

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/15

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

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

**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND
ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)**

10th October 2022

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Introduction

1. The Fair Work Commission (**the Commission**) is currently undertaking a 4 yearly review of modern awards (**the Review**) in accordance with the transitional provisions of Schedule 1, Part 5 – Amendments made by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*, of the *Fair Work Act 2009* (**the FW Act**).
2. On the 25th August 2022 the Full Bench issued a Decision ([2022] FWCFB 161) concerning the annual leave shutdown provisions in modern awards. In the Decision the Full Bench Majority (Vice President Hatcher and Deputy President Asbury) reached *provisional* views and conclusions (as stated in paragraphs [149] to [160]) that, in summary, were to the effect that 78 awards that currently contained a shutdown provision should be varied to include the model term or a modified version of it. The Full Bench Majority then invited interested parties to lodge any submissions on the *provisional* views and conclusions, and the terms of yet to be published draft determinations, within 21 days of the publication of the draft determinations.¹
3. In the Decision, Commissioner Hunt did not agree with the provisional view of the Full Bench Majority to adopt the proposed model clause.² Commissioner Hunt expressed a separate provisional view that the proposed model clause be modified as set out in paragraph [233] of the Decision.
4. On 19th September 2022 the draft determinations were published on the Commission website. This submission is made 21 days after their publication in accordance with the invitation in paragraph [161] of the Decision.

Response to the *Provisional* Views and Considerations of the Full Bench

5. In paragraphs [149] to [155] of the Decision, the Full Bench Majority set out a number of *provisional* conclusions in respect of the establishment of a model clause. The first conclusion, in paragraph [149], is to delete any 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.
6. The CFMMEU (Construction and General Division) (the CFMEU 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.³ We also accept that the Commission has no power to include a

¹ [2022] FWCFB 161, at [161]

² *Ibid.*, at [193]

³ *Ibid.*, at [149]

provision by which an employer may require that leave without pay be taken by employees⁴ (as currently provided for in the *Building and Construction General On-site Award 2020* and *Joinery and Building Trades Award 2020*). We therefore disagree with the provisional view of Commissioner Hunt that such power exists.⁵

7. The CFMMEU C&G is concerned however that the deletion of the existing provisions and insertion of the model clause will potentially have unintended consequences for employees in the building and construction industry where the Xmas/New Year closedown is the norm. The consequences for employees are more significant than those for employers as suggested by Commissioner Hunt in paragraphs [218] and [219], as it is extremely doubtful that employers will pay the employees wages for the days the employee does not work and is not on paid annual leave. An employer faced with this prospect is more likely to terminate employees or only engage future employees on a casual basis.
8. It is noted that Commissioner Hunt has suggested that a clause requiring new employees to take up to one week of paid annual leave in advance may mitigate the impact on new employees of the model clause.⁶ The CFMMEU C&G does not support this approach as it is inconsistent with the view of the Full Bench Majority that,

“It appears to us to be logically fallacious, unfair and unreasonable that an employee could be required to take “leave” to which the employee has no entitlement in the first place with the result that the employee’s right to take leave with pay, at a time suitable to the employee, would be impacted.”⁷

The other more important reason for not supporting this approach is that we do not see where the power lies under the FW Act to insert such a provision.

9. The CFMMEU C&G submits that a better way of mitigating the impact on employees, particularly in the building and construction industry, would be to insert a new subclause in the annual leave clause of awards which allows employees to request to take a period of unpaid leave in conjunction with a period of paid annual leave. The wording proposed for this new subclause is the following:

⁴ Ibid., at [150]

⁵ Ibid., at [211] and [222]

⁶ Ibid., at [222]

⁷ Ibid., at [151]

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.
10. The subclause proposed above would be beneficial to employees and apply to any period where paid annual leave is taken. The proposed subclause would therefore not conflict with the propositions derived by the Full Bench Majority as set out in paragraphs [140] and [141].
11. The CFMMEU C&G notes that there is nothing in the FW Act that prevents an employer and an employee agreeing to an employee taking a period of unpaid leave, but the lack of any specific provision in the awards may lead to uncertainty for both employers and employees.
12. The Full Bench Majority recognised that an award entitlement to leave without pay may be established pursuant to s.139(1)(h) of the FW Act⁸, and such a provision is permitted by s.142(1) as it is incidental to the annual leave term. We also submit that it is essential for the purpose of making the annual leave term, inclusive of the annual leave during shutdown provision, operate in a practical way.
13. The second conclusion reached by the Full Bench Majority is 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*".⁹ The CFMMEU C&G supports this approach. The CFMMEU C&G also supports the third conclusion stated in paragraph [154] of the Decision.

⁸ Ibid., at [141]

⁹ Ibid., at [153]

14. The CFMMEU C&G supports the provisional view to modify the proposed model clause¹⁰ and the example of the *Building and Construction General On-site Award 2020* set out in paragraph [158].

Response to the Draft Determinations

15. As stated in paragraphs 7 to 12 above, the removal of the existing award provisions and replacement with the modified model term will have unintended consequences mainly impacting on employees. These unintended consequences can be mitigated by the adoption of the proposed subclause permitting employees to request the taking of unpaid leave in conjunction with a period of paid annual leave.

16. The CFMMEU C&G therefore submits that the draft determinations be amended to include such a provision. Attached at Appendix 1 are amended draft determinations for the *Building and Construction General On-site Award 2020*, *Joinery and Building Trades Award 2020* and the *Mobile Crane Hiring Award 2020*, as examples of how this can be done.

17. It should be noted that in the amended draft determination for the *Joinery and Building Trades Award 2020* the words “*or any shorter period agreed between them and the employer*” in clause 27.9(b) have been deleted as they are not in the current award clause 27.9(a). For the same reason a similar change has been made in clause 24.6(b) of the amended draft determination for the *Mobile Crane Hiring Award 2020*.

¹⁰ Ibid., at [156]

Appendix 1 – Amended Draft Determinations

MA000020 PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting— shutdown provisions (AM2016/15)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2020

[MA000020]

Building, metal and civil construction industries

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 2022

4 yearly review of modern awards – plain language re-drafting – shutdown provisions – Building and Construction General On-Site Award 2020 – variation to clause 31.

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 31.3 and inserting the following:

31.3 Direction to take annual leave during shutdown

- (a) Clause 31.3 applies if an employer:
- (i) intends to shut down all or part of its operation for a particular period in conjunction with the Christmas/New Year holidays (**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 two months' written notice of a temporary shutdown period.
- (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 31.3(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 31.3(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 31.3(d).
- (g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 31.4.
- (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 31.4, to which an entitlement has not been accrued, is to be taken into account.
- (i) Clauses 31.6 to 31.8 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 31.3.

2. By inserting new clause 31.9 as follows:

31.9 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 31.9(b)(ii) as an employee record.

3. By updating the cross-references accordingly.
- B. This determination comes into operation on XX MONTH 2022. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX MONTH 2022.

VICE PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting— shutdown provisions (AM2016/15)

JOINERY AND BUILDING TRADES AWARD 2020 [MA000029]

Building, metal and civil construction industries

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 2022

4 yearly review of modern awards – plain language re-drafting – shutdown provisions – Joinery and Building Trades Award 2020 – variation to clause 27.

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 27.9 and inserting the following:

27.9 Direction to take annual leave during shutdown

(a) Clause 27.9 applies if an employer:

- (i) intends to shut down all or part of its operation for a particular period in conjunction with the Christmas/New Year period for the purpose of giving the whole of the annual leave owing to all or the majority of the employees in the enterprise or part concerned (**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 two months' written notice of a temporary shutdown period.
- (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 27.9(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 27.9(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 27.9(d).
- (g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 27.8.
- (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 27.8, to which an entitlement has not been accrued, is to be taken into account.
- (i) Clauses 27.5 to 27.7 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 27.9.

2. By inserting new clause 27.12 as follows:

27.12 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 31.9(b)(ii) as an employee record.

3. By updating the cross-references accordingly.

B. This determination comes into operation on XX MONTH 2022. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX MONTH 2022.

VICE PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—plain language re-drafting— shutdown provisions (AM2016/15)

MOBILE CRANE HIRING AWARD 2020 [MA000032]

Building, metal and civil construction industries

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 2022

4 yearly review of modern awards – plain language re-drafting – shutdown provisions – Mobile Crane Hiring Award 2020 – variation to clause 24.

- 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 24.6 and 24.7.
 2. By renumbering clauses 24.8 to 24.11 as clauses 24.7 to 24.10
 3. By inserting new clause 24.6 as follows:

24.6 Direction to take annual leave during shutdown

- (a) Clause 24.6 applies if an employer:
- (i) intends to shut down all or part of its operation for a particular period for the purposes of allowing annual leave to all or the bulk of employees in the depot or section concerned (**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.
- (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 24.6(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 24.6(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 24.6(d).
- (g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 24.3.
- (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 24.3, to which an entitlement has not been accrued, is to be taken into account.
- (i) Clauses 24.7 to 24.9 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 24.6.

4. By inserting new clause 24.11 as follows:

24.11 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 24.11(b)(ii) as an employee record.
- 5. By updating the cross-references accordingly.
- B. This determination comes into operation on XX MONTH 2022. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX MONTH 2022.

VICE PRESIDENT