Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

Plain language re-drafting
(AM2016/15)

18 April 2019

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/15 PLAIN LANGUAGE RE-DRAFTING

1. INTRODUCTION

1. This reply submission is made by Australian Industry Group (**Ai Group**) in response to the Statement issued by the Fair Work Commission (**Commission**) on 28 February 2019 (**the February Statement**)[1].

2. This submission should be read in conjunction with Ai Group's submission of 22 March 2019 (**Ai Group's March 2019 Submission**).

3. The February Statement identifies the current status of matters before the Plain Language Full Bench and invites commentary and submissions from interested parties on a range of matters. This submission responds to various submissions of other parties in relation to:

    - Issues with cross-references to the relevant industry in the coverage clause of the *Market and Social Research Award 2010* and the Commission's proposal to amend the clauses dealing with on-hire employees and group training services to refer to the relevant industry instead of a clause reference.[2]

    - Proposed re-drafting of the annual leave loading clauses in awards that contain a reference to an employee being paid the higher of the annual leave loading or a shift "loading" or an "allowance".[3]

    - Whether the modern awards that currently contain shutdown provisions should be varied to include the model term at Attachment D to the February Statement, what, if any, award specific variations should be

[1] [2019] FWCFB 1255.

[2] [2019] FWCFB 1255, [35].

[3] [2019] FWCFB 1255, [71].

made and whether unpaid leave taken during a period of shutdown counts as 'service'.[4]

4. None of the submissions of other parties have led to Ai Group altering the positions set out in Ai Group's March 2019 Submission.

5. All references to clause numbers in this submission refer to the appropriate reference in the most recent exposure draft in respect of each award.

2. CROSS-REFERENCES IN COVERAGE CLAUSES

6. Ai Group's position on this issue is set out in paragraphs 7 to 9 of Ai Group's March 2019 Submission. The views referred to therein address the submissions of the other parties in relation to this issue.

3. INTERACTION BETWEEN ANNUAL LEAVE LOADING CLAUSES AND PENALTY RATE PROVISIONS

7. Ai Group's position on this issue is outlined at paragraphs 13 to 24 of Ai Group's March 2019 Submission.

8. We note that the majority of the other parties' submissions highlight issues with the clause proposed in paragraph [67] of the February Statement which Ai Group has not recommended for inclusion in any modern award. The problems raised by the other parties in relation to the confusing wording of this clause are resolved in the revised leave loading clause proposed at paragraph 20 of Ai Group's March 2019 Submission.

9. Ai Group opposes the model clause proposed in paragraphs 7 and 8 of the AWU Submission of 25 March 2019 (**AWU Submission)**. Ai Group also opposes the model clause proposed in paragraph 14 of the CFMMEU (Construction and General Division) Submission (**CFMMEU C&G Submission**) of 2 April 2019.

[4] [2019] FWCFB 1255, [85].

10. The alternative approach suggested in paragraph 7 of the AWU Submission includes proposed sub-clauses (c)(i) and (d)(i) and would require the 17.5% annual leave loading to be calculated on the "hourly rate payable to the employee for annual leave under the Award for the employee's ordinary hours of work in the period". Ai Group notes that the utilisation of this reference rate would be inappropriate for a significant number of awards referred to in Attachment B to the February Statement. Owing to the substantial degree of variance between these awards concerning the appropriate reference rate, the AWU's proposed clause would constitute a substantive variation that should not be made, and is outside of the scope of the Plain Language Re-drafting exercise.

11. By way of example:

- Clause 15.8(b) of the revised exposure draft of the *Cement, Lime and Quarrying Award* provides for calculation of the 17.5% annual leave loading on the employee's minimum rate of pay.

- Clause 31.1(c)(i) of the exposure draft of the *General Retail Industry Award* states that the 17.5% annual leave loading is calculated on the employee's minimum hourly rate for all ordinary hours of work in the period.

- Clause 20.3(b) of the exposure draft of the *Health Professionals and Support Services Award* provides that the 17.5% annual leave loading is calculated on the employee's minimum rate of pay.

12. The use of the AWU's proposed term as a model to rectify the issues highlighted in paragraphs [59] – [70] of the February Statement would be inappropriate for a significant number of the awards referred to in Appendix B.

13. Proposed clause (c)(ii) of the AWU's model leave loading provision provides for the payment of "the value of the additional weekend penalty rate payments for the employee's ordinary hours of work during the period" where this is greater than the payment mandated by proposed clause (c)(i). Proposed clause (d)(ii)

provides for the payment of "the value of the additional shift work and weekend penalty rate payments for the employee's ordinary hours of work during the period of leave" where this is greater than the payment mandated by proposed clause (d)(i).

14. For the reasons outlined in paragraph 13 of Ai Group's March 2019 Submission and paragraphs 3 to 10 of Ai Group's Submission of 31 August 2016, we oppose the use of the term 'rate' to refer to a 'penalty'. This is owing to the common usage of the former term to denote a payment which incorporates the minimum hourly rate as well as the loading.

15. The AWU's proposed model term would cause confusion with respect to the alternative amounts to be paid where these are greater than the 17.5% annual leave loading.

16. The model provision proposed by the AWU does not include relevant clause references for the applicable weekend and shift penalties referred to in proposed clauses (c)(ii) and (d)(ii). This is problematic as weekend penalties for day workers and shiftworkers are frequently located in different clauses. Lay readers of an award may be unaware of this distinction and the absence of an appropriate signpost is likely to cause confusion.

17. The AWU's model provision appears to compensate for lack of a clause reference by providing an example of a relevant shift/weekend penalty: (emphasis added)

> (c)(ii) the value of the additional weekend penalty rate payments for the employee's ordinary hours of work during the period e.g. 50% of the minimum/ordinary hourly rate for work on a Saturday and 100% of the minimum/ordinary hourly rate for work on a Sunday.
>
> …
>
> (d)(ii) the value of the additional shift work and weekend penalty rate payments for the employee's ordinary hours of work during the period of leave e.g. 15% of the minimum/ordinary hourly rate for afternoon shift and 100% of the minimum/ordinary hourly rate for work on a Sunday.

18. Such examples are more likely to cause confusion if they are worded differently to the substantive clause providing for the relevant penalty. It is also likely that the inclusion of an example, as proposed in the AWU model provision, would oversimplify the range of penalties that may apply for periods of shiftwork and ordinary hours worked on a weekend. This is likely to be the case in awards which provide for different penalties on a Saturday and a Sunday, or different penalties depending on the time that day work is performed on a Saturday. Shift penalties can also vary substantially depending on the time of work, the manner in which shifts are arranged, and the sector worked in. For example, under the *Building and Construction General On-Site Award*, a 15% loading applies for work performed in the civil construction sector during an afternoon or night shift other than on a Saturday, Sunday or holiday, whereas a 50% loading applies for work performed outside of the civil construction sector, during afternoon or night shifts where an employee is employed continuously for five shifts, Monday to Friday.

19. Signposting clause numbers in any model annual leave loading provision is less likely to cause confusion than the provision of an example of a specific penalty.

20. The proposed clause in paragraph 14 of the CFMMEU C&G Submission should not be accepted as it provides no clarity concerning the applicable reference rate for the 17.5% annual leave loading. This gives rise to additional ambiguity for the numerous awards which provide such a reference rate.

21. The CFMMEU C&G's proposed clause is structured in a confusing manner which is contrary to that currently used in the majority of exposure drafts. The proposed clause is reproduced below:

> X.3 Annual Leave Loading
>
> **(a)** Employees who would have worked on day work, Monday to Friday, had they not been on leave, will receive a loading of 17.5% in addition to the payment for the period of annual as specified in clause X.2.
>
> **(b)** Employees who would have worked on shiftwork or whose ordinary hours would have included weekend work, had they not been on leave, will receive either:
>
> **(i)** the loading specified in clause X.3.(a); or

(ii) where greater, a loading equivalent to:

the relevant shiftwork/weekend penalty rate – 100%

22. The CFMMEU C&G's proposed clause provides for the applicable loading for day workers who would have worked Monday to Friday in clause X.3(a). The applicable loadings for day workers whose ordinary hours would have included weekend work and for shiftworkers are dealt with together in proposed clause X.3(b). By separating day workers who would have worked only Monday to Friday from day workers whose ordinary hours would have included weekend work and by grouping the latter category with shiftworkers, the proposed clause would cause confusion. A day worker may have performed ordinary hours on days which fall on both a weekend and a weekday. The applicable loadings for day workers should be dealt with together, as reflected in the majority of the annual leave loading provisions in the exposure drafts which provide for separate leave loading payments for shiftworkers.

23. It is unclear why a reference to a 100% loading has been referred to as the "relevant shiftwork/weekend penalty rate" in the CFMMEU C&G's proposed clause X.3(b)(ii). The inclusion of this specific penalty is inappropriate for a model term.

24. For the reasons outlined above, the FWC should reject the model annual leave loading clauses proposed in the AWU and CFMMEU C&G submissions.

4. MODEL SHUTDOWN PROVISION

25. Ai Group's views concerning the model shutdown term at Attachment D to the February Statement (**Model Shutdown Term**) are outlined at paragraphs 25 to 68 of Ai Group's March 2019 Submission. After an examination of the other parties' submissions, we have not been convinced to change our position.

Amendments to the Model Shutdown Term

26. Ai Group understands that the Plain Language Re-drafting process is not intended to result in substantive amendments to modern awards.[5] Ai Group appreciates that caveats have been articulated with respect to this proposition.[6] A number of union parties have made submissions seeking to retain existing restrictions on directions to take annual leave pursuant to a shutdown provision. Ai Group opposes the retention of such restrictions, particularly where essential flexibilities referred to in Ai Group's March 2019 Submission are not retained.

27. The main benefit of introducing a Model Shutdown Term into those modern awards that currently provide for shutdown is to achieve greater uniformity across relevant awards with respect to this issue. Whilst Ai Group continues to rely on comments made at paragraph 39 of Ai Group's March 2019 Submission that such consistency should not be achieved 'at any cost', we note that it would be near impossible for the FWC to introduce the Model Shutdown Term across the awards listed at Attachment A to the February Statement without application of a 'swings and roundabouts' approach.

28. Various unions have made submissions expressing support for the Model Shutdown Term on the proviso that no provisions in existing clauses of benefit to employees are removed. Such "cherry-picking" detracts from the benefits of a 'model' clause and would be unfair upon employers.

29. Also, a number of entitlements various union parties have raised as appropriate for retention are not currently provided for in current awards. These are outlined below.

[5] [2016] FWCFB 8932, [11].

[6] [2017] FWCFB 344, [10] – [13].

Australasian Meat Industry Employees Union Submission

30. The Australasian Meat Industry Employees Union (**AMIEU**) proposes various amendments to the Model Shutdown Term with respect to the *Meat Industry Award 2010* and the *Poultry Processing Award 2010*, ostensibly with a view to protecting particular conditions which the AMIEU claims are currently contained within these modern awards.

31. In relation to the *Meat Industry Award 2010*, the AMIEU has proposed an award specific variation to the Model Shutdown Term that would ensure employees are provided with no less than three months' *written* notice of an employer's intention to 'stand down' employees for the duration of a close-down.

32. Ai Group opposes retention of the words 'stand down' in the context of the Model Shutdown Term. As the CFMMEU (Mining and Energy Division) submission demonstrates, and as discussed below, use of this wording may give rise to a misunderstanding that leave taken pursuant to a shutdown provision is of the same as a stand-down under s.524 of the *Fair Work Act 2009* (**FW Act**).

33. The AMIEU's recommended retention of the three month notice period for implementation of a close-down would constitute a substantive amendment if the requirement for *written notice* is to be imported from the Model Shutdown Term into the *Meat Industry Award 2010*. Also, three months is an excessive notice period for a close down.

34. Ai Group opposes the AMIEU's contention that the *Meat Industry Award 2010* does not currently permit a close-down period to exceed the annual leave accruals available to employees. Clause 37.8(d) of the *Meat Industry Award 2010* clearly envisages an employee being provided leave without pay for the purposes of an annual close-down. Clause 37.8(b) states that 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 37.3 and 37.5 will be granted. As such, clause 37.8(b) clearly contemplates the period of leave taken pursuant to

clause 37.8 potentially extending further than an annual leave entitlement already accrued.

35. With respect to the *Poultry Processing Award 2010*, the AMIEU has proposed a number of award-specific variations to the Model Shutdown Term. The AMIEU has included a proposed variation to the term which retains the existing requirement for one month's notice whilst importing the model term's requirement for such notice to be in writing. The relevant provisions in the Model Shutdown Term should be retained instead of the AMIEU's proposed provisions.

36. The AMIEU has suggested variations to the Model Shutdown Term which replace the words 'temporary shutdown period' with 'annual close-down'. If the FWC varies the award, whilst retaining the existing requirement for employers to reach agreement with a majority of employees in order to implement a close-down more than once in a year, the use of the term 'annual' would have the potential to confuse readers.

37. Ai Group opposes the inclusion of proposed sub-clause 27.9(j) in the *Poultry Processing Award 2010*:

> (j) Any unpaid leave taken under 27.9(d)(i) counts as service.

38. Such a clause does not reflect existing entitlements in the *Poultry Processing Award 2010*. Indeed, clause 27.9(e) of the current award limits accrual of service to periods of annual leave taken by an employee as a result of a close-down under clause 27.8. Extending the definition of 'service' to encompass time spent on periods of unpaid leave pursuant to clause 27 of the *Poultry Processing Award 2010* would constitute a substantive amendment which does not reflect existing entitlements in the *Poultry Processing Award 2010*.

Australian Manufacturing Workers' Union

39. On pages 5 – 8 of the 27 March 2019 Submission of the Australian Manufacturing Workers' Union (**AMWU**), a table lists existing shutdown provisions in a number of awards in which the AMWU has an interest.

40. There is an apparent error on page 6 with respect to the *Seafood Processing Award 2010*. An employer is currently able to close down an enterprise or part of an enterprise for the purposes of allowing annual leave to all or the majority of employees provided that the employer gives not less than four weeks' notice of its intention to do so (clause 27.11(a)). The AMWU Submission incorrectly states that one month's notice is currently required and seeks retention of this entitlement.

Construction, Forestry, Maritime, Mining & Energy Union (Manufacturing Division)

41. The Manufacturing Division of the CFMMEU (**CFMMEU MD**) opposes the insertion of the Model Shutdown Term into the modern awards that currently contain a shutdown provision. In support of its position, a number of clauses are referred to in the *Textile, Clothing, Footwear and Associated Industries Award 2010* (**TCF Award**) which the union claims are more beneficial than those which are contained in the Model Shutdown Term. Ai Group opposes the CFMMEU MD's position.

42. Clause 41.7(a) of the TCF Award reads as follows:

> An employer may close-down the plant, or a section or sections of it, in order to allow all or the bulk of employees their annual leave.

43. The CFMMEU MD Submission seeks to contrast this with the Model Shutdown Term by stating that the wording in clause 41.7(a) gives rise to a presumption that there is no discriminatory basis upon which employees are selected to take leave pursuant to a shutdown. The equivalent clause within the Model Shutdown Term is XX.XX(a) which reads as follows:

> 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.

44. At paragraph 17 of its submission, the CFMMEU MD claims that the use of the word 'section' in clause 41.7(a) of the TCF Award indicates an "identifiable, operational part of the employer's business" which may be subject to a close-down whereas the word 'part' in clause XX.XX(a) of the Model Shutdown Term contains no such connotations.

45. Dictionary definitions of the word 'section' demonstrate that the concerns expressed by the CFMMEU MD are not valid.

46. 'Section' is defined in the Oxford Concise Dictionary (7th ed) 1982 p 950 as follows (emphasis added):

> "1. n. **part** cut off from something; one of the **parts** into which something is divided arbitrarily or may naturally be considered as divided…"

47. Three of the first four definitions of 'section' in the *Macquarie Dictionary Online* also indicate that 'section' and 'part' can be used interchangeably (emphasis added):

> 1. a **part** cut off or separated.
>
> …
>
> 3. one of a number of **parts** that can be fitted together to make a whole: sections of a fishing rod.
>
> 4. a distinct **part** of a country, community, class, or the like.

48. The use of the word 'part' as opposed to 'section' in clause XX.XX(a) of the Model Shutdown Term has no bearing on any issues relating to discrimination. Moreover, discrimination by an employer is addressed in the General Protections in Part 3-1 of the FW Act.

49. The CFMMEU MD submission asserts at paragraph 18 that clauses 41.5(d) and 41.5(e) operate to limit the outer perimeter of the close-down provision to a maximum of one year's accrual under the NES. We assume, for the purposes of this submission, that the CFMMEU MD Submission intended to refer to 41.7(d) and 41.7(e). Ai Group disagrees with the CFMMEU MD's interpretation of these clauses (which are reproduced below):

(d) Any employee who has not qualified for a full entitlement to annual leave must be paid annual leave on a proportionate basis for 2.923 hours for each completed week of continuous service, provided that the employee has at least one months' continuous service.

(e) Any employee who has qualified for a full entitlement to annual leave in accordance with the NES must be paid 2.923 hours for each completed week of continuous service performed in excess of 12 months' continuous service, in addition to being allowed their annual leave.

50. Clauses 41.7(d) and 41.7(e) merely provide a method of payment for annual leave. They do not suggest a cap on the amount of leave which may be taken pursuant to the shutdown term, and a cap should not be included in the term.

51. The CFMMEU (MD) Submission highlights the absence of an equivalent to clause 41.7(g) of the TCF Award in the Model Shutdown Term. Clause 41.7(g) of the TCF Award reads as follows:

> Any period during which an employee is stood off without pay will count as service in calculating 12 months' continuous service

52. Ai Group submits that this term merely refers to the accrual of 12 months' continuous service for the purposes of sub-clauses 41.7(d) and 41.7(e). Clause 41.7(g) provides no indication that periods spent on unpaid leave pursuant to clause 41 of the TCF Award are counted as 'service' for the purposes of the NES.

United Voice's claim with respect to the *Children's Services Award 2010*

53. At paragraphs 7 and 8 of United Voice's submission of 4 April 2019, reference is made to the union's claim in respect of the *Children's Services Award 2010* in the Award Stage of the 4 Yearly Review. Paragraphs 213 to 263 of United Voice's submissions in those proceedings pertain to a claim that modern award terms providing for an employer to require that an employee take unpaid leave are not permissible under the FW Act.[7]

[7] AM2018/18 and AM2018/20, Outline of Submissions (United Voice), 15 March 2019.

54. Ai Group is not currently involved in those proceedings. Nevertheless, if the Full Bench is minded to consider this matter in the context of the present proceedings, we wish to make the following points in opposition to the claim:

- Section 139 of the FW Act contains the categories of terms which may be included within a modern award. Amongst the list of these matters is included at s 139(1)(h):

  > leave, leave loadings and arrangements for taking leave

  A term allowing for a direction by an employer to take 'unpaid leave' may be considered a term in respect of 'leave' or 'arrangements for taking leave'.

- Although the FW Act lacks a clear definition of 'leave' for the purposes of s.139, it is clear that the Act includes numerous types of unpaid leave, including unpaid parental leave under Division 5 of Part 2-2, unpaid carer's leave in Subdivision B, Division 7 of Part 2-2, unpaid family and domestic violence leave in Subdivision CA of Division 7 of Part 2-2, unpaid community service leave in Division 8 of Part 2-2, and unpaid compassionate leave in Subdivision C of Division 7 of Part 2-2. As such, a broader interpretation of the word 'leave' to encompass 'unpaid leave' is consistent with its grammatical meaning as well as its purpose and should therefore be accepted.[8]

- That the concept of 'leave' under the FW Act was not intended to incorporate an assumption that such time of absence would necessarily be paid is indicated by the drafters' inclusion of the word 'paid' before:

  - 'leave' in ss.79 and 755;

  - 'no safe job leave' in s.82A;

[8] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (the Engineers Case)* (1920) 28 CLR 129, 161-2; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.

- ‘annual leave’ in ss.88, 89, 91, 92, 93; and
- ‘personal/carer’s leave’ in ss.96, 97, 98, 99, 100, 101.

This clear reference to payment indicates that ‘leave’, where unspecified, may be paid or unpaid under the Act.

- The FW Act does not manifest an intention that the term ‘leave’ is only to contemplate leave which is provided for under the Act itself. Various provisions in the FW Act refer directly to leave entitlements that do not arise under the Act. These include:
  - State or Territory laws that deal with long service leave (s.113)
  - State or Territory laws relating to leave for victims of crime (s.106D).
  - State or Territory laws that provide entitlements for employees that are more beneficial than the entitlements under the extended parental leave provisions (s.747(b)).

  Also, the reference to “unpaid leave” in s.22(2)(b) of the FW Act is not limited to types of leave referred to in the Act.

  As such, it should be accepted that a term may be included in a modern award pursuant to s.139(1)(h) of the FW Act in respect of leave which does not otherwise appear in the Act. This is clear from the inclusion of Ceremonial Leave entitlements in the *Aboriginal Community Controlled Health Services Award 2010*.

- The FW Act does not only recognise the taking of unpaid leave on the election of the employee. Sections 73(2) and 82(2) of the FW Act empower an employer to require an employee to take unpaid parental leave.

- The provision of an explicit term in s.93(3), allowing for a modern award to include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave and the absence of an equivalent provision for unpaid leave is explained by the fact that Division 6 – Annual leave of Part 2-2 only deals with paid annual leave.

55. Statutory recognition of an employer's right to direct the taking of unpaid leave during a period of shutdown has historically been recognised in employment legislation. Section 4A of the *Annual Holidays Act 1944* (NSW) provided employers with a right to implement a close-down of a business in whole or in part and make a direction to an employee to take unpaid leave where insufficient leave is accrued to cover the shutdown period.

56. It is notable that on 11 June 2015, the Annual Leave Full Bench issued a decision which assumed that the FWC was empowered to deal with variations to modern awards in relation to paid, as well as unpaid leave.[9]

57. Ai Group submits that terms permitting directions by an employer for an employee to take leave without pay are able to be included in a modern award under s.139(1)(h) of the FW Act.

Whether 'unpaid leave' taken pursuant to a shutdown provision counts as service

58. Regarding the question of whether time spent on unpaid leave at the direction of an employer pursuant to a shutdown clause counts as 'service', various union parties have expressed their agreement with the position put by the Mining and Energy Division of the CFMMEU (**CFMMEU M&E**) in its submission of 22 March 2019.

59. The CFMMEU M&E maintains the position, formerly put in respect of the *Black Coal Mining Industry Award 2010* in submissions made on 11 September 2017 that unpaid leave taken during a period of shutdown, should be counted as 'service' and extends that position to the *Mining Industry Award 2010* and the

[9] Four yearly review of modern awards [2015] FWCFB 3406, Note 1.

Coal Export Terminals Award 2010. Ai Group opposes the CFMMEU M&E's position and submits that its arguments are not correct.

60. The CFMMEU M&E submission, at paragraph 9 relies on the point put in earlier submissions that it is "fair and reasonable that an employee taking leave without pay to accommodate a shutdown period, the discretion of which is at the unilateral discretion of the employer, should not incur any other penalty".

61. In the majority of the shutdown clauses referred to in Attachment D to the February Statement, various checks on the ability of an employer to shut down their enterprise or direct an employee to take paid or unpaid leave prevent such decisions being made, as claimed by CFMMEU M&E, at the unilateral discretion of the employer.

62. Section 93(3) of the FW Act states that a modern award may only include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances if the requirement is reasonable. In a Decision made by the FWC on 27 March 2017, the Annual Leave Full Bench expressed the provisional view that the two means by which a shutdown term may be framed to ensure compliance with s.93(3) is to ensure a range of procedural and substantial safeguards or simply require that any direction to take leave be reasonable.[10] Such requirements demonstrate that an award term that provides for a direction to take leave which is at the unilateral discretion of the employer, without a reasonableness requirement or detailed safeguards, may not meet the threshold required by s.93(3) of the FW Act.

63. The model term at Attachment A to Ai Group's March 2019 Submission, which is based on the term at Attachment D to the February Statement, does not provide an employer with excessive discretion to direct an employee to take unpaid annual leave. Ai Group's proposed shutdown clause:

- Is limited in application to circumstances where a requisite notice period has been provided;

[10] [2017] FWCFB 959, [37].

- Requires such notice to be in writing;
- Restricts an employer's direction to take unpaid annual leave until an employee has failed to make an election between the options at proposed sub-clause X(a)(ii);
- Is limited in application to circumstances where the employee does not have a sufficient entitlement to annual leave to cover the entire duration of the temporary shutdown period or where it would not be reasonable to direct the employee to take such leave; and
- Imports a reasonableness requirement as in sub-clause X(e)(i).

64. In support of its claim that a period of unpaid leave taken at the direction of the employer should count as service, the CFMMEU M&E contends that, at common law, an employee who is able to serve will receive the benefits of employment and that this is not contingent on the performance of work. The common law position is well settled that if work is not performed in accordance with an employment contract, the employee has not earned payment for the period.[11]

65. The concept of 'service' by a national system employee is relevant for the accrual of various entitlements under the FW Act and is itself defined in s.22 of the Act. For the purposes of these proceedings, 'service' is a statutory concept and should be viewed through this lens in determining whether unpaid leave taken pursuant to a shutdown clause in a modern award should be counted as 'service'.

66. The FW Act itself reflects the common law reliance on the performance of work for a right to accrue to payment of wages. Section 323(1) requires an employer to pay an employee in relation to the performance of work.

[11] *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at 450 (Latham CJ), 465 (Dixon J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428.

67. In its submissions concerning s.22 of the FW Act, the CFMMEU M&E states, at paragraph 12, that the FW Act follows the principle that an employee who is available to serve will receive the benefits of employment in that it 'carves out' exceptions to service in circumstances where there is an unwillingness to serve. Ai Group submits that this indicates a misreading of s.22 of the Act.

68. Paragraph 22(2)(b) excludes all periods of unpaid leave or unpaid authorised absence from the definition of 'service', with a number of exceptions to this blanket rule provided at s.22(b)(i) – (iii). Contrary to what is stated in the CFMMEU M&E submission, the FW Act does not carve out exceptions to 'service' in circumstances where there is an unwillingness to serve. The Act clearly evinces an intention that unpaid authorised absences are excluded from the definition of 'service' as the general rule, with exceptions applied to this. It would be illogical for the drafters of the legislation to have provided a general exclusion for 'unpaid authorised absence' if the intent was to only exclude periods of unpaid leave where the employee had been unwilling to serve. Such an interpretation seeks to rewrite the provision and invites the FWC to read an obligation into the Act which is not there. Such a course is not to be taken lightly.[12] If the legislature intended unpaid leave to be excluded from the definition of 'service' where such unpaid leave is taken exclusively at the initiative of the employer, these words could have been written into the legislation. That they were not suggests that the CFMMEU M&E are relying on an interpretation of s.22 of the FW Act which is not supportable.

69. The CFMMEU M&E submission states at paragraph 14 that unpaid leave taken pursuant to a shutdown provision in a modern award is closer in character to absences on unpaid leave that count as service for the purposes of the FW Act given, as stated by the CFMMEU M&E "there is the marked absence of any voluntary withdrawal of service". The CFMMEU M&E submission has mischaracterised the nature of the categories of unpaid leave which count as 'service' pursuant to the exceptions contained in s.22(2)(b)(i) – (iii). Absence under Division 8 of Part 2-2, which deals with community service leave is clearly

[12] *Thompson v Goold & Co* [1910] AC 409, 420. *Graham v Minister for Immigration and Border Protection* [2018] FCA 1012, [83].

not taken at the instigation of the employer. Periods spent on such leave are included within the definition of service pursuant to s.22(2)(b)(i) of the FW Act. The legislature has left open the possibility of additional periods being excluded from the definition of 'service' via prescription in regulations pursuant to s.22(2)(c) of the FW Act. Such provisions leave open the periods which may be included within, or excluded from, the definition of 'service' and do not demonstrate an intention to tether the definition of 'service' to periods where an employee presents to perform work.

70. Further support for Ai Group's position is provided by the more expansive definition of 'service' contemplated by s.22(4) of the FW Act for the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2. Only periods of unauthorised absence or periods prescribed by the regulations are excluded from the definition of 'service' for the purpose of the provisions under s.22(4)(a).

71. The CFMMEU M&E submission asserts that periods of stand down under s.524 of the FW Act have the same character as unpaid leave taken pursuant to a direction made under a shutdown provision. This argument has no weight considering the clear exclusion of periods of stand down from the definition of 'service' under s.22(2)(b).

72. Also, there are clear distinctions between absence due to 'stand down' of an employee under s.524 of the FW Act and unpaid leave taken pursuant to a direction under a shutdown provision in a modern award:

- The circumstances under which an employee may be stood down are limited to those provided for in s.524(1)(a) – (c). Each of these include events which could not be considered for the benefit of either employers or the employees stood down under this provision. By contrast, shutdown provisions in modern awards enable employers to coordinate the taking of annual leave in businesses, such as manufacturing, where a critical mass of the workforce may be required to maintain production. Such provisions are often used to ensure that employees can reasonably take annual leave and are therefore of mutual benefit to both employers and employees.

- The significant checks on the capacity of an award to provide for shutdown contained in s.93(3) of the FW Act and the many procedural safeguards which limit employer discretion in requiring an employee to take leave pursuant to a shutdown provision in a modern award are absent from s.524.

- Subsection 524(3) states that an employer is not required to make payments for a period of stand down. By contrast, shutdown provisions typically envisage annual leave being taken during a period of shutdown. It is ordinarily assumed that unpaid leave will only be taken where an individual employee lacks sufficient accrued annual leave to cover the entirety of a shutdown period.

73. To view leave taken pursuant to s.524 as of the same category as unpaid leave taken under a shutdown provision in a modern award is demonstrably contrary to the intent of s.525 of the FW Act which states that an employee is not taken to be stood down under s.524(1) during a period where that employee is taking paid or unpaid leave that is authorised by the employer or is otherwise authorised to be absent from his or her employment. It is clear from the wording of s.525 that the legislature intended unpaid authorised absence of the kind taken pursuant to a shutdown provision in a modern award to be dealt with separately to periods during which an employee is stood down under s.524(1) of the FW Act.

74. Ai Group notes that a significant part of the CFMMEU M&E submission refers to the modern awards objective and seeks to argue that unpaid leave taken pursuant to a shutdown provision in a modern award should be counted as 'service'. The Full Bench did not ask for submissions on this point. Parties were asked at paragraph [84] of the February Statement whether unpaid leave taken during a shutdown period counts as 'service'.

75. The CFMMEU M&E submission fails to demonstrate that unpaid leave taken pursuant to a shutdown provision is considered 'service' under the FW Act. The union's submissions on this point rely on a misreading of the FW Act and an attempt to encourage the FWC to read obligations into the Act which are not

there. Accordingly, the FWC should reject the submissions made by the CFMMEU M&E regarding the interaction between shutdown provisions in modern awards, s.22 of the FW Act and the common law entitlement to payment for work. As such, the FWC should also reject the submissions made by the union parties which are similar to or rely on the CFMMEU M&E submissions on this issue. These include:

- Submission of the AWU, dated 25 March 2019
- Submission of the AMWU, dated 27 March 2019
- Submission of the CEPU, dated 28 March 2019
- Submission of the CPSU, dated 29 March 2019
- Submission of the CFMMEU (Construction and General Division), dated 2 April 2019
- Submission of United Voice, dated 4 April 2019
- Submission of the CFMMEU (Manufacturing Division), dated 8 April 2019.

76. For the reasons outlined in these submissions, Ai Group also opposes the recommendation in paragraph 11 of the submission of the AWU dated 25 March 2019 that the Full Bench's model term should be amended to prescribe that all periods of leave taken pursuant to a shutdown clause are treated as 'service' for all purposes.