Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission
Public Holidays
(AM2014/301)

29 MARCH 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/301 PUBLIC HOLIDAYS

1. INTRODUCTION

1. In the context of the 4 yearly review of modern awards (**Review**), three unions (**Unions**) are pursuing variations to several modern awards, each of which are designed to afford additional entitlements to employees in relation to public holidays.

2. Specifically:

- The Australian Manufacturing Workers' Union (**AMWU**) is seeking variations to four modern awards such that they would require the payment of the relevant public holiday penalty rates prescribed by the award where an employee performs work on 25 December (Christmas Day) and that date falls on a Saturday or Sunday, and where another day is substituted for Christmas Day which would otherwise be a public holiday because of s.115(1) of the *Fair Work Act 2009* (**FW Act**). Those awards are:

    1) The *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);

    2) The *Food, Beverage and Tobacco Manufacturing Award 2010* (**FBT Award**);

    3) The *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award**); and

    4) The *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**Vehicle Award**).

- The Health Services Union (**HSU**) is seeking variations to six modern awards such that they would require the payment of the relevant public holiday penalty rates prescribed by the award where an employee performs work on any public holiday identified in s.115(1) of the FW Act and that public holiday falls on a Saturday or Sunday, and where

another day is substituted for the day that would otherwise have been a public holiday. Those awards are:

1) The *Aboriginal Community Controlled Health Services Award 2010* (**Aboriginal Health Services Award**);

2) The *Aged Care Award 2010* (**Aged Care Award**);

3) The *Health Professionals and Support Services Award 2010* (**Health Professionals Award**);

4) The *Social, Community, Home Care and Disability Services Award 2010* (**SACS Award**);

5) The *Ambulance and Patient Transport Award 2010* (**Ambulance Award**); and

6) The *Nurses Award 2010* (**Nurses Award**).

- The Shop, Distributive and Allied Employees' Association (**SDA**) is seeking variations to seven modern awards such that they would include a new provision applying to full-time employees and part-time employees who work an average of 5 days per week. The proposed clause would provide such employees with the benefit of a day off in lieu, an equivalent day's pay or an extra day of annual leave if a public holiday falls on a day that the employee is not required to work. The awards it seeks to vary are:

  1) The *General Retail Industry Award 2010* (**Retail Award**);

  2) The *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**);

  3) The *Fast Food Industry Award 2010* (**Fast Food Award**);

  4) The *Storage Services and Wholesale Award 2010* (**Storage Services Award**);

5) The Vehicle Award;

6) The *Pharmacy Industry Award 2010*; and

7) The *Mannequins and Models Award 2010*.

3. The Australian Industry Group (**Ai Group**) has a significant interest in each of the aforementioned claims, the grant of which is strongly opposed.

4. The submissions that follow deal with each of Unions' claims in turn and set out the bases for our opposition. The submissions are filed in accordance with amended directions issued by the Fair Work Commission (**Commission**) on 8 March 2017.

2. THE STATUTORY FRAMEWORK

2.1 The Legislative Provisions of the FW Act Relevant to the Review

5. The Unions' claims are being pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the FW Act.

6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

7. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

8. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.

9. We later address each element of the modern awards objective with reference to the Unions' claims for the purposes of establishing that, having regard to s.138 of the FW Act, the claims should not be granted.

2.2 The Legislative Provisions of the FW Act Relevant to Public Holidays

10. Section 26 of the FW Act excludes various State and Territory industrial laws. However, s.27(1) states that s.26 does not apply to a law of a State or Territory in so far as: *"(b) the law deals with any non-excluded matters"*.

11. Section 27(2)(j) prescribes the following non-excluded matter:

> (j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays.

12. Subsection 29 prescribes that a term of a modern award applies subject to "(b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d)".

13. The Explanatory Memorandum for the *Fair Work Bill 2008* states, at paragraph 142:

> 142 Paragraph 27(1)(c) saves State and Territory laws dealing with the following non-excluded matters, which are set out in subclause 27(2):
>
> …
>
> - Declaration, prescription or substitution of public holidays, but not employee and employer public holiday rights and obligations, that are dealt with by the NES (Division 10 of Part 2-2).

14. Sections 26 – 29 have the effect of saving State and Territory laws that declare, prescribe or substitute public holidays. These provisions evince a clear legislative intention to preserve the role of States and Territories for the purposes of specifying the days upon which public holidays fall. However, the obligations and entitlements to arise in relation to such public holidays are a matter for the Commonwealth Parliament and, to the extent that awards supplement the NES, the Commission.

15. Section 115(1)(a) of the FW Act identifies eight public holidays. All national system employees enjoy benefits arising from the FW Act in relation to those days. For instance:

- Section 114(1) provides that an employee is entitled to be absent from his or her employment on a day that is a public holiday.

- Section 114(3) provides that if requested work on a public holiday, an employee may refuse if the request is not reasonable or the refusal is reasonable.

16. By virtue of s.115(1)(b), in addition to the eight public holidays identified at s.115(1)(a), any other day or part-day that is declared or prescribed by or

under a law of a State or Territory is also deemed a public holiday. It is as a result of s.115(1)(b) that additional public holidays so declared by State and Territory legislation in circumstances where the "actual" day falls on a weekend are recognised in the federal Fair Work system.

17. The FW Act also recognises that public holidays may be substituted in one of two ways. Firstly, State and Territory laws may substitute a public holiday (s.115(2)). Secondly, a modern award or enterprise agreement may include a term that enables an employer to reach agreement with its employees to substitute a public holiday (s.115(3)). In either case, the substituted day is to be recognised as a public holiday in lieu of the "actual" day prescribed by s.115(1).

18. Lastly, s.116 deals with circumstances in which an employee is not absent from his or her employment on a day or part-day that is a public holiday. In such circumstances, the employee must be paid at their base rate of pay (defined by s.16 of the FW Act) for the employee's ordinary hours of work on that day or part-day.

19. A recent decision of the Federal Court of Australia gave consideration to the proper interpretation of s.116 of the FW Act and specifically, whether it gives rise to an entitlement where the employee would not otherwise have been required to work. Justice Rangiah ultimately concluded that: (emphasis added)

> The applicant's argument that the employees have "ordinary hours of work" on every day of the year because they are required to be available to work on all shifts cannot be accepted. The phrase "the employee's ordinary hours of work on the day or part-day" in s 116 of the FWA contains two questions rolled-up together, namely whether the employee would ordinarily have worked on the public holiday and, if so, what the ordinary hours are on that day. This is confirmed by cl 461 of the Explanatory Memorandum to the *Fair Work Bill 2008* which states that "An employee is not entitled to any payment for absence on a public holiday if they would not have ordinarily worked on that day." Thus, s 116 is concerned with whether the employee would ordinarily have worked on the public holiday if the employee were not absent from work in accordance with the entitlement under s 114.[1]

[1] *Queensland Nurses' Union of Employees v Ramsay Health Care Australia Pty Ltd* [2016] FCA 1486 at [37].

20. Accordingly, whilst the NES provides an entitlement to employees who would have been required to work on a public holiday, but for their right to be absent pursuant to s.114, the NES does not otherwise confer an entitlement to employees who are not required to work on a public holiday.

21. The NES represents the minimum safety net developed by Parliament and is reflective of what it has assessed as providing an appropriate set of terms and conditions in relation to public holidays. Whilst this can be supplemented by the award system, the question that here presents itself is whether such supplementation in the form sought by the Unions is necessary in order to ensure that each of the relevant awards, *together with the NES*, provides a fair and relevant minimum safety net of terms and conditions. It is our submission that the Unions have failed to establish that this is so.

2.3 State and Territory Laws Relevant to Public Holidays

22. As we have earlier set out, decisions made by States and Territories to declare additional or substitute public holidays have a direct bearing on the safety net afforded by the NES and modern awards. This is the case by virtue of ss.115(1)(b) and 115(2) of the FW Act.

23. The claims here mounted by the AMWU and the HSU relate specifically to substituted public holidays. They are designed to overcome such substitution by requiring the payment of public holiday penalty rates for work performed on the "actual" day and the substitute day. A matter that will necessarily be relevant to the Commission's consideration of their claims is the extent to which substitute public holidays have been declared by each of the States and Territories. The prevalence of substitution goes to two matters: the potential impact of the claim and a consideration as to whether the proposed provisions can be justified as being *necessary* to achieve the modern awards objective. We turn to those issues later in this submission.

24. In the table below, we provide a summary of the effect of the relevant State and Territory laws in operation as at the time of drafting this submission.

✓ Legislation provides for a substitute day where the actual day falls of the weekend

	NSW *Public Holidays Act 2010*	ACT *Holidays Act 1958*	VIC *Public Holidays Act 1993*	TAS *Statutory Holidays Act 2000*	SA *Holidays Act 1910*	WA *Public and Bank Holidays Act 1972*	NT *Public Holidays Act 1981*	QLD *Holidays Act 1983*
1 Jan (New Year's Day)	X	X	X	✓	✓ if Saturday	X	X	X
26 Jan (Australia Day)	✓	✓	✓	✓	✓ if Saturday	✓	✓	✓
Good Friday	X	X	X	X	X	X	X	X
Easter Monday	X	X	X	X	X	X	X	X
25 April (Anzac Day)	X	✓ if Sunday	X	X	X	X	✓ if Sunday	✓ if Sunday
Queen's Birthday[2]	X	X	X	X	X	X	X	X
25 Dec (Christmas Day)	X	X	✓[3]	X	✓ if Saturday	X	X	X
26 Dec (Boxing Day)	X	X	X	✓	✓ if Saturday	X	✓	X

25. The table demonstrates that few public holidays are substituted by virtue of State and Territory laws. Australia Day is the only public holiday to be substituted in each State and Territory. Further, five of the eight States and Territories only substitute one or two public holidays in a year.

26. To properly assess the claims made by the AMWU and the HSU in this Review, consideration must also be given to when the public holidays that are the subject of substitution will next fall on a weekend and the frequency with which this will occur.

[2] On the day on which it is celebrated in a State or Territory or a region of a State or Territory

[3] Whilst the *Public Holidays Act 1993* requires that Christmas day will be substituted if it falls on a weekend, in 2016 the Minister for Small Business, Innovation and Trade appointed 25 December 2016 as a public holiday. See Government Gazette of 25 November 2016: http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S364.pdf

27. The table below marks when each of the public holidays that are the subject of substitution pursuant to any State and Territory legislation will fall on a weekend during 2016 – 2026. As can be seen, the frequency with which such substitution will in fact occur is low. For instance, over the next decade, Anzac Day will be substituted on three occasions in the Australian Capital Territory (2020, 2021 and 2026) and only once in the Northern Territory and Queensland (2021). It will not be substituted in any other State or Territory.

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
1 Jan (New Year's Day)		✓					✓	✓			
26 Jan (Australia Day)				✓	✓					✓	
25 April (Anzac Day)					✓	✓					✓
25 Dec (Christmas Day)	✓					✓	✓				
26 Dec (Boxing Day)					✓	✓					✓

28. Importantly, for the purposes of the AMWU's claim:

- Christmas Day fell on a Sunday in 2016. Only the Victorian legislation provided for substitution, however in November 2016 the Minister for Small Business, Innovation and Trade appointed 25 December 2016 as a public holiday[4] and so as a result, an additional public holiday was declared. Consequently, Christmas Day was not substituted in any State or Territory in 2016. In such circumstances, the AMWU's clause would have had no work to do.

- Christmas Day will next fall on a weekend (Saturday) in 2021. Assuming the position under State and Territory legislation remains as is presently the case, it would be substituted only in Victoria and South Australia, subject to any more generous declarations that the relevant Minister may make.

[4] Government Gazette of 25 November 2016: http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S364.pdf

- In the following year (2022), Christmas Day would fall on a Sunday. It would be substituted only in Victoria, and only if the relevant Victorian Minister decided to implement a different approach to what the Minister decided to implement in 2016.

- After 2021/22, Christmas Day would not fall on a weekend again until 2027.

29. It is also relevant to consider the extent to which additional public holidays have been declared by State and Territory laws in order to appreciate the potential impact of the SDA's claim, which would confer an entitlement in circumstances where a non-working day falls on any public holiday. The table below sets out each of the additional public holidays provided by State and Territory laws as at the date of drafting this submission: [5]

[5] This table is based on the data contained in Table 72 in *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

	NSW *Public Holidays Act 2010*	ACT *Holidays Act 1958*	VIC *Public Holidays Act 1993*	TAS *Statutory Holidays Act 2000*	SA *Holidays Act 1910*	WA *Public and Bank Holidays Act 1972*	NT *Public Holidays Act 1981*	QLD *Holidays Act 1983*
New Year's Day	✓	✓	✓	✓	✓	✓	✓	✓
Regatta Day				✓				
Labour Day	✓	✓	✓		✓	✓		✓
Canberra Day		✓						
March Public Holiday					✓			
Eight Hours Day				✓				
Easter Saturday	✓	✓	✓		✓		✓	✓
Easter Sunday	✓	✓	✓					
May Day							✓	
Western Australia Day						✓		
Picnic Day								✓
Family and Community Day		✓						
AFL Grand Final Eve			✓					
Melbourne Cup			✓					
Christmas Eve					✓		✓	
New Year's Eve					✓		✓	

30. The analysis reveals the extent to which the safety net afforded by s.115(1)(a) of the FW Act is supplemented by State and Territory legislation, such that there are in fact a significant number of public holidays to which employees are entitled. Indeed each State or Territory has declared between three and six additional public holidays each year.

2.4 Conclusion

31. Having regard to the relevant legislative provisions that we have here set out, we make the following submissions, which we will later develop when considering other aspects of the Unions' claims.

32. **Firstly**, the NES reflects a safety net in relation to public holidays that has been deemed sufficient by Parliament. The Commission's power to supplement that safety net is constrained by s.138 of the FW Act, which requires that each award is only permitted to include terms that are necessary for the purposes of ensuring that the award, together with the NES, provides a fair and relevant minimum safety net. The clauses proposed by the Unions are not necessary in the relevant sense.

33. **Secondly**, the NES recognises the role that States and Territories play in declaring public holidays by way of both substitution and additional public holidays. This too forms part of the safety net which Parliament considers appropriate. The AMWU and HSU claims seek to circumvent the role that State and Territory Governments play, notwithstanding its express contemplation by the FW Act. This is because the provisions they have proposed would have the effect of creating an additional public holiday for the purposes of determining the rate payable to employees for work performed on that day. This is not appropriate. It undermines the role that State and Territory Governments play and, to a large extent, the effect of s.115(2) of the FW Act.

34. **Thirdly, in relation to the AMWU's claim**; the incidence of Christmas Day falling on a weekend and being substituted by State and Territory legislation is very low. Further, the issue will not now arise until 2021, assuming the position under the current legislation remains as it currently is. Whilst the AMWU may seek to argue that this would render the impact of the claim minimal, it does not alleviate the cost and operational impacts of such a clause in relation to an individual business. Such microeconomic considerations form an essential part of the Commission's assessment of the Unions' claims, as per various aspects of s.134(1) and s.3(g) of the FW Act. Furthermore, it is difficult to identify why such a clause is necessary in circumstances where it will have minimal (if any) work to do for the coming four Christmas'.

35. **Fourthly, in relation to the HSU's claim;** we make similar observations regarding the incidence of substitution of public holidays generally and as a consequence, the necessity of the provisions proposed.

36. **Fifthly, in relation to the SDA's claim;** when assessing the potential impact of the claim, it is relevant to note the significant number of additional public holidays that have been declared by the States and Territories in addition to the public holidays identified at s.115(1)(a) of the FW Act. Further, we note that the safety net provided by the NES does *not* extend to circumstances in which a day on which the employee is not required to work falls on a public holiday. It does, however, provide for payment at the base rate of pay where an employee would have worked but for their right to be absent pursuant to s.114(1). The provision proposed by the SDA would apply in both of those scenarios. As we later establish, the SDA has not established that it is necessary to supplement the safety net in this regard.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

3.1 The Preliminary Jurisdictional Issues Decision

37. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[6] provides the framework within which the Review is to proceed.

38. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[7]

39. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[8]

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[8] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

40. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[9]

41. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to

[9] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[10]

42. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

43. Accordingly, the Preliminary Jurisdictional Issues decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

[10] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

44. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> **[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.[11]

45. The Unions' claims conflict with the principles in the Preliminary Jurisdictional Issues Decision. Further, they have not discharged the evidentiary burden described in the above decision. Accordingly, their claims should be rejected.

3.2 Considerations Associated with Procedural Fairness

46. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the Unions in support of them. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clauses sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

[11] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

47. Should the Unions or the Commission during the course of these proceedings seek to vary the relevant awards in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded a further opportunity to make submissions and/or call evidence. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim as they have not been granted a chance to be heard in relation to the variations sought to be made, which may well have implications that have not otherwise been put before the Full Bench.

4. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

48. Public holiday provisions in awards have been the subject of consideration by the Commission and its predecessors on several prior occasions. We here propose to deal with such decisions that are of relevance to these proceedings.

49. It was observed by the Commission in the Preliminary Jurisdictional Issues Decision that it should take into account previous decisions that are relevant to a contested issue and that previous Full Bench decisions "should generally be followed, in the absence of cogent reasons for not doing so": (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[12]

[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

50. The Commission's recent decision regarding its review of penalty rates in various modern awards (**Penalty Rates Decision**) provides examples of cogent reasons for *not* following previous Full Bench decisions: (emphasis added)

> **[255]** As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision,* while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:
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> - the legislative context which pertained at that time may be materially different from the FW Act;
> - 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 be relevant to the weight to be accorded to the previous decision; or
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.[13]

51. For reasons that will later become apparent, the aforementioned factors are relevant to assessing the significance to these proceedings of the authorities here relied upon by the Unions. This is particularly true of the public holidays test case of 1993 – 1995.

4.1 The Public Holidays Test Case of 1993 – 1995

52. The AMWU, HSU and SDA each rely on a series of decisions issued in 1993 – 1995 by a Full Bench of the Australian Industrial Relations Commission (**AIRC**), which relate to various issues concerning public holidays (**Public Holidays Test Case**).

The Relevant Statutory Framework

53. The AIRC's decisions were made in the context of the *Industrial Relations Act 1988* (**IR Act**). The applications were made pursuant to s.113, which did not impose any constraints on the AIRC's discretion to vary an award. Rather it

[13] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

mandated that the IR Act apply to such applications and proceedings in the same manner, as far as possible, as it applied in relation to industrial disputes:

Section 133 Power to set aside or vary awards

(1) The Commission may set aside an award or any of the terms of an award.

(2) The Commission may, and shall if it considers it desirable for the purpose of removing ambiguity or uncertainty, vary an award.

…

(4) This Act applies in relation to applications, and proceedings in relation to applications, for the setting aside or variation of awards in the same manner, as far as possible, as it applies in relation to industrial disputes and proceedings in relation to industrial disputes, and for that purpose such an application shall be treated as if it were the notification of an industrial dispute.

…

54. Section 90 of the IR Act required the AIRC to take into account the public interest: (emphasis added)

90. Commission to take into account the public interest

In the performance of its functions, the Commission shall take into account the public interest, and for that purpose shall have regard to:

(a) the objects of this Act and, in particular, the objects of this Part; and

(b) the state of the national economy and the likely effects on the national economy and of any award or order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.

55. Section 90 effectively required the Commission to have regard to the objects of the IR Act, the objects of Part VI of that Act and macroeconomic considerations associated with the national economy.

56. Section 88A prescribed the objects of Part VI of the IR Act, which related to dispute prevention and settlement in the following terms: (emphasis added)

88A. The objects of this Part are to ensure that:

(a) employees are protected by awards that set fair and enforceable minimum wages and conditions of employment that are maintained at a relevant level; and

(b) awards (other than paid rates awards) act as a safety net of minimum wages and conditions of employment underpinning direct bargaining; and

(c) awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, while employees' interests are also properly taken into account; and

(d) regard is had, in connection with making, reviewing and varying awards, to stable and appropriate relativities based on skill, responsibility and the conditions under which work is performed, and on the need for skill-based career paths; and

(e) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that both:

(i) gives employees prompt access to fair and enforceable minimum wages and conditions of employment, so far as they do not already have them; and

(ii) encourages the prevention and settlement of industrial disputes by the making of agreements under Part VIB.

57. The objects of the IR Act appeared at s.3 in the following terms: (emphasis added)

3. Objects of Act

The principal object of this Act is to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and the welfare of the people of Australia by:

(a) encouraging and facilitating the making of agreements, between the parties involved in industrial relations, to determine matters pertaining to the relationship between employers and employees, particularly at the workplace or enterprise level; and

(b) providing the means for:

(i) establishing and maintaining an effective framework for protecting wages and conditions of employment through awards; and

(ii) ensuring that labour standards meet Australia's international obligations; and

(c) providing a framework of rights and responsibilities for the parties involved in industrial relations which encourages fair and effective bargaining and ensures that those parties abide by agreements between them; and

(d) enabling the Commission to prevent and settle industrial disputes:

(i) so far as possible, by conciliation; and

(ii) where necessary, by arbitration; and

(e) encouraging and facilitating the development of organisations, particularly by reducing the number of organisations in an industry or enterprise; and

(f) helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

58. As can be seen from the above extracts, the statutory framework governing the AIRC's consideration of the applications before it during the Public Holidays Test Case related primarily to considerations associated with protecting the rights and interests of employees as well as certain macroeconomic factors. Importantly, the IR Act did not require that the AIRC have regard to many of the considerations that are here relevant to the Commission's determination of the Unions claims, namely:

- The object of the FW Act to provide a *balanced* framework for cooperative and productive workplace relations that promotes national economic prosperity and economic growth for Australia's future economic prosperity and social inclusion for all Australians by:
    - Providing workplace relations laws that are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity[14]; and
    - Acknowledging the special circumstances of small and medium-sized businesses[15];
- The provision of a safety net that is fair to employers and employees[16];
- The provision of a safety net that is relevant in a temporal sense[17];
- The need to encourage collective bargaining[18];

[14] Section 3(a) of the FW Act.

[15] Section 3(g) of the FW Act.

[16] Section 134(1)(a) of the FW Act and *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[17] Section 134(1) of the FW Act.

[18] Section 134(1)(b) of the FW Act.

- The need to promote flexible modern work practices and the efficient and productive performance of work[19];

- The likely impact on business including productivity, employment costs and the regulatory burden[20]; and

- Importantly, a clear limitation on the Commission's jurisdiction to insert provisions in an award unless such a term is necessary to achieve the modern awards objective[21].

59. Whilst elements of s.134(1) quite clearly require the Commission to take into account the various types of impacts that an award variation might have on an individual employer, with the exception of s.88A(c) of the IR Act, this was not a feature of the legislative regime that applied during the Public Holidays Test Case. Further, regard for the special circumstances of small and medium-sized enterprises and the need to encourage collective bargaining were not expressly identified as considerations to which the AIRC was required to turn its mind.

60. The legislative framework within which the AIRC made its decisions in relation to the Public Holidays Test Case was markedly different to that which governs this Review. The IR Act granted the AIRC far greater discretion to vary awards than that which is permitted by the FW Act. Crucially, the primary constraint that limits the Commission's jurisdiction to vary modern awards; that being s.138 of the FW Act, did not apply during the Public Holidays Test Case. The AIRC's jurisdiction to vary awards was not so confined. This, coupled with the very different considerations to which the AIRC was required to have regard, renders the legislative context that then applied materially different to the FW Act.

61. As was recently observed by a Full Bench of the Commission in the Penalty Rates Decision, a materially different legislative context from the FW Act at

[19] Section 134(1)(d) of the FW Act.

[20] Section 134(1)(f) of the FW Act.

[21] Section 138 of the FW Act.

the time of a previous Full Bench decision may be a cogent reason for not following such a decision.[22]

62. Accordingly, the Full Bench as presently constituted should not consider itself constrained by the Public Holidays Test Case decisions. Cogent reasons for not adopting the principles articulated by those Full Bench decisions clearly present themselves when regard is had to the relevant legislative frameworks. Therefore, to the extent that the Unions seek to rely on those principles for the purposes of advancing their claims in these proceedings, it is our submission that the Commission is certainly not bound by those decisions and indeed should depart from them for the purposes of disposing of the Unions' claims.

Preliminary Proceedings

63. The first of the 1993 – 1995 Public Holidays Test Case decisions[23] was issued by the AIRC on 15 December 1993, in the context of the then Victorian Government amending the relevant state legislation, which had "the potential to deprive some employees, working under awards of the Commission, of holidays which they might otherwise have enjoyed". Various unions consequently applied for award variations affecting entitlements to public holidays, including interim orders in relation to Christmas Day, Boxing Day and New Years' Day.

64. This decision is not of any relevance to these proceedings, other than the contextual point that the impetus for the Public Holiday Test Cases, and the initial focus, was on the number of public holidays that employees should be entitled to. These days employees are entitled to many more public holidays than they were in 1993, because of the actions of State and Territory Governments in proclaiming additional public holidays when various public holidays fall on the weekend, rather than substitute days.

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [254] – [255].

[23] Print L0498.

65. None of the proponents seek to rely upon the AIRC's 15 December 1993 Decision. We therefore do not propose to deal with it any further.

66. Two further decisions[24] were issued on 14 February 1994 (on an interim basis) and 29 March 1994 respectively in relation to applications made by the Victorian Government and various state public instrumentalities to delete award provisions prescribing public holidays on Easter Saturday, Easter Tuesday and Show Day in Victoria. These decisions similarly have no bearing on these proceedings.

The First Test Case Decision

67. On 4 August 1994, the Full Bench issued a decision[25] regarding several applications made to substantively alter public holiday entitlements in numerous awards (**First Test Case Decision**). Specifically, the ACTU and the Victorian Trades Hall Council "sought award variations which would counter losses of leave entitlements consequent upon the governmental decisions in Victoria".

68. The gravamen of the unions' case is summarised in the following paragraph of the decision:

> … that a standard for public holidays should form part of an award "safety net". He referred to the structure and Objects of the Industrial Relations Act 1988, as recently amended. These, he said, favoured the determination of wages and conditions by bargaining, but with a safety net of award-prescribed terms. The safety net should include provisions to ensure that employees have an entitlement to leisure (or payment in lieu thereof) on an adequate number of days loosely designated as "public holidays". According to the final submissions of the ACTU and the VTHC, the union claims seek "a minimum of 10 prescribed (named) public holidays plus one additional public holiday in each State, as a safety net standard for workers covered by federal awards". The ten named days include Easter Saturday, which we consider later in this decision. The remaining nine named days are … New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Eight Hours' Day (or Labour Day), Christmas Day and Boxing Day. Whenever New Year's Day, Australia Day, Christmas Day or Boxing Day fell on a Saturday or Sunday, a substitute holiday would be provided. …

[24] Print L1693 and Print L2597.

[25] Print L4534.

69. The decision reveals that propositions put by employer representatives and the Victorian Government regarding the role of the AIRC in relation to the declaration of public holidays were accepted by the Full Bench: (emphasis added)

> We also accept that the declaration of public holidays, by whatever legal instrument, is the prerogative of the various Governments. There is a need, therefore, to reconcile, if possible, the Commission's "safety net" function with the authority of Governments.
>
> …
>
> Further, the Commission does not trespass on the States' authority if it prescribes that, when a specified day such as Christmas Day or Australia Day falls on a Saturday or a Sunday, there will be a holiday on the next Monday in lieu of the "actual" day. Such prescription is limited, of course, to the Commission's awards.
>
> …
>
> … Traditionally, the States have determined, indirectly, the number of "public holidays" as well as the specific days on which they occur. … Former decisions of arbitral tribunals imply that such a decision would be adopted, for the State of Victoria, by the Commission. That practice is challenged by the "safety net" principle advocated by the unions.
>
> Although the leave which employees enjoy under the broad characterisation of "public holidays" is a significant benefit and, as such, ought to be excluded from the "safety net" concept, the safety net standard goes more, we think, to the quantum of leave than to the specification of days. There are, however, some days which have special significance in community mores – a significance which awards may well reflect. These days are Good Friday, Anzac Day and Christmas Day. Otherwise, the specification of days should be seen as variable over time and between States, Territories and even localities. … we think that a prescription of ten days gives reasonable effect to the criterion of minimum change. With that standard in mind, we think that award provisions at this time should normally provide:
>
> - that holidays (or payment in lieu) be observed also in respect of New Year's Day, Good Friday, the Monday thereafter, Anzac day Christmas Day and Boxing Day;
>
>   …
>
> - that when a prescribed holiday, other than Anzac day, falls on a Saturday or Sunday, a substitute day is provided.
>
> …
>
> … In effect, our decision allows for State or Territory autonomy, subject to meeting, as a minimum, the safety net standard.

70. As can be seen, the AIRC made the following observations regarding the role that federal awards should play in regulating public holiday entitlements.

71. **Firstly**, that the AIRC's awards should provide a safety net in relation to public holidays. That safety net was to relate to the *quantum* of leave rather than the specification of the days on which those holidays fell.

72. **Secondly**, the role of State and Territory Governments was recognised and maintained in relation to the specification of public holidays. It was recognised however that this may vary over time and between States and Territories.

73. We here note that the approach taken by the legislature under the Fair Work regime as earlier set out is consistent with the First Test Case Decision. The NES at s.115(1)(a) prescribes certain public holidays that are recognised as a minimum standard applying to all national system employees. The safety net is otherwise constituted of public holidays declared or prescribed by a law of a State or Territory, pursuant to s.115(1)(b). The number of such public holidays and the days upon which they fall is a matter for State and Territory Governments.

74. Furthermore, the NES also acknowledges and gives effect to the role played by the States and Territories in specifying the days upon which the public holidays identified at s.115(1)(a) fall. Specifically, by virtue of s.115(2), the decision of a State or Territory to substitute a public holiday has the effect of deeming the substituted day a public holiday rather than that which has been identified by the FW Act.

75. **Thirdly**, the AIRC decided that if any prescribed holiday apart from Anzac Day fell on a weekend, it would be substituted.

76. For the purposes of the AMWU's claim, it is relevant to note that this aspect of the AIRC's decision included Christmas Day, despite the Full Bench's comments regarding the "special significance in community mores" associated with it. It appears that whilst the AIRC determined that the significance associated with Christmas Day necessitated its identification in

awards as a public holiday that formed part of the safety net, it did not consider that such factors warranted its exemption from substitution.

77. The AIRC's decision is also apposite when considering the HSU's claim. The decision signifies an acceptance that all public holidays falling on weekend, with the exception of Anzac Day, would be substituted by force of the awards. The AIRC did not decide to introduce an entitlement that would nonetheless apply to work performed by an employee on the actual day.

78. The unions also sought the insertion of a facilitative provision that would enable an employer to agree with its employees to substitute a public holiday. The AIRC agreed that "there should be a facilitative provision" and proposed such a clause, albeit not in the same terms sought by the unions. We again note that the AIRC did not determine that in such circumstances award entitlements associated with the performance of work on a public holiday should, as part of the safety net, apply on the "actual" day in the event of substitution. This is a matter that is relevant to the AMWU's and HSU's claim.

79. The AIRC then turned to the issue of non-standard working arrangements: (emphasis added)

> There are problems in applying a standard provision to the circumstances of employees whose working arrangements differ from the norm. One which was brought to our notice concerns employees who normally work on Saturdays. The substitution provision may affect such persons harshly. We take as an example a year wherein Christmas Day falls on a Saturday. A person who works on Christmas Day will receive the amount normally paid for Saturday work; and if he or she does not work on the substitute day, the higher rate prescribed for work on that day will be irrelevant.
>
> …
>
> We agree this problem requires further attention; … There may well be other problems affecting persons with non-standard work arrangements to which attention should be given. … Attached to this decision is a draft order which will form the basis of award variations to be effected as soon as practicable. We reserve the right of all parties to the matters which are before us to advise us in writing of further variations which they believe to be necessary to deal with special problems likely to arise in the relevant awards. … A member of this Bench will list those matters for hearing with a view to preparing a report to the Bench. We hope in this way to be in a position to provide further general guidance and to minimise the need for award-by-award hearings with their potential for inconsistencies.

80. As can be seen, in the First Test Case Decision the AIRC did not make any final determination regarding the treatment of non-standard working arrangements or circumstances in which a public holiday fell on a weekend and was substituted. Further, the draft order accompanying the decision did not purport to do so. Rather, a process was established to deal with any such matters in due course.

The First Interim Test Case Decision

81. Later that year, on 14 December 1994, the AIRC issued an interim decision[26] (**First Interim Test Case Decision**), as the Full Bench was not in a position to deal conclusively with the matters raised at the hearing following the First Test Case Decision.

82. The decision included a draft interim order which related specifically to Christmas in 1994 and New Year's Day in 1995, both of which fell on a weekend. The reasons for this interim decision were very brief and accordingly, we reproduce them here in full: (emphasis added)

> We cannot publish before the holiday period a decision which deals comprehensively with the matters which were the subject of proceedings on 13 December. Accordingly, we have decided to issue a draft interim order, a copy of which is attached. The order reflects our view that a non-casual worker who works on an "actual" day should receive the appropriate penalty rate – that is, the holiday rate applicable under the award – in addition to normal award entitlements for work on that day. The employee who enjoys the benefit of this provision and also works on the "substitute" day should be paid normal award entitlements, without the application of any holiday loadings, for that work.
>
> Parties wishing the interim order to be inserted into specific awards should make the necessary applications. The orders will be settled by Senior Deputy President MacBean and Commissioner O'Shea. They are unlikely to be able to deal with all such applications by 23 December. We accept, therefore, that it will be necessary for some orders to have retrospective effect.
>
> It is our intention that this interim decision and the draft interim order will afford guidance to Commission members dealing with awards which are not before this bench. Where the Commission members consider that the existing award provisions reflect the intent of the interim order, they should not feel obliged to make such an order.

[26] Print L7799.

83. Attached to the First Interim Test Case Decision was a draft order which would have the following effect:

- The relevant award would prescribe a substitute day for Christmas Day in 1994 and New Year's Day in 1995;
- Notwithstanding such substitution, the award would require that an employee who performed work on Christmas Day or New Year's Day be paid the appropriate public holiday rate. If, however, that employee also worked on the substitute day, the employee would not be entitled to the public holiday penalty rate on the subsequent day but rather, would be paid at the normal award rate for work on that day

84. As can be seen, the AIRC did not expressly deal with the contentions of the parties before it or identify the various arguments raised. It does not appear that any evidence was heard. The decision does not, as such, articulate any reasons or the rationale underpinning the approach taken in the draft order.

The Second Interim Test Case Decision

85. Shortly afterward, on 16 December 1994, the Full Bench issued a supplementary decision[27] dealing with the aforementioned draft order as follows:

> Following questions directed to us about the implementation of our interim decision of 14 December 1994 [Print L7799], we have decided that some clarification is necessary.
>
> 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.

[27] Print L7971.

In the interim draft order, we failed to capture the intention inferred in the interim decision of providing for non-casual workers only.

We express regret for any inconvenience caused by deficiencies in the previous decision.

A revised draft interim order is attached.

86. Consistent with the above decision, the amended draft interim order applied only to full-time and part-time employees. If made, it would have the following effect:

- The relevant award would prescribe a substitute day for Christmas Day in 1994 and New Year's Day in 1995.
- Notwithstanding such substitution, the award would require that an employee who performs work on Christmas Day or New Year's Day be paid the appropriate public holiday rate. The employee would also be entitled to a substitute holiday or an extra day's wages at ordinary rates if the employee worked on Christmas Day.
- If the employee also works on the substitute day, the employee would not be entitled to the public holiday penalty rate on the subsequent day but rather, would be paid at the normal award rate for work on that day.

87. Once again, in light of the interim nature of the proceedings, the decision did not set out the AIRC's reasons for its decision and is therefore of little probative value to the Commission as here constituted.

The Second Test Case Decision

88. The following decision[28] was issued on 20 March 1995 (**Second Test Case Decision)**, which dealt squarely with non-standard working arrangements, as referred to in the First Test Case Decision. The decision was made in light of submissions received from various interested parties, however it does not

[28] Print L9178.

make reference to any evidence. We infer from this that no evidence was in fact called by the parties.

89. The AIRC observed at the very outset that the submissions made highlighted the diversity of circumstances that "*must* be taken into account": (emphasis added)

> In considering the information provided to us about non-standard working arrangements and the submissions made about them, we have been impressed by the diversity of circumstances which must be taken into account. It is apparent to us that a draft order which dealt comprehensively with non-standard arrangements is impractical and might cause anomalies or needless disputation.

90. In light of this, the AIRC described its approach as one that involved "articulating principles" that it saw as being "generally appropriate", however ultimately a determination as to whether those principles were implemented in a specific award and if so the manner in which this was done was to be considered in the context of specific awards. The Second Test Case Decision did not, of itself, result in award variations:

> … Accordingly, we propose in this decision to consider various types of non-standard working arrangements and to articulate principles which we see as being generally appropriate. Members of the Commission dealing with particular awards will be expected to apply these principles wherever possible, but may need to adapt them to specific circumstances.
>
> …
>
> … Although we expect that [the principles] will generally be implemented in the application of safety-net standards, we acknowledge the diversity of practices that have been in place and anticipate that the principles pertaining to non-standard working arrangements will be applied sensitively and flexibly, with due regard to special circumstances.

91. The non-standard working arrangements considered by the AIRC were:

- Full-time employees working a non-standard week;
- Part-time employees; and
- Casual employees.

92. It is relevant to note that the Full Bench did not expressly consider any specific industry or deal with common working arrangements of full-time and part-time

employees in any industry. The decision, by its very nature, deals with each of the types of employment identified above in very broad, general terms based on notions of fairness and equity. No express consideration is given in the decision to the potential impact on business generally or in any specific industry. No mention is made of microeconomic or macroeconomic consequences that might flow from the decision.

93. The AIRC ultimately "commended" the following principles:

- That a full-time employee who does not work Monday – Friday should receive the benefit of prescribed public holidays. They should not forfeit that benefit because a public holiday falls on a non-working day.

- That a full-time employee who works a non-standard week should not enjoy leave in respect of both the actual day and the substitute day. They should receive the benefit of only one of them.

- That a full-time employee who ordinarily works on a Saturday or Sunday should be paid at the Saturday or Sunday rate for work performed on the actual day when substitution is prescribed. Provided that, when the actual day is Christmas Day, the employee should receive a loading of one-half of an ordinary day's wages.

- That a part-time employee whose normal roster includes a prescribed holiday should either be afforded the public holiday on pay or receive the appropriate public holiday rate for work on that day.

- That a part-time employee whose normal roster includes a Saturday or Sunday which would be a prescribed holiday but for the substitution of an alternate day should not lose a holiday because of the substitution, but the employee should not be afforded holidays (or pay in lieu) in respect of the actual day and the substitute day.

- That casual employees who are employed on prescribed public holidays should be paid at the relevant public holiday penalty rate.

94. Whilst each of the Unions seek to rely on the Second Test Case Decision, they have undertaken little if any analysis of the extent to which the above principles were in fact adopted in the relevant awards or to any consideration that was given to whether, operationally, the proposed clauses could be accommodated by employers. As to the first matter, the analysis set out in the following chapter will reveal that the principles were not reflected in many major awards underpinning the modern awards here before the Commission.

95. Nonetheless, given the extent to which the AMWU, HSU and SDA seek to rely on the Second Test Case Decision in support of their claims, we now turn, in some detail, to the AIRC's consideration of each of the relevant forms of non-standard working arrangements.

Full-time Employees Working a Non-Standard Week

96. This part of the AIRC's decision related to full-time employees who "do not regularly work a five-day, Monday – Friday week". The AIRC noted that a prescribed public holiday may fall on a day when such an employee is not working in any event. In such circumstances it found that:

> … Fairness requires that the worker be not disadvantaged by that fact. The appropriate compensation, we think, is
>
> - an alternative "day off"; or
> - an addition of one day to annual leave; or
> - an additional day's wages.

97. The AIRC's decision appears to be premised entirely on notions of fairness to a full-time employee who does not regularly work a five day Monday – Friday week. It is not apparent from the decision that any other factor was relevant to the AIRC's consideration in this regard.

98. Whilst the SDA seeks to rely on this part of the Second Test Case Decision in support of its claim, the basis upon which the AIRC made its decision is pertinent to assessing the weight that should be attributed to it. As we have earlier set out, the legislative provisions in operation at the time did not require the Full Bench to have regard to many of the factors that the Full Bench is now

required to take into account. The AIRC's reasons for decision do not articulate whether such factors were considered. Further, given the nature of the proceedings and the decision made, regard was not had to the specific working arrangements or operational requirements of businesses in any industry including the industries to which the SDA's claim relates.

99. It is also relevant to note that the principle here articulated related only to certain full-time employees and did *not* apply to part-time employees, as now sought by the SDA. To this extent, the SDA's claim in this Review extends beyond the scope of that which was determined by the AIRC.

100. The decision then considered circumstances in which a public holiday falls on a weekend and is substituted by force of another award provision. The Full Bench determined that in such circumstances:

- Where an employee only works on the actual day, work on this day would attract the Saturday or Sunday penalty rate; it would not attract public holiday penalty rates (with the exception of Christmas Day which is dealt with below). It said that this was "fair" because the employee would enjoy the benefit of the substitution (e.g. a day off on the substitute day).

- Where an employee works on both the "actual" day and the substitute day, this would entitle the employee to Saturday/Sunday rates on the "actual day" and payment at public holiday rates on the substitute day or a day's leave to be taken on another day or added to annual leave. The "actual" day would not, as such, be treated as a public holiday in such circumstances.

101. The above principles are broadly consistent with the safety net that presently applies in the very vast majority of industries. That is, where a day is substituted, the substituted day attracts public holiday penalty rates and the "actual" day is no longer treated as a public holiday. The HSU's claim clearly extends beyond the scope of the Second Test Case Decision.

Part-time Employees

102. Having recognised that the hours of work of part-time employees might be arranged in very different ways, the AIRC "did not think it practical" to go beyond expressing the very general principle that where the normal roster of a part-time employee includes a day which is a public holiday, the employee should either enjoy the public holiday on pay or receive the appropriate public holiday rate for working on it.

103. The AIRC did, however, articulate the following principles in relation to part-time employees "whose normal roster includes a Saturday or Sunday which would be a prescribed holiday but for the substitution of an alternate day" on the basis that "equity" would be preserved:

- The employee should be entitled to leave with pay on the "actual" day without substitution; or
- If the employee works on the "actual" day, he or she should be entitled to normal Saturday or Sunday rates and another day as a holiday (which may or may not be the substitute day). This principle was subject to the observations made below regarding Christmas Day; or
- If the employee works on the "actual" day, he or she should be entitled to normal Saturday or Sunday rates and payment for an additional day of equal length at ordinary rates. This principle was also subject to the observations made below regarding Christmas Day.

104. It would appear that the rationale for this aspect of the AIRC's decision rested on the premise that a part-time employee working on the "actual day" may not enjoy the benefit of the substitute day if, for instance, it fell on a non-working day. Once again, however, the decision does not articulate whether any consideration was given to the cost or operational consequences that would arise from the provision of such entitlements. Of course making such an assessment would be a particularly complex task given the wide range of part-

time working arrangements in place across different industries, as acknowledged by the AIRC.

Christmas Day – Full-time and Part-time Employees

105. The Full Bench decided that a special exception would be made to the above principles in relation to Christmas Day: (emphasis added)

> The ACTU contends that Christmas Day should be regarded differently from other days which are subject to substitution. A non-standard full-time worker required to work on the actual day should receive the public holiday rate for that day, rather than the Saturday or Sunday rates. This, the ACTU argues, is a proper recognition of the significance of Christmas Day in the lives of many members of the community. We agree with the underlying contention of the ACTU but favour a more straightforward prescription. In our opinion, the employee should receive the Saturday or Sunday payment (as appropriate) plus a loading of one-half a normal day's wages for a full day's work. Thus if the ordinary Sunday rate is double time, the employee who works on Christmas Day when it is Sunday will be paid 2.5 times the normal daily rate and be entitled to the benefit of the substitute day.

106. The Christmas Day loading contemplated in the extract above was also extended to a part-time employee who works on 25 December when it falls on a weekend but is substituted, provided that the employee's normal roster included the Saturday or Sunday which would have been the public holiday but for the substitution.

107. The AIRC's decision do not articulate whether consideration was given to the cost or operational impact that such an award variation might have on businesses. Rather, it simply proceeded on the basis that such a change would give "proper recognition" to the "significance of Christmas Day" as contended by the ACTU. As we have earlier submitted, the variation was made without regard for the many considerations listed at s.134(1) of the FW Act and therefore, the AIRC's decision should be accorded little weight for the purposes of these proceedings.

108. We note also that the application of the clause was more confined than that which is now sought by the AMWU. It did not apply to all employees. Rather, it was confined to certain categories of full-time and part-time employees by reference to the manner in which their hours of work were arranged. It would appear that, for instance, if a full-time worker who ordinarily worked Monday

– Friday was unexpectedly required to perform overtime on Christmas Day when it fell on the weekend and was substituted, the principle articulated by the AIRC would not entitle such an employee to the Christmas Day loading. Under the AMWU's clause, however, *any* work performed on Christmas Day would be paid at the public holiday rate. Similarly, the AMWU's proposal in this Review is not limited to part-time employees "whose normal roster includes a Saturday or Sunday which would be a prescribed holiday but for the substitution of an alternate day".

Casual Employees

109. Having determined that casual employees should be entitled to public holiday penalty rates in addition to the casual loading for work performed on public holidays, the AIRC made the following ruling in relation to the substitution of days:

> … Given that casuals may well work for multiple employers, we do not think it expedient to entertain any contention about work on *"actual"* rather than substitute days. The higher rate for casuals apply only on the days prescribed in the awards as holidays.

110. We here note that the provisions proposed by the AMWU and the HSU in the current Review seek the insertion of a clause that would have the effect of affording an entitlement to public holiday penalty rates where a casual employee works on a public holiday that falls on a weekend and is substituted. Such a provision quite clearly falls beyond the scope of the Second Test Case Decision.

The AMWU's Submissions Regarding the Public Holidays Test Case

111. The AMWU's submissions regarding the Public Holidays Test Case Decisions can be summarised as follows:

- The decisions are "arbitral authority" that Christmas Day is a "special public holiday" and to be treated differently to other public holidays.[29]

[29] AMWU submission dated 20 October 2016 at paragraph 20.

- The AIRC "decided on a loading of one-half of the normal day's wages".[30]

- The decision should be read as stating that the principles should be adopted unless there are reasons to the contrary.[31]

- The Public Holidays Test Case is "unfinished business" and should now be adopted absent compelling reasons not to.[32]

112. We make the following submissions in response to these contentions.

113. **Firstly**, contrary to the AMWU's submissions, the Public Holidays Test Case decisions are not "arbitral authority" for the proposition that Christmas Day is a special public holiday that is to be treated differently.

114. The decision itself does not reveal the extent to which contrary views were put by respondent parties, whether such views were given consideration and, if so, the basis upon which they were not adopted by the AIRC.

115. As observed in the Penalty Rates Decision, the context of a decision may be a cogent reason for not following a previous Full Bench decision, for example:

- "The extent to which the relevant issue was contested and, in particular, the extent of evidence and submissions put in the previous proceeding will be relevant to the weight accorded to the previous decision"; and

- "The extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision".[33]

116. The decisions therefore cannot be considered "arbitral authority" in the sense of being binding on the Commission as presently constituted. Indeed in our

[30] AMWU submission dated 20 October 2016 at paragraph 21.

[31] AMWU submission dated 20 October 2016 at paragraph 24.

[32] AMWU submission dated 20 October 2016 at paragraph 27.

[33] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [254] – [255].

view, by virtue of the aforementioned factors, they should be accorded little weight.

117. We note also that the decisions in question were issued over two decades ago. There have been many changes in the legislative provisions and in society over this period. Amongst the other matters that the AMWU is required to establish in the current proceedings, it is incumbent upon the AMWU to establish that Christmas Day does, in contemporary Australia, warrant differential treatment from other public holidays in terms of the penalty rates payable.

118. **Secondly**, the AIRC did not, as such, "decide on" a new award entitlement in relation to work on Christmas Day. Rather, it commended a certain principle which could, on application, be implemented in an award having regard to matters specifically arising in relation to it. The Public Holiday Test Case decisions did *not* have the effect of determining that all federal awards would necessarily be varied to reflect the principles it articulated. As will become apparent in the following chapter of this submission, very few pre-modern awards contained a Christmas Day loading.

119. **Thirdly**, the AIRC's decision did not require that the relevant principles were to be adopted "unless there were reasons to the contrary". Rather, the process implemented allowed parties to make applications to vary specific awards consistent with the principles articulated in the decisions and the relevant provisions of the IR Act. The "diversity of practices that [had] been in place" were acknowledged by the AIRC and it anticipated that "the principles pertaining to non-standard working arrangements [would] be applied sensitively and flexibly, with due regard to special circumstances".[34] The decisions did not mandate any change to the awards. It was left to the parties to make such applications if they so elected.

120. **Fourthly**, the Public Holidays Test Case is not "unfinished business". The decisions relied upon by the AMWU were issued many years ago in the

[34] Print L9178.

context of an entirely different statutory regime. The Full Bench articulated certain general principles and parties were at liberty to seek award variations reflecting those principles. It cannot be said that the claim advanced in this Review should be granted for the purposes of completing the exercise undertaken by the AIRC some 20 years ago. The principles there articulated have little relevance in the current context. Rather, the AMWU's claim must be considered based on its own merits having regard to the relevant statutory criteria that now applies. The AMWU cannot be permitted to wholly rely on a decision of 1995 for the purposes of justifying an award variation in 2017.

121. Accordingly, whilst the Public Holidays Test Case did result in the expression of a general principle regarding provision for a Christmas Day loading, for the reasons here set out, we consider that little weight can be attributed to those decisions and as a result, the AMWU's arguments in relation to them cannot succeed.

The HSU's Submissions Regarding the Public Holidays Test Case

122. The HSU seeks to rely on the following principles articulated in the Second Test Case Decision:

- That full-time workers who do not regularly work a five day, Monday to Friday week including persons who regularly work on a Saturday or Sunday, those with variable rosters and employees who work for nine days per fortnight or 19 days in each four week cycle – should be assured of the benefit of prescribed holidays. They should not forfeit that benefit because a prescribed public holiday falls on a non-working day. If a prescribed public holiday falls on a day when the employee would not be working in any event the appropriate compensation is:

  a) an alternative day off; or

  b) an addition of one day to annual leave; or

  c) an additional day's wages.

- An employee required to work on Christmas Day should receive the Saturday or Sunday payment (as appropriate) plus a loading of one-half of a normal day's wages for a full days work.[35]

123. The HSU submits that the above principles are of "particular relevance"[36] to its claim, however it fails to articulate why it considers that to be so.

124. It is trite to observe that the first principle above is directed at circumstances that differ significantly from the scope of the HSU's proposed clause. For instance:

- The principle relates only to full-time employees who do not regularly work a five day Monday – Friday week. The HSU's proposed clause, however, relates to all employees: Full-time, part-time and casual regardless of their working hours.

- The AIRC's principle was designed to ensure that full-time employees who do not work a "standard work week" do not lose the benefit of a public holiday that falls on a non-working day. Whilst the HSU's claim is said to seek to "address the circumstances of workers covered by the awards in question who regularly work on weekends"[37], the terms of the clauses sought purport to have far broader application. They apply to any employee who performs any work on a public holiday that falls on a weekend and is substituted. This would include, for instance, a casual employee or the performance of unrostered overtime by any employee.

- The compensation or entitlement contemplated by the AIRC was the provision of an alternate day off, an additional day of annual leave or an additional day's wages. The clause sought by the HSU potentially carries a higher cost impost, as it requires the payment of public holiday penalty rates which, in at least some if not all of the awards the

[35] HSU submission dated 19 January 2017 at paragraph 14.
[36] HSU submission dated 19 January 2017 at paragraph 14.
[37] HSU submission dated 19 January 2017 at paragraph 12.

subject of its claim, equates to 250% of the minimum hourly rate prescribed by the relevant award.

125. We have dealt with the second principle above regarding Christmas Day in relation to the AMWU's claim. It is sufficient to note for present purposes that the AIRC's decision to require the payment of an additional loading, related only to Christmas Day. It did not extend to other public holidays or to casual employees.

126. Further, the First Test Case Decision expressly determined to include facilitative provisions enabling the substitution of public holidays and provisions which, by their own force, would substitute any public holiday if it fell on a weekend.

127. The AIRC also determined that with the exception of Christmas Day, where a full-time employee worked on the "actual" day which fell on a weekend and was substituted, the employee would be entitled to the appropriate weekend penalty rate rather than the public holiday penalty rate. The same would occur if the employee worked on both the actual day and the substitute day. To this extent, again, the claim advanced by the HSU's claim extends beyond that which was contemplated by the Public Holiday Test Case decisions.

The SDA's Submissions Regarding the Public Holidays Test Case

128. The SDA relies on the principle articulated in the Second Test case decision regarding full-time employees who do not work a standard week and circumstances in which a public holiday falls on a non-working day of such an employee.[38] For the reasons we have earlier articulated, we consider that it should be attributed little weight.

[38] SDA submission dated 10 October 2016 at paragraphs 46 – 47.

129. It then submits as follows:

> This decision was further expanded on in respect of the retail industry by Commissioner O'Shea who was one member of the Full Bench hearing public holidays test case matters. It was by way of private arbitration or recommendation but effectively became a precedent for the retail industry.[39]

130. The decision[40] referred to was made in the context of a dispute between the SDA and Woolworths Variety Stores Ltd regarding an enterprise agreement. Commissioner O'Shea decided that the AIRC's principle regarding a public holiday falling on a non-working day of a full-time employee should be extended to part-time employees for the purposes of that enterprise agreement.

131. The decision arose in the context of a private arbitration which did not require any consideration as to whether it was appropriate or necessary to include the provision sought by the SDA in the minimum safety net covering all employees and employers in any given industry.

132. Whilst the SDA submits that the decision cited "effectively became a precedent for the industry"[41], it has not provided any material in support of this proposition. The union has not pointed to so much as one other piece of documentary material that establishes that, as a matter of course, the above principle was extended to part-time employees in the retail industry. Indeed the decision of Commissioner O'Shea to which it has referred cites a decision of the AIRC where it *refused* to adapt the test case principle such that it applied to part-time employees as sought by the SDA in relation to an enterprise agreement applying to Coles Supermarkets.[42]

133. In any event, even if the SDA's contention were accepted, we do not consider that it provides any material support to the claim here mounted by the union.

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[39] SDA submission dated 10 October 2016 at paragraph 48.

[40] *SDA v Woolworths Variety Stores Ltd* (Print P5603).

[41] SDA submission dated 10 October 2016 at paragraph 48.

[42] *SDA v Coles Supermarkets* (Print M8048).

134. The Commission is constrained by s.138 of the FW Act in the manner we have earlier described. This necessarily renders the principles articulated by the AIRC of lesser weight as well as any subsequent decisions that extended those principles in the context of specific disputes.

4.2 The Part 10A Award Modernisation Process (2008 – 2010)

135. During the Part 10A award modernisation process, the AIRC first considered, in general terms, whether modern awards ought to supplement public holiday entitlements in the NES in relation to the number of days that are to be observed as public holidays. In its decision regarding various general issues and the priority modern awards, it stated: (emphasis added)

> **[105]** 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.[43]

136. In a subsequent decision regarding Stage 2 awards, the Full Bench reiterated the above: (emphasis added)

> **[48]** Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. We think that we should give proper weight to the Parliament's decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.[44]

137. As can be seen, the AIRC gave explicit consideration to whether modern awards should supplement the NES by prescribing additional public holidays. Despite arguments to the contrary, it decided that it would not do so. This was primarily because it took the view that proper weight should be given to Parliament's decision to regulate minimum standards in relation to matters covered by the NES.

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[43] *Award Modernisation* [2008] AIRCFB 1000 at [105].

[44] *Award Modernisation* [2009] AIRCFB 345 at [48].

138. The AIRC's decisions regarding the identification of additional public holidays in specific modern awards was consistent with the general approach it outlined in the decisions above.

139. For example, when publishing the exposure draft of the Aboriginal Health Services Award, the AIRC did not provide for public holidays in addition to the NES. It described its decision as being "consistent with [its] approach in other awards"[45]. When it later issued its decision regarding the making of the award, it made the following further remarks: (emphasis added)

> **[101]** NACCHO pressed for the provision of National Aboriginal and Torres Strait Islanders Observance Day (NATSIO Day) as an additional public holiday. Some other employers were opposed to this. We recognise that NATSIO Day is an important symbolic and cultural event. We have not, however, inserted additional public holidays in modern awards in recognition of the Parliament's determination to regulate the number of public holidays through the NES. Consequently, we have decided not to insert NATSIO Day as an additional public holiday. The provisions as to substitution (now slightly varied) might in any case be of assistance.[46]

140. In relation to the *Electrical Power Industry Award 2010*, the AIRC stated: (emphasis added)

> **[88]** The specification of a day as a public holiday is a matter for government. We are not prepared to increase the number of public holidays by a variation to the exposure draft as suggested by the unions.[47]

141. An application made by the certain unions to vary the *Airport Employees Award 2010* shortly after it was made was treated in a similar vein: (emphasis added)

> **[11]** The AMWU and CPSU seek supplementation of the Public Holidays provisions of the NES to the extent of an additional public holiday and public holidays which fall on a weekend. The NES deals with public holidays on a comprehensive basis and prescribes uniform minimum conditions. It would not be appropriate to supplement these provisions simply to maintain more generous arrangements. There does not appear to be any other basis for the claim. The proposed variation is rejected.[48]

142. Whilst we accept that the Unions are not here seeking the prescription of additional public holidays *per se*, the effect of the AMWU's claim and the

[45] *Award Modernisation* [2009] AIRCFB 865 at [130].

[46] *Award Modernisation* [2009] AIRCFB 945 at [101].

[47] *Award Modernisation* [2009] AIRCFB 826 at [88].

[48] *Re Airport Employees Award 2010* [2010] FWAFB 286 at [11].

HSU's claim is to increase the number of days that attract public holiday penalty rates. In so doing, the provisions proposed would circumvent the decisions of the relevant State and Territory Governments to substitute certain public holidays. For the purposes of the relevant awards, the effect of the proposed clauses is to instead provide an additional public holiday; an approach that the AIRC expressly refused to adopt during the award modernisation process. The Unions have not presented a case that warrant a departure form that approach.

143. We acknowledge that the AIRC's subsequent decision regarding Stage 2 awards (cited above) expressed a caveat in relation to the aforementioned general proposition; that being that "there may be room for argument about what constitutes supplementation in a particular case". For the reasons we later set out in this submission, in these proceedings, the Unions have not successfully argued that such supplementation is appropriate or necessary.

4.3 Application by the SDA to vary the Retail Award (2010)

144. Soon after the awards were made, the SDA made an application to vary the Retail Award to include a non-working day provision in the following terms, which is relevantly similar to the clause put before the Full Bench as presently constituted:

> **33.5. Holiday on a Rostered Day Off**
>
> If a public holiday falls on an employee's rostered day off a full time employee, or a part time employee who works 5 days per week (or 6 days if they have so elected), shall be entitled to receive by mutual agreement:
>
> - Another day off in lieu; or
> - An equivalent day's pay; or
> - One extra day added to his/her annual leave.
>
> The days on which the employee is not rostered to work shall be deemed to be rostered days off.

145. It made the following submissions in support of its application:

> The second issue is the non-working day provision that was a standard in the Federal Retail Awards and in most State NAPSAS. These provisions have now appeared in other modern awards and should be placed back into the retail award. Many employees do not work a standard Monday-Friday roster with common rosters of Tuesday to Saturday occurring.
>
> The standard in the Victorian Shops Award and ACT Retail Award reflected outcomes from the Public Holiday Test Case. These have been beneficial to the industry in providing fairness and equity in applying Public Holidays. The majority of employees in retail will not be defined as shift workers, even though they do work 7 days a week, so are not entitled to a 5th week of annual leave. They should not be denied their public holiday benefit. The variation seeks to insert a new clause 33.5 to redress this issue.[49]

146. The application was rejected for the following reasons:

> **[22]** Further changes are sought by the SDA in relation to Christmas Day substitution and a non-working day provision. In the context of opposition by employers, the NES and limited award supplementation, we do not believe that a case for these variations has been established.[50]

147. The Full Bench evidently determined that the claim should be dismissed for reasons that related primarily to the approach it had taken during the award modernisation process, which involved limited supplementation of the NES. It should be noted that its decision did *not* merely turn on the prevalence or otherwise of such an entitlement in pre-modern instruments. Rather, the AIRC appears to have considered the merits of the proposed clause and the appropriateness of including such a provision in a modern award. In the current Review, the SDA has not pointed to any cogent reasons for departing from that conclusion.

4.4 Applications by various unions to vary the Manufacturing Award and other modern awards (2010)

148. In December 2010 four unions made applications pursuant to ss.158 and/or 160 of the FW Act to vary five modern awards to include an additional penalty payable where Christmas Day fell on a weekend and was not a public holiday

[49] SDA application dated 5 November 2009.

[50] *Re General Retail Industry Award 2010* [2010] FWAFB 305 at [22].

by virtue of substitution. This included an application by the AMWU to vary the Manufacturing Award. The applications were heard and determined jointly by a Full Bench of Fair Work Australia (as it then was). They were opposed by numerous employer representatives including Ai Group.

149. Having cited the Second Test Case Decision, the Full Bench stated:

> **[44]** It is apparent the *Public Holiday Test Case* decision of 1995 commended the additional penalty rate in respect of Christmas Day as a principle that may need adaption to specific circumstances. Further, while the Full Bench expected the principle would generally be implemented, the Full Bench acknowledged there were pre-existing diverse practices and anticipated the principle would be applied sensitively and flexibly with due regard to special circumstances.
>
> **[45]** The additional penalty rate in respect of Christmas Day is not a prevailing standard in the underlying award-based transitional instruments that previously covered the employers and employees now covered by the modern Manufacturing Award, modern Cleaning Award, modern Security Award or modern Nurses' Award.
>
> …
>
> **[47]** Fair Work Australia's ability to vary modern awards outside the four yearly reviews of modern awards is constrained by the Fair Work Act. We do not think the non-inclusion of the additional penalty rate in respect of Christmas Day in the modern awards before us can be regarded as an error in the sense intended by s.160 of the Fair Work Act. We have come to this conclusion having regard to the caution expressed by the Full Bench in the *Public Holidays Test Case* decision of 1995 and the other factors to which we have just referred concerning the absence of a prevailing standard in respect of the additional penalty rate in the relevant underlying instruments and the additional penalty rate having been specifically raised previously but not included. These factors also prevent us from concluding the variations sought by the unions are necessary to achieve the modern awards objective.
>
> **[48]** Accordingly, we decline to make determinations varying the modern Manufacturing Award, modern Cleaning Award, modern Security Award, modern Nurses' Award or modern Finance Award to include an additional penalty rate where Christmas Day both falls on a weekend and is not a "public holiday".[51]

150. As can be seen, the Full Bench was there called upon to consider the very same variation that is again being pursued by the AMWU in relation to the Manufacturing Award. Contrary to the AMWU's submissions, its decision was not based entirely on "its limited capacity to vary awards outside the four yearly review"[52]. Rather, in its reasons for decision, the Full Bench also made the

[51] *Australian Nursing Federation and others* [2010] FWAFB 9290 at [44] – [48].

[52] AMWU submission dated 20 October 2016 at paragraph 17.

following salient points that are of significance to the Commission's consideration of the claim here mounted by the AMWU:

- Consistent with our earlier submissions, the Second Test Case Decision commended certain principles. It did not determine that those principles should be implemented in any specific awards. Rather it anticipated that the principle "would be applied sensitively and flexibly having regard to special circumstances".

- The additional penalty rate sought was not a prevailing standard in the underlying pre-modern awards that previously covered those now covered by the Manufacturing Award. This is a matter that goes to the extent to which the above principle was (or rather, was not) implemented. As will later become apparent, the same can be said for the other awards that are the subject of the AMWU's claim.

- Having regard to the "caution expressed by the Full Bench" in the Second Test Case Decision and the absence of the entitlement sought in the relevant pre-modern awards, the Full Bench could not conclude that the variation sought was necessary to achieve the modern awards objective. In the context of these proceedings, the AMWU has failed to establish that there are any cogent reasons for departing from that decision which, in our view, remains apposite.

151. In the abovementioned Full Bench proceedings, an application by Ai Group to vary clause 44.2 of the Manufacturing Award was heard at the same time as the Unions' applications. Ai Group sought to vary clause 44.2 of the Award to clarify that where Christmas Day, Boxing Day, New Year's Day or Australia Day fall on a weekend then, respectively, 27 December, 28 December or the Monday after New Year's Day or Australia Day will be observed as the public holiday for the purposes of the public holiday penalty rate entitlements under the modern Manufacturing Award and those public holiday penalty rate entitlements will not apply to a public holiday on 25 December, 26 December, 1 January or 26 January.

152. Clause 44.2 stated:

> **44.2 Public holidays which fall on a weekend**
>
> (a) Where Christmas Day falls on a Saturday or a Sunday, 27 December is observed as the public holiday instead of the prescribed day.
>
> (b) Where Boxing Day falls on a Saturday or a Sunday, 28 December is observed as the public holiday instead of the prescribed day.
>
> (c) Where New Year's Day or Australia Day falls on a Saturday or a Sunday, the following Monday is observed as the public holiday instead of the prescribed day.

153. The Full Bench agreed that the clause was ambiguous but decided that, rather than varying the clause as sought by Ai Group, the appropriate approach was to delete the clause and leave the NES to deal with the issues.

154. In its decision, the Full Bench referred to the following paragraph in the AIRC's award modernisation decision regarding various general issues and the priority modern awards:

> **[105]** 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.[53]

4.5 The Two Year Review of Modern Awards – *Airline Operations – Ground Staff Award 2010* (2013)

155. During the two year review of modern awards, the ASU sought a variation to clause 37.5(a) of the *Airline Operations – Ground Staff Award 2010* (**Ground Staff Award**), to provide for certain additional entitlements where a full-time employee's ordinary hours of work are structured to include a day off and such a day falls on a public holiday:

> **(a)** Except as provided for in clauses 37.5(b) and (c), and where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:

[53] *Award Modernisation* [2008] AIRCFB 1000 at [105].

(i) 7.6 hours of pay at the ordinary time rate; or

(ii) 7.6 hours of extra annual leave; or

(iii) a substitute day off on an alternative week day.

156. The effect of the variation sought by the ASU was to extend the application of the clause to part-time employees on the basis that the scope of the clause was ambiguous in this regard.

157. Vice President Watson dismissed the claim and in so doing made the following relevant remarks: (emphasis added)

[19] Section 116 of the Act and the note that follows it are important. They provide:

> "116 Payment for absence on public holiday
>
> If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.
>
> Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs."

[20] This section and the note reflect what I consider to be the general position. An obligation to make payment for public holidays arises where an employee is absent from employment on a public holiday in accordance with the entitlement to the public holiday in s.114 of the Fair Work Act.

[21] Many awards extend this entitlement to payment when a full time employee is rostered off on a public holiday. It appears that the genesis of this provision arose during the award simplification process with respect to the *Metal Engineering and Associated Industries Award 1998* (Metals Award). The concept is directed to ensuring that full time employees who obtained an entitlement to a rostered day off as part of the reduction of ordinary hours to 38 per week do not have their rostered days off coinciding with a public holiday, and if it transpires that a public holiday occurs on a rostered day off, an alternative day is provided or an additional days pay is made. In the Metals Award at least the concept has never applied to part-time employees because they do not have rostered days off as such.

[22] By definition part-time employees work less than full time hours - mostly by way of having more days where they are not required to attend for work. The extension of the entitlement to part-time employees would take the concept of payment for rostered days off coinciding with a public holiday beyond its intended purpose and create more confusion than it is intended to resolve. I consider that the clarification

provided by rejecting the application is the best way of resolving any existing confusion.[54]

158. As can be seen, apart from not finding that the provision was ambiguous, His Honour also dealt with merit-based considerations that led him to dismiss the claim. Specifically, the Vice President found that the origins of the provision in question reveal the concept underpinning it, which is not relevant to part-time employees. An extension of the clause to part-time employees would therefore take the entitlement beyond its intended purpose.

159. As we later develop, the SDA alleges that the provision it here seeks is similar to the provision reproduced above in the Ground Staff Award. Having regard to the decision of Vice President Watson however, it is apparent that the clause the union seeks extends well beyond that which His Honour identified as the "intended purpose" of the clause found in the Ground Staff Award.

4.6 The Two Year Review of Modern Awards – Public Holidays Common Issues Proceedings (2013)

160. During the two year review of modern awards, a Full Bench of the Commission was constituted to deal with various claims relating to public holiday entitlements. This included applications by the ACTU and some affiliated unions including the AMWU and SDA seeking the insertion of three model clauses in a large number of modern awards. The following applications are of relevance to these proceedings, both of which were rejected by the Full Bench:

- The proposed insertion of a model clause requiring the payment of a loading where Christmas Day falls on a weekend and is not a public holiday within the meaning of the NES. Whilst not in identical terms, the AMWU's claim in this Review is based on the same premise.

- The proposed insertion of a model clause providing certain additional entitlements if a public holiday falls on a day that a full-time employee

[54] *Australian Municipal, Administrative and Clerical Services Union* [2012] FWA 9137 at [19] – [22].

or part-time employee is normally rostered to work 5 days or more per week and would not be rostered to work. This proposal is in very similar terms to that which is now sought by the SDA.

The Application for a Christmas Day Loading

161. The insertion of the following model term was sought by the unions:

> **Christmas Day Loading**
>
> 1. An employee working on Christmas Day in circumstances where that day falls on a Saturday or Sunday and is not a public holiday within the meaning of the NES will be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and be entitled to the benefit of the substitute day.
>
> 2. This loading is cumulative with the rates prescribed in Clause [X] – Penalty Rates.[55]

162. The ACTU's submissions in support of their claim have here been repeated by the AMWU. In essence the ACTU contended that Christmas Day is of particular significance to Australians, as per the Public Holidays Test Case decisions.[56] Further:

> **[86]** The ACTU submitted that the principle of an additional Christmas Day loading was intended to be broadly applied by the Full Bench in the Public Holiday Test Case, but which was not a prevailing standard in the underlying award-based transitional instruments which were the subject of the Part 10A award modernisation process.[57]

163. The application was successfully opposed by various employer interests including Ai Group.

164. In making its decision, the Full Bench stated as follows: (emphasis added)

> **[89]** It is important to appreciate that <u>in 2010 a Full Bench of FWA considered and rejected applications to vary a number of modern awards to include an additional penalty where Christmas Day falls on a weekend and is not a "public holiday"</u>.
>
> ...
>
> **[93]** It is also relevant to observe that Christmas Day will not fall on a weekend until December 2016, being a Sunday in that year. This will be some years after the Commission has conducted the more comprehensive four yearly review of all modern

[55] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [80].

[56] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [84] – [86].

[57] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [86].

awards. In such circumstances it is unnecessary for us to express a concluded view on this aspect of the ACTU's claim. The matter can be reconsidered in the context of the four yearly review.[58]

165. As can be seen the Full Bench ultimately concluded that it was not necessary for it to reach a concluded view as Christmas Day would not fall on a weekend until December 2016, by which time the Commission would have conducted the current Review, during which the issue could be reconsidered.

166. As earlier stated, Christmas Day will next fall on a weekend in 2021. We consider it virtually impossible to justify the *necessity* of an award clause (in the sense contemplated by s.138) in circumstances where it will not have any application resulting from State/Territory declarations for over four years. Needless to say, the AMWU will have ample opportunity to bring a claim for the change sought at the relevant time if it so chooses, having regard to the relevant State and Territory legislation and declarations at that time. At the present time, there can be no certainty regarding the State and Territory laws that will be in operation at the relevant time, nor of what public holiday declarations will be made by the relevant State and Territory Ministers. In the circumstances, we consider that the Full Bench as presently constituted ought to dismiss the claim.

The Application regarding Non-Working Days

167. The following model clause was also sought by the ACTU and its affiliates in relation to a public holiday falling on a non-working day:

Public Holidays falling on Non-Working Days

1. This section applies to:

   a) full time (non-casual) employees; and

   b) part-time (non-casual) employees who are normally rostered to work 5 days or more per week averaged over a four week cycle.

2. When a public holiday falls on a day the employee would not be rostered to work in any event, the employee must receive either:

[58] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [89] – [93].

a) an additional day's wages;

b) an alternative day off at the base rate of pay, to be taken within 28 days; or

c) an additional day of annual leave.

3. The compensation in sub-clause (2) must be calculated according to the number of ordinary hours rostered per day, or if this is not fixed, the average number of ordinary hours worked per day in the preceding 28 days.

4. The employee is entitled to elect the form of compensation they will receive in accordance with the provisions of this clause.

5. This clause does not apply to part-day public holidays.

6. To avoid doubt, this clause does not apply where a public holiday falls on a Saturday or Sunday. Where a public holiday falls on a Saturday or Sunday and an additional or substitute holiday is prescribed by state or territory law, this clause applies to the additional or substitute day.

168. The claim was advanced on the same basic premise as the SDA's claim is here being propounded:

[54] The basis of the claim as advanced by the ACTU is as follows:

> "[The provision] relates to ensuring that full-time employees who do not regularly work a five day, Monday to Friday week and part-time (non-casual) employees who work 5 days or more per week averaged over a four week cycle are adequately and fairly compensated where a public holiday falls on a day when the employee would not ordinarily be working.
>
> Employees who fall into this category include, but are not limited to, workers who work regularly on Saturday and Sunday, workers with variable rosters, continuous shift workers and employees who work for nine days per fortnight or 19 days in each of four weeks (for example where workers have a system of rostered days off, although this particular circumstance is dealt with directly in the second proposed model clause)."

…

[57] Further, the ACTU contended that the AIRC established the principle that where a prescribed holiday falls upon a day when a non-standard employee would not be working in any event, "[f]airness requires that the worker not be disadvantaged by that fact" and articulated the principle that the appropriate compensation to ensure that the safety net for non-standard employees, where a public holiday falls on a day which they would not be working in any event, was as follows:

- an alternative day off; or
- an addition of one day to annual leave; or

- an additional day's wages.[59]

169. This claim was also successfully opposed by many employer representatives including Ai Group.

170. The Full Bench rejected the application for the following reasons: (emphasis added)

> **[62]** The Public Holiday Test Case remains a relevant consideration for present purposes, but there is considerable force in Ai Group's submission that it was determined in a different statutory context. In particular, the scheme of the present Act places reliance upon a relatively comprehensive set of minimum standards provided by the NES and the role of the modern awards is intended to operate in that context.
>
> …
>
> **[64]** The AIRC and FWA Full Benches did not apply all elements of the Public Holiday Test Case decisions to many of the modern awards during the award modernisation process. However, certain elements were included having regard to the former awards and NAPSAs applying in each industry and to the legislative framework at the time of the award modernisation process.
>
> **[65]** The Penalty Rates Full Bench decision comprehensively considered the award modernisation process and its consequences for the Transitional Review. This included the 'swings and roundabouts' approach having regard to the terms of awards and NAPSAs applying in the relevant industries and the need for parties seeking to change the modern awards to demonstrate cogent reasons for such. Those observations are apposite to the matters presently before us.
>
> **[66]** While this aspect of the ACTU's claim is not without merit it does constitute a substantial variation of the award safety net and in our view is more appropriately dealt with in the 4 yearly review of modern awards provided for in s.156 of the FW Act. …
>
> **[67]** On the material before us there is insufficient information to adequately assess the impact of the proposed change. The same may be said of the ACTU's proposed model clause as a concept. Further, we consider that the practical operation of the proposed model provision to different patterns of employment as provided in some of the modern awards is uncertain and may well create unintended consequences.
>
> **[68]** We have concluded that this element should not be adopted as a model provision or included in the named awards as part of this Transitional Review.[60]

171. The Full Bench recognised the force of our submission regarding the very different statutory context in which the Public Holidays Test Case was

[59] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [54] – [57].

[60] *Modern Awards Review 2012 – Public Holidays* [2013] FWCFB 2168 at [62] – [68].

determined; a matter that we have canvassed earlier in this submission. It also, importantly, found that there was inadequate information before it to properly assess the impact of the proposed change or the practical operation of the proposed model clause. As we will later develop, the case mounted by the SDA in these proceedings suffers from the very same deficiencies.

172. The SDA has not identified any cogent reasons for departing from this decision, the reasons for which remain apposite. It is relevant to note that the Full Bench's ruling was not confined to reasons associated with the scope of the two year review. Rather, it expressed concerns regarding the relevance of the aforementioned test case principles as well as the application and impact of the clause proposed. In the current proceedings these matters have not been adequately addressed such that the Commission might consider that it should depart from this previous Full Bench ruling.

4.7 Conclusion

173. Our summary of prior consideration given by the Commission and its predecessors to public holiday award provisions allows for the following propositions to be distilled.

174. **Firstly**, the Public Holiday Test Case was decided in a very different legislative context to that which now prevails. To the extent that the Unions seek to rely upon certain principles expressed in the relevant decisions, they should be attributed little weight.

175. **Secondly**, and in any event, the Public Holiday Test Case decisions expressed only general principles that did not of themselves result in award variations. The AIRC identified the need to exercise caution when implementing those principles and the importance of adopting a sensitive, flexible approach which had regard to the circumstances of the coverage of a particular award.

176. **Thirdly**, in certain respects, the claims advanced by the Unions in this Review extend beyond the scope of the principles expressed by the AIRC. To that extent, the Public Holidays Test Case cannot be relied upon.

177. **Fourthly**, The AIRC's approach during the Part 10A award modernisation process of not supplementing the NES is appropriate and should be maintained by dismissing the Unions' claims. No cogent reason has been identified for departing from the relevant decisions.

178. **Fifthly**, express consideration was given by Fair Work Australia in 2010 and again by the Commission during the two year review to claims to introduce a Christmas Day loading. No cogent reasons have been identified by the Unions for departing from those decisions.

179. **Sixthly**, express consideration was given to provisions similar if not identical to that sought by the SDA in this Review soon after the awards were made and during the two year review. The reasons there provided remain apposite and when applied to these proceedings must necessarily lead the Commission to conclude that the claim should be dismissed.

5. ANALYSIS OF MODERN AND PRE–MODERN AWARDS

5.1 An Analysis of Public Holiday Provisions in Modern Awards

180. Modern awards take various approaches to regulating terms and conditions applicable to public holidays. Some do no more than to prescribe a higher rate of pay for work performed on a public holiday. Many permit an employer to substitute public holidays with the agreement of their employees. Some awards contain clauses that afford additional entitlements where an employee performs work on a public holiday, whilst others apply where an employee does *not* work on a public holiday.

181. At **Attachment A** to this submission, we set out our analysis of each of the 122 modern awards for the purposes of identifying which of those contain provisions of the nature now sought by the Unions.

182. Importantly:

- In relation to the **AMWU's claim**: only **two**[61] **of the 122 modern awards** contain a clause applying to all employees covered by the award that requires the payment of public holiday penalty rates prescribed by the award or some other additional amount in circumstances where 25 December falls on a weekend and another day is substituted for that day.

- In relation to the **HSU's claim**: **none of the 122 modern awards** contain a clause applying to all employees covered by the award that requires the payment of the public holiday penalty prescribed by the award or some other additional amount in circumstances where a public holiday falls on a weekend and another day is substituted for that day.

[61] The *Mannequins and Models Award 2010* and the Nurses Award.

- In relation to the **SDA's claim**: only **six**[62] **of the 122 modern awards** contain a provision that provides some additional benefit to full-time and part-time employees who work an average of five days a week when they are not required to work on a public holiday that falls on a weekday.

183. As can be seen, the provisions sought by the Unions cannot properly be characterised as reflecting a common standard across the modern awards system. In fact the very opposite is true; a very small number of awards provide the entitlements here sought by the AMWU and SDA, and not one modern award contains a provision akin to the HSU's proposal.

184. A small number of awards contain provisions that are derivatives of those which the Unions have proposed. In some cases, they are narrower in their application (that is, they apply only to a subset of employees covered by the award by reference to the basis upon which they are employed or the manner in which their hours of work are arranged). In other cases, the current provisions provide a lesser benefit than what has been proposed by the Unions. For instance:

- In relation to the **AMWU's claim**: two awards require the payment of an additional amount for work performed by a full-time or part-time employee on 25 December when it falls on a weekend and is substituted. Such provisions do not apply to casual employees.[63]

- In relation to the **SDA's claim**: some awards provide an entitlement where a full-time employee's rostered day off falls on a public holiday by virtue of the arrangement of their ordinary hours.[64] Such clauses do not apply to part-time or casual employees simply by virtue of the fact that they are not required to work on a day that is a public holiday and

[62] The *Airport Employees Award 2010*, the Ambulance Award, the *Animal Care and Veterinary Services Award 2010*, *Corrections and Detention (Private Sector) Award 2010*, the *Fire Fighting Industry Award 2010* and the *Live Performance Award 2010*.

[63] For example the *Hospitality Industry (General) Award 2010* and the Restaurant Award.

[64] For example the Ground Staff Award, the FBT Award, the Graphic Arts Award, the Manufacturing Award the *Wine Industry Award 2010*.

as a result, such provisions are notably confined in their scope. In other awards, such an entitlement arises only where a system of arranging ordinary hours is implemented such that an employee is given a rostered day off and that rostered day off falls on a weekend.[65]

185. The Unions' claims, however, do not reflect any of the nuances that are found in current provisions that are similar in their nature to the clauses now proposed. They have instead elected to pursue the introduction of provisions that would apply to all employees covered by the relevant awards without exception. Their claims do not have any regard for the manner in which such employees' hours of work are arranged or the basis upon which they have been engaged.

186. Without accepting any of the analysis of current award clauses undertaken by the Unions in these proceedings or the manner in which they seek to characterise them, an important question arises in relation to the submissions they seek to make pursuant to that analysis: what is the significance or indeed the relevance of an assertion that provisions similar to those that they seek are commonly found in other modern awards?

187. In our view, the commonality or otherwise of the relevant provisions in the modern awards system is neither here nor there. Importantly, s.156(5) of the FW Act requires that each modern award must be reviewed in its own right. That is, each award must individually be considered when assessing whether it contains terms only to the extent necessary to achieve the modern awards objective. Further, as the Commission stated in its Preliminary Jurisdictional Issues decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different

[65] For example the *Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010*, the *Plumbing and Fire Sprinklers Award 2010*, the *Gardening and Landscaping Services Award 2010*, the *Pest Control Industry Award 2010*, the *Quarrying Award 2010*, the *Security Services Industry Award 2010* and the *Storage Services and Wholesale Award 2010*.

modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.[66]

188. Even if it were the case that many awards contain provisions that are similar to the Unions' proposed clauses, little can turn on this. The Unions' task here is to establish that, in the context of each award that they seek to vary, the provision proposed is necessary for the purposes of ensuring that the award is providing a fair and relevant minimum safety net. That the clause sought commonly appears in other awards serves only to distract the Commission from the statutory function that it is here required to discharge. It does not assist the Unions in establishing that, having regard to the considerations listed at s.134(1) of the FW Act, the clauses proposed are necessary in the sense contemplated by s.138.

The AMWU's Submissions and Analysis

189. The AMWU points to certain modern award provisions that deal specifically with work performed on Christmas Day in support of the proposition that the "significance of Christmas Day" is reflected in such entitlements: (emphasis added)

> The significance of Christmas Day is also reflected in entitlements present in Modern Awards. Many awards provide for the differential treatment of Christmas Day, usually involving a higher penalty for hours worked, but also providing for substitution. This can be seen through the catalogue of Modern Awards in Appendix 1. There are in total 18 modern awards with specific entitlements and provisions for work performed on Christmas Day, ranging from the Christmas Day loading, to additional penalty rates, and substitution provisions.[67]

190. The 18 modern awards identified at Appendix 1 to the AMWU's submission contain provisions that deal with work performed on Christmas Day in a range of ways. We note however that:

- Whilst some awards do provide for the payment of an additional amount where Christmas Day falls on a weekend and another day is substituted for that day, the entitlement prescribed is limited to certain

[66] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

[67] AMWU submission dated 20 October 2016 at paragraph 49.

classes of employees. For instance, the relevant provision in the *Hospitality Industry (General) Award 2010* (**Hospitality Award**) and the *Restaurant Industry Award* 2010 (**Restaurant Award**) does not apply to casual employees. Similarly, the *Road Transport and Distribution Award 2010*, the *Textile, Clothing, Footwear and Associated Industries Award 2010* and the *Waste Management Award 2010* contain provisions that apply only to full-time and/or part-time employees who are regularly rostered to work ordinary hours on a Saturday or Sunday. Therefore the benefits afforded by these awards is limited when compared to the AMWU's claim.

- Many of the award clauses identified by the AMWU do not relate to circumstances in which the Christmas Day public holiday is substituted.[68] Whilst they prescribe a specific entitlement that arises when an employee performs work on Christmas Day, consideration would need to be given on an award by award basis, having regard to the drafting of the specific terms of the relevant provisions, in order to ascertain whether that entitlement applies to work performed on 25 December where the Christmas Day public holiday is substituted. Unless it applies to both 25 December and the substituted day, the provisions do have the same effect as the AMWU's proposed clause, which would be to require the payment of public holiday rates on an *additional* day where the public holiday has been substituted.

191. Accordingly, the AMWU's analysis of modern awards cannot be relied upon to establish that the entitlement it seeks is a common feature of the modern awards system. Indeed it rather supports the contrary proposition.

192. To the extent that the AMWU seeks to rely on its analysis in order to establish "the significance of Christmas Day", we make the following submissions.

[68] For example the *Animal Care and Veterinary Services Award 2010*, the *Registered and Licensed Clubs Award 2010*, the *Timber Industry Award 2010* and the *Airport Employees Award 2010*.

193. **Firstly**, the AMWU has pointed to only 18 of 122 modern awards (15%) that contain any provision that draws a distinction between Christmas Day and other public holidays; an amount that on any view constitutes a small proportion.

194. **Secondly**, a more considered analysis of those 18 awards reveals that the magnitude of the entitlement provided by the relevant provision falls well shy in many instances when compared to the AMWU's proposal. For example, a full-time employee under the *Road Transport (Long Distance Operations) Award 2010* is entitled to an additional 20% of the minimum weekly rate for work performed on any public holiday apart from Good Friday or Christmas Day in which case the employee is entitled to 30% instead; a differential of 10%. In at least one instance, that being the *Contract Call Centres Award 2010*, the provision identified simply provides that Christmas Day will be substituted where it falls on a weekend; the very outcome that the AMWU is here attempting to overcome.

195. For the reasons we have here articulated, we do not consider that the AMWU's analysis of modern awards lends support to its claim. Rather, as we have earlier set out, the clause it has proposed is quite clearly out of step with public holiday provisions in other awards.

The HSU's Submissions and Analysis

196. The HSU makes the following submission in support of its claim:

> A number of modern awards do provide separate public holiday provisions, in addition to the NES entitlements, which appear to recognise the need for a clause specifying public holiday entitlements when public holidays fall on a Saturday or Sunday, for workers who regularly work weekends.
>
> This is particularly the case with Christmas Day, which appears to be treated with a special significant in a number of awards.[69]

197. The HSU then identifies seven modern awards as examples of such awards. It is sufficient to note that not one of the awards identified contains a clause applying to all employees covered by it requiring the payment of the public

[69] HSU submission dated 17 January 2017 at paragraphs 16 – 17.

holiday penalty prescribed by the award or some other additional amount in circumstances where any public holiday falls on a weekend and another day is substituted for that day. This is consistent with our analysis at **Attachment A** to this submission.

The SDA's Submissions and Analysis

198. The SDA asserts that its claim is "supported by the existence of a similar provision"[70] in 46 modern awards, as identified at attachment 19 to its submissions. It further submits:

> Some awards contain a provision referring to a public holiday falling on all non-working days. Some awards contain a provision referring only to a public holiday falling on a rostered day off accruing by virtue of the 38-hour week.[71]

199. The majority of awards that contain a provision of the sort characterised by the SDA as being "similar" to its proposal apply only to full-time employees who, by virtue of the way in which their ordinary hours of work are arranged, are entitled to a rostered day off.[72] In many cases, the award itself specifies different ways in which ordinary hours may be arranged including the provision of rostered days off. Such clauses do not generally apply to part-time or casual employees and in this way, we consider that the scope of many of the award provisions upon which the SDA seeks to rely is fundamentally different to the SDA's proposal.[73]

200. Many awards enable a full-time employee's ordinary hours to be arranged such that they work more than 38 ordinary hours in a week, however a proportion of those hours accrue towards a rostered day off that is taken at a later point in time. Such an arrangement may either be expressly provided by the award or the relevant terms of the award may be sufficiently flexible so as

[70] SDA submission dated 10 October 2016 at paragraph 50.

[71] SDA submission dated 10 October 2016 at paragraph 51.

[72] For example the Ground Staff Award, the FBT Award, the Graphic Arts Award, the Manufacturing Award the *Wine Industry Award 2010*.

[73] For example the *Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010*, the *Plumbing and Fire Sprinklers Award 2010*, the *Gardening and Landscaping Services Award 2010*, the *Pest Control Industry Award 2010*, the *Quarrying Award 2010*, the *Security Services Industry Award 2010* and the *Storage Services and Wholesale Award 2010*.

to enable an employer to implement such an arrangement even if it not expressly contemplated.

201. If a rostered day off, accrued in the sense here described, falls on a public holiday, such an employee can arguably be disadvantaged. That is because the employee has worked additional hours each day which, but for the system of rostered days off, would likely have given rise to an entitlement to overtime. It is for this reason that some awards prohibit an employee from taking (or an employer from requiring an employee to take) a rostered day off on a public holiday.[74]

202. It cannot be said that the SDA's proposed clause is comparable to the provisions here described. It would extend well beyond the circumstances in which such clauses are designed to apply and would operate in a manner far more generous.

203. As revealed by **Attachment A** to our submission, we have identified only six[75] awards that contain a provision that provides an additional benefit to all full-time and part-time employees that would be covered by the SDA's clause.

204. It cannot be argued, as the SDA endeavours to do, that there is a "strong precedent"[76] for the provision that it seeks. Our analysis instead establishes that a very small proportion of awards contain a provision comparable to the SDA's proposed clause.

5.2 An Analysis of the Relevant Pre-Modern Awards

205. Each of the Unions that are seeking award variations rely on the relevant pre-modern awards in support of their claims. We here deal with their submissions in this regard.

[74] For example, the Vehicle Award and the *Silviculture Award 2010*.

[75] The *Airport Employees Award 2010*, the Ambulance Award, the *Animal Care and Veterinary Services Award 2010*, *Corrections and Detention (Private Sector) Award 2010*, the *Fire Fighting Industry Award 2010* and the *Live Performance Award 2010*.

[76] SDA's submission dated 10 October 2016 at paragraph 52.

The AMWU's Submissions and Analysis

206. The AMWU submits that "the Christmas Day loading entitlement does appear in many precursor awards to the modern awards where change is sought"[77] (sic). We do not accept this proposition.

207. At **Attachment B** to this submission, we set out our analysis of 119 pre-reform federal awards and NAPSAs underpinning the Manufacturing Award. Of those, only 3 provided the entitlement here sought by the AMWU. Crucially, the *Metal, Engineering and Associated Industries Award 1998*, upon which the Manufacturing Award is primarily based, did not contain a provision of the nature sought by the AMWU.

208. Quite clearly the very vast majority of awards relevant to the making of the Manufacturing Award did not contain the entitlement.

209. Of the 92 pre-modern instruments preceding the FBT Award, only 15 provided the entitlement here sought by the AMWU. We refer to **Attachment C** of our submissions in this regard.

210. **Attachment D** to our submission demonstrates that only two pre-modern awards preceding the making of the Graphic Arts Award contained an entitlement to a Christmas Day loading. One was a pre-reform federal industry award applying in South Australia and Tasmania. The other was a NAPSA applying in Queensland. The remaining 29 awards did not contain such an entitlement including the *Graphic Arts – General – Award 2000* upon which the modern award is primarily based.

211. The only pre-modern award preceding the Vehicle Award which contained a Christmas Day loading was the *Vehicle Industry – Repair, Services and Retail Award 2002*. It is important to note however that the *Vehicle Industry Award 2000*, which applied federally to vehicle manufacturing, did *not* contain such a

[77] AMWU submissions dated 20 October 2016 at paragraph 33.

provision. Our analysis in relation to the vehicle industry can be found at **Attachment E.**

212. As can be seen, the overwhelming majority of pre-modern awards preceding the making of the Manufacturing Award, FBT Award, Graphic Awards and Vehicle Award did not provide for the entitlement here sought by the AMWU. This includes, in most cases, the primary underpinning pre-reform federal award(s). The union appears to implicitly accept that this is the case, ultimately submitting that the entitlement "is not altogether alien to the awards where change is sought"[78]. We would agree that its prevalence can be put no higher.

The HSU's Submissions and Analysis

213. The HSU submits that the history of the health sector awards supports its proposed variations. However, the HSU has not undertaken a detailed analysis of the predecessor awards relevant to the making of the modern awards subject to its claim. Rather, the HSU has simply made generic assertions based on the public holiday clauses in a select few pre-modern awards.

214. It is also evident that many of the pre-modern award clauses which the HSU relies on do not evince support for its claim to extend the benefit of public holiday penalties to all public holidays falling on a weekend that have been substituted. This is because many applied to specific public holidays, and/or specified that employees who work weekends shall observe the public holiday on the actual day and not on the substitute day. That is, they were not entitled to the benefit of the "actual" day and the substitute day.

215. Contrary to the HSU's submissions, the development of the modern awards that the HSU seeks to vary does not support its case. Many of the major underpinning awards in fact did not contain a clause akin to that which the HSU now seeks.

[78] AMWU submissions dated 20 October 2016 at paragraph 37.

216. We consider the relevant predecessor awards in relation to each of the six awards the HSU seeks to vary below.

The Health Professionals Award, Nurses Award and Aged Care Award

217. The Health Professionals Award, Aged Care Award and Nurses Award were made along with the *Medical Practitioners Award 2010* (**Medical Award**) during Stage 2 of the award modernisation process as part of the health and welfare services group. In the AIRC's award modernisation decision of 3 September 2008,[79] the AIRC listed 179 instruments (excluding enterprise awards) as being relevant to the making of those awards.

218. The HSU claims that the Federal common rule awards in Victoria had the largest coverage in the pre-modern award system and that many of these awards contained clauses that were similar to its proposed variations. However, the HSU has not undertaken a complete analysis of all relevant Federal common rule awards in Victoria. It has also not undertaken a complete analysis of other pre-reform awards and NAPSAs listed by the AIRC as relevant to the making of the Health Professionals Award, the Aged Care Award and the Nurses Award. The HSU's consideration of a few predecessor awards cannot be relied upon to establish that the relevant entitlement was commonplace.

219. A number of the predecessor awards relevant to the making of the Health Professionals Award, Aged Care Award and Nurses Awards do not contain clauses entitling employees to additional benefits for working on public holidays falling on weekends that have been substituted. For example:

- Clause 40 of the *Health and Allied Services – Private Sector -Victoria Consolidated Award 1998* specifies that when Christmas Day, Boxing Day, New Year's Day or Australia Day fall on a weekend, a holiday in lieu thereof shall be observed after the weekend but does not contain

[79] *Award Modernisation* [2008] AIRCFB 708.

additional benefits for employees who work on the actual public holidays.

- Clause 27 of the *Private Hospital and Residential Aged Care (Nursing Homes) Award 2002* entitles an employee who works on any public holiday or day observed in lieu thereof to a loading of 50% but does not specify additional benefits for employees who work on public holidays falling on weekends that have been substituted.

- Clause 27 of the *Residential Aged Care (Hostels) Award 2002* entitles an employee who works on any public holiday or day observed in lieu thereof to a loading of 50% but not specify additional benefits for employees who work on public holidays falling on weekends that have been substituted.

- Clause 29 of the *Dental (Private Sector Victoria) Award 1998* specifies that when Christmas Day, Boxing Day, New Year's Day or Australia Day fall on a weekend, a holiday in lieu thereof shall be observed after the weekend but does not contain additional benefits for employees who work on the actual public holidays.

- Clause 19 of the *Health Employees (Dental Health Services) Award 2003* specifies that when a public holiday falls on a Saturday or Sunday the holiday shall be observed after the weekend but does not contain additional benefits for employees who work on the actual public holiday falling on a weekend.

- Clause 27 of the *Nursing Assistants' Award 2002* entitles an employee who works on any public holiday or day observed in lieu thereof to a loading of 50% but not specify additional benefits for employees who work on public holidays falling on weekends that have been substituted.

220. In addition, it should be noted that many of the predecessor awards relied on by the HSU are not consistent with its claim. For example, the *Nurses (Victorian Health Services) Award 2000* does not entitle employees to the

benefit of both the actual public holiday falling on a weekend and the substituted day. Rather it specifies that when Christmas Day, Boxing Day, New Years Day or Australia Day fall on a weekend, full-time Monday to Friday employees and/or part time employees who work in services that only operate Monday to Friday shall observe the public holiday on the substitute day whilst all other employees shall observe it on the actual day.[80]

221. Furthermore, many of the predecessor award clauses which the HSU refers to as providing additional benefits to employees working on an actual public holiday that has been substituted are limited to specific public holidays, such as Christmas Day, Boxing Day and/or New Year's Day. For example:

- Clause 35.5 of the *Health Services Union of Australia (Victoria – Private Sector – Medical Scientists, Psychologists and Pharmacists) Award 2004* only provides additional benefits to employees working on Christmas Day, Boxing Day and New Year's Day.

- Clause 24 of the *Nurses (Victorian Health Services) Award 2000* (also referred to above) only allows employees who work weekends to observe Christmas Day, Boxing Day and New Years Day on the actual day rather than the substitute day.

- Clause 7.6 of the former Health Services Employees Award in South Australia only provided additional benefits to employees working on Christmas Day.

222. Whilst we have not examined all predecessor awards that were relevant to the making of the Health Professionals Award, the Nurses Award and the Aged Care Award, it is clear from the above that the HSU's proposal does not reflect a universal standard in the health sector.

[80] *Nurses (Victorian Health Services) Award 2000* clause 24

The Ambulance Award

223. The Ambulance Award is largely based on the federal *Ambulance Services and Patient Transport Employees Award, Victoria 2002* (**Victorian Federal Ambulance Award**) as stated by the AIRC in its decision of 25 September 2009:

> **[90]** We publish an exposure draft of an Ambulance and Patient Transport Industry Award 2010. The written submissions made and the oral material presented during the pre-drafting consultations indicated a large degree of agreement between the majority of the private Non-Emergency Patient Transport (NEPT) providers in Victoria and the LHMU regarding the content of the proposed award. Both the NEPT providers and the LHMU based their draft awards on the federal *Ambulance Services and Patient Transport Employees Award, Victoria 2002* (Victorian federal award). In all of the other states, either pre-reform enterprise awards or NAPSAs derived from state enterprise agreements apply.
>
> **[91]** The terms of the exposure draft reflect, in large part, the Victorian federal award which covers both emergency and non-emergency patient transport. The wage rates also reflect the Victorian federal award as proposed by the major parties. It has not been suggested that the adoption of these rates is inappropriate and we have taken account of the wage fixation history of the Victorian federal award. [81]

224. Clause 32 of the Victorian Federal Ambulance Award dealt with public holidays. It specified that where Christmas Day, Boxing Day, New Years Day or Australia Day fell on a weekend a holiday in lieu would be observed after the weekend and also provided for pay or time of in lieu when an employee worked on a public holiday. It did not however provide any additional benefits for employees who worked on the actual day that has been substituted because it fell on a weekend.

225. Accordingly, the primary pre-reform award upon which the modern award is premised did not contain the clause now sought by the HSU.

The SACS Award

226. The SACS Award incorporates a number of different industry sectors that had previously been dealt with separately; namely, social and community services, home care, family day care schemes and disability services.

[81] *Award Modernisation* [2009] AIRCFB 865 at [90] – [91].

227. In its decision of 25 September 2009 during the Part 10A process, the AIRC set out the major predecessor awards in each of the industry sectors upon which the wage rates and classification structures in the modern SACS Award were ultimately based.[82] These were:

- In relation to social and community services, the federal *Social and Community Services (Queensland) Award 2001*;
- In relation to crisis accommodation employees, the federal *Crisis Assistance Supported Housing (Queensland) Award 1999*;
- In relation to family day care schemes, the federal *Family Day Care Services Award 1999;*
- In relation to disability services, the federal *Residential and Support Services (Victoria) Award 1999*; and
- In relation to home care employees, the federal *Home and Community Care Award 2001.*

228. None of the above awards contained clauses entitling employees to additional benefits for working on a public holiday that fell on a weekend but was substituted.[83]

<u>The Aboriginal Health Award</u>

229. The minimum weekly rates and classifications in the Aboriginal Health Award are primarily based on those in the *Health Services Union of Australia (Aboriginal and Torres Strait Islander Health Services) Award 2002* (**Aboriginal Health Award 2002**), as noted by the AIRC in its decision of 25 September 2009.[84] This predecessor award was the main industry award at

[82] *Award Modernisation* [2009] AIRCFB 865 at [99] – [106].

[83] See *Social and Community Services (Queensland) Award 2001* clause 35; *Crisis Assistance Supported Housing (Queensland) Award 1999* clause 36; *Family Day Care Services Award 1999* clause 33; *Residential and Support Services (Victoria) Award 1999* clause 26; and *Home and Community Care Award 2001* clause 29.

[84] *Award Modernisation* [2009] AIRCFB 865 at [128].

the time applying to a large number of aboriginal community controlled health services in Queensland, Victoria and New South Wales.

230. Clause 31 of the Aboriginal Health Award 2002 dealt with public holidays. It specified that when Christmas Day, Boxing Day, New Years Day or Australia Day fell on a weekend, a holiday in lieu thereof would be observed after the weekend but did not contain any clauses of the nature sought by the HSU.

The SDA's Submissions and Analysis

231. The SDA claims that its "application is supported by the existence of a similar provision … in the predecessor federal awards to the modern awards the subject of these applications"[85]. It then goes on to identify those awards.

232. Without accepting the accuracy of the SDA's analysis, the fact that a provision similar to that which is now sought was contained in certain relevant pre-modern awards does not, in and of itself, provide a proper basis for an award variation in this Review. The power to include a term in an award is constrained by s.138 of the FW Act, which requires that it be necessary to achieve the modern awards objective. The requisite assessment is to be made having regard to the considerations listed at s.134(1) in the current context and in light of contemporary employment and business practices.

233. Further, the absence such of a provision from the minimum safety net for over seven years does not advance the SDA's case. There is no evidence of any material disadvantage to employees arising during the intervening period.

234. We also consider that it can reasonably be inferred that, firstly, there may be new employers who have entered the relevant industries and have not previously been covered by an industrial instrument that contains such an entitlement. For any such employer, the introduction of the clause sought by the SDA would amount to a substantial change to the minimum safety net to which they have not previously been exposed. The prior existence of such an entitlement in pre-modern awards is not of any relevance to such an employer.

[85] SDA submissions dated 10 October 2016 at paragraph 54.

The same can be said of employers not covered by the pre-modern awards identified by the SDA. Secondly, in relation to those employers who were previously required, by virtue of a pre-modern award, to afford their employees the relevant entitlement, some seven years have since lapsed. Such businesses may during that time have altered their rostering arrangements, the constitution of their workforce and/or their enterprise agreements in light of the fact that the relevant modern awards do not contain the clause now sought by the SDA. The grant of the Union's claim may significantly impact any such business.

235. It is for these reasons that the prevalence or otherwise of the clause sought by the SDA in the instruments underpinning the relevant modern awards does not in and of itself lend support for its claim. It does not overcome the onus borne by the SDA (which it has not otherwise discharged) to establish that the clauses sought are necessary to ensure that each award is achieving a fair and relevant minimum safety net having regard to the need to encourage collective bargaining (s.134(1)(b)), the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)), the likely impact on business including on productivity, employment costs and the regulatory burden (s.134()1(f)) and the economy at large (s.134(1)(h)).

6. THE AMWU'S CLAIM

236. The submissions that follow relate to the AMWU's claim.

6.1 The Variations Sought by the AMWU

237. The AMWU is seeking to vary the following four modern awards:

- The Manufacturing Award;
- The FBT Award;
- The Graphic Arts Award; and
- The Vehicle Award.

238. In essence, the AMWU has proposed the insertion of new provisions in each of the aforementioned awards, which would apply in circumstances where 25 December (being Christmas Day) falls on a Saturday or Sunday, where an employee is required to perform work on that day and another day has been substituted for the day that would otherwise be a public holiday. The precise variations sought are set out in the draft determinations filed by the union on 14 December 2016, however by way of example we here set the clause it has proposed in relation to the Manufacturing Award:

> **44.2** Where Christmas Day 25 December falls on a weekend and is substituted for another day:
>
> (a) an employee who works on Christmas Day 25 December will receive payment for that work as if it were a public holiday; and
>
> (b) Continuous shiftworkers who work on Christmas Day 25 December will receive double time and a half.
>
> Note: s.115 of the Act confers Public Holiday status on the substitute day, which should continue to be treated as a public holiday.

239. We note that another day may be substituted for the Christmas Day public holiday in one of two ways. The substitution may occur by virtue of legislation passed by a State or Territory Government or in accordance with the relevant procedure prescribed by such legislation. Alternatively, pursuant to the award

itself, agreement may be reached between an employer and its employees to substitute a public holiday. For instance, clause 44.2 of the Manufacturing Award is in the following terms:

> **44.2 Substitution of certain public holidays by agreement at the enterprise**
>
> **(a)** By agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned, an alternative day may be taken as the public holiday instead of any of the prescribed days.
>
> **(b)** An employer and an individual employee may agree to the employee taking another day as the public holiday instead of the day which is being observed as the public holiday in the enterprise or part of the enterprise concerned.

240. Similar provisions can be found in the FBT Award[86], the Graphic Arts Award[87] and the Vehicle Award[88].

241. The provisions proposed by the AMWU would apply where Christmas Day was substituted in either of the aforementioned ways.

242. The proposed provisions apply to all employees covered by the relevant awards, whether engaged on a full-time, part-time or casual basis. The provisions would apply irrespective of whether the employee ordinarily works on weekends and whether the work performed constitutes ordinary hours or overtime.

243. The grant of the AMWU's claim would, in broad terms, have the effect of entitling an employee who works on 25 December, in the circumstances described above, to payment as though it were a public holiday. That is, the employee would generally be entitled to the public holiday rates prescribed by the relevant award instead of the appropriate weekend penalty rate. Put simply, the AMWU is seeking an increase to the penalty rate payable for work performed on Christmas Day when it falls on a weekend and is substituted.

244. In this way, the AMWU's claim attempts to circumvent the decisions of State and Territory Governments and agreements reached between employers and

[86] Clause 37.2 of the FBT Award.

[87] Clause 41.5 of the Graphic Arts Award.

[88] Clause 32.2 of the Vehicle Award.

their employees to substitute the public holiday that would otherwise fall on 25 December. Indeed the grant of the variations sought would have the effect of rendering any substitution of the 25 December public holiday otiose for the purposes of identifying the rate at which the employee would be paid on that day. The variation sought would instead have the same effect in that regard as the declaration of an additional public holiday.

245. We note that in certain instances, the AMWU's claim goes further than to simply require the payment of the public holiday penalty rates presently prescribed by the relevant award. That is:

- Under the Manufacturing Award, a continuous shiftworker is to be paid double time for work performed on a public holiday.[89] The draft determination filed by the AMWU, however, seeks the insertion of a new subclause (clause 44.2(b) reproduced above) that would require payment at double time and a half where a continuous shiftworker works on Christmas Day, it falls on a weekend and is substituted for another day.

- The variation sought to the FBT Award would have the same effect.[90]

- Clause 41.4 of the Graphic Arts Award entitles weekly employees in a non-daily or regional newspaper office to payment at double time for work performed on a public holiday. The AMWU is seeking the insertion of a new clause that would require that such an employee be paid 50% in addition to that amount if the employee works on Christmas Day, it falls on a weekend and is substituted for another day.

246. In essence, the AMWU's claim seeks to extend the benefit of public holiday penalty rates to circumstances in which an employee performs work on Christmas Day where it falls on a weekend and another day is substituted for it. In some instances, the claim also seeks to prescribe the amount payable in

[89] Clause 37.5(a) of the Manufacturing Award.

[90] Clause 31.5(a) of the FBT Award requires that a continuous shiftworker be paid double time for work performed on a public holiday.

such circumstances, which is higher than the amount due for work performed on other public holidays.

6.2 The AMWU's Case

247. The gravamen of the AMWU's case can be summarised as follows:

- Employees who perform work on 25 December should be remunerated at a higher rate so as to recognise the social, cultural and religious significance of Christmas Day. That significance is said to be reflected in the AMWU's survey.

- The proposed variation is consistent with prior consideration given to the relevant issues, including the Public Holidays Test Case Decision.

- The proposed variation is not a "novel or radical concept" when regard is had to the relevant pre-modern instruments that preceded the modern awards that the AMWU is seeking to have varied, as well as other modern awards.

- The proposed provisions are necessary to ensure that the relevant awards are achieving the modern awards objective.

248. We deal with each element of the AMWU's case in the submissions that follow.

6.3 The Relevant Legislative Provisions

249. At Chapter 2 of this submission, we have set out the legislative provisions relevant to the AMWU's claim. This includes an assessment of the extent to which Christmas Day is in fact substituted by State and Territory legislation where it falls on a weekend.

250. As we there identified:

- Christmas Day fell on a Sunday in 2016. Only the Victorian legislation provided for substitution, however in November 2016 the Minister for Small Business, Innovation and Trade appointed 25 December 2016

as a public holiday[91] and so as a result, an additional public holiday was effectively declared. Consequently, Christmas Day was not substituted in any State or Territory in 2016. In such circumstances, the AMWU's clause would have had no work to do.

- Christmas Day will next fall on a weekend (Saturday) in 2021. Assuming the position under State and Territory legislation remains as is presently the case, it would be substituted only in Victoria and South Australia, subject to any more generous declarations that the relevant Minister may make

- In the following year (2022), Christmas Day would fall on a Sunday. It would be substituted only in Victoria, subject to any more generous declaration that the relevant Minister may make

- Christmas Day would not fall again on a weekend until 2027.

251. Self-evidently, the incidence of Christmas Day falling on a weekend and being substituted by State and Territory legislation is very low. Further, the issue will not now arise until 2021, assuming the position under the current legislation remains as it currently is. In our view, it is impossible to justify that the proposed provision is necessary in such circumstances.

6.4 Prior Consideration of the Relevant Issues

252. At Chapter 4 of this submission, we have given careful consideration to the authorities upon which the AMWU seeks to rely in support of its claim. We need not repeat those submissions here.

[91] Government Gazette of 25 November 2016: http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S364.pdf

6.5 Analysis of Modern Awards and Pre-Modern Awards

253. At Chapter 5 of this submission we have given consideration to other modern awards and the relevant pre-modern awards. Without reproducing those submissions here we simply note that:

- The very vast majority of modern awards do *not* provide for the payment of a higher amount for work performed on Christmas Day where it falls on a weekend and is substituted.

- The very vast majority of instruments that preceded the relevant modern awards did *not* provide for the payment of a higher amount for work performed on Christmas Day where it falls on a weekend and is substituted. This includes many of the major pre-reform federal awards.

254. Neither of these factors lend support to the AMWU's claim.

6.6 The AMWU's Survey

255. In support of its claim, the AMWU has presented the responses of a survey it conducted in relation to its members' experiences associated with public holidays. Of particular relevance are Appendices 5 – 9 to its submissions.

256. The relevant material has *not* been presented in the form of evidence. No witness has been put forward to attest to the truth of the survey responses or to explain the methodology underpinning its conduct or analysis. As a result, respondent parties cannot test the material before us. This is an issue that must necessarily render the survey of very little weight.

The Conduct of the Survey

257. In its submissions the AMWU states as follows:

> A link to the survey was sent to all members through an email. 272 members clicked through to the linked survey and provided a response.[92]

[92] AMWU submission dated 20 October 2016 at paragraph 39.

258. This is all that is known about the conduct of the AMWU's survey. Accordingly, a raft of questions arise as to the veracity of its results. The scarcity of material before the Commission allows for a number of adverse inferences to be drawn. For instance, there is nothing to suggest that the sample of respondents was not carefully and deliberately selected such that it would result in biased responses. It is entirely possible that the sample was taken from employees employed by only selected businesses in which there is a heavy union presence.

259. A series of questions arise regarding the medium by which the survey was in fact conducted. The use of an online survey platform is not immune from discredit. As we understand it, there are various options or functionalities open to the administrator of the survey when it is established and during its operation that can have a significant bearing upon its reliability. The AMWU has not provided any insight into the process that was involved in setting up the survey and whether any such safeguards were implemented.

260. We are also left entirely unadvised as to manner in which respondents were informed of the survey and invited to participate. Was the conduct of the survey preceded by union campaigns that sought to drive the rhetoric underlying the claims before the Commission and were designed to elicit certain responses from survey participants? Were participants of the survey invited to union organised events in order to encourage them to participate in the survey and if so, what were they told?

261. The Commission should have little confidence in the survey commissioned by the AMWU. There is no evidence before it about a number of issues associated with the administration of the survey or its results. Such a lack of transparency gives rise to doubt as to the manner in which it was conducted and whether the results cited in its submissions are accurate. Indeed the Commission cannot be certain that the results cited reflect the complete set of results that were generated from the survey and that they do not reflect a mere subset of the responses received that have conveniently been cherrypicked.

Similarly, we can have no confidence that the results have not been impaired by an inadvertent or administrative error.

262. For the reasons set out above, it is our submission that an adverse inference can and should be drawn from the absence of any evidence in this regard.

263. We note that the AMWU has been involved in a number of previous Commission proceedings in which it has sought to rely on a survey or it has responded to a survey conducted by another interested party. It is therefore well aware of the types of criticisms that are likely to be made of surveys. Indeed in the context of the casual and part-time common issues proceedings, Ai Group raised these very issues in response to the survey results that the AMWU there sought to rely upon. Despite this, the AMWU has not so much as attempted to shield its case from the obvious evidentiary gaps that we have here highlighted. These matters are neither novel nor particularly complex. It is surprising that the AMWU has not, in mounting its case, addressed this readily apparent defect.

The Survey Sample

264. The AMWU's submissions state that 272 members responded to its survey, excluding those who were retired or unemployed[93].

265. The sample size of the survey is an extremely small one. It represents but a fraction of a percentage of all employees engaged in the relevant industries. It can by no means be considered representative of the workforce generally, of the manufacturing industry, of its subsets, or of any other industry covered by a modern award.

266. The number of respondents that are in fact covered by the awards that are the subject of the AMWU's claim is not apparent from the survey results. Respondents were not asked to identify whether they are covered by an award, if so the award that covers them and/or whether another industrial instrument such as an enterprise agreement applies to them. As a result, it is

[93] AMWU submission dated 20 October 2016 at paragraphs 38 – 39.

impossible to identify the number of respondents to whom the four awards that are here being considered apply; a matter that runs squarely to the relevance of the survey results and the weight that should be attributed to them.

267. We note that 25 respondents stated that they work in the on-site building and construction industry and another 38 stated that they worked in an industry other than:

- Metals and engineering;
- Printing, graphic arts and newspapers;
- Vehicle manufacturing, repair, services and retail;
- Food, beverage and tobacco manufacturing; and
- On-site building and construction.

268. In our view, the responses of those that work in the on-site building and construction industry and those that work in an unidentified industry are of little probative value in these proceedings, which relate squarely to the Manufacturing Award, the Vehicle Award, the Graphic Arts Award and the FBT Award. Their responses should therefore be disregarded.

269. Once the aforementioned respondents are excluded, 247 respondents remain. The analysis we have undertaken in the submissions that follow relate to this subset of respondents.

270. All respondents were members of the AMWU. It is conceivable that this would impact upon the results of the survey. For instance, to the extent that respondents were influenced by union propaganda, this may have had a greater bearing upon the survey results than might otherwise have been the case.

271. For the various reasons we have here articulated, the survey sample is by no measure a representative one. Therefore, its results cannot be interpreted as

generally reflective of the industries that are covered by the four relevant awards.

The Survey Results

272. Appendix 5 sets out survey responses to the following question: 'What makes a public holiday meaningful?'. Self-evidently, the question simply seeks the subjective views of an employee as to the factors that, in their view, render a public holiday 'meaningful'. The responses are not confined to Christmas Day. We consider that they are of little if any relevance to these proceedings and should be disregarded.

273. Appendix 9 to the AMWU's submissions purports to set out all responses to the union's survey. Whilst this information is not provided in the AMWU's submissions, we consider it important to note that of the 247 respondents identified above:

- 29 respondents did not identify whether they have ever been required to work on Christmas Day;
- 132 respondents identified that they have *not* been required to work on Christmas Day, whether it be in their current job or a former job; and
- 48 respondents identified that they have been required to work on Christmas Day in a previous job, however the survey does not reveal whether that previous job was in one of the industries that are here being considered.

274. The responses of the 209 respondents who did not state that they have been required to work on Christmas Day in their current job should be disregarded when considering the respondents' views as to their experience of working on Christmas Day, as they are not relevant (or, in some cases, it is not clear that they *are* relevant) to the present proceedings.

275. The survey does, however, establish that a small proportion of the respondents (38 out of 247; 15%) have been required to work on Christmas Day in their current job; a matter that supports our submission that the provision proposed is not *necessary*, bearing in mind of course that even fewer than 38 employees were likely required to work on a Christmas Day when it fell on a weekend and was substituted.

276. This is a matter in relation to which the survey responses are entirely opaque. They do not reveal, in relation to the 38 employees who have been required to work on Christmas Day in their current job:

- Whether Christmas Day had fallen on a weekend;
- If so, whether it had been substituted;
- If so, the rate at which the employee was paid.

277. It is plausible that all 38 employees were required to work on Christmas Day in circumstances where:

- It did not fall on a weekend or it did but was not substituted and therefore it was treated, for the purposes of the award, as a public holiday as a result of which the employee was entitled to public holiday penalty rates; or
- An instrument other than a modern award applied to the employee in accordance with which the employee was entitled to a higher rate even if Christmas Day fell on a weekend and was substituted.

278. Accordingly, even in relation to this group of employees, little can turn on the responses they provide regarding their experience of working on Christmas Day. This is because the responses are not confined to the relevant group of employees that is here being considered. It is conceivable that those who have responded to the survey fall in either of the categories identified in the above paragraph and as a result, were paid at a higher penalty rate. They, notwithstanding, may have expressed the view in the AMWU's survey that

their experience of working on Christmas Day was a negative one. The current proceedings do not concern such employees or their grievances associated with working on Christmas Day. The rate at which an employee is to be paid for working on Christmas Day generally has not been put in issue.

279. Accordingly, it is not in fact clear if *any* of the survey responses provided to the Commission are even remotely relevant to these proceedings. We strongly submit that therefore it should be disregarded in its entirety.

280. Of course in addition there is the fundamental issue of the extent to which the subjective views of employees who have been required to work on Christmas Day are in fact of any probative value. For instance, the survey results do not establish or even suggest that the employees' sentiments would be addressed or alleviated by the imposition of a higher rate of pay. It would appear that in many instances the only material remedy would be the right to refuse to work on Christmas Day, which is found in s.114(1) of the FW Act. The extent to which the respondents had such a right when they were required to work on Christmas Day, whether they sought to exercise that right or whether they in fact elected to work on Christmas Day is not apparent from the survey responses.

The AMWU's Submissions and Analysis

281. We now turn to consider and respond to the specific propositions put by the AMWU in relation to its survey.

282. **Firstly**, the AMWU submits that the survey establishes that Christmas Day continues to have special significance.[94]

283. At its highest, the survey establishes that less than half of a very small sample of employees (which is not representative for the reasons we have earlier explained) who are employed in a group of industries not limited to the industries here being considered, identified that Christmas Day is of greater significance to them relative to Anzac Day, Australia Day, Boxing Day, Easter

[94] AMWU submission dated 20 October 2016 at paragraph 43.

Monday, Good Friday, Labour Day, New Year's Day and Queen's Birthday. Contrary to the AMWU's submissions, the survey alone does *not* establish that Christmas Day has "special significance in community mores – a significance which the awards may well reflect"[95], such that employees should be entitled to a higher penalty rate on that day than other public holidays.

284. **Secondly**, the AMWU submits that this special significance is largely associated with the time that employees spend on Christmas Day with their families.[96] The following submissions are made without accepting the accuracy of the analysis set out at paragraphs 44 – 45 of the AMWU's submissions.

285. Even if it is accepted that Christmas Day is important to employees because of the time they spend with their families, this takes the AMWU only so far. The survey does not establish that such time cannot be spent, or is not in fact spent, on the substitute public holiday instead.

286. Where a substitute day is declared, that day, by virtue of s.115(2), is a public holiday for all national system employees. On that day, all such employees are, by virtue of s.114(1), entitled to be absent from their employment. To the extent that employees covered by the relevant awards nonetheless work on such a day, they are entitled to public holiday penalty rates. Neither the AMWU's survey nor its submissions establish that the activities undertaken on Christmas Day, such as spending time with family, cannot meaningfully be undertaken instead on the substitute day.

287. **Thirdly**, the AMWU submits that although many survey respondents did not identify with any religion, "this didn't drag down the importance of Christmas Day and spending time with family".[97]

288. That many survey respondents did not identify with any religion serves only to further our above arguments. Of the 247 respondents that we have earlier

[95] AMWU submission dated 20 October 2016 at paragraph 43.

[96] AMWU submission dated 20 October 2016 at paragraphs 44 – 45.

[97] AMWU submission dated 20 October 2016 at paragraph 46(c).

referred to, only 80 (32%) stated that they "have a religion that [they] follow or believe in". The remaining respondents either did not respond, or responded with 'no' or 'prefer not to answer'.

289. Whilst the survey does not identify the extent to which Christmas Day holds any religious significance for those that said that they do have a religion that they follow or believe in, it can reasonably be inferred that this would not be the case for all such respondents. This may be because their religious beliefs do not involve the celebration of Christmas or, even if they do, the individual respondent does not assign any religious significance to the occasion. Indeed of the above 80 respondents, only 12 (15%) mentioned undertaking any religious activity on Christmas Day when asked what they normally do on 25 December.

290. Accordingly, it is all the more difficult to justify the imposition of a higher rate of pay on Christmas Day where it is substituted. If 25 December does not carry a material religious significance to the very vast majority of employees, as is suggested by the AMWU's survey, there is no sound basis upon which it can be argued that other activities primarily undertaken on Christmas Day that render it of significance (such as spending time with family and friends) cannot meaningfully be undertaken on the substitute public holiday that has been declared. Given that this is so, the arguments made by the AMWU regarding the "special significance" of 25 December carry far less weight.

291. **Fourthly**, the AMWU submits that 32.5% of respondents worked on Saturdays and 25.7% of respondents worked on Sundays.[98]

292. Little turns on this proposition. This is in part because of the very small survey sample, which cannot be said to be representative of working hours of the relevant industries generally. Further, it does not in any way assist the Commission in ascertaining current practices where Christmas Day falls on a weekend and is substituted. For instance, it does not assist the Commission in identifying the proportion of employees in the relevant industries who are in

[98] AMWU submission dated 20 October 2016 at paragraph 46(d).

fact required to work on Christmas Day when it falls on a weekend and is substituted; a matter that is of obvious relevance when assessing the *necessity* of the proposed clause.

293. **Fifthly**, the AMWU submits that 19.2% of respondents have been required to work on Christmas Day in their current job and that their experience of such work was "largely negative". For the reasons we have earlier articulated, this evidence is of very little, if any, probative value and should not be accorded any weight by the Commission.

6.7 The Significance of Christmas Day

294. The central proposition driving the AMWU's claim is what it describes as the special significance of Christmas Day which, the union submits, warrants differential treatment to other public holidays. In support of its position it makes the following arguments:

- Christmas Day is universally celebrated[99] by "secular Australians", those who identify themselves as Christian and those who belong to another faith.[100]

- The substitution of Christmas Day does not result in the activities connected with that day, being "social time with family"[101], moving to the substitute day.[102]

- Where an employee is forced to work on Christmas Day, they must be appropriately compensated for such work, which is performed during inherently unsocial hours.[103]

[99] AMWU submission dated 20 October 2016 at paragraph 7.

[100] AMWU submission dated 20 October 2016 at paragraph 52.

[101] AMWU submission dated 20 October 2016 at paragraph 50.

[102] AMWU submission dated 20 October 2016 at paragraph 3.

[103] AMWU submission dated 20 October 2016 at paragraphs 4 – 5.

- A substitute day does not sufficiently compensate employees who experience the social disadvantage of working on 25 December, given the special social, cultural and religious significance of the date.[104]

- Christmas Day also corresponds with a higher level of Australians "holidaying and visiting families and friends".[105] Many Australians travel domestically to visit their family and relatives for Christmas Day.[106]

295. **Firstly**, there is no evidence that establishes that Christmas is celebrated by all award-covered Australians.

296. According to the most recent ABS data available, only 61% of Australians identify themselves as Christian. Other common religions amongst Australians include Islam, Hinduism, Buddhism and Judaism.[107]

297. The multicultural society in which we live necessarily means that not all Australians celebrate all occasions that have a public holiday attributed to them. For instance, for many Australians, Easter does not carry any religious or other significance. It may be accepted, nonetheless, that by virtue of the fact that Good Friday and Easter Monday are national public holidays, the 'Easter long weekend' may result in time spent together by families and with friends.

298. The same can be said for Christmas Day. As we have earlier stated, the survey upon which the AMWU seeks to rely establishes that only a small proportion of persons partake in religious activities on Christmas Day.

299. The AMWU's submissions consistently refer to the importance of time spent with family and friends on Christmas Day. We do not dispute the proposition that many Australians spend Christmas Day with their family and/or friends. However, many families also can (and do) 'celebrate' Christmas on a day

[104] AMWU submission dated 20 October 2016 at paragraph 4.

[105] AMWU submission dated 20 October 2016 at paragraph 55.

[106] AMWU submission dated 20 October 2016 at paragraph 57.

[107] ABS 2011 Census, Table B14: http://stat.data.abs.gov.au/Index.aspx?DataSetCode=ABS_CENSUS2011_B14.

other than 25 December and in some instances, such time spent with family and friends is not *for the purposes of* celebrating Christmas but it arises incidentally by virtue of the fact that public holidays are declared, resulting in many Australians not being required to attend work or other commitments.

300. It is commonplace for those who do celebrate Christmas to partake in festivities with family and friends on Christmas Eve, Boxing Day and on any additional or substitute public holiday declared thereafter. This may arise due to a requirement to work, because said family and friends are located at a distance such that this requires some travel or because some Australians participate in multiple celebrations with different parts of their families. We do not consider (nor do we understand the AMWU to be arguing) that in such circumstances the significance of Christmas Day is lost; or that the time spent with family and friends, albeit not on 25 December, is of any less value to the individual.

301. We also consider that for some families who do not 'celebrate' Christmas as such, 25 December or the holiday season that generally falls around it may result in time spent with family and friends. This is not necessarily in order to celebrate Christmas Day but arises by virtue of the fact that that period of time coincides with school holidays, public holidays and many businesses closing down. This leads families to spend time together much as they would at any other time of the year in similar circumstances (for instance, during the Easter break). In our view, such employees do not necessarily attribute the significance to Christmas Day that is alleged by the AMWU. Where such employees are required to work on Christmas Day, there may be no reason why the said activities could not be undertaken on another day (such as the substitute day) and there is no evidence to suggest that such employees are materially disadvantaged or that the performance of work on 25 December by such employees is necessarily rendered more "unsocial" than work on any public holiday.

302. It is also the case that for some, Christmas Day does not involve any celebration with family and friends. Many Australians' families live interstate

or abroad; this is particularly true of those Australians who have migrated from overseas. Others may simply not attribute any significance to Christmas Day on account of their religious beliefs or cultural norms.

303. The AMWU has not undertaken any considered, careful analysis of the extent to which the relevant group of employees to whom the Commission is here required to turn its mind:

- Celebrate Christmas Day in the sense that they partake in some special activities associated with Christmas Day *because* it is Christmas Day; and
- Such activities that cannot be undertaken on another day.

304. Of course we are not purporting to argue that Christmas Day is insignificant or unimportant. However, in order to sustain an argument that the significance of Christmas Day is such for all or even most employees covered by the relevant awards that work performed on that day warrants special recognition and the payment of a higher rate *despite* the decision of certain State and Territory governments to substitute the public holiday, greater analysis is required to establish that this is in fact necessary, having regard to the demographic profile of the workforce and the manner in which Christmas Day is in fact celebrated by them. The material before the Commission does not permit it to find that:

- Christmas Day is celebrated universally; or
- The activities undertaken on Christmas Day cannot (or are not) undertaken on another day such as a substitute public holiday; or
- Work performed on Christmas Day is necessarily work performed during unsocial hours.

305. **Secondly**, the AMWU's submissions refer to employees being "forced" to work on Christmas Day.[108] Whilst we return to this issue in greater detail below, we note for present purposes that there is no evidence before the Commission that goes to the extent to which employees are in fact required to perform work on a Christmas Day when it falls on a weekend and is substituted, notwithstanding that those are the very employees towards whom the union's claim is targeted.

306. This issue goes to the very heart of our contention that the Commission cannot be satisfied that the proposed provision is *necessary*, nor can it accurately assess the potential cost of the claim.

307. **Thirdly**, it seems to us that the real cause of the AMWU's complaints are the decisions made by State and Territory Governments to substitute the Christmas Day public holiday and s.114(2) of the FW Act, which gives effect to those decisions as part of the federal safety net.

308. The AMWU repeatedly states that the significance of Christmas Day cannot be "replicated" on another day including the substitute day and that the provision of a substitute day does not adequately compensate those who work on Christmas Day.

309. If the Commission accepts the AMWU's arguments, it is our contention that the more appropriate remedy is to vary the awards such that:

- The public holiday penalty rate prescribed by the relevant award is payable for work performed on 25 December; and

- No entitlement to public holiday rates arises on a substitute or additional public holiday declared by State and Territory laws.

310. It is illogical to argue, as the union seeks to do, that Christmas Day carries the ultimate significance which cannot be attributed to any other day including a substitute public holiday, however work performed on both the "actual" day

[108] AMWU submission dated 20 October 2016 at paragraph 4.

and the substitute or additional day should be compensated at the same rate. If the AMWU's submissions are accepted, it would seem that the substitute or additional day is in fact of very little if any value and there is therefore no disutility associated with working on that day such that the payment of a penalty rate is warranted. To this extent, an inherent internal inconsistency arises from the case here presented by the AMWU.

311. The union has not, by any measure, justified (or even attempted to justify) the payment of public holiday penalty rates on both the "actual" public holiday and the substitute day to employees who work on both days or to employees who work on only the substitute day. Once again, if the AMWU's arguments regarding the significance of Christmas Day are accepted, no such justification is apparent.

312. In the alternate, it is of course open to the AMWU to lobby the relevant Governments to seek appropriate changes to State and Territory legislation and/or the FW Act in order to achieve the end that it is here seeking.

313. **Fourthly**, we do not understand the relevance of the AMWU's submissions regarding increased domestic travel in association with Christmas Day. Such employees would necessarily seek leave from their employer to be absent on Christmas Day (or a substitute public holiday). Neither the proposed variation nor the current provisions have any bearing on such employees.

6.8 Section 114(4) of the FW Act

314. Section 114(1) of the FW Act entitles an employee to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes. An employer may however request an employee to work on a public holiday if is the request is reasonable (s.114(2)), which an employee may refuse (s.114(3)). Section 114(4) lists the considerations that must be taken into account in determining whether a request or a refusal to work on a public holiday is reasonable.

315. The AMWU submits that the criteria listed at s.114(4) "can be used as a proxy measure of the disadvantage accruing to employees who work on 25 December when it falls on a weekend".[109]

316. **Firstly**, we do not consider that it is appropriate to apply the matters identified at s.114(4) as a "proxy" in the manner proposed by the AMWU. By virtue of its substitution, in the relevant circumstances 25 December is no longer a public holiday and therefore, s.114 has no effect. That is a feature of the safety net established by the FW Act.

317. The AMWU submits that: (emphasis added)

> The criteria in s.114(4) of the Act are used in assessing the reasonableness of the employer's request that an employee work on a public holiday. The AMWU submits that this criteria are also relevant for the purposes of assessing the reasonableness of working on the "actual" Christmas Day". Christmas celebrations are particularly relevant to that day so that they cannot properly be replicated on a substituted day. The Full Bench of the AIRC was correct to note in the Public Holidays test case that the safety net standard "goes more ,.. to the quantum of leave than to the specification of days", but crucially identified Christmas Day as an obvious exception, and one having "special significance in community mores". Christmas Day is not to function as merely another public holiday making up the minimum safety net. There is Full Bench authority supporting the principle that it holds special national significance. It is in this context in which s.114(4) should be considered.[110]

318. We make the following observations regarding this passage of the AMWU's submission:

- For reasons we have earlier articulated, we do not accept that Christmas celebrations cannot necessarily be replicated on a substituted day for many employees. Similarly, we do not accept that where Christmas Day is substituted, the employee's "personal circumstances" will be the same "as for a weekday Christmas Day".[111]

- Despite the AIRC's remarks regarding Christmas Day in the context of the Public Holidays Test Case, it decided Christmas Day would be substituted if it fell on a weekend and although an extra loading was

[109] AMWU submission dated 20 October 2016 at paragraph 58.

[110] AMWU submission dated 20 October 2016 at paragraph 59.

[111] AMWU submission dated 20 October 2016 at paragraph 60.

ultimately prescribed, it did not extend to all employees. When considered in full, the Public Holidays Test Case decisions do not advance the AMWU's claim.

319. **Secondly**, even if the factors listed at s.114(1) were applied to a requirement to work on 25 December when it has been substituted in order to ascertain whether the requirement is reasonable, we consider that many of the relevant considerations would in fact weigh in favour of a conclusion that that is so.

320. For instance:

- **Section 114(4)(a): the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee.**

  Regardless of whether the relevant work is performed on the "actual" day or a substitute day, the nature of the workplace including its operational requirements may be such that a requirement to work on 25 December is reasonable. This is particularly true of many manufacturing operations.

- **Section 114(4)(b): the employee's personal circumstances, including family responsibilities.**

  To the extent that an employee has caring responsibilities, these may in fact be alleviated by the presence of other family members or friends on 25 December who are able to assist with such care. As to the AMWU's submissions regarding an employee's family responsibilities on Christmas Day, as we have previously submitted, it cannot be assumed that such responsibilities remain where a substitute day has been declared or that such responsibilities cannot reasonably be reassigned to the substitute day.

- **Section 114(4)(c): whether the employee could reasonably expect that the employer might request work on the public holiday.**

  The business' operations, the nature of the work performed and custom and practice at the enterprise might be such that they lead an employee to reasonably expect that their employer might require them to work on 25 December, regardless of whether it is substituted.

- **Section 114(4)(d): whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday.**

  An employee required to work on the "actual day" will, despite substitution, be entitled to weekend penalty rates. As a result, a requirement to work on 25 December in the relevant circumstances is not necessarily unreasonable.

- **Section 114(4)(e): the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork).**

  We consider that there are various circumstances in which the relevant type of employment would render a requirement to perform work on Christmas Day where it has been substituted reasonable. For instance, where an employee is a continuous shiftworker in a 24/7 operation, where a casual employee is engaged to perform work on an ad hoc basis in order to replace absent staff, or where a full-time or part-time employee's regular roster involves the performance of work on the day upon which Christmas Day falls.

- **Section 114(4)(f): the amount of notice in advance of the public holiday given by the employer when making the request.**

  In circumstances where an employee is required to work on the actual day with a reasonable period of notice, we cannot identify any reason why this factor would render the requirement unreasonable.

- **Section 114(4)(g): any other relevant matter.**

  There may be other relevant considerations that render the requirement to work reasonable. For instance, if the employee does not celebrate Christmas, if the employee intends to celebrate Christmas on the substitute day or some other day or where the employee in fact wants to work on that day.

321. **Thirdly**, to the extent that the AMWU's submissions complain that where a public holiday is substituted, s.114(1) does not apply to such an employee[112]; this is a matter that falls squarely for the consideration of the legislature. In formulating the relevant provisions of the NES, Parliament has determined that it is appropriate that decisions made by State and Territory governments to substitute public holidays be given effect and that by virtue of such decisions, employees will not have a statutory right to refuse to work pursuant to s.114(1) on the "actual" day. We do not understand the AMWU's claim as seeking to overcome this issue. It is readily apparent that the variation it has proposed would not have that effect. As a result, its concerns in this regard are not a matter relevant to the current proceedings.

6.9 Section 138 and the Modern Awards Objective

322. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

323. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

[112] AMWU submission dated 20 October 2016 at paragraph 64.

324. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether additional entitlements for employees working on 25 December should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

325. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[113]

326. The 'necessary' test must be considered with respect to each element of every proposal put by the AMWU. By way of example, the union must establish that in relation to the Manufacturing Award:

- A provision requiring that an employee be paid for work on 25 December where it falls on a weekend and is substituted as though it is a public holiday is necessary, and if so;

[113] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

- An additional provision requiring that continuous shiftworkers be paid a higher amount than that which is otherwise payable on public holidays is also necessary.

327. The AMWU has failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the relevant awards meet the modern awards objective. In addition to the many other merit-based arguments that we have made in this submission, we refer to the following matters that further this proposition.

328. **Firstly**, as we have previously stated, the clause sought by the AMWU will have very limited application by virtue of the following factors:

- The position under current State and Territory laws is such that where Christmas Day falls on a weekend, it would only be substituted in Victoria, and in South Australia if it falls on a Saturday (subject to any Ministerial declaration prescribing an additional public holiday on the "actual day"). No other State or Territory requires the substitution of Christmas Day.

- Christmas Day will next fall on a weekend in 2021 (Saturday), 2022 (Sunday) and then in 2027 (Saturday).

- Whilst a public holiday may be substituted by virtue of an agreement reached between an employer and its employees pursuant to the facilitative provision in each of the four awards before the Commission, it can reasonably be inferred that if the clause proposed by the AMWU were inserted, it is extremely unlikely that an employer would agree to substitute the public holiday in circumstances where it would give rise to an obligation to pay public holiday penalty rates on an additional day. As a result, it is unlikely that the proposed clause would have any work to do beyond the substitution of Christmas Day by virtue of State and Territory legislation.

329. An award clause cannot be deemed a necessary part of the safety net in circumstances where it will have such limited application. Every six years, the clause would apply to employees in two states and in the following year it would apply in only one state (subject to any Ministerial declarations prescribing a more generous outcome for employees). Apart from that, the provision would have virtually no work to do.

330. There is of course the prospect that in 2021, when Christmas Day will next fall on a weekend, the application of the clause will be different. This may occur by virtue of changes to the relevant legislation or because of declarations made by the then Governments. For instance, if the Victorian and South Australian legislation was amended in the intervening period, it may be that none of the States or Territories substitute the Christmas Day public holiday and accordingly the proposed clause is otiose.

331. Accordingly, in the context of the current legislative framework and having regard to the prospect that changes to State and Territory legislation may render the proposed clause inutile when Christmas Day next falls on a weekend, the Commission can and should conclude that the proposed clause is not necessary in order to achieve a fair and relevant minimum safety net. Such a decision would not preclude the AMWU from making another application in 2021 if it considers it necessary, in which case the Commission and interested parties would have the benefit of knowing the extent to which Christmas Day will in fact be substituted that year by force of State and Territory laws and declarations.

332. **Secondly,** the necessity of an award provision must be assessed in the context of other pre-existing award clauses. Relevantly, the awards themselves already provide an appropriate mechanism which can be implemented in order to attract public holiday penalty rates for work performed on Christmas Day.

333. For instance, clause 44.2(a) of the Manufacturing Award, which we have earlier reproduced, allows for agreement between an employer and the

majority of employees that an alternative day will be taken as the public holiday instead of any of the prescribed days.

334. By virtue of s.114(2) of the FW Act, where Christmas Day is substituted by the States and Territories, the substitute day is a prescribed public holiday in the sense contemplated by clause 44.2(a). That provision enables agreement to be reached to recognise 25 December as the public holiday instead of the substituted day. Similar provisions can be found in the FBT Award[114], the Graphic Arts Award[115] and the Vehicle Award[116].

335. The implementation of such an agreement would ensure that employees who perform work on Christmas Day are paid public holiday penalty rates. The payment of the public holiday penalty rate would no longer be required in relation to the substitute day, which we consider is consistent with the AMWU's submissions regarding the significance of Christmas Day.

336. **Thirdly,** the necessity of the proposed provision must be established in the context of existing award provisions that require the payment of public holiday rates on the substitute day in circumstances where the employee performs work on the actual day and the substitute day or where the employee only works on the substitute day.

337. As we have earlier submitted, the AMWU has not so much as attempted to justify why an employee who performs work on the actual day and the substitute day should be entitled to the payment of penalty rates on both days. If the employee is required to work on Christmas Day, and if it is accepted that the disutility associated with working on Christmas Day relates only to the actual day and not the substitute day, there is no justification for the continuing obligation to pay public holiday penalty rates on the substitute day. The same can be said for circumstances in which the employee works only on the substitute day.

[114] Clause 37.2 of the FBT Award.

[115] Clause 41.5 of the Graphic Arts Award.

[116] Clause 32.2 of the Vehicle Award.

338. The Commission cannot be satisfied that the proposed clause as well as the relevant existing clauses are necessary. It is for this reason that we have earlier submitted that if the Commission is compelled by the AMWU's submissions, consideration ought to be given to whether the award should be varied to remove the entitlement to public holiday entitlements on the substitute day.

339. **Fourthly**, there is no evidence before the Commission regarding the extent to which:

- Businesses in the relevant industries operate on Christmas Day when it falls on a weekend and is substituted; and
- The number or proportion of employees that are required to work as a result.

340. In the absence of such crucial information that goes to the application of the proposed clause, the Commission cannot be satisfied that the proposed clause is necessary. There is simply insufficient material before it in order to make the requisite assessment.

341. **Fifthly**, that the variations proposed by the AMWU may not adversely affect all employers in an industry is not the test to be applied in determining whether the variation should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

342. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine productivity in a certain industry or for employers covered by an award. No adverse inference can or should be drawn from the absence of

evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

343. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

344. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[117]

345. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large. For all the reasons we have here set out, the AMWU has *not* overcome that threshold.

A 'Fair' Safety Net

346. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full

[117] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[118]

347. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[119]

348. The imposition of an additional financial liability on employers in the absence of any sound merit basis for it is entirely unfair. The AMWU has not established that there is any serious foundation for the clause it has proposed.

349. It is particularly unfair that employers would be saddled with an additional cost impost for work performed on Christmas Day, in circumstances where they are already required to compensate employees for the performance of work on the substitute day. We can identify no justification for introducing an additional financial entitlement for employees in such circumstances.

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[118] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[119] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

350. The unfairness is compounded when regard is had to the broad reach of the proposed clauses. The clauses proposed would apply to all employees; full-time, part-time and casual, regardless of whether they are performing ordinary hours of work or overtime and irrespective of whether the performance of work on that day is a feature of their regular roster.

351. In addition, the clauses would require the payment of higher penalty rates for certain types of employees (such as continuous shiftworkers) than the public holiday penalty rates presently prescribed by the awards.

352. Continuous shiftworkers (i.e. 7-day shiftwork) are generally entitled to an additional week of annual leave to compensate for having to regularly work on Sundays and public holidays. See for example clause 41.3 of the Manufacturing Award, clause 34.3 of the FBT Award, clause 37.4 of the Graphic Arts Award, and clause 29.7 of the Vehicle Award, all which say:

> For the purpose of the additional week of annual leave provided for in s.87(1)(b) of the Act, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.

353. The purpose of the 'additional week of annual leave' for continuous shiftworkers was recently confirmed by a Full Bench Commission, whereby it said:

> **[91]** … The historical basis for an entitlement to an extra week's annual leave was usually to compensate seven-day shiftworkers for having to regularly work on Sundays and public holidays. There was considerable debate in various decisions of industrial tribunals over the course of the last century as to what constituted seven-day shift work (sometimes alternatively characterised as "continuous shift work") either generally or for the purpose of particular occupations and industries. The minimum position seems to have been that a seven-day shiftworker had to have been a shiftworker who regularly worked Sundays and public holidays, with "regularly" defined in the most generous case as being 35 shifts per year.[120]

354. There has be *no* examination of this element of the AMWU's proposals in its submissions and there is certainly no evidence before the Commission that might provide any suggestion as to why the AMWU's proposed award changes are necessary.

[120] *Appeal by Health Services Union* [2013] FWCFB 5551 at [91].

355. The introduction of the proposed clauses in the circumstances described above would not be in keeping with the provision of a fair safety net.

A 'Minimum' Safety Net

356. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

357. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provisions here sought by the AMWU. Matters such as these are more appropriately dealt through enterprise bargaining.

The NES

358. Earlier in this submission we have outlined the relevant provisions of the NES and the approach previously taken by the Commission and it's predecessors in the face of similar claims to supplement the NES in modern awards. We need not repeat those submissions here save for noting that it is our position that the relevant awards, *together with the NES*, provide a fair and appropriate safety net in relation to public holidays. A case has not been made for supplementing it in the manner sought by the AMWU nor to override the decisions made by State and Territory Governments, which are expressly contemplated by the NES.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

359. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent

standard of living" and to engage in community life, assessed in the context of contemporary norms.[121]

360. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[122]

361. The Commission's Penalty Rates Decision provides the most recent data for the 'low paid' threshold:[123]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

362. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The AMWU has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the four awards that are the subject of their claim are reliant on the minimum rates prescribed by those awards.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the four awards that are the subject of their claim are "low paid" in the sense contemplated by the above decision.

[121] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[122] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[123] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.

- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

363. As a consequence of this deficiency in the case mounted by the AMWU, the Commission cannot determine whether s.134(1)(a) lends support to the union's claim. Even if it were so satisfied, the extent to which this might be so cannot be ascertained, which is of course relevant to the Commission's ultimate determination as to whether the proposed provision is *necessary*.

364. The Penalty Rates Decision identifies the factors that affect the relative living standard of employees: (emphasis added)

> **[171]** The relative living standard of employees is affected by the level of wages they earn, the hours they work, the tax-transfer payments and the circumstances of the households in which they live. …[124]

365. The AMWU relies on a previous Commission decision issued in the context of an Annual Wage Review which also establishes the above proposition. Although not articulated in this way, it appears that the AMWU is attempting to argue that the relative living standards of an employee are adversely affected if the hours they work include Christmas Day and that their living standards would be improved if the union's claim was granted because such employees would then be paid at a higher rate for such work.[125]

366. The proposition here put by the union is a factual one. It is contending that, as a matter of fact, an employee's living standards are adversely affected if they work on Christmas Day. It must of course be borne in mind that relative living standards are to be determined by comparing the living standards of workers reliant on minimum award rates with those of other groups that are deemed to

[124] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [171].

[125] AMWU submission dated 20 October 2016 at paragraphs 65 – 66.

be relevant.[126] As we have earlier submitted, the AMWU has not undertaken any of the analysis necessary to determine the relative living standards of the relevant group of employees. Additionally, and by extension, it has not established that their living standards are adversely affected by performing work on Christmas Day. There is no material before the Commission that would allow it to conclude that that is so.

367. At paragraph 67 of its submissions the union submits that, on account of the limited ability that employees in the manufacturing industry allegedly have to negotiate their start and finish times, "the potential of working on the actual Christmas Day would have a particularly deleterious impact for employees engaged in the manufacturing industry".[127]

368. The AMWU here seeks to draw an inference that is simply not open to it. It relies on ABS data of some eight years ago relating to the manufacturing industry generally, without any explanation as to whether this relates to award covered employees, if so, whether they are covered by the Manufacturing Award and/or other manufacturing industry awards, whether other industrial instruments apply to them and so on. No information is provided as to the manner in which the data cited was collected. Nor is any basis established for asserting that the alleged difficulties associated with negotiating starting and finishing times would also result in a "deleterious impact" by virtue of working on Christmas Day.

369. It is noteworthy that the AMWU has expressed this element of its submission speculatively. It states that working on Christmas Day "would have" a particularly adverse impact on employees in the manufacturing industry rather than establishing, as a matter of fact, that employees engaged in the manufacturing industry *are* so affected. Whilst the union was given the opportunity to call such evidence in these proceedings, it has failed to do so.

[126] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310].

[127] AMWU submission dated 20 October 2016 at paragraph 67.

370. For the reasons we have here articulated, the Commission cannot be satisfied that s.134(1)(a) lends support to the AMWU's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

371. The AMWU's submissions in the current proceedings, and their repeated attempts to seek the inclusion of an additional payment for work on a Christmas Day in the relevant circumstances in prior proceedings, suggests that this is an issue of importance to the union, which, absent its inclusion in the awards system, would encourage it and its members to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

372. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations which increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

373. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the awards that are the subject of the AMWU's claim, each of which would have the effect of introducing additional costs and inflexibilities.

374. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will

be significantly lifted, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

375. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

376. The AMWU's submission regarding s.134(1)(c) of the FW Act can quickly be dispensed with. The union submits that "the proposed variation may actually increase the number of people available to work on [25 December] and therefore increase workforce participation in terms of hours of work"[128].

377. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[129]

378. The prospect of additional employees being available to work on Christmas Day is not relevant to the need to promote social inclusion *through increased workforce participation*. It would not have the effect of increasing workforce participation in the sense contemplated by s.134(1)(c) of the FW Act. Accordingly, the AMWU's submissions in this regard should be disregarded. They seriously misunderstand the inquiry that is in fact required to be undertaken by the relevant provision and instead raise issues that only serve to pose a distraction.

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[128] AMWU submission dated 20 October 2016 at paragraph 71.

[129] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

379. To the extent that the Commission determines that it may, nonetheless, have regard to the AMWU's contention as an additional discretionary consideration, we note that the union has not called any evidence that might establish that an increase to the rate payable for work performed on 25 December where Christmas Day is substituted will in fact result in an increase to the number of employees available to perform work on that day.

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

380. It is reasonably foreseeable that the imposition of a higher penalty rate for work performed on Christmas Day in the relevant circumstances may deter employers from requiring employees to perform work on that day. This is consistent with recent observations made in the Penalty Rates Decision: (emphasis added)

> **[39]** 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.[130]

381. In that decision, the Commission also expressed the view that such deterrence is inconsistent with s.134(1)(d) of the FW Act:

> **[152]** … In particular, the 'need to promote flexible modern work practices and the efficient and productive performance of work' (s.134(1)(d)) appears antithetical to the idea of *deterring* the performance of work at specified times.[131]

382. Irrespective of whether the intention of the proposed variation is to deter employers from scheduling work on Christmas Day where it is substituted, it must be accepted that it will likely have such an effect and, to this extent, the

[130] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [39].

[131] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [152].

variation undermines the need to promote flexible modern work practices and the efficient and productive performance of work.

383. The AMWU submits that its claim may promote workplace productivity "by reducing the incentive for employees to inappropriately use sick leave on the actual Christmas Day"[132] or "to take other, potentially inappropriate, forms of leave"[133].

384. Whilst we note the union's concession that sick leave may (or, is) inappropriately accessed by employees from time to time, there is no evidence that this has in fact occurred in circumstances where Christmas Day has previously fallen on a weekend and was substituted. Nor is there evidence that employees have taken other "inappropriate" forms of leave. It is of course open to an employee to seek to take paid annual leave in accordance with the NES and, in accordance with s.88(2) of the FW Act, an employer must not unreasonably refuse to agree to a request to take such leave.

385. The AMWU also makes the following submission in relation to s.134(1)(d):

> The AMWU's claim can be seen as a "modern work practice" as it recognises that Monday to Friday week (sic) operates alongside weekend work, for many employees. Particularly in the Manufacturing Industries where the productive use of capital has resulted in continuous shiftwork being adopted in some sites, the AMWU's proposed variation promotes this flexible work practice through adequate compensation.[134]

386. There is no basis for the contention that an additional penalty on Christmas Day will promote flexible work practices. The AMWU has not articulated any comprehensible reasoning for this assertion and there is certainly no evidence to that effect. Indeed in our view, for the reasons articulated above, it is likely to have the contrary consequence.

[132] AMWU submission dated 20 December 2016 at paragraph 80.

[133] AMWU submission dated 20 December 2016 at paragraph 81.

[134] AMWU submission dated 20 October 2016 at paragraph 79.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

387. Section 134(1)(da) of the FW Act relevantly requires that the Commission take into account the need to provide additional remuneration for:

- Employees working unsocial, irregular or unpredictable hours;[135] and
- Employees working on weekends and public holidays.[136]

388. The recent Penalty Rates Decision provides important guidance as to the proper application of s.134(1)(da): (emphasis added)

> **[192]** The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.
>
> **[193]** As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):
>
> > 'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.' (emphasis added)
>
> **[194]** To the extent that the above passage suggests that s.134(1)(da) '*requires* additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the *need* for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that

[135] Section 134(1)(da)(ii) of the FW Act.

[136] Section 134(1)(da)(iii) of the FW Act.

s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

…

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.[137]

389. As stated by the Full Bench, s.134(1)(da) does not *require* that an award prescribe a higher rate of pay for working in any of the circumstances described in s.134(1)(da). It is not to be read as a mandate for requiring the payment of additional remuneration where an employee works on a public holiday or during "unsocial, irregular or unpredictable hours". Accordingly, no deficiency can be said to exist in the awards here before the Commission by virtue of the fact that they do not require the payment of public holiday rates for work performed on 25 December when it is substituted.

390. It is also relevant to note that employees who perform work on Christmas Day when it falls on a weekend are under the terms of each of the relevant awards receiving additional remuneration. That is, they are entitled to the relevant

[137] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [192] – [199].

weekend penalty rate or overtime rate. To that extent, they are already in receipt of "additional remuneration".

391. In any event, s.134(1)(da) is one of many factors that must be taken into account when assessing whether each of the relevant awards provide a fair and relevant minimum safety net. It must necessarily be balanced with many other relevant considerations. Accordingly, even if it were accepted that s.134(1)(da) lends support to the AMWU's claim, this is not in and of itself determinative of the matter. For the reasons that we have set out in this submission, when regard is had to the other factors listed at s.134(1), it becomes abundantly clear that the claim should be dismissed.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

392. We agree with the AMWU's submission that this is a neutral consideration.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

393. In the Penalty Rates Decision, the Full Bench stated as follows in relation to s.134(1)(f):

> **[219]** It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact on business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. …[138]

394. We consider that it is also axiomatic that the exercise of modern award powers to vary a modern award to increase penalty rates is likely to have a negative impact on business by increasing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate.

[138] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [219].

395. The fact that additional employment costs will be incurred in circumstances where an additional entitlement is introduced in the modern awards system is self-evident, and does not require that we provide evidence of this.

396. On the material before the Commission, the *precise* cost of the claim cannot, however, be assessed. This is because:

- The extent to which State and Territory legislation will in fact require the substitution of Christmas Day in 2021 is not known; and
- The number of businesses in the relevant industries that operate on Christmas Day when it falls on a weekend and is substituted is not known; and
- The number of employees covered by the award that are required to work on Christmas Day when it falls on a weekend and is substituted is not known.

397. In any event, s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

398. Accordingly, arguments that go to the infrequency with which Christmas Day will in fact fall on a weekend or the small number of States and Territories that substitute the relevant public holiday[139] do not overcome the reality that the claim would, nonetheless, impose additional costs on those employers who require employees to perform work in the relevant circumstances. That employers in other States and Territories currently face this additional cost is neither here nor there.

[139] AMWU submission dated 20 October 2016 at paragraphs 89 – 90.

The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

399. The need to ensure a stable system tells against granting the claim in the absence of a sound evidentiary and meritorious case.

400. The AMWU has failed to mount any probative evidence that might establish the many factual propositions upon which it seeks to rely, nor has it established any sound rationale for expanding the safety net in the manner sought. This too weights against the grant of the claim.

The Likely Impact on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

401. To the extent that the proposed clause is at odds with ss.134(1)(b), 134(1)(d) and 134(1)(f), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

6.10 CONCLUSION

402. The AMWU's claim should be dismissed for all of the reasons that follow.

403. **Firstly,** the AMWU's claim has the effect of circumventing the role that State and Territories play in specifying the days upon which public holidays will fall for the purposes of determining the penalty rate payable for work performed on that day, which is expressly contemplated by the FW Act. This is not appropriate. Further, a case has not been made out for the need to supplement the existing safety net provided by the NES in this regard.

404. **Secondly,** the incidence of Christmas Day falling on a weekend and being substituted by State and Territory legislation is very low. Further, the issue will not now arise until 2021. Accordingly, the variation proposed cannot be justified as being *necessary* to achieve the modern awards objective.

405. **Thirdly**, to the extent that the AMWU seeks to rely on the Public Holidays Test Case decisions; they were made in a very different legislative context and accordingly, the Commission should give the relevant principles there articulated by the AIRC little weight.

406. **Fourthly**, and in any event, the principle relating to an additional Christmas Day loading was designed specifically to compensate full-time employees working non-standard arrangements and part-time employees whose normal roster included the Saturday or Sunday which would have been the public holiday but for the substitution. The AMWU's claim is far more expansive and to that extent, it cannot properly rely upon the Public Holidays Test Case.

407. **Fifthly**, the AIRC determined during the award modernisation process that it would not supplement the NES by prescribing additional public holidays in modern awards. The AMWU's claim has this effect, to the extent that it requires the payment of public holiday penalty rates on an additional day. No cogent reasons have been established for departing from the AIRC's approach.

408. **Sixthly**, since the modern awards were made, the Commission and its predecessors have twice considered whether a Christmas Day loading should be introduced in the Manufacturing Award and other modern awards. In each instance the claim has been dismissed. No cogent reasons have been established for departing from those decisions.

409. **Seventhly**, the entitlement sought was extremely uncommon in the pre-reform awards underpinning the making of the modern awards that are the subject of the AMWU's claim. This history does not advance its case.

410. **Eighthly**, the AMWU's survey is of little if any probative value and should be disregarded.

411. **Ninthly**, whilst we do not argue that Christmas Day is insignificant or unimportant, the AMWU's material does not establish that Christmas Day is universally celebrated by the relevant group of employees or that many of the

activities undertaken cannot (and are not) undertaken on another day such as a substitute public holiday.

412. **Tenthly**, the provision proposed is not necessary to ensure that each of the relevant awards are providing a fair and relevant minimum safety net of terms and conditions. Specifically:

- The proposed clause is not necessary given that Christmas Day will not be substituted by State and Territory laws until 2021, at which time it will be substituted in only two States (subject to any more generous Ministerial declaration).

- The Commission cannot be satisfied that the proposed clause is necessary in circumstances where the number of employers who in fact require employees to work in the relevant circumstances and therefore the number of employees that are in fact so required is not known.

- The proposed clause is unfair to employers.

- The absence of the proposed clause will likely encourage the AMWU and its members to engage in collective bargaining.

- The proposed clause may undermine flexible modern work practices and the efficient and productive performance of work.

- The proposed clause will increase employment costs and thereby adversely affect business.

7. THE HSU'S CLAIM

413. The submissions that follow relate to the HSU's claim.

7.1 The Variations Sought by the HSU

414. The HSU is seeking to vary the following six modern awards:

- The Aboriginal Health Services Award;
- The Aged Care Award;
- The Health Professionals Award;
- The SACS Award;
- The Ambulance Award; and
- The Nurses Award.

415. The HSU's claim relates to the payment of public holiday rates when the actual public holiday falls on a weekend but is substituted for another day by State/Territory legislation. Under the proposed clauses, the public holiday rates would also still apply on the substitute day.

416. We note that another day may be substituted for a public holiday in one of two ways. The substitution may occur by virtue of legislation passed by a State or Territory Government or in accordance with the relevant procedure prescribed by such legislation. Alternatively, pursuant to many of the relevant awards, agreement may be reached between an employer and its employees to substitute a public holiday. For example, clause 32.2 of the Nurses Award provides as follows:

> **32.2 Public holiday substitution**
>
> An employer and the employees may, by agreement, substitute another day for a public holiday.

417. Similar provisions can be found in the Health Professionals Award,[140] Ambulance Award[141] and Aboriginal Health Services Award.[142] The Aboriginal Health Services Award also allows for substitution by agreement between the employer and an individual employee.[143]

418. The HSU's submissions do not address whether the proposed clause is intended to apply in circumstances where a public holiday might be substituted by the operation of an award clause enabling it. Nonetheless, this appears to be the effect of the provision.

419. The grant of the HSU's claim would, in broad terms, have the effect of entitling an employee who works on a day that falls on a weekend and would have been a public holiday had it not been substituted for another day to payment for that day as though it were a public holiday.

420. The HSU's claim attempts to circumvent the decisions of State and Territory Governments or, where applicable, any agreement reached between an employer and its employees to substitute the public holiday that would otherwise fall on the weekend.

7.2 The HSU's Case

421. The HSU submits that its proposed variations should be granted for the following reasons:

- The public holiday provisions in the awards relevant to the HSU's claim do not operate satisfactorily for employees who work non-standard hours;

[140] Clause 32.1 of the Health Award.

[141] Clause 31.3 of the Ambulance Award.

[142] Clause 29.2(a) of the Aboriginal Health Award.

[143] Clause 29.2(b) of the Aboriginal Health Award.

- The variations are consistent with previous decisions of the Commission and its predecessors, including the Public Holidays Test Case decisions;

- The variations are consistent with the history of the health sector awards;

- A number of modern awards provide separate public holiday provisions which appear to recognise the need to specify public holiday entitlements when public holidays fall on a weekend; and

- The proposed provisions are necessary to ensure the relevant awards meet the modern awards objective.

422. We deal with these arguments in the submissions that follow.

7.3 The Relevant Legislative Provisions

423. At Chapter 2 of this submission, we set out in detail the legislative provisions relevant to a consideration of the HSU's claim. We do not propose to repeat those submissions here.

424. Whilst State and Territory legislation gives the relevant Government the power to substitute any public holiday or public half-holiday, in practice public holidays have traditionally only been substituted for another day when they fall on a weekend.

425. It is evident from the analysis we have set out at Chapter 2 that only small number of public holidays will be substituted for another day if they fall on a weekend pursuant to State and Territory legislation. The HSU's proposed variation would apply to all such days, in effect overriding that substitution for the purposes of determining whether public holiday penalty rates are payable pursuant to the relevant awards.

426. At Chapter 2, we also deal with the frequency with which the relevant public holidays will fall on a weekend. As we there submit, the extent to which this in

fact occurs is relatively low. As a result, the next public holiday to fall on a weekend will not be until 2019, when Australia Day will fall on a Saturday. This is the only public holiday that will fall on a weekend that year.

427. The table below identifies when each of the public holidays presently substituted by State and Territory legislation will fall on a weekend during 2016 – 2026, and the States and Territories in which they will in fact be substituted:

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026
1 Jan (New Year's Day)		✓ (TAS)					✓ (TAS)	✓(all but SA)			
26 Jan (Australia Day)				✓ (all)	✓ (all but SA)					✓ (all but SA)	
25 April (Anzac Day)						✓ (ACT, NT & QLD)					
25 Dec (Christmas Day)	✓ (VIC) [144]					✓ (VIC & SA)	✓ (VIC)				
26 Dec (Boxing Day)					✓ (TAS, SA & NT)	✓ (TAS & NT)					✓ (TAS, SA & NT)

428. Given the relatively low prevalence of substitution, we consider that the clause sought by the HSU is not necessary to achieve the modern awards objective. Pursuant to s.138 of the FW Act, the Commission can only supplement the NES in modern awards by including terms that are necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. As the actual occurrence of public holidays on a weekend and the extent to which such public holidays are substituted is relatively rare, it is difficult to see how the HSU's claim is *necessary* to ensure the provision of a fair and relevant minimum safety net.

[144] However, in 2016 the Minister for Small Business, Innovation and Trade appointed 25 December 2016 as a public holiday. See Government Gazette of 25 November 2016: http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S364.pdf

7.4 The Various Tensions to Arise from the HSU's Claim

429. There is an obvious conceptual overlap between the claims being advanced in these proceedings by the AMWU and HSU. Both seek that penalty rates be applied on days that would be public holidays but for their substitution of an alternate public holiday. However, the AMWU claim only seeks such entitlements in relation to the 25 December. In contrast, the HSU ambitiously proposes that penalties should apply whenever a public holiday falls on a weekend and is consequently subject to substitution.

430. It is difficulty to reconcile the fundamental differences in the cases being advanced by the respective unions in these proceedings.

431. The central thesis of the AMWU's case is that the 25 December is a particularly significant public holiday that warrants special recognition or treatment by the modern awards system. At paragraph 41 of their written submissions the HSU appears to similarly argue that it is particularly important that employees receive additional remuneration for working on 25 December. Without accepting the validity of these arguments, we must observe that the case for extending penalty rates to any public holiday that has been substituted is even weaker than that presented in relation to only Christmas Day.

432. It is telling that even the AMWU have not been so bold as to seek the kind of exceedingly generous change claimed by the HSU. Given this context, it could hardly be suggested that the HSU's proposal reflects any kind of widespread community expectation as what should form part of a fair and relevant safety net of minimum terms and conditions concerning public holidays.

433. Moreover, if the HSU's claims were granted, the awards that it seeks to amend would operate in a manner that is out of step with the approach generally taken within the award system. The Commission should not entertain such a prospect given the HSU has not provided any persuasive explanation as to why the specific awards the subject of its claim warrant amendment in the particularly generous manner it proposes. The union has not properly established that the characteristics of employers and employees covered by

the respective awards, or the work that such individuals perform, justifies adopting such an unusual and generous approach.

434. All that appears to be said by the HSU in this regard is that:

> For employees in the Health Industry, which operates every day of the year, the NES provisions for a substituted public holiday, together with the State and Territory public holiday legislation, create an anomaly."[145]

435. Many elements of the health industry do not operate every day of the year. Moreover, there are many industries in which people work every day, or almost every day, of the year. The health industry cannot be simply assumed to be so unique as to warrant different treatment in relation to public holidays under the award system.

436. At paragraphs 16 – 28 of its submissions, the HSU points to a small number of awards that in some way supplement the legislation's identification of public holidays for the purposes of extending certain entitlements to employees. However, this does not warrant the granting of the claim. Instead, it calls into question whether such clauses should be retained as a *necessary* part of the safety net in those industries. We note that several of these clauses appear in awards[146] that apply to a smaller number of employees than the main health industry awards and that the union has not pointed to any detailed consideration of the merits of such provisions during proceedings conducted under the award modernisation process. Nonetheless, we do not here press for the removal of such provisions. It would not be appropriate for such awards to be amended without a proper consideration of the circumstances of the particular industries in which they apply.

[145] HSU submission dated 19 January 2017 at paragraph 9.

[146] The rely on the *Supported Employment Services Award 2010*, the *Aboriginal Rights Movement Award 2016* and the *Animal Care and Veterinary Services Award 2010*.

7.5 Employees with Non-Standard Hours

437. The HSU submits that its claim should be granted because the public holidays provisions in the awards subject to its claim do not operate satisfactorily for employees who work non-standard hours. It states:

> The public holiday provisions in the modern awards and the NES operate satisfactorily for Monday to Friday workers. However, it is the HSU's view that there has been an oversight with regards to employees who work non-standard hours. The public holidays provisions do not adequately address the circumstances of workers covered by the awards in question who regularly work on weekends.[147]

438. We note that the HSU has not provided any evidence to support its claim or even given any indication as to why it believes the public holiday provisions are not operating effectively for employees with non-standard hours. On its face, therefore, the HSU's assertion cannot be relied upon or attributed any weight.

439. In addition, we submit that the HSU's claim is implausible and overstated for a number of reasons.

440. **Firstly**, as we have previously set out, it is relatively uncommon for public holidays to fall on a weekend.

441. **Secondly,** even when public holidays do fall on a weekend, it is relatively rare that they are substituted for another day. Apart from the fact that most public holidays that are substituted are only substituted in one or two States and Territories, pursuant to the current legislative provisions in each of the States and Territories an additional day is provided for many public holidays if they fall on a weekend.[148]

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[147] HSU submission dated 19 January 2017 at paragraph 12.

[148] See section 6 of the *Public Holidays Act 1993 (Vic);* section 4 of the *Public Holidays Act 2010 (NSW);* the schedule to the *Holidays Act 1983 (QLD);* section 4 of the *Statutory Holidays Act 2000 (TAS);* section 3 of the *Holidays Act 1910 (SA*); the second schedule to the *Public and Bank Holidays Act 1972 (WA*); section 3 of the *Holidays Act 1958 (ACT);* and schedule 2 to the *Public Holidays Act (NT).*

442. In light of the above, it is clear that an employee in any one State or Territory who regularly works weekends will only very rarely work on a public holiday that has fallen on a weekend and been substituted.

443. **Thirdly,** most of the awards that are subject to the HSU's claim contain provisions that enable agreement between an employer and the majority of employees to substitute a public holiday. For example:

- Clause 29.2(a) of the Aboriginal Health Services Award allows for an alternate day to be taken as a public holiday instead of one of the prescribed days by agreement between the employer and the majority of employees, and clause 29.2(b) allows for substitution of the day observed as a public holiday by agreement between an employer and an individual employee.

- Clause 32.2 of the Nurses Award provides that an employer and the employees may, by agreement, substitute another day for a public holiday.

- Clause 31.3 of the Ambulance Award provides that an employer and the majority of employees may, by agreement, substitute another day for a public holiday.

444. Using such provisions, an employer can reach agreement with employees who regularly work weekends as to what day will be observed as a public holiday. In this way, if any employees are working on a public holiday that has fallen on a weekend and been substituted pursuant to State and Territory legislation, agreement can be reached such that, for those employees, the public holiday will be substituted for another day (such as the actual day).

445. **Fourthly,** the majority of modern awards (including all of those subject to the HSU's claim) already provide additional benefits to employees who regularly work on weekends to compensate them for working on those days.

446. The most pertinent example is the payment of penalty rates to employees who work on weekends. Under all six modern awards subject to the HSU's claim,

employees are entitled to penalty rates for work undertaken on Saturdays and Sundays.[149]

447. Another example is the provision of additional annual leave. Under s.87(1)(b) of the FW Act, an employee who is covered by a modern award that defines or describes the employee as a shiftworker for the purposes of the NES is entitled to an extra week of annual leave (that is five weeks instead of four).

448. Pursuant to this section, many modern awards define a shiftworker for the purposes of the NES as an employee who regularly works on Sundays and public holidays, or in some cases, weekends generally. All of the awards subject to the HSU's claim contain such a clause, as shown below:

- Clause 31.1(b) of the Health Professionals Award specifies that for the purposes of the NES, a shiftworker is an employee who is regularly rostered to work Sundays and public holidays.

- Clause 31.1(b) of the Nurses Award specifies that for the purposes of the NES, a shiftworker is an employee who is regularly rostered over seven days of the week and regularly works on weekends.

- Clause 31.2 of the SACS Award specifies that for the purposes of the NES, a shiftworker is an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues.

- Clause 26.1(b) of the Aboriginal Health Services Award specifies that for the purposes of the NES, a shiftworker is defined as an employee who is regularly rostered to work ordinary shifts on Sundays and public holidays (that is, not less than 10 in any 12 month period).

- Clause 28.2(a) specifies that for the purposes of the NES, a shiftworker is an employee who is regularly rostered to work their ordinary hours

[149] See clause 22 of the Ambulance Award; clause 23 of the Aged Care Award; clauses 25 of the Aboriginal Health Services Award; clause 26 of the Health Professionals Award; clause 26 of the Nurses Award; and clause 26 of the SACS Award.

outside the ordinary hours of work as a day worker and/or an employee who works for more than four ordinary hours on 10 or more weekends.

- Clause 30.2 of the Ambulance Award specifies that for the purposes of the NES, a shiftworker is an employee who is regularly rostered to work over seven days a week and on Sundays and public holidays.

449. Given the above, the HSU's claim that the "public holiday provisions do not adequately address the circumstances of workers…who regularly work on weekends"[150] must be rejected. On the contrary, the modern awards subject to the HSU's claim provide generous compensation to employees who regularly work on weekends and who may therefore work on a public holiday that has fallen on a weekend and been substituted. In addition to the payment of weekend penalties, by defining shiftworkers for the purposes of the NES as employees who regularly work on weekends and, in some instances, public holidays, the awards in question entitle employees who work such hours to an additional week of annual leave.

450. If the HSU's claim was granted, as well as being entitled to public holiday penalties for any work undertaken on the actual day and the substitute day, employees may also have an entitlement to an extra week of annual leave pursuant to one of the above clauses. In this way, such employees would be "double dipping" because the extra week of annual leave is already intended to compensate them for working those hours, as confirmed by a recent FWC Full Bench decision.[151] Such excessive compensation cannot be said to meet the modern awards objective of providing a fair and relevant *minimum* safety net.

451. **Fifthly,** when looking at the relevant State and Territory legislation itself, it is evident that any assertion that all employees with non-standard hours are disadvantaged by public holiday provisions compared to Monday - Friday employees is incorrect. This is in part because some public holidays fall on a

[150] HSU submission dated 19 January 2017 at paragraph 12.

[151] *Appeal by Health Services Union* [2013] FWCFB 5551 at [91].

weekend and are not substituted, nor is an additional day provided. In those circumstances, those who work Monday – Friday will not receive the benefits of such public holidays. It is also trite to observe that employees who do not work Monday – Friday do not lose the benefit of *all* public holidays that fall during the week, unless they only work on weekends.

452. **Sixthly,** whilst the HSU's claim purports to "address the circumstances of workers covered by the awards in question who regularly work on weekends,"[152] the scope of clauses sought have a far broader application. The HSU's proposal would apply to *any* employee who performs *any* work on a public holiday that has fallen on a weekend and been substituted. This would include, for example, casual employees or any employee who performs overtime. It is not confined to employees who work non-standard hours.

7.6 Analysis of Modern Awards and Pre-Modern Awards

453. At chapter 5 of this submission, we set out in detail our analysis of the 122 modern awards with respect to the HSU, SDA and AMWU's claims. We also set out our analysis of the relevant pre-modern awards. We do not propose to repeat those submissions here save for reinforcing that:

- *None* of the 122 modern awards contain a clause akin to that sought by the HSU; and
- The history of the six awards subject to the HSU's claim does not support the inclusion of the union's proposed clauses. Many of the major underpinning awards in fact did not contain a clause such as that which the HSU now seeks.

7.7 Prior Consideration of the Relevant Issues

454. At Chapter 4 of this submission, we have given careful consideration to the authorities upon which the HSU seeks to rely in support of its claim. We do not propose to repeat those submissions here save for noting that our analysis

[152] HSU submission dated 19 January 2017 at paragraph 12.

of the previous decisions relied on by the HSU shows that those decisions must be disregarded, or attributed only little weight, in respect of the union's claim.

7.8 Section 138 and the Modern Awards Objective

455. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

456. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

457. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether additional entitlements for employees working on public holidays that have been substituted should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

458. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. <u>The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different</u>

modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[153]

459. The HSU has failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the awards subject to its claim meet the modern awards objective. In addition to the other merit-based arguments that we have made in this submission, we refer to the following matters that further this proposition.

460. **Firstly**, as we have previously stated, the extent to which the clause sought by the HSU is necessary in the sense contemplated by s.138 is questionable given the following:

- The occurrence of public holidays on a weekend to begin with this relatively low.
- Even when a public holiday does fall on a weekend, it is rare that it will be widely substituted across Australia.
- Pursuant to the current legislative provisions in each of the States and Territories an additional day is already provided for many public holidays if they fall on a weekend. The result of this is that, for many public holidays that fall on a weekend, both the actual day and the additional day will be observed as public holidays.

461. In addition, whilst a public holiday may be substituted by virtue of an agreement reached between an employer and its employees pursuant to the facilitative provision in each of the six awards subject to the HSU's claim, it is reasonably foreseeable that if the clause proposed by the HSU were inserted, an employer would be unlikely agree to substitute the public holiday in

[153] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

circumstances where it would give rise to an obligation to pay public holiday penalty rates on an additional day. As a result, it is unlikely that the proposed clause would have much work to do beyond the substitution of public holidays by virtue of State and Territory legislation.

462. In the above circumstances, it is difficult to see how the HSU's claim is *necessary* to ensure the provision of a fair and relevant minimum safety net.

463. **Secondly,** the necessity of an award provision must be assessed in the context of other pre-existing award clauses. Relevantly, as we have previously noted, most of the awards themselves already provide an appropriate mechanism which can be implemented in order to attract public holiday penalty rates for work performed on a public holiday that has fallen on a weekend and been substituted.

464. In considering the necessity of the proposed clause in the context of other pre-existing award clauses, we also reiterate that all of the awards subject to the HSU's claim already provide additional benefits to employees who regularly work on weekends and who may therefore work on a public holiday that has fallen on a weekend and been substituted. This includes the payment of weekend penalties as well as the provision of an additional week of annual leave (if the employee meets the definition of shiftworker for the purposes of the NES as defined in the relevant award). These additional benefits are intended to compensate employees for working those hours and it can therefore not be said that the HSU's claim is necessary to provide a fair and relevant safety net for those employees. On the contrary, as we have previously outlined, the HSU's proposed clause, if granted, could mean that many employees who regularly work on weekends would be "double dipping."

465. **Thirdly,** the necessity of the proposed provision must be established in the context of existing award provisions that require the payment of public holiday rates on the substitute day in circumstances where the employee performs work on the actual day and the substitute day.

466. The HSU has not so much as attempted to justify why an employee who performs work on the actual day and the substitute day should be entitled to the payment of penalty rates on both days. If an employee works on the actual day, we can see no justification for why the employee should be paid public holiday penalties on the substitute day as well (if they work on that day). This is particularly so in circumstances where the relevant State/Territory Government has decided that certain public holidays should be substituted and not treated as a public holiday on both the actual day and the substitute day.

467. For this reason, if the Commission is compelled by the HSU's submissions, consideration ought to be given as to whether the award should be varied to remove the entitlement to public holiday entitlements for both the actual day and substitute day where an employee works on both days.

468. **Fourthly**, there is no evidence before the Commission regarding:

- the extent to which employers in the relevant industries operate on public holidays when they fall on a weekend and are substituted; or
- The number or proportion of employees that are required to work as a result.

469. In the absence of such crucial information that goes to the application of the proposed clause, the Commission cannot be satisfied that the proposed clause is necessary. There is simply insufficient material before it in order to make the requisite assessment.

470. **Fifthly**, that the variations proposed by the HSU may not adversely affect all employers in an industry is not the test to be applied in determining whether the variation should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that

regard must be had to different types of businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

471. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine productivity in a certain industry or for employers covered by an award. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

472. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of particular types of businesses as well as industry at large.

473. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[154]

[154] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

474. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the HSU has *not* overcome that threshold.

A 'Fair' Safety Net

475. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[155]

476. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[156]

[155] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[156] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

477. The imposition of an additional financial liability on employers in the absence of any sound merit basis for it is entirely unfair. The HSU has not established that there is any serious foundation for the clause it has proposed.

478. It is particularly unfair that employers would be saddled with an additional cost impost for work performed on any public holiday falling on a weekend that has been substituted, in circumstances where they are already required to compensate employees for the performance of work on the substitute day. We can identify no justification for introducing an additional financial entitlement for employees in such circumstances. This is especially so when regard is had to the additional benefits already afforded to employees who regularly work weekends.

479. This unfairness is compounded when regard is had to the broad reach of the proposed clauses. Apart from the fact that the clauses proposed would apply to *any* public holiday that falls on a weekend and has been substituted, the clauses proposed would apply to all employees. This includes full-time, part-time and casual employees, regardless of whether they are performing ordinary hours of work or overtime and irrespective of whether the performance of work on that day is a feature of their regular roster.

480. In the circumstances described above, the introduction of the proposed award provisions would not be in keeping with the provision of a fair safety net.

A 'Minimum' Safety Net

481. Modern awards are intended to afford employees with a minimum safety net, which is to include the basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

482. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provisions here sought by the HSU. Matters such as these are more appropriately dealt through enterprise bargaining.

The NES

483. Earlier in this submission we have outlined the relevant provisions of the NES and the approach previously taken by the Commission and its predecessors in the face of similar claims to supplement the NES in modern awards. We need not repeat those submissions here save for noting that it is our position that the relevant awards, *together with the NES*, provide a fair and appropriate safety net in relation to public holidays. The HSU has failed to establish a case for supplementing the NES or for overriding the decisions made by State and Territory Governments.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

484. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a) (emphasis added):

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[157]

485. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[158]

486. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The HSU has not, however,

[157] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[158] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the six awards that are the subject of its claim are reliant on the minimum rates prescribed by those awards.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the six awards that are the subject of its claim are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

487. As a consequence of this deficiency in the case mounted by the HSU, the Commission cannot be satisfied that s.134(1)(a) lends support for the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

488. The HSU's submissions in the current proceedings suggest that the inclusion of additional payment for work on a public holiday that has fallen on a weekend and been substituted is an issue of great importance to the union, which, absent its inclusion in the awards system, would encourage it and its members to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining. We also

note that the NES contemplates that the substitution of public holidays is a matter for enterprise bargaining.[159]

489. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

490. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the awards that are the subject of the HSU's claim, each of which would have the effect of introducing additional costs and inflexibilities.

491. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be significantly lifted, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

492. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

[159] Section 115(3) of the FW Act.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

493. A Full Bench of the Commission, in the context of the 'award flexibility' common issues case, considered the proper interpretation of s.134(1)(c). It stated (emphasis added):

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[160]

494. There is no material before the Commission to suggest that the HSU's proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

495. On the contrary, given that the HSU's claim would substantially increase the penalties payable to employees working on a public holiday that has fallen on a weekend and been substituted by requiring the payment of public holiday penalties on the actual day, it is reasonably foreseeable that it may in fact *decrease* workforce participation. This is because a business that typically operates on weekends may decide to close or reduce its operating hours on that day (if it is not obliged to operate) and/or reduce its staffing levels to a minimum due to the extra costs it would need to pay to employees who work on that day.

496. That the imposition of additional penalty rates for work performed on a public holiday that has fallen on a weekend and been substituted may deter employers from requiring employees to perform work on that day is consistent with recent observations made in the Penalty Rates Decision. In considering the relevance of deterrence as a factor in setting weekend and penalty rates, the Full Bench noted that:

[160] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

> **[39]** … the imposition of a penalty rate may have the effect of deterring employers from scheduling work at specified times or on certain days, …[161]

497. For the above reasons, s.134(1)(c) cannot be relied upon to support the HSU's claim.

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

498. To the extent that the imposition of additional penalty rates for work performed on a public holiday that has fallen on a weekend and been substituted might result in an employer reducing its operating hours and/or staffing levels on that day, the HSU's proposal clearly undermines the need to promote flexible modern work practices and the efficient and productive performance of work.

499. That this is so is compounded by the fact that public holiday penalties will also be applying on the substitute day (which will typically only be a day or two after the actual day) and that employers may therefore have reduced hours or minimal staffing levels on that day as well.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

500. We have addressed this issue is detail in the context of the AMWU's claim. The comments we there make are of equal relevance to the HSU's claim. Nonetheless, given that the HSU's proposal is broader in scope than the AMWU's, and that the HSU has advanced a different and arguably weaker merit based case in support of its claims, we make the following additional submissions in relation to the s.134(1)(da) considerations. We also here address the HSU's submissions in relation to s.134(1)(da).

501. Section 134(1)(da) requires the Full Bench to take into account the need to provide additional remuneration to employees working in certain discrete circumstances mentioned in s.134(1)(da)(i),(ii),(iii) and (iv). As observed by the HSU, this includes circumstances where employees are working public

[161] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [39].

holidays, unsocial hours and shift work.[162] It also includes employees performing work on weekends.

502. Section 134(1)(da) is relevant to the claim because the employees that would receive the relevant benefits are potentially performing shift work and/or working on weekends. For the reasons that we set out below, the section is not relevant as a consequence of the provision's reference to "public holidays". Nor do we accept that the performance of work on a day that is no longer a public holiday by virtue of s.115(2) of the FW Act necessarily constitutes the performance of work during "unsocial…hours."

503. In the Penalty Rates Decision, the Full Bench effectively identified various matters that are required to be considered in order for the requirements of s.134(1)(da) to be met:

> **[45]** An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified requires a consideration of a range of matters, including:
>
> > (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
> >
> > (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
> >
> > (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award. [163]

504. The HSU does not seek to lead any evidence addressing the above cited range of matters that the Full Bench has indicated require consideration pursuant to s.134(a)(da)(ii). The union has similarly not meaningfully addressed the current terms of the modern awards that already compensate employees for working on actual or substituted public holidays. It has not, for example, undertaken any analysis of the history, operation or effect of current award terms which relate to matters such as the payment of shift loadings or

[162] HSU submission dated 19 January 2017 at paragraph 39.

[163] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [45].

weekend penalty rates. Nor has it considered the extent to which certain employees covered by the relevant awards already receive additional annual leave to compensate them for working certain hours.[164]

505. Given that the HSU has not put material before the Full Bench which would enable such matters to be properly considered, the Full Bench should determine that an appropriate case for the proposed variation has not been made out. This failing alone warrants rejection of the claim.

Implications Arising from the Operation of s.115(2)

506. The fact that the days that are the subject of the HSU's claim would have been 'public holidays' had substitution not occurred does not give rise to any relevant consideration connected to s.134(1)(da).

507. In relation to s.134(1)(da), the Full Bench in the Penalty Rates Decision made the following relevant observations:

> **[202]** Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance (s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working 'unsocial … hours'. Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides 'a fair and relevant minimum safety net.' A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.[165]

508. The requirement to take into account the need to provide additional remuneration to employees working on a public holiday is not relevant to the HSU's claim, given that the entitlement it seeks only applies when an employee works on a day that is no longer a public holiday by virtue of another day having been substituted for that public holiday.

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[164] *Appeal by Health Services Union* [2013] FWCFB 5551 at [91].

[165] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [202].

509. That this is so is clear considering the fact that the term 'public holiday' is referred to in the dictionary to the FW Act (s.12 of the Act), which provides "see section 115". Section 115(1) contains a list of specified public holidays and s.115(2) provides, in effect, that once a day or part-day is substituted for a public holiday, the substituted day or part-day is the public holiday. The reference to 'public holidays' in section 134(a)(da) should be interpreted as meaning 'public holidays' as defined within s.115. Consequently, once the original day ceases to be a 'public holiday' for the purposes of s.115, it ceases to be a 'public holiday' for the purpose of s.134(1)(da).

510. The relevant awards already provide appropriate remuneration for employees performing shiftwork and weekend work. The HSU does not appear to quibble with the quantum of such rates. Rather, it seeks an "additional public holiday loading" because the day would otherwise have been a public holiday but for its substitution pursuant to s.115(2).

511. What falls from our contention regarding the construction of the statute is that it should not be accepted by the Full Bench that s.134(1)(da) would weigh in favour of granting the claim by virtue of the reference to public holidays. The days that are the subject of the claim are, by definition, not public holidays.

512. Nonetheless, a central consideration for the Full Bench in the context of these proceedings is whether the imposition of the penalty rates proposed by the union would be necessary to provide employees with 'fair and relevant' compensation for the disutility associated with working on the particular days to which the proposed penalty would attach. The union has not advanced any evidence to establish the level of disutility associated with working on the days that are the subject of its claim. At its highest the case advanced suggests that the HSU believes that 25 December is of some particular importance, although even in this regard very little is put to justify its position.

513. The alteration of penalty rates represents a very significant variation to the safety net. The recent Penalty Rates Decision ushered in very modest reductions in penalties for a small number of industries, but only after extensive evidence was advanced by the proponents of the relevant claims

(including Ai Group). In sectors where a robust case was not advanced a claimed change was not granted. Given this approach, it would be startlingly inconsistent for the Full Bench to increase penalty rates in the context of the awards the subject of the HSU's claim given the paucity of material that has been advanced by the proponents of the claim.

The HSU's Submissions

514. At paragraph 40 of its submissions the HSU contends that: "it seems apparent that it was never the intention of the NES and modern award provisions to provide lesser entitlements to workers who do not work Monday to Friday Schedules." There is no basis provided for the union's contention.

515. Regardless, the relevant awards (generally) provide part-time and full-time employees with the same terms and conditions in relation to payment for working on a public holiday. That is, these employees receive the same public holiday penalty rates for working on days that are public holidays. The extent to which this crystallises into different monetary entitlements is a product of variables such as the employee's classification, number of days and hours an employee works and their roster patterns.

516. It is also wrong to assume, as the HSU does, that an employee who works Monday – Friday will necessarily receive the benefit of a greater number of public holidays. The extent to which this occurs will depend on variables such as the particular pattern of days and hours worked by an employee; the State or Territory in which the employee works and the calendar year in which the employee works. This issue is discussed in greater detail in our response to the SDA's claim. However, put simply, some employees that perform their ordinary hours of work on a weekend will already receive a greater number of public holidays than employees working Monday to Friday. Accordingly, there can be no force to the notion that the claim should be granted on the basis of some kind of imperative to deliver a level of equality of entitlements between employees working on different days of the week.

517. At paragraph 40 of its submission the HSU also submits that there are workers in the health industry who are regularly employed on weekends, or who perform shift work, and that they should be entitled to public holiday entitlements like all employees.

518. To the extent that working on weekends is an entrenched practice in the health industry, it can also be reasonably asserted that this is simply part-and-parcel of working in the sector and that as such, employees who work those hours, are already properly remunerated under the totality of conditions afforded to employees under the relevant awards. In advancing its case, the HSU has not pointed to any change in circumstances since the modern awards were made which would warrant a reassessment of the current safety net regarding public holidays. The fact that a greater number of public holidays may, in any given year, fall between Monday to Friday, rather than on the weekend, is not suggested by the union to be a recent development.

519. Finally, given the HSU's contention that the NES was not intended to provide lesser entitlements to employees who do not work Monday – Friday we also note, for completeness, that the Explanatory Memorandum accompanying the Fair Work Bill 2008 clearly suggests that the NES was not intended to provide any additional or compensatory entitlement to employees regularly working weekends in circumstances where a substituted public holiday is implemented under a State or Territory law:

> 457. Where a law of a State or Territory substitutes a day or part-day for a day or part-day that would otherwise be a public holiday, the substituted day or part-day is considered to be the public holiday or the purposes of the NES (subclause 115(2)). That is, where a day is substituted under State or Territory law, an employee is entitled to be absent on the substituted day instead of the original public holiday, not on both days and an employer will not be required to provide public holiday entitlements on 2 days in respect of the one holiday.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

520. In addressing this mandatory consideration, the HSU points to state-based differentials in the treatment of public holidays:

> 42. The different public holiday provisions in the States and Territories around whether public holiday which fall on weekends are additional or substitute holidays means that employees in will miss out on on public holiday entitlements in some states but not in others.
>
> 43. This would appear to contradict the need for equal remuneration for work of equal or comparable value, It also goes against the modern award system being a national one, which is consistent across the country."[166]

521. The HSU's submission fundamentally misunderstands the requirement espoused in s.134(1)(e). In the Penalty Rates Decision, the Full Bench observed:

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly:
>
> > 'In this Act:
> >
> > ***equal remuneration for work of equal of comparable value:*** see subsection 302(2).'
>
> **[206]** The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.
>
> **[207]** The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.[167]

522. Section 134(1)(e) is simply not directed at the removal of State based differences in award derived entitlements.

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[166] HSU submission dated 16 October 2017 at paragraphs 42 – 43.

[167] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [204] – [207].

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

523. Given the nature of the HSU's proposed changes, it is inevitable that they would result in increased employment costs. For the same reasons we have advanced in relation to the AMWU claim, this is self-evident.

524. Of course, the *potential* cost impacts flowing from the HSU's claim are also much more significant those associated with AMWU's claim, given the relative breadth of the HSU proposal.

525. In considering the matters referred to in s.134(1)(f), in the context of the current claim, it is important that the Full Bench be mindful of the cumulative cost impact and regulatory burden that employee entitlements to public holidays have upon employers. The potential merits of affording the benefits of the HSU claim to individual employees that work on the relevant days must not only be weighed against the costs of extending the application of penalty rates to such days, but also considered within the broader framework of public holiday penalty rate provisions contained within awards.

526. The obvious point is that while the HSU seeks to address a perceived anomalous outcome for some employees flowing from the award systems interaction with substituted public holidays declared under State or Territory law, there is no proposal by the HSU to remove the obligation to pay penalty rates for the substituted day or indeed for an additional day that may granted be declared by State or Territory Governments. As such it is the totality of cost upon employers in relation to public holidays that must be considered in order to identify an appropriate balance in setting a fair and relevant safety net. As previously identified, what constitutes a "fair" safety net of minimum terms and conditions needs to be considered from the perspective of both employers and employees.

527. The negative impact on employers associated with public holidays and the granting of "additional public holidays" was considered in some detail during

the 2012 Post-implementation Review of the FW Act [168] as well the Productivity Commission's Inquiry Report into the Workplace Relations Framework in 2015 (**PC Report**).[169] Both recommended capping the number of public holidays each year for which penalty rates are payable.

528. In considering the impacts of additional public holidays on employers, the Panel for the 2012 Post-implementation Review noted the following (emphasis added):

> A large number of employers indicated concern about arrangements for the payment of public holidays. Employers' concerns were generally about the ability for state and territory governments to declare additional public holidays under s. 115 (1)(b) of the FW Act to those provided under s. 115 (1)(a), and the resultant increase in wage costs due to penalty rates then applying under modern awards. Some employer and employee representatives indicated that the current system had resulted in confusion and called for a national standard to be developed.
>
> The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days).
>
> Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day.
>
> The issue of public holidays was identified as important for many stakeholders in submissions and discussions with the Panel. Current arrangements have meant that the number of public holidays in each jurisdiction can vary widely. For example, in 2012 the number is expected to range from between 10 and 13 days, depending on the state or territory. The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel. To overcome these concerns, the Panel's view is that under the NES, there should be a nationally consistent number of public holidays each year for which penalty rates are payable, and that the number of days for which penalty rates are payable should not be able to be increased by declaring additional or substitute days by state and territory governments. This would not prevent employers and employees entering agreements to provide for penalty rates to be payable on a greater number of public holidays, nor to specify additional days as public holidays.

[168] McCallum, R., Moore, M. and Edwards, J. (2012) *Towards more productive and equitable workplaces: an evaluation of the Fair Work Legislation*, Australian Government.
[169] Australian Government Productivity Commission, *Workplace Relations Framework: Productivity Inquiry Report*, 2015, Volume 1, No.76

Recommendation 8: The Panel recommends that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11.[170]

529. The PC Report went further. Noting that the recommendation of the 2012 Post-implementation Review "would only partly address the cost implications of newly designated public holidays"[171] (in that it only requires that penalty rates would not be payable if an employee worked on an additional public holiday), the PC Report recommended that the NES should be amended to remove any obligation for an employer to pay for an employee's absence on newly designated public holidays as well as penalty rates if an employee does work on a newly designated public holiday.[172]

530. The HSU's claim would compound the difficulties employers face in relation to the operation of the current relatively generous safety net. It would extend the payment of public holiday penalties to employees who work on public holidays that fall on a weekend and are substituted. Such an outcome is completely at odds with the recommendations of the 2012 Post-implementation Review and the PC Report. Indeed, whilst it is clear from the above that there is widespread concern about the declaration of additional public holidays, the HSU is proposing that the Full Bench adopt the very opposite approach.

531. Crucially, it cannot be assumed that the costs of granting the claim would be insignificant.

532. Whilst we must acknowledge that the number of public holidays that are currently substituted by virtue of State and Territory laws is limited, the Commission should be mindful that under the relevant State and Territory systems there is commonly a broad discretion afforded to the relevant Government to declare additional public holidays. Consequently, if the HSU's claim is granted, there is the potential for the safety net to impose additional and currently unforeseeable costs on employers as a product of politically

[170] McCallum, R., Moore, M. and Edwards, J. (2012) *Towards more productive and equitable workplaces: an evaluation of the Fair Work Legislation*, Australian Government, pp.102-103.

[171] Australian Government Productivity Commission, *Workplace Relations Framework: Productivity Inquiry Report*, 2015, Volume 1, No.76, p.192

[172] Ibid at pp.192-193.

influenced decisions made by such Governments. Such considerations are not only contrary to s.134(1)(f) but also the maintenance of a "stable" award system as contemplated by s.134(1)(g).

533. The negative consequences of the costs flowing from the HSU's claim will likely be particularly difficult for some employers in the health industry that do not have the capacity to avoid operating on weekends. It is undoubtedly uncontentious that many organisations in the health industry operate on a 24/7 basis and do not have the ability to choose whether to close or open on a public holiday because of the costs. Given this context, it is particularly problematic that the HSU has made no attempt to establish either the anticipated costs of their claim or the capacity of employers to afford such costs.

534. In some contexts, the increased costs flowing from the HSU's claim may result in employers seeking to reduce staffing numbers on days that will attract the new penalty rates. Where this occurs, it may have a negative impact on productivity. Of course, it is difficult for the Full Bench to form a clear view in relation to such matters given the proponents of the claim have elected to not lead evidence relating to relevant factual considerations, such as the impact of current penalty rates clauses on the operations of the employers covered by the relevant awards and staffing practices.

535. There may also be negative consequences for the broader community that will flow from material increases in the labour costs incurred by employers in this vital sector. Logically, this may take the form of increased health care costs for patients or reduced service delivery. These are not irrelevant or unimportant considerations. The Full Bench should be extremely cautious about imposing additional costs on employers engaged in the health sector.

536. The HSU has made no attempt to advance evidence addressing this mandatory consideration referred to in s.134(f).

537. Ultimately, the precise costs of the HSU claim cannot be assessed based on the material before the Commission.

538. The proposed clauses will also increase the regulatory burden upon employers. This will be a product of the imposition of new penalty rates but also because of the need for employers to grapple with the proposition that certain days may be recognised as public holidays for the purposes of applying public holiday penalty rates but not for the purposes determining entitlements under the NES.

The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

539. The need to ensure a simple and stable system weighs strongly against granting the HSU's claim.

540. Generally, the current public holiday penalty rates regime contained within the relevant awards applies on public holidays as defined under the NES.

541. Maintaining a consistent identification of days that attract public holiday related entitlements within both the NES and the modern awards will aid in ensuring a simple and easy to understand modern awards system, as contemplated by s.134(1)(g). Treating different days as public holidays under the NES and award system introduces an unnecessary level of complexity into the safety net that is apt to confuse employers and employees.

542. The HSU's claim would significantly alter the nexus between how public holidays are dealt with under the NES and the modern awards, with the result being that different days will be considered public holidays for the purposes of the entitlements afforded under each.

543. The wording of the clause is also somewhat unclear. In particular, it is not even clear from the union's clause when its proposed variation is intended to apply. The proposed clause simply provides (emphasis added):

> Where any public holiday falls on a Saturday or Sunday and <u>the public holiday is substituted for another day</u>, an employee required to work on the actual public holiday shall receive payment for the work as if it were a public holiday.

544. The clause does not stipulate what is meant by the phrase "is substituted for another day." Given this, the question arises as to whether the clause is only intended to apply when public holidays are substituted pursuant to State/Territory legislation or whether it is intended to apply to situations where a public holiday is substituted by agreement between an employer and its employees under the award as well.

545. The submissions advanced in support of the HSU's claim appear to indicate that the clause is only meant to apply in circumstances where a public holiday is substituted pursuant to legislation. However, this is not apparent from the wording of the clause.

546. Finally, the need to ensure a stable and sustainable system tells against granting the claim given the HSU's failure to mount a sound evidentiary and meritorious case. Therefore, on this basis alone, s.134(1)(g) weighs against granting the claim.

The Likely Impact on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

547. To the extent that the HSU's proposed clause is at odds with ss.134(1)(b), 134(1)(d) and 134(1)(f), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

7.9 Conclusion

548. The HSU's claim should be dismissed for all of the reasons that follow.

549. **Firstly,** the HSU's claim has the effect of circumventing the role that State and Territories play in specifying the days upon which public holidays will fall for the purposes of determining the penalty rate payable for work performed on that day, which is expressly contemplated by the FW Act. This is not appropriate. Further, a case has not been made out for the need to supplement the existing safety net provided by the NES in this regard.

550. **Secondly,** the incidence of public holidays falling on a weekend and being substituted by State and Territory legislation is low. Accordingly, the variation proposed cannot be justified as being *necessary* to achieve the modern awards objective.

551. **Thirdly**, to the extent that the HSU seeks to rely on the Public Holidays Test Case decisions; they were made in a very different legislative context and accordingly, the Commission should give the relevant principles there articulated by the AIRC little weight.

552. **Fourthly**, and in any event, those decisions did not recommend that awards be varied to deliver the entitlement here sought by the HSU. The union's claim is far more expansive than the principles there articulated and to that extent, it cannot properly rely upon the Public Holidays Test Case.

553. **Fifthly**, the AIRC determined during the award modernisation process that it would not supplement the NES by prescribing additional public holidays in modern awards. The HSU's claim has this effect, to the extent that it requires the payment of public holiday penalty rates on an additional day. No cogent reasons have been established for departing from the AIRC's approach.

554. **Sixthly**, the entitlement sought was uncommon in the pre-reform awards underpinning the making of the modern awards that are the subject of the HSU's claim. This history does not advance its case.

555. **Seventhly,** the HSU's case does not establish that employees who work non-standard hours are in fact disadvantaged in the manner alleged.

556. **Eighthly**, the provision proposed is not necessary to ensure that each of the relevant awards are providing a fair and relevant minimum safety net of terms and conditions. Specifically:

- The proposed clause is not necessary given that the incidence of public holidays falling on a weekend and being substituted is low.

- The Commission cannot be satisfied that the proposed clause is necessary in circumstances where the number of employers who in fact require employees to work in the relevant circumstances and therefore the number of employees that are in fact so required is not known.

- The proposed clause is unfair to employers.

- The absence of the proposed clause will likely encourage the HSU and its members to engage in collective bargaining.

- The proposed clause may undermine flexible modern work practices and the efficient and productive performance of work.

- The proposed clause will increase employment costs and thereby adversely affect business.

8. THE SDA'S CLAIM

557. The submissions that follow relate to the SDA's claim.

8.1 The Variations Sought by the SDA

558. The SDA seeks a variation to the following seven awards:

- The Retail Award;
- The Hair and Beauty Award;
- The Fast Food Award;
- The Storage Services Award;
- The Vehicle Award;
- The *Pharmacy Industry Award 2010*; and
- The *Mannequins and Models Award 2010*.

559. Ai Group has an interest in each of the above awards apart from the *Pharmacy Industry Award 2010* and the *Mannequins and Models Award 2010*. The submissions that follow relate specifically to those five awards (**Awards**).

560. The union has proposed the insertion of a new clause in the following terms in each of the Awards save for the Storage Services Award and Vehicle Award:

> This subclause applies to full time employees, and to part time employees who work an average of five days per week.
>
> If a public holiday or a part-day public holiday falls on a day an employee is not rostered to work they shall be entitled to receive by mutual agreement:
>
> a) Another day or part-day off in lieu; or
>
> b) An equivalent day or part-day's pay; or
>
> c) One extra day or part-day added to his or her annual leave.

This subclause shall not apply to public holidays falling on a Saturday or a Sunday (except where they are substituted to another day) nor to part-day public holidays of less than eleven hours.[173]

561. The Storage Services Award presently contains the following clause, which the SDA describes as being confined in its application to "an RDO arising from the 38-hour working week"[174]:

29.3 Rostered day off falling on a public holiday

(a) An employee who by the circumstances of the arrangement of their ordinary hours of work is entitled to a rostered day off which falls on a public holiday prescribed by this clause, will be granted an alternative day off to be determined by mutual agreement between the employer and the employee.

(b) If mutual agreement is not reached then clause 10—Dispute resolution will apply.

562. The Vehicle Award contains a similar clause:

32.3 Rostered day off or accumulated time off falling on a public holiday

In the case of an employee whose ordinary hours of work are arranged in such a manner as to entitle the employee to a rostered day off, the weekday to be taken off will not coincide with a public holiday. Provided that, in the event that a public holiday is prescribed after a roster is arranged the employer will allow the employee to take an alternative weekday off instead of the public holiday.

563. The SDA appears to seek the retention of the above clauses and the addition of the following in the Storage Services Award and the Vehicle Award:

Public holiday falling on a non-rostered day

This subclause applies to full time employees, and to part time employees who work an average five days per week.

If a public holiday or a part-day public holidays falls on a day an employee is not rostered to work (other than a rostered day off) the employee shall be granted an alternative day or part-day off to be determined by mutual agreement between the employer and employee.

This subclause shall not apply to public holidays falling on a Saturday or Sunday (except where they are substituted to another day) nor to part-day public holidays of less than eleven hours.[175]

[173] SDA submission dated 10 October 2016 at paragraph 17.

[174] SDA submission dated 10 October 2016 at paragraph 18.

[175] SDA submission dated 10 October 2016 at paragraph 18.

564. We make the following observations regarding the operation of the proposed clause.

565. **Firstly,** whilst we later deal with the SDA's rationale for its proposed clause, for present purposes it is sufficient to note that, in its submission, its claim is intended to address the "disadvantage" suffered by employees who work "non-standard working arrangements" compared to those who work on Monday – Friday. By extension, the SDA appears to consider Monday – Friday a "standard working arrangement".

566. Notwithstanding, its proposed clause would apply to all full-time employees covered by the Awards and all part-time employees who work an average of five days a week, irrespective of the days upon which they work.

567. In this way, the proposed clause is not, in fact, limited in its application to those who work "non-standard" working arrangements. Rather, it has the effect of extending a benefit arising from any public holiday that falls on a Monday – Friday to all full-time employees and all part-time employees who work an average of five days per week, irrespective of the days upon which they work.

568. **Secondly,** the provisions proposed apply to all full-time employees, regardless of the manner in which their ordinary hours are arranged or the number of days upon which the employee works. As we later discuss, the Awards generally grant some flexibility as to the manner in which a full-time employee's ordinary hours may be arranged and permit the averaging of ordinary hours. As a result, such an employee covered by most if not all of the Awards may work, for instance four days a week or a nine day fortnight. An entitlement under the proposed clause would arise in those circumstances on the fifth day or the tenth day respectively.

569. **Thirdly**, the provisions proposed apply to part-time employees "who work an average of five days per week".

570. We note at the outset that a fundamental flaw arises from the application of the clause sought. The provision does not specify the period of time over which the average number of days worked by a part-time employee is to be

calculated. We later return to this issue when giving consideration to the extent to which the provision is (or rather, is not) "simple and easy to understand" as contemplated by s.134(1)(g) of the FW Act.

571. **Fourthly**, the provision applies to part-time employees who work an average of five days per week, irrespective of the period of time spent working on those days. Put another way, the clause applies to part-time employees who work an average of five days a week regardless of the number of hours worked on those days, which could be as little as three hours under the Awards, with the exception of the Vehicle Award which does not contain a minimum engagement period for part-time employees.

572. **Fifthly**, when calculating the average number of days worked by a part-time employee, the proposed clause does not make any distinction between ordinary hours and overtime. It refers simply to part-time employees who work an average of five *days* per week. For this purpose, a 'day' could conceivably include a day of, for instance, overtime. The regulatory burden associated with ascertaining whether a part-time employee works an average of five days per week in such circumstances is self-evident.

573. **Sixthly**, the clause does not make any accommodation for shiftworkers. For example, clause 25.1(c) of the Storage Services Award defines a night shift as "a shift finishing after midnight and at or before 8.30 am". Accordingly, a night shift would commence on one calendar day and continue into the following calendar day. A literal interpretation of the SDA's clause would suggest that such a shift would constitute two "days" for the purposes of calculating the average number of days worked by a part-time employee. This is unfair from the perspective of employers.

574. **Seventhly**, the clause applies where any public holiday that is not on a Saturday or Sunday falls on a day that an employee is not required to work. This would appear to include public holidays prescribed at s.115(1)(a) of the FW Act, substitute public holidays and additional public holidays declared by the States and Territories, including local public holidays.

575. As can be seen from our analysis at Chapter 2 of this submission, the clause would apply in relation to a significant number of public holidays. For instance, in New South Wales during 2017, there will be a total of 13 public holidays of which nine will fall on Monday – Friday. In Victoria, 11 public holidays will fall on Monday – Friday during 2017. This is an issue that goes squarely to the potential impact of the claim, which we later come to.

576. **Eighthly**, the proposed provision would apply where a public holiday or part-day public holiday falls on any day that the employee is "not rostered to work". It appears to proceed on the basis that all employees covered by the Awards will be *rostered*, in the sense that a roster will be implemented which reflects when an employee is to work.

577. We note that the Awards do not all require an employer to produce or implement a roster as such. For example, the Storage Services Award contains the following provision regarding the hours of work of a part-time employee:

> **11.3 Part-time employment**
>
> …
>
> **(c)** At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

578. The written agreement there reached does not constituted a "roster". It is simply a written agreement that documents the times and days at which a part-time employee will work. An employee may of course be required to work additional hours, which would constitute overtime by virtue of clause 11.3(f).

579. Whilst clause 25.5 deals specifically with setting and altering shift rosters, the Storage Services Award does not in any way deal with rostering the hours of work of a day worker. It does not require, expressly or implicitly, that a roster be created and circulated for the purposes of identifying when such a full-time or part-time employee is required to work.

580. It is unclear how the proposed clause would apply in circumstances such as these, where there is no award-derived obligation to implement a roster. Rather, that is a matter that is left to an employer's discretion. The clause is not "simple and easy to understand" in this regard.

581. **Ninthly**, the proposed clause does not distinguish between the various reasons for which the employee is not rostered to work. Regardless of the basis upon which an employee is not rostered, the entitlements there provided would arise.

582. It is relevant to note that a full-time or part-time employee may not be rostered to work on a public holiday for a broad range of reasons, including but not limited to the following:

- The business may assess, based on sales forecasts, that it requires less employees to work on a public holiday and, as a result, decides not to roster certain employees. If an employee has ordinary hours on that day, he or she has an entitlement to payment at the base rate of pay pursuant to s.116 of the FW Act for those ordinary hours.

- The business may be prevented from operating on a public holiday due to, for instance, the trading hours of the shopping centre in which it is located or legislation such as the *Retail Trading Act 2008* (NSW) which prohibits shops from opening at all times on Good Friday, Easter Sunday, Christmas Day and Boxing Day, subject to certain exemptions. If an employee has ordinary hours on that day, he or she has an entitlement to payment at the base rate of pay pursuant to s.116 of the FW Act for those ordinary hours.

- An employee may exercise his or her right to be absent on a public holiday pursuant to s.114(1) of the FW Act and/or a request made by their employer to work pursuant to s.114(2) may be refused by the employee pursuant to s.114(3). If the employee has ordinary hours on that day, consistent with s.116, the employee is entitled to payment at the base rate of pay for those ordinary hours.

- The public holiday may fall on a day that an employee is not ordinarily rostered to work. For instance, pursuant to clause 12.3 of the Vehicle Award, it may be agreed that the part-time employee will work every Saturday – Wednesday, however the relevant public holiday falls on a Friday.

- The public holiday may fall on a day that an employee is not ordinarily rostered to work because the relevant employer does not operate on that day. For instance, a full-time or part-time employee may not be rostered to work on public holiday that falls on a Monday because, every Monday, the beauty salon in which the employee is employed does not operate. That is, its trading hours do not, as a matter of course, include Monday.

583. As can be seen, the provision sought may apply in a very wide range of circumstances. This is a matter that goes squarely to the potential cost of the claim. Many of the examples we have provided appear to arise in circumstances not expressly contemplated by the SDA's submissions. Nonetheless, given the terms in which the proposed clauses have been drafted, we consider that they may apply in each of the aforementioned cases even though there is no apparent rationale or justification for them.

584. **Tenthly**, the provision would appear to apply where an employee is required to work but is not *rostered* to work (noting the concerns we have raised above regarding the notion of "rostering").

585. For example, a full-time or part-time employee may be required to work overtime which is not rostered in the sense that the need to perform such work arises unexpectedly and therefore has not been identified on any roster implemented by the employer. In such circumstances, the employee would be entitled to overtime rates *and* the provisions of the proposed clause. As we later submit, this is an inherently unfair outcome from the perspective of employers.

586. **Eleventhly**, where the clause applies, in the context of most of the Awards, it affords an employee with the benefit of either:

- Another *day* or *part-day* in lieu; or
- An equivalent *day* or *part-day*'s pay; or
- One extra *day* or *part-day* of annual leave.

587. The provision proposed in relation to the Storage Services Award and the Vehicle Award differs slightly, as it would entitle the employee to "an alternative day or part-day off". It does not provide for the second or third options listed above.

588. The quantum of the entitlement to which an employee in fact has access is entirely unclear. We do not understand the meaning of the terms "day" or "part-day" as used in the proposed clause.

589. Full-time employees under the Awards may work a range of numbers of ordinary hours in a day. A full-time employee will not necessarily work the same number of ordinary hours each day and different full-time employees engaged under a particular award may work different numbers of ordinary hours in a day.

590. For instance, under the Fast Food Award, a full-time employee is engaged to work an average of 38 ordinary hours a week over a period of no more than four weeks.[176] By virtue of clause 25.3, an employee may work up to 11 ordinary hours in a day. Ordinary hours may be worked on any day of the week, including Saturday and Sunday.

591. It is clearly conceivable that a full-time employee's ordinary hours may not be the same each day or each week, as the award affords some flexibility as to the manner in which ordinary hours of work are arranged.

[176] Clause 11 and clause 25.2(a) of the Fast Food Award.

592. The same can be said of a part-time employee covered by the Fast Food Award. Clauses 12.2 and 12.3 provide as follows:

> **12.2** At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:
>
> - the number of hours worked each day;
> - which days of the week the employee will work;
> - the actual starting and finishing times of each day;
> - that any variation will be in writing;
> - that the minimum daily engagement is three hours; and
> - the times of taking and the duration of meal breaks.
>
> **12.3** Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

593. Apart from the requirement that a part-time employee's hours reflect a "regular pattern" and the entitlement to a minimum three hour engagement, there is no restriction on the arrangement of a part-time employee's ordinary hours. An employer and part-time employee could agree that the employee will work three hours on Saturday, four hours on Sunday and five hours on Monday - Wednesday.

594. In the face of such variability, the meaning of "day" and "part-day" in relation to both full-time and part-time employees is entirely unclear.

595. The proposed clause does not specify whether the calculation of a "day" or "part-day" is to include a consideration of the performance of overtime. If that is so, the complexities we have outlined above are compounded further. This is particularly so because overtime is often worked on an ad hoc, irregular basis.

596. The uncertainties that arise from the application of the proposed clause create a greater regulatory burden on employers and render the proposed provisions inconsistent with the need to ensure that the Awards are "simple and easy to understand". It also poses a serious difficulty when attempting to assess the potential cost of the claim.

597. **Twelfthly**, the clause proposed in relation to most of the Awards provides for "an equivalent day or part-day's pay", however it is silent as to the rate at which an employee is to be paid. The provision is ambiguous in this regard and does not allow for an accurate assessment of the cost of the claim.

8.2 The SDA's Case

598. The gravamen of the SDA's case is summarised in the following paragraphs of its written submissions:

> Full time and five day a week part time employees who work Monday to Friday receive the benefit of most public holidays except Easter Saturday and , where applicable, Easter Sunday. States and Territories have legislated to provide that in respect of most moveable public holidays whenever they fall on a Saturday or a Sunday there will be an additional public holiday or a substitute public holiday on the following Monday and/or Tuesday as appropriate. This means that generally Monday to Friday workers do not miss out on public holidays. For example in Victoria in 2016 Monday to Friday workers will receive the benefit of 11 public holidays.
>
> Workers with non-standard work arrangements are disadvantaged compared to Monday to Friday workers when a public holiday falls on their non-working day. They lose the benefit of the public holiday.
>
> …
>
> In the proposed clauses which we have drafted we have excluded public holidays falling on a Saturday or Sunday so that workers with non-standard work arrangements are treated the same in respect of Saturdays and Sundays when they are not rostered to work as are Monday to Friday workers.[177]

599. The SDA's case appears designed to apply to employees to whom it refers as having "non-standard working arrangements"; that is, those who do not work Monday – Friday. The basic premise of its claim is that such employees should, as matter of equity, receive some compensation in relation to public holidays upon which they are not rostered to work. The union considers that without such an entitlement they are disadvantaged when compared to those who work Monday – Friday, because they would be entitled to benefits associated with all such public holidays.

[177] SDA submission dated 16 October 2016 at paragraphs 15 – 16 and 20.

600. In the submissions that follow we deal with the arguments put by the union in support of its claim.

8.3 The Relevant Legislative Provisions

601. At Chapter 2 of this submission we have dealt with the legislative provisions relevant to these proceedings. We need not repeat those submissions here. We seek only to reiterate that there may be circumstances in which an employee is absent on a public holiday by virtue of which they are entitled to payment pursuant to s.116 of the FW Act and an entitlement would also appear to arise under the proposed clause.

602. The circumstances in which an entitlement arises under s.116 was described in a recent Federal Court decision as follows:

> For the purposes of s 116 of the FWA, an employee will be absent from his or her employment on a public holiday "in accordance with" Div 10 if the employee is absent under the entitlement to be absent created by s 114. An employee will be absent under that entitlement if the employee has ordinary hours of work on the public holiday but does not work on that day, either because the employee is not requested by the employer to work, or refuses the request to work where the request is not reasonable or the refusal is reasonable.[178]

603. That is, if an employee has ordinary hours of work on a public holiday and is absent for any of the following reasons, he or she is entitled to payment at the base rate of pay for those ordinary hours:

- The employee is absent pursuant to their statutory right to be so;
- The employee is absent because the he or she is not requested to work; or
- The employee is absent because the employee was requested to work but refused to because the request was not reasonable or because the refusal is reasonable.

[178] *Queensland Nurses' Union of Employees v Ramsay Health Care Australia Pty Ltd* [2016] FCA 1486 at [37].

604. The SDA's proposal seeks to expand the safety net afforded by the FW Act, absent any justification. The safety net applying to all full-time employees and the relevant group of part-time employees on any public-holiday would be supplemented in relation to any public holiday that falls on Monday – Friday. It would not be limited to those who work "non-standard" working arrangements.

605. The restraint shown by the legislature by:

- limiting the benefit it affords employees who do not work on a public holiday to circumstances in which the employee is absent in accordance with Division 10 of the NES and specifically, to circumstances in which the employee has ordinary hours on that day; and

- not providing an entitlement to employees who do not work on a public holiday in any other circumstances and specifically, where the employee does not have ordinary hours on that day;

would be supplanted by the SDA's proposed clause. It would significantly expand the circumstances in which an employee receives an entitlement in relation to a public holiday where the employee is not rostered to work on that day and it would deliver an additional entitlement to some employees.

606. The Commission's discretion to supplement the NES in this way is limited by s.138 of the FW Act. For all the reasons we have here explained, the relevant statutory threshold has not been met by the SDA.

607. We also consider that the grant of the SDA's claim would result in an employee potentially receiving the benefit of two entitlements (one pursuant to the Awards and the other pursuant to the NES) in circumstances where s.116 applies, both of which are designed to compensate an employee for their absence on a public holiday if the requisite criteria is satisfied. Were an employee in receipt of both of those entitlements, they would effectively be

double-dipping, which is an inherently unfair outcome from an employer's perspective.

608. The FW Act requires that the Commission is to ensure that modern awards, "together with the NES" provide a fair and relevant minimum safety net.

609. When the Awards are considered "with the NES" and in particular s.116 of the FW Act, the Commission cannot be satisfied that the proposed clause is necessary to provide a *fair* and *relevant* minimum safety net. The FW Act strikes an appropriate balance in respect of employees who do not work on public holidays, which should not be disturbed by the grant of the SDA's far-reaching claim.

8.4 Prior Consideration of the Relevant Issues

610. The SDA's case appears to rely significantly on the Public Holidays Test Case decisions. We have carefully dealt with the relevant elements of those decisions at Chapter 2 of this submission and need not repeat those arguments here.

8.5 Analysis of Modern Awards and Pre-Modern Awards

611. At Chapter 5 of this submission we have given consideration to other modern awards and the relevant pre-modern awards. Without reproducing those submissions here we simply note that:

- Only six[179] of the 122 modern awards contain a provision that provides some additional benefit to full-time and part-time employees who work an average of five days a week when they are not required to work on a public holiday that falls on a weekday. The very vast majority of award provisions that the SDA refers to in other awards are fundamentally different in nature and narrower in scope.

[179] The *Airport Employees Award 2010*, the Ambulance Award, the *Animal Care and Veterinary Services Award 2010*, *Corrections and Detention (Private Sector) Award 2010*, the *Fire Fighting Industry Award 2010* and the *Live Performance Award 2010*.

- Even if it is accepted that some pre-modern awards underpinning the Awards contained a provision similar to that which is here sought, that does not, in and of itself, provide a proper basis for an award variation in this Review. The power to include a term in an award is constrained by s.138 of the FW Act, which requires that it be necessary to achieve the modern awards objective. The requisite assessment is to be made having regard to the considerations listed at s.134(1) in the current context and in light of contemporary employment and business practices.

612. Accordingly, an analysis of other modern awards and the relevant pre-modern awards does not advance the SDA's claim.

8.6 The Alleged Disadvantage Suffered due to Non-Standard Working Arrangements

613. At the very heart of the SDA's claim is a concern that those employees who work non-standard arrangements (that is, they do not work Monday – Friday each week) are disadvantaged because they do not receive the benefit of public holidays that fall on Monday – Friday when the employee is not rostered to work on those days.[180] In the submissions that follow, we deal with this alleged disadvantage.

614. **Firstly**, we observe that working arrangements that involve the performance of work on a basis other than five days a week Monday – Friday can no longer be considered a "non-standard" working arrangement. This is particularly true of the industries covered by the Awards. We note that the SDA has not undertaken any analysis of the working arrangements applying to employees engaged under the Awards and there is scant evidence of the prevalence of such working arrangements.

615. For instance, employees in the fast food and retail industries (including the retail sector covered by the Vehicle Award) are very commonly engaged on

[180] SD submission dated 10 October 2016 at paragraph 16.

working arrangements that deviate from a Monday – Friday five day pattern. This is in part a product of their employers' operating hours which extend throughout the week. Indeed it is our understanding that in many fast food operations, employees who work five days a week Monday – Friday would make up only a very small proportion of the workforce.

616. We dispute any assertion that the working arrangements here targeted are novel, unusual or non-standard. They are commonly implemented and reflect the needs of contemporary businesses to staff their operations every day of the week and, to a large degree, the desires of employees to work such patterns in order to accommodate their personal circumstances such as caring responsibilities or study-related commitments.

617. A requirement to work an arrangement that does not involve the performance of work five days a week on Monday – Friday cannot, in the current context, be considered "non-standard". In most of the industries covered by the Awards, we consider that a "standard" working arrangement, as such, prevails. Any award variation that has the effect of deterring or precluding an employer from requiring its employees to work such arrangements is potentially contrary to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).

618. **Secondly**, the SDA's case proceeds, erroneously, on the assumption that employees who do not work Monday – Friday suffer a disadvantage. Its submissions do not, however, contain any analysis as to whether this is in fact so.

619. The union acknowledges that employees who work Monday – Friday do not receive the benefit of public holidays that fall on Saturday and Sunday and they do not here seek to vary that position. They also accept that given this is so, an employee working "non-standard arrangements" should not be granted an additional benefit in relation to public holidays that fall on a Saturday or Sunday where the employee is not rostered to work on that day.[181] It appears

[181] SDA submission dated 10 October 2016 at paragraph 20.

to be of the view that its concern to achieve equity between employees working "standard arrangements" and "non-standard arrangements" does not arise in relation to those public holidays.

620. For the purposes of these proceedings, we have undertaken an analysis of public holidays in each State and Territory during 2017 with reference to a sample of "non-standard" working arrangements that involve the performance of work on five consecutive days per week:

- Employees who work Tuesday – Saturday;
- Employees who work Wednesday – Sunday;
- Employees who work Thursday – Monday;
- Employees who work Friday – Tuesday;
- Employees who work Saturday – Wednesday; and
- Employees who work Sunday – Thursday.

621. In selecting these working arrangements we note that some of the Awards require that an employee's ordinary hours must be arranged such that they are granted a specified number of consecutive days off each week or fortnight. For instance, clause 28.11 of the Retail Award states:

> **28.11 Consecutive days off**
>
> **(a)** Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.
>
> **(b)** This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.
>
> **(c)** An employee can terminate the agreement by giving four weeks' notice to the employer.

622. A proper consideration of these working arrangements reveals that in fact those employees who work Monday – Friday, in many instances, will be

afforded the benefit of fewer public holidays than those who do not. In other instances, an employee who works "non-standard" working arrangements will receive the benefit of the same number of public holidays as an employee working Monday – Friday. The boxes shaded in red highlight the circumstances in which either of the aforementioned outcomes arise:

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Mon – Fri	**11**	**10**	**10**	**9**	**10**	**9**	**11**	**10**
Tues – Sat	5	5	5	5	5	4	7	4
Wed – Sun	5	5	6	5	6	2	6	3
Thurs – Mon	12	11	12	10	12	7	11	9
Fri – Tues	13	12	13	11	13	8	13	10
Sat – Wed	12	11	12	10	12	7	11	9
Sun – Thurs	12	11	12	10	12	8	11	10

623. We consider that this proposition will also hold true in respect of many non-standard working arrangements where an employee does not work on consecutive days. For instance, Mr Bongailas is a full-time employee covered by the Vehicle Award. He has been called to give evidence by the SDA. At paragraph 4 of his statement, he describes his working pattern as follows:

> My hours of work are normally 46.5 hours per week and I am normally rostered on Monday, Tuesday, Thursday, Friday and Saturday and rostered off Wednesday on each week. [182]

624. An employee that works the pattern described by Mr Bongailas during 2017 in any State or Territory will have the benefit of at least as many if not more public holidays than an employee who works Monday – Friday, as demonstrated in the table below:

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Mon – Fri	**11**	**10**	**10**	**9**	**10**	**9**	**11**	**10**
Mon – Tues Thurs – Sat	12	12	11	10	11	9	12	10

625. In the following chapter we deal with the evidence to be given by the SDA's witnesses in greater detail. For the reasons we there outline, the union's evidentiary case does not advance its proposition that employees who work

[182] Affidavit of Ian Bongailas dated 28 April 2016 at paragraph 4.

"non-standard" working arrangements are disadvantaged as compared to those who work Monday – Friday.

626. Having regard to the material before it, the Commission cannot be satisfied that, as a general proposition, an employee who does not work Monday – Friday will receive the benefit of fewer public holidays than an employee who does works Monday – Friday and that therefore the former will be disadvantaged. Indeed our analysis suggests that in many instances, the very opposite is true.

627. At its highest, the material reveals that the number of public holidays in relation to which an employee will receive some benefit is contingent upon their working arrangements. An employee working in accordance with a certain arrangement will not necessarily receive the benefit of the same number of public holidays as an employee who works in accordance with another arrangement. It does *not* follow, however, that an employee who does not work Monday – Friday is necessarily disadvantaged when compared to an employee who works Monday – Friday. Consequently, the central premise of the SDA's case is flawed.

628. **Thirdly**, the extent to which the SDA seeks to assert that employers deliberately alter employees' rosters in order to avoid obligations relating to public holidays is unclear. Whilst it is implicit in the statements provided by two of its witnesses[183], in its written submissions the SDA does not argue that that is the mischief to which its claim is directed. We nonetheless make the following observations in this regard.

629. The provisions that apply to the hours of work for a part-time employee in each of the Awards are very rigid. They require agreement at the time of engagement between an employer and employee regarding the number of hours to be worked, the days upon which they will be worked and the specific starting and finishing times. A variation to that agreement cannot generally be

[183] Affidavit of Ian Bongailas dated 28 September 2016 at Affidavit of Brooke Baker dated 5 October 2016.

made by an employer unilaterally. Most of the Awards require the consent of the employee.

630. For instance, clauses 12.2 and 12.3 of the Fast Food Award are in the following terms:

> **12.2** At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:
>
> - the number of hours worked each day;
> - which days of the week the employee will work;
> - the actual starting and finishing times of each day;
> - that any variation will be in writing;
> - that the minimum daily engagement is three hours; and
> - the times of taking and the duration of meal breaks.
>
> **12.3** Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

631. Whilst the Retail Award and the Hair and Beauty Award enable an employer to vary a part-time employee's roster (but not the agreed number of hours) with the provision of a minimum notice period, both of those awards expressly require that an employer must not alter the roster to avoid award obligations. For example, clause 12.8 of the Retail Award states as follows: (emphasis added)

> **12.8 Rosters**
>
> **(a)** A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee.
>
> **(b)** The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee.
>
> **(c)** Rosters will not be changed except as provided in clause 12.8(a) from week to week, or fortnight to fortnight, <u>nor will they be changed to avoid any award entitlements.</u>

632. Consequently, there is very limited scope to vary the hours of a part-time employee under the Awards. The aforementioned aspects of the relevant

provisions provide an important safeguard against any alleged manipulation of rosters.

633. In this way, the Awards contain adequate measures to prevent employers from unilaterally altering the rosters of part-time employees in order to avoid public holiday obligations. To the extent that the SDA holds the view that this nonetheless occurs in a manner that it prohibited by those award provisions; that is a matter for enforcement proceedings. An additional award entitlement cannot be justified on that basis.

634. As we have previously explained, the Awards allow for a reasonable degree of flexibility as to the arrangement of ordinary hours of full-time employees. This is entirely appropriate. An employer's ability to rearrange a full-time employee's ordinary hours in light of, for instance, sales forecasts or other operational requirements is an essential flexibility. Their discretion in this regard is of course limited by the fact that a full-time employee is engaged to work 38 ordinary hours each week (subject to any averaging of those hours).

635. The question that here arises is whether an additional award obligation should be imposed on employers where they exercise their right to alter a full-time employee's ordinary hours for legitimate business reasons associated with public holidays.

636. To argue that the motivating factor is simply to avoid paying public holiday penalty rates simplifies the decision-making process that a business employs in determining its rosters. A complex mix of factors can contribute to an employer's assessment as to the number of employees required to work on any given day and the selection of those employees. The relevant factors include but are not limited to operational requirements, sales forecasts, maintaining an appropriate skills mix, planned and unplanned staff absences, and the availability of other employees (such as casual employees).

637. It is entirely legitimate that an employer make this assessment in respect of the performance of work on a public holiday in the same manner as they do on any other day. The imposition of an additional obligation in such

circumstances in entirely unfair and unreasonable. To the extent that the proposed clause results in an employer making changes to the constitution of its workforce or the manner in which it arranges the hours of work of its employees such that its efficiency and productivity is adversely impacted, this is contrary to s.134(1)(d) of the FW Act.

638. Whilst the SDA's evidence appears to suggest that two of the witnesses hold the view that their employers alter their roster for the purposes of avoiding payment of public holiday penalty rates, the basis upon which they have reached that conclusion is not made out in their evidence.

639. In any event, there is an entirely insufficient amount of evidence in these proceedings to allow the Full Bench to find that such practices occur or have occurred in any instances in addition to the two alleged by the SDA's witnesses. It is not open to the Commission to find that deliberate changes to rosters are widely made by employers covered by the Awards in order to avoid public holidays and that employees are in fact disadvantaged as a result.

640. **Fourthly**, it is trite to observe that not all employees under the awards system receive the benefit of all entitlements afforded by it and the NES. Whilst some apply to certain employees, others will arise only in relation to other employees. An employee's eligibility for an entitlement under the safety net is contingent upon a range of factors including the basis upon which they are engaged (that is, whether they are a full-time, part-time or casual employee), the hours that they work and the work that they in fact perform. An employee engaged to work Monday – Friday does not receive weekend penalty rates. An employee engaged on day work does not receive shift loadings. A casual employee does not have an entitlement to annual leave or paid personal/carer's leave. A full-time or part-time employee does not have an entitlement to a casual loading.

641. The objective of the safety net is not to deliver access to all entitlements to all employees. It is not designed or intended to afford an entitlement to every provision to every employee. Rather, the role of the safety net is to is to strike a careful balance of terms and conditions that are provided to all employees

covered by it, having regard to the basis upon which the relevant entitlements are extended to certain employees, the factors that those entitlements seek to compensate for, the nature of the entitlement, the quantum of the entitlement, the other entitlements to which the relevant employees already have access and the impact on employers.

642. The SDA has not identified any cogent reason why all full-time employees and part-time employees working an average of five days a week who are not rostered to work on public holidays should nonetheless receive some benefit. Its entire case rests on broad notions of fairness and parity. In our submission, for the reasons here articulated, its arguments in this regard should not be accepted. To do so would be to upset the balance presently struck by the safety net including the entitlement found at s.116 of the FW Act.

643. Further, employees who work "non-standard" working arrangements are in receipt of various entitlements that do not accrue to other employees. For instance, such employees are commonly paid weekend penalty rates, shift loadings and may have an entitlement to an additional week of annual leave pursuant to the NES.

644. In addition, we consider that to some degree, an employee who works non-standard working arrangements, particularly part-time employees, ought to be aware that their working arrangements will have some bearing on the entitlements afforded to them. This includes weekend penalty rates, shift loadings, certain allowances, the amount of annual leave that will accrue and public holidays. For instance, where a part-time employee agrees to work on certain days that do not include Mondays, the employee does so knowing that multiple public holidays fall on a Monday and that he or she will not be rostered to work on those days, as a result of which no entitlement in respect of those days will accrue. It is not fair that employers be required to afford those employees additional compensation notwithstanding their agreement in this regard.

645. The SDA has not established, as it must do to warrant the award variation sought, that the clause proposed is necessary to achieve the modern awards

objective. Submissions that compare the entitlements of one class of employees with another and which simplistically plead that a "disadvantage" arises and must be remedied, ignore the intricacies of the current safety net and the balance that it must strike amongst employees, and between employees and employers.

646. **Fifthly**, we consider that the unions' arguments regarding the alleged "disadvantage" are particularly unconvincing in relation to those who are not rostered to work on a public holiday because they *elect* not to work on that day by virtue of their right to be absent pursuant to s.114(1) of the FW Act.

647. That is, where any full-time employee or part-time employee who works an average of five days a week exercises their right to be absent pursuant to s.114(1) of the FW Act or refuses to work consistent with s.114(3), we can identify no cogent reason why any additional benefit should be bestowed upon such an employee.

648. The employee, in those circumstances, is not rostered to work because the employee has exercised a right granted to him or her by the statute to not work on that day. The employee is not working at their own choosing. Any alleged disadvantage that accrues by virtue of the fact that the employee does not work on that public holiday results from a conscious decision made by the individual.

649. It is entirely unjustifiable to impose an award obligation on an employer in these circumstances. The SDA has not so much as attempted to explain the reason for which such a clause could be considered *necessary* in the relevant sense. Implicit in this silence is perhaps an acceptance that it is ludicrous to suggest that an employee is "disadvantaged" in such circumstances so as to warrant a requirement that they be granted additional pay or leave pursuant to the Awards.

650. **Sixthly and in summary,** the issues we have here raised highlight the breadth of the SDA's claim and the unfairness that it would create. The case mounted by the union is absolutely void of any rationale for affording an

entitlement to employees in all of the circumstances that would be covered by the proposed clause. This is particularly so because, as we have here established:

- The proposition that employees who work "non-standard" arrangements are disadvantaged as compared to those who work Monday – Friday is fundamentally flawed and, as demonstrated above, in many cases is simply untrue;

- The application of the proposed clause is not limited to circumstances in which an employee works in accordance with "non-standard" arrangements; and

- The NES already affords an entitlement in certain circumstances where an employee is not rostered to work on a public holiday. The SDA has not established that it is necessary to supplement the pre-existing safety net.

8.7 The SDA's Evidence

651. We here deal briefly with the evidentiary case mounted by the SDA.

652. **Firstly**, the SDA has called only 15 lay witnesses in support of its case, of whom 12 are full-time employees[184], one is employed on a part-time basis[185] and the basis of another's employment is not clear[186].

[184] Affidavit of Ian Bongailas dated 28 September 2016; Affidavit of Brooke Baker dated 5 October 2016; Affidavit of Lauren Benallack dated 5 October 2016; Affidavit of Jillian Carroll dated 6 October 2016; Affidavit of Dorothy Clark dated 8 October 2016; Affidavit of Robert Crisp dated 6 October 2016; Affidavit of Peter Ericksen dated 6 October 2016; Affidavit of Ibrahim Hassan dated 3 October 2016; Affidavit of Thomas Pender dated 5 October 2016; Affidavit of Elise Pollard dated 6 October 2016; Affidavit of Simon Redden dated 8 October 2016 and Affidavit of David Whittaker dated 6 October 2016.

[185] Affidavit of Natalie Procter dated 28 September 2016.

[186] Affidavit of Ashlea Roberts dated 1 October 2016. See also affidavit of Karen Greaves dated 1 October 2016, who gives evidence regarding Ashlea Roberts

653. The table below identifies the number of witnesses covered by each of the Awards. It is trite to observe that they do not represent so much as a fraction of a percentage of the employees engaged in the relevant industries:

Award	Number of Witnesses
Retail Award	8
Hair and Beauty Award	2
Fast Food Award	0
Storage Services Award	3[187]
Vehicle Award	1

654. The SDA's evidence is by no means representative of the industries covered by the Awards.

655. **Secondly**, the vast majority of witnesses[188] simply tell of the days upon which they are typically rostered to work and the public holidays that, as a consequence of those rostering arrangements, fell on a day that they were not so rostered. These witnesses do not allege that this occurred due to any deliberate decision made by their employer in order to avoid obligations associated with public holidays. Indeed when regard is had to their evidence regarding the specific days upon which the relevant public holiday fell, it is clear that this occurred on a day that the employee was not, in accordance with their ordinary roster pattern, required to work.

656. Neither the witness' statements nor the SDA's submissions contain any comparison between the public holidays to which a Monday – Friday worker was entitled over the relevant period of time and those to which each witness was entitled. Accordingly, the evidence does not, in and of itself, establish that there is any issue of parity between the witness and an employee who works Monday – Friday.

[187] Whilst it is not clear from the statements themselves, we proceed on the assumption that Robert Crisp, Peter Eriksen and David Whitaker are covered by the Storage Services Award.

[188] Affidavit of Lauren Benallack dated 5 October 2016; Affidavit of Jillian Carroll dated 6 October 2016; Affidavit of Dorothy Clark dated 8 October 2016; Affidavit of Ibrahim Hassan dated 3 October 2016; Affidavit of Thomas Pender dated 5 October 2016; Affidavit of Elise Pollard dated 6 October 2016; Affidavit of Natalie Procter dated 28 September 2016 and Affidavit of Simon Redden dated 8 October 2016.

657. **Thirdly**, some witnesses simply note that their employers provide (or did provide) them with some additional benefit where a public holiday falls (or fell) on a public holiday. Whilst in some instances this appears to be by virtue of an enterprise agreement applying to the employee,[189] in other cases no documented source of the benefit is identified.[190]

658. We do not understand the relevance of this evidence to the current proceedings other than to establish that the process of enterprise bargaining has been successful in the relevant instances in securing the entitlement here sought by the SDA in the relevant agreements and that in some instances, employers afford their employees over-award benefits which include entitlements of the nature sought.

659. **Fourthly**, having regard to the submissions we have here made, only the following factual propositions can be distilled from the SDA's evidence:

- A very small number of employees covered by some of the Awards are engaged in "non-standard working arrangements", five days a week;
- A very small proportion of such employees will, in some instances, not receive the benefit of some public holidays where they fall on a day that they are not rostered to work;
- A very small number of employers covered by some of the Awards do not presently afford their employee with any additional benefit in the aforementioned circumstances;
- One employer covered by one of the Awards currently has an enterprise agreement in place which contains an entitlement that is similar to the one here sought by the SDA; and

[189] Affidavit of Robert Crisp dated 6 October 2016; Affidavit of Peter Ericksen dated 6 October 2016 and Affidavit of David Whittaker dated 6 October 2016.

[190] Affidavit Karen Greaves dated 1 October 2016; Affidavit of Elise Pollard dated 6 October 2016 and Affidavit of Ashlea Roberts dated 1 October 2016.

- In at least the aforementioned instance, the SDA was successful in securing the inclusion of a provision similar to that which is here sought in an enterprise agreement.

660. Ai Group may seek to deal with the SDA's evidence in greater detail once respondent parties have had an opportunity to test it.

8.8 Section 138 and the Modern Awards Objective

661. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

662. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

663. We also note that each award, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether additional entitlements for employees not rostered to work on a public holiday should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

664. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[191]

665. The 'necessary' test must be considered with respect to each element of every proposal put by the SDA. By way of example, the union must establish that in relation to the Fast Food Award:

- A provision affording the proposed entitlement to all full-time employees is necessary;
- A provision affording the proposed entitlement to all part-time employees who work an average of five days per week is necessary;
- A provision affording another day or part-day of time off in lieu in the relevant circumstances is necessary;
- A provision affording an equivalent day or part day's pay is necessary;
- A provision affording an additional day or part-day of annual leave is necessary;

and so on in relation to each and every element of the proposed clause.

666. The SDA must then establish that every element of the proposed clause is necessary in relation to each of the remaining Awards.

667. That the variations proposed by the SDA may not adversely affect all employers in an industry is not the test to be applied in determining whether

[191] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

the variations should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific types of businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

668. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine productivity in a certain industry or for employers covered by an award. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

669. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

670. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the

considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[192]

671. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.

672. For all the reasons we have here set out, the SDA has *not* overcome that threshold. It has failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the Awards each meet the modern awards objective.

673. In the submissions that follow, we deal with each element of s.134(1) of the FW Act. In so doing, we note that the SDA has not troubled itself with so much as attempting to address these pivotal statutory considerations.

A 'Fair' Safety Net

674. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[193]

675. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC

[192] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[193] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[194]

676. The grant of the SDA's claim would be unfair to employers in various ways.

677. **Firstly**, the imposition of an additional financial liability and operational difficulties on employers in the absence of any sound merit basis for it is entirely unfair. The SDA has not established that there is any serious foundation for the clause it has proposed. On this basis alone, we consider that the claim should be dismissed.

678. **Secondly**, the proposed clause has the effect of granting all full-time and part-time employees who work an average of five days per week an entitlement in relation to all public holidays that fall on Monday – Friday, notwithstanding the union couching its case by reference to those who work "non-standard" working arrangements. There is no apparent basis for the windfall gain that would flow to the many employees who do not suffer the disadvantaged alleged by the union. It would be unfair to saddle employers with additional costs and operational complexities in such circumstances.

679. **Thirdly**, a particular unfairness flows to employers by virtue of the fact that the proposed clause applies where an employee *elects* not to work on a public holiday for the reasons we have earlier set out.

680. **Fourthly**, we have earlier set out the broad range of circumstances in which an employee would have access to the entitlements afforded by the proposed clause. We consider that it is extremely unfair to employers if the entitlement

[194] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

is granted to employees who are not rostered to work on a public holiday due to circumstances that are beyond the employer's immediate control such as a shopping centre's trading hours, requirements of legislation that places limitations on trading hours or because the business' usual trading hours do not include the day on which the public holiday falls.

681. **Fifthly**, it is equally unfair if the entitlement arises in circumstances where an employee is not rostered to work because, due to operational requirements or other legitimate business reasons, the employer does not require the employee to work.

682. **Sixthly**, the proposed clause is particularly unfair because it would apply to employees who already have the benefit of s.116 of the FW Act, as such employees would be "double-dipping".

683. **Seventhly**, the provision of an additional entitlement where an employee works unrostered overtime on the public holiday, in addition to the payment of overtime rates for that work, is also unfair to employers. There is no justification for such a generous entitlement in relation to the performance of such work.

684. **Eighthly**, the proposed clause does not deal with the issue of shiftworkers for the purposes of calculating the average number of days that a part-time employee works in a week. As we have explained earlier, an employee who works a shift that commences on one calendar day and concludes on the following calendar day, for the purposes of the proposed clause, may be considered as having worked on two "days". This necessarily renders it more likely that the employee will be entitled to the provisions of the clause, absent any justifiable basis for such an outcome. In this way, the clause is unfair to employers.

685. The introduction of the proposed clause in the circumstances described above would not be in keeping with the provision of a fair safety net.

A 'Minimum' Safety Net

686. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

687. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provisions here sought by the SDA. Matters such as these are more appropriately dealt through enterprise bargaining.

A 'Relevant' Safety Net

688. In the recent Penalty Rates Decision, the Full Bench expressed the view that: (emphasis added)

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. …[195]

689. A modern award will suit contemporary circumstances if it reflects modern work practices, working arrangements and operational requirements. Further, it will be drafted having regard to other existing parts of the safety net such as the NES.

690. We have earlier articulated our reasons for disputing the proposition that employees who do not work Monday – Friday are engaged on "non-standard" arrangements. We have also made submissions regarding the relevance of the NES to these proceedings. Having regard to those matters, the proposed provisions cannot appropriately form part of a "relevant" safety net.

The NES

691. Earlier in this submission we have outlined the relevant provisions of the NES and in particular, s.116 of the Act. As we have earlier explained, when the Awards are considered *with the NES*, as required by s.134(1), it is apparent

[195] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

that a fair and relevant minimum safety net is presently afforded to those not rostered to work on a public holiday and that therefore, the clause sought is not necessary.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

692. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[196]

693. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[197]

694. The Commission's Penalty Rates Decision provides the most recent data for the 'low paid' threshold:[198]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

695. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The SDA has not, however,

[196] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[197] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[198] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Awards are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Awards are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

696. As a consequence of this deficiency in the case mounted by the SDA, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

697. The SDA's submissions in the current proceedings, and their repeated attempts to seek the inclusion of the relevant entitlement (or one very similar in nature) in prior proceedings, suggests that this is an issue of extreme importance to the union, which, absent its inclusion in the awards system, would encourage it and its members to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

698. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase

employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

699. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the awards that are the subject of the SDA's claim, each of which would have the effect of introducing additional costs and inflexibilities.

700. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be significantly lifted, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

701. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

702. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. <u>The social inclusion referred to in this context is employment.</u> In other words,

s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[199]

703. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

704. To the extent that the provision proposed would result in employers altering the constitution of its workforce by and/rostering arrangements, for instance, by engaging fewer part-time employees and instead requiring its casual employees to work additional shifts, this would adversely affect the need to promote social inclusion.

705. Accordingly, s.134(1)(c) cannot be relied upon in support of the SDA's claim.

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

706. The provision proposed by the SDA is contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work for the reasons that follow.

707. **Firstly**, the clause would grant an employee the right to an additional day or part-day in lieu; an additional day or part-day of annual leave; or an equivalent day or part-day's pay. Either of the first two options would result in additional staff absences.

708. Virtually any form of leave taken by employees can have an adverse impact upon the need to promote flexible modern work practices and the efficient and productive performance of work. This is because staff absences have an impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations.

[199] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

709. In some circumstances, it may not be possible for an employer to engage relief staff to cover the absent employee. To the extent that this adversely affects the efficiency with which the relevant work is performed in the employee's absence or indeed whether the work can be performed at all, the entitlement to additional leave is inconsistent with s.134(1)(d).

710. However, an employer's access to relief staff is not necessarily the end of the matter. For instance, if the replacement employee does not possess the necessary skills, knowledge or experience to undertake the work ordinarily performed by the absent employee, this self-evidently will also undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

711. **Secondly**, to the extent that the proposed provision results in employers making alterations to the constitution of their workforce, their rostering arrangements or other practices such that its efficiency and productivity is adversely impacted, the proposed provision is contrary to s.134(1)(d).

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

712. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

713. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

714. The clause sought by the SDA would adversely impact business in various ways. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

715. **Firstly**, the proposed clause is exceptionally broad in its application. At the very commencement of this chapter we explained that although the union's claim is couched with reference to employees working "non-standard" arrangements, it would in fact apply to any full-time employee or part-time employee who works an average of five days per week. This is a matter that goes squarely to the potential impact of the claim.

716. **Secondly**, the proposed clause would apply in relation to any public holiday that falls on Monday - Friday; including those identified at s.115(1)(a) of the FW Act, substitute public holidays and additional public holidays. As identified in chapter 2 of this submission and earlier in this chapter, that includes a considerable number of public holidays. This too runs directly to the potential impact of the claim.

717. **Thirdly**, the claim would result in increased employment costs. This is self-evident. Those costs would arise because the proposed clause provides an entitlement to additional pay or additional leave. Indirect costs would also arise in circumstances where an employer engages staff to cover resulting staff absences.

718. **Fourthly**, the aforementioned cost implications are compounded where an employee has an entitlement to payment at the base rate of pay for ordinary hours pursuant to s.116 of the FW Act.

719. **Fifthly**, businesses would be met with additional costs in circumstances where they do not operate on public holidays for any of the reasons we have previously articulated. The same can be said for circumstances in which an employer requires an employee to work, for instance, unrostered overtime. This is inherently unfair and unjustifiable.

720. **Sixthly**, for the reasons we have set out above in relation to s.134(1)(d), the proposed clause may also adversely impact productivity.

721. **Seventhly,** the proposed clause would increase the regulatory burden by virtue of the fact that it is not "simple and easy to understand". We address this matter shortly.

722. **Eighthly**, the provision requires an employer to identify those employees that are eligible for the entitlement proposed. This involves ascertaining which of its part-time employees work "an average of five days per week".

723. Putting to one side the obvious ambiguities that arise from the drafting of the clause, it is apparent that the clause would require an employer to undertake an analysis of every part-time employee's working patterns every time such an employee is not rostered to work on a public holiday. This is a potentially an extremely time consuming and resource intensive task, particularly in the context of large businesses who engage a significant number of employees. It would involve a careful consideration of the relevant employment records and the necessary arithmetic exercise in respect of each of those employees. The difficulty may be further compounded where the employee has been employed by the employer over an extended period of time.

724. **Ninthly**, the provision requires the employee's agreement as to which of the three identified entitlements he or she will be afforded. The process of discussing the matter with the employee and if necessary, undertaking a process of negotiation in order to reach a consensus can be very time consuming and resource intensive. In this way, the administration of the clause would increase an employer's regulatory burden.

The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

<u>Simple and Easy to Understand</u>

725. It is self evident that the proposed clause is not simple and easy to understand.

726. **Firstly**, the manner in which the average number of days worked by a part-time employee is to be calculated is by no means clear. For instance, the clause does not identify the period over which the number of days is to be averaged. That is, is the number of days worked to be averaged over the entire period of service with the employer? Or is it to be calculated over a shorter period of time?

727. **Secondly,** it is not clear whether, for the purposes of making the above calculation, only days upon which ordinary hours were worked are to be included or whether the relevant calculation also includes days upon which only overtime was performed.

728. **Thirdly**, as we have earlier explained, it is not clear how the provision would apply in enterprises where employees are not, as such, "rostered".

729. **Fourthly**, the meaning of "day" and "part-day" for the purposes of identifying the amount of pay or leave due to an employee is entirely unclear. We have discussed this issue at the commencement of this chapter.

730. **Fifthly,** the provision is silent as to the rate at which an employee is to be paid in circumstances where the clause applies. We have dealt with this issue earlier in this submission also.

A Stable Modern Awards System

731. The need to ensure a stable system tells against granting the claim in the absence of a sound evidentiary and meritorious case.

732. The SDA has failed to mount any probative evidence that might establish the many factual propositions upon which it seeks to rely, nor has it established any sound rationale for expanding the safety net in the manner sought. This too weights against the grant of the claim.

The Likely Impact on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

733. To the extent that the proposed clause is at odds with ss.134(1)(d), 134(1)(f) and 134(1)(g), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

8.9 Conclusion

734. The SDA's claim should be dismissed for all of the reasons that follow.

735. **Firstly**, the central premise of the union's claim, that employees who work "non-standard" arrangements are disadvantaged compared to those who work Monday – Friday is fundamentally flawed and, in many cases, plainly erroneous. The arguments are particularly unconvincing in relation to those who *elect* not to work on public holidays.

736. **Secondly**, the proposed clause would provide an additional entitlement in circumstances where an employee presently has an entitlement under s.116 of the FW Act. The SDA has not demonstrated that supplementing the NES in this way is warranted. Further, to this extent the clause would result in double-dipping, which is inherently unfair.

737. **Thirdly**, the application of the clause is extremely broad and as a result is likely to have a significant impact on business by way of additional employment costs, an increased regulatory burden and lost productivity.

738. **Fourthly**, the provision proposed is by no means simple and easy to understand. It is ambiguous in various respects.

739. **Fifthly**, to the extent that the SDA seeks to rely upon the Public Holidays Test Case decisions, those decisions were made in a very different legislative context. They should not here be followed.

740. **Sixthly**, the SDA has not established any cogent reasons for departing from the Commission's decision to dismiss the ACTU's claim during the two year review, in which it considered the insertion of a very similar clause as that which is here proposed.

741. **Seventhly**, a consideration of other modern awards does not lend support to the SDA's case. The very vast majority of award provisions that the SDA refers to in other awards are fundamentally different in nature and narrower in scope.

742. **Eighthly**, even if it is accepted that some pre-modern awards underpinning the Awards contained a provision similar to that which is here sought, that does not, in and of itself, provide a proper basis for an award variation in this Review. The power to include a term in an award is constrained by s.138 of the FW Act.

743. **Ninthly,** the evidentiary case presented falls well short of establishing any factual propositions that would assist the SDA's case.

744. **Tenthly**, the SDA has not established that the provision proposed is necessary to ensure that each of the Awards provides a fair and relevant minimum safety net of terms and conditions.

Australian Industry Group

Attachments to submission in reply

- Attachment A - Public Holiday Provisions in Modern Awards
- Attachment B - Analysis of Metal Industry Pre-Reform Industrial Awards and NAPSAs
- Attachment C - Analysis of Food, Beverage and Tobacco Manufacturing Industry Pre-Reform Industrial Awards and NAPSAs
- Attachment D - Analysis of Graphic Arts, Printing and Publishing Industry Pre-Reform
- Industrial Awards and NAPSAs
- Attachment E - Analysis of Vehicle Industry Pre-Reform Industrial Awards and NAPSAs