

**IN THE FAIR WORK COMMISSION
AM2016/15**

4 Yearly Review of Modern Awards – Plain Language Re-drafting – Substitution of Public Holidays

Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These submissions are filed on behalf of the National Road Transport Association (NatRoad) in response to the Statement of Justice Ross dated 15 March 2018¹ (the Statement) and the related Directions of Vice President Hatcher dated 27 April 2018² (the Directions).
2. The Directions invite interested parties to file submissions on two points:
 - 1) *The accuracy of the list of substitution clauses referred to the Plain Language Full Bench referred to in paragraph [10] of [2018] FWC 1501; and*
 - 2) *Whether an award term which permits public holiday substitution by agreement between an employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of section 55(1)³.*
3. NatRoad's interests arise principally from members' coverage of the *Road Transport and Distribution Award 2010 (Distribution Award)* and the *Road Transport (Long Distance Operations Award 2010 (Long-Distance Award)*. These awards contain a term permitting the 'Substitution of certain public holidays by agreement at the enterprise'. Several other awards also regulate members' employment arrangements. Four of those awards are included in the list set out in paragraph [10] of the Statement as currently containing substitution of public holiday clauses, namely:
 - the *Clerks—Private Sector Award 2010*;
 - the *Manufacturing and Associated Industries and Occupations Award 2010*;
 - the *Transport (Cash in Transit) Award 2010*; and
 - the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.
4. NatRoad is a not for profit industry association. It represents the interests of more than 1100 contract carriers, employing contractors, owner drivers and other businesses that operate in the road transport industry throughout Australia. Most of NatRoad's members are small businesses.

¹ [2018] FWC 1501 <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc1501.htm>

² (AM2016/15) <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-dirs-270418.pdf>

³ A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

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5. This submission addresses both points as invited in the Direction, however the submissions on the second point are principally directed to the Distribution Award and the Long-Distance Award (together the **Transport Awards**).

Accuracy of List

6. In relation to point one of the Direction, NatRoad confirms that the awards we have an interest in, that is the awards that regulate our members' employment arrangements, referred to in the list in paragraph [10] of the Statement as currently containing substitution of public holiday clauses is correct.
7. However, the provisions in the relevant public holiday terms of the awards are not common, with a number of variations being evident:
- (i) the Transport Awards and the *Transport (Cash in Transit) Award 2010* (**Cash-in-Transit Award**) – clause 32.2(a) of the Distribution Award, clause 26.2(a) of the Long-Distance Award and clause 30.2(a) Cash-in-Transit Award provide '*An employer and their employees may agree to substitute another day for any prescribed in the NES. For this purpose, the consent of the majority of affected employees will constitute agreement.*';
 - (ii) the *Clerks—Private Sector Award 2010* – clause 31.2 provides '*An employer and the employees may by agreement substitute another day for a public holiday.*';
 - (iii) the *Manufacturing and Associated Industries and Occupations Award 2010* – clause 44.2 provides:
 - '(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.*'; and
 - (iv) the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* – clause 32.2 provides '*By agreement between an employer and the majority of employees in a particular workplace another day or different days may be substituted for the said days or any of them. Further, an employer and an employee may agree to substitute another day or days for the said days or any of them.*'

Exclusion of the NES

8. In its Further Submissions Re Exposure Drafts published 3 June 2016⁴, the National Tertiary Education Union (the **NTEU**) submitted that clauses in various higher education awards were inconsistent with the NES specifically, those clauses that provide for the substitution of public holidays. Specifically, that the words 'the majority of employees in an enterprise' should be replaced with the words 'an employee'.
9. The Statement identifies 78 modern awards that contain clauses which permit the substitution of a public holiday by agreement with the majority of employees.
10. Section 115(3) of the *Fair Work Act 2009* (Cth) provides that '*A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the*

⁴ NTEU [submission](#), 8 June 2016

substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).'

11. The public holiday terms in the Transport Awards provide '*An employer and their employees may agree to substitute another day for any prescribed in the NES. For this purpose, the consent of the majority of affected employees will constitute agreement.*'
12. Public holidays often create issues for small businesses when, for whatever reasons, they have to be open for business or be operational, and an employee(s) refuses to work on the public holiday.
13. However, irrespective of any decision of the Full Bench in this matter, employees will continue to have a workplace right to reasonably refuse or be absent from work on a day or part-day that is a public holiday⁵.
14. In relation to the NTEU's submission that the words 'the majority of employees in an enterprise' should be replaced with the words 'an employee' to ensure that the term is consistent, such change to the sentence 'For this purpose, the consent of the majority of affected employees will constitute agreement' will add nothing to the term in the Transport Awards.
15. NatRoad submits that compliance with the NES can be achieved, pragmatically through the removal of the entire second sentence.

Conclusion

16. As invited in the Directions we submit for the Full Bench's consideration our response to the two points set out in paragraph 2 of this submission as follows:
 - 1) *As to the accuracy of the list of substitution clauses referred to the Plain Language Full Bench referred to in paragraph [10] of the Statement⁶, for the awards we have an interest in the list is correct.*
 - 2) *Whether an award term which permits public holiday substitution by agreement between an employer and a majority of employees excludes the NES or any provision of the NES, within the meaning of section 55(1)⁷, we accept that the second sentence in the Public Holiday term in the Transport Awards, 'For this purpose, the consent of the majority of affected employees will constitute agreement' is inconsistent with the NES, and that the sentence should be removed.*

⁵ s.114 of the *Fair Work Act 2009* (Cth)

⁶ [2018] FWC 1501 <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc1501.htm>

⁷ *A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.*