DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

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

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HUNT SYDNEY, 25 AUGUST 2022

4 yearly review of modern awards – plain language – shutdown provisions.

DECISION OF VICE PRESIDENT HATCHER AND DEPUTY PRESIDENT ASBURY

1. Background

[1] During the annual leave common issue proceedings conducted as part of the 4 yearly review of modern awards, an issue arose in relation to the *Black Coal Mining Award 2010* (Black Coal Award) regarding annual leave shutdown. This triggered a wider review of annual leave shutdown clauses in modern awards generally in the circumstances described below.

[2] In decisions issued on 11 June 2015[1] (*June 2015 decision*) and 15 September 2015[2] (*September 2015 decision*), the Annual Leave Full Bench determined model clauses in respect of taking excessive annual leave, the cashing out of annual leave, electronic funds transfer and paid annual leave, and granting annual leave in advance. In the *June 2015 decision*, the Annual Leave Full Bench also considered a model "close-down" clause proposed by a group of employer parties to be placed into 65 modern awards. This proposed clause had three features of present relevance:

- it would apply to the close-down of an enterprise, or part of it, for the purpose of allowing paid annual leave to all or a majority of employees in the enterprise or part of it;

- subject to the provision of notice, it would require employees to take paid annual leave for the full period of closing where they have sufficient accrued annual leave to do so; and

[1] [2015] FWCFB 3406

[2] [2015] FWCFB 5771

- where employees had insufficient or no accrued annual leave to cover the full period of the closing, they would be required to take leave without pay for the relevant period.[3]

[3] The Full Bench was not persuaded to grant the employers' claim for three reasons:

(1) Section 93(3) of the *Fair Work Act 2009* (FW Act) empowers award terms requiring an employee to take paid annual leave only if the requirement was reasonable. The Full Bench was not satisfied that the clause was reasonable because of the breadth of its expression; in particular, there was no restriction on the number of times a close-down can occur in a 12-month period, no restriction on the duration of the close-down, and the four-week notice period was not reasonable given the breadth of the provision.

(2) While it was desirable that provisions dealing with the taking of annual leave be uniform across modern awards, close-down provision were an exception to this general proposition and warranted consideration on an award-by-award basis.

(3) The employer proponents of the claim had not established a merit case sufficient to warrant granting the claim.[4]

[4] The Full Bench left open the capacity for parties to seek variations of individual modern awards to vary an existing shutdown provision or to insert an appropriate provision.[5]

[5] In a decision issued on 22 September 2016[6] (*September 2016 decision*), the Annual Leave Full Bench dealt with the issue of whether the excessive leave model term should be included in the Black Coal Award. This was opposed by the Coal Mining Industry Employer Group (CMIEG). The Full Bench decided that the broad right for an employer to direct the taking of annual leave without other considerations and requirements, as was the case in clause 25.4(c) of the Black Coal Award (as at 22 September 2016), was not consistent with s 93(3) of the FW Act.[7] Therefore it was not a term that could be included in a modern award.[8] The Full Bench determined to delete clause 25.4 of the Black Coal Award in its entirety and replace it with the excessive leave model term it had earlier determined, subject to one modification which is not presently relevant.[9] The Full Bench recognised that this variation might have a consequential effect on the operation of the annual leave shutdown clause then contained in clause 25.10 of the Black Coal Award, in that there might be a question as to whether an employee could be directed to take annual leave during a shutdown. In a draft variation determination published in conjunction with the *September 2016 decision*, the Full

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[3] [2015] FWCFB 3406 at [336]

[4] Ibid at [370]-[381]

[5] Ibid at [382]

[6] [2016] FWCFB 6836

[7] Ibid at [83]

[8] Ibid

[9] Ibid at [84]

Bench proposed a modification to clause 25.10 to address this issue and invited interested parties to comment upon this.[10]

[6] In response to the draft variation determination for the Black Coal Award, the CMIEG proposed a new shutdown clause to replace the existing clause 25.10. Under its proposed clause, an employer could require an employee to take annual leave during the period of the shutdown, subject to the capacity of the employee to elect to take leave without pay during the period of the shutdown. Employees who were not yet entitled to sufficient annual leave to cover the shutdown could elect to take annual leave in advance or could otherwise be placed onto unpaid leave.[11]

[7] This proposed clause, which was opposed by the Construction, Forestry, Mining and Energy Union, as it then was (CFMMEU), and the Australian Manufacturing Workers' Union (AMWU), was considered by the Annual Leave Full Bench in a decision issued on 27 March 2017[12] (*March 2017 decision*). The Full Bench observed that a provision permitting different arrangements for annual leave during a period of shutdown or close-down may be consistent with the statutory framework, depending on its terms. It considered that there was some merit in the CMIEG proposal, but concluded that it was capable of being applied in a manner inconsistent with s 93(3) of the FW Act and therefore it would be appropriate to impose some limitations upon the scope of the provision.[13] The Full Bench stated the *provisional* view that a revised shutdown provision should be inserted into the Back Coal Award in the following terms:

> **"25.10 Shutdown**
>
> **(a)** Clause 25.10 applies if an employer intends to shutdown all or part of its operation for a particular period (temporary shutdown period); and wishes to require affected employees to take leave during that period.
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> **(b)** The employer must give the affected employees one month's written notice of a temporary shutdown period.
>
> **(c)** The employer must give immediate written notice of a temporary shutdown period to any employee who is engaged after the notice is given under paragraph (b) and who will be affected by that period.
>
> **(d)** The following applies to any affected employee during a temporary shutdown period:
>
> **(i)** if the employee has accrued an entitlement to paid annual leave the employee may elect to take some or all of the leave during the temporary shutdown period and may also elect to take unpaid leave to cover any part of the temporary shutdown period;

[10] Ibid at [85]-[86]; draft variation determination

[11] [2017] FWCFB 959 at [13]

[12] Ibid

[13] Ibid at [29]-[33]

(ii) if the employee does not elect to take paid annual leave or unpaid leave to cover the whole of the temporary shutdown period, then the employer may direct the employee to take a period of accrued paid annual leave or unpaid leave to cover the whole of the temporary shutdown period;

(iii)if the employee has not accrued an entitlement to any paid annual leave, the employer may direct the employee to take leave without pay to cover the whole of the temporary shutdown period.

(e) A direction by the employer under clause 25.10(d)(ii):

(i) must be in writing; and

(ii) must be reasonable.

(f) The employee must take paid annual leave or unpaid annual leave in accordance with a direction under clause 25.10(d)(ii)

(g) 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 25.9, to which an entitlement has not been accrued is to be taken into account.

(h) When an employer shuts down all or part of its operation under this provision, clauses 25.4 to 25.6 do not apply to employees directly affected by the shutdown and this clause will apply."

[8] The Full Bench also said:

"[39] As observed by the CFMEU, this is the first occasion on which we have given detailed consideration to the need for a stand down term to be consistent with s.93(3) of the FW Act. It is for that reason that we have only expressed a provisional view in respect of this issue. We also acknowledge that the adoption of the provisional views expressed is likely to have implications for existing shutdown terms in other modern awards. There are some 81 modern awards which presently contain shutdown (or closedown provisions). The relevant provisions are set in Attachment A and we note that there are a variety of approaches including some modern awards where the provisions operate more narrowly than the clause under consideration here. We propose to invite submissions from the parties interested in the *Black Coal Award* and those interested in the other 80 modern awards which contain shutdown provisions."

[9] Interested parties were invited to provide submissions in response to the provisional view. A number of submissions were subsequently received, including from the CMIEG, the CFMMEU, the AMWU and the Australian Industry Group (Ai Group). Relevantly for the present proceedings, the submissions of the CFMMEU and the AMWU both contended, among other things, that the capacity of an employer to direct the taking of leave without pay in proposed clauses 25.10(d)(ii) and (iii) amounted to a right to stand down the employee and, as such, was not permitted to be included in a modern award. The AMWU in particular submitted

that stand down was not included in the list of matters permitted to be the subject of award terms in s 139 of the FW Act, and stand down was specifically dealt with in s 524 of the FW Act.

[10] The Annual Leave Full Bench conducted a hearing on 5 May 2017 to receive further submissions concerning the provisional views expressed in the March 2017 decision. In a Statement[14] issued by the President on 15 May 2017 it was noted that, at the hearing, parties were directed to file submissions "*clarifying their position with respect to the inclusion of a power to direct employees to take unpaid annual leave*". The Statement further noted that the CMIEG had filed a revised proposed shutdown clause. This revised proposal omitted any capacity for the employer to require an employee to take unpaid annual leave during a shutdown. The Statement invited interested parties to make submissions in response to the CMIEG proposal. However, after the CFMMEU stated its opposition to the proposal, the CMIEG withdrew it and the parties reverted to their original positions in respect of the provisional views stated in the *March 2017 decision*.

[11] Directions were issued on 4 August 2017 to finalise the matter, including by way of the receipt of evidence and the listing of a hearing on 9 October 2017. The parties were also directed to consider a revised draft of clause 25.10 which, relevantly, omitted any capacity for the employer to direct an employee to take leave without pay but retained an entitlement for the employee to elect to take leave without pay instead of taking annual leave during a shutdown period.

[12] Submissions from the CMIEG, the CFMMEU and the AMWU were received in response. The CMIEG proposed a further draft clause 25.10 which relevantly provided that an employer could direct an employee to take annual leave during a shutdown and, where the employee has an insufficient annual leave accrual, the employee would be taken to be on leave without pay for the relevant period. In response, both the CFMMEU and the AMWU submitted that it remained the case that a provision of this nature deeming the employee to be on leave without pay amounted to a stand down, which was not permitted by the FW Act to be included in a modern award. The unions accepted that an employee could elect to take leave without pay during a shutdown, but the CFMMEU in particular submitted that any such leave without pay should count as service. Both unions also opposed the inclusion in the Black Coal Award of a provision under which employees could be required to take annual leave during a shutdown subject only to a constraint of reasonableness.

[13] In a decision issued on 19 October 2017[15] (*October 2017 decision*) the Annual Leave Full Bench finalised the form of the revised shutdown clause to be included in the Black Coal Award. It determined, subject to one modification, to adopt the revised 4 August 2017 proposal. In respect of the capacity to direct the taking of accrued paid annual leave during a shutdown, the Full Bench determined that the revised clause met the reasonableness requirement of s 93(3) in that:

> "(i) The term only applies to temporary shutdowns.

[14] [2017] FWC 2662

[15] [2017] FWCFB 5394

(ii) The employer must give affected employees 28 days' written notice of a temporary shutdown period.

(iii) The power to direct an employee to take a period of accrued paid annual leave only arises if the employee does not elect to take paid annual leave or leave without pay to cover the whole of the temporary shutdown period.

(iv) A direction to take a period of accrued paid leave must be in writing *and* must be reasonable."[16]

[14] The Full Bench also rejected the CMIEG proposal in respect of employees being "taken to be" on leave without pay if they did not have sufficient accrued annual leave to cover the period of the shutdown. The Full Bench accepted, without giving any reasons, that the CMIEG's proposed provision was capable of falling within the scope of s 139(1)(h) as being a matter about "*leave*".[17] However, it rejected the proposition on the merits, determining that it was not apparent why it was necessary, in order to meet the modern awards objective, to insert such a term in the Black Coal Award, and it rejected the proposition that the absence of such a provision would render a shutdown clause nugatory.[18] The Full Bench declined to deal with the issue raised by the CFMMEU as to whether any leave without pay should count as service, saying:

"[67] We are not satisfied that it is appropriate to deal with the issue of service at this time. The issue raised may have implications in the review of all shutdown terms in modern awards. It is appropriate that it be considered in the context of a broader review of shutdown terms."

[15] The Black Coal Award was ultimately varied in accordance with the *October 2017 decision* on 9 November 2017.[19]

[16] In a Statement[20] issued on 9 November 2017, 81 identified modern awards containing shutdown provisions, and the continuity of service issue referred to in the *October 2017 decision*, were referred to the Plain Language Full Bench for determination of the final form of a shutdown clause in each award.

[17] The Plain Language Full Bench issued a Statement on 28 February 2019[21] (*February 2019 statement*) containing, in Attachment C, an updated list of modern awards (not including the Black Coal Award) containing shutdown provisions. These awards were, at the date of the *February 2019 statement*, 2010 awards. As at the date of this decision all these awards except for the *Children's Services Award 2010* (Children's Award) have been consolidated as 2020 awards and we refer to them as such in this decision unless stated otherwise. **Attachment A** to this decision sets out a further updated list of the 78 modern awards (excluding the Children's

[16] Ibid at [29]

[17] Ibid at [32]; we note that the reference in the decision to s 139(1)(b) is a typographical error.

[18] Ibid at [33]-[62]

[19] Ibid at [76]; PR597595

[20] [2017] FWC 5861

[21] [2019] FWCFB 1255

Award, which is dealt with separately in chapter 6 of our decision) that currently contain shutdown provisions.

[18] In the *February 2019 statement*, the Plain Language Full Bench asked interested parties to make submissions on the following matters:

1. Whether the modern awards that currently contain shutdown provisions should be varied to include the following model term:

XX.XX Shutdown

(a) Clause XX.XX applies if an employer intends to shut down all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take 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 is engaged.

(d) The following applies to any affected employee during a temporary shutdown period:

(i) the employee may elect to cover the temporary shutdown period by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause XX.XX;

(ii) if the employee does not make an election under clause XX.XX(d)(i) that covers the whole of the temporary shutdown period, then 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)(ii):

(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)(ii).

(g) 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.

(h) If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause XX.XX, then the employee is taken not to be on leave on that day or part-day.

(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.

2. Any award-specific variations that should be made; and

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

[19] It may be noted the proposed model term reproduces the shutdown provision inserted in the Black Coal Award by the Annual Leave Full Bench (except for some introductory words in what is now clause 24.9(a) of the 2020 version of the Black Coal Award). The Full Bench stated in the *February 2019 statement* that the above matters would be decided on the papers unless any party requested a formal hearing. No such requests were received.

[20] Submissions were received from:

- Australian Business Industrial & New South Wales Business Chamber (ABI);[22]
- Australian Manufacturing Workers' Union (AMWU);[23]
- Australian Hotels Association (AHA);[24]
- Australian Workers' Union (AWU);[25]
- Australian Industry Group (Ai Group);[26]
- Australasian Meat Industry Employees Union (AMIEU);[27]
- Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division (CFMMEU – M&E);[28]
- Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division (CFMMEU – MD);[29]

[22] Submission, ABI & NSWBC, 1 April 2019

[23] Submission, AMWU, 27 March 2019

[24] Submission, AHA, 22 March 2019

[25] Submission, AWU, 25 March 2019

[26] Submission, Ai Group, 22 March 2019

[27] Submission, AMIEU, 22 March 2019

[28] Submission, CFMMEU – M&E, 22 March 2019

[29] Submission, CFMMEU – MD, 8 April 2019

- Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division (CFMMEU – C&G);[30]
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU);[31]
- CPSU, the Community and Public Sector Union (CPSU);[32]
- Flight Attendants' Association of Australia (FAAA).[33]
- Housing Industry Association (HIA);[34]
- Master Builders Australia (MBA);[35] and
- United Voice (now the United Workers Union) (UWU).[36]

[21] Submissions in reply were received from:

- Ai Group;[37]
- AMIEU;[38] and
- CFMMEU – C&G.[39]

[22] This decision deals with the outstanding matters in respect of shutdown terms. The Full Bench was reconstituted on 6 July 2022 for the purpose of finalising the shutdown provisions in the awards identified in the *February 2019 statement*.

[23] We propose to first set out the legislative framework and the history of shutdown provisions before we turn to the submissions made in respect of the three questions in [18] above.

2. The legislative framework

[24] Section 93(3) of the FW Act prescribes the circumstances in which an employee may be required to take annual leave as follows:

> (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

[25] The Explanatory Memorandum to the *Fair Work Bill 2008* provides guidance regarding the intention of subclause 93(3) of the Bill and what factors may be considered when determining if a requirement is "*reasonable*":

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[30] Submission, CFMMEU – C&G, 2 April 2019

[31] Submission, CEPU, 28 March 2019

[32] Submission, CPSU, 29 March 2019

[33] Submission, FAAA, 3 May 2019

[34] Submission, HIA, 22 March 2019

[35] Submission, MBA, 22 March 2019

[36] Submission, United Voice, 4 April 2019

[37] Submission in Reply, Ai Group, 18 April 2019

[38] Submission in Reply, AMIEU, 17 May 2019

[39] Submission in Reply, CFMMEU – C&G, 17 April 2019

> "Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.
>
> In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:
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> - the needs of both the employee and the employer's business;
> - any agreed arrangement with the employee;
> - the custom and practice in the business;
> - the timing of the requirement or direction to take leave; and
> - the reasonableness of the period of notice given to the employee to take leave."[40]

[26] In relation to the continuity of service issue, "*service*" and "*continuous service*" are defined in s 22 of the FW Act in the following way:

> **22 Meanings of service and continuous service**
>
> *General meaning*
>
> (1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).
>
> (2) The following periods do not count as service:
>
> (a) any period of unauthorised absence;
>
> (b) any period of unpaid leave or unpaid authorised absence, other than:
>
> (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
>
> (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
>
> (iii) a period of leave or absence of a kind prescribed by the regulations;
>
> (c) any other period of a kind prescribed by the regulations.

[40] Fair Work Bill 2008: Explanatory Memorandum at [381]-[382]

(3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.

Meaning for Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2

(4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:

(a) a period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

[27] Section 136(1) of the FW Act deals with what terms may or must be included in modern awards as follows:

136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

(a) Subdivision B (which deals with terms that may be included in modern awards); or

(b) Subdivision C (which deals with terms that must be included in modern awards); or

(c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or

(d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

[28] In respect of s 136(1)(a), s 139(1)(a) provides:

139 Terms that may be included in modern awards--general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and
(ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;
(ii) employees working on weekends or public holidays;
(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and
(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;
(ii) responsibilities or skills that are not taken into account in rates of pay;
(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

[29] Section 524(1) of the FW Act deals with circumstances in which an employer can stand down employees, and s 524(3) provides that the employer is not required to pay the employee for a period of stand down authorised by s 524(1). Section 524(2) provides:

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

[30] Section 156 of the FW Act previously dealt with the conduct of 4 yearly reviews of modern awards. Section 156 was repealed by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) effective retrospectively from 1 January 2018, but cl 26 of Sch 1 to the Act (which was added by the amending Act) requires the Commission to continue to apply s 156 to the current 4 yearly review as if it had not been repealed. Accordingly, for present purposes, s 156 must be applied as if it remains in force.

[31] Section 156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context, "*review*" has its ordinary and natural meaning of "*survey, inspect, re-examine or look back upon*".[41] The

[41] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 401 at [38]

discretion in s 156(2)(b)(i) to make determinations varying modern awards in a 4 yearly review, is expressed in general, unqualified, terms.

[32] If a power to decide is conferred by a statute and the context (including the subject matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied.[42] However, a number of provisions of the FW Act which are relevant to the 4 yearly review operate to constrain the breadth of the discretion in s 156(2)(b)(i). In particular, the review function in Part 2-3 of the FW Act involves the performance or exercise of the Commission's "*modern award powers*" (see s 134(2)(a)). It follows that the "*modern awards objective*" in s 134 applies to the 4 yearly review.

[33] Section 138 (achieving the modern awards objective) and a range of other provisions of the FW Act are also relevant to the 4 yearly review: s 3 (object of the Act); s 55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s 135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s 284 (the minimum wages objective); s 577 (performance of functions etc by the Commission); s 578 (matters the Commission must take into account in performing functions etc); and Division 3 of Part 5-1 (conduct of matters before the Commission).

[34] The modern awards objective is in s 134 of the FW Act:

> **134 The modern awards objective**
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> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or

[42] *O'Sullivan v Farrer* (1989) 168 CLR 210 at [216] per Mason CJ, Brennan, Dawson and Gaudron JJ

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[35] The modern awards objective is to "*ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*", taking into account the particular considerations identified in ss 134(1)(a)-(h) of the FW Act (the s 134 considerations).

[36] The modern awards objective is very broadly expressed.[43] It is a composite expression which requires that modern awards, together with the NES, provide "*a fair and relevant*

[43] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227 at [35]

minimum safety net of terms and conditions", taking into account s 134 considerations.[44] "*Fairness*" in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[45]

[37] The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[46] No particular primacy is attached to any of the s 134 considerations[47] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[38] It is not necessary to make a finding that the modern award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award.[48] Generally speaking, the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[49] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in ss 134(1)(a)-(h) of the FW Act and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[39] Further, the matters which may be taken into account are not confined to the s 134 considerations. As the Full Court of the Federal Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:[50]

> "What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a 'fair and relevant minimum safety net of terms and conditions', they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters 'must be determined by implication from the subject matter, scope and purpose of the' Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40)."[51]

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[44] *4 Yearly Review of Modern Awards—Penalty Rates (Hospitality and Retail Sectors) Decision* [2017] FWCFB 1001, 256 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 401 at [41]-[44]

[45] [2018] FWCFB 3500 at [21]-[24]

[46] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[47] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 401 at [33]

[48] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[49] Ibid at [109]-[110]; though the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[50] [2017] FCAFC 161, 253 FCR 401 at [161]

[51] Ibid at [48]

[40] Section 138 of the FW Act emphasises the importance of the modern awards objective:

> **138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[41] What is "*necessary*" to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[52]

[42] In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*[53] the Federal Court (Tracey J) considered what it meant for the Commission to be satisfied that making a determination varying a modern award (outside a 4 yearly review) was "*necessary to achieve the modern awards objective*" for the purposes of s 157(1) as follows:

> "The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is 'necessary' in order 'to achieve the modern awards objective'. That objective is very broadly expressed: FWA must 'provide a fair and relevant minimum safety net of terms and conditions' which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> …
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
>
> …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary."[54]

[43] The above observation, in particular the distinction between that which is "necessary" and that which is merely "desirable" is apposite to s 138, including the observation that

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[52] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227

[53] Ibid

[54] Ibid at [35]-[37] and [46]

reasonable minds may differ as to whether a particular award term or proposed variation is necessary, as opposed to merely desirable. What is "*necessary*" to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[55]

[44] In the *4 Yearly Review of Modern Awards—Penalty Rates (Hospitality and Retail Sectors) Decision*[56] the Full Bench summarised the general propositions applying to the Commission's task in the 4 yearly review, as follows:

> "1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
>
> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
>
> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
>
> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
>
> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
>
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision."[57]

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[55] Ibid

[56] [2017] FWCFB 1001, 256 IR 1 at [269]

[57] Ibid at [269]

[45] Where an interested party applies for a variation to a modern award as part of the 4 yearly review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd* as follows:[58]

> "[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net."

[46] In the same decision the Full Court also said: "...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective."[59]

[47] We will adopt these principles in this decision.

3. The history of shutdown provisions

[48] There is a long history of shutdown provisions being included in awards prior to the commencement of the FW Act. Such provisions were usually included in awards to facilitate the taking of annual leave entitlements. For example, clause 21 of the *Metal Trades Award 1952*[60] contained the following provision relating to annual shutdowns:

> *Annual Close Down*
>
> (m) Where an employer closes down his plant, or a section or sections thereof, for the purposes of allowing annual leave to all or the bulk of the employees in the plant, or section or sections concerned, the following provisions shall apply:—

[58] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, 252 FCR 337

[59] Ibid at [46]

[60] [1952] CthArbRp 11, 73 CAR 324 at 446

(i) He may by giving not less than one month's notice of his intention so to do stand off for the duration of the close down all employees in the plant or section or sections concerned, and allow to those who are not then qualified for two full weeks' leave paid leave on a proportionate basis of one-sixth of a week's leave for each completed month of continuous service.

(ii) An employee who has then qualified for two full weeks' leave, and has also completed a further month or more of continuous service shall be allowed his leave, and shall subject to sub-clause (f) hereof also be paid one-sixth of a week's wages in respect of each completed month of continuous service performed since the close of his last twelve-monthly qualifying period.

(iii) The next twelve-monthly qualifying period for each employee affected by such close down shall commence from the day on which the plant, or section or sections concerned is reopened for work. Provided that all time during which an employee is stood off without pay for the purposes of this sub-clause shall be deemed to be time of service in the next twelve-monthly qualifying period.

(iv) If in the first year of his service with an employer an employee is allowed proportionate annual leave under paragraph (i) hereof, and subsequently within such year lawfully leaves his employment or his employment is terminated by the employer through no fault of the employee, he shall be entitled to the benefit of sub-clause (1) of this clause subject to adjustment for any proportionate leave which he may have been allowed as aforesaid.

[49] Three observations may be made about the above provision: *first*, the provision is concerned only with shutdowns for the purpose of allowing annual leave; *second*, insofar as an employee does not have a sufficient accrued annual leave entitlement, the employee is "*stood off without pay*"; and, *third*, the period the employee is "*stood off*" is deemed to be part of the employee's service for the next twelve month qualifying period for annual leave. These three features remained in clause 7.1.12 of the *Metal, Engineering and Associated Industries Award 1998*[61] as it was immediately before the commencement of the FW Act.

[50] Another example of a pre-modernisation award provision concerning shutdowns is clause 32.9 of the *National Building and Construction Industry Award 2000*,[62] which provided:

32.9 Annual close down

32.9.1 Notwithstanding anything contained in this award an employer giving any leave in conjunction with the Christmas - New Year holidays may, at the employer's option, either:

32.9.1(a) stand off without pay during the period of leave any employee who has not yet qualified under 32.1 hereof, or

[61] AP789529CRV

[62] AP790741CRV

> **32.9.1(b)** stand off for the period of leave any employee who has not qualified under 32.1 hereof and pay the employee (up to the period of leave then given) at a rate of one-twelfth of an ordinary week's wages in respect of each 38 hours' continuous service (excluding overtime).
>
> **32.9.2** Provided that where an employer at their option decides to close down their establishment at the Christmas - New Year period for the purpose of giving the whole of the annual leave due to all, or the majority of their employees then qualified for such leave, the employer shall give at least two months' notice to their employees of their intention so to do.

[51] The above provision has the first two of the three characteristics of the provision in the two metal industry awards identified above, but not the third. Clause 32.3 of the *National Building and Construction Industry Award 2000* provided for employers to allow employees to take leave prior to their right to take leave accruing, and a formula for employees who had worked for 12 months in the industry with a number of different employers, to be paid a pro rata amount for leave based on each completed five working days of continuous service with the current employer.

[52] A third pre-modernisation example is clause 29.11 of *The Coal Mining Industry (Production and Engineering) Consolidated Award 1997*,[63] which is solely concerned with the taking of annual leave during, and notice to be provided for, shutdowns:

> **29.11 Shutdown**
>
> **29.11.1** An employer who shuts down all or any part of its operation must give employees at least 28 days['] notice of the shutdown or such shorter period as agreed between the employer and the affected employees.
>
> **29.11.2** Employees directly affected by the shutdown who have annual leave credits may take all or part of those credits during the shutdown period.
>
> **29.11.3** Employees directly affected by the shutdown who are not yet entitled to annual leave, may take leave during the shutdown period calculated using the formula in 29.9.

[53] Clause 29.9 of *The Coal Mining Industry (Production and Engineering) Consolidated Award 1997* provided a formula for calculating the amount of paid leave to which an employee with less than a full year's entitlement to leave or who had not reached an anniversary of employment, was entitled. Clause 29.10 of that award also provided for an employer to allow employees to take annual leave before it was credited. Clearly, these provisions dealt with paid annual leave. The award did not provide for employees to be stood aside without pay if they did not have sufficient paid leave accrued to cover the period of the shutdown.

[63] AP774609

[54] A minority of pre-modernisation awards containing shutdown clauses stated that such provisions were for the purpose of allowing the closedown of the employer's business or operations during specified holiday periods or to meet the employer's operational requirements, rather than simply to facilitate the taking of annual leave. A number of pre-modernisation awards containing shutdown clauses referred to employees taking leave without pay, rather than being "stood off" or "stood down" if they did not have sufficient accrued paid annual leave entitlements to cover the period of a shutdown.

[55] Statutory shutdown provisions were introduced in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices Act), but only in connection with the taking of annual leave. The Australian Fair Pay and Conditions Standard established by the Work Choices Act gave an employer the right to direct employees to take leave during a shutdown for the whole, or part, of its business. These provisions, set out below, only applied to annual leave that was credited to employees and employees were required to take at least that amount of annual leave during a period an employer shut down a business:

> **92H Rules about taking annual leave**
>
> *Shut downs*
>
> (5) An employee must take an amount of annual leave during a particular period if:
>
> (a) the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and
>
> (b) at least that amount of annual leave is credited to the employee.[64]

[56] As a result of amendments made to the *Workplace Relations Act 1996* subsequent to the Work Choices Act, the then-Australian Industrial Relations Commission (AIRC) was required to conduct an award modernisation process and, in the course of this process, the AIRC Full Bench gave consideration to existing annual leave provisions relating to shutdowns. In a decision issued on 19 December 2008,[65] the Full Bench considered annual leave generally and said:

> "[95] As we noted in our statement of 12 September 2008, it has not been possible to develop a single model clause for annual leave. While some parties have sought greater uniformity in the area, there is a wide range of differing provisions in the awards and NAPSAs that we are dealing with. In many cases the provisions are more generous to employees than the provisions of the NES. Areas in which this can be observed are the quantum of holiday pay, leave loading and the definition of shift worker. In considering what should be included in the modern award on each of these matters we have attempted to identify or formulate a standard entitlement in the area covered by the modern award rather than preserving a range of differing entitlements. This involves a

[64] *Workplace Relations Act 1996* (Cth) s 236(5)

[65] [2008] AIRCFB 1000

> degree of rationalisation at the award level only and will not result in standard provisions across all awards."

[57] As part of this consideration, the Full Bench said in relation to shutdowns:

> "[97] The provisions in awards and NAPSAs governing annual close-downs vary significantly. It is preferable that we do not alter provisions which have been specifically developed for particular industries. We have adopted the approach of attempting to identify an industry standard in each case. This means there may be some variation in the close-down provisions."

[58] Notwithstanding the above statement, shutdown provisions in the modern awards created during the award modernisation process did change in a relevantly significant respect in particular industries compared to the predecessor awards. References in the pre-existing clauses to employees being stood down or stood off during annual closedowns where they did not have sufficient annual leave accrued were in most cases removed and replaced with references to the employee taking unpaid leave. This can be seen, for example, in clause 34.7(c) of the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award)[66] and clause 31.3(a) of the *Building and Construction General On-Site Award 2020* (Building Award).[67] In the former case, the provision that the period of the shutdown counts as service was retained.[68] However, there are some cases where (presumably due to an oversight), reference to employees being stood down or stood off remains – for example, clause 25.8(d) of the *Meat Industry Award 2020* (Meat Award) and clause 24.6(a)(iv) of the *Mobile Crane Hiring Award 2020* (Mobile Crane Award).

[59] These alterations appear to have been made because, while s 139(1)(h) of the FW Act authorises the Commission to include in modern awards terms about leave and arrangements for taking leave, the FW Act does not authorise award terms about the stand down of employees – a matter to which we will return later in this decision. It is also notable that clause 31.3 of the Building Award limits the operation of annual close down provisions to the Christmas/New Year holidays, thereby limiting the ability for an employer to direct an employee to take unpaid leave. Further, clause 31.4 of the Building Award provides for annual leave to be taken in advance by agreement and sets out mutual rights and obligations in this regard. In contrast, the *Clerks—Private Sector Award 2020* simply provides that an employer could require an employee to take annual leave as part of a close-down of its operations, by giving at least 4 weeks' notice, and makes no reference to a direction being given for employees to take unpaid leave.[69]

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[66] Previously clause 41.8(c) of the *Manufacturing and Associated Industries and Occupations Award 2010*

[67] Previously clause 38.3(a) of the *Building and Construction General On-Site Award 2010*

[68] Previously clause 41.8(d), now clause 34.7(d)

[69] *Clerks—Private Sector Award 2020* clause 32.5

4. Submissions

4.1 Submissions on whether all modern awards that currently contain shutdown provisions should be varied to include the model term

[60] The following parties filed general submissions regarding insertion of the model term in all modern awards that currently contain a shutdown provision[70] (listed at Attachment A to this decision):

- ABI;
- Ai Group;
- AMIEU;
- CFMMEU – C&G;
- CFMMEU – MD; and
- United Voice (as it then was, now UWU).

(i) ABI

[61] ABI opposes the insertion of the model term in the awards that currently contain shutdown provisions and invites the Commission to conclude:

- shutdown provisions have been common in the industrial relations sphere for a significant period of time;

- the existing shutdown provisions are based on broad industrial standards that applied in various industries prior to 2009;

- when awards were modernised in 2010 and the current awards created, the shutdown provisions in each of the awards satisfied the modern awards objective; and

- the current shutdown provisions are regularly used by businesses.

[62] ABI submits that substantive changes should only be made to the existing shutdown provisions where there is a cogent basis to do so, as expressed by the Full Bench in the *June 2015 decision*.[71] It contends that the model term differs from the existing shutdown provisions in material respects:

(1) None of the existing shutdown provisions require an employer's direction to an employee pursuant to a shutdown to be "*reasonable*", whereas the model term does – which amounts to a substantive change.

(2) The model term allows an employee to elect to take unpaid leave during a shutdown even if they have paid annual leave accrued. This would increase the

[70] Other than the *Black Coal Mining Industry Award 2020*

[71] [2015] FWCFB 3406 at [382]

regulatory burden on employers by removing a legitimate way that they are able to reduce the liabilities associated with accrued annual leave.

(3) The model term requires employers to implement new procedures that are not simple or easy to implement.

(4) Currently, 14 awards do not require employers to give a minimum notice period before implementing a shutdown. The model term does contain that requirement and therefore this is a substantive change. ABI does not object to the inclusion of a minimum notice period in the model term provided it remains at 28 days.

(5) Currently, 55 awards do not require employers to give a written direction to employees prior to implementing a shutdown. The model term contains this requirement, which amounts to a substantive change. However ABI does not oppose the model term being inserted subject to the minimum notice period remaining at 28 days.

(6) Currently, 52 awards allow employers to direct employees take a period of unpaid leave during a shutdown period, which is an essential clause because it gives employers the ability to actually shut down their business. ABI submits that if this ability were removed, it would result in practical and financial difficulties for employers. This part of the model term is inconsistent with that part of the modern awards objective in ss 134(1)(f) and (g) of the FW Act.

[63] Should we be minded to insert the model term, ABI submits that it should be amended in two respects. First, ABI submits that the provisions that enable an employee to elect to take a period of unpaid leave should be removed or varied so that employees cannot choose to take unpaid leave instead of accrued annual leave, or if a period of election is given, it should be limited to seven days. Following those seven days, employers should be able to direct an employee take accrued leave where no election has occurred. Second, ABI submits that existing provisions in awards which give employers the ability to direct employees to take unpaid leave should be retained.

(ii) Ai Group

[64] The Ai Group opposes the variation of those awards in which it has an interest to insert the model term. It submits the model term would reduce or remove the ability of employers to direct an employee to take paid or unpaid leave during a shutdown, undermine employers' ability to implement a shutdown and/or the benefits associated with it, and the model term would impose practical and administrative burdens on employers.

[65] Ai Group proposes an alternative model term, which is set out below (proposed changes marked up):

"**XX.XX Shutdown**

(a) Clause XX.XX applies if an employer intends to shutdown all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take 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 paragraph (b) and who will be affected by that period, as soon as reasonable practicable after the employee is engaged.

(d) The following applies to any affected employee during a temporary shutdown period:

(i) the employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.

(ii) ~~**(i)**~~ subject to the agreement of the employer, the employee may elect to cover the temporary shutdown period by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause XX.XX;

(iii) ~~**(ii)**~~ if the employee does not make an election under subparagraph (i) that covers the whole of the temporary shutdown period, and the employee does not have sufficient accrued entitlement to paid annual leave to cover the entire duration of the temporary shutdown (or it would not be reasonable to direct the employee to take such leave), ~~then~~ the employer may direct the employee to take a period of ~~paid annual leave to which the employee has accrued an entitlement~~ leave without pay that is necessary to cover the period of the shutdown that would not otherwise be covered by their taking of paid annual leave.

(e) A direction by the employer under clause XX.XX(d)(ii):

(i) must be in writing; and

(ii) must be reasonable.

(f) The employee must take paid annual leave or unpaid leave in accordance with a direction under clause XX.XX(d)(ii).

(g) 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.

(h) If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause XX.XX, the employee is taken not to be on leave on that day or part-day.

(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."

[66] The Ai Group submits that many of the current shutdown provisions in the awards at Attachment A are drafted in a way that imply they will be used only to enable a "*significant proportion*" of a business' employees to take annual leave. The right to direct employees to take annual leave during a shutdown is "*essential*" for employers, to allow them to reduce leave liability and manage employee absences, especially in operations which require large amounts of employees to attend to ensure efficient or productive performance of work. The Ai Group submits that awards currently providing for a shutdown period "*for the purposes of allowing leave to employees*" should not be varied in such a way that removes this employer right.

[67] The Ai Group also submits that the model term does not give an employer the right to direct an employee to take unpaid leave during a shutdown period, which is not consistent with the current shutdown provisions in many awards. This would undermine the benefit of a shutdown and is a "*major deficiency*". Where an award does not give an employer this right, the employer may be forced to pay full-time or part-time employees who did not have enough leave accrued for the entire shutdown period. The Ai Group submits this may expose employers to additional costs. The Ai Group submits that the model term should be amended to give employers this right, or the model term should not be inserted into any award that currently provides this right.

[68] The Ai Group submits that the model term only gives an employer the right to direct an employee to take annual leave after the employee has been afforded the opportunity to elect to take other types of leave (paid annual leave, leave without pay and annual leave in advance). The Ai Group submits that this is a substantive change and would overturn the standard practice in many industries. The Ai Group also submits that, in the majority of circumstances, it is likely that employees would prefer to take paid leave rather than unpaid leave. The Ai Group contends that many existing awards do not impose this election requirement on employers and if adopted, the requirement would impose a substantial and significant administrative burden on employers. The Ai Group submits that this change would involve developing a system for obtaining and processing employee preferences which is particularly burdensome for large or geographically diverse employers.

[69] The Ai Group submits that the model term should be amended to give employers the ability to make a direction to its workforce to take annual or unpaid leave for all or part of a shutdown period. This direction should not be subject to employee choice to take unpaid leave in circumstances where they have paid annual leave accrued. The Ai Group acknowledges that this direction should be subject to mechanisms that ensure the direction is reasonable. The Ai Group also accepts that the requirement a direction be reasonable negates the need for additional complex rules relating to shutdowns and aligns with s 93(3) of the FW Act which provides:

> "(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable."

[70] The Ai Group submits that the model term does not impose a timeframe within which an employee can make an election to take paid annual leave, leave without pay and annual leave in advance during a shutdown. The Ai Group contends that this would cause a delay for an employer in implementing a shutdown and create uncertainty as to when a direction under subclause (e) can be made. The Ai Group submits that if the Commission decides to adopt the part of the model term that gives employees the opportunity to elect the type of leave they take during a shutdown, the term should be amended to include a time limit on the making of that election.

(iii) AMIEU

[71] The AMIEU submits that where shutdown provisions contain provisions that are tailored to an industry or go beyond the model term, they should be retained.

(iv) CFMMEU – C&G

[72] The CFMMEU – C&G opposes the insertion of the model term into awards currently containing shutdown provisions, for the following reasons:

(1) The existing shutdown provisions are tailored to the ways various industries operate and provide better entitlements than the model clause. For example, the Building Award and the *Joinery and Building Trades Award 2020* (Joinery Award) both limit the operation of the shutdown provision to the Christmas-New Year period and require greater notice periods from the employer (e.g. 2 months' notice) of any such close down.

(2) The shutdown provisions have been in force for many years and are well understood by the parties, and should not be altered without evidence or substantive reasoning.

(v) CFMMEU – MD

[73] The CFMMEU – MD opposes the model term being inserted in the awards that currently contain annual leave shutdown provisions. The CFMMEU– MD submits that existing shutdown provisions have historically been developed to address particular patterns of work or production

and reflect industry practice, and each provision needs to be considered in context of other annual leave terms within a specific award.

[74] The CFMMEU – MD submits that the existing provisions often contain more beneficial terms than those in the model term and that as a general principle, the plain language re-drafting process is not intended to alter existing substantive provisions.

(vi) UWU

[75] The UWU opposes the insertion of the model term in the awards that currently contain shutdown provisions. It submits that a term that allows an employer to direct an employee to take unpaid leave as part of a shutdown may not be permitted under the FW Act.

[76] The UWU submits that, in the alternative, if the Commission determines that such a term is permitted, the model term does not contain a number of employee protections that are currently provided for in a number of modern awards. It refers to clause 21.4(c) of the *Cleaning Services Award 2020*, which limits a shutdown period to 4 weeks and clause 21.4(f) which provides that an employee may be redeployed to another site for the shutdown period, clause 24.4(b) of the Children's Award which limits a shutdown period to 4 weeks over "*Christmas vacation*"; and clauses 25.11(d) and (e) of the *Food, Beverage and Tobacco Manufacturing Award 2020* (FBTM Award) which restricts the number of shutdowns to one or two separate periods per year and provides that "*any leave taken*" as a result of a shutdown counts as service.

[77] The UWU submits that subclause (h) of the proposed model term should be re-drafted to expressly provide that the employee would be taken to be on paid public holiday leave on any day or part-day that is a public holiday during the shutdown period as follows (proposed changes marked up):

> "**(h)** If a temporary shutdown period includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause XX.XX, the employee ~~is taken not to be on leave on that day or part-day.~~ will be paid as provided for in this award and the employee is taken not to be on annual leave or leave without pay on that day or part-day."

Reply Submissions

(i) CFMMEU – C&G

[78] CFMMEU – C&G submits there is "*a consensus of opinion*" amongst employer parties that the model term should not be inserted in the awards with existing shutdown provisions and notes this is consistent with its own submissions.

(ii) Ai Group

[79] In response to union submissions contending existing provisions that are beneficial to employees should be retained, the Ai Group submits that "*cherry picking*" in this way detracts from the benefits of a model term and would be unfair to employers. It contends that a number

of union parties have proposed to retain a number of entitlements that are not currently provided in existing awards.

4.2 Submissions on whether any award-specific variations should be made

[80] We now turn to the award-specific submissions.

(a) *AWU*

[81] The AWU has an interest in a large number of awards.[72] It does not oppose the variation of those awards to incorporate the model term, but submits that award-specific variations should be made to the model term to account for clauses in modern awards that currently contain express limitations on when shutdown provisions can be applied. AWU submits the awards that appear to fall into this category are:

- *Airline Operations–Ground Staff Award 2020*
- *Asphalt Industry Award 2020*
- FBTM *Award*
- *Gardening and Landscaping Services Award 2020*
- Manufacturing Award
- *Pharmaceutical Industry Award 2020*
- *Plumbing and Fire Sprinklers Award 2020*
- *Seafood Processing Award 2020* (Seafood Award)
- *Timber Industry Award 2020* (Timber Award)
- *Vehicle Repair, Services and Retail Award 2020*
- *Wine Industry Award 2020*

(b) *AMWU*

[82] The AMWU does not oppose variation of the awards set out at Attachment A to incorporate the model term, provided "*existing safeguards*" in those awards are maintained. The AMWU submits that those safeguards are provisions for longer notice periods than those in the model term and provisions stating that leave taken by an employee during a shutdown counts as service, as contained in the following awards:

- *Airline Operations-Ground Staff Award 2020*

[72] *Airline Operations–Ground Staff Award 2020, Alpine Resorts Award 2020, Aluminium Industry Award 2020, Aquaculture Industry Award 2020, Asphalt Industry Award 2020, Building and Construction General On-site Award 2020, Cemetery Industry Award 2020, Cement, Lime and Quarrying Award 2020, Cleaning Services Award 2020, Concrete Products Award 2020, Electrical Power Industry Award 2020, Food, Beverage and Tobacco Manufacturing Award 2020, Gardening and Landscaping Services Award 2020, Gas Industry Award 2020, General Retail Industry Award 2020, Hair and Beauty Industry Award 2010, Health Professionals and Support Services Award 2020, Horse and Greyhound Training Award 2020, Hospitality Industry (General) Award 2020, Hydrocarbons Industry (Upstream) Award 2020, Manufacturing and Associated Industries and Occupations Award 2020, Mining Industry Award 2020, Miscellaneous Award 2020, Nursery Award 2020, Oil Refining and Manufacturing Award 2020, Pest Control Industry Award 2020, Pharmaceutical Industry Award 2020, Plumbing and Fire Sprinklers Award 2020, Premixed Concrete Award 2020, Racing Clubs Events Award 2020, Racing Industry Ground Maintenance Award 2020, Registered and Licensed Clubs Award 2020, Restaurant Industry Award 2020, Salt Industry Award 2020, Seafood Processing Award 2020, Security Services Industry Award 2020, Silviculture Award 2020, Storage Services and Wholesale Award 2020, Sugar Industry Award 2020, Timber Industry Award 2020, Vehicle Repair, Services and Retail Award 2020, Water Industry Award 2020, Wine Industry Award 2010* and *Wool Storage, Sampling and Testing Award 2020.*

- Building Award
- FBTM Award
- *Graphic Arts, Printing and Publishing Award 2020*
- Manufacturing Award
- *Oil Refining and Manufacturing Award 2020*
- Seafood Award
- *Sugar Industry Award 2020*
- *Vehicle Repair, Services and Retail Award 2020*

(c) *Ai Group*

[83] The Ai Group submits that under clause 27.11(a) of the *Seafood Processing Award 2010*[73] an employer may close down an enterprise or part of an enterprise for the purposes of allowing annual leave to all or the majority of employees, if 4 weeks' notice is given. It disagrees with the AMWU's submission that one month's notice is required and it seeks to retain the 4 weeks' notice provision.

(d) *CFMMEU – MD*

[84] The CFMMEU – MD states that it has an interest in the Joinery Award, the Manufacturing Award, the Timber Award, and the *Textile, Clothing, Footwear and Associated Industries Award 2020* (Textile Award).

[85] The CFMMEU – MD opposes the model term being inserted in the Joinery, Manufacturing, Timber and Textile Awards. The basis of the objection is:

(1) The current provisions reflect the practices developed in each industry and address particular patterns of work;

(2) The current provisions must be considered in the context of other annual leave provisions within an award;

(3) The current provisions contain more beneficial provisions than the model term; and

(4) The plain language re-drafting process is not intended to make substantive changes to existing award entitlements.

[86] The CFMMEU – MD submits that the shutdown provisions in each of these awards contain more beneficial provisions than the model term. Using the Textile Award[74] as an example, it identifies the following differences:

[73] Clause 27.11(a) of the *Seafood Processing Award 2010* appears as clause 21.11(a) of the *Seafood Processing Award 2020*, which operated from 4 February 2020.

[74] The submission refers to the 2010 version of the award, current at that time. The *Textile, Clothing, Footwear and Associated Industries Award 2020* has since become operative, but the wording of the equivalent clauses is the same in the current version.

(1) the award requires an employer to give at least three months' notice of its intention to shut down (compared to 28 days' notice under the model term);

(2) the award requires all or a bulk of employees of a plant or section be subject to the shutdown (compared to "*a part*" under the model term);

(3) the award restricts the amount of leave that can be taken pursuant to a shutdown period to one year of NES accrual;

(4) the interaction of clauses 41.3 and 41.7[75] of the award means an employer may implement a shutdown but there are restrictions on the maximum length and number of periods of annual leave, which means employers cannot use shutdown provisions in a manner that is unfair to employees;

(5) the award provides that unpaid leave taken during a shutdown period counts as continuous service, whereas the model term is silent on the issue of continuity of service.

[87] The CFMMEU – MD submits that the Manufacturing Award and the Timber Award also contain more beneficial provisions, being the purpose of a shutdown, service, a restriction on the number of shutdowns that may be implemented within a 12 month period, minimum shutdown periods, and facilitative provisions that allow for the shutdown provisions to be varied by agreement. In relation to the Joinery Award, the CFMMEU – MD supports and adopts the submissions of the CFMMEU – C&G.

(e) *MBA*

[88] The MBA states that it has an interest in the Building Award and the Joinery Award. MBA opposes the inclusion of the model term in these awards. The basis of MBA's opposition is:

(1) It has had no feedback that its members do not understand the existing shutdown provisions or that the provisions are working inefficiently; and

(2) The Commission has no material before it which requires the inclusion of the model term in these awards.

(f) *HIA*

[89] The HIA states that it has an interest in the Building Award and the Joinery Award and opposes the inclusion of the model term in those awards. It submits that no party has expressed the need for change in the shutdown provisions and that the provisions are well understood, meaning there is no need to insert the model term.

(g) *CEPU*

[75] Clauses 32.2 and 32.6 in the *Textile, Clothing, Footwear and Associated Industries Award 2020*

[90] The CEPU states that it has an interest in the *Electrical Power Industry Award 2020* (the Electrical Power Award) and the *Electrical, Electronic and Communications Contracting Award 2020* (the Electrical Contracting Award). The CEPU supports the following submissions:

(1) CFMMEU – M&E submissions dated 22 March 2019;

(2) AWU submissions dated 25 March 2019; and

(3) AMWU submissions dated 27 March 2019.

[91] The CEPU does not oppose the model clause being included in the Electrical Power Award because, currently, it does not make sufficient provision for shutdown.

[92] The CEPU does oppose the model clause being inserted into the Electrical Contracting Award. The CEPU states that the model clause would leave those covered by the award worse off than the current shutdown provision. The basis of the CEPU's objection is the model clause has:

- a shorter notice period of 28 days' written notice by the employer;
- a broad spectrum when the shutdown can occur (i.e. not specific to Christmas-New Year Period);
- no provision for identifying that unpaid leave taken during shut down does not break service of an employee; and
- no definition of a shutdown to cap the duration of shutdown period.

(h) *FAAA*

[93] The FAAA has an interest in the *Aircraft Cabin Crew Award 2020*.

[94] The FAAA does not agree that the model term should be included in modern awards with shutdown provisions and submits that award-reliant employees will be at a disadvantage in terms of bargaining power and thus be exploited by an employer into having no choice but to take leave without pay.

[95] The FAAA submits this amounts to "*standing down an employee*" which is not permitted by s 139 of the FW Act and adopts the position of the AMWU (in the AMWU's submissions of 11 April 2017 and 3 October 2017) on the relationship between a term allowing an employer to "*direct unpaid leave*" and a term "*directing stand down*".

[96] The FAAA also places emphasis on the need for "*bargaining position*" to be considered when providing options for an agreement between employer and employee.

[97] If the Commission determines that the model term should be included, the FAAA highlights a flaw in subclause (d)(i) of the model term. It submits that the model clause is unclear as to what would happen if an employee refuses to elect any option available for the shutdown period. A scenario whereby the employee wishes to work but the employer refuses to allow this could arise. The FAAA submits this may lead to tension between employee and employer and the employee seeking an underpayment order to resolve the issue, which is unfair on the employee.

[98] The FAAA submits the model term should be amended to allow the employee to attend work and be paid during the shutdown period, or if the employer is unable to provide work, the employee be paid the ordinary rate.

(i) *CPSU*

[99] The CPSU does not oppose variation of the *Broadcasting, Recorded Entertainment and Cinemas Award 2020*, the *Contract Call Centres Award 2020*, the *Miscellaneous Award 2020* and the *Telecommunications Services Award 2020* to incorporate the model term, subject to the retention of any current provisions that are more beneficial than the model term and that are tailored to a particular industry. It supports the submissions of the CFMMEU – M&E.

(j) *CFMMEU – M&E*

[100] The CFMMEU – M&E supports the variation of the *Mining Industry Award 2020* (Mining Award) and the *Coal Export Terminals Award 2020* (Coal Export Award) to insert the model term.

(k) *AHA*

[101] The AHA has an interest in the *Hospitality Industry (General) Award 2020* (the Hospitality Award) and does not oppose the model term being inserted in awards containing annual leave shutdown provisions, including the Hospitality Award. The AHA submits:

(1) Sub-paragraph (i) refers to "*directions to take excessive leave in accordance with clause 34.7*[76] *of the Hospitality Award.*"

(2) Section 22 of the FW Act clearly defines the meaning of service and continuous service and it is evident "*that unpaid leave, whether taken at the request of the employee or as a result of a close-down at the initiative of the employer, does not count as service.*"

(l) *AMIEU*

[102] The AMIEU submits the model term would address a number of issues with the shutdown provisions in the Meat Award but it requires amendments to retain the particular

[76] Clause 34.8 in the *Hospitality Industry (General) Award 2010*

conditions of the current clause. Clause 25.8 of the Meat Award provides for shutdowns and is set out as follows:[77]

> "**25.8 Annual close-down**
>
> **(a)** Where an employer closes down a plant or a section of a plant for the purpose of allowing annual leave to all or the bulk of the employees in the plant or sections concerned, the employer should, where possible, give the employees concerned not less than three months' notice of the employer's intention to stand down for the duration of the close-down all employees in the plant or sections concerned.
>
> **(b)** For those employees who have not qualified for annual leave in accordance with clause 37—Annual leave, paid leave on a proportionate basis at the appropriate rate of wage and loading prescribed by clauses 25.3 and 25.5 will be granted.
>
> **(c)** An employee who has then qualified for annual leave in accordance with clauses 25.1 or 25.2 and has also completed a further month or more of continuous service will be allowed leave and will also be paid leave on a proportionate basis for the period worked since the close of the employee's last 12 monthly qualifying period.
>
> **(d)** The next 12 month qualifying period for each employee affected by the close-down will commence from the day on which the plant or section concerned is reopened for work. Provided that all time during which an employee is stood off without pay for the purposes of this clause will be deemed to be time of service in the next 12 monthly qualifying period.
>
> **(e)** If in the first year of service with an employer an employee is allowed proportionate annual leave under clause 25.8(b), and subsequently within such year leaves employment or employment is terminated by the employer through no fault of the employee, the employee will be entitled to the benefit of clause 25.6 subject to the adjustment for any proportionate leave which may have been allowed."

[103] The AMIEU submits the model term should be amended to "*protect*" the current provisions of the Meat Award. The AMIEU's amended model term is set out below (proposed changes marked up):

> "**25.8 ~~Shutdown~~ Annual close-down**
>
> ~~**(a)** Clause XX.XX applies if an employer intends to shutdown all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take leave during that period.~~
>
> **(a)** Where an employer closes down a plant or sections of a plant for the purpose of allowing annual leave to all or the bulk of the employees in the plant or sections

[77] Clause 25.8 is in the same terms as clause 37.8 of the 2010 Award.

concerned, the employer should, where possible, give the employees concerned not less than three months' written notice of the employer's intention to stand down for the duration of the close-down all employees in the plant or sections concerned.

(b) The employer must give ~~the affected employees 28 days' written notice of a temporary shutdown period~~ written notice of an annual close-down to any employee who is engaged after the notice is given under paragraph (a) ~~(b)~~ and who will be affected by that period, as soon as reasonable (sic) practicable after the employee is engaged.

~~**(c)** The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under paragraph (b) and who will be affected by that period, as soon as reasonable practicable after the employee is engaged.~~

(c) ~~**(d)**~~ The following applies to any affected employee during ~~a temporary shutdown period~~ an annual close-down:

(i) the employee may elect to cover the ~~temporary shutdown period~~ annual close-down by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause 25.7;

(ii) if the employee does not make an election under subparagraph (i) that covers the whole of the ~~temporary shutdown period~~ annual close-down, then the employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.

(d) ~~**(e)**~~ A direction by the employer under clause 25.8(c)(ii):

(i) must be in writing; and
(ii) must be reasonable.

(e) ~~**(f)**~~ The employee must take paid annual leave in accordance with a direction under clause 25.8(c)(ii).

(f) ~~**(g)**~~ 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 25.7, to which an entitlement has not been accrued is to be taken into account.

(g) ~~**(f)**~~ If an ~~temporary shutdown period~~ annual close-down includes a day or part-day that is a public holiday and would have been a working day for the employee had

the employee not been on leave in accordance with clause 25.8, the employee is taken not to be on leave on that day or part-day.

(h) All time during which an employee is stood off without pay for the purposes of clause 25.8 will be counted as service.

(i) Clauses 25.10 to 25.12 do not apply to a period of annual leave that an employee is required to take during an annual close-down in accordance with clause 25.8."

[104] Specifically in reply to the AMIEU's submissions concerning the Meat Award, the Ai Group opposes the AMIEU's proposal to retain the three-month written notice requirement. It contends that the requirement is excessive and would constitute a substantive change if the requirement for notice to be written (as set out in the model term) is adopted. Ai Group disagrees with the AMIEU's submission that the Meat Award does not allow a shutdown period to exceed the amount of annual leave accrued by an employee. In reply, the AMIEU contends that the three-month notice period is derived from the current award and its predecessor awards and is a long-standing condition in the industry. It submits the requirement for written notice is not a substantive amendment and is normal practice in the industry.

[105] The Ai Group also opposes the retention of the term "*stand down*" which it submits would create a misunderstanding that leave taken under a shutdown provision is the same as that taken under s 524 of the FW Act, which gives an employer the ability to "*stand down*" an employee in specific circumstances. The AMIEU agrees with this proposition and is not opposed to such an amendment.

[106] The Ai Group disagrees with the submission that clause 25.8(b) of the Meat Award does not permit a shutdown period to exceed the annual leave accruals available to employees. The Ai Group submits that clause 25.8(d) "*clearly*" provides that an employee may take leave without pay for the purposes of a shutdown. The Ai Group contends that clause 25.8(b) provides for annual leave to be paid on a proportionate basis and contemplates the period of leave taken pursuant to clause 25.8, being extended further than an accrued annual leave entitlement.

[107] In reply, the AMIEU submits that a shutdown is for the purpose of allowing annual leave to all or the bulk of employees in the plant or sections concerned, which "*represents an important limitation on the duration of an annual close-down*". Therefore, the AMIEU submits, a shutdown period cannot exceed four weeks for day workers, and five weeks for shiftworkers.

[108] The AMIEU agrees with the Ai Group's submission concerning 25.8(b), but contends it applies to annual leave entitlement of an individual employee and does not permit an annual close down which exceed the annual leave entitlement of the "*greater workforce*" for the sole purpose of allowing employees to take annual leave.

[109] The AMIEU is agreeable to the inclusion of the annual leave shutdown model clause in the *Poultry Processing Award 2020* (Poultry Award), but submits the model term should be amended to "*protect*" the current provisions. The AMIEU's amended term is set out below (proposed changes marked up):

"**21.5 ~~Shutdown~~ Annual close-down**

(a) Notwithstanding s.88 of the Act and clause 21.5 an employer may close down an enterprise or part of it during any period of pre-planned maintenance or the installation of machinery, subject to the provisions of this clause.

~~**(a)** Clause XX.XX applies if an employer intends to shutdown all or part of its operation for a particular period (**temporary shutdown period**) and wishes to require affected employees to take leave during that period.~~

(b) The employer must give the affected employees not less than one month's ~~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 an annual close-down ~~a temporary shutdown period~~ to any employee who is engaged after the notice is given under paragraph (b) and who will be affected by that period, as soon as reasonable practicable after the employee is engaged.

(d) A close-down must not occur on more than one occasion per year, unless otherwise agreed between an employer and the majority of employees concerned.

(e) ~~**(d)**~~ The following applies to any affected employee during an annual close-down: ~~a temporary shutdown period:~~

(i) the employee may elect to cover the annual close-down ~~temporary shutdown~~ period by doing one, or a combination of 2 or more, of the following:

- taking paid annual leave if the employee has accrued an entitlement to such leave;
- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause 21.10;

(ii) if the employee does not make an election under subparagraph (i) that covers the whole of the annual close-down ~~temporary shutdown period~~, then the employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.

(f) ~~**(e)**~~ A direction by the employer under clause 21.5(e)(ii):

(i) must be in writing; and

(ii) must be reasonable.

(g) ~~**(f)**~~ The employee must take paid annual leave in accordance with a direction under clause 21.5(d)(ii).

(h) ~~**(g)**~~ 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 21.10, to which an entitlement has not been accrued is to be taken into account.

(i) ~~**(h)**~~ Any unpaid leave taken under clause 21.5(e)(i) counts as service.

(j) If an annual close-down ~~a temporary shutdown period~~ includes a day or part-day that is a public holiday and would have been a working day for the employee had the employee not been on leave in accordance with clause 21.5, the employee is taken not to be on leave on that day or part-day.

(k) ~~**(i)**~~ Clauses 27.5 to 27.7 do not apply to a period of annual leave that an employee is required to take during an annual close-down ~~a temporary shutdown period~~ in accordance with clause XX.XX."

[110] Ai Group disagrees with the AMIEU's proposal to replace "*temporary shutdown period*" with "*annual close-down*". It submits "*annual*" may confuse readers if the requirement for employers to agree with the majority of employees to implement more than one shutdown per year is retained. In reply, the AMIEU submits the words "*annual close-down*", and the ability to reach agreement in relation to a second or subsequent close-down, are long-standing, and are not confusing.

4.3 Submission on whether unpaid leave taken during a shutdown period counts as service

[111] The following parties filed submissions in relation to this matter:

- ABI;[78]
- Ai Group;[79]
- AMWU;[80]
- AWU;[81]
- CFMMEU – C&G;[82]
- CFMMEU – MD;[83]
- CFMMEU – M&E;[84]
- CPSU;[85]
- FAAA;[86]

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[78] Submission, ABI & NSWBC, 1 April 2019

[79] Submission, Ai Group, 22 March 2019

[80] Submission, AMWU, 27 March 2019

[81] Submission, AWU, 25 March 2019

[82] Submission, CFMMEU–C&G, 2 April 2019; Submission in Reply, CFMMEU – C&G, 17 April 2019

[83] Submission, CFMMEU – MD, 8 April 2019

[84] Submission, CFMMEU – M&E, 22 March 2019

[85] Submission, CPSU, 29 March 2019

[86] Submission, FAAA, 3 May 2019

- HIA;[87] and
- UWU.[88]

[112] The HIA submits that s 22 of the FW Act defines service for the purposes of a shutdown period. Unless expressly dealt with by the award, unpaid leave does not count as a service and HIA submits that the Building Award should adopt this approach, as it is currently silent. HIA submits that the Joinery Award (clause 27.9(d)) provides that unpaid leave during a shutdown counts as service and provides employees with a greater entitlement than the model term.

[113] ABI submits that s 22 determines what is counted as service for the purposes of a number of entitlements under the FW Act. It contends that under s 22, unpaid leave periods generally do not count as service but periods of unpaid leave that *are not* unauthorised, which includes leave during shutdowns, do count as service for the purposes of entitlements relating to flexible working arrangement requests, unpaid parental leave and notice of termination.

[114] The Ai Group submits that absent any award provision dealing with this issue, s 22 of the FW Act applies and unpaid leave taken pursuant to a shutdown provision counts as service. However, for the purposes of the general meaning of "service", any leave that is not captured by the exceptions in s 22(2)(b)(i)-(iii) is excluded and does not count as service.

[115] The CFMMEU – M&E submits that unpaid leave taken during a shutdown period does count as service with respect to the Black Coal Award, the Mining Award and the Coal Export Award. It submits it is fair and reasonable that where an employee takes the leave "*at the unilateral discretion of the employer*" to accommodate the shutdown, the employee should not incur a further penalty. It is submitted that this is in contrast to an employee requesting unpaid leave at their initiative.

[116] The CFMMEU – M&E further submits that the denial of payment to an employee when they are ready to work is "*acutely unfair*". An employee's readiness and willingness to perform work is not disturbed by the fact that there is no work to perform. The common law has established that where an employee is available to work, they shall receive the benefits of employment, regardless of the performance of work. The CFMMEU – M&E relies on *Curro and Another v Beyond Productions Pty Ltd*[89] in support of this contention.

[117] The CFMMEU – M&E submits that s 22 of the FW Act excludes from service unpaid leave that is "*taken exclusively at the initiative of an employee*", or where an employee voluntarily withdraws their service. In contrast, the shutdown provisions in the Black Coal Award and the model term are different – it is leave taken as a result of an employer direction and does not involve any withdrawal of service by the employee. The CFMMEU – M&E submits that there is no basis to mandate that unpaid leave taken during a shutdown not count as service.

[118] CFMMEU – M&E submits that the Commission should look to the legislature's approach in respect of this issue. They submit that the legislation contains a clear intention to

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[87] Submission, HIA, 22 March 2019

[88] Submission, United Voice, 4 April 2019

[89] *Curro and Another v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337

differentiate between unpaid leave taken (a) at the direction of an employer, and (b) at the initiative of the employee. Unpaid leave taken pursuant to a shutdown is taken in circumstances where the employee cannot perform work and would not otherwise be taken. Allowing employers to direct employees take leave at their discretion, which benefits the employer and results in a negative effect on the employee's service record, does not meet the modern awards objective of providing a fair and relevant safety net.

[119] The UWU supports the CFMMEU – M&E's submission that unpaid leave taken during a shutdown counts as service.

[120] The CFMMEU – C&G likewise submits unpaid leave taken during a shutdown period should count as service. It refers to the Mobile Crane Award and the Joinery Award, which it submits explicitly address this issue and provide that leave taken during a shutdown period does count as service. CFMMEU – C&G submits that all awards that contain a shutdown clause should contain such a provision. It supports the submissions of the CFMMEU – M&E on this point.

[121] MBA submits that whether unpaid leave taken during a shutdown counts as service in the Building Award is determined by the definition of "*continuous service*" in clause 2 of the Building Award. "*Continuous service*" under that definition means a period of service of an employee regardless of the employee's absence from work for any of the following reasons:

- Annual leave, personal leave, or parental leave;
- Illness or accident up to a maximum of four weeks after the expiration of paid sick leave;
- Jury service;
- Injury received during the course of employment and up to a maximum of 26 weeks for which the employee received worker's compensation;
- Where called up for military service for up to three months in any qualifying period;
- Long service leave; and
- Any reason satisfactory to the employer, provided the employee has informed the employer within 24 hours of the time when the employee was due to attend for work, or as soon as practicable thereafter, of the reason for the absence and probable duration.

[122] The CFMMEU – MD submits that the Joinery, Manufacturing, Timber and Textile Awards provide that unpaid leave taken pursuant to shutdown provisions counts as service, which is the "*correct and appropriate*" position. It further adopts and relies on the submissions of the CFMMEU – C&G.

[123] The CPSU submits that if an employee is required to take unpaid leave during a shutdown period it should count as service for all purposes, because employees should not be disadvantaged by the employer's decision to implement the shutdown.

[124] The AMWU submits that unpaid leave taken during a shutdown (where directed by an employer) is a benefit for an employer and a detriment to an employee. It relies on its submissions made in matter no. AM2014/47 – Annual leave common issue. It submits that s 22 of the FW Act does not permit a break in accrual of service-related entitlements where an employee takes leave approved by their employer.

[125] The FAAA supports the submissions of the CFMMEU – M&E. It submits it is inherently unfair for an employer to be "*penalised*" as a result of an employer's decision to implement a shutdown.

[126] The AWU submits the model term should be amended to provide that all leave taken pursuant to a shutdown clause counts as service for all purposes. It supports the submission of the CFMMEU – M&E dated 22 March 2019 on this point. It submits that this is an explicit feature of the current shutdown provisions in six awards.[90]

[127] In relation to the Poultry Award, the AMIEU proposes an additional clause be inserted into the model shutdown provision:

> "(x) Any unpaid leave taken under XX.X(d)(i) counts as service."

[128] Submissions in reply were filed by the following parties:

- MBA;[91]
- the CFMMEU – C&G;[92]
- the Ai Group;[93] and
- the AMIEU.[94]

[129] MBA submits CFMMEU – C&G's position that unpaid leave taken during a shutdown period counts as service should be rejected. MBA submits that the CFMMEU – C&G adopts its position based on the assumption that because that is the entitlement in the Joinery Award and the Mobile Crane Award, the entitlement should be extended to all other awards which contain shutdown provisions, even if they are silent on the matter. MBA submits this is a flawed and incorrect assumption.

[130] The CFMMEU — C&G submits that the submissions of the Ai Group, the HIA and ABI rely on s 22 of the FW Act, but the Joinery Award and the Mobile Crane Award include express provisions that recognise unpaid leave taken pursuant to a shutdown is recognised as

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[90] *Food, Beverage and Tobacco Manufacturing Award 2020*; *Manufacturing and Associated Industries and Occupations Award 2020; Pharmaceutical Industry Award 2020; Seafood Processing Award 2020; Timber Industry Award 2020;* and *Wine Industry Award 2020*

[91] Submission in Reply, MBA, 24 April 2019

[92] Submission in Reply, CFMMEU – C&G, 17 April 2019

[93] Submission in Reply, Ai Group, 18 April 2019

[94] Submission, AMIEU, 17 May 2019

service, with similar provisions having been identified by the AMWU, AWU, CEPU and CFMMEU – MD.

[131] The Ai Group contends that the majority of existing shutdown clauses contain "*checks*" which prevent an employer from making the unilateral decisions as claimed by the CFMMEU – M&E. Section 93(3) of the FW Act also prevents this by importing the requirement that an employer direction to take annual leave be reasonable. It maintains its proposed clause does not give employers an excessive ability to direct an employee to take unpaid leave.

[132] Ai Group submits that the common law is well settled that where work is not performed pursuant to a contract of employment, an employee has not earned money for the period. The Ai Group relies on the authorities of *Automatic Fire Sprinklers Pty Ltd v Watson*[95] and *Byrne v Australian Airlines Ltd*[96] in support of this proposition and contends this position is reflected in s 323(1) of the FW Act, which requires an employer to pay an employee for work performed.

[133] The Ai Group disagrees with the CFMMEU M&E's interpretation of s 22 of the FW Act that it allows exclusions from "*service*" only where an employee is unwilling to work. The Ai Group submits the correct interpretation is that unpaid authorised absences are excluded, and the exceptions are then applied to that starting position. It submits that the CFMMEU – M&E's position invites the reading in of a provision that does not exist; if the legislature intended for unpaid leave taken pursuant to a shutdown and exclusively at the direction of an employer to be a period of "*service*", it would have included such a provision. In response to the contention that unpaid leave taken pursuant to a shutdown provision involves the absence of any voluntary withdrawal of service, Ai Group submits this mischaracterises the nature of the categories of unpaid leave which count as service under the exceptions at s 22(2)(b)(i)-(iii). Further, the Ai Group submits that the submission that the stand down provisions under s 524 of the FW Act are of the same character as shutdown provisions has no weight when s 22(2)(b) excludes stand down periods from the definition of service. This contention is also contrary to s 525 of the FW Act which states an employee is not taken to be on a stand down under s 524 where they are taking authorised paid or unpaid leave or are absent for another reason as authorised by the employer.

[134] The Ai Group opposes the AWU's submission that the model term should be amended to expressly provide that all leave taken pursuant to a shutdown clause is to be treated as service for all purposes. It contends the Commission should reject the CFMMEU – M&D's submissions and those made by union parties of a similar nature or rely on the CFMMEU – M&D's submissions.

5. Consideration

[135] We propose in our consideration to address the three questions posed in [18] above jointly because, as will be apparent, they are interrelated in important respects. In particular, the question of whether leave without pay counts as service under s 22 of the FW Act, or whether by award prescription it should count as service, overlaps with the question of whether

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[95] *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at 450 (per Latham CJ), 465 (per Dixon J)

[96] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 428

any model clause for shutdowns should provide for an employee right of election to take leave without pay or permit the employer to direct the taking of leave without pay.

[136] As our earlier analysis of the history of shutdown provisions demonstrates, shutdown provisions were originally designed principally to facilitate an employer having their employees take annual leave during the same period in the year. As an incident to this, employees who had not accrued sufficient annual leave to cover the period of the shutdown might, in some cases, be stood down without pay or be required to take leave without pay. Over time, a range of variants in shutdown provisions emerged: some provisions allowed shutdowns to occur in a wider range of circumstances; some required minimum periods of notice for shutdowns; some constrained the period in the year in which any shutdown occurred or, alternatively, allowed for more than one shutdown per year; and some provided that any period during which an employee was stood down without pay or took leave without pay during a shutdown counted as service for specified purposes while others did not or were silent about this.

[137] Five aspects of the FW Act are of particular relevance to our consideration of shutdown provisions in modern awards:

(1) Section 22 defines "*service*" in a way which, by s 22(2)(b), excludes "*any period of unpaid leave or unpaid authorised absence*" subject to the exceptions specified in subparagraphs (i)-(iii). The exception in s 22(b)(ii) is for "*a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment*"; thus, such stand down periods count as service under s 22.

(2) Section 93(3) (read together with s 136(1)(d)) permits (relevantly) a modern award to include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances "*but only if the requirement is reasonable*". By contrast, this was not an "*allowable award matter*" under s 513(1) of the *Workplace Relations Act 1996* as it was immediately prior to the commencement of the FW Act (although award entitlements about annual leave that were allowable award matters immediately before the main provisions of the Work Choices Act took effect were preserved by s 527(1) and (2)(a)).

(3) Section 139 of the FW Act does not include the shutdown of the employer's business, or part thereof, for any period as a matter which may be the subject of a term in a modern award.

(4) Section 139 does not include stand down as a matter which may the subject of a term in a modern award, and s 524 discloses a legislative intention that the stand down of employees without pay may only occur in the circumstances prescribed in s 524(1), or in any wider circumstances as authorised by an enterprise agreement or a contract of employment (s 524(2)). There is no contemplation that a modern award may make any prescription about stand down. By contrast, s 513(1)(l) of the *Workplace Relations Act 1996* as it was immediately prior to the commencement of the FW Act provided that an award could include terms about "*stand-down provisions*".

(5) Section 142(1) provides that modern awards may include terms that are incidental to a term that is permitted or required to be in the award or essential for the purpose of making a particular term operate in a practical way.

[138] Five basal propositions may be derived from the above matters. *First*, to the extent that awards contain provisions referring to shutdowns, they may only do so as an incident of terms which relate to a subject matter expressly permitted by s 139(1) (or some other provision of the FW Act authorising concerning award terms about specific matters). The provisions currently concerning shutdowns to be found in modern awards are contained within the annual leave clauses of those awards, and thus may be regarded as provisions incidental to or necessary for the practical operation of terms concerning the circumstances in which annual leave may be taken or may be required to be taken (and thus empowered by 142(1)(a) operating in conjunction with s 93(3) and/or s 139(1)(h)). It may be noted in this connection that the Explanatory Memorandum for the *Fair Work Bill 2008* contemplated that an award might deal with annual shutdowns as an incident of a provision concerned with the taking of annual leave made pursuant to s 93(3):

> "Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period."[97] (underlining added)

[139] *Second*, consistent with the reasoning in the *September 2016 decision*, a shutdown provision which enables an employer to direct the taking of annual leave merely on the notification of a shutdown period without any other considerations or requirements does not satisfy the criterion of reasonableness in s 93(3) and is therefore not permitted to be included in a modern award. As an example, we consider that clause 31.3 of the Building Award is a provision of the nature described and accordingly is not permitted to be included in a modern award.

[140] *Third*, a shutdown clause cannot include a provision to the effect that the employer can stand down an employee without pay during a shutdown period which is for the purpose of facilitating annual leave if the employee does not have sufficient accrued annual leave entitlements. The FW Act does not directly authorise award terms about the stand down of employees without pay, and such a provision could not, under s 142(1), be regarded as incidental to or necessary for the practical operation of a provision which is about the taking of paid annual leave.

[141] *Fourth*, an award entitlement to leave without pay may be established pursuant to s 139(1)(h) and, in that context, award provisions may deal with arrangements for the taking of such leave. However, in the absence of any award entitlement to leave without pay (or even any entitlement to request such leave), we do not consider that there is power under the FW Act to include in an award a provision by which the employer may *require* an employee to take leave

[97] Fair Work Bill 2008: Explanatory Memorandum at [381]

without pay during a shutdown period where the employee does not have sufficient annual leave entitlements to cover the period (e.g. clause 21.8(c)(iii) of the *Asphalt Industry Award 2020*). Such a provision is, in our view, not about leave at all and, as such, is not authorised by s 139(1)(h). The concept of "*leave*" in the FW Act, including in s 139(1)(h), is a beneficial entitlement for employees to be absent from work. It is clearly distinct from the concept of stand down without pay dealt with in s 524. In this context, leave without pay may be sought by an employee who seeks the employer's permission to be absent from work at a time when the employee wishes to be absent or whose personal circumstances prevent attendance at work. It is a benefit to the employee which may or may not be agreed to by the employer. A provision by which an employee may be required to take "leave" without pay is, in our view, no different in substance to the standing down of the employee without pay, since it occurs on the employer's initiative and without the employee's consent and leads to the same result of the employee being deprived of work and pay. Labelling a stand down as "leave" taken by employer direction does not make it leave for the purpose of s 139(1)(h). This is particularly so in the absence of award provisions entitling an employee to apply for leave without pay and to be granted such leave. By application of the aphorism that one cannot do indirectly what one cannot do directly, this would seem to us to be a provision which the Commission is not empowered to include in modern awards.

[142] In this regard, we respectfully depart from the view, not supported by reasons, in paragraph [32] of the *October 2017 decision*, and accept the submissions made on this point in 2017 by the CFMMEU and the AMWU and, in 2019, by the UWU and the FAAA. We note that the view of the Full Bench in the *October 2017 decision* was made in the context of the Black Coal Award, which did not specifically provide for employees to be directed to take unpaid leave. The parties did not take issue in relation to the taking of unpaid leave in close down periods and the Full Bench in that case refused on merit grounds, to vary the Award to provide employers with the right to give such a direction.[98] We also note that the comment of the Full Bench in the *October 2017 decision* was framed in the form of an observation that the provision proposed by the CMIEG was "capable" of falling within the scope of terms that may be included in modern award as provided in s 139. For the reasons set out above it may be the case that a modern award can provide for an employee entitlement to leave without pay, although we express no concluded view about this. Finally, the provision the Full Bench was commenting on provided for employees to be "taken to be on leave without pay" in certain circumstances, and not for employees to be directed to take such leave.

[143] There are also a number of award provisions which refer to employees being "*given*" (without seeking or agreeing to) unpaid leave during a shutdown period; for example, clause 34.7(c) of the Manufacturing Award provides that where an employer has closed down its enterprise or part of it for the purpose of employees taking annual leave:

> "(c) an employee who has not accrued sufficient leave to cover part or all of the close down, is allowed paid leave for the period for which they have accrued sufficient leave *and given unpaid leave for the remainder of the closedown*;" (italics added)

[144] With the benefit of arguments directed to this issue in the present proceedings, this, again, does not appear to us to be any different in substance to a stand down without pay: the

[98] [2017] FWCFB 5394 at [61]-[62]

employer has initiated a situation whereby the employee is deprived of work and pay without their consent. In respect of the Manufacturing Award and its predecessors, the historical position earlier outlined whereby an employer right to "*stand off*" employees during a shutdown period was altered to "*giving*" them leave without pay in the award modernisation process, shows that while the labelling was changed, the substance was not.

[145] *Fifth*, to the extent that shutdown provisions in awards currently provide for an employee to be required to take leave without pay, the plain effect of s 22(2), read with s 22(4), is that such "leave" does not count as service for the purpose of the NES entitlements to annual leave, personal/carer's leave and redundancy pay, but by virtue of s 22(3) such leave does not break continuity of service. While we do not consider such "leave" to be, in truth, leave within the conception of the FW Act, it would nonetheless constitute an "*unpaid authorised absence*" to which s 22(2) applies. Therefore, an award provision (such as clause 34.7(d) of the Manufacturing Award) which provides that a period of leave does count as service only has effect with respect to these NES entitlements if it can be characterised as provision which supplements the NES and is accordingly authorised by s 55(4)(b).

[146] Having regard to these five propositions, we turn to the consideration of whether we should establish a model term in respect of shutdowns. Our preference remains for the establishment of a model term, so far as is practicable. Where awards make provision for a common entitlement or obligation, this should be expressed in the same terms in each award so as to promote clarity of understanding and aid compliance. Most shutdown provisions have the same fundamental purpose, so there is significant room for model terminology to be developed. Further, it is apparent to us that a number of the current shutdown provisions may offend the FW Act insofar as they:

- are primarily concerned with authorising the shutdown of the employer's business rather than the taking of annual leave (e.g. clause 21.5 of the Poultry Award);

- allow for the employer to direct employees to take annual leave during a shutdown without requiring that this be reasonable either in terms or in substance (virtually all existing shutdown clauses); and

- require employees to take leave without pay during a shutdown (e.g. clause 21.8(c)(iii) of the *Asphalt Industry Award 2020*).

[147] Rather than engage in a piecemeal review of each shutdown provision in each award, we consider a preferable approach is to develop a model term and then adapt it to the circumstances of each award. In respect of the model term proposed in the *February 2019 statement*, no submissions are in favour of inserting that model term to replace all existing shutdown provisions without some modification to the model term or certain award-specific variations. A common thread running through the many of the submissions is that a model term should only be inserted if the existing entitlements, or more beneficial entitlements than those provided for in the model term, can be preserved.

[148] The principal differences between shutdown clauses that currently exist in awards may be identified as follows:

(1) *Circumstances in which shutdowns occur*: Many award clauses apply to any case in which the employer intends to close down its operations, or part thereof, for a particular period, such as clause 28.4(a)(i) of the *General Retail Industry Award 2020* (Retail Award). However other clauses place restrictions on the shutdown circumstances to which they apply. Such restrictions may apply to the time of year during which the shutdown occurs and the purpose of the shutdown. In the first category, for example, clause 31.3(a) of the Building Award applies to shutdowns "*in conjunction with the Christmas/New Year holidays*". In the second category, clause 21.5 of the Poultry Award applies to a shutdown "*during any period of pre-planned maintenance or the installation of machinery*". In other cases, the shutdown must be for the purpose of allowing annual leave to be taken (e.g. clause 34.7 of the Manufacturing Award).

(2) *Frequency and length of shutdowns*: Some award provisions apply to any shutdown (such as clause 28.4 of the Retail Award), but others limit the number of shutdowns per year or prescribe a minimum period for shutdowns. Clauses 34.7(e)-(g) of the Manufacturing Award allow for two shutdowns per year, one of which must be for 14 consecutive days or, by agreement with a majority of employees, three shutdowns, one of which must be for 14 consecutive days. Clause 21.5(b) of the Poultry Award allows for only one close down per year unless otherwise agreed with a majority of employees.

(3) *Notice period for shutdowns*: The notice requirements for shutdown periods vary greatly. A period of four weeks is common: e.g. clause 34.7(a) of the Manufacturing Award and clause 28.4(b) of the Retail Award. Some awards provide for a greater period of notice; e.g. clause 25.8(a) of the Meat Award provides for not less than three months' notice, although this is qualified by "*where possible*". Some awards contain no notice requirement: e.g. clause 24.7 of the Mobile Crane Award in relation to partial shutdowns.

(4) *Provision for taking leave without pay*: Many provisions make no reference to taking leave without pay in connection with shutdowns, such as clause 28.4 of the Retail Award. However, as discussed earlier, some awards require an employee to take leave without pay or refer to the employer "*giving*" leave without pay, where the employee's accrued annual leave entitlements are insufficient to cover the period of the shutdown.

(5) *Whether leave taken counts as service*: Many awards, particularly (but not only) those that make no reference to taking leave without pay, do not address this issue at all. Those that do address the issue do so in a variety of ways. Several provide that any leave taken by an employee as a result of a shutdown will count as service: e.g. clause 34.7(d) of the Manufacturing Award. Other awards take a different approach, both in terms of the type of leave that is counted, and what it counts towards. For example: clause 21.5(e) of the Poultry Award provides that "*any annual leave taken by an employee as a result of a close-down*" counts as service; clause 24.6(a)(iv) of the Mobile Crane Award provides that all time during which an employee is "*stood off without pay*" under a shutdown is counted as service

> "*for the purpose of annual leave accrual*"; and clause 32.6(g) of the Textile Award provides that "*[a]ny period during which an employee is stood off without pay will count as service in calculating 12 months' continuous service.*"

[149] Having regard to these matters, our *provisional* conclusions in respect of the establishment of a model term as proposed in the *February 2019 statement* are as follows. *First*, we will delete any reference in the model term to the employee having a right to *elect* to take leave without pay in lieu of accessing accrued annual leave entitlements during a shutdown. We accept the submissions made by a number of employer groups that to allow this would be to vitiate the purpose of a shutdown that occurs in order for accrued annual leave to be taken. Further, and more fundamentally, employees do not have any general entitlement to take leave without pay either under the NES[99] or any award, and the establishment "by the backdoor" of an undefined entitlement to take such leave in a clause that is concerned with the taking of annual leave would not be appropriate.

[150] We have already stated our view that the Commission has no power to include a provision in an award by which an employer may *require* an employee to take leave without pay. For this reason, we will not accede to the submissions made by a number of employer groups that the right of the employee to *elect* to take leave without pay should be replaced with a right of the employer to *require* that leave without pay be taken (or that existing provisions to this effect should be retained). This would amount, in substance, to the stand down of the employee without pay – a matter which may not be the subject of an award term. Any stand down of an employee during a shutdown period would therefore have to occur in accordance with s 524(1) of the FW Act or pursuant to authorisation in an enterprise agreement or contract of employment (s 524(2)).

[151] Even if power existed under the FW Act to make an award provision of the nature sought by the employer groups, we would not include a provision of this nature in a clause which is concerned with the taking of paid annual leave during a shutdown of an enterprise or part of it (and not with facilitating business shutdowns *simpliciter*, as suggested by ABI) in the absence of the employee otherwise having an entitlement to take leave without pay. It appears to us to be logically fallacious, unfair and unreasonable that an employee could be required to take "leave" to which the employee has no entitlement in the first place with the result that the employee's right to take leave with pay, at a time suitable to the employee, would be impacted.

[152] This conclusion disposes of any need to further consider whether leave without pay should, by award prescription, count as service for the purpose of NES entitlements to annual leave, personal leave or redundancy. There is no dispute that, under s 22, paid annual leave taken during a shutdown counts as part of an employee's service for the purpose of the FW Act, so no award prescription is required for this.

[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

[99] NES entitlements to unpaid leave in Pt 2-2 of the Act are only for specific purposes: parental and maternity leave (Div 5); unpaid carer's leave (Div 7, Subdiv B); and family and domestic violence leave (Div 7, Subdiv CA).

leave; it is not intended to constitute regulation of when employers may choose to temporarily shut down their businesses.

[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.

[156] Consistent with these conclusions, our *provisional* view is that the proposed model clause will be modified so that, in an award which requires no adaptation (such as the Retail Award), it will provide as follows:

"**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 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."

[157] We have not included subclause (h) of the model clause proposed in the *February 2019 statement* because it merely repeats the effect of s 89(1) of the FW Act and is therefore unnecessary.

[158] We will give two examples of the adaptation of the clause in accordance with the *provisional* conclusions expressed above. In the Building Award, the clause would provide as follows:

"**31.3 Direction to take annual leave during shutdown**

(a) Clause 31.3 applies if an employer:

(i) intends to shut down all or part of its operation for a particular period in conjunction with the Christmas/New Year holidays (**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 two months' written notice of a temporary shutdown period.

(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 31.3(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 31.3(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 31.3(d).

(g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 31.4.

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

(i) Clauses 31.6 to 31.8 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 31.3."

[159] In the Poultry Award, the clause would provide:

"**21.5 Direction to take annual leave during shutdown**

(a) Clause 21.5 applies if an employer:

(i) intends to shut down all or part of its operation for a particular period of pre-planned maintenance or the installation of machinery (**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 one month's written notice of a temporary shutdown period.

(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 21.5(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 21.5(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 21.5(d).

(g) An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 21.10.

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

(i) Clauses 21.7 to 21.9 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 21.5."

[160] Our *provisional* view is that the variation of the 78 awards which currently contain shutdown provisions (including the Black Coal Award, but excluding the Children's Award, which is dealt with separately below) in the terms identified above is necessary to meet the modern awards objective in s 134 of the FW Act. In reaching this conclusion, we have taken into account the matters specified in s 134 into account in the following way (using the paragraph designations in the subsection):

(a) The variations will not affect relative living standards or the needs of the low paid. This is a neutral consideration.

(b) It cannot positively be said that the variations will encourage collective bargaining, so this weighs against the variations to a minor degree.

(c) It cannot positively be said that the variations will promote social inclusion through increased workforce participation, so this weighs against the variations to a minor degree.

(d) It cannot positively be said that the variations will promote flexible modern work practices and the efficient and productive performance of work, so this weighs against the variations to a minor degree.

(da) This is not a relevant consideration.

(e) This is not a relevant consideration.

(f) The variations will not have any positive or negative effect on productivity, employment costs or the regulatory burden. Although we have not included provisions empowering employer directions to employees to take unpaid leave, which may currently be found in some awards, for the reasons we have earlier set out we do not consider that such directions are matters that can be included in modern awards. Therefore, we do not consider that their removal can properly be viewed as relevant to the issue of any impact on productivity, employment costs or the regulatory burden.

(g) The establishment of model, plain language shutdown provisions which are largely common across awards will assist in ensuring that the modern award system is at least simple, easy to understand, stable and sustainable. This weighs in favour of the variations.

(h) The variations will not have any discernible impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. This is a neutral consideration.

Next steps

[161] Draft determinations varying the 78 awards in a manner consistent with the *provisional* views and conclusion stated 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.

6. UWU claim to vary the Children's Award

6.1 Background

[162] The UWU seeks to vary the annual leave provisions in the Children's Award to require employers who direct employees to take annual leave without pay over the Christmas period to pay ordinary time to those employees if they have not accrued any leave. In the alternative, the UWU seeks to reduce the maximum amount of leave without pay that an employee can be directed to take to two weeks and to amend clause 24.4(c) to provide that employees can only be directed to take paid annual leave.

6.2 The claim

[163] The Full Bench determining the substantive claims in respect of the Children's Award (AM2018/18) referred the review of clause 24.4 of the Children's Award to this Full Bench.[100] A number of submissions were filed in relation to this claim.[101]

[164] The UWU proposes two possible variations to clause 24.4:

Option 1: delete clause 24.4(c) and amend clause 24.4(b) as follows:

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[100] [2020] FWCFB 3011 at [446]-[459]

[101] Draft determination, United Voice, 7 November 2018; Submission, JAG, 9 November 2018; Submission, United Voice, 15 March 2019; Revised draft determination, United Voice, 15 March 2019; Submission in reply, ACA, ABI, NSWBC, NOSHSA, JAG, 16 April 2019; Submission in reply, Australian Federation of Employers & Industries, 16 April 2019; Submission, United Voice, 29 May 2019; Submission, ACA, ABI, NSWBC, NOSHSA, JAG, 29 May 2019; Submission, Australian Federation of Employers & Industries, 31 May 2019; Submission, United Voice, 9 July 2019; Submission, Australian Federation of Employers & Industries, 10 July 2019.

> "(b) During the Christmas vacation only, an employee may be directed to take annual leave. ~~An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks.~~ Where an employee has insufficient accrued leave to maintain their ordinary rate of pay during the vacation period, an employee will be paid the ordinary rate of pay during such a period."
>
> Option 2: amend clause 24.4(b) as follows:
>
> "(b) During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary rate of pay during the vacation period may be required to take leave without pay for a maximum of ~~four~~ two weeks."

[165] The UWU also seeks to amend clause 24.4(c) to ensure that employees may only be directed to take paid annual leave as follows:

> "(c) Notwithstanding clause 24.4(a) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take paid annual leave by giving at least four weeks' notice as part of a close-down of its operations."

[166] The UWU also seeks to insert a definition of "*Christmas vacation*" that limits a Christmas vacation period to a maximum of 4 weeks.

[167] The UWU submits that clause 24.4(c) is redundant because clauses 24.4(a), 24.5, 25.6 and 24.7 deal with excessive leave accruals and employer rights to direct an employee to take paid annual leave. It contends that 24.4(c) may lead to inefficiencies in the way that annual leave is managed and displace the FW Act's provision that paid annual leave is to be taken by agreement between an employer and an employee. The UWU submits that the clause allows an employer to direct employees to take annual leave during school holiday periods other than the Christmas period, in circumstances where there is no excessive leave accrual. Further, an employer may force an employee to take their accrued leave then enter into an agreement to take annual leave in advance (pursuant to clause 24.8) which would place the employee in leave accrual deficit.

[168] The UWU submits that clause 24.4(b) of the Children's Award gives an employer power to stand down an employee for up to 4 weeks without pay. Clause 24.4 provides:

> **24.4 Taking annual leave**
>
> **(a)** Where a workplace is closed during a vacation period, other than Christmas vacation, and no work is available, an employee will be paid the ordinary rate of pay during such a period.
>
> **(b)** During the Christmas vacation only, an employee may be directed to take annual leave. An employee without sufficient accrued leave to maintain their ordinary

rate of pay during the vacation period may be required to take leave without pay for a maximum of four weeks.

(c) Notwithstanding clause 24.4(a) in establishments which operate for more than 48 weeks per year, an employer may require an employee to take annual leave by giving at least four weeks' notice as part of a close-down of its operations.

6.3 Submissions and evidence

[169] The Australian Childcare Alliance Inc, Australian Business Industrial, the New South Wales Business Chamber, the National Outside School Hours Services Alliance and Junior Adventures Group (ECEC Employers) oppose the claim. The ECEC Employers submit that the requirement to pay employees for leave in circumstances where no leave is accrued seems to be requiring payment of additional annual leave and is not appropriate. The ECEC Employers submit that this would be a substantive change to the award and is incongruous with the provisions allowing an employer to direct an employee to take annual leave and for annual leave to be paid in advance. The current clause, which is aligned with the industry, is permitted to be in the award by s 139(1)(h) of the FW Act and should not be disturbed.

[170] The Australian Federation of Employers and Industries (AFEI) also opposes the claim. It submits that the variations, if granted, could have a significant impact on employers' employment costs and operations and that the evidence filed by the UWU does not demonstrate that the variations are necessary to achieve the modern award objective. It contends that Option 1, if adopted, would provide a disincentive for employees to accrue enough annual leave to cover the Christmas vacation period.

[171] Evidence was filed in relation to this claim during proceedings relating to the substantive issues in the Children's Award and the *Educational Services (Teachers) Award 2020* (AM2018/18 and AM2018/20). Hearings were held on 6, 7, 8 and 9 May 2019.

[172] Katy Paton[102] is the Education and Quality Coordinator of Eastwood Early Education Pty Ltd (Eastwood), a provider of long day-care services in Queensland, across two centres. Ms Paton gave evidence that one centre, located in Eastwood, closes only the weeks of Christmas and New Year.[103] On cross-examination by UWU, Ms Paton acknowledged that Eastwood does not require the ability to direct employees to take leave at any time of the year other than Christmas/New Year.[104]

[173] Pamela Avril Maclean[105] is the Company Director and operator of two long day-care centres in Queensland (Big Day Out Care & Education). Under cross-examination by UWU, Ms Maclean acknowledged that because the centres are open for 52 weeks a year, there is no need for a shutdown provision in the award which gives her the ability to direct employees not to attend work.[106]

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[102] Witness Statement of Katy Paton, 14 March 2019, Exhibit 21

[103] Transcript, 7 May 2019 at PN2378

[104] Transcript, 7 May 2019 at PN2381-PN2386

[105] Amended Witness Statement of Pamela Avril Maclean, 13 March 2019, Exhibit 25

[106] Transcript, 7 May 2019 at PN2550-PN2554

[174] Ann Marie Chemello[107] is the Company Director and operator of three companies providing long day-care services in Western Australia: Warriapendi Early Learning Centre, Ellenbrook School of Early Learning and Malvern Springs Early Learning. Under cross-examination by UWU, Ms Chemello gave evidence that the three centres close only on public holidays and stated there is no need to use the provisions allowing her to direct employees not to attend work for any period during a year.[108]

[175] Karthiga Viknarasah[109] is the Director and Educational Leader of Choice Childcare Holdings Pty Ltd and a Director of Lidcome Preschool Kindergarten, both long day care centres. Both centres operate for 50 weeks a year.

[176] Jae Dean Fraser[110] is the Managing Director of The Scholars Group Pty Ltd, Little Scholars School of Early Learning Pty Ltd and Scholars Consulting Pty Ltd. Mr Fraser's companies operate 7 centres providing early childhood and long day care services across Queensland and New South Wales. Mr Fraser also manages a further 5 centres.

[177] Mr Fraser gave evidence that his centres are closed only on public holidays. Typically, more staff request leave than can be approved during the Christmas period, due to demand for childcare from working families. If employees who did not have leave accrued were entitled to be paid over the period, Mr Fraser would roster them to work.

[178] Under cross-examination by the UWU, Mr Fraser confirmed he does not use the shutdown provisions and acknowledged that if UWU's proposed variation were made, it would not impact his businesses.[111]

[179] Kristen McPhail[112] is the Company Director and operator of two companies providing long day care and out of hours school care services: Pachamama Early Education and Childcare and Pachamama Activity Centre. Ms McPhail was cross-examined by UWU. Ms McPhail gave evidence that the two centres close only on public holidays and accepted there is no need to utilise the shutdown provisions in the Award.[113]

[180] Kylie Brannelly[114] is the Chief Executive Officer of the Queensland Children's Activities Network and has held that position since 2005. Ms Brannelly is also the Chairperson of the National Outside School Hours Services Alliance. Under cross-examination by UWU, Ms Brannelly gave evidence that the majority of services close over the Christmas period for 2 weeks and are open for between 48 and 50 weeks each year.[115] Ms Brannelly agreed that most

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[107] Witness Statement of Ann Marie Chemello, 1 March 2019, Exhibit 27

[108] Transcript, 7 May 2019, at PN2738-PN2744

[109] Amended Witness Statement of Karthiga Viknarasah, 11 April 2019, Exhibit 13

[110] Amended Witness Statement of Jae Dean Fraser, 15 April 2019, Exhibit 18

[111] Transcript, 7 May 2019, at PN1877-PN1883

[112] Amended Witness Statement of Kristen McPhail, 12 April 2019, Exhibit 28

[113] Transcript, 7 May 2019, at PN3120-PN3125

[114] Amended Witness Statement of Kylie Brannelly, 15 April 2019, Exhibit 34

[115] Transcript, 8 May 2019 at PN3504-PN3505

services would not be impeded by an award provision restricting a shutdown period to two weeks over the Christmas and New Year period.[116]

[181] Sarah Elizabeth Tullberg[117] has been the Company Director, owner and operator of Knox Childcare and Kindergarten in Victoria for 7 years. Ms Tullberg is also the Operations Manager of three Wallaby Childcare Group centres in Victoria, a role she has held since 2011. Ms Tullberg gave evidence that the centres she owns and manages have demand for services all year and close only on public holidays. Should a change in demand occur, Ms Tullberg might consider closing centres but would roster on the employees who had no accrued annual leave to work, therefore it would not be financially viable.

[182] Under cross-examination by UWU, Ms Tullberg stated that all centres close only on public holidays, and do not shut down over the Christmas and New Year period. Ms Tullberg acknowledged that if the award were varied so shutdowns could only be implemented over the Christmas period, it would not impact on the operation of the centres.[118]

[183] Kerry Joseph Mahony[119] is the owner and operator of 2 long day care centres in the Western suburbs of Adelaide. Mr Mahony gave evidence that one of the centres operates for 52 weeks per year and only closes on public holidays, and the second closes over the Christmas period for 2 weeks. Over this period, 25% of enrolled children attend and the centres operate with a reduced staff roster, therefore there is a need for some employees to take leave. Mr Mahony gave evidence that if he were required to pay employees who had no leave accrued, he would roster them for work at the centre that operates for 52 weeks a year and find something for them to do. Mr Mahony was cross-examined by UWU. Mr Mahony agreed that if the award were varied so shutdowns could only be implemented over the Christmas period, it would not impact his centres at all.[120]

[184] Nicole Louise Llewellyn[121] is the franchisee owner of Kool Kidz Mill Park, providing childcare, early learning and kindergarten services in Victoria. Ms Llewellyn gave evidence that no issues have arisen in relation to shutdown and annual leave accruals at the centre. Should an employee wish to take leave but did not have enough accrued, Ms Llewellyn was of the view that it would not be appropriate for her to pay them regardless of their leave entitlements. She would allow those with annual leave accrued take leave, and those without leave accrued work. The centre operates 52 weeks a year.[122] While under cross-examination by UWU, Ms Llewellyn agreed that if the award were varied in a way that limits an employer's ability to direct employees to take annual leave over the Christmas and New Year period, it would not affect how she operates the centre.[123]

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[116] Transcript, 8 May 2019 at PN3506

[117] Amended Witness Statement of Sarah Elizabeth Tullberg, 9 April 2019, Exhibit 35

[118] Transcript, 8 May 2019 at PN3728-PN3734

[119] Amended Witness Statement of Kerry Joseph Mahony, 11 April 2019, Exhibit 38

[120] Transcript, 8 May 2019 at PN3983-PN3987

[121] Amended Witness Statement of Nicole Louise Llewellyn, 9 April 2019, Exhibit 39

[122] Transcript, 9 May 2019 at PN4335

[123] Transcript, 9 May 2019 at PN4336

[185] Alexandra Hands[124] is the Company Director of two companies providing long day care services across two centres in Adelaide: Windybanks Pty Ltd trading as Unley Early Learning Centre and CBF Childcare Pty Ltd trading as Daws Road Early Learning Centre. Both centres operate 52 weeks per year.[125] Under cross-examination by UWU, Ms Hands agreed that if the award were varied so shutdowns could only be implemented over the Christmas period, it would not impact her centres.[126]

[186] The UWU submits that no witness gave any evidence supporting the conclusion that the current provisions relating to employer abilities concerning shutdowns are used, necessary or that clause 24.4(b) presents a real problem.[127] It submits the Commission is entitled to find that the current shutdown provisions are "*anachronistic*", and that the evidence shows employers manage leave responsibly – which the variations sought will reinforce. Referring to the evidence, the UWU contends it reflects the "*for profit*" nature of the sector and submits that the evidence of Ms Llewellyn and Ms Paton establishes that employers manage leave "*like most businesses where there are foreseeable reductions in demand over the Christmas/New Year period*".

[187] Some of the ECEC Employers submit that there are no evidentiary findings that can be made in relation to this claim. They submit that while some evidence suggested some centres do not implement a shutdown over the Christmas period or otherwise implement a two-week shutdown, Ms Brannelly stated that the majority of centres do close for two weeks over the Christmas holidays.[128] AFEI submits there is no basis to make the variations proposed, as no evidence supporting an evidentiary finding was provided.[129]

6.4 Consideration

[188] For the reasons stated in [140]-[142] above, we do not consider that clause 24.4(b), to the extent that it allows an employer to direct an employee to take leave without pay for up to four weeks, is a provision which is permitted to be included in a modern award because it is, in substance, a provision authorising the stand down of an employee without pay. Further, for reasons similar to those stated in [147]-[150] above, we do not consider it appropriate to have an award provision referring to "*leave without pay*" when there is otherwise no general provision for such an entitlement in the NES or the Children's Award. Accordingly, we consider, consistent in part with the UWU's "Option 1", that the second sentence in clause 24.4(b) must be deleted. This variation would also render moot the UWU's "Option 2".

[189] Having regard to this conclusion, we do not consider that it is necessary to vary the Children's Award to provide for the other aspect of the UWU's "Option 1", namely a positive requirement for employees to be paid their ordinary rate of pay if they have insufficient annual leave to cover a Christmas vacation period. The proper management of the taking of employees' annual leave entitlements consistent with s 88 of the FW Act, employees' public holiday

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[124] Witness Statement of Alexandra Hands, 12 March 2019, Exhibit 43

[125] Transcript, 9 May 2019, at PN4795-PN4797

[126] Transcript, 9 May 2019, at PN4798

[127] Submission, United Voice, 29 May 2019

[128] Submission in reply, ACA, ABI and NSWBC, 29 May 2019

[129] Submission, AFEI, 2 June 2019

entitlements, the use of accrued rostered days off and accrued time off in lieu of overtime, and the use of the facility under clause 24.8 to take annual leave in advance by agreement, is likely to ensure that all employees have sufficient leave to cover any Christmas vacation period. The evidence before us indicates that many, perhaps most, employers under this award do not even have Christmas vacation closure periods apart from closure during public holidays and, for those that do, the closure is usually only for a short period of time. It seems to us therefore that there is no problem of substance that requires resolution by way of the grant of the second aspect of the UWU's "Option 1".

[190] Clause 24.4 is, in substance, a shutdown provision of the same nature as those in other awards which have been discussed earlier in this decision. For the same reasons set out in [149]-[160] above, as relevant, our *provisional* view is that the Children's Award should be varied to include the model term in [156] in substitution for the current clause 24.4, but with adaptations to incorporate existing specific provisions. The new clause would be as follows:

"**24.4 Direction to take annual leave during shutdown**

(a) Clause 24.4 applies if an employer:

(i) intends to shut down all or part of its operation for a particular period during the Christmas vacation (**temporary shutdown period**); and

(ii) wishes to require affected employees to take paid annual leave during that period.

(b) Clause 24.4 does not apply to a shut down during any vacation period other than the Christmas vacation. During any shut down to which clause 24.4 does not apply, employees will be paid the ordinary rate of pay.

(c) 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.

(d) The employer must give written notice of a temporary shutdown period to any employee who is engaged after the notice is given under clause 24.4(c) and who will be affected by that period, as soon as reasonably practicable after the employee is engaged.

(e) The employer may direct the employee to take a period of paid annual leave to which the employee has accrued an entitlement.

(f) A direction by the employer under clause 24.4(e):

(i) must be in writing; and

(ii) must be reasonable.

(g) The employee must take paid annual leave in accordance with a direction under clause 24.4(e).

> **(h)** An employee may take annual leave in advance during a temporary shutdown period in accordance with an agreement under clause 24.8.
>
> **(i)** 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 24.8, to which an entitlement has not been accrued, is to be taken into account.
>
> **(j)** 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."

[191] Our *provisional* view is that the above variation is necessary to achieve the modern awards objective and, in reaching this conclusion, we have taken the s 134(1) considerations into account in the same way as set out in [160] above.

6.5 Next steps

[192] A draft determination varying the Children's Award consistent with the *provisional* views expressed above will be published in due course. Interested parties will be provided with a period of 21 days from the date the draft determination is published to lodge any submissions:

(1) in response to the *provisional* views expressed in [190]-[191] above; and

(2) concerning the terms of the draft determination.

DECISION OF COMMISSIONER HUNT

[193] I have had the benefit of reading the decision of Vice President Hatcher and Deputy President Asbury (the Majority Decision). Having regard to the *provisional* view in the Majority Decision, I am not in agreement to adopt the proposed model clause for the following reasons.

[194] My decision involves a provisional view as to the terms permitted within a modern award when an employer determines it appropriate to have a shutdown, requiring employees to not attend for work.

[195] A shutdown may be required in a workplace for various reasons. Those reasons may include maintenance work to be performed on machinery where production workers are not required. Another reason may be that the whole business shuts down over the Christmas break, for example, where it has been determined that no work will be performed.

[196] Since the commencement of modern awards made under the *Fair Work Act 2009* (the Act), a significant number of modern awards have contained provisions permitting a shutdown period, permitting various forms of leave to be taken by employees. In the absence of an employee willingly requesting annual leave, an employer has, in scores of modern awards made by the Fair Work Commission (the Commission), been permitted to direct an employee to take

annual leave during the shutdown period, or in the case of an employee not having sufficient annual leave to cover the period, requiring the employee to take leave without pay.

[197] The *Manufacturing and Associated Industries and Occupations Award 2020* presently permits this where the clause is as follows:

> "**34.7 Annual close down**
>
> 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:
>
> **(a)** the employer gives not less than 4 weeks' notice of intention to do so; and
>
> **(b)** an employee who has accrued sufficient leave to cover the period of the close down, is allowed leave and also paid for that leave at the appropriate rate in accordance with clauses 34.3 and 34.4; and
>
> **(c)** an employee who has not accrued sufficient leave to cover part or all of the close down, is allowed paid leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown; and
>
> **(d)** any leave taken by an employee as a result of a close down pursuant to clause 34.7 also counts as service by the employee with their employer; and
>
> **(e)** the employer may only close down the enterprise or part of it pursuant to clause 34.7 for one or 2 separate periods in a year; and
>
> **(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."

[198] Accordingly, for more than a decade, under this particular award, arrangements have been made between employers and employees to give no less than four weeks' notice of an intention to have a closedown. For new employees without a sufficient entitlement to paid leave, they would be required not to attend for work and would be given unpaid leave for the remainder of the closedown.

[199] If any longer-serving employee had used their annual leave accrual during the year, if they did not have a full accrual to cover the length of the closedown, they too would be required to take unpaid leave for any shortfall.

[200] A similar provision is within the *Road Transport and Distribution Award 2020*:

> "**24.9 Annual close-down**
>
> An employer may close down an enterprise or part of the enterprise for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned, provided that:
>
> **(a)** the employer gives not less than one month's notice of its intention to do so;
>
> **(b)** an employee who has accrued sufficient leave to cover the period of the close down is allowed leave, and is paid for that leave at the appropriate rate;
>
> **(c)** an employee who has not accrued sufficient leave to cover part or all of the close down is allowed paid leave for the period for which they have accrued sufficient leave, and given unpaid leave for the remainder of the close-down; and
>
> **(d)** any leave taken by an employee as a result of a close down pursuant to clause 24.9 also counts as service by the employee with their employer."

[201] In a decision issued on 19 October 2017,[130] the Annual Leave Full Bench said the following in relation to considerations within the *Black Coal Mining Industry Award 2010* (Black Coal Award) as it then was:

> "**[31]** As we have noted, there is a dispute as to whether an employer should have the power to (in effect) direct an employee to take a period of unpaid leave in circumstances where the employee has not accrued sufficient paid annual leave to cover any part of a temporary shutdown period.
>
> **[32]** We accept that CMIEG's proposed clause 25.10(d)(iii) – in respect of unpaid leave – is capable of falling within the scope of s.139(1)(b), as being a matter 'about' 'leave'. The central question is whether such a term is necessary to achieve the modern awards objective."

[202] It is my view the Full Bench was referring to s.139(1)(h) and incorrectly referenced s.139(1)(b). Section 139 of the Act is as follows:

> "**139 Terms that may be included in modern awards—general**
>
> (1) A modern award may include terms about any of the following matters:
>
> (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
>
> (i) skill-based classifications and career structures; and
>
> (ii) incentive-based payments, piece rates and bonuses;

[130] [2017] FWCFB 5394

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award."

[203] The Full Bench ultimately decided against permitting an inclusion to direct an employee to take unpaid leave in circumstances where the employee did not have sufficient annual leave accrual on the basis of merit and that the Black Coal Award had not earlier contained such a provision. Further, the Full Bench stated that it is common ground that shutdowns are an infrequent event in the industry.

[204] I am in agreement with the Full Bench that s 139(1)(h), allowing a modern award to include terms about any of the following matters including 'leave', permits consideration of unpaid leave. I am not satisfied that 'leave' or 'arrangements for taking leave' is limited only to accrued annual leave. It is not necessary to discuss other leave provisions such as personal leave etc. in this context.

[205] Scores of modern awards made by the Commission over the last decade have also included clauses permitting employees to agree in writing to the employee taking a period of paid annual leave in advance of an entitlement accruing. It appears to me that the only power available to the Commission to have included such clauses in modern awards is pursuant to s.139(1)(h). The modern award clauses include reference to an employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.

[206] In my view, if there is power to include in modern awards the provision for employees to agree to take annual leave in advance, the term 'leave' within s.139(1)(h) is not to be narrowly construed. The Commission has allowed, by agreement, an employee and their employer to provide for paid leave before an entitlement exists.

[207] The definition of 'paid annual leave' within the Act is at s 12 and is as follows:

> "'***paid annual leave***' means paid annual leave to which a national system employee is entitled under section 87."

[208] The entitlement at section 87 of the Act is for four weeks of paid annual leave or more in certain circumstances. The employee's entitlement accrues progressively during a year of service.

[209] Section 93(3) of the Act provides as follows:

> "(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable."

[210] Clearly there exists a power to include within modern awards the ability for an employer to require an employee to take paid annual leave. The modern award term will, by force of the Act, state that the requirement needs to be reasonable.

[211] In my view there is no prohibition within the Act preventing a modern award term permitting the following:

(a) an employer directing an employee to take unpaid leave during a shutdown where the employee does not have sufficient leave accrual; and
(b) an employer directing an employee to take paid annual leave in advance of the entitlement accruing.

[212] The limitation, of course, is that on each occasion an employee is directed by their employer, the requirement must be reasonable.

[213] Currently, scores of modern awards contain a provision permitting an employer to direct an employee to take unpaid annual leave during a shutdown where the employee does not have sufficient leave accrual. In my view, the removal of that term within modern awards has the potential to cause some economic harm to some employers.

[214] In the situation where an employer decides to shutdown a business for two weeks or so over the Christmas period to allow for rest and recreation and where supplies to their business might be limited due to other businesses engaging in a shutdown, employees who have recently joined the business and who do not have sufficient annual leave accrual should be directed to either take a limited amount of annual leave in advance or take leave without pay.

[215] Section 134 of the Act describes the modern award objective. It includes the following:

> "(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> …..
> …..
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> ……
> ……"

[216] In my view, if the Majority Decision provisional term is ultimately adopted and inserted into modern awards, the effect will be that employees without a sufficient annual leave accrual during a shutdown will, if they elect against taking annual leave in advance or leave without pay, be paid wages by the employer. For modern awards where an employer has been permitted to require an employee to take unpaid leave, the proposed change, if adopted, is a direct cost to the employer not earlier experienced.

[217] Employees with longer service and a leave accrual to cover the whole period of the shutdown might be understandably disturbed to learn that a new employee without sufficient leave to cover the period is entitled to wages paid by the employer. For the same absence, longer-serving employees who might have requested annual leave at other times in the year and been refused on account of requiring leave to cover an expected shutdown period, will need to fund that shutdown period from their accrued leave, while new employees are paid wages by the employer.

[218] It is not uncommon in the building industry, for example, for a shutdown to occur for two-to-three weeks over late December/early January. Outside of public holidays, the working days required to fund the whole shutdown period might be up to say, 10 days. A new employee might only have around five days' annual leave accrual at the commencement of the shutdown period. In my view, the employer should not be required to pay the new employee wages for the balance of the shutdown period for which they do not have accrued leave.

[219] Further, if employees throughout a year understand that if they do not have enough accrued leave to cover all of the shutdown period, and if they elect against taking annual leave in advance or unpaid leave, they will become entitled to wages in any event, it is possible

employees may request annual leave at greater frequency and increased days at other times of the year. If a request for annual leave is refused by an employer on account of requiring the employee to have sufficient leave accrual to cover a proposed shutdown, disputation is more likely.

[220] For all of these reasons, respectfully I am not in agreement with the Majority Decision provisional term because I do not consider appropriate regard has been had for s 134(f) of the Act and the potential impact this may have on employers for not only new employees without sufficient leave accrual, but for existing employees who might wish to utilise their leave more freely throughout the year, and put into dispute where leave requests are refused by the employer.

[221] If the Majority Decision provisional term is ultimately inserted into modern awards, such term will then be used to determine the better off overall test (BOOT) when employers and employees make an enterprise agreement and require approval of the Commission to approve the enterprise agreement. If, at an enterprise level employees may be directed to take unpaid leave if they do not have sufficient leave accrual during a shutdown, or they are directed to take annual leave in advance, this will then be examined by the Commission against an award without such provisions. There is risk that such a term in an enterprise agreement may not satisfy the BOOT.

[222] While I am satisfied that there is no prohibition within the Act, permitting an employer to require an employee to take leave without pay for a period within a shutdown for which they do not have sufficient leave accrued, I consider that the bulk of the impact with respect to a new employee's employment can be mitigated by requiring the new employee to take up to one week of paid annual leave in advance. The requirement must, of course, be reasonable, as required by s 93(3) of the Act.

[223] My provisional view is that the proposed model clause be modified so that, in an award which requires no adaptation, it will provide as follows:

"**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 is engaged.

(d) The following applies to any affected employee during a temporary shutdown period:

(i) The employee may elect to cover the temporary shutdown period by taking paid annual leave if the employee has accrued an entitlement to such leave.

(ii) If the employee does not have sufficient accrued annual leave to cover part or all of the temporary shutdown period, the employee may elect to cover the shortfall by:

- taking leave without pay;
- taking annual leave in advance in accordance with an agreement under clause XX.XX;

(ii) if the employee does not make an election under clause XX.XX(d)(i) and (ii) that covers the whole of the temporary shutdown period, then 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 in their first twelve months of service (calculated on the first day of the temporary shutdown period) who has not accrued an entitlement to cover all of the temporary shutdown period may be directed by the employer to take annual leave in advance up to a maximum of one week. Such direction by the employer:

(i) must be in writing; and

(ii) must be reasonable.

(h) The employee must take paid annual leave in advance in accordance with a direction under clause XX.XX(g).

(i) 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."

[224] In my view, the effect of inserting subclauses (g) and (h) will result in employers having confidence to employ new employees in the months leading up to a proposed shutdown. Without a provision as proposed, employers may baulk at employing new employees, weighing up how they will pay for the period of time when they do not require the new employee to attend for work, at the same time as they are likely to be experiencing an impact to the business on account of the shutdown.

[225] To conclude, I am satisfied there is power to insert the terms proposed by me and having regard to the likely impact on business, including on productivity and employment costs, it is appropriate to do so. I would seek the views of the parties as proposed by the majority.

[226] With respect to the UWU's claim to vary the *Children's Services Award 2010*, for the same reasons above I propose the model term at [223] above.

VICE PRESIDENT

Attachment A

1. *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020* (clause 22.3)
2. *Aircraft Cabin Crew Award 2020* (clause 19.4)
3. *Airline Operations–Ground Staff Award 2020* (clause 22.6)
4. *Alpine Resorts Award 2020* (clause 25.3)
5. *Aluminium Industry Award 2020* (clause 22.4)
6. *Ambulance and Patient Transport Industry Award 2020* (clause 22.7)
7. *Animal Care and Veterinary Services Award 2020* (clause 22.5)
8. *Aquaculture Industry Award 2020* (clause 22.9)
9. *Asphalt Industry Award 2020* (clause 21.8)
10. *Banking, Finance and Insurance Award 2020* (clause 22.5)
11. *Black Coal Mining Industry Award 2020* (clause 24.9)
12. *Broadcasting and Recorded Entertainment Award 2020* (clause 18.6)
13. *Building and Construction General On-site Award 2020* (clause 31.3)
14. *Business Equipment Award 2020* (clause 23.5)
15. *Car Parking Award 2020* (clause 24.6)
16. *Cemetery Industry Award 2020* (clause 19.3)
17. *Cement, Lime and Quarrying Award 2020* (clause 22.8)
18. *Cleaning Services Award 2020* (clause 21.4)
19. *Clerks—Private Sector Award 2020* (clause 32.5)
20. *Coal Export Terminals Award 2020* (clause 20.7)
21. *Commercial Sales Award 2020* (clause 20.6)
22. *Concrete Products Award 2020* (clause 22.6)
23. *Contract Call Centres Award 2020* (clause 22.10)
24. *Educational Services (Post-Secondary Education) Award 2020* (clause 22.5)
25. *Electrical Power Industry Award 2020* (clause 21.8)
26. *Electrical, Electronic and Communications Contracting Award 2020* (clause 21.5)
27. *Fitness Industry Award 2020* (clause 21.3)
28. *Food, Beverage and Tobacco Manufacturing Award 2020* (clause 25.11)
29. *Gardening and Landscaping Services Award 2020* (clause 20.9)
30. *Gas Industry Award 2020* (clause 20.7)
31. *General Retail Industry Award 2020* (clause 28.4)
32. *Graphic Arts, Printing and Publishing Award 2020* (clause 31.12)
33. *Hair and Beauty Industry Award 2020* (clause 24.3)
34. *Health Professionals and Support Services Award 2020* (clause 26.5)
35. *Higher Education Industry—General Staff—Award 2020* (clause 24.4)
36. *Horse and Greyhound Training Award 2020* (clause 18.6)
37. *Hospitality Industry (General) Award 2020* (clause 30.4)
38. *Hydrocarbons Industry (Upstream) Award 2020* (clause 25.7)
39. *Joinery and Building Trades Award 2020* (clause 27.9)
40. *Journalists Published Media Award 2020* (clause 20.8)
41. *Legal Services Award 2020* (clause 22.7)
42. *Local Government Industry Award 2020* (clause 23.5)
43. *Manufacturing and Associated Industries and Occupations Award 2020* (clause 34.7)
44. *Meat Industry Award 2020* (clause 25.8)
45. *Mining Industry Award 2020* (clause 22.7)

46. *Mobile Crane Hiring Award 2020* (clause 24.6)
47. *Miscellaneous Award 2020* (clause 21.4)
48. *Nursery Award 2020* (clause 22.12)
49. *Nurses Award 2020* (clause 22.7)
50. *Oil Refining and Manufacturing Award 2020* (clause 24.6)
51. *Pest Control Industry Award 2020* (clause 23.9)
52. *Pharmaceutical Industry Award 2020* (clause 21.5)
53. *Plumbing and Fire Sprinklers Award 2020* (clause 24.4)
54. *Poultry Processing Award 2020* (clause 21.5)
55. *Premixed Concrete Award 2020* (clause 22.8)
56. *Professional Employees Award 2020* (clause 18.4)
57. *Racing Clubs Events Award 2020* (clause 23.5)
58. *Racing Industry Ground Maintenance Award 2020* (clause 21.5)
59. *Real Estate Industry Award 2020* (clause 20.5(a))
60. *Registered and Licensed Clubs Award 2020* (clause 25.4)
61. *Restaurant Industry Award 2020* (clause 25.4)
62. *Road Transport (Long Distance Operations) Award 2020* (clause 20.4)
63. *Road Transport and Distribution Award 2020* (clause 24.9)
64. *Salt Industry Award 2020* (clause 23.10)
65. *Seafood Processing Award 2020* (clause 21.11)
66. *Security Services Industry Award 2020* (clause 21.4)
67. *Silviculture Award 2020* (clause 22.5)
68. *Storage Services and Wholesale Award 2020* (clause 24.5)
69. *Sugar Industry Award 2020* (clause 31.5)
70. *Supported Employment Services Award 2020* (clause 32.3)
71. *Surveying Award 2020* (clause 22.7)
72. *Telecommunications Services Award 2020* (clause 22.9)
73. *Textile, Clothing, Footwear and Associated Industries Award 2020* (clause 32.6)
74. *Timber Industry Award 2020* (clause 28.10)
75. *Vehicle Repair, Services and Retail Award 2020* (clause 29.6)
76. *Water Industry Award 2020* (clause 22.4)
77. *Wine Industry Award 2020* (clause 24.9)
78. *Wool Storage, Sampling and Testing Award 2020* (clause 23.5)

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