

IN THE FAIR WORK COMMISSION

Four Yearly Review of Modern Awards
Plain Language Drafting – Substitution of Public Holidays
(AM2016/5)

**CONSTRUCTION FORESTRY MARITIME MINING &
ENERGY UNION – MANUFACTURING DIVISION
SUBMISSION**

(21 May 2018)

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AM2016/15
Plain Language Re-drafting – Substitution of Public Holidays

Submission of CFMEU – Manufacturing Division

BACKGROUND

1. The CFMEU – Manufacturing Division provides these submissions in response to the Statement issued by the President on 15 March 2018¹ ('Statement') and the Directions of Vice-President Hatcher on 27 April 2018² ('Directions').
2. On 27 March 2018, the amalgamation of the Textile, Clothing and Footwear Union of Australia (TCFUA) with the Construction, Forestry, Mining and Energy Union (CFMEU) and the Maritime Union of Australia (MUA) took effect.³
3. On the amalgamation taking effect, the TCFUA⁴ and MUA⁵ were de-registered as registered organisations under the *Fair Work (Registered Organisations) Act 2009* (RO Act).
4. Upon the amalgamation, the Forestry, Furnishing, Building Products and Manufacturing Division of the CFMEU became the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union. The members and activities of the former TCFUA were absorbed into the CFMEU – Manufacturing Division.

¹ 4 yearly review of modern awards – Plain language re-drafting, Statement, [2018] FWC 1501, (15 March 2018)

² 4 yearly review of modern awards – Plain language re-drafting, Directions, (27 April 2018)

³ *Construction, Forestry, Mining and Energy Union; the Maritime Union of Australia and Textile, Clothing and Footwear Union of Australia* [2018] FWC 1017, Gostencnik DP (6 March 2018). Note: This decision is currently the subject of an appeal by AMMA and MBA (see C2018/1245)

⁴ Textile, Clothing and Footwear Union of Australia [2018] FWC 1794, Gostencnik DP (27 March 2018)

⁵ The Maritime Union of Australia [2018] FWC 1797, Gostencnik DP (27 March 2018)

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5. The Statement invited interested parties to make submissions on:
 - *The accuracy of the list of substitution clauses referred to in paragraph [10] of [2018] FWC 1501; and*
 - *Whether an award term which permits public holidays substitution by agreement between an employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of s.55(1).*⁶

6. In these proceedings, by way of general application, the CFMEU – Manufacturing Division supports and adopts the submissions filed by the Construction Forestry Maritime Mining and Energy Union (Construction and General Division)⁷ ('CFMMEU – C&G) and the Australian Manufacturing Workers Union ('AMWU').⁸

Accuracy of the list of awards in Attachment A to the Statement

7. Attachment A of the Statement is a list of modern awards 'that allow substitution of public holidays by majority agreement'. The CFMEU – Manufacturing Division has an interest in the following awards in Attachment A:
 - *Joinery and Building Trades Award 2010 ('Joinery Award');*
 - *Manufacturing and Associated Industries and Occupations Award 2010 ('Manufacturing Award')*
 - *Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award')*
 - *Timber Industry Award 2010 ('Timber Award')*

8. The CFMEU – Manufacturing Division agrees that the *Joinery Award* allows for the

⁶ Directions; op cit; at [2]

⁷ (AM2016/15) Submission of the Construction Forestry Maritime Mining and Energy Union (Construction and General Division) (17 May 2018)

⁸ (AM2016/15) Submission of the Australian Manufacturing Workers Union (17 May 2018)

substitution of public holidays by majority agreement.

9. We disagree however, that the *Manufacturing Award*, *TCF Award* and the *Timber Award* should be included in Attachment A. This is because the relevant provisions of the respective awards do not limit substitution of public holidays by majority agreement, but also provide for substitution by agreement between an employer and an individual employee. The relevant provisions are reproduced below.

TCF Award

10. Sub-clause 43.4 of the *TCF Award* provides:

43.4 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.

Timber Award

11. Sub-clause 36.2 of the *Timber Award* is in relevantly identical terms to the equivalent provision of the *TCF Award* and provides as follows:

36.2 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.

12. Sub-clause 43.4 of the *TCF Award* and sub-clause 36.2 of the *Timber Award* are

clearly and unambiguously, facilitative provisions providing for both majority and individual agreement with respect to public holiday substitution.

Manufacturing Award

13. Sub-clause of the Manufacturing Award is in relevantly identical terms to the equivalent terms in the TCF Award and the Timber Award. As submitted by the AMWU⁹, additionally, clause 8.3 of the *Manufacturing Award* outlines the process for Facilitation by majority or individual agreement with respect to a range of matters, including substitution of public holidays.
14. It is therefore submitted that the each of the *TCF Award*, the *Timber Award* and the *Manufacturing Award* should be removed from the list in Attachment A to the Statement.

Whether an award term which permits public holidays substitution by agreement between an employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of s.55(1)

15. The CFMEU – Manufacturing Division submits that such a term in a modern award, does not exclude the NES or any provision of the NES, within the meaning of s.55(1).
16. Section 115(3) provides:
- ‘A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part day that would otherwise be a public holiday because of subsection (1) of (2).’*
17. It is evident from the words of s.115(3), in particular the inclusion of the word ‘*may*’, that s.115(3) is discretionary, rather than prescriptive. Further, neither s115(3) or any

⁹ AMWU submission; op cit; at paragraphs 3 - 9

other provision of the NES on Public Holidays prescribes the form of a public holiday substitution term which may be included in a modern award.

18. Critically, an award term which provides for public holiday substitution by majority agreement does not operate to deprive an employee of any NES public holiday entitlement contained in sections 114 to 106 of the FW Act. Public holiday substitution terms in modern awards are, we submit, correctly characterised as being facilitative in nature. Such terms do not have any detrimental effect on an employee's rights or entitlement with respect to public holidays under the NES.

19. In these circumstances, such award terms are entirely consistent with section 55(4) (ancillary or incidental award terms) and the NES.

20. The terms are otherwise permissible because of the effect of section 55(5) in that they are substantially the same as the substantive terms of the NES, even if not incidental or ancillary, of facilitative of the NES entitlement. Section 55(5) provides:

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

21. Further, in construing any potential ambiguity in s.115(3) (which is not conceded) it is appropriate to have recourse to the Explanatory Memorandum, The Explanatory Memorandum explains the purpose of the "agreement protection" in s.115(3) as: *[this] means that a modern award or agreement cannot provide that a substitute day can be determined unilaterally by the employer". The current provisions serve rather than frustrate that objective."*

22. In addition to the above, we support and adopt the submissions of the CFMEU (C&G)

and the AMWU.

Filed by:
CFMEU – Manufacturing Division
(21 May 2018)