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Sent: Thursday, 15 June 2017 3:31 PM
To: Chambers - Hatcher VP
Cc: tmcdonald@moray.com.au; Peter Cooper; Michael Robson
Subject: AM2014/301 - Public Holidays

The Associate
Vice President Hatcher

Dear Associate

We note the direction of the Vice President made on 6 April 2017 concerning variations sought to the Clubs Award by Clubs Australia industrial. Please find attached to this email:

- an outline of submission; and
- comparison of Public Holidays Provisions in pre-modern Federal and State Awards.

We will make requisitions concerning the witnesses in relation to which statements have been filed.

We have raised an issue in our submission concerning the intersection of this review and the Penalty Rates Review.

We thank the Commission for the extension. We apologise if our submission is prolix.

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IN THE FAIR WORK COMMISSION

Matter No: AM2014/301

Section 156 - Four Yearly Review of Modern Awards – Public holidays common issue

SUBMISSION OF UNITED VOICE

I – Introduction

1. This submission concerns variations proposed by Clubs Australian Industrial ('CAI') to the *Registered and Licensed Clubs Award 2010* ('the Clubs Award').
2. CAI is seeking the following variations to the Clubs Award:
 - a limit on the number of public holidays to 10 days;
 - the deletion of the current clause 34.3, which provides for additional remuneration for full time employees in relation to public holidays generally;
 - the provision of less remuneration for a smaller number of public holidays identified in the award;
 - the provision for 'substitute' public holidays for certain public holidays when they fall on the weekend; and
 - clarification of the operation of cl 29.3 (c).
3. United Voice opposes the variations except for the variation concerning cl 29.3 (c). We leave this matter to the discretion of the Commission with the proviso that the CAI proposal is mean spirited.

Summary

4. CAI relies on the following arguments in support of their application for reducing public holiday entitlements for full time employees.
5. First, CAI argues that the public holiday provisions impose an unfair cost on employers in the clubs sector as clubs are allegedly sometimes unable to trade on public holidays. This problem is exacerbated by the promulgation of additional public holidays by state governments.
6. Secondly, CAI argues that the current public holiday provisions are an innovation originating from Award Modernisation. Their proposed variations would restore the pre-modernisation standard.
7. Thirdly, the current public holiday provisions are superior to conditions in other industries with which the clubs sector competes.

8. Finally, CAI submits that a modern award cannot include terms superior to the National Employment Standards ('NES'). Where a modern award provides better terms than the NES, those terms should be deleted.
9. The United Voice, in summary, urges the Commission to reject these arguments because:
- The current public holiday's provisions in the Clubs Award are appropriate and are part of the fair and relevant safety of terms and conditions for club employees. For reasons that are further elaborated in this submission, the safety net for club workers may be reduced elsewhere in a manner relevant to the entitlements under consideration here and in this context the Commission should exercise caution in this matter.
 - The objective of modern awards is to provide, with the NES, a fair and relevant minimum safety net of terms and conditions. This will necessarily involve terms that provide for entitlements that supplement the NES to account for industry specific circumstances. The Clubs Award public holiday provisions are necessary to provide a fair and relevant safety net.
 - The proposed variation to limit the number of public holidays under the Award and to institute substitute days would contravene the NES. In any case, the Commission has consistently held that it does not have the power to distinguish between the public holidays promulgated by state and territory governments and those 'made' by the Commonwealth Parliament.
 - The current public holiday provisions reflect both long established principles applied federally concerning public holidays and the terms of the balance of relevant pre-modern awards and NAPSAs.
 - There is no probative evidence that clubs would increase employment or trade on public holidays if the variations are made. Indeed, there is no evidence of any genuine benefit to the community or economy if these variations were made.
 - There is limited evidence before the Commission that there is an unusual cost burden placed on the clubs sector employers by the Clubs Award public holiday provisions. Similar provisions are found all modern awards covering the hospitality sector.
 - In relation to the proposed variation to cl 29.3 (c), the equivalent provision in the *Hospitality Industry (General) Award 2010* ('the Hospitality Award') is clause 32.2(c) and it is equivalent to what CAI is proposing. The equivalent provision in the *Restaurant Industry Award 2010* ('Restaurants Award') is clause 34.4(d) and is different as it deals with 'prescribed public holidays' rather than ones 'prescribed ... under the NES'. The change proposed by CAI will some years reduce permanent club workers remuneration

when Christmas Day falls on a weekday, lacks generosity and deprives governments other than the Commonwealth government of the ability to regulate entitlements around Christmas Day.

II – Threshold issues

10. The penalty rates clauses in the Clubs Award have been recently reviewed in the Penalty Rates Review (AM2014/305). CAI was a major participant in this review and made claims that the penalty rates paid to permanent and casual employees be reduced from between 25 to 50% for weekend and public holiday work.¹ CAI also had a specific claim to vary 29.3(c) which is similar to the claim made here.²
11. On 23 February 2017, the substantive decision in the Penalty Rates Review was published.³
12. Early in the review on 17 December 2014, the President, Justice Ross, observed in a Statement:⁴

Public holidays

[15] Australian Business Industrial and the NSW Business Chamber asked whether the issue of penalty rates applying on a public holiday will be dealt with in these proceedings or as part of the Public holidays common issue. Further, Business SA raised the issue of penalty rates on part-day public holidays. The part-day public holiday issue (including the penalty rates payable on part-day public holidays) is currently being dealt with in AM2012/355 and will be finalised during the Public holidays common issue under AM2014/301 as part of the Review. Any other issues in relation to the penalty rate payable on a public holiday in the awards referred to in paragraph [3] of this Statement will be dealt with during these proceedings.

13. There were a number of claims by other participants in the Penalty Rates Review that concerned public holidays and traversed issues very similar to the claims made by CAI here.⁵
14. A number of hospitality employers, of which CAI was not a part, sought a two tiered approach to public holidays that differentiated between public holidays named within the National Employment Standards ('NES') and those gazetted by State or Territory governments. In the Penalty Rates Decision it was noted:

¹ Outline of submission on behalf of Clubs Australia Industrial, filed 29 June 2015, Penalty Rates Review. See also: *4 Yearly Review of Modern Awards –Penalty Rates* [2017] (23 February 2017) FWCFB 1001 ('Penalty Rates Decision') at [7], [302] and for the review of the Clubs Award [907] to [1009]

² *Statement - Summary of Claims- 4 yearly review of modern awards –Penalty Rates* [2016] FWVFB 7288 (12 October 2016), ('Summary Statement') Attachment A3.

³ *4 yearly review of modern awards –Penalty Rates* [2017] FWCFB 1001. ('Penalty Rates Decision').

⁴ *4 yearly review of modern awards –Penalty Rates* [2014] FWC 9175.

⁵ Generally: Summary statement noted above.

[1958] Further, we have concluded that the two-tiered approach advanced by the Hospitality Employers lacks merit. We have considered the arguments advanced in support of the proposal, but find them unpersuasive. The distinction sought to be drawn between those public holidays expressly mentioned in s.115 (1) (a) and the other days declared or prescribed by or under a law of a State or Territory as a public holiday (s.115(1)(b)), is illusory.

[1959] It is relevant to observe that during the Transitional Review, various employer interests sought to vary the Hospitality, Retail, Fast Food and Hair and Beauty Awards to provide that where a public holiday falls on a weekend and an additional public holiday is declared or gazetted, the public loading will only apply to the actual public holiday. In the Modern Awards Review 2012 – Public Holidays decision, the Full Bench rejected these applications, in the following terms:

‘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.’ (Footnotes omitted).

[1960] further, as noted in the 1994 Public Holidays Test Case decision, ‘the declaration of public holidays, by whatever legal instrument, is the prerogative of the various Governments’.

[1961] We concur with the views expressed in the 1994 and 2012 decisions. This does not mean that the number and standardisation of public holidays across Australia is not a legitimate issue. Rather, it is one primarily for the Commonwealth, State and Territory legislatures. In this context, we note that s.115 (1) (b) provides, in effect, that

particular State or Territory declared public holidays can be excluded by regulation from counting as a public holiday for the purpose of the FW Act. No such regulations have been made.

15. In relation to other public holiday claims concerning the Hospitality and Retail Award, the Penalty Rates Decision noted:

[1981] We acknowledge that a number of ancillary claims were advanced in respect of the public holiday terms in some of the *Hospitality and Retail Awards*. The argument in respect of these claims was very limited and we do not propose to determine those matters in this decision. A conference will be convened in the coming weeks, to ascertain whether any of the claims we have not dealt with are still being pressed. Any outstanding claims may be referred to the Public Holidays Full Bench.

16. The Clubs Award was one of the awards where the Penalty Rates Review found that the proponents of change had not made out a merit case for change. The Clubs Award is exceptional amongst the modern awards reviewed in the penalty rates review as the Full Bench recommended no change to this award.

17. The Penalty Rates Decision noted:

[2044] *In Chapter 7.3.6 we conclude that CAI has not established a merit case sufficient to warrant the variation of the Clubs Award. We also express the view that there are 2 options in respect of the future conduct of the penalty rates review of the Clubs Award:*

- *Option 1: determinations could be made revoking the Clubs Award and varying the coverage of the Hospitality Award so that it covers the class of employers and employees presently covered by the Clubs Award. Such a course would obviously avoid the need for any further Review proceedings in respect of the Clubs Award.*
- *Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.*

[2045] *At [1000] we express the provisional view that option 1 has merit and warrants further consideration. We propose to provide an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, we invite submissions on the two options set out above.*⁶

⁶ Penalty Rates Decision at [2044].

18. The Full Bench noted that in relation to public holidays that its observations and conclusions concerning public holidays are *'directed to all of the above modern awards (i.e. those under review), with the exception of the Clubs Award. We have decided to defer our consideration of the public holiday penalty rates in the Clubs Award until other penalty rates claims in respect of that award have been determined.'*⁷
19. On 24 March 2017, United Voice expressed its concern in a written submission that the Penalty Rates Full Bench's offer of further review in relation to the Clubs and Restaurants Award offends because, among other things, the principal that there should be finality in proceedings. We intend to progress these arguments.
20. On 28 March 2017, the President observed:
- United Voice submits that the Full Bench should not invite or permit RCI to re-litigate as what is described as their failed claim for variation to penalty rates. What I propose to do in relation to this issue is constitute a Full Bench to deal with RCI's proposition that it be given a further opportunity and wants to run its case. That decision to constitute a Full Bench does not involve any rejection implicit or otherwise of the position put by United Voice. It's just that United Voice's submission will have to be dealt with as a preliminary matter by somebody, and it's appropriate that it be dealt with by the Full Bench constituted to hear whatever RCI wants to put.*⁸
21. On 28 March 2017, CAI was maintaining a position that it wanted conciliation and would not comment publically one way or another whether it wanted further review of the Clubs Award.
22. On 2 May 2017, CAI informed the Commission of its intention to take up the Penalty Rates Full Bench's offer of a further review of the Clubs Award and expressed a preference for option 1.⁹
23. The Hospitality Award provides at clause 37:

37.1 National Employment Standards

(a) Public holidays are provided for in the NES.

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.

(b) Additional arrangements for full-time employees:

⁷ Penalty Rates Decision at [1915].

⁸ Transcript of Penalty Rates Review, 28 March 2017, PN28715.

⁹ Submission of Clubs Australia dated 2 May 2017, [5].

(i) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 32.2, either:

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

(ii) 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.

24. This clause is identical to the current clause in the Clubs Award and not subject to any known variation application.

25. On 5 June 2017, the Penalty Rates Full Bench in its decision¹¹ on transitional arrangements noted:

[236] The provisional views expressed in the Penalty Rates decision were just that and we sought further submissions before making any decision on that aspect. In the circumstances the appropriate way forward is for Clubs Australia (Industrial) (or any other interested party) to file an application setting out the course of action it proposes. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine the future conduct of the matter.

26. The Clubs Award has been placed in a special category. Essentially there appears to be an offer by the Commission which CAI intends to take up to argue the case that the Clubs Award be abolished and the sector merged industrially with the Hospitality Award. Implicit in such a merger is that the clubs sector would get the rates and other ancillary entitlements determined as appropriate for the hospitality sector. This would presumably involve the club sector receiving the current treatment of public holidays within Hospitality Award as part of a 'package deal' of reduced penalty rates. In the Penalty Rates Decision it was noted:

[1005] We accept that there are differences between the two awards (Clubs and Hospitality), for example in relation to annualised salary arrangements, overtime on Saturdays and in both the classification definitions and the range of classifications covered. But it seems to us that such differences may be accommodated by either appropriate transitional arrangements or the inclusion of clubs-specific sector arrangement within the Hospitality Award.

¹¹ 4 yearly review of Modern Awards –Penalty Rates –Transitional Arrangements [2017] FWCFB 3001.

27. What is the appropriate penalty rate and public holiday compensation were properly identified by the Penalty Rates Full Bench as connected to at least the Sunday rate within an award.¹² In determining what is a fair and relevant safety net of terms and conditions, the appropriate rates for work on weekends and public holidays should be determined with related entitlements dealing with public holidays or at least be known.
28. The Penalty Rates Review has foreshadowed that there is likely to be a substantial further review of the Clubs Award and its penalty rates and provisions concerning public holidays.
29. Prior to the hearing of these claims in this common issue, CAI should, at the least, clearly indicate what it intends to do in relation to the Penalty Rates Review concerning public holidays.
30. Irrespective of the general application of principles of finality in a proceeding such as the 4 yearly review we note that consideration 134(1)(g) of the moderns award objective provides for '*the need to ensure a simple, easy to understand, stable (emphasis added) and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*'.
31. We note that CAI has a reply on 27 June 2017.

III – Need for these variations

The section 55 argument

32. CAI advances an argument that modern awards cannot include terms more beneficial than the NES. If CAI is correct in its submission that a modern award cannot ever provide more beneficial conditions than the NES many modern award will require variation to remove conditions that offend this principle.
33. More generally, we question if CAI is pursuing this application in good faith. CAI submits that cl 34.3 is causing its members substantial harm; it has led evidence from several witnesses who say that this provision has a substantial impact on their businesses. A term of a modern award '*has no effect to the extent that it contravenes section 55*' under s 56 of the Act. This would be a defence in proceeding brought against an employer for contravention of clause 34.3. CAI has had seven years to challenge this provision. United Voice cannot find a record of a time where CAI or any club has raised this issue.

'... a material change in circumstances'

14. We note that CAI relies on the decision of the Full Bench in *Four yearly review of modern awards – penalty rates* [2017] FWCFB 1001 ('*Penalty Rates Case*') to say that it does not need to demonstrate a '*material change in circumstances.*' Even if CAI's proposed approach is correct, it has not advanced cogent reasons or a sufficient evidentiary case to justify the Commission's

¹² Penalty Rates Decision at [1952] to [1953].

departure from well-established principles of industrial regulation that underpin the current public holiday provisions.

IV – Award history

15. The Fair Work Commission and its predecessors have consistently held that they do not have the power to prevent the creation of public holidays by government. This is reflected in the fact that the majority of federal and state pre-modern awards did not limit the number of public holidays on which penalty rates could be paid. Since modernisation, the Commission has found on several occasions that the current public holiday standard provides a fair and relevant safety net.
16. Moreover, the majority of pre-modern awards included a similar to cl 34.3 of the Clubs Award.
17. The current Clubs Award public holiday provisions are consistent with the ‘*historical*’ approach of the Commission.

The Public Holidays Test Case

18. In the early 1990s, the Australian Industrial Relations Commission (‘AIRC’) heard and determined a series of matters concerned with constructing a safety net of prescribed holidays, now described as the *Public Holidays Test Case*.¹³ The findings from the Public Holidays Test Case are, relevantly, that:
 - (a) The declaration of public holidays, by whatever legal instrument, is the prerogative of government.¹⁴ It is not open to the Commission to prevent a state or territory from creating ‘*extra*’ public holidays.¹⁵
 - (b) The Commission ought not to usurp the function of government by ‘*declaring*’ certain days to be public holidays.¹⁶ The reverse proposition is also true. If a state or territory government has declared a day to be a public holiday, then the Commission ought to give effect to that declaration by ensuring that penalty rates payable on public holidays are payable regardless of which government made the declaration.
 - (c) Where a state or territory creates ‘*extra*’ public holidays, ‘*the existence of a lesser standard in the Commission’s awards would be a likely source of industrial unrest*’.¹⁷

¹³ *Re Public Holidays* (unreported, AIRC (FB), L4534, 4 August 1994); *Re Public Holidays* (unreported, AIRC (FB), L7799, 13 December 1994); *Re Public Holidays* (unreported, AIRC (FB), 16 December 1994, 16 December 1994); and *Re Public Holidays* (unreported, AIRC (FB), L9178, 20 March 1995).

¹⁴ L4534 at [19].

¹⁵ L4534 at [20].

¹⁶ L4534 at [19].

¹⁷ L4534, [20].

- (d) The award provisions naming specific public holidays form safety net leave provisions; states and territories may prescribe leave entitlements for additional public holidays. In this way, states and territories may add, but not subtract, from safety net leave provisions.¹⁸
- (e) Compensation for working on public holidays, whether in the form of additional leave, or penalty rates, forms part of the safety net standard with which the Commission is concerned.¹⁹
- (f) The ‘*special circumstances*’ of the tourist and hospitality industries do not warrant treating days like Easter Saturday and Easter Monday as ‘ordinary’ days when Good Friday and Easter Sunday are not so treated.²⁰

Re Modern Awards Review 2012 – Public Holidays [2013] FWCFB 2168

- 21. This Commission and its predecessor have consistently followed the *Public Holidays Test Case*.
- 22. During the 2 year transitional review,²¹ the Australian Hotels Association (‘AHA’) sought to amend the public holiday provisions in the *Hospitality Award* to limit the number of public holidays on which penalty rates were payable.²² The AHA contended that the application of the NES provisions in the *Hospitality Award* had resulted in a ‘*skewing*’ of the *Public Holiday Test Case* principles, in effect because the NES defined public holidays as including those gazetted or declared by states and territories, which increased the total number of public holidays. The Full Bench rejected the application to differentiate between public holidays, finding that:

[107] ... the operation of the provision as proposed by the applicant employer organisations would lead to different outcomes depending upon how each State and Territory act was framed and in our view such an outcome would not be appropriate.

- 23. While the Full Bench acknowledged that while the issue and standardisation of public holidays across Australia was a legitimate one, it was an issue for the state, territory and the Commonwealth Parliaments to determine.²³

The Penalty Rates Case

- 24. As already noted, the issue of limiting the number of public holidays has already been arbitrated in the Penalty Rates Review.²⁴

¹⁸ L4534, [20].

¹⁹ L4534, [20].

²⁰ L4534, [21].

²¹ *Modern Awards Review 2012 - Public Holidays [2013] FWCFB 2168*

²² As above at [101].

²³ *2012 Public Holidays Decision*, [102].

25. The mooted absorption of the club sector within the Hospitality Award, which CAI appears to support, is premised on the similarity of the two sectors. The Penalty Rates Decision notes:

[1003] But while there are a number of differences between clubs and the enterprises presently covered by the Hospitality Award (such as hotels) we are not presently persuaded that those differences warrant a separate award. In particular, the fact that clubs are not-for-profit community based organisations does not mean that they warrant a separate award. A number of other modern awards cover both not-for-profit and for-profit enterprises, such as the Clerks – Private Sector Award 2010 and the Aged Care Award 2010.

[1004] We would also observe that there is a high degree of commonality in the work performed by the employees covered by the Clubs Award and the Hospitality Award, as evidenced by the similarities in the classification levels and rates of pay (see below).

26. CAI has led no evidence that would distinguish between the clubs sector and the rest of the hospitality industry.

Regulation of public holidays in pre-modern awards and NAPSAs

Precursor public holidays clauses

27. Historically, the majority of pre-modern awards covering the vast majority of clubs included a ‘gazettal provision’ that treated gazetted or declared public holidays that were not named as public holidays in the Award as public holidays for the purposes of the award. CAI’s assertion that the Fair Work Commission historically limited the number of public holidays attracting payment of public holiday penalty rates is also demonstrably false.
28. The majority of predecessor awards provided for an unspecified number of public holidays. Usually, the public holidays clause in these awards would prescribe a number of named public holidays and then include words to the effect that any other day provided as a public holiday by the state government would be a public holiday for the purposes of the award.
29. For example, cl 16.1.1 of the New South Wales *Club Employees (State) Award*²⁷ (‘NSW Award’) provided as follows:

New Year’s Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Queen’s Birthday, Eight Hour Day, Christmas Day, Boxing Day, the third Monday in February of each year shall be a holiday for the purpose of this clause, and any other day or days proclaimed or gazetted as Public Holidays for the State.
(Emphasis added)

²⁴ Penalty Rates Decision at [1958] to [1961].

²⁷ AN120136

30. All time worked on a day prescribed by clause 16.1.1 was paid at a rate of ‘2 ½ times the ordinary time rate of pay’.²⁸
31. The *Licensed Clubs (Victoria) Award 1998* (‘Victorian Award’),²⁹ the *Clubs Etc. Employees’ Award – South East Queensland 2003*³⁰ (‘Queensland Award’), *Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002*³¹ (‘Northern Territory Award’), *Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998*³² (‘ACT Award’), *Clerks (Clubs, Hotels & Motels) Award (SA)*³³ (‘South Australian Clubs Clerks Award’), *Hotels, Clubs, Etc., Award (SA)*³⁴ (‘SA Award’) and the *Clubs Workers Award 1976 (WA)* (‘the WA Award’)³⁵ provided that all public holidays gazetted or legislated for by the state government would be public holidays for the purposes of the Award. There was no distinction between the ‘named days’ and the ‘gazetted days’ in the payment of public holiday penalty rates in any of these awards.
32. Only the Tasmanian award did not include a ‘gazetted provision’. However, this award appears to name all public holidays in Tasmania at the time it was operative.

Precursors to cl 34.3

33. CAI’s implication that clause 34.3 is a novel entitlement created by the modern award system is false. A substantially similar provision was found in most pre-modern awards and NAPSAs. In fact, the current entitlement is substantially less onerous than the most predecessor awards because most of them also applied to part-time employees. The current Hospitality Award provision deals with part time work.
34. All federal awards included a provision substantially similar to the current Clubs Award 34.3. The Victorian Award provided following at clause 20.6:

Where an employee’s normal rostered day or days off as prescribed by 15.2 of this award coincide with a holiday prescribed in this clause, the holiday shall not be a holiday for such employee and the holiday shall be substituted in one of the methods following:

20.6.1 One day with pay added to the annual leave.

²⁸ AN120136, cl 16.1.3.

²⁹ AP787060CRV

³⁰ AN140073

³¹ AP812953CRN

³² AP787017CRA

³³ AN150037

³⁴ AN150066

³⁵ AN160082.

20.6.2 Payment of one day's pay shall be made to the employee on the next succeeding pay day.

20.6.3 Such holiday may be allowed off with pay to the employee within 28 days after such holiday falls.

20.6.4 One of the above methods must be mutually agreed upon by the employee and the employer. Failing such agreement, the provision prescribed in 20.6.1 shall apply.

35. Similar provisions were found in the Queensland Award,³⁶ Northern Territory Award,³⁷ South Australian Clubs Clerks Award,³⁸ and the South Australian Clubs Award,³⁹ Tasmanian Award.⁴⁰ For the most part, the pre-modern awards extended these entitlements to part-time employees.⁴¹
36. The NSW Award provided that a full-time employee whose rostered day off fell on a public holiday should be paid for 8 hours at the ordinary time rate.⁴² A part-time employee was also entitled to a payment of '1/5 of their ordinary weekly hours'.⁴³ However, this entitlement did not apply to a 'weekly employee who has not worked any ordinary hours outside the range of midnight Sunday to Midnight Friday and who never works ordinary hours on weekends'.⁴⁴
37. The WA Award provided that where a public holiday falls on the employee's rostered day off, then the employee is entitled to a day off work the following day without deduction of pay.⁴⁵

Award regulation in competing industries

38. The Clubs Association submits that clause 34.3 is not a requirement that is imposed on employers in other industries and that this is unfair.⁴⁶ They give the specific example of the public holiday provisions that apply to clerks under the *Clerks Private Sector Award 2010* ('Clerks Award').⁴⁷
39. The choice to compare Clubs Award with the Clerks Award is strange. The awards that cover the clubs sector's actual competitors covered are the Hospitality Award and the Restaurants Award. These awards cover workers in classifications that are substantially similar to those in the Club Award, including clerical classifications. CAI's own lay evidence supports the contention that their competitors are Restaurants Award and Hospitality Award covered businesses.

³⁶ AN140073, 7.6.

³⁷ AP812953CRN, cl 30.2.

³⁸ AN150037, cl 6.1.5.2.

³⁹ AN150066, cl 6.4.4.

⁴⁰ AN170057, cl 18.

⁴¹ AN170057, cl 18 (f).

⁴² AN120136, cl 16.1.6 (a).

⁴³ AN120136, cl 16.1.6 (b).

⁴⁴ AN120136, cl 16.1.6.

⁴⁵ AN160082, cl 17 (1) (b).

⁴⁶ Submission of Clubs Australia dated 30 March 2017, [48].

⁴⁷ Submission of Clubs Australia dated 30 March 2017, [49].

40. Both the Hospitality Award and the Restaurants Award provide an entitlement that is practically identical to Clubs Award clause 34.3.⁴⁸ We note that as not-for profit organisations, most clubs enjoy favourable tax advantages compared to for profit hospitality businesses.
41. There is no merit in the argument that this provision puts the clubs sector at a competitive disadvantage.

Conclusion

42. The majority of pre-modern clubs awards did not limit the number of public holidays for which penalty rates were paid. Most included a term similar to cl 34.2. These provisions are consistent with the principles established in the *Public Holidays Test Case Decision* and followed by the Commission in the 2012 and 2014 reviews of modern awards. Nearly identical provisions exist in the other hospitality industry awards. CAI has led no evidence that would justify the Commission departing from long established industrial practise.

V – Deleting clause 34.3

43. CAI seeks to delete clause 34.3 of the Clubs Award. This proposed variation is unfair to full time clubs workers as it will deny full-time employees their current entitlement to rostered days off.

Rationale for clause 34.3

44. CAI denies that there is any rationale for this provision. There is a clear rationale for the provision.
45. The primary purpose of clause 34.3 is to protect the employee’s entitlements to rostered days off. The clause ensures that employers do not have an incentive to roster their employee’s days off so that they fall on public holidays. This protection is necessary to ensure a fair and relevant safety net of terms and conditions in an industry dominated by businesses operating over weekends, public holidays and unsociable times.
46. The Clubs Award covers a sector of the hospitality industry. Clubs operate early in the morning, late at night, on Saturdays, Sundays and Public Holidays. The evidence led by CAI is that clubs open on almost every day of the year. This is reflected in the flexible ordinary hours and rostering provisions of the Clubs Award.

Rostering under the Club Award

47. Under clause 26 of the Clubs Award, ordinary hours can be worked on any day of the week, including public holidays.⁴⁹ There is no span of hours clause in the Award, so ordinary hours can

⁴⁸ See Restaurants Award, cl 38.2, and Hospitality Award, cl 37.1 (b).

⁴⁹ Clubs Award, cl 26.3.

be worked at any time of day. Moreover, there is no provision in the Clubs Award that differentiates between shift-workers and day workers for the purposes of rostering.

48. Even if a full-time employee normally worked the standard working week, they could still be rostered at any other time.
49. An employee is entitled to two days off each week ('normal rostered days off').⁵⁰ Normal roster days off are unpaid absences from work. In most other industries, this would simply be Saturday and Sunday. Full-time employees may accrue rostered days off by working additional hours without pay ('accrued rostered days off').⁵¹ Accrued rostered days off are paid for by the employee through work that would otherwise be unpaid.
50. Full-time employees work their ordinary hours according to a roster.⁵² The roster is set by the employer fortnightly.⁵³ The employer may require an employer to take their rostered days off on any day of the week. The roster can be varied by mutual consent on 7 days' notice⁵⁴ otherwise the employer can unilaterally vary hours on giving two weeks' notice.⁵⁵

Clause 34.3 protects an employee's time off work

51. Clause 34.3 ensures that employers do not roster their full-time employees to minimise time off work (normal rostered days off), cheat employees of their accrued days off and deny employees public holidays. Without cl 34.3 an employee's rostered could be changed so that their normal rostered days off fell on public holidays. This would allow an employer to arbitrarily reduce an employee's time off work.
52. The benefits of time off work are widely recognised. The Annual Leave Full Bench notes the following in relation to annual leave:

As we have mentioned, the purpose of annual leave is to provide employees with a period of rest and recreation. A corollary of excessive accrual of annual leave is that employees are not receiving the benefit for which the leave was intended. In the proceedings before us it was generally accepted that not taking a reasonable portion of leave can give rise to a serious threat to the health and safety of the employees concerned. This consensus is reflected in the academic research.⁵⁶

53. In the *Annual Leave Case decision*, the Full Bench cited the following summary of research:

⁵⁰ Clubs Award, cl 26.2.

⁵¹ Clubs Award, cl 26.7.

⁵² Clubs Award, cl 10.3 and 25.

⁵³ Clubs Award, cl 25.1.

⁵⁴ Clubs Award, cl 25.2.

⁵⁵ Clubs Award, cl 25.2.

⁵⁶ *Four yearly review of modern awards [2015] FWCFB 3406 ('Annual Leave Case decision'), [117].*

“There is also a physiological and psychological need for opportunities for rest and recovery from periods of sustained daily and weekly effort at work (Van Hooff et al., 2007).

The issue of paid annual leave is less frequently discussed in working time research and in wider public policy discourse. Longer breaks from work in the form of paid leave are a crucial aspect of working time that have significant implications for health and well-being. Breaks from work of more than a day or two provide the opportunity for more substantial rest and recovery from work demands than a lunch break; evening at home or weekend can provide (Trenberth and Dewe, 2002). This is especially the case in typically busy dual-earner or sole-parent/-worker households, in which weekdays and weekends are often busy and tightly scheduled, and especially so for parents.⁵⁷

54. This reasoning is applicable to public holidays and rostered days off. The purpose of rostered days off is to allow employees a regular period of rest and relaxation. Public Holidays add additional days of rest and relaxation on days of publicly recognised significance. Essentially, the more days away from work, the better. While annual leave offers the opportunity for substantial rest and recuperation, regularly schedule breaks are required to maintain health and wellbeing.
55. Given the irregular rosters worked by employees in the hospitality industry,⁵⁸ protecting times for rest and recuperation is especially important.

The effect of the proposed variation

56. If CAI’s variation were successful, then employers would have the ability to roster days off so that they coincided with public holidays. This would be the equivalent of an employer requiring an employee with a weekday roster to work on a Saturday with no additional pay because Monday was a public holiday. Similarly, if the employer chose to set the employee’s accrued day off on a public holiday, the employee would have simply worked those additional hours for no additional pay. This would reduce the employee’s total number of days off in a year, which would have substantial impacts on the employee’s health and remuneration. Clause 34.3 is necessary for the Clubs Award to achieve the modern awards objective.
57. Currently, cl 34.3 does not apply to part-time employees. The clause is unnecessary because a part-time employee’s rostered is fixed under cl 10.4 (iii) by their contract of employment and may only be varied by agreement between the employer and employee. However, CAI has proposed variations that would permit an employer to set an employee’s ordinary hours of work

⁵⁷ As above, [118].

⁵⁸ On average 67 per cent of clubs employees worked on weekends for the period 2008-2016. See *Changing Work Patterns*, Table 3.25.

by the roster. This matter is being dealt with by the Part-time Employment Full Bench (AM2014/196).

58. If this application is successful, United Voice may seek to vary cl 34.3 to ensure that the rostered days off and public holidays of part-time employees are given the same protections.

Are modern awards able to include provisions that provide more beneficial conditions than those prescribed by the NES?

59. CAI submits that clause 34.3 excludes the NES and for that reason should be removed from the Award. It submits that because Division 10 of the Act provides a minimum entitlement for public holidays, no modern award can provide a better entitlement. It submits that s 116 of the Act 'makes clear that there should not be additional remuneration if an employee is not ordinarily rostered to work on the day that the public holiday falls'.
60. The position of CAI is inconsistent with the Act. Section 55(4) and (6) of the Act clearly allow more beneficial treatment of NES entitlements in modern awards. There is no reason to say public holidays are a special case.

Section 116

61. Division 10, Part 2-2 of the Act provides a minimum entitlement to be absent, with certain exceptions, from work on a public holiday without loss of pay. Section 116 of the Act provides that if an employee is absent from employment on a public holiday in accordance with Division 10 their employer must pay the employee 'at the employee's base rate of pay for the employee's ordinary hours on the day or part-day'. Whether or not an employee is 'ordinarily rostered to work' on a public holiday is irrelevant. What matters is that an employee was rostered to work ordinary hours on the day on which the public holiday fell.
62. An employee as Commissioner Bisset stated in *FBIS International Protective Services (Aust) Collective Agreement 2012*⁵⁹:

*[83] Section 116 is clear that if a person is absent in accordance with the Division the employer must pay the employee. A shiftworker who is not rostered to work on a particular day is not absent in accordance with the Division but rather is absent in accordance with his or her work roster. The absence is not caused by or attributable to the public holiday. The absence is caused by the roster the employee is required to work. The public holidays have no effect on the requirement to attend or not to attend work at any.*⁶⁰

⁵⁹ [2012] FWA 10043 (29 November 2012).

⁶⁰ As above at [83].

63. The fact that an employee may have worked hours on a particular day, or would normally work hours on a particular day, is of no consequence. In *Queensland Nurses Union of Employees v Ramsay Health Care*⁶¹, Rangiah J of the Federal Court held:

*While the employees potentially have ordinary hours of work on any day before the roster for a fortnight is set, they actually have ordinary hours of work only on the days for which they are in fact rostered. Section 116 is concerned with the actuality, or reality, of the position.*⁶² (Emphasis added)

64. The NES does not, by itself, provide a fair and relevant safety net for employees on rotating rosters. Only 12 per cent of employees work shift work and the majority of workers only work during the week.⁶³ As a minimum standard, the NES reflects the working patterns of most employees. The purpose of the modern award system is to tailor terms and conditions that provide a fair and relevant safety net for specific industries.
65. The Act also includes a number of notes to s 55(4) which illustrate the types of provision that supplement the NES and appear to be also clear examples of entitlements in excess of the NES:

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

66. The supplementary explanatory memorandum notes that a modern award may include 'terms that supplement the NES' but 'the effect of those terms is not detrimental to an employee in any respect compared to the NES'.⁶⁴
67. The Act does not prohibit the modern award system from ever providing additional entitlements that relate to NES entitlements.

⁶¹ [2016] FCA 1486.

⁶² As above at [38].

⁶³ See Fair Work Commission, *Changing Work Patterns*, 20 January 2017, Table 3.1, Table 3.2, Table 3.3, Table 3.4, table 3.8.

⁶⁴ Supplementary explanatory memorandum to the Fair Work Amendment Bill 2009, item 24.

The Commission's discretion

68. The modern awards objective is to '*provide a fair and relevant safety net of terms and condition*' together with the NES.⁶⁷ The Commission must ensure that the modern awards and NES together provide a fair and relevant safety net, taking into account the criteria at s 134(1)(a)-(h) of the Act. These factors in the modern awards objective are '*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*'.⁶⁸
69. Section 138 of the FW Act relevantly provides:
- 138** A modern award may include terms that it is permitted to include, and must include terms that it is required to include, *only to the extent necessary to achieve the modern awards objective* and (to the extent applicable) the minimum wages objective. (Emphasis added).
70. What is '*necessary*' in a particular case is a value judgment based on an assessment of the considerations in s.134 (1), having regard to the submissions and the evidence directed to those considerations.⁶⁹ There may be more than one way that a modern award can provide a fair and relevant safety.⁷⁰

VI – Claim to limit the number of public holidays on which penalty rates are paid

19. CAI seeks to limit the number of days on which public holiday penalty rates are paid to 10 days named in the Award. CAI is seeking the insertion of a new clause 34.4 as follows:

34.3 An employee who works on any of the following public holidays, unless an alternative day is agreed or there is a substitute holiday, must be paid the rate prescribed in clause 29:

- (a) Christmas Day;*
- (b) Boxing Day;*
- (c) New Year's Day;*
- (d) Australia Day;*
- (e) Good Friday*
- (f) Easter Saturday;*
- (g) Easter Monday*

⁶⁷ the Act, s 134.

⁶⁸ *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

⁶⁹ *Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (*Jurisdictional Issues Decision*), [36].

⁷⁰ *Jurisdictional Issues Decision*, [34].

- (h) Anzac Day;
- (i) Queens Birthday;
- (j) Labour Day.

20. United Voice opposes this application. CAI's assertion that its proposed variation is '*consistent with what the FWC traditionally regarded as the safety net*'⁷² does not reflect the history of award regulation of public holidays or the conditions provided by the majority of pre-modern clubs industry awards as described in Section IV.

VII – Substituted holidays claim

71. CAI has proposed variations to the Clubs Award that would institute 'substitute public holidays' in the Clubs Award. CAI set out their claim in their draft determination filed on 18 April 2017 as follows:

34.4 *Substitute holidays*

(a) When New Year's Day, Australia Day, Queen's Birthday or Labour Day falls on a Saturday or Sunday, such day will not be a holiday and the appropriate weekend penalty rate prescribed in clause 29 will apply. The holiday will be observed on the following Monday.

(b) When Christmas Day or Boxing Day falls on a Saturday or Sunday, public holiday rates will be paid for work performed on:

- *27 December (in lieu of Christmas Day if Christmas Day falls on a weekend);*
- *28 December (in lieu of Boxing Day if Boxing Day falls on a weekend).*

72. The general effect of the proposed variation is to limit the number of days on which penalty rates are paid under the modern award. As noted above, the Commission should follow the decisions regarding limiting the number of public holidays in the *Public Holidays Test Case decision*, the *Transitional Review decision* and the *Penalty Rates Case decision*.

73. To the extent that the proposed variation denies an employee the right to be absent from work on a public holiday under s 114 of the Act, it would contravene the NES and so should not be included in the Clubs Award.

74. Moreover, the proposed variation is inconsistent with the long standard principles regarding award regulation of public holidays in described above.

⁷²

Submission of Clubs Australia Industrial dated 30 March 2017.

United Voice

15 June 2017

Comparison of Public Holiday Provisions in pre-modern Federal and State Awards

	AP787060CRV	AN120136 - NSW	AN140073 - Qld	AN160082 - WA	AN170057 - Tas	AP812953CRN - Fed	AP787017CRA - Fed	AN150037 - SA	AN150066 - SA	AN160075 - WA
	<i>Licensed Clubs (Victoria) Award 1998</i>	<i>Club Employees (State) Award</i>	<i>Clubs Etc. Employees' Award - South East Queensland 2003</i>	<i>Club Workers' Award, 1976</i>	<i>Licensed Clubs Award</i>	<i>Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002</i>	<i>Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998</i>	<i>Clerks (Clubs, Hotels & Motels) Award</i>	<i>Hotels, Clubs, Etc., Award</i>	<i>Clerks' (Hotels, Motels and Clubs) Award 1979</i>
prescribed public holidays	<p>20.1 An employee shall be entitled to holidays on the following days:</p> <p>20.1.1 New Year's Day, Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day, Melbourne Cup Day, Australia Day, Anzac Day, Queen's Birthday and Labour Day; and 20.1.2 When Christmas Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on 27 December. 20.1.3 When Boxing Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on 28 December. 20.1.4 When New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.</p>	<p>16.1.1 The day or days upon which the following Holidays fall, or the days on which such Holidays are observed, shall be Holidays for the purpose of this award: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Eight Hour Day, Christmas Day, Boxing Day, the third Monday in February of each year shall be a holiday for the purpose of this clause, and any other day or days proclaimed or gazetted as Public Holidays for the State.</p>	<p>7.6.1 Subject to clause 7.6.11 all work done by any employee on: - the 1st of January; - the 26th of January; - Good Friday; - Easter Saturday (the day after Good Friday); - Easter Monday; - the 25th day of April (Anzac Day); - the Birthday of the Sovereign; - Christmas Day; and - Boxing Day; or - any day appointed under the Holidays Act 1983, to be kept in place of any such holiday shall be paid for at the rate of double time and a-half with a minimum of 4 hours.</p> <p>7.6.2 Labour Day All employees covered by this Award shall be entitled to be paid a full day's wages for Labour Day (the first Monday in May or other day appointed under the Holidays Act 1983, to be kept in place of that holiday) irrespective of the fact that no work may be performed on such day, and if any employee concerned actually works on Labour Day, such employee shall be paid a full day's wage for that day and in addition a payment for the time actually worked at one and a-half times the ordinary rate prescribed for such work with a minimum of 4 hours.</p> <p>7.6.3 Annual Show All work done by employees in a district specified from time to time by the Minister by notification published in the Industrial Gazette on the day appointed under the Holidays Act 1983, to be kept as a holiday in relation to the annual agricultural, horticultural or industrial show held at the principal city or town, as specified in such notification of such district shall be paid for at the rate of double time and a-half with a minimum of 4 hours.</p> <p>7.6.4 Annual show when holiday not appointed In a district in which a holiday is not appointed for an annual agricultural, horticultural or industrial show, the employee and employer must agree on an ordinary working day that is to be treated as a show holiday for all purposes.</p>	<p>17 (1) (a) Subject to any other provision of this award, the following days or the days observed in lieu shall be observed as holidays without deduction of pay: New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, State Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this subclause.</p> <p>17 (4) Where - (a) a day is proclaimed as a Public Holiday or as a Public half-holiday under Section 7 of the Public and Bank Holidays Act, 1972; and (b) that proclamation does not apply throughout the State or to the metropolitan area of the State. that day shall be a whole holiday or, as the case may be, a half-holiday for the purpose of this Award within the district or locality specified in the proclamation.</p>	<p>New Year's Day, Australia Day, Hobart Regatta Day (south of Oatlands), Labour Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Show Day (as defined), Recreation Day (where Hobart Regatta day is not observed), Christmas Day and Boxing Day.</p>	<p>30.1 An employee on weekly hiring is entitled to the following days (referred to in this award as public holidays) without deduction of wages: New Year's Day; Australia Day; Good Friday; Easter Monday; Anzac Day; Labour Day (1st May); Queen's Birthday; Show Day; Picnic Day (1st Monday in August); Christmas Day; and Boxing Day; or such other day as is generally observed in the locality as a substitution for any of the said days.</p> <p>30.3 Where the Commonwealth Government or the Northern Territory Government proclaims or gazettes an additional public holiday to be observed by persons generally in the Northern Territory or a particular locality in the Territory (other than those covered by Federal Awards), or when such proclaimed or gazetted day is by any required judicial or administrative order to be so observed, such day will be deemed to be a holiday for the purposes of this award. They day will apply to employees covered by this Award employed in the Northern Territory or locality in respect of which the holiday has been proclaimed or ordered.</p>	<p>27.1 Prescribed holidays</p> <p>Employees other than casual employees are entitled to the following public holidays without loss of pay, namely:</p> <p>27.1.1 New Year's Day, Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day; and</p> <p>27.1.2 The following days, as prescribed in the Australian Capital Territory: Australian Day, Anzac Day, Queen's Birthday and Eight Hours' Day or Labour Day; and</p> <p>27.1.3 One other day fixed as follows: Canberra Day.</p> <p>27.3 Where in the Australian Capital Territory, public holidays are declared or prescribed on days other than those set out in 27.1 and 27.2 above, those days shall constitute additional holidays for the purpose of this award.</p>	<p>New Year's Day, Proclamation Day, Good Friday, the day after Good Friday, Easter Monday, Anzac Day, Adelaide Cup Day, Queen's Birthday, Labour Day, Christmas Day, Commemoration Day, and any other day which by proclamation or Act of Parliament may be declared a public holiday or any other day which may be substituted for any day.</p>	<p>Except as provided in clause 7.7.2, each employee (not being a casual employee) shall be paid at the rate of double time and a half for all time worked on the following public holidays, viz.: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Adelaide Cup Day, Queen's Birthday, Labour Day, Union Picnic Day (substituted for day after Good Friday), Christmas Day, Proclamation Day, and any other day which by proclamation under section 4 of the Holidays Act may be declared a public holiday.</p>	<p>(1) (a) Subject to any other provision of this award, the following days or the days observed in lieu shall be observed as holidays without deduction of pay: New Year's Day, Australia Day, Labour Day, Good Friday, Easter Monday, Anzac Day, State Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day. Provided that another day may be taken as a holiday by arrangement between the parties in lieu of any of the days named in this paragraph.</p>

	AP787060CRV	AN120136 - NSW	AN140073 - Qld	AN160082 - WA	AN170057 - Tas	AP812953CRN - Fed	AP787017CRA - Fed	AN150037 - SA	AN150066 - SA	AN160075 - WA
	<i>Licensed Clubs (Victoria) Award 1998</i>	<i>Club Employees (State) Award</i>	<i>Clubs Etc. Employees' Award - South East Queensland 2003</i>	<i>Club Workers' Award, 1976</i>	<i>Licensed Clubs Award</i>	<i>Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002</i>	<i>Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998</i>	<i>Clerks (Clubs, Hotels & Motels) Award</i>	<i>Hotels, Clubs, Etc., Award</i>	<i>Clerks' (Hotels, Motels and Clubs) Award 1979</i>
rostered day off (RDO) falling on public holiday	<p>20.6 Where an employee's normal rostered day or days off as prescribed by 15.2 of this award coincide with a holiday prescribed in this clause, the holiday shall not be a holiday for such employee and the holiday shall be substituted in one of the methods following: 20.6.1 One day with pay added to the annual leave. 20.6.2 Payment of one day's pay shall be made to the employee on the next succeeding pay day. 20.6.3 Such holiday may be allowed off with pay to the employee within 28 days after such holiday falls. 20.6.4 One of the above methods must be mutually agreed upon by the employee and the employer. Failing such agreement, the provision prescribed in 20.6.1 shall apply</p>	<p>16.1.6 Where a Public Holiday falls on a full-time or part-time employee's Rostered Day Off, the employee shall be paid:</p> <p>(a) 8 hours in the case of full-time employee's;</p> <p>(b) 1/5 of the ordinary weekly hours in the case of a part-time employee.</p> <p>This subclause shall not apply to a weekly employee who has not worked any ordinary hours outside the range of midnight Sunday to midnight Friday and who never works ordinary hours on weekends.</p>	<p>7.6.8 Holidays In Lieu - Should any of the holidays mentioned in clauses 7.6.1 and 7.6.2 fall on a day that a part-time or full-time employee is rostered off duty, such employee shall, in lieu of such holiday, be entitled to either -</p> <p>(a) payment of additional hours pay; or</p> <p>(b) be granted additional hours off; or</p> <p>(c) have additional hours added to the employee's annual leave entitlement.</p> <p>Additional hours shall mean the average number of ordinary hours worked per day over the employee's most recently completed roster cycle as per clause 6.3: Provided that in the case of an employee who has yet to complete a roster cycle, the average hours will be calculated based on the ordinary hours already worked in accordance with the employee's current roster cycle: Provided further that in no instance will an employee be entitled to more than 7.6 hours' credit for each holiday.</p>	<p>17 (1) (b) When any of the days mentioned in paragraph (a) hereof falls on a worker's rostered day off the holiday shall be observed on the next rostered working day. In this case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.</p>	<p>18. DAYS OFF COINCIDING WITH PUBLIC HOLIDAY</p> <p>An employee shall not be required to take a rostered day off on any of the holidays prescribed by Clause 21 - Holidays with Pay, hereof unless one of the following provisions apply:</p> <p>(a) one day with pay added to the annual leave;</p> <p>(b) payment of one day's pay shall be made to the employee on the next succeeding pay day;</p> <p>(c) such holiday may be allowed off with pay to the employee within 28 days after such holiday falls;</p> <p>(d) one of the above methods must be mutually agreed upon by the employee and the employer, failing such agreement the provisions prescribed in subclause (a) herein shall apply;</p> <p>(e) one of the above methods must be mutually agreed upon by the employee and the employer, failing such agreement the provisions prescribed in subclause (a) herein shall apply;</p> <p>(f) for the purposes of calculation one day for a part-time employee shall be: total number of hours worked in the 4 week period prior to the public holiday number of days worked giving the average number of hours worked each day.</p>	<p>30.2 Where a holiday falls on a non-working day, the holiday will be taken on the first next ordinary working day or will be added to the employee's annual leave and paid for as such.</p>	<p>27.5.1 Except as provided in 27.7.1 and 27.7.2 hereof, if an employee is not required to work on a day observed as a holiday in accordance with 27.1, 27.2 and 27.3 hereof, such employee shall be paid the amount of wages the employee would have received if the day had not been a holiday and had worked for the usual time on that day.</p>	<p>6.1.5.2 Where the employee's day off coincides with a public holiday, as set in Clause 7.6, one day instead of the holiday will be added to the employee's annual leave or allowed to the employee within 28 days of the holiday, or payment of one day of pay should be made to the employee on the next succeeding pay day.</p>	<p>6.4.4 Where a rostered day off of an employee (not being a casual employee) coincides with a holiday or holidays prescribed in clause 7.7, one day in lieu of each such holiday shall be added to the employee's annual leave or allowed within 28 days of such holiday, or payment of one day's pay shall be made on the next succeeding pay day.</p>	<p>(b) When any of the days mentioned in paragraph (a) hereof falls on an employee's rostered day off the employer and the employee may agree that the employee receive:</p> <p>(i) an additional day's wages, or</p> <p>(ii) another day off may be allowed within twenty-eight days of the award holiday, or</p> <p>(iii) an additional day off may be taken in conjunction with a period of annual leave.</p> <p>(c) In addition to the ordinary rate of pay an employee shall be paid at time and a half for all work done during ordinary hours on a holiday.</p> <p>(2) The provisions of paragraphs (a) and (b) of subclause (1) of this clause shall not apply to casual workers.</p>