

## IN THE FAIR WORK COMMISSION

**Matter No.:** AM2014/47  
**Re Application by:** "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



### **Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)**

#### **4 Yearly Review of Modern Awards**

#### **COVER SHEET**

#### **About the Australian Manufacturing Workers' Union**

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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## Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following further submissions to the Fair Work Commission in accordance with the directions of Justice Ross on 4 August 2017.
2. The directions sought the views of interested parties about the revised draft clause 25.10 of the Black Coal Mining Award 2010 (**BCMI Award**) attached to the direction as "Attachment A" (the FWC Proposed Clause 4 August 2017).
3. The FWC Proposed 4 August proposed shutdown clause is as follows:

### *25.10 Shutdown*

*(a) Clause 25.10 applies if an employer intends to shutdown all or part of its operation for a particular period (temporary shutdown period); and wishes to require affected employees to take leave during that period.*

*(b) The employer must give the affected employees 28 days' written notice of a temporary shutdown period, or such shorter period as agreed between the employer and the employees affected.*

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

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

*(i) if the employee has accrued an entitlement to paid annual leave the employee may elect to take some or all of the leave during the temporary shutdown period and may also elect to take leave without pay to cover any part of the temporary shutdown period;*

*(ii) if the employee does not elect to take paid annual leave or leave without pay to cover the whole of the temporary shutdown period, then the employer may direct the employee to take a period of accrued paid annual leave.*

*(e) A direction by the employer to take paid annual leave under clause 25.10(d)(ii):*

*(i) must be in writing; and*

*(ii) must be reasonable.*

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

*(g) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause 25.9, to which an entitlement has not been accrued is to be taken into account.*

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

4. These submissions will also address the submissions of the Coal Mining Industry Employer Group (**CMIEG**) CMIEG dated the 1 September 2017.
5. The AMWU confirms, as set out in its submissions on 13 April 2017<sup>1</sup> and 18 May 2017<sup>2</sup>, that it retains its objections to the insertion of a shutdown clause in the Award.
6. In summary, these objections relate to any shutdown clause that proposes to:
  - a) give the power to any employee to direct the taking of leave; and
  - b) that results in the ability of the employer to require an employee to take unpaid annual leave whether or not they requested such unpaid leave which is tantamount to a stand down.
7. These submissions will address the following issues :
  - a) The relevant power in the Fair Work Act 2009 ( Fair Work Act) to direct the taking annual leave;
  - b) That the direction to take annual leave for a shutdown is unreasonable; and
  - c) The CMIEG proposed shutdown clause.

### ***The relevant power for the taking of Annual Leave***

8. The Commission’s power to make variations to the award pursuant to section 156 of the Fair Work Act, was relevantly canvassed in the Preliminary Jurisdictional Issues decision.<sup>3</sup>
9. In the exercise of its powers relating the Modern Awards, the Commission must ensure that it is achieving the modern award objective, that being to ensure that the NES and the Modern Awards are a “fair and relevant minimum safety net of terms and conditions<sup>4</sup>.

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<sup>1</sup> AMUW Submissions 13 April 2017 <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201447-sub-amwu-110417.pdf>

<sup>2</sup> Correspondence of AMWU 18 May 2017 <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201447-sub-amwu-180517.pdf>

<sup>3</sup> [2014] FWCB 1788

<sup>4</sup> S134 Fair Work Act

10. The Commission’s power to include terms annual leave entitlements is derived from s139 (1)(h) the Act, which provides that the modern awards can contain terms about “*leave, leave loadings, and arrangement for taking leave*”.
11. The power to include provisions relating to annual leave in modern awards and enterprise agreements is pursuant to section 93(3) of the Fair Work Act.
12. The *Annual Leave decision* discussed the regulatory framework that empowers the Commission to include clauses in Modern Awards about the taking of paid leave in detail<sup>5</sup>.
13. It specifically addressed the application of the section 93(3) in allowing for modern award or enterprise agreement to include terms otherwise dealing with the taking of paid annual leave. The section states:
 

*93 (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.*
14. Section 93(4) provides that “a modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.”
15. Sections 55(4) provides the interaction rules for the NES and the Awards and is relevant in the context of the annual leave arrangements. Section 55 (4)(a) relevantly states:
 

*A modern award or enterprise agreement may also include the following kinds of terms:*

  - a) *Terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards*
  - b) *Terms that supplement the National Employment standards but only to the extent that the effect of those terms is not detrimental to any employee in any respect. When compared to the National Employment Standards”*
16. A similar section to section 55 (4)(a) is section 142 which is relevant in the context of annual leave in that it allows for how a particular award operates or an any other terms incidental to the parent term. Its states:
 

*142 (1) A modern award may include terms that are :*

  - a) *Incidental to a term that is permitted or required to be in the modern award; and*
  - b) *Essential for the purpose of making a particular term operate in a practical way.*
17. In the context of shutdowns the Full Bench said:

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<sup>5</sup> 4 yearly review of modern awards- Annual Leave [2015] FWCFB 3406

[371]First while we accept that a close- down provision may be included in the modern awards, it is clear from the terms of s93(3) that an award provision requiring an employee to take paid annual leave in such circumstances is only permitted if the requirement is **reasonable**.<sup>6</sup>Emphasis added.

18. The allowance provided for in section 93 (3) is based on a requirement of any such provision being reasonable and is confined to the taking of “paid leave”. It is predicated on the expectation that the entitlement to leave already exists and that the employee is availing of the entitlement.
19. Where the entitlement has not eventuated, that is where the employee has no accrued leave, the taking of leave is to be facilitated with mechanisms to safeguard the entitlement.
20. The requirement of reasonableness cannot be satisfied by a mere mechanism of stating the provision is reasonable. Neither can it be contended that the circumstances where shutdown provisions are invoked, fuelled by an intention the employer to shutdown its operations for whatever reason, is somehow automatically reasonable<sup>7</sup>.
21. Whether the shutdown provision is reasonable is to be gauged by the proclivities of the industry. In the Annual Leave decision<sup>8</sup> the Full Bench referred to the *2008 Award Modernisation Decision* where it said:

*[99] The provisions in awards and NAPS’s governing annual close – downs vary significantly. It is preferable that we do not alter provisions which have been specifically developed for particular industries. We have adopted the approach of attempting to an industry standard in each case.*

### ***The nature of shutdowns in the black coal industry***

22. A shutdown has traditionally been a time when company shuts down some or all of its operations to allow for major maintenance, general upkeep and or modifications to plants or equipment.
23. As stated in the AMWU submission of 11 April 2017<sup>9</sup> and the evidence provided by CMIEG,<sup>10</sup> shutdowns in the coal mining industry have evolved. They are now utilised for a myriad of reasons including managing annual leave balances, stockpiles reaching full capacity, for undertaking maintenance shutdowns or managing peak annual leave requests.
24. The discreet nature of shutdowns has given rise to the situation where there is opportunity for deployment of affected employees to other sections of the mines should they not wish to use their annual leave entitlements. Evidence provided by

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<sup>6</sup> Ibid at 371

<sup>7</sup> CMIEG Submission dated 11 September [40]

<sup>4</sup> yearly review of modern awards- Annual Leave [2015] FWCFB 3406 [375]

<sup>9</sup> AMWU submissions dated 11 April [4] –[10]

<sup>10</sup> CMIEG Submissions of 11 September 2017 at [33]

CMIEG<sup>11</sup> is that there have been no disputes at their member employers work sites relating to shutdowns for employees indicating that practical alternatives are being used by employers.

25. The development of annual leave provisions and shutdowns in the back coal mining industry coalesced in 1988<sup>12</sup> with the commencement of 24 hours a day operation. The decision established the standard for the subsequent coal award where:

*an employer decides to shutdown the mine, or a section or sections thereof, the employer may allow those employees who are not then qualified for a full entitlement to leave to cover the period of shutdown paid leave on a proportionate basis at the prescribed rate for the employees classification immediately prior to the commencement of such leave<sup>13</sup>.*

26. The Awards retained a measure of protection for the employee that may not have the entitlement to leave by safeguarding payment during the time of leave.
27. In the Awards subsequent to the 1998,<sup>14</sup> the employees that went on leave during a shutdown were either paid for the period or the proportionate part of the period of the shutdown, as noted in the CMIEG submissions.<sup>15</sup>
28. The provisions in the current Black Coal Award for shutdown never included a direction or requirement to take leave. They provided:

#### **25.10 Shutdown**

*(a) An employer that shuts down all or any part of its operation must give employees at least 28 days' notice of the shutdown or such shorter period as agreed between the employer and the employees affected.*

*(b) Employees directly affected by the shutdown who have an entitlement to annual leave may take all or part of that entitlement during the shutdown period.*

*(c) Employees who are directly affected by the shutdown and who are not yet entitled to sufficient annual leave may, during the shutdown period, take any annual leave accrued in accordance with clause 25.9.*

29. The clause does not permit an employer to direct an employee to take annual leave during a shutdown.

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<sup>11</sup> Ibid at [30-33]

<sup>12</sup> Federated Engine drivers & Fireman's Association of Australasia and Queensland Coal Association and Others [1988] ACIndT 4080

<sup>13</sup> Ibid at 19(h)

<sup>14</sup>; The Coal Mining Industry Award ( Deputies and Shotfires) 2002, Coal Mining Industry ( Staff) Award, 2004; Coal Mining Industry ( Engineers) award 1990 ( Western Australia ) ;Coal Mining Industry Protection ( Production and Engineering) Interim Consent Ward, September 1990, Coal Mining Industry Interim Consent Award ( Deputies and Shot fires) 1990, Coal Mining Industry ( Supervision and Administration) Interim Consent Award September 1990aand Coal Mining Industry ( Miners) Award, 1982, Queensland.

<sup>15</sup> CMIEG Submissions 11 September 2017 [30]

30. Clause 25.4 c of the Award entitled the employer to direct the employee to take leave however; this was in the context of excessive annual leave. The September 2016<sup>16</sup> decision deleted clause 25.4 of the Award on the basis that it was inconsistent with the NES and did not meet the reasonableness requirements of the s93(3) of the Act.
31. CMIEG conceded in its submissions of 21 October 2016<sup>17</sup> that the power to direct the taking of leave was contained in the now deleted clause 25.4 (c)<sup>18</sup>. The clause when combined with the shutdown provisions of 25.10 of the Award gave effect to the direction to take leave during a shutdown.
32. Planning for maintenance work in mines that will utilise shutdowns can be up to a year in advance. This allows for significant planning ahead to minimise employees being left stranded without work. The incidences of shutdowns being across the entirety of operations are rare and the practice is for employees to be redeployed. The nature of shutdowns in the industry has now changed and granting back the power to employers to direct annual leave is not reasonable.
33. Whilst the situation where an entire mine ceases operation for a period of time situation may call for a shutdown, the flexible nature of contemporary mines does not warrant a granting of such a broad arbitrary power to employers to direct the taking of unpaid leave. Such a power also detracts from the employees' ability to determine how and when their annual leave entitlements are to be used.
34. Annual leave clauses must provide for the individual needs of the employee. It should look to facilitating a voluntary reaching agreement between employers and employee. The Full Bench in the 15 September 2015, Annual Leave Decision<sup>19</sup>, when discussing the how an annual leave clause would best address the requirements of s93 (3) of the Act, said:

*Giving primacy to the right of the employee to request to take accrued annual leave (and not have that request unreasonably refused by the employer) over the right of the employer to direct that leave be taken, provides a means of ensuring that the personal needs and circumstances of the employee are taken into account.<sup>20</sup>*

### ***The CMIEG proposed clause***

35. In their submissions 11 September 2017, the CMIEG have proposed a further amended clause for the shutdown which states :

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<sup>16</sup> [2106]FWCFC 6836

<sup>17</sup> CMIEG submission dated 21 October 2016 [7-8]

<sup>18</sup> [2016] FWCFB 6836

<sup>19</sup> [2016] FWCB 5771

<sup>20</sup> Ibid [94-96]

### 25.10 Shutdown

*(a) Clause 25.10 applies if an employer intends to shutdown all or part of its operation for a particular period (temporary shutdown period); and wishes to require affected employees to take leave during that period.*

*(b) The employer must give the affected employees 28 days' written notice of a temporary shutdown period or such shorter period as agreed between the employer and the employees affected.*

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

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

*(i) if the employee has accrued an entitlement to paid annual leave the employee may elect to take some or all of the leave during the temporary shutdown period, and may also elect to take leave without pay to cover any part of the temporary shutdown period, or annual leave in advance in accordance with clause 25.9 (or a combination of accrued annual leave, annual leave in advance or leave without pay);*

*(ii) if the employee does not elect to take paid annual leave or leave without pay to cover the whole of the temporary shutdown period, then the employer may direct the employee to take a period of accrued paid annual leave;*

*(iii) if the employee has not accrued an entitlement to any paid annual leave sufficient to cover any part of the temporary shutdown period, then the employee is taken to be on leave without pay for the relevant period.*

*(e) A direction by the employer to take paid annual leave under clause 25.10(d):*

*(i) must be in writing; and*

*(ii) must be reasonable.*

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

*(g) In determining the amount of paid annual leave to which an employee has accrued an entitlement, any period of paid annual leave taken in advance by the employee, in accordance with an agreement under clause 25.9, to which an entitlement has not been accrued is to be taken into account.*

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

36. The clause in summary seeks to:

- a) Entitle an employer to direct, upon giving of 28 days notice, an employee to take annual leave during shutdown; and



- b) Create the situation where if the employee does not have enough annual leave is deemed to be on leave without pay.
37. The proposed clause (d) (i) provides for a combination of paid annual leave, annual leave in advance and unpaid leave. As set out in its submissions of 11 April 2017, the AMWU outlined its position on paid leave in advance as being a preferred option should a stand down clause be permitted by the commission<sup>21</sup>.
38. This allows the ability of the employee to retain discretion over how and when their leave is to be used to be maintained. It addresses the circumstances where an employee may want to save their leave for their own reasons.
39. The option of leave without pay as a mechanism for facilitating a shutdown is opposed by the AMWU.

### ***Unpaid leave and Stand down***

40. The CMIEG proposed clause d (ii) seeks to reinstate the right of the employer to direct the taking of leave by employees. Coupled with the clause d (iii) the effect of the clause is a mechanism to enact a stand down.<sup>22</sup> It removes the individual focus mandated by section 93(3) of the Act and enables the employer to direct, that regardless of the individual circumstances of the employee, leave be taken.
41. The direction to compel an employee to take time off from work without pay is not reasonable within the context of s93 (3). It strips the employee of any consent they may have in exercising their discretion over their leave entitlements.
42. Employees who are available to work have the reasonable expectation that they will be paid for the work. Employers who choose to avoid this obligation by deeming an employee to be on unpaid leave are utilising a stand down without satisfying the requirements of the stand down provisions of the Fair Work Act at section 524.
43. The clause gives the authority to the employer to direct an employee to not attend work as there is no useful employment for the period of the shutdown and will not be paid for the period of the shutdown. This amounts to a stand down as was raised submissions of the AMWU and the CFMEU.<sup>23</sup>
44. The relevant section of the Fair Work relating to stand down is section 524, which states:

*Employer may stand down employees in certain circumstances*

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<sup>21</sup> AMWU Submissions 11 April 2017 [40-42]

<sup>22</sup> Ibid [13- 19]

<sup>23</sup> CFMEU Submissions dated 11 April 2017 and AMWU submissions dated 11 April 2017.

*(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*

*(a) industrial action (other than industrial action organised or engaged in by the employer);*

*(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*

*(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*

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

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

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

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

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

*(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.*

45. Section 524 sets out the difference between an employee being stood down pursuant to section 524(1) and taking "leave" whether paid or unpaid. It states:

*Employee not stood down during a period of authorised leave or absence*

*An employee is not taken to be stood down under subsection 524(1) during a period when the employee:*

*(a) is taking paid or unpaid leave that is authorised by the employer; or*

*(b) is otherwise authorised to be absent from his or her employment.*

*Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).*

**Emphasis added.**

46. The section rests on the right of the employee to "take" leave, that is an employee availing of their entitlement to leave. In this instance, the proposed clause of the

CMIEG, takes away this right of the employee to have any discretion of how the leave is utilised in both directing the taking of the leave and in deeming that the employee is on unpaid leave.

47. Where the employee loses their discretion over how their leave is to be used any benefit that may flow from time off from work is tainted. In the instance of shutdown over Christmas break, where the employee has been directed to take leave without pay, the benefit is likely to be to the employer alone.
48. CMIEG's submission<sup>24</sup> that the Commission's provisional view that unpaid family and domestic leave is an "implicit acceptance" that paid domestic leave ought to be provided in modern awards glosses over the context of the situation. The leave sought is initiated by the employee, exercising their right to the entitlement.
49. The proposed clause by the CMIEG cannot be considered to be an adequate mechanism that safeguards the rights of the employees and whether the clause is reasonable cannot be gauged only on the views of the operational requirements of the employer alone.

### ***The modern awards objective***

50. The decision of the Full Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd*<sup>25</sup> held that a review of the award is a review of the Award as a whole. That is:

*It was necessary for the for the Commission to review the award, and, by reference to the matters set out in s134 (1) and any other consideration consistent with the objective, come to an evaluative judgment about the objectives and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.*<sup>26</sup>

51. In the context of the Award as a whole, the proposition that a shutdown clause be included in the Award that allows for employers to place employees on leave without pay, cannot be said to achieve the modern award objective as it does not provide a fair safety net.
52. Where an employee is ready and available to work and is told they cannot and will be placed on enforced leave, where any recreational pleasure or family time will be invariably tainted, is not in any objective sense, fair.
53. The stating in the clause that the direction to take leave must be "reasonable" does little to fill the gap of procedural safeguards necessary to ensure that the requirements of section 93(3) are met.

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<sup>24</sup> CMIEG submission 11 September 2017 [55]

<sup>25</sup> [2017] FCAFC 123

<sup>26</sup> Ibid [29]

54. The loss of control by employees over their entitlement does not provide a relevant and applicable safeguard for employees.

### ***Conclusion***

55. The nature of shut downs in the industry have evolved such that they are not a common event and do not warrant an employer being granted a power to direct employees to take leave.
56. The power to direct the taking of leave in the Award was unique to excessive leave provisions and to assist in the management of existing entitlements of employees. The removal of the direction to take leave outside the context of excessive leave was found to be not reasonable by the Commission and should not be granted back to the employers.
57. The clause seeks to circumvent the protections granted by section 93(3) of the Act to employees. The requirement of reasonableness in this section of the Act rests on the inclusion of the procedural and substantive safeguards of employee entitlements that are not satisfied.
58. The AMWU submits that section 93(3) does not allow the employers directing employees to paid annual leave. A direction to take leave by the employer where the employee does not choose to runs foul of the section.
59. The AMWU opposes the inclusion of clause that provides an employer may stand down employees without pay as it cannot be considered a fair and relevant safety net.
60. If the FWC allows that it is necessary to include an employer power to direct an employee to take unpaid leave or stood down the AMWU submits that the employee should have the option of requesting and being granted paid leave in advance.

End

3 October 2017