

From: Kate Thomson [mailto:Kate.Thomson@Ablawyers.com.au]
Sent: Tuesday, 22 May 2018 12:01 PM
To: AMOD
Cc: Chambers - Ross J; Chambers - Hatcher VP; Dick Grozier; Luis Izzo
Subject: RE: AM2016/15 Plain language re-drafting [SEC=UNCLASSIFIED] [ABLAW-ImanageDocs.FID153201]

Dear Sir/Madam

AM2016/15 Plain language re-drafting

We refer to the above and to our [email correspondence](#) below.

We **attach** a submission on behalf of our clients, ABI and the NSW Business Chamber.

Regrettably we need to seek the leave of the Commission to file outside of the amended timetable. We apologise for any inconvenience caused in this regard and appreciate the Commission's consideration of this request.

If you require further information please do not hesitate to contact me.

Yours sincerely

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Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS

PLAIN LANGUAGE RE-DRAFTING:

SUBSTITUTION OF PUBLIC HOLIDAYS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

22 MAY 2018

1. INTRODUCTION

- 1.1 These submissions are made in response to the Statement ([2018] FWC 1501) (**Statement**) and Directions issued on 27 April 2018 (**Directions**) with respect to matter AM2016/15 - Plain language re-drafting on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 These submissions specifically address the second dot point of [2] of the Directions; that is, whether an award term which permits the substitution of public holidays by agreement between an employer and a majority of employees excludes any provision of the National Employment Standards (**NES**), within the meaning of section 55(1) of the *Fair Work Act 2009* (Cth) (**FW Act**).
- 1.3 At this time, we do not propose to comment on the accuracy of the list of awards referred to in paragraph [10] and Attachment A of the Statement.

2. BACKGROUND

- 2.1 In the course of reviewing the *Educational Services (Post-Secondary Education) Award 2010* (**the Award**) and the other instruments covering the higher education sector, the National Tertiary Education Union (**NTEU**) has submitted that clauses drafted along the following lines are inconsistent with section 115(3) of the FW Act:

29.2 Substitution of public holidays by agreement

By agreement between the employer and the majority of employees in an enterprise another day may be substituted for a public holiday.

- 2.2 Our clients have previously made two submissions in respect of this issue:
- (a) On 6 May 2016, we filed a [submission in reply](#) on behalf of our clients in respect of the Group 3 Exposure Drafts, in which we suggested the equivalent clause to clause 29.2 (clause 20.2) in the Award is inconsistent with the NES; and
 - (b) on 24 November 2017, we filed a further [submission](#) expressing the view that the clause is not inconsistent with the NES (at [8]).
- 2.3 These submissions set out our clients' preferred and further developed view, which is consistent with the submission filed on 24 November 2017.

3. SECTION 55 OF THE FW ACT

3.1 Subsection 55(1) of the FW Act provides as follows:

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

3.2 The term “exclude” is not specifically defined in subsection 55(1) or elsewhere. However, the Explanatory Memorandum to the Fair Work Bill described the intention of subsection 55(1) as follows:

The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.

This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES.

4. WHAT IS THE PROVISION PURPORTEDLY BEING EXCLUDED IN THIS CASE?

4.1 The provision that is likely to be excluded by any award provision pertaining to substitution is 115(1) of the FW Act - which relevantly prescribes those days which constitute public holidays.

4.2 The modern award provisions presently under consideration seek to vary which days are considered as public holidays for the purposes of the FW Act and the modern award.

4.3 However, the operation of section 115(1) is conditioned by section 115(3) of the FW Act. Section 115(3) provides as follows:

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

4.4 It is clear from the plain meaning of the words of section 115(3) that an agreement to substitute public holidays is permitted under the NES (and therefore does not exclude the NES), provided such agreement is made in accordance with the relevant provisions of a modern award or enterprise agreement. This is further reinforced by sections 55(2) and (3) of the FW Act, which provide that the NES has effect subject to terms included in a

modern award or enterprise agreement pursuant to any power conferred in Part 2-2 of the FW Act.¹

5. THE OPERATION OF SECTION 115(3)

5.1 The language adopted in section 115(3) is very broad. It simply provides that a modern award or enterprise agreement may include terms for an employer and employee “to agree” on the substitution of a day or part-day for a public holiday.

5.2 The section does not contain any restriction or prescription as to how such agreement must be made, or with whom. For example, there is no requirement that the agreement be in writing, or that it must only be limited to an agreement between an employer and each individual employee.

5.3 The practical details regarding how an agreement is made or what type of agreement is made to substitute the public holiday are not addressed by section 115 and are left to the terms of the relevant modern award or enterprise agreement. In this way, section 115 creates the power for the Commission to include certain terms in the modern award about public holiday substitution by agreement, but does not specify precisely how that power is to be exercised.

5.4 This approach broadly reflects other provisions of the FW Act (for example, section 139) which create very broad powers for the Commission to include certain types of terms in modern awards, subject to compliance with sections that condition the exercise of modern award powers at large, such as sections 134 and 138 of the FW Act.

Does the phrase “terms providing for an employer and employee to agree” inherently contemplate agreement with an individual?

5.5 If the Commission is to conclude that an award provision pertaining to majority agreement is inconsistent with the NES, the Fair Work Commission would need to be satisfied that the phrase “terms providing for an employer and employee to agree” inherently contemplates agreements made only on an individual basis.

5.6 Our clients submit that there is no basis to construe this phrase so narrowly. This is because:

- (a) Firstly, the term “agree” does not exclusively refer to agreements between individuals. The Macquarie Dictionary relevantly defines “agree” as follows:

¹ The power to include substitution terms in a modern award derives from section 115(3), which forms part of Part 2-2 of the FW Act.

“To yield assent; consent

To be of one mind; harmonise in opinion or feeling;

To live in concord or without contention; harmonise in action

Come to an arrangement or understanding; arrive at a settlement...”²

The natural and ordinary meaning of the word “agree” can apply equally to a collective agreement as it can to an agreement on an individual basis. The Dictionary definition confirms that an agreement can simply be an understanding or arrangement arrived at by parties - a concept well suited to collective arrangements. Indeed, the concept of ‘collective agreement’ is broadly recognised within the FW Act, where “*enterprise agreements*” are agreed to by a majority of employees, as opposed to every employee.

- (b) Secondly, the mere use of the singular form of the word “employee” does not preclude an agreement being reached with employees collectively. Section 23 of the *Acts Interpretation Act 1901* (Cth) confirms that, unless a contrary intention appears in an Act:

words in the singular number include the plural and words in the plural number include the singular.

The starting point for interpreting section 115(3) of the FW Act is to assume that the reference to the word “employee” also includes references to “employees”. There is no indication within section 115 (or elsewhere in the FW Act) that this *prima facie* position is to be departed from.

- (c) Thirdly, the Explanatory Memorandum tends to confirm that the main focus of section 115(3) of the FW Act is to prevent an employer acting unilaterally to substitute a public holiday. The Explanatory Memorandum indicates there must be some agreement in place prior to substitution occurring. However, the Explanatory Memorandum - like the FW Act - is silent as to the form that any agreement is to take. The inclusion of a modern award term providing for collective forms of agreement prior to substitution occurring accordingly aligns with the underlying purpose of section 115(3), as evidenced by the Explanatory Memorandum provisions.

² Macquarie Concise Dictionary, 3rd edition, page 20

5.7 For these reasons, our clients submit that modern award clauses which permit agreement with a majority of employees do not contravene section 55 of the FW Act.



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd