

15 March 2017

Justice Iain JK Ross
President
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3001

c/ The Associate to his Honour, Justice Ross
Via email: chambers.ross.j@fwc.gov.au
Cc: amod@fwc.gov.au

**Re: 4 Yearly Review of Modern Awards - Common Issue - Public Holidays
(AM2014/301)**

Dear President Ross, Vice-President Hatcher and Fair Work Commission members,

Thank you for the opportunity to make a submission in accordance with the directions of the Full Bench issued on 27 April 2016, dealing with applications to vary public holiday provisions in modern awards as a common issue arising from the four yearly review.

Please find attached a joint submission prepared by the Australian Catholic Council for Employment Relations (ACCER) and the Catholic Commission for Employment Relations (CCER).

ACCER is an agency of the Australian Catholic Bishops Conference, which provides the Bishops with advice on employment relations issues. CCER is a not for profit organisation established by the Bishops of NSW and the ACT to advise and represent the interests of Catholic employers in NSW and the ACT on a broad range of employment relations issues.

Our advocacy is informed by the Church's experience as a major employer, concern for the well-being of workers, especially low paid workers and low income working families, as well as Catholic social teaching on work and the employment relationship.

ACCER and CCER's submission is confined to the issue of penalty rates for work performed on Christmas Day, 25 December. In our view, Christmas Day should be acknowledged as a day of special social and religious significance and accordingly be recognised as a public holiday, whether occurring on a weekday or weekend. We support applications for modern awards to provide for the payment of the public holiday penalty rate for employees working on Christmas Day, irrespective of whether a *substitute* day or an *additional* public holiday is declared when Christmas Day occurs on a weekend.

Thank you for considering our views.

Yours sincerely



Anthony Farley
Executive Director, Catholic Commission for Employment Relations
A/Chair, Australian Catholic Council for Employment Relations



**AUSTRALIAN CATHOLIC COUNCIL FOR EMPLOYMENT RELATIONS
AND
CATHOLIC COMMISSION FOR EMPLOYMENT RELATIONS**

**JOINT SUBMISSION TO THE
FAIR WORK COMMISSION
4 YEARLY REVIEW OF MODERN AWARDS –
COMMON ISSUE –
PUBLIC HOLIDAYS
(AM2014/301)**

15 MARCH 2017

OVERVIEW

This submission has been prepared jointly by Australian Catholic Council for Employment Relations (**ACCER**) and Catholic Commission for Employment Relations (**CCER**).

CCER is a not for profit organisation established by the Bishops of New South Wales (**NSW**) and the Australian Capital Territory (**ACT**) to advise and represent the interests of Catholic employers in NSW and the ACT on a broad range of employment relations and human resource issues.

CCER works with employers across a number of sectors: Catholic independent and systemic schools; social services agencies, including aged care, disability support, health facilities and children's services; and religious congregations, parishes, chanceries and other Diocesan employers throughout NSW and the ACT.

ACCER is an agency of the Australian Catholic Bishops Conference (**ACBC**), which provides the Bishops with advice on employment relations issues. One of its principal activities has been the advocacy of adequate safety net wages for low paid workers. The Catholic Church employs over 180,000 employees through its agencies across Australia.

ACCER and CCER's advocacy on workplace relations issues is informed by the Church's experience as a major employer as well as Catholic social teaching on work and the employment relationship, which places great emphasis on the right of workers and their families to a decent standard of living that promotes proper care of children, family stability and social inclusion.

ACCER and CCER welcome the opportunity for interested parties to provide a submission in accordance with the directions of the Fair Work Commission (**FWC**) Full Bench issued on 27 April 2016, dealing with applications to vary public holiday provisions in modern awards as a common issue arising from the four yearly review. Our submission is confined to the issue of penalty rates for work performed on Christmas Day, 25 December.

Under current arrangements, employees who work on Christmas Day where it falls on a weekend may not receive the applicable modern award public holiday penalty rates in some states where a *substitute* public holiday is declared instead of an *additional* public holiday.

ACCER and CCER's submission argues that Christmas Day should be acknowledged as a day of special social and religious significance and accordingly be recognised as a public holiday, whether occurring on a weekday or weekend. In our view, modern awards should provide for the payment of the public holiday penalty rate for employees working on Christmas Day, irrespective of whether a *substitute* day or an *additional* public holiday is declared when Christmas Day occurs on a weekend.

In light of its importance in the liturgical calendar, Christmas Day is one of the most significant Christian feasts and a notable time for family, rest and recreation. Those who work on Christmas Day do so to provide the community with essential services (health, transport, power etc) or hospitality services which allow families to enjoy the holiday. Those workers who miss out on celebrating a day with such special status should receive suitable compensation through the relevant public holiday penalty rates payment for that sacrifice.

SUBMISSION

Applications to vary award provisions for Christmas Day

The FWC Public Holiday review arises from employer and union applications to vary provisions for public holidays in modern awards. The applications have been made during the four yearly review of modern awards and subsequently dealt with as a common issue by a specially constituted Full Bench.

Broadly, there are two types of applications before the FWC which deal with non-working days and weekend public holidays. ACCER and CCER's submission in these matters is confined to the issue of penalty rates for work performed on Christmas Day, 25 December when it falls on a weekend.

In this regard, ACCER and CCER support applications before the FWC which seek to vary specific awards to provide for public holiday penalty rates to apply to work performed on Christmas Day, regardless of whether it is designated as a public holiday.

For example, the Australian Manufacturing Workers' Union (**AMWU**) is pursuing changes to public holiday entitlements in a number of manufacturing industry awards. The proposed change would provide that employees who work on Christmas Day when 25 December falls on a weekend (and has been substituted so that another day is the public holiday instead i.e. the following Monday or Tuesday) are paid as if 25 December was a public holiday at the rate of double time and a half.¹ The Health Services Union (**HSU**) makes similar submissions in respect of other awards. It is anticipated that employers will oppose such proposals.

Christmas Day public holiday arrangements

Section 115 (1)(a)(vii) of the *Fair Work Act 2009* (**FW Act**) provides that 25 December (Christmas Day) is a public holiday. Further, under s115 (2) if a law of a State or Territory substitutes a day that would otherwise be a public holiday under the FW Act, then the substituted day is the public holiday for the purpose of the FW Act and provisions in modern awards dealing with entitlements and payments.

Under some State and Territory public holiday legislation, where Christmas Day falls on a Saturday or Sunday, the Christmas Day public holiday is *substituted* so that another day (the following Monday or Tuesday) is declared as the public holiday instead. This means that 25 December is treated as an ordinary weekend day and only the substitute day is treated as a public holiday. For example, in Victoria and the Northern Territory, Governments have elected to substitute the public holiday to the next available weekday where Christmas Day falls on a weekend. However, last year the State Government of Victoria made a late decision on 25 November 2016 to grant an additional day and observe Christmas Day as a public holiday on 25 December.

The situation differs in most other States, where an *additional* public holiday is declared as well as a public holiday on 25 December. In NSW, the *Public Holidays Act 2010* (**NSW PH**

¹ [2016] AMWU Submission to Fair Work Commission AM2014/301 Public Holidays, p2
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014301-sub-amwu-201016.pdf>

Act) provides for an *additional* public holiday when New Year's Day, Christmas Day or Boxing Day falls on a weekend. This means that both Christmas Day and the additional day are treated as public holidays. For example, last year in NSW Tuesday 27 December 2016 was declared an additional public holiday under the NSW PH Act as well as Christmas Day which fell on a Sunday.

Penalty rates payments

The entitlement to payment of penalty rates for work performed on Christmas Day differs depending on the State or Territory in which an employee works and the provisions of the applicable modern award.

Modern awards and agreements provide penalty rates for employees who work on public holidays. Rates vary but generally the '*standard*' public holiday penalty rate for day workers and non-continuous shift workers is double time and a half or double time for continuous shift workers. Some instruments provide for a substitute day off, an additional day of annual leave or time in lieu.

Employees in States/Territories where the Christmas Day holiday is granted as an *additional* day will be entitled to receive the relevant award public holiday penalty where they work on either 25 December or the additional day or both days.

However, employees in States/Territories where the Christmas Day holiday is *substituted* and who work on the actual day only receive their normal weekend award entitlements. Only employees working on the substitute day are entitled to receive the relevant public holiday entitlements according to their award or agreement. This means that some employees who work on a weekend Christmas Day will not receive public holiday penalty rates. They will only be entitled to be paid the applicable, but lower, Saturday or Sunday penalty rate with modern awards generally providing that time and a half is payable on Saturday and double time on Sundays.

NSW Public Holiday Act Statutory Review

While NSW employees who work on Christmas Day are entitled to receive applicable public holiday penalty rates, this may change in the future. The NSW Government recently undertook a statutory review of the NSW PH Act, finalised in October 2016. While the review does not propose any changes, employers were pushing for NSW to replace Christmas Day, Boxing Day and New Year's Day public holidays which fall on the weekend with a substitute rather than additional day (to avoid what has been characterised as '*double dipping*').²

Presumably, there will be similar pressures in other States and Territories to replace public holiday additional days with substitute days, with consequent effects for penalty rate payments.

² [2016] AiGroup and AFEI Submissions to the Statutory Review of the Public Holidays Act 2010 (NSW)

Who is working on Christmas Day?

While the Australian Bureau of Statistics does not collect data on the number of employees working on Christmas Day, clearly many employees work on the day across a range of industries including police, emergency services, health, aged and disability care services, transport, power, hospitality, restaurants and clubs.

Further, we know that weekend work is now common, having nearly trebled over the past 20 years, from 12% of workers in 1993 to roughly a third today with 30% of single job holders and 60% of multiple job holders working weekdays and weekends. In the accommodation and food services sector the proportion is much higher at 72%.³

Those employees who do regularly work weekends, including Christmas Day when it falls on a weekend, are therefore disproportionately disadvantaged by the current award arrangements for Christmas Day penalty rates at a time when the shift to weekend work is increasing.

However, the shift to more weekend work does not lessen the significance of working on the actual Christmas Day for those weekend workers who miss out on the holiday and who may not receive public holiday penalty rates.

Why is there a problem?

As noted above, employees who work on Christmas Day where it falls on a weekend may not receive public holiday penalty rates in some states where a *substitute* public holiday is declared instead of an *additional* public holiday.

Further, under section 114 of the FW Act, employees are entitled to be absent on public holidays and may refuse a request to work if they have reasonable grounds to do so. 'Reasonableness' is determined based on a number of factors such as an employee's personal circumstances including family responsibilities, and whether the level of remuneration reflects an expectation of work on the public holiday.

However, these important protections, including an assessment of the 'reasonableness' of working on the day, do not apply in circumstances where a substitute day and not Christmas Day is declared as a public holiday. This means that an employee's family responsibilities, and the level of remuneration they receive are not required to be considered when requesting them to work on Christmas Day.

By not acknowledging the actual Christmas Day as a public holiday, with all its religious and community significance, when it falls on a weekend, non-standard workers are unable to refuse work and do not receive additional penalties for performing work on the day. In addition, a substitute day cannot replicate the important religious, family, and social time that only occurs once a year on Christmas Day.

³ [2012] Australian Bureau of Statistics 6342.0 - *Working Time Arrangements, Australia*, November

In ACCER and CCER's view, this means that some employees working on Christmas Day are not adequately compensated for the loss of family and social time and the festivities only associated with that particular day.

Christmas remains a uniquely 'special' day

In light of its importance in the liturgical calendar, Christmas Day is one of the most significant Christian feasts and a notable time for family, rest and recreation.

As Pope Francis has stated:

*On this day of joy, we are all called to contemplate the Child Jesus, who gives hope once again to every person on the face of the earth. By his grace, let us with our voices and our actions give witness to solidarity and peace. Merry Christmas to all!*⁴

Research shows that Christmas remains a time of religious and social significance in Australia with high importance placed in the broader community on celebrating a festive time with family and friends. A recent survey reported that 57% of respondents identified themselves as belonging to a religion that celebrates Christmas as a religious holiday. 87% of those who are not religious still celebrate Christmas to some extent and 56% of those who belong to another religion still celebrate Christmas. Importantly the research shows that for 85% of the population, Christmas Day remains the most important highlight of the calendar with 61% celebrating the day with parents or extended family.⁵

Festive activities including family and social time that occur on or in connection with Christmas Day simply do not occur on substitute days precisely because of the time off taken across the community (but only those employees who work on the substitute day receive the public holiday penalty payment).

It is clear that Christmas Day is a uniquely special day and should therefore be treated differently in modern awards in a way that reflects its special status. This position was explicitly recognised by the Australian Industrial Relations Commission (**AIRC**) in the *Public Holidays Test Case* decisions of 1994 and 1995. The Full Bench agreed with the ACTU's 'underlying contention' that 'Christmas Day should be regarded differently from other days which are subject to substitution' due to the 'significance of Christmas Day in the lives of many members of the community.'⁶

ACCER and CCER submit that the research above shows that the special significance of Christmas Day has not changed in the 22 years since the AIRC decision, is the same for all occupations and industries in light of its universal celebration, and should, therefore, be reflected in Christmas Day entitlements that provide equitable compensation for all workers across all modern awards.

⁴ [2016] Vatican Radio, Pope Francis: Christmas message "Urbi et Orbi"

http://en.radiovaticana.va/news/2016/12/25/pope_francis_christmas_message_urbi_et_orbi_full_text/1281611

⁵ [2012] McCrindle Research, <http://www.mccrindle.com.au/ResearchSummaries/Christmas-in-21st-Century-Australia.pdf>

⁶ [20 March 1995] Industrial Relations Commission 251/1995 [1995] AIRC 443. Print L9178.

Support for appropriate award compensation for working on Christmas Day

ACCER and CCER support, as a general principle, that modern awards should provide that employees who work on Christmas Day (25 December) when that day falls on a weekend and is substituted so that another day is designated as the public holiday instead, are entitled to be paid applicable public holiday penalty rates as if 25 December was a public holiday.

We note that a number of modern awards already specify provisions for loadings and substitute days to apply to work on Christmas Day in these circumstances, such as the *Hospitality General Award 2010* [cl 32.2 (c)] and *Nurses Award 2010* [cl 32.1 (b)].

ACCER and CCER's view is that clauses that recognise the special significance of Christmas Day should be a universal provision in modern awards. On that basis, we support the applications made by the AMWU and HSU for Christmas Day award variations currently before the FWC.

Such an approach is consistent with the modern award objective in section 134 (da) of the FW Act, which provides for the need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays.

ACCER and CCER recognise the concerns of employers in increasing Christmas period labour costs. However, in light of the current declaration of Christmas Day and additional days as public holidays in many states, the proposal to include the public holiday penalty loading will not have a significant cost impact on employers. In addition, Christmas Day falling on the weekend happens relatively infrequently.

While we acknowledge that for many employees this is not currently a problem, state and territory governments could change their legislative arrangements for public holidays in future, with consequent impacts on access to award penalty rate entitlements. ACCER and CCER's submission aims to ensure that those employees who are required to work on Christmas Day will always be equitably compensated for the unsociable impacts of doing so, regardless of the state or territory in which they reside.