



New South Wales

**REVIEW OF THE  
BANKS AND BANK HOLIDAYS**

**ACT 1912**

**OPTIONS PAPER**

**AUGUST 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 Holiday 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.

A Discussion Paper setting out background information, identifying the issues to be addressed in the Review, and inviting submissions was released on 29 June. Some 22 submissions were received. (See the Table of Submissions in Appendix B. Unpublished submissions are not listed.) This Options Paper has been prepared to digest the views emerging from the submissions and to identify issues for further consideration. The Discussion Paper explained the current operation of the *Banks and Banks Holidays Act 1912* and its interaction with relevant Commonwealth legislation including the recently enacted *Fair Work Act 2009* (Cth). That information is not repeated in this Options Paper.

I invite your comments on this Options Paper. My own preliminary views are expressed in the discussion of options for reform in each section of this paper. However it remains open for interested parties to provide further evidence of relevant implications of the options and points of focus (including information on labour costs). Any new evidence will be taken into consideration in the preparation of a final report to the Minister for Industrial Relations.

The next section sets out how to provide comments. The closing date has been set as **11 September 2009** to allow me to prepare a final report for the Minister for Industrial Relations in October 2009.

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

Yours faithfully

Professor Joellen Riley

## How to make comments

Comments 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. You are encouraged to provide evidence, where possible, that substantiates any views or concerns you have on any or all of the issues discussed in the paper.

The closing date for comments is **11 September 2009**.

To make your comments electronically, please email [review@oir.commerce.nsw.gov.au](mailto:review@oir.commerce.nsw.gov.au).

To make comments by post, please address to:

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Review of *Banks and Bank Holiday Act*  
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Please note that anonymous comments will not be regarded.

More information on the Review and on public and bank holidays generally, is available from the NSW Office of Industrial Relations [website](#).

## Introduction

This Review of the *Banks and Bank Holidays Act 1912* (NSW) (BBH Act) has been undertaken with a view to enacting new legislation to deal with the creation and observance of public holidays in New South Wales. The submissions received following the release of the [Discussion Paper](#) confirm that this is a welcome reform, however some important differences of opinion emerged on some of the fundamental questions that need to be resolved before new legislation can be developed. This Options Paper digests the submissions and identifies a number of options for dealing with those areas of contention.

Before dealing with the specific questions raised in the Discussion Paper, it is important to consider the essential purposes and objects of legislating at State level for the creation and observance of public holidays. On its face, the principal object is to identify days of special significance, and to facilitate their recognition and celebration by the community at large. A number of individuals made submissions to the Review which emphasised the importance to families of being able to share in the commemoration of certain important occasions. A full-time working mother of three, who preferred to remain anonymous, wrote (on the subject of public holidays falling on weekends) “let’s not lose the days to celebrate what is important or else the celebrations will see less and less people participating”.

In the past, State laws created public holidays, and industrial instruments made under State legislation (such as common rule State awards) were able to regulate the observance of those days by providing rights to paid time off, or rights to penalty rates to compensate employees who have worked unsociable hours. The flexibility of the award system enabled those rights to be tailored to accommodate the different working patterns experienced by particular occupational groups. Now, for reasons described below, State legislatures and industrial instruments are limited in their capacity to directly regulate working conditions. So a fundamental question to be resolved in this Review is: what role can and should a State government play in influencing the industrial arrangements of national system employers, given that federal legislation now purports to cover the majority of corporate private sector employment? The answer to this question will influence decisions about the provisions to be included in new public holidays and bank trading legislation.

## State’s role in industrial regulation

Following the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) by the Howard federal government, State governments have found themselves in a difficult situation. On the one hand, the ability to directly regulate decent wages and working conditions in the private sector had been taken over almost entirely by federal law. The *Fair Work Act 2009* (Cth) maintains provisions overriding State industrial laws in respect of national system employers.<sup>1</sup> The constitutional limitations of federal power to legislate in this field means that unincorporated businesses are not covered by federal law, however the numbers of private sector employers in this category is relatively small.<sup>2</sup> On the other hand, both Work Choices and now Fair Work allow a number of exemptions from the general

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<sup>1</sup> See *Fair Work Act 2009* (Cth) s 26.

<sup>2</sup> A number of States have decided to follow the example of Victoria and refer industrial matters to the Commonwealth, and the New South Wales government has been considering that option, but this Review cannot pre-empt any such decision.

exclusion of State laws.<sup>3</sup> This means that State governments have maintained an ability to legislate in a number of areas tangential to industrial relations. In particular, States continue to control business trading hours: see *Fair Work Act* s 27(2)(n). When Work Choices was first enacted several States sought to exploit as many of the exemptions as possible, in an effort to maintain an influence in State industrial relations policy and practice.<sup>4</sup> Given the importance of industrial relations for the health of a State's economy and the well-being of its people, this is an entirely understandable strategy, especially at a time when federal industrial relations policy was driven by an agenda largely hostile to the participation of trade unions. The question that arises now, in the light of a change of federal government, and the enactment of new federal Fair Work legislation, is whether (and if so, to what extent) State governments should continue to use remaining powers over matters such as trading hours to influence industrial arrangements of national system employers.

### **Bank trading hours as an example**

The BBH Act presently forbids banks from opening branches in New South Wales on weekends without a special exemption granted by the Director General of the Department of Services, Technology and Administration.<sup>5</sup> These exemptions tend to be granted, but on the condition that only voluntary employees can be engaged to staff branches on weekends. Normally, unless they were engaged on contracts specifically stipulating Monday to Friday work, employees in a seven day business would not be entitled to determine their own rostering arrangements to avoid weekend work. An employer could readily make an argument that a refusal to participate in the regular rostering arrangements for such a business was a genuine operational reason to refuse to employ a person.

The submission made by the Financial Services Union representing bank employees argued that the Commonwealth Bank demonstrated a preference for compulsory weekend rostering when they were able to make federal Australian Workplace Agreements (AWAs). "These AWAs contained no provisions for voluntary work on a weekend and contained no provisions or penalty payments for weekend work or overtime."<sup>6</sup> By maintaining control over permission to trade, the State government can ensure that weekend work is voluntary. Just as the *Industrial Relations (Child Employment) Act 2006* (NSW) was able to ensure that workers under the age of 18 could not be exploited by AWAs, legislation restricting bank trading on weekends without special permission could ensure that retail banking employees (at least those engaged in branches) could not be required to work on weekends against their will.

On the other side of this argument, however, are the submissions made by the Commonwealth Bank and the Australian Bankers Association (ABA), which argue that banks should be treated in the same way as other retail businesses, and that weekend

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<sup>3</sup> See for example the *Industrial Relations (Child Employment) Act 2006* (NSW) which took advantage of the exemption of laws with respect to 'child labour' to enact protections for minors in New South Wales from being exploited by federal Australian Workplace Agreements (AWAs). See J Riley "Employing Minors in New South Wales: The Industrial Relations (Child Employment) Act 2006 (NSW)" (2007) 20 *AJLL* 295.

<sup>4</sup> See A Dungan "Work Choices: The Challenge for State Government" paper presented at the Australian Labour Law Association Conference, Brisbane, 22 September 2006; T Sarina and J Riley "Industrial Relations in 2006" (2007) 49(3) *JIR* 345 at 347-352.

<sup>5</sup> See Discussion Paper p. 20. In addition, the Director-General of the Department of Services, Technology and Administration was formerly known as the Director-General of Commerce.

<sup>6</sup> FSU p.11.

trading arrangements should be a matter for negotiation between employers and employees.<sup>7</sup> “The ABA believes that the appropriate place to deal with terms and conditions for employees is in industrial instruments and reflected appropriately in workplace agreements.”<sup>8</sup> On this side of the argument is the view that it is no longer legitimate for State governments to use narrow exemptions in the federal legislation to continue to regulate isolated pockets of the labour market.

This example illustrates one of the fundamental decisions that the State legislature needs to make in deciding how to deal with the matters presently contained in the BBH Act. Should the ability to regulate trading hours continue to be used for the purpose of influencing industrial conditions?

## **Public holidays**

The same question arises when we consider the power to create public holidays. Fair Work exempts State laws for the “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”: s 27(2)(j). Fair Work s 115(1)(b) specifically acknowledges public holidays “declared or prescribed by or under a law of a State” and confers entitlements on employees in respect of those holidays. In particular, s 114 provides employees with a right to be absent from work without loss of pay and a right to reasonably refuse to accede to a request that they work on a public holiday. Any right to penalty rates for work on a public holiday will arise from an award or other industrial instrument. An entitlement to penalty rates is one of several matters for consideration in determining whether a request to work on a public holiday is reasonable: s 114(4)(d).

While State legislation cannot now determine any rights for national system employees to receive penalty rates for work on public holidays, or to substitute time off on a public holiday for time off on a more convenient day, a public holiday declared by a State will create a right for a national system employee to reasonably refuse to work on the named public holiday. That right of refusal is itself an industrially significant right. While the worker is entitled to refuse to work, the onus is on the employer to offer a sufficient incentive to persuade the worker to choose to work on a day others are celebrating as a holiday. A number of submissions (notably those from employer groups) state that the observance of public holidays and the substitution of days should be left to industrial negotiation.<sup>9</sup> Under Fair Work sub-sections 115(3) and (4), parties do have the ability to negotiate to substitute public holidays for more convenient days. The question is, should the State government use its power to declare public holidays to ensure that employees enjoy the bargaining advantage of having a right to refuse to work at certain times? This issue will be revisited in the discussion (below) about substitution and addition arrangements when public holidays fall on weekends.

## **Maintaining the ‘status quo’**

The media release issued by the Minister for Industrial Relations on 30 May 2009 identified that it was not the intention of the Review to increase or reduce the number of public holidays observed in New South Wales.<sup>10</sup> The challenge in drafting new legislation will be in meeting this objective, given that presently the number of public

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<sup>7</sup> See CBA p.5 and ABA p.3.

<sup>8</sup> ABA p.3.

<sup>9</sup> See for example NRA p. 1; AiG p.2.

<sup>10</sup> Media Release, 30 May 2009, <http://www.industrialrelations.nsw.gov.au>.

holidays actually enjoyed by employees varies depending on the calendar, one's occupational group, one's pattern of working hours, and the employer's location. For example, a bank teller working Monday to Friday in Newcastle would enjoy more public holidays than a retail worker rostered on Wednesday to Sunday in Sydney. Monday to Friday employees enjoyed one less public holiday in 2009 than they did in 2008, because in 2009 Anzac Day was on Saturday. Nevertheless, this is a challenge which ought not to be ignored.

The arrangements enshrined in the BBH Act date back to a time when Sunday was a sacred day of religious observance, shops and businesses were closed, and only workers in essential services were required to work. Today, the *Shop Trading Act 2008* (NSW) restricts trading on only four and a half days in the year, and even then, shops can apply for and are regularly granted exemptions from these restrictions. Workers in many industries now regularly work on weekends. This means that some inequity has crept into arrangements for observing public holidays when they fall on weekends. If a public holiday falls on a Sunday and is therefore substituted for Monday, a worker who is rostered to work on Sunday but not Monday in that week will have no public holiday, no right to refuse to work, and no entitlement to public holiday penalty rates for working on the day. The Monday worker will have a right to a paid day off and is able to enjoy the particular festivities of the public holiday occasion.

This assumes that the employee is not already covered by an industrial instrument that makes arrangements to provide equal treatment of workers on different rosters. In the past, some awards have included provisions to ensure that all employees enjoy the benefit of one paid day off in a week when a public holiday falls, notwithstanding that they may not be rostered on to work on that day.<sup>11</sup> Such arrangements are the consequence of industrial negotiations based on past customs for declaring public holidays and substitute holidays. Some of these long-standing arrangements were disturbed when Work Choices was enacted.<sup>12</sup>

A question for this Review is, should new legislation be introduced on the assumption that the new legislation should accommodate current industrial arrangements (i.e., those awards and agreements in operation at the time of enactment), or should the onus of making appropriate industrial arrangements to accommodate a modernised Act fall back to the industrial parties? The Fair Work legislation permits such arrangements to operate.

From this point forward, the State legislation will not be able to regulate industrial arrangements for national system employers directly, simply because the federal legislation excludes any State law purporting to deal with "the rights and obligations of an employee or employer in relation to public holidays": Fair Work s 27(2)(j). This means that any provisions in any State Public Holidays Act which purport to influence the rights and obligations of employees and employers will only be effective in respect of State system employees, i.e., those working in the public sector, or for unincorporated firms. If the State legislation is to influence industrial arrangements for national system employers and employees it can only do so by influencing the positions from which the industrial parties begin to bargain. If the State legislature confers a right to a public holiday on a particular day, it confers a right to refuse to work. This may enhance the employee's prospects of either taking the time off, or

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<sup>11</sup> See for example the Shop Employees (State) Award cl 17, particularly sub-clause 17(A)(ii)(b). The Hospitality Industry (General) Award 2010 recently made as a federal modern award contains such a provision in clause 37.1(b).

<sup>12</sup> See Discussion Paper at pp. 10-12.

negotiating a rate of remuneration that adequately compensates for the loss of the time off with family and friends and to observe the particular significance of that day.

## Modern awards

Many employees do not presently engage in any kind of industrial bargaining with their employers, either through trade unions or individually.<sup>13</sup> Many employees' working conditions are governed by awards. From 1 January 2010, federal modern awards will commence operation. It is proposed that these awards will be reviewed only every four years (see *Fair Work Act* s 156). There is scope for FWA to vary modern awards between four yearly reviews where this "is necessary to achieve the modern awards objective", however this is likely to happen rarely: see s 157. So it is likely that many employees' entitlements in respect of public holidays will be governed by these instruments, with little opportunity for any review in the short term, absent some commitment from the federal government or Fair Work Australia to reopen consideration of public holiday entitlements.

A perusal of some of the modern awards made to date demonstrates that clauses concerning public holidays state that public holidays are provided by the NES. Some awards add provisions entitling employers and employees to substitute days for the NES public holidays, and providing that employees who work on both the NES holiday and the substituted holiday shall be paid penalty rates for only one of the two days. See for example the public holidays clause in the General Retail Industry Award 2010:

### General Retail Industry Award 2010

#### 33. Public Holidays

33.1 Public holidays are provided for in the NES.

33.2 An employer and a majority of employees may agree to substitute another day for a public holiday. If either the public holiday or the substitute day is worked, public holiday penalties must be paid. If both days are worked one day at the election of the employee must be paid at public holiday rates.

This clause still means that the employee described above who was rostered to work on a Sunday but not a Monday, would not enjoy the benefits of a public holiday falling on a Sunday, if State legislation already provided that a substitute public holiday should be observed on the Monday. For example, if 26 January fell on Sunday, and State legislation provided that the public holiday should be on Monday 27 January, only Monday 27 January would be a public holiday according to the NES. The *Fair Work Act* s 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. An employer would have no reason to negotiate a substitute public holiday for an employee who was rostered on for the Sunday, but not on the Monday. Workers rostered on the Monday would enjoy the various benefits associated with the holiday, including the award entitlement to substitute it for another day. The Sunday worker would enjoy no entitlements.

Clearly, the current arrangements by which States declare public holidays on a "one-size fits all basis", with no facility to allow for occupation-based variation, face great difficulty in meeting an objective to ensure fair and equal treatment of employees regardless of their patterns of working hours.

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<sup>13</sup> Who Bargains? To be released 7 August 2009

## The case for a new Public Holidays Act in New South Wales

Without exception, all submissions received in this Review supported the introduction of special legislation dealing specifically with public holidays. Submissions from both unions and employer organisations agreed that the existing *Banks and Banks Holiday Act 1912* (NSW) (BBH Act) is ripe for modernisation, particularly since the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices).<sup>14</sup>

As was explained in the Discussion Paper,<sup>15</sup> prior to Work Choices, the observance of public holidays in New South Wales was largely a matter of industrial negotiation. In the course of regulating some of the trading activities of banks, the BBH Act identified certain days as bank ‘close holidays’ and provided a mechanism for the proclamation of other public holidays, but how these days were observed in business and industry outside of the banking sector was largely a matter of industrial negotiation. State and federal awards and industrial instruments dealt with matters such as entitlements to paid leave, penalty rates for work on holidays, and arrangements for substituting proclaimed holidays for alternate dates. The common law employment contracts of award-free employees tended to incorporate these arrangements by custom and practice, if not explicitly. Although Work Choices has now been overtaken by the *Fair Work Act 2009* (Cth), it has had a lasting legacy. Federal legislation now overrides State industrial laws in respect of all national system employers. The scope for State legislatures to influence industrial arrangements between corporate employers and their employees is now extremely limited.

Nevertheless, the *Fair Work Act* – like Work Choices – preserves an important role for the States in prescribing which days are to be observed as public holidays: see FW Act s 115(1)(b). It also provides that if State legislation determines that a particular public holiday is to be substituted for another day (for instance, because the real holiday falls on a Sunday), the substitute day will be the public holiday, and will therefore attract the employee’s right to reasonably refuse to work on that day, and the employer’s obligation to pay any applicable penalty rates if work is performed.

This means that State laws prescribing public holidays and making arrangements for additional or substitute days are highly influential in the rights and obligations of employers and employees. So it is a matter of considerable importance that employers and employees are able to understand their rights and obligations in respect of public holidays. This is best achieved by enacting special legislation dealing specifically with public holidays. The purposes and objects of such an Act would be to make predictable and transparent provisions identifying those days of cultural, social and religious significance to be observed according to the industrial arrangements set out in federal and State industrial legislation and instruments. Some submissions have argued that the Act should recognise changed patterns of working hours by endeavouring to facilitate equitable treatment between workers, regardless of working patterns.<sup>16</sup> Ideally, the legislation would include most entitlements as clear entitlements, and leave only those matters which necessarily require the exercise of some executive or administrative discretion to periodic gazettal.

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<sup>14</sup> See Unions NSW p.2; SDA p.3; ABA p. 1; NRA p.1; ANRA p.2; AiG p.1; ABI p.1.

<sup>15</sup> See Discussion Paper pp 10-14.

<sup>16</sup> See Unions NSW pp. 9-10; SDA p. 9.

## Trading hours

The BBH Act primarily deals with bank trading hours. As was explained in the Discussion Paper (at p 15) trading hours for other kinds of businesses are not affected by the BBH Act. Shop trading is regulated by the *Shop Trading Act 2008* (NSW).

## Industrial arrangements

As has been explained above and in the Discussion Paper, the scope for State legislation to directly influence the industrial rights and obligations of national system employees and employers in respect of public holidays is now extremely limited. Nevertheless, there is scope to influence the industrial entitlements of State system employees. A new Public Holiday Act for New South Wales could include a Part, applicable to unincorporated employers and any others who fall outside of the federal system, to provide the same right to reasonably refuse to work on a public holiday as is provided in the NES. This measure would assist in providing the kind of clarity and certainty that many employers have requested, by ensuring that all New South Wales employees have the same safety net entitlement to public holidays. Ensuring equitable treatment of workers regardless of whether their employment is regulated by State or federal law would create a simpler and more durable system for the recognition of public holiday entitlements across New South Wales.

### Focus point

Consideration should be given to the enactment of a new Public Holidays Act which names the following days as public holidays to be observed in New South Wales:

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Saturday
- Easter Sunday \*
- Easter Monday
- 25 April (Anzac Day)
- The second Monday in June (Queen's Birthday)
- The first Monday in October (Labour Day).
- 25 December (Christmas Day)
- 26 December (Boxing Day).

[\* See below for a discussion of Easter Sunday.]

Of these days, the following are specifically named in the *Fair Work Act*, s115 as public holidays for national system employees. These will be public holidays for national system employees, whether State legislation proclaims them as such or not.

- 1 January (New Year's Day)
- 26 January (Australia Day)
- Good Friday
- Easter Monday
- 25 April (Anzac Day)
- The Queen's Birthday
- 25 December (Christmas Day)
- 26 December (Boxing Day).

Fair Work s 115, also names as a public holiday "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". Easter Saturday, Easter Sunday and Labour Day would need to be named as public holidays in State legislation for national system employees to be entitled to the benefits afforded by public holidays under the National Employment Standards (i.e., the right to reasonably refuse to work on those days).

Easter Saturday is presently a public holiday in New South Wales as a consequence of the BBH Act s 15 and Fourth Schedule, Part 1 (which names "The Day after Good Friday" as a close bank holiday). Easter Saturday is also specifically named as a holiday in the *Holidays Act* 1958 (ACT) s 3(v); the *Public Holidays Act* 1993 (Vic) s 6(f); the *Holidays Act* 1910 (SA) Schedule 2, Part 1; the *Public Holidays Act* 2004 (NT) Schedule 2; the *Holidays Act* 1983 (Qld) Schedule Part 1.

\* A special case needs to be made for Easter Sunday, because it is presently *not* named as a public holiday in any State or Territory public holidays legislation.<sup>17</sup> Easter Sunday is, however, named as a "restricted trading day" in the *Shop Trading Act* 2008 (NSW). Although not specifically named as a public holiday in either the *Fair Work Act* (or the *Workplace Relations Act* 1996) or the BBH Act, this is because all Sundays were traditionally holidays, before the extensive liberalisation of trading and working hours in recent decades. Many of the State public holiday Acts were also passed in times before the liberalisation of Sunday trading. Given contemporary working patterns in many industries, it is appropriate that this particular Sunday be named as a public holiday, now that many Sundays have become ordinary working days. The submission by the SDA p.13-14 makes a persuasive case for naming a day already named as a restricted trading day as a public holiday. It is anomalous that a shop employee whose employer has a special exemption from the restrictions of the *Shop Trading Act* to trade on Easter Sunday should be requested to work without receiving any public holiday penalty rates on that day. By declaring Easter Sunday as a public holiday, the State legislation would ensure that employees requested to work on Easter Sunday would have the same protections as those required to work on Easter Saturday or Easter Monday. The principal protection provided by the Fair Work Act is a right to reasonably refuse to work on that day. Any right to penalty rates for work on that day would be a matter for industrial negotiation.

Labour Day is customarily gazetted as a public holiday in New South Wales under BBH Act s 19. All Australian States and Territories observe Labour Day, although the choice of day is not uniform. (The choice of day is addressed below under Question 2.)

The Act should also contain a Part providing the NES right to reasonably refuse to work on a public holiday (stipulated in the Fair Work Act s 114) to all State system employees.

## Review Questions

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

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<sup>17</sup> The Tasmanian legislation (*Statutory Holidays Act* 2000) names Easter Tuesday as a public holiday. No States presently name Easter Sunday as a public holiday.

**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?**

The Discussion Paper evoked a number of submissions which specifically addressed the question of how public holidays should be observed when the official or 'real' day of celebration falls on a weekend, or (more rarely) clashes with another official holiday. For example, in 2011, Easter Monday falls on 25 April (Anzac Day). Submissions fell into two clear camps: those asserting that if a public holiday falls on a weekend, there should be a substitute holiday on the following Monday, and those asserting that there should be an additional holiday on the following Monday.

Only one submission (from the Australian Retailers Association, ARA p.4) asserted a preference that there should be no additions or substitutions whatsoever. According to this submission, in a Christmas period such as the 1999/2000 period, when Christmas Day fell on Saturday 25 December 1999, Boxing Day on Sunday 26 December, and New Year's Day on Saturday 1 January, there would be no public holidays for employees who worked on Monday to Friday. The Christmas / New Year week would provide no break from ordinary working time. Weekend shiftworkers would, however, have an entitlement to the days off.

Generally, most employer groups accepted that named public holidays falling on a Sunday should result in a substituted holiday on the following Monday. Employer groups' principal concern was to avoid the risk that the declaration of an additional holiday for a weekend public holiday would create an opportunity for those employees who were rostered on to work on both the real and additional day to receive public holiday penalty rates for two days instead of one. This result has been avoided in the past by special provisions in awards and enterprise agreements precluding claims for penalty rates on two days in respect of the same holiday. However these arrangements were disturbed by the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* (See Discussion Paper p.10.)

Unions NSW submitted that all public holidays falling on weekends should result in proclamation of an additional day, so that "the original intent of providing respite from the normal working week for all workers to commemorate public holidays is satisfied" (Unions NSW p 10). The basis of this submission (which was also supported by the SDA and FSU) is that the commonly adopted arrangements for substituting public holidays privilege employees who work standard Monday to Friday hours over those who work rosters covering weekends.

The main submissions received on this issue are summarised here.

### **Summary of submissions**

The *Australian National Retailers Association (ANRA)* submission identified the need for national retailers to have national consistency where substitute and additional days are gazetted in lieu of public holidays that fall on a Saturday or Sunday. Whilst the ANRA identified that many national retailers had industrial instruments that effectively dealt with the issues of payment of penalty rates and employee entitlements to a day off, the issue of consistency still remains in some situations. In particular, where Anzac day falls on a Sunday, employees normally rostered to work Sundays may need to access other forms of leave in order to participate in the Anzac day memorial services due to the designated public holiday occurring on the Monday, rather than the Sunday.

Further, the ANRA expressed substantial concerns for employers where employees may be able to 'double-dip' and access public holiday arrangements on two days where an additional day is allocated.

The *National Retail Association* (NRA) submission expressed opposition to 'the creation of additional days when celebrated dates of a public holiday fall on weekends in any circumstances'. As such, the NRA supports an approach similar to that adopted in Queensland where substitute days are awarded for all celebrated days that fall on a Saturday or Sunday, with the exception of Anzac day, which should always be commemorated on the actual day.

The *Australian Retailers Association* (ARA) submission supports the removal of gazetted additional or substitute public holidays when public holidays fall on a weekend. Further, the ARA "believes employees who are rostered to work on the 'real' day of religious celebration should have the right to reasonably request an unpaid day of leave". The basis of the ARA submission for the removal of the additional and substitution practices appears to be the additional cost burden on small retailers who cannot afford to pay penalty rates for both the real and additional public holidays.

The Australian Industry Group (AiG p.2) argued that additional days should not be granted because of the additional costs they impose on businesses operating across seven days. AiG also argued that substitutions should be made only where it has been customary to substitute holidays in the past. These submissions were also echoed by Australian Business Industrial (ABI p.2).

*Coles Supermarkets (Australia) Pty Ltd* submits that there is no capacity for the retail sector to adopt an approach of additional public holidays. As such, Coles proposed that substitute days apply in the following circumstances<sup>18</sup>:

- Where Christmas Day is a Saturday or Sunday, a holiday in lieu shall be observed on 27 December.
- Where Boxing Day is a Saturday or a Sunday a holiday in lieu shall be observed on 28 December.
- Where New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.

Coles identified these circumstances as optimal for all type of rostered employees (standard and non-standard). Further, as identified by Coles, these scenarios are supported by the Australian Industrial Relations Commission's Public Holidays Test Case.<sup>19</sup>

The *Shop, Distributive and Allied Employees Association* (SDA) submit that the BBH Act be amended "to provide for additional public holiday arrangements rather than substituted public day arrangements for public holidays which fall on weekends". The SDA believe this would create a balance between the extension of trading hours adopted by retailers and the deprivation of weekends and public holidays experienced by retail and service industry employees. The views of the SDA are echoed by other submitting unions, including Unions NSW.

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<sup>18</sup> Coles submission, p. 2

<sup>19</sup> *1994 Public Holidays Test Case* (Full Bench, 4 August 1994, Print L4534) . This test case provided that where certain prescribed days fell on a weekend, a substitute day would be awarded, and it would be the substitute day that attracted penalty rates.

Mr Dave Spring also argued a case for additional rather than substitute holidays when celebrated days fall on weekends, to avoid “problems and confusion for people who regularly work weekends and public holidays.”

The following page provides a table of current practice for determining additional and substitute days across all States and Territories in Australia.

**Current practice for determining additional and substitute days across all States and Territories**

	<b>Christmas Day</b>	<b>Boxing Day</b>	<b>New Years Day</b>	<b>Australia Day</b>	<b>Anzac Day</b>
<b>NSW</b>	Additional day is granted when it falls on a Saturday. Substitute day is granted on the following Monday when it falls on Sunday.	Additional day is granted when it falls on a Saturday. Substitute day is granted on the following Monday when it falls on Sunday.	Additional day is granted when it falls on a Saturday. Substitute day is granted on the following Monday when it falls on Sunday.	Substitute day is granted when it falls on a Saturday or Sunday.	No day in lieu when it falls on Saturday. Substitute day on the following Monday when it falls on a Sunday.
<b>VIC</b>	Substitute day as the Monday after when it is a Saturday or the Tuesday after when it is a Sunday.	Additional day on the Monday after 26 December when it is a Saturday or the Tuesday after it is a Sunday.	Additional day on the Monday after 1 January when it is a Saturday or Sunday.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	No day in lieu when it falls on Saturday or Sunday.
<b>WA</b>	Additional public holiday and bank holiday on the following Monday, when it falls on a Saturday or Sunday.	Additional public holiday and bank holiday on the following Monday, when it falls on a Saturday. Additional public holiday and bank holiday on the following Tuesday, when it falls on a Sunday/Monday.	Additional public holiday and bank holiday on the following Monday, when it falls on a Saturday or Sunday.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	Additional public holiday and bank holiday on the following Monday, when it falls on a Saturday or Sunday.
<b>QLD</b>	Substitute public holiday on the following Monday, when it falls on a Sunday.	Substitute public holiday on the following Monday, when it falls on a Sunday. Substitute public holiday on the next day, when it falls on a Monday.	Substitute public holiday on the following Monday, when it falls on a Sunday.	Substitute public holiday on the following Monday, when it falls on a Saturday or Sunday.	Substitute public holiday on the following Monday, when it falls on a Sunday.
<b>SA</b>	Substitute bank holiday day when it falls on a Saturday, Christmas Day remains a public holiday. Additional public holiday when it falls on a Sunday.	Substitute public holiday when it falls on a Saturday. Additional public holiday when it falls on a Sunday.	Substitute bank holiday day when it falls on a Saturday, however, New Years day remains as a public holiday. Additional public holiday when it falls on a Sunday.	Substitute bank holiday day when it falls on a Saturday, Australia day remains as a public holiday. Additional public holiday when it falls on a Sunday.	Public holiday always on Anzac day and an additional bank holiday when it falls on a Sunday.
<b>TAS</b>	Substitute day on the following Monday or Tuesday, when it falls on a Saturday or Sunday, respectively.	Substitute day on the following Monday or Tuesday, when it falls on a Saturday or Sunday, respectively.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	-
<b>NT</b>	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	Substitute day on the following Monday, when it falls on a Saturday. Substitute day on the following Tuesday, when it falls on a Sunday or Monday.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	Substitute day on the following Monday, when it falls on a Saturday or Sunday.	Additional day on the following Monday, when it falls on a Sunday.
<b>ACT</b>	Substitute day if it falls on a Saturday or Sunday.	Substitute day if it falls on a Saturday or Sunday.	Substitute day if it falls on a Saturday or Sunday.	Substitute day if it falls on a Saturday or Sunday.	Substitute day only if it falls on a Sunday.

## One size fits all?

Arguably, the question of whether substitute or additional days are appropriate in cases where public holidays fall on weekends should be answered differently for different holidays. There are five public holidays throughout the year which give rise to this problem. Each day has its own particular significance, and reasons may differ between these days for preferring either an additional or substituted holiday, or no change, where it falls on a weekend or public holiday. The current practice for substituting or adding days in New South Wales and in other States is presented in the table on the previous page.

A major objective of this Review is to modernise New South Wales law without adding or subtracting any public holiday entitlements. As the submissions summarised above show, holidays falling on weekends create a particular challenge because current practice in New South Wales means that employees working different rosters are already at risk of differential treatment, depending on whether a substitute holiday is declared for one falling on a weekend. To illustrate this, this paper explains how current practice in New South Wales affects three different employment patterns. For the sake of convenience, these employment patterns have been labelled:

- Standard (Monday to Friday),
- Non-standard A (Wednesday to Sunday); and
- Non-standard B (Saturday to Wednesday).

The difference between Non-Standard A and Non-Standard B is that Non-Standard A never works on Monday, and Monday is the day typically chosen as a substitute holiday when a celebrated day falls on a weekend. Of course, there are many more patterns of work that are commonly undertaken, particularly in the retail and hospitality industries. Many people working similar patterns of hours will enjoy different working conditions, depending on whether they are classified as permanent, permanent part-time or casual staff, and whether they qualify as shiftworkers for the purposes of shift penalties. These conditions vary between occupational groups, so these three scenarios provide a necessarily simplistic picture, for the purpose of helping to explain the significance of any decision respecting holiday substitutions or additions.

Each section concludes with at least two Options:

- A maintain current practice – so that there is no appreciable effect on employers' and their labour costs by the introduction of new legislation; and
- B prefer a position which maintains Standard benefits and ensures Non-Standard workers also enjoy these Standard benefits.

It should be remembered that this section presumes that current industrial entitlements remain in place. As was outlined in the Introduction to this paper, industrial entitlements can – and most certainly will – be renegotiated over time. It is in fact considerably simpler to renegotiate industrial arrangements to accommodate legislative provisions, than it is to change legislation to suit industrial arrangements. Much of the current problem has been created because legislation has been enacted with insufficient regard to longstanding industrial arrangements in particular industries. Federal legislation has attempted to impose a one-size fits all approach to public holidays, upon a range of industries with very different working patterns. In many respects the problem of ensuring parity between workers with different working patterns was much easier when these matters were governed principally by industry-

wide awards, which could be adjusted to accommodate changing working patterns in particular occupational groups.

In fact, an ideal solution to this problem would be to declare that certain named days are public holidays and, that every employee who is rostered on to work during a week in which a public holiday falls is entitled to a paid day off during that week. Those normally rostered on to work on the named day would be entitled to take that day off. Those normally rostered on other days excluding the named day would be entitled to take an alternative day off. Those required to work the full week, would be entitled to be paid for one day at public holiday penalty rates. Part-time workers could be granted this right on a pro-rated basis. For example, a person who regularly worked three days a week from Tuesday to Thursday would receive 0.6 (three-fifths) of a day off in lieu, in any week in which the Monday was a public holiday. This solution would ensure that every worker, regardless of their working patterns, would enjoy the benefits of public holidays.

Unfortunately, State legislation is not able to achieve this result at present, because the *Fair Work Act* excludes any State industrial legislation which purports to deal with the industrial rights and obligations of employers and employees. This solution is one which would need to be enshrined in federal legislation.

In the meantime, the State legislature needs to solve the problem as equitably as possible within the current constraints.

## **1.1 Christmas and Boxing Day**

Regardless of one's religious convictions, Christmas and Boxing Day have become important traditional family celebrations enabling people to reconnect with extended family. Two days together, when all members of the family can reliably expect to have time off, is especially important given the geography of modern life, in which families often live at considerable distances from each other.

### **Present arrangements**

#### Christmas on Saturday

When Christmas Day falls on a Saturday, it has been customary in New South Wales to declare an additional public holiday so that Saturday 25 December and Tuesday 28 December are gazetted as Christmas holidays.

Whenever Christmas Day falls on a Saturday, Boxing Day will fall on a Sunday and there is a substituted holiday for Monday 27 December. This occurred in 1976, 1982, 1993, 1999 and 2004 and will occur next in 2010.

So when Christmas Day falls on a Saturday the following will be public holidays: Saturday 25 December, Monday 27 December and Tuesday 28 December. Note that Sunday 26 is not a public holiday. This occurred in 1976, 1982, 1993, 1999 and 2004. The next time that Christmas will fall on a Saturday is in 2010.

#### Christmas on Sunday

When Christmas Day falls on a Sunday, a substitute holiday is gazetted for Monday 26 December. In 1977, 1983, 1988 and 2005 no additional public holiday was gazetted for Sunday 25 December, so this day was not a public holiday. In 1994, an additional day was gazetted for Sunday 25 December.

Since Christmas Day is observed on Monday 26 December, Boxing Day is observed on Tuesday 27 December. So if Christmas Day falls on a Sunday, and the usual pattern is observed, Sunday 25 December will not be an official public holiday. The public holidays will be Monday 26 December and Tuesday 28 December.

### Boxing Day on a Saturday

Before 1998, when Boxing Day fell on a Saturday both Saturday 26 December and Monday 28 December were gazetted as public holidays. In other words, an additional holiday was declared to ensure that the Saturday and the following Monday were both public holidays. This occurred in 1981, 1987 and 1992.

Practice appears to have changed in 1998 when Saturday 26 December was not a public holiday, and a substitute holiday was gazetted for Monday 28 December. Boxing Day falls on Saturday in 2009 and a substitute holiday has been gazetted for Monday 28 December 2009.

### **Impact on Standard worker**

Monday to Friday workers get two paid holidays for the Christmas break regardless of when Christmas falls. When Christmas falls on a Saturday they enjoy a continuous four day break from work. Likewise, when Christmas falls on a Sunday they enjoy a continuous four day break from work. When Boxing Day falls on a Saturday, they also get a four day weekend, because they have Friday off for Christmas, and Monday off for Boxing Day.

Most importantly, Standard workers will always enjoy a right to refuse to work on 25 and 26 December, so will not find themselves rostered on to an ordinary shift on the real Christmas Day or Boxing Day.

### **Impact on Non-standard A worker**

When Christmas Day is a Saturday, these workers have a public holiday for Christmas on Saturday but since the Boxing Day holiday is substituted till Monday, they will be required to work their Sunday shift as usual (unless they have specifically negotiated some other arrangement).

If Christmas Day is on Sunday, they will not have a right to reasonably refuse to work on the real Christmas Day, and will be paid their usual Sunday penalty rates for work on that day, if their industrial instrument provides for penalty rates.

If Boxing Day is a Saturday and is therefore substituted for Monday, they will not have a public holiday for Boxing Day. They can be rostered on to work at normal Saturday rates on Saturday 26 December, without any right to reasonably refuse to work. Because they are not rostered on to work on Monday and Tuesday, they will not have the benefit of those public holidays in lieu of the real days, unless they work under an award or agreement that provides for a substitute holiday to be granted. See the Hospitality Industry (General) Award 2010 below for an example of a clause which would address this inequity by ensuring that workers whose rostered day/s off falls on a public holiday are able to take a day in lieu or receive additional pay. Not all modern awards make these arrangements at present.<sup>20</sup>

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<sup>20</sup> See for example the Fast Food Industry Award 2010 (MA000003) clause 30 and the Security Services Industry Award 2010 (MA000016) clause 26, both of which would cover Non-Standard workers.

## **Hospitality Industry (General) Award 2010**

### 37. Public holidays

#### 37.1 National Employment Standards

##### (a) Public holidays are provided for in the NES

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday in lieu of any of the days prescribed in s.54 of the NES.

##### (b) Additional arrangements for full-time employees:

(i) A full-time employee whose rostered day off falls on a public holiday must, subject to clause 32.2, either:

be paid an extra day's pay; or

be provided with an alternative day off within 28 days; or

receive an additional day's annual leave.

## **Impact on Non-standard B worker**

If 25 December fell on a Saturday, these workers would not be required to work on Christmas Day, or on the additional Tuesday public holiday. They would be required to work on the 'real' Boxing Day on Sunday, but would have the benefit of the substitute holiday on Monday. This pattern of work would effectively provide three public holidays for the Christmas break, but would require work on the Sunday in between. If a worker acceded to a request to work and the industrial arrangements applying to work attracted penalty rates for public holidays, penalty rates would be paid for three days. (This assumes that their industrial arrangements do not already limit their rights to penalty rates for additional public holidays.) This is a consequence of the fact that an additional public holiday was awarded for Christmas Day falling on a Saturday.

If Boxing Day were to fall on Saturday, they would be required to work on Saturday and Sunday, but would have Monday off as a public holiday.

## **Options for reform**

### **Option A: Maintain current New South Wales practice**

In order to maintain current practice in New South Wales, a new Public Holidays Act should provide that:

If 25 December falls on a Saturday, the public holidays will be:

- 25 December (Christmas)
- 27 December (substituted Boxing Day holiday)
- 28 December (additional Christmas holiday)

If 25 December falls on a Sunday, the public holidays will be:

- 26 December (Boxing Day)
- 27 December (substituted Christmas Day)

If 26 December falls on a Saturday, the public holiday will be

- 26 December (Boxing Day)
- 28 December (additional Boxing Day).

**Option B: Maintain current benefits for Standard workers, and extend those benefits to non-standard workers**

In order to ensure that Non-Standard workers are also guaranteed two public holidays to celebrate Christmas and Boxing Day, it would be necessary to provide that when Christmas Day fell on a Sunday, the following Tuesday would be additional (rather than a substitute) holiday. Likewise, when Boxing Day fell on a Saturday or Sunday the following Monday would be an additional holiday.

This pattern is adopted in Western Australia: see *Public and Banks Holidays Act 1972* (WA) s 5 and Second Schedule.<sup>21</sup>

The benefit of this option would be that it ensures that all workers (Standard and Non-Standard) enjoy the same right to reasonably refuse to work on the real Christmas and Boxing Day. Given the special significance of these days, this seems to be a fair and reasonable option for ensuring that the growing number of non-standard workers are able to share in traditional family celebrations if they choose to, and have good reasons to resist requests to work on those days.

The problem with this option is that it has the potential to provide extra public holiday entitlements for Non-Standard B worker, because this working pattern includes work on weekends, and on Monday and Tuesday when the additional days would fall.

If this option were adopted it would provide an immediate windfall for any Non-Standard B worker, and a corresponding increase in labour costs for their employers, unless industrial instruments already contemplate that workers are only entitled to be paid penalty rates on either the real or the additional public holiday when an additional holiday is granted in respect of a weekend holiday. Some old State awards and federal agreements (especially those in the retail sector) make this provision already, and there would be no reason why industrial instruments made under the Fair Work legislation could not recognise this issue, and make provision for workers to receive penalty rates for work on only one of the real and additional public holidays.

**Focus point**

New South Wales already provides additional days for Christmas and Boxing Day when they fall on Saturdays. It is a small step to provide additional days for when they fall on Sundays also. Work on ordinary Sundays already attracts penalty rates in many if not most industries, so the additional cost of naming a real Christmas Sunday as a public holiday and allowing an additional public holiday on the following Tuesday would appear to be no more than the difference between the Sunday penalty rate and the public holiday penalty rate. Western Australia's modern legislation has adopted this approach. There is no general uniformity across the nation, so bringing New South Wales practice into line with Western Australia would be a step towards more uniform practice, especially given broad community expectation that families will enjoy a two day break at Christmas time. This option ensures that the Non-Standard workers and their families enjoy an equal entitlement to participate in family activities.

<sup>21</sup> The Western Australian legislation provides for additional public holidays whenever Christmas Day, Boxing Day, New Year's Day or Anzac Day falls on a weekend. It provides for substitute days when Australia Day falls on a weekend.

## **1.2 New Year's Day**

### **Present arrangements**

Although New Year's Day is a public holiday, the real time of celebration is on the evening of New Year's Eve, when many people engage in community festivities to ring in a new calendar year. It is probably more onerous for a worker to be required to work on the evening of New Year's Eve, than on New Year's Day itself, which is more likely to be a day of quiet rest after a late night.

Whenever Christmas Day falls on a Saturday, New Year's Day will also fall on a Saturday. Likewise, when Christmas Day falls on Sunday, the following New Year's Day will also be a Sunday. This is worth mentioning, because any disadvantage a weekend worker suffers as a consequence of public holidays falling on weekends is duplicated over the Christmas and New Year period. Additional holidays have been gazetted to ensure a long weekend when New Year's Day falls on a Saturday. So both Saturday 1 January and Monday 3 January have been public holidays in 1972, 1977, 1983, 1994, 2000 and 2005.

When New Year's Day falls on a Sunday, however, a substitute day has been named. So in 1978, 1984, 1989, 1995 and 2006 Sunday 1 January was not a public holiday, but Monday 2 January was. This practice can only be explained by the traditional expectation that Sunday is always a day of rest in any event, and anyone requested to work on Sunday would already receive the same or similar penalty rates as are applied to a public holiday. In the contemporary industrial climate, this expectation no longer holds. For example, the Security Services Industry Award 2010 provides for a 100% penalty to be applied to Sunday work, and a 150% penalty for public holidays.<sup>22</sup> The Fast Food Industry Award 2010 provides a 75% penalty for work on Sunday, whereas work on a public holiday is compensated by a penalty rate of 150%.<sup>23</sup> It can no longer be assumed that work on Sunday will attract the same or similar remuneration as work on a public holiday.

### **Impact on Standard worker**

Monday to Friday workers will always get a day off for New Year's Day, regardless of the day upon which it falls.

### **Impact on Non-standard A worker**

Wednesday to Sunday workers will get a public holiday if New Year's Day fall on Wednesday, Thursday, Friday or Saturday, but not if it falls on a Sunday. This is because Monday is celebrated as a substitute holiday. They also miss out on a holiday if it falls on Monday or Tuesday, unless their industrial arrangements are like those in the Hospitality Industry General Award 2010 described above, and provide a day off in any week in which a public holiday falls, if they are not rostered to work on the actual public holiday.

### **Impact on Non-standard B worker**

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<sup>22</sup> See Security Services Industry Award 2010 (MA 000016) clause 22.3.

<sup>23</sup> See Fast Food Industry Award 2010 (MA000003) clauses 26.2(c) and 30.3.

Saturday to Wednesday workers will get a day off for New Year's Day if it falls on Sunday, Monday, Tuesday or Wednesday. They will get two days off for New Year's Day if it falls on a Saturday, by virtue of the additional day granted when New Year's Day falls on Saturday, unless their industrial arrangements already provide that penalty rates will be paid for only one day in respect of New Year's Day when an additional day is granted. They will not get a public holiday when it falls on Thursday or Friday, unless they have the benefit of an award or agreement clause with the same effect as the Hospitality Industry General Award 2010, clause 37.1(b), described above.

### **Options for reform**

#### **Option A: Maintain current New South Wales practice**

In order to maintain current arrangements, which favour Standard workers, the new Act should provide that where 1 January falls on a Saturday, Monday 3 January will be an additional public holiday. If 1 January falls on a Sunday, the New Year's Day holiday will be substituted for Monday 3 January.

#### **Option B: Maintain current benefits for Standard workers, and extend those benefits to non-standard workers**

In order to maintain the current entitlements of Standard workers and extend those entitlements to Non-Standard workers, the legislation should provide that if 1 January falls on either Saturday or Sunday, then the following Monday will be an additional holiday. This option would ensure greater equity between Standard and Non-Standard workers, because it would stop the current practice of taking away a Sunday public holiday in order to confer a substitute holiday on Standard workers.

This approach is adopted in Western Australia and Victoria.<sup>24</sup>

As can be seen from the illustration of the way additional holidays affect Non-Standard B workers, this option would increase the number of occasions when Non-Standard workers could double-up on holiday entitlements, unless their industrial arrangements also deal with this issue.

#### **Focus point**

Arguably, the case for adopting Option B is not so strong for New Year's Day as for Christmas and Boxing Day, because of the special family significance of those days. Nevertheless, adopting Option B would bring New South Wales into line with Victoria and Western Australia, and would improve equity between Standard and Non-Standard workers and for this reason it warrants serious consideration. Any concerns about double-dipping of penalty rates for certain Non-Standard workers could and should be dealt with by industrial negotiation.

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<sup>24</sup> See *Public Holidays Amendment Act 2008* (Vic) s 5 substituting s 6 of the *Public Holidays Act 1993* (Vic).

## **1.3 Australia Day**

### **Present arrangements**

In 1988, the Australian Governments decided that Australia Day should be celebrated consistently on 26 January, rather than continue with an earlier practice of celebrating on the last Monday in January. Since then, the holiday has been substituted for a Monday whenever 26 January has fallen on either a Saturday or Sunday. This occurred in 1991, 2002 and 2008, when 26 January fell on a Saturday, and in 1992, 1997 and 2003 when 26 January fell on a Sunday. The next time that 26 January falls on a weekend will be 2013.

This practice is followed by all other States except South Australia, so harmonisation of arrangements across the nation would favour retaining this practice. Nevertheless, it is another practice that favours Standard workers over Non-Standard workers.

### **Impact on Standard worker**

Standard Monday to Friday workers always get a holiday for Australia Day, either on the weekday upon which it falls, or on the following Monday if it falls on a weekend.

### **Impact on Non-standard A worker**

Wednesday to Sunday workers only get a holiday for Australia Day if it falls on Wednesday, Thursday or Friday, unless they work under some kind of industrial instrument which provides them with a day off in a week in which a public holiday falls. See for example the Hospitality General Award 2010 federal modern award, and the Shop Employees (State) Award sub-clause 17(A)(ii)(b), described above. Non-Standard A workers who have no such benefits will receive a public holiday for Australia Day in approximately three out of every seven years.

### **Impact on Non-standard B worker**

Saturday to Wednesday workers will get a holiday for Australia Day if it falls on Monday, Tuesday or Wednesday. This means that Non Standard B workers will receive a public holiday in approximately six out of every seven years. (This is because although they will not have a holiday on Saturday 26 January or Sunday 26 January, they will have a holiday on the following Monday because of the substitution.)

## **Options for reform**

### **Option A: Maintain current New South Wales practice**

Current practice could be maintained by including provisions in the Public Holidays Act which name 26 January as a public holiday for the commemoration of Australia Day, and providing that this day be substituted for the following Monday if 26 January falls on either Saturday or Sunday. This option would maintain the current privilege enjoyed by standard Monday to Friday workers, and would leave in place any current industrial arrangements allowing non-standard workers to take another day off if they miss out on a public holiday in that week because they are not rostered on Monday. It would neither add to nor subtract from current labour costs of employers operating in New South Wales. Option A also conforms with current practice in all other States except South Australia.

### **Option B: Maintain current benefits for Standard workers, and extend those benefits to non-standard workers**

In order to provide all Non-Standard workers with the same entitlement to reasonably refuse to work on the real Australia Day, but also maintain current practice of allowing all Standard workers a day off for Australia Day, it would be necessary to provide that an additional holiday be named for the following Monday, whenever Australia Day fell on Saturday or Sunday. This option carries the same risks as Option B for Christmas, Boxing Day and New Year's Day.

### **Focus point**

Notwithstanding its importance as a day of national celebration, Australia Day has never been treated as a particularly sacred day. It is not a day when shop trading is restricted, and it is not associated with any particular traditions and practices (such as the Anzac Day marches and commemorative services, described below). New South Wales' current practice conforms with that in all other States except South Australia. If the objective of the Review is principally to enshrine existing practice in modern legislation, this Option A should be adopted.

## **1.4 Anzac Day**

### **Present arrangements**

Presently in New South Wales, Anzac Day is celebrated on 25 April, regardless of when it falls in the week. In 2009, Anzac Day fell on Saturday. Saturday was a public holiday, and under the Shop Trading Act, shops were required to close for a half day (until 1pm) unless they were exempt from trading restrictions (see Discussion Paper p. 20). Although this situation attracted some public comment and criticism, in this case the government had adopted standard practice. When Anzac Day fell on a Saturday in 1998, 1992, 1987 and 1981, no additional or substitute public holiday was gazetted for Monday 27 April.

The submission from the RSL asserted that Anzac Day must be commemorated on 25 April regardless of the day upon which it occurs. The day should never be substituted, and there is no need for any additional days to be proclaimed. The RSL is entirely happy with the arrangements made in 2009, when Anzac Day fell on Saturday 25 April, and no public holiday was held on Monday 27 April. According to the RSL's preference, Anzac Day next year should be held on Sunday 25 April, and no public holiday should be proclaimed for Monday 26 April. The RSL submitted that it is not

necessary nor desirable that the commemoration of Anzac Day should give rise to a long weekend, because a long weekend potentially draws people away from attendance at marches and other services. The RSL's view is that Anzac Day is an austere occasion, and should be recognised by a complete close down of trading activities, sporting fixtures and all the usual routines of life, until 1 pm on 25 April.

On the other hand, some individual citizens making submissions to the Review have argued that there should be an additional public holiday if Anzac Day falls on a weekend. Mr Dave Spring submits (p.1) "If Anzac Day is on a Saturday or Sunday it simply falls into the routine of our weekend lives and it does not take on the significance it deserves." The RSL countered this view by submitting that proper observance of Anzac Day involved only a morning of a citizen's time, and that it should not be seen as an occasion for a holiday as such, but for reflection on the sacrifice of military service personnel in theatres of war.

Under the Terms of Reference, the Review is required to take account of the Council for the Australian Federation Meeting of Premiers (CAF) held on 12 September 2008<sup>25</sup>, where 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.'

There is no CAF recommendation presently on what arrangements should be made for Anzac Day falling on Saturday.

### **Impact on Standard worker**

Presently Standard workers will not receive a public holiday if Anzac Day falls on Saturday. Under present arrangements, which are also recommended by CAF, Standard workers do get a substitute public holiday if Anzac Day falls on Sunday. Mr Dave Spring, and one other individual citizen making submissions to the Review expressed the view that the usual pressures of family life tend to swamp Anzac Day celebrations unless a public holiday is given when it falls on a weekend.

### **Impact on Non-standard A worker**

Presently Wednesday to Sunday workers will not have a guaranteed entitlement to time off on Anzac Day if it falls on a Sunday, because of the substitution arrangements presently in place. This is another case of ignoring the non-Standard worker to provide a benefit to the Standard worker and it arises for historical reasons, dating back to a time when every Sunday was a day of rest.

### **Impact on Non-standard B worker**

Presently Saturday to Wednesday workers would be at risk of being called into work on the real Anzac Day on Sunday 25 April without a right to refuse, but they will have the benefit of the substitute day on the following Monday.

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<sup>25</sup> 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>

## Options for reform

### **Option A: Maintain current New South Wales practice**

If current practice – and the CAF recommendation – were enacted in legislation, no additional or substitute holidays would be made when Anzac Day fell on Saturday, and the holiday would fall on Monday 26 April when Anzac Day fell on Sunday. In 2011, when Anzac Day falls on the same day as Easter Monday, Tuesday 26 April would be named as a public holiday.

This practice is currently also observed in Queensland and the ACT.

### **Option B: Maintain current benefits for Standard workers, and extend those benefits to non-standard workers**

If current practice were to be amended to ensure that all workers enjoyed a right to reasonably refuse to work on the 'real' Anzac Day (in conformity with the RSL's wishes), but the entitlements of Standard workers were also maintained, then the new Act should declare an additional public holiday for Monday 26 April whenever Anzac Day falls on a Sunday. This practice is presently adopted in Western Australia, South Australia and the Northern Territory. (Western Australia also provides an additional holiday on Monday 27 April when Anzac Day falls on a Saturday.)

This option would allow two public holidays for Anzac Day for Non-Standard B workers.

### **Option C: RSL preferred option**

The RSL has argued for observing Anzac Day on 25 April, regardless of whether it falls on a Saturday or Sunday, with no substitute or additional day for a public holiday. This submission is also supported by Coles and the various retailers associations. This conforms with current practice in Victoria.<sup>26</sup>

### **Focus point**

Option B has the benefit that it preserves existing arrangements for standard workers, but also respects the RSL's principal concern that the 'real' Anzac Day be properly recognised. The submissions indicate that this option would be favoured by the unions (although their submissions generally also request additional holidays when Anzac Day falls on a Saturday), but would be deeply unpopular with the retail traders, who would face additional penalty rate costs. It would also defeat the RSL's additional concern that the recognition of Anzac Day should not generate long weekends.

## 2. The Queen's Birthday and Labour Day

**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?**

All submissions to the Review specifically addressing this question agreed that these days should remain on the days traditionally celebrated in New South Wales, i.e. the second Monday in June for the Queen's Birthday, and the first Monday in October for

<sup>26</sup> See *Public Holidays Act 1993* (Vic) s 6(h).

Labour Day. The celebration of these days is not presently uniform around Australia, notwithstanding various meetings of the State Premiers to discuss harmonising the celebration of these public holidays. New South Wales on its own is not able to achieve uniformity. Submissions to the Review generally agree that the present dates provide a convenient spread of holidays across the calendar.<sup>27</sup>

#### **Focus point**

The new legislation should contain provisions declaring that the following days are public holidays each year:

- Second Monday in June to commemorate the Birthday of the Sovereign.
- First Monday in October to commemorate Labour Day.

The dates of these holidays should be moved only if, in the course of harmonisation of all public holidays, national consensus is achieved for the adoption of other dates.

### **3. Local public holidays and half-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?**

A number of submissions to the Review dealt with the question of local public holidays, such as Newcastle Show Day and Albury Cup Day.

Given that the choice of local public holidays is presently made by local governments and reflect the traditions of particular local communities, it would be inappropriate to attempt to name those days in State legislative provisions. The best method for ensuring that local communities maintain control over their own celebrations and can vary their practices over time as a consequence of local influences, is to include in the Public Holidays Act a provision enabling the annual gazettal of local holidays. This is currently the practice under the BBH Act s 19(3).

An example of such a provision in another State Act is the *Public Holidays Act 1993* (Vic) s 7(1)(b). This provision limits the number of such local holidays to one per municipal district (or two half-holidays), and requires a minimum of six months notice.

The question remains, however, whether these local days should be treated as public holidays according to the new National Employment Standards. The Discussion Paper explained some of the industrial confusion that arose in respect of Newcastle Show Day when Work Choices was first enacted and it was discovered – to the surprise of many employers – that their workforces would now be entitled to take the day off on full pay, notwithstanding that an alternative public holiday (Easter Tuesday) had already been given to those workers.<sup>28</sup>

On the whole, submissions from employer representatives noted the additional costs and confusion caused when Work Choices effectively extended the benefits of paid

<sup>27</sup> See ABI p 3; Unions NSW, p 13.

<sup>28</sup> See Discussion Paper at p. 12. See Also AiG pp. 3-4.

leave on local holidays to all national system employees, even those who already had an entitlement to another day's leave in lieu.

## Summary of submissions

The *Australian Industry Group* (AiG) submission did not oppose the observation of local holidays, however it proposed that arrangements for local holidays should be certain, and should not add to the costs of those employers who already give their staff another day in lieu of the Show Day. The gazettal of Newcastle Show Day as a public holiday triggered the operation of the *Workplace Relations Act* s 612 and gave all national system workers an extra day's paid leave or an entitlement to penalty rates for working on that day. AiG did not object to the day remaining a holiday for State system workers, i.e. those in the public sector and on State awards which already accommodate show day arrangements (AiG p.4).

The *Australian Business Industrial* (ABI) submission also noted that following Work Choices the traditional gazettal of local show days as public holidays had created confusion and a greater cost burden for national system employers. ABI proposed that "local public holidays should be created rarely, and the criteria for their gazettal must appropriately balance the requirement for the holiday against significant costs and uncertainty involved for local businesses" (ABI p.4).

The *Hunter Business Chamber* (whose members are affected by the gazettal of Newcastle Show Day) have submitted that local agricultural show and race days ought not to be named as public holidays, now that federal industrial legislation grants additional rights to employees and imposes corresponding burdens on employers in respect of those days (See HBC p.2).

*GP Access Australia* (GPAA), an organisation working with general medical practices in the Hunter Region, also submitted that local holiday arrangements caused "mass confusion" and some inequity as different classifications of workers would be treated differently depending on whether they were employed by a corporation and so enjoyed the national system benefit of a paid day off, or by an unincorporated medical partnership, and received no paid time off (GPAA p.1).

The *Motor Traders Association of NSW* (MTANSW) submitted that local show days should not be gazetted as public holidays. "[T]he conferring of the benefit of a local public holiday to employees should be entirely a matter of negotiation between the relevant employer and employees at the enterprise level within the locality concerned." MTANSW p.3.

The *Waste Contractors and Recyclers Association of NSW* (WCRANSW) representing waste and recycling collection contractors submitted that the 27 local public holidays observed at different times across the State were "an unnecessary cost and an operational burden on business": WCRANSW p.1. This submission noted the particular confusion arising when workers lived in a different district from their place of work. Nevertheless, the submission did not propose outright abolition of local public holidays. Rather, it proposed that the number of local holidays should be reduced, and that the Office of Industrial Relations should issue "very clear guidance material that provides clarity on all local public holiday matters and their application" (WCRANSW p.1).

The *Unions NSW* submission proposes maintenance of the current arrangements for choosing and proclaiming local public holidays, and proposes that those arrangements be "strengthened to ensure that such community events are able to occur by providing

people with a guaranteed local public holiday on such days in order to attend such events” (Unions NSW p.15).

*Albury City* submitted that it the Albury Gold Cup race day was an important community event that injected “millions of dollars into the local economy each year” and that it was “imperative that the authority to nominate a local public holiday remains with Local Government” (*Albury City* p.1).

### **Options for reform**

The problem identified by the employer groups was created by the Work Choices legislation. One option for reform would be to alter State government practice so that industrial arrangements can be returned (as far as possible) to their pre-Work Choices position. The State legislation could provide for the proclamation of certain days for local events (such as show days) for certain localities, without calling them ‘public holidays’ for the purposes of the National Employment Standards. The proclamation of these days would continue to entitle those employees working under awards, enterprise agreements and contracts that recognised rights to time off for the particular local event, but would not entitle other employees who were previously not entitled to this holiday to paid leave or penalty rates on that day.

This option would not completely preserve the pre-Work Choices position, because many workers previously covered by State awards will be covered by modern awards when the Fair Work system is fully operational, and modern awards generally leave the naming of public holidays to the NES. Businesses in these localities would need to enter into new enterprise agreements to reintroduce an entitlement to time off on a local event.

Alternatively, the State government could take the view that this problem was not of its own making, and leave current arrangements in place, so that each year local governments make a case for recognition of particular public holidays and these are gazetted as local public holidays. National system employers become obliged to recognise these days, and the onus falls upon them to negotiate industrial arrangements with their staff. Now that Fair Work s 115(3) and (4) allows for parties to make enforceable agreements to vary standard public holiday arrangements, this is a matter that can be left to negotiation.

#### **Option A: Return to pre-Work Choices practice**

Maintain the current practice, whereby local councils to advise the Minister of the days that should be gazetted for the observance of these holidays. This would require inclusion of a provision in the new legislation enabling the Minister or Director General to receive proposals from local councils. Name these days as Local Event Days, but not as public holidays, to be observed according to provisions in industrial awards and agreements.

#### **Option B: Maintain current (post Work Choices) practice**

Maintain the current practice, and name the days as public holidays, so that they have whatever effect is given to them by State and federal industrial legislation as well as by industrial instruments. Employers can then seek to make enterprise agreements to deal with the inconvenience of public holidays, or they may lobby the federal government to amend the Fair Work Act to reflect their concerns. The Fair Work Act was made in the knowledge of current practices for proclaiming local public holidays, so it may be assumed that the federal legislature intended the effect currently described by the employer submissions.

### **Focus point**

The onus for determining the timing of local event celebrations and taking responsibility for consulting with regional chambers of commerce about these days should rest upon local government authorities. They should be required to make decisions each year, and notify the Director-General of the Department of Services, Technology and Administration, of the need to gazette these dates as Local Event Days. The Director-General should have the authority to reject proposals where they are unreasonable (for example, if more than one date is set for the same region). It would be preferable to return to pre-Work Choices arrangements. This might be achieved by retaining these days as public holidays for a period of time, during which industrial parties would be encouraged to make agreements to ensure that those workers who customarily enjoy local public holidays are entitled to do so under a State or federal industrial instrument. Once the Minister for Industrial Relations was satisfied that those industrial arrangements had been established, there would no longer be any need to name local event days as public holidays under State wide legislation. A provision stating that local event days are not intended to be public holidays could be proclaimed to come into operation.

## **4. August bank holiday**

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

August Bank Holiday, on the first Monday in August, is a 'close holiday' for banks in New South Wales as a consequence of BBH Act s 15 and the Fourth Schedule Part 2. It is not, and never has been, a generally observed public holiday in New South Wales, although many public sector workers and clerical workers have enjoyed this day or a substitute as a kind of white collar picnic day.

Two questions arise in respect of August Bank Holiday. The first is, should August Bank Holiday remain as a day on which bank branches are required to close? At its heart, this is a question concerning the trading hours of banks, rather than public holidays more generally. The second question is, should August Bank Holiday be named in a new Public Holiday Act as a public holiday? This would ensure that those employees who currently enjoy the day as a public holiday would continue to do so, and those whose industrial arrangements allow a substitute for the day would also continue to enjoy their existing entitlements. Employees who have had no entitlement to the holiday or a substitute in the past would acquire a new entitlement, and this would impose additional labour costs on employers of those employees. Employees who are facing the loss of a union picnic day entitlement as a consequence of the phasing out of State Awards following the federal take-over of industrial relations laws could treat August Bank Holiday or its substitute as a replacement for a lost picnic day.

These two questions will be considered in turn, however we should first address a particularly lawyerly submission made by the FSU.

### **The Terms of Reference of the Review**

FSU submission (FSU p.4) makes the argument that the Terms of Reference of the Review (particularly paragraph (g) requiring review of 'the operation of the August Bank Holiday and weekend bank trading arrangements generally') do not permit me to make

any recommendations involving the abandonment of this holiday. It is submitted that the only question I am permitted to consider is “when should the holiday be taken?”

The statement of Terms of Reference of a Review is not a statutory instrument. It simply represents the Minister’s instructions on the matters upon which he requires information and advice. If the FSU’s interpretation of the Minister’s intentions is correct, then the Minister will ignore any recommendation that August Bank Holiday should not be included in the new legislation, and there is no harm done here in considering the questions.

Nevertheless, my own view is that the Minister’s Terms of Reference did intend that I address the question of the observance of August Bank Holiday and this would include considering questions such as:

- Should August Bank Holiday be named in new legislation as a public holiday, so that it is given the effect given to public holidays under the Fair Work legislation, i.e., it would become a holiday upon which all employees in NSW would be entitled to reasonably refuse to perform work.
- Should August Bank Holiday be named as a day on which banks (and banks alone) are not permitted to trade, so that retail staff of banks (but not head office or call centre staff) are unable to be rostered on for work on that day (whether voluntarily or involuntarily).

If it is permissible to consider these questions, it is also permissible to propose a negative answer to either or both of them. The fact that the Review is primarily a review of the BBH Act and bank trading practices are the principal subject matter of that legislation confirms my view that the continued existence of August Bank holiday is a legitimate matter for consideration in this Options paper.

## **Summary of submissions**

Banks, bank employees and bank customers are most interested in the fate of August Bank holiday. Submissions were received from Unions NSW and the FSU, speaking on behalf of bank employees; and from the Commonwealth Bank and the Australian Bankers Association, on behalf of the interests of banks. Two retailer organisations – the National Retail Association (NRA) and the Australian Retailers Association (ARA) – and one individual citizen (Mr Dave Spring) voiced the interests of bank customers. There was by no means a large or diverse range of submissions on this issue.

### **The Banks’ position**

The Commonwealth Bank submission (CommBank p.1) argued that there is no compelling reason for keeping the August Bank holiday, and that retail banks should operate under the same permissive trading rules as other retail businesses. The reasons offered in support of this view are:

- The original rationale for the holiday has disappeared.
- Bank customers are disadvantaged by bank closure on a business day.
- Bank branches in other States are not required to close on this day.
- Banks are disadvantaged relative to other financial institutions with whom they compete and who are able to open on this day.

According to the Commonwealth Bank submission (CommBank p.2), legislation was originally passed to permit banks to close on a day in August so that banks would be

able to give their employees an annual day off as other employers were able to do. Without legislation permitting bank closure, banks would be required to be open in order to meet any demands for payment of bills of exchange or promissory notes falling due on that day. “[F]ailure to meet such payment could expose the Bank to an application for bankruptcy”: CommBank p.3, citing the Hansard debates for the first *Bank Holidays Act 1875* (NSW). Similar ancient reasons justify the naming of Saturdays and Sundays as “bank close days”. This ensures that the bank is not required to meet payment of any bills of exchange until the next business day. The bank submits that these reasons no longer exist, and this is demonstrated by the fact that banks in other States do not observe a special bank holiday.

Commbank (at p.3) also stated that any disadvantage to existing employees created by removing the holiday could be dealt with by giving those employees another day off. The Australian Bankers Association (ABA p.3) supports “removing the bank holiday and providing existing employees with, for example, a day in lieu”.

The problem with this proposal is that it raises the question: a day in lieu of what? Without an existing right to a holiday, employees have no legal basis for negotiating a substitute holiday. The only way to give an employee a day off outside of existing public holiday provisions would be if employers volunteered to confer that benefit on employees either through individual contracts or flexibility agreements, or by collective enterprise agreements. If the banks are proposing that only existing employees (and not future recruits) retain the entitlement to the extra day off, this raises questions of equity between different generations of employees working side by side. The only way that State law could ensure that banks provided their staff with a day in lieu of August Bank holiday would be to adopt the current practices for dealing with bank trading on weekends. Legislation would need to retain a restriction on trading on August Bank Holiday, but allow exemptions to banks who agreed to meet certain conditions, including a condition that employees working on that day be afforded a day off in lieu. The State legislature no longer has the power to make industrial laws for national system employers. It can affect industrial arrangements only indirectly, by using its powers to regulate trading activity.

### **The Unions’ position**

Unions NSW and the FSU submissions contest the banks’ submissions by arguing that there are no compelling reasons for changing the present arrangements. Certainly there appears to be no evidence in the current economic climate that the banks affected by these trading restrictions are suffering from unfair competition from other financial institutions. The banks affected by this ‘close holiday’ are the most profitable organisations in the financial services sector and have achieved a high market share notwithstanding the alleged impediment of a requirement to close on the first Monday in August: Unions NSW p.16; FSU pp. 5-7.

The FSU also notes that there is no strong consumer led demand for removing the holiday: FSU p.6. Submissions to this Review provoked only one individual consumer complaint about banks being closed on August Bank Holiday. Two retailer associations favoured abolition of the day. Notably, the submission from the Shopping Centre Council of Australia made no mention of bank trading hours.

Unions NSW and the FSU stated that August Bank Holiday should be maintained because it ensures a day off for some bank staff (branch personnel) and penalty rates for call centre workers. To remove the holiday would reduce current industrial entitlements of existing staff: FSU p.7. Bank employees are industrially weak (FSU p.8) and would be unlikely to be able to bargain collectively for an additional holiday or

'picnic day' in enterprise agreements to make up for the loss of this entitlement. "Unions NSW believes that the enterprise based bargaining system is not a satisfactory vehicle to provide equity in the circumstances where a holiday was removed from an entire industry" (Unions NSW p.17).

Unions NSW also submitted that abolition of August Bank Holiday would have an adverse impact on tourism because "the first Monday in August is one of only two winter long weekends in the calendar . . . The Bank Holiday weekend is in the middle of the official ski season with benefits to regional tourism throughout New South Wales and Sydney has a metropolitan race meeting held at Randwick every Bank Holiday Monday" (Unions NSW p.17).

### **Bank customers**

The National Retail Association (NRA p.2) submitted that August Bank Holiday should not be retained, for the same reason that weekend trading should be permitted: "The vast majority of the retail and service sectors currently trade across seven days and access to banking services on weekends would provide substantial benefits to consumers and businesses."

The Australian Retailers Association (ARA p.6) submitted that August Bank Holiday is disruptive to customers "including retailers and the wider business community". ARA said that this day has no cultural, community or religious significance warranting including it as a public holiday. ARA also "supports repeal of provisions making every Saturday and Sunday a 'close bank holiday' so that banks are permitted to open on weekends to meet consumer and small business demand" (ARA p.7).

The only individual citizen to comment on the August Bank Holiday question, Mr Dave Spring, NSW, supported its cancellation. "It's hard enough to get to a bank without a queue during working hours, let alone when they take days off that the rest of us are working" (p.1).

### **Options for reform**

#### **Option A: No change**

If the status quo is to be maintained precisely, legislation restricting bank trading would need to continue to name August Bank Holiday as a close day for banks.

#### **Option B: Liberalise trading but retain bank employees' entitlements**

If the State government is minded to pay regard to the banks' arguments that closure on this day creates grave inconvenience to customers and hinders fair competition in the financial services market, it would be possible to liberalise bank trading on this day without reducing the entitlements of existing bank staff by adopting a system of permitting exemptions from trading restrictions, similar to the present exemptions for weekend trading. The administration of the exemptions would permit the Director General of the Department of Services, Technology and Administration to impose conditions on the issue of exemptions, and these conditions could protect the entitlement of bank staff to a day off in lieu of the August Bank Holiday.

#### **Option C: Extend August Bank Holiday (under another name) to all employees**

Naming August Bank Holiday as a public holiday in the Public Holidays Act would extend an entitlement to a paid day off to all national system employees. The typical provisions in modern awards would permit employers and employees to negotiate to substitute this day off. Unions would be able to use the substitution of this day to

replace the entitlements to picnic days that have been progressively eroded by federal regulation. This option would, however, add to the costs of national system employers who presently have no obligations to observe either August Bank Holiday or any picnic day.

If this option is adopted, consideration needs to be given to whether the first Monday in August is the most appropriate day, and whether it should continue to be named Bank Holiday. Other States celebrate an additional public holiday, for example Foundation Day in Western Australia. In the interest of moving towards national harmonisation of public holidays, there would be an argument for naming the first Tuesday in November (Melbourne Cup Day) as the special New South Wales holiday. Unions NSW have argued in their submission (Unions NSW p.20) for the institution of a special Union Picnic Day to be enjoyed as a public holiday. On its face, an extension of August Bank Holiday to all employees in New South Wales would satisfy this claim.

#### **Option D: Abandon bank trading restrictions on August Bank Holiday**

If this option is adopted, banks would be relieved of restrictions on trading on the first Monday in August, and employees would have no legislative protection for any entitlement to take the day off. Whether employees maintained an entitlement to a day off in lieu would be entirely a matter for negotiation between the banks, the FSU and employees themselves. Overtime, the entitlement to a day off for bank employees and others whose awards and enterprise agreements have been based on banking industry practices is likely to disappear.

#### **Focus point**

The choice between these options depends very much on the guiding purposes of reform of the BBH Act. If the purpose of this Review is principally to liberalise bank trading restrictions and modernise the processes for declaring public holidays without increasing the number of holidays observed State-wide, Option D would be an acceptable solution. However, if the State is concerned to maintain protection of employee entitlements to the extent of its powers to do so, Options A, B and C have merits, depending on which employee entitlements are of concern. Protection of existing bank staff entitlements is best served by Option A, but may be effected to some extent by Option B. Protection of all former State award employees' entitlements to a picnic day could be effected by Option C. Option C would also bring New South Wales employees' entitlements to public holidays into line with the entitlements of employees in other Australian States. To see the [Table of State-wide public holidays \(including additional days\) in New South Wales since 1972](#).

If a change is to be introduced, it should be delayed for a period (possibly two years) to provide time for industrial parties to negotiate arrangements to recognise an industry holiday. The banks intimated in their submissions that they were prepared to include entitlements in enterprise agreements to this effect. Abolition of the August Bank Holiday could be made conditional upon these industrial arrangements being established.

## **5. Weekend trading for banks**

**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? It so, should the grant of an exemption be subject to any mandatory conditions?**

The question of weekend bank trading raises similar issues to those raised by the August Bank Holiday. At the centre of this question is striking a balance between the interests of retail banks in joining in the general liberalisation of retail trading hours that has occurred in New South Wales in recent decades, and the interests of bank employees in maintaining their familiar and traditional Monday to Friday working patterns. More broadly, the liberalisation of bank trading hours may, conceivably, lead to greater erosion of the concept of a weekend and the creeping incursion of commercial activity into time for family and community activities.

Arguably, this has already occurred to some extent because of the extensive exemptions granted by the Director General of the Department of Service, Technology and Administration to the many banks who have already sought permission to trade on Saturdays.<sup>29</sup> Presently, the system of exemptions has operated so as to require banks to roster only voluntary staff for weekend trading days. The FSU has made a vigorous and persuasive defence of this system, on the basis that any erosion of the formal requirement that weekend work be voluntary would expose bank employees – many of whom are parents – to a requirement to work on weekends, thereby “seriously eroding the capacity of bank employees to have control over their working hours and their work/life balance” (FSU p.10). As trading hours for other businesses have been liberalised more people are required to work on weekends. The FSU suggests that evidence drawn from the bank employers’ practices in offering AWAs to staff show that if given their preference, banks would assert a right to unfettered control of rostering on weekends.

### **Summary of submissions**

*Unions NSW* (pp.18-19) has submitted that the present arrangements be maintained. This would mean preserving restrictions on bank trading hours, to forbid weekend trading except where the Director General of the Department of Services, Technology and Administration has granted an exemption. The present avenue for appeal to the Administrative Decisions Tribunal of any decision of the Director General should be maintained, and the test for permitting trading should continue to be that the grant of an exemption should be “in the public interest”. This has allowed the imposition of conditions requiring that only volunteers should be rostered to work on weekends.

The *FSU* submitted that further deregulation of bank opening hours was unnecessary because the benefit would be “negligible and unidentified” and would seriously erode the capacity for bank employees to have control over their working hours and work/life balance (p10). The exemption mechanism, including the provision of standing for the FSU to seek administrative review of any decisions of the Director General granting exemptions, provided important protections for a vulnerable group of workers, many of whom are women with families. “Any further loss of control over working hours for these women would have detrimental societal impacts through stress on family relationships and loss of cohesion in the home.” (p.10).

The *Commonwealth Bank* (CommBank pp.4-6) submitted that weekend trading was important to customers. The Bank cited its own research showing that 51% of their customers rated the ability to visit a bank branch on the weekend as of high importance, and only 18% of respondents said they would never go to a bank on a

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<sup>29</sup> See Discussion Paper at pp 20-21.

weekend. The Bank's submission did not provide any details of this survey. For example it did not identify the size of the sample of customers, the time or the circumstances in which the survey was conducted.

CommBank also submitted that weekend trading was beneficial to many of its staff who preferred weekend work for various personal reasons (p.5).

CommBank claimed that the present process for obtaining exemptions was "time consuming and cumbersome" (p.4) and if an appeal was lodged (for example by the FSU) it could take many months to resolve the issue. The Bank cited the ADT decision in *Finance Sector Union of Australia (NSW) v Director General Department of Commerce (NSW) and Anor* [2008] NSWADT 338 as a matter which delayed an application made on 12 September 2007 and granted on 31 October 2007 until 18 November 2008. CommBank submitted that industrial arrangements ensuring that only voluntary staff work on weekends should be left to industrial agreements addressing the terms and conditions of weekend work (p.5).

The *Australian Bankers Association* (ABA) submitted that banks should be treated equally with other businesses (ABA p.1) and should therefore be permitted to trade on weekends for the benefit of their customers and those employees who find weekend work more suitable to their other commitments (ABA p.3). The ABA also submitted that "the appropriate place to deal with terms and conditions for employees is in industrial instruments" (ABA p.3) and referred to the provisions in the National Employment Standards dealing with working hours, overtime and shift work. The ABA submission stated "Arrangements should ensure that existing employees are not disadvantaged." (It must be noted, however that the State legislature has no power to directly legislate to meet this aspiration, and can only do so by control of trading hours.)

The *National Retail Association* (NRA p.2) submitted that "the vast majority of the retail and services sectors currently trade across seven days and access to banking services on weekends would provide substantial benefits to consumers and businesses."

The *Australian Retailers Association* submission (ARA p.7) supported the repeal of provisions making weekends 'close bank holidays' so that "banks are permitted to open on weekends to meet consumer and small business demand". Neither the NRA or ARA submissions commented on the current systems allowing for exemptions. The Australian National Retailers Association (ANRA) did not comment on bank trading hours in their submission. Nor did Coles, the Australian Industry Group, Australian Business Industrial, GP Access, the Motor Traders Association NSW or the Shopping Centre Council of Australia.

### **Options for reform**

Two options flow from the submissions received.

#### **Option A: No change**

The first option, supported by the unions, is to leave in place the present arrangements. This would necessitate preserving in legislation dealing with bank trading a restriction on weekend trading, but allowing banks to apply for exemptions for these restrictions. By this means the State legislature can influence what it would otherwise have no power to direct: it may require conditions on the grant of exemptions to ensure that only volunteers are rostered to work on weekends.

#### **Option B: Treat banks in the same way as shops.**

The second option, strongly urged by the banks, is to treat banks in the same way as shops. This may involve either special legislation dealing only with banks, or addition of a new part to the *Shop Trading Act 2008* (NSW) to deal with bank trading hours. Treating banks in the same way as retailers would mean that they are able to open at will on all but four and one half days per year, and would be able to apply for exemptions to trade on those restricted days.

### **Focus point**

Insufficient evidence of bank customers' views emerged from the Review to enable an assessment of the public interest in liberalising bank trading restrictions. If, on the basis of further evidence of convenience to bank customers, it were decided to adopt Option B, this measure should be delayed pending a period during which banks and the FSU should be encouraged to make industrial arrangements protecting employees' existing entitlement that weekend work is voluntary.

## **Other issues**

### **Union picnic day**

Unions NSW have argued for the institution of an 11<sup>th</sup> State wide holiday, called Union Picnic Day. See Unions NSW p. 20. This submission has been dealt with in the context of considering the fate of August Bank Holiday, above. In view of the Minister's media release,<sup>30</sup> stating that the government had no present intention to create new public holidays, this suggestion has not been considered as a separate matter. See the discussion of Option C under Question 4, "August Bank Holiday".

## **Trading issues**

In the course of submission to the Review a number of organisations commented on the operation of the *Shop Trading Act 2008* (NSW), and the system of exemptions operating under that legislation.

By far the most extensive submissions were made by the SDA. The SDA noted that in 2008 many exemptions were granted by the Director General of the Department of Services, Technology and Administration to permit retailers to trade on Boxing Day. This meant that many shop employees were not able to take a two day break to enjoy family celebrations over Christmas: SDA p.16. This marked an unwelcome "intrusion of work into the time available for employees to devote to their families": SDA p.16. The SDA complained that it was also "forced to defend another swathe of applications made by retailers to open for trade on Easter Sunday (81 applications alone) and Anzac Day": SDA p.18. The SDA argues that the extensive use of the exemptions provisions undermines Parliament's intention when it preserved just four and one-half days as restricted trading days. On SDA p.17, the submission cites the Second Reading speech to the *Shop Trading Act*, made by the Hon Penny Sharpe in the Legislative Council on 26 June 2008: "[G]iven that trading restrictions will now apply only on a handful of our most significant public holidays the need for such exemptions should be significantly reduced."

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<sup>30</sup> Above n.10.

I have a great deal of sympathy with these submissions.<sup>31</sup> Now that shops can trade all hours, seven days a week, on 360.5 days a year, it seems entirely unnecessary that a large section of the workforce should be denied a full 4.5 guaranteed rest days to commit to interests other than shopping. It is not clear to me why it should be necessary after the retail frenzy leading up to Christmas to reopen the shopping malls on Boxing Day, nor why it is necessary for people to engage in recreational shopping on sacred days such as Good Friday, Easter Sunday and Anzac Day. Surely the whole community deserves some respite from shopping. Family activities are spoiled when members of the family are required to work on those days.

On the other hand, the Shopping Centre Council of Australia (SCCA) argued that there should be no restrictions whatsoever on retail trading in New South Wales (SCCA p.2).

Nevertheless, the Terms of Reference of this Review do not contemplate the making of any recommendations for amendment of any kind to the *Shop Trading Act 2008*, so this paper does no more than note those concerns.

### **Timetable for reform**

Some of the options for reform in this Options Paper would affect existing industrial arrangements in some occupational groups, notably in the banking sector, and in any sector where seven day trading was the norm. (Industries which customarily close down over the Christmas period would be affected to a considerably lesser extent.) If such options are adopted, impact on industrial arrangements could be minimised by delaying the introduction of provisions until industrial parties have negotiated arrangements accommodating the new public holiday regime. It is possible to stagger the introduction of reforms by providing that certain Parts or sections of legislation do not take effect until proclamation, and proclamation may be delayed until the Minister is satisfied that interested parties have had time to make appropriate accommodations.

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<sup>31</sup> I acknowledge this as a personal view, which may well be at odds with general community values. Unfortunately, too few ordinary citizens chose to respond to the Discussion Paper to enable any fair assessment of community values on the question of the intrusion of commercial activity into community and family time.

# Appendix A

## 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.

# Appendix B

## Table of Submissions

The following public submissions in response to the discussion paper were received:

1. Albury City
2. Australian Bankers Association (ABA)
3. Australian Industry Group (AIG)
4. Australian National Retailers Association (ANRA)
5. Australasian Retailers Association (ARA)
6. Coles Supermarkets (Australia) Pty Ltd
7. Commonwealth Bank (CommBank)
8. Finance Sector Union (FSU)
9. Mr. N. Ford
10. GP Access (GPAA)
11. Hunter Business Chamber (HBC)
12. Joint SDA NSW and SAWEFA (SDA)
13. Motor Traders Association (MTA)
14. Mrs. L. McMorland
15. National Retail Association (NRA)
16. The Returned and Services League of Australia (NSW Branch) (RSL)
17. Unions NSW
18. Shopping Centre Council of Australia (SCCA)
19. Mr. D. Spring
20. Waste Contractors and Recyclers Association (WCRANSW)