

IN THE FAIR WORK COMMISSION

Matter No: AM2016/15

United Workers Union

4 yearly review of modern awards—Plain language—Shutdown provisions

(AM2016/15)

SUBMISSIONS OF UNITED WORKERS UNION

Introduction

1. On 25 August 2022, the Full Bench published a decision in relation to the 4 yearly review of modern awards, and specifically the shutdown provisions in a number of modern awards ('**the Decision**').¹ At [161] the Full Bench invited parties to lodge any submissions in relation to the provisional views and conclusions stated at [149] to [160], and concerning the terms of the draft determinations. Those draft determinations were published subsequent to the decision, in relation to a total of 78 awards.
2. The United Workers Union ('**UWU**') has coverage of workers across a number of the 78 awards. These submissions outline UWU's concerns in relation to:
 - (a) the specific amendments to the Children Services Award;
 - (b) the removal of provisions regarding the frequency and length of shutdowns;and

¹ [2022] FWCFB 161.

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- (c) existing provisions regarding unpaid leave.

Children Services' Award

3. Noting the FWC's views at [160], [162] – [189]; and in respect of the matters raised at [192]:
- (a) UWU supports the limitation of the shutdown provision to the 'Christmas vacation' period, and the associated modification of the proposed 'model' provision.
- (b) UWU supports the continuation of a requirement to pay employees for shutdowns outside of clause 24.4 at their ordinary rate of pay.
- (c) UWU does not propose further amendment to the draft determination, unless the model draft determination is varied in substance.

Conditions in existing Awards not replicated in the draft determinations

4. UWU notes that the following Awards currently contain a number of conditions not replicated in the draft determinations, this includes (but is not limited to):

Award	Alteration
Contract Call Centres Award 2020	<ul style="list-style-type: none">• The existing clause allows for one or two close down periods, or more if a majority of employees agree. This has been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Car Park Industry Award	<ul style="list-style-type: none">• Provides that public holidays will be paid (regardless of if on annual leave or unpaid leave, and are not annual leave).
Cleaning Services Award 2020	<ul style="list-style-type: none">• The existing clause allowed for a maximum shutdown length of 4 weeks, plus public

	<p>holidays. This clause has been deleted in the draft determination, where the only requirement is that the direction is reasonable.</p> <ul style="list-style-type: none"> Provides that public holidays will be paid (regardless of if on annual leave or unpaid leave, and are not annual leave).
Educational Services (Post-Secondary Education) Award 2020	<ul style="list-style-type: none"> The existing clause allows for two close down periods each year. This has been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Fitness Industry Award 2020	<ul style="list-style-type: none"> The existing clause allows for one close down periods each 12-month period. This has been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Food, Beverage and Tobacco Manufacturing Award 2020	<ul style="list-style-type: none"> The existing clause allows for one or two close down periods, or three if a majority of employees agree. The shutdown must also in some situations be 14 days long at minimum. These clauses have been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Gardening and Landscaping Award	<ul style="list-style-type: none"> Provides that Public holidays that fall within the period of close down will be paid as provided for in this award and will not count as a day of annual leave or leave without pay.
Higher Education Industry—General Staff—Award 2020	<ul style="list-style-type: none"> The existing clause regarding stand down of ‘employees engaged in domestic work’ on leave without pay during semester/term breaks has been removed. The clause is now limited only to the Christmas shutdown period.

Manufacturing And Associated Industries and Occupations Award 2020	<ul style="list-style-type: none"> The existing clause allows for one or two close down periods, or three if a majority of employees agree. The shutdown must also in some situations be 14 days long at minimum. These clauses have been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Pharmaceutical Industry Award 2020	<ul style="list-style-type: none"> A limit of one per year, per clause 21.5(e).
Poultry Processing Award 2020	<ul style="list-style-type: none"> The existing clause allows for one close down period per year, unless otherwise agreed between an employer and the majority of employees concerned. This has been deleted in the draft determination, where the only requirement is that the direction is reasonable.
Security Services Industry Award 2020	<ul style="list-style-type: none"> Clause 21.4(e) provides that: <i>(e) An employee must be taken not to be on leave on any public holiday that falls during a temporary close down period. The employer is to pay the employee for the public holiday as the Award requires.</i> This would include circumstances of unpaid leave.
Wine Industry Award	<ul style="list-style-type: none"> The existing clause allows for one or two close down periods. The shutdown must also in some situations be 14 days long at minimum. These clauses have been deleted in the draft determination, where the only requirement is that the direction is reasonable.

5. The nature of the clauses can be summarised as follows:

- (a) Limits the length of a shut-down;
- (b) Limits on the number of shut-downs in a period; and

- (c) The requirement to obtain employee/majority support.

(‘the existing shut down limitations’).

- 6. In addition to the existing limitations, there are also two matters that arise with the removal of unpaid leave from the provision:

- (a) The requirement that unpaid leave (if an employee were to elect to take such leave) is required to be counted towards service, cf. section 22 of the Fair Work Act 2009 (Cth); and
- (b) The requirement to pay an employee for public holidays that fall within the period of annual leave, see *Cleaning Services Award*, *Security Award*, the *Gardening and Landscaping Award* and the *Car Parking Award*.

(‘the unpaid leave provisions’).

Frequency and length of shutdowns

- 7. UWU is concerned by the proposed removal of proscriptions relating to the frequency and/or length of shutdowns in the draft determinations.
- 8. As seen in the above table, many of the Awards (and the list of Awards at para. 4 are those that UWU has an interest in) contain a limitation to the number of shut downs that may occur in a calendar year or within a 12 month period (often one, sometimes two or three with majority agreement). A number of the Awards also contain limitations on the maximum length of a shut down or provisions that require some form of majority agreement.
- 9. Whilst we note the Full Bench’s provisional view at [155], relating to the shutdowns being ‘temporary’ and that the direction to take annual leave must be ‘reasonable’, UWU is concerned that the removal of the existing limitations will create greater

uncertainty and ultimately lead to increased disputation regarding the 'reasonableness' or otherwise of a proposed shut down.

10. It is noted that section 93(3) of the *Fair Work Act 2009* does require that any a modern award may include terms requiring an employee, or allowing for an employee to be required, to take annual leave in particular circumstances, but only if the requirement is reasonable.
11. UWW accepts that within the parameters of this section premised on 'reasonableness', and the draft shut down provision, there is an ability to curtail the misuse of a shutdowns – but it is one that operates on a case by case basis.
12. The existing limitations are, generally, the cumulation of the historical operation of annual shutdowns within an industry, and in this respect, they have operated to restrain the circumstances in which an employer may shutdown and/or require an employee to take leave. they also provide greater guidance (albeit not definite guidance) about when a shutdown may be considered 'reasonable' – accepting that the individual employee's circumstance ought still to be considered.
13. The proposed removal of these restrictions is likely to lead to uncertainty and increased disputation.
 - (a) Is it reasonable, for example, for an employer to have three shut-downs when they would normally have a maximum of two shut downs? What about in circumstances where the employee is left with no annual leave accrual at the end of the shutdown period, compared to one week's annual leave accrual, compared to four weeks?

- (b) What happens if they are taken once per fortnight to reduce production and use the majority of annual leave accruals?²
14. The answers to the above hypothetical questions are not easily answered. Moreover, what is reasonable in one situation, may not be in another.
15. The existing limitations provide some restriction around the use of shutdowns, and in turn are more likely to be categorised as 'reasonable'³. For example, a maximum of one or two shutdowns per year is far more likely to be 'reasonable', compared to 26 shut downs per year, of one day duration.
16. The existing limitations act to prevent the outer limits testing of what is 'reasonable', and in turn, limits disputation. In this respect, it is UWU's submission that such amendment would support the modern award objective contained in section 134(1), giving consideration to the grounds outlined in [156] of the Decision.
17. Thus, for the reasons outlined above, UWU is concerned that the draft determinations will lead to increased disputation and uncertainty and submits that the existing limitations should be retained in each of the Awards listed above.

Filed on behalf of the
United Workers Union
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² See for example *United Voice v Valspar (WPC) Pty Ltd* [2015] FCCA 1139.

³ Subject to an employee's individual circumstances.