

## NATIONAL OFFICE

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*Fair Work Act 2009*

### FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards – Plain Language – Shutdown provisions

AM2016/15

### AWU SUBMISSION – PROVISIONAL VIEWS AND DRAFT DETERMINATIONS

#### BACKGROUND

1. On 25 August 2022, a Full Bench of the Fair Work Commission issued a decision as part of the 4-yearly review of modern awards concerning shutdown provisions: *4 yearly review of modern awards – Plain Language – Shutdown provisions* [2022] FWCFB 161 (**'August Decision'**).
2. In the *August Decision*, the Full Bench issued a direction for interested parties to file submissions concerning the majority's provisional views and the terms of 78 draft determinations within 21 days.
3. The Australian Workers' Union's (**'AWU'**) submissions are below.

#### PROVISIONAL VIEW #4 – FREQUENCY AND LENGTH OF SHUTDOWNS

4. In the *August Decision*, the majority expressed the following provisional view concerning award provisions that prescribe limits on the duration and frequency of shutdowns at [155]:

*Fourth, 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.*

5. The AWU has identified the following awards of interest to the AWU that currently contain limits on the duration and frequency of shutdowns:
  - *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*: 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).

6. The modern awards objective requires the Commission to take into account the ‘need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia...’<sup>1</sup>
7. The AWU submits this factor weighs strongly in favour of retaining the existing provisions which prescribe limits on the duration and frequency of shutdowns, instead of relying on more general references to a shutdown being ‘temporary’ and a requirement to take annual leave being ‘reasonable’, for the following reasons.
8. Firstly, reasonable minds may differ about the meaning of the term ‘temporary’ and whether a requirement to take annual leave is ‘reasonable’. In contrast, for example, whether an employer is implementing one or two shutdowns during a year can be clearly determined. The prescriptive terms are clearer to understand for award users.
9. Secondly, and relatedly, the dispute resolution clauses in modern awards may require the agreement of both parties before the Commission can arbitrate a dispute. That means a dispute about whether a shutdown is ‘temporary’ or whether a requirement to take annual leave is ‘reasonable’ may need to be resolved by a court. That is generally a time consuming and costly exercise. Most workers are unlikely to have the financial resources, or the will, to contest a decision made by their employer in court.
10. Thirdly, the current prescriptive terms have been taken to meet the modern awards objective in the past and a necessity to delete the prescriptive provisions does not appear to have been established. There does not appear

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<sup>1</sup> Section 134(1)g) of the FW Act.

to be any suggestion the prescriptive terms are not capable of being included in a modern award or are contrary to the National Employment Standards.

11. For these reasons, the AWU submits the model term should be tailored for the awards identified above (and any others in the same category that the AWU has not identified) so the existing prescriptive provisions about the duration and frequency of shutdowns are retained.

#### **CFMMEU SUBMISSIONS – UNPAID LEAVE ENTITLEMENT**

12. The AWU has reviewed a draft submission from the CFMMEU Construction and General Division which argues in favour of the inclusion of a term permitting employees to request unpaid leave in conjunction with a period of annual leave.
13. The AWU submits there may be merit in this proposal given the majority's finding that terms allowing an employee to elect to take unpaid leave and allowing an employer to require an employee to take unpaid leave cannot, or should not, be included in modern awards.
14. The ability for employees to request unpaid leave may ensure award users are aware this approach is an option to deal with a situation whereby a worksite is shutting down and an employee does not have sufficient annual leave accrued to cover the period.

STEPHEN CRAWFORD  
**SENIOR NATIONAL LEGAL OFFICER**

10 OCTOBER 2022