



Award Variation – Annual Leave Shutdown Provisions

The Fair Work Commission (**FWC**) has decided to significantly vary the annual leave shutdown provisions in 78 modern awards by replacing them with a new model annual leave shutdown clause (**Model Clause**).

The most significant change for many employers will be that the Model Clause will remove the ability for an employer to direct an employee to take a period of unpaid leave if that employee does not have a sufficient annual leave balance to cover the shutdown that was previously provided for in many modern awards.

This summary sets out the upcoming changes to the shutdown provisions of the 78 modern awards and identifies potential options to mitigate any adverse impacts on Growers.

The *Horticulture Award 2020* does not contain an annual leave shutdown provision and therefore was not subject to the review. However, Growers may engage employees covered by other modern Awards that have been affected.

Background

On 25 August 2022, the majority of a Full Bench of the FWC issued a decision that proposed amending the existing shutdown provisions in all modern awards by replacing them with a new Model Clause. It was proposed that the Model Clause:

- Would not include any capacity for an employer to direct employees to take unpaid leave during a shutdown in circumstances where an employee had not accrued enough paid leave to cover the period of the shutdown or expressly contemplate employee requests for unpaid leave during a shutdown. The majority of the Full Bench expressed a view that it does not have the power under the Fair Work Act 2009 (Cth) (FW Act) to include terms in a modern award that enable an employer to direct an employee to take unpaid leave.
- Would not include any capacity for an employer to direct employees to take annual leave in advance.
- Would require an employer to provide at least 28 days' written notice of a shutdown, unless the modern award already requires a longer notice period, in which case the longer period will be retained.
- Would be tailored when included in individual awards to reflect the circumstances in which the relevant existing clauses permit a shutdown.
- Would require that any direction from an employer to take annual leave during a shutdown must be reasonable. The clause would not otherwise deal with the frequency or length of shutdowns

Commissioner Hunt, in a dissenting decision, expressed the provisional view that the *Fair Work Act 2009* (Cth) (**FW Act**) does not prevent a modern award from including a term which permits:

- an employer from directing an employee to take unpaid leave during a shutdown where the employee does not have sufficient leave accrued; or
- an employer from directing an employee to take paid annual leave in advance of the entitlement accruing.

On 22 December 2022, the FWC issued a further decision (**December decision**) in which the majority confirmed its provisional view that a new Model Clause will be inserted into 78 modern awards. Commissioner Hunt issued a further dissenting decision. The 78 modern awards will accordingly be varied as proposed by the majority.

What variations have been made to the modern awards?

A version of the Model Clause will replace the existing shutdown clauses in 78 modern awards identified in **Attachment A**.

The Model Clause contains the following terms:

XX.XX Direction to take annual leave during shutdown

(a) Clause XX.XX applies if an employer:

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

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

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

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

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

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

(i) must be in writing; and

(ii) must be reasonable.

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

(g) In respect of any part of a temporary shutdown period which is not the subject of a direction under clause XX.XX(d), an employer and an employee may agree, in

writing, for the employee to take leave without pay during that part of the temporary shutdown period.

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

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

(j) Clauses XX.XX to XX.XX do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause XX.XX

What is the operative date of the changes?

The new shutdown provisions were operative from 1 May 2023

What potential options are available to employers?

A practical implication of the December decision is that where employees do not have sufficient annual leave to cover the full shutdown period employers may need to either:

- secure agreement from employees to take a period of unpaid leave;
- pay employees for the shutdown period even if the employees perform no work; or
- allow employees to work

Manage annual leave balances

Growers can mitigate the impact of the Model Clause by managing annual leave approvals to ensure that existing employees maintain enough leave to cover a future shutdown period.

Section 88(2) of the FW Act allows an employer to refuse an employee's request for annual leave if the refusal is reasonable. In the December decision, the FWC expressed a view that an employer's refusal of a request for annual leave may be reasonable if it would result in the employee having insufficient leave to cover a proposed shutdown.

Growers are encouraged to review any workplace policies that deal with the approval of leave to ensure that employees, and managers with authority to approve leave, are aware of any expectation that an employee should retain sufficient annual leave balances to cover a future period of shutdown.

Use other forms of paid absence to cover a shortfall

Where an employee does not have sufficient annual leave accrued to cover the entire period of a shutdown, the employee might agree to use other forms of paid absence to cover that period. For example, a shortfall in accrued annual leave might be managed by an agreement to access:

- Accrued time off in lieu of overtime;
- Accrued rostered days off (where the applicable modern award/enterprise agreement allows for the accrual of rostered days off); and/or
- Annual leave in advance.

While the use of other forms of absence may resolve the issue of an employee having insufficient annual leave to cover a period of shutdown, it is important to appreciate that it is common for modern awards and enterprise agreements to require that an employee must provide their agreement to using one of the entitlements listed above.

Provide alternative work for an employee to perform

Where only a part of a Grower's business is being shut down for a period, a Grower may be able to direct an employee to perform alternative duties during that period to those which they would ordinarily perform.

Whether an employee can be directed to perform alternative duties will depend on the individual circumstances of the employee. Growers should consider whether the applicable contract of employment, modern award or enterprise agreement contain terms relating to an employer's ability to direct an employee to perform alternative duties (see for example clause 29 of the *Manufacturing and Associated Industries and Occupations Award 2020*).

Make an enterprise agreement tailored to the business' needs

A Grower can make an enterprise agreement with its employees that provides terms dealing with shutdowns that differ from the relevant modern award. Alternatively, Growers may seek to vary an existing enterprise agreement to ensure that it contains shutdown provisions that meet the requirements of their organisation. This could include, for example, a clause that allows an employer to direct employees to take a period of unpaid leave, or a clause that provides for accrued rostered days off to be used during a shutdown period.

The feasibility and merit of seeking to either make or vary an enterprise agreement to deal with shutdown arrangements will depend upon an Grower's individual circumstances.

Make provision for shutdowns in the contract of employment

In circumstances where an employee does not have sufficient annual leave to cover a shutdown period, the requirement to pay an employee for that period may be subject to the terms of the employee's contract of employment (see paragraph [69] of the December decision).

Growers may wish to consider the feasibility of including terms in employment contracts that specifically deal with shutdown periods, particularly for new employees who will not have the opportunity to accrue sufficient leave before the shutdown commences. This could potentially encompass terms that require an employee to take a period of unpaid leave during a shutdown.

Stand down employees

Section 524(1)(c) of the FW Act allows employers to stand down employees without pay in circumstances where an employee cannot be usefully employed for a period because there is a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

In the December decision, the FWC expressed a view that in some circumstances s.524 may operate in conjunction with a shutdown period. The FWC gave the example of a head contractor closing down a building site over Christmas/New Year causing a stoppage of work for a subcontracted employer.

Growers are encouraged to seek advice about their individual circumstances before utilising the stand down provisions of s.524 (including in the way described in the example above). A stand down under s.524 requires an employer to establish that there has been a stoppage of work outside the employer's control and that the employee cannot be usefully employed during that period.

Attachment A

List of modern awards that will be varied to include the Model Clause

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

39. *Joinery and Building Trades Award 2020* (clause 27.9)
40. *Journalists Published Media Award 2020* (clause 20.8)
41. *Legal Services Award 2020* (clause 22.7)
42. *Local Government Industry Award 2020* (clause 23.5)
43. *Manufacturing and Associated Industries and Occupations Award 2020* (clause 34.7)
44. *Meat Industry Award 2020* (clause 25.8)
45. *Mining Industry Award 2020* (clause 22.7)
46. *Mobile Crane Hiring Award 2020* (clause 24.6)
47. *Miscellaneous Award 2020* (clause 21.4)
48. *Nursery Award 2020* (clause 22.12)
49. *Nurses Award 2020* (clause 22.7)
50. *Oil Refining and Manufacturing Award 2020* (clause 24.6)
51. *Pest Control Industry Award 2020* (clause 23.9)
52. *Pharmaceutical Industry Award 2020* (clause 21.5)
53. *Plumbing and Fire Sprinklers Award 2020* (clause 24.4)
54. *Poultry Processing Award 2020* (clause 21.5)
55. *Premixed Concrete Award 2020* (clause 22.8)
56. *Professional Employees Award 2020* (clause 18.4)
57. *Racing Clubs Events Award 2020* (clause 23.5)
58. *Racing Industry Ground Maintenance Award 2020* (clause 21.5)
59. *Real Estate Industry Award 2020* (clause 20.5(a))
60. *Registered and Licensed Clubs Award 2020* (clause 25.4)
61. *Restaurant Industry Award 2020* (clause 25.4)
62. *Road Transport (Long Distance Operations) Award 2020* (clause 20.4)
63. *Road Transport and Distribution Award 2020* (clause 24.9)
64. *Salt Industry Award 2020* (clause 23.10)
65. *Seafood Processing Award 2020* (clause 21.11)
66. *Security Services Industry Award 2020* (clause 21.4)
67. *Silviculture Award 2020* (clause 22.5)
68. *Storage Services and Wholesale Award 2020* (clause 24.5)
69. *Sugar Industry Award 2020* (clause 31.5)
70. *Supported Employment Services Award 2020* (clause 32.3)
71. *Surveying Award 2020* (clause 22.7)
72. *Telecommunications Services Award 2020* (clause 22.9)
73. *Textile, Clothing, Footwear and Associated Industries Award 2020* (clause 32.6)
74. *Timber Industry Award 2020* (clause 28.10)
75. *Vehicle Repair, Services and Retail Award 2020* (clause 29.6)
76. *Water Industry Award 2020* (clause 22.4)
77. *Wine Industry Award 2020* (clause 24.9)
78. *Wool Storage, Sampling and Testing Award 2020* (clause 23.5)