Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission
Plain language re-drafting (AM2016/15)

22 March 2019

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE-DRAFTING

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Statement issued by the Fair Work Commission (**Commission**) on 28 February 2019 (**the February Statement**).[1]

2. The February Statement sets out the current status of matters before the Plain Language Full Bench and invites submissions from interested parties on a range of matters. This submission addresses the following matters:

   - The Commission's *provisional view* that given its limited resources, the time constraints in relation to the finalisation of the 4 Yearly Review, and the substantive changes that have been made to the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Building and Construction General On-Site Award 2010*, these awards should not be re-drafted in plain language at this time.[2]

   - The Commission's proposal to amend the clauses dealing with on-hire employees and group training services to refer to the relevant industry instead of a clause reference.[3]

   - The award-specific National Training Wage Schedules in various awards.

[1] [2019] FWCFB 1255

[2] [2019] FWCFB 1255, [13]

[3] [2019] FWCFB 1255, [35]

- Proposed re-drafting of the annual leave loading clauses in awards that contain a reference to an employee being paid the higher of the annual leave loading or a shift "loading" or an "allowance".[4]

- Whether the modern awards that currently contain shutdown provisions should be varied to include the model term at Attachment D to the February Statement; what, if any, award specific variations should be made; and whether unpaid leave taken during a period of shutdown counts as 'service'.[5]

3. All references to clause numbers in this submission refer to the appropriate reference in the exposure draft in respect of each award.

2. PLAIN LANGUAGE RE-DRAFTING OF THE VEHICLE, MANUFACTURING AND BUILDING AWARDS

4. In the February 2019 Statement, the Full Bench stated:

> [13] During the Review, the *Vehicle Manufacturing, Repair, Services and Retail Award* and the *Manufacturing and Associated Industries and Occupations Award* have been substantially redrafted. Substantive changes have also been made to the *Building and Construction General On-site Award*. Given the limited resources of the Commission, the time constraints in relation to the finalisation of the review and the substantive changes that have been made to these awards it is our *provisional view* that these awards not be redrafted in plain language at this time.
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> [14] Schedule 1 to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth*) repealed the provision for 4 yearly reviews of modern awards in the *Fair Work Act 2009* (Cth), with effect from 1 January 2018. Consequently, there will not be any further 4 yearly reviews. However, the residual framework for exercising modem awards powers includes s.157 which allows the Commission may make, vary or revoke a modem award on its own motion. In 2020, consideration will be given to the further re-drafting of awards in plain language using the residual framework in the Act. The Vehicle, Manufacturing and Building Awards will be considered for inclusion in that process.
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> [15] Interested parties are invited to comment on the *provisional view* at [93]. Submissions should be filed by 4pm on Friday 22 March 2019. If there is no opposition to the provisional view we will not redraft these awards in plain language at this time.

[4] [2019] FWCFB 1255, [71]

[5] [2019] FWCFB 1255, [85]

5. We assume that the reference to [93] in paragraph [15] above was intended to be a reference to paragraph [13].

6. We do not object to the *provisional view* that the Vehicle, Manufacturing and Building Awards not be re-drafted in plain language at this time, nor that the Commission in 2020 consider whether these awards should be re-drafted in plain language at that time. However, we note that there is the potential for many of the issues of concern raised in the following joint submissions of Ai Group and other parties to still be relevant in 2020 and that it could still be inappropriate to commence a plain language re-drafting process for these awards at that time:

- Joint submission of Ai Group and the MTFU re. the Manufacturing Award
- Joint submission of Ai Group, the CFMEU, the AWU and the CEPU re. the Building On-site Award
- Joint submission of Ai Group, the Motor Traders Associations and the AMWU re. the Vehicle Award

3. MARKET AND SOCIAL RESEARCH AWARD & CROSS REFERENCES IN COVERAGE CLAUSES

7. With regard to the changes proposed at paragraphs [33] and [34] of the February Statement,[6] the clauses to be inserted into particular awards will need appropriate modification to take into account that:

- Some awards have occupational coverage, rather than industry coverage;
- Some awards have both industry and occupational coverage; and
- Many awards cover group apprentices as well as group trainees.

[6] [2019] FWCFB 1255

8. During Stage 4 of the 2008/09 Award Modernisation Process, Ai Group was heavily involved in the development of the coverage clauses for labour hire employees, group apprentices and group trainees. At the time it was evident to all parties and to the AIRC, that the same wording would not be appropriate for all awards because of the issues raised above.

9. It is important that interested parties be afforded an opportunity to review and comment on any draft determinations that are prepared in order to implement the proposals at paragraphs [33] and [34] of the February Statement, so that any award specific considerations can be identified.

4. THE AWARD-SPECIFIC NATIONAL TRAINING WAGE SCHEDULES IN VARIOUS AWARDS

10. At paragraph [56] of the February Statement, the Full Bench stated:

> [56] Parties with an interest in the Ground Staff Award, the Airport Employees Award, the Food Manufacturing Award, the Manufacturing Award and the Sugar Award were directed to hold discussions and report back at a second mention on 27 September 2018. The AMWU wrote to the Commission on 26 October 2018 to report that an in principle agreement had been reached with Ai Group and that draft schedules would be filed as soon as practicable. Nothing has been received to date and the parties are directed to file their draft schedules by 4 pm on Friday 22 March 2019.

11. Discussions have taken place between Ai Group and the AMWU regarding the content of the National Training Wage Schedules for the four awards referred to above and agreement has been reached on the content.

12. Ai Group understands that the AMWU intends to file the four draft Schedules reflecting the outcome of the discussions between the parties.

5. INTERACTION BETWEEN ANNUAL LEAVE LOADING CLAUSES AND PENALTY RATE PROVISIONS

13. In numerous submissions made throughout the course of the 4 Rearly Review, Ai Group has raised concerns regarding the interaction between annual leave loading clauses and terms that provide for shift and weekend rates, in the exposure drafts issued by the Commission. Annual leave loading clauses often

provide that when an employee takes a period of annual leave, an employer is obliged to pay either a 17.5% annual leave loading or applicable shift and/or weekend penalties, whichever is the higher. The exposure drafts have been amended, in many cases, to refer to various premiums as 'rates' as opposed to 'penalties' or 'allowances'. Penalty 'rates' are expressed as a percentage that incorporates the applicable minimum hourly rate whereas a penalty or allowance is ordinarily expressed as a percentage that excludes an applicable minimum hourly rate. In many cases, the terminology is used inconsistently.

14. In a submission to the plain language Full Bench dated 20 February 2018, Ai Group proposed amendments to clauses 34.3(c)(ii) and 34.3(d)(ii) of the exposure draft of the *Clerks (Private Sector) Award*.[7] Ai Group's proposed clauses which outline applicable comparators to the 17.5% annual leave loading are reproduced below:

> **(c)(ii)** Relevant weekend penalties specified in clause 23—Penalty rates (employees other than shiftworkers) for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work.
>
> **(d)(ii)** Relevant penalty rates for shiftwork (excluding public holiday penalty rates) as specified in clause 28—Penalty rates for shiftwork for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee's ordinary hours of work.'

15. Ai Group's proposed clauses are referred to at [173] of the Full Bench decision issued on 6 September 2018.[8]

[7] AM2016/15, Ai Group Submission (20 February 2018), [83], [89]

[8] [2018] FWCFB 5553, [173]

16. In the February Statement, the Commission proposed adopting the following subclauses that are referred to at [67] as a "suggestion of Ai Group (based on the Clerks PLED) (**the paragraph [67] clauses**):[9]

> '(c) For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:
>
> (i) 17.5% of the employee's minimum hourly rate for the employee's ordinary hours of work in the period; or
>
> (ii) The minimum hourly rate for the employee's ordinary hours of work in the period inclusive of weekend penalty rates as specified in clause 21— Penalty rates (employees other than shiftworkers). For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work.
>
> (d) For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:
>
> (i) 17.5% of the employee's minimum hourly rate for the employee's ordinary hours of work in the period; or
>
> (ii) The minimum hourly rate for the employee's ordinary hours of work in the period inclusive of shift and weekend penalty rates for shiftwork as specified in clause 28—Penalty rates for shiftwork. For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee's ordinary hours of work.

17. We respectfully observe that, as currently drafted, the clauses referred to in paragraph [67] do not accurately reflect Ai Group's proposal. Instead, it appears that only the underlined sections of Ai Group's proposed clauses have been added to the Clerks PLED. This partial adoption of our suggested changes has meant that the intended meaning of our proposal has been lost. Incorporation

[9] [2019] FWCFB 1255, [67]

of the clauses specified in paragraph [67] into any of the exposure drafts, including that of the *Clerks (Private Sector) Award,* would be inappropriate.

18. The clauses referred to at paragraph [67] of the February Statement provide for payment of either the 17.5% annual leave loading or "the minimum hourly rate for the employee's ordinary hours of work in the period inclusive of weekend penalty rates as specified in clause 21 – Penalty rates (employees other than shiftworkers)". Although each clause states that the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work, this does not solve the abovementioned problem of the clause comparing payment of the 'minimum hourly rate' in addition to the relevant penalty rates with payment of the 17.5% annual leave loading. The clause does not compare like with like.

19. In Ai Group's 20 February 2018 Submission, the issue was raised that clause 34.3(c)(ii) of the Clerks PLED required payment of "penalty rates as specified in clause 23", which prescribes weekend and public holiday penalty rates. Ai Group expressed concern that this resulted in a substantive deviation from the current clause 29.3(b)(i), which contemplates only weekend penalty rates. To resolve this issue, the Commission inserted the word "weekend" before the words "penalty rates" in clause 34.3(c)(ii) and the words "shift and weekend" before the words "penalty rates" in clause 34.3(d)(ii) as an interim measure. Ai Group does not oppose this amendment however we note that as Ai Group's original proposed clause 34.3(d)(ii) explicitly excluded the payment of public holiday penalty rates. If such an approach was adopted the further amendment would be unnecessary.

20. Ai Group supports amending, where appropriate, annual leave loading clauses in awards to achieve consistency in the terminology used to denote premiums payable during a period of annual leave. As such, Ai Group proposes the following clause be incorporated into the revised Clerks PLED:

32.3 Annual Leave Loading

...

(c) For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:

(i) 17.5% of the employee's minimum hourly rate for the employee's ordinary hours of work in the period; or

(ii) Relevant weekend penalties specified in clause 21—Penalty rates (employees other than shiftworkers) (excluding public holiday penalty rates) for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work.

(d) For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:

(i) 17.5% of the employee's minimum hourly rate for the employee's ordinary hours of work in the period; or

(ii) Relevant penalty rates for shiftwork (excluding public holiday penalty rates) as specified in clause 28—Penalty rates for shiftwork for the employee's ordinary hours of work in the period. For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee's ordinary hours of work.'

21. The abovementioned clause (**the revised leave loading clause**) has been amended to clarify that the penalties payable pursuant to clause 32(c)(ii) do not include public holiday penalties.

22. In relation to the wording of annual leave loading provisions more broadly, we note that there are is currently a level of diversity in the manner in which awards regulate payment for annual leave and annual leave loading more specifically. Consequently, simply inserting the revised annual leave loading clause inserted into all awards identified at Attachment B, without tailoring to reflect award specific provisions, is not appropriate.

23. Ai Group has reviewed the annual leave loading provisions within the majority of the awards listed in Attachment B to the February Statement and considers that most require amendment to address issues arising from inconsistent terminology used to refer to premiums referenced in their respective annual leave loading provisions. However, owing to the diverse arrangements that awards provide for with respect to annual leave loading, each award will need to be considered individually in order to determine the appropriate amendments. It has not been possible for us to develop and propose such amendments within the timeframes available.

24. It may be ueful for draft determinations to be prepared by the Commission for each of the awards listed in Attachment B and for parties to review and comment on the proposed changes. To ensure consistency with any future approach that may be adopted by the Commission in relation to the terminology to be used to describe various rates, penalties and allowances, as referred to in paragraph [63] of the February Statement[10], it may be that this opportunity could also be afforded to parties in the context of the light touch plain English redrafting process. Alternatively, it may be that the leave loading issue is best dealt with after the Commission settles upon the broader approach to be taken in relation to the terminology that will be used in respect of rates, penalties and allowances.

6. INCORPORATION OF THE MODEL SHUTDOWN PROVISION

25. The genesis of this matter lies in the review of annual leave provisions in modern awards. By decisions of the Commission in June 2015 and September 2015, model clauses were determined governing 'excessive leave' and 'granting of leave in advance'.[11] In the course of those proceedings, Ai Group made submissions, along with a number of other employer parties, proposing the insertion of a new clause into a number of modern awards relating to annual leave where an employer closes down all or a part of its business.

[10] [2019] FWCFB 1255

[11] [2015] FWCFB 5771; [2015] FWCFB 3406

26. In a Decision issued on 11 June 2015, the Commission determined that the employer proponents of the claim for a model shutdown clause had failed to establish a merit case sufficient to warrant the granting of the claim.[12] The Commission left open the capacity for interested parties to seek a variation to a modern award to either vary an existing close-down provision or to insert an appropriate provision on an individual basis.

27. On 22 September 2016, the Full Bench issued a decision finalising various outstanding matters in relation to the variation of annual leave terms in modern awards.[13] These outstanding issues included whether the excessive leave model term should be included in modern awards and whether particular existing terms that provided for the taking of annual leave should be retained. Among the modern awards considered was the *Black Coal Mining Industry Award 2010 (**Black Coal Award**)*.

28. Subclause 25.4(c) (as it then was), of the *Black Coal Award*, provided that that the employer 'may direct an employee to take all or part' of their annual leave entitlement on the giving of 28 days' notice in writing. The Commission found that the broad right of an employer to direct the taking of annual leave under clause 25.4(c) of the *Black Coal Mining Industry Award 2010*, without other considerations or requirements, was not consistent with s.93(3) of the *Fair Work Act 2009* (**FW Act**).[14]

29. Section 93(3) of the FW Act provides:

> A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

30. The Commission decided to delete clause 25.4(c) and insert a model excessive leave term.[15]

[12] [2015] FWCFB 3406

[13] [2016] FWCFB 6836

[14] [2016] FWCFB 6836, [76]

[15] [2016] FWCFB 6836, [22]

31. Owing to uncertainty regarding the operation of clause 25.10 (Shutdowns), brought about as a result of the deletion of clause 25.4(c) of the *Black Coal Award*, the Coal Mining Industry Employer Group (**CMIEG**) proposed a revised shutdown clause for insertion into that award. The Commission considered the submissions advanced by CMIEG but concluded that the imposition of some limitations upon the scope of the shutdown provision would be appropriate. Drawing a crucial distinction between general provisions that permit an employer to direct an employee to take a period of annual leave and shutdown provisions, the Commission said:[16]

> ...a general provision that permits the employers under the Black Coal Award to direct that annual leave be taken on notice, without other considerations and requirements, is not consistent with the scheme of the FW Act and with s.93(3) in particular. However, a term permitting different arrangements for annual leave during a period of shutdown or close-down may be consistent with statutory framework, depending on the terms of such a provision.

32. The Commission expressed the provisional view that there are two means by which a shutdown term may be framed to ensure compliance with s.93(3) of the FW Act. The term may include a range of procedural and substantive safeguards or it may require that any direction to take annual leave be reasonable. [17] The Commission acknowledged that the provisional view expressed in relation to the interaction between s.93(3) and shutdown provisions would be likely to have implications for existing provisions in the 81 other modern awards that contain such a provision.[18]

33. On 9 November 2017, the Commission referred the shutdown provisions in modern awards to the Plain Language Full Bench to determine the final form of a shutdown clause to be inserted into those modern awards that currently contain such a provision.[19]

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[16] [2017] FWCFB 959, [29]

[17] Ibid, [38]

[18] Ibid, [39]

[19] [2017] FWC 5861

34. In Attachment C to the February Statement, the Commission has listed the 80 modern awards containing shutdown provisions. Parties have been requested to make submissions on:

- Whether the modern awards that currently contain shutdown provisions should be varied to include the model term at Attachment D to the February Statement;
- Any award specific variations that should be made; and
- Whether unpaid leave taken during a shutdown period counts as service.

35. The model term at Attachment D to the February Statement (**Model Shutdown Term**) is in similar terms to the revised shutdown provision inserted in the *Black Coal Mining Industry Award 2010* by the Commission on 9 November 2017:[20]

(a) Clause XX.XX applies if an employer intends to shutdown all or part of its operation for a particular period (temporary shutdown period) and wishes to require affected employees to take 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 paragraph (b) and who will be affected by that period, as soon as reasonable practicable after the employee is engaged.

(d) The following applies to any affected employee during a temporary shutdown period:

(i) the employee may elect to cover the temporary shutdown period by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;

[20] [2017] FWCFB 5394 at [76]; PR597595

- taking annual leave in advance in accordance with an agreement under clause XX.XX;

(ii) if the employee does not make an election under subparagraph (i) that covers the whole of the temporary shutdown period, then 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)(ii):

(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)(ii).

(g) 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.

(h) If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause XX.XX, the employee is taken not to be on leave on that day or part-day.

(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.'

36. Ai Group has an interest in a significant number of the modern awards listed at Attachment C to the February Statement. Noting that there are numerous ways in which a specific shutdown provision may meet the requirements of s.93(3) of the FW Act, Ai Group acknowledges that achieving greater uniformity in the provisions governing directions to take leave under circumstances where an employer decides to temporarily shut down all or part of its business is desirable to the extent that is consistent with the imperative to ensure that the system is simple and easy to understand. However, such consistency should not pursued at any cost.

37. A consideration of whether existing shut down provisions should be replaced by the model term (or any an amended version of the model term) must take into account the potential impact that this may have upon employers covered

by such existing provisions given that many have undoubtedly structured their practices relating to conduct of shutdowns, management of annual leave entitlements, as well as the structure of their current workforces around the current capacity to direct employees to take leave at a uniform time. Moreover, in many instances the current shutdown provisions reflect the specific circumstances and needs of particular industries.

38. Having regard to the abovementioned matters, it is readily apparent that any unnecessary curtailing of current employer rights to direct employees to take leave in the context of a shutdown may have significant and unwarranted adverse consequences for employers including, in particular, significant disruption to their operations and workforces. We develop these points in the sections that follow. Suffice to say that, given this context, the Full Bench should not lightly accept that any restriction upon an employer's existing award derived right to manage the taking of leave in the context of a shutdown is necessary, in the sense contemplated by s.138 (except to the extent mandated by s.93(3)).

39. Ultimately, Ai Group contends that it would be inappropriate to adopt the uniform approach of replacing existing shutdown provisions with the Model Shutdown Term, in its current form. Our concern in this regard can be distilled down to three broad issues:

- In the context of many awards, the model clause would reduce or remove an employer's capacity to manage and coordinate the taking of paid annual leave by directing that employees take such leave during a shut down, even in circumstances where such a direction is reasonable.

- The proposed clause's omission of a right to direct employees to take unpaid leave if they have insufficient accrued entitlements to paid annual leave would undermine the capacity of many employers to implement a shut down or at the very least would undermine the utility of implementing a shut down.

- There are unwarranted practical and administrative difficulties or burdens that would flow from the particular process that has been developed in relation to the implementation of a shut down.

40. In advancing these submissions we do not preclude the possibility that greater uniformity between current shutdown provisions can and arguably should be achieved. Nor do we overlook that there may a range of benefits from the implementation of elements of the model term (having regard to the interests of employers, employees and the necessary considerations arising from s.134) or that there is arguably a need to update some aspects of some of the current provisions to reflect the current legislative scheme. To that end, we have also sought to constructively suggest amendments to the proposed model term, as set out in **Annexure A**.

The need to enable employers to manage and coordinate the taking of leave

41. Compared to many current shutdown clauses in awards, the model term restricts an employer's ability to make a direction under clause XX.XX(d)(ii) to circumstances where an employer has not taken advantage of an opportunity to make an election under clause XX.XX(d)(i). If implemented, existing rights to make a such direction that have been recognised in the federal industrial relations system for many years would be significantly curtailed.

42. Under the former *Workplace Relations Act 1996* (Cth), an employer's right to direct employees to take leave during a close down was dealt with in the Australian Fair Pay and Conditions Standard. Under the Standard, employers had greater certainty over their rights to implement a shutdown for the whole or part of its business. Section 236(5) of the former *Workplace Relations Act* provided:

> **Shut downs**
>
> **(5)** An employee must take an amount of annual leave during a particular period if:
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> **(a)** the employee is directed to do so by the employee's employer

because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and

(b) at least that amount of annual leave is credited to the employee."

43. Furthermore, State legislation, such as the *Annual Holidays Act 1944* (NSW), provided under s.4A(2) for the right of an employer to implement a close down of its business, in whole or in part. That section is set out below. The Annual Holidays Act provided for a minimum notice period the employer was to provide an employee and dealt with circumstances of when an employee had insufficient leave accrued. Importantly, it enabled an employer to direct an employee to take a period of unpaid leave to cover the close down period.

"4A Annual close-down

(1)

(a) In this section:

"Period of employment" means the period during which a worker is employed by an employer referred to in subsection (2), being a period computed

(a) where the worker has not during the employment with that employer become entitled to any annual holiday under section 3, from the date of commencement of the employment with that employer, or

(b) where the worker has during the employment with that employer become entitled to any annual holiday or holidays under section 3, from the date upon which the worker last became entitled to an annual holiday,

up to the commencement of the specified period affecting that worker.

"Specified period" means the period specified by an employer pursuant to subsection (2).

(b) This section, subsections (2) and (3) excepted, shall apply only to a worker to whom notice has been given pursuant to this section.

(c) Subsections (2) and (3) of section 3 shall not apply to a worker to whom notice has been given pursuant to this section.

(2) Subject to subsection (3), an employer may give notice to a worker employed in any part of the employer's establishment that, during a period specified when giving that notice, that establishment or part will be temporarily closed (or reduced to a nucleus) for the purposes of giving an annual holiday or leave without pay to the workers to whom such notice has been given.

(3) Notice pursuant to subsection (2):

(a) shall be given to a worker not less than one month before the commencement of the specified period or, in the case of a worker who commences employment less than one month before the commencement of the specified period, on the day the worker commences employment, and

(b) shall not be given by an employer more than once in any calendar year.

(4) Where, immediately before the commencement of the specified period, a worker is not entitled under section 3 to any holiday:

(a) the worker shall be given and shall take leave without pay for the specified period, and

(b) the worker shall, in addition, be paid:

(i) three forty-ninths of the worker's ordinary pay for the worker's period of employment where the specified period commences upon or before 30 November 1974, and one twelfth of the worker's ordinary pay where the specified period commences after that date, and

(ii) the worker's ordinary pay for any special or public holiday, during the period of the worker's leave without pay, for which the worker would be entitled to payment under any Act, award or agreement or under the worker's contract of employment.

(5) Where, immediately before the commencement of the specified period, a worker is under section 3 entitled to a holiday of a duration less than that of the specified period:

(a) the worker shall be given and shall take the whole of that holiday during the specified period,

(b) t he worker shall be given and shall take leave without pay for the balance of the specified period, and

(c) the worker shall, in addition, be paid the amounts referred to in subsection (4) (b).

(6) Where, immediately before the commencement of the specified period, a worker is under section 3 entitled to a holiday of a duration not less than that of the specified period:

(a) the worker shall, on and from the commencement of the specified period, be given and shall take the whole of that holiday, or

(b) where the worker and the employer so agree, the worker shall, on and from the commencement of the specified period, be given and shall take part of his or her holiday for a period not less than the specified period and postpone the taking of the balance of his or her holiday until

a time to be agreed upon between the worker and the employer.

(7) Where payment has been made to a worker pursuant to subsection (4) or (5) the worker shall be deemed:

(a) to have completed a year of employment for the purposes of this Act immediately before the commencement of the specified period, and

(b) to have been given the whole of the annual holiday to which the worker would be entitled for that year of employment.

44. A background paper, prepared by the Commission's research area in the context of the Annual Leave - Common Issue proceedings referred to annual close-down provisions appearing in modern awards prior to the passing of the Work Choices Act in 2005.[21] The Paper identifies that the Metal Industry Award 1971 was varied in 1977 to include a shutdown provision.[22]

45. For industries, such as manufacturing, which rely on maintenance of production processes and where employers suffer considerable financial detriment where a vital sector of the workforce is unavailable, shutdown provisions are an essential part of doing business.

46. Shutdown provisions possess a dual function of enabling an employer to direct the taking of leave whilst simultaneously ensuring that an employer's leave liability is kept at a manageable level. It is very common for employers to close down all or a part of their business over either the Christmas / New Year Period or at other times of the year for the explicit purpose of providing annual leave to a significant number of its employees.

47. Many of the shutdown provisions in the awards referred to in Attachment C to the February Statement are drafted in such a way as to assume that they will only be used to enable a significant proportion of the workforce in an enterprise to take annual leave. For example, the preamble to clause 34.11 of the *Food, Beverage and Tobacco Manufacturing Award 2010* reads (emphasis added):

> Notwithstanding s.88 of the Act and clause 34.6, an employer may close down an enterprise or part of it <u>for the purpose of allowing annual leave to all or the majority</u>

[21] Fair Work Commission, *Background Paper* (AM2014/47), 30 May 2014, [54]

[22] Decision to vary Metal Industry Award 1971, M39V-S Print D1611, Sydney, 26 July 1977

of the employees in the enterprise or part concerned, provided that...

48. The right to direct employees to take annual leave during a period of 'close down' is essential to enable employers to utilise periods of low workload to reduce leave liability and to better manage staff absences due to the accessing of such leave. This is essential to minimise the adverse impacts of such absences on the operation of the enterprise. In this regard, it needs to be appreciated that a close-down constitutes a mechanism for coordinating the taking of paid leave simultaneously by the workforce (or part of their workforce). This is obviously important in contexts where a critical mass of attendance by the employee's workforce is necessary in order to ensure, or maximise, the efficient or productive performance of work (such as in the context of production lines or maintenance operations conducted in a manufacturing environment) or where there is a difficulty sourcing replacement labour for functions essential to the employer's operations.

49. In the context where awards currently provide for the operation of a shutdown or close down, *for the purposes of allowing leave to employees*, the Commission should be particularly careful to refrain from implementing a shutdown clause that would remove or water down an employer's ability to manage employee absences for paid annual leave (except to the extent required by s.93(3).

The need for such shutdown clauses to require the taking of unpaid leave

50. The Model Clause does not appear to afford an employer any right to direct an employee to take a period of unpaid leave during the period of a shutdown. In contrast, many current shutdown clauses do provide for such a right.[23]

[23] See for example clause 41.10(c) of the *Manufacturing and Associated Industries and Occupations Award 2010*

51. The absence of an ability to direct employees to take unpaid leave under the Model Clause is a major deficiency. It would undermine the utility of an employer implementing a shutdown.

52. Absent an award derived right to direct employees to take such leave, an employer that shuts down their operations may be compelled by the award to continue to pay full-time or part-time employees who do not have sufficient accrued paid annual leave for the duration of the shutdown. Accordingly, the adoption of the Model Clause uniformly across all awards that currently contain shutdown provisions could expose many employers that rely on existing shutdown provisions to significant additional costs.

53. Unless the Model Clause is modified to provide employers with an ability to direct the taking of unpaid leave in the context of a shutdown, the Commission should not insert the proposed Model Clause into any modern award that currently does afford such a right to employers.

Practical and administrative difficulties likely to flow from the proposed process

54. As currently drafted, the Model Clause only allows a direction to be made by an employer for the taking of annual leave where an employee has first been provided with an opportunity to elect between the options listed in proposed clause XX.XX(d)(i). Aside from constituting a substantive amendment that is likely to overturn established practices in a significant number of industries where the existing award provides for an employer direction to be made by default, the model clause is likely to impose a significant administrative burden on employers.

55. In practice, many employers operating under awards that contain shutdown provisions would routinely issue directions to employees to take a period of annual leave during a shutdown. It is likely that in the vast majority of such circumstances employees with accrued entitlements to paid annual leave entitlements would prefer to access such entitlements rather than to take unpaid leave.

56. Requiring an opportunity to be given to each employee to elect between different leave options in the context of a shutdown adds complexity to the process of closing down operations which has never formerly applied and which would give rise to a substantial and unnecessary administrative burden for employers.

57. Under the Model Term employers would need to develop and implement systems for soliciting and processing employee preferences in relation to leave in the context of a shutdown. For many employers of large or geographically diverse workforces this is likely to be an onerous task, particularly in the context of blue-collar environments where the process often cannot be readily implemented through payroll systems that enable employees to make such elections via electronic means.

58. The Commission should amend the Model Shutdown Term to allow an employer to make a direction to its workforce to take annual or unpaid leave for all or part of a period of shutdown or a combination thereof, depending on the amount accrued. Any direction to take annual leave in such circumstances should not be subject to an employee right to instead take unpaid annual leave, for all of the reasons previously identified. However, we accept that there may be a need to retain additional mechanisms to ensure that such a requirement is reasonable. This may include the requirement for advanced written notice and the express requirement in subclause (e) of the model clause that any direction be reasonable.

59. The significance of the proposed inclusion of a requirement that the direction be reasonable should not be overlooked. It is, we accept, a mechanism that ensures that the award provision will align with the requirement contained in s.93(3). However, it is also a provision that would be apt to cater to the myriad of reasons that may necessitate an employer not directing an employee to take paid annual leave in particular circumstances. It negates the need for a range of additional, unnecessarily complex and prescriptive rules around the implementation of a shut down.

Absence of a timeframe within which an employee must make an election

60. The Model Shutdown Term affords employees an ability to elect to take unpaid leave in preference to paid annual leave. However, the proposed clause provides no timeframe within which an affected employee must make such an election, in circumstances where an employer has given notice of a temporary shutdown period.

61. The lack of any clear timeframes which apply to an employee making an election under clause XX.XX(d)(i) risks any decision by an employer to implement a shutdown being significantly stalled. At the very least, it may create uncertainty as to precisely when the direction contemplated by paragraph (e) may be issued.

62. If, contrary to Ai Group's submissions, the approach of affording employees an opportunity to elect as to what type of leave to take during a shutdown, prior to an employer being afforded a right to direct the taking of leave, is to be retained, the Model Term should be amended to include a time limit on the making of an election under clause XX.XX(d)(i).

Whether unpaid leave taken during a shutdown period counts as service

63. At paragraph [82] of the February Statement, the Commission stated (references omitted):

> During proceedings relating to the shutdown provisions in the Black Coal Award, the Construction, Forestry, Mining and Energy Union (CFMEU) submitted that where an employee takes unpaid leave during a shutdown period that leave counts as service and provisions to that effect should be inserted. The CFMEU submitted it is fair and reasonable for unpaid leave during shutdown to count as service because the leave would be taken as a result of the employer's action and would not be taken in absence of that action. The CFMEU also submitted an employee therefore should not be subject to a penalty and a shutdown situation is distinct from the scenario where an employee initiates the taking of leave without pay.

64. As the Full Bench was not satisfied that it was appropriate to deal with the question of whether unpaid leave taken pursuant to a shutdown term counts as service, the matter has been referred to the Plain Language Full Bench. Within this context, the February Statement has asked for submissions addressing whether unpaid leave taken during a shutdown counts as service.

65. Absent an award provision dealing with the issue of whether leave taken pursuant to a shutdown clause counts as service (for the purposes of the Act), the matter will be governed by s.22, which relevantly provides:

> ***Meanings of service and continuous service***
>
> *General meaning*
>
> **(1)** A period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an excluded period) that does not count as service because of subsection (2).
>
> **(2)** The following periods do not count as service:
>
> **(a)** any period of unauthorised absence;
>
> **(b)** any period of unpaid leave or unpaid authorised absence, other than:
>
> **(i)** a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
>
> **(ii)** a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
>
> **(iii)** a period of leave or absence of a kind prescribed by the regulations;
>
> **(c)** any other period of a kind prescribed by the regulations.
>
> **(3)** An excluded period does not break a national system employee's continuous service with his or her national system employer, but does not count towards the length of the employee's continuous service.
>
> **(3A)** Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which subsection (4) applies). If they do so, subsection (3) applies accordingly.
>
> *Meaning for Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2*
>
> **(4)** For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of

Part 2-2:

(a) a period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's continuous service with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

66. No regulations have been made for the purpose of s.22(2)(b)(iii) or 22(4)(a)(ii).

67. As can be seen from the provision reproduced above, for the purposes of the 'General meaning' of 'service' provided in s.22(1) - (3A) of the FW Act, any period of unpaid leave that does not fall within the defined exceptions in subsection 22(2)(b)(i)-(iii) is excluded.[24] That is, it does not count as service.

68. In contrast, for the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 of the FW Act, unpaid leave taken pursuant to a shutdown clause would count as service.[25] Only periods of unauthorised absence or any other period of a kind prescribed by the regulations will be excluded from service for the purpose of these provisions of the Act.

[24] Section 22(1) and 22(2)

[25] Section 22(4)

Annexure A

Alternate shutdown clause retaining an employer right to direct the taking of paid annual leave and unpaid during a temporary shutdown

(a) Clause XX.XX applies if an employer intends to shutdown all or part of its operation for a particular period (temporary shutdown period) and wishes to require affected employees to take 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 paragraph (b) and who will be affected by that period, as soon as reasonable practicable after the employee is engaged.

(d) The following applies to any affected employee during a temporary shutdown period:

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

(ii) subject to the agreement of the employer, the employee may elect to cover the temporary shutdown period by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause XX.XX;

(iii) if the employee does not make an election under subparagraph (ii) that covers the whole of the temporary shutdown period, and the employee does not have sufficient accrued entitlement to paid annual leave to cover the entire duration of the temporary shutdown (or it would not be reasonable to direct the employee to take such leave), the employer may direct the employee to take a period of leave without pay that is necessary to cover the period of the shutdown that would not otherwise be covered by their taking of paid annual leave.

(e) A direction by the employer under clause XX.XX(d)(i) or clause xx(d)(ii):

(i) must be in writing; and

(ii) must be reasonable.

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

(g) 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.

(h) If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause XX.XX, the employee is taken not to be on leave on that day or part-day.

(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.'