

**SUBMISSION TO
FAIR WORK COMMISSION**

Matter No:

AM 2014/301

PUBLIC HOLIDAYS

JULY 2018

**SUBMISSION IN RESPONSE TO
STATEMENT ISSUED 21 JUNE 2018
RE: CHRISTMAS DAY ARRANGEMENTS IN THE
HEALTH & RELATED SECTOR AWARDS**

**SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS**

**Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Tasmania
Australian Private Hospitals Association – Victoria
Australian Private Hospitals Association – Western Australia
Catholic Health Australia
Day Hospitals Australia
Private Hospitals Association of Queensland
Private Hospitals Association of New South Wales**

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PARTIES TO THIS SUBMISSION

- [1] This submission is being lodged on behalf of the Private Hospital Industry Employers' Associations (PHIEA) which includes: Australian Private Hospitals Association (APHA), the Private Hospitals Association of Queensland (PHAQ), APHA – South Australia, APHA – Tasmania; APHA – Victoria, APHA – Western Australia, Private Hospitals Association of New South Wales, Catholic Health Australia and Day Hospitals Australia. These organisations collectively represent approximately 95% of licensed private hospital beds in Australia and in addition, represent approximately 90% of all Free Standing Day Hospitals.
- [2] In responding to the statement issued by Commissioner Hampton on 21 June 2018 [2018] FWC 3530, inviting submissions regarding the concept of whether some modern awards operating in the health and related sectors where the Nurses Award presently applies should be varied in relation to Christmas Day arrangements, it may be of assistance to briefly summarise the background which resulted in the current Christmas Day provision in the Nurses Award.

BACKGROUND

- [3] In 2012, the ACTU & Others (AM2012/132) & ANMF (AM2012/134) lodged an application to the Modern Awards Review 2012 – Public Holidays matter seeking to establish some model provisions in a number of awards, including the Nurses Award and the Health Professionals & Support Services Award. One element of the ACTU application related to Christmas Day Loading.

The ACTU's model provision (supported by the ANF) was as follows:
Christmas Day Loading

1. *An employee working on Christmas Day in circumstances where that day falls on a Saturday or Sunday and is not a public holiday within the meaning of the NES will be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and be entitled to the benefit of the substitute day.*
2. *This loading is cumulative with the rates prescribed in clause [x] – Penalty Rates*

This proposal not only sought an additional loading of 50% of the employee's ordinary time rate for the hours worked on that day but also to be entitled to the benefit of the substitute day.

- [4] In its submissions to the *Modern Awards Review 2012 – Public Holidays* issue (AM2012/134 & Others and AM2012/132) regarding Christmas Day payment when 25th December is not a gazetted holiday, PHIEA highlighted the significant financial burden such a clause would introduce for businesses which operate seven days a week such as Private Hospitals. Such a clause would allow for 'double dipping' in that an employee working on 25th December and on the substitute public holiday would receive two penalties for the same holiday celebration.

[5] As a suggestion, which would recognise the significance of Christmas Day but without adding to the costs of the business, PHIEA proposed the transfer of 50% penalty from the substitute day to the 25th December and proposed some wording for an alternative clause. In responding to this suggestion, the Full Bench observed:

[95] *There was some relevant evidence concerning the circumstances applying under the Nurses Award and in our view there is some merit in the PHIEA alternative proposal*

[96] *We will refer this element of the claims as applying to the Nurses Award to DP Smith to convene discussions with the relevant parties and to make the final determination having regard to this decision*

The resulting determination by DP Smith issued on 1 October 2013 (PR539905) following consultation and agreement by ANMF, PHIEA and Aged Care Employers, is reflected in the current provisions in the Nurses Award.

[6] In responding to the HSU's public holidays claim in March 2017, and in keeping with the proposal PHIEA had made in its submissions to the *Modern Awards Review 2012 – Public Holidays* issue (AM2012/134 & Others and AM2012/132) in respect of the Nurses Award, we put forward a conceptually similar proposal for consideration by the Full Bench as detailed in paragraph [7] below in respect of the HP&SS Award.

In our March 2017 response, PHIEA rejected the HSU's proposed clause for the HP&SS Award stating that for PHIEA to be able to agree to any amendment to the current HP&SS Award provisions, the proposal would need to reflect similar wording to that of the Nurses Award and therefore we suggested the following alternative clause for consideration.

[7] **32.1 Payment for work done on public holidays (HP&SS)**

- a) *All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time and a half of their ordinary rate of pay.*
- b) *Businesses that operate seven days a week shall recognise work performed on a public holiday which falls on a Saturday or Sunday and, where because of substitution, is not a public holiday within the meaning of the NES with the Saturday or Sunday payment (as appropriate) plus an additional loading of 50% of the employee's ordinary time rate for the hours worked on that day. All work performed on the substitute day by an employee will receive an additional loading of 100% of the ordinary time rate for the hours worked on that day instead of the rate referred to in clause 32.1 (a).*

Notes regarding underlined words in the above clause:

1. Whilst the wording in the PHIEA proposed clause 32.1 (a) and (b) above is essentially the same as the Nurses Award, clause 32.1 (a) was amended to reflect the fact that in the HP&SS Award the public holiday penalty is double time and a half and not double time as in the Nurses Award.

2. Similarly, in clause 32.1(b) we proposed that the additional loading payable on the substitute day should be 100% rather than the 50% payable in the Nurses Award. This difference in loading reflecting the fact that work performed on a public holiday in the Nurses Award is paid at double time of the ordinary rate of pay, rather than the double time and half applicable in the HP&SS Award.
3. In accordance with the arrangement currently under consideration by the Commission, the words 'public holiday' underlined in the above clause would obviously need to be substituted with 25 December.

[8] At present under the HP&SS Award, any employee working on 25 December which falls on a weekend day and which has a substituted day, is paid 150% for the weekend work. Any employee who works on the substituted day is paid 250% for working on the 'public holiday'.

PHIEA's suggested wording would see the employee who works on that weekend day paid at 200% (+50%) and would see an employee who works on the substituted day paid 200% (-50%).

As these amendments bring the proposal back to a cost neutral proposition, PHIEA would support an amendment to the Health Professionals and Support Services Award if it was worded in accordance with this suggestion.

As an employer group with a significant number of employees covered by both the Nurses and Health Professionals & Support Services Awards, we believe it would be preferable for there to be some consistency of terms for all hospital personnel working on Christmas Day.

Whilst PHIEA's interest in this matter is limited to the Nurses and Health Professional & Support Services Awards, we are of the view that the suggested wording above may be appropriate for the other health and related sector awards where the Nurses Award currently applies.

It is important to highlight however, that the Nurses Award has five weeks annual leave and public holiday penalties of 200%, whereas the other health and related awards have 4 weeks annual leave and 250% public holiday penalties, therefore whilst it may be appropriate to adopt the same wording, in order to ensure equity to both employers and employees, PHIEA is of the view that for awards with 4 weeks annual leave and 250% public holiday penalties, the clause wording should be in line with our proposed clause noted in paragraph [7] on page 3, subject to substituting the words 'public holiday' in clause 32.1 (b) line 2 with '25 December'.

Should the Commission consider that a conference is warranted, PHIEA would intend to participate.

[END OF SUBMISSION]