Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission
Annual Leave
– Shutdown Provisions
(AM2014/47)

18 APRIL 2017

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AM2014/47 ANNUAL LEAVE – SHUTDOWN PROVISIONS

Introduction

1. On 27 March 2017, a Full Bench of the Fair Work Commission (**Commission**) issued a decision[1] (**Decision**) in relation to annual leave provisions in the *Black Coal Mining Industry Award 2010* (**Black Coal Award**). Specifically, the Full Bench considered the form of shutdown provision to be included in that award having regard to s.93(3) of the *Fair Work Act 2009* (**Act**), which is in the following terms:

> **93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave**
>
> …
>
> **(3)** A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

2. Having quoted the Full Bench's decision of September 2016[2], the Full Bench stated as follows at paragraph [29] of the Decision: (emphasis added)

> **[29]** As the above extract from the *September 2016* decision makes clear, a general provision that permits employers under the *Black Coal Award* to direct that annual leave be taken on notice, without other considerations and requirements, is not consistent with the scheme of the FW Act and with s.93(3) in particular. However, a term permitting different arrangements for annual leave during a period of shutdown or close-down may be consistent with statutory framework (sic), depending on the terms of such a provision.[3]

3. At paragraph [34] of the Decision, the Full Bench set out a revised shutdown provision that it proposes to include in the Black Coal Award. The clause contains a requirement that any direction to take paid annual leave or unpaid leave must "be reasonable" in the following terms:

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[1] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959.

[2] *4 yearly review of modern awards – Annual Leave* [2016] FWCFB 6836.

[3] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959 at [29].

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

...

(ii) must be reasonable.

4. At paragraphs [35] – [38] of the Decision, the Full Bench set out what we understand to be a range of other provisional views regarding the operation of s.93(3) of Act as it pertains to shutdown provisions in awards: (emphasis added)

> **[35]** The proposed revised shutdown provision is consistent with the position put by the CMIEG earlier in these proceedings. As noted in the September 2016 decision (see [28] above), the CMIEG had submitted that the addition of the words 'and the direction to the employee is reasonable' to clause 25.4(c) would meet the requirements of s.93(3) and in the event of a dispute about the reasonableness of a direction the employee concerned would utilise the dispute settlement procedure in the award. We rejected the CMIEG submission at that time as it was advanced as an alternative to the excessive leave model term and we concluded that the model term provided a more appropriate means of ensuring that any directions to take excessive accrued leave will be reasonable in terms of s.93(3). Different considerations apply in the present context. We are considering the terms of a shutdown provision and, importantly, a term which does not include any substantive constraints on the quantum and timing of the directed leave. In these circumstances it may be appropriate that any direction to take accrued paid annual leave, or unpaid leave, be subject to the requirement that such a direction be reasonable.
>
> **[36]** As we have previously concluded, an award term that simply allows an employer to (upon the giving of a specified period of notice) direct an employee to take a period of accrued annual leave is not 'reasonable' in the sense contemplated by s.93(3). Such a provision does not require any consideration of the needs of the employee who would be subject to such a direction. As the *Explanatory Memorandum* to what is now s.93(3) states:
>
> > '381. Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.
> >
> > 382. In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:
> >
> > the needs of both the employee and the employer's business;
> >
> > any agreed arrangement with the employee;
> >
> > the custom and practice in the business;
> >
> > the timing of the requirement or direction to take leave; and

the reasonableness of the period of notice given to the employee to take leave.'

[37] While the needs of the employer's business is a relevant consideration favouring the reasonableness of a request to take leave during a shutdown (or closedown) period, it is apparent that the assessment of the reasonableness of such a requirement also requires a consideration of the impact of any such requirement on the affected employees. As the Full Bench in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* observed, in assessing the reasonableness of such a requirement, 'all relevant considerations need to be taken into account including those which are set out in paragraph [382] of the Explanatory Memorandum'.

[38] In that light, our provisional view is that there are two means by which a shutdown term may be framed such as to ensure compliance with s.93(3). Such a term may either include a range of procedural and substantive safeguards (eg as is the case with the excessive leave model term), or it may simply require that any direction to take leave be reasonable. As is evident from the provisional shutdown term set out above (at [35]), our provisional view is that the latter approach is preferable. It recognises that shutdown terms have been a feature of award regulation for a long time and it results in a term which is simple and easy to understand.[4]

5. Importantly, the Full Bench acknowledged that it was the first occasion on which detailed consideration had been given to the need for a shutdown term to be consistent with s.93(3) of the Act. It then identified that there are some 81 modern awards that contain shutdown (or close down) provisions and that the adoption of the various provisional views it expressed in the Decision were likely to have implications for existing shutdown provision in such instruments. It further observed that there are a variety of approaches adopted within shutdown provisions.[5] The various award provisions are extracted in Attachment A to the Decision.

6. Ai Group has an interest in a significant number of awards identified in Attachment A to the Decision. These submissions are advanced in light of this broader interest. They do not specifically address whether the proposed variation is appropriate in the context of the Black Coal Award. Instead, they canvass relevant considerations associated with the operation of s.93(3) and whether there is any imperative for the Commission to act at its own initiative to vary other modern awards that contain shutdown provisions.

[4] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959 at [35] – [38].

[5] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959 at [39].

7. The Full Bench has not, at this stage, proposed the inclusion of a model shutdown provision in other modern awards or proposed any form of uniform amendment to existing annual leave provisions. We would potentially seek to advance additional material if the Full Bench proposed any specific amendment to awards other than the Black Coal Award.

The Importance and Utility of Shutdown Provisions

8. Shutdown provisions are commonly utilised in a raft of industries. Any change to a modern award that restricts an employer's ability to direct an employee to access paid annual leave or unpaid leave will potentially have a significant adverse impact upon employers. The nature and extent of this impact will likely vary between industries and between individual enterprises. An amendment that waters down an employer's capacity to require an employee to take paid annual leave or unpaid leave during a period when they are shutdown and consequently not in a position to actually utilise the employee, is very significant.

9. Suffice to say that restricting the operation of shutdown provisions is not the kind of change that should be made absent a clear understanding of industry practices in relation to such matters.

10. Employers often shutdown in order to grant annual leave to a workforce at a time of low demand, such as over the Christmas / New Year period. Often a business aligns its shutdown period with the shutdown periods of key customers and suppliers. Also in manufacturing environments there may not be sufficient numerical flexibility within a workforce to accommodate employees taking sporadic period of annual leave through the year while still maintaining operations such as a production line. As Attachment A reveals, many of the shutdown provisions in awards only apply where an employer shuts down for the purpose of allowing annual leave to all or a majority of employees in the enterprise or a part of the enterprise.

The Current Shutdown Provisions are Consistent with Section 93(3) of the Act

11. It cannot be assumed that a shutdown provision is necessarily inconsistent with s.93(3) of the Act. As the Full Bench observed in its Decision:

> **[29]** … a term permitting different arrangements for annual leave during a period of shutdown or close down may be consistent with statutory framework (sic), depending on the terms of such a provision.[6]

12. Accordingly, the Commission must have regard to the specific terms of the 81 shutdown clauses found at Attachment A to the Decision in order to properly assess whether any of them do not comply with s.93(3) of the Act. Ai Group strongly opposes any contention that any or all of the existing shutdown provisions are necessarily inconsistent with s.93(3) absent an express requirement that any direction to take leave pursuant to them is reasonable. Such a conclusion cannot be reached in the abstract. Rather, regard must be had to the specific terms of each and every shutdown provision, the industry (or industries) in which they operate and whether there is any factual basis for the proposition that the clauses are inconsistent with s.93(3) of the Act.

13. Shutdown clauses operate only in circumstances where the employer is ceasing (or almost ceasing) its operations for a period. This provides an inherent limitation on the use of such clauses.

14. A shutdown clause is distinguishable from a clause that affords an employer a general right to direct employees to take paid annual leave and/or unpaid leave. It is similarly distinguishable from a clause that enables an employer to require an employee to take paid annual leave in order to address excessive annual leave accruals.

15. There is a very obvious and significant fetter on an employer's ability to use shutdown provisions. That is, the employer must *shut down* its operations. This is a very significant safeguard. It cannot be assumed that employers would abuse such a provision or even apply it in an unreasonable manner. There is

[6] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959 at [29].

certainly no material before the Commission that would enable it to make such a finding.

16. It may be accepted that all relevant circumstances must be taken into account is assessing whether a clause complies with s.93(3). It may also be accepted that this includes the potential impact upon employees. However, it does not follow that there will not be situations where the reason for which an employee has been required to take leave will render the requirement reasonable regardless of the needs of the individual employee.

17. Put another away, there may be some circumstances in which it will always be reasonable for an award term to require or permit a requirement that the employee take a period of leave, such as where an employer implements a shutdown. This is consistent with the Explanatory Memorandum to the *Fair Work Bill 2008*, which suggests that a requirement that an employee take annual leave during a shutdown is a reasonable requirement:

> 381. Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.

18. In any event, an assessment as to whether a shutdown provision operates reasonably in the relevant sense must be made in the context of the relevant industry or occupation to which it applies. The mere existence of a right to direct employees to take paid annual leave during a shutdown does not necessarily mean that from a factual perspective it is open to any form of abuse or unreasonable application in the context of the particular industry in which the award operates. Any assessment of this should not be undertaken in the abstract but in the context of a detailed examination of the operation of such provisions. In the absence of such an examination, the Full Bench should proceed on the presumption that such clauses are appropriate.

19. In its Decision, the Full Bench observed that "shutdown terms have been a feature of award regulation for a long time"[7]. It is also the case that in some enterprises, it is widely known and understood by the relevant employees that the business shuts down at particular times of the year. This is also true of certain industries, in which employees are aware and understand that the industry, in general terms, ceases to operate over, for instance, the Christmas/New Year period. An obvious example can be found in educational industries. The existence of this knowledge and understanding amongst employees engaged in the relevant industries and occupations is a pertinent factor when assessing whether a direction to take leave pursuant to a shutdown provision in an award is reasonable. In our view, industry and/or business custom and practice which, over time, has had the effect of putting employees on notice lends support for the proposition that such clauses operate in a manner that is reasonable.

20. We acknowledge of course that the imposition of additional requirements or safeguards will lend strength to the argument that a requirement to take annual leave pursuant to such a clause is reasonable.

21. Varying approaches can be found in the 81 awards identified at Attachment A to the Decision in this regard. For instance:

- The *Airline Operations – Ground Staff Award 2010* enables an employer to "apply a system of annual close-down with respect to all or the bulk of employees in a plant or section thereof in which case at least three months' notice will be given".

- The *Building and Construction General On-Site Award 2010* contains an "annual close down" provision which applies only "in conjunction with Christmas/New Year holidays"; that is, the provision can be applied only at a particular time of the year. Employees must be given at least two months' notice.

[7] *4 yearly review of modern awards – Annual leave* [2017] FWCFB 959 at [38].

- The *Cleaning Services Award 2010* contains various safeguards that are reflective of the contract cleaning industry:
    - The clause applies only "where the client of an employer … intends temporarily to close or reduce to a nucleus the establishment or a section thereof for the purposes of allowing annual leave to that client employer's employees".
    - The employer must give affected employees one month's notice of their intention to close-down.
    - "Where practicable an employee with insufficient or no accrued annual leave will be employed at another of the employer's sites for the period that would otherwise be a period of leave without pay".
    - "The close-down period will be limited to four weeks …".
- The *Manufacturing and Associated Industries and Occupations Award 2010* contains the following restrictions on an employer's right to direct an employee to take leave during a close down:
    - Employees must be given at least four weeks of notice;
    - An employer may only shut down its enterprise once or twice a year; and
    - If the employer closes down the enterprise or part of it in two separate periods, one of the periods must be for at least 14 consecutive days.

22. As can be seen from Attachment A to the Decision, many shutdown provisions contain several safeguards in addition to the aforementioned inherent limitation on the application of the clause; that being that it operates only where an employer ceases (or almost ceases) to operate. When each clause is considered in totality, and in the absence of any evidence to the contrary, the Commission cannot find that the provisions are inconsistent with s.93(3).

Indeed in our view, the contrary conclusion is open to the Full Bench and should, with respect, be reached by it.

23. Ai Group appreciates that the Full Bench's concern in these proceedings is to ensure that award clauses comply with s.93(3). If the Full Bench accepts our contention that some or all shut down provisions are, on their face, consistent with s.93(3), the inclusion of a provision seeking to reflect the operation of the section is not only unnecessary, but also potentially problematic. Of course, individuals may hold different views about whether a direction or requirement to take paid annual leave in particular circumstances is reasonable. The proposed clause suggests to the reader that a requirement issued pursuant to an award shutdown provisions may not be reasonable. It also makes the parties responsible for making this determination, and could accordingly be a catalyst for unnecessary disputation. It would be better for the Full Bench to recognise that the existing shutdown provisions comply with s.93(3). This would be consistent with the need to ensure that awards are simple and easy to understand.[8]

24. Furthermore, modern awards have been in operation for over six years. Given this context, there is a striking absence of disputation regarding the operation of shutdown provisions. Relevantly, in the context of the 4 yearly review of modern awards, no party has called for the implementation of greater restrictions on the operation of shutdown provisions.

25. The Commission should not here proceed on the assumption that the relevant clauses are, on their face, inconsistent with s.93(3). Rather, it should proceed to consider varying relevant awards only if an interested party contends that a shutdown provision in a particular award is deficient and advances an appropriate case is support of a variation, as contemplated in the *Preliminary Jurisdictional Issues Decision.*[9]

[8] As contemplated under s.134(1)(g).

[9] *4 yearly review of modern awards: Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788.

Unpaid Leave

26. Any new restriction upon an employer's existing ability to direct an employee to take unpaid leave during a period of a shutdown is potentially a very significant alteration to the safety net.

27. Crucially, this is not a variation that is compelled by the operation of s.93(3), which relates only to paid annual leave. It would simply represent a reassessment by the Full Bench as to what constitutes a fair and relevant safety net in the absence of any material that might allow it to properly make that assessment.

28. Ai Group opposes the introduction of such a limitation on an employer's ability to direct an employee to take unpaid leave in the context of a shutdown.

Position in the Alternate

29. Notwithstanding the above submissions, if the Full Bench forms the view that any of the 81 shutdown provisions are contrary to the requirements of s.93(3), we agree that this would be rectified by the inclusion of a term requiring that the requirement be reasonable. The award term would thereafter by its own force require that any direction to take paid annual leave must be reasonable.

30. In our view, however, such a change would then necessitate a reconsideration of the shutdown provisions within awards more broadly. This is because a modern award must only contain terms to the extent necessary to achieve the modern awards objective (s.138 of the Act). Further, the statute requires that each award must be reviewed in its own right (s.156(5)).

31. If a shutdown provision were varied to contain an overriding requirement that any direction to take annual leave pursuant to it must be reasonable, it is difficult to conceive of a justification for the inclusion of any additional limitations or "safeguards" that curb an employer's discretion to direct an employee to take annual leave. This is because regardless of the presence of such restrictions, any direction to take leave must always be reasonable and therefore, the provision is necessarily compliant with s.93(3) of the Act. Further, there is a

complete absence of material before the Commission that would justify the inclusion of any additional fetters on an employer's discretion. The Commission cannot be satisfied that they are necessary in the relevant sense.

32. For instance, clause 29.5 of the *Clerks – Private Sector Award 2010* is in the following terms:

> **29.5 Close-down**
>
> An employer may require an employee to take annual leave as part of a close-down of its operations, by giving at least four weeks' notice.

33. If the above clause were amended such that it requires that any direction to take annual leave pursuant to it must be reasonable, any concern that the Commission may have regarding its compliance with s.93(3) would be allayed. Further, and importantly, there is no evidence before the Commission regarding the operation of the clause that would enable it to determine that the imposition of any additional inflexibilities is necessary in the relevant sense. In this regard, we also note that a particularly careful approach must be taken in relation to shutdown provisions in occupational awards such as the *Clerks – Private Sector Award 2010*, which in many cases will be concurrently applied to clerical employees who work alongside employees covered by another modern award which also contains a shutdown provision.

34. To take another example, clause 41.10 of the *Manufacturing and Associated Industries and Occupations Award 2010* is in the following terms:

> **41.10 Annual close down**
>
> Notwithstanding s.88 of the Act and clause 41.6, an employer may close down an enterprise or part of it for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned, provided that:
>
> **(a)** the employer gives not less than four weeks notice of intention to do so; and
>
> **(b)** an employee who has accrued sufficient leave to cover the period of the close down, is allowed leave and also paid for that leave at the appropriate wage in accordance with clauses 41.4 and 41.5; and
>
> **(c)** an employee who has not accrued sufficient leave to cover part or all of the close down, is allowed paid leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown; and

> **(d)** any leave taken by an employee as a result of a close down pursuant to clause 41.10 also counts as service by the employee with their employer; and
>
> **(e)** the employer may only close down the enterprise or part of it pursuant to clause 41.10 for one or two separate periods in a year; and
>
> **(f)** if the employer closes down the enterprise or part of it pursuant to clause 41.10 in two separate periods, one of the periods must be for a period of at least 14 consecutive days including non-working days; and
>
> **(g)** the employer and the majority of employees concerned may agree to the enterprise or part of it being closed down pursuant to clause 41.10 for three separate periods in a year provided that one of the periods is a period of at least 14 days including non-working days; and
>
> **(h)** the employer may close down the enterprise or part of it for a period of at least 14 days including non-working days and allow the balance of any annual leave to be taken in one continuous period in accordance with a roster.

35. If clause 41.10 was amended to give effect to the provisional views expressed by the Commission in the Decision, we consider that the restrictions it prescribes ought to be reconsidered, including:

- The restriction on the employer's right to shut down the enterprise not more than twice in a year; and
- The prescription of the number of days for which an employer must shut down.

36. It cannot be said that such prescription is necessary to ensure compliance with s.93(3) if the clause were to expressly require that every direction to take leave pursuant to it must be reasonable. In addition, the Commission must reassess whether all elements of the amended clause are in fact necessary to ensure that the *Manufacturing and Associated Industries and Occupations Award 2010* provides a fair and relevant minimum safety net. In our view, an express requirement that any direction to take paid annual leave must be reasonable is an adequate safeguard and would render the aforementioned elements of the clause unnecessary. At the very least it must be accepted that there is no evidence that, having regard to s.138 of the Act, the current limitations as well as an additional clause dealing expressly with "reasonableness" are all necessary to achieve the modern awards objective.

37. Further, if there is to be any additional express restriction on an employer's capacity to require an employee to take paid annual leave inserted into awards, it may be appropriate to insert a provision enabling the employer to direct an employee to take a period of *unpaid* leave for the duration of the shutdown. We note that a raft of awards currently enable an employer to direct an employee to take paid annual leave but there is no accompanying capacity to direct employees that do not have sufficient leave to cover the period of the shutdown to take unpaid leave. Others only enable an employer to direct an employee to take unpaid leave if they have accrued insufficient paid leave to cover the duration of the shutdown.

38. It would be very problematic and unfair if employers that have a long-standing practice of implementing shutdowns, in accordance with current and previous industrial regulation, were now faced with the prospect of not being able to direct employees to take either paid or unpaid leave during a period in which they are not actually operating.

39. While s.93(3) may be viewed as a limitation on award regulation regarding the taking of paid annual leave, it does not restrict the capacity for awards to regulate the taking of unpaid leave. Of course, awards must be compliant with s.93(3), however the modern awards objective also requires that the interests of employers must be taken into account and that the awards must be fair to employers and employees. If awards do not enable the implementation of shutdowns, at least in industries in which this is common practice, they will not meet the objective of forming part of a fair and relevant minimum safety net, as contemplated by s.134. If s.93(3) mandates awards imposing greater restriction on an employer's capacity to direct the taking of paid annual leave, it also justifies granting employers greater capacity to manage the taking of unpaid leave. If s.93(3) operates in this manner it would undermine the integrity of shutdown provisions by enhancing employee entitlements relating to annual leave and would consequently necessitate rebalancing of the shutdown provisions in order to ensure the needs of industry are met.

40. Accordingly, if the Commission, despite our earlier submissions, proceeds to amend any or all pre-existing shutdown provisions to expressly require that any direction to take paid annual leave must be reasonable (rather than proceeding on the basis that current shutdown provisions comply with s.93(3)), it must also give consideration to whether each proposed clause, having regard to all its elements, is necessary to achieve the modern awards objective in relation to each individual award. In our view, the inclusion of an additional award-derived requirement that goes to the "reasonableness" of the request is a cogent reason for finding that the pre-existing inflexibilities are no longer necessary. Further, it will necessitate the inclusion of additional employer rights to require employees to take unpaid leave.