

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Part-Day Public Holidays
(AM2014/301)

12 October 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/301 PART-DAY PUBLIC HOLIDAYS

INTRODUCTION

1. On 14 September 2018, the Fair Work Commission (**Commission**) issued a 'Further Statement'¹ (**Statement**) concerning the part-day public holiday schedule (**Schedule**) that is appended to a number of modern awards.
2. The Statement cites the following paragraphs of a report prepared by Commissioner Hampton regarding the matter: (emphasis added)

[4] The report noted the various issues, proposals and considerations relevant to the matter and observed that an immediate option might be considered in the following terms (footnotes omitted):

[22] As a result, it would appear that the appropriate measure would be to consider making each of the present Schedules ongoing, but noting that they will be further considered as part of the finalisation of the present 4 yearly review. Further, applications to vary specific awards might also be made by parties with a relevant interest and considered by the Commission at an appropriate time. This approach would remove the uncertainty associated with the year by year approach, recognise that for some awards there is a prospect that the present Schedules will be maintained, whilst also allowing for the fact that alternative approaches might ultimately be taken. Those alternatives might include extending the provisions to all part-day public holidays, removing clauses that are not necessary and/or placing the relevant terms within the body of the modern awards.

[23] In terms of the framework of the Act, such an approach would appear to be consistent with the various decisions of the Commission which have found that the existing Schedules were necessary and with the approach adopted by the Commission to the assessment of the modern awards objective as part of this Review. Further, this approach would allow for the fact that some changes to the existing modern awards might be self-evident and others might require probative evidence so as to demonstrate a need to vary the award to provide for consistency with that objective. Further, this would recognise that the Review involves each modern award as a whole and there is some evident practical benefit in allowing this matter to be fully reviewed after the (other) substantive provisions of the modern awards have been finalised, including by having regard to the Commission's approach to adopt plain language principles.

[24] This approach would mean, in effect, that the reference to the particular year in the terms of each Schedule would be removed. Further, the final clause

¹ *Part-day public holidays* [2018] FWCFB 5803.

in each award Schedule would be revised to note that the Schedule may be further reviewed as part of the 4 yearly review of modern awards, in lieu of the present reference to being an “interim” provision. Any decision issued by the Full Bench could also expressly recognise the capacity for parties to make an application to vary one or more modern awards in relation to the part-day public holiday provisions as part of this Review.”²

3. Interested parties have been given an opportunity to file written submissions in relation to the approach set out in the Commissioner’s report “or any other approach to the issues identified in that Report”.³ The Australian Industry Group (**Ai Group**) files this submission accordingly.

THE COMMISSIONER’S PROPOSED APPROACH

4. In his report to the Full Bench, Commissioner Hampton proposes that:
 - a) The Schedules be amended by removing references to any specific calendar year, such that the Schedules have ongoing application.
 - b) The Schedules be amended to remove any reference to their purportedly “interim” nature.
 - c) The Schedules be amended to note they will be further considered as part of the finalisation of the present 4 yearly review.
5. Ai Group submits that:
 - a) The Schedules should be amended by removing references to any specific calendar year, such that their application is ongoing; on the basis that Ai Group has not identified any concern arising from the practical operation of the Schedule. Further, such an approach does not preclude any interested party from seeking a specific variation to the Schedule in relation to a particular award (or particular awards) if they have identified such a concern; in the context of the current award review or by making a separate application pursuant to the *Fair Work Act 2009*.

² *Part-day public holidays* [2018] FWCFB 5803 at [4].

³ *Part-day public holidays* [2018] FWCFB 5803 at direction 1.

- b) It does not oppose the proposed removal of any references to the Schedules being “interim in nature” if the Schedules are amended to remove references to any specific calendar year.
- c) The Schedules should *not* be amended to note they will be further considered as part of the finalisation of the present 4 yearly review, because:
 - i. For the reasons articulated in Ai Group’s [correspondence](#) to the Commission of 6 July 2018 and articulated during [proceedings](#) before Commissioner Hampton on 10 August 2018, Ai Group considers that a general ‘review’ of the Schedule is not necessary or warranted.
 - ii. Further and in any event, it is not *necessary* (in the sense contemplated by s.138 of the *Fair Work Act 2009*) that the Schedule include such a term.