DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Plain language—Shutdown provisions
(AM2016/15)

ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT SYDNEY, 22 DECEMBER 2022

4 yearly review of modern awards – plain language – shutdown provisions.

DECISION OF ACTING PRESIDENT HATCHER AND DEPUTY PRESIDENT ASBURY

Background

[1] On 25 August 2022 we issued a decision concerning the issue of annual leave shutdown provisions in modern awards (*August 2022 decision*).[1] The *August 2022 decision* followed on from a Statement made on 28 February 2019 by a differently-constituted Full Bench (*February 2019 statement*)[2] which set out a draft model term and invited submissions on:

- whether modern awards that currently contain shutdown provision should be varied to include the model term;
- any award-specific variations that should be made; and
- whether unpaid leave taken during a shutdown period counts as service.

[2] As there were no requests for a formal hearing the above matters were to be decided on the papers.

[3] The majority in the *August 2022 decision* (Hatcher VP and Asbury DP) expressed a number of *provisional* conclusions and views and proposed a modified model term. The *provisional* conclusions reached in respect of the establishment of the majority modified model term are summarised as follows:

[1] [2022] FWCFB 161.
[2] [2019] FWCFB 1255.

1. The reference in the model term to the employee having a right to *elect* to take leave without pay in lieu of accessing accrued annual leave entitlements during a shutdown should be deleted. The majority stated that there is no general entitlement to take leave without pay under either the NES or any award and the establishment of an undefined entitlement to take such leave in a clause concerned with taking of annual leave would not be appropriate.[3]

2. The majority also expressed a view that the Commission has no power to include a provision in an award by which an employer may *require* an employee to take leave without pay. Replacing the right of an employee to elect to take leave with a right of the employer to require that leave without pay be taken (or existing provisions be retained), as suggested by a number of employer groups, would amount in substance to the stand-down of the employee without pay, a matter which may not be the subject of an award term. Nor would such a term be appropriate to be included in a modern award even if the Commission had power to do so.[4]

3. The model term would be adapted in individual awards to incorporate existing prescriptions which limit the application of shutdown provisions by reference to the circumstances in which the shutdowns occur.[5]

4. The model term would retain a minimum requirement for 28 days' notice (subject to agreement as to a lesser period) of a shutdown, which the majority considered to be fair and reasonable, but in individual awards the term would be adapted to retain existing prescriptions for a greater period of notice to be given.[6]

5. The model term would not be adapted to take into account the differing prescriptions of frequency and length of shutdowns, since these amount in substance to the regulation of shutdowns. The majority stated that the requirements that the shutdown must be "temporary" and that any direction to take annual leave must be reasonable will ensure that the model term could not be abused in respect of the frequency or length of shutdowns.[7]

[4] Consistent with the above *provisional* conclusions, the majority expressed the *provisional* view that the proposed model term (set out in the *February 2019 statement*) should be modified to provide as follows (in an award that requires no adaptation):

"**XX.XX Direction to take annual leave during shutdown**

(a) Clause XX.XX applies if an employer:

[3] [2022] FWCFB 161 at [149].

[4] Ibid at [150].

[5] Ibid at [153].

[6] Ibid at [154].

[7] Ibid at [155].

(i) intends to shut down all or part of its operation for a particular period (**temporary shutdown period**); and

(ii) wishes to require affected employees to take paid annual leave during that period.

(b) The employer must give the affected employees 28 days' written notice of a temporary shutdown period, or any shorter period agreed between them and the employer.

(c) The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under clause XX.XX(b) and who will be affected by that period, as soon as reasonably practicable after the employee is engaged.

(d) The employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.

(e) A direction by the employer under clause XX.XX(d):

(i) must be in writing; and

(ii) must be reasonable.

(f) The employee must take paid annual leave in accordance with a direction under clause XX.XX(d).

(g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause XX.XX.

(h) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause XX.XX, to which an entitlement has not been accrued, is to be taken into account.

(i) Clauses XX.XX to XX.XX do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause XX.XX."[8]

[5] The majority decision set out examples of how the model term above would be adapted in the Building Award[9] and the Poultry Award[10] in accordance with the *provisional* conclusions expressed.

[8] Ibid at [156].

[9] Ibid at [158].

[10] Ibid at [159].

[6] The majority decision expressed the *provisional* view that the variation of the 78 awards which currently contain shutdown provisions (listed at Attachment A to the *August 2022 decision*) in the terms set out above is necessary to meet the modern awards objective in s 134 of the *Fair Work Act 2009* (FW Act).[11] It indicated that draft determinations in line with the *provisional* views and conclusions would be published in due course and invited submissions within 21 days of publication. The majority directed interested parties to file submissions in response to:

- the provisional views and conclusions in paragraphs [149] to [160] of the *August 2022 decision* (summarised above); and
- the terms of the draft determinations.[12]

[7] The majority in the *August 2022 decision* noted that the *Children's Services Award 2010* (Children's Award) had not yet been consolidated as a 2020 Award and that the United Workers Union's claim to vary the annual leave provision had been referred to this Full Bench. The majority expressed the provisional view that the Children's Award should be varied to include the proposed majority modified model clause, with adaptations to incorporate specific existing provisions.

[8] Draft determinations varying the 78 awards were published on 19 September 2022. An extension of time to file submissions in response to the *provisional* conclusions in the *August 2022 decision* and the draft determinations was subsequently granted.

Submissions

[9] The following parties filed submissions:

- Australian Confederation of Commerce and Industry, Australian Business Industrial, Australian Cabinet and Furniture Association, Australian Childcare Alliance, Business SA, Chamber of Commerce and Industry Western Australia, Local Government NSW, Master Plumbers and Mechanical Services Association of Australia, National Electrical and Communications Association, National Fire Industry Association, NSW Business Chambers Ltd, Tasmanian Chamber of Commerce and Industry and Western Australian Local Government Association (ACCI Group)[13]
- Australian Education Union, Independent Education Union of Australia and National Tertiary Education Industry Union (AEU, IEUA and NTEU)[14]
- Australian Hotels Association (AHA)[15]

[11] Ibid at [160].

[12] Ibid at [161].

[13] ACCI and others submission dated 21 November 2022.

[14] AUE, IEUA and NTEU submission dated 10 October 2022.

[15] AHA submission dated 10 October 2022.

- Australian Industry Group (Ai Group)[16]
- Australian Meat Industry Council (AMIC)[17]
- Australian Workers' Union (AWU)[18]
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)[19]
- CPSU, the Community and Public Sector Union (CPSU)[20]
- Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) - Construction & General Division[21]
- CFMMEU - Manufacturing Division[22]
- Housing Industry Association (HIA)[23]
- Master Plumbers and Mechanical Services Association of Australia (MPMSAA)[24]
- Motor Trades Organisations (MTOs)[25]
- National Electrical and Communications Association (NECA)[26]
- United Workers Union (UWU).[27]

[10] Notwithstanding that there was no direction to do so, the Ai Group filed a witness statement made by Patrick Sullivan, its Marketing and Insights Manager, and the HIA submitted a witness statement made by Russell Holtham, General Manager Operations HIA Apprentices.

[11] The submissions are summarised below.

ACCI Group

[16] Ai Group submission dated 25 November 2022.

[17] AMIC submission dated 18 November 2022.

[18] AWU submission dated 10 October 2022.

[19] CEPU – Electrical Division submission dated 10 October 2022.

[20] CPSU (PSU Group) submission dated 21 November 2022.

[21] CFMMEU – Construction & General Division submission dated 10 October 2022.

[22] CFMMEU – Manufacturing Division submission dated 10 October 2022.

[23] HIA submission dated 21 November 2022.

[24] Master Plumbers submission dated 10 October 2022.

[25] MTO submission dated 21 November 2022.

[26] NECA submission dated 11 October 2022.

[27] UWU submission dated 10 October 2022.

[12] The ACCI Group opposes the adoption of the model clause in the relevant modern awards and contends that:

- there is power under s 139 of the FW Act to insert terms into modern awards entitling employers to place employees on unpaid leave during a period of shutdown;

- in the alternative, there is power under s 93 of the FW Act to insert terms into modern awards entitling employers to direct the taking of annual leave in advance during a shutdown;

- there are strong merit grounds that would support the Commission maintaining current provisions allowing employees to be directed to take unpaid leave during a shutdown or alternatively being directed to take annual leave in advance.

[13] The ACCI Group submits that s 139(1)(h) of the FW Act provides a power for the Commission to insert terms allowing for employees to be directed to take unpaid leave during shutdowns because such terms on their face deal with the topic of leave and identify a circumstance when such leave may be introduced or mandated by the employer. While the *August 2022 decision* found that such terms would be tantamount to a stand-down, this does not prevent them for being "about" unpaid leave for the purposes of s 139. The word "*about*" is a preposition defined as meaning "*of, concerning, in regard to*" or "*connected with*". As a result, the ACCI Group submitted, there is no limitation in the ordinary use of the term "*about*" that prevents a provision being about multiple matters. They submitted that, to the extent that the *August 2022 decision* found that "*leave*" and "*leave without pay*" are beneficial entitlements distinct from stand-downs, this conclusion does not mean that leave cannot arise when it is mandated by the employer, for example paid annual leave imposed upon employees pursuant to ss 93 and 94 of the FW Act.

[14] The ACCI Group further submits that, in any event, the Commission has the power to include an unpaid leave shutdown term into modern awards pursuant to s.139(1)(c) of the FW Act on the basis that they are "*about*" arrangements for when work is performed, that is they are "*of, concerning, in regard to…connected with*" arrangements for when work is performed. The ACCI Group and others maintain that award provisions that enable an employer to define the period of operation of an employer's business are capable of being about "*hours of work*" and "*rostering*", while provisions that enable the employer to close its business, placing employees on paid and unpaid leave, are capable of being about "*variations to working hours*".

[15] The ACCI Group submits in the alternative that provisions about the taking of annual leave in advance, including requirements about when such leave must be taken, may be included in modern awards. They maintain that the insertion of Annual Leave in Advance Terms into modern awards has previously been found permissible by the Commission pursuant to Part 2-2 of the FW Act in *4 Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406 at [390]. They submit the effect of s 93(3) (which forms part of Part 2-2 of the FW Act) is important because, if a clause in a modern award is included pursuant to s 93(3), then the NES has effect *subject to* the modern award terms, that is, that the modern award terms "*may prevail over or govern how the NES provisions apply*". This conclusion, they submit, is confirmed by

a plain reading of s 55(2) and (3) of the FW Act, noting that any requirement to take annual leave in advance imposed by a modern award must be reasonable pursuant to s 93(3).

[16] The ACCI Group submits that maintaining the existing terms allowing employees to be directed to take unpaid leave or, in the alternative, inserting terms allowing employees to be directed to take annual leave in advance, would meet the modern awards objective in s 134(1), but that the model term proposed in the *August 2022 decision* would not. In the latter respect, they pointed to the considerations in paragraphs (c), (d), (f), and (h) of s 134(1) as weighing against the proposed model term. In relation to s 134(1)(c), the ACCI Group submitted that the model term would discourage social inclusion through increased participation because it would encourage employers to defer engaging new employees in the latter parts of the year. In relation to s 134(1)(d), the ACCI Group submits that the proposed model term, by requiring employers to pay employees during shut down periods where they have not accrued sufficient annual leave, does not promote flexible modern work practices and efficient and productive work. This is particularly the case, they submitted, where the employee has exhausted their annual leave entitlements prior to a shutdown.

[17] As to s 134(1)(f), the ACCI Group submits that this is a highly relevant consideration due to the prevalence of annual shutdowns across all industries and the widespread practice of employers directing employees to take leave without pay during a shutdown where an employee does not have sufficient annual leave. In support of this proposition, the ACCI Group relies on three surveys: the first conducted jointly by ACCI and the Ai Group (joint survey), the second by Local Government NSW (the LGNSW survey) and the third being the 2014 Joint Employer survey conducted as part of the 4 Yearly Review (2014 survey). The joint survey was of 2,390 employers conducted between October and November 2022. Its findings include:

- Since 1 January 2010, 89.5% of employers surveyed have shut down all or part of their operations.
- Reasons surveyed employers implemented shutdowns included:
    - To enable full-time and part-time employees to take annual leave (54.3%);
    - To coincide with an annual or seasonal slowdown or cessation of trade (68.16%);
    - To enable the routine maintenance of plant and/or equipment (15.05%);
    - To reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented (28.3%);
    - To coincide with shutdowns implemented by other related organisations such as clients or suppliers (54.41%).
- 78.61% of employers who had implemented shutdowns said that they had experienced situations where an employee had not accrued sufficient annual leave to utilise during a shutdown period.

- Where an employee had not accrued enough annual leave to utilise during a shut down, ways employers managed this included:
    - Requiring employees to perform work (21.36%);
    - Directing employees to take leave without pay (79.93%);
    - Permitting employees to take annual leave in advance (48.79%).

[18] The LGNSW Survey found that:

- 96% of respondents had implemented a shutdown and 77% had done so on more than 10 occasions.
- 87% per cent of respondents had implemented a shutdown in circumstances in which employees did not have sufficient annual leave.
- Where employees did not have sufficient annual leave, respondents did the following:
    - Nearly 30% of respondents required employees to take leave without pay.
    - More than 50% of respondents utilised annual leave in advance.
    - Nearly 50% of respondents relied upon other forms of paid leave.

[19] The 2014 survey involved 4,137 businesses in May 2014 as part of the 4 Yearly Review of Modern Awards. The 2014 Survey found that between January 2010 and May 2014, 47% of respondents had closed down all or part of their operations, with 30% of respondents closing down 3–4 times during this period. This was higher for employers in the manufacturing industry (83%), the construction industry (78%) and the professional, scientific and technical services industry (67%).

[20] The ACCI Group submit the three surveys demonstrate that shutdowns are widely utilised by employers, that employers shut down for legitimate and appropriate reasons, that it is not uncommon for employees to have no accrued sufficient annual leave to cover the period of a shut down and that employers rely heavily on the ability to direct employees to take leave without pay, annual leave in advance and other leave during those periods. They submit that the proposed model term, by removing from at least 52 modern awards the ability to direct employees to take unpaid leave during a shutdown, constitutes a substantial shift in the award safety net and will, as a result, impose new cost burdens on employers for which they will not receive any performance of work or additional productivity return. This, they submit, would come at a particularly difficult time due to high inflation and the increased costs of finance associated with increases to interest rates. As to s 134(1)(h), the ACCI group submits that the proposed model term could have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy because it will impose significant additional cost burdens on business at a time where businesses are facing both decades high inflation and increased costs of finance.

[21] The ACCI Group submits that if employers cannot direct the taking of unpaid leave:

- employees who use all of their annual leave prior to a shutdown will be able to double-dip by also being paid during the shutdown period;
- alternatively, employers may try to refuse some annual leave requests on account of upcoming shutdowns, leading to employees disputing whether such refusals are "reasonable" in accordance with s 89 of the FW Act;
- employers may not hire employees during the months prior to a shutdown if there is not sufficient time to accrue sufficient annual leave; and
- employees who have retained enough annual leave for a shutdown may have resentment and antipathy towards employees who do not have access to annual leave but will be paid nonetheless.

Ai Group

[22] The Ai Group submits, in summary, that:

- the Commission has power to include (or retain) a term in modern awards requiring employees (or enabling employers to require employees) to take unpaid leave during a shutdown;
- unpaid leave during a shutdown and a stand-down pursuant to s 524 of the FW Act are separate and distinct concepts;
- unpaid leave terms are necessary to ensure that the relevant awards achieve the modern awards objective; and
- if modern awards are not to include such terms, any model clause should include an expanded capacity for employers to direct employees to take paid annual leave in advance.

[23] The Ai Group submits that the majority conclusion in the *August 2022 decision* that the Commission does not have the power to include or retain terms that permit employees to be directed to take unpaid leave is incorrect, and that such power exists under s 139(1)(h) (in conjunction with s 142) or alternatively under s 139(1)(c). It submits that:

- the sources of power s 142(1) in conjunction with either of ss 93(3) or 139(1)(h) are not exhaustive and that there is at least one other source of power, being s.139(1)(c);
- the fact that s 139(1) does not mention shutdowns as a separate matter is beside the point, with the relevant question being whether or not the various terms that would facilitate a shutdown are capable of support under a source of power

recognised by s 136(1) (regardless of the purpose to which that shutdown is directed);

- the characterisation of an unpaid leave term as no different in substance to a stand-down "*since it occurs on the employer's initiative and without the employer's consent and leads to the same result of the employee being deprived of work and pay*" …asks the wrong question, since just because s 139(1) does not expressly contemplate modern awards dealing with stand-downs does not prevent a term creating rights and obligations which in certain ways resemble those arising in a stand-down context from engaging another source of power under s 136(1);

- even if the comparison between stand-downs and shutdowns were relevant, it overlooks material differences between shutdowns and stand-downs under s 524(1), namely that stand-downs are unanticipated and beyond the control of the employer compared to shutdowns which are in response to anticipated circumstances and are initiated by the employer;

- the concept of standing employees down and taking unpaid leave in the context of a shutdown have been, and are, separate and distinct;

- that the FW Act does not directly authorise unpaid leave terms does not mean that such terms cannot be incidental to and necessary for the practical operation of a term about paid annual leave, or another matter authorised under s 136(1);

- ss 93(3), 94(5) and 94(6) illustrate Parliament's intention to facilitate an employer's ability to implement annual shutdowns within reasonable bounds, and it is artificial to suppose that Parliament intended that shutdowns be confined to businesses with employees with sufficient paid annual leave;

- without unpaid leave terms, employers are faced with the choice to pay each employee without sufficient accrued annual leave even if they perform no work, or allow them to work despite the lack of useful work available and with the potential safety issues that might arise, thus negating the utility of the paid annual leave term;

- the unpaid leave term is thus incidental to and necessary for the practical operation of the paid annual leave term; and

- the characterisation of leave as "*a beneficial entitlement for employees to be absent from work*" does not appear in the FW Act, and cannot be reconciled with the various ways in which an employer can require an employee to take unpaid parental leave under s 73(2) without the employee's consent.

[24] The Ai Group submits in the alternative (like the ACCI Group) that even if there is no power under s 139(1)(h), an unpaid leave term may be authorised by s 139(1)(c), since "*arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours*" would encompass arrangements for the non-performance of work and would plainly allow for a term facilitating rostering arrangements

involving periods where no work is offered or performed. The Ai Group submits that the removal of unpaid leave terms is not necessary (in the sense contemplated by s 138) and would cause disruption to long-standing practices, increased and unexpected costs for employers, and adverse consequences for employers and employees.

[25] The Ai Group relied on the witness statement of Mr Sullivan, which concerned the conduct of the joint survey, and submitted that the joint survey demonstrated that:

- many employers rely on modern award shutdown provisions in order to implement a shutdown;
- it is not uncommon for employers to implement a shutdown at least once a year;
- shutdowns are implemented for a range of reasons, most commonly to enable permanent employees to take annual leave;
- most employers encounter circumstances in which employees do not have enough annual leave to cover the entire period of a shutdown; and
- in such situations, it is very rare for the employees to work during the shutdown or be paid without being required to work and, overwhelmingly, employees are required to take unpaid leave, and less commonly but not infrequently employees take annual leave in advance.

[26] The Ai Group submits that the removal of the unpaid leave terms would be inconsistent with the considerations in s 134(1)(d) and (f) because it would constitute a departure from a long-established element of industrial regulation and long-standing industry practice. It submits that shutdowns are commonly implemented due to a slow down in trade or business activity and, as a result, employers may be unable to productively engage employees who have insufficient annual leave during a shutdown. If an employer cannot direct the taking of unpaid leave, it would be required to pay employees who have insufficient accrued leave for the duration of the shutdown, giving rise to a significant, unexpected and unfair cost for employers without the benefit of any productive output from employees. Even where employers are able to provide employees with insufficient annual leave with some work, this would be inconsistent with the need to ensure the efficient and productive performance of work, might require additional employees to be rostered to work for health and safety or supervision reasons and thus add to the cost and regulatory burden, would undermine the employer's ability to completely shutdown their enterprise or part thereof and coordinate the taking of leave simultaneously by the workforce, and might compromise the capacity of employers to undertake essential maintenance and repair work during a shutdown. The Ai Group submits that removal of the ability to direct unpaid leave would hinder employers' operational flexibility at a time where they are facing high inflationary and interest rate pressure, resulting in significant adverse impacts, and might also have unintended adverse consequences for employees including:

- some employers will be less inclined to grant paid annual leave requested by employees for the periods outside of the shutdown period;

- employers will be less inclined to grant periods of unpaid leave during the year, as it will inhibit the accrual of an employee's annual leave entitlements;

- employers will be less inclined to hire new employees at certain times of the year where it is anticipated that they will be unable to accrue sufficient annual leave prior to a shutdown;

- employers will be more inclined to engage casual or labour hire employees and less inclined to convert casual employees where a request is made, if it anticipated that the employee will be unable to accrue sufficient annual leave prior to a shutdown;

- employers will be more inclined to terminate employees with insufficient accrued leave prior to a shutdown, rather than pay them for time not worked;

- employers will be more inclined to allot periods in which certain employees can take paid leave throughout the year and to move away or limit the use of shutdowns, meaning employees who have typically had leave over Christmas/New Year may be unable to do so.

[27] The Ai Group also submits that some employers may endeavour to implement other arrangements with their employees, including the taking of annual leave in advance or taking of long-service leave. This imposes an additional unfair regulatory burden on employers and may result in adverse consequences where an employee does not agree to take annual leave in advance or does not have access to another form of paid leave. For the above reasons, it submits that the retention of unpaid leave terms is necessary to achieve the modern awards objective, and submits that the considerations in paragraphs (a), (b), (c) and (g) of s 134(1) do not support the removal of unpaid leave terms, with the other considerations being neutral.

[28] The Ai Group notes that the proposed model term allows an employee to elect to take annual leave in advance to cover a shutdown period and submits that it is difficult to envisage circumstances where an employee would so elect because, if a modern award cannot include unpaid leave terms, it appears that an employer would be required to pay each employee without an accrued paid annual leave balance for the shutdown period even if those employees performed no work. That being the case, there would be no rational basis for an employee to elect to take paid annual leave in advance of accrual. It submits that if the Commission finds it lacks the power in include an unpaid leave term in a modern award, it should amend the proposed model term to enable an employer to direct an employee to take annual leave in advance, subject to any such direction being reasonable. Such a term, it submits, would plainly be within power, since it is a term about leave or arrangements for taking leave for the purposes of s 139(1)(h) as well as being a term allowing for an employee to be required to take paid annual leave in accordance with s 93(3) or a term otherwise dealing with the taking of paid annual leave for the purposes of s 93(4). Such a term would meet the modern awards objective, particularly when considering the likely impact of the removal of unpaid leave terms on business (s 134(1)(f)) and the need to ensure stability in the modern award system (s 134(1)(g)).

[29] Further in the alternative, the Ai Group submits that if the Commission concludes there is power to include unpaid leave terms but that they are not necessary to achieve the modern

awards objective, it should implement the Ai Group's proposed transitional arrangements before any model term takes effect taking into account that the Christmas period, when most shutdowns take place, is approaching. Accordingly, the Ai Group submits that the Commission should not make any variations to the relevant awards before Christmas 2022, and instead determine that the new model term will not take effect until 1 July 2023, so as to provide employers with an opportunity to consider and implement strategies for managing annual leave prior to Christmas shutdowns, to ensure that the framework is clearly in place well before employers are required to notify employees of the 2023 Christmas shutdown, and to ensure that the model clause does not apply to any shutdowns during the first half of 2023 before employers have had a sufficient opportunity to assess their employees' annual leave and determine how best to implement future shutdowns.

Australian Meat Industry Council

[30] The AMIC submits, in respect of the *Meat Industry Award 2020* (Meat Award), that the third and the fourth proposition of the five propositions set out in paragraphs [138] to [145] of the *August 2022 decision* are incorrect. In respect of the third proposition, the AMIC argues that s 139(1) empowers the Commission to include terms about leave and arrangements for taking leave in a modern award, with the FW Act drawing no distinction between leave that is fully paid, partly paid, or unpaid, or granted or directed or authorised by the employer. It contends that while the existing shutdown clause in the Meat Award is primarily concerned with the arrangements for taking paid annual leave in circumstances where employers are required to cease all productive work to allow the workforce to take annual leave, the shutdown clause has an ancillary and related purpose of managing the leave arrangements of employees who have not accrued sufficient annual leave at the time of a shutdown.

[31] The AMIC submits it is incorrect to say that the leave entitlements of such employees cannot be addressed or provided for in the shutdown clause, and any such provision in a shutdown clause must be removed as not being incidental to or necessary for the practical operation of a provision. It further submits the shutdown clause is not confined to the subject of paid annual leave but is concerned with addressing what special leave arrangements should apply in respect of a shutdown which differs from the ordinary course of the granting and conferral of leave throughout a year, and thus should be characterised as one dealing with the manner in which leave entitlements found elsewhere in the Meat Award are to be modified in the particular circumstances where the workplace is to be closed or for a specified purpose. Therefore, it is submitted, the provision is itself a provision in relation to leave, or arrangements for taking leave, and is incidental to and necessary for the practical operation of a provision which is designed to accommodate the working and leave entitlements of the entire production workforce, not simply that part of the workforce which has otherwise qualified for paid annual leave.

[32] In respect of the fourth proposition the AMIC submits that the existing shutdown provision in the Meat Industry Award creates an entitlement to leave without pay, and as a result it is not clear why the *August 2022 decision* found that there was not currently an award entitlement to leave without pay or why it is necessary for a separate entitlement be found elsewhere to support the existing shutdown provision. Section 139(1)(h) empowers the Commission to establish an award entitlement to leave without pay and, as a result, the current shutdown provisions are supportable in their own right per s 139(1)(h) as being an entitlement

to leave. The AMIC further argues that the provision enabling an employer to direct an employee to take unpaid leave while the business is shutdown is incidental to, or necessary for the practical operation of, the primary provision conferring leave without pay in the particular circumstances.

[33] The AMIC argues that the merit of including a shutdown provision empowering an employer to direct an employee to take unpaid leave should be assessed against the circumstances of each particular industry, and submits that directed leave can be highly beneficial to an employee as it may operate as an alternative to termination, casualisation or other impact on their employment security due to a workplace shutdown. The AMIC rejected the proposition that a direction to take leave without pay would be tantamount to a stand-down, and submitted that the legislature had seen fit to confer a power on the Commission to make award provisions for leave without reference to who may authorise or direct such leave or to whether such leave is paid or unpaid. As a result, this wide power should not be limited in the sense contemplated at [141] of the *August 2022 decision*, and the consequence that the practical outcome of the shutdown provision is superficially similar to a stand-down is not a reason as to why both the shutdown and stand-down provisions should not be able to be adopted and applied to their fullest permissible extent as the legislation does not erect any barrier of mutual exclusivity as between the provisions.

[34] The AMIC additionally submits that under the draft determination, employees who have accrued annual leave during the year will be placed in an inferior position in comparison to employees who have not accrued sufficient annual leave or have otherwise used their annual leave during the year because employees who have accrued annual leave will be required to exhaust this entitlement during a shutdown whilst those who do not have sufficient leave accrued will be entitled to receive full pay and not exhaust any part of their leave accruals. The AMIC submits that this is a clear inequity which mitigates against its implementation into the Meat Award.

[35] The AMIC submits that it does not otherwise have any substantive objection to the terms in the draft determination for the Meat Award.

AWU

[36] The AWU in its submissions identifies a number of awards that currently contain limits on the duration and frequency of shutdowns and in which it has an interest:

- *Airline Operations – Ground Staff Award 2020*: clause 26.6;
- *Fitness Industry Award 2020*: clause 21.3(b);
- *Food, Beverage and Tobacco Manufacturing Award 2020*: clause 25.11(e) to (h);
- *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award): clause 34.7(e) to (h);
- *Pharmaceutical Industry Award 2020*: clause 21.5(e);

- *Seafood Processing Award 2020*: clause 21.11(e) to (h);

- *Wine Industry Award 2020*: clause 24.9(e) to (g).

[37] The AWU submits that the requirement for the Commission to take into account the "*need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia*…" weighs strongly in favour of retaining the existing award provisions which limit the duration and frequency of shutdowns, rather than relying on the more general references to shutdowns being "*temporary*" and a direction being "*reasonable*" which may lead to disputation and litigation. Accordingly, the AWU submits that the proposed model term should be modified for the awards above (and any other awards with similar provisions) to retain existing prescriptive provisions about the duration and frequency of shutdowns.

[38] The AWU submits there may be merit in the new clause proposed by the CFMMEU (C&G) (set out further below), given the majority's finding that terms which allow an employee to elect to take unpaid leave or which allow an employer to require an employee to take unpaid leave, cannot, or should not, be included in modern awards. The AWU submits that the ability for an employee to request unpaid leave may ensure users of the award are aware of this option during a shutdown where insufficient annual leave has been accrued.

CFMMEU – Construction and General Division

[39] The CFMMEU (C&G) accepts that the purpose of the shutdown provision in the annual leave clause is to enable employers to direct employees to take accrued annual leave. It also accepts that the Commission has no power to include a provision in an award by which an employer may require an employee to take leave without pay. However, it submits that it has a concern that replacing the existing provisions with the proposed model term may have unintended consequences for employees in the building and construction industry where the Christmas/New Year closedown is the norm. It is submitted that it is extremely doubtful that employers will pay employees for the days they do not work and are not on paid annual leave, and it is more likely that the employment of such employees will be terminated and/or future employees will be engaged only on a casual basis. Accordingly, the CFMMEU (C&G) submits that the insertion of a new clause which allows employees to take a period of unpaid leave in conjunction with a period of paid annual leave would be a better way of mitigating the impact on employees (particularly in the building and construction industry). It proposes the following:

"**XX.X Employee request to take unpaid leave in conjunction with annual leave**

(a) An employee may request to take a period of unpaid leave in conjunction with a period of paid annual leave (including annual leave in advance).

(b) Where an employer agrees to an employee's request to take a period of unpaid leave such agreement must:

(i) state the amount of unpaid leave to be taken and the date on which the leave is to commence; and

(ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

(c) The employer must keep a copy of any agreement under clause XX.X(b)(ii) as an employee record."

[40] The CFMMEU (C&G) otherwise supports the clause proposed for the *Building and Construction General On-site Award 2020* (Building Award) set out in paragraph [158] of the *August 2022 decision*. As to the draft determinations for the *Joinery and Building Trades Award 2020* (Joinery Award) and the *Mobile Crane Hiring Award 2020* (Mobile Crane Award), the CFMMEU (C&G) submits that the above variation should also be made. In addition, it submits that the words "*or any shorter period agreed between them and the employer*" in clause 27.9(b) of the draft determination for the Joinery Award and clause 24.6(b) of the draft determination for the Mobile Crane Award should be deleted as this wording is not in the current award.

CFMMEU – Manufacturing Division

[41] The CFMMEU (Manufacturing) observe that the opening paragraph of current clause 34.7 of the Manufacturing Award provides as follows:

"Notwithstanding section 88 of the Act and clause 34.9, an employer may close down an enterprise or part of it for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned, provided that:"

[42] It submits that it is unclear why the words "*or part concerned*" has been omitted from the draft determination and submitted that they should be retained. It also submits that the inclusion of the words "*or any shorter period agreed between them and the employer*" in clause 34.7(b) of the draft determination is not reflective of the current provision, and is not appropriate or necessary to achieve the intention of the plain language redrafting exercise or more fundamentally, the modern awards objective.

[43] The CFMMEU (Manufacturing) also submits that current clauses 34.7 (e), (f), (g) and (h) of the Manufacturing Award, which deal with the number and length of closedowns, form an important safety net for employees and have existed in the manufacturing industry for decades. It submits that these provisions are essentially about annual leave and the taking of annual leave consistent with s 139(1)(h) rather than "a purported regulation of 'shutdowns'." It accordingly opposes the provisional view in paragraph [155] of the *August 2022 decision* and reflected in the draft determination.

[44] In relation to the *Textile, Clothing, Footwear and Associated Industries Award 2020* (Textile Award), the CFMMEU (Manufacturing) notes that clause 32.6(b) of the draft determination, which deals with the provision of 3 months' notice of temporary shutdown, introduces the wording "*or any shorter period agreed between them and the employer*". It submits this is not reflective of the existing provision and is neither appropriate nor necessary for inclusion given the nature and characteristics of the industry. It also submits that the reference to "*clause 33.6*" at clause 32.6(i) of the draft determination is an error and should instead refer to "*clause 32.6*". In respect of the *Timber Industry Award 2020* (Timber Award), the CFMMEU (Manufacturing) also opposes, for the same reasons as with the Manufacturing

Award and the Textile Award, the inclusion of the words "or any shorter period agreed between them and the employer" in clause 28.10(b) of the draft determination.

Housing Industry Association

[45] The HIA states that it has an interest in the following awards:

- Building Award;
- Joinery Award*;*
- Manufacturing Award*;*
- Timber Award.

[46] The HIA opposes the insertion of the proposed model term into the above awards it has an interest in and submits that the model term is at odds with the modern awards objective. It relies on the evidence of the joint survey as demonstrating that annual shutdowns are widely adopted and accepted, including employers directing employees to take unpaid leave. The exclusion of the ability to direct employees to take unpaid leave, where they do not have sufficient annual leave prior to a shutdown, would jeopardise well accepted and long-standing industry practice and adversely impact productivity, employment costs and impose an additional regulatory burden. It submits that final quarter is generally the busiest time for businesses and results in a higher level of recruitment, particularly the commencement of school-leavers as apprentices, and notes that employees recruited in the final quarter do not have sufficient annual leave to cover the shutdown period, with it being accepted practice for employers to direct employees to take unpaid leave.

[47] The HIA argues that if employers are instead required to provide leave in advance, they will encounter issues in relation to recovering entitlements due to staff retention issues. In support of this, the HIA submit that apprentices often resign within the first 3 to 6 months and that employees often either do not return to work after a shutdown or resign shortly afterwards, making it difficult for the employer to recover the cost of annual leave in advance. It relies on the witness statement of Mr Holtham to demonstrate these contentions. It submits that, in order to resolve these issues, employers will either have to bear the cost of paying leave in advance with the risk that employees will resign, not recruit into the final quarter of each year or increase the cost of their business services to cover the cost of providing leave entitlements.

[48] The HIA submits that businesses could face increased employment costs where employees who have not accrued sufficient annual leave refuse to take annual leave in advance during a period of shutdown, and also queries whether it would be considered "*reasonable*" pursuant to s 88(2) of the FW Act for an employer to refuse an employee's annual leave request during the year to ensure the employee had a sufficient annual leave balance to cover a shutdown period.

Motor Trades Organisations

[49] The MTOs likewise oppose the adoption of the proposed model term and submit that the Commission should maintain the current unpaid leave close down terms contained in clause 29.6(a) of the *Vehicle Repair, Services and Retail Award 2020* (Vehicle Award). In the alternative, the MTO submits that the proposed model term should be amended in relation to the Vehicle Award to maintain the effect of the current unpaid leave close down terms. For reasons the same as those advanced by the other employer groups, the MTOs maintain that the Commission has power under s 139(1) to insert a term into modern awards to provide that an employee will take unpaid leave where they do not have sufficient accrued annual leave to cover a shutdown period, as is currently provided for under clause 29.6(a) of the Vehicle Award. The MTO further submits that the Commission is empowered under s 139 to insert a term into a modern award entitling an employer to direct an employee to take unpaid leave during a shutdown period. In the event that the Commission decides to insert the proposed model term into the Vehicle Award, the MTOs submits that the effective date of such decision be deferred until after the upcoming Christmas - New Year 2022/2023 close down period to enable employers and employees sufficient time to understand the impact of the changes, and to take steps to minimise the adverse impact that will otherwise occur.

National Electrical and Communications Association

[50] The NECA submits that the proposed changes to shutdown provisions means that where employees do not have accrued leave the flexibility for employers to allow shutdown of their sites becomes limited or comes at significant cost, and that mitigation of this will detrimentally impact current employees, prospective employees and employers alike. It submits that many sites and workplaces in the electrotechnology sector include large numbers of subcontractors from various companies and that the ability for all trades to shut down together should not be impacted in the manner proposed by the proposed model provision. Further, many small contractors require all employees to take similar leave to ensure a safe and functioning workplace. The NECA submits that the Commission has power to make an award term by which employees may be directed to take unpaid leave, as this constitutes leave for the purposes of s 139(1)(h). Alternatively, such a provision is empowered under s 139(1)(c). If there is no such power under the FW Act, the NECA submits that the Commission should include in the model term the ability for employers to direct employees to take annual leave in advance where they do not have sufficient annual leave.

AEU, IEUA and NTEU

[51] The AEU, IEUA and NTEU submit that the current limitation in the *Educational Services (Post-Secondary Education) Award 2020* (Post-Secondary Education Award) of up to 2 close-down periods each year is a limitation on the circumstances in which shutdowns occur and is an adaptable limitation, rather than a limitation in relation to the frequency and length of shutdowns. They submit that their understanding of the current award limitation of "*up to 2 close-down periods each year*" implicitly refers to the two opportunities per year for employers to, if they intended to close their operations, do so during the two breaks between the two teaching semesters commonly used by employers in the industry. They accordingly, submit that this limitation should be retained via an adaptation to the proposed model clause.

Community and Public Sector Union

[52] The CPSU does not oppose the proposed model term but submits that it should be modified to reflect existing provisions about the frequency and length of shutdowns. Like the AWU, it submits that the consideration in s 134(1)(g), namely the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia, supports the retention of existing modern award provisions that prescribe the frequency and length of shutdowns rather than reliance on a general reference to a "*temporary*" shutdown or for taking of annual leave to be "*reasonable*". It submits that parties may differ as to the meaning of "*temporary*" and "*reasonable*" and that the current award provisions are clear and simple to understand for all award users. The CPSU further submits that, in the event of a dispute about whether a shutdown is "*temporary*" and "*reasonable*", parties may be required to resolve the matter in court, with most award-covered workers not being financially positioned, or willing, to pursue such a dispute in court. The CPSU identifies three awards of interest to it that currently include prescriptive limits on frequency and length of shutdowns:

- *Telecommunications Services Award 2020;*
- *Contract Call Centres Award 2020;*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2020.*

United Workers' Union

[53] The UWU identifies the following modern awards as currently containing a limitation to the number of shutdowns that may occur in a calendar year or 12-month period, or limitations on the maximum length of a shutdown, or provisions that require a form of majority employee agreement:

- *Contract Call Centres Award 2020* (current clause 22.10 limits *shutdowns* to one or 2 periods, or more if a majority of employee agree);
- *Car Parking Award 2020* (current clause 24.6 provides that public holidays that fall within the period of close down will be paid as provided for in the Award and will not count as a day of annual leave or leave without pay);
- *Cleaning Services Award 2020* (current clause 21.4 provides that a close-down period may be for a maximum of 4 weeks, plus public holidays *and* that any public holidays that fall within the period will be paid as provided for in the Award and will not count as a day of annual leave or leave without pay);
- Post-Secondary Education Award (current clause 23.5 allows for up to 2 close down periods each year);
- *Fitness Industry Award 2020* (current clause 21.3 provides that no more than one shutdown can occur in a 12-month period and that public *holidays* that fall within a shutdown will be paid in accordance with the NES and will not count as a day of annual leave or leave without pay);

- *Food, Beverage and Tobacco Manufacturing Award 2020* (current clause 25.11 provides that an employer may only shutdown for one or 2 separate periods in a year, or 3 if a majority of employees agree, and in some circumstances the shutdown must be of at least 14 consecutive days);

- *Gardening and Landscaping Award 2020* (current clause 20.9 provides that public holidays that fall within a shutdown period be paid as provided for in the Award and will not count as a day of annual leave or leave without pay);

- *Higher Education Industry – General Staff – Award 2020* (current clause 24.4 provides for the stand-down of 'employees engaged in domestic work' on leave without pay during both semester/term breaks and the Christmas shutdown period);

- Manufacturing Award (current clause 34.7 allows for one or 2 close down periods, or 3 if a majority of employees agree and in some situations the shutdown *must* be a minimum of 14 days);

- *Pharmaceutical Industry Award 2020* (current clause 21.5 limits shutdowns to one period per year);

- *Poultry Processing Award 2020* (current clause 21.5 allows for one close down period per year unless otherwise agreed by a majority of employees);

- *Security Services Industry Award 2020* (current clause 21.4 provides that an employee is not taken to be on leave on any public holidays *that* falls during a shutdown and be paid as provided for by the Award);

- *Wine Industry Award 2020* (current clause 24.9 allows one or 2 shutdown periods and in some situations the shutdown must be a minimum of 14 *days*).

[54] The UWU expresses concern at the removal of the existing limitations and submits that it will create greater uncertainty and lead to increased disputes regarding the reasonableness of proposed shutdowns. The UWU notes that s 93(3) allows for an employee to be required to take annual leave where the requirement is "*reasonable*" and accepts that this section and the proposed model term, have the ability to curtail the misuse of shutdowns, but only on a case-by-case basis. It submits that the existing limitations to shutdown provisions in awards represent the historical operation of shutdowns within a particular industry, operate to restrain the circumstances in which an employer may shutdown and provide greater guidance about what may constitute a "*reasonable*" shutdown, and that the removal of these limitations will lead to uncertainty and increased disruption. The UWU submits that as a result the existing limitations should be retained in each of the modern awards it identified.

Communications, Electrical and Plumbing Union

[55] The CEPU objects to the removal of the current clause 21.5(c) from the draft determination for the *Electrical, Electronic and Communications Contracting Award 2020* (Electrical Award):

> "(c) Unpaid leave taken does not break service of an employee and is not an **excepted period** as per the NES."

[56] The CEPU acknowledges the majority's conclusion in relation to the election/requirement to take unpaid leave, however submits that the current clause 21.5(c) does not give an employee the right to take leave without pay in lieu of accrued annual leave entitlements, nor does it infer that an employee has a general entitlement to leave without pay under the NES or any award, or provide the employer with a right to require/direct an employee to take leave without pay. Rather, the CEPU submits that current clause 21.5(c) provides clarity and certainty that unpaid leave taken during shutdown will not break service, and that if the model clause is not amended then employees who take leave without pay by agreement during a shutdown or who bargain a shutdown clause in an enterprise agreement will be worse off.

[57] The CEPU also submits that current clause 21.5(e) of the Electrical Award should be inserted into the model term for the Electrical Award. Clause 21.5(e) provides:

> "(e) **Close-down** means a period of not less than 2 consecutive weeks and not more than 4 consecutive weeks, inclusive of public holidays."

[58] The CEPU submit that the word "*temporary*" in the proposed model term is open to interpretation and is therefore insufficient to ensure employees will not be worse off without the present limitations on the duration of shutdowns provided by clause 21.5(e) being retained.

Australian Hotels Association

[59] The AHA submit that there is an apparent typographical error in the draft determination for the Hospitality Award. The reference in proposed clause 30.4(i) to clause "21.5" should be amended to clause "30.4", so that it reads:

> "(i) Clauses 30.6 to 30.8 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause 30.4."

Master Plumbers' and Mechanical Services Association of Australia

[60] The MPMSAA, which is part of the ACCI Group, supports the submissions made by the ACCI Group. It also submits that clause 24.4(a)(i) of the draft determination for the *Plumbing and Fire Sprinklers Award 2020* (Plumbing Award) should be drafted such that it concludes immediately after the words "*particular period*". It takes issue only with the words "*whole of the annual leave due to all, or the majority of their employees qualified for such leave*" which, although they have been taken directly from the current award, are not clear and concise in their intent, purpose and operation. It does not oppose the adaptation of the model clause in clause 24.4(b) of the draft determination, given that it reflects the current notice requirements under the Award.

Postscript re submissions

[61] On 7 December 2022, Master Builders Australia (MBA) filed submissions over two weeks after the time permitted by our directions without having either sought or obtained an extension of time or permission to do so. The submissions were based on, and annexed, a survey which it had conducted.

Consideration

[62] It is apparent that there are two principal issues arising from the parties' submissions:

(1) The employer submissions generally take issue with the first *provisional* conclusion stated in paragraphs [149]-[151] of the *August 2022 decision*, insofar as it concerns a rejection of the proposition that an employer right to require an employee to take leave without pay during a shutdown period should be included in the model clause.

(2) The main issue raised by submissions made by various unions is that existing award provisions imposing limitations on the length and frequency of shutdowns should be retained by way of adaptations to the model clause, contrary to the fourth *provisional* conclusion stated in paragraph [155] of the *August 2022 decision*.

[63] There are also some award-specific issues which have been raised by particular parties. We will deal with these three categories of issues in turn.

Directed leave without pay

[64] We are not persuaded, for the reasons which follow, to depart from the first *provisional* conclusion stated in paragraphs [149]-[151] of the *August 2022 decision*. It is not necessary to repeat in detail the reasoning for that conclusion; it is sufficient to emphasise the following propositions:

(1) The FW Act does not include, in s 139 or elsewhere, a power for the Commission to include terms about the stand-down of employees in a modern award. In this respect, the FW Act altered the position which applied under the preceding *Workplace Relations Act* since 1996 whereby the stand-down of employees was one of the prescribed "allowable award matters" (initially under s 89A(2), subsequently s 513(1)(l)). Instead, the FW Act directly regulates the circumstances in which employers may stand down their employees in Pt 3-5 of the FW Act (specifically, s 524). Respect must therefore be given to the fact that the legislature has chosen to remove the stand-down of employees from the list of matters which may be the subject of award terms and, by s 524, to restrict the circumstances in which a stand-down may occur.

(2) "*Stand-down*" (or "*stand-off*") has a well-established meaning: it refers to a circumstance where an employer has no useful work for an employee to perform for a period, and therefore directs the employee not to attend the workplace and does not pay the employee for that period. There is no functional difference between a stand-down, so described, of an employee during a period when the

employer shuts down its business or part of it, and a direction to an employee to (notionally) take leave without pay during a shutdown. That stand-downs may also occur in a broader range of circumstances does not invalidate this proposition.

(3) As explained in the *August 2022 decision*, pre-modernisation shutdown clauses in awards variously used terms such as "*stand-down*", "*stand-off*" and "*leave without pay*" to describe the same circumstance whereby an employee without sufficient accrued annual leave to cover a shutdown period is directed not to attend work and is not paid. The fact that a number of modern awards (such as the Manufacturing Award) adopted the terminology of a direction to take leave without pay in lieu of the terminology of "*stand-down*" or "*stand-off*" used in the equivalent shutdown provisions in the predecessor awards (such as the *Metal, Engineering and Associated Industries Award 1998*) shows that the difference is merely one of labelling rather than substance. Additionally, a number of awards (such as the Meat Award, to which we will return) still use the terminology of "*stand-down*" or "*stand-off without pay*" and make no reference to a direction to take leave without pay at all. There is no suggestion that such provisions are of any different effect to those award provisions which allow an employee to be directed to take leave without pay during a shutdown.

(4) The provisions in question are therefore, in substance, provisions about the stand-down of employees during shutdowns. They are not provisions about leave, leave loadings or arrangements for taking leave such as to be authorised by s 139(1)(h) because they are not concerned with "*leave*" in the proper sense at all, and the mere use of the label "*unpaid leave*" does not make them about leave. "Leave" is not defined in the FW Act, but in accordance with its established industrial meaning it is a beneficial entitlement for an employee to be absent from work. Leave without pay is a recognised form of leave entitlement, and the NES provides for a number of unpaid leave entitlements: unpaid parental leave, unpaid special maternity leave, unpaid carer's leave, unpaid family and domestic violence leave and community service leave. These all have the character of entitlements that are beneficial to employees. An award term that is about an employee entitlement to take leave without pay would clearly be authorised under s 139(1)(h), as would a term about the taking of such leave pursuant to such an entitlement. However, the existing provisions which are sought to be retained by the ACCI Group, the Ai Group and other employer groups do not establish any entitlement to take leave without pay either generally or even in the context of a shutdown. The model clause proposed in the *February 2019 statement* would have created an entitlement for employees to take leave without pay during a shutdown, but this was opposed in subsequent submissions filed by Australian Business Industrial and the Ai Group and was, as a consequence, deleted from the modified model term proposed in the *August 2022 decision*.

(5) The shutdown clauses the subject of this part of the 4 yearly review are not concerned with shutdowns as such (which is not a matter included in s 139(1)), but rather are terms authorised by s 93(3) allowing for an employee to be required to take paid annual leave in particular circumstances. That is, their purpose is to describe a circumstance (namely during a shutdown) in which an employee may

be directed to take annual leave. It is not, for the purpose of s 142(1), incidental to a s 93(3) term or essential to make it operate in a practical way for an employer to be able to direct an employee (including an employee who may have no accrued annual leave entitlement at all and therefore could not be the subject of a requirement to take annual leave) to take leave without pay.

(6) Accordingly, the existing clauses which permit employees to be directed to take leave with pay, or to be stood-down or stood-off, during a shutdown, are beyond power. They are not authorised by s 93(3), s 139(1) or s 142.

(7) Even if the conclusion in (6) is incorrect, we would not retain such provisions, since we do not consider that they are necessary for the provision of a fair and relevant minimum safety net of terms and conditions. It would not be fair for an employer to be able to direct an employee take leave without pay during a shutdown, unconstrained by any requirements as to reasonableness, prior consultation or (in most cases) the duration of the shutdown, in circumstances where the employee themself has no entitlement to take, or even request, leave without pay if they wish to do so.

[65] We do not intend to deal specifically with those submissions which simply seek to re-canvas the above propositions, the reasoning for which were set out in the *August 2022 decision*. However, it is necessary to deal with some new propositions advanced in the submissions concerning the issue of power. *First*, a number of the submissions contended that s 139(1)(c) provides the requisite head of power. We do not accept this. Section 139(1)(c) authorises award terms that are about "*arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours*." We do not think that a provision by which an employer may require an employee not to attend the workplace and not pay the employee for a period during which the employer's business, or a part of it, is shut down, may reasonably be characterised as concerned with arrangements for when work is performed. As we have previously found, terms allowing for employees to be directed to take unpaid leave during a shutdown are tantamount to standing employees down. The Ai Group submissions concede that such provisions resemble those arising in a stand-down. The circumstances in which an employer may stand down employees are dealt with in Chapter 3, Division 2 of the FW Act and there is nothing in those terms to suggest that any other provision of the FW Act provides a source of power for such terms to be included in a modern award.

[66] *Second*, the Ai Group submits that ss 93(3) and 94(5) and (6) illustrate a legislative intention to facilitate an employer's ability to implement annual shutdowns within reasonable bounds. That cannot be accepted, since the provisions make no reference to shutdowns and are plainly concerned with circumstances in which paid annual leave entitlements may be taken, including by employer direction. This submission rests entirely on the fact that the Explanatory Memorandum for the Fair Work Bill, in relation to s 93(3), gives as one of two examples of a reasonable requirement to take annual leave "*if the employer decides to shut down the workplace over the Christmas/New Year period*". No legitimate exercise in statutory construction can derive a legislative intention to facilitate shutdowns generally from this reference.

[67] *Third*, we reject the submission made by the Ai Group that s 73(2), under which an employee may in prescribed circumstances be required to take unpaid parental leave within 6 weeks before the birth of a child, negates the proposition that the concept of leave under the FW Act is one of a beneficial entitlement for employees to be absent from work. The critical distinguishing element is that the operation of s 73(2) is premised, in s 73(1), on the employee having an entitlement to unpaid parental leave – which is clearly a beneficial entitlement. Thus s 73(2) is, like ss 93(3) and 94(5), concerned with a requirement to take a period of leave to which the employee is entitled for a beneficial purpose.

[68] *Fourth*, the AMIC's submission that the existing shutdown provision in clause 25.8 of the Meat Award has the ancillary purpose of managing the leave arrangements of employees who have not accrued sufficient annual leave at the time of a shutdown, and that clause 25.8 creates an entitlement to leave without pay, is entirely unsupported by the text of the provision. Clause 25.8 contains no reference at all to leave without pay. Instead, clause 25.8 refers expressly to employees being given 3 months' notice of the "*employer's intention to stand down all employees in the plant or sections concerned*" (underlining added), with employees then being given annual leave to the extent that it has accrued. If employees covered by the Meat Award have been directed to take leave without pay for some or all of the period of a shutdown, this cannot have occurred pursuant to clause 25.8. More generally, we do not consider that any of the existing shutdown clauses which confer on the employer a right to direct employees to take leave without pay or treat them as being on leave without pay can be construed as conferring on the employee an entitlement to take leave without pay. None of the provisions provides or contemplates that an employee has a right to take such leave or even to request it, not even that the employee's consent is required.

[69] We do not accept that the removal of existing provisions permitting an employee to be directed to take leave with pay or stood down if they do not have sufficient accrued annual leave will *necessarily* have the legal effect or practical effect that an employee in this situation will have to be paid. As to the legal effect, this will depend upon the applicability of s 524, the terms of the employee's contract of employment, as well as any applicable enterprise agreement. In relation to s 524, there are likely to be many circumstances in which s 524(1)(c) applies; for example, in the building industry, if a head contractor closes down a building site over Christmas/New Year, that is likely to cause a stoppage of work for which a subcontractor employer cannot reasonably be held responsible and thus enable a stand-down under s 524.

[70] As to the practical effect, we make the following observations:

(1) On the working assumption that a shutdown period would in most cases be two weeks or less[28] (except for some industry sectors with special characteristics) and would typically occur during the Christmas/New Year period, any employee with 6 months or more of service is likely to have accrued sufficient annual leave to cover the shutdown period. Some employer submissions have expressed a concern about employees using up their annual leave entitlements during the course of the year prior to the shutdown occurring, but we consider that s 88 of the FW Act provides sufficient scope for employers to manage employee annual leave requests so that employees have sufficient accrued leave to cover a shutdown

[28] Note that the proposed model terms will not include provisions such as that in clause 34.7 of the Manufacturing Award.

period. In particular, where it is an established feature of an employer's business, or a relevant part of it, to shut down in the Christmas/New Year period, it would be unlikely that a refusal to agree to a leave request which would leave the employee with insufficient accrued leave to cover the shutdown period would be unreasonable within the meaning of s 88(2) unless there were some strong countervailing factors pertaining to the individual concerned.

(2) The fact that the asserted problem is largely confined to employees with only six months or less of service (or, in the case of a one-week shutdown, three months or less of service[29]) diminishes its significance. Even if s 524, the contract of employment, or any applicable enterprise agreement, does not address the issue of shutdown, any shortfall may be managed using a variety of means including use of accrued rostered days off and time off in lieu of overtime, or granting requests to take annual leave in advance. It will be unusual for an employee to have *no* accrued annual leave, so in most cases it will only be a question of covering a shortfall and not the entire period. Contrary to the AMIC's submission, employees who do not have sufficient leave accrued to cover the whole of a shutdown period will not be entitled to receive full pay for the whole period and not exhaust any part of their leave accruals, and such employees may be directed to take such leave as is accrued to cover part of the shutdown.

(3) Twenty-four of the total of 78 modern awards which contain a shutdown clause currently make no provision permitting an employer to direct employees to take leave without pay, or to stand them down, if they do not have sufficient accrued leave to cover a shutdown period. This includes major awards such as the Hospitality Award, the *Restaurant Industry Award 2020*, the *General Retail Industry Award 2020*, the *Registered and Licensed Clubs Award 2020* and the *Local Government Industry Award 2020*. There is no evidence that the lack of such provisions has caused any difficulty in the industry sectors covered by these awards. Further, there are a further 47 awards which contain no shutdown provision at all, but there is no reason to assume that shutdowns never occur in the areas of employment covered by these awards. In this connection, it may be noted that a number of employer groups (including the ACCI and the Ai Group) previously, and unsuccessfully,[30] applied for a model shutdown clause which included a capacity to require employees to take leave without pay to be included in a number of awards including 41 awards which contained no shutdown provision.

(4) The term we have proposed enables an employer to shut down all or part of its operation for a particular period. There is nothing to prevent an employer from identifying useful work that could be performed in a part of its operation by employees who do not have sufficient accrued annual leave to cover all or part of a shutdown, and who do not agree to take leave without pay, from performing such work, provided the work is within the terms of relevant modern award

[29] It may even be less than this. A narrow shutdown intended to encompass just the period from Christmas Day to New Year's Day will, on the 2022/23 calendar, only encompass 3 working days.

[30] [2015] FWCFB 3406.

provisions dealing with employer and employee duties. An example of such a provision is clause 29 of the Manufacturing Award which provides as follows:

29. Employer and employee duties

29.1 An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the classification structure of this award provided that such duties are not designed to promote de-skilling.

29.2 An employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment.

29.3 Any direction issued by an employer under clause 29 must be consistent with the employer's responsibilities to provide a safe and healthy working environment.

(5) All modern awards contain provisions for individual flexibility arrangements which allow for agreements to be reached with employees about matters including overtime or penalty rates. These provisions allow for the introduction of time off in lieu of overtime or other banking arrangements. Many modern awards contain provisions explicitly allowing for such arrangements. Banked time could be used to cover periods when a workplace is shut down and there is every likelihood that employees will wish to use banked time to cover such shutdowns given that they are often at times of the year when employees wish to spend time with their families and friends as noted in some of the survey responses tendered by the employer interests.

[71] It is also necessary to say something about the MBA's survey evidence, and submissions filed by MBA based on that survey evidence. The survey is of limited use because, at the outset, it does not distinguish between employers to which the Building Award or the Joinery Award applies and employers bound by an enterprise agreement. To the extent that the survey results refer to employees taking leave without pay during annual shutdowns if they had insufficient accrued leave, it is impossible to tell whether, or to what extent, this occurs pursuant to clause 31.3 of the Building Award or clause 27.9 of the Joinery Award or pursuant to an enterprise agreement. Of greater significance, however, is that the survey included the following questions:

"Q11 If the laws were changed and you could only shutdown if all your workers had sufficient paid leave entitlements to cover the Annual Shutdown period, what impact would this have on you, your workers and your business?

Q12 Do you have any other comments about the potential impacts on your workers, yourself or your business if you were no longer able to have an Annual Shutdown?"

[72] These questions are highly misleading, since there is nothing in the shutdown clauses proposed in the *August 2022 decision* for the Building Award and the Joinery Award that would

stop an employer having an annual shutdown, and indeed the clause is premised on such shutdowns continuing to occur. Understandably, these questions produced a range of alarmed responses such as "*Will be extremely disappointed as we no longer can enjoy the traditional practice of celebrating and spending time with family for an extended days off from work*", "*Workers would burn out as the Christmas period is some of the hottest conditions of the year*" and "*This would affect family time over the festive period, this break is essential for mental health*". On the basis of this, MBA advanced the submission that the proposed terms for the Building Award and the Joinery Award would be "*extremely detrimental to the financial and mental wellbeing of business owners and their workers across the entire [building and construction industry]*". That submission is rejected because it is founded on a fallacy of MBA's own invention. However, the MBA survey is not entirely inutile. Interestingly, in respect of employees with insufficient leave to cover shutdown periods, it shows that 45% of respondent employers had at least some capacity to "*gainfully employ*" such employees, and that 31% of employers said employees used accrued rostered days off during shutdowns and 15% said they used paid time off in lieu. As we have noted, these options remain open under the model clause we have proposed.

[73] It is convenient at this point to deal with the proposal advanced by the CFMMEU (C&G) and supported by the AWU for an additional provision by which an employee may request to take leave without pay in conjunction with annual leave during a shutdown. This proposal suffers from the defect which we identified in paragraph [149] of the *August 2022 decision* in respect of the capacity for the employee to elect to take leave without pay in the model clause proposed in the *February 2019 statement* – namely, that if an employee has the right to elect to take leave without pay in lieu of annual leave, it may defeat the purpose of an annual leave shutdown to have employees take annual leave and reduce their leave balances. This conclusion involved an acceptance of submissions advanced by ABI and the Ai Group. However, we see merit in a provision which allows an employer and an employee to agree that the employee take leave without pay during a shutdown once they have exhausted their annual leave balance, not only for the awards in which the CFMMEU (C&G) has an interest, but also for all the awards which will contain the model term. This provision would follow paragraph (f) of the proposed model clause set out in paragraph [156] of the *August 2022 decision* (with the following paragraphs being redesignated appropriately):

> **(g)** In respect of any part of a shutdown period which is not the subject of a direction under clause XX.XX(d), an employer and an employee may agree, in writing, for the employee to take leave without pay during that part of the shutdown period.

[74] We note that a written agreement may be recorded through means including an exchange of emails, text messages or by other electronic means.[31] The above provision is consistent with the concept of leave being a beneficial entitlement for employees to be absent from work. It is beneficial in that it allows the employee the capacity, if they wish, to take leave without pay during a shutdown in lieu of alternatives such as taking accrued rostered days off, time off in lieu of overtime or being required to perform work. The provision is thus about "*leave*" in the proper sense and is therefore authorised by s 139(1)(h).

[31] See *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 3571 at [14]-[18]

[75] Finally, we note the alternative proposal advanced by the ACCI Group, the Ai Group and other employer groups that the model clause should include, in respect of employees who have insufficient accrued leave to cover the period of a shutdown, a provision enabling the employer to direct the employee to take annual leave in advance. This new proposal has come very late in the day, is not directly responsive to the *provisional* views stated in the *August 2022 decision*, and its full consideration would require us to re-open the proceedings to give all parties an opportunity to respond to it. Further, we harbour some doubt as to whether there is power under s 93(3) of the FW Act to make an award term by which an employee may be required to take annual leave in advance and, if such power exists, we further doubt whether such a term could ever meet the reasonableness condition in s 93(3), although we make no definitive conclusion about these matters. The key difficulty is that identified in the submissions of the HIA and the evidence of Mr Holtham: the alternative proposal allows, and suggests no mechanism for resolving, situations whereby employees are in debit in their annual leave balance when their employment terminates. It is one thing for annual leave in advance to be taken by agreement between an employer and an employee, since they will be able to reach a consensus as to whether such a situation is likely to occur and, if it does, how it will be resolved. It is another thing entirely for such a situation to arise because of the unilateral decision of one party to the employment relationship. We further consider that the alternative proposal is fundamentally imbalanced and unfair because it does not allow for any corresponding circumstance in which the employee has a right to take annual leave in advance. Accordingly, we will not adopt the alternative proposal.

Limitations on the length and frequency of shutdowns

[76] We are not persuaded by the submissions of the AWU, the CFMMEU – Manufacturing Division, the AEU, IEUA and NTEU, the CPSU, the UWU or the CEPU to depart from the fourth *provisional* view stated in paragraph [155] of the *August 2022 decision.* Apart from the matters already canvassed in the *August 2022 decision*, we consider that the proposed retention of existing provisions concerning the length and frequency of shutdowns suffers from the following difficulties:

(1) Such provisions are historical in nature (being derived from pre-modernisation awards), and there is no evidence before us that their retention is either necessary or sufficient (whether in particular awards or generally) to meet the overriding requirement of reasonableness in s 93(3). For example, clause 34.7(g) of the Manufacturing Award which permits three shutdowns per year with one of them being at least for 14 days, provided there is agreement with the *majority* of employees. We could not be satisfied on the material before us that it would be reasonable for *all* affected employees to be directed to take annual leave during this number of shutdowns.

(2) The retention of the provisions referred to by the unions would involve an exercise in "cherry-picking", since not all provisions of the existing shutdown clauses are proposed to be retained.

(3) It is not clear to us whether all the existing limitations are even beneficial to employees. In particular, the unions' submissions do not explain, and it is not clear to us, why provisions such as clauses 34.7(f) and (g) of the Manufacturing Award

and clause 21.5(e) of the Electrical Award, which impose *minimum* periods for shutdowns, provide a general benefit for employees let alone whether they are suitable for employers.

(4) The retention of the existing prescriptions as to the frequency and duration of shutdowns would be destructive of the notion of establishing a model shutdown clause with substantial commonality across awards.

(5) Such limitations inhibit the flexibility for employers to shut down part or all of their operations and their removal will offset the difficulties asserted by employer interests related to changes to their practices related to our proposed model term.

Other matters

[77] In respect of the submissions made by the CFMMEU (C&G) and the CFMMEU - Manufacturing Division opposing the capacity in the proposed model term to have a shorter notice period for a shutdown than 28 days by agreement, we do not propose to remove this. It is a feature of the first model term proposed in the *February 2019 statement* and the proposed model term in the *August 2022 decision*, and we see no reason in principle why a collective agreement about a shorter notice period should be prohibited.

[78] In relation to the submission of the CFMMEU – Manufacturing Division referred to in paragraphs [41]-[42] above, the words "*or part concerned*" will be added to clause 34.7(a)(i) in the determination for the Manufacturing Award as proposed.

[79] We note the submission made by the CEPU (paragraphs [56]-[57] above) that clause 21.5(c) of the Electrical Award, which provides that unpaid leave does not break the service of an employee and is not "*an excepted period per the NES*", should be retained. We do not agree because:

(1) Section 22(3) of the FW Act makes it clear that unpaid leave does not break an employee's continuous service, so to this extent clause 21.5(c) is unnecessary.

(2) Section 22(1), (2) and (3) (which is not part of the NES) makes it equally clear that unpaid leave taken during a shutdown is an "*excluded period*" for the purpose of the section and thus does not count as service (see paragraph [137(1)] of the *August 2022 decision*. Thus, the reference to unpaid leave being "*an excepted period per the NES*", if we comprehend its intended meaning correctly, is inconsistent with the FW Act.

[80] We reject the submission made by the MPMSAA concerning proposed clause 24.4(a)(i) of the draft determination for the Plumbing Award. Consistent with the approach we have taken across all relevant awards, where the award currently states that the purpose of the shutdown must be to allow employees to take annual leave, this requirement has been retained (see paragraph [153] of the *August 2022 decision*). There is no reason to take a different approach for the Plumbing Award.

[81] The drafting errors identified in the submissions of the AHA and the CFMMEU – Manufacturing Division (paragraph [44] above) will be corrected.

Conclusion

[82] We have determined that the following model clause will replace the existing shutdown clauses in the 78 awards the subject of this proceeding, subject to the adaptations in individual awards contemplated in paragraphs [153]-[154] and [158]-[159] of the *August 2022 decision* and incorporated in the draft determinations:

XX.XX Direction to take annual leave during shutdown

(a) Clause XX.XX applies if an employer:

(i) intends to shut down all or part of its operation for a particular period (temporary shutdown period); and

(ii) wishes to require affected employees to take paid annual leave during that period.

(b) The employer must give the affected employees 28 days' written notice of a temporary shutdown period, or any shorter period agreed between the employer and the majority of relevant employees.

(c) The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under clause XX.XX(b) and who will be affected by that period as soon as reasonably practicable after the employee is engaged.

(d) The employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement during a temporary shutdown period.

(e) A direction by the employer under clause XX.XX(d):

(i) must be in writing; and

(ii) must be reasonable.

(f) The employee must take paid annual leave in accordance with a direction under clause XX.XX(d).

(g) In respect of any part of a temporary shutdown period which is not the subject of a direction under clause XX.XX(d), an employer and an employee may agree, in writing, for the employee to take leave without pay during that part of the temporary shutdown period.

(h) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause XX.XX.

(i) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause XX.XX, to which an entitlement has not been accrued, is to be taken into account.

(j) Clauses XX.XX to XX.XX do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause XX.XX

[83] We consider, for the reasons stated above and in the *August 2022 decision* that such variations to the 78 awards in question are necessary to meet the modern awards objective in s 134(1) (as varied by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022*). In reaching this conclusion, we have taken into account the matters specified in s 134(1) in the following way (using the paragraph designations in the subsection):

(a) The variations will not affect relative living standards or the needs of the low paid. This is a neutral consideration.

(aa) In respect of those awards which currently provide, or purport to provide, for a power for employers to direct employees to take leave without pay during a shutdown or to stand them down, the removal of such provisions may be characterised as improving access to secure work to a minor degree, and this weighs in favour of the variations to the same degree. In awards which do not currently contain such provisions, this is a neutral consideration.

(ab) The variations have no implications for gender equality, so this is a neutral consideration.

(b) It is possible that the variations may encourage parties to engage in collective bargaining to establish shutdown provisions that address more directly the circumstances of the enterprise, so this weighs in favour of the variations to a minor degree.

(c) It cannot positively be said that the variations will promote social inclusion through increased workforce participation, so this weighs against the variations to a minor degree.

(d) Insofar as the variations remove current prescriptions concerning the frequency and length of shutdowns and replace this with an overriding requirement that any direction to take annual leave during a shutdown must be reasonable, this may to a minor degree promote flexible modern work practices with respect to shutdowns and, accordingly, this weighs in favour of the variations to the same degree.

(da) This is not a relevant consideration.

(f) In respect of those awards which currently provide, or purport to provide, for a power for employers to direct employees to take leave without pay during a shutdown or to stand them down, the removal of such terms may conceivably increase employment costs although, for the reasons stated in paragraph [69] above, this is unlikely to be significant having regard to the capacity of employees to elect to take leave without pay or seek to take annual leave in advance and other modern award provisions which will mitigate the impact of the removal of such terms. Further, if we are correct in concluding that such terms may not under the FW Act be included in modern awards, then we do not consider that the removal of such terms can properly be viewed as relevant to the issue of any impact on productivity, employment costs or the regulatory burden. To the extent that we have simplified and standardised the shutdown provisions in awards and removed existing levels of prescription, the variations are likely to reduce the regulatory burden on employers. Overall, we consider that the consideration in paragraph (f) is neutral.

(g) The establishment of model, plain language shutdown provisions which are largely common across awards will assist in ensuring that the modern award system is at least simple, easy to understand, stable and sustainable. This weighs in favour of the variations.

(h) The variations will not have any discernible impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. This is a neutral consideration.

[84] Determinations varying the 78 awards to give effect to this decision will be published in due course. Having regard to the submissions of the Ai Group concerning operative date (paragraph [29] above), the variations will take effect on 1 May 2023.

DECISION OF COMMISSIONER HUNT

[85] I have had the benefit of reading the decision of Acting President Hatcher and Deputy President Asbury (the Majority Decision). I am not in agreement to adopt the model clause at [82] of the Majority Decision.

[86] For the reasons earlier stated by me in my dissenting decision of the Full Bench decision on 25 August 2022, I am satisfied that s 139(1)(h) of the FW Act provides a power for the Commission to insert terms allowing for employees to be directed to take unpaid leave during a period of a shutdown. I agree with the submissions made by many of the parties asserting that such a power exists.

[87] I am of the view that the Majority Decision has misconstrued at [69] the difference between what is typically an annual shutdown of work by an employer which is planned and communicated, and that of a stand down at s 524(1)(c) of the FW Act. It appears to me that it is suggested that if a head contractor effectively locks up the premises, sub-contracting employers below *may* be able to effect a stand down of their employees pursuant to s 524(1)(c), without requiring any payment to employees at all during the period. Other employees in the building industry, for example, who cannot perform work due to supplier's closures will be

required to pay to employees annual leave for the shutdown period, and then wages beyond any period for which an employee does not have an annual leave accrual.

[88] I consider that there is a stark difference between that of an organised and communicated shutdown and that of a stand down as provided for in s 524 of the FW Act. I do not accept that the terms are identified in reality by industrial parties as interchangeable. Shutdowns occur because the employer wants them to, for various sound reasons. They are planned. Stand downs are typically borne from an urgent set of circumstances beyond the employer's control.

[89] The likely effect of the Majority Decision is that some employees of those employers who know they will be having an annual shutdown will be denied annual leave when requested throughout the year. This will increase disputation between employers and employees. Whilst I am pleased to see within the Majority Decision the insertion of the new subclause XX.XX (g), which will permit employees to seek to take leave without pay for any period beyond which they have accrued annual leave, it is expected this will only be taken up by employees if they were, for example, wanting to seek say, three weeks' leave the following year and hoping the employer would not deny such a request. There would be no cogent reason for an employee to request leave without pay if they knew the employer had to pay them wages in any event. The request for leave without pay would be made, it seems to me, by employees hoping to take substantial periods of leave throughout the year which might now otherwise be denied.

[90] I would insert the model clause proposed by me in the 25 August 2022 decision at [223].

[91] Regarding the Majority Decision's determination at [84] that the operative date of the model clauses will be 1 May 2023, it appears to me that if the majority has determined that there is no power within the FW Act to permit an employer to direct or require an employee to take unpaid leave, the operative date of such a decision should be from when the decision is issued.

ACTING PRESIDENT

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