



Motor Trades Organisations

IN THE FAIR WORK COMMISSION

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

SUBMISSION ON BEHALF OF THE MOTOR TRADES ORGANISATIONS

1. This submission is filed on behalf of the Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, the Motor Trades Association of Queensland, and the Motor Trade Association of Western Australia, (collectively, the Motor Trades Organisations) with reference to the above matter and in accordance with paragraph [161] of the Decision of Vice President Hatcher and Deputy President Asbury dated 25 August 2022¹ (**August 2022 Decision**).
2. The Motor Trades Organisations (**MTO**) maintain an interest in the *Vehicle Repair, Services and Retail Award 2020 (Vehicle Award)*.
3. The MTO respectfully opposes the adoption of the Model Term in the August 2022 Decision in the Vehicle Award and, by extension, the remaining 51 modern awards that also currently provides for unpaid leave to be taken during an annual shutdown/ close down.
4. The MTO instead submits that there is a power under section 139 of the *Fair Work Act 2009 (FW Act)* to insert terms into modern awards that, as currently provided under clause 29.6(a) of the Vehicle Award, provide that the "... *balance of the close down for which the employee does not*

¹ [2022] FWCFB 161

have sufficient accrued leave to cover such period will be leave without pay” (unpaid leave close down terms).

5. For the avoidance of doubt, the MTO further submits that there is also power under section 139 of the FW Act to insert terms into modern awards entitling employers to place employees on unpaid leave during a period of shutdown/ close down.
6. The MTO submits that there are strong merit grounds that support the Commission maintaining the current unpaid leave close down terms under 29.6(a) of the Vehicle Award. Accordingly, the Model Term should not be adopted in the Vehicle Award.
7. In the alternative, the MTO submits that the Model Term should be amended in relation to the Vehicle Award to maintain the effect of the current unpaid leave close down terms. A copy of MTO’s proposed amendment to the Vehicle Award draft determination is provided at Attachment A (changes as tracked).
8. In the event that the Commission determines to proceed with its provisional view to insert the Model Term into the Vehicle Award without amendment, MTO submits that the effective date of such decision be deferred until after the upcoming common Christmas - New Year 2022/2023 close down period to give employers and employees sufficient time to understand the impact of the changes, and to take steps to minimise the adverse impact that will otherwise occur.

The power to include provisions about unpaid leave in modern awards: Section 139(1)(h)

9. MTO notes that the majority judgement in the August 2022 Decision expressed the view that the Commission does not have power under section 139(1)(h) to include unpaid leave shutdown terms in modern awards. The MTO respectively disagrees with this view and submits that the Commission does have such power.
10. In support of its view that the Commission does have power under section 139(1)(h) to include unpaid leave shutdown terms in modern awards, the MTO submits that:

- (a) Unpaid leave shutdown terms (and unpaid close down terms) expressly address the topic of unpaid leave. They identify a circumstance under a modern award when such leave may be required to be taken.
- (b) Unpaid leave shutdown terms (and unpaid close down terms) are distinct from, and are not tantamount to, a 'stand down' under section 524 of the FW Act. Indeed, section 525 makes clear that an employee is not taken to be stood down when the employee *"is taking paid or unpaid leave authorised by the employer"*², with the statutory note at the end of section 525 providing annual leave as an example of "paid or unpaid leave".
- (c) To the extent that the majority judgment identifies that "leave" and "leave without pay" are beneficial entitlements to be absent from work, such a conclusion does not mean that leave cannot arise when it is mandated by the employer (or otherwise occurs other than at the request of an employee). For example, paid annual leave is an example of a beneficial entitlement that pursuant to sections 93 and 94 of the FW Act (and clause 29.9 of the Vehicle Award), may be unilaterally imposed upon employees without having been requested.

11. MTO further submits that the power of the Commission to include unpaid leave shutdown terms (and unpaid close down terms) in modern awards is evidenced by the fact that currently, 52 out of the 78 modern awards contain such terms. Further, MTO notes that in the decisions leading up to the August 2022 Decision, it had been acknowledged by the Commission that it held such power³.

The power to include provisions about unpaid leave in modern awards: Section 139(1)(c)

12. The MTO submits that the power to include unpaid leave shutdown terms (and unpaid close down terms) into modern awards is also provided at section 139(1)(c) of the FW Act.

13. Section 139(1)(c) empowers the Commission to include terms in modern awards about:

"arrangements for when work is performed, including hours of work, rostering, notice period, rest breaks and variations to working hours."

² Section 524(1)(a)

³ [2015] FWCFB 3406, [2015] FWCFB 5771, [2017] FWCFB 959 at [13], [2017] FWCFB 5394 at [32]

14. The MTO respectfully submits that provisions in modern awards (e.g. clause 29.6 of the Vehicle Award) that prescribe arrangements for the closure of an operation so that employees will not perform work (and not be paid for the relevant periods if they have not accrued sufficient paid annual leave) are directly concerned with arrangements for when work is performed.
15. Further, the MTO submits that clause 29.6 of the Vehicle Award may be understood as being about:
- (a) “hours of work” as well as “rostering”, as it enables an employer to define the period of operation of its business through the use of shutdown/ close down and the introduction of absences; and
 - (b) “variations to working hours”, as it enables an employer to close its business, placing employees on paid and/or unpaid leave.
16. Accordingly, section 139(1)(c) provides the Commission with power to include provisions dealing with the shutdown/ close down of an employer’s business and for employees to not perform work (and to not be paid for not performing work) during that period if they have not accrued sufficient paid annual leave to cover the shutdown/close down period.

Merit basis for maintaining the unpaid leave shutdown terms

17. The MTO submit that there are strong merit-based grounds to maintain the existing unpaid leave close down terms in the Vehicle Award (and by extension, in the remaining 51 modern awards that also currently provide for unpaid leave to be taken during an annual shutdown).
18. Given the modern awards objective governs the exercise of the Commission’s discretion in relation to the terms of modern awards, any merit-based consideration must be conducted through the prism of section 134 of the FW Act.
19. Consistent with the principles-based approach previously taken by the Commission⁴, the MTO addresses below each of the factors set out in section 134(1) with respect to maintaining the

⁴ [2018] FWCFB 4984 at [52] and [2018] FWCFB 4177 at [3]-[13]

existing unpaid leave close down terms in the Vehicle Award as an alternative to adopting the Model Term as currently drafted.

Section 134(1)(a) – relative living standards and the needs of the low-paid

20. The MTO agrees with the majority determination that this factor is a neutral consideration with respect to the Model Term.

Section 134(1)(b)

21. The MTO submits that this is a broadly neutral consideration, albeit that MTO's proposed terms are arguably better aligned than the Model Term.

Section 134(1)(c)

22. The Model Term discourages social inclusion through increased workforce participation as it is likely to result in employers providing payment to employees during a period when the business is shutdown and there is no work for the employees to perform, likely causing financial hardship to small and medium sized businesses.

23. In practice, this will encourage employers to defer engagement of new employees so as to ensure that employees that will not have sufficient accrued paid annual leave are not employed until after the shutdown period has occurred.

24. This issue is avoided by retaining the current unpaid leave close down terms in the Vehicle Award or by adopting MTO's proposed amendment to the Model Term.

Section 134(1)(d)

25. To the extent that the Model Term will result in employers providing payment to employees during a period when the business is shut down and there is no work for the employees to perform, it does not promote flexible modern work practices or the efficient and productive performance of work. Rather, it promotes unproductive outcomes and workplace disharmony.

26. Accordingly, MTO respectfully submits that this factor weighs against the Model Term.

27. In contrast, the retaining of the current unpaid leave close down terms in the Vehicle Award or accepting MTO's proposed amendment to the Model Term would avoid placing the additional financial burden of paying an employee where there is no work to be performed (or alternatively, prevent an employer from being able to shut down their operations when needed), and accordingly promotes productivity.

Section 134(1)(da)

28. This factor is not a relevant consideration.

Section 134(1)(e)

29. This factor is not a relevant consideration.

Section 134(1)(f)

30. The MTO submits that this is a highly relevant consideration, give both the prevalence of annual shut downs across all industries (including automotive close downs); as well as the widespread practice, consistent with clause 29.6(a) of the Vehicle Award, of employees being on unpaid leave when they do not have sufficient accrued paid annual leave to use during this period. Further, compliance with the Model Term will increase the administrative burden on small business in particular.

31. The MTO notes that a number of its members participated in a survey conducted during October and November 2022 (**Employer Survey**) by the Australian Chamber of Commerce and Industry and the Australian Industry Group.

32. The responses to the Employer Survey demonstrate that:

(a) the use of shutdowns by employers is a commonly used and widespread practice;

(b) employers utilise shutdowns for legitimate and appropriate reasons which include:

(i) seasonal slowdowns and the cessation of trade during certain periods of the year; and

(ii) for the purpose of undertaking important and necessary maintenance to plant and equipment; and

(c) it is not uncommon for employees to have not accrued sufficient annual leave to take during a shut down and in these circumstances employers have heavily utilised the ability to direct these employees to take leave without pay during these periods. However, as noted earlier, the clause 29.6(a) of the Vehicle Award does not technically empower award-covered employers to “direct” such employees to take leave without pay.

33. The Model Term therefore constitutes a substantial shift to the award safety net, by removing from at least 52 modern awards, unpaid leave arrangements during a period of shutdown/ close down. In the case of the Vehicle Award, the Model Term removes the current certainty provided by a term that is in effect a deeming provision. That is, currently under the Vehicle Award an employer does not need to “direct” an employee to take unpaid leave (and an employee does not need to request unpaid leave) as the provision itself provides that an employee with insufficient accrued paid annual leave will be on leave without pay for the balance of the close down period.

34. Accordingly, the Model Term is therefore likely to directly impose new cost burdens on a substantial proportion of employers for which they will not receive any performance of work or additional productivity return at a particularly difficult time following the continuing impact COVID-19.

35. By contrast, retaining the current unpaid leave close down terms in the Vehicle Award or accepting MTO’s proposed amendment to the Model Term would take into account the impact of shutdown provisions on business and seek to ameliorate the regulatory burden on business associated with the operation of annual shutdown terms.

Section 134(1)(g)

36. The introduction of model terms can assist in providing a simple, easy to understand stable and sustainable modern award system.

37. However, the Model Term as presently drafted sits inconsistently with other provisions of the modern award objective that outweighs this consideration. Perhaps more significantly in the context of the Vehicle Award, the Model Term as currently drafted removes the current simplicity and certainty in relation to what occurs in the event that an employee has insufficient accrued paid annual leave during a shutdown period. Practical examples of the potential adverse impact of the removal of the current simplicity are provided in the ‘Other Considerations’ section below.

38. A better outcome would be if the current unpaid leave provision in the Vehicle Award is retained or if MTO's proposed amendment was inserted into the Model Term, thereby ensuring a simple modern award system whilst also furthering other modern awards objectives outlined in section 134.

Section 134(1)(h)

39. The matters mentioned in s134(1)(h) focus on the aggregate impact of an exercise of modern award powers.

40. As previously outlined, MTO submits that:

- (a) there are grounds to support a strong inference that employers are presently commonly implementing shutdowns/ close downs and placing employees on periods of unpaid leave from time to time during such shutdowns/ close downs; and
- (b) the Model Term as presently drafted is, in practice, likely to impose significant additional cost burdens on business at a particularly difficult time.

41. Accordingly, the introduction of the Model Term (as presently drafted) into the Vehicle Award (and the remaining 51 modern awards that also currently provided for unpaid leave to be taken during an annual shutdown) could have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

42. Without increased revenue or productivity to offset the additional cost burden imposed by the Model Term, the Model Term will act as a disincentive for businesses in the automotive industry to employ additional employees and, in some cases, could even lead to redundancies as part of a desire to reduce costs.

43. Alternatively, to offset the increase in costs due to the need to pay employees whilst a business is shut down, employers may need to increase the costs of the good and services that they provide, which is inflationary.

44. In light of the above, this factor again weighs against the introduction of the Model Term.

45. A better outcome would be if the current unpaid leave provision in the Vehicle Award is retained or if MTO's proposed amendment was inserted into the Model Term, thereby ensuring a simple modern award system whilst also furthering other modern awards objectives outlined in section 134.

Other merit-based considerations

46. There are other more general considerations that suggest the Model Term (as presently drafted) will not give rise to a fair and reasonable safety net, by reason of the removal of the unpaid leave close down terms from the Vehicle Award.
47. Practical examples of what may occur at a workplace level under the Model Term include:
- (a) employees using all of their accrued paid annual leave prior to a shutdown and then essentially 'double-dipping' by also being paid during the shutdown period when they have exhausted their leave accruals;
 - (b) employers refusing some annual leave requests on account of upcoming shutdowns, leading to employees disputing whether such refusals are "reasonable" and permitted by section 89 of the FW Act, creating workplace disharmony;
 - (c) employers paying paid annual leave in advance to employees and being unable to recover those monies when the employee subsequently resigns with a negative annual leave accrual balance. For example, it is likely that in the current tight labour market, that a new employee who has just been paid two weeks paid annual leave in advance will be motivated to resign and commence employment with a new employer. This is because they will factor in having to work 6 months to get their annual leave accrual balance back to zero, particularly as the employer has no effective way of recovering the advance payment in the event that the employee leaves;
 - (d) as previously mentioned, employers not hiring employees during the preceding months prior to a shutdown if the amount of time is not sufficient for enough annual leave to have been accrued prior to the shutdown period;
 - (e) there may be an additional risk⁵ that some employers may terminate the employment of recently engaged employees with insufficient accrued paid annual leave, as a result of being unable to afford to pay wages for the days such employees are not performing work during the shutdown period;
 - (f) small business owners who cannot afford to pay employees for not performing work may feel compelled to not have an annual shutdown, meaning that they will forgo a break themselves and increase the risk of harm to their own health and wellbeing; and
 - (g) resentment and antipathy amongst employees who have retained enough annual leave to take during a shutdown against employees who do not have access to annual leave but will be paid nonetheless. This is a matter expressly identified in the minority decision of Commissioner Hunt in the August 2022 Decision at paragraph [217].

⁵ See for example, Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) [Submission](#), at [7].

Substantive change to modern awards should not be pursued without cogent evidence

48. Pursuant to the *Preliminary Jurisdictional Issues Decision*⁶ and the *4 Yearly Review of Modern Awards – Penalty Rates*⁷, it is uncontroversial that:

- (a) cogent reasons would ordinarily be required to departing from previous Full Bench decisions which have made modern award provisions; and
- (b) such cogent reasons would ordinarily be supported by probative evidence directed towards the relevant legislative framework.

49. In the present case, the Full Bench has proposed to remove the unpaid leave shutdown terms on account of a perceived lack of power to introduce such terms into modern awards - thereby extinguishing any need for evidence or other cogent reasons to depart from the previously made award terms.

50. However, should the Commission accept the arguments outlined above to the effect that the unpaid leave shutdown terms can be included in modern awards, then cogent reasons (likely supported by probative evidence) would be required to depart from the existing unpaid leave shutdown terms in the Vehicle Award (and other relevant modern awards).

51. The MTO submits that no such cogent reasons nor probative evidence presently exist to support the introduction of the Model Term (as currently drafted) into the Vehicle Award.

Conclusion

52. On an evaluative basis, the MTO submits that the modern awards objective does not warrant the adoption of the Model Term unless the Model Term is varied (at least in respect of the Vehicle Award) to include the unpaid leave close down terms.

53. The MTO thanks the Commission for the opportunity to make this submission.

MOTOR TRADES ORGANISATIONS
21 November 2022

⁶ [2014] FWCFB 1788 at [19]-[24]

⁷ [2017] FWCFB 1001 at [254]

ATTACHMENT A

MA000089 PRXXXXXX

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)**

VEHICLE REPAIR, SERVICES AND RETAIL AWARD 2020

[MA000089]

Vehicle industry

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT

SYDNEY, XX MONTH 202X

4 yearly review of modern awards – plain language re-drafting – shutdown provisions – Vehicle Repair, Services and Retail Award 2020 – variation to clause 29.6.

A. Further to the decision issued by the Full Bench on XX MONTH 202X [[202X] FWCFB XXX], the above award is varied as follows:

1. By deleting clause 29.6 and inserting the following:

29.6 Direction to take annual leave during shutdown

(a) Clause 29.6 applies if an employer:

- (i) 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 bulk of the employees in the workplace or section or sections of the workplace (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 29.6(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 29.6(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 29.6(d).
- (g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 29.7.
- (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 29.7, to which an entitlement has not been accrued, is to be taken into account.
- (i) The balance of the temporary shutdown period for which an employee does not have sufficient accrued paid annual leave will be unpaid leave.
- (j) Clauses 29.8 to 29.10 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 29.6.

2. By updating the cross-references accordingly.

B. This determination comes into operation on XX MONTH 202X. 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 202X.

VICE PRESIDENT