



STATEMENT

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

Part-day public holidays (AM2014/301 and AM2019/17)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

SYDNEY, 30 SEPTEMBER 2022

4 yearly review of modern awards – part-day public holiday schedules.

Introduction and background

[1] This statement deals with the review of the part-day public holiday schedules (Schedules) contained in 112 of the 121 modern awards. There are currently five different versions of the Schedules found in these modern awards.

[2] The Schedules were first made by a Full Bench in 2012¹ following the introduction of part-day public holidays from 7.00 pm to midnight on Christmas Eve and New Year’s Eve in South Australia.² They were intended to address what were said to be ambiguities and uncertainties arising as to how provisions about the following matters interacted with part-day public holidays:

- annualised salary arrangements;
- rostered day off arrangements;
- annual close down arrangements;
- time off in lieu for work performed on a public holiday; and
- minimum engagement provisions.³

[3] The Schedules were initially made on a largely consensual basis. They were also made only on an interim basis, as the Full Bench explained:

“[20] We wish to make it clear that these determinations are made on an interim basis only and this is why the determinations refer to 2012. The position taken by the various parties in these proceedings is without prejudice to the position they may take in any subsequent consideration of these issues. We also note that the issues arising from part-

¹ [2012] FWAFB 10738

² *Statutes Amendment (Shop Trading and Holidays) Act 2012 (SA)*

³ [2012] FWAFB 10738 at [11]

day public holidays require more comprehensive review, which should be undertaken after we have dealt with the substantive public holiday issues raised in the Modern Awards Review 2012.”

[4] Notwithstanding the above statement, the Schedules were extended on an ad hoc, year-by-year basis until 2018. In 2018, the Schedules were considered by a Full Bench which was constituted to review the issue of public holidays generally as part of the conduct of the 4 yearly review of modern awards. After conferrals with interested parties, a report was prepared by a member of that Bench, Commissioner Hampton. This report was considered by the Full Bench in a decision issued on 7 November 2018.⁴ In this decision, the Full Bench determined to give the Schedules an indefinite operation, saying:

“[18] Consistent with the preliminary views set out in the Report, we consider that it is appropriate to vary the existing Schedules to make them ongoing. In particular, the present Schedules have some work to do and the Christmas Eve and New Year’s Eve Public Holidays are now only a few months away. In all of the circumstances we consider that the amendment of the schedules is necessary to ensure that the modern awards concerned achieve the modern awards objective set out in s.134 of the Act. In addition, if there is to be any award by award consideration of whether the Schedules are required in their present form, this will take some time and will require that all of the other terms of the modern awards that bear upon this issue have been finalised. This finalisation will not take place until the (other) terms of the modern awards are resolved as part of the 4 yearly review.” (footnote omitted)

[5] The Full Bench also said that it had not yet finally determined whether the Schedules should all remain in their present form, while anticipating that “some provisions dealing with part-day public holidays will be necessary in some, if not most, modern awards”, and foreshadowed four possible options for their review:

- leave the Schedules in the present form;
- amend the Schedules to include provision for all part-day public holidays;
- amend the Schedules to include other provisions; and
- incorporate the operative provisions in the body of the modern awards.⁵

[6] The Schedules were varied as a result of a decision by a separate Full Bench on 17 December 2019,⁶ in order to make them applicable to the part-day public holiday declared for Christmas Eve from 6.00 pm to midnight in Queensland.⁷

[7] On 20 December 2019, the President of the Commission issued a statement⁸ by which the further review of the Schedules was transferred to the Full Bench assigned to finalise exposure drafts in the 4 yearly review. The statement also indicated that Commissioner Hampton would conduct a conference in relation to the matter in February 2020, but various

⁴ [2018] FWCFB 6540

⁵ Ibid at [19]

⁶ [2019] FWCFB 8491

⁷ *Holidays and Other Legislation Amendment Bill 2019* (Qld)

⁸ [2019] FWC 8581

events then intervened. On 25 September 2020, Commissioner Hampton issued a statement⁹ together with plain language re-drafts of each of the five versions of the Schedule. Versions 1 to 3 of the Schedule were each expressed to apply to a number of different modern awards, while version 4 was expressed to apply to the *Fast Food Industry Award 2010* (Fast Food Award) only and version 5 to the *Timber Industry Award 2010* (Timber Award) only.¹⁰ In this statement, interested parties were invited to provide written submissions on the following structural and drafting issues:¹¹

“Substantive/structural issues

1. Should the schedules cover all part-day public holidays or only those falling on Christmas and New Year’s Eve?
2. Versions 2 and 3 as now drafted are the same and version 2 could be included in all of the relevant modern awards that contain an annualised wage arrangement provision or otherwise provide for an annualised wage. Is it necessary to have a different version of the schedule depending upon whether the modern award expressly provides for an annualised wage or could the same version be applied to all modern awards?
3. Version 4 applies to the Fast Food Industry Award 2010 only and includes an annualised wage arrangements clause but the award does not contain an annualised wage arrangement provision or otherwise provide for an annualised wage. Also, this award does not include the clause other versions (A.2.7 in versions 2 and 3) relating to employees not rostered to work at the time of the part-day public holiday. Is it still necessary to include the annualised wage clause and not to include the clause relating to employees not rostered to work?
4. Version 5 applies to the Timber Industry Award 2010 only and includes discrete provisions applying to employees whose ordinary pattern of work involves rostered shifts which include the part-day public holiday hours. It does not include the clause other versions (A.2.7 in versions 2 and 3) relating to employees not rostered to work at the time of the part-day public holiday. Is it appropriate to include the clause relating to employees not rostered to work in this award?
5. In light of questions 3 and 4 above, is it still necessary to retain particular versions of the schedule for the Fast Food Industry Award 2010 (version 4) and the Timber Industry Award 2010 (version 5) when finalised?
6. Alternatively, could one schedule contain all provisions, aside from the discrete Version 5 provisions, and replace versions 1 to 4?

⁹ [\[2020\] FWC 5110](#)

¹⁰ [Attachments to Statement – \[2020\] FWC 5110](#)

¹¹ [\[2020\] FWC 5110](#) at [9]

Drafting issues

1. Is the additional reference to personal/carer's leave in clauses A.2.4 and A.2.6 (A.2.7 in versions 2 and 3), and therefore the reference to sections 98 and 99 of the Act in the Note at the beginning of the Schedule, appropriate?
2. Is it appropriate to add "accrued day off" to clause A.2.5, as this concept is used in a number of modern awards?"

[8] The Commissioner then conducted a conference on 21 October 2020 in relation to these issues and the written submissions. Following this, he published a report summarising the parties' positions on these outstanding issues and draft Schedules.¹² The Commissioner's report also included some observations to assist the Commission in the further consideration of the matter.

[9] On 22 February 2022, the exposure draft finalisation Full Bench issued a statement¹³ (February 2022 Statement) dealing with a number of issues arising from the plain language draft versions of the Schedule, the conference conducted by Commissioner Hampton and issues covered in his report. Interested parties were invited to comment on a number of provisional views (discussed further below) and other issues in order to finalise the matter.¹⁴

[10] The following parties filed submissions pursuant to the February 2022 Statement:

- Housing Industry Association (HIA) on 21 March 2022;¹⁵
- Master Builders Australia (MBA) on 21 March 2022 in relation to the *Building and Construction General On-site Award 2020* (Building Award) and the *Joinery and Building Trades Award 2020* (Joinery Award);¹⁶
- Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (CFMMEU) on 21 March 2022 in relation to the Building Award, the Joinery Award and the *Mobile Crane Hiring Award 2020* (Mobile Crane Award);¹⁷
- The combined Local Government Associations (LGA) on 21 March 2022, in relation to the *Local Government Industry Award 2020* (LG Award);¹⁸ and
- The Australian Industry Group (Ai Group) on 21 March 2022.¹⁹

¹² [\[2020\] FWC 5609](#)

¹³ [\[2022\] FWCFB 15](#)

¹⁴ Ibid at [75]

¹⁵ [HIA submission, 21 March 2022](#)

¹⁶ [MBA submission, 21 March 2022](#)

¹⁷ [CFMMEU submission, 21 March 2022](#)

¹⁸ [LGA submission, 21 March 2022](#)

¹⁹ [Ai Group submission, 21 March 2022](#)

[11] Submissions in reply were received from:

- the Australian Municipal, Administrative, Clerical and Services Union (ASU) on 11 April 2022 in relation to the LG Award;²⁰
- the Australian Manufacturing Workers' Union (AMWU) on 8 April 2022 in relation to the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award);²¹
- MBA on 11 April 2022 in relation to the Building Award and the Joinery Award;²²
- CFMMEU on 11 April 2022 in relation to the Building Award, the Joinery Award and the Mobile Crane Award;²³
- HIA on 11 April 2022, in relation to the Building Award;²⁴ and
- the Ai Group on 8 April 2022.²⁵

Provisional views and submissions in response

[12] The provisional views expressed in the February 2022 Statement, and the submissions in response thereto, are summarised below.

Scope of the part-day public holiday schedules

[13] To address a concern that the scope of the Schedules may be extended beyond the public holidays provided for in the National Employment Standards (NES) in the *Fair Work Act 2009* (FW Act), the Full Bench expressed the provisional view that clause A.1 in the Schedules should be varied to ensure it applies on a part-day declared or prescribed by a law of a State or Territory to be a public holiday.²⁶

[14] The HIA,²⁷ MBA,²⁸ the CFMMEU²⁹ and the LGA³⁰ each submitted that they support the provisional view as it relates to the awards in which they have an interest.

²⁰ [ASU submission in reply, 11 April 2022](#)

²¹ [AMWU submission in reply, 8 April 2022](#)

²² [MBA submission in reply, 11 April 2022](#)

²³ [CFMMEU submission in reply, 11 April 2022](#)

²⁴ [HIA submission in reply, 11 April 2022](#)

²⁵ [Ai Group submission in reply, 8 April 2022](#)

²⁶ [2022] FWCFB 15 at [16]

²⁷ [HIA submission, 21 March 2022](#) at p 1

²⁸ [MBA submission, 21 March 2022](#) at [6]

²⁹ [CFMMEU submission, 21 March 2022](#) at [3]

³⁰ [LGA submission, 21 March 2022](#) at [7]

[15] The Ai Group did not support the provisional view³¹ because it remained concerned about the potential for the proposed variation to clause A.1 to extend coverage of the Schedule beyond the definition of a public holiday contained in the NES.

Adoption of common (model) provisions across the modern awards

[16] To consolidate the five versions of the Schedule, the Full Bench expressed the provisional view that:³²

“[20] ...versions 1 to 3 of the schedules should be varied as suggested by Commissioner Hampton and the relevant parties, that is:

- The plain language re-drafted version 1 of the schedule should be inserted into each of the relevant modern awards that do not contain an annualised wage arrangements provision.
- The plain language redrafted version 2 of the schedule should be inserted into each of relevant modern awards that do contain annualised wage arrangements provisions. – generally, those currently utilising versions 2 and 3 provided they have the relevant provision.
- Version 3 is no longer necessary.”

[17] The HIA supported the provisional view,³³ as did the CFMMEU³⁴ as it related to version 1 of the Schedule being inserted into modern awards that do not contain annualised wage arrangement provisions. The CFMMEU further submitted that where appropriate, drafting changes to version 1 consistent with the rest of the CFMMEU’s submissions in relation to specific awards should be permitted.

[18] The LGA supported the provisional view that version 2 of the Schedule was appropriate to be inserted into the LG Award.³⁵

[19] The Ai Group supported the provisional view, however submitted that the *Supported Employment Services Award 2020* should instead include version 2 of the Schedule because it contains an annualised wage arrangement provision.³⁶

[20] As to version 4 of the Schedule that was intended to be adopted in the Fast Food Award only (noting that this award has recently been re-drafted in plain language as part of matter no. AM2016/15 and is now the *Fast Food Industry Award 2020*), the Full Bench expressed the

³¹ [Ai Group submission, 21 March 2022](#) at [9]-[11]

³² [2022] FWCFB 15 at [20]

³³ [HIA submission, 21 March 2022](#) pages 1-2

³⁴ [CFMMEU submission, 21 March 2022](#) at [4]-[5]

³⁵ [LGA submission, 21 March 2022](#) at [8]

³⁶ [Ai Group submission, 21 March 2022](#) at [12]-[13]

provisional view that clause A.2.6 should be deleted and that clause A.2.3 should be varied as follows to ensure that the Schedule only includes terms that are relevant to the award:³⁷

“A.2.3 if an employee, ~~other than an employee paid an annualised wage under this award,~~ works any hours on the part-day public holiday, then they must be paid at the public holiday penalty rate (if any) in this award applicable to the hours worked”

[21] The Ai Group submitted that it supported the provisional view.³⁸

[22] The Full Bench invited parties to comment on whether the Schedules to the Timber Award or the Fast Food Award should be varied to include clause A.2.7 which provides as follows:³⁹

“A.2.7 if an employee, other than an employee who has exercised their right to refuse to work in accordance with clause A.2.1, is not rostered to work on the part-day public holiday, then they are not entitled to another day off, another day’s pay or another day of annual or personal/carer’s leave as a result of the part-day public holiday.”

[23] The HIA submitted that version 4 as it was included in Attachment A to the February 2022 Statement should be inserted into the Timber Award.⁴⁰ This version does not contain the version of clause A.2.7 set out above, so we assume this indicates the HIA is opposed to this clause being included.

[24] The Ai Group also submitted that it opposed the inclusion of this clause in the Timber Award as well as the Fast Food Award.⁴¹

Reference to public holiday penalty rates

[25] The Full Bench expressed the provisional view that the words “if any” should be inserted into clause A.2.3 of the Schedules to take into account that some awards may not provide for a penalty rate to be paid for work undertaken on a public holiday.⁴²

“if an employee works any hours on the part-day public holiday, then they must be paid at the public holiday penalty rate (if any) in this award applicable to the hours worked”

[26] The parties have been unable to agree on a consistent position about the inclusion of these words in proposed clause A.2.3. The HIA submitted that it agrees with the provisional view and supported the inclusion of the words in the Building Award, the Joinery Award and the Timber Award.⁴³ The Ai Group also supports the provisional view.⁴⁴

³⁷ [2022] FWCFB 15 at [23]

³⁸ [Ai Group submission, 21 March 2022](#) at [14]

³⁹ [2022] FWCFB 15 at [27]

⁴⁰ [HIA submission, 21 March 2022](#) p 1

⁴¹ [Ai Group submission, 21 March 2022](#) at [15]

⁴² [2022] FWCFB 15 at [37]

⁴³ [HIA submission, 21 March 2022](#) page 2

⁴⁴ [Ai Group submission, 21 March 2022](#) at [16]

[27] The CFMMEU opposes the provisional view on the basis that most modern awards, and particularly those in which the CFMMEU is interested in these proceedings, contain penalty rates for work on a public holiday. In these circumstances, the inclusion of the words “if any” in clause A.2.3 would be unnecessary and confusing.⁴⁵

[28] In reply, MBA submitted that it opposes the CFMMEU’s submission that including the words “if any” would create confusion.⁴⁶ The Ai Group also submitted in reply that it opposed the CFMMEU’s submission and stated that the words “if any” are an example of generalised drafting which is necessary for a standard Schedule to be used across multiple awards. These words address the possibility that a modern award does not provide for public holiday penalty rates.⁴⁷

Ordinary rate of pay

[29] The Full Bench expressed the provisional view that any clauses in the plain language versions of the Schedules including the words “rate of pay applicable to their ordinary hours” should be varied to instead refer to the “rate applicable under the NES”.⁴⁸

[30] MBA,⁴⁹ the LGA⁵⁰ and the Ai Group⁵¹ supported this provisional view. The CFMMEU acknowledged that the proposed change would be consistent with the public holiday clauses in awards, but opposed the provisional view because it believes that employees should be paid their “*ordinary time hourly rate*” when they are absent from work on a public holiday.⁵²

[31] In reply, MBA maintained its support for the provisional view but submitted that the current wording which refers to employees’ “*ordinary rate of pay*” should be retained in the Building Award and the Joinery Award in the event that the Commission is minded to consider any award-specific amendments.⁵³

[32] The Ai Group submitted in reply that the CFMMEU has not identified any persuasive argument that the provisional view should not be followed, and reiterated its support of the provisional view.⁵⁴

Full-day entitlements in certain public holiday provisions

[33] The Full Bench identified an issue regarding the interaction between the Schedules and clauses in some modern awards that provide for an employee to receive full-day entitlements

⁴⁵ [CFMMEU submission, 21 March 2022](#) at [8]

⁴⁶ [MBA submission in reply, 11 April 2022](#) at [6]

⁴⁷ [Ai Group submission in reply, 8 April 2022](#) at [6]-[11]

⁴⁸ [2022] FWCFB 15 at [58]

⁴⁹ [MBA submission, 21 March 2022](#) at [7]

⁵⁰ [LGA submission, 21 March 2022](#) at [11]

⁵¹ [Ai Group submission, 21 March 2022](#) at [26]

⁵² [CFMMEU submission, 21 March 2022](#) at [12]

⁵³ [MBA submission in reply, 11 April 2022](#) at [13]-[15]

⁵⁴ [Ai Group submission in reply, 8 April 2022](#) at [15]-[18]

when their ordinary hours of work include a day off and this day falls on a public holiday. The Full Bench expressed the provisional view that this issue could be resolved in a way that would avoid employees receiving payment for hours that would not have been worked on the part-day public holiday by inserting a term similar to clause A.2.6 of version 5 of the Schedule (which applies to the Timber Award only) in the Manufacturing Award, the *Food, Beverage and Tobacco Manufacturing Award 2020* (FBTM Award), the *Textile, Clothing, Footwear and Associated Industries Award 2020* (TCF Award) and the *Seafood Processing Award 2020* (Seafood Award).⁵⁵ Draft amended clauses for each of these four awards were published with the statement.

[34] The Ai Group agrees with the provisional view in relation to the Manufacturing Award, but suggested some amended wording for proposed clause A.2.8, removing the reference to rostered shifts in favour of inserting “*ordinary hours of work*” so as not to confine the operation of the clause.⁵⁶ The Ai Group also submitted that the same issue arises with respect to proposed clause A.2.7 in the FBTM Award, the TCF Award and the Seafood Award and therefore equivalent amendments should also be made in these awards.⁵⁷

[35] In reply the AMWU noted that it had not made submissions initially because it supported the Commission’s provisional view, but now wished to reply to the Ai Group’s submission. The AMWU submitted that the first appearance of the word “*ordinary*” should remain in proposed clause A.2.8 in the Manufacturing Award (such that it commences “*if an employee’s ordinary pattern of work*”) as well as a corresponding change for proposed clause A.2.7 in the FBTM Award. The AMWU submitted that the words “*working ordinary hours that include*” should replace the words “*rostered shifts which include*” in the proposed clause.⁵⁸

[36] The Full Bench also invited parties to comment on whether any other awards apart from the Manufacturing Award, the FBTM Award, the TCF Award and the Seafood Award included a similar issue in relation to the interaction with full-day entitlements in public holiday provisions.⁵⁹

[37] The Ai Group identified 13 further modern awards in this category.⁶⁰ In reply, the AMWU submitted that it was not clear whether the Ai Group was proposing that proposed clause A.2.8 also be inserted into these awards, but if it were, the AMWU would support this as it related to the *Graphic Arts, Printing and Publishing Award 2020*.⁶¹

Accrued day off

[38] The Full Bench invited the parties to identify whether there are any issues that may require award-specific consideration in relation to proposed clause A.2.5, which is contained in

⁵⁵ [2022] FWCFB 15 at [63]

⁵⁶ [Ai Group submission, 21 March 2022](#) at [30]

⁵⁷ *Ibid* at [33]

⁵⁸ [AMWU submission in reply, 8 April 2022](#) at [7]-[14]

⁵⁹ [2022] FWCFB 15 at [64]

⁶⁰ [Ai Group submission, 21 March 2022](#) at [34]

⁶¹ [AMWU submission in reply, 8 April 2022](#) at [16]-[17]

all five versions of the Schedule and provides for an “*accrued day off*” as well as a “*rostered day off*”:⁶²

“A.2.5 if a full-time or part-time employee is usually rostered to work ordinary hours on the part-day public holiday but does not work because they are on a rostered day off or accrued day off, then they are taken to be on a public holiday for those hours and must be paid at the rate of pay applicable to their ordinary hours during that time.”

[39] HIA submitted that only the term “*rostered day off*” should appear in the Building Award, the Joinery Award and the Timber Award because the term “*accrued day off*” is inconsistent with these awards.⁶³ Likewise, the Ai Group submitted that the term “*accrued day off*” should be removed to avoid inconsistencies with existing provisions in the number of modern awards which contain “*rostered day off*” provisions.⁶⁴

[40] The CFMMEU submits that the word “*or*” is no longer needed after “*rostered day off*”.⁶⁵

[41] MBA submitted that both terms should remain in the proposed clause to ensure all circumstances remain covered under the Schedule, rather than only those where an employee does not work because they are on a rostered day off.⁶⁶ The MBA reiterated this submission in reply, and noted that it understood the CFMMEU’s submission to indicate its support for removing the term “*accrued day off*” from the proposed clause.⁶⁷

[42] The CFMMEU submitted in reply that it did not support the MBA’s position because the current Building Award did not contain the term “*accrued day off*”.⁶⁸ Further, the CFMMEU submitted that the inconsistency issue identified by the Ai Group would not arise in practice.⁶⁹

Minimum payment provisions

[43] The Full Bench invited the parties to comment on whether a provision similar to clause 29.4(c) of the *Hospitality Industry (General) Award 2020* (Hospitality Award) would resolve any ambiguity in relation to the interaction between minimum payment periods in modern awards and the Schedules. Such a variation would be in the following terms:⁷⁰

“Hours of work performed immediately before or after a part-day public holiday, that form part of one continuous shift, are counted as part of the minimum payment/engagement period (if any) in this award.”

⁶² [2022] FWCFB 15 at [45]

⁶³ [HIA submission, 21 March 2022](#) at p 2

⁶⁴ [Ai Group submission, 21 March 2022](#) at [17]-[18]

⁶⁵ [CFMMEU submission, 21 March 2022](#) at [9]

⁶⁶ [MBA submission, 21 March 2022](#) at [11]

⁶⁷ [MBA submission in reply, 11 April 2022](#) at [7]-[9]

⁶⁸ [CFMMEU submission in reply, 11 April 2022](#) at [4]

⁶⁹ *Ibid* at [7]-[9]

⁷⁰ [2022] FWCFB 15 at [52]

[44] The HIA, MBA and the CFMMEU submitted that they would not oppose such a clause being inserted into the awards in which they had an interest, but this was qualified. The HIA submitted that some re-drafting would be required in order for such a clause to be included in the Building Award.⁷¹ The CFMMEU was opposed to the inclusion of the words “*if any*” in the clause.⁷²

[45] The Ai Group did not oppose the inclusion of the clause as drafted in the Schedules.⁷³

[46] The LGA submits that such a clause would be unnecessary in the LG Award because it does not contain a minimum payment provision.⁷⁴

[47] In reply, the MBA submitted that the CFMMEU’s proposal to remove the words “*if any*” from the clause should be rejected,⁷⁵ as did the Ai Group.⁷⁶ The CFMMEU submitted in reply that the HIA was incorrect to assert that the Joinery Award did not contain a minimum engagement provision and proposed further changes to be made to the proposed clause if it were to be inserted into the Building Award.⁷⁷

Award-specific issues – LG Award

[48] The Full Bench invited the parties to comment on whether the LGA’s proposed amendments to clause A.2.5 of the Schedule to the LG Award should be made or whether a tailored clause, as proposed by the Ai Group, should be considered.⁷⁸ The LGA had proposed the following:

“A.2.5 if a full-time or part-time employee is usually rostered to work ordinary hours on the part-day public holiday but does not work because they are on a rostered day off ~~or accrued day off~~, while employed on a 7 day a week rotating roster system or on an accrued rostered day off, then they are taken to be on a public holiday for those hours and must be paid at the rate of pay applicable to their ordinary hours during that time.”⁷⁹

[49] There was no agreement between the parties on this issue. The LGA proposed an alternative form of wording for the LG Award which it said would address its as well as the Ai Group’s position.⁸⁰ In reply, the ASU proposed a further alternative two clauses for the Schedule because the LGA’s proposal did not reflect the existing entitlements of employees under the LG Award.⁸¹

⁷¹ [HIA submission, 21 March 2022](#) at p 2

⁷² [CFMMEU submission, 21 March 2022](#) at [10]-[11]

⁷³ [Ai Group submission, 21 March 2022](#) at [25]

⁷⁴ [LGA submission, 21 March 2022](#) at [16]

⁷⁵ [MBA submission in reply, 11 April 2022](#) at [12]

⁷⁶ [Ai Group submission in reply, 8 April 2022](#) at [9]

⁷⁷ [CFMMEU submission in reply, 11 April 2022](#) at [5]-[6]

⁷⁸ [2022] FWCFB 15 at [71]

⁷⁹ *Ibid* at [69]

⁸⁰ [LGA submission, 21 March 2022](#) at [18]

⁸¹ [ASU submission in reply, 11 April 2022](#)

Award-specific issues – daily hire employees

[50] At paragraph [65] of the February 2022 Statement, the Full Bench noted that the CFMMEU had raised concerns that version 1 of the Schedule, which would apply to the Building Award, did not mention daily hire employees, the predominant form of employment under that award. The CFMMEU raised a number of additional issues in relation to this, and the parties were asked to report back to the Commission on whether a joint position was reached.⁸²

[51] It is apparent that the parties have not been able to reach a joint position on this issue. The differences of opinion remain following the filing of submissions in the matter. The CFMMEU submitted that it remains of the view that the words “*full-time or part-time employee*” should be replaced with “*part-time weekly hire, full-time weekly hire or daily hire employee*” wherever it appears in the Schedule to the Building Award, because it will remove ambiguity about daily hire employees’ entitlement to be paid for public holidays on which they do not work.⁸³ In addition, the CFMMEU submitted that references to “*part-time employee*” should be removed from the Schedule to the Mobile Crane Award as there is no part-time employment under the Award.⁸⁴ MBA disagreed with the CFMMEU’s contention that there was ambiguity in how daily hire employment interacted with the proposed Schedule to the Building Award.⁸⁵

[52] In reply, the Ai Group submitted that it did not support including daily and weekly hire employees in the descriptions in the Schedule to the Building Award on the basis that this would extend entitlements to such employees that were not currently available.⁸⁶ Further, this would introduce confusion, the Ai Group submitted, because daily hire employees are not “*usually rostered*” to work particular hours.⁸⁷ Similarly, MBA stated that the CFMMEU’s proposed amendment to the Schedule to the Building Award would create confusion and should be rejected.⁸⁸ While the HIA submitted in reply that it may be inconsistent with the nature of daily hire employment to include such employees in the Schedule to the Building Award, it did not oppose the CFMMEU’s proposed amendment.⁸⁹

[53] In relation to the CFMMEU’s submission regarding the Mobile Crane Award, the Ai Group submitted in reply that part-time employment was referenced in the award and on that basis the reference to part-time employment should remain in the Schedule.⁹⁰

[54] The CFMMEU submitted in reply that nothing of substance had been raised by the Ai Group or HIA in response to its submission, and requested a further opportunity to make

⁸² [2022] FWCFB 15 at [67]

⁸³ [CFMMEU submission, 21 March 2022](#) at [14]

⁸⁴ *Ibid* at [15]

⁸⁵ [MBA submission, 21 March 2022](#) at [16]-[18]

⁸⁶ [Ai Group submission in reply, 8 April 2022](#) at [21]

⁸⁷ *Ibid* at [24]-[27]

⁸⁸ [MBA submission in reply, 11 April 2022](#) at [18]

⁸⁹ [HIA submission in reply, 11 April 2022](#)

⁹⁰ [Ai Group submission in reply, 8 April 2022](#) at [28]-[30]

submissions on the issue should the Commission give consideration to the Ai Group's position.⁹¹

Consideration

[55] As we have earlier recounted, the Schedules were placed into awards in 2012 by way of a largely consensual process intended to address parties' concerns as to how the existing provisions of awards would interact with the part-day public holidays introduced that year in South Australia. The Schedules began as an interim measure and, since then, the Commission has grappled with how the issue of whether, and how, the issue of part-day public holidays should be addressed in modern awards in the longer term. The 2020 conference conducted by Commissioner Hampton, his report arising from this and the February 2022 Statement together constituted endeavours to identify an accepted basis upon which the Schedules would remain in the 2020 versions of modern awards established as a result of the 4 yearly review of modern awards.

[56] As our summary of the submissions received in response to the February 2022 Statement makes clear, there is no consensus amongst the parties as to the form the Schedules should take in the future and, indeed, the submissions expose some fundamental difference in principle between the parties. On one view, the attempt to create plain language versions of the Schedules, far from assisting parties by addressing perceived difficulties and uncertainties as to how award provisions should apply to part-day public holidays, has instead created difficulties and uncertainties. In these circumstances, we do not propose to determine individually the wide range of issues thrown up by the parties' submissions. Instead, we think the time has come to engage in a more fundamental consideration of whether the continuation of the Schedules serves any practical purpose.

[57] This consideration may proceed by reference to two awards covering employers and employees most likely to be affected by the part-day public holidays which operate in South Australia and Queensland: the *Fast Food Industry Award 2020* and the *Hospitality Award*. Schedule F of the former award currently provides:

- F.1** This schedule operates where this award otherwise contains provisions dealing with public holidays that supplement the NES.
- F.2** Where a part-day public holiday is declared or prescribed between 6.00 pm and midnight, or 7.00 pm and midnight on Christmas Eve (24 December in each year) or New Year's Eve (31 December in each year) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this award relating to public holidays to the extent of the inconsistency:
 - (a)** All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.

⁹¹ [CFMMEU submission in reply, 11 April 2022](#) at [10]-[13]

- (b) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.
- (c) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of being on annual leave does not work, they will be taken not to be on annual leave during the hours of the prescribed part-day public holiday that they would have usually been rostered to work and will be paid their ordinary rate of pay for such hours.
- (d) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday, but as a result of having a rostered day off (RDO) provided under this award, does not work, the employee will be taken to be on a public holiday for such hours and paid their ordinary rate of pay for those hours.
- (e) Excluding annualised salaried employees to whom clause F.2(f) applies, where an employee works any hours on the declared or prescribed part-day public holiday they will be entitled to the appropriate public holiday penalty rate (if any) in this award for those hours worked.
- (f) Where an employee is paid an annualised salary under the provisions of this award and is entitled under this award to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked between on the declared or prescribed part-day public holiday.

F.3 An employer and employee may agree to substitute another part-day for a part-day that [is a] part-day public holiday under the NES.

F.4 This schedule is an interim provision and subject to further review.

[58] Upon analysis, it is clear that Schedule F establishes no prescription additional to or independent of the NES or the provisions in the body of the Fast Food Award:

- Clauses F.1 and F.4 are machinery provisions.
- Clause F.2(a) is simply a reflection (albeit incomplete) of s 114 of the FW Act (noting that the provisions of the FW Act which refer to “*public holidays*” include part-day public holidays declared in a State or Territory: s 115(1)(b)).
- Clause F.2(b) reflects s 116 of the FW Act except, confusingly, it uses the expression “*ordinary rate of pay*” in respect of the requirement for payment instead of the defined expression “*base rate of pay*” used in s 116.
- Clause F.2(c) reflects s 89(1) of the FW Act.

- Clause F.2(d) deals with employees taking rostered days off during part-day public holidays, but the Fast Food Award does not make any provision for rostered days off nor does it contain any full-day public holiday provisions referring to rostered days off.
- Clause F.2(e) repeats the effect of clause 27.3(b) of the Fast Food Award.
- Clause F.2(f) deals with employees paid an annualised salary under the provisions of the award, but the Fast Food Award does not contain any annualised salary provision.
- Clause F.3 repeats the effect of clause 27.2(b) of the Fast Food Award.

[59] It does not appear to us therefore that Schedule F of the Fast Food Award serves any purpose. It does not meaningfully address any of the five categories of ambiguity or uncertainty set out in paragraph [2] above which formed the *raison d'être* for the establishment of the Schedules in 2012, and does not establish any entitlement or obligation that is not already applicable under the NES or the other provisions of the Fast Food Award. That being the case, it cannot be said that its continued inclusion in the award is necessary to meet the modern awards objective.

[60] Schedule I of the Hospitality Award provides:

- I.1** This schedule operates where this award otherwise contains provisions dealing with public holidays that supplement the NES.
- I.2** Where a part-day public holiday is declared or prescribed between 6.00 pm and midnight, or 7.00 pm and midnight on Christmas Eve (24 December in each year) or New Year's Eve (31 December in each year) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this award relating to public holidays to the extent of the inconsistency:
- (a) All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.
 - (b) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.
 - (c) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of being on annual leave does not work, they will be taken not to be on annual leave during the hours of the declared or prescribed part-day public holiday that they would have usually been rostered to work and will be paid their ordinary rate of pay for such hours.

- (d) Where a part-time or full-time employee is usually rostered to work ordinary hours between 6.00 pm and midnight or 7.00 pm and midnight, but as a result of having a rostered day off or an accrued day off provided in this award, does not work, the employee will be taken to be a on a public holiday for such hours and paid their ordinary rate of pay for those hours.
- (e) Excluding annualised wage arrangement employees to whom clause I.2(f) applies, where an employee works any hours on the declared or prescribed part-day public holiday they will be entitled to the appropriate public holiday penalty rate (if any) in this award for those hours worked.
- (f) Where an employee is paid an annualised wage arrangement under the provisions of this award and is entitled under this award to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked on the declared or prescribed part-day public holiday.
- (g) An employee not rostered to work on the declared or prescribed part-day public holiday, other than an employee who has exercised their right in accordance with clause I.2(a), will not be entitled to another day off, another day's pay or another day of annual leave as a result of the part-day public holiday.

I.3 An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES.

I.4 This schedule is not intended to detract from or supplement the NES.

[61] Clauses I.1 and I.4 are machinery provisions, and clauses I.2(a), (b) and (c) reflect the NES in the same way as clauses F.2(a), (b) and (c) of the Fast Food Award. As to the other provisions of Schedule I:

- Clause I.2(d) deals with the situation where the employee is normally rostered to work on a part-day public holiday but is absent from work on a “rostered day off” (RDO) or an “accrued day off” (ADO). As clause 15, *Ordinary hours of work and rostering arrangements* of the Hospitality Award makes apparent, the concepts of RDOs and ADOs are relevant only to full-time employees. Clause I.2(d) provides, in respect of part-day public holidays, an equivalent to clause 35.3 of the Hospitality Award, which provides:

35.3 Additional public holiday arrangements for full-time employees

An employer must, if the rostered day off or accrued day off of a full-time employee falls on a public holiday, do one of the following:

- (a) pay the employee an extra day's pay; or

- (b) give the employee an alternative day off within 28 days; or
- (c) give the employee an additional day's annual leave.

Clause I.2(d) appears to proceed on the premise that the references to a “*day’s pay*” and a “*day off*” imply that clause 35.3 is concerned only with full-day public holidays and not part-day public holidays.

- Clause I.2(e) repeats the effect of clause 29.2 of the Hospitality Award.
- Clause I.2(f) contradicts the effect of clause 24.2(a)(vi) of the Hospitality Award, as it now is, in respect of part-day public holidays for no apparent reason.
- Clause I.2(g) is confusing. Because it echoes the terms of clause 35.3 in listing the things to which an employee not rostered to work on a part-day public holiday is *not* entitled, it appears to be intended to exclude the potential operation of that clause in relation to part-day public holidays. However, the provision on one view contradicts clause I.2(d) insofar as payment for part-day public holidays falling on a rostered day off is concerned.

[62] The only matter which distinguishes Schedule I of Hospitality Award from Schedule F of the Fast Food Award is that, in clauses I.2(d) and I.2(g), it attempts to address the position applying to RDOS and ADOs coinciding with a part-day public holiday. However, it does so in a confusing and uncertain manner. This would better be addressed by an appropriate amendment to clause 35.3 so that it deals with part-day as well as full-day public holidays, and it is not a reason to retain the Schedule. In respect of the other categories of ambiguity/uncertainty in paragraph [2] above, annualised salary arrangements are separately dealt with in clause 24.2(a)(vi), annual leave taken because of an annual close down (or in any other circumstance) is dealt with in s 89(1), time off in lieu is dealt with in clause 29.4(d)(ii), and minimum engagement is dealt with in clauses 29.4(a)-(c). Schedule I makes no separate provision for part-day public holidays in respect of any of these matters except for clause I.2(f) which, as earlier stated, contradicts clause 24.2(a)(vi). Accordingly, subject to an appropriate amendment to clause 35.3 being made, we do not consider that it is necessary to continue Schedule I in the Hospitality Award in order to meet the modern awards objective.

[63] Our *provisional* view is therefore that the Schedules should be deleted from all awards in which they currently appear on the basis that where any Schedule makes provision for a matter in a way which does not simply repeat or reflect the NES or another term of the award, such provision should be incorporated in the body of the award by way of an appropriate amendment. In addition, there are some awards where further minor amendments may be necessary to clarify the application of existing award provisions to part-day public holidays where this is not currently dealt with by the Schedules.

[64] Draft determinations varying those awards currently containing the Schedules to give effect to our *provisional* view will be published in conjunction with this Statement. Parties will have **21 days from the date of this Statement** to file any submissions they wish to make in response to our *provisional* view and the terms of the draft determinations. Where, in the case

of any award, there is no opposition to the *provisional* view and the terms of the draft determination, a determination will be made varying the award in question.

[65] We do not propose to make any variations to those modern awards which do not currently contain a part-day public holiday schedule. If any interested party considers that the application of any provisions of those awards to part-day public holidays is attended by any practical uncertainty (as distinct from mere hypothetical uncertainty in respect of awards under which part-day public holidays have no practical relevance), they may make separate application to vary those awards pursuant to s 158 and/or s 160 of the FW Act.



VICE PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR746402>