

In the Fair Work Commission

Matter no. AM2016/15

s. 156, 4-yearly-review of modern awards

Plain language re-drafting, Shutdown provisions

CPSU (PSU GROUP) SUBMISSION – PROVISIONAL VIEWS AND DRAFT DETERMINATIONS

Background

1. On 25 August 2022, a Full Bench of the Fair Work Commission (**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 (Decision)*.
2. In the Decision, the Full Bench issued directions for interested parties to file submissions concerning the provisional views and the terms of 78 draft determinations within 21 days of the draft determinations being published.
3. On 19 September 2022, draft determinations were published on the Commission website.
4. On 10 October 2022, the Commission extended the deadline for submissions for all interested parties until 21 November 2022.
5. The CPSU's submissions in relation to the provisional decision and relevant draft determinations are provided below.

Provisional view – Frequency and length of shutdowns

6. In the Decision, the Full Bench indicates its provisional view concerning modern award provisions that prescribe limits on the frequency and length of shutdowns. At paragraph [155], the Full Bench provides,

'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 shutdowns 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 shutdown'.

7. The CPSU (PSU Group) (**CPSU**) has identified the following awards of interest to the CPSU that currently include limits on frequency and length of shutdowns:
 - i. **Telecommunications Services Award** - clause 22.9 (Annual closedown)
 - ii. **Contract Call Centres Award** – clause 22.10 (Annual closedown)
 - iii. **Broadcasting, Recorded Entertainment and Cinemas Award** – clause 18.6 (Closedown)
8. The modern awards objective requires that the Commission consider the ‘need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia...’
9. This factor supports the retention of existing provisions that relate to prescriptions on the frequency and length of shutdowns instead of relying on a general reference to shutdowns being ‘temporary’ and for the requirement of the taking of annual leave to be ‘reasonable’.
10. Under the proposed model, parties may have different views about the meaning of the term ‘temporary’ and whether a requirement to take annual leave is ‘reasonable’. In comparison, the current prescriptive provisions are clear and simple to understand for all award users, i.e., whether an employer implements one or two shutdowns in a year, or whether a majority agreement of employees is required for any additional shutdowns proposed by the employer can be clearly determined.
11. Further, dispute resolution of modern awards may require agreement of the parties for the Commission to be able to arbitrate a dispute. In the event of a dispute about whether a shutdown is ‘temporary’ or whether a requirement to take annual leave is ‘reasonable’, parties may be required to resolve the matter in court which is both costly and time-consuming for all parties. Most award workers would not be financially positioned, or willing, to pursue such a dispute in court.
12. The shutdown provisions in their current terms have been taken to meet the modern awards objective and a necessity to remove the prescriptive limitations within the provisions has not been clearly made out/ established. The provisional view does not indicate that the terms are not capable of being included in a modern award.
13. Overall, the CPSU is not opposed to the model term proposed in the decision, however, submits that it be modified for the modern awards identified above to reflect the existing prescriptive provisions about frequency and length of shutdowns.

Arundhati Tandel

Senior Industrial Officer

21 November 2022