

## AM2014/301 – PUBLIC HOLIDAYS

### Outline of Submissions of Clubs Australia (Industrial)

1. Clubs Australia Industrial ('CAI') seek changes to the public holiday provisions of the *Registered and Licensed Clubs Award 2010* ('the Award') outlined at paragraph 5 below in relation to limiting the number of public holidays and removing additional pay for public holidays that fall on days that employees would not ordinarily work.
2. The effect of the interplay between the NES and the Award is that there has been a significant increase in the number of public holidays impacting clubs. CAI submits that the public holidays recognised by the Award for the purposes of payment of penalty rates should be limited to the standard safety net for awards.
3. The impact of public holidays is exacerbated by an Award provision which requires that employees be given the equivalent of a day's pay for all public holidays even if they would not have ordinarily worked on the public holidays. CAI submits that the continuation of such a provision in the Award when the *Fair Work Act 2009* ('the Act') has limited payments for public holidays to days that employees would ordinarily work, is neither desirable nor necessary.

### Public Holidays and Clubs

4. Public Holidays are a particular cost impact for Clubs due to a number of factors:
  - (a) Clubs are formed for the purpose of member's recreation and leisure pursuits<sup>1</sup>;
  - (b) These recreation and leisure pursuits are most in demand on public holidays because:
    - (i) Members are less likely to be at work and are, therefore, more available to attend their club;
    - (ii) Clubs are an integral part of the holiday itself (such as RSL clubs on Anzac Day); and
    - (iii) For many clubs the busiest times of year are Christmas and Easter (which is also when there are the largest number of public holidays).
  - (c) Clubs are membership based and not for profit.<sup>2</sup> As such, there has traditionally been an expectation that clubs will be available to members on public holidays, whether or not it is profitable for clubs to trade. Liquor laws have traditionally recognised this fact in allowing clubs more liberal trading hours, including in relation to public holiday trade;

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<sup>1</sup> S. 10 of the *Registered Clubs Act 1976* provides that clubs be established for social, literary, political or other lawful purpose.

<sup>2</sup> The *Registered Clubs Act 1976* NSW highlights some of the distinctions between clubs and their profit-based counterparts, such as hotels and restaurants. NSW clubs can be established only for social, literary, political, sporting, athletic or other lawful purposes. Clubs are owned by their members whose membership fees buy a share in the club and contribute to a common fund for the benefit of members. However, the legislation prohibits any distribution of club profits or income amongst members so, unlike commercial organisations, no dividends are paid to these 'shareholders'. Non-members also can patronise a club, but only if they reside more than five kilometres away, if they are members of another club with similar objectives, or if they are visiting to attend an organised sport or competition the club is hosting. Accordingly, clubs are considered not-for-profit organisations as trading profits do not accrue to individuals, but must be channelled into facilities and services that benefit members, promote the purpose for which the club was established, and/or support charitable or community causes.

- (d) Given that clubs employ a higher proportion of permanent employees than other areas of hospitality, the cost of public holidays are greater for clubs. Under the Award and NES full-time employees not only receive penalty rates if they work on a public holiday but they are paid for every public holiday even if they would not ordinarily work on the public holiday. Casual employees, however, only receive payment if they actually work on a public holiday;
- (e) The situation is exacerbated as a result of State Governments promulgating additional, rather than substitute holidays, when a public holiday falls on a weekend;
- (f) This trend of promulgating additional public holidays has been particularly apparent in NSW (for example, since 2011 additional holidays have been legislated in NSW when Christmas Day or New Year's Day fall on a weekend) where the largest number of club employees are engaged, thereby increasing the financial impact of this practice;
- (g) Unlike most other industries all of the management employees in clubs are covered by the Award and they are generally employed on a full-time basis. These, often highly paid, managerial employees also receive the additional public holiday benefits; and
- (h) The costs associated with public holidays results in club's either not being able to trade, reducing the service's offered or incurring exorbitant costs, with a consequent reduction in the employment opportunities that can be offered to employees.

### Changes sought to the Award

5. In its correspondence to the FWC dated 12 February 2015, CAI foreshadowed that it will seek the following changes to the Award:
  - “(a) that the days which are to be regarded as public holidays for the purposes of the Award be defined by the Award;
  - (b) subject to paragraph (c) below;
  - (c) that employees only be entitled to one public holiday in respect of each celebration (either the day itself or any day substituted for the day itself); and
  - (d) that employees be entitled to be paid for absences on a public holiday only if they would have ordinarily worked on that day (and not otherwise) by the deletion of clause 34.3(a) and (b) of the Award.”

Hereafter paragraph (a), (b) and (c) will be referred to collectively as ‘**Limiting the Number of Holidays**’ and paragraph (d) will be referred to as ‘**the Additional Days Provision**’.

6. Also, an issue that arose in the Penalty Rates Common Issue proceedings in relation to the application of the additional loading for work on Christmas Day under the Award was moved to be dealt with in the proceedings in relation to the Public Holidays Common Issue. (**‘Christmas Day Loading Clarification**’).

### Limiting the Number of Holidays

7. CAI seek to cap the number of holidays for which it is required to pay employees who work on a public holiday at the standard number of holidays that had been traditionally recognised in Federal Awards prior to the introduction of the NES.

8. As noted in the Penalty Rates case, this was consistent with the 2012 post-implementation review of the *Fair Work Act*<sup>3</sup> and the Productivity Commission Final Report.<sup>4</sup>
9. The reason that public holidays have increased is that State and Territory Governments have proclaimed additional holidays.
10. The reason for proclaiming these public holidays is not always clear. In most cases, however it appears that additional days are being promulgated so that employees who would not ordinarily work on the day that the public holidays falls because it is a weekend will still receive a public holiday, and vice versa. For example, in the *Public Holidays Act 2010* (NSW), since 2011, additional days are declared for Christmas and New Year's Day when they fall on weekends.
11. CAI accepts that the operation of s. 114, to some extent, limits the FWC's powers to address such issues. Nevertheless, to the extent that the FWC has power to address the extension of public holidays in the Award, CAI submits that it should do so. To this end, CAI proposes two changes. Firstly, the Award should be changed to not provide for penalty rates to be paid for work on those days. Secondly, the Award provision providing additional holidays for those not rostered to work on a public holiday ('the Additional Day Provision') should be removed.
12. Limiting the number of Holidays attracting the payment of public holiday penalty rates to the standard 11 days is consistent with what the FWC traditionally regarded as a fair safety net. To increase the number of days adds significant cost to club employers when it is not apparent that there is any disutility associated with working on these additional days. For example, there is no particular celebration which occurs on those days which an employee would be unable to participate in if they worked on that day.
13. Clause 34.3 of the Award should also be removed for, amongst other reasons, that it constitutes double-dipping. That is, the problem of an additional day with respect to the same public holidays is doubled because the Award gives an additional days pay to purportedly avoid employees missing out on public holidays falling on a weekend and State Governments promulgate additional public holidays for the same reason.
14. The Act deals comprehensively with the number of public holidays and with compensation for holidays for employees that do not work. In the circumstances, it is neither desirable nor necessary for the Award to also regulate these issues beyond what is expressly provided for in the Act.
15. For the reasons CAI elaborates upon below, it submits that such a provision also excludes the operation of and/or is inconsistent with the NES and the modern awards objective.

#### ***Public Holiday Entitlements under the Award***

16. Clause 3 of the Award provides that "**public holiday** means a day identified as a public holiday in the NES".
17. Clauses 29.1 and 29.2 of the Award provides for a penalty rate of 250% for an employee working on a public holiday (inclusive of the 25% casual loading).
18. Clause 29.3 of the Award provides as follows:

*"Public holidays*

*(a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work.*

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<sup>3</sup>pp. 102-103

<sup>4</sup> Australian Government Productivity Commission (2015), *Workplace Relations Framework: Productivity Commission Inquiry Report Volume 1*, No.76 at p.55, Recommendation 16.2; also at p. 540, Recommendation 16.2

*(b) Employees other than maintenance or horticultural employees who work on a prescribed holiday may, by agreement, perform such work at ordinary rates plus 50% additional loading, instead of the penalty rate prescribed in clause 29.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due.*

*(c) An employee other than a casual working on Christmas Day when it falls on a weekend will be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.*

19. Clause 30.1 of the Award provides for an additional weeks leave for a shift worker which "means a seven day shift worker who is regularly rostered to work on Sundays and public holidays, and includes a club manager".

20. Clause 34, Public Holidays, of the Award provides:

*"34.1 Public holidays are provided for in the NES.*

*34.2 By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in s.115 of the Act.*

*34.3 Additional arrangements for full-time employees*

*(a) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 29.3:*

- (i) be paid an extra day's pay;*
- (ii) be provided with an alternative day off within 28 days; or*
- (iii) receive an additional day's annual leave.*

*(b) Clause 34.3(a) does not apply in relation to Easter Saturday, if employees have their ordinary hours rostered only on Monday to Friday.*

*(c) A full-time employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day."*

21. Accordingly, on a public holiday a club must pay:

- (a) Double time and a half to those employees who work;
- (b) The equivalent of one day's pay to those full-time employees who would not ordinarily have been required to work;
- (c) The equivalent of one day's pay to those employees who would have ordinarily been required to work;
- (d) Additional annual leave to those employees regularly working Sundays and public holidays; and
- (e) For employees working on a weekend, significantly higher penalty rates than industries, such as hospitality, and retail, together with the provision of an additional day for a public holiday if the employee would not ordinarily work that day.

### **NES Entitlements**

22. The public holidays to which the entitlements in the Award are derived are those provided for in the NES. Accordingly, the Award's provisions in relation to public holidays must be in

accordance with the NES. CAI submits that the Additional Day Off Provision in clause 34.3 of the Award is not in accordance with the NES.

23. The NES provides for public holidays in Division 10 as follows:

***Division 10—Public holidays***

***114 Entitlement to be absent from employment on public holiday***

*Employee entitled to be absent on public holiday*

*(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. Reasonable requests to work on public holidays*

*(2) However, an employer may request an employee to work on a public holiday if the request is reasonable.*

*(3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:*

*(a) the request is not reasonable; or*

*(b) the refusal is reasonable.*

*(4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:*

*(a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;*

*(b) the employee's personal circumstances, including family responsibilities;*

*(c) whether the employee could reasonably expect that the employer might request work on the public holiday;*

*(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;*

*(e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);*

*(f) the amount of notice in advance of the public holiday given by the employer when making the request;*

*(g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request; and*

*(h) any other relevant matter.*

***115 Meaning of public holiday .***

*The public holidays*

*(1) The following are public holidays:*

*(a) each of these days:*

(i) 1 January (New Year's Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

.....

#### **116 Payment for absence on public holiday**

*If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.*

*Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.*

24. Section 61(3) provides that "*Divisions 3 to 12 constitute the National Employment Standards*". Accordingly, all of Division 10 (which includes s. 116 and the Note) forms part of the NES.
25. This provision has the effect of expressly including the Note to s.116 even though such notes would not otherwise have been deemed to be included as part of the Act.<sup>5</sup>
26. Even if the view was taken that the Note did not form part of the Act that does not mean that they may not be used as an aid to construction and it should not be disregarded.<sup>6</sup>
27. Section 55(1) makes it clear that a modern award "*must not exclude the National Employment Standards or any provision of the National Employment Standards*".
28. CAI submits that clause 34.1 (c) of the Award excludes a provision of the NES, specifically s. 116 of the Act.
29. The *Explanatory Memorandum* for the *Fair Work Bill 2008* provides the following explanation of s.116:  

*"460. Clause 116 entitles an employee to payment when absent from work on a public holiday. Where an employee is absent on a day or part-day that is a public holiday under this*

<sup>5</sup> See the *Acts Interpretation Act 1901* (Cth) as it stood when the *Fair Work Act 2009* commenced operation

<sup>6</sup> [2012] FWCFB 5600 at [17]

*Division, the employer is liable to pay the employee at his or her base rate of pay for ordinary hours of work.*

*461. An employee is not entitled to any payment for absence on a public holiday if they would not ordinarily have worked on that day.”*

30. The operation of the Division 10 was considered by Ranelagh J in *Queensland Nurses Union of Employees v Ramsay Health Care Australia Pty Ltd*<sup>7</sup>:

*“The obligation on an employer under s 116 of the FWA to pay an employee for a public holiday arises only where the employee is absent from his or her employment on the public holiday “in accordance with this Division”. The words “this Division” refer to Div 10, particularly s 114.*

*Section 114(1) of the FWA confers an entitlement (qualified by s 114(2)) on an employee to be absent from his or her employment on a public holiday. Section 114(1) operates upon the tacit assumption that the employee would otherwise be required to work under the terms of his or her employment on that day. Otherwise, there would be no point in conferring a statutory entitlement to be absent. Further, where s 116 applies, the employer is required to pay the employee “at the employee’s base rate of pay for the employee’s ordinary hours of work on the day or part-day”. The provision assumes that the employee has ordinary hours of work on the public holiday. This is reinforced by the note to s 116 which states, “If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section.”*

*Depending on the context, the phrase “in accordance with” can mean “under an obligation created by” a particular term or provision: see Chan v Cresdon Pty Ltd [1989] HCA 63; (1989) 168 CLR 242 at 249. In its context in s 116, the phrase means “under the entitlement created by” s 114 of the FWA.*

*For the purposes of s 116 of the FWA, an employee will be absent from his or her employment on a public holiday “in accordance with” Div 10 if the employee is absent under the entitlement to be absent created by s 114. An employee will be absent under that entitlement if the employee has ordinary hours of work on the public holiday but does not work on that day, either because the employee is not requested by the employer to work, or refuses a request to work where the request is not reasonable or the refusal is reasonable.*

*This construction of s 116 is consistent with the examples given in the note to the section. One of the examples is of a part-time employee whose part-time hours do not include a public holiday. Such an employee is not absent from work under any entitlement under s 114 to be absent, but because the terms of employment do not require the employee to work on the public holiday. Further, such an employee does not have ordinary hours of work on the public holiday. The employee is therefore not entitled to payment under s 116 for the public holiday.”*

31. Providing an entitlement to payment for a public holiday conferred by s. 114 cannot be other than in accordance with s. 116. Section 116 makes it clear that payment for public holidays is only an entitlement when an employee would have had ordinary hours on that day, and not otherwise.<sup>8</sup> The Note to s.116 reinforces this interpretation.
32. Clause 34.3 of the Award has the effect of excluding the operation of s.116 by providing for an entitlement to payment under Division 10 when the employee does not have ordinary hours of work on a public holiday.
33. Such a term would not contravene s.55(1) if it was permitted by subsection (4) or (5) of s.55 (if it was ancillary or incidental to the public holidays entitlements of the NES or to supplement the NES within the meaning of s.55(4)(b) of the FW Act.

<sup>7</sup> [2016] FCA 1486 at [23 to 28]

<sup>8</sup> See *R v Wallis ex parte Employee Association of Wool Selling Brokers* (1949) 78 CLR 529 at [550]

34. In the *Modern Awards Review 2012 – Public Holidays* the Full Bench did not rule out the possibility that such a provision could be considered to supplement the NES.<sup>9</sup>
35. CAI submits, however, that whether a provision is considered to be supplementary may depend upon the purpose of the provision. For example, a provision which is directed at seeking to ensure that a rostered day off (arising from implementing the 38 hour week by a 19 day month) does not fall on a public holiday is different to the Additional Days Provision.<sup>10</sup> As the Full Bench stated:
- “We think that we should give proper weight to the Parliament’s decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament’s intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.”<sup>11</sup>*
36. In the case of club industry, the provision does create a higher standard as it gives all full-time employees payment for public holidays on which they would not have been working ordinary hours contrary to s.116.
37. CAI submits that the Additional Days Provision should not be considered to be supplementary. Firstly, it is inconsistent with s. 116 for the reasons given above. Secondly, it could not have been Parliament’s intention that the FWC could make general provisions for higher standards.

#### **Modern Awards Objective**

38. Even if the FWC took the view that the Additional Days provision supplemented the NES, having regard to the modern awards objective, CAI submits that the provision should be removed from the Award.
39. As was made clear in the *Penalty Rates Case*<sup>12</sup>, there need not have been a material change in circumstances since the modern award was made. Rather, in exercising the discretion conferred by s.156 in the review, the focus will be whether the Award meets the modern awards objective set out in s. 134:

*“The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

*(a) relative living standards and the needs of the low paid; and*

*(b) the need to encourage collective bargaining; and*

*(c) the need to promote social inclusion through increased workforce participation; and*

*(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

*(da) the need to provide additional remuneration for:*

*(i) employees working overtime; or*

*(ii) employees working unsocial, irregular or unpredictable hours; or*

*(iii) employees working on weekends or public holidays; or*

<sup>9</sup> *Modern Awards Review 2012 – Public Holidays* [2013] FWCFCB 2168 at [63]

<sup>10</sup> *Ibid* at [38] and [39]

<sup>11</sup> [2009] AIRCFB 345, at [48]

<sup>12</sup> [2017] FWCFCB 1001 at [42] to [44]

*(iv) employees working shifts; and*

*(e) the principle of equal remuneration for work of equal or comparable value; and*

*(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*

*(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

*(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

*This is the modern awards objective.*

*When does the modern awards objective apply?*

*(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:*

*(a) the FWC's functions or powers under this Part; and*

*(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.*

*Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."*

40. CAI submits that the variations sought are consistent with the modern awards objective.
41. Section 134(1) provides that "modern awards provide a fair and relevant minimum safety net of terms and conditions, taking into account...:

*(da) the need to provide additional remuneration for:*

*(iii) Employees working on weekends or public holidays*

...

*(f) the likely impact of any exercise of modern award powers on business, including an productivity, employment costs and the regulatory burden."*

42. CAI submits that the Additional Days Provision cannot be properly characterised as a "fair", "relevant" or a "minimum safety net".
43. When considering the interaction between the NES and modern awards, it should be observed that the Act contemplates that the NES has set terms and conditions which are fair, relevant and a minimum safety net in relation to the terms and conditions that they provide, and that the modern awards set terms and conditions which are fair, relevant and a minimum safety net in relation to the terms and conditions that they provide. This is reflected in objects in s.3 (b) and (c) of the Act:

*"(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and*

*(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual*

*employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.”*

44. It follows that to seek provisions in awards which are over and above those set out in the NES are not “fair”, “relevant” or a “minimum safety net” and would, therefore be inconsistent with the modern awards objective in s.134 of the Act.
45. The Additional Days Provision is not fair as it lacks sufficient justification and it unnecessarily increases costs.
46. There is no justification for the payments as an employee suffers no loss of pay by reason of the occurrence of the holiday. While the Act identifies a need to provide additional remuneration for working on public holidays, it makes it clear in s.116 that there should not be additional remuneration if an employee is not ordinarily rostered to work on the day that the public holiday falls.
47. While such provisions may have been conceded by industrial parties at one time or another, it is clear from s. 116 that there is no intent for such a provision to be generally applicable in modern awards and that such a provision should not be continued in the Award if it is not consistent with the modern awards objective<sup>13</sup>
48. Further, it is not fair to impose on the club industry an obligation to pay all employees for public holidays that they would not have ordinarily worked when it is not a requirement upon employers in many other industries. Where there are such provisions in other awards they are often more narrow in their scope and operation dealing with rostered days off arising from working a 19 day month.<sup>14</sup>
49. For example, a clerk working full-time in a club, Monday to Friday, would receive an additional days pay for a public holiday falling on a Saturday whereas a clerk working under the *Clerks Private Sector Award 2010* would not receive the additional days pay. In NSW this would mean a clerk under this Award who did not work on a public holidays would be paid for 13 days whereas under the *Clerks Award* they would be paid for 10 days.
50. The rationale for the Additional Days Provision is not clear in any event. It appears to stem from an assumption that an employee working on a weekend receives less holidays. This is not necessarily correct. For example:
  - (a) An employee who works on a weekend may, however, work on other days that public holidays fall and may receive as many holidays as a Monday to Friday worker. For example, employees working a 7 day rotating roster will all receive about the same number of public holidays; or
  - (b) A weekend worker could also receive more holidays than a Monday to Friday worker depending upon their ordinary rostered hours. An employee who works Saturday to Thursday for example, would receive more holidays than a Monday to Friday worker.
51. CAI submits that clause 34.3 is unfair as it unnecessarily inflates employment costs exacerbating the challenges already being faced by clubs when public holidays occur. These costs can result in clubs either not being able to trade or reducing the services offered, with a consequent reduction in employment opportunities. Further, the Additional Days Provision acts to penalise employees who engage full-time employees as casual employees have no entitlement to additional pay for public holidays unless they work on the public holiday.

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<sup>13</sup> See *Penalty Rates Case* [2017] FWCFB 1001 at [43]

<sup>14</sup> *Australian Municipal, Administrative, Clerical and Services Union re Airline Operations Ground Staff Award 2010*, [2012] FWA 9137 at [21]

**Relevant?**

52. The NES now deals with remuneration in relation to employees who do not work on public holidays. As the Full Bench has previously stated in relation to public holidays:

*“The scheme of the present Act places reliance upon a relatively comprehensive set of minimum standards provided by the NES and the role of the modern awards is intended to operate in that context”<sup>15</sup>*

53. It is not relevant to have award provisions dealing with the same matters as are dealt with in the NES.

**Minimum Safety Net?**

54. The effect of the Additional Days Provision is to increase the number of days to which employees are entitled to the equivalent of a day’s pay on account of public holidays falling on days that employees would not work.
55. This results in a defacto increase to the number of public holidays to which employees would be entitled under the NES. As the Full Bench (referring to the *Modern Awards Review 2012 – Public Holidays*) decision stated:

*“Although the incidence and level of the public holiday penalties is a matter for the Commission, the issue of additional public holidays arises directly from the scheme of the FW Act and in particular, the NES reliance upon the State and Territory laws to establish the actual days.*

*In its Award Modernisation decision concerning the making of the priority modern awards, the Full Bench of the AIRC said in respect of public holidays that:*

*A number of requests were made that we supplement the public holiday entitlements in the NES by including in awards some days that are observed as public holidays but not gazetted as such. We have decided against that course as it is apparent that the NES governs the question of the number of public holidays to which employees should be entitled.”*

*The conclusions of that Full Bench remain apposite.<sup>16</sup>”*

56. CAI submits that the provision exceeds the safety net provided for public holidays in the NES. Whether the Award provision acts to exclude or supplement the NES, it is clearly providing a significant benefit in excess of the minimum safety net inconsistent with the modern awards objective.

**Christmas Day Loading**

57. CAI also seeks that the Award be varied to address an ambiguity that exists in relation to clause 29.3(c) dealing with additional payment for Christmas Day. This clause states:

*An employee other than a casual working on Christmas Day when it falls on a weekend will be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.*

58. CAI seeks that the Award be varied as follows:

*An employee other than a casual working on Christmas Day when it such day falls on a weekend, and is not prescribed as a public holidays as defined in this award, will be paid an*

<sup>15</sup> *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [62]

<sup>16</sup> *The Penalty Rates Case* [2017] FWCFB 1001 at [1959]

*additional loading of 50% of their ~~ordinary time rate~~ applicable ordinary hourly rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.*

59. Such a variation would be consistent with variations made to similar provisions in clause 32.2(c) of the *Hospitality Industry General Award 2010* and clause 34.4(d) of the *Restaurant Industry Award 2010* to address this issue.
60. Both of those Awards were varied by the FWC without objection as there was an acceptance that the additional 50% penalty was only intended to be payable when Christmas Day is not a prescribed public holiday.
61. This was explained in Deputy President' Gooley's decision dealing with the variation of the *Restaurant Industry Award 2010*.<sup>17</sup> Deputy President Gooley stated:

*[296] VECCI proposed to vary clause 34.4(d) to insert the words "and it is not a prescribed public holiday" as follows:*

*"An employee other than a casual working on Christmas Day when it falls on a weekend and it is not a prescribed public holiday will be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and will also be entitled to the benefit of a substitute day."*

*[297] VECCI submitted that the current award provision is ambiguous. The Public Holidays Full Bench<sup>18</sup> considered a similar application made to vary the Hospitality Award. In that matter, like here, the variation is intended to clarify the existing provision and not to change the substance of the existing provision. On 15 August 2013, that award was varied as sought by VECCI.<sup>19</sup>*

*[298] There was no opposition to the proposed variation. I note that in the variation proposed by the ACTU in the public holidays case, the ACTU accepted that clauses of this nature were intended to require the penalty to be paid when Christmas day is not a prescribed public holiday<sup>20</sup> and this was accepted by the Full Bench of FWA in 2010.<sup>21</sup>*

62. The same ambiguity referred to above, arises in this Award. At the time that the existing provision was included in the Award, Christmas Day was not a prescribed public holiday when it fell on a Saturday or Sunday but this is now not always the case. Indeed, last year Christmas Day was on a Sunday and, in NSW, was also a prescribed public holiday. The variation proposed would reflect the intent of the provision and remove this ambiguity.

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<sup>17</sup> [2013] FWC 7840

<sup>18</sup> [2013] FWCFB 2168 at [94].

<sup>19</sup> PR540249.

<sup>20</sup> [2013] FWCFB 2168 at [80].

<sup>21</sup> [2010] FWA FB 9290 at [43].