



New South Wales

**REVIEW OF THE
BANKS AND BANK HOLIDAYS**

ACT 1912

DISCUSSION PAPER

JUNE 2009

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Preface

At the end of May 2009 I was appointed by the New South Wales Government to undertake a review of the *Banks and Bank Holidays Act 1912* (NSW) and was asked to recommend changes to modernise the operation of the Act and other instruments which affect the creation and operation of public holidays and bank holidays in New South Wales.

This Discussion Paper sets out the background information and aims to identify the significant issues that arise out of the legislation as it currently operates. It also discusses the interaction with relevant Commonwealth legislation including the recently enacted *Fair Work Act 2009* (Cth).

I invite your comments on the Discussion Paper. The final section sets out how to make a submission. The closing date has been set as Friday 17th July 2009 to allow me to report by October 2009.

There will be a further opportunity to comment when I release an options paper on Thursday the 13th August 2009.

If you would like further information, please email review@oir.commerce.nsw.gov.au or visit the [Review of the Banks and Bank Holidays Act 1912](#).

Yours faithfully

Professor Joellen Riley

How to make a submission

Submissions are welcome from all people interested in these issues and particularly those groups and individuals that may be impacted by any change in the legislation. Submitters are encouraged to provide evidence, where possible, that substantiates any views or concerns they have on any or all of the issues discussed in the paper.

The closing date for submissions is **Friday 17 July 2009**.

To lodge your submission electronically, please email review@oir.commerce.nsw.gov.au.

To lodge your submission by post, please address to:

Professor Joellen Riley
Review of *Banks and Bank Holidays Act*
Office of Industrial Relations
NSW Department of Commerce
2-24 Rawson Place
Sydney NSW 2000

Please note that anonymous submissions will not be accepted. It is the intention of the Review to publish submissions on its website. Please indicate if you would not like your submission to be published on the website.

For more information visit [Review of the Banks and Bank Holidays Act](#).

Why conduct a review?

For some time now, people have recognised that the New South Wales legislation for proclaiming public holidays is in need of modernisation.¹ The [Banks and Bank Holidays Act 1912](#) (the BBH Act) is a relic of former times, when commercial activity revolved around the opening hours of banks and when banking business was conducted over the counter and recorded in pen and ink. When enacted, the BBH Act was primarily concerned with bank trading hours. It became the means by which workers in New South Wales enjoyed public holidays largely because industrial awards (and later, enterprise agreements) adopted the various days stipulated as 'bank holidays' in BBH Act section 15 and Schedule 4, and any days proclaimed by the Governor or appointed by the Minister under section 19, as days upon which workers were entitled to paid days off, or penalty rates.²

Trading hours and patterns of working hours have changed dramatically over recent decades. And so has the balance of federal and State influence over both banking and industrial regulation. Part 2 of the BBH Act dealing with the 'Publication of statements and registration of banks', has become irrelevant, as these aspects of Australian banking business are now regulated by federal legislation under the supervision of the Australian Prudential Regulation Authority (APRA). And changes to the federal [Workplace Relations Act 1996](#) (Cth) (WR Act) made by the Work Choices legislation introduced some confusion in the observance of some of the holidays (particularly local or regional public holidays) proclaimed under BBH Act section 19.

From 1 January 2010 the new National Employment Standards in the [Fair Work Act 2009](#) (Cth) will influence many New South Wales workers' industrial entitlements in respect of public holidays, so this confusion can be expected to continue. The confusion generated by the interplay of federal and state regulation has emphasised the inconvenience of a system which is dependent upon the annual proclamation of many of the days observed as holidays in the State. Several other States have enacted modern legislation to deal specifically with public holidays. It is time that New South Wales modernised its legislation.

The modernisation of the legislation also creates an opportunity for us to reflect on our reasons for observing public holidays, so that we ensure that future

¹ See for example *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222, in which a full bench of the NSW Industrial Relations Commission noted that the difficulties in the case had been caused by the fact that the *Banks and Banks Holidays Act 1912* (NSW) had 'been put to a use for which it was not originally designed'. They said: 'The Act was and is designed to regulate firstly and foremostly the operation of banks. For historical reasons which are not clear to us, it appears to have become the vehicle for the regulation of public holidays in this State. That regulation depends on an arcane interaction between various provisions of the statute and executive action from time to time.'

² These arrangements have not been without their problems. On a number of occasions, industrial commissions and courts have been called upon to settle arguments over the proper interpretation of award clauses when additional and substituted public holidays have been proclaimed. For example *Kinsella v Bournes* [1928] IR 445; *In Re Butter Cheese and Bacon Factories and Milk and Cream Condenseries Awards* [1950] IR 62; *In Re Public Hospital Nurses (State) Award* [1956] IR 269; *In Re Boarding Houses Employees (State) Award* [1961] IR 383; *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222.

arrangements for the creation and observance of these days properly meets the expectations of the community. Australians have traditionally celebrated days of particular national significance, and times for religious reflection. Public holidays provide welcome respite from work and an opportunity to join together in family and community activities. While annual leave entitlements provide necessary rest, recuperation and recreation for individuals, public holidays provide the opportunity for shared commemoration and celebration of significant events and occasions in our common heritage. It is by no means the intention of this Review to disturb the enjoyment of public holidays in New South Wales. In announcing the Review, the Minister for Industrial Relations, the Hon John Hatzistergos, affirmed that there was no intention to reduce or increase the number of public holidays.³

Holidays commemorated in New South Wales

The following dates and festivals are currently celebrated in New South Wales. Although there has been debate at different times about whether these dates and celebrations have been the most appropriate choices for public holidays, the Terms of Reference of the present Review do not encompass any reconsideration of these days.

³ Media Release, 30 May 2009, <http://www.industrialrelations.nsw.gov.au>.

National public holidays

New Year's Day

New Year's day is a public holiday observed on the first day of the calendar year.

Australia Day

Australia Day marks the anniversary of the arrival of the First Fleet and the establishment of the first European settlement in Australia, on 26 January 1788.

Prior to 1988, the Bicentennial Year, Australia Day had been celebrated as a long weekend incorporating the last Monday in January. However, the Bicentennial Year changed this practice and confirms Australia Day as the 26 January each year.

The Council of Australian Governments determined (in 1993) that Australia Day should be uniformly observed around the nation on 26 January.

Anzac Day

Anzac Day is a day for remembrance and recognition of all Australians who have served our country in wartime. The original Anzac were the soldiers of the Australian and New Zealand Army Corps who fought in Gallipoli in Turkey during the First World War. These troops landed in Gallipoli on 25 April 1915, and the Anzac Day public holiday is held on 25 April each year. Anzac Day is regularly commemorated by holding public marches of returned services and defence forces personnel. These marches are usually held at dawn, or at least very early in the day.

State public holidays

Queen's Birthday

The Queen's Birthday holiday is an official holiday that is celebrated in New South Wales on the second Monday in June each year. Whilst Queen Elizabeth II's actual birthday is 21 April, celebrations of the Sovereign's birthday have had a long history in Australia commencing in 1788 when Admiral Arthur Phillip first declared an official holiday.

Recipients of the Order of Australia are announced twice a year; the first list on Australia Day (26 January) and the second list on the Queen's Official Birthday. The Queen of Australia is also the Sovereign of the Order of Australia.

Labour Day or Eight Hour Day

The celebration of Labour Day has its origins in the eight hour day movement, which advocated eight hours for work, eight hours for recreation, and eight hours for rest. Labour Day is an annual holiday celebrated in New South Wales on the first Monday in October to commemorate the efforts of the labour union movement, and the economic and social achievements of the State's workers.

Some other States celebrate Labour Day on other dates. For example in Queensland and the Northern Territory Labour Day is celebrated on the first Monday in May, and in Victoria, Tasmania and Western Australia it is celebrated early in March.

Bank Holiday

The August bank holiday is a 'close bank holiday' named in the Fourth Schedule of the *Banks and Bank Holidays Act 1912* (NSW). It is a day on which banks (as defined in s 15A of that Act) are not permitted to open for business. Consequently, bank employees, and employees in the financial services sector generally, have customarily enjoyed this holiday. It is not, however, widely observed across the community, and it has no particular equivalent in other States.

Religious holidays

In New South Wales and Australia generally, public holidays are observed at the Christian festivals of Christmas and Easter.

Good Friday

Christians commemorate Good Friday as the day on which Jesus was crucified. It is always the Friday immediately preceding Easter Sunday. The Easter festival is, however, a 'moveable feast', occurring between March 22 and April 25, depending on the liturgical calendar followed by the Roman Catholic Church and some Protestant denominations. Some Orthodox Christian denominations celebrate Easter according to a different liturgical calendar.

Easter Saturday

Easter Saturday is (naturally) the day immediately following Good Friday, and before Easter Sunday. Roman Catholic and Protestant Christians commemorate this day as Holy Saturday, the period that Jesus spent in his tomb.

Easter Sunday

Christians celebrate Easter Sunday as the day of the resurrection of Jesus. Both Good Friday and Easter Sunday are treated as particularly holy days by practising Christians.

Easter Monday

Easter Monday has traditionally been designated as a public holiday in addition to Easter Sunday. In past times when the community more generally observed a Sunday Sabbath, it became customary to hold a public holiday on the Monday following a holy day, since the Sunday was already observed by rest from work.

Christmas Day

Christians around the globe celebrate the birth of Christ on Christmas Day, 25 December.

Boxing Day

Boxing day is a public holiday observed as the day after Christmas Day. There are many theories for why Boxing Day has become a public holiday. One of the most popular theories is that it dates back to times when domestic servants who had to work on Christmas Day were given a day off on the following day for their own Christmas celebration. The masters and mistresses did for themselves on that day, relying on the boxed left-overs set aside for them by their dutiful servants.

Another theory is that this was the day on which Christmas boxes or presents were given to employees or service workers. Although the reasons for establishing this day off may now be lost in history, Australians continue to observe the day as an important public holiday on which to visit friends and family. The extended time off is particularly important for people who live and work at a distance from their families.

Effect of the present legislation

Parts 1 and 2 of the Act deal with 'Publication of statements and registration of banks', and no longer have any practical effect in New South Wales. APRA deals with these regulatory matters now.

Part 3 'Bank Holidays' provides for certain days to be 'bank holidays'. The consequence of a day being a 'bank holiday' is that all banks (defined in section 14A) must close on that day, unless they have been granted approval to open under Schedule 6 of the BBH Act. Schedule 6 provides that banks who wish to open on weekends can apply to the Director General of the Department of Commerce for an exemption from section 15A(2). The Director General is obliged to consider the public interest before granting any exemption, and may grant an exemption on conditions. Bank holidays also have consequences for the [Bills of Exchange Act 1909](#) (Cth), which provides that bills of exchange that fall due on a bank holiday become payable on the following business day.

Section 15A provides that every Saturday and Sunday is a 'close holiday'. Section 15 provides that the days listed in the Fourth Schedule are bank holidays and shall be kept as close holidays in New South Wales. This schedule has two Parts. Part 1 lists the following days:

- The first day of January
- The twenty-sixth day of January
- Good Friday
- The day after Good Friday
- Easter Monday
- The twenty-fifth day of April (Anzac Day)
- Christmas Day
- The twenty-sixth day of December.

Part 1 also provides that whenever 1 January, 26 January, 25 April, 25 December or 26 December fall on a Sunday, the following Monday shall be a bank holiday; and whenever 26 December falls on a Monday, the following day (Tuesday 27 December) shall be a bank holiday.

Part 2 lists 'the Anniversary of the Birthday of the Sovereign' and 'the first day of August', and provides that where either of these days falls on any day except a Monday, the following Monday will be observed as the holiday, unless other arrangements are gazetted.

The Fourth Schedule makes no mention of substituted or additional bank holidays when any of the special dates listed in the schedule fall on a Saturday. The practice of substituting holidays when any of these days fall on a Saturday has depended upon the exercise of powers under section 20 of the Act. This section empowers the Governor to appoint a substitute bank holiday in any year that it appears that an appointed bank holiday would be 'inexpedient'. This provision has also been used to appoint the second Monday in June as the Queen's Birthday holiday, since during the reign of Queen Elizabeth II, the 'Anniversary of the Birthday of the Sovereign' would fall sometime late in April. (Her Majesty's actual birthday falls on 21 April.)

All of these days described above are 'bank holidays', not 'public holidays'. The distinction between these terms has been noted in *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch*.⁴ The term 'public holiday' appears only in sections 19 and 21 of the Act. Section 19 empowers the Governor and the Minister to proclaim, by publication in the Gazette, special days to be observed as 'public holidays' or 'half-holidays'. The Governor has power to proclaim public holidays

⁴ [1994] NSWIRComm 222 at 14.

throughout New South Wales, and the Minister has power to proclaim public holidays 'in any local government area, part of a local government area, or other part of New South Wales'. The Labour Day holiday generally observed on the first Monday in October depends on a proclamation under section 19. This is also the provision that enables the Minister to proclaim local public holidays, such as Newcastle Show Day. Sub-section 19(7) provides that any proclaimed public holiday or half-holiday shall be kept as a 'close holiday or half holiday' in all banks within the relevant area.⁵

The only section in the Act with any direct relevance to the industrial arrangements to be observed on bank holidays or public holidays is section 21, which provides that reference to a bank or public holiday in any 'industrial agreement' or 'agreement relating to work' shall be deemed to be a reference to the day 'on which such holiday is publicly observed'. This expression has led to controversies when days such as Christmas Day, Boxing Day, and New Year's Day have fallen on a Saturday or Sunday and the following Monday has been proclaimed as a bank holiday. Where an industrial award provides for penalty rates on 'Christmas Day and Boxing Day', and public holidays have been proclaimed for 27 and 28 December, there have been contests over whether penalty rates must be paid on 25 and 26 December, or 27 and 28 December, or on all four days.⁶

In any event, the entitlement of workers to be absent from work without loss of pay, or to receive penalty rates for working on a bank or public holiday, has (until recently) derived from industrial awards and agreements. Award-free employees have enjoyed these arrangements as a matter of custom and practice. The BBH Act does not mandate these arrangements. For example, the August bank holiday (listed in Part 2 of the Fourth Schedule) is not generally observed outside the banking sector. Some classifications of employees enjoy a substituted holiday for this day, but only because they have the benefit of an award, enterprise agreement or employment contract that confers such an entitlement. Since 29 February 1988, New South Wales public servants have been granted an additional holiday between Christmas and the New Year instead of August Bank Holiday.⁷

There has been Commonwealth recognition of State bank trading laws for many decades. The [Banking Act 1959](#) at section 68 recognises the continued operation of State bank holidays alongside federal bank holidays.

The interrelationship of the BBH Act with industrial instruments was disturbed by the former federal government's enactment of the [Workplace Relations Amendment \(Work Choices\) Act 2005](#) (Cth) (Work Choices).

⁵ Section 22 provides that banks may also apply to the Treasurer for permission to close for an afternoon 'half holiday', however advice from New South Wales Treasury to the Director General of the NSW Department of Industrial Relations in 1999 confirmed that this section had been obsolete for many years and should be repealed.

⁶ See for example *In Re Butter Cheese and Bacon Factories and Milk and Cream Condenseries Awards* [1950] IR 62; *In Re Public Hospital Nurses (State) Award* [1956] IR 269; *In Re Boarding Houses Employees (State) Award* [1961] IR 383; *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222.

⁷ See Public Sector Management (General) Regulation 1988, cl 14(2)(c).

Relationships between public holidays and industrial arrangements

Until the enactment of Work Choices, many workers in New South Wales were covered by awards and enterprise bargains which determined arrangements for work and pay on public holidays. If arguments arose over the interpretation of these entitlements, they could be resolved by reference to the Industrial Relations Commission of New South Wales. Work Choices disturbed these arrangements by providing that all employers who were 'constitutional corporations' within the meaning of the new section 6 of the *Workplace Relations Act* 1996 (Cth) (WR Act) would no longer be bound by State industrial laws: see WR Act section 16(1)(a). Although State industrial laws would no longer apply to federal system employers, the legislation preserved the effect of State laws dealing with the creation of public holidays: see WR Act section 16(3)(g). This means that State laws can declare public holidays and prohibit or permit trading on those days, but no State law can directly prescribe the pay and conditions that federal system employers are obliged to afford their employees on those days.⁸

This position continues to hold under the *Fair Work Act* 2009 (Cth) (FW Act).⁹ According to FW Act section 26, all State or Territory industrial laws are excluded from applying to 'national system' employers and employees. Nevertheless, FW Act section 27(2) makes exceptions for 'business trading hours' (section 27(2)(n)) and 'declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays' (section 27(2)(j)).

Work Choices introduced a set of minimum conditions applying to all federal system employees, which included entitlements to paid leave for public holidays, subject to a proviso that employees may be requested to work on that day, so long as the employer's request was reasonable. Under the WR Act, an employee who reasonably refused to work on a public holiday was protected from dismissal or injury in their employment: section 615. A range of factors (listed in section 613) determined whether the request was reasonable in the circumstances, including:

- (a) the nature of the work performed by the employee; and
- (b) the type of employment (for example, whether full-time, part-time, casual or shift work); and
- (c) the nature of the employer's workplace or enterprise (including its operational requirements); and
- (d) the employee's reasons for refusing the request; and
- (e) the employee's personal circumstances (including family responsibilities); and
- (f) whether the employee is entitled to additional remuneration or other benefits as a consequence of working on the public holiday; and

⁸ State laws still apply to the NSW system employees, including unincorporated employing entities (such as partnerships) and any entities which are not 'trading and financial corporations' within the meaning of the Australian Constitution.

⁹ At the time of preparing this paper, the Fair Work Act 2009 had been passed, however the repeal of the WR Act was awaiting the passage of the Fair Work (Consequential and Transitional Amendments) Bill 2009. This paper has been prepared on the assumption that the WR Act will have been repealed before the conclusion of this Review.

- (g) whether a workplace agreement, award, other industrial instrument, contract of employment or written guideline or policy that regulates the employee's employment contemplates that the employer might require work on public holidays, or particular public holidays; and
- (h) whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays; and
- (i) the amount of notice in advance of the public holiday given by the employer when making the request; and
- (j) the amount of notice in advance of the public holiday given by the employee in refusing the request; and
- (k) whether an emergency or other unforeseen circumstances are involved; and
- (l) any other relevant factors.

The public holidays listed in WR Act section 611 included:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- 25 December (Christmas Day)
- 26 December (Boxing Day), and
- Any other day proclaimed in a State law as a substitute for any of these days, and
- Any other days declared by State law to be observed generally across the State or in a region (but not a union picnic day).

Although Easter Saturday, the Queen's Birthday and Labour Day were not specifically mentioned in the list, they would generally be included as a consequence of their gazettal under a State law. Likewise, any local Show Days would be included as 'any other days declared by State law'. Picnic days were expressly excluded by section 611(b)(ii),¹⁰ and there was provision for regulations to be made to exclude particular State public holidays, should the federal government have considered that necessary.

The use of the word 'and' had the effect that it was possible for two days to serve as a public holiday for the one celebratory event. So for example, if Christmas Day, New Year's Day, Australia Day or Anzac Day were to fall on a weekend, and the relevant State or Territory law declared a substitute public holiday for the following Monday, both the 'real' holiday and the Monday substitute would be public holidays according to section 611.

WR Act section 612 provided that an employee was entitled to be absent without loss of pay on a public holiday, however any entitlement to a penalty rate of pay for work done on a public holiday would need to arise from an industrial instrument, such as an award or workplace agreement. If a federal system employer was bound by a State industrial award at the time Work Choices commenced, the State award was

¹⁰ Union picnic days were specifically excluded from 'allowable award matters' when the *Workplace Relations and Other Legislation Act 1996* (Cth) first reduced federal awards to 20 allowable matters.

treated as a 'Notional Agreement Preserving a State Award' (NAPSA), and continued to have effect as if it were a federal workplace agreement,¹¹ until such time as the employer and employees agreed to make another kind of workplace agreement.

The effect of these provisions was that if a State government declared a public holiday that applied generally in the State or a region, that day would become a public holiday, and all federal system employees (including those covered by NAPSA) would be entitled to a paid day off, or – if they agreed to a reasonable request to work – to penalty rates at whatever rate was prescribed in the relevant federal award, NAPSA, Preserved State Agreement (PSA), workplace agreement, or employment contract. This entitlement to a public holiday could not be bargained away by an award or workplace agreement. This is because WR Act section 612(4) stated that an award or agreement term which denied an employee a right to reasonably refuse to work on a public holiday 'has no effect'. This had some unexpected consequences for employers in some localities, where regional public holidays had been gazetted.

For example, on 27 February 2008 the New South Wales Minister for Industrial Relations appointed Friday 11 April 2008 (Newcastle Show Day) to be observed as a public holiday within the Newcastle and Lake Macquarie City Council areas. All federal employees in those local government areas became entitled to a day off, or, if they worked on that day, to the penalty rates provided in their industrial award or agreement. Previously, only those workers whose awards or agreements allowed the public holiday had been able to take it. Some awards and agreements had provided that workers should be entitled to take off the Tuesday after Easter as a substitute for the Newcastle Show Day holiday. A number of employers continued to operate according to the terms in their awards and agreements, so a group of employees took action in the Chief Industrial Magistrate's Court to assert their entitlement to penalty rates for working on that day.¹² The employees won this action. The Work Choices legislation, in combination with the practice of gazetting local show days as regional public holidays, had the effect of conferring an extra public holiday (or extra pay) on workers in those districts.

Perhaps the most inconvenient result of this was that employers and employees were unsure of their obligations and entitlements, and needed to consult legal advice and ultimately litigated the matter. Laws affecting the rights and obligations of employers and employees should operate transparently and predictably, so as to avoid the costs and inconveniences of litigation.

Public holidays and the Fair Work Act

The FW Act makes very similar provisions to the WR Act sections 611 - 615. From 1 January 2010, public holidays will be dealt with as part of the National Employment Standards (NES). Under FW Act section 114, national system employees are entitled to be absent from work on a public holiday without any loss of pay. Employees have a right to reasonably refuse a request to work on a public holiday.

¹¹ As a federal workplace agreement, the NAPSA would not be able to contain any 'prohibited content' as defined by WR Act s 356 and Workplace Relations Regulations 8.5-8.7. Any prohibited content in a NAPSA is void: *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Schedule 8 s 37.

¹² See *Geoffrey Trunks and Ors v Waratah Engineering Pty Ltd and Ors*, unreported, 12 December 2008 (Hart J).

Whether a request to work is reasonable depends on the factors in sub-section 114(4):

- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
 - (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
 - (b) the employee's personal circumstances, including family responsibilities;
 - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
 - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
 - (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
 - (f) the amount of notice in advance of the public holiday given by the employer when making the request;
 - (g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;
 - (h) any other relevant matter.

Section 115 defines 'public holiday' as:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- The Queen's Birthday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory)
- 25 December (Christmas Day)
- 26 December (Boxing Day), and
- Any other day or part day declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday.

Section 115(2) makes a different provision for substituted days than the WR Act section 611. FW Act section 115 (2) provides that if a State or Territory law substitutes a day for a public holiday then the substituted day is the public holiday – and the real day is not a public holiday.

It would seem that if a State law has already declared a substitute public holiday, then the employer and employee may agree to revert to the 'real' holiday, or to substitute another day. Arguably, the Newcastle Show Day problem described above would not have created the same problems under the FW Act, because any award or agreement which already provided for substitution of Easter Tuesday for Newcastle Show Day would have been effective under FW Act sub-section 115(3). However in cases where industrial instruments or employment contracts have made no arrangements for observing local public holidays, the FW Act will continue the new entitlement created by the WR Act for all federal employees working within the

local council areas to enjoy a right to reasonably refuse to work on any day gazetted as a local or regional public holiday for that area.

See the [list of local public holidays and half-holidays](#) gazetted in New South Wales for 2009.

The FW Act allows employers and employees to agree to substitute another day for a public holiday. For example, from 1 January 2010 when the National Employment Standards commence, the *Fair Work Act 2009* would permit people of other than Christian faith, to substitute other religiously significant days for the Christian public holidays by agreement with their employers.

Union picnic days

Before the [Workplace Relations and Other Legislation Amendment Act 1996](#) (Cth), union picnic days were common in federal and State industrial awards. Traditionally, unions would hold picnics for their members on these days, and many employers would support the festivities. These days would be celebrated on different dates in different industries. In the days of closed shops (before 1996), all employees with this entitlement under an industrial instrument would enjoy these occasions.

In its first term of office, the Howard government reduced the matters that could be included in federal awards, and one of the matters to disappear from federal awards was the union picnic day. Entitlements to picnic days could still be included in federal certified agreements, and State awards still included them. Following the enactment of Work Choices, federal system employers who were bound by a State award continued to be bound by those award provisions, as the State award operated as a notional agreement preserving a State award (NAPSA). An examination of 242 New South Wales State awards conducted by the Office of Industrial Relations in June 2009 showed that 181, or 75 per cent, contained a provision for an additional, non-standard holiday (including union picnic days). Nevertheless, NAPSAs have a limited life span. Under Work Choices, NAPSAs were to expire at the end of a three year transitional period (on 27 March 2009), however this period has been extended to accommodate the transition to the new Fair Work regime.¹³

The *Fair Work Act* does not expressly include union picnic days as permitted matters for modern awards. For many employees who do not have the benefit of a collectively bargained enterprise agreement, entitlements to days off for community celebration will be limited to those days named in the National Employment Standards in FW Act section 611. Since these days include days declared by State law as public holidays, there is scope for State governments to take steps to preserve an entitlement to a picnic day by declaring an additional public holiday. This step was taken in the ACT in 2007 when it declared a new public holiday for 'Family and Community Day'. Unions ACT have expressed a preference for naming this day 'Union Picnic Day', in recognition of the unions' work in securing this public holiday as compensation for the general loss of union picnic days in the Territory.¹⁴ The *Fair Work Act* allows employers and employees to agree (either in awards, enterprise agreements or by common law agreements) to substitute other days for public holidays: see sub-sections 115(3) and (4). So it would be possible for those

¹³ The transitional arrangements surrounding the introduction of the *Fair Work Act* were not settled at the time of preparing this paper.

¹⁴ Unions ACT Submission: *Future of the Family and Community Day Public Holiday*, 29 May 2009.

employees who wished to do so, to substitute a declared public holiday in order to celebrate a traditional picnic day.

Relationship between public holidays and trading restrictions

The BBH Act as it presently stands restricts banks (as defined in section 15A) from trading on Saturdays, Sundays, and all the days listed in Schedule 4 or proclaimed under section 19 as bank holidays. It does not, however, create any restrictions on trading for any business which is not a bank. And as explained above, banks have been able to seek and obtain exemptions from these trading restrictions by applying to the Director General of the Department of Commerce under Schedule 6 of the BBH Act.

It is the [Shop Trading Act 2008](#) that prohibits shops from trading on certain named days. 'Shop' is defined in section 3 to mean premises:

- (a) that are used wholly or predominantly for the retail sale of goods, and
- (b) in or at which goods are sold or exposed or offered for sale by retail on one or more occasions.

Nevertheless a whole range of shops (including bakeries, chemists, newsagents, take-away food outlets, etc) are exempt from these restrictions by section 7 and Schedule 1 of the Act. Also, any small shop run by its owners and no more than four employees is exempted by section 8. Larger retailers can apply to the Director General of the Department of Commerce for an exemption under section 10. These exemptions are granted only on the condition (set out in section 13) that any staff rostered to work have 'freely elected to work on that day, without any coercion, harassment, threat or intimidation by or on behalf of the occupier of the shop'.

It is only shops that are affected by this legislation. Businesses and services that are not engaged in retail trade are free to operate as they wish throughout the year.

The *Shop Trading Act 2008* defines restricted trading days as:

- Good Friday
- Easter Sunday
- prior to 1pm on Anzac Day
- Christmas Day
- Boxing Day.

The Act does not make any arrangements for observing these days on substitute days if they fall on a Saturday or Sunday.

Shiftworkers and public holidays

Employees in many industries that operate 24 hours, seven days a week, are regularly rostered to work on public holidays. Generally, these employees are classified as 'shiftworkers' and receive additional annual leave entitlements to compensate for the fact that they regularly work unsociable hours.

Shiftworkers in New South Wales

The [Industrial Relations Act 1996](#) (NSW) does not include a definition of the meaning of a shift worker. Shiftwork is defined by clauses in awards or agreements.

It is common for an agreement or award to stipulate an additional one to two weeks' annual leave as compensation for working irregular and unsociable hours. An example is the newspaper printing industry where printers are required to regularly work evenings and public holidays to ensure the publication of daily newspapers.

Two examples of State award provisions dealing with shiftwork can be found at:

- Clause 11 of the [Shop Employees \(State\) Award](#)
- Part 6 of the [Metals, Engineering and Associated Industries \(State\) Award](#)

Federal system shiftworkers

Federal system employers (and that includes all incorporated private sector employers) are bound by the definition of a shift worker in WR Act section 228:

shift worker means:

- (a) an employee who:
 - (i) is employed in a business in which shifts are continuously rostered 24 hours a day for 7 days a week; and
 - (ii) is regularly rostered to work those shifts; and
 - (iii) regularly works on Sundays and public holidays; or
- (b) an employee of a type that is prescribed by regulations made for the purposes of this paragraph.

Note: Subsection (2) enables regulations to be made providing that an employee belonging to a specified class is not a shift worker.

- (2) The regulations may provide that an employee:
 - (a) who is covered by paragraph (a) or (b) of the definition of **shift worker** in subsection (1); and
 - (b) who belongs to a class specified in the regulations;is not a shift worker for the purposes of this Division.
- (3) Without limiting the way in which a class of employees may be described for the purposes of regulations made under subsection (2), the class may be described by reference to one or more of the following:
 - (a) a particular industry;
 - (b) a particular kind of work;
 - (c) a particular type of employment;
 - (d) a particular type of shift work (whether described by reference to the organisation or allocation of shifts or otherwise).

Shiftworkers are entitled to an additional (fifth) week of annual leave in return for working irregular hours including public holidays: WR Act section 232(3).

When the National Employment Standards in the *Fair Work Act* 2009 take effect on 1 January 2010, national system shiftworkers will maintain similar entitlements. Under the Fair Work Act, section 87, a shiftworker is an employee who is defined as such by a provision in a modern award or enterprise agreement, or (in the case of award-free employees) is one who:

- (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and
- (ii) is regularly rostered to work those shifts; and

- (iii) regularly works on Sundays and public holidays.

Under FW Act section 87(1)(b) a shiftworker is entitled to an extra (fifth) week of annual leave.

Two examples of shiftworker provisions in modern awards can be found at:

- Clause 29 of the [General Retail Industry Award 2010](#)
- Clause 37 of the [Manufacturing and Associated Industries Award 2010](#)

Questions for the Review

The arrangements described above raise the following issues and questions upon which submissions are invited.

1. **Additional and substitute days when celebrated dates fall on weekends.**

It is anticipated that the Review will recommend the enactment of special legislation dealing with public holidays, and that a provision will be included to provide greater certainty for employers and employees when celebrated events fall on weekends, or when more than one celebrated event falls on the same day. For example, in 2011, Anzac Day will fall on Easter Monday.

[Table of all gazetted public holidays \(including additional days\) in New South Wales since 1972.](#)

Public holidays falling on Sunday

When a celebrated event falls on a Sunday, it is customary to observe a public holiday on the following Monday. The question arises as to whether the Monday should be an **additional** or a **substituted** public holiday. If it is treated as an additional public holiday, then employees will be entitled to a paid day off on both days, and if they do agree to work, employers will be required to meet any penalty rate obligations in their awards or agreements on both the 'real' and the additional public holiday. If it is treated as a substitute public holiday, then the 'real' day of celebration becomes an ordinary Sunday for the purposes of penalty rates. Employees who regularly work on seven day rosters are affected by this decision. Employees who are rostered to work on the 'real' day of celebration will not have a right to reasonably refuse a request to work on that day. So for example, a worker rostered to work on Sunday 25 April, when Monday 26 April has been gazetted as a substitute Anzac Day holiday, would not be entitled to take a paid day off on the Sunday to attend an Anzac Day march or commemorative service.

Public holidays falling on Saturday

When Christmas Day falls on a Saturday, it has been customary to declare an additional public holiday. So for example, in 1976, the public holidays were observed on Saturday 25 December, and Tuesday 28 December. (The Boxing Day holiday was celebrated on Monday 27 December.) The same occurred in 1982, 1993, 1999 and 2004. (The next time that Christmas will fall on a Saturday is in 2010.)

However it is not always customary to gazette either an additional or a substitute holiday for other celebratory days. So for example, when Anzac Day falls on a Saturday (as it did in 2009, and also in 1998, 1992, 1987 and 1981) no additional or

substitute public holiday was gazetted for Monday 27 April. On the other hand, additional holidays have been gazetted to ensure a long weekend when New Year's Day falls on a Saturday.

Anzac Day

Some arrangements have already been agreed in principle for the celebration of Anzac Day. At the Council for the Australian Federation Meeting of Premiers held on 12 September 2008¹⁵, it was agreed in principle to 'take steps to harmonise arrangements for the provision of the Anzac Day holiday as follows:

- A substitute public holiday on the following Monday where Anzac Day falls on a Sunday;
- A substitute public holiday on the Tuesday when Anzac Day falls on Easter Monday in 2011.'

The Minister's office makes the following statement about the Anzac day arrangements in 2009:

'Anzac Day is a day of national commemoration and is traditionally observed on 25 April. In order to preserve the honour and integrity of the day, the NSW Government elected not to appoint a substitute day in 2009. Importantly, this approach is supported by the RSL.'

Australia Day

Some years ago, when Australia commemorated the bicentenary of the landing of the First Fleet in Sydney Harbour in 1788, it was decided that Australia Day should be celebrated consistently on 26 January, rather than continue with an earlier practice of celebrating it as a long weekend.

This decision was confirmed by a Council of Australian Government meeting in June 1993, where the main concern was to ensure uniformity of public holidays across Australia to as wide an extent possible 'to overcome the wasteful situation where parts of Australia are closed down while other parts remain open'.¹⁶

When Australia Day falls on a weekend, a substitute holiday has customarily been proclaimed for the following Monday. This has been the case in 1991, 2002 and 2008, when 26 January fell on a Saturday. The next time that 26 January falls on a Saturday will be 2013.

How should new legislation deal with public holidays which fall on a Saturday or Sunday? Should different arrangements be made for different public holidays? For example, are there reasons for treating New Year's Day, Australia Day and Anzac Day differently?

¹⁵ Council for the Australian Federation Meeting of Premiers communiqué, 12 September 2008, is available at:

<http://www.caf.gov.au/Documents/CAF%20Communique%2012%20Sep%202008.PDF>

¹⁶ COAG communiqué of 8-9 June 1993 is available at

http://www.coag.gov.au/coag_meeting_outcomes/1993-06-08/index.cfm#holidays.

2. The Queen's Birthday and Labour Day

At various times in the past the State Premiers have met to discuss the question of harmonising the celebration of public holidays ([Table of Australian public holidays](#)).

There are good reasons for keeping the Queen's Birthday holiday in June, and the Labour Day holiday in October. These choices spread public holidays more evenly throughout the year. Presently, the BBH Act requires that these dates be proclaimed each year.

Should the Queen's Birthday and Labour Day holidays be fixed by a provision in the legislation, rather than be left to annual proclamation in the Gazette? Which dates are the most appropriate dates for celebration of these holidays?

3. Local public holidays and half-holidays

Many local and regional areas have traditionally observed whole or half day holidays specific to a particular region or community ([Table of local public holidays for NSW in 2009](#)). The practice until now has been for local councils to advise the Minister of the days that should be gazetted for the observance of these holidays. Local councils are required to justify their reasons for seeking the proclamation of these days as well as undertake public consultation in support of the proposal. In the past, the industrial arrangements for employers and workers were dealt with in industrial awards and agreements, or by more informal negotiation between employers and employees. Since 2006, federal workplace relations laws have created obligations on all federal system employers operating in a region in which a public holiday is declared to allow their employees paid time off on those holidays.

Given the new industrial significance of local public holidays, should the arrangements for choosing and proclaiming public holidays be changed, and if so, how?

4. August bank holiday

Presently banks in New South Wales are required to close on the first Monday in August unless they have been granted an exemption under the BBH Act Schedule 6. This 'close bank holiday' is not observed in any other State or Territory, so banks operating nationally complain that this creates inconvenience for banks and their New South Wales customers. Not all financial institutions are required to observe this day, so those banks that are required to close have argued that they face unfair competition from those institutions that have engaged in comparative advertising campaigns, claiming to provide better service to customers than the banks. Banks cannot apply for an exemption from observing this 'close bank holiday'. The exemptions provisions in the BBH Act Schedule 6 apply only to weekend opening. Banks do not support continuation of the practice of observing an August bank holiday.

On the other hand, employees of banks have generally been able to enjoy the August bank holiday as a paid day off work, because it is a 'close bank holiday' under the BBH Act. While the banks remain closed on that day, few counter service staff of banks will be required to work on that day. (It should be noted, however, that many banks and other financial institutions employ call centre workers on seven day rosters.) Some employees in industries related to banking have also traditionally enjoyed either the August bank holiday or a substituted day as an additional holiday.

If the BBH Act was amended to remove the August bank holiday, these employees would suffer a reduction in their employment conditions, in circumstances where it is no longer possible to negotiate for the inclusion of a union picnic day in a federal modern award. It is likely that only employees who enjoy strong collective representation will be able to negotiate for the retention of this day's leave in an enterprise agreement.

Although other States and Territories do not celebrate August bank holiday, some do celebrate an event of State significance. Victoria has Melbourne Cup Day on the first Tuesday in November. Western Australia has Foundation Day. The ACT has Canberra Day in March and Family and Community Day in November. ([Table of Australian public holidays.](#))

Should the August Bank Holiday be retained as a 'close bank holiday'?

5. Weekend trading for banks

BBH Act section 15A presently requires banks to close on weekends (unless they obtain an exemption to permit trading). Banks have complained that this requirement interferes with their ability to compete with their non-bank competitors who are able to engage in trading activities on weekends. Banks in Victoria are entitled to, and do, open for Saturday morning trading.

To some extent, the banks' concerns have been alleviated by extensive use of the approvals process in Schedule 6 which allows banks to apply to the Director General of the Department of Commerce to open on weekends.¹⁷

The following banks have applied and received an exemption for weekend bank trading:

- Australian and New Zealand Banking Group Limited (ANZ)
- Commonwealth Bank of Australia
- Westpac Banking Corporation
- St George Bank Limited
- Bendigo Bank Limited
- Bank of Western Australia Limited
- HSBC Bank Australia Limited
- Citigroup Pty Ltd
- Bank of China
- National Australia Bank Limited

On the other hand, bank trading hours remain an important factor in preserving the entitlement to a weekend break from work for many bank employees. The present arrangements under which banks are required to obtain exemptions to open on weekends ensure that only willing employees can be rostered to work on weekends. This is achieved by the imposition of conditions on the grant of exemptions. Presently, the BBH Act does not contain any provision similar to section 13 of the *Shop Trading Act 2008* which mandates that exemptions from trading restrictions can only be granted on the condition that work on those days must be voluntary. Whether such conditions are imposed is a matter left to the discretion of the Director General of the Department of Commerce. The Director General makes a decision on

¹⁷ Further information on the process for banks to receive trading exemptions is available at: http://www.industrialrelations.nsw.gov.au/About_OIR/Shop_trading_hours/Weekend_bank_trading.html

whether to grant an exemption, and if so, on which conditions, after consultation with unions representing employees who will be affected by any exemption. The bank making the application and employee representatives can seek a review of the decision by the New South Wales Administrative Decisions Tribunal.¹⁸

These decisions have been contentious in the past. Many bank counter staff are women with families. Without the freedom to refuse work on weekends, their family time on weekends may be eroded. States are no longer able to directly legislate to confer any industrial entitlements on the employees of federal system employers. States can only do so indirectly, by refusing permission to trade except on the condition that the employer must afford certain rights to employees. The system presently in place for granting applications for an exemption from the bank weekend trading restrictions is able to achieve what more direct State industrial legislation cannot do under the current federal industrial relations laws.

Should the provisions making every Saturday and Sunday a 'close bank holiday' be repealed, so that banks (like other financial institutions) are permitted to open on weekends? Should the present arrangements be retained, which prohibit weekend trading, but allow banks to open if they are granted an exemption? If so, should the grant of an exemption be subject to any mandatory conditions?

¹⁸ See for example *Finance Sector Union of Australia (NSW) v Director General, Department of Commerce (NSW) & Anor* [2008] NSWADT 338, where the FSU challenged the issue of an exemption for Saturday trading to the Commonwealth Bank, without any explicit conditions requiring that only volunteers should be rostered on for Saturday work. The Commonwealth Bank contested this application. The FSU was successful in part.

Terms of Reference

- (1) The Minister requests that the Office of Industrial Relations, through the engagement of Professor Joellen Riley of the University of Sydney, undertake a review that considers the current and future operation of the *Banks and Bank Holidays Act 1912*. At the conclusion of the Review Professor Riley will issue a report recommending changes to modernise the operation of legislation and other instruments which affect the creation and operation of public holidays and bank holidays in New South Wales.
- (2) Professor Riley, in undertaking the review, is requested to have regard to:
 - (a) the existing legislative framework for public holidays and bank holidays, including the *Banks and Bank Holidays Act 1912*, the *Shop Trading Act 2008*, the *Industrial Relations Act 1996* and relevant Commonwealth legislation (including the *Fair Work Act 2009*);
 - (b) industrial arrangements existing in public sector and private sector industrial instruments arising from decisions of the Industrial Relations Commission of New South Wales and the Australian Industrial Relations Commission;
 - (c) community standards established by State and Territory legislation applying across Australia and the agreements reached at the Council of Australian Governments on 9 June 1993 and the Council for the Australian Federation on 12 September 2008;
 - (d) standards established by decisions of Australian industrial relations tribunals, including the Industrial Relations Commission of New South Wales and the Australian Industrial Relations Commission;
 - (e) New South Wales Government policies and practices concerning the gazettal of bank holidays, local public holidays, and substitute and additional days under the *Banks and Bank Holidays Act 1912* and the *Shop Trading Act 2008*;
 - (f) community standards and practices regarding the rostering of workers on public holidays, including arrangements for workers to volunteer to work on public holidays and the compensation provided to such workers for public holiday work;
 - (g) the operation of the August bank holiday and weekend bank trading arrangements generally; and
 - (h) the creation and operation of local public holidays under the *Banks and Bank Holidays Act 1912*.
- (3) In preparing the report to the Minister, Professor Riley is requested to:
 - (a) hold such public hearings as is considered appropriate;
 - (b) invite submissions from:
 - (i) organisations registered/recognised by the *Industrial Relations Act 1996*; and/or
 - (ii) organisations and individuals who the Office of Industrial Relations/Professor Riley considers may have a significant interest in the legislation under review; and
 - (c) publish a decision outlining any proposed changes to legislation and/or other instruments and any other findings by October 2009.

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