

IN THE FAIR WORK COMMISSION

Four Yearly Review of Modern Awards
(AM2016/15)

Plain Language Redrafting – Annual Leave Shutdown Provisions

Submission in response to provisional views in Decision [2022]
FWCFB 161 (25 August 2022) and Draft Determinations
published (19 September 2022)
Various awards

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

(10 October 2022)

CFMEU – Manufacturing Division	Contact Person: Vivienne Wiles Senior National Industrial Officer	Address: Level 2, 154 Bouverie Street, Carlton VIC, 3053	Tel: 0419 334 102 Email: vwiles@cfmeumd.org mdindustrial@cfmeu.org.au
-----------------------------------------------	---------------------------------------------------------------------------------------	------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

(AM2016/15)
Plain Language Redrafting – Shutdown Provisions
Draft Determinations – Various Awards

Submission of the
Construction, Forestry, Maritime, Mining and Energy Union
(Manufacturing Division)

BACKGROUND

1. On 25 August 2022, the reconstituted Plain Language Drafting Full Bench¹ issued a decision (*‘August 2022 Decision’*) regarding shut down provisions in modern awards.²
2. In the *August 2022 Decision* the Full Bench expressed a number of conclusions and *provisional* views regarding the revised form of a model annual leave shut down term.
3. At paragraph [161] of the *August 2022 Decision*, the Full Bench stated:

[161] Draft determinations varying the 78 awards in a manner consistent with the provisional views and conclusion state above will be published in due course. Interested parties will be provided with a period of 21 days from the date the draft determinations are published to lodge any submissions:

- (1) in response to the provisional views and conclusions stated in paragraphs [149] – [160] above;*
- (2) concerning the terms of the draft determinations.³*

4. On 19 September 2022, draft determinations were published in relation to multiple awards which contain shut down provisions.
5. The CFMMEU-Manufacturing Division (“CFMMEU-MD”) has an interest in the following modern awards which contain existing shutdown provisions:

¹ Hatcher, VP; Asbury, DP; Hunt, C.

²4 Yearly Review of Modern Awards (AM2016/15) Plain Language, Shutdown Provisions, Decision [2022] FWCFB 161 (23 August 2022)

³ Ibid; at [161]

- *Joinery and Building Trades Award 2020* (“Joinery Award”) [clause 27.9 – Annual close-down]
 - *Manufacturing and Associated Industries and Occupations Award 2020* (“Manufacturing Award”) [clause 34.7]
 - *Textile, Clothing, Footwear and Associated Industries Award 2022* (“TCF Award”) [clause 32.6 – Close Down]
 - *Timber Industry Award 2020* (“Timber Award”) [clause 28.10 – Annual close down]
6. The CFMMEU-MD previously provided submissions regarding annual leave shutdown provisions in these awards on 8 April 2019.⁴

PROVISIONAL VIEWS OF THE FULL BENCH IN AUGUST 2022 DECISION

Proposed model term (unmodified)

7. At paragraph [156] of the *August 2022 Decision*, the Full Bench stated its *provisional* view that the proposed model award will be modified so, that in an award which requires no adaptation (such as the Retail Award) it will provide as follows (“the proposed model term”):

XX.XX Direction to take annual leave during shutdown

(a) Clause XX.XX 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 XX.XX(b) and who will be affected by that period, as soon as reasonably practicable after the employee

⁴ (AM2016/15) 4 Yearly Review of Modern Awards, Plain language Redrafting – Standard Clause, Submission of the CFMMEU-Manufacturing Division in response to Statement [2019] FWCFB 1255 (8 April 2019)

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 XX.XX(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 XX.XX(d).

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

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

(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.⁵

Proposed model term (modified)

8. In relation to the adaptation of the proposed model term in particular awards, the Full Bench stated at paragraphs [153] – [155] of the August 2022 Decision the following *provisional* conclusions (in part):

*[153] **Second**, 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.*

⁵ [2022] FWCB 161 at [156]

[154] **Third**, the model clause will retain a minimum requirement for 28 days' notice (subject to agreement as to a lesser period) of a shutdown, which we consider to be fair and reasonable, but in individual awards the clause will be adapted to retain existing prescriptions for a greater period of notice to be given.

[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.⁶

DRAFT DETERMINATIONS

Textile, Clothing, Footwear and Associated Industries Award 2022⁷

9. The draft determination for the TCF Award (clause 32.6) modifies the proposed model term in the following respects.

Circumstances in which shutdowns occur

10. Firstly, proposed varied **sub-clause 32.6(a)(i)** is modified to state, '*intends to shut down all or part of its operation for a particular period in order to allow all or all the bulk of employees their annual leave (temporary shutdown period).*'
11. This term effectively mirrors (other than the reference to 'temporary shutdown period') the current existing formulation in clause 32.6(a) of the TCF Award.
12. The proposed modification to **sub-clause 32.6(a)(i)** reflects the Full Bench's observation in paragraph [148](1) of the *August 2022 Decision* regarding the 'circumstances in which shutdowns occur' and is consistent with the Full Bench's *provisional* view in paragraph [153]

⁶ [2022] FWCB 161 at [153] – [155]

⁷ *Textile, Clothing, Footwear and Associated Industries Award 2020* [MA000017] (version as amended to 1 July 2022)

reproduced above.

13. The CFMME-MD supports the formulation in **sub-clause 32.6(a)(i)** as representing an appropriate modification from the model term.

Amount of notice of a temporary shutdown

14. Secondly, proposed **sub-clause 32.6(b)** of the TCF Award is modified to state *'The employer must give the affected employees 3 months' written notice of a temporary shutdown period, or any shorter period agreed between them and the employer.'* [emphasis added]
15. The first part of the proposed term reflects the current requirement for an employer to give *at least 3 months'* notice in clause 32.6(b) of the TCF Award.
16. This aspect of the proposed modification to **sub-clause 32.6(b)** reflects the Full Bench's observation in paragraph [148](3) of the *August 2022 Decision* regarding 'notice period for shutdowns' and is consistent with the Full Bench's *provisional* view in paragraph [154] reproduced above.
17. However, proposed varied **sub-clause 32.6(b)** deviates from the existing clause 32.6(b) of the TCF Award (at least 3 months) which contains no qualification or capacity for the 3 month period to be reduced by agreement.
18. Prior to the Part 10A Award Modernisation process, the minimum 3 months' notice period (excluding a capacity for reduction by agreement) in relation to annual leave shutdowns had been a consistent feature of various pre-reform and pre-simplified awards in the TCF industry for many decades⁸. It remains an important safeguard for low paid and award dependent employees in the TCF sector.
19. We submit the introduction of an additional capacity to reduce the 3 months' notice by agreement is not reflective of the existing provision and is neither appropriate or necessary

⁸ See [pre-reform] *Clothing Trades Award 1999* (clause 37.11.3); [pre-reform] *Footwear Industry Award 2000* (clause 31.12.1); [pre-simplified] *Clothing Trades Award 1982* (clause 18(l)(i)); *Footwear -Manufacturing and Component – Industries Award 1979* (clause 26(l)(i))

for inclusion into clause 32 of the TCF Award, given the nature and characteristics of the industry.

20. The CFMME-MD otherwise submits the formulation in **sub-clause 32.6(a)(i)** represents an appropriate modification to the TCF Award from the model term.

Other Issues

21. Proposed sub-clause 32.6(i) of the draft determination for the TCF Award provides:

'Clauses 32.3 to 33.5 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in clause 33.6.'

22. We assume that the reference to 'clause 33.6' above is an error and the intended reference was to 'clause 32.6'.

Timber Industry Award 2020⁹

23. The draft determination for the Timber Award (clause 28.10) modifies the proposed model term in the following respects.

Circumstances in which shutdowns occur

24. Firstly, proposed varied 28.10(a)(i) is modified to state, *'intends to shut down all or part of its operation for a particular period for the purpose of allowing annual leave to all or the majority of employees in the enterprise or part concerned (temporary shutdown period).'*
25. This term effectively mirrors (other than the reference to 'temporary shutdown') the current existing formulation in clause 28.10 (opening paragraph) of the Timber Award.
26. The proposed modification to sub-clause 28.10(a)(i) reflects the Full Bench's observation in paragraph [148](1) of the August 2022 Decision and is consistent with the Full Bench's provisional view in paragraph [153].
27. The CFMMEU-MD supports the formulation in sub-clause 28.10(a)(i) as representing an

⁹ Timber Industry Award 2020 [MA000071] as varied to 1 July 2022

appropriate modification from the model term.

Amount of notice of a temporary shutdown

28. Secondly, proposed **sub-clause 28.10(b)** of the Timber Award is modified to state, *'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'*. [emphasis added].
29. The first part of the proposed term (28 days' notice) reflects the period of notice currently provided under clause 28.10(a) of the Timber Award (i.e., not less than 4 weeks' notice).
30. This aspect of proposed **sub-clause 28.10(b)** reflects the Full Bench's observations in paragraph [148](3) of the *August 2022 Decision* regarding 'notice period for shutdowns' and is consistent with the Full Bench's *provisional* view in paragraph [154].
31. However, proposed **sub-clause 28.10(b)** deviates from the existing clause 28.10(a) in that it permits (by agreement) a lesser period of 28 days' notice to be given to employees.
32. We submit the inclusion of a capacity to have a lesser period of notice by agreement is not reflective of the provision, is not appropriate or necessary to achieve either the plain language objective, or more fundamentally, the modern awards objective (s134).
33. The CFMME-MD otherwise submits the formulation in **sub-clause 28.10(b)** represents an appropriate modification to the Timber Award from the model term.

Joinery and Building Trades Award 2020¹⁰

34. The draft determination for the Joinery Award (clause 27.9) modifies the proposed model term in the following respects.

Circumstances in which shutdowns occur

35. Firstly, proposed varied 22.9(a)(i) is modified to state, *'intends to shut down all or part of its operation for a particular period in conjunction with the Christmas/New Year period for the*

¹⁰ Joinery and Building Trades Award 2020 [MA000029] as varied to 11 July 2022

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).'

36. This term mirrors in effect (other than the reference to 'temporary shutdown') the current existing formulation in clause 27.9 (opening paragraph) of the Joinery Award.
37. The proposed modification to sub-clause 27.9(a)(i) reflects the Full Bench's observation in paragraph [148](1) of the *August 2022 Decision* and is consistent with the Full Bench's *provisional* view in paragraph [153].
38. The CFMMEU-MD considers the formulation in sub-clause 27.9(a)(i) represents an appropriate modification to the Joinery Award from the model term.

Amount of notice of a temporary shutdown

39. Secondly, proposed **sub-clause 27.9 (b)** of the Joinery Award is modified to state, '*The employer must give the affected employees two months' written notice of a temporary shutdown period, or any shorter period agreed between them and the employer*'. [emphasis added].
40. The first part of the proposed term (two months' notice) reflects the period of notice currently provided under clause 27.9(a) of the Joinery Award (i.e., 'not less than 2 months' notice of intention to do so.')
41. This aspect of proposed **sub-clause 27.9(b)** reflects the Full Bench's observations in paragraph [148](3) of the *August 2022 Decision* regarding 'notice period for shutdowns' and is consistent with the Full Bench's *provisional* view in paragraph [154].
42. However, proposed **sub-clause 27.9(b)** deviates from the existing clause 27.9(a) in that it permits (by agreement) a lesser period of 2 months' notice to be given to employees.
43. We submit the inclusion of a capacity to have a lesser period of notice by agreement is not reflective of the current provision and is not appropriate or necessary to achieve either the plain language objective, or more fundamentally, the modern awards objective (s134).

44. The CFMME-MD otherwise submits the formulation in **sub-clause 27.9(b)** represents an appropriate modification to the Joinery Award from the model term.

Manufacturing and Associated Industries and Occupations Award 2020¹¹

45. The draft determination for the Manufacturing Award (clause 34.7) modifies the proposed model term in the following respects.

Circumstances in which shutdowns occur

46. Firstly, proposed varied 34.7(a)(i) is modified to state, *'intends to shut down all or part of its operation for a particular period for the purpose of allowing annual leave to all or the majority of the employees in the enterprise (temporary shutdown period).'*
47. Clause 34.7 (opening paragraph) of the Manufacturing Award currently provides:
'Notwithstanding section 88 of the Act and clause 34.9, an employer may close down an enterprise or part of it for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned, provided that:'
48. The words 'or part concerned' in the last line of clause 34.7 of the Manufacturing Award does not appear in the draft determination. It is unclear whether the omission of these words is intentional or by error. On its face, it would seem that the additional words should remain in the proposed variation to clause 34.7 of the Manufacturing Award.
49. Proposed clause 34.7 (a) otherwise mirrors in effect (other than the reference to 'temporary shutdown') the current existing formulation in clause 34.7 (opening paragraph) of the Manufacturing Award.
50. The proposed modification to sub-clause 34.7(a)(i) reflects the Full Bench's observation in paragraph [148](1) of the *August 2022 Decision* and is consistent with the Full Bench's *provisional* view in paragraph [153].

¹¹ Manufacturing and Associated Industries and Occupations Award 2020 [MA000010] as varied to 1 August 2022

51. Outside of the issue raised above at paragraphs [51] – [53] the CFMMEU-MD considers the formulation in sub-clause 34.7(a)(i) represents an appropriate modification to the Manufacturing Award from the model term.

Amount of notice of a temporary shutdown

52. Secondly, proposed **sub-clause 34.7(b)** of the Manufacturing Award is modified to state, *‘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’*. [emphasis added].

53. The first part of the proposed term (28 days’ notice) reflects the period of notice currently provided under clause 34.7(a) of the Manufacturing Award (i.e., not less than 4 weeks’ notice).

54. This aspect of proposed **sub-clause 34.7(b)** reflects the Full Bench’s observations in paragraph [148](3) of the *August 2022 Decision* regarding ‘notice period for shutdowns’ and is consistent with the Full Bench’s *provisional* view in paragraph [154].

55. However, proposed **sub-clause 34.7(b)** deviates from the existing clause 34.7(a) in that it permits (by agreement) a lesser period of 28 days’ notice to be given to employees.

56. We submit the inclusion of a capacity to have a lesser period of notice by agreement is not reflective of the current provision, is not appropriate or necessary to achieve the intention of plain language redrafting exercise or more fundamentally, the modern awards objective (s134).

57. The CFMME-MD otherwise submits the formulation in **sub-clause 34.7(b)** represents an appropriate modification to the Manufacturing Award from the model term.

Limitation on number of periods of annual close down and length of those periods

58. The draft determination has excluded from proposed clause 34.7 the following existing provisions of clause 34.7 of the Manufacturing Award:

34.7 Annual close down

(e) the employer may only close down the enterprise or part of it pursuant to clause 34.7 for one or two separate periods in a year.

(f) if the employer closes down the enterprise or part of it pursuant to clause 34.7 in 2 separate periods, one of the periods must be for a period of at least 14 consecutive days including non-working days; and

(g) the employer and the majority of employees concerned may agree to the enterprise or part of it being closed down pursuant to clause 34.7 for 3 separate periods in a year provided that one of the periods is a period of at least 14 days including non-working days; and

(h) 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 one continuous period in accordance with a roster.

59. In the *August 2022 Decision* the Full Bench's *provisional* view in relation to these issues is contained at paragraph [155] as follows:

[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.

60. These provisions (or versions of them) have existed in relevant awards in the manufacturing industry for decades and reflect common and accepted industry practice. They are beneficial in nature to employees and ensure that employees have the benefit of an extended annual leave break of appreciable length. At the time of the making of the modern Manufacturing Award the inclusion of such terms was deemed necessary to ensure that the Manufacturing Award together with the NES provide a fair and relevant minimum safety net of terms and conditions of employment.

61. It is uncontroversial that section 139 permits a modern award to contain the matters at

s139(1)(a) – (j) including at (h) ‘leave, leave loadings and arrangements for the taking of leave’. Additionally, section 142 provides for the inclusion of incidental and machinery terms in a modern award.

62. It is submitted, current clauses 34.7(e), (f), (g) and (h) are terms which are essentially about ‘[annual] leave’ and the ‘taking of [annual] leave consistent with section 139(h). In our view this is the true character of these provisions, rather than a purported regulation of ‘shutdowns’.

63. As such, the CFMMEU-MS opposes the *provisional* view of the Full Bench outlined at paragraph [155] and reflected in the terms of the draft determination for the Manufacturing Award.

Vivienne Wiles
Senior National Industrial Officer
CFMMEU – Manufacturing Division

(10 October 2022)