



STATEMENT

Fair Work Act 2009

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

Part-day Public Holiday provisions in modern awards

(AM2012/355)

COMMISSIONER HAMPTON

ADELAIDE, 29 SEPTEMBER 2014

Application to vary modern awards in relation to part-day public holiday provisions.

[1] The background to this matter is set out in the Decision¹ issued by the Full Bench on 13 November 2013 regarding part-day public holiday provisions in various Modern Awards.

[2] In brief, most of the Commission's modern awards were varied to include an additional schedule dealing with part-day public holidays, originally in 2012, and again in 2013 with some minor additions.² There are a number of different versions of the schedule but each is directed at confirming appropriate arrangements for certain part-day public holidays. On each occasion, the various schedules were specified to operate on an interim basis for the relevant year.

[3] On 21 August 2014, Business SA wrote³ to the Commission in the context of discussions that had taken place between them and the Shop, Distributive and Allied Employees Association and United Voice regarding the continued operation of the schedules. In particular, Business SA confirmed the need to vary the schedules to deal with the part-day public holidays that would take place in South Australia later in 2014.

[4] I convened a conference of interested parties on 17 September 2014 and have now heard the positions of many of the organisations that have participated in previous proceedings concerning these provisions in recent years.

[5] All of the parties appearing at the conference, or providing written submissions, supported the continuation of the present arrangements to cover the Christmas and New Year part-day public holidays that will take place in South Australia later this year. However, during the course of the conference, two alternate positions were expressed concerning how that objective should be met.

[6] Business SA proposed that the provisions should operate on an ongoing basis, in order to alleviate the need for the various schedules to be varied each year. It contended that the schedules had operated without any apparent concerns and could now safely operate without the need for yearly review. This submission was supported by SA Unions, the Shop, Distributive and Allied Employees Association, United Voice, and the Construction, Forestry,

Mining and Energy Union. The Australian Industry Group subsequently provided correspondence⁴ supporting the position of Business SA.

[7] The Australian Hotels Association, whilst supporting the making of appropriate determinations to cover the 2014 public holidays, raised concerns about the provisions being made “permanent”, given the upcoming review of the public holiday provisions in modern awards more generally. That review is taking place as part of the 4 yearly review of Modern Awards and proceedings before the Full Bench are currently scheduled on that aspect in the first part of 2015.⁵ This view was supported by Restaurant and Catering Industrial, Accommodation Association of Australia, Motor Inn, Motel and Accommodation Association and the South Australian Wine Industry Association. Each of these organisations advised that they anticipated making submissions as part of the 4 yearly review seeking significant variations to public holiday provisions more generally.

[8] The Master Builders Association supported the Business SA proposal but reserved the right to make further submissions. The Construction, Forestry, Mining and Energy Union, Forestry, Furnishing, Building Products and Manufacturing Division contended that those awards in which it had an interest should be varied simply to include the 2014 part-day public holidays.

[9] Following the conference, Mr Cairney on behalf of Business SA confirmed⁶ that the proposal to make the part-day public holiday schedules ongoing was not intended to impact upon any parties’ ability to argue their case concerning public holiday provisions more generally before the Full Bench next year. Rather, it was intended to ensure the continuation of the safety net position should a decision not be made by a Full Bench prior to December 2015.

[10] It is apparent that the various modern award schedules should be amended to continue their operation for the 2014 part-day public holidays. This could be achieved in one of two ways.

[11] Firstly, by simply amending the references to 2013 in each of the part-day public holiday schedules to cite 2014 in lieu thereof. This would comprehend the 2014 holidays, however it would require the Full Bench to fully conclude the public holiday aspect of the 4 yearly review and to vary the relevant modern awards, or make further interim provisions, by no later than December 2015.

[12] Alternatively, each of the part-day public holiday schedules could be amended so that they were to apply to part-day public holidays occurring on Christmas Eve and New Year’s Eve generally. Given the 4 yearly modern award review process, any such variations could be made by the Full Bench on the express basis that the variations would not prevent the further consideration of the provisions as part of that review. Further, any party would be at liberty to make an application, on an appropriate basis, to further vary one or more of the schedules to remove an ambiguity or uncertainty.⁷

[13] I recommend that the Full Commission consider the above options and determine an appropriate variation(s) to the relevant modern award schedules well ahead of part-day public holidays that will take place later this year in South Australia.



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¹ [2013] FWC 8939.

² See for example PR544519.

³ Letter from Business SA, 21 August 2014.

⁴ Email from Ms Bhatt, 23 August 2014.

⁵ See Statement of the Full Bench issued 13 August 2014 - [2014] FWC 5537.

⁶ Letter from Business SA, 18 September 2014.

⁷ S.160 of the Act.