Fair Work Commission: 4 Yearly Review of Modern Awards

AM2014/301: PUBLIC HOLIDAYS - COMMON ISSUE PROCEEDINGS

Australian Business Industrial (ABI)

-and-

NSW Business Chamber (NSWBC)

30 MARCH 2017

A: BACKGROUND

1. INTRODUCTION

1.1 These submissions are filed in relation to proceedings AM2014/301 (**Proceedings**) by:

(a) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members; and

(b) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

2. CLAIMS BEFORE THE FULL BENCH

2.1 These submissions respond to three claims are currently before the Full Bench:

(a) The Health Services Union (**HSU**) advances a claim which seeks public holiday pay rates for employees working on a Saturday or Sunday which has been substituted as a public holiday. This claim is made in six awards[1] (**HSU Claim**).

(b) A similar claim made by the Australian Manufacturing Workers' Union (**AMWU**) solely in respect of Christmas Day in four awards[2] (**AMWU Claim**).

These submissions refer to these claims collectively as the **Substituted Holidays Claims**.

(c) The Shop Distributive and Allied Employees' Association (**SDA**) advances a claim which would provide employees who work an average of 5 days per week additional benefits where a public holiday falls on a non-rostered day (**5 Day Entitlement Claim**). These entitlements (additional pay, substituted day or leave day) would not apply to a public holiday falling on a weekend.

2.2 Prior to any direct assessment of the claims, it is critical to sufficiently establish the relevant background to the subject matter of these proceedings: public holidays.

2.3 The reason for this is two-fold.

2.4 Firstly, public holidays are subject to specific legislative arrangements which are distinct in the context of contemporary industrial conditions. These arrangements involve the

[1] Aboriginal Community Controlled Health Services Award, Aged Care Award, Health Professional and Support Services Award, Social, Community, Home Care and Disability Services Award, Ambulance and Patient Transport Award and Nurses Award.

[2] Manufacturing and Associated Industries and Occupations Award, Food, Beverage and Tobacco Manufacturing Award, Graphic Arts, Printing and Publishing Award, Vehicle Manufacturing, Repair, Services and Retail Award.

interaction between the *Fair Work Act 2009* (Cth) (**FW Act**) and various state and territory Acts and government determinations/gazettals.

2.5 Secondly, notwithstanding the general tenor of the moving parties' submissions, the nature of the 'entitlement' to public holidays is fundamentally distinct from a mere entitlement to a certain number of 'paid days off' per year.

B: PUBLIC HOLIDAYS IN CONTEXT

3. HISTORY OF PUBLIC HOLIDAYS

3.1 Public holidays are recognised in many jurisdictions around the world as days of commemoration and celebration. Although the term holiday is a compound of 'holy' and 'day', Australian jurisprudence has long recognised that:

> '*...there is a clear distinction between the religious or historic event which is celebrated by the public holiday and the public holiday itself*.'[3]

3.2 Notwithstanding the distinction between the date of a public holiday and the event which it commemorates, public holidays have been traditionally distinct from other periods of employee absence given that public holidays are:

(i) observed communally (hence the 'public') on specific identified days;

(ii) granted so as to allow a communal recognition or observance of events of cultural, religious or historic significance.

3.3 As such, public holidays have not traditionally been considered to be a general form of paid leave. Rather, the typical award formulation was in terms of a right to be absent from work without loss of pay. The entitlement was to be absent from work during the public holiday and to not lose the wage which would have been attracted had the employee undertaken his or her usual ordinary time work.

4. DEFINITION OF PUBLIC HOLIDAYS: STATE AND TERRITORY JURISDICTIONS

4.1 Public holidays in Australia have their genesis in the legislative protection of certain days as 'bank holidays' and later as holidays for the public service. As a general trend, these specified days were then progressively adopted into State and Commonwealth awards beyond banking and the public service before being identified by specific legislation as public holidays.

4.2 The identification of public holidays has traditionally been the responsibility of the State and Territory governments. As such, the public holidays identified and their timing has varied considerably across the State and Territory jurisdictions.

4.3 In NSW, an early mechanism for the creation of what were to become public holidays was an *Act to make provision for Bank Holidays and respecting obligations to make payments*

[3] *Confederation of ACT Industry v. ALHOUI and The Uniting Church in Australia (ACT) Property Trust* (unreported, per O'Connor, Moore and Madgwick J, FEC No. 1659/98, 22 December 1998)

and do other acts on such Holidays [14th July, 1875.] 39 Vic No 2[4] (**1875 Act**).

4.4 The 1875 Act prevented banks from opening or banking operations being undertaken on 10 'special days' (the 8 days currently identified by s 115 of the FW Act in addition to '*The day after Good Friday*' and '*The Anniversary of the Birthday of the Prince of Wales*'). The 1875 Act also made provision for the NSW Government to proclaim other public holidays on which all banking business was prohibited.

4.5 Notably, the 1875 Act was confined to prohibiting banking functions and did not specifically contemplate employees working on the prescribed days. The 1875 Act was updated in NSW in 1898[5] which was in turn updated in 1912 in the form of *Banks and Bank Holidays Act 1912* (NSW) (**BBH Act**).

4.6 Following the legislative designation of certain 'Bank Holidays' by the NSW government, various NSW industrial awards began to adopt 'Bank Holidays' as holidays within non-banking industries and attach conditions to the performance of work on such days. Again, the emphasis was on discouraging attendance at work rather than creating paid leave entitlements. Indeed, it was typical for employees to lose their entitlement to pay for the day of the specified public holiday if they took unauthorised absence either side of the day. Further, an entitlement to public holiday is contingent on the work location of the employee. This is not true of the various forms of paid leave.

4.7 The process of 'appropriating' bank holiday legislation into wider industrial instruments was not without issue in NSW. In 1994 the Full Bench of the NSW Industrial Relations Commission noted the difficulties arising from the fact that the BBH Act had '*been put to a use for which it was not originally designed'.*[6]

4.8 In that case, the Full Bench said:

> '*The Act was and is designed to regulate firstly and foremostly the operation of banks. For historical reasons which are not clear to us, it appears to have become the vehicle for the regulation of public holidays in this State. That regulation depends on the arcane interaction between various provisions of the statute and executive action from time to time.'*

[4] See http://www5.austlii.edu.au/au/legis/nsw/num_act/bha1875n9157.pdf
[5] See *Act No. 9, 1898. : An Act to consolidate the Laws relating' to Banks and Bank Holidays.* [27th July, 1898.] http://www5.austlii.edu.au/au/legis/nsw/num_act/babha1898n9215.pdf
[6] *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222

4.9 This tension was also noted in a 2009 Review into the BBH Act[7], where it was noted that:

> '[i]*t has been recognised for some time now that the New South Wales legislation for proclaiming public holidays is in need of modernisation.... the BBH Act is a relic of former times, where commercial activity revolved around the opening hours of banks and when banking business was conducted over the counter and recorded in pen and ink. Although when first enacted, the BBH Act was primarily concerned with Bank trading hours, it became the means by which workers in New South Wales enjoyed Public Holidays largely because industrial awards (and later enterprise agreements) adopted the 'bank holidays' of the BBH Act as days upon which all kinds of workers were entitled to be paid days off, or penalty rates.'*

4.10 The relevance of the BBH Act in NSW and the concept that public holidays were distinct from the events which they recognised was subsequently confirmed in a number of authorities including a decision of the Full Bench of the Industrial Court of New South Wales in *Employers' Federation of New South Wales v Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers' Division, New South Wales Branch* (1994) 87 IR 335 where the Full Bench adopted, with approval, the observations of Cook and Beattie JJ made in a joint judgment in *Re Boarding Houses, &c, Employees (State) Award and Other Awards* [1961] AR (NSW) 383 in which their Honours had said at 393:

> *'We think that the true position as to the observance of public holidays is to be ascertained by reference to the Banks and Bank Holidays Act. Further, we think that in construing public holidays clauses in awards it should be presumed that the award making tribunals have recognised the notorious fact that a public holiday may be observed in respect of a particular occasion on a day other than the calendar date of the occasion...'*

4.11 The BBH Act was ultimately replaced with the *Public Holidays Act* 2010 (NSW), which, in addition to the FW Act, now regulates public holidays in NSW.

4.12 The historical position in NSW is broadly reflected in other states, where legislatively defined public or bank holidays have been appropriated into industrial awards.

4.13 In Victoria the legislature followed a similar pattern to NSW by:

(a) identifying Good Friday and Christmas Day as Bank Holidays in *The Instruments and Securities Statute* 1864 (VIC)*;* before

[7] *Public Holidays in NSW Review of the Banks and Banks Holiday Act 1912*, Professor Joellen Riley, October 2009, NSW Government

(b) identifying further Bank and public holidays in the *Bank Holidays Act 1873* (VIC), *Public and Bank Holidays Act 1897* (VIC), the *Public Service Act 1928* (VIC), *Banks and Currency Act 1928* (VIC), *Public Holidays and Bank Holidays Act 1934* (VIC), *Public and Bank Holidays Act 1953* (VIC) and *Public and Bank Holidays Act 1958* (VIC).[8]

4.14 The *Public Holiday Act 1993* (VIC) is the extant legislation in Victoria identifying public holidays. Such Act defines 11 public holidays while also granting power to the Minister to appoint another one or more days or half-days as public holidays or public half-holidays by notice published in the Government Gazette.[9] In 2016, Victorians experienced 14 public holidays including Australia's most recently created public holiday, '*Friday before the AFL Grand Final*' Public Holiday[10].

4.15 In South Australia, the extant *Holidays Act 1910* (SA), repealed the *Bank Holidays Act 1873* (SA), *The Bank Holidays Amendment Act 1893* (SA) *and The Holidays Act 1909* (SA).

4.16 The *Holidays Act 1910* (SA) identifies Sundays as nominal public holidays, 9 standalone public holidays, two part-day public holidays and also provides an ability for the Governor to proclaim public holidays throughout the state or within a district or locality within the state.[11]

4.17 In Western Australia, the *Public and Bank Holidays Act 1972 (*WA) identifies 10 public holidays and provides an ability of the Governor to appoint a special day specified in the proclamation to be a public holiday or bank holiday, or both.[12]

4.18 In Queensland, the *Holidays Act 1983* (QLD) identifies 10 public holidays and provides an ability of the Governor to appoint a special day specified in the proclamation to be a public holiday.[13]

4.19 In Tasmania, public holidays are defined by the *Statutory Holidays Act 2000* (TAS) which also provides the Minister with the power to create new public holidays.[14]

4.20 *The Holidays Act 1958* (ACT) and the *Public Holidays Act* (NT) are the relevant Public Holiday Acts in the Territories.

4.21 Given the disparate sources by which public holidays are defined in Australia, the nature of

[8] See for example *The Bank Holidays Acts* 1904-1906 (QLD), *Bank Holidays Act* 1958 (Vic)
[9] See *Public Holiday Act 1993* (VIC) s 7
[10] See Victoria Government Gazette No. S 229 Wednesday 19 August 2015
[11] See *Holidays Act* 1910 s 4
[12] See *Public and Bank Holidays Act* 1972 (WA) s 7
[13] See *Holidays Act 1983* (QLD) s 4
[14] See *Statutory Holidays Act 2000* s 5

number of public holidays in Australia has not been static or uniform. By way of example:

(a) an additional Public Holiday for Boxing Day is only operative in NSW, QLD, VIC and WA;

(b) Easter Saturday is not a public Holiday in TAS or WA;

(c) Easter Sunday is a Public Holiday only in NSW and VIC;

(d) the following public holidays are only observed in one State:

(i) Adelaide Cup (SA);

(ii) Canberra Day ((ACT);

(iii) Christmas Eve (SA);

(iv) Family and Community Day (ACT);

(v) Melbourne Cup (VIC);

(vi) Recreation Day (TAS);

(vii) Royal Hobart Regatta Day (TAS);

(viii) Royal Hobart Show Day (TAS);

(ix) Royal Queensland Show (QLD);

(x) Western Australian Day (WA);

(xi) May Day (NT);

(xii) Picnic Day (NT); and

(xiii) Friday before the Grand Final (VIC).

5. DEFINITION OF PUBLIC HOLIDAYS: FEDERAL JURISDICTION

5.1 The historical position of public holidays in the Federal jurisdiction can be summarised by Piper CJ's statement in the *Tanning Industry Case* (1944) 53 CAR 615 at 621, when his Honour stated:

> *'This Court does not create such holidays as King's Birthday and the like; they exist either by statute or general custom apart from any Act or prescription by the Court; what the Court d*[oes is] *.. to select a certain number of already existing and recognised holidays and, on the assumption that, generally speaking, such holidays would be observed as such, apply to them the principle of no loss of pay because of absence if no work were required, and, in addition, in order to protect the employee*

from any improper loss of the benefit of such holidays, prescribe a deterrent by providing penalty rates for work on such days.'

6. ENTITLEMENTS ARISING FROM PUBLIC HOLIDAYS

6.1 The transition of public holidays from days on which banking business was prohibited to days on which the wider public could enjoy an absence from work without loss of pay or otherwise receive penalty rates has occurred largely on an award by award basis. By at least the late 1970's the allowance of public holidays without loss of pay (usually ten per year) was a feature of almost all industrial awards.[15]

6.2 It is apparent from a review of historical awards that although the 'adoption' of public holidays into industrial awards was almost universal, entitlements arising for employees on such days varied by award. As a general guide, awards have historically provided on public holidays a combination of:

(a) a mere entitlement to be absent from work;

(b) an entitlement to be absent from work without loss of pay;

(c) an entitlement to penalty rates if required to work;

(d) entitlements to a substituted public holiday if required to work.[16]

6.3 A consideration of the entitlements arising from public holidays was undertaken in the **1994 Test Case.**

6.4 The 1994 Test Case was comprised of a series of 4 decisions of the AIRC in 1994 and 1995: Prints L4534, L7799, L7971 and L9178. The 1994 Test Case decision can be summarised as follows:[17]

The First Decision, 4 August 1994 (Print L4534)

6.5 This decision dealt with the determination of an appropriate award safety net for over 50 awards standard in respect of:

(a) the number of public holidays (determined to be 11); and

(b) substitution arrangements for holidays falling on weekends.

The Second Decision, 14 December 1994 (Print L7799)

6.6 This decision was described as being *'interim'* in nature. The Commission provided that:

[15] As noted by Law Book Co's Industrial Arbitration Service Industrial Reports (1979) at 312
[16] See for example *Federal Meat Industry Award 1959*
[17] See AIRC Decision H0008 Dec 292/99 M Print R3183

(a) Tuesday 27 December 1994 was a *'substitute day'* in lieu of Christmas Day, which fell on a Sunday;

(b) Monday 2 January 1995 was a *'substitute day'* in lieu of New Year's Day, which fell on a Sunday;

(c) a non-casual employee who works on Christmas Day, New Years Day or both is to be paid at the appropriate holiday rate in addition to other award entitlements for work on these days; and

(d) if a non-casual employee works on Christmas Day, New Years Day or both *and* also works on the relevant substitute day or days, then they are to be paid at the normal award rate for work on the substitute day.

The Third Decision, 16 December 1994 (Print L7971)

6.7 On 16 December 1994 the Bench issued a Supplementary Decision to clarify the intent of its decision of 14 December 1994. At page 1 of the decision the Bench says:

> *'It is our intention that a person who is rostered to work on Christmas Day should be paid at the Christmas Day rate prescribed in the award plus either:*
>
> *· a day's holiday in lieu; or*
>
> *· another day's wages.*
>
> *The day in lieu may, if the employer wishes, be added to the employee's annual leave. Corresponding provisions will apply to New Year's Day.'*

The Fourth Decision, 20 March 1995 (Print L9178)

6.8 This decision dealt with the position of employees who did not work *'standard'* hours.

7. THE MODERN ERA – WORKPLACE RELATIONS ACT

7.1 An express entitlement to public holidays was inserted into the Federal industrial legislation by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (**Work Choices**) Schedule 1B in the form of what would become s 611 of the *Workplace Relations Act 1996* (Cth).

7.2 Importantly, the Work Choices amendments introduced an entitlement for employees to a day off on the following public holidays: 1 January (New Year's Day); 26 January (Australia Day); Good Friday; Easter Monday; 25 April (Anzac Day); 25 December (Christmas Day); 26 December (Boxing Day); and any day declared as a holiday generally within a State or Territory, or a region of that State or Territory, as a public holiday (except a day declared as

a public holiday in substitution for a named day, or a union picnic day). Under Work Choices, an employee could be requested to work on a public holiday[18]; however such a request could be refused on reasonable grounds. Previously employees could be required to work their ordinary hours falling on a public holiday, but this was discouraged by the penalty rates which typically applied.

8. PUBLIC HOLIDAYS UNDER THE FW ACT

8.1 The FW Act extended the Work Choices amendment provisions in respect of public holidays by identifying an additional public holiday, the Queen's Birthday holiday, while continuing to recognise as public holidays those days which are declared or prescribed under a law of a State or Territory as a public holiday.

8.2 Division 10 of the FW Act enshrines the following principles in relation to public holidays:

(i) that an employee is entitled to be absent from his or her employment on a public holiday;

(ii) that an employer may request an employee to work on a public holiday if the request is reasonable;

(iii) that certain days are identified as a public holiday along with other days or part days prescribed by a State or Territory law;

(iv) substitution of public holidays under a State or Territory law is left to the State or Territory, can also be the subject of a modern award or enterprise agreement and for employees who are award or agreement free may be the subject of agreement; and

(v) when an employee is absent from employment on 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 that day <u>only if the employee would otherwise have worked that day</u>.

8.3 This latter principle is encapsulated in s 116 of the FW Act and its accompanying note.

8.4 This note makes it abundantly clear that the policy position the Act espouses on payment for public holidays is that an employee receives payment only if they would have otherwise worked the public holiday.

8.5 This is reinforced by the *Explanatory Memorandum* to the *Fair Work Bill* 2008 which at

[18] See *Workplace Relations Act* 1996 (Cth) s 612

page 76 says :

> *'Clause 116 - Payment for absence on public holidays*
>
> *460. Clause 116 entitles an employee to payment when absent from work on a public holiday. Where an employees is absent on a day or part-day that is a public holiday under this 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.*

8.6 In creating Modern Awards, the Australian Industrial Relations Commission declined to increase the number of public holidays from those outlined in the National Employment Standards[19].

8.7 Further, in its *Modern Awards Review 2012 - Public Holidays* [2013] FWCFB 2168 (**2013 Test Case**), the Commission also identified that the AIRC made a '*conscious decision*' not to insert the 1994 Test Case decision in all modern awards having regard to the various industrial instruments considered at that time[20]. In the same decision, the Commission also held at [51] that:

> *'there is no proper basis for the assertion that uniformity of award provisions dealing with public holidays was an intended outcome of the award modernisation process. Any lack of uniformity in the application of the Public Holidays test case decision was a feature of the federal award system well before the commencement of the Part 10A award modernisation process.'*

9. THE PENALTY RATES CASE

9.1 Public holidays under the framework of the FW Act were most recently considered in the **2017 Penalty Rates Case** [2017] FWCFB 1001.

9.2 The 2017 Penalty Rates Case outlines with clarity the relevant legislative position in respect of public holidays at [1893].

9.3 The Full Bench also confirmed its agreement with the following principles outlined in the 1994 and 2013 Test Cases:

(a) although the incidence and level of the public holiday penalties is a matter for the

[19] See [2013] FWCFB 2168 at [50]

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;[20]

(b) the NES governs the question of the number of public holidays to which employees should be entitled and as such public holiday entitlements in the NES should not be supplemented through the inclusion in awards some days that are observed as public holidays but not gazetted as such;[21]

(c) the declaration of public holidays, by whatever legal instrument, is the prerogative of the various Governments.[22]

9.4 The Full Bench concluded at [1961] that:

> *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.*

10. RATIONALE FOR 'PENALTY' RATES ON PUBLIC HOLIDAYS

10.1 Historically, the industrial justification for penalty rates on public holidays was two-fold.

10.2 Firstly, as the term 'penalty' rate would suggest, penalty rates were imposed to penalise employers for requiring employees to work in certain circumstances. This concern was noted in *Variation of the South Australian Railways Interim Award* (1935) 35 CAR 370 at 372, where the Arbitration Court held that penalties were:

> *'... imposed for the purpose of discouraging employers from employing men under conditions likely to impair their health, or for the purpose of discouraging certain kinds of work, or working under particular conditions.*

10.3 This justification, where increased rates were imposed as a 'deterrent'[23] on employers, has not been used as a justification for the imposition of penalty rates in recent times.

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[20] [2017] FWCFB 1001 at [1959]
[21] [2017] FWCFB 1001 at [1959]
[22] [2017] FWCFB 1001 at [1960]
[23] See Applications by Organizations of Employees for Awards and Variations of Certain Awards (1947) 58 CAR 610 as per Drake-Brockman ACJ and Sugerman J at 615

10.4 As was recently held by the Full Bench in the 2017 Penalty Rates Case:

> *Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, we have concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. We accept that the imposition of a penalty rate may have the effect of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the objective of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates. The second historical justification for penalty rates, and the justification which has been used to support the imposition of penalty rates in recent industrial jurisprudence, is the view that work on Public Holidays causes inconvenience and disability in relation to family and other relationships as well as recreational, religious and leisure opportunities and that employees should be compensated for such inconvenience and disability.*[24]
>
> *...*
>
> *We accept that public holidays, by their nature, are intended 'to serve a special community role' and that the expectation (and practice) is that the vast majority of employees do not work on public holidays. But these features do not support the adoption of deterrence as an objective in setting public holiday penalty rates. However, these features are relevant to determining the amount of compensation to be provided to employees who work on public holidays, given the additional disutility associated with working on a day when the vast majority of other employees are enjoying a day of leisure.*[25]

[24] [2017] FWCFB 1001 at [39]
[25] [2017] FWCFB 1001 at [41]

C: TASK OF THE FULL BENCH

11. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

11.1 The Full Bench in the 2017 Penalty Rates Case[26] has outlined the legislative framework relevant to the 4 Yearly Review as follows:

(a) *The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.*

(b) *Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.*

(c) *In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.*

(d) *The particular context may be a cogent reason for not following a previous Full Bench decision, for example:*

(i) the legislative context which pertained at that time may be materially different from the FW Act;

(ii) the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

(iii) the extent of the previous Full Bench's consideration of the contested issue.

[26] [2017] FWCFB 1001 at [269]

The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.

11.2 Given the above and the effect of the relevant provisions of the FW Act the Full Bench is now required to determine whether:

(a) the moving parties have advanced a sufficient case including meeting the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation[27], such as to warrant the Full Bench exercising its discretion pursuant to s 139 (or s 55) of the FW Act. This assessment should be directed at reviewing each award 'in its own right' (see 156(5));

(b) any such exercise of discretion is consistent with s 134 of the FW Act; and

(c) the proposed changes would be consistent with s 138 of the FW Act.

[27] Preliminary Issues Decision at [23] and [60].

D: THE SUBSTITUTED HOLIDAYS CLAIMS

12. THE PREMISE

12.1 The central argument behind the Substituted Holidays Claims is that where a public holiday is substituted:

(a) the 'actual day' retains special significance;

(b) an employee who is required to work on the substituted day is subject to a special inconvenience or disutility by being required to work on that actual day; and

(c) the employee is not provided with fair and relevant compensation for that disutility or inconvenience.

12.2 Given the above, the Substituted Holidays Claims seek to impose public holiday pay conditions on days which are not public holidays (having been substituted).

12.3 The effect of the claim in the various awards is to create, from a penalty rates perspective, two days paid as work on public holidays, although only one is a day not worked without loss of pay.

13. MERIT ARGUMENTS AGAINST THE CLAIMS

13.1 As developed above, under current legislative arrangements, public holidays derive their existence from the interaction between the FW Act and the various state and territory Acts, gazettals and proclamations.

13.2 The identity of these days, whether they be Christmas Day, Easter Sunday or Grand Final Eve, are not inherently auspicious or special *at law.* They derive their significance from operation of the FW Act and the various state legislative arrangements.

13.3 Whether equitable or not, the position at law remains that individual state and territory governments can unilaterally create additional public holidays.

13.4 As such, and as has been acknowledged, the creation or limitation of new public holidays is not the role of the Fair Work Commission.

13.5 In that the Substituted Holidays Claims seek to identify additional days worthy of recognition as de facto public holidays (at least in terms of pay rates), they seek to override the specific role identified for state and territory governments in the FW Act.

13.6 It is, with respect, an error to equate the 'day itself' with a 'public holiday' in circumstances where a state or territory government has declared, proclaimed or gazetted that the day should be substituted. To put it plainly: a substitute public day is exactly that, a day *in place*

of another day. This misunderstanding, which appears to underpin the primary reasoning behind the Substituted Holidays Claims, is best expressed in [5] of the HSU's submissions, which states that the 'public holiday itself' should be afforded special status 'as opposed to a substitute day'.

13.7 This submission fundamentally mischaracterises what substitution is and the legal status of public holidays. Once a day is substituted as a public holiday, 'the actual day' is no longer a public holiday for the purposes of the FW Act. This much should be clear from the terms of s 15(2) of the FW Act.

13.8 Given the above, we do not consider the present state of affairs (where working on 'actual days' do not attract public holiday loadings) to be an 'anomaly', but rather the natural and ordinary consequence of the operation of the FW Act in conjunction with the express will of state and territory governments. State and territory governments can and do exercise their prerogative under these arrangements to provide additional public holidays where they consider it appropriate. Where no such prerogative has been exercised and a day has been substituted, it cannot be said to be anomalous that the 'actual day' loses its status as a public holiday.

13.9 Indeed, the only effect of a decision by a state or territory government to declare or substitute a public holiday is to regulate industrial conditions. In that sense, the decision to substitute a public holiday by a state or territory government necessarily brings with it the intention to transfer public holiday industrial conditions from the 'actual day' to another day.

13.10 With respect, without a strongly compelling case, this prerogative should not be disturbed by the determination of the Full Bench.

14. SCOPE OF CLAIMS

14.1 On the basis of the submissions filed by the moving parties, the Substituted Holidays Claims will only apply in relation to days which can be substituted:

(a) New Year's Days (SA on Saturdays, TAS);

(b) Australia Day (all jurisdictions save for SA where is additional on Sundays);

(c) Anzac Day (ACT on Sundays, NT on Sundays, QLD on Sundays);

(d) Christmas Day (SA on Saturdays, VIC);

(e) Boxing Day (NT, SA on Saturdays, TAS).

14.2 It is conceded that 25 December will retain a special significance regardless of whether it is a public holiday or not.

14.3 This argument is considerably weaker however when considered against other public holidays.

14.4 For example, it is difficult to perceive the specific 'special significance' of Boxing Day as 26 December or of New Year's Day as 1 January. While these days are by definition 'calendar specific', their significance is not derived from any other characteristic other than they ordinarily fall on a public holiday which falls on a particular date. In that sense, there is no disadvantage in being unable to celebrate New Year's Day or Boxing Day on the 'actual day' (where that day is not a public holiday) given that the status of the 'actual day' is largely arbitrary.

14.5 The day on which the Substituted Holidays Claims would have the most widespread effect is Australia Day (substituted in all jurisdictions save SA). While it is certainly not relevant to the scope of these proceedings, for the purposes of these submissions, it is perhaps sufficient to simply note that the special significance of celebrating Australia Day on the 'actual date' of 26 January is not without controversy.

14.6 In the submission of ABI and NSWBC, where there is clear legislative intent to ensure that a public holiday is to be celebrated on the 'actual day', state and territory governments will take steps accordingly. One example of this is Anzac Day which in NSW is only recognised as a public holiday on 25 April, regardless of the day of the week on which it falls. Another example was the declaration of Christmas Day as a public holiday by the Victorian Government in 2016 (a decision made after the filing of the Substituted Holidays Claims).

14.7 It is of course conceded that the granting of the Substituted Holidays Claims will not give rise to additional public holidays in the true sense, given that employees will not be able to exercise their rights under Division 10 of the FW Act to refuse to work, nor will employees receive any payment unless they perform work.

14.8 Notwithstanding this limitation, the effect of the Substituted Holidays Claims will be, from a payroll perspective, to create two public holidays in circumstances where only one exists at law.

14.9 Penalty rates will therefore be payable over two days in the same business and potentially be claimed by the same employee twice. This is in no way fair or relevant.

14.10 If the AMWU argument is to 'cut both ways' the disutility or inconvenience suffered by employees required to work on a Christmas Day public holiday which is not 25 December

will be less than that suffered by employees working on a 25 December public holiday. In these circumstances, is the public holiday pay rate provided for work on day which is not 25 December, a day with 'no cultural or religious significance'[28] appropriate? This argument is even more compelling in relation to the wider scope of the HSU Claim.

14.11 Indeed this unfairness is recognised in awards cited by the unions to support their case.

14.12 For example, the *Nurses Award* 2010 provides for an additional non-public holiday 25 December loading but offsets this with a reduction in the ordinary public loading for the substituted day:

> ***32.1 Payment for work done on public holidays***
>
> *(a) All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time of their ordinary rate of pay.*
>
> *(b) Businesses that operate seven days a week shall recognise work performed on 25 December which falls on a Saturday or Sunday and, where because of substitution, is not a public holiday within the meaning of the NES with the Saturday or Sunday payment (as appropriate) plus an additional loading of 50% of the employee's ordinary time rate for the hours worked on that day. All work performed on the substitute day by an employee will receive an additional loading of 50% of the ordinary time rate for the hours worked on that day instead of the rate referred to in clause 32.1.*

14.13 This approach recognises the inherent unfairness of 'multiplying' public holiday pay conditions over several days. This approach is reflected to varying degrees in both the *Supported Employment Services Award* 2010 and *Timber Industry Award* 2010.

15. JURISDICTION TO GRANT CLAIMS

15.1 The Full Bench must be satisfied that it has jurisdiction to grant the relevant claims under ss 55 or 139 of the FW Act.

15.2 We concede that the granting of the Substituted Holidays Claims is likely to be within the scope of s 139(1)(e).

16. HAS A SUFFICIENT EVIDENTIARY CASE BEEN ADVANCED?

16.1 The Preliminary Issues Decision, as confirmed by the 2017 Penalty Rates Case, mandates that where significant variations are sought within the context of the 4 Yearly Review,

[28] See AMWU Submissions at [5]

parties are required to bring probative evidence in support of their claims.

16.2 Instructively, a Full Bench in *Security Services Industry Award* [2015] FWCFB 620 noted at [8]:

> *While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.*

16.3 The nature of the variations sought mean that it was both necessary and feasible[29] to bring probative evidence.

16.4 The evidentiary position of each of the Substituted Holidays Claims can be summarised as follows:

(a) AMWU Claim: Survey material identifying the significance of Christmas Day;

(b) HSU Claim: None.

16.5 The materials brought in support of the AMWU Claim seek to establish something uncontroversial. As noted above, it will not be put by ABI and NSWBC that Christmas Day loses its cultural significance in circumstances where it is substituted as a public holiday.

16.6 Notwithstanding this position, no evidence is before the Full Bench as the effect on employees of receiving the day which in substitution for Christmas Day, either for those employees who are required to work on that day or those are not.

16.7 On the other hand, given that no evidentiary support has been brought in support of the

[29] See [2017] FWCFB 1001 at [52]

HSU Claim, including any evidence of the cultural significance of the various public holidays or the likely effect of the claim, it should be refused.

17. RELIANCE ON TEST CASES

17.1 The Substituted Holidays Claims also appear to place particular reliance on the operation of the 1994 Test Case.

17.2 The 1994 Test Case decision must be understood in its statutory context which is materially different from the Fair Work system. Difference in statutory context was recognised by the Full Bench in the 2017 Penalty Rates Case as a justification for departing from a previous Full Bench Decision.[30]

17.3 As such, the proposition (which is in fact advanced by the AMWU in these proceedings) that the 1994 Test Case represents 'unfinished business' needs be critically assessed.

17.4 The 1994 Test Case was made under the *Australian Industrial Relations Act 1988* as amended (**1988 Act**). The 1988 Act was based on the industrial relations head of power in the Australian Constitution and had at its heart the prevention and settlement of industrial disputes by way of compulsory conciliation and arbitration and the making of awards.

17.5 The notion of a safety net as is currently comprehended in the Fair Work Act was not alive under the 1988 Act.

17.6 When the 1994 Test Case was made the Commonwealth jurisdiction was but one jurisdiction supervising industrial relations in Australia. There was at that time substantial state industrial relations systems which in some industries were the major source of industrial relations regulation across Australia.

17.7 The 1994 Test Case decision was not adopted by the various State systems operating at that time but remained a decision largely contained within the then Commonwealth system.

17.8 The creation of modern awards required a complex and detailed examination of all of the underlying award based transitional instruments that previously covered employers and employees in various industries to determine what was the most appropriate terms and conditions to apply within a particular industry; this included such things as rates of pay for Christmas Day etc where relevant.

17.9 This required Fair Work Australia (as it then was) to consider and acknowledge pre-existing diverse practices and conditions and to apply them with sensitivity and flexibility to ensure

[30] See [2017] FWCFB 1001 at [269]

that the appropriate conditions for an industry emerged in the formulation of modern awards at first instance.

17.10 In our submission when drafting the NES the government would have been aware of or should have been aware of the 1994 Test Case Decision and had it intended for elements of that decision to form part of the safety net then it could have done so in its formulation of Division 10 public holidays.

17.11 The Commonwealth did not do this and in fact instead enunciated a very clear but different policy in its formulation.

17.12 Given the above, mere reliance on the 1994 Test Case in these proceedings, in the absence of a compelling case directed at the requirements of the FW Act, is likely to lead the Full Bench into error.

18. CONSISTENCY WITH THE MODERN AWARDS OBJECTIVE

18.1 As noted by the Full Bench in the 2017 Penalty Rates Case, the Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. The relevant limbs of the Modern Awards Objective are addressed as follows:

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

18.2 The HSU do not address this limb.

18.3 Clearly, the operation of the Substituted Holidays Claims are relatively limited (given that multiple public holidays are unlikely to be substituted in any given year). In that sense, the effect on the living standards and needs of the low paid will be limited.

18.4 The AMWU Submission on this point is curious and requires further clarification.

(b) the need to encourage collective bargaining

18.5 It is not readily apparent as to how the inclusion of an additional entitlement in the minimum safety net could conceivably encourage collective bargaining.

18.6 Any impetus for parties to bargain for the specific substitution arrangements will be undercut by the proposal.

18.7 Indeed, given that the relevance of the Substituted Holidays Claims will vary from business to business, as result of how those businesses roster around public holidays, one would have thought the subject would be more appropriately dealt with by collective bargaining.

18.8 Given the above, the AMWU's submission that it is highly unlikely that safety-net reliant employees would collectively bargain in order to make Christmas Day a day attracting

public holiday entitlements should not be accepted.

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

18.9 This limb is unlikely to be relevant to the Full Bench's consideration.

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

18.10 Arrangements whereby public holiday pay entitlements stretch beyond public holidays cannot be said to reflect modern work practices or the efficient or productive performance of work.

18.11 As was found in the 2017 Penalty Rates Case, penalty rates will have an effect on decisions employers make when staffing their enterprises. This fact should be reflected by the limitation of public holiday pay conditions to the public holiday itself, in the matters to be taken into account:

(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

(iv) employees working shifts;

18.12 The AMWU argues that the term 'public holidays' in s 134(1)(da)(iii) should be 'read broadly' to encompass substituted public holidays and 'the actual day'.

18.13 Such a reading should not be adopted. Indeed it is the mischaracterisation of 'public holidays' as anything other than a legal construct which underpin the fundamental error of the Substituted Holidays Claims. Once a day has been substituted as a public holiday, it is no longer a public holiday.

18.14 While s 134(1)(da)(iii) does have relevance to these proceedings, its relevance is limited to the status of a day as a weekend, but not as a public holiday.

18.15 By way of alternative, the AMWU submits that it is self-evident that s 134(da)(1)(ii) applies given that work on a Christmas Day would constitute 'unsocial' hours.

18.16 This proposition is, with respect, far from self evident. Indeed, considered within the context of s 134(1)(da) as a whole, it is apparent that the reference in s 134(da)(1)(ii) to 'hours' relates to the timing of work within a day, while s 134(1)(da)(iii) relates to the day

upon which work is performed.

18.17 This means that, under the operation of the FW Act, the working of a standard day would not attract the operation of s 134(da)(1)(ii) regardless of the day upon which those hours are performed, given that the type of hours worked are not unsocial. The types of days which would attract consideration for additional remuneration are identified in s 134(1)(da)(iii) as public holidays and weekends.

18.18 On a merit level, employees will already receive loadings for days relevant to the Substituted Holidays Claims, in the form of weekend rates. In some cases, the differential between these rates and public holidays may not be significant, particularly when the 'actual day' is a Sunday. Should these employees be rostered to work the public holiday, they will also enjoy entitlements arising from that.

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

18.19 The HSU submits that the variance between states and territories in respect of the substitution of public holidays enliven this limb of the modern awards objective.

18.20 This submission should not be accepted.

18.21 Even if the variation of public holiday entitlements was relevant to s 134(1)(e), the fact that state and territory government can introduce public holidays regardless of a decision to substitute means that the Substituted Holidays Claims will not influence this limb.

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

18.22 The likely cost impact of the Substituted Holidays Claims have not been scaled although it is acknowledged that the effect of the granting of the claims will only affect a small number of days in any given year.

18.23 Nonetheless the granting of the claims will extend public holiday penalty rates across days which are not public holidays. This will increase costs. Given the findings of the 2017 Penalty Rates Case, such a result is unlikely to be consistent with prevailing industrial trends.

18.24 The HSU's submission that duplicating public holiday payrates on non-public holidays will provide certainty for employers thereby decrease regulatory burden should not be accepted. A duplication of cost will be a duplication of cost regardless of the notice provided.

(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;

18.25 Providing public holiday rates for days which are not public holidays does not in our submission facilitate a simple or easy to understand system. While there may be a pragmatic and logical simplicity to an alternative proposition that public holiday penalty rates should only apply to the 'actual days' of public holidays, the current system of additional, substituted, state and territory- based public holidays will not be simplified by the Substituted Holidays Claims.

(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.

18.26 An approach whereby public holiday rates extend to days which are not public holidays in addition to the retention of public holiday rates will not have a positive effect on matters relevant to this limb.

19. CONCLUSION

19.1 In short, the Substituted Holidays Claims seek to:

(a) subvert the role of state and territory governments in determining public holidays;

(b) in doing so, duplicate public holiday pay rates over days which are not public holidays.

19.2 With respect, it is not the role of the Fair Work Commission to in effect determine which days should be afforded the status of public holidays (albeit only in terms of pay rates) in the face of clear legislative intent to the contrary.

19.3 For this reason alone, the claims should fail.

E: THE 5 DAY ENTITLEMENT CLAIM

20. NATURE OF PUBLIC HOLIDAYS: ADDITIONAL LEAVE OR A RIGHT TO A DAY OFF?

20.1 The SDA's 5 Day Entitlement Claim seeks, for employees who work an average of five days per week, additional benefits where a public holiday falls on a non-rostered day (**5 Day Entitlement Claim**). These entitlements (additional pay, substituted day or leave day) would not apply to a public holiday falling on a weekend.

20.2 The gravamen of the 5 Day Entitlement Claim appears to be that:

(a) the entitlement to public holidays should amount an entitlement to a certain number of paid days off (or payment in lieu);

(b) the working of a five-day week is the threshold at which an employee should become entitled to a certain number of paid days off (or payment in lieu) in the form of public holidays (**5 Day Employees**);

(c) given the above, where 5 Day Employees are not rostered on a public holiday, they 'miss out' on the benefit of the public holiday and should be compensated.

20.3 It is the position of ABI and NSWBC that these premises are not only unsupported, but are inconsistent with the operation of Division 10 of the FW Act and to the industrial purpose of public holidays.

21. INTERACTION OF THE 5 DAY ENTITLEMENT CLAIM AND THE LEGISLATIVE FRAMEWORK

21.1 As identified above, public holidays have not traditionally been characterised as an accumulating and flexible source of leave. Rather, public holidays have traditionally been communally observed on specific days so as to allow a communal recognition or observance of events of cultural, religious or historic significance.

21.2 In that sense, the traditional understanding of public holidays allows:

(i) an employee to absent themselves from work on a particular day to recognise that day's significance; and

(ii) that such absent can be shared with the wider 'public' including the employee's family, friends, church or community.

21.3 This traditional position is clearly reflected in the terms of Division 10 of the FW Act. Division 10 of the FW Act is introduced in the Explanatory Memorandum to the Fair Work Bill 2008 in the following terms:

447. This Division establishes an entitlement to be absent from work on a public

holiday. The Division also allows an employer to request an employee to work on a public holiday where this is reasonable and entitles an employee to refuse to do so in certain circumstances.

21.4 In the submission of ABI and NSWBC, this passage is instructive as it identifies the essence of the industrial concept of the public holiday: an entitlement to be absent on a specific day, when otherwise the employee would be required at work.

21.5 As identified above, Division 10 of the FW Act contains:

(a) section 114 which outlines an entitlement to be absent from employment on public holiday;

(b) section 115 which is definitional in that it outlines the meaning of 'public holiday' as 8 specific days and any other days declared by a State or territory government; and

(c) section 116 which outlines that if an employee is absent from work in accordance with Division 10, the employee is entitled to payment. Section 116 also contains an explicit exclusion of workers not rostered on a public holiday.

21.6 Critically, the terms of Division 10 of the FW Act and the above characterisation do not suggest that the entitlement to public holidays amounts to an entitlement to an amount of paid leave, but rather an entitlement to absent oneself from certain specific days, *without loss* of pay. Indeed the submission of ABI and NSWBC, the prospect of payment on a public holiday for absence (and indeed the prospect of the receipt of penalty rates for work required on a public holiday) are ancillary to the primary character of public holiday, which is a right of absence.

21.7 Considering the legislative context, it is apparent that the argument that 5 Day Workers who are not rostered on public holidays 'miss out' on or 'lose the benefit of'[31] public holidays simply does not hold.

21.8 In simple terms:

(a) a 5 Day Employee who is not rostered on to work on a public holiday enjoys the primary benefit of public holidays in that they are not required to work;

(b) a 5 Day Employee who is not rostered on to work a public holiday also suffers no loss of pay on account of their absence.

[31] See [16] of the SDA Submissions

21.9 An identical scenario is faced by a casual employee or a part-time employee or indeed any employee regardless of whether they work 'non-standard hours'.

21.10 The SDA seeks a clause to ensure that 5 Day Employees are 'treated the same'[32] as Monday-Friday full time workers. With respect, both groups are equally protected by Division 10 of the FW Act.

22. FURTHER MATTERS

22.1 The SDA's pursuit of the 5 Day Entitlement Claim is made on the basis that the current legislative system discriminates against 5 Day Employees working 'non-standard' shift patterns (5 days per week including Saturday and Sunday) (**Non-Standard Workers**).

22.2 At [25] of the SDA Submissions, the SDA claim that it is unfair that Non-Standard Workers may be required to work more days and more hours than Monday to Friday Workers without any compensating benefit. This argument notably ignores benefits obtained by way of perpetual weekend rates.

22.3 It is important also to recognise that it is incorrect to suggest that Non-Standard Workers will never receive payment in respect of public holidays. Where a public holiday falls on a working day for Non-Standard Worker (including either a Saturday, Sunday or a substituted or additional Friday or Monday), such workers will receive payment notwithstanding their absence from work.

22.4 It is also relevant to note that where a public holiday falls on a Saturday or Sunday, (which depending on the jurisdiction can include New Year's Day, Australia Day, Anzac Day, Christmas Day, Boxing Day, Easter Sunday, New Year's Eve), Non-Standard Workers who are rostered on these days will be paid notwithstanding their absence (or alternatively be paid penalty rates).

22.5 This is established in the evidence filed by the SDA, which suggests that the extent to which Non-Standard Workers 'miss out' on entitlements will vary from year to year.

22.6 Variation in employees' circumstances arising from public holidays is of course inevitable in every case given:

(a) different states and territories have different public holidays;

(b) different employees will work different roster patterns; and

(c) different employees will work different hours (fulltime, part-time or casual).

[32] See SDA Submissions at [20]

22.7 This variation in of itself suggests that the SDA's attempt to characterise an entitlement to public holidays under the NES as an entitlement to a certain number of paid days off (or payment in lieu) in fundamentally flawed.

22.8 No meaningful argument has been advanced as to why the working of a 5 day week should be the threshold for the entitlement sought beyond a reference to the various test cases. Given that the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made, the lack of a comprehensive case by the SDA is fatal.

23. HAS A SUFFICIENT EVIDENTIARY CASE BEEN ADVANCED?

23.1 As an initial observation, the evidence filed by the SDA is de-identified and as such no investigation is currently possible into the relevant circumstances of the deponents or their employers. The witness statements do provide however provide support for a matter which is not in contention: that employees not rostered on public holidays will not receive payment on those days.

23.2 Given the effect of s 116 of the FW Act, this evidence is not surprising.

23.3 The evidence does not however provide insight into:

(i) any effect of being not rostered on the days that public holidays are observed and therefore not being required to work those days;

(ii) any effect of 'missing out' on any payment for these days;

(iii) the financial effect of working non-Standard shift patterns;

(iv) the specific conditions justifying the variation in the relevant industries.

23.4 Given the requirements outlined below in respect of the Modern Awards Objective, the evidence as filed does not present a compelling or substantial case upon which to justify the variation of the relevant awards.

23.5 While it demonstrates that some 5 Day Employees receive payment on fewer public holidays than others, having regard to the purpose of public holidays and the wider legislative arrangements of the FW Act, the evidence of the SDA does not demonstrate that the current safety net is not fair and relevant. Indeed, the evidence demonstrates that the operation of the NES is working as intended.

24. JURISDICTION TO GRANT CLAIM

24.1 In order to grant the 5 Day Entitlement Claim, the Full Bench must be satisfied that the

claim falls within jurisdiction.

24.2 This requirement is not sufficiently addressed by the SDA in its submissions.

25. RELIANCE ON TEST CASES

25.1 The 5 Day Entitlement Claim also appears to place particular reliance on the operation of the 1994 and 2013 Test Cases. The SDA submit that:

(a) the Full Bench's Decision in 2013 identified a 'similar claim' in the 2012 Review as being 'not without merit' however declined to vary the relevant awards given that it was a substantial variation proposal unsupported by evidence and more appropriately dealt with in the 4 Yearly Review;

(b) the current claim is now supported by sufficient evidence;

(c) the current claim is consistent with the 1994 Test case.

25.2 Two responses need to be made to this argument.

25.3 Firstly, the Full Bench's description of a similar claim in 2012 as being '*not without merit*' can hardly be considered as an endorsement upon which the Full Bench can now rely. A sufficient case needs to be run now.

25.4 Secondly, as developed above in relation to the Substituted Holidays Claims, the Full Bench should be cautious in seeking to apply the 1994 Test Case without a compelling case being made in respect of the FW Act given:

(a) that it was not incorporated into either the NES or Modern Awards generally; and

(b) the different legislative regime under which it was decided.

26. CONSISTENCY WITH THE MODERN AWARDS OBJECTIVE

26.1 The matters relevant to the assessment of the Modern Awards Objective in respect of Substituted Holidays Claims are, for the most part, relevant to the assessment of the 5 Day Entitlement Claim.

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

26.2 No meaningful attempt is made by the moving party to address this limb.

26.3 For our purposes, it is sufficient to note that an assessment of the existing safety net needs to do more than to crudely compare one group of employees against another so as to demonstrate a disparity. It must have regard to the purpose of each element of the safety net to assess whether that purpose is being fulfilled in a fair and relevant way. The purpose

of public holidays is to allow employees to absent themselves on particular days. In this respect the current safety net is operating exactly as intended in respect of the relevant awards and should be maintained.

(b) the need to encourage collective bargaining

26.4 It is not readily apparent as to how the inclusion of an additional entitlement in the minimum safety net could conceivably encourage collective bargaining.

26.5 Any impetus for parties to bargain for the specific public holiday arrangements will be undercut by the proposal.

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

26.6 This limb is unlikely to be relevant to the Full Bench's consideration.

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

26.7 Arrangements whereby public holiday entitlements stretch beyond those arising on public holidays cannot be said to reflect modern work practices or the efficient or productive performance of work.

26.8 As was found in the 2017 Penalty Rates Case, penalty rates will have a necessary effect on decisions employers make when staffing their enterprises. This fact should be reflected by the limitation of public holiday conditions to the public holiday itself, in the matters to be taken into account.

(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

(iv) employees working shifts;

26.9 Given that the 5 Day Entitlement Claim does not apply to working on public holidays, this limb is not relevant.

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

26.10 This limb is not relevant.

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

26.11 Given the findings of the Full Bench in the 2017 Penalty Rates Case in relation to the positive employment effect of a reduction of penalty rates[33], it is reasonable to infer that increasing penalty rates may have the opposite effect.

26.12 The provision of additional entitlements arising from public holidays, in effect 'extending' the effect of public holidays over multiple days, will have obvious and detrimental effects of business.

(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;

26.13 The 5 Day Entitlement Claim will not make the Awards system simpler, but rather will create a multi-headed entitlement, applicable to a specific group of employees, contingent on a particular type of public holiday.

(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.

26.14 The likely cost of the 5 Day Entitlement Claim has not been 'scaled'. That said, the proposed entitlement is significant, both due to the additional payment/leave which it will create but also due to the administrative compliance that the will be required.

27. CONCLUSION

27.1 The SDA's 5 Day Entitlement Claim is unsupported by probative or compelling evidence.

27.2 No rationale is established why the Full Bench should depart from the traditional conception of public holidays or from the relevant terms of the FW Act.

27.3 While the operation of Public Holiday entitlements will vary amongst employees and businesses, ABI and NSWBC submit that in reflecting the NES, the relevant modern awards currently provide a fair and relevant safety net which should not be disturbed.

[33] See [2017] FWCFB 1001 at [1933]