NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Shop Employees (State) Award [2006] NSWIRComm 5

FILE NUMBER(S): IRC 5543 and 5544

HEARING DATE(S): 12/12/2005

DECISION DATE: 31/01/2006

PARTIES:

APPLICANTS

Shop, Distributive and Allied Employees' Association, New South Wales

Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales

RESPONDENTS

Australian Business Industrial

Australian Industry Group, New South Wales Branch

Australian Retailers Association, New South Wales

Catholic Commission for Employment Relations

Employers First

INTERVENOR

Unions NSW

JUDGMENT OF: Wright J President Boland J Tabbaa C

LEGAL REPRESENTATIVES

APPLICANTS

Mr A Rogers of counsel

Mr D Bliss

Shop Distributive and Allied Employees' Association, NSW and Shop Assistants' and Warehouse Employees' Federation of Australia, Newcastle and Northern NSW

RESPONDENTS

Ms S Wellard

Australian Business Industrial

Ms N Street

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Mr M Mullins

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Ms A Humphries

Catholic Commission for Employment Relations

Ms J Smith

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INTERVENOR

Ms A Hughes

Unions NSW

CASES CITED: Commercial Travellers (State) Award, Re [1970] AR (NSW) 250

Pastoral Industry (State) Award, Re (2001) 104 IR 168

Petrol and Oil Sellers (State) and Motor Car Washers (State) Awards, Re [1956] AR (NSW) 407

Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Limited (1935) 54 CLR 230

Residual Business Management Corporation and New South Wales Local Government, Clerical,

Administrative, Energy, Airlines & Utilities Union (2005) 145 IR 93
Shop Employees (State) Award, Re [1978] AR (NSW) 50
State Wage Case 2005 (2005) 142 IR 337
Willow Wren Canal Carrying Co Ltd v British Transport Commission [1956] 1 All ER 567

LEGISLATION CITED: Bank and Bank Holidays Act 1912
Industrial Relations Act 1996
Workplace Relations Act 1996 (Cth)
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

JUDGMENT:

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

FULL BENCH

CORAM: Wright J, President
Boland J
Tabbaa C

Tuesday 31 January 2006

Matter No IRC 5543 of 2005

RE SHOP EMPLOYEES (STATE) AWARD

Application by Shop, Distributive and Allied Employees' Association, New South Wales for variation re Picnic Day

Matter No IRC 5544 of 2005

RE SHOP EMPLOYEES (STATE) AWARD

Application by Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern, New South Wales for variation re Picnic Day

DECISION OF THE COMMISSION
[2006] NSWIRComm 5

1 The Shop, Distributive and Allied Employees' Association, New South Wales and the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales ("the applicants") filed applications in the Industrial Registry pursuant to s 17 of the *Industrial Relations Act* 1996 to vary the Shop Employees (State) Award. The applications seek to amend cl 17 of the Award by deleting reference to "Union Picnic Day" and substituting "the first Tuesday in November" as one of 11 public holidays to be prescribed by the Award.

2 The principal basis of the applicants' claim was that the Union Picnic Day prescribed by the Award was not, in fact, a picnic day but rather, properly characterised, was an additional public holiday. The applicants also claimed, however, the variation was necessary in order to protect a long-standing entitlement of employees covered by the Award to 11 holidays throughout the year, one of those days being a Union Picnic Day. The

applicants' concern was that with the commencement of the Commonwealth's *Workplace Relations Amendment (Work Choices) Act* 2005 ("Work Choices Act"), employees of constitutional corporations will no longer be entitled to the Union Picnic Day and the number of holidays they have been entitled to will be reduced.

3 The employer interests represented in proceedings, with the exception of the Catholic Commission for Employment Relations (CCER), opposed the applications. CCER's position was one of support for the applications.

4 The applications initially came before *Staunton* J who subsequently formed the opinion that pursuant to s 193 of the Act they should be referred to the President to determine whether or not a Full Bench should deal with the applications. Her Honour referred the applications on 15 November 2005.

5 Subsequently, directions were made for the hearing and determination of the applications by arbitration under Principle 10 - Special Cases, of the Commission's Wage Fixing Principles: See *State Wage Case 2005* (2005) 142 IR 337. Initially, however, the applications were allocated to *Grayson* DP for conciliation but that was unsuccessful and, on 28 November, his Honour issued a certificate of attempted conciliation pursuant to s 135(2) of the Act.

The applications

6 The applications are in the same terms and seek to delete the existing cl 17 Holidays and to insert a new clause 17. The existing clause is in the following terms:

17. Holidays

(A) Public Holidays —

(i) Work done on any of the holidays prescribed in paragraph (ii) of this subclause shall be paid for at the rate of double time and one-half, with a minimum payment of three hours.

(ii) (a) The days observed as New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Anzac Day, Queen's Birthday, Labour Day, Christmas Day, Boxing Day and all days proclaimed as public holidays for the State shall be holidays; provided that any day proclaimed as a holiday for the State for a special purpose but observed throughout the State on different days also shall be a holiday.

(b) Every full-time or part-time employee allowed a holiday specified herein shall be deemed to have worked in the week in which the holiday falls the number of ordinary working hours that he/she would have worked had the day not been a holiday.

Provided that any full-time or part-time employee whose roster is changed with the intent of avoiding or reducing payment due or the benefit applicable under this clause and who would, but for the change of roster, have been entitled otherwise to a payment or benefit for a public holiday or holidays shall be paid for such holiday or holidays as if his/her roster had not been changed.

Provided further that where a full-time or part-time employee working an average of five days per week is rostered so that he/she does not work his/her ordinary hours on the same days each week and the employee's rostered day off falls on a day prescribed as a holiday in subparagraph (a) of this paragraph, the employee shall be paid by mutual agreement between the employer and the employee in one of the following methods:

(1) payment of an additional day's wages;

(2) addition of one day to the employee's annual holidays;

(3) another day may be allowed off with pay to the employee within 28 days after the holiday falls, or during the week prior the holiday.

For the purposes of this paragraph, "day" means the average number of hours in the employee's normal roster cycle worked by the employee prior to the day on which the public holiday falls.

(iii) A full-time or part-time employee absent without leave on their last working day before or their first working day after any award holiday shall be liable to forfeit wages for the day of absence as well as for the holiday, except where an employer is satisfied that the employee's absence was caused through illness, in which case wages shall not be forfeited for the holiday; provided that an employee absent on one day only either before or after a group of holidays shall forfeit wages only for one holiday as well as for the period of absence.

(B) Picnic Day - In addition to the holidays prescribed in paragraph (ii) of subclause (A) of this clause, full-time and part-time employees rostered to work shall be entitled to an additional holiday without loss of pay and this day shall be known as the picnic day of the appropriate union (namely, the Shop, Distributive and Allied Employees' Association, New South Wales, or the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales).

This day shall be on the first Tuesday of November in any year, or on any other day agreed to by the appropriate union.

Where the establishment of an employer remains open and a full-time or part-time employee volunteers to work on the picnic day of the appropriate union, such employee shall then be given another day off without loss of pay. Such alternative day shall be given and taken not later than 28 days after the nominated day on a day mutually agreed between the employer and the employee.

Provided that in no circumstances shall an employee forfeit entitlement to the additional holiday and should such extenuating circumstances arise where the day is not taken as described above, it must be given and taken on a day without loss of pay added to the employee’s next period of annual leave.

Provided further that where an employee's employment terminates prior to the taking of such alternative day, the employee shall receive an additional day's pay on termination.

Provided further that employees on annual leave or long service leave on the day referred to in this subclause shall have an additional day added to their next period of annual leave.

7 The proposed new clause is as follows:

17. Holidays

(A) Public Holidays -

(i) Subject to subclause (B), work done on any of the holidays prescribed in paragraph (ii) of this subclause shall be paid for at the rate of double time and one-half, with a minimum payment of three hours.

(ii) (a) The days observed as New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, Anzac Day, Queen's Birthday, Labour Day, the first Tuesday in November, Christmas Day, Boxing Day and all days proclaimed as public holidays for the State shall be holidays; provided that any day proclaimed as a holiday for the State for a special purpose but observed throughout the State on different days also shall be a holiday.

(b) For all holidays not including the first Tuesday in November:

Every full-time or part-time employee allowed a holiday specified herein shall be deemed to have worked in the week in which the holiday falls the number of ordinary working hours that he/she would have worked had the day not been a holiday.

Provided that any full-time or part-time employee whose roster is changed with the intent of avoiding or reducing payment due or the benefit applicable under this clause and who would, but for the change of roster, have been entitled otherwise to a payment or benefit for a public holiday or holidays shall be paid for such holiday or holidays as if his/her roster had not been changed.

Provided further that where a full-time or part-time employee working an average of five days per week is rostered so that he/she does not work his/her ordinary hours on the same days each week and the employee's rostered day off falls on a day prescribed as a holiday in subparagraph (a) of this paragraph, the employee shall be paid by mutual agreement between the employer and the employee in one of the following methods:

(1) payment of an additional day's wages;

(2) addition of one day to the employee's annual holidays;

(3) another day may be allowed off with pay to the employee within 28 days after the holiday falls, or during the week prior to the holiday.

For the purposes of this paragraph, "day" means the average number of hours in the employee's normal roster cycle worked by the employee prior to the day on which the public holiday falls.

(iii) A full-time or part-time employee absent without leave on their last working day before or their first working day after any award holiday shall be liable to forfeit wages for the day of absence as well as for the holiday, except where an employer is satisfied that the employee's absence was caused through illness, in which case wages shall not be forfeited for the holiday; provided that an employee absent on one day only either before or after a group of holidays shall forfeit wages only for one holiday as well as for the period of absence.

(B) The first Tuesday in November - Full-time and part-time employees rostered to work shall be entitled to a holiday without loss of pay on the first Tuesday of November in any year.

Work on the first Tuesday of November shall not be paid at the rate of double time and a half, but shall be paid as follows:

> Where the establishment of an employer remains open and a full-time or part-time employee volunteers to work on the first Tuesday of November, such employee shall then be given another day off without loss of pay. Such alternative day shall be given and taken not later than 28 days after the nominated day on a day mutually agreed between the employer and the employee.
>
> Provided that in no circumstances shall an employee forfeit entitlement to the additional holiday and should such extenuating circumstances arise where the day is not taken as described above, it must be given and taken on a day without loss of pay added to the employee's next period of annual leave.
>
> Provided further that where an employee's employment terminates prior to the taking of such alternative day, the employee shall receive an additional day's pay on termination.
>
> Provided further that employees on annual leave or long service leave on the day referred to in this subclause shall have an additional day added to their next period of annual leave.

8 The grounds and reasons in support of the applications were expressed to be as follows:

> 1 The claim is just and proper.
>
> 2 The claim seeks to maintain the integrity of existing "fair and reasonable" terms and conditions of employment in the Award for employees.
>
> 3 The claim does not impose any additional cost, managerial or administrative burden on employers whatsoever.
>
> 4 The Shop Employees (State) Award is beyond its nominal term and can be appropriately varied by this Commission exercising its powers under s 17(3)(d) of the NSW *Industrial Relations Act* 1996.
>
> 5 The claim is not contrary to the public interest.
>
> 6 Such other grounds and reasons as the Commission deems appropriate.

Picnic day - Award history

9 In *Re Shop Employees (State) Award* [1978] AR (NSW) 50, *Macken* J declined to grant an application by the Australian Workers' Union (AWU) for a Union Picnic Day because his Honour considered no case had been made out. However, on the basis of an alternative submission put by the AWU, his Honour decided that in light of a trend towards a standard of 11 public holidays he proposed to award an additional holiday. *Macken* J allowed the parties to the Award to confer "as to how that additional day should be woven into the fabric of the holidays clause in the award. Failing agreement between the parties I will hear and determine any issues remaining in dispute."

10 The affidavit of Geoffrey John Williams was read. From between 1978 until mid-2005 Mr Williams was the Secretary/Treasurer of the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales ("SAWEF, Newcastle"). Mr Williams stated that in 1978 he appeared in the proceedings before *Macken* J but that he was not, at the time of his appearance, the Secretary of SAWEF, Newcastle. Mr Williams deposed:

While it is not reflected in Macken J.'s reasons for judgment, my recollection is that the SAWEF, Newcastle in that case had made application for, and argued in support of, an additional public holiday to be inserted into the Shop Employees (State) Award ("the Award") but had not made application for a union picnic day to be inserted into the Award. The SAWEF, Newcastle's primary basis for the application for an additional holiday was to bring the number of holidays under the Award up to eleven.

His Honour's judgment reflected what I recall was the type of holiday sought by SAWEF, Newcastle.

At the time that the judgment was delivered, there was a serious dispute between the federally registered Shop Distributive and Allied Employees' Association ("SDA") and the state registered Australian Workers' Union ("AWU"), which was, together with SAWEF, Newcastle, a principal union party to the Award.
Because of that disputation it was difficult to obtain agreement between the parties about the operation of the additional holiday awarded by Macken J.

When the proceedings determined by Macken J. had commenced in 1976 there was no dispute such as might have caused this difficulty.

However, on 22 February 1978, the Supreme Court of New South Wales (coram Taylor, Chief Judge in Common Law) had held that the AWU had no legal existence.

This meant that there was a gap, or arguably a gap, in industrial representation for retail and some other employees in New South Wales. While SAWEF, Newcastle had similar coverage to the AWU, its constitution was limited to areas in and around Newcastle and the central coast of New South Wales.

The difficulty was not resolved until after 29 September 1981 when the then New South Wales Industrial Commission, broadly speaking, found in favour of the SDA and registered the Shop, Distributive and Allied Employees' Association, New South Wales ("the SDA, NSW"), one of the current applicants.

This decision resolved the question of representation of retail employees in the NSW system and was followed by the making of a variation to the NSW Award by the insertion of a clause in substantially similar terms to the current subclause B to clause 17 of the Award. Annexed hereto and marked with the letter "A" is a copy of page 375 of Volume 232 NSW Industrial Gazette published on 18 January 1984 showing the variation inserted into the Award on 12 July 1982.

That variation was the direct consequence of the decision of Macken J. delivered on 9 March 1978 awarding the additional public holiday sought by the SAWEF, Newcastle and, if his Honour is correct, sought in the alternative by the AWU.

Because of the doubt about the status of the AWU, the additional holiday was not inserted into the award for several years.

11 The Australian Retailers' Association, whose submissions we will come to shortly, contested the view that the Union Picnic Day inserted in the Award in 1982 was an additional public holiday and submitted the intention of the parties was that the day be a picnic day.

Work Choices Act

12 Before going to the respective cases of the parties, it is necessary to consider how the Work Choices Act, once it commences, will operate. As we understand it, the Bill finally passed through both Houses of the Commonwealth Parliament on 7 December 2005 accompanied by a significant number of amendments some of

which are relevant to our consideration in these proceedings (at the time of hearing the Act had not received Royal Assent but we understand such Assent was given on 15 December 2005).

13 It is not necessary for our purposes to delve into the detail of the Act, which is unusually complex. It is sufficient to explain our understanding of the framework of the relevant parts of the Act that underpin the applicants' concern that once Schedule 1 of the Act commences to operate, employees engaged by constitutional corporations pursuant to the Award will no longer be entitled to the Union Picnic Day and the number of holidays they have been entitled to will be reduced.

14 The Work Choices Act amends the *Workplace Relations Act* 1996 (Cth) ("WRA"). Schedule 1 of the Act sets out the main amendments and within Schedule 1 is a further schedule, Schedule 15, which is relevant to the matters here under consideration. Schedule 15 is titled "Transitional treatment of State employment agreements and State awards". Clause 2 of the Act provides that Schedule 1 (incorporating Schedule 15) will commence on:

> A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.

15 The Act inserts a new s 7C in the WRA, which provides:

> **7C Act excludes some State and Territory laws**
>
> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in
> section 170BB);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or
> another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises.
>
> Note: Subsection 4(1) defines *applies to employment generally*.
>
> ***State and Territory laws that are not excluded***
>
> (2) However, subsection (1) does not apply to a law of a State or
> Territory so far as:
>
> (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
>
> (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(ca) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers)

(d) child labour;

(e) long service leave;

(f) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(g) the method of payment of wages or salaries;

(h) the frequency of payment of wages or salaries;

(i) deductions from wages or salaries;

(j) deleted;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part IX (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.
(4A) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

16 "State or Territory industrial law" is defined in s 4 as including the *Industrial Relations Act* 1996 (NSW): s 4(1)(a)(i).

17 The purported effect of s 7C is that the WRA would operate to the exclusion of present and future State and Territory industrial jurisdictions in their application to employers and employees who fall within the general constitutional coverage of the amended WRA. Importantly, the amended WRA, in so far as it purports to exclude the operation of the State jurisdictions, will not do so in respect of certain employers, including where the employer is not a constitutional corporation (e.g. a partnership, a sole trader): See definition of employer in s 4AB of the WRA.

18 Not all State industrial laws will be made inoperative by the amended WRA. Section 7C(3) lists a number of such laws that will not be excluded and relevantly, for present purposes, these include in s 7C(3)(f) "the observance of a public holiday, except the rate of payment of an employee for the public holiday".

19 Whilst the amended WRA purports to exclude the operation of State industrial laws to the extent identified in s 7C, the Commonwealth legislature proposes that State awards and agreements will be *preserved* to the extent that the *Work Choices Act* would apply from the commencement of operation of the amendments and a State award will be known as a "notional agreement preserving State awards" or a "preserved State agreement", as the case may be. The State award or State agreement will still be in existence under State law but the purported effect of the amendments to the WRA is to render the State awards and agreements inoperative under State law as to certain employees (by virtue of s 109 of the Constitution and relevant provisions of the amended WRA) and to, in effect, give them a new identity as a transitional arrangement, under federal law.

20 In so far as notional agreements preserving State awards are concerned, the transitional period is up to three years during which the notional agreement may be converted into a certified agreement or Australian Workplace Agreement. In the event the notional agreement is not converted, it is proposed that eventually federal awards will be rationalised along industry sector lines. Once these rationalised federal awards come into operation, any notional agreement that has not been converted will cease to operate where the federal award applies to an employee's employment previously regulated by the notional agreement.

21 The terms of the notional agreement will be the terms of the State Award as at the date of the commencement of Schedule 1. However, even though the actual terms of the notional agreement might allow a State Industrial Authority to perform a function or exercise a power the Authority is prohibited (to the extent of any inconsistency) from doing so.

22 Clause 37 of Schedule 15 provides that:

> A term of a notional agreement preserving State awards is void to the extent that it contains prohibited content of a prescribed kind.

23 The Bill does not identify prohibited content but defines the expression "prohibited content" in proposed s 101D in the following terms:

> The regulations may specify matters that are prohibited content for the purposes of this Act.

24 Section 101D is to be found in subdivision B of Division 7 of Part VIB, Workplace Agreements. Nevertheless, it would appear that the intention is, in respect of "prohibited content", that such content will be prescribed by the regulations once they are promulgated.

25 Thus, the proposed effect of the amendments, in so far as they are presently relevant, will be as follows:

(1) From the commencement of Schedule 1 of the Act ("the reform commencement") the terms and conditions of the Shop Employees (State) Award will be reflected in a notional agreement preserving the Award and the notional agreement will bind an employer that is a constitutional corporation, employees of the business of the employer, and unions (with at least one member who is an employee of the business and who is eligible to be a member of the union), who at the time of commencement were all bound by or party to the Award. The notional agreement will also apply to future employees who would have been bound by the Award (cll 31, 32, 33).

(2) The terms of the notional agreement will be the terms of the Award as they existed when Schedule 1 of the Act commences plus any "preserved entitlement" derived from a State law (e.g., annual leave, parental leave, redundancy pay, etc.) (cl 34).

(3) A notional agreement preserving the Award will be void to the extent that it contains prohibited content of a kind to be prescribed by the regulations (cl 37).

(4) Even though the terms of a notional agreement might confer a function or power on this Commission that function or power, so far as it relates to employers and employees covered by the federal instrument, must not be performed or exercised after the reform commencement (cl 35) and none of the terms and conditions of employment included in the notional agreement are enforceable under State law (cl 38).

(5) A notional agreement ceases operation:

(a) at the end of a period of three years beginning on the reform commencement;

(b) in relation to an employee, if a certified agreement or AWA comes into operation in relation to the employee;

(c) in relation to an employee, if the employee becomes bound by a federal award (cl 38A).

26 It may also be noted that s 170AE of the WRA, which is in Div 1A of Part VIA provides:

Division 1A—Entitlement to public holidays

170AE Definition of *public holiday*

In this Division:

public holiday means:

(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) 25 December (Christmas Day);
(vii) 26 December (Boxing Day); and

(b) any other day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:

(i) a day declared by or under (or determined in accordance with a procedure under) the law of the State or Territory to be observed as a public holiday in substitution for a day named in paragraph (a); or
(ii) a union picnic day; or
(iii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday.

Case for the applicants

27 Mr *Rogers* of counsel for the applicants made the point at the outset of his submissions that the proposed award variation provides no additional benefit to employees to that which currently applies and imposes no additional burden on employers.

28 In relation to the effect of the Work Choices Act on the Union Picnic Day under the Award, Mr *Rogers* submitted that it was "probable" that such holidays will be declared as "prohibited content" for the purpose of notional agreements preserving State awards. This was so, he contended, because the new s 116B of the amended WRA identifies those matters that are not allowable award matters and one of those matters is "union picnic days": s 116B(1)(i).

29 By virtue of s 116L of the amended WRA, matters that are identified in s 116B as being non-allowable matters will cease to have effect after the reform commencement. Thus, if a federal award at the time of the reform commencement provides for a union picnic day, that provision will relevantly cease to have effect immediately after commencement. The import of Mr *Rogers*' submission was that if union picnic days were to be abolished from awards it was probable that the regulations would also prohibit the inclusion of such holidays in notional agreements.

30 In any event, we note that once the rationalised federal awards come into operation superseding notional agreements, the union picnic day to which shop employees are currently entitled will no longer be available.

31 The applicants submitted that when the Union Picnic Day was inserted into the Award it did no more than bring the Award into line with other NSW awards. Initially, it was submitted, *Macken* J declined to include a picnic day in the Award: [1978] AR (NSW) 50 at 55. However, his Honour recognised the Award was deficient in the number of holidays it provided for having regard to the general standard of 11 holidays in

awards at the time, and his Honour granted an additional holiday. The Award was eventually varied in 1982 to provide for a "Union Picnic Day" but Mr *Rogers* submitted it was a picnic day in name only.

32 It was submitted for the applicants that, as Mr Williams stated in his evidence, the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales has never held a picnic day. The Shop, Distributive and Allied Employees' Association, New South Wales and the Shop Assistants and Warehouse Employees' Federation of Australia ("SDA") did hold a picnic day on the first Tuesday in November each year but attendance was not obligatory in order to receive the holiday, and only about 700-1,000 people attended the picnic, the majority of these being employees of the large retailers whose employees were covered by federal industrial instruments in New South Wales in any event.

33 The applicants submitted that the general standard in the State was 11 holidays per annum. For this proposition the applicants relied on the affidavit of David John Bliss, an organiser and industrial officer with the SDA since 1995. Mr Bliss deposed that on 21 November 2005 he performed a review of major common rule awards applicable to work performed within the State of New South Wales. The result of Mr Bliss's research was that of the 54 awards examined, 17 of these awards provided for 10 holidays, one award provided for 12 holidays and 36 of the awards provided for 11 holidays.

34 The applicants also referred to the decision of the Australian Industrial Relations Commission given on 4 August 1994 in the Public Holidays Test Case Print L4534, a decision of a Full Bench, in which it was established that the standard in respect of public holidays in the federal jurisdiction was 11 holidays.

Unions NSW

35 Unions NSW, the employees' State peak council, supported the applications. In particular it was submitted:

· The proposed variation seeks to provide no additional benefit to employees and therefore will not impose any additional burden or costs to any employers covered by this award.

· If the Bill currently before the Federal Parliament, the Workplace Relations Amendment (Work Choices) Bill 2005, is passed into law, all State Awards, including the Shop Employees (State) Award shall be converted into Federal *Notional Agreements Preserving State Awards*.

· The conversion of State Awards into Federal *Notional Agreement Preserving State Awards* shall provide for a reduction and diminution of entitlements, which are operative under current State Awards.

· One such entitlement that Unions NSW submits shall be affected (and is the subject of these proceedings) is that of the Union Picnic Day. Unions NSW reiterates the submissions made in ... the written submissions of the applicant unions in regards to the Workplace Relations Amendment (Work Choices) Bill 2005 and Union Picnic Days.

· Further Unions NSW supports the submission made by the applicant unions that the general standard throughout the overwhelming majority of New South Wales Awards, is for 11 public holidays.

36 It was further submitted that in supporting the applications, it was to be noted the variations sought did not provide additional benefits to employees, nor did they impose any additional burden on employers.

37 Finally, it was submitted that provisions of the Work Choices Act would not only have an effect on the Award and the provisions subject to these proceedings, but that it will affect all State Awards and this would not be limited to Union Picnic Days alone.

Australian Retailers' Association

38 The major employer interests in the industry were represented by the Australian Retailers' Association ("ARA"). In summary the ARA submitted:

· Given that union picnic days will be a non-allowable matter for federal awards when the Act commences and given the wording of the "WorkChoices booklet" there is a strong argument that the likely outcome will be as the applicants submitted:

> That any holiday, howsoever described, which has the characteristics of a union picnic day will be disallowed.

· In *Ramsay and Aberfoyle Manufacturing Company (Australia) Pty Limited* (1935) 54 CLR 320 at 253 the High Court of Australia on appeal from the Supreme Court of Victoria ruled in a majority decision that a court should not hand down a ruling on prospective laws, and as such dismissed an appeal whereby an interlocutory injunction was sought by the appellant based upon a council by-law that had yet to be legislated. This decision should guide this Commission in regards to any potential inappropriateness in considering the Bill as a court of law cannot speculate on the nature of potential changes to legislation.

· The history of the union picnic day provision in the Award shows that the intention of the applicants was to have a Union Picnic Day placed in the award notwithstanding the decision of *Macken* J to include an additional holiday.

· The *Bank and Bank Holidays Act 1912* enshrines a comprehensive list of public holidays relevant to New South Wales and ensures that at least 10 public holidays are observed on weekdays (Monday through to Friday) every year. It would be inappropriate to characterise the Union Picnic Day as The First Tuesday In November, as The First Tuesday In November is not a legislated public holiday in New South Wales.

· There is considerable disparity in the number of holidays listed in New South Wales state awards. It would be erroneous to state that 11 holidays per state award is the standard.

· It is not in the public interest to alter the award in the terms suggested by the unions as it took over 4 years for all parties to settle the current terms for the union picnic day. Without the presence of regulations or other guidelines explaining any changes to NAPSAS [notional agreements preserving State awards] it would be detrimental to the public interest to accept the unions' proposed changes to the award.

39 The ARA submitted in conclusion:

> As there is no consent between the parties regarding the removal of the Union Picnic Day from the award the ARA would ask the Commission not to alter the consent position reached between the parties in regards to the Union Picnic Day in 1982. The parties took over 4 years to reach agreement about the inclusion of a Union Picnic Day in the award and as such the ARA would oppose the unions application on the basis that it disturbs this consent position.
>
> Given the degree of uncertainty surrounding the fate of New South Wales state awards at present for corporations it would be appropriate for the Commission to not amend the award in the terms proposed by the union.
>
> The Commission should not alter the present wording in the award regarding the Union Picnic Day. This is consistent with Section 17(3)(d) of the *Industrial Relations Act 1996*.

Australian Business Industrial and Australian Industry Group

40 Australian Business Industrial and the Australian Industry Group, New South Wales Branch ("the joint employers") submitted that there were insufficient grounds in support of the variation. In particular, it was submitted, the Commission should refuse the applications because:

(a) the effect of the proposed federal legislation is speculative;

(b) in any case the proposed changes to federal legislation are not relevant considerations;

(c) the inclusion of a Picnic Day in the Award is a fair and reasonable condition of employment and in the absence of consent it should not be removed; and

(d) there is nothing significant for employers and employees in New South Wales about the first Tuesday in November.

41 In relation to the first ground, the joint employers submitted the proposed federal legislation specifies what will not be allowable matters in federal awards (such as union picnic days), but it did not specify what, if anything, will be prohibited content in notional agreements. It was contended that the proposed federal legislation provides that regulations may be made setting out prohibited content in notional agreements. However, the assumption by the applicants that the regulations will deem the matters that are not allowable matters in federal awards to be prohibited content in notional agreements, was speculative.

42 In relation to the second ground, the joint employers submitted it is established that courts of law can only act upon the law as it is, and have no right to, and cannot, speculate upon alterations in the law that may be made in the future: *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Limited* (1935) 54 CLR 230 at 253; *Willow Wren Canal Carrying Co Ltd v British Transport Commission* [1956] 1 All ER 567 at 569.

43 Further, it was submitted that to the extent the proposed changes were relevant, it was notable that the Award would continue to apply within the New South Wales jurisdiction and to those employers and employees to whom it will apply. The joint employers submitted that the Commission should concern itself with the industrial instruments within its jurisdiction and that the relevant considerations for varying these instruments were those specific to the jurisdiction.

44 In relation to the third ground relied upon by the joint employers, it was submitted in so far as the current entitlement in cl 17(B) represented a fair and reasonable condition of employment (and no party claimed otherwise) it should continue undisturbed. The joint employers contended the applicants had not shown that the entitlement was anything other than a fair and reasonable condition of a common rule award in NSW. Further, that the current entitlement represented a consent position of industrial parties.

45 It was put by the joint employers that in a contested case, the onus falls on the applicant to make out a case for an alteration to an award, which otherwise will remain undisturbed: *Re Pastoral Industry (State) Award* (2001) 104 IR 168 at 185. The joint employers submitted that the applicants had not met the onus in this matter and it followed that the Award should remain undisturbed.

46 As to the joint employers' fourth ground in opposition to the application, it was submitted that inherent in the applicants' position was the proposition that the Award should be varied to recognise a day (being the first Tuesday in November) that is not observed generally as a Public Holiday in New South Wales, nor is it a Public Holiday for any purpose in New South Wales, nor is it a day of any special significance in New South Wales. The proposition that an employee should have an entitlement to take leave simply because it is the first Tuesday in November finds no support in authority and should be rejected.

Other employer interests

47 Employers First supported the submissions made by the Australian Retailers' Association.

48 As we have already noted, the Catholic Commission for Employment Relations submitted that the amended applications should be granted.

Consideration

49 The Commission's power to vary an award derives from s 17 of the *Industrial Relations Act*, which provides:

> **17 Variation or rescission of award**
>
> (1) The Commission may vary or rescind an award.
>
> (2) Sections 11, 13 and 15 apply to any such variation or rescission. The other provisions of this Division continue to apply to the award as varied.
>
> (3) An award may be varied or rescinded in any of the following circumstances only:
>
> (a) at any time with the mutual consent of all the parties to the making of the original award,
> (b) at any time to give effect to a decision of the Full Bench of the Commission under section 50 or 51 (National and State decisions),
> (c) during its nominal term if the Commission considers that it is not contrary to the public interest to do so and that there is a substantial reason to do so,
> (d) after its nominal term if the Commission considers that it is not contrary to the public interest to do so.
>
> (4) This section extends to a variation or rescission of an award in the course of an arbitration by the Commission under Chapter 3 to resolve an industrial dispute.

50 Further, any award made by the Commission must set fair and reasonable conditions of employment for employees: see s 10 of the Act.

51 The nominal term of the Award has expired and so the basis upon which the Commission may vary it will depend upon the Commission's view as to whether it considers that it is not contrary to the public interest to do so: s 17(3)(d). Overlaid on the statutory test to be applied are the Commission's wage fixing principles and the relevant principle in this case is that relating to special cases, which is in the following terms:

> Except for the flow on of test case provisions, any claim for increases in wages and salaries, or changes in conditions in awards, other than those allowed elsewhere in the principles, will be processed as a special case before a Full Bench of the Commission, unless otherwise allocated by the President.
>
> This principle does not apply to applications for awards consented to by the parties, which will be dealt with in the terms of the Act, or to enterprise arrangements, which will be dealt with in accordance with the Enterprise Arrangements principle.

52 As the Full Bench in *Residual Business Management Corporation and New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union* (2005) 145 IR 93 recently observed:

> 46 In order to be successful in a special case application the applicant would need to satisfy the Commission, most usually a Full Bench, that the case being brought is exceptional in character; that it is "of such a kind as to exceed or excel in some way that which is usual or common": *Oxford English Dictionary*, second edition, 1989. But there is also the obligation on the applicant to show that granting the claim is necessary to establish fair and reasonable conditions of employment: *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384 at 420.

53 It is apparent in this case that the applicants regard their claim as special because they find themselves in a situation where the picnic day holiday prescribed by the Award is not a true picnic day. Further, there is the likelihood at some time after the commencement of the legislative changes contained in the Work Choices Act, the provision regarding Union Picnic Day in the notional agreement preserving the Shop Employees (State) Award will cease to apply because it will be prescribed by regulation to be prohibited content. And that, in any event, once a federal award is made covering the retail sector, thereby superseding the notional agreement, union picnic day provisions will be non-allowable matters and will have no application.

54 We accept that there is a likelihood that once the changes contained in the Work Choices Act take effect (from a date yet to be proclaimed), then subject to the law surviving any likely constitutional challenge, employees whose terms and conditions of employment are regulated by a Notional Agreement Preserving the Award will lose any entitlement to a Union Picnic Day. The major employer party to the Award shares this view. What this Commission is being asked to do, in the face of that likelihood, is convert the picnic day into a holiday under the Award so that when the Award also becomes a notional agreement under the federal law, there is much less likelihood of the day being lost for employees under the notional agreement. Of course, employees of businesses that are not constitutional corporations will maintain an entitlement to the picnic day because their terms and conditions of employment will remain under the Award and any notional agreement will not affect them.

55 What is in prospect is that employees in the retail sector in New South Wales, whose terms and conditions become regulated by a notional agreement, will lose an entitlement that has been in the Award for the past 23 years. Such employees will no longer have the benefit of 11 holidays, which is undoubtedly the number of holidays in New South Wales enjoyed by most employees covered by State awards, and federally. Shop employees are likely to lose the benefit of the picnic day because of what it is called: a Union Picnic Day and not a public holiday.

56 Whatever view one takes about the fairness of what is proposed to be achieved under the new federal laws, it is not the function or role of a quasi-judicial tribunal such as this Commission to act in such a way as to deliberately thwart or frustrate the intentions of the Commonwealth Parliament. On one view of it, that is what we are being asked to do here; to cloak the picnic day in another guise as an "additional holiday" so that it will avoid being regarded as prohibited content or a non-allowable award matter under the amended WRA.

57 This is not to say, however, that the Commission will decline to deal with all applications where the rights or entitlements of employees will be affected by the new federal laws. Each application will be considered on its merits according to the existing law and practice in this jurisdiction, regardless of any impending changes to the federal laws.

58 That brings us to a consideration of whether there are grounds to vary the Award divorced from any consideration of what the future might hold for employees presently covered by the Award but who may become bound by a Notional Agreement Preserving the Award.

59 It will be recalled that in 1978 *Macken* J determined that he would award an additional public holiday and left it to the parties to confer on the terms of an award variation. There followed a lengthy inter-union dispute that delayed any variation until 1982. There was also an appeal by the Retail Traders' Association from the decision of *Macken* J making the Shop Employees Interim (State) Award but this was later withdrawn.

60 In 1982 both the SDA and SAWEF filed separate applications to vary the Shop Employees (State) Interim Award that had been made by *Macken* J in 1978. The SDA's application was by way of notice of motion and sought a Union Picnic Day to be held on the first Tuesday in November each year. The application stated:

> All members of SDA shall be allowed this day free from work on full pay.

61 SAWEF's application sought an "additional holiday" to be set by agreement between the employer and the employees concerned after having taken into consideration the operation of the particular establishment". The application also sought:

> [A] holiday on the first Tuesday in the month of November each year and such holiday shall be known as the Retail Industry Picnic Day.

62 The reason why *Macken* J refused the application for a picnic day was explained by his Honour as follows:

> No attempt has been made to hold a picnic for shop employees and no evidence was brought to indicate that a sufficient number of employees would attend a union picnic to make the picnic truly representative of all employees in the industry.
>
> In the case of a claim of this character, based as it is on the social value of fostering the spirit of unionism amongst employees, the unions must do more than adopt an "Oliver Twist" approach to the claim; it is not sufficient to merely say "please". It is not a claim which the Commission, throughout the picnic day cases, has always held must be supported by evidence such as would justify the awarding of a union picnic day.

63 The leading authority in the "picnic day cases" would appear to be *Re Petrol and Oil Sellers (State) and Motor Car Washers (State) Awards* [1956] AR (NSW) 407 where the Full Bench stated at 425:

> There are, we think, a number of requirements which ought to be satisfied before a union picnic day is made an award holiday, and among them is the fact that a picnic day will be held and will be attended by a sufficient number of employees in the industry to make attendance truly representative of all of the employees in the industry.

64 The decision in the Petrol and Oil Sellers' Case was followed by *Sheehy* J in *Re Commercial Travellers (State) Award* [1970] AR (NSW) 250. There his Honour stated at 252:

> The awarding of a picnic day as a paid holiday would not be justified if, in reality, there would be no picnic or one which would be poorly attended.

65 The holiday that is referred to as a Union Picnic Day under the Award has none of the characteristics - if it ever did - of a picnic day. The day is generally available to all employees under the Award and not just union members. Further, SAWEF has never held a picnic day. Moreover, there is no requirement in the Award that employees attend the picnic day in order to receive payment for the holiday and no evidence is required of attendance. It seems the picnic day held by the SDA is largely attended by union members employed in New South Wales under industrial instruments other than the Award. We also note the picnic day is referred to in the Award as an "additional holiday" and may be taken on a day other than on the first Tuesday in November.

66 The applications seek to delete any reference to "Union Picnic Day" and substitute a holiday that is to be the first Tuesday in November each year. The variations do not disturb the arrangements that currently apply for the taking of the picnic day, so there is no detriment to employers by way of increased inconvenience or increased cost as a consequence of the proposed variation.

67 We consider the applications are entirely sensible and reflect the fact that the so-called Union Picnic Day holiday is not a picnic day when considered against the principles for awarding such days. It would be unfair and unreasonable, however, to remove the Union Picnic Day from the Award without substituting another day to be taken as a holiday given that employees under the Award have been entitled to 11 holidays since 1982. Moreover, we consider that to reduce the number of holidays for shop employees to ten would be to disadvantage this class of employee given that a very substantial number of employees under the majority of the Awards of this Commission are entitled to 11 holidays each year. In respect of those awards that provide for 10 holidays we note that in most cases Easter Saturday is not one of the holidays. This would seem to be because the designation of Easter Saturday as a holiday would provide no practical benefit for employees covered by these awards.

68 We consider that the variation proposed by the applicants would provide for a condition of employment that is fair and reasonable. In so far as the requirements of the special case principle are concerned, *Macken* J in 1978 rejected a claim for a picnic day and determined that the Award should provide for an additional holiday. Then followed a hiatus at the end of which the parties agreed on a variation that incorporated Union Picnic Day in the Award in 1982. The Day has none of the true characteristics of a picnic day and one union party to the Award has never held a picnic day.

69 We consider a special case exists for recognising in the Award the first day of November for what was originally intended to be: an additional holiday. Accordingly, we propose to vary the Award in terms of the SDA's amended application and we so order. The variation shall take effect on and from 1 February 2006.

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