Coal and Shale Employees Federation and Ors v J&A Brown and Abermain Seaham Collieries Ltd and Ors* [1938] 40 CAR 367 at 386-9 per Drake-Brockman J; and subsequent decisions making the Miners' Award ([1939] 40 CAR 411 (29 June 1939); Engine Drivers' and Firemen's Award ([1939] 40 CAR 437, 29 June 1939); and Mechanics' Award ([1939] 40 CAR 448, 29 June 1939).

¹⁹ See [The Australian Coal and Shale Employees' Federation and others \[1968\] ACIndT 1888 \(29 August 1968\)](#) and [The Australian Coal and Shale Employees' Federation and the Queensland Coal Owners' Association \[1968\] ACIndT 1903 \(21 October 1968\)](#); and prior to that [The Australian Coal and Shale Employees' Federation; the Federated Engine Drivers' and Firemen's Association of Australasia and NSW Combined Colliery Proprietors' Association \[1963\] ACIndT 1604 \(4 December 1963\)](#); and [The Australasian Coal and Shale Employees' Federation and J & A Brown and Abermain Seaham Collieries Limited \[1947\] ACIndT 426 \(2 June 1947\)](#).

²⁰ CFMEU submissions at [9.1].

- (b) in respect of payment on public holidays,²¹ section 116 already deals with payment when an employee is absent;
- (c) in respect of leave being granted in advance,²² clause 25.9 already deals with "annual leave in advance" and is specifically referred to in the proposed sub-clause 25.10(g);
- (d) in respect of notice to be provided for a shutdown,²³ the clause provides for 28 days' notice which is equivalent to the preponderance of modern awards that provide for four weeks' notice; and
- (e) in respect of the taking of paid annual leave during a period of a stand down under section 524,²⁴ this is already dealt with in section 525 of the FW Act.

Ashurst Australia
Solicitors for the CMIEG

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²¹ CFMEU submissions at [9.2].

²² AMWU submissions at [40]-[42].

²³ AMWU submissions at [35]-[39].

²⁴ AMWU submissions at [43]-[46].