

IN THE FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

Plain Language Redrafting – Standard Clauses
(AM2016/15)

**SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION –
MANUFACTURING DIVISION**

In response to Statement [2019] FWCFB 1255

(8 April 2019)

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BACKGROUND

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1. The Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ('CFMMEU – MD') provides this submission in response to the Statement [2019] FWCFB 1255 ¹issued by the Plain Language Full Bench on 28 February 2019 ('*the February 2019 Statement*').
2. The Full Bench invited interested parties to make submissions regarding various matters, including provisional views raised in the *February 2019 Statement*. The CFMMEU-MD apologises for the delay in filing its submission. We note that reply submissions are due to be filed by 18 April 2019.
3. In the Plain Language Proceedings, the CFMMEU – MD has an interest in the following modern awards:
 - *Dry Cleaning and Laundry Industry Award 2010 ('DC&LI Award')*
 - *Joinery and Building Trades Award 2010 ('Joinery Award')*
 - *Manufacturing and Associated Industries and Occupations Award 2010 ('Manufacturing Award')*
 - *Timber Industry Award 2010 ('Timber Award')*
 - *Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award')*
4. With respect to the matters raised in the February 2019 Statement, these submissions specifically respond to the following:
 - Terminology – Annual leave loading²
 - Shutdown provisions³

TERMINOLOGY – ANNUAL LEAVE LOADING

5. At paragraphs [64] – [72] of the *February 2019 Statement*, the Full Bench outlines an issue

¹ 4 yearly review of modern awards – plain language redrafting – status update, [2019] FWCFB 1255 (28 February 2019)

² Ibid; [64] – [71]

³ Ibid; [77] – [86]

raised by the AIG as to the terminology used in multiple modern awards regarding an entitlement to annual leave loading. Comments are invited on the AIG's proposed amended wording at paragraph [67] of the *February 2019 Statement*. In the list of awards in Attachment B to the *February 2019 Statement* (which provide an entitlement to annual leave loading), the CFMMEU – MD has an interest in the following awards:

- *DC&LI Award*
- *Joinery Award*
- *Manufacturing Award*
- *TCF Award*; and
- *Timber Award*

6. The CFMMEU – MD opposes the draft wording proposed by the AIG. We concur with the following submissions of various unions in relation to this issue:

- The proposed [AIG] clause refers to a '*minimum hourly rate*' and this would lower the rate of payment for employees who have an ordinary hourly pay (inclusive of all-purpose allowances);⁴
- The reference to a '*minimum hourly rate*' being '*inclusive*' of weekend penalties and/or shift loadings appears problematic if the '*minimum hourly rate*' is also defined in a modern award to be a bare classification rate that doesn't include any allowance, loadings or penalty rates;⁵
- The wording of the proposed clause is also arguably less 'plain language' than the clause it seeks to replace.⁶

7. The CFMMEU – MD submits that given the complexities in terminology relating to shiftwork penalties, loadings and rates across awards, the AIG proposed wording should not be

⁴ (AM2016/15) Plain Language Re-drafting; United Voice submission (4 April 2019) at paragraphs 3 - 4

⁵ (AM2016/15) Plain Language Re-drafting; AWU submission (25 March 2019) at paragraph 5

⁶ United Voice submission, op cit; at paragraph 4

adopted as a template, but rather the issue should be addressed on an award by award basis. Given the primary objective of the Plain Language Redrafting process, we note the suggested simplified wording provided by the CFMMEU – C&G Division in its submission of 2 April 2019 at paragraph 14.⁷

ANNUAL SHUTDOWN PROVISIONS

8. The *February 2019 Statement* invited parties to make submissions in relation to the following matters:
- (i) Whether the modern awards that currently contain shutdown provisions should be varied to include the model term at Attachment D;
 - (ii) Any award specific variations that should be made; and
 - (iii) Whether unpaid leave taken during a shutdown period counts as service.⁸

Whether awards that currently contain shut down provisions should be varied to include the model term at Attachment D

9. The following modern awards in which the CFMMEU – MD has an interest, contain an annual leave shutdown provision:
- *Joinery Award* (Clause 32.9)
 - *Manufacturing Award* (clause 41.10)
 - *Timber Award* (Clause 33.11)
 - *TCF Award* (Clause 41.2)
10. The CFMMEU – MD opposes the insertion of the model term into modern awards which currently contain annual leave shut down provisions, including the awards in which we have an interest. In summary, the basis of our opposition is based on the following:
- (i) existing annual leave shut down provisions in awards have historically

⁷ (AM2016/15) Plain Language Re-drafting; CFMMEU – Construction and General Division, submission (2 April 2019) at paragraph 14

⁸ *Ibid*; [84]

developed to address particular patterns of work or production and reflect industry practice; and

- (ii) existing annual leave shut down provisions need to be considered in context of other annual leave terms within a specific award;
- (iii) existing annual leave shut down provisions often contain more beneficial terms to those contained in the model term (Attachment D);
- (iv) as a general principle, the Plain Language Re-drafting process as part of the 4 yearly review is not intended to alter existing substantive provisions in awards.

11. Taking the annual leave shutdown provision in the TCF Award as an example, we elaborate on the arguments above. Clause 41.7 of the TCF Award provides:

41.7 Close-down

(a) An employer may close-down the plant, or a section or sections of it, in order to allow all or the bulk of employees their annual leave.

(b) The employer must give all affected employees at least three months notice of the intention to close the plant or section (s).

(c) The employer may stand off all employees in the plant or section(s) affected by the close-down.

(d) Any employee who has not qualified for a full entitlement to annual leave must be paid annual leave on a proportionate basis for 2.923 hours for each completed week of continuous service, provided that the employee has at least one months' continuous service.

(e) Any employee who has qualified for a full entitlement to annual leave in accordance with the NES must be paid 2.923 hours for each completed week of continuous service performed in excess of 12 months' continuous service, in addition to being allowed their annual leave.

(f) The employer and a majority of employees may agree to extend the period of close-down by no more than two days, and all employees stood down without pay, provided that agreement is in accordance with clause 8.3.

(g) Any period during which an employee is stood off without pay will count as service in calculating 12 months' continuous service.

12. The current annual leave shut down provision existed in various forms in both the pre-reform and pre-simplified awards in the TCF industry. It is representative of established and settled award regulation in the sector and recognises that formalised annual leave close downs in the TCF industry are common, typically occurring over the Christmas/ New Year period for between 2-3 weeks. Additionally, in practice, a second shorter close down commonly takes place for a week to coincide with the Easter break, school holidays or certain public holidays (such as Melbourne Cup in Melbourne).
13. These close down arrangements under the TCF Award have been developed to address the needs of the TCF industry, are relatively consistent and predictable and are widely understood by industry participants.
14. Secondly, it is apparent from a review of clause 41.7 of the TCF Award that the current provision contains a number of more beneficial conditions, as compared to those of the model term. These safeguards condition the right of an employer to institute a close down in the TCF industry. A number of examples of the current safeguards in clause 41.7 follow.

Extended notice – 3 months

15. The requirement on an employer to give at least 3 months' notice of its intention to close the plant or section(s) of it [clause 41.7(b)] as compared to 28 days' written notice under the model term [clause XX.XX(b)];

Requirement that all, or bulk of the employees subject to the close down

16. The requirement that the close down is '*of the plant or section or sections of it for the purpose of allowing all, or the bulk of employees their annual leave*' [clause 41.7(a)]. That is, there is a presumption that there is no discriminatory basis upon which employees are selected to be off on annual leave as part of a close down.

17. By contrast, the use of the word 'section' connotes an identifiable, operational part of the employer's business. By contrast, the model term uses a different, but less precise formulation of *'intends to shut down all or part of its operation for a particular period'* [clause XX.XX(a)]. In our submission, the use of the words 'a part' is far more generalised than the current word 'section' and could conceivably operate to apply to only 1 or 2 workers in a particular 'part' of the enterprise. If this was occur, this would represent a departure from the current framework which facilitates all, or the great bulk of the workforce being subject to the close down and taking a period of annual leave. The current clause in the TCF Award works to avoid particular individuals being unfairly targeted and being directed to take annual leave as part of the minimalist 'close down'.

Close down limited to one years' annual leave accrual

18. A further safeguard in clause 41.7 of the TCF Award, operates to limit the outer parameter of the close down provision to a maximum of one years' accrual under the NES. We submit that this is the effect of sub-clauses 41.5(d) and (e). Under the model term there would appear to be no such outer limitation.

Interaction with other annual leave provisions – maximum periods of annual leave

19. Clause 41.7 of the TCF Award needs to be read, and operates in conjunction with other annual leave terms which confine the operation of the close down clause.

20. An additional safeguard is provided in the interaction of clause 41.7 (Close-down) with clause 41.3 (Annual leave may be taken in more than one period). Clause 41.3 provides that annual leave must be given and taken on one or two continuous period, and if the latter, then one period must be of at least 21 consecutive days. This is the default position. There is however, capacity (under clause 41.3(b)) for an employer and an individual employee to agree that the employee take annual leave in up to 3 periods, provided agreement is made as per the faciliative process.

21. It is evident that clause 41.3 operates consistently with clause 41.7 (Close-downs) and the

common practice of employers instituting an extended close down over Christmas/New Year. That is, the employer under clause 41.7, on the giving of 3 months' notice, has a right to close down their plant or section/s of it for the purpose of allowing employees to take their annual leave; however, if they do so, they must also be compliant with clause 41.3 which prescribes the maximum number of periods of annual leave and their length. It means that the close-down provision is not at large and cannot operate to result in manifest unfairness to employees in relation to their annual leave entitlement.

Continuity of Service

22. Clause 41.7(g) provides that in circumstances where an employee under a close-down is stood off without pay (because they have insufficient leave accrual) that period will count as service in calculating 12 months continuous service.
23. By contrast, the model term is silent on the issue if continuity of service in relation to periods where an employee as a consequence, is effectively on unpaid leave.
24. As outlined above, in relation to clause 41.7 of the TCF Award, significant safeguards exist to ensure that the close down provision cannot be used by an employer in an unlimited or arbitrary manner. The insertion of the model close-down clause into the TCF Award would constitute a significant diminution of current safeguards and conditions for employees.
25. Clause 41.10 (Annual close down) of the *Manufacturing Award* also contains a number of additional safeguards and which provide more beneficial terms than those contained in the model close-down clause. These include:
 - The characterisation of the purpose of the close down i.e. 'an employer may close down an enterprise or part of it for the purpose of allowing annual leave to all or to majority of the employees in the enterprise or part concerned.' [41.10 preamble]
 - Any leave taken by an employee as a result of a close down (under 41.10) also counts as service by the employee with their employer [41.10(d)];
 - The employer may only close down the enterprise or part of it pursuant to clause 41.10 for one or two separate periods in a year [41.10(e)];

- If the employer closes down the enterprise or part of it pursuant to clause 41.10 in two separate periods, one of the periods must be for a period of at least 14 consecutive days including non-working days [41.10(f)];
- The employer and a majority of employees concerned may agree to the enterprise or part of it being closed pursuant to clause 41.10 for three separate periods in a year provided that one of the periods is a period of at least 14 days including non-working days [41.10(g)]; and
- The employer may close down the enterprise or part of it for a period of at least 14 days including non-working days and allow the balance of any annual leave to be taken in once continuous period in accordance with a roster [41.10(h)].
[our emphasis]

26. Clause 33.11 (Annual close down) of the *Timber Award* is in identical terms as clause 41.10 (Annual close down) of the *Manufacturing Award* and therefore similar submissions apply.

27. Clause 32.9 (Annual close down) of the *Joinery Award* contains a number of more beneficial terms than those contained in the model close down clause. In this respect we support and adopt the submissions of the CFMMEU – Construction and General Division dated 2 April 2019.

28. As outlined above, current close-down provisions in the *TCF Award*, the *Manufacturing Award*, the *Timber Award* and the *Joinery Award* all contain superior conditions to those contained in the model term. These are substantive provisions and constitute important safeguards for award dependent employees. In addition, the close down terms reflect well established patterns of work in the respective industries. At the time the modern awards were made they were held by the respective Award Modernisation full benches to have met the modern awards objective in the Act.

Whether unpaid leave taken during a shutdown period counts as service.

29. As outlined above the respective close-down provisions of the *TCF Award*, the

Manufacturing Award, the *Timber Award* and the *Joinery Award* all currently ensure that unpaid leave (taken under the close down clauses) count as service by an employee with their employer. In our submission, this is the correct and appropriate position for award dependent workers.

30. The CFMMEU – MD further relies on, and adopts the submissions of the CFMMEU – Mining and Energy Division with respect to this issue.⁹

HOURLY RATES OF PAY SCHEDULES – MINIMUM HOURLY RATE AND PERCENTAGE OR ORDINARY HOURLY RATE

31. The CFMMEU – MD supports, and adopts the submissions of the CFMMEU – Construction and General Division in relation to this issue.¹⁰

Filed by the:

Construction, Forestry, Maritime, Mining and Energy Union
Manufacturing Division

(8 April 2019)

⁹ (AM2016/15) Plain Language Re-drafting; CFMMEU – Mining and Energy Division; submission (22 March 2019) at paragraphs 20 - 22

¹⁰ (AM2016/15) Plain Language Re-drafting; CFMMEU – Construction and General Division; submission (2 April 20-19) at paragraphs 19 - 23