

FAIR WORK COMMISSION

Matter No. 2014/301

FOUR YEARLY REVIEW OF MODERN AWARDS

PUBLIC HOLIDAYS - COMMON ISSUE

NOTE – CONSIDERATION OF *PUBLIC HOLIDAYS TEST CASE* IN PROCEEDINGS FOR THE MAKING OF THE GENERAL RETAIL AWARD, FAST & RELATED PROCEEDINGS

1. At the conclusion of the hearing of this matter on 26 July 2017, the Commission gave the SDA leave to file a note addressing the extent to which the *Public Holidays Test Case* was considered in award modernisation proceedings and in related proceedings in respect of the *General Retail Industry Award 2010 (GRIA)*.
2. This note addresses that issue and in particular the submission advanced by a number of employer organisations that, in the above proceedings, the Commission or its predecessors rejected the *Public Holidays Test Case*.
3. The above submission is misconceived and should be rejected for the reasons outlined below.

Award Modernisation Proceedings

4. Award provision in respect of public holidays was not the subject of detailed submissions by any party in award modernisation proceedings which resulted in the making of the awards the subject of this proceeding (or any other awards so far as the SDA is aware). The *Public Holidays Test Case* was not raised by any party in their submissions in award modernisation proceedings which resulted in the making of the awards the subject of this proceeding. The principal focus of submissions in respect of public holidays was the penalty rate to be paid for work on such days.
5. In summary, in determining the content of modern awards including the awards the subject of this proceeding, the AIRC dismissed all claims for award provisions relating to leave entitlements prescribed by the NES. This included annual leave, sick leave,

carer's leave, public holidays and parental leave. The AIRC ruled against any supplementation of these statutory entitlements.

6. As was observed by the Full Bench in the *Penalty Rates Decision*,¹ the award modernisation process did not allow for detailed consideration of claims due to time constraints and the manner in which that process was conducted.
7. Given the above matters, there is no basis to contend that the AIRC rejected the *Public Holidays Test Case* in award modernisation proceedings.

SDA's application to vary the GRIA in 2010

8. In 2009, before the scheduled commencement of the GRIA, the SDA made application to Fair Work Australia for approximately 15 variations to be made to various terms of the GRIA. These submissions were directed to be short. One of the variations sought was in terms similar to the variation now sought by the SDA in the current proceeding (the **non-working day provision**).
9. In its short written submission in support of the **non-working day provision**, the SDA made a passing reference to the *Public Holidays Test Case* in a single sentence. It stated:²

The standard in the Victorian Shops Award and ACT Retail Award reflected outcomes from the Public Holiday Test Case.
10. The variations to the GRIA sought by the SDA together with a number of variations sought by employer organisations were considered by a Full Bench of Fair Work Australia in [2010] FWA 305. In total, the variations sought by employers and the SDA related to 15 different subject matters.
11. In its decision, the Full Bench's consideration of the non-working day provision sought by the SDA was limited to the following two sentences:³

Further changes are sought by the SDA in relation to Christmas Day substitution and a non-working day provision. In the context of opposition by employers,

¹ *Four Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [1487] to [1491]).

² As set out in the Reply Submissions of the Ai Group dated 29 March 2017 at [145].

³ At [22].

the NES and limited award supplementation, we do not believe that a case for these variations has been established.

12. The Full Bench did not mention the *Public Holidays Test Case*, let alone analyse it.
13. There is accordingly no basis to the claim that, in the above proceeding a Full Bench rejected the *Public Holidays Test Case* when determining the SDA's application. That decision was the subject of passing reference by the SDA in proceedings which related to applications for numerous other award variations. It would appear from the decision that the Full Bench did not find it necessary to consider the *Public Holidays Test Case* at all because of the view it adopted about the NES and award supplementation.
14. Finally, the claim that the *Public Holidays Test Case* was rejected in award modernisation and/or the proceeding referred to above is contrary to the recognition by the Full Bench in the *2012 Transitional Review*⁴ that the *Public Holiday Test Case* remained a relevant consideration for the purposes of that review.

11 August 2017

**SHOP, DISTRIBUTIVE AND ALLIED
EMPLOYEES' ASSOCIATION**

⁴ [2013] FWCFB 2168 at [62].