



DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Australian Nursing Federation and others

(AM2010/232, AM2010/237, AM2010/238, AM2010/239, AM2010/244 and AM2010/247)

Various industries

SENIOR DEPUTY PRESIDENT ACTON
DEPUTY PRESIDENT IVES
COMMISSIONER BLAIR

MELBOURNE, 2 DECEMBER 2010

Application to vary modern awards - public holidays.

Introduction

[1] This decision concerns six applications to vary modern awards in respect of their public holiday provisions. The applications are essentially as follows:

[2] **AM2919/237** - An application by The Australian Industry Group (AiG) to vary the *Manufacturing and Associated Industries and Occupations Award 2010*¹ (modern Manufacturing Award) to clarify that where Christmas Day, Boxing Day, New Year's Day or Australia Day fall on a weekend then, respectively, 27 December, 28 December or the Monday after New Year's Day or Australia Day will be observed as the public holiday for the purposes of the public holiday penalty rate entitlements under the modern Manufacturing Award and those public holiday penalty rate entitlements will not apply to a public holiday on 25 December, 26 December, 1 January or 26 January.

[3] **AM2010/244** - An application by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (AMWU) to vary the modern Manufacturing Award to provide that an employee who works on a Christmas Day that falls on a weekend is to receive their normal Saturday or Sunday pay rate plus a loading of 50% with a minimum of three hours pay and also be entitled to the benefit of the substituted public holiday.

[4] **AM2010/232** - An application by the Australian Nursing Federation (ANF) to vary the *Nurses Award 2010*² (modern Nurses' Award) to provide that where Christmas Day falls on a weekend and by force of the National Employment Standards (NES) a substitute day is observed as a public holiday, a full-time or part-time employee is to be paid a loading of 50% of their ordinary pay rate in addition to the Saturday or Sunday pay rate for all ordinary hours

worked on 25 December with a minimum of four hours pay and also be entitled to the benefit of the substituted public holiday.

[5] **AM2010/238 and AM2010/239** - Applications by the Liquor, Hospitality and Miscellaneous Union (LHMU) to vary the *Cleaning Services Award 2010*³ (modern Cleaning Award) and the *Security Services Industry Award 2010*⁴ (modern Security Award) to provide that an employee, other than a casual, who works on a Christmas Day which falls on a weekend and which is not a public holiday within the meaning of the NES is to be paid an additional loading of 50% of their ordinary time rate for the hours worked on Christmas Day.

[6] **AM2010/247** - An application by the Finance Sector Union of Australia (FSUA) to vary the *Banking, Finance and Insurance Award 2010*⁵ (modern Finance Award) to provide that an employee both rostered and required to work on a Christmas Day which is on a weekend is to be paid at the rate of double time for the hours worked plus a loading of half of a normal day's pay for a full day's work and also be entitled to the benefit of a substitute day.

[7] Relevant to the applications are the provisions in the *Fair Work Act 2009* (Cth) (the Fair Work Act) in respect of public holidays.

National Employment Standards and section 139

[8] The NES in the Fair Work Act provide the following in respect of public holidays:

“Division 10 – Public holidays

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

- (1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

- (2) However, an employer may request an employee to work on a public holiday if the request is reasonable.
- (3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
 - (a) the request is not reasonable; or
 - (b) the refusal is reasonable.

- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
- (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
 - (b) the employee's personal circumstances, including family responsibilities;
 - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
 - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
 - (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
 - (f) the amount of notice in advance of the public holiday given by the employer when making the request;
 - (g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;
 - (h) any other relevant matter.

115 **Meaning of *public holiday***

The public holidays

- (1) The following are ***public holidays***:
- (a) each of these days:
 - (i) 1 January (New Year's Day);
 - (ii) 26 January (Australia Day);
 - (iii) Good Friday;
 - (iv) Easter Monday;
 - (v) 25 April (Anzac Day);

- (vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
 - (vii) 25 December (Christmas Day);
 - (viii) 26 December (Boxing Day);
- (b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

- (2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the **public holiday**.

Substituted public holidays under modern awards and enterprise agreements

- (3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Substituted public holidays for award/agreement free employees

- (4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For

example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.”

[9] The NES on public holidays define the days that are “public holidays” and, subject to an employer’s reasonable request for work, entitle an employee to be absent from work on a “public holiday” without loss of pay.

[10] Section 139 of the Fair Work Act sets out the terms that may be included in a modern award and s.139(1)(e)(ii) provides for a modern award to include terms about the penalty rates for employees who work on public holidays.

[11] We are advised that State or Territory laws have declared or prescribed additional public holidays or substituted a day for a day that would otherwise be a public holiday, or are likely to do so, with the following effects for the Christmas and New Year public holidays in 2010/11:

Western Australia

| | |
|-----------------------|--|
| Saturday, December 25 | Public holiday |
| Sunday, December 26 | Public holiday |
| Monday, December 27 | Additional public holiday for Christmas Day |
| Tuesday, December 28 | Additional public holiday for Boxing Day |
| Saturday, January 1 | Public holiday |
| Monday, January 3 | Additional public holiday for New Year’s Day |

New South Wales and Queensland

| | |
|-----------------------|--|
| Saturday, December 25 | Public holiday |
| Sunday, December 26 | |
| Monday, December 27 | Substitute public holiday for Boxing Day |
| Tuesday, December 28 | Additional public holiday for Christmas Day |
| Saturday, January 1 | Public holiday |
| Monday, January 3 | Additional public holiday for New Year’s Day |

Victoria

| | |
|-----------------------|--|
| Saturday, December 25 | |
| Sunday, December 26 | Public holiday |
| Monday, December 27 | Substitute public holiday for Christmas Day |
| Tuesday, December 28 | Additional public holiday for Boxing Day |
| Saturday, January 1 | Public holiday |
| Monday, January 3 | Additional public holiday for New Year’s Day |

South Australia

| | |
|-----------------------|--|
| Saturday, December 25 | |
| Sunday, December 26 | Public holiday |
| Monday, December 27 | Substitute public holiday for Christmas Day |
| Tuesday, December 28 | Additional public holiday for Proclamation Day |
| Saturday, January 1 | |
| Monday, January 3 | Substitute public holiday for New Year's Day |

Tasmania, Australian Capital Territory and Northern Territory

| | |
|-----------------------|--|
| Saturday, December 25 | Additional public holiday for Christmas Day |
| Sunday, December 26 | |
| Monday, December 27 | Substitute public holiday for Christmas Day |
| Tuesday, December 28 | Substitute public holiday for Boxing Day |
| Saturday, January 1 | |
| Monday, January 3 | Substitute public holiday for New Year's Day |

[12] Having set out the nature of the applications before us and the Fair Work Act provisions on public holidays, we will deal with AiG's application and then the union applications.

The AiG application

[13] The AiG seeks that clause 13.9 of the modern Manufacturing Award be varied to the following:

"13.9 Public holidays

- (a) Where the part-time employee's normal paid hours fall on a public holiday prescribed in the NES and work is not performed by the employee, such employee must not lose pay for the day.
- (b) Where the part-time employee works on the public holiday, the part-time employee must be paid in accordance with clauses 32.4(e), 36.2(f), 37.5 and 40.9."

[14] The substantive effect of the variation sought to clause 13.9 is to add clause 32.4(e) to the clause.

[15] The AiG also seeks that the words below with a line through them be deleted from clause 44 of the modern Manufacturing Award and the words below which are underlined be added to clause 44:

“44. PUBLIC HOLIDAYS

44.1 Public holidays are provided for in the NES.

44.2 Public holidays which fall on a weekend

- (a) Where Christmas Day falls on a Saturday or a Sunday, 27 December is observed as the public holiday ~~instead of the prescribed day.~~ for the purposes of clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 and these clauses do not apply to a public holiday on 25 December.
- (b) Where Boxing Day falls on a Saturday or a Sunday, 28 December is observed as the public holiday ~~instead of the prescribed day.~~ for the purposes of clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 and these clauses do not apply to a public holiday on 26 December.
- (c) Where New Year’s Day or Australia Day falls on a Saturday or a Sunday, the following Monday is observed as the public holiday ~~instead of the prescribed day.~~ for the purposes of clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 and these clauses do not apply to a public holiday on 1 January and 26 January respectively.

44.3 Substitution of certain public holidays by agreement at the enterprise

- (a) By agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned, an alternative day may be taken as the public holiday instead of any of the prescribed days.
- (b) An employer and an individual employee may agree to the employee taking another day as the public holiday instead of the day which is being observed as the public holiday in the enterprise or part of the enterprise concerned.

44.4 Rostered day off falling on public holiday

- (a) Except as provided for in clauses 44.4(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee’s ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:
 - (i) 7.6 hours of pay at the ordinary time rate; or
 - (ii) 7.6 hours of extra annual leave; or
 - (iii) a substitute day off on an alternative week day.

- (b) Where an employee has credited time accumulated pursuant to clause 34.6, then such credited time should not be taken as a day off on a public holiday.
- (c) If an employee is rostered to take credited time accumulated pursuant to clause 34.6 as a day off on a week day and such week day is prescribed as a public holiday after the employee was given notice of the day off, then the employer must allow the employee to take the time off on an alternative week day.
- (d) Clauses 44.4(b) and (c) do not apply in relation to days off which are specified in an employee's regular roster or pattern of ordinary hours as clause 44.4(a) applies to such days off."

[16] Clauses 32.4(e), 36.2(f), 27.5 and 40.9 concern penalty rates for an employee who works on a public holiday.

[17] The AiG's application is made under s.160 of the Fair Work Act and is said by the AiG to be consistent with the modern awards objective and to meet the requirements of s.157 of the Fair Work Act.

[18] Section 160 of the Fair Work Act is as follows:

- "160 Variation of modern award to remove ambiguity or uncertainty or correct error**
- (1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
 - (2) FWA may make the determination:
 - (a) on its own initiative; or
 - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award."

[19] Section 157 of Fair Work Act provides for the variation of a modern award outside the four yearly reviews of modern awards if Fair Work Australia is satisfied the variation is necessary to achieve the modern awards objective.

[20] The AiG submit their proposed variations to clause 44.2 of the modern Manufacturing Award are necessary because the clause is ambiguous or uncertain. In this regard they maintain the current clause 44.2 of the modern Manufacturing Award operates to provide that:

"Where Christmas Day falls on a Saturday or a Sunday, 27 December is observed as the public holiday for the purposes of:

- clause 13.9(b) – Penalty rates for a part-time employee who works on a public holiday;

- clause 32.4(e) – Penalty rate for travelling on a public holiday;
- clause 36.2(f) – Penalty rate for a day worker who works ordinary time on a public holiday;
- clause 37.5 – Penalty rates for continuous shiftworkers and non-continuous shiftworkers who work ordinary time on a public holiday; and
- clause 40.9 - Penalty rates for day workers, continuous shiftworkers and non-continuous shiftworkers who work overtime on a public holiday;

and these clauses do not apply to a public holiday on 25 December.

Where Boxing Day falls on a Saturday or a Sunday, 28 December is observed as the public holiday for the purposes of clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 and these clauses do not apply to a public holiday on 26 December.

Where New Year's Day or Australia Day fall on a Saturday or a Sunday, the following Monday is observed as the public holiday for the purposes of clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 and these clauses do not apply to a public holiday on 1 January and 26 January respectively.”

[21] However, the AiG points out that the Fair Work Ombudsman has concluded the current clause 44.2 of the modern Manufacturing Award does not so operate.⁶ The Fair Work Ombudsman considers the current clause 44.2 of the modern Manufacturing Award is of no effect.

[22] The AiG state their proposed variation to clause 13.9 of the modern Manufacturing Award is a consequential amendment associated with their proposed variation to clause 44.2.

[23] The AiG also submit their proposed variation to clause 44.4 of the modern Manufacturing Award is aimed at removing ambiguity or uncertainty in respect of the clause.

[24] The variations are supported by the Australian Chamber of Commerce and Industry (ACCI) and the Chamber of Commerce and Industry of Western Australia (CCIWA). The CCIWA supports the AiG’s application to vary clause 44.2 to the extent Fair Work Australia considers the variations are necessary to confirm the operation of the modern Manufacturing Award. However, they maintain there is no necessity to vary clause 44.2 because in their view the provisions of the modern Manufacturing Award relating to public holidays exist for the purpose of regulating penalty payments and do not seek to alter an employee’s entitlement under the NES.

[25] The AiG’s proposed variations to clause 44.2 are opposed by the Attorney-General and Minister for Industrial Relations, Queensland who submits the clause is not ambiguous or uncertain and the variations are not necessary to achieve the modern awards objective. The variation is similarly opposed by the Australian Council of Trade Unions (ACTU), the AMWU, The Australian Workers’ Union (AWU), the LHMU, the Construction, Forestry, Mining and Energy Union (CFMEU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The AWMU

maintains the primary purpose of the clause is to allow Monday to Friday workers the benefit of a “public holiday” when certain “public holidays” fall on a weekend. The ACTU, LHMU, CFMEU and CEPU submit that to the extent Fair Work Australia concludes ambiguity or uncertainty is associated with the current clause 44.2 of the modern Manufacturing Award, then such ambiguity or uncertainty should be removed by deleting clause 44.2 from the modern award.

[26] A Full Bench of the AIRC considered the removal of ambiguity or uncertainty from an industrial instrument, a statutory agreement, in *Tenix Defence Pty Limited*.⁷ The Full Bench said:

“[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:

‘The identification of whether or not a provision in an instrument can be said to contain an “ambiguity” requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the ‘parent’ award with which a complimentary provision is to be read.’

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention.” [Footnotes omitted]

[27] It is apparent there are rival contentions between the AiG and others, including the Fair Work Ombudsman, about the import of clause 44.2 of the modern Manufacturing Award. We consider each of the contentions is arguable.

[28] The AiG’s contention is essentially based on the fact the wording of the current clause 44.2 of the modern Manufacturing Award is almost identical to that of clause 7.5.1(d) in Part 1 of the *Metals, Engineering and Associated Industries Award 1998*,⁸ (the Metals Award). The effect of clause 7.5.1(d) in Part 1 of the Metals Award is that the employers covered by it do not have to pay the public holiday penalty rates in the Metals Award for work on 25 December, 26 December, 1 January or 26 January when those dates occur on a weekend, instead the public holiday penalty rates are paid for work on, respectively,

27 December, 28 December or the Monday following 1 January or 26 January. The public holiday penalty rates involved are very similar to those in clauses 13.9(b), 32.4(e), 36.2(f), 37.5 and 40.9 of the modern Manufacturing Award and the Metals Award was significant in the making of the modern Manufacturing Award.

[29] The basis of the Fair Work Ombudsman's contention is that clause 44.2 of the modern Manufacturing Award is ancillary or incidental to the NES and when read in conjunction with clause 44.1 of the modern Manufacturing Award provides, in effect, that certain "public holidays" in the NES will not be "observed" as "public holidays" for the purposes of determining terms and conditions of employment. As a result, clause 44.2 is inconsistent with the NES because it operates to exclude the NES entitlement to be absent from work on certain "public holidays" without loss of pay. Sections 55 and 56 of the Fair Work Act operate to disallow a term of a modern award that offends the NES.

[30] Given the rival contentions about the import of clause 44.2 and our view that an arguable case has been made out for more than one contention, we find the current clause 44.2 of the modern Manufacturing Award is a source of ambiguity or uncertainty. We turn then to consider exercising our discretion to remove the ambiguity or uncertainty.

[31] In its *Award Modernisation* decision⁹ concerning the making of the priority modern awards, the Full Bench of the AIRC said in respect of public holidays that:

“[105] A number of requests were made that we supplement the public holiday entitlements in the NES by including in awards some days that are observed as public holidays but not gazetted as such. We have decided against that course as it is apparent that the NES governs the question of the number of public holidays to which employees should be entitled.”

[32] We note that consistent with that decision clause 44.1 of the modern Manufacturing Award provides that "public holidays are provided for in the NES."

[33] Section 115(3) of the Fair Work Act provides that a modern award may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of ss.115(1) or (2) of the Fair Work Act. Clause 44.3 of the modern Manufacturing Award provides for such substitution by agreement.

[34] We also note that the same or very similar wording to the current clause 44.2 in the modern Manufacturing Award is contained in only another four of the 122 modern awards made by the Australian Industrial Relations Commission (AIRC). These other four modern awards are the *Airline Operations - Ground Staff Award 2010*,¹⁰ the *Contract Call Centres Award 2010*,¹¹ the *Textile, Clothing, Footwear and Associated Industries Award 2010*¹² (modern TCF Award) and the *Timber Industry Award 2010*.¹³

[35] In including a clause identical to clause 44.2 in the modern TCF Award, the Full Bench said:

“Public holidays

[23] A number of alterations were agreed. Consistent with the approach we have already indicated we only propose to deal with those matters which are in contention.

[24] The first matter relates to the substitution arrangements when a public holiday falls on a weekend. The particular public holidays are Christmas Day, Boxing Day, New Year’s Day and Australia Day.

[25] AiGroup submit that the absence of a substitution provision in the award does not mean that substitution would not occur because substitution is provided for in the National Employment Standards (NES) and as such the variation sought is unnecessary. During the submissions on the exposure draft AiGroup had included a substitution clause.

[26] It appears to us that the NES would more than likely cover the position but, in the circumstances, we are prepared to include a substitution provision in identical terms to those contained in the *Manufacturing and Associated Industries and Occupations Award 2010*.¹⁴ [Endnotes omitted]

[36] Having regard to the Full Bench decision when it included a clause the same as clause 44.2 in the modern TCF Award, the effect of clauses 44.1 and 44.3 of the modern Manufacturing Award and the proximity of clause 44.2 to such clauses and also having regard to the fact that clauses such as clause 44.2 are in very few modern awards, we consider clause 44.2 is meant to do no more than that which the NES on public holidays effectively provide. Clause 44.2 in the modern Manufacturing Award, in our view, is not intended to operate as the AiG suggests.

[37] In the circumstances, we consider it is desirable to remove the ambiguity or uncertainty associated with the current clause 44.2 in the modern manufacturing Award and that the most appropriate way of doing so is by deleting clause 44.2 from the modern Manufacturing Award. That would make the modern Manufacturing Award consistent with the vast majority of modern awards which do not contain such a clause. Given our conclusions we do not think it can be maintained the variations sought by the AiG to clause 44.2 of the modern Manufacturing Award are necessary to achieve the modern awards objective.

[38] With respect to the other variations the AiG seeks, there is no objection to the AiG’s proposed variation to clause 13.9 of the modern Manufacturing Award to include a reference to clause 32.4(e) of the modern Manufacturing Award in that clause. It is apparent that clause 32.4(e) was excluded from clause 13.9 of the modern Manufacturing Award in error. We will vary clause 13.9 of the modern Manufacturing Award as sought by the AiG to include a reference to clause 32.4(e) of the modern Manufacturing Award.

[39] We will also make the variation the AiG seeks to clause 44.4 of the modern Manufacturing Award to include the word “except” before the words “where the rostered day off falls”. Such a variation will remove the ambiguity or uncertainty that has arisen by the non-inclusion of the word “where” before those words and will clarify the intent of the clause.

[40] We turn then to deal with the union applications.

Union applications

[41] All of the union applications seek an additional penalty rate where Christmas Day both falls on a weekend and is not a “public holiday”. The applications are made under s.158 and/or s.160 of the Fair Work Act. The union applications are also supported by the ACTU, CFMEU and CEPU.

[42] The union applications are opposed by the AiG, ACCI, CCIWA, the Australian Security Industry Association Limited, Aged Care Association Australia Ltd, Aged Care Association - New South Wales, Aged Care Queensland, Aged and Community Care Victoria, Aged and Community Services Association of New South Wales and Australian Capital Territory Inc, Aged and Community Services Australia, Aged and Community Services South Australia and Northern Territory Inc, Aged and Community Services Tasmania, Aged and Community Services Western Australia, the Building Service Contractors Association of Australia, The Spotless Group and Chubb Australasia.

[43] The additional penalty rate where Christmas Day both falls on a weekend and is not a “public holiday” is a principle established by a Full Bench of the AIRC in the *Public Holiday Test Case* decision¹⁵ of 1995. In that decision the Full Bench said:

“[W]e propose in this decision to consider various types of non-standard arrangements and to articulate principles which we see as being generally appropriate. Members of the Commission dealing with particular awards will be expected to apply these principles wherever possible, but may need to adapt them to specific circumstances...

The ACTU contends that Christmas Day should be regarded differently from other days which are subject to substitution. A non-standard full-time worker required to work on the actual day should receive the public holiday rate for that day, rather than the Saturday or Sunday rate. This, the ACTU argues, is a proper recognition of the significance of Christmas Day in the lives of many members of the community. We agree with the underlying contention of the ACTU but favour a more straightforward prescription. In our opinion, the employee should receive the Saturday or Sunday payment (as appropriate) plus a loading of one-half of a normal day's wages for a full day's work. Thus if the ordinary Sunday rate is double time, the employee who works on Christmas Day when it is a Sunday will be paid 2.5 times the normal daily rate and be entitled to the benefit of the substitute day. . .

In summary, we commend the following principles: . . .

- (3) that a full-time worker who ordinarily works on a Saturday or Sunday should be paid at the Saturday or Sunday rate for work performed on the ‘*actual*’ day when substitution is prescribed, save that when the ‘*actual*’ day is Christmas Day the employee should receive a loading of one-half of an ordinary day's wages ...

... These principles are more fully elaborated above. Although we expect that they will generally be implemented in the application of safety-net standards, we acknowledge the diversity of practices that have been in place and anticipate that the principles pertaining to non-standard working arrangements will be applied sensitively and flexibly, with due regard to special circumstances.”

[44] It is apparent the *Public Holiday Test Case* decision of 1995 commended the additional penalty rate in respect of Christmas Day as a principle that may need adaption to specific circumstances. Further, while the Full Bench expected the principle would generally be implemented, the Full Bench acknowledged there were pre-existing diverse practices and anticipated the principle would be applied sensitively and flexibly with due regard to special circumstances.

[45] The additional penalty rate in respect of Christmas Day is not a prevailing standard in the underlying award-based transitional instruments that previously covered the employers and employees now covered by the modern Manufacturing Award, modern Cleaning Award, modern Security Award or modern Nurses’ Award.

[46] In respect of the modern Finance Award, the additional penalty rate where Christmas Day both falls on a weekend and is not a “public holiday” was specifically raised during the course of the AIRC proceedings concerning the making of the modern Finance Award.¹⁶ However, the AIRC did not include it in the modern Finance Award.

[47] Fair Work Australia’s ability to vary modern awards outside the four yearly reviews of modern awards is constrained by the Fair Work Act. We do not think the non-inclusion of the additional penalty rate in respect of Christmas Day in the modern awards before us can be regarded as an error in the sense intended by s.160 of the Fair Work Act. We have come to this conclusion having regard to the caution expressed by the Full Bench in the *Public Holidays Test Case* decision of 1995 and the other factors to which we have just referred concerning the absence of a prevailing standard in respect of the additional penalty rate in the relevant underlying instruments and the additional penalty rate having been specifically raised previously but not included. These factors also prevent us from concluding the variations sought by the unions are necessary to achieve the modern awards objective.

[48] Accordingly, we decline to make determinations varying the modern Manufacturing Award, modern Cleaning Award, modern Security Award, modern Nurses’ Award or modern Finance Award to include an additional penalty rate where Christmas Day both falls on a weekend and is not a “public holiday”.

Conclusion

[49] We have decided to make a determination deleting the current clause 44.2 from the modern Manufacturing Award and, as sought by the AiG, providing for minor variations to clauses 13.9 and 44.4 of that modern award.

[50] At this stage, we have decided not to make determinations varying the modern Manufacturing Award, modern Cleaning Award, modern Security Award, modern Nurses’ Award or modern Finance Award to include an additional penalty where Christmas Day both falls on a weekend and is not a “public holiday”.

[51] A determination giving effect to our decision is being issued at the same time as this decision.¹⁷

SENIOR DEPUTY PRESIDENT

Appearances:

S. Smith with *G. Vaccaro* for The Australian Industry Group and Chubb Australasia.

G. Noble for the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU).

N. Swancott for the Liquor, Hospitality and Miscellaneous Union.

A. McCarthy for the Australian Nursing Federation.

A. Horneman-Wren, senior counsel, with *M. Healy* for the Attorney-General and Minister for Industrial Relations, Queensland.

E. McCoy for the Australian Council of Trade Unions.

S. Maxwell for the Construction, Forestry, Mining and Energy Union.

A. Kentish for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

M. Perica for the CPSU, the Community and Public Sector Union.

A. Leszczyński, for the Finance Sector Union of Australia.

M. Rahilly with *D. Ainsbury* for the Aged Care Association Australia Ltd; Aged Care Association - New South Wales; Aged Care Queensland; Aged and Community Care Victoria; Aged and Community Services Association of New South Wales and Australian Capital Territory Inc; Aged and Community Services Australia; Aged and Community Services South Australia and Northern Territory Inc; Aged and Community Services Tasmania and Aged and Community Services Western Australia.

R. Frenzel for the Building Service Contractors Association of Australia.

C. Delaney for the Australian Security Industry Association Limited.

D. Gregory for the Australian Chamber of Commerce and Industry and the Chamber of Commerce and Industry of Western Australia.

D. Trindade, solicitor, for The Spotless Group.

Hearing details:

2010.

Melbourne:

November, 24.

Endnotes:

¹ MA000010.

² MA000034.

³ MA000022.

⁴ MA000016.

⁵ MA000019.

⁶ Exhibit AiG 1 at Annexure B.

⁷ PR917548.

⁸ AP789529CRV.

⁹ [2008] AIRCFB 1000.

¹⁰ MA000048.

¹¹ MA000023.

¹² MA000017.

¹³ MA000071.

¹⁴ *Textile, Clothing, Footwear and Associated Industries Award 2010*, [2010] FWAFB 1811.

¹⁵ Print L9178.

¹⁶ See, for example, *Finance Sector Union of Australia Submission to the Full Bench on Award Modernisation. Financial Services Group AM2008/16. 13 February 2009* at p.45.

¹⁷ PR504593.

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