



# Summary of Decision

12 April 2013

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## Transitional Review Public Holidays Decision

[2013] FWCFB 2168

### SUMMARY

1. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) provides that the Fair Work Commission must conduct a review of all modern awards as soon as practicable after 1 January 2012 (the Transitional Review). The scope of the Transitional Review was dealt with in the June 2012 Transitional Review decision [2012] FWAFB 5600. In the Public Holidays decision, the Commission adopted the June 2012 Full Bench decision and applied it to the applications before it.
2. This decision deals with 31 applications to vary public holiday provisions in 101 modern awards. Many of the applications involve matters that were expressly dealt with by the AIRC in the award modernisation process. In these circumstances the need to advance probative evidence in support of an application to vary a modern award is particularly important. The Transitional Review does not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions. As the June 2012 Full Bench stated, in the context of the Transitional Review:

“...the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome.”
3. The Full Bench also noted that it is important to recognise that we are dealing with a system in transition. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Transitional Review. Such changes are more appropriately dealt with in the 4 yearly review, after the transition process has completed given that the Transitional Review is narrower in scope than the 4 yearly reviews provided in s.156 of the Act.
4. The Full Bench had before it applications from the ACTU, individual unions and employer organisations.
5. The ACTU sought the introduction of model public holiday provisions in a large number of modern awards. There were three substantive elements to the ACTU's claim:
  - (i) to vary the public holidays entitlement for employees working non-standard hours;

- (ii) provide that a rostered day off must not be taken on a public holiday; and
  - (iii) an employee working on Christmas Day, in circumstances where the day falls on a Saturday or Sunday and is not a public holiday within the meaning of the NES, should be paid an additional loading of 50% of their ordinary time rate for the hours worked on that day and be entitled to a substitute day off.
6. The Commission rejected each element of the ACTU's claim. In relation to item (i) the Full Bench said:

“[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.”

7. As to item (ii) the Full Bench:

“[176] We note that there are presently different arrangements in modern awards dealing with the establishment and operation of RDOs and to some extent, public holidays. For reasons set out earlier, cogent reasons are required to significantly modify the present modern awards as part of this Transitional Review.

[177] There is no evidence before us as to the extent of concerns or the nature of present arrangements in workplaces regarding RDOs and public holidays that demonstrate a need to adopt modified arrangements with the modern awards.”

8. The Commission decided that it is unnecessary to express a view on the third element of the ACTU's claim because Christmas Day will not fall on a weekend until December 2016 and accordingly the claim can be considered in the more comprehensive 4 yearly review of all modern awards.
9. The Full Bench also rejected a number of other claims which sought to substantially alter current modern award provisions in relation to public holidays.
10. A number of applications to clarify ambiguity or introduce some additional flexibility in the current award arrangements were referred to individual Commission Members for determination.

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- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

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