



DECISION

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, 4 NOVEMBER 2022

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

Introduction

[1] In the Statement we issued on 30 September 2022 (the *September Statement*) we set out the history of the part-day public holiday schedules in modern awards (Schedules) and expressed the *provisional* view that the Schedules should be deleted from the 112 awards in which they currently appear (listed at Appendix A). This was on the basis that any provision contained in the Schedules which does not repeat relevant provisions of the National Employment Standards or another term in the award should be incorporated into the body of the award. We published draft determinations giving effect to this *provisional* view along with the *September Statement*.

[2] In the *September Statement* we sought submissions from parties in response to the *provisional* view and the draft determinations. We received only 5 submissions from the following interested parties, none of which opposed the *provisional* view:

- Australian Industry Group (Ai Group);
- Master Builders Australia;
- the combined Local Government Associations (Local Government NSW and the Western Australian Local Government Association);
- Motor Trades Organisations (the Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, and the Motor Trade Association of Western Australia); and
- Housing Industry Association (HIA).

[3] The Ai Group makes a general submission concerning minimum payments or minimum periods of engagement on a public holiday which affects 60 of the subject awards and specific

submissions concerning the draft determinations for 14 named awards. The HIA also raises a specific drafting issue concerning the draft determination for the *Building and Construction General On-site Award 2020* (Building Award). The other submissions raise no specific issue concerning any of the draft determinations.

[4] We deal with the matters raised by the Ai Group and the HIA below *seriatim*.

Minimum payments/minimum engagement periods

[5] In 60 of the draft determinations, we have proposed to insert the following wording:

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 in clause x.

[6] The Ai Group supports the inclusion of the above clauses but submits that the provision should also apply to full-day public holidays. This would operate so that, as an example, if an employee performs work on a night shift that straddles an ordinary day and a public holiday, the work performed on the day preceding the public holiday should be counted as part of any applicable minimum engagement or payment period that applies to the public holiday. It also submits that by expressly setting out the provision for shifts commencing before or after a *part-day* public holiday, there is a risk that the absence of such a provision for other public holidays will be used as a reason to treat those days differently.

[7] We do not consider that we should act upon this submission. The proposed clause is intended to deal with circumstances peculiar to the interaction of part-day public holiday provisions and minimum payment or engagement provisions. Where, for example, an award provides for a minimum payment of four hours' pay for work on a public holiday, a question may arise as to whether, for an employee rostered to work four hours on a day part of which is a public holiday, the minimum payment requirement is satisfied if the rostered work straddles the time at which the part-day public holiday commences. This may be a live issue in respect of part-time and casual employees in industries such as retail, hospitality and restaurants. The proposed clause addresses this issue by putting beyond doubt that, in the situation described, the minimum payment requirement is satisfied.

[8] The Ai Group submission raises the quite different scenario of a night shift which straddles the midnight point at which a full-day public holiday commences or ends. Night shifts raise different issues which are usually dealt with specifically by the shift work provisions of awards. These issues travel well beyond the scope of this aspect of the 4 yearly review of modern awards, which specifically concerns the current part-day public holidays schedules found in most awards. Accordingly, we do not consider that it is appropriate to deal with the Ai Group's general submission in this proceeding. It is, of course, open to the Ai Group to make an application under s 158(1) of the *Fair Work Act 2009* (FW Act) to vary any award in respect of the issue it has identified.

Aged Care Award 2010

[9] The Ai Group submits that the second dot point in clause 29.2(a)(ii) should be varied to read “A *full-time employee who does not work on a public holiday will be paid their ordinary pay for that day or part-day*”, to make clear that the entitlement applies on a pro rata basis. We agree that this requires clarification, but we consider the provision should be altered to read:

- A full-time employee who does not work on a public holiday **or part-day public holiday** will be paid their ordinary pay for that day **or part-day**.

[10] The Ai Group also submits that the third dot point in clause 29.2(a)(ii) should be varied to read “*Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been on a public holiday or part-day public holiday*”, in order to make clear that public holiday payments for any part of a shift that falls on a part-day public holiday is instead of any shift or weekend penalty rates. It seeks equivalent variations to be made to clauses 29.2(b)(v) and 29.2(c)(iii).

[11] We do not consider that the addition of the words “*or part-day public holiday*” is necessary, since in the context of these provisions it is clear enough that the expression “*public holiday*” in these provisions necessarily includes part-day public holidays. However, the Ai Group is right to point to the erroneous omission of the word “*on*” in the provision; accordingly, it will be corrected to read:

- Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been **on** a public holiday.

Building and Construction General On-site Award 2020

[12] The draft determination would vary clause 30.1 so that it reads: “*(e) All work performed on public holidays, or substituted days or part-days, must be paid at 250% of the ordinary hourly rate.*” The Ai Group submits that clause 30.1 would be clearer if it read: “*(e) All work performed on public holidays, or substituted public holidays or part-day public holidays, must be paid at 250% of the ordinary hourly rate*”. We do not agree, since the terminology proposed is inconsistent with the way in which substitute days are expressed in clauses 36.2 and 36.3. The proposed variation to the draft determination will therefore not be made.

[13] The draft determination would also add the following new clauses 29.11 and 30.2(e) to the Building Award as follows:

29.11 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 in clause 29.10.

[30.2](e) 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 in clause 30.2(d)

[14] The HIA submits that the term “*continuous shift*” is not used in the Building Award, and the above new provisions should be varied so that they simply say “*Hours of work performed immediately before or after a part-day public holiday are counted as part of the*”

minimum payment/engagement period...”. We reject this. The determination as drafted makes it clear that, in order for the new provisions to apply, the hours worked immediately before or after the part-day public holiday must be continuous with the hours worked during the part-day public holiday. This requirement is absent from the HIA’s version.

Cement, Lime and Quarrying Award 2020

[15] Clauses 14.6(b) and (c) currently provide:

(b) Rostered days off on public holidays

When a rostered day off falls on a public holiday prescribed in clause 27—Public holidays, the next working day will be taken instead of the rostered day off unless an alternative day is agreed to between the employee and the employer.

(c) Rostered day off accrual

Each day of paid leave taken and any public holiday occurring during any cycle of 4 weeks will be regarded as a day worked for the purposes of accruing a rostered day off.

[16] The draft determination would amend clause 14.6(c) to add the words “*or part-day*” after the words “*regarded as a day*”. The Ai Group proposes instead that a new subclause be added after clauses 14.6(c) and (d) which would provide:

Clauses 14.6(b) and 14.6(c) apply on a pro-rata basis where a paid rostered day off falls on a part-day public holiday.

[17] We do not consider that the proposed variation should be made, principally because it is unclear how a substitute rostered day off could be given on a pro-rata basis for that part of it which falls on a part-day public holiday. We would also observe that in the industry covered by this award, it is highly unlikely that clause 14.6(b) would have any practical work to do in respect of a part-day public holiday.

Clerks – Private Sector Award 2020

Commercial Sales Award 2020

Graphic Arts, Printing and Publishing Award 2020

[18] The variations the Ai Group has proposed to the draft determinations for these awards are the same in effect as those it proposes for the Building Award. They are rejected for the same reasons as stated in relation to the Building Award.

Electrical, Electronic and Communications Contracting Award 2020
Joinery and Building Trades Award 2020
Plumbing and Fire Sprinklers Award 2020
Security Services Industry Award 2020

[19] The variations proposed by the Ai Group for the draft determinations for these awards are the same in effect as that which it proposes for the *Cement, Lime and Quarrying Award 2020*. They are rejected for the same reasons.

Hair and Beauty Industry Award 2020

[20] Clause 29.3 of this award currently provides:

29.3 Payment for work on public holiday or substitute day

- (a) Subject to clause 29.3(b), an employer must pay an employee who works on a public holiday or part-day public holiday, or on a day that is substituted for a public holiday or part-day public holiday, at the public holiday penalty rate set out in clauses 22—Overtime and 23—Penalty rates.
- (b) Where an agreement to substitute a part-day under clause 29.2 has been made the following applies:
 - (i) if both days are worked, then the public holiday penalty rate applies on the day or part-day elected by employee;
 - (ii) if only the actual public holiday or part-day public holiday is worked, then the public holiday penalty rate applies; or
 - (iii) if only the substitute public holiday or part-day public holiday is worked, then the public holiday penalty rate applies.

[21] The Ai Group submits that although the text of clauses 29.3(b)(i)-(iii) suggests that the provision applies to all public holidays, including part-day public holidays, the chapeau refers only to part-day public holidays. Accordingly, it is submitted, the reference to “*part-day*” in the chapeau should be replaced with “*public holiday*”.

[22] We agree with the Ai Group that there is an inconsistency between the chapeau in clause 29.3(b) and paragraphs (i)-(iii). It is clear from clauses 35.2 and 35.3 of the 2010 version of this award that paragraphs (i)-(iii) are intended apply to both full-day and part-day public holidays. The chapeau therefore requires correction. In addition, we observe that two other matters require correction:

- (1) Clause 29.3(a) should refer to a day *or part-day* that is substituted for a public holiday or part-day public holiday but does not.
- (2) The word “*the*” before “*employee*” is missing from clause 29.3(b)(i).

[23] The determination to be made will add a variation to clause 29.3 so that it reads as follows:

29.3 Payment for work on public holiday or substitute day

- (a) Subject to clause 29.3(b), an employer must pay an employee who works on a public holiday or part-day public holiday, or on a day **or part-day** that is substituted for a public holiday or part-day public holiday, at the public holiday penalty rate set out in clauses 22—Overtime and 23—Penalty rates.
- (b) Where an agreement to substitute a **day or** part-day under clause 29.2 has been made the following applies:
 - (i) if both days are worked, then the public holiday penalty rate applies on the day or part-day elected by **the** employee;
 - (ii) if only the actual public holiday or part-day public holiday is worked, then the public holiday penalty rate applies; or
 - (iii) if only the substitute public holiday or part-day public holiday is worked, then the public holiday penalty rate applies.

Seafood Processing Award 2020

[24] Clause 20.2(a) provides:

- (a) A day worker required to work on a public holiday must be paid for a minimum of 3 hours' work at the rate of **250%** of the minimum hourly rate.

[25] The Ai Group submits that this clause does not make it clear that the hours of work performed immediately before or after a public holiday or part-day public holiday which form part of one continuous shift and are to be counted as part of the minimum payment period specified. It submits that a new clause 20.2(c) should be added which provides:

- (c) Hours of work performed immediately before or after a public holiday, that form part of one continuous shift, are counted as part of the minimum payment period in clause 20.2(a).

[26] We accept the Ai Group's submission in respect of part-day public holidays. However, we do not accept the point in respect of full-day public holidays, not least because the ordinary hours of a "*day worker*" must be worked between 6.00 am and 6.00 pm and thus cannot spread across the midnight point at which a full-day public holiday commences or finishes. Therefore the determination for this award will add a new clause 20.2(c) as follows:

- (c) 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 in clause 20.2(a).

Transport (Cash in Transit) Award 2020

[27] Clause 2 defines “public holiday” as meaning “a day identified as a public holiday in section 115 of the Act”. The Ai Group submits that, for clarity, this should read: “a day **or part-day** identified as a public holiday in section 115 of the Act”. We agree. A variation to this effect will be added to the determination to be made.

Vehicle Repair, Services and Retail Award 2020

[28] Clause 24.5(b) of this award provides:

- (b) For work other than that referred to in clause 24.9, an employee required to work overtime on a Sunday or a public holiday must be provided with at least 4 hours’ work, or paid for 4 hours at the appropriate rate.

[29] Item 2 of the draft determination would add a new clause 24.5(c) (with the existing clause 24.5(c) redesignated as 24.5(d)) as follows:

- (c) 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 in clause 24.5(b).

[30] The Ai Group submits that the new clause 24.5(c) is unnecessary because the existing clause 24.5(c) (which would become clause 24.5(d)) provides:

- (c) Clause 24.5 does not apply where work is continuous with overtime or work commenced on the previous day or completed on the following day.

[31] We do not agree that the proposed new clause is wholly unnecessary, because work on a part-day public holiday may be continuous with work that is commenced or completed on the same calendar day but is outside the prescribed timespan of the part-day. The proposed new clause will be modified to reflect this as follows:

- (c) Hours of work performed immediately before or after a part-day public holiday **on the same day as the part-day public holiday**, that form part of one continuous shift, are counted as part of the minimum payment/engagement period in clause 24.5(b).

[32] In addition, we observe that the new clause 24.5(d) should be corrected as follows for precision:

- (d) ~~Clauses 24.5(a) and (b)~~ does not apply where work is continuous with overtime or work commenced on the previous day or completed on the following day.

Conclusion

[33] We confirm the *provisional* view in the *September Statement*. We are satisfied that the variations contained in the draft determinations published in conjunction with the *September*

Statement, as modified by this decision, are necessary in order for the 112 subject awards to meet the modern awards objective. In reaching this conclusion, we have placed determinative weight on that part of the consideration in s 134(1)(g) of the FW Act which refers to the need for modern awards to be “*simple*” and “*easy to understand*”; the balance of the considerations in s 134(1) are either not relevant to the current proceeding or have neutral weight.

[34] Determinations giving effect to the *September Statement* and this decision are published in conjunction with this decision. The determinations will take effect on 14 November 2022.



VICE PRESIDENT

APPENDIX A – awards currently containing part-day public holidays

Award title	Award ID
<i>Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020</i>	MA000115
<i>Aged Care Award 2010</i>	MA000018
<i>Air Pilots Award 2020</i>	MA000046
<i>Aircraft Cabin Crew Award 2020</i>	MA000047
<i>Airline Operations—Ground Staff Award 2020</i>	MA000048
<i>Airport Employees Award 2020</i>	MA000049
<i>Ambulance and Patient Transport Industry Award 2020</i>	MA000098
<i>Amusement, Events and Recreation Award 2020</i>	MA000080
<i>Animal Care and Veterinary Services Award 2020</i>	MA000118
<i>Aquaculture Industry Award 2020</i>	MA000114
<i>Architects Award 2020</i>	MA000079
<i>Asphalt Industry Award 2020</i>	MA000054
<i>Banking, Finance and Insurance Award 2020</i>	MA000019
<i>Book Industry Award 2020</i>	MA000078
<i>Broadcasting and Recorded Entertainment Award 2020</i>	MA000091
<i>Building and Construction General On-site Award 2020</i>	MA000020
<i>Business Equipment Award 2020</i>	MA000021
<i>Car Parking Award 2020</i>	MA000095
<i>Cement, Lime and Quarrying Award 2020</i>	MA000055
<i>Cemetery Industry Award 2020</i>	MA000070
<i>Children’s Services Award 2010</i>	MA000120
<i>Cleaning Services Award 2020</i>	MA000022
<i>Clerks – Private Sector Award 2020</i>	MA000002
<i>Concrete Products Award 2020</i>	MA000056
<i>Contract Call Centre Award 2020</i>	MA000023
<i>Commercial Sales Award 2020</i>	MA000083
<i>Corrections and Detention (Private Sector) Award 2020</i>	MA000110
<i>Dredging Industry Award 2020</i>	MA000085
<i>Dry Cleaning and Laundry Industry Award 2020</i>	MA000096
<i>Educational Services (Post-Secondary Education) Award 2020</i>	MA000075
<i>Educational Services (Schools) General Staff Award 2020</i>	MA000076
<i>Educational Services (Teachers) Award 2020</i>	MA000077
<i>Electrical, Electronic and Communications Contracting Award 2020</i>	MA000025
<i>Electrical Power Industry Award 2020</i>	MA000088
<i>Fast Food Industry Award 2020</i>	MA000003
<i>Fire Fighting Industry Award 2020</i>	MA000111

Award title	Award ID
<i>Fitness Industry Award 2020</i>	MA000094
<i>Food, Beverage and Tobacco Manufacturing Award 2020</i>	MA000073
<i>Funeral Industry Award 2020</i>	MA000105
<i>Gardening and Landscaping Services Award 2020</i>	MA000101
<i>Gas Industry Award 2020</i>	MA000061
<i>General Retail Industry Award 2020</i>	MA000004
<i>Graphic Arts, Printing and Publishing Award 2020</i>	MA000026
<i>Hair and Beauty Industry Award 2020</i>	MA000005
<i>Health Professionals and Support Services Award 2020</i>	MA000027
<i>Higher Education Industry—Academic Staff—Award 2020</i>	MA000006
<i>Higher Education Industry—General Staff—Award 2020</i>	MA000007
<i>Horse and Greyhound Training Award 2020</i>	MA000008
<i>Horticulture Award 2020</i>	MA000028
<i>Hospitality Industry (General) Award 2020</i>	MA000009
<i>Hydrocarbons Field Geologists Award 2020</i>	MA000064
<i>Hydrocarbons Industry (Upstream) Award 2020</i>	MA000062
<i>Joinery and Building Trades Award 2020</i>	MA000029
<i>Journalists Published Media Award 2020</i>	MA000067
<i>Labour Market Assistance Industry Award 2020</i>	MA000099
<i>Legal Services Award 2020</i>	MA000116
<i>Live Performance Award 2020</i>	MA000081
<i>Local Government Industry Award 2020</i>	MA000112
<i>Mannequins and Models Award 2020</i>	MA000117
<i>Manufacturing and Associated Industries and Occupations Award 2020</i>	MA000010
<i>Marine Tourism and Charter Vessels Award 2020</i>	MA000093
<i>Marine Towage Award 2020</i>	MA000050
<i>Maritime Offshore Oil and Gas Award 2020</i>	MA000086
<i>Market and Social Research Award 2020</i>	MA000030
<i>Meat Industry Award 2020</i>	MA000059
<i>Medical Practitioners Award 2020</i>	MA000031
<i>Mining Industry Award 2020</i>	MA000011
<i>Miscellaneous Award 2020</i>	MA000104
<i>Mobile Crane Hiring Award 2020</i>	MA000032
<i>Nursery Award 2020</i>	MA000033
<i>Nurses Award 2020</i>	MA000034
<i>Oil Refining and Manufacturing Award 2020</i>	MA000072
<i>Passenger Vehicle Transportation Award 2020</i>	MA000063
<i>Pastoral Award 2020</i>	MA000035

Award title	Award ID
<i>Pest Control Industry Award 2020</i>	MA000097
<i>Pharmaceutical Industry Award 2020</i>	MA000069
<i>Pharmacy Industry Award 2020</i>	MA000012
<i>Plumbing and Fire Sprinklers Award 2020</i>	MA000036
<i>Ports, Harbours and Enclosed Water Vessels Award 2020</i>	MA000052
<i>Poultry Processing Award 2020</i>	MA000074
<i>Premixed Concrete Award 2020</i>	MA000057
<i>Professional Diving Industry (Industrial) Award 2020</i>	MA000108
<i>Professional Diving Industry (Recreational) Award 2020</i>	MA000109
<i>Racing Clubs Events Award 2020</i>	MA000013
<i>Racing Industry Ground Maintenance Award 2020</i>	MA000014
<i>Real Estate Industry Award 2020</i>	MA000106
<i>Registered and Licensed Clubs Award 2020</i>	MA000058
<i>Restaurant Industry Award 2020</i>	MA000119
<i>Road Transport and Distribution Award 2020</i>	MA000038
<i>Road Transport (Long Distance Operations) Award 2020</i>	MA000039
<i>Salt Industry Award 2020</i>	MA000107
<i>Seafood Processing Award 2020</i>	MA000068
<i>Seagoing Industry Award 2020</i>	MA000122
<i>Security Services Industry Award 2020</i>	MA000016
<i>Silviculture Award 2020</i>	MA000040
<i>Social, Community, Home Care and Disability Services Industry Award 2010</i>	MA000100
<i>Sporting Organisations Award 2020</i>	MA000082
<i>State Government Agencies Award 2020</i>	MA000121
<i>Stevedoring Industry Award 2020</i>	MA000053
<i>Storage Services and Wholesale Award 2020</i>	MA000084
<i>Supported Employment Services Award 2020</i>	MA000103
<i>Surveying Award 2020</i>	MA000066
<i>Telecommunications Services Award 2020</i>	MA000041
<i>Textile, Clothing, Footwear and Associated Industries Award 2020</i>	MA000017
<i>Timber Industry Award 2020</i>	MA000071
<i>Transport (Cash in Transit) Award 2020</i>	MA000042
<i>Travelling Shows Award 2020</i>	MA000102
<i>Vehicle Repair, Services and Retail Award 2020</i>	MA000089
<i>Waste Management Award 2020</i>	MA000043
<i>Water Industry Award 2020</i>	MA000113
<i>Wine Industry Award 2020</i>	MA000090
<i>Wool Storage, Sampling and Testing Award 2020</i>	MA000044

Printed by authority of the Commonwealth Government Printer

<PR747380>