

**4 yearly review of modern awards – plain language – shutdown provisions
(AM2016/15)**

**On behalf of the
AUSTRALIAN EDUCATION UNION
INDEPENDENT EDUCATION UNION OF AUSTRALIA
NATIONAL TERTIARY EDUCATION INDUSTRY UNION
(Filed pursuant to the directions made on 25 August 2022)**

1. These submissions are made on behalf of the Australian Education Union (“**AEU**”), the Independent Education Union of Australia (“**IEUA**”), and the National Tertiary Education Industry Union (“**NTEU**”) in response to the direction at paragraph [161] of the 25 August 2022 Decision (“**Decision**”) that interested parties file submissions in response to the provisional views and conclusions stated in paragraphs [149]-[160] of the Decision and concerning the terms of the subsequently published draft determinations.
2. These submissions are confined to responding to the Fair Work Commission’s (“**FWC**”) provisional views and conclusions at paragraphs [153] and [155] of the Decision and concerning the terms of the 19 September 2022 draft determination (“**Draft Determination**”) to vary the *Educational Services (Post-Secondary Education) Award 2020* (“**ES(PSE) Award**”).
3. The AEU, IEUA and NTEU submit that the model shutdown clause should be adaptable to take into account existing ES(PSE) Award limitations on directions to take annual leave during shutdowns.
4. To that end the AEU, IEUA and NTEU propose a variation to the Draft Determination (attached as **Annexure A**) that would have the effect of retaining the existing ES(PSE) Award limitations on directions to take annual leave during shutdowns.

Interested parties

5. The AEU, IEUA and NTEU submit that we are interested parties in this matter, all being unions with coverage of employees employed in the post-secondary educational services industry, the industry covered by the ES(PSE) Award,¹ an award affected by this review.

¹ CI 4.2 ES(PSE) Award.

FWC provisional views and conclusions

6. At paragraph [147] of the Decision, the FWC identifies that its preferred approach to finalising the shutdown provisions in the awards identified by the Plain Language Full Bench in a Statement on 28 February 2019 is to “develop a model term and then adapt it to the circumstances of each award.”
7. At paragraph [153] and [155] of the Decision, the FWC distinguishes between categories of existing award shutdown provisions which will and will not be preserved by adaptation of the model clauses to individual awards:
 - a. Paragraph [153] of the Decision provides that “the model clause will 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, as identified in [148](1) above. We emphasise that this is for the purpose of retaining existing limitations in particular industries and occupations concerning the circumstances in which employees may be directed to take annual leave; it is not intended to constitute regulation of when employers may choose to temporarily shut down their businesses.”
 - b. Paragraph [155] of the Decision provides that “the model clause will not be adaptable to take into account the differing prescriptions identified in [148](2) above, since these amount in substance to the regulation of shutdowns. The requirements that the shutdown must be “temporary” and that any direction to take annual leave must be reasonable will ensure that the model clause cannot be abused in respect of the frequency or length of shutdowns.”
8. The distinction at paragraphs [153] and [155] of the Decision turn on a distinction between the appropriateness of retaining existing limitations on the “circumstances in which shutdowns occur” (at [153]) and the inappropriateness of retaining limitations which would “constitute regulation of when employers may choose to temporarily shut down their businesses” (at [153]) or would “amount in substance to the regulation of shutdowns” (at [155]).
 - a. Examples of existing limitations on the “circumstances in which shutdowns occur” are given at paragraph [148](1) of the Decision, and include shutdowns in conjunction with holidays, maintenance and installation of machinery, and to allow annual leave to be taken, and which are collectively described as limitations on the “circumstances in which shutdowns occur”.

- b. Examples of existing limitations that would “constitute regulation of when employers may choose to temporarily shut down their businesses” are given at paragraph [148](2) of the Decision, and include limitations on the number of shutdowns per year, prescriptions on the minimum period for shutdowns, and limitations on the number of shutdowns per year unless agreed with by a majority of employees, and which are collectively described as limitations on the “frequency and length of shutdowns”.

ES(PSE) Award shutdown provisions and Draft Determination

9. Currently, the shutdown provisions in the ES(PSE) Award provide at cl 23.5:

23.5 Annual close-down

(a) An employer may specify up to 2 close-down periods each year, during which the employer will be closing down its operations.

(b) For these periods an employer may require an employee to take annual leave subject to the requirement that the employee is given notice as soon as practicable of the employer’s intention to close down.

10. The Draft Determination to vary the ES(PSE) Award would have the effect of removing the current cl 23.5(a) limitation on shutdowns to “up to 2 close-down periods each year”.
11. The Draft Determination’s removal of the current limitation on shutdowns to “up to 2 close-down periods each year” appears to flow from the FWC’s views that it is inappropriate to retain limitations on the “frequency and length of shutdowns” (at [148](2) of the Decision) as these would “constitute regulation of when employers may choose to temporarily shut down their businesses” (at [153]) or would “amount in substance to the regulation of shutdowns” (at [155]).

Why the ES(PSE) Award limitations should be retained

12. The AEU, IEUA and NTEU all understand the meaning of the current limitation on shutdowns to “up to 2 close-down periods each year” at cl 23.5(a) of the ES(PSE) Award to be in reference to the prevailing two semesters per year-based work patterns of the post-secondary education industry. Although not stated explicitly in cl 23.5(a) of the ES(PSE) Award, the AEU, IEUA and NTEU’s understanding is that the “2 close-down periods each year” implicitly refer 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.

13. The AEU, IEUA and NTEU have not had the opportunity to consult with post-secondary education industry employer representatives regarding their understanding of this provision. However, the AEU, IEUA and NTEU's understanding is that, despite this provision's long history in the ES(PSE) Award since it was first made in 2009,² the meaning of the limitation on shutdowns to "up to 2 close-down periods each year" has not been the subject of industrial disputes or litigation.
14. Considering the lack of disputation, the AEU, IEUA and NTEU submit that it is a view likely held in common among employer and employee representatives that the limitation is in reference to the two opportunities for employers to, if they intended to close their operations, do so during the two breaks between the two teaching semesters per year typically used by employers in the industry.
15. Accordingly, the current limitation on shutdowns to "up to 2 close-down periods each year" at cl 23.5(a) of the ES(PSE) Award may be better characterised as a "circumstance"-based limitation on shutdowns in reference to the two semesters per year-based work patterns of the post-secondary education industry.
16. Following the FWC's distinction between the categories of adaptable and non-adaptable limitations at [153] and [155] of the Decision, the limitation on shutdowns to "up to 2 close-down periods each year" at cl 23.5(a) of the ES(PSE) Award should be categorised as a limitation on the "circumstances in which shutdowns occur" (at [148](2)), and is an adaptable limitation per paragraph [153] of the Decision.
17. The limitation should be retained by way of a variation, tracked in red, to the terms of the Draft Determination in **Annexure A**.

Dated: 10 October 2022

Australian Education Union

Independent Education Union of Australia

National Tertiary Education Industry Union

² The limitation exists in substantially the same form at cl 25.5 of the *Educational Services (Post-Secondary Education) Award 2010* [PR991583], 16 December 2009, accessible [here](#).

ANNEXURE A

DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards – plain language – shutdown provisions (AM2016/15)

EDUCATIONAL SERVICES (POST-SECONDARY EDUCATION) AWARD 2010

[MA000075]

Educational services

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 2022

*4 yearly review of modern awards – plain language re-drafting – shutdown provisions –
Educational Services (Post-Secondary Education) Award 2020 – variation to clause 23.5.*

A. Further to the decision issued by the Full Bench on XX MONTH 2022 [[2022] FWCFB XXX], the above award is varied as follows:

1. By deleting clause 23.5 and inserting the following:

23.5 Direction to take annual leave during shutdown

(a) Clause 23.5 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 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 23.5(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 23.5(d):

(i) must be in writing; ~~and~~

(ii) must be reasonable; ~~and~~

(iii) must not be made for more than two periods each year.

(f) The employee must take paid annual leave in accordance with a direction under clause 23.5(d).

(g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 23.4.

(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 23.4, to which an entitlement has not been accrued, is to be taken into account.

(i) Clauses 23.7 to 23.9 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 23.5.