

ACTUS WORKPLACE LAWYERS

7 November 2023

High Court to hear BHP's public holiday special leave application

On 21 November, the High Court will hear BHP's application for special leave to appeal a problematic 28 March 2023 [decision](#) of the Full Court of the Federal Court. In its decision, the Federal Court held that employers must request, not just require, employees to work on a public holiday. A decision is likely to be handed down the same day on whether special leave is granted. If special leave is granted, the appeal will be heard by the High Court next year.

The Federal Court's decision has caused 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 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.*

For assistance in drafting employment contract terms that address in a practical manner the effects of the Full Federal Court's decision, please contact Justine Smith, Lawyer at Actus Workplace Lawyers on 0414 947 651 or Email: justine.smith@actuslawyers.com.au.