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Professor Joellen Riley
Review of Banks and Bank Holidays Act
Office of Industrial Relations
NSW Department of Commerce
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By email: review@oir.commerce.nsw.gov.au

Dear Professor Riley

Submissions in response to Review of the *Bank and Bank Holidays Act 1912 – Options Paper*

Ai Group appreciates the opportunity to comment on the Options Paper in relation to the Review of the *Banks and Bank Holidays Act 1912*, released in August.

In these submissions, it is not our intention to address every issue raised in the Options Paper but only those issues of most concern to Ai Group's members. Further, we do not seek to repeat the views expressed in our submissions provided in relation to the Discussion Paper, but would rely on those views in addition to those set out in this submission.

The issues of key concern to Ai Group regarding this Review are to ensure that:

- the proposed new public holidays legislation for NSW is simple to understand and, so far as reasonably practicable, puts in place transparent and predictable arrangements for public holidays in the State;
- the proposed new legislation does not give rise to additional public holidays in NSW;
- appropriate arrangements are put in place with regards to local holidays and half holidays, to give effect to historic and settled (pre-WorkChoices) practices. Under such arrangements, local holidays and half holidays would be observed only where they are specifically recognised under industrial instruments.

Current practice should be maintained

Subject to the comments below regarding local holidays, Ai Group believes that the proposed modern public holidays legislation should reflect current practice in NSW with regards to the days recognised as public holidays. The Review should not seek to increase (or decrease) the number of public holidays in NSW, consistent with the Minister's intention in commissioning the Review, as recognised on page 7 of the Options Paper.

Importantly, current practice should also be maintained with regards to arrangements to be made when public holidays fall on weekends. Current practice in the States and Territories with regards to when various public holidays fall on weekends is set out in the table on page 16 of the Options Paper. What is notable from this table is that although there is no uniformity across the various jurisdictions, NSW is amongst the most "generous" with regards to its current arrangements. Currently, there are three circumstances in which additional days are declared in NSW, namely when:

- Christmas day falls on a Saturday;
- Boxing Day falls on a Saturday;
- New Years Day falls on a Saturday.

The only other jurisdictions in which additional days are declared in more circumstances are Western Australia and South Australia. All other States and Territories in fact have more substitute days (rather than additional days) than does NSW.

It should also be emphasised that under the decision of the Full Bench of the Australian Industrial Relations Commission in the *Public Holidays Test Case*, no additional days were provided where public holidays fell on the weekend, but rather substitute days¹. In providing additional days in the circumstances above, current NSW practice is therefore already more generous in terms of its effect on non-standard work arrangements than is the Test Case Standard.

The Options Paper expresses support for changing current arrangements in NSW by declaring more additional days where public holidays fall on weekends, rather than having substitute days. In particular, the Options Paper seems to favour having additional days when:

- Christmas Day falls on a Sunday;
- Boxing Day falls on a Sunday;
- New Years Day falls on a Sunday.

These changes are put forward to address the perceived unfairness to employees who work "non-standard" working arrangements, particularly those working Saturdays and Sundays. The Options Paper also expresses a view that current arrangements for public holidays in NSW unduly favour employees working "standard" working arrangements, of Monday to Friday. On the one hand, it is difficult to argue with the view that current practice ensures that most public holidays fall on days between Monday to Friday, meaning that those employees who regularly work weekends may not enjoy equal benefits, particularly in years where certain public holidays fall on weekends and such days are substituted for weekdays. It is also the case that employees in certain industries (being those which typically operate on a 7 day week basis) are more affected than others by these arrangements.

¹ Although the decision also recognised additional days declared under State or Territory legislation, it evidently was not thought necessary to include as part of a test case standard additional days (rather than substitute days) where certain public holidays fell on the weekend.

In Ai Group's view, however, it is not the role of State legislation to attempt to ensure all employees enjoy equitable benefits to public holidays. In Ai Group's view, the current arrangements regarding substituted days and additional days allow for a reasonable compromise of the various interests and differences concerned. It would be very unfair to employers to increase the number of additional days where public holidays fall on weekends. It could just as easily be argued that the "real" public holiday on which the particular day falls should always be retained as the public holiday, and no substitution made where it falls on a weekend. In numerous industries, this would reduce labour costs and inconvenience associated with public holidays. However, it is accepted that certain public holidays falling on weekends have customarily been substituted for a weekday, and that there is an expectation amongst employees that this continue.

The Options Paper contemplates that if the option of having more additional days was adopted, employers would and should seek to make industrial instruments to ensure that employees would not be able to "double dip" for penalty rates in respect of both days. However, even if this was to occur, it must not be overlooked that:

- Industrial instruments cannot reduce the number of days recognised as public holidays for the purpose of the NES entitlement to reasonably refuse to work (and where absent, to be paid for ordinary hours not worked). While it is possible for an industrial instrument to provide that an employee will only receive penalty rates on particular public holidays, and it may allow for substitution of those days (in which the NES right will attach to the substituted day), the number of days in respect of which an employee has the right to reasonably refuse to work is fixed by the NES. Importantly, where such right is exercised, it is also a right of paid absence. It is foreseeable that increasing the number of additional days would give rise to a particular employee exercising the right to paid absence on two days instead of one, or having one paid day off and the other attracting penalty rates;
- For many workplaces, adopting more additional days would still increase the overall number of employees who are entitled to public holiday penalty rates. This is because employees working a greater variety of rosters will have a working day falling on at least one of the two public holidays. While industrial instruments could ensure that any particular employee will only get penalty rates on one such day, the overall number of employees receiving public holiday penalty rates is still higher. This of course is the rationale behind the proposed move to more additional days – that more employees will enjoy the benefit.
- The public holiday provisions of most modern awards have already been determined and the Australian Industrial Relations Commission is unlikely to amend awards to address a public holiday issue in one State.
- There is no guarantee that addressing this issue through an enterprise agreement would not be held by Fair Work Australia to breach the Better Off Overall Test.

Overall, there is the potential for greater disruption to business operations and increased labour costs.

The impact of arrangements for public holidays and their effect on common working patterns in a particular industry or workplace is a matter properly within the scope of industrial instruments. As the Options Paper recognises, some industrial instruments (such as the *Hospitality Industry (General) Award 2010*) make special provision for where a full time employee's rostered day off falls on a public holiday. In many industries, employees who regularly work weekends and public holidays are entitled to additional annual leave,

whether under federal legislation or an industrial instrument. This of course is in addition to weekend penalty rates and shift loadings to which employees may be entitled.

Under some instruments, there are special provisions for employees who regularly work Sundays even if they do not also work Saturdays or public holidays. An example is provided by Clause 27.13 of the *Hospitality Industry (General) Award 2010*, which provides:

An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.

Another factor which may be taken into account is that at least some employees rostered to work on a Sunday which is the “real” public holiday but who do not receive public holiday penalty rates may in fact be working some or all of those hours as overtime (ie exceeding weekly maximum hours). Under federal legislation, employees have a right to refuse to work unreasonable additional hours. This right is similar to the right to reasonably refuse to work on public holidays (although it does not carry a right to paid absence). Further, under many instruments, employees working overtime on Sundays are entitled to higher rates than normal Sunday rates, even if the rates are still lower than public holiday rates. For example, under the *Contract Call Centre Award 2010*, overtime on Sundays is paid at double time, compared with normal Sunday penalty rates of 75% and 50% (depending on whether the work is outside or between the spread of hours).

Thus while in a year when an employee works on the “real” Christmas Day which is not a public holiday he or she may not receive public holiday penalty rates, there are various other entitlements and protections in place which, in an overall sense, address much of the perceived unfairness to employees.

In many industries, it is of course a known and accepted feature of working arrangements that employees will be rostered to work weekends and public holidays. Where such rosters exist, it is also common in many cases for them to alternate, such that many employees do not work a fixed arrangement of days on an ongoing basis. The result of this is that an employee who is rostered to work one year when a real public holiday falls on a weekend and is substituted for a day on which the employee is not rostered to work (which is the concern to which the proposal for more additional days is addressed) is unlikely to experience this problem repeatedly. Of course, the likelihood of this occurring is also reduced by the fact that the public holidays do not fall on weekends every year.

A further issue concerns Easter Sunday. The Options Paper supports the view that current arrangements should be changed so that Easter Sunday is recognised as public holiday in NSW (see pages 11-12 of the Options Paper). As a starting point, this is quite clearly a proposal to increase the number of public holidays in NSW. Of course, it would also give rise to four consecutive public holidays, which undoubtedly would compound existing disruption and labour cost issues around this time of the year. For employees, the fact that public holidays are clustered together over this period also makes it more likely that any particular employee (particularly if he or she is a full time employee) will have a working day on at least one such public holiday, meaning that they will not miss out entirely on the public holiday “benefits” (attracting the right to reasonably refuse to work and, in many industries, public holiday penalty rates).

It is notable that, as the Options Paper recognised on page 12, Easter Sunday is not currently a public holiday under current arrangements in any State or Territory. To the extent to which industry-specific issues are raised by current arrangements (with reference to the retail industry discussion on page 12), these are issues for consideration within the

context of industrial instruments, and not for State legislation which by its nature will affect national system employees across all industries.

The Options Paper, on page 12, identifies the potential labour cost increase for naming Easter Sunday as a public holiday as being the difference between Sunday penalty rates and public holiday rates. In Ai Group's view, the impact on business is not quite this simple. For one, there are also costs flowing from the fact that employees may exercise the right to reasonably refuse to work on that day (carrying a right to paid absence under the NES). However, even if the cost issue is dealt with in these terms, there are quite significant differences between Sunday rates and public holiday rates under a number of industrial instruments. For example:

- Under the *Contract Call Centres Award 2010*, the Sunday penalty rate is 50% between 7am and 7pm, and 75% outside those times. This compares with the public holiday penalty of 150% (ie double time and a half). This reflects the provisions under the current *Contract Call Centre Industry Award 2001*. The same rates apply to inhouse call centres under the *Clerks – Private Sector – Award 2010*;
- Under the *Fast Food Industry Award 2010*, work on Sundays attracts a 75% loading, whereas the public holiday penalty rate is 250% and 275% for casuals;
- Under the *Hospitality Industry (General) Award 2010*, the penalties are the same as under the *Fast Food Industry Award 2010*.

There may also be some inconsistency between, on the one hand, an argument that public holiday penalty rates are not so much higher than Sunday penalties as to rule out the option of making Easter Sunday a public holiday², yet on the other hand, having regard to the differences between Sunday rates and public holiday rates in support of the view that real public holidays falling on Sundays should remain public holidays³. In any event, the issue of having more additional days is, in Ai Group's view, more complicated than a simple comparison of penalty rates, although certainly that is an issue of concern. The fact that all national system employees would gain additional days for the purpose of the NES (the entitlement to reasonably refuse to work as well as the right to be paid for ordinary hours not worked), and the potential for direct and indirect cost increases and inconvenience, must also be considered.

The special case of local holidays and half holidays

As indicated above, Ai Group strongly supports changing current practice as it relates to declaring local holidays and half holidays. This issue was considered in detail in our previous submissions, with specific reference to our strong opposition to continuing the practice of declaring Newcastle Show Day as a public holiday in the relevant Council areas. In 2008 and 2009, this arrangement had a major impact on Ai Group's many members in the region, which is dominated by manufacturing industries in which this day has not historically been observed as a public holiday. The fact that this was not the Government's intention in declaring Newcastle Show Day has been confirmed in correspondence from the Office of Industrial Relations to Ai Group. Neither was it the intention of Newcastle City Council which was responsible for requesting that the day be so declared⁴.

² Page 12 of the Options Paper.

³ Page 22 of the Options Paper, where the point is made that rates for working Sundays are not necessarily the same or similar as public holiday penalty rates.

⁴ As to the Newcastle City Council's decision-making process, the relevant report by the Acting General Manager to the Newcastle City Council regarding Newcastle Show Day 2008, being the

In Ai Group's view, it is legitimate and necessary to distinguish current practice relating to local holidays and half holidays from other aspects of current practice with regards to the recognition of public holidays in NSW. As the Options Paper recognises, as a result of federal legislation since WorkChoices, current practice is having a far wider impact than that which it has ever had in the past and that which was intended by the Government.

Arrangements for half holidays also need to be re-considered. Currently, the overwhelming majority of local public holidays declared in NSW are half-holidays. In 2009, there are 20 half holidays and only 6 full day local holidays⁵. Current federal legislation does not recognise half holidays, nor do the overwhelming majority of industrial instruments. This position will fundamentally change from 1 January 2010. Under the National Employment Standards (NES), all half holidays recognised in state legislation will also be recognised as public holidays for the purposes of the NES, giving rise to a right to reasonable refuse to work. Furthermore, under most modern awards, because half holidays are recognised under the NES, they will also be recognised for the purpose of the modern award, which in most cases, gives rise to public holiday penalty rates. Continuing current practice into next year will give rise, in practical terms, to large numbers of national system employees enjoying an increased number of public holidays. In Ai Group's view, it would be consistent with the Minister's intention behind the Review to ensure this does not occur.

For the above reasons, the role and impact of NSW public holidays legislation has fundamentally changed since current arrangements were developed, and further significant change will occur once NES and modern awards commence. Against this background, there is a need to change current practice, which should be reflected in the proposed new legislation.

To address these concerns, Ai Group would support Option A on page 30 of the Options Paper, that is, a power to name local public holidays and half-holidays as "local event days" (or half days) rather than public holidays. The implications would then hinge on the provisions of particular industrial instruments and whether or not they recognise such days. This arrangement should ensure that the day or half day does not give rise to entitlements for the purposes of the NES, which (relevantly) recognise days observed generally within a region as a public holiday. To ensure this effect is achieved, the legislation should clearly distinguish between public holidays and local event days and half-holidays and their intended effect.

Under provisions of some relevant industrial instruments (being those which relate to workplaces or industries which have traditionally observed such local holidays or half holidays), the arrangements flagged in Option A would be sufficient to give rise to a legal entitlement under that instrument for the day to be observed. A review of such instruments may be necessary to consider the extent to which this is the case. In any event, there is reason to believe that in many such workplaces and industries, while declaring such days as "local event days" may not technically give rise to benefits under the applicable instrument, employers would be willing to continue to observe such days, whether out of custom and practice or goodwill. This would certainly be the case, one assumes, for the relevant Councils and State Government departments or instrumentalities, which are understood to make up a large proportion of the relevant employees who have traditionally enjoyed such days as public holidays. Were this practice to be continued voluntarily (or otherwise) by such employers, it may also have some effect on modelling the practice for other employers in workplaces which have also customarily enjoyed local public holidays.

document put to the Council to reconsider how the gazettal notice should be worded, can be found online at: http://www.newcastle.nsw.gov.au/_data/assets/pdf_file/0006/29814/Show_Day.pdf

⁵ See NSW Government Gazette No 158, 19 December 2008.

The extent to which the possibilities just discussed would occur in practice could of course be explored in more detail with the relevant parties as part of the Review.

On page 31 of the Options Paper, another possible option for local holidays is raised, being to retain current practice for declaring local holidays for a period of time to allow industrial arrangements to be put in place to ensure workplaces in which local public holidays have customarily been enjoyed continue to enjoy those arrangements into the future. While this option is clearly preferable to retaining current practice indefinitely, in Ai Group's view, it is not necessary for the reasons discussed above. Furthermore, it would also have the effect in the meantime that all national system employers would have to recognise such days as public holidays for the purpose of the NES and, in many cases, industrial instruments. It would be preferable to re-establish pre-Workchoices norms as soon as possible. Continuing with present arrangements would, over time, entrench a new and unwarranted custom.

For employees who genuinely wish to participate in local event days, there are many arrangements in modern workplaces which could accommodate this, such as through taking of RDOs, annual leave, leave without pay, or making up for the time off in some other way.

It should also be recognised that in some regions, employers already voluntarily recognise half holidays even where not legally obliged to do so, giving employees the afternoon off work to attend the local event (such as Albury Cup Day). This is generally done out of goodwill or to support the local community and local economy, and where it is able to be accommodated and costed in the context of the particular business and its operations. To some extent therefore, it may be thought that it is unnecessary to formally mandate such days or half holidays as public holidays.

The difficulties of applying local holidays/local event days

In practice, there remains some confusion regarding the application of local holidays and half holidays. The common scenarios which are presently giving rise to uncertainty are:

- When an employee lives outside the relevant region but works in the region, and vice versa;
- When the employee's usual place of work is outside the relevant region, but he or she works on a site within the region on the particular day or half day, or vice versa.

It would be desirable if, as part of the Review, consideration was given to clarifying these issues. If the option regarding declaring the days and half days as local "event" days and half days is adopted, consideration could be given to the form in which such days are gazetted or the provisions of the proposed legislation which enable the gazettal could make clearer the intended operation. It is acknowledged that there may be limitations on the extent to which State legislation is able to resolve these issues and that it may be necessary for them to be addressed through federal legislation and/or industrial instruments.

August Bank Holiday

Ai Group opposes the option of making August bank holiday a general public holiday in NSW, or some other date being declared as an additional public holiday in place of August Bank Holiday (page 34, Option C). This again would clearly result in an additional state-wide public holiday in NSW, contrary to the Minister's intention. In support of this option, the Options Paper discussed the fact that some other states and territories have an additional public holiday. There is currently a large measure of inconsistency between the states and territories regarding public holidays, such that comparing the number of public

holidays in the jurisdictions is somewhat artificial. For example, as discussed above in this submission, when NSW arrangements for when public holidays fall on weekends are taken into account, NSW current practice is relatively generous.

Should you have any queries about Ai Group's position, please contact Samantha Edwards, Senior Adviser – Workplace Relations Policy on (02) 9466 5421 or myself.

We look forward to the release of the Final Report and the Review's recommendations in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Goodsell', written in a cursive style.

Mark Goodsell
Director – NSW
Australian Industry Group