Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Redrafting – Shutdown Provisions (AM2016/15)

25 November 2022

Ai GROUP

AM2016/15

PLAIN LANGUAGE REDRAFTING – SHUTDOWN PROVISIONS

1. INTRODUCTION

1. This submission is filed by the Australian Industry Group (**Ai Group**) in relation to a decision issued by the Fair Work Commission (**Commission**) on 25 August 2022[1] (**Decision**) concerning the redrafting of shutdown provisions in a large number of awards. In particular, this submission responds to the matters identified at paragraph [161] of Decision by the majority of the Full Bench (**Majority**), as well as the request for the *'views of the parties'* made by Commissioner Hunt.

2. The Majority and Commissioner Hunt have expressed contrary views as to the central issue of whether the Commission has power to include within awards a right to direct employees to take unpaid leave and, if the power exists, whether such a provision should form part of the safety net. Our submission advances the following key contentions in this regard:

   (a) The Commission has power to include (or retain) a term in modern awards requiring employees (or enabling employers to require employees) to take unpaid leave during a shutdown (**Unpaid Leave Terms**).

   (b) Unpaid leave during a shutdown and a stand down pursuant to s.524 of the *Fair Work Act 2009* (**Act**) are separate and distinct concepts.

   (c) Unpaid Leave Terms are necessary to ensure that the relevant awards achieve the modern awards objective.

   (d) If modern awards are not to include Unpaid Leave Terms, any model clause should include an expanded capacity for employers to direct employees to take paid annual leave in advance.

[1] [2022] FWCFB 161.

2. THE RELEVANT LEGISLATIVE FRAMEWORK

3. Now-repealed section 156 of the Act previously dealt with the conduct of 4 yearly reviews of modern awards. Clause 26 of Schedule 1 to the Act requires the Commission to continue to apply s.156 to the current 4 yearly review as if it had not been repealed. To that end, s.156(2)(b) empowers the Commission, in the course of its 4 yearly review of modern awards, to make a determination to vary a modern award.

4. Section 134(1) sets out the modern awards objective. Section 134(2) provides that the modern awards objective applies to the performance or exercise of the Commission's modern award powers, including its functions or powers under Part 2-3, which includes s.156.[2]

5. The *'objective'* that s.134 establishes is ensuring that modern awards, together with the National Employment Standards (**NES**), provide a *'fair and relevant minimum safety net of terms and conditions'*. The broad range of considerations prescribed by ss.134(1)(a) to (h) are matters the Commission must, at a minimum, take into account in evaluating whether modern awards meet that objective. The Commission is not, however, confined only to the considerations at ss.134(1)(a) - (h) in determining what is a fair and relevant minimum safety net of terms and conditions: it is *"entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act"*.[3]

[2] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 (***Penalty Rates Case***) at [19].

[3] *Penalty Rates Case* at [49] - [50].

6. Applying s.134 in the Commission's exercise of its variation powers in s.156(2)(b) involves the exercise of broad value judgments, balancing the various factors in s.134. As the Full Federal Court observed in *Anglo Coal* (at [29]): (emphasis added)

> …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.

7. But the breadth of that value judgment is substantially narrowed by s.138 of the Act. It provides: (emphasis added)

> 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.

8. Section 138 thus narrows what is otherwise a review *'at large'*. It does so in two respects:

   (a) The Commission must find in *absolute* terms (as opposed to reaching a state of satisfaction) that a proposed variation of the modern award meets the description in s.138; and

   (b) The variation can be made *only to the extent necessary* to achieve the modern awards objective – a narrower concept than appropriate or desirable.

9. Within the confines of these mandatory statutory considerations, the Full Bench (by way of its *Preliminary Jurisdictional Issues Decision*[4]) established a standard for assessing a proposed change to a modern award. The Full Bench expressed that standard in the following terms (at [23]): (emphasis added)

> The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. <u>However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation</u>.

10. That standard reflected the Commission's established practice, as a matter of policy and sound administration, of following previous relevant Full Bench in the absence of cogent reasons for not doing so;[5] and it applied the modern awards objective, taking particular account of the need to ensure a *'stable'* award system (s 134(1)(g)).

11. A Full Bench in *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 expressed a similar measure of caution when foreshadowing possible applications to vary shutdown provisions, requiring (at [382]) that any such applications be supported by *"cogent evidence of industry circumstances requiring such a provision or variation"*. Relatedly, the Full Bench in *4 Yearly Review of Modern Awards—Penalty Rates (Hospitality and Retail Sectors)* (2017) 256 IR 1 at [269] observed that *"significant changes where merit is reasonably contestable should be supported by analysis of the relevant legislative provisions and, where feasible, probative evidence"*, and that 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".*

[4] [2014] FWCFB 1788.

[5] *Preliminary Jurisdictional Issues Decision* at [26] - [27].

12. Two things relevantly follow.

13. *First*, merely assessing the fairness or reasonableness at large of a particular proposed variation is an insufficient basis to exercise power to vary a modern award. The Commission must take into account the matters specified in s.134, and there must be a cogent basis to conclude (with reference to those matters) that the proposed variation both meets the modern awards objective and extends only so far as is necessary to meet that objective. Those matters ought to be clearly ascertainable on the face of the Commission's reasons.

14. *Second*, material changes of the type the Majority proposes should be assessed with considerable caution.

3. THE DECISION IN RELATION TO UNPAID LEAVE TERMS

15. Some 52 modern awards currently contain Unpaid Leave Terms. Employers have relied upon those terms since their inception. They are an important element of a suite of provisions facilitating the uniform leave-taking across a workforce that is necessary for the practical implementation of a shutdown period.

16. In its Decision, the Full Bench expressed conflicting provisional views on whether such terms should be included in a model shutdown clause (and, by extension, be retained in those awards in which such terms presently appear). The Majority would remove them, principally on the ground that the Commission lacks power to include such terms in modern awards. If that view be correct – and thus the extant Unpaid Leave Terms be (and always have been) of no effect[6] – employers across a swathe of industries would potentially be exposed to underpayment claims (and potential civil penalties) for their reliance hitherto upon those award terms.

[6] By operation of s.137 of the Act.

17. By contrast, Commission Hunt provisionally concluded (at [211] and [222]) that the Commission has power under s.136 to include Unpaid Leave Terms, and terms allowing an employer to direct employees to take paid leave in advance of accrual to cover shutdown periods (**Paid Advance Leave Direction Terms**). Commissioner Hunt proposed a model clause which would allow an employee without sufficient paid annual leave to elect to either take unpaid leave or paid leave in advance of accrual, and in the absence of such an election, would include a Paid Advance Leave Direction Term.

18. Each of the Majority and minority have invited submissions in response to those provisional views and conclusions. For the reasons canvassed below:

    (a) The Majority's provisional conclusions concerning a purported lack of power to include or retain Unpaid Leave Terms are, with respect, in error. Unpaid Leave Terms are capable of support under s.139(1)(h) (in conjunction with s.142), or alternatively under s.139(1)(c).

    (b) It is Ai Group's primary position that Unpaid Leave Terms should be retained in any awards in which such provisions currently exist.

    (c) Should the Commission form a final conclusion that no power exists to retain Unpaid Leave Terms, the model shutdown clause should include a capacity for employers to direct employees to take annual leave in advance.

    (d) Should the Commission accept that Unpaid Leave Terms are within power, but determine that it is not prepared to retain them on the basis that they are not necessary to ensure that the relevant awards achieve the modern awards objective; it should simply remove the Unpaid Leave Terms. It should instead implement the transitional arrangements we have proposed before any model term takes effect.

4. THE COMMISSION'S POWER TO INCLUDE UNPAID LEAVE TERMS

19. At [150] of the Decision, the Majority provisionally concluded that it would not include or retain an Unpaid Leave Term in any modern award. The principal basis for that provisional conclusion was a finding (at [141]) that the Commission lacks power under s.136 to include a term in a modern award requiring employees to take unpaid leave during a shutdown when that employee has an insufficient paid leave balance to cover the shutdown period.

20. As noted above, such terms have appeared (and continue to appear) in some 52 modern awards. Employers have relied upon them to facilitate shutdowns until now. Given that s.137 of the Act provides that a term of a modern award has no effect to the extent that it contravenes s.136, the Majority's construction raises the prospect of employers being exposed to potential underpayment claims – including those seeking the imposition of civil penalties – simply by having relied upon those terms. Those material consequences underscore the importance of carefully scrutinising the Majority's provisional views and conclusions insofar as they concern questions of power, and the merit of the cautious approach to change that emerges from the authorities discussed above.

21. Once that appropriate scrutiny is applied, and with respect, several errors emerge in the Majority's provisional conclusion.

22. *First*, the majority proceeds from the wrong starting point. Its first *'basal proposition'* (at [138]) suggests that awards may only contain provisions referring to shutdowns as an incident of terms which relate to a subject matter expressly permitted by s.139(1) (or some other FW Act provision authorising awards terms about specific matters). That proposition is correct so far as it goes. But the Majority then wrongly confines the source of power for shutdown terms to s.142(1) in conjunction with either of ss.93(3) or 139(1)(h), on the basis that shutdown provisions in modern awards are <u>currently</u> contained within the annual leave clauses of those awards. Whilst those sections undoubtedly constitute sources of power to include shutdown terms, they are not exhaustive. The mere

fact that such terms have appeared alongside broader terms dealing with paid annual leave does not confine their possible characterisation to that topic. Indeed, there is at least one other source of award-making power capable of supporting such terms; that being s.139(1)(c) of the Act. We address this further below.

23. *Second*, the Majority appears to reason that a modern award may only facilitate a shutdown where its purpose is to facilitate the taking of annual leave (and not for other reasons, such as allowing the closedown of an employer's business during specified holiday periods or to meet the employer's operational requirements). The basis for that limitation is unclear. The mere fact that s.139(1) does not list shutdowns as a separate matter is beside the point: the question is whether or not the various terms that would facilitate a shutdown are capable of support under a source of power recognised by s.136(1) (regardless of the purpose to which that shutdown is directed).

24. *Third*, and relatedly, the Majority characterises an Unpaid Leave Term as no different in substance to a stand down *"since it occurs on the employer's initiative and without the employer's consent and leads to the same result of the employee being deprived of work and pay"*.[7] But again, that approach asks the wrong question. Section 139(1) of course does not expressly contemplate modern award terms dealing with stand downs *sui generis*. But that fact does not prevent a term creating rights and obligations which in certain ways resemble those arising in a stand down context from engaging another source of power under s.136(1).

25. *Fourth,* even if that comparison were relevant, it in any event overlooks material differences between shutdowns and stand downs under s.524(1).

26. A crucial unifying characteristic of the circumstances prescribed under s.524(1) is that each is unanticipated and beyond the control of the employer. Thus, stand down clauses serve two purposes: to provide financial relief to an employer from paying wages in circumstances where, through no fault of its own, the employer

[7] The Decision at [141].

has no work that the employees can usefully perform; and to protect the employees from what would otherwise flow from the termination of their services.[8] By contrast, shutdowns, by their nature, may be implemented in response to circumstances that are anticipated and they are initiated by an employer. In this sense, shutdown provisions bear far closer resemblance to those dealing with alterations to rosters than they do to stand downs.

27. The distinction between stand downs and Unpaid Leave Terms can also be seen in pre-modern awards. At **Attachment A** to this submission, we identify over 40 awards that contemplated a right to stand employees down in circumstances substantially the same or similar to those now identified in s.524 of the Act whilst also, separately, providing for the taking of unpaid leave in the context of a shutdown that was related to annual leave. This list is by no means exhaustive.

28. The concept of standing employees down and taking unpaid leave in the context of a shutdown have been, and are, separate and distinct.

29. *Fifth,* that the Act does not directly authorise Unpaid Leave Terms does not mean that such terms cannot be incidental to and necessary for the practical operation of a term about paid annual leave, or about another matter authorised under s.136(1). To the contrary; whilst shutdowns are not expressly listed as a s.139(1) *'matter'*, there can be little doubt that Parliament intended to facilitate an employer's ability to implement annual shutdowns within reasonable bounds. That facilitative intention is not confined to award-making. To illustrate:

    (a) Section 93(3) allows a modern award to include terms allowing for an employee to be required to take paid annual leave in particular circumstances if the requirement is reasonable. The Explanatory Memorandum expressly contemplates one of those reasonable

[8] See *CEPU v Qantas Airways Ltd* (2020) 295 IR 225 at [18]-[20] (Flick J) and the authorities there discussed.

requirements being an employer's decision to *"shut down the workplace over the Christmas/New Year period"*;[9]

(b) Section 94(5) allows an employer to require an award/agreement free employee to take paid annual leave in particular circumstances if the requirement is reasonable. A legislative note then provides that such a requirement may be reasonable if, amongst other things, *"the employer's enterprise is being shut down for a period (for example, between Christmas and New Year)"*.[10]

(c) Section 94(6) allows an employer and an award/agreement free employee to agree on when and how paid annual leave may be taken. A legislative note then provides that such an agreement might concern (amongst other things) taking paid annual leave in advance of accrual.

30. But it would be artificial to suppose that such legislative intention would be confined to facilitating shutdowns at enterprises where, at the time a shutdown was to commence, had only employees with a sufficient paid annual leave balance to cover the shutdown period. That was not the position prior to award modernisation: whilst the Majority refers to '*a number*' of pre-modern awards containing such terms, **Attachment A** to this submission reveals over 40 pre-modern awards across a wide array of industries and occupations containing those provisions. This is far from an exhaustive list. Further, as Ai Group has previously submitted, such facilitative provisions have formed a part of State and Federal legislative schemes for many years.[11]

[9] As to the proper use of explanatory memoranda in this context, see Bromberg J's discussion in *ABCC v CFMEU (The Bay Street Case)* (2018) FCR 564 at [51].

[10] A legislative note forms part of the Act: see s 13(1) of the *Acts Interpretation Act 1901* (Cth).

[11] Ai Group's submission dated 22 March 2019 at [41] – [45].

31. Beyond the administrative morass that would entail, such an approach would also have a chilling effect on the engagement of new employees shortly before the commencement of a shutdown period, and would likely increase disputation between newer and older employees given the windfall gain that newer employees without accrued leave balances would obtain (for the reasons Commissioner Hunt articulates at [214] - [220] of the Decision).

32. Unpaid Leave Terms are thus properly seen as an important element in a suite of award terms – alongside terms allowing for employers to require employees to take paid annual leave – which facilitate shutdown arrangements. Absent their inclusion, or some other mechanism for ensuring that employees are absent from the workplace over a shutdown period, employers face an invidious choice: pay each employee without an accrued paid annual leave balance for the shutdown period even if those employees performed no work, or allow those employees to attend work notwithstanding the lack of useful work available. There are also potential safety issues that might arise from such attendance during times where minimum safe crewing levels are not maintained.

33. In that scenario, the utility of a shutdown – something which Parliament expressly contemplated, and enacted provisions to facilitate in various ways – would be largely negated. Importantly, the utility of a term allowing an employer to reasonably require employees to take <u>paid</u> annual leave during a shutdown – another element of a suite of terms facilitating shutdowns plainly permissible in light of s.93(3), and indeed included at clause (d) of the majority's model term – would be similarly negated. The Unpaid Leave Term is thus incidental to (and necessary for the practical application of) that paid annual leave term.

34. *Fifth*, the majority applies a broad-ranging definition of *'leave'* which is then deployed in apparent contrast to the type of absence contemplated by an Unpaid Leave Term. That definition – *"a beneficial entitlement for employees to be absent from work"* – does not appear in the Act. But in any event, that definition cannot be reconciled with the various ways in which an employer can require an employee to take unpaid parental leave under s.73(2). In each of those cases, the employee does not consent to taking unpaid leave at the particular time the

employer requires it to be taken: were it otherwise, no such *'requirement'* would be necessary. That ability to require employees to take unpaid leave recognises a balancing of interests between the employee's desire to attend for (and be paid for) work, and the employer's interest in ensuring that work is performed only by those employees who are fit for work. On the Majority's approach, such a period of absence – unpaid, and otherwise than by the employee's consent – would not be *'leave'* at all. But Parliament defined it in just those terms.

Section 134(1)(c) of the Act

35. Even if the Majority's provisional view that s.139(1)(h) cannot support an Unpaid Leave Term is correct, it does not follow that such a term is incapable of being included in a modern award.

36. Section 139(1)(c) provides that a modern award may include terms about *"arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours"*.

37. Several points emerge from s.139(1)(c)'s text and context.

38. *First,* the composite phrase *'arrangements for when work is performed'* is on its face broad enough to encompass arrangements for when work might be performed and (it logically follows) when it might not. Nothing on that plain text suggests any limitation excluding arrangements for the non-performance of work during particular calendar periods.

39. *Second*, the exemplar *'arrangements'* set out in the balance of s.139(1)(c) are not confined to the arrangement of work within a shift or day. Rather, they are of a genus that contemplates terms dealing with the impact upon work arrangements of times at which the workplace is not operational.

40. *Third*, even if those exemplar arrangements were of a materially different genus to shutdown terms, the use of the term *'including'* in any event suggests words of illustration, rather than words of confinement. The starting position is Lord Watson' statement of principle in *Dilworth v Commissioner of Stamps* (1899) AC

99, adopted by each of McTiernan, Kitto and Menzies JJ in *Y.Z. Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 (***Cummings***):

> The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

41. As Gibbs CJ observed in *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 (***Gray***) at [18] (Mason, Wilson, Brennan, Deane and Dawson JJ agreeing), whether the ordinary enlarging meaning of *'includes'* is displaced in favour of the more limited *'means and includes'* will depend on context. But there are no relevant contextual matters that would displace that ordinary enlarging meaning here.

42. *Fourth*, and relatedly, s.139(1)(c) would plainly allow for a modern award to include a term facilitating rostering arrangements, or variations to those arrangements at particular times of the year. Such rostering arrangements can (and in some industries frequently do) involve periods where no work is offered or performed. Even time rosters (such as 7/7 or 14/14 rosters) are pertinent examples. But if s.139(1)(c) permits a modern award to include a term allowing an employer to structure its rosters so that employees are not offered work (and thus are not paid for work) for a period of a week or two, why could it not permit the same where that period is uniform across the workplace, and falls over the Christmas break?

43. *Fifth,* section 139(1)(c) has been previously construed in a consonantly broad manner. In the *2012 Public Holidays Review*,[12] the Full Bench considered a proposal for an additional day off (or compensation in lieu) for those employees who *'miss out'* on a public holiday falling on a non-working day. The Full Bench there observed (at [63]) that the proposal might (amongst other possible sources of power) be supported by s.139(1)(c). If anything, there would appear to be a

[12] (2018) 275 IR 383.

closer connection between the composite phrase *'arrangements for when work is performed'* and an Unpaid Leave Term on the one hand, and a term creating an employee entitlement to an additional day's leave without reference to their actual working arrangements on the other.

Conclusion

44. For the reasons set out above, Unpaid Leave Terms can be included in a modern award pursuant to s.139(1)(c), s.139(1)(h) and / or s.142(1).

5. THE MODERN AWARDS OBJECTIVE

45. The retention of Unpaid Leave Terms, as part of a scheme for dealing with the implementation of shutdowns, is necessary for those awards that contain such provisions to satisfy the modern awards objective.

46. The removal of Unpaid Leave Terms will cause significant disruption to long-standing practices, increased and unexpected costs for employers, and various adverse consequences for both employers and employees. Given this context, the deletion of such a right from a model shutdown clause is not necessary, in the sense contemplated by s.138 of the Act.

47. Putting aside the question of whether there is power to include an Unpaid Leave Term in an award; no compelling case has been made out for redesigning the award systems' regulation of annual leave and, more specifically, what may be termed, for convenience, *'annual leave related shutdowns'*. No party advanced a claim raising any concern with the shutdown provisions in practice, excluding an initial claim that was rejected, in part, on the basis that such matters should be dealt with on an award-by-award basis. Rather, the matter was initiated at the Commission's own motion as part of its plain language redrafting process.

48. There is no evidence before the Commission, but for that which has now been led by Ai Group, that would enable the Commission to properly assess the impact of its proposed variation or the matters identified in s.134(1) of the Act. It would be inappropriate for the Commission to make a sweeping and radical change to the safety net in the context of such an evidentiary vacuum.

49. We develop our submissions further below; but before doing so, we canvass the results of a survey of Ai Group and some of ACCI's affiliates' members regarding shutdowns (**Survey**).

The Results of the Survey

50. The Survey was facilitated by Ai Group. The details of the conduct of the Survey and its results are addressed in the statement of Patrick Sullivan.[13]

51. The Survey was open for only two weeks, given the limited timeframe afforded to prepare our evidence in these proceedings. Despite this, it attracted 2390 complete responses.[14] Of these, 1990 respondents indicated that their organisation was covered by a modern award (including where an enterprise agreement applied to some or all such employees)[15] (**Total Respondents**). This is a significant volume of responses and it suggests that the regulation of shutdowns in modern awards is of significant concern to employers.

52. The majority of the Total Respondents (i.e. 61%) were not covered by any enterprise agreement.[16] 14% of the Total Respondents reported that some of their award-covered employees were covered by awards, whilst others were covered by enterprise agreements.[17] Only 15% indicated that enterprise agreements applied to all of their award-covered employees.[18] Thus, the Survey results largely reflect the practices and views of employers who are award-dependent.

53. The Total Respondents employed employees across a broad range of industries and occupations, covered by approximately 100 modern awards.[19]

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[13] Witness statement of Patrick Sullivan dated 18 November 2022.

[14] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q1'*.

[15] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q1'*.

[16] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q2'*.

[17] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q2'*.

[18] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q2'*.

[19] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q3'*.

54. The results are reflective of the views and practices of small, medium and large enterprises:[20]

Respondent Size	% of Total Respondents
Small (1 – 19)	52%
Medium (20 – 199)	36%
Large (200+)	12%

55. The vast majority – some 1781 or 89% of the Total Respondents (**Relevant Respondents**) - had shutdown all or part of their operations since 1 January 2010.[21] Over 1100 reported shutting down at least once a year since then.[22]

56. The Survey asked the Relevant Respondents why they had shutdown their respective organisations and proposed various options for them to choose from. The key results were as follows:[23]

Reason	Number of Respondents	% of Relevant Respondents[24]
To coincide with an annual or seasonal slowdown or cessation of trade	1214	68%
To coincide with shutdowns implemented by other related organisations, such as clients or suppliers	969	54%
To enable full-time and part-time employees to take annual leave	967	54%
To reduce or avoid the disruption that would be caused by multiple public holidays is a shutdown was not implement	504	28%
To enable the routine maintenance of plant and / or equipment	268	15%
Other	185	10%

[20] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q4'*.

[21] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q6'*.

[22] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure D in relation to Question 7.

[23] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q8'*.

[24] The percentages calculated do not total 100 because respondents could select more than one of the options.

57. Of the Relevant Respondents:[25]

(a) 79% (or 1400) reported that there had been a situation where an employee did not have enough annual leave to cover the whole shutdown.

(b) Only 17% reported that such circumstances had not arisen.

58. The 1400 participants who reported that there had been a situation where an employee did not have enough annual leave to cover the entirety of a shutdown were asked to identify the approach they adopted in respect of those employees. The results were as follows:[26]

Approach	**Number of Respondents**	**% of the 1400 Respondents**[27]
The employees were required to take unpaid leave	1119	80%
The employees were allowed to take annual leave in advance	683	49%
The employees performed work	299	21%
The employees were permitted or required to take another form of paid leave	154	11%
The employees were paid, but they were not required to work or access a form of leave	37	3%
Other	72	5%

59. The Survey should inform the Commission's decision about the formulation of the model term and, in particular, the inclusion of a provision that relates to taking unpaid leave. Given the large number of responses to the Survey, it provides an important insight into the frequency with which employers typically close down, the reasons for shutting down and the approaches they adopt in respect of employees who have not accrued sufficient annual leave to cover the relevant period. As a Full Bench of the Commission had observed regarding a similar

[25] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q9'*.

[26] Witness statement of Patrick Sullivan dated 18 November 2022 at Annexure E, *'Summary for Q10'*.

[27] The percentages calculated do not total 100 because respondents could select more than one of the options.

survey conducted during the four yearly review of modern awards concerning annual leave common issues: (emphasis added)

> **[47]** Taking account of all these issues we are satisfied that the Employer Survey provides a valuable insight into the practical issues facing employers in the management of the existing annual leave arrangements and we will take the Employer Survey responses into account. The Employer Survey utilised the available databases in order to maximise the number of responses. A substantial number of responses were received (relative to other employment surveys) and the respondents were reasonably representative of the population of employers in each state and territory. The methodological limitations with the survey (i.e. it was not a random stratified sample) mean that the results cannot be extrapolated such that they can be said to be representative of all employers.[28]

60. The Survey demonstrates that:

    (a) Many employers rely on modern award shutdown provisions in order to implement a shutdown;

    (b) It is not uncommon for employers to implement a shutdown at least once a year;

    (c) Shutdowns are implemented for a range of reasons. One of the most common reasons is to enable permanent employees to take annual leave; however, there are other key reasons that concern the operation of employers' businesses;

    (d) Most employers encounter circumstances in which employees do not have enough annual leave to cover the entire period of a shutdown; and

    (e) In such situations, it is very rare for the employees to work during the shutdown or be paid without being required to work. Overwhelmingly, employees are required to take unpaid leave. Less commonly but not infrequently, employees take annual leave in advance.

61. It follows that the removal of a right to direct employees to take unpaid leave would amount to a significant disruption to existing practices and would adversely impact employers and some employees.

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[28] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [47].

The Modern Awards Objective

62. The modern awards objective requires the Commission to ensure that an award, together with the NES, provides a fair and relevant minimum safety net, taking into account the factors listed at ss.134(1)(a) – (h) of the Act. For the reasons that follow, we identify why Unpaid Leave Terms are necessary to ensure that the relevant awards achieve the modern awards objective.

A Fair Safety Net, Section 134(1)(d) & Section 134(f)

63. The removal of Unpaid Leave Terms would have various significant unfair and adverse consequences for employers and in some cases, for employees too. It would be inconsistent with each of the aforementioned elements of the modern awards objective, for the reasons that follow.

64. *First*, the proposed change would represent a departure from a long-established element of industrial regulation in Australia and would disrupt long-standing practices in a vast number of industries. The prevalence of requiring employees to take unpaid leave during a shutdown where they have not accrued enough annual leave can be seen from the Survey results.

65. At the very least, the current award terms dealing with shutdowns have generally been in place since the modern awards were first made. Many, if not most, current award provisions reflect arrangements that were in place under predecessor awards. Award provisions affording employers a right to direct employees to take unpaid leave have existed long before the award modernisation process in 2010; for example, in manufacturing from as early as 1952[29].

66. The right to direct employees to take unpaid leave in the context of a shutdown implemented for the purposes of directing employees to take annual leave has also been a feature of various legislative schemes. Relevantly, the *Annual Holidays Act 1944* (NSW) contemplated employees taking unpaid leave during

[29] The Decision at [48].

a shutdown if they had accrued insufficient paid leave to cover the period of the shutdown.

67. The operating and staffing arrangements of many employers have no doubt been structured around the ability, derived from industrial regulation, to direct employees to take a period of annual leave, or as necessary, unpaid leave, to facilitate the implementation of a shutdown. The Survey results show that directing an employee to take unpaid leave or annual leave in advance is not only an established practice, but a common one across various industries.

68. *Second,* as can be seen from the Survey results, shutdowns are commonly implemented due to a slow down in trade or business activity. It follows that an employer may not be able to productively engage their employees who do not have enough annual leave during the shutdown. Take for example an employee engaged in a manufacturing facility on a production line, that cannot operate unless it is manned by at least a certain number of employees.

69. Although this proposition is not without complexity, it would appear that in the absence of an ability to direct the taking of unpaid leave pursuant to an award term, employers will generally have to pay full-time or part-time employees who do not have sufficient accrued paid annual leave for the duration of the shutdown and direct them to not attend work.

70. The Survey shows that it is extremely uncommon for an employee to be paid in circumstances where they were not required to work or able to access a form of leave. The proposed model clause would therefore give rise to a significant and unexpected cost impost for employers, particularly where shutdowns are an essential part of doing business. This would be grossly unfair. Employers would not have the benefit of any productive output from those employees. It would amount to an unjustifiable increase to employers' employment costs.

71. *Third,* to the extent that some employers are able to provide employees without enough annual leave with some work:

(a) The circumstances are inconsistent with the need to ensure the efficient and productive performance of work. In many cases, a lone employee (or a small group of employees) will not be able to work in a way that is efficient or productive, in the absence of the broader cohort of employees with whom they typically work. An employer in this context may simply be choosing to provide the employee with some work in order to avoid a situation in which they are not performing *any* work – an even less desirable outcome.

(b) In some contexts, it may become necessary for an employer to require additional employees to work (e.g. for health and safety reasons, to supervise employees etc). This would be unfair to the employer and to those additional employees if they do not wish to work. It would also increase employment costs to the extent that it would result in those employees not using their accrued annual leave.

(c) The task of endeavouring to identify work that can usefully be undertaken by employees and, where relevant, arranging for the supervision of those employees and other such associated matters would impose a new regulatory burden on employers.

(d) It would undermine the employer's ability to completely shutdown their enterprise or part thereof. This of itself would be unfair. Many employers use the shutdown period to coordinate the taking of leave simultaneously by the workforce. This is particularly important in contexts where a critical mass of employees is needed to ensure and/or maximise, the efficient or productive performance of work (such as in the context of production lines).

(e) Many employers undertake essential maintenance and repair work during a shutdown (as can be seen from the Survey Results). For example, in manufacturing facilities, it is very common for employers to direct production employees to take leave during a shutdown and, in that time, to require maintenance employees to work on the relevant plant and

equipment. Employers may no longer be able to do this if they cannot implement uniform leave-taking across their production workers. This would undermine the efficient and productive performance of work, it would increase employers' regulatory burden and it would potentially increase employment costs.

72. *Fourth,* the removal of an employer's ability to direct employees to take unpaid leave would add further and unexpected cost pressures and hinder operational flexibility for employers in circumstances where they have faced, and continue to face, high inflationary and interest rate pressures. It would be particularly unfair to impose a model shutdown clause which has such significant impacts on employers in the current economic climate.

73. *Fifth,* the removal of the ability to direct employees to take unpaid leave may have unintended adverse consequences for employees too. For example, some employers will be:

    (a) Less inclined to grant paid annual leave to employees for the periods requested by the employee, if such period falls outside of the shutdown period. That is so because employers will be incentivised to ensure that employees have enough annual leave accrued to cover upcoming shutdown periods.

    (b) Less inclined to grant periods of unpaid leave during the year, as it will inhibit the accrual of an employee's annual leave entitlements.

    (c) Less inclined to hire new employees at certain times of the year where it is anticipated that they will not be able to accrue enough annual leave to cover the shutdown period.

    (d) More inclined to use casual employees or labour hire employees and be less inclined to convert casual employees if a conversion request is made at a certain point of the year in which it is anticipated that, upon conversion, such employee will not be able to accrue enough annual leave to cover the shutdown period.

(e) More inclined to consider terminating employees ahead of a shutdown instead of paying those with insufficient leave accrued for time not worked. This is all the more likely in the context of employees who have not been employed for at least the minimum employment period necessary to be eligible to make an application for an unfair dismissal remedy.

(f) More inclined to allot periods in which certain employees can take paid leave throughout the year and to move away or limit the use of shutdowns (which has been commonly used to manage annual leave accruals across the workforce). This may mean that some employees who have traditionally enjoyed a period of leave during times such as the Christmas / New Year period may not be able to continue doing so.

74. *Sixth,* we anticipate that some employers would endeavour to implement other arrangements with their employees. For instance, they may try to reach agreement with their employee regarding the taking of annual leave in advance in accordance with the award or taking long service leave, where the relevant source of the entitlement permits this. It is unfair to impose this additional regulatory burden on employers. Further adverse consequences would flow where an employee does not agree to take annual leave in advance or an employee does not have access to another form of paid leave.

75. For all of these reasons, Unpaid Leave Terms should be included in those awards that currently contain such a provision.

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

76. The *Annual Wage Review 2019 – 2020* decision dealt with the interpretation of s.134(1)(a):

> **[338]** The assessment of relative living standards requires a comparison of the living standards of NMW-reliant workers and award-reliant workers with the wage rates of other relevant groups, particularly non-managerial workers, and to changes in average and median earnings of the broader labour force.
>
> **…**

> **[360]** Assessing the needs of the low paid involves analysing the extent to which low-paid workers are able to purchase the essential items necessary for achieving a decent standard of living for them and their families, and to allow them to participate in community life, assessed against contemporary norms.[30]

77. Further, the term *'low paid'* has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[359]** A threshold of two-thirds of median adult full-time ordinary earnings is the benchmark we use to identify who is 'low paid' within the meaning of ss 134(1)(a) and 284(1)(c).[31]

78. The relative living standards and needs of the low paid are not likely to be substantially impacted by the retention or deletion of Unpaid Leave Terms. Section 134(1)(a) does not support the deletion of such clauses.

Section 134(1)(b) – the need to encourage collective bargaining

79. There is no evidence or other material to suggest that the proposed variations would encourage collective bargaining (that is, encourage employers and / or employees to participate in an enterprise bargaining process).

80. Insofar as the proposed model clause omits Unpaid Leave Terms, this could have the effect of discouraging collective bargaining, as the inclusion of such a flexibility in a proposed enterprise agreement may be viewed as a factor that weighs against the agreement passing the *'better off overall'* test prescribed by s.193 of the Act.

81. It might theoretically be argued that the removal of Unpaid Leave Terms may incentivise employers to engage in enterprise bargaining. However, it would be both perverse and inappropriate to remove important flexibilities from the awards system, given the many adverse consequences that will likely flow from it, as a means of potentially encouraging collective bargaining.

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[30] *Annual Wage Review 2019 – 2020* [2020] FWCFB 3500 at [338] – [360].

[31] *Annual Wage Review 2019-20* [2020] FWCFB 3500. See also *Annual Wage Review 2018-19* [2019] FWCFB 3500 at [205]; *Annual Wage Review 2012-2013* [2013] FWCFB 4000 at [362]; and *Annual Wage Review 2013-14* [2014] FWCFB 3500 at [310].

82. For these reasons, s.134(1)(b) does no support the proposed deletion of Unpaid Leave Terms.

Section 134(1)(c) – the need to promote social inclusion through increased workforce participation

83. An unintended consequence of the removal of Unpaid Leave Terms is the potential for employers to refrain from engaging new employees in periods leading up to a shutdown. In addition, where an employee does not have sufficient leave accrued, some employers may seek to terminate the employment of the employees in preference to paying them during the shutdown, where they cannot be usefully and productively engaged.

84. To that end, s.134(1)(c) of the Act weighs against the removal of Unpaid Leave Terms.

Section 134(1)(da) – the need to provide additional remuneration for employees working in various circumstances

85. Section 134(1)(da) of the Act is not relevant to the matters being considered in these proceedings. Therefore, it is a neutral consideration.

Section 134(1)(e) – equal remuneration for work of equal or comparable value

86. At paragraphs [204] – [207] in *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, the following was stated:

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly:
>
> > 'In this Act:
> >
> > ***equal remuneration for work of equal of comparable value:*** see subsection 302(2).'
>
> **[206]** The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.

> **[207]** The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.[32]

87. Section 134(1)(e) of the Act is plainly a neutral consideration in this matter.

Section 134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap

88. Unpaid Leave Terms should be retained in the interests of maintaining a stable awards system. As set out earlier, these provisions have a long history and have been heavily relied upon by employers in many industries. Their removal will cause significant disruption to existing practices.

89. The proposed removal of Unpaid Leave Terms will also create uncertainty as to what is to occur in respect of employees who do not have enough accrued annual leave during a shutdown. Put simply, many awards only require payment for when work is performed. It would consequently be unclear what must be paid, pursuant to such awards, to permanent employee who are not afforded any work during a period of a shutdown. The awards will not be simple and easy to understand in this regard.

90. Section 134(1)(g) of the Act weighs against the removal of Unpaid Leave Terms.

Section 134(1)(h) – the likely impact on employment growth, inflation and sustainability, performance and competitiveness of the national economy

91. Section 134(1)(h) of the Act is a neutral consideration in this matter.

[32] *Penalty Rates Case* at [204] – [207].

5. ANNUAL LEAVE IN ADVANCE

92. The Majority's draft model term stops short of allowing an employer to require an employee to take paid annual leave in advance of accrual to cover a shutdown period. But its draft model term expressly allows an employee to elect to do so. No part of the Majority's reasons appear to address why the latter would meet the modern awards objective, but the former would not. That aside, it is in any event difficult to envisage a scenario in which a term allowing for such an employee election would be practically engaged. If (as the Majority concluded) a modern award cannot include Unpaid Leave Terms, it appears that an employer would be required to pay each employee without an accrued paid annual leave balance for the shutdown period even if those employees performed no work. That being the case, there would be no rational basis for an employee to elect to take paid annual leave in advance of accrual.

93. If the Commission finds that it lacks power to include an Unpaid Leave Term in a modern award (either by virtue of s.138 of the Act or s.136); it should amend the proposed model term to include an ability to direct an employee to take paid annual leave in advance. This would, to some degree, ameliorate the problems associated with removing Unpaid Leave Terms.

94. Such a term should:

    (a) Given an employer the right to direct an employee with insufficient accrued annual leave to take annual leave advance to cover the relevant period of the shutdown (which may be the whole period of the shutdown if the employee does not have any accrued annual leave);

    (b) Deal with circumstances in which an employee has not accrued the leave taken in advance upon the termination of their employment, by allowing the employer to deduct an amount equivalent to the amount not accrued from termination payments;[33] and

[33] See for example clause 34.12(d) of the *Manufacturing and Associated Industries and Occupations Award 2020*.

(c) Require that any direction to take annual leave in advance must be reasonable.[34]

95. Such a term would plainly be within power. It would be a term about *'leave'* or *'arrangements for taking leave'* for the purposes of s.139(1)(h). It would also be a term allowing for an employee to be required to take paid annual leave in particular circumstances for the purposes of s.93(3) (albeit that the requirement would need in each particular case to be reasonable). If it did not fall within the scope of s.93(3), it would be a term *'otherwise dealing with the taking of paid annual leave'* for the purposes of s.93(4).

96. Such terms meet the modern awards objective, particularly taking into account the likely impact of the Unpaid Leave Terms being removed on business (s.134(1)(f)) and the need to ensure stability in the modern award system (s.134(1)(g)).

6. TRANSITIONAL ARRANGEMENTS

97. If the Commission finds that Unpaid Leave Terms are within power, however, they are not necessary to ensure that the relevant awards achieve the modern awards objective, the Commission should not simply delete them. The immediate absence of Unpaid Leave Terms would not ensure that the awards achieve the modern awards objective, for the reasons set out at section 4 of this submission. Instead, the Commission should adopt the approach identified below.

98. Moreover, the Commission should not implement its model term in the context of awards that do not contain an Unpaid Leave Term immediately either.

99. There remain only four weeks until Christmas and the associated festive season, during which time shutdown provisions contained in awards are most commonly relied upon. We anticipate that many employers have already notified their employees of the arrangements that will be implemented during that period. Any

[34] For the purposes of s.93(3) of the Act.

changes to the regulation of shutdown provisions at this time of year is likely to cause significant disruption and confusion in industry.

100. Accordingly, the Commission should:

(a) Not make any variations to the aforementioned groups of awards before Christmas in 2022.

(b) Determine that its model term in those awards will not take effect until 1 July 2023. This would:

(i) Provide employers with an opportunity to consider and implement strategies for managing annual leave before Christmas shutdowns are implemented next year.

(ii) Ensure that well before employers are required to notify employees of their Christmas 2023 shutdowns, the new rules are clearly in place.

(iii) Ensure that the model clause does not apply to any shutdowns implemented in the first half of next year (e.g. some manufacturing employers regularly shutdown around Easter), before employers have had a sufficient opportunity to assess their employees' annual leave balances and determine how to best implement shutdowns in their enterprises moving forward.

Attachment A: Pre-Modern Awards with Unpaid Leave Terms and Stand Down Clauses

	Award Title	Award Code	Shut down clause number	Stand down clause number
1	A.C.T. Funeral Industry Award 2002	AP815104	22.8	10
2	Asphalt and Bitumen Industry (NSW and ACT) Award 1999	AP766022	22.6	13
3	Australian Workers' Union Construction and Maintenance Award 2002	AP815828	33.9	18
4	AWU Commercial Landscaping Award 2001	AP806077	24.8	14
5	Biscuit & Confectionery Award	AN150013	7.1.7	4.10
6	Bread Trade (Victoria) Award 1999	AP769688	25.10	12
7	Building and Construction Industry (State) Award	AN120089	32.9	14
8	Building and Construction Industry Award	AN170010	32(i)	11
9	Building and Construction Workers (State) Award	AN150022	30(h)	41
10	Building Trades (Construction) Award 1987	AN160034	22(9)	44
11	Building Trades (SA) Construction Award	AN150023	26.9	39
12	Business Equipment Industry - Technical Service - Award 1999	AP769412	28.11	15
13	Draughting Employees, Planners, Technical Employees, &c (State) Award	AN120185	7.1(iv)	4.6
14	Electrical Contracting Industry (South Australia) Award	AN150050	7.1.8	4.9
15	Federal Meat Industry (Processing) Award 2000	AP781451	26.9	18
16	Federal Meat Industry (Retail and Wholesale) Award 2000	AP805114	27.13	19
17	Funeral Industry Award 2003	AP825425	21.8	13
18	Grocery Products Manufacture - Manufacturing Grocers Award 2003	AP820730	32.10	15
19	Hairdressing and Beauty Services - Victoria - Award 2001	AP806816	31.9	27

20	Industrial Spraypainting and Sandblasting Award 1991	AN160180	20(9)	40
21	Metal Industry (Northern Territory) Award 2003	AP825130	7.2.13	4.6.
22	Metal, Engineering and Associated Industries Award 1998	AP789529	7.1.12	4.6
23	Milk Treatment and Distribution Employees (A.C.T.) Award 2003	AP822300	27.12	11
24	National Building and Construction Industry Award 2000	AP790741	32.9	14
25	National Metal and Engineering on-site Construction Industry Award 2002	AP816828	30.13	13
26	Plumbing Industry (Qld and WA) Award 1999	AP792354	23.7	39
27	Retail and Wholesale Industry - Retail Distribution Centres Shop, Distributive and Allied Employees' Award 2003	AP822886	29.12.5	12
28	Storage Services - Fruit Packing - Victoria - Award 2002	AP818390	27.2.5	11
29	Storage Services - General - Award 1999	AP796791	27.7	11
30	Storage Services - Paint Industry - Award 2002	AP814112	24.7	10
31	Storage Services Retail Victorian Warehouses Award 2000	AP796002	29.6	12
32	Television, Radio and Electronics Service Industry Award, 1998	AP799596	7.1.11	4.6
33	Transport Workers (Mixed Industries) Award 2002	AP813166	32.13	18
34	Transport Workers (SA) Award	AN150164	7.1.10	4.10
35	Vehicle Industry Award 2000	AP801818	7.1.11	4.3
36	Metal, Engineering and Associated Industries (State) Award	AN120334	7.1.12	4.6
37	Rubber Workers (State) Award	AN120483	33(m)	5
38	Vehicle Industry (SA) Repair Service & Retail Award	AN150167	7.1.11	4.11
39	The Coal Mining Industry (Production and Engineering) Consolidated Award 1997	AP774609	29.11	15
40	Coal Mining Industry (Staff) Award, 2004	AP835164	26.11	13

41	AWU Cementitious Products (Port Melbourne) Award 1999	AP766145	24.11	16
42	Cement Industry Award - State 2003	AN140056	7.1.6	4.9
43	Cemetery Employees Award 2003	AP822505	24.10	22