[2019] FWCFB 5145
FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Plain language re-drafting
(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT MELBOURNE, 25 JULY 2019

Substitution of public holidays by majority agreement – alleged NES inconsistency

Introduction

[1] This decision concerns the question of whether award terms which permit the substitution of public holidays either by agreement between an employer and a majority of employees or by unilateral decision of the employer are inconsistent with the National Employment Standards (NES).

[2] This issue has arisen from a submission made by National Tertiary Education Union (NTEU) in the course of the review of the Group 3 Awards. The NTEU submitted that clauses in exposure drafts published for the *Educational Services (Post-Secondary Education) Award*, the *Higher Education Industry (General Staff) Award* and the *Higher Education Industry (Academic Staff) Award* were inconsistent with the NES in that they provided for the substitution of public holidays by methods other than by agreement between an employer and an employee in accordance with s.115(3) of the *Fair Work Act 2009* (FW Act).

[3] The issue raised by the NTEU has implications for a number of other awards. In a Statement issued on 15 March 2018 the President, Ross J, determined that there should be a broader review of all awards containing terms that provide for the substitution of public holidays either by majority agreement or unilaterally by the employer. 1 Attachment A to the Statement listed 78 awards that allow for the substitution of public holidays by majority agreement, and Attachment B listed 5 awards that allow the employer to substitute a public holiday unilaterally.

[4] Directions were issued on 27 April 2018 inviting interested parties to make submissions concerning:

- the accuracy of the list of substitution clauses identified in Attachments A and B of the Statement; and

- 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 s.55(1).

Statutory framework and relevant award provisions

[5] Part 2-2 of the FW Act contains the NES. Section 61 explains the nature and function of the NES as follows:

> **61 The National Employment Standards are minimum standards applying to employment of employees**
>
> (1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).
>
> Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.
>
> (2) The minimum standards relate to the following matters:
>
> (a) maximum weekly hours (Division 3);
>
> (b) requests for flexible working arrangements (Division 4);
>
> (c) parental leave and related entitlements (Division 5);
>
> (d) annual leave (Division 6);
>
> (e) personal/carer's leave, compassionate leave and unpaid family and domestic violence leave (Division 7);
>
> (f) community service leave (Division 8);
>
> (g) long service leave (Division 9);
>
> (h) public holidays (Division 10);
>
> (i) notice of termination and redundancy pay (Division 11);
>
> (j) Fair Work Information Statement (Division 12).
>
> (3) Divisions 3 to 12 constitute the *National Employment Standards*.

[6] Provisions of the NES pertaining to public holidays are contained in Pt 2-2 Div 10 of the FW Act. Section 114 establishes a conditional entitlement to be absent from work on public holidays as follows:

> **114 Entitlement to be absent from employment on public holiday**
>
> *Employee entitled to be absent on public holiday*
>
> (1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.
>
> *Reasonable requests to work on public holidays*
>
> (2) However, an employer may request an employee to work on a public holiday if the request is reasonable.

[7] Section 115(1) defines what constitutes a public holiday for the purpose of the entitlement in s.114 in the following terms:

> **115 Meaning of public holiday**
>
> *The public holidays*
>
> (1) The following are ***public holidays***:
>
> (a) each of these days:
>
> (i) 1 January (New Year's Day);
>
> (ii) 26 January (Australia Day);
>
> (iii) Good Friday;
>
> (iv) Easter Monday;
>
> (v) 25 April (Anzac Day);
>
> (vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
>
> (vii) 25 December (Christmas Day);
>
> (viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

(2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the ***public holiday*** .

Substituted public holidays under modern awards and enterprise agreements

(3) 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).

Substituted public holidays for award/agreement free employees

(4) An employer and an award/agreement free employee may 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).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

[8] Section 116 entitles an employee who is absent from work on a public holiday to payment at the employee's base rate of pay for the employee's ordinary hours of work on that day.

[9] Section 55 deals with the interaction between the NES and modern awards and enterprise agreements as follows:

55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

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

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

> (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
>
> (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

> (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
>
> (b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

> (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(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).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the *award or agreement entitlement*) that is the same as an entitlement (the *NES entitlement*) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards

relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

[10] Section 56 provides that:

A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.

[11] An example of an award provision which allows for the substitution of a public holiday by agreement between the employer and a majority of employees is clause 29 of the *Educational Services (Post-Secondary Education) Award 2010* (Post-Secondary Education Award), which provides:

29. Public holidays

29.1 Public holidays are provided for in the NES.

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.

[12] An example of an award provision which allows for the employer to substitute a public holiday unilaterally is clause 27 of the *Higher Education Industry (Academic Staff) Award* (Academic Staff Award). Clause 27 provides:

27. Public holidays

27.1 Public holidays are provided for in the NES.

27.2 Substitution of public holidays where University holidays provided

An employer may substitute a public holiday or part holiday for another working day or part-day to be taken during a period of institutional close-

down. Where substitution occurs the substituted day or part day will be the public holiday for the purposes of this award.

[13] Clause 33.2 of the *Higher Education Industry (General Staff) Award* (General Staff Award) is in the same terms as clause 27.2 of the Academic Staff Award.

Submissions

NTEU

[14] The NTEU submitted that clause 27.2 of the Academic Staff Award reflected a longstanding practice in universities of scheduling teaching activities on some public holidays and treating these public holidays as ordinary days for the purpose of the university timetable. A substitute day during non-term time is then offered to avoid a requirement to pay public holiday penalty rates. The NTEU submitted that clauses which allowed this type of arrangement to take effect contravened the NES because s.115(3) of the FW Act allowed for substitution of public holidays in modern awards only where there is agreement between an employer and an employee, and contended that the relevant provisions of the Academic Staff Award and the General Staff Award should be modified accordingly.

[15] With regard to the Post-Secondary Education Award, the NTEU submitted that clause 29.2 also contravened s.115(3) since it allows substitution arrangements to be made on the basis of agreement between an employer and a majority of employees, whereas the FW Act allows for substitution arrangements where there is agreement between an employer and an employee.

Health Services Union (HSU)

[16] The HSU submitted that clause 32.1 of the *Health Professionals and Support Services Award 2010* (Health Professionals Award), which allows an employer to unilaterally substitute a public holiday, is contrary to s.115(3) of the FW Act and accordingly is of no effect by virtue of s.56 of the FW Act.

[17] The HSU also submitted that the *Pharmacy Industry Award 2010* had wrongly been included in Attachment A of the Statement, when in fact it should have been placed in Attachment B because the second sentence of clause 31.2 permitted the employer to substitute public holidays unilaterally.

Private Hospital Industry Employer Association (PHIEA)

[18] The PHIEA conceded that clause 32.1 of the Health Professionals Award was inconsistent with s.115(2) of the FW Act and should therefore be removed to ensure substitution of public holidays only occurs by agreement between the employer and employees.

Business SA

[19] Business SA initially submitted that an award term which provided for the substitution of a public holidays with the agreement of a majority of employees only and did not provide for substitution by individual agreement (as was the case with 49 of the 79 awards listed in Attachment A of the Statement) constituted an inconsistency with or an exclusion of the NES because it denied to the employee the opportunity to enter into an agreement with the employer concerning substitution. However, where an award provided for the options of substitution by majority employee agreement or by individual employment agreement — such as clause 37.2 of the *Food, Beverage and Tobacco Manufacturing Award 2010* (FBTM Award) — no inconsistency or exclusion arose, since the employee was not denied the opportunity to agree to a substitute public holiday. In that circumstance the majority agreement option was an ancillary term for the primary term under s.115(3) for the purposes of s.55(4) of the FW Act. Where an individual employee disagreed with the position of the majority of employees, the award still provided for the option of the employee reaching an agreement for an alternative arrangement with the employer.

[20] However, Business SA changed its position in its reply submissions, and submitted that terms allowing for substitution by majority agreement were authorised by s.115(3).

National Road Transport Association (NatRoad)

[21] NatRoad submitted that provisions in awards applicable to the road transport industry which permitted the substitution of public holidays with the agreement of a majority of affected employees (clause 32.2(a) of the *Road Transport and Distribution Award 2010* and clause 26.2(a) of the *Road Transport (Long Distance Operations) Award 2010*) were inconsistent with the NES and should be removed.

Australian Industry Group (Ai Group)

[22] Ai Group submitted that the awards identified in Attachments A and B of the Statement could be placed in five categories:

> (1) awards that enable substitution of holidays by agreement with the majority of employees;
>
> (2) awards that enable substitution by agreement with an individual employee or multiple individual employees;
>
> (3) awards that enable substitution by majority agreement *or* individual agreement;

(4) awards that enable substitution by majority agreement together with individual agreement, which will be observed by the enterprise as a result of the majority agreement; and

(5) awards that enable an employer to unilaterally substitute a public holiday where agreement cannot be reached.

[23] Ai Group submitted that majority agreement terms in awards in the first category are authorised by s.115(3), on the basis that the word *"employee"* in s.115(3) may be read as including *"employees"* in accordance with s.23 of the *Acts Interpretation Act 1901*, so that terms allowing agreement to be reached with multiple employees are permitted to be included in awards. The NES will operate subject to such terms and is not excluded for the purposes of s.55(1) of the FW Act.

[24] Ai Group submitted that award terms in the second category, permitting substitution of public holidays by individual agreement, were also plainly authorised by s.115(3).

[25] In respect of the third and fourth categories, Ai Group submitted that such terms were permissible for the same reasons as for the first category.

[26] Ai Group submitted in the alternative, with respect to terms in the first, third and fourth categories, that if any such terms were held not to be authorised by s.115(3), they should be replaced by terms allowing for the substitution of public holidays by agreement between the employer and the employee.

[27] Ai Group did not assert that terms in the fifth category were authorised by s.115(3) but submitted that if such terms were held not to be permitted by the FW Act, the relevant awards nonetheless contemplate individual agreement which should not be removed.

Construction, Forestry, Mining, Manufacturing and Energy Union (CFMMEU)

[28] The CFMMEU noted that six awards listed in Attachment A of the Statement in which it has an interest – the *Electrical Power Industry Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award), the *Mining Industry Award 2010*, the *Waste Management Award 2010*, the *Textile, Clothing, Footwear and Associated Industries Award 2010* and the *Timber Industry Award 2010* – contained provisions for substitution by individual agreement as well as majority agreement.

[29] The CFMMEU submitted that majority agreement terms do not exclude the NES because they could be considered ancillary terms or terms that give employees the same entitlement as the NES in respect of public holidays and so

were authorised by ss.55(4) or 55(7). The CFMMEU Manufacturing Division also submitted that such terms are otherwise permissible because of the effect of s.55(5). The CFMMEU submitted that where a public holiday was substituted, the employee still enjoyed the same number of public holidays and the same entitlement to penalty rates if work was required on the public holiday, and the employer still had the right to make a reasonable request for the employee to work on a public holiday.

Australian Manufacturing Workers Union (AMWU)

[30] The AMWU submitted that the Manufacturing Award and the FBTM Award did not belong in Attachment A to the Statement. In the Manufacturing Award, clause 44.2(a) provided for substitution by majority agreement and clause 44.2(b) provided for substitution by individual agreement (with the FBTM Award containing identical provisions). The AMWU submitted that this meant that there was a dual requirement – for majority *and* individual agreement – in order for any substitution of public holidays to take effect.

[31] The AMWU otherwise submitted that an award term permitting substitution by majority agreement does not exclude the NES, since there were no specific provisions of Div 10 of Pt 2-2 of the FW Act that would be excluded by such a provision.

Australian Business Industrial and the NSW Business Chamber (ABI)

[32] ABI submitted that an agreement to substitute public holidays is permitted under the NES if it is made pursuant to a provision in an award or enterprise agreement authorised by s.115(3). Section 115(3) is expressed in broad terms and is not prescriptive as to how such agreement may be made or with whom. There was no basis to construe s.115(3) so as to confine it to agreements made only on an individual basis, and it could be read as equally applying to a collective agreement. The concept of a collective agreement was broadly recognised within the FW Act, where enterprise agreements are agreed to by a majority of employees as opposed to every employee. For these reasons, award clauses that permit substitution of public holidays by agreement with a majority of employees did not contravene s.55 of the FW Act.

Consideration

[33] Section 61 of the FW Act explains that Pt 2-2 of the FW Act establishes minimum standards (the National Employment Standards) in relation to a range of specified matters (including public holidays) that are applicable to the employment of employees and which cannot be displaced. Section 55(1) operates in aid of this "non-displacement" objective by providing that a modern award or enterprise agreement must not exclude the NES or any provision of the NES. The provisions

of an award or agreement will exclude the NES if, in their operation, they result in an outcome where employees do not receive (in full or at all) a benefit provided for by the NES. 2 Section 55(1) operates subject to subsections 55(2)–(7). Section 56 provides that a term of an award or enterprise agreement which contravenes s.55 is of no effect.

[34] The NES scheme concerning public holidays is contained in Div 10 of Pt 2-2 of the FW Act. In the scheme, s.114(1) firstly establishes a statutory entitlement for an employee to be absent from work on a public holiday, subject to the right of an employer under s.114(2) to make a reasonable request that an employee work on the public holiday. Section 114(3) entitles an employee to refuse a request where the request is not reasonable or where the refusal is reasonable (that is, an employee may reasonably refuse a reasonable request to work on a public holiday). Section 114(4) identifies the considerations required to be taken into account in determining whether a request or refusal of a request to work on a public holiday is reasonable.

[35] Section 116 supplements the entitlement established by s.114(1) by further entitling an employee who is absent from work on a public holiday to payment at the employee's base rate of pay for the employee's ordinary hours of work.

[36] The function of s.115 in the scheme is to define what a public holiday is for the purpose of the entitlements established by ss.114 and 116. Section 115(1)(a) specifies eight days that are public holidays. Each of these days may broadly be characterised as being, to varying degrees, of social or cultural significance in the Australian community. Section 115(1)(b) adds to these eight days such other days (or part-days) declared or prescribed to be public holidays under State or Territory laws (unless excluded by regulations made pursuant to the FW Act). Section 115(2) provides that where, under a State or Territory law, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday under s.115(1), then that substituted day or part-day is a public holiday for the purpose of Div 10. To that extent, s.115(2) modifies the definition in s.115(1) of what constitutes a public holiday for the purpose of the entitlements established by ss.114 and 116. Section 115(4) is not presently relevant because it concerns the position of award/agreement-free employees. We will consider the effect of s.115(3) shortly.

[37] An award provision which provides for the substitution of public holidays will result in employees not receiving the entitlements established by ss.114 and 116 in respect of the public holidays specified in s.115(1) and (2), and so will necessarily exclude the NES and will be of no effect unless it is authorised under subsections 55(2)-(7). This includes award provisions which provide for the substitution of public holidays unilaterally by the employer or by a majority vote of employees. It is therefore necessary to consider whether such provisions are saved by s.55(2)-(7).

[38] Section 55(2) allows an award or enterprise agreement to include terms that the award or agreement is expressly permitted to include by a provision of Pt 2-2 or a regulation made for the purposes of s.127, and s.55(3) provides that the NES have effect subject to terms included in an award or agreement as referred to in s.55(2). No relevant regulation has been made pursuant to s.127, and no party contended otherwise. However, as earlier set out, a number of parties submitted that the award public holiday substitution terms under consideration here were authorised by s.115(3) (being a provision of Pt 2-2).

[39] Section 115(3) provides that awards and enterprise agreements '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' under s.115(1) or s.115(2).

[40] We accept the submission of ABI, that s.115(3) is not prescriptive as to the means by which such an agreement may be reached. We also accept the submission made by Ai Group and ABI that the word 'employee' in s.115(3) may be read in the plural consistent with s.23(b) of the *Acts Interpretation Act 1901*, so that an award term authorising substitution of public holidays by agreement with a number of employees in a collective process, for the purpose of the public holiday entitlements of those employees, is authorised by s.115(3). However, the fundamental requirement is that the employer and employee(s) must *agree* upon the substitution. 'Agreement' in s.115(3) bears its ordinary meaning—that is, an arrangement between parties for which there is mutual consent.

[41] We consider it to be clear that an award provision that allows the employer to substitute a public holiday unilaterally—that is, without the agreement of the affected employee(s)—is not authorised by s.115(3), and no party attempted to contend otherwise. We likewise consider that a majority-agreement provision that permits the substitution of public holidays in respect of any minority of employees who do not so agree is not authorised by s.115(3). ABI attempted in its submission to draw an analogy between an agreement made pursuant to an award term authorised by s.115(3) and the process of making enterprise agreements by majority vote under Pt 2-4 of the FW Act but, as the Federal Court Full Court explained in *Toyota Motor Corp Australia v Marmara* 3, an enterprise agreement is not an agreement in the ordinarily-understood sense (emphasis added):

> '[88] We do not accept that premise, or the appropriateness of the contractual analogy. Under the FW Act, *an enterprise agreement is an agreement in name only*. Those who, by s.172(2), are empowered to "make" an enterprise agreement are the employer and "the employees who are employed at the time the agreement is made and who will be covered by the agreement". *A contract lawyer would assume that those persons would be parties to the agreement, and that the assent of all of them would be necessary for the agreement to be "made". But the lawyer would be wrong on both counts.* The FW Act does not

identify the employer, or any employee, as a "party" to an enterprise agreement. Further, notwithstanding the specific empowering terms of s.172, *it is not necessary for all the employees who are employed at the time an agreement is made and who will be covered by the agreement to assent to the terms of the agreement*. Once a majority of those employees have agreed by voting, the agreement must be sent to the Commission for approval and, if approved, thenceforth applies to all the employees in the relevant group, even those who did not agree, and even those, subsequently taken into employment, who were not part of the relevant group at the time the vote was taken under s.182.'

[42] We now turn to s.55(4), which provides that an award or enterprise agreement may include terms that are ancillary or incidental to the operation of an employee's entitlement under the NES or which supplement the NES, but only to the extent that the effect of those terms is not detrimental to the employee in any respect when compared with the NES. To the extent that an award or agreement term is permitted by s.55(4), s.55(7) provides that the term does not contravene s.55(1).

[43] We do not consider that an award term providing for the substitution of public holidays unilaterally by the employer or by majority vote can be said to be ancillary, incidental or supplementary to the entitlements established by ss.114 and 116, since such a term fundamentally changes the entitlements rather than facilitating or adding to them, by altering the days on which public holidays may be enjoyed. In any event, we consider that such provisions are detrimental to employees when compared to the NES provision in Div 10 of Pt 2-2, since they may deprive employees of the capacity to enjoy public holidays on days of social and cultural significance without their consent. It is no answer to say that an employee will enjoy the same number of public holidays pursuant to such a provision if, for example, the effect is that an employer may require an employee to work on Christmas Day as an ordinary working day because the employer has determined unilaterally that another day will be substituted for Christmas Day as the public holiday.

[44] Finally, we reject the CFMMEU Manufacturing Division submission that s.55(5) authorises award provisions of this nature. It is sufficient to say that s.55(5) only operates with respect to enterprise agreements and has no application to awards.

[45] We conclude therefore that the provisions in the awards listed in Attachment A of the Statement which permit the substitution of public holidays by agreement with a majority of affected employees, and the provisions in the awards listed in Attachment B of the Statement which permit the employer to substitute public holidays unilaterally, operate to exclude the NES provisions in Div 10 of Pt 2-2, contravene s.55(1), and have no effect pursuant to s.56.

[46] It also appears that clause 28.2 of the *Sporting Organisations Award 2010* may operate to exclude the NES. Clause 28.2 states:

> 'By agreement, an employer may substitute another day for a public holiday.'

[47] The problem with this clause is that it does not specify with whom substitution is to be agreed. The clause will be amended to ensure that it does not exclude the NES.

[48] We note the submission advanced by the AMWU that the public holiday substitution provisions in the Manufacturing Award and the FBTM Award were of a different character because they had cumulative requirements for both majority and individual agreement. The Ai Group, as we understand it, advanced a submission to similar effect. Clause 44.2 of the Manufacturing Award provides:

> **44.2 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.

[49] We do not agree that clause 44.2 of the Manufacturing Award (or clause 37.2 of the FBTM Award, which is in the same terms) establishes cumulative requirements for majority and individual agreement. We consider that the provision plainly allows for two methods by which the substitution of public holidays may occur: in paragraph (a), by majority agreement, and in paragraph (b) by individual agreement. Paragraph (a) contravenes s.55(1) and therefore has no effect under s.56. Paragraph (b) is authorised by s.115(3).

[50] We consider that the provisions in the awards listed in Attachments A and B of the Statement which allow for substitution of public holidays by majority employee agreement or unilaterally by the employer, along with clause 28.2 of the *Sporting Organisations Award 2010*, should be deleted. In each case, the award should contain terms that simply provide:

> X.X(a) An employer and employee may agree to substitute another day for a day that would otherwise be a public holiday under the NES.
>
> X.X(b) An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES.

[51] For those awards that include part-day public holiday schedules, the following note will be added at the end of clause X—Public holidays:

> NOTE: For provisions relating to part-day public holidays see Schedule X—Part-day Public Holidays.

[52] The following clause will also be added to the part-day public holiday schedules:

> X.2 An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES.

[53] Draft determinations to give effect to this decision will be published in due course. Once published, interested parties will have 21 days to comment upon them before they are issued in final form.

PRESIDENT

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<PR710649>

1 [2018] FWC 1501 at [10]

2 *Canavan Building Pty Ltd* [2014] FWCFB 3202, (2014) 244 IR 1 at [36]

3 *Toyota Motor Corp Australia v Marmara* [2014] FCAFC 84, (2014) 222 FCR 152, (2014) 244 IR 335