



# STATEMENT

*Fair Work Act 2009*  
s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—Plain language—Shutdown provisions** (AM2016/15)

ACTING PRESIDENT HATCHER

SYDNEY, 23 JANUARY 2023

*4 yearly review of modern awards – plain language – shutdown provisions – Black Coal Mining Industry Award 2020.*

[1] On 25 August 2022, the Full Bench in this matter issued a decision (*August 2022 decision*)<sup>1</sup> in which, by majority, it expressed the provisional view that 79 awards, being the 78 awards listed at Attachment A to that decision and the *Children’s Services Award 2010*, should be varied to include a proposed model clause pertaining to the taking of annual leave during shutdowns.<sup>2</sup> One of the awards provisionally intended to be varied was the *Black Coal Mining Industry Award 2020* (Black Coal Award).<sup>3</sup> The *August 2022 decision* stated that draft determinations consistent with this provisional view would be published in due course, and interested parties would then have 21 days to lodge submissions in response.<sup>4</sup>

[2] Due to an administrative oversight, only 78 draft determinations were subsequently published, including the draft determination for the *Children’s Services Award 2010*. A draft determination varying the Black Coal Award in line with the provisional views expressed at [160] of the *August 2022 decision* was not published.

[3] A number of submissions in response to the provisional view in the *August 2022 decision* and the draft determinations were filed. However, no submission was filed pertaining to the Black Coal Award, presumably because of the failure to publish a draft determination for this award.

[4] On 22 December 2022, the Full Bench issued a further decision<sup>5</sup> (*December 2022 decision*) dealing with the submissions filed in response to the *August 2022 decision* and the 78 published draft determinations. The Full Bench majority determined, in response to those submissions, to vary the awards to include a model clause pertaining to the taking of annual leave during shutdowns.<sup>6</sup> In doing so, the majority modified the model clause proposed in the *August 2022 decision*. The majority determined that the variations would take effect on 1 May 2023. As stated, determinations varying the 78 awards to give effect to this decision will be published in due course.<sup>7</sup>

[5] It remains necessary for the Full Bench to finalise the position for the Black Coal Award. For that purpose, interested parties are invited to file submissions concerning whether clause 24.9 of the Black Coal Award should be varied to reflect the model clause set out in paragraph

[82] of the *December 2022 decision*. To assist parties, a draft determination setting out such a variation is attached to this statement. Any such submissions shall be filed by **5:00 pm (AEDT)** on **Monday, 13 February 2023**.



ACTING PRESIDENT

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# DRAFT DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—plain language re-drafting—shutdown provisions** (AM2016/15)

### **BLACK COAL MINING INDUSTRY AWARD 2020** [MA0000001]

Coal industry

ACTING PRESIDENT HATCHER  
XXXXXXXXXX  
XXXXXXXXXX

SYDNEY, XX MONTH 2023

*4 yearly review of modern awards – plain language re-drafting – shutdown provisions –  
Black Coal Mining Industry Award 2020 – variation to clause 24.9.*

A. Further to the decision issued by the majority of the Full Bench on XX MONTH 2023, the above award is varied as follows:

1. By deleting clause 24.9 and inserting the following:

#### **24.9 Direction to take annual leave during shutdown**

- (a) Clause 24.9 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 24.9(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 24.9(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 24.9(d).
- (g) In respect of any part of a temporary shutdown period which is not the subject of a direction under clause 24.9(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 24.13.
- (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 24.13, to which an entitlement has not been accrued, is to be taken into account.
- (j) Clauses 24.10 to 24.12 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 24.9.

2. By updating the cross-references accordingly.

B. This determination comes into operation on 1 May 2023. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 1 May 2023.

ACTING PRESIDENT

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<sup>1</sup> [\[2022\] FWCFB 161](#)

<sup>2</sup> Ibid at [160]

<sup>3</sup> Ibid

<sup>4</sup> Ibid at [161], [191]

<sup>5</sup> [\[2022\] FWCFB 246](#)

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<sup>6</sup> Ibid at [82]

<sup>7</sup> Ibid at [84]