



# STATEMENT

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards – Plain language re-drafting**

(AM2016/15)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 15 MARCH 2018

*Substitution of public holidays by majority agreement – alleged NES inconsistencies –referral to Plain Language Full Bench*

[1] In the course of the review of the Group 3 Awards the National Tertiary Education Union (the NTEU) submitted that clauses in various higher education awards were inconsistent with the NES.<sup>1</sup> The clauses in question provide for the substitution of public holidays. Clause 20.2 of the Post-Secondary Award exposure draft is such a term, it states:

### **‘20.2 Substitution of public holidays by agreement**

By agreement between the employer and *the majority of employees in an enterprise* another day may be substituted for a public holiday.’ [Emphasis added]

[2] Clause 29.2 of the current *Educational Services (Post-Secondary Education) Award 2010* is in identical terms.

[3] The NTEU submit that the words ‘the majority of employees in an enterprise’ should be replaced with the words ‘an employee’ to ensure that the term is consistent with s.115(3) of the *Fair Work Act 2009 (Cth)*. Section 115(3) states:

### **‘s.115 Meaning of public holiday**

...

(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)’ [Emphasis added]

[4] The Australian Higher Education Industrial Association and Business SA agreed with the NTEU.

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<sup>1</sup> NTEU [submission](#), 8 June 2016

[5] ABI took a different view and submitted that the relevant clauses were *not* inconsistent with the NES.

[6] The issue raised by the NTEU has implications for a number of other modern awards which are not Group 3 Awards. On that basis the Group 3 Full Bench concluded:

‘As the determination of the issue in the context of this award may have implications for other awards we do not propose to deal with the issue in this decision. This issue will be the subject of a Statement by the President shortly.’<sup>2</sup>

[7] As noted above, s.115(3) of the Act states that a modern award may include terms providing for ‘an employer and *an 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.

[8] The issue in question is whether an award term which permits public holidays substitution by agreement between an employer and *a majority* of employees excludes the NES or any provision of the NES, within the meaning of s.55(1).

[9] Of the 122 modern awards, 78 contain clauses which permit the substitution of public holiday by agreement with the majority of employees. These 78 modern awards are listed at **Attachment A**. A further 5 modern awards permit the substitution of public holidays by an employer, these are listed at **Attachment B**. In addition, the *Sporting Organisations Award 2010* does not specify whether agreement is with an employee or a majority of employees.

### **Next Steps**

[10] Given the general nature of the issue raised, I am satisfied that a broader review of all awards containing a term which provides for the substitution of public holidays by either majority agreement, or unilaterally by an employer, is required. Accordingly, substitution clauses in the awards listed in Attachments A and B, together with the *Sporting Organisations Award 2010* are referred to the Plain Language Full Bench for review.

[11] The Plain Language Full Bench will issue directions in due course.

### PRESIDENT

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<sup>2</sup> [2018] FWCFB 1405 at [37].

**Attachment A — Awards that allow substitution of public holidays by majority agreement**

Aboriginal Community Controlled Health Services Award 2010  
Airline Operations—Ground Staff Award 2010  
Airport Employees Award 2010  
Alpine Resorts Award 2010  
Aluminium Industry Award 2010  
Ambulance and Patient Transport Industry Award 2010  
Aquaculture Industry Award 2010  
Architects Award 2010  
Asphalt Industry Award 2010  
Banking, Finance and Insurance Award 2010  
Black Coal Mining Industry Award 2010  
Broadcasting and Recorded Entertainment Award 2010  
Building and Construction General On-site Award 2010  
Business Equipment Award 2010  
Car Parking Award 2010  
Cement and Lime Award 2010  
Children’s Services Award 2010  
Cleaning Services Award 2010  
Clerks—Private Sector Award 2010  
Commercial Sales Award 2010  
Concrete Products Award 2010  
Contract Call Centre Award 2010  
Educational Services (Post-Secondary Education) Award 2010  
Educational Services (Schools) General Staff Award 2010  
Electrical Power Industry Award 2010  
Electrical, Electronic and Communications Contracting Award 2010  
Fast Food Industry Award 2010  
Food, Beverage and Tobacco Manufacturing Award 2010  
Gardening and Landscaping Services Award 2010  
General Retail Industry Award 2010  
Graphic Arts, Printing and Publishing Award 2010  
Hair and Beauty Industry Award 2010  
Health Professionals and Support Services Award 2010  
Horse and Greyhound Training Award 2010  
Horticulture Award 2010  
Hospitality Industry (General) Award 2010  
Hydrocarbons Industry (Upstream) Award 2010  
Joinery and Building Trades Award 2010  
Journalists Published Media Award 2010  
Labour Market Assistance Industry Award 2010  
Live Performance Award 2010  
Mannequins and Models Award 2010  
Manufacturing and Associated Industries and Occupations Award 2010  
Meat Industry Award 2010  
Mining Industry Award 2010

Miscellaneous Award 2010  
Mobile Crane Hiring Award 2010  
Nursery Award 2010  
Nurses Award 2010  
Oil Refining and Manufacturing Award 2010  
Pastoral Award 2010  
Pest Control Industry Award 2010  
Pharmaceutical Industry Award 2010  
Pharmacy Industry Award 2010  
Plumbing and Fire Sprinklers Award 2010  
Poultry Processing Award 2010  
Premixed Concrete Award 2010  
Professional Employees Award 2010  
Quarrying Award 2010  
Racing Clubs Events Award 2010  
Racing Industry Ground Maintenance Award 2010  
Registered and Licensed Clubs Award 2010  
Restaurant Industry Award 2010  
Road Transport (Long Distance Operations) Award 2010  
Road Transport and Distribution Award 2010  
Salt Industry Award 2010  
Seafood Processing Award 2010  
Security Services Industry Award 2010  
Storage Services and Wholesale Award 2010  
Surveying Award 2010  
Telecommunications Services Award 2010  
Textile, Clothing, Footwear and Associated Industries Award 2010  
Timber Industry Award 2010  
Transport (Cash in Transit) Award 2010  
Vehicle Manufacturing, Repair, Services and Retail Award 2010  
Waste Management Award 2010  
Wine Industry Award 2010  
Wool Storage, Sampling and Testing Award 2010

**Attachment B —Awards that allow substitution of public holidays by employer**

Educational Services (Teachers) Award 2010

Health Professionals and Support Services Award 2010

Higher Education Industry—Academic Staff—Award 2010

Higher Education Industry—General Staff—Award 2010

Horse and Greyhound Training Award 2010