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Federal Court's public holiday decision is causing widespread concern amongst employers

A 28 March decision of the Full Federal Court is causing widespread concern amongst employers that need to operate on public holidays, including employers in the mining, manufacturing, aviation, healthcare, emergency services and hospitality industries.

In numerous industries it is very common for employees to be rostered to work on public holidays and for employees to understand that they need to work on those days. The Federal Court has interpreted the National Employment Standards in the Fair Work Act as requiring an employer to 'request' that an employee work on a public holiday to give an employee the opportunity to reasonably refuse to work.

The case involved a company within the BHP Group (OS MCAP Pty Ltd). The company's practice was to roster employees to work on each public holiday and to assume that the employees who were rostered to work, would work on those days. The CFMMEU argued that this practice breached section 114 of the Fair Work Act.

In their joint judgment Collier, Thomas and Raper JJ said:

> 5. *….. In this Court's view, a "request" within the meaning of s 114(2), connotes its ordinary meaning, an employer may make a request of employees in the form of a question, leaving the employee with a choice as to whether he or she will agree or refuse to work on the public holiday. Ultimately, after discussion or negotiation, the employer may require an employee to work on a public holiday if the request is reasonable and the employee's refusal is unreasonable.*

The Court rejected the employer's argument that the CFMMEU's interpretation would be unworkable. On this point, the Court said:

> 44. *The Court does not accept the submission of OS that the Union's interpretation would be inherently unworkable because such an interpretation would mean that an employer could not ever have a roster which included working hours on Christmas holidays or ever contain a contractual requirement. An employer is able to have a roster which includes public holidays. All that is required is that an employer ensures that employees understand either that the roster is in draft requesting those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation, or where a request is made before the roster is finalised. Similarly, a contract may contain a provision foreshadowing that the employees may be asked to work on public holidays and may be required where the request is reasonable and a refusal unreasonable.*
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> 45. *An employer never has complete certainty of operation regarding what it would like in the future to demand of its employees and whether it can do so lawfully. An employer is only ever able to demand of its employees what is lawful and reasonable regardless of what a roster or contract say. Indeed, even if a contract contained a term which, in some circumstances, might be lawful and reasonable, does not mean by the intersection of a plethora of statutory*

> *obligations, that nonetheless the direction is not lawful in the particular circumstances. It may be, as OS suggested, administratively burdensome for a mine to have to make a request rather than be able to require employees to work on public holidays. However, the legislation intends to confront this very mischief: To ensure that employers do not so require employees to work on public holidays absent the request being reasonable or the employee being able to refuse to work in reasonable circumstances.*

For assistance in navigating the effects of the Full Federal Court's decision, please contact Stephen Smith, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: stephen.smith@actuslawyers.com.au.