

TWO RECENT WORKPLACE DECISIONS

24 November 2023

To: AADA MEMBERS

Please find below information regarding two decisions recently handed down by the courts related to Australia's workplace laws.

Rostering on Public Holidays

On Tuesday 21 November, the High Court refused special leave to appeal in respect of the [decision](#) in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51. Accordingly, the earlier decision of the Full Federal Court will stand.

This earlier decision held that the right of an employer to “request an employee to work on a public holiday if the request is reasonable” under section 114(2) of the *Fair Work Act 2009* (Cth) **meant that an employer must ask an employee to work on a public holiday, rather than automatically roster them to work on such a day.**

This is a significant decision which will impact a lot of employers, particularly those in industries which require staff to work over the Christmas and New Year period.

Please find **attached** a fact sheet provided to the AADA by the Australian Chamber of Commerce and Industry (ACCI) on rostering on public holidays.

Right of Entry Decision

Last week the Full Federal Court handed down a decision confirming the broad scope of s484 right of entry laws.

In *CEPU v Austal Ships Pty Ltd* [2023] FCAFC 180, the Full Federal Court confirmed that **union officials can use their right to enter premises for ‘discussions’ with members for the purpose of gathering signatures on petitions or ‘secure a commitment to a particular course of action in the future’**, i.e., beyond the end of the discussion. Which in this case was securing signatures backing a majority support determination.

If you have any questions or need further information, please contact:

Melissa Dimovski

DIRECTOR POLICY AND ADVOCACY

Australian Automotive Dealer Association Ltd.

E: mdimovski@aada.asn.au

M: +61 436 353 877

Fact Sheet — Rostering on Public Holidays

Key Points:

- Australian employers must ask their employees if they wish to work public holidays and cannot automatically roster them on.
- Employers who automatically roster employees to work public holidays must immediately review their internal policies and procedures to ensure compliance with the *Fair Work Act 2009*.
- This position was recently clarified by the Full Federal Court on 28 March 2023, in *CFMMEU v OS MCAP Pty Ltd*.
- This factsheet includes practical guidance regarding how employers may ensure compliance.

Can employees be made to work on a public holiday?

Under the *Fair Work Act 2009* (FW Act), an employee is entitled to be absent from work on a public holiday.¹ However, an employer may request an employee work on a public holiday if the request is reasonable.²

If an employer makes a request for an employee to work on a public holiday, the employee can only refuse if:³

- (a) the employer's request is not reasonable; or
- (b) the employee's refusal is reasonable.

If the employer is satisfied that the employee's refusal to work on a public holiday is not reasonable, then the employer can direct the employee to work.

A flowchart illustrating this process is set out at **Annexure A**.

What is a “request” to work on a public holiday?

A “request” by an employer provides employees with a choice as to whether they work on the public holiday. A request leaves room for negotiation and discussion between the employer and the employee.

In practice, this means that the employer must make clear to the employee that they have a choice, although the employee cannot refuse unreasonably.

Recently, a decision of the Full Federal Court held that issuing a roster where an employee works a public holiday, without first confirming that the roster is a draft or otherwise open to discussion, is not a “request”.⁴ It is a “requirement”, which employees believe they are obliged to obey.

Therefore, simply rostering an employee to work on a public holiday will not fulfill the employer's obligation to “request” an employee work on a public holiday.

¹ Section 114(1), *Fair Work Act 2009* (FW Act).

² Section 114(2), FW Act.

³ Sections 114(3)(a) and 114(3)(b), FW Act.

⁴ *CFMMEU v OS MCAP Pty Ltd* [2023] FCAFC 51.

How can employers clarify that a rostered working day on a public holiday is a request?

When rostering an employee to work a public holiday, an employer must make it clear that the employee has the right to reasonably refuse to work that day. This means that:

- the roster is clearly provided as a draft and contains a note requesting employees who have been allocated to work on the public holiday to indicate whether they accept or refuse the allocated work; or
- a request can be made before the roster is circulated.

In practice, employers will want to avoid implications that rosters are generally being provided in draft and that shifts falling on days that aren't public holidays are able to be refused. Therefore, employers should avoid issuing rosters in draft that do not distinguish between normal working days and public holidays.

It would be administratively burdensome for employers with larger workforces to write to all employees individually requesting them to work public holidays before finalising a roster.

A practical approach employers may take to ensure compliance with the FW Act is to include a note on all rosters confirming that:

- **if an employee has been allocated a public holiday to work that this is a request, not a requirement;**
- **the employee has a certain period prior to the public holiday shift to notify management that they do not wish to work on that day; and**
- **any refusal must be reasonable.**

This approach would be supported by a special public holiday policy, which would provide further detail about the employer's approach to rostering on public holidays and sets out when a request or refusal may be reasonable.

Can employment contracts include a term that employees “may be required to work on public holidays”?

Many employers include terms in employment contracts that state that employees may be required to work on public holidays. These contract terms are unlikely, of themselves, to be unlawful. However, they are likely to be unenforceable if they are inconsistent with the requirement for employers to provide employees with a choice about whether they work on a public holiday before finalising rosters.

Employers wishing to include these clauses in new employment contracts should rephrase the wording to state that employees may be “requested” to work on public holidays and will be required to work where the request is reasonable and a refusal is unreasonable. Again, such a term should be well supported by a public holiday rostering policy and procedure.

While untested in the courts, a contract term confirming that an employee may be requested to work on public holidays, and, further, that they have the right to reasonably refuse a rostered shift on a public holiday, is unlikely to be sufficient to offset a practice of automatically rostering an employee to work a public holiday.

When is a request or refusal considered reasonable?

Whether an employer's request or an employee's refusal is reasonable will depend on the individual circumstances of the case. When determining whether a request, or refusal, to work on a public holiday is reasonable the following factors must be considered:⁵

- (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
- (b) the employee's personal circumstances, including family responsibilities;
- (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
- (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
- (f) the amount of notice in advance of the public holiday given by the employer when making the request;
- (g) in relation to the refusal of a request, the amount of notice in advance of the public holiday given by the employee when refusing the request; and
- (h) any other relevant matter.

In practice, this may mean that:

(for requests)

- a request to work on a public holiday may be reasonable where the employee is employed in a workplace that requires a certain level of staffing on a public holiday (like a hospital) and has been given warning of the likelihood of being required to work on public holidays;⁶
- a request to work on a public holiday may be reasonable where the employee is a shift worker on a rotating roster that provides certainty and fairness to employees, with each employee taking turns in working on public holidays;⁷

(for refusals)

- a refusal to work on a public holiday may be reasonable where the employee has notified the employer in advance that she or he will not be able to work on the public holiday because of family commitments;⁸ and
- a refusal to work on a public holiday may be unreasonable where the employee fails to provide any reasons or simply asserts that they have a right to not work on public holidays.⁹

⁵ Section 114(4), FW Act.

⁶ Explanatory Memorandum, Fair Work Bill 2008 [453].

⁷ *Clark v Ventura Transit Pty Ltd* [2018] FCCA 468.

⁸ Explanatory Memorandum, Fair Work Bill 2008 [454].

⁹ *Clark v Ventura Transit Pty Ltd* [2018] FCCA 468.

Why is this now relevant?

On 28 March 2023, the Full Federal Court handed down its decision in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51. The High Court refused to review this decision, meaning that it will stand as the correct interpretation of the National Employment Standards.

The decision clarified how employers must approach the rostering of employees on public holidays. The position confirmed by the Full Federal Court is inconsistent with the understanding of many employers with rosters in place.

Those employers should urgently review their existing practices.

Disclaimer

The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

Annexure A

