



# Business SA Submission in Reply

4 yearly review of  
modern awards – *Plain  
language re-drafting –  
Substitution of public  
holidays*

**(AM2016/15)**

7 June 2018

## Introduction

1. Business SA provides this submission in reply in accordance with directions issued on 27 April 2018.<sup>1</sup> Parties were previously invited to provide submissions regarding the interaction of public holiday substitution clauses and the NES; a concern arising from the review of Group 3 Awards.<sup>2</sup> At issue was whether an award term which permits public holiday substitution by agreement between the employer and a majority of employees excludes the NES or any provision of the NES within the meaning of s 55(1) of the Act. Business SA provided a submission for this matter on 16 May 2018.<sup>3</sup>
2. The following two paragraphs summarise Business SA's May Submission. Business SA noted the statutory framework, including what we considered to be the most relevant NES provision, Division 10 – Public Holidays. Business SA submitted the NES creates two overarching public holiday entitlements: an entitlement to be absent (s 114), and an entitlement to be paid during that absence (s 116).<sup>4</sup> We further submitted that s 115 is a definition section which sets out which day or part-day will be considered the public holiday for the purposes of ss 114 and 116.<sup>5</sup> We considered s 115(3) of the Act to be particularly relevant for this discussion, as this broadly sets out the power for an award to contain terms permitting substitution of public holidays.
3. Business SA then noted that potential inconsistency needed to be considered in two contexts, firstly where only majority agreement terms exist in an award, and secondly where both majority and individual agreement terms exist in an award. Business SA considered that there may be an inconsistency where an award only contains terms permitting substitution of public holidays by majority agreement. However, Business SA submitted awards which permit substitution by majority agreement and individual agreement were clearly consistent with the NES, based on both the terms of the Act and suggestions arising from previous decisions.<sup>6</sup>

## Submissions in reply

### **Australian Business Industrial and the NSW Business Chamber (ABI)**

4. Business SA agrees with the submissions of ABI regarding the broad nature of s 115(3). We further agree that this section does not prescribe any requirements for agreements contemplated by the section.<sup>7</sup> We note a number of parties have made submissions to similar effect.
5. Business SA supports ABI's submission regarding interpretation of s 115(3). In our May Submission, Business SA submitted that there may be an inconsistency where an award contains terms providing for substitution of public holidays by majority agreement but not by individual agreement. This ambiguity arose based on the words '...may include terms providing for an employer and employee to agree...'. While we maintain an inconsistency may exist,

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<sup>1</sup> Vice President Hatcher, 'Directions – 4 yearly review of modern awards – plain language re-drafting', 27 April 2018, [3].

<sup>2</sup> [2018] FWC 1501.

<sup>3</sup> Business SA, '4 yearly review of modern awards – Plain language re-drafting – Substitution of public holidays', 16 May 2018 (**May Submission**).

<sup>4</sup> *Ibid* [14].

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* [18], [32].

<sup>7</sup> ABI, 'Plain language re-drafting: Substitution of Public Holidays', 22 May 2018, [5.1]-[5.3].

we find force in submissions suggesting the word ‘employee’ should also be read to include ‘employees’.<sup>8</sup> Business SA agrees with these submissions, and should the Commission accept this interpretation our earlier submission that an inconsistency may exist will no longer be pressed.

#### **Australian Industry Group (AIG)**

6. For the same reasons as detailed above, Business SA agrees with AIG’s submission suggesting s 115(3) should be interpreted broadly.<sup>9</sup>
7. Business SA agrees with AIG’s submission individual agreement clauses are not inconsistent with the NES.<sup>10</sup> We also agree that regardless of the outcome of this matter, individual agreement clauses should not be removed from awards.<sup>11</sup>

#### **Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU)**

8. Business SA agrees with the AMWU’s submission that majority agreement clauses are relevant to a number of s 114 paragraphs and are not inconsistent with any provision of the NES.<sup>12</sup>

#### **Community and Public Sector Union (CPSU)**

9. Business SA agrees with the CPSU’s submission that majority agreement terms are allowable under s 55(4).<sup>13</sup> We further note submissions of the CFEMU – Construction & General Division and the CFMEU – Manufacturing Division<sup>14</sup> to similar effect.
10. Business SA also agrees with the CPSU’s alternative submission regarding award terms which allow substitution by majority and individual agreement.<sup>15</sup>

#### **Health Services Union (HSU)**

11. If the Commission finds that ‘employee’ in s 115(3) does not also include ‘employees’ we agree with the HSU’s submission regarding the *Aboriginal Community Controlled Health Services Award*.<sup>16</sup>
12. Business SA partially agrees with the HSU’s submission regarding variation to public holiday substitution provisions in the *Ambulance and Public Transport Industry Award*, *Health Professional and Support Services Award*, and the *Nurses Award*. It is unclear whether the HSU’s submission to vary these awards will take the form of additional words to allow individual agreement, such as in the *Aboriginal Community Controlled Health Services Award*, or will replace majority agreement terms with individual agreement terms. If the Commission finds majority

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<sup>8</sup> ABI, ‘Plain language re-drafting: Substitution of Public Holidays’, 22 May 2018, [5.6].

<sup>9</sup> AIG, ‘Plain language re-drafting – Substitution of public holidays’, 17 May 2018, [7].

<sup>10</sup> Ibid [13].

<sup>11</sup> Ibid [16].

<sup>12</sup> AMWU submission in 2016/15 Plain Language re-drafting – Substitution of Public Holidays’, 17 May 2018, [10], [13].

<sup>13</sup> CPSU, ‘Submissions in plain language re-drafting and substitution of public holidays by agreement’, 17 May 2018, [5].

<sup>14</sup> CFMEU – Manufacturing Division, ‘Four yearly review of modern awards – Plain language drafting – Substitution of public holidays’, 21 May 2018, [15]-[19].

<sup>15</sup> Ibid [6]-[8].

<sup>16</sup> HSU, ‘Plain language re-drafting, Submissions of the Health Services Union’, 17 May 2018, [19].

agreement terms alone inconsistent with the NES, but considers awards with both majority and individual agreement substitution terms valid, these awards should only be varied to add an individual agreement term. Majority agreement terms should not be removed.

### Conclusion

13. In providing these reply submissions Business SA notes the many parties have put that majority agreement terms are not inconsistent with the NES, the basis for these submissions are varied but lead to the same conclusion. In our May Submission we put that existence of a majority agreement term and absence of an individual agreement term in an award may constitute an inconsistency with the NES. As stated earlier, while an inconsistency may exist, the weight of submissions put by parties in support of majority agreement clauses, and the varied bases of these submissions, suggest our concern may be unwarranted.
  
14. Business SA thanks the Fair Work Commission for accepting these reply submissions.

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