

Mediation and Employment Relations Services

239 Magill Rd Maylands SA 5069

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LSA MEMBER UPDATE NOVEMBER 2023

Fair Work Ombudsman Audits

Earlier this year advised that the Fair Work Ombudsman paid surprise visits to farms in Western Australia.

More recently that Office visited several horticulture plantations in the Sunshine Coast and Lockyer Valley in Queensland, and the Riverina and Sunraysia areas. Fifteen “hot spots” were identified.

Those audits netted \$316,860 in fines and \$72,301 in underpayments across 447 business in its agriculture strategy plan which began in December 2021.

Underpayment of wages may also result in under payment of Return to Work SA (“RTWSA”) Levies and Superannuation contributions (ATO). Not long ago a RTWSA Audit revealed underpayment of levies. RTWSA also audited sham arrangements of “contractors” who were employees. An ABN and/or invoice does not in itself convert an employment relationship to one of a contractor.

Proclaimed Public Holidays

The following days have been proclaimed public holidays:

1. Sunday 24 December: Christmas Eve: 7pm to midnight
2. Monday 25 December: Christmas Day
3. Tuesday 26 December: Proclamation Day public holiday and Boxing Day
4. Sunday 31 December: New Year's Eve: 7pm to midnight
5. Monday 1 January 2024: New Year's Day

The 2024 Public Holidays can be accessed at

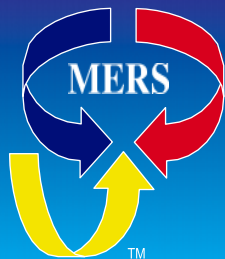
https://www.safework.sa.gov.au/_data/assets/file/0009/289404/South-Australia-Public-Holidays-Calendar.ics

Work on Public Holidays

The Pastoral Award 2020 makes the following provisions in clauses 25 and :

“25. Public holidays

25.1 Public holiday entitlements are provided for in the NES.



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25.2 Substitution of certain public holidays by agreement at the enterprise

- (a) An employer and employee may agree to substitute another day for a day that would otherwise be a public holiday under the NES.
- (b) An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES."

On 21st November 2023 it was reported that the High Court has rejected BHP's bid to challenge a full Federal Court ruling clarifying when employees can reasonably refuse requests to work on public holidays.

The Court found that section 114 (2) of the Fair Work Act permits an employer to request that an employee work on a public holiday, while s114(3) allows that a request can be refused if it is not reasonable, or refusal is reasonable.

"In this court's view, a 'request' within the meaning of s114(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," the full court said.

"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."

It is important to consider this decision when requesting employees to work on a public holiday. In a previous decision it was found that this principle would apply when the workplace operates over 7 days and 24 hours per day.

To minimise the risk of employees not agreeing to work on a Public Holiday, the letters of employment should include that the employees will be required to work on Public Holidays, especially where such essentials as animal husbandry is required on those days.

“35.5 Public holidays rate of pay

A farm and livestock hand required to work on a public holiday will be paid **200%** of the ordinary hourly rate.”

Members' Industrial Relations Advice

LSA members are entitled to contact MERS for a free half hour consultation, per member per year. Our telephone number is 08 83312422) and email chas@mers.com.au

Recent Member Updates are included in the MERS website www.mers.com.au