

# Public Holidays in NSW

Review of the Banks and  
Bank Holidays Act 1912



Professor Joellen Riley

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At the end of May 2009 I was appointed by the New South Wales Government to undertake a review of the *Banks and Bank Holidays Act 1912* (NSW) and was asked to recommend changes to modernise the operation of the Act and other instruments which affect the creation and operation of public holidays and bank holidays in New South Wales. I have been ably assisted in undertaking this Review by Miriam Fransen and Nallini Rajaretnam of NSW Industrial Relations.

A Discussion Paper was released on 29 June 2009 and sets out some background information, identified various issues to be addressed by the Review, and invited submissions from key interested parties including members of the public. This paper also discussed the interaction with relevant Commonwealth legislation including the recently enacted *Fair Work Act 2009* (Cth). Some 22 submissions were received (appendix A) which greatly assisted the Review.

Following consideration of these consultations and submissions, an Options Paper was released for the purpose of generating further, more focused consideration of the implications of different approaches to achieving the Review's goals.

The Options Paper was released on 18 August 2009 inviting submissions from interested parties. 27 public submissions were received (appendix A). Some further 222 submissions were received from members of the public, primarily from those who work in the banking and retail sectors in NSW, whose views have not been published publicly to respect their privacy. The issues raised by these members of the public have been summarised and reported on as a group within a particular industry.

In addition I met with a number of organisations during two rounds of consultations, one prior to the Discussion Paper being published and one immediately after the release of the Options Paper (appendix B).

I would like to thank all those organisations and individuals who made many helpful submissions. I have attempted in preparing this final report to take account of the information and opinions expressed in all of those submissions. Inevitably, there have been many disagreements between different organisations, generally dependent upon whether they represent the interests of employers or workers in a particular industry, and generally concerning the industrial relations consequences of public holidays. Today, those industrial consequences are largely in the hands of federal law, and the capacity for State government influence is limited. In the end, it has been necessary in this Review to focus on the primary objective of recommending modern legislation for the creation and recognition of public holidays for the commemoration and celebration of significant social and cultural occasions.

The Recommendations in this Report – undertaken as an independent enquiry – seek to promote those objectives. There will no doubt be disagreement – particularly between employer and union groups – on whether the recommendations are acceptable or workable. Ultimately, it is for the New South Wales Government to determine whether any or all of these recommendations should be implemented in NSW at this time.

Yours faithfully

Professor Joellen Riley

# Terms of reference

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- (1) The Minister requests that NSW 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 NSW 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.

# 1. Introduction

## 1.1 WHY UNDERTAKE A REVIEW?

As the Terms of Reference prefacing this Report indicate, 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, and to reconsider the present trading restrictions on banks.

It has been recognised for some time now that the New South Wales legislation for proclaiming public holidays is in need of modernisation.<sup>1</sup> The BBH Act is a relic of former times, when commercial activity revolved around the opening hours of banks and when banking business was conducted over the counter and recorded in pen and ink. Although when first enacted, the BBH Act was primarily concerned with bank trading hours, it became the means by which workers in New South Wales enjoyed public holidays largely because industrial awards (and later, enterprise agreements) adopted the ‘bank holidays’ of the BBH Act as days upon which all kinds of workers were entitled to paid days off, or penalty rates.<sup>2</sup>

Trading hours and patterns of working hours have changed dramatically over recent decades. And so has the balance of federal and State influence over both banking and industrial regulation. Part 2 of the BBH Act became irrelevant when these aspects of Australian banking business became regulated federally under the supervision of the Australian Prudential Regulation Authority (APRA). The BBH Act holiday provisions continued to operate, but were given new significance when the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) was enacted. The interaction between these then-new Work Choices provisions and public holiday clauses in State awards created some confusion, particularly in relation to local holidays (see below). From 1 January 2010 the new

National Employment Standards (NES) in the *Fair Work Act 2009* (Cth) (the FW Act) will influence the clear majority of New South Wales workers’ industrial entitlements in respect of public holidays. Some of this confusion can be expected to continue if legislation is not enacted in the near future, preferably in early 2010.

The confusion generated by the interplay of federal and State regulation has emphasised the inconvenience of a system which is dependent upon the annual proclamation of many of the days observed as holidays in the State. Several other States have enacted modern legislation to deal specifically with public holidays. It is now proposed to introduce similar legislation in New South Wales.

The submissions received by the Review following the release of both the Discussion Paper and the subsequent Options Paper confirmed that this is a welcome reform. All parties – employer associations, unions and ordinary citizens – uniformly applaud the proposal to introduce clear legislative provisions which will enable them to plan for the recognition and celebration of public holidays. Nevertheless, some important differences of opinion emerged about which days should be declared as public holidays, what should happen when a public holiday falls on a weekend, and whether the August Bank Holiday should continue to be observed.

Many of the differences of opinion focused on the industrial consequences of public holidays. Employer associations, particularly those operating in the hospitality and retail sectors where it is common to continue to trade on some public holidays, were particularly concerned about the costs of public holidays in terms of penalty rates of pay on those days. Their concerns are understandable, particularly in view of present economic uncertainty. As the Discussion

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

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

Paper released in May explained, the federal Fair Work system has now largely taken over the determination of industrial obligations and entitlements. Any proposed State Act dealing with public holidays will not be able to make any effective provisions dealing with industrial matters, at least to the extent that they affect the rights and entitlements of national system employers and employees. From 1 January 2010, those obligations and entitlements – including entitlements to penalty rates of pay on public holidays – will be determined by federal modern awards and enterprise agreements. The State's role is limited to identifying public holidays to be observed in addition to, or in substitute for, those days already listed in the FW Act section 115.

In recommending new legislation and an appropriate schedule of days, it is important to consider the essential purpose of public holidays legislation. The principal object is to identify days of special public 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'*. Another asked for *'intervention to ensure that employers' wishes to have 24/7 trading hours do not make it totally impossible for families to come together'*. This Report has been prepared on the basis that this is the principal object of new legislation – to ensure that the citizens of New South Wales enjoy the necessary legislative support for the continued enjoyment of times of community celebration. In fulfilling that object, and in light of the Terms of Reference of the Review, I have been guided by a number of objectives.

## 1.2 OBJECTIVES OF THE REVIEW

During the course of this Review it became clear that new public holidays legislation should ideally serve a number of objectives:

- Clarity;
- Consistency with community values; and
- National harmony, where possible.

Each of these objectives is explained here, and informs the recommendations in this Report.

### Clarity

Principally, new legislation should provide clarity and certainty so that all citizens are able to know when public holidays will fall. This enables people to plan celebrations, and it ensures that employers and employees understand their obligations and entitlements in respect of work on those days. For this reason it is recommended that legislation stipulate days to be observed, and avoid reliance on periodic gazettal of days wherever possible. It is also important that the legislation be drafted to preclude any arguments over ambiguity. Legal ambiguities create great expense and inconvenience for industrial parties relying on those laws to determine industrial obligations and entitlements.

### Consistency with community values

Legislation should support the values of the community and reflect the customs and practices already observed in the State. Australians have traditionally celebrated days of particular national significance, and times for religious reflection. Public holidays provide welcome respite from work and an opportunity to join together in family and community activities. While annual leave entitlements provide necessary rest, recuperation and recreation for individuals, public holidays provide the opportunity for shared commemoration and celebration of significant events and occasions in our common heritage.

It is by no means the intention of this Review to disturb the enjoyment of public holidays in New South Wales. The Minister for Industrial Relations, the Hon John Hatzistergos, MLC affirmed that

there was no intention to add to or subtract from the number of public holidays observed in New South Wales holidays.<sup>3</sup> This assurance reflects the objective that public holiday provisions must meet community expectations, and that is why a full public review has been held, to gauge community views. This is nevertheless a challenging objective, because already New South Wales citizens enjoy different numbers of public holidays in a year, depending on how days fall in the calendar, what kind of work they do, and whether they live and work in a particular region.

In recent years, the liberalisation of trading hours so that Sunday has become a regular working day in many industries has already effectively reduced the number of public holidays that some working people enjoy in New South Wales. The discussion (in section 4.6) of Easter Sunday illustrates this point. At a time when all Sundays were free of work, the Easter holiday break ran for four days – from Good Friday to Easter Monday. Now that Sunday is a normal trading day, retail workers in those districts where trading is allowed on Easter Sunday can be asked to work on that day, for normal Sunday rates of pay. Any proposal for new legislation needs to consider whether the spirit of the old laws should be preserved so that days like Easter Sunday are restored to public holiday status.

### **National harmony**

A third objective is to attempt – as far as possible – to ensure that New South Wales legislation is in harmony with other States so that there is some national uniformity and consistency. This has been an objective of the agreements reached at the Council of Australian Governments (COAG) on 9 June 1993 and the Council for the Australian Federation (CAF) on 12 September 2008.

Presently, however, there is no uniformity between the States on a number of important questions, such as the dates to be observed for the Queen's Birthday and Labour Day, and how to treat public holidays which fall on weekends. Every other State also has a State-specific holiday. Unless one considers August Bank Holiday to be such a holiday, New South Wales does not presently observe any such holiday. So in making decisions about the days to be included in a new Act for New South

Wales, the decisions taken by other States should be considered, but it will not be possible at present to create a completely harmonious national system for the observance of public holidays. This could only be achieved, by agreement by the Council of Australian Governments.

### **1.3 MAP OF THIS REPORT**

The following section 2 of this Report explains the background to this Review in greater detail. In particular, it outlines the provisions of the BBH Act and its historical relationship with industrial legislation and instruments, to show how it is that public holidays have been declared and observed in New South Wales to date. Much of this background information has already been provided in the initial Discussion Paper released on 29 June 2009; however it is included in this final Report for the purpose of providing a complete picture in one document of the rationale and process of this Review. Readers who are familiar with the Discussion and Options Papers may choose to begin reading in section 4.

Section 3 outlines the questions posed by the Discussion Paper, and provides a digest of the submissions received in response to the Discussion Paper.

Section 4 provides a digest of submissions received to the more focused options for reform proposed by the Options Paper.

Section 5 explains our recommendations for reform and section 6 deals with ancillary issues such as a timetable for enactment.

In summary, the recommendations are:

#### **Recommendation 1: A new Act and an extension of Division 10 of the Fair Work Act rights to State system employees**

A new public holidays Act should be enacted which names days to be observed as public holidays in New South Wales. Provision should be made in this legislation adopting Division 10 of the FW Act in respect of State system employees, so that all employers and employees in New South Wales

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

are treated in the same way in respect of the entitlement to be absent from employment on a public holiday and the entitlement to be paid for absence on a public holiday.

Disputes over whether State system employees have been denied these rights would be a matter for the Industrial Relations Commission of New South Wales to resolve. Disputes of this nature would need to be treated in the same manner as a breach of an industrial instrument, utilising conciliation at the first stage of the dispute.

### **Recommendation 2: Named public holidays**

On the basis of broad consensus on the above days, the following days should be named as public holidays in New South Wales legislation:

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

Most of these days are also named in the FW Act (see section 2.3.4).

### **Recommendation 3: A commitment to reconsider Easter Sunday**

Further consideration should be given to naming Easter Sunday as a public holiday. The matter should be raised with the other States at the next COAG/CAF meetings, to seek national uniformity on this question. It is clearly an anomaly that Easter Saturday is a public holiday, but Easter Sunday is not. However while all other States do not name Easter Sunday as a public holiday, a decision to do so in New South Wales would hinder the objective of national harmonisation.

### **Recommendation 4: Additional days for Christmas and Boxing Day falling on weekends**

On the basis of strong submissions in support of the importance of guaranteeing family time for workers in all occupations at this time of year, additional days should be named as public holidays when Christmas or Boxing Day fall on a Saturday or Sunday.

This means that the legislation should provide that when 25 December (Christmas Day) falls on a Saturday, there should be:

- a public holiday on Saturday 25 December;
- a public holiday on Sunday 26 December;
- an additional day on Monday 27 December; and
- an additional day on Tuesday 28 December.

When 25 December (Christmas Day) falls on a Sunday, there should be:

- a public holiday on Sunday 25 December;
- a public holiday on Monday 26 December; and
- an additional day on Tuesday 27 December.

When 26 December (Boxing Day) falls on a Saturday there should be:

- a public holiday on Friday 25 December;
- a public holiday on Saturday 26 December; and
- an additional day on Monday 28 December.

### **Recommendation 5: Additional day for New Year's Day falling on weekends**

When 1 January falls on Saturday or Sunday an additional day should be granted on the following Monday. (This is Option B in the Options paper and it would bring NSW practice into harmony with Victoria and Western Australia.)

### **Recommendation 6: Substitute day for Australia Day falling on weekends**

When 26 January falls on a Saturday or Sunday, the public holiday should be substituted for the following Monday (27 or 28 January).

### **Recommendation 7: Observe Anzac Day only on 25 April**

Anzac Day should be celebrated on 25 April, and no substitute or additional day should be given when it falls on a weekend.

### **Recommendation 8: Provide for gazettal of local event days named by local government authorities**

Local holidays should be determined by local councils. A provision should be included in public holidays legislation to enable gazettal of these days as either public holidays or local event days. It would be incumbent upon local government authorities to make a case for gazettal as a public holiday to be observed by all national system employers in the region. It is recommended that the government gazette them as local event days only unless the local government authority is able to bring evidence of wide consultation and acceptance of the public holiday by the local community.

### **Recommendation 9: August Bank Holiday to be a 'bank close day' but not a public holiday**

August Bank Holiday should not be named in the list of named days as a general public holiday.

### **Recommendation 10: Trading arrangements for 'bank close days'**

A separate Part in a new public holidays Act should deal with bank trading hours. A provision should name as 'bank close days', all weekends, public holidays (those named in the Act for general observation) and the first day of August<sup>4</sup> (August Bank Holiday). Banks should however be permitted to apply for exemptions to allow trading on all of these days (including August Bank Holiday and other public holidays, but excluding the days restricted by the *Shop Trading Act 2008 (NSW)* as amended in 2009). The legislation should provide that exemptions will be granted on condition that banks engage voluntary staff on these days (in terms similar to the *Shop Trading Act 2008 (NSW)*, section 13). 'Bank' should be defined according to the definition in section 14A of the *BBH Act* to ensure that this provision applies only to those financial institutions presently restricted from trading at these times. These provisions should be enacted to operate for a period of years, with a view to repeal to enable complete liberalisation of bank trading hours if over time it is shown that banks are able to observe their commitments to maintaining leave entitlements for their staff.

In addition, issues regarding bills of exchange, promissory notes and similar (to the extent that Commonwealth legislation does not deal with the issue) can be dealt with in this section. A similar approach was taken in the Victorian public holiday legislation, for example see section 9 of the *Public Holidays Act 1993 (Vic)*.

<sup>4</sup> The August Bank Holiday is the first day of August when it is a Monday, if it falls on any other day of the week, the following Monday becomes the August Bank Holiday in lieu thereof, see Part 2 of Schedule 4 of the *Banks and Bank Holidays Act 1912*.

## 2. Background

### 2.1 A RATIONALE FOR PUBLIC HOLIDAYS

Australia is not unique in observing public holidays. Public holidays are recognised throughout the world as days of commemoration and celebration. The term holiday is a compound of holy and day. Holiday originally referred only to special religious days to allow people to spend time in worship and reflection. In modern use it has taken on a broader meaning. Public holidays provide an opportunity for workers to rest, communities to gather, and most importantly for recognition of days of significance that are often unique to the particular country. Following is a sample of countries and the number of national holidays they celebrate.<sup>5</sup>

Australia	9 days <sup>6</sup>
Germany	9 days
Burundi	16 days
El Salvador	13 days
Ireland	9 days
Japan	17 days
Lebanon	20 days
Switzerland	10 days
United Kingdom	8 days
Venezuela	13 days
Vietnam	11 days
Zambia	13 days

This is not to say that Australians enjoy fewer holidays than people in many other countries. Many of those countries which observe more public holidays do not enjoy the same level of annual leave entitlements as Australians. But it does show that the celebration of community events is natural and common to most nations.

Preserving entitlements to shared time off, to spend with family and friends, is particularly important in our contemporary world. There is significant evidence that demonstrates many Australians are working long hours, well in excess of the prescribed 38 hours per week. The FW Act can require employees to work additional hours over and above 38 hours if they are reasonable. In the first case on what constitutes 'reasonable additional hours', the Federal Magistrates' Court rejected a mineworker's claim that a roster change that increased his weekly hours from 40 to 44 was unreasonable because it interfered with his family responsibilities.<sup>7</sup>

Australia has some of the longest working hours among full-time employees in the countries belonging to the Organisation for Economic Co-operation and Development. Despite claims of a downward trend, since the Australian Bureau of Statistics (ABS) has been collecting usual hours data in 2001, average usual hours have remained between 44 and 45 hours per week.<sup>8</sup> Some of these studies correlate longer working hours with the increase of workplace stress. The Australian Medical Association strongly believes that '*spending time with family and friends, practising relaxation and taking regular breaks and time away from work are among the best ways to reduce (workplace) stress*'.<sup>9</sup>

According to the latest Australian Social Trends released on 27 September 2009, the ABS reported extra hours, multiple jobs and weekend work were cutting into Australian family life. Data

<sup>5</sup> Source: Q++ Studio, World Holidays, available at: <http://www.qppstudio.net/> It should be noted that this resource does not stipulate whether these days are paid days off as is the case in the Fair Work Act and corresponding State legislation.

<sup>6</sup> This is the number of public holidays observed federally, i.e. in all States. Some States have additional holidays. See link to Table of Australian public holidays.

<sup>7</sup> MacPherson v Coal & Allied Mining Services Pty Limited [2009] FMCA 881 (9 September 2009), <http://www.austlii.edu.au/au/cases/cth/FMCA/2009/881.html>.

<sup>8</sup> ABS 2008 statistics cited in Australia at Work, van Wanrooy et al, October 2008, p.6, <http://www.australiaatwork.org.au/>.

<sup>9</sup> Australian Medical Association, 2001, *AMA Warns of Stress at Work*, press release available at [www.actu.asn.au/compsigns/callcentral/amawarnsofstress.html](http://www.actu.asn.au/compsigns/callcentral/amawarnsofstress.html).

collected in 2007 indicated there are over one and a half million two-parent families with children in Australia, with most of these families having both parents working. In the majority (80%) of these working families, at least one of the parents said they were often or always pressed for time. The main reason parents gave for feeling time pressured was trying to achieve a balance between work and family. Working a combination of weekdays and weekends (although not necessarily every day of the week) was a common working arrangement for many families. Just over half of all couple families where both parents were working had this arrangement for one (41%) or both (15%) parents. One-third of working lone parents usually worked a combination of weekdays and weekends.<sup>10</sup>

Concern that working time was eroding shared family time was a common theme in many of the submissions to the Review made by individual citizens. One writer lamented that the liberalisation of trading hours and the pressure of the '24/7' working culture meant that we were experiencing a change from 'living in a community to living in an economy'.

The importance of public holiday celebrations was recently highlighted in the NSW Parliament when debating the *Shop Trading Amendment Act 2009* (NSW). Member for Coogee, Mr Paul Pearce, MP offered the following comments but the sentiments contained herein were clearly evident amongst all who debated the Bill in both Houses regardless of their political persuasion.

*The starting point when looking at this Bill is the significance of the five restricted trading days in our calendar. Christmas Day, Boxing Day, Good Friday, Easter Sunday and Anzac Day are our most important public holidays. These are days when we come together as families and as communities. They are days that have significance beyond just having a holiday; they are days that mean something to the overwhelming majority of people in New South Wales.*

*They connect generations of family members. The fact that we have holidays on two consecutive days recognises the importance of Christmas in our society.*

*This Bill recognises that days of community significance ought to be protected. Christmas Day, Boxing Day, Good Friday, Easter Sunday and Anzac Day deserve a special place in our calendar. They are the days that help make our society what it is.*

*There are those who would say that since no-one wants to trade on those days, what is the point of restrictions? Such an approach denies reality. Retailers are subject to intense commercial pressure. There will always be a small number of retailers intent on trading on Christmas Day and Anzac Day. They may only seek to trade for a limited period at first but over time their intent is for these days to be ordinary trading days. This ... has been the experience in many parts of the United States of America where shops routinely open on the afternoon of Christmas Day. This is something that I never wish to see occur in Australia. It is important that we never have such a practice arise here. We are not merely an economy, we are a society.<sup>11</sup>*

Recognising and valuing public holidays is one way of preserving some time for community values.

## 2.2 HOLIDAYS COMMEMORATED IN NEW SOUTH WALES

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

<sup>10</sup> ABS Australian Social Trends, Sep 2009, Cat. No. 4102.0 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features50Sep+2009>.

<sup>11</sup> Hansard, Legislative Assembly 22 September 2009, pp. 26-27, <http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA20090922>.

## National public holidays

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

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

### **Australia Day**

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

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

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

### **Anzac Day**

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

## State public holidays

### **Queen's Birthday**

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

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

### **Labour Day or Eight Hour Day**

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

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

### **Bank Holiday**

The August Bank Holiday is a 'close Bank Holiday' named in the Fourth Schedule of the BBH Act. It is a day on which banks (as defined in section 14A of that Act) are not permitted to open for business. Consequently, bank employees, and employees in the financial services sector generally, have customarily enjoyed this holiday. It is not, however, widely observed across the community, and it has no particular equivalent in other States.

## Religious holidays

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

### **Good Friday**

Christians commemorate Good Friday as the day on which Jesus was crucified. It is always the Friday immediately preceding Easter Sunday. The Easter festival is, however, a 'moveable feast', occurring between March 22 and April 25,

depending on the liturgical calendar followed by the Roman Catholic Church and some Protestant denominations. Some Orthodox Christian denominations celebrate Easter according to a different liturgical calendar.

### **Easter Saturday**

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

### **Easter Sunday**

Christians celebrate Easter Sunday as the day of the resurrection of Jesus. Both Good Friday and Easter Sunday are treated as particularly holy days by practising Christians. Although Easter Sunday is a restricted trading day under the *Shop Trading Act 2008* (NSW) it is not named as a public holiday in the BBH Act. This is no doubt because all Sundays are 'close bank days' according to the BBH Act, and so no Sundays are named as public holidays.

### **Easter Monday**

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

### **Christmas Day**

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

### **Boxing Day**

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

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

## **2.3 PRESENT NSW ARRANGEMENTS**

Presently, workers in New South Wales enjoy entitlements to time off work for public holidays as a consequence of the BBH Act, government decisions to gazette holidays under that Act, provisions in the *Workplace Relations Act 1996* (Cth) (WR Act) and an array of industrial instruments which refer to the BBH Act and its gazettals to determine which days shall attract certain entitlements to time off or penalty rates for work.

Understanding these arrangements requires an understanding of the BBH Act, and the history of its relationship with industrial legislation, from before the enactment of *Work Choices* to its present relationship with the new FW Act.

### **2.3.1 Banks and Bank Holidays Act – main provisions**

Part 3 of the BBH Act, 'Bank Holidays,' provides for certain days to be 'bank holidays'.<sup>12</sup> The consequence of a day being a 'bank holiday' is that all banks (defined in section 14A) must

<sup>12</sup> Parts 1 and 2 of the BBH Act deal with 'Publication of statements and registration of banks', and no longer have any practical effect in New South Wales. APRA deals with these regulatory matters now.

close on that day, unless they have been granted approval to open under Schedule 6 of the BBH Act. Schedule 6 provides that banks who wish to open on weekends can apply to the Director-General of the Department of Services, Technology and Administration for an exemption from section 15A(2). The Director-General is obliged to consider the public interest before granting any exemption, and may grant an exemption on conditions. Bank holidays also have consequences for the *Bills of Exchange Act 1909* (Cth), which provides that bills of exchange that fall due on a bank holiday become payable on the following business day.

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

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

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

This practice of substituting Monday for holidays falling on Sunday is explained by the fact that in 1912 when the Act was made, Sunday was treated as a sacred day of rest. All Sundays were close bank days, shops were not permitted to trade and most businesses outside of essential services closed. The fact that Easter Sunday is not presently named as a public holiday is a fossil of these times and attitudes.

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

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

All of these days described above are 'bank holidays', not 'public holidays'. The distinction between these terms has been noted in *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch*.<sup>13</sup> The term 'public holiday' appears only in sections 19 and 21 of the BBH Act. Section 19 empowers the Governor and the Minister to proclaim, by publication in the Gazette, special days to be observed as 'public holidays' or 'half-holidays'. The Governor has power to proclaim public holidays throughout New South Wales, and the Minister has power to proclaim public holidays 'in any local government area, part of a local government area, or other part of New South Wales'. The Labour Day holiday generally observed on the first Monday in October depends on a proclamation under section 19. This is also the provision that enables the Minister to proclaim local public holidays, such as Newcastle Show Day.

Sub-section 19(7) provides that any proclaimed public holiday or half-holiday shall be kept as a 'close holiday or half holiday' in all banks within the relevant area.<sup>14</sup>

<sup>13</sup> [1994] NSWIRComm 222 at 14.

<sup>14</sup> Section 22 provides that banks may also apply to the Treasurer for permission to close for an afternoon 'half holiday', however advice from New South Wales Treasury to the Director-General of the NSW Department of Industrial Relations in 1999 confirmed that this section had been obsolete for many years and should be repealed.

The only section in the Act with any direct relevance to the industrial arrangements to be observed on bank holidays or public holidays is section 21, which provides that reference to a bank or public holiday in any 'industrial agreement' or 'agreement relating to work' shall be deemed to be a reference to the day 'on which such holiday is publicly observed'. This expression has led to controversies when days such as Christmas Day, Boxing Day, and New Year's Day have fallen on a Saturday or Sunday and the following Monday has been proclaimed as a bank holiday. Where an industrial award provides for penalty rates on 'Christmas Day and Boxing Day', and public holidays have been proclaimed for 27 and 28 December, there have been contests over whether penalty rates must be paid on 25 and 26 December, or 27 and 28 December, or on all four days.<sup>15</sup>

### 2.3.2 Role of industrial instruments

Apart from this one reference in section 21, the BBH Act makes no provisions for workers to enjoy any entitlements to time off or to penalty rates for work on public holidays. Until the enactment of the Work Choices legislation, those entitlements were derived from industrial awards and agreements. Award-free employees have enjoyed these arrangements as a matter of custom and practice.

The fact that the BBH Act does not mandate these arrangements is apparent from the industrial treatment of August Bank Holiday (listed in Part 2 of the Fourth Schedule) which is not a generally observed public holiday. This day (conferring a long weekend in August) is observed only by banks, insurance companies, some solicitors and accountants, and the Australian Stock Exchange. Some classifications of employees (generally in 'white collar' occupations) enjoy a substituted holiday for this day, but only because they have the benefit of an award, enterprise agreement or employment contract that confers such an entitlement. Unions NSW provides the following advice on the observance of August Bank Holiday:

*'There are numerous agreements and awards throughout NSW that provide such a day (August Bank Holiday) as an additional public holiday. Awards and agreements in the Public Sector, Rail industry and also the Health and Aged Care industry, including both for profit and not for profit employers and both public and private entities. Many of those awards allow for the day to be substituted for another day, i.e. a day between Boxing Day and New Year's Day.'* (Unions NSW submission, p 11.)

Since 29 February 1988, public servants in New South Wales, have been granted an additional holiday between Christmas and the New Year instead of August Bank Holiday.<sup>16</sup>

### 2.3.3 Federal workplace relations legislation

The interrelationship of the BBH Act with industrial instruments was disturbed by the former federal government's enactment of Work Choices.

Until the enactment of Work Choices, many workers in New South Wales were covered by awards and enterprise bargains which determined arrangements for work and pay on public holidays. If arguments arose over the interpretation of these entitlements, they could be resolved by reference to the Industrial Relations Commission of New South Wales. Work Choices disturbed these arrangements by providing that all employers who were 'constitutional corporations' within the meaning of the new section 6 of the WR Act would no longer be bound by State industrial laws: see WR Act section 16(1)(a). Although State industrial laws would no longer apply to federal system employers, the legislation preserved the effect of State laws dealing with the creation of public holidays: see WR Act section 16(3)(g). This meant that State laws could declare public holidays and prohibit or permit trading on those days, but no State law could directly prescribe the pay and conditions that federal system employers were obliged to afford their employees on those days.<sup>17</sup>

<sup>15</sup> See for example *In Re Butter Cheese and Bacon Factories and Milk and Cream Condenseries Awards* [1950] IR 62; *In Re Public Hospital Nurses (State) Award* [1956] IR 269; *In Re Boarding Houses Employees (State) Award* [1961] IR 383; *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222.

<sup>16</sup> See Public Sector Management (General) Regulation 1988, cl 14(2)(c).

<sup>17</sup> State laws still apply to the NSW system employees, including unincorporated employing entities (such as partnerships) and any entities which are not 'trading and financial corporations' within the meaning of the Australian Constitution.

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

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

- (a) the nature of the work performed by the employee; and
- (b) the type of employment (for example, whether full time, part time, casual or shift work); and
- (c) the nature of the employer's workplace or enterprise (including its operational requirements); and
- (d) the employee's reasons for refusing the request; and
- (e) the employee's personal circumstances (including family responsibilities); and
- (f) whether the employee is entitled to additional remuneration or other benefits as a consequence of working on the public holiday; and
- (g) whether a workplace agreement, award, other industrial instrument, contract of employment or written guideline or policy that regulates the employee's employment contemplates that the employer might require work on public holidays, or particular public holidays; and

- (h) whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays; and
- (i) the amount of notice in advance of the public holiday given by the employer when making the request; and
- (j) the amount of notice in advance of the public holiday given by the employee in refusing the request; and
- (k) whether an emergency or other unforeseen circumstances are involved; and
- (l) any other relevant factors.

The public holidays listed in WR Act section 611 included:

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

Although Easter Saturday, the Queen's Birthday and Labour Day were not specifically mentioned in the list, they would generally be included as a consequence of their gazettal under a State law. Likewise, any local Show Days would be included as 'any other days declared by State law'. Picnic days were expressly excluded by section 611(b)(ii),<sup>18</sup> and there was provision for regulations to be made to exclude particular State public holidays, should the federal government have considered that necessary.

The use of the word 'and' had the effect that it was possible for two days to serve as a public holiday for the one celebratory event. So for example, if Christmas Day, New Year's Day, Australia Day or Anzac Day were to fall on a weekend, and

<sup>18</sup> Union picnic days were specifically excluded from 'allowable award matters' when the *Workplace Relations and Other Legislation Act 1996* (Cth) first reduced federal awards to 20 allowable matters.

the relevant State or Territory law declared a substitute public holiday for the following Monday, both the 'real' holiday and the Monday substitute would be public holidays according to section 611.

Section 612 of the VWR Act provided that an employee was entitled to be absent without loss of pay on a public holiday, however any entitlement to a penalty rate of pay for work done on a public holiday would need to arise from an industrial instrument, such as an award or workplace agreement. If a federal system employer was bound by a State industrial award at the time Work Choices commenced, the State award was treated as a 'Notional Agreement Preserving State Awards' (NAPSA), and continued to have effect as if it were a federal workplace agreement,<sup>19</sup> until such time as the employer and employees agreed to make another kind of workplace agreement.

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

For example, on 27 February 2008 the New South Wales Minister for Industrial Relations appointed Friday 11 April 2008 (Newcastle Show Day) to be observed as a public holiday within the Newcastle and Lake Macquarie City Council areas. All federal employees in those local government areas became entitled to a day off, or, if they worked on that day,

to the penalty rates provided in their industrial award or agreement. Previously, only those workers whose awards or agreements allowed the public holiday had been able to take it. Some awards and agreements had provided that workers should be entitled to take off the Tuesday after Easter as a substitute for the Newcastle Show Day holiday. A number of employers continued to operate according to the terms in their awards and agreements, so a group of employees took action in the Chief Industrial Magistrates' Court to assert their entitlement to penalty rates for working on that day.<sup>20</sup> The employees won this action. The Work Choices legislation, in combination with the practice of gazetted local show days as regional public holidays, had the effect of conferring an extra public holiday (or extra pay) on workers in those districts.

Perhaps the most inconvenient result of this was that employers and employees were unsure of their obligations and entitlements, and needed to consult legal advice and ultimately litigated the matter. Laws affecting the rights and obligations of employers and employees should operate transparently and predictably, so as to avoid the costs and inconveniences of litigation. This is one of the principal objectives of this Review: to propose legislation that will provide clarity, and so preclude expensive and confusing legal arguments over entitlements.

#### **2.3.4 The Fair Work Act**

The FW Act makes very similar provisions to the WR Act sections 611 – 615. From 1 January 2010, public holidays will be dealt with as part of the National Employment Standards (NES). Under FW Act section 114, national system employees are entitled to be absent from work on a public holiday without any loss of pay. Employees have a right to reasonably refuse a request to work on a public holiday. Whether a request to work is reasonable depends on the factors in sub-section 114(4):

- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:

<sup>19</sup> As a federal workplace agreement, the NAPSA would not be able to contain any 'prohibited content' as defined by WR Act section 356 and Workplace Relations Regulations 8.5-8.7. Any prohibited content in a NAPSA is void: *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Schedule 8, section 37.

<sup>20</sup> See *Geoffrey Trunks and Ors v Waratah Engineering Pty Ltd and Ors*, unreported, 12 December 2008 (Hart J).

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

Section 115 defines 'public holiday' as:

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

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

It would seem that if a State law has already declared a substitute public holiday, then the employer and employee may agree to revert to the 'real' holiday, or to substitute another day. Arguably, the Newcastle Show Day problem described above would not have created the same problems under the FW Act, because any award or agreement which already provided for substitution of Easter Tuesday for Newcastle Show Day would have been effective under FW Act sub-section 115(3). However in cases where industrial instruments or employment contracts have made no arrangements for observing local public holidays, the FW Act will continue the new entitlement created by the WR Act for all federal employees working within the local council areas to enjoy a right to reasonably refuse to work on any day gazetted as a local or regional public holiday for that area.<sup>21</sup>

A list of local public holidays and half-holidays gazetted in New South Wales for 2009 is available at [http://www.industrialrelations.nsw.gov.au/About\\_OIR/Public\\_Holidays.html](http://www.industrialrelations.nsw.gov.au/About_OIR/Public_Holidays.html).

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

### 2.3.5 Modern awards

The NES name public holidays and provide the right to reasonably refuse to work on those days, however rights to penalty rates are left to modern awards and enterprise agreements. Many employees do not presently engage in any kind of industrial bargaining with their employers, either through trade unions or individually, and rely

<sup>21</sup> This view is contested by the submission made by the Motor Traders Association of NSW (See MTANSW p 5), on the basis that the decision of Hart J in *Geoffrey Trunks and Ors v Waratah Engineering Pty Ltd* (unreported, 12 December 2008) was 'incorrectly decided' and 'should be subject to an appeal'. This Review has been prepared on the assumption that decisions of the courts are sound and will be followed by other judges, and on the firm knowledge that no judicial decision can be appealed by anyone other than parties to the dispute.

<sup>22</sup> See van Wanrooy, B, Wright, S and Buchanan, J, *Who Bargains? A Report prepared for the NSW Office of Industrial Relations by the Workplace Research Centre, University of Sydney, May 2009*, [http://www.industrialrelations.nsw.gov.au/pdfs/Who\\_Bargains\\_Report.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/Who_Bargains_Report.pdf).

largely on awards to determine rates of pay.<sup>22</sup> From 1 January 2010, federal modern awards will commence operation. It is proposed that these awards will be reviewed only every four years (see FW Act section 156). There is scope for Fair Work Australia (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 section 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 FWA 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.

### **2.3.6 Union picnic days**

Before considering the relationship between the BBH Act and trading restrictions, it is useful to consider the place of union picnic days within the scheme of public holidays, given especially that August Bank Holiday has tended to assume a role more like a union picnic day, than a generally observed public holiday.

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

In its first term of office, the Howard government reduced the matters that could be included in federal awards, and one of the matters to disappear from federal awards was the union picnic day. Entitlements to picnic days could still be included in federal certified agreements, and State awards still included them. Following the enactment of *Work Choices*, federal system employers who were bound by a State award continued to be bound by those award provisions, as the State award operated as a NAPSA. An examination of 242 New South Wales State awards conducted by NSW Industrial Relations in June 2009 showed that 181, or 75 per cent, contained a provision for an additional, non-standard holiday (including union picnic days). Nevertheless, NAPSA's have a limited life span. Under *Work Choices*, NAPSA's were to expire at the end of a three year transitional period (on 27 March 2009), however this period has been extended until 1 January 2014 to accommodate the transition to the new Fair Work regime.<sup>23</sup>

The FW Act does not expressly include union picnic days as permitted matters for modern awards. For many employees who do not have the benefit of a collectively bargained enterprise agreement, entitlements to days off for community celebration will be limited to those days named

<sup>23</sup> See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Schedule 3, Part 3, section 20(1). It should, however, also be noted that Schedule 5, Part 2, section 3 of the TPCA requires the FWA to terminate any NAPSA's it considers are completely replaced by a modern award. This must be done as soon as is practicable after the modern award comes into operation.

in the NES in FW Act section 115. Since these days include days declared by State law as public holidays, there is scope for State governments to take steps to preserve an entitlement to a picnic day by declaring an additional public holiday. This step was taken in the ACT in 2007 when it declared a new public holiday for 'Family and Community Day'. Unions ACT have expressed a preference for naming this day 'Union Picnic Day', in recognition of the unions' work in securing this public holiday as compensation for the general loss of union picnic days in the Territory.<sup>24</sup> The FW Act allows employers and employees to agree (either in awards, enterprise agreements or by common law agreements) to substitute other days for public holidays: see sub-sections 115(3) and (4). So it would be possible for those employees who wished to do so, to substitute a declared public holiday in order to celebrate a traditional picnic day.

### 2.3.7 Relationship between public holidays and trading restrictions

The BBH Act as it presently stands restricts banks (as defined in section 14A) from trading on Saturdays, Sundays, and all the days listed in Schedule 4 or proclaimed under section 19 as bank holidays. It does not, however, create any restrictions on trading for any business which is not a bank. Banks have been able to seek and obtain exemptions from these trading restrictions by applying to the Director-General of the Department of Services, Technology and Administration under Schedule 6 of the BBH Act.

It is the *Shop Trading Act 2008* (NSW) that prohibits shops from trading on certain named days. The Act defines restricted trading days as:

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

A 'Shop' is defined in section 3 to mean premises:

- (a) that are used wholly or predominantly for the retail sale of goods, and

- (b) in or at which goods are sold or exposed or offered for sale by retail on one or more occasions.

Nevertheless a whole range of shops (including bakeries, chemists, newsagents, take-away food outlets, etc) are exempt from these restrictions by section 7 and Schedule 1 of the Act. Also, any small shop run by its owners and no more than four employees is exempted by section 8.

Larger retailers can apply to the Director-General of the Department of Services, Technology and Administration for an exemption from these restrictions under section 10. Exemptions have been granted on the condition (set out in section 13) that any staff rostered to work have 'freely elected to work on that day, without any coercion, harassment, threat or intimidation by or on behalf of the occupier of the shop'.

On 11 September 2009 the New South Wales Government introduced the *Shop Trading Amendment Act 2009* (NSW) which limits gaining an exemption even further on restricted trading days to exceptional circumstances only. The Act amends the *Shop Trading Act 2008* (NSW) and the *Shop Trading Regulation 2009* (NSW) as follows:

- (a) to limit the circumstances in which exemptions to enable trading on restricted trading days may be granted and to restrict the right to apply for such an exemption to occupiers of shops,
- (b) to make other amendments relating to applications for such exemptions,
- (c) to enable third parties to appeal to the Administrative Decisions Tribunal for reviews of decisions relating to such exemptions,
- (d) to enable inspectors to require records relating to shop employees and business receipts to be produced for enforcement purposes,
- (e) to render void any provision of a lease (or related agreement or arrangement) that requires an occupier of a shop to keep the shop open on a restricted trading day,
- (f) to make other amendments of a minor or consequential nature and to enact savings and transitional provisions consequent on the enactment of the proposed Act.

In introducing the Bill for this Act, the following comments were made on the five restricted trading days: ‘these days are recognised as being of such civic, religious and community significance that restrictions on retail trading are warranted’, and further: ‘[T]he Government recognises that these five restricted trading days are very important to many Australians and provide a timely opportunity for families to be together’.<sup>25</sup>

Neither the *Shop Trading Act 2008* nor the *Shop Trading Amendment Act 2009* make any arrangements for observing the restricted trading days on substitute days if they fall on a Saturday or Sunday.

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

### 2.3.8 Public holidays and shift workers

The Options Paper released in August 2009 considered the effect of current public holidays practices – particularly the substitution of days falling on a Sunday with a public holiday on the following Monday – on workers with different patterns of hours. Monday to Friday workers were described as standard workers, and those who worked other days (Wednesday to Sunday; or Saturday to Wednesday) ‘non-standard’. This designation drew some criticism on the basis that workers described as ‘non-standard’ were already compensated for working unsociable hours by the additional week of annual leave afforded to shift workers. While some non-standard workers are shift workers, not all employees who work other than Monday to Friday meet the definitions of shift worker that attract the entitlement to additional leave. It is useful, then, to clarify here the meaning of shift worker.

#### Shift workers in New South Wales

The *Industrial Relations Act 1996* (NSW) does not include a definition of the meaning of a shift worker. Shift work is defined by clauses in awards or agreements.

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

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

- Clause 11 of the Shop Employees (State) Award.
- Part 6 of the Metals, Engineering and Associated Industries (State) Award.

#### Federal system shift workers

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

**shift** worker means:

(a) an employee who:

- (i) is employed in a business in which shifts are continuously rostered 24 hours a day for 7 days a week; and
- (ii) is regularly rostered to work those shifts; and
- (iii) regularly works on Sundays and public holidays; or

(b) an employee of a type that is prescribed by regulations made for the purposes of this paragraph.

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

(2) The regulations may provide that an employee:

- (a) who is covered by paragraph (a) or (b) of the definition of *shift worker* in subsection (1); and
- (b) who belongs to a class specified in the regulations;

is not a shift worker for the purposes of this Division.

<sup>25</sup> Hansard, p.1, NSW legislative assembly, 11 September 2009.

(3) Without limiting the way in which a class of employees may be described for the purposes of regulations made under subsection (2), the class may be described by reference to one or more of the following:

- (a) a particular industry;
- (b) a particular kind of work;
- (c) a particular type of employment;
- (d) a particular type of shift work (whether described by reference to the organisation or allocation of shifts or otherwise).

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

When the NES in the FW Act take effect on 1 January 2010, national system shift workers will maintain similar entitlements. Under the FW Act, section 87, a shift worker is an employee who is defined as such by a provision in a modern award or enterprise agreement, or (in the case of award-free employees) is one who:

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

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

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

- Clause 29 of the General Retail Industry Award 2010.
- Clause 37 of the Manufacturing and Associated Industries Award 2010.

## 3. Discussion Paper—phase one of the Review

This Review commenced with the development of a Discussion Paper which set out the background information and aimed to identify the significant issues that arise out of the legislation as it currently operates. It also discussed the interaction with relevant Commonwealth legislation including the recently enacted FW Act.

Five specific areas were identified and questions were put inviting submissions on each of the five areas. They were:

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

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?

### **ii. 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?

### **iii. 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?

### **iv. August Bank Holiday**

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

### **v. 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? If so, should the grant of an exemption be subject to any mandatory conditions?

In response to the Discussion Paper, 22 submissions were received (see appendix A). The comments received on each of the five issues have been summarised as follows.

### **3.1 ADDITIONAL AND SUBSTITUTE DAYS WHEN CELEBRATED DATES FALL ON WEEKENDS**

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, p.4) asserted a preference that there should be no additions or substitutions whatsoever.

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 Work Choices (see section 2.3.3).

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

*Finance Sector Union*, (FSU) was 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 *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 supported 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 supported the removal of gazetted additional or substitute public holidays when public holidays fall on a weekend. Further, the ARA believed '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 appeared 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* (Coles) submitted 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>27</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 (AIRC) Public Holidays Test Case decision.<sup>28</sup>

The SDA submitted 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.

Mr D Spring also argued a case for additional rather than substitute holidays when celebrated days fall on weekends, to avoid 'problems and

<sup>27</sup> Coles Supermarkets (Australia) Pty. Ltd, p.2.

<sup>28</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.

confusion for people who regularly work weekends and public holidays’.

The Returned and Services League of Australia (RSL) made no submissions in respect of any public holidays except Anzac Day. The RSL’s strongly held position is that Anzac Day should always be commemorated on 25 April regardless of the day upon which it falls, and there should be no substitutions or additions.

### 3.2 THE QUEEN’S BIRTHDAY AND LABOUR DAY

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 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 agreed that the present dates provide a convenient spread of holidays across the calendar.<sup>29</sup>

### 3.3 LOCAL PUBLIC HOLIDAYS AND HALF-HOLIDAYS

#### The issue

As was explained in section 2.3.3, the proclamation of local show days as public holidays created some confusion following the enactment of Work Choices. A number of submissions to the Review raised concerns about this confusion. No-one proposed however that local show days should be abolished, or that those workers who have customarily been able to take time off to celebrate them should be disadvantaged. The submissions from employers reflected only a concern that former pre-Work Choices arrangements had been disturbed, to the considerable confusion and

expense of employers who had already negotiated other arrangements for local show days.<sup>30</sup>

Given that the choice of local public holidays is presently made by local governments and reflects 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 new public holidays Act a provision enabling the annual gazettal of local holidays. This is currently the practice under the BBH Act section 19(3).

An example of such a provision in another State Act is the *Public Holidays Act 1993 (Vic)* section 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 NES.

#### The submissions

On the whole, submissions from employer representatives noted the additional costs and confusion caused when Work Choices effectively extended the benefits of paid leave on local holidays to all federal system employees, even those who already had an entitlement to another day’s leave in lieu.

The 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 WR Act section 612 and gave all federal 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)

<sup>29</sup> See Australian Business Industrial p.3 and Unions NSW, p.13.

<sup>30</sup> See Discussion Paper at p.12. See Also AiG pp.3-4.

The 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 federal 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 (HBC) (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. (HBC, p.2)

GP Access (GPA), 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 federal system benefit of a paid day off, or by an unincorporated medical partnership, and received no paid time off. (GPA, 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 NSW 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 proposed maintenance of the current arrangements for choosing and proclaiming local public holidays, and proposed 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 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)

### 3.4 AUGUST BANK HOLIDAY

Banks, bank employees and bank customers are most interested in the fate of August Bank Holiday. Submissions following the Discussion Paper were received from Unions NSW and the FSU, speaking on behalf of bank employees; and from the Commonwealth Bank (CommBank) and the Australian Bankers Association (ABA), on behalf of the interests of banks. Two retailer organisations – the NRA and the ARA – and one individual citizen (Mr D Spring) voiced the interests of bank customers. More submissions on this issue, primarily from bank employees, followed the release of the Options Paper (discussed below at box out 2).

#### The Banks' position

The CommBank submission argued that there was 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. (CommBank, p.1) The reasons offered in support of this view were:

- The original rationale for the holiday had 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 CommBank (at 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 submitted 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 supported *'removing the bank holiday and providing existing employees with, for example, a day in lieu'*. (ABA, p.3)

### **The Unions' position**

Unions NSW and the FSU submissions contested the banks' submissions by arguing that there were 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 noted that there was no strong consumer led demand for removing the holiday. (FSU, p.6) Unions NSW and the FSU stated that August Bank Holiday should be maintained because it ensured 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) Unions NSW believed that the enterprise based bargaining system was 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**

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.

The NRA 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'*. (NRA, p.2)

The ARA submitted that August Bank Holiday is disruptive to customers *'including retailers and the wider business community'*. (ARA, p.6) ARA said that this day had no cultural, community or religious significance warranting including it as a public holiday. ARA also supported *'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 (not employed by a bank) to comment on the August Bank Holiday

question, Mr D Spring 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)

### 3.5 WEEKEND TRADING FOR BANKS

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 Services, Technology and Administration to the many banks who have already sought permission to trade on Saturdays.<sup>31</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 suggested 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.

Unions NSW (pp.18-19) 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 (p.10). 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'*. (FSU, p.10)

CommBank (at 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 weekend.

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

CommBank claimed that the present process for obtaining exemptions was 'time consuming and cumbersome' and if an appeal was lodged (for example by the FSU) it could take many months to resolve the issue. (Commbank, p.4) The Bank cited the Administrative Decisions Tribunal 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. (Commbank, p.5)

The 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 NES dealing with working hours, overtime and shift work. The ABA submission stated *'Arrangements should ensure that existing employees are not disadvantaged.'* The NRA 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'*. (NRA, p.2)

The ARA submission 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'*. (ARA, p.7) Neither the NRA or ARA submissions commented on the current systems allowing for exemptions.

The ANRA did not comment on bank trading hours in their submissions following the Discussion Paper. Nor did Coles, AiG, ABI, GPA, MTANSW or the Shopping Centre Council of Australia.



## 4. Options Paper—phase two of the Review

Following analysis of the submissions to the Discussion Paper, an Options Paper was developed setting out options for dealing with these questions. The Paper took on board the views emerging from the submissions and identified issues for further consideration. In particular, the Options Paper accepted the concerns of those workers who now regularly work on weekends, and their complaints that continuing the past practice of substituting Sunday holidays for the following Monday would mean that in some years they would be required to work on the real public holiday without a right to reasonably refuse work on that day, and without an entitlement to public holiday penalty rates.

To this end, alternative options were proposed on each of the questions for the Review, one option seeking to preserve current practice, and a second option seeking to address some of the inequity that has come about as a consequence of the liberalisation of trading hours without a corresponding reconsideration of public holiday arrangements. Three categories of workers were proposed to assist in modeling the options: standard workers who work Monday to Friday, non-standard A workers who work Wednesday to Sunday (and not on Monday); and non-standard B workers (who work from Saturday to Wednesday, and therefore work on both the weekend and Mondays).

Again submissions were invited from any interested party and a further round of consultations was held with a number of interested organisations (see appendix B for a list of organisations). The Options Paper specifically invited submitters to provide evidence of relevant implications of the proposed options (including information on labour costs).

The options on the five significant issues identified in the initial Discussion Paper and the responses received on each of the options presented are summarised below.

The Options Paper also elicited responses on an additional issue: the question of whether Easter Sunday should be a public holiday. This issue emerged as a consequence of a recommendation made in the Options Paper that Easter Sunday should be one of the standard days named as a public holiday, in view of the fact that Sunday has become a normal working day for many workers.

The original spirit of the BBH Act (which would have assumed that Easter Sunday was to be respected as a holiday) is preserved by ensuring that Easter Sunday is named as one of the holidays. This recommendation (which received some media attention) drew particularly antagonistic responses from employer groups, particularly in the hospitality and retail sector. In view of the importance that this issue acquired in the course of considering the Options Paper, Easter Sunday is also included in the issues discussed below.

### Box Out 1: Personal submissions received by the Review

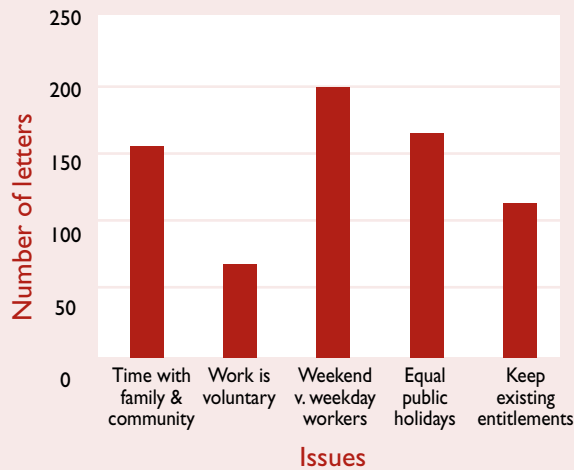
Unlike the Discussion Paper, where very few personal submissions were received, the response to the Options Paper resulted in 218 personal letters and emails being sent to the Review. The letters detail the issues of concern for employees in the retail and banking sector and provide anecdotal evidence that demonstrates workers in these sectors strongly value their public holidays.

The submissions came from across the whole of New South Wales, including small country towns, tourist locations along the coast, metropolitan

areas in Sydney and many places in between. In relation to the retail sector, 130 representations were made by people working in small and large businesses including Bunnings, Coles and Kmart. From the banking sector 88 representations were drawn from across the four pillar banks as well as other financial and insurance institutions.

The issues raised in the letters had commonalities despite being representations from two very distinctive sectors. The five most significant issues raised by submitters are depicted in the following graph:

### Commonality of Issues



Of the 218 letters received 156 emphasised the importance of public holidays for the purpose of spending time with family and the community. A banking assistant from Oak Flats wrote *'families can have a day to spend together without the pressure of trying to coordinate annual leave between the parents and not having to pull kids out of school or miss Saturday soccer in order to have a day with the whole family.'* A retail worker from West Hoxton wrote *'workers rely on public holidays for family time'* and says knowing that the rest of her family also get this day off which is not necessarily the case with annual leave makes it *'special family time... that should be protected'*.

68 submitters raised the importance of being able to reasonably refuse to work on a public holiday, that is, the ability to volunteer rather than being required to work. A worker from Goonellabah who works every second Sunday has given strong support for Easter Sunday being declared a public holiday as this would mean to her a *'great day to spend extra time with my family'*. Workers in the banking sector were particularly strong on this issue as exemptions to trade on weekends are based on the condition that workers must volunteer to work.

Over 90% of the total letters received from individuals or 199 letters highlighted the need to recognise different classes of employees.

These submitters wanted the Review to know that any future decisions surrounding public holidays should take into account those who regularly work weekends as opposed to weekday only workers. They said weekend workers were disadvantaged when public holidays fall on a weekend and the day is substituted for the Monday. Generally they wanted the public holiday to be declared on the day it falls and/or provide additional days so *'that Monday to Friday workers are also not disadvantaged'*. One submitter used 2009 as an example that demonstrates inequity to weekend workers when Christmas Day will fall on a Friday and says *'families need two days in a row at Christmas, especially to give us the opportunity to travel to visit close relatives. Employees who don't normally work on a Saturday automatically get paid for the public holiday when it is declared on the Monday and there is a great inequity in situations like that'*.

167 submissions expressed the importance of having the same amount of holidays as other States. A worker in Beecroft wrote *'NSW, like all other States should receive 11 declared public holidays also. Why shouldn't we receive the (same) rights as other employees in Australia?'* Another worker from Thirroul wrote *'in NSW we have only ten legislated public holidays, as opposed to the majority of the States having eleven, or twelve in the ACT! This is really too few to allow family gatherings'*.

113 submitters felt very strongly that they did not want to see any of their existing entitlements eroded any further. In expressing a sentiment that was echoed by many of his industry colleagues, a banking manager from Sydney's eastern suburbs wrote *'This is an industry day and I want to retain this day. It is very important that workers conditions are not eroded any further. In the banking industry we are always asked to do more for less. I do not want to lose the Bank Holiday or any other conditions.'*

Other issues raised in the 218 letters received have been dealt with in the subject areas to which they are relevant.

## 4.1 ADDITIONAL AND SUBSTITUTE DAYS WHEN CELEBRATED DATES FALL ON WEEKENDS

### 4.1.1 Christmas and Boxing Day

#### 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 an 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)* section 5 and Second Schedule.<sup>32</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 workers, because this working pattern includes work on weekends, and 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>32</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.

Generally, most employer groups accepted that named public holidays falling on a Sunday should result in a substituted holiday on the following Monday. In response to the Options Paper many of the employer groups argued that any perceived unfairness to employees is offset by weekend work already attracting generous penalties (though not as attractive as public holiday rates) and that employees work under these arrangements knowing and accepting that weekend work is a regular feature of their employment. Employer groups generally supported Option A of the Options Paper.

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 and has to some extent also been acknowledged in some modern awards, for example see the General Retail Industry Award 2010.

However on this issue AiG offered the following comments: *'industrial instruments cannot reduce the number of days recognised as public holidays for the purposes of the NES entitlement to reasonably refuse to work (and where absent, to be paid for ordinary hours worked) ... increasing the number of additional days would give rise to a particular employee exercising the right to paid absence on two days instead of one, or having one paid day off and the other attracting penalty rates.'* (AiG, p.3) AiG also saw as an obstacle the fact that many awards have already been determined and the AIRC was unlikely to amend awards to address a public holiday issue in one State nor is there a guarantee that addressing the issue through enterprise bargaining would not breach the Better Off Overall Test.

The AiG preference was to maintain current practice when existing public holidays fall on weekends. *'it is not the role of State legislation to attempt to ensure all employees enjoy equitable*

*benefits to public holidays ... the current arrangements regarding substituted days and additional days allow for a reasonable compromise of the various interests and differences concerned. It would be very unfair to employers to increase the number of additional days when public holidays fall on weekends.'* (AiG, p.3)

ABI supports maintaining current practice: *'where 25 or 26 December falls on a Sunday there is a substituted public holiday on the next day which is not a holiday, and where 25 or 26 December falls on a Saturday there is an additional holiday on the next week day which is not a holiday.'* (ABI, p4)

ANRA does not support the granting of an additional day rather than a substitute holiday where Christmas Day or Boxing Day falls on a Sunday. (ANRA, p.1) AFEI was of a similar view and provided that *'any new legislation should maintain the status quo and not extend public holidays provisions.'* (AFEI, p.7) The ARA supports only a substitute public holiday *'in situations where either a substitute or additional public holiday is being considered'*. (ARA, p.6) Option A was also supported by the ARA, ClubsNSW, David Jones, ABI, Master Grocers Association (MGA), and Housing Industry Association (HIA). All cited additional cost to the employer as the main reason against declaring additional days.

The view of the banks differs to that of the other employer groups. The ABA in their submission, supported by Commonwealth Bank, advocate: *'when Christmas Day falls on a Sunday, the following Tuesday should be an **additional** day (rather than a substitute day). When Boxing Day falls on a Saturday or Sunday, the following Monday should be an **additional** day'*. The ABA is also strongly supportive of working towards national consistency.

Unions, many retail and bank industry workers and some small businesses supported Option B of the Options paper. Denton Engineering, a small business, submitted the view that *'all Australian workers should be entitled to Option B.'*

Unions NSW is of the view that the legislation should not only list the public holidays to be observed but also the additional days when public holidays fall on a Saturday or Sunday. This ensures

that *'both standard and non-standard workers are able to enjoy the original intent of the legislation, which was to provide respite from the normal working week to commemorate specific holidays'*. (Unions NSW, pp.4-5)

Unions NSW did not accept that this would provide any great additional costs to business. *'In the event that a workers roster entails both days as so proclaimed in the legislation, we submit that it would be left to the appropriate industrial instrument as to which day attracts such penalties'*. (Unions NSW, p.8) The FSU supported this view and added *'while the religious significance of Christmas remains highly relevant to large numbers of NSW families, secular people take advantage of the guaranteed time away from work at this time to connect with family and friends.'* (FSU, p.6)

Along with the other unions, the SDA strongly supported Option B and argued that retailers have already enjoyed a disproportionate share of the rewards of extended weekend trading, citing retail turnover figures as outweighing wage increases awarded to retail workers.

The SDA conclude that *'it would be an absurd outcome if these benefits of deregulation were used as the reason to deny retail workers fair and reasonable public holiday entitlements on weekends, when this difficulty only arises as a direct consequence of the extension of weekend trading'*. (SDA, pp.5-6)

Retail workers also demonstrated support for Christmas Day and Boxing Day being kept as two consecutive public holidays. These consecutive days, as highlighted by the SDA provide individuals with much needed respite and the opportunity to have time with their families that live away from them. A retail worker from Ballina wrote *'I have a large family and for me not to be able to attend Christmas and Easter celebrations with them would be unfair. My family lives long distances from me and I am only able to attend because of the public holidays falling in sequence'*.

A retail worker from Lismore highlights that the two days off in a row for Christmas will provide a break for *'many people who have just endured the hustle and stress of the build up to Christmas'*.

## 4.1.2 New Year's Day

### 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>33</sup>

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.

Most submissions were consistent in either recommending substitute or additional days for all public holidays. Nevertheless the strongest arguments based around time with family were made in respect of Christmas and Easter.

The ABI supported no additional days and recommended *‘that when 1 January is a Saturday or Sunday, the proposed public holidays Act should provide that Monday 3 January is a substitute public holiday, or failing this, the proposed Act should provide in terms of option A which would mean that where 1 January was a Saturday, 3 January would be prescribed as an additional public holiday, but if a Sunday 2 January would be a substituted day.’* (ABI, p.4)

The Retailers Association supported option A on the basis of labour costs already being significant at this time of the year. (RA, p.2) ANRA does not support *‘the granting of an additional holiday where 1 January falls on a Sunday.’* (ANRA, p.1)

The ABA, together with the Commonwealth Bank, supported substitution *‘where New Year’s Day fall(s) on a weekend, the following Monday should be observed as a substitute day.’* (ABA, p.1)

Unions NSW and affiliates support *‘the inclusion of Option B: Maintain current benefits for standard workers and extend those benefits to non-standard workers.’* (Unions NSW, p.7) The SDA and the FSU also supported this option. The unions’ view is that *‘this option is the most appropriate method of ensuring that all workers and their families are able to enjoy the entitlement to such public holidays.’* (Unions NSW, p.7)

The SDA also gave strong support to additional public holiday arrangements when New Years Day falls on a weekend. *‘Given the full deregulation of trading hours on Sundays, there is no longer any coherent reason why there should be the different treatment of New Year’s Day falling on a Saturday (additional day granted) and New Year’s Day falling on a Sunday (substitution). ... additional public holiday arrangements (will) bring New South Wales into line with the modern public holiday legislation in operation in Victoria and Western Australia.’* (SDA, p.10)

Generally speaking most submitters advocated the maintenance of the present arrangements or the creation of an additional day when New Years day falls on a weekend. Only a couple of individuals supported no substitution or addition of the day at all. Ms N Sheppard did not support any additional

days for any public holidays and said *‘I think when the public holiday is a date, it should be ONLY this date that is a public holiday, regardless of what day of the week it falls’.*

#### 4.1.3 Australia Day

##### Options for reform

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

Current practice could be maintained by including provisions in a new 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 to 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). New South Wales’ current practice conforms to 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.

Most of the organisations representing employers supported Option A. The Retailers Association provided *'as option A is followed by all States except South Australia, option B would only create further confusion for retailers with stores in New South Wales and other States'*. (RA, p.2)

The ARA also supported option A and said *'the current NSW practice for Australia Day is harmonised with other States except South Australia. For retailers with multi-state operations (including department stores, national chains and franchises) harmonisation reduces the complexity of sorting out rosters, wages, budgets, penalty rates and stock levels'*. Further the ARA state that the substitute arrangement reflects *'the modern consumer's requirement for shops to be open on Australia Day and demonstrates that consumers don't associate the day with any particular cultural traditions or practices'*. (ARA, p.7)

ABI supports *'substitution of the following Monday in the event that 26 January falls on a Saturday or Sunday'*. (ABI, p.4)

The ABA supports option A *'where Australia Day fall(s) on a weekend, the following Monday should be observed as a substitute day'*. (ABA, p.1)

ANRA does not support *'the granting of an additional holiday where Australia Day falls on a Saturday or Sunday'* (ANRA, p.1)

Denton Engineering supported Option B, the provision of an additional day *'so that everyone can celebrate & enjoy being Australian'*.

Unions NSW also gave its support to option B and stated *'All public holidays are proclaimed for a specific reason and each is important in their own right. Any move to treat Australia Day differently to the other public holidays above, in our view diminishes the importance of such day'*. (Unions NSW, p.7)

The SDA and FSU supported the submissions of Unions NSW. (SDA, p.10) The FSU provided further that *'the principle of having a day off work to celebrate our national day is one that should be protected and extended – this day is not only important for families, but is also an important day of broader community engagement and community celebration'*. (FSU, p.6)

#### 4.1.4 Anzac Day

##### 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>34</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.

### **Option A**

The MGA proposed that 'NSW legislation maintains current practice so that there is no appreciable effect on employers and their labour costs by the introduction of new legislation'. (MGA, p.2)

### **Option B**

Unions NSW supports an amended version of Option B to also proclaim an additional day when Anzac Day falls on a Saturday, that is, an additional day is granted when Anzac Day falls on either Saturday or Sunday. They add 'observing an additional public holiday as outlined in Option B when 25 April falls on a Saturday or a Sunday ... does not diminish the importance and relevance of such day. It is appropriate that all workers be given the same entitlement to public holidays irrespective of whether they are standard or non-standard workers'. (Unions NSW, pp.7-8)

The SDA and the FSU supported the position of Unions NSW. The FSU added 'the argument that an additional day somehow detracts from the solemnity of ANZAC Day is not supported by any evidence and ensuring that an additional public holiday was gazetted or proclaimed on the following Monday when 25 April falls on a Saturday or Sunday would facilitate travel by NSW residents who want to join commemorative ceremonies in areas away from home'. (SDA p.10, FSU, p.7)

Ms L Solomon who works for a shopping centre provided the following view 'when significant public holidays fall on a weekend, the actual day should be a public holiday and additional days declared on the subsequent weekdays this would ensure weekend workers are not deprived of their benefits and also caters for Monday to Friday workers'.

A financial controller for an organisation who wished to remain anonymous provided the following view on Anzac Day. An 'additional public holiday and bank holiday on the following Monday, when it (Anzac Day) falls on a Saturday or Sunday. If the following Monday also happens to be a gazetted public holiday for example 26 April 2011 is Easter Monday, then the additional public holiday would be on the following working day'.

The rationale for this was as follows 'we agree with the Focus Point in the Options Paper that the above preserves existing arrangements for standard workers, but also respects the RSL's principal concern that the 'real' Anzac Day be properly recognised. We also agree with Mr D Spring's submission that if no additional public holiday is granted when Anzac Day falls 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'.

### **Option C**

It is fair to say that the greater number of submissions received by the Review supported Option C. The preferred option of the RSL was supported by most employers and their representatives, including the AFEI (p.7), ANRA (p.1), ARA (p.8), ClubsNSW (p.2), David Jones (p.5), Denton Engineering (p.1), Leading Edge Electronics Murwillumbah (p.1), HIA (p.1), Ms N Sheppard, and the RA (p.2).

ABI supported the RSL position in the way Anzac Day ought to be treated but added the following 'failing acceptance of this position, the current situation (substitution when 25 April is a Sunday and no alteration to Anzac Day or Easter Monday when Easter Monday falls on 25 April, be maintained in the proposed public holiday legislation'. (ABI, p.13)

### **Other**

The ABA supported substitution 'where Anzac Day fall(s) on a weekend, the following Monday should be observed as a substitute day'. (ABA, p.1) The Commonwealth Bank supported the ABA's submission on Anzac Day (CommBank, p.1)

The following organisations or individuals made no representations on Anzac Day in their submissions to the Options Paper. AiG, the Anglican Church Diocese of Sydney (Anglican Church), GPA, MTANSW, Mr R Sen, Ms K Farley and Resi Mortgages.

## 4.2 THE QUEENS BIRTHDAY AND LABOUR DAY

### 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.

Apart from a couple of submissions from small business proprietors suggesting that we should dispense with the Queen's Birthday and Labour Day, submissions to the Review generally supported the view that these days should remain as it is in New South Wales.

For example Mr Gary Rickard of Leading Edge Electronics Murwillumbah gives the following view: 'in tough economic times it is time for increased productivity. Let's trim down the public holidays. Days such as the Bank Holiday, Labour Day, Queens Birthday are old school and belong in times past when work was plentiful. By all means keep days such as Anzac and Easter but lets rid ourselves of unnecessary long weekends'.

Given the overwhelming support for the retention of these days as they are currently provided for the focus point as described above has been adopted in full as a recommendation.

## 4.3 LOCAL PUBLIC HOLIDAYS AND HALF-HOLIDAYS

### 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 NES. 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 section 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 FW Act to reflect their concerns. The FW 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.

ABI in its submission proposed that any new legislation regarding the declaration of public holidays should *'be separately identified so as to not give rise to a public holiday in the terms of the Fair Work Act.'* (ABI, p.14) The common concern for employer groups, such as ABI, has been that if the NSW legislation does not make a clear distinction in regard to the application of local public holidays and half-holidays, federal system employers will face an additional cost burden for employees seeking an entitlement to the local public holiday. This concern has arisen out of past experience with Newcastle Show Day following the enactment of Work Choices (see section 2.3.3). This view point is shared by the AFEL, AiG and the RA.

ClubsNSW supports the proclamation of local event days rather than public holidays, to be observed according to provisions in industrial awards and agreements. (ClubsNSW, p.3) This view is echoed in submissions received from the HIA and the MTANSW.

GPA objected to an option for the treatment of local public holidays that relies on enterprise agreements or lobbying the federal government to deal with Show Days such as the Newcastle Show Day. GPA submitted that this is *'impractical for general practices that are mostly small businesses that do not have the expertise, resources or time to negotiate enterprise agreements. There is not one general practice within our geographic boundaries*

that has entered into a collective agreement with staff that I am aware of. Nor are practice principals/owners generally mobilised or active in relation to interactions with employer associations. I would go further to suggest that reliance on awards would be quite standard amongst small businesses in general.' (GPA, p.1)

The HBC submitted the 'rationale for the gazettal of Local Public Holidays should take into account modern industrial principles; including the right for an employer and employee to negotiate their work arrangements, and the capacity of the economy to pay'. (HBC, p.2) Further, the Chamber supported Local Government Authorities holding primary responsibility for the declaration of these days following public consultation, so that employers are able to comment, adjust work practices and negotiate agreements with their employees that suit their business needs.

Unions NSW believe that a shift to local event days will mean that the importance of local public holidays as part of our social and community life will be jeopardised as fewer workers would be able to participate in the events held on such days.

In terms of industrial entitlements, Unions NSW identified that this would create problems within all industrial instruments, as no industrial instrument currently recognises a local event day but they do recognise a local public holiday. (Unions NSW, p.9) Further, it is unrealistic to expect that all modern awards, enterprise agreements and state awards will be varied to include such a term. Thus, the entitlement to such local public holidays would be lost for many workers in New South Wales.

Further, the Unions highlighted that in 'the *Geoffrey Trunks and Ors v Waratah Engineering Pty Ltd and Ors*, unreported, 12 December 2008 (at para 31 – 37) Hart J held that the award itself, the *Metal, Engineering and Associated Industries Award* provided a right to a paid day off on local public holidays. Whilst there may have been confusion in Newcastle in 2008, there is no such confusion at the present. It is important to note that there was no dispute in Newcastle in 2009 that workers had the right to a day off with pay'. (Unions NSW, p.9) The Unions therefore submitted that the State Government should not deny any workers the entitlement they currently enjoy to a paid local public holiday.

## 4.4 AUGUST BANK HOLIDAY

### 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 new 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 achieved 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. 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.

The ABA supported the removal of the August Bank Holiday as it currently constrains the trading of banks and provides bank employees with an entitlement not available in other industries. In particular, the ABA stated that *'Trading restrictions imposed on banks with regards to the August Bank Holiday cause inconvenience for retail customers and business disruption for business customers across the NSW community'*. (ABA, p.2) The ABA are seeking to allow banks to open on the August Bank Holiday to allow business continuity in a national banking system.

The ABA has implied and the CommBank has explicitly stated, that if the August Bank Holiday is removed an entitlement to a day in lieu will be provided to existing bank employees that receive the August Bank Holiday. The ABA believes this will become a negotiated industrial entitlement that is best dealt with through industrial instruments rather than the restricted trading legislation. (ABA, p.3; CommBank, p.1)

A submission received from Leading Edge Electronics Murwillumbah supported the removal

of the August Bank Holiday. The submission stated that *'It places an undue security risk on my staff and myself when I have to safeguard my bankings from Friday and Saturday plus Mondays takings because the bank is closed.'* This submission supports the view of the ABA that, currently the August Bank Holiday is an inconvenience to a number of small business operators.

*David Jones Pty Ltd* (David Jones) noted that the August Bank Holiday is not a holiday based on cultural or religious significance and thus it is not warranted that it be extended to workers beyond the banking industry. David Jones agreed there were reasonable grounds for employees to gain an entitlement to an additional day's leave. The *David Jones Enterprise Agreement* already prescribes an alternate day for employees in NSW, traditionally referred to as the union picnic day, on Melbourne Cup Day. (David Jones, p.5) David Jones' view was also supported by other retail employers' submissions.

The HIA opposed the extension of the August Bank Holiday to all employees. HIA stated that *'This holiday is of no special significance to the community at large and the additional cost burden that would be created for business by making this day a public holiday would be unjustified'*. (HIA, p. 2) Further, HIA has supported that the entitlement to the August Bank Holiday be moved to the enterprise level through industrial negotiation rather than the current situation where the entitlement exists in legislation.

The FSU supports retaining the August Bank Holiday as it currently operates with an extension to all other workers in New South Wales. The FSU submit that the removal of the August Bank Holiday entitlement would affect more than just bank employees, as many workers that receive this entitlement are in the broader financial services industry, such as insurance companies. Data

provided by the FSU demonstrates that there are approximately 163,600 employees in the Financial and Insurance Services Industry<sup>35</sup> that could potentially stand to lose an entitlement to the August Bank Holiday. Further, the FSU believe that shifting the allocation of this entitlement to industrial negotiation will be severely limited by the nature of the employer-employees relationship in the industry. (FSU, pp. 12-13)

Both Unions NSW and the SDA are in support of the extension of the August Bank Holiday to all workers. The primary reason for this is to restore the Union Picnic Day that was lost under WorkChoices. This is a view that is shared by a number of personal submissions as well.

In addition to these submissions, a number of personal submissions from bank employees were received. Their views are represented in the following box.

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<sup>35</sup> ABS statistics cited in the FSU submission, p.10. However, a general understanding of the financial and insurance services industry, would suggest that not all these workers would be defined as 'bank' employees for the purposes of the BBH Act and the relevant industrial instruments that this Act calls upon. As such, the real impact may be marginally less than what this figure indicates.

## Box Out 2: Submissions from bank employees

Over 85 submissions from bank employees detailed their personal views on the current public holiday arrangements. These submissions focused in particular on weekend bank trading and the August Bank Holiday. In respect of these, bank employees raised their concerns that the weekend and public holiday close days and current 'voluntary' weekend work arrangements may cease.

68% of submissions discuss the importance of maintaining a work/life balance in an industry that is experiencing increased levels of overtime and 69% believed that the Bank Holiday is guaranteed time away from work and should remain. A bank manager from Parklea stated *'I work at least 60 hours per week with no compensation (for overtime) thus it is important to have laws that protect our work/life balance in an industry that is dominated by a few very large and powerful employers.'*

Further, approximately 68% of submissions were concerned that existing entitlements would be eroded and should be maintained. A person from Bondi Beach wrote *'In the banking industry we are always asked to do more for less. I do not want to lose the Bank Holiday or any other conditions.'*

Bank employees demonstrated a desire for increased family time, with 73% explicitly stating this. A bank employee from the Queanbeyan area wrote *'The bank is always saying to us that they have a family friendly policy BUT in reality this*

*is not the case as they want us to work extra hours all the time, and to take time off is very hard as no one covers your position when you are on leave. Your work just piles up and then when you get back you need to work longer hours to get through the work that has been left. This then makes you feel WHY did I take leave OR be sick.'* A bank team leader in Sydney wrote *'The extra day provides valuable family time that western societies clearly lack. It's refreshing for the mind, body and soul.'*

Another issue raised in these submissions was the belief that public holidays provide important respite and rest time away from the workplace. A manager in the Cessnock region stated *'It allows a valuable break from what is at times a very stressful occupation; Provide for valuable time spent with family that is lost regularly through additional demands from work.'*

Weekend work for bank employees is currently on a 'voluntary' basis and 64% of submissions supported maintaining these current arrangements. A Superannuation Services Assistant in Sydney stated *'We have little control over the amount of extra work given to us and the deadlines that we are required to meet. This means we may have to cut into our personal time in the evenings and on the weekends to ensure the deadline is met and the company runs smoothly. It is important to have laws that protect our work/life balance in an industry that is dominated by a few very large and powerful employers.'*

## 4.5 WEEKEND TRADING FOR BANKS

### Options for reform

Two options flow from the submissions received on the Discussion Paper.

#### 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.

The ABA with the support of the CommBank made strong submissions in support of weekend bank trading. The ABA stated that the primary reason for an extension of bank trading hours is to ensure the greatest degree of flexibility possible for customers seeking to conduct their banking. Data from a survey undertaken by the ABA showed that currently 42 per cent of customers are dissatisfied with bank trading hours and 65 per cent support weekend trading.<sup>36</sup>

The ABA have submitted that the current process of seeking exemptions to trade on a weekend is an *'unnecessary regulatory burden for banks and creates unfair competition across the financial services industry.'*<sup>37</sup> Further, the ABA have indicated that the current exemption arrangements are inconsistent with other states. *'For example, in Queensland and Victoria, banks are entitled to (and do) open on weekends, subject only to relevant local council regulations.'*<sup>38</sup>

The FSU demonstrated support for the current system of weekend trading exemptions for banks. The current system delivers weekend hours for those that voluntarily choose to work, as well as extended trading hours for those banks that have sought to trade. In this regard, the FSU believes the current system delivers equitably to all parties without placing commercial interests above the interest of bank workers and the greater public interest in weekend bank trading. Recent staff audits conducted by the FSU, indicated that:

- 52.25% of branch workers worked overtime in the week of the audit;
- an average of 9.9 hours of overtime was worked within those branches that reported over time during the week of the audit;
- of the employees who worked overtime more than 25% did not receive payment for their overtime worked.<sup>39</sup>

The FSU believe that these statistics indicate the need for the preservation of the current weekend trading practices of banks with an emphasis on ensuring that the current cultural practices are not extended to usurp weekends and times of respite

<sup>36</sup> Australian Bankers Association, pp.3-4.

<sup>37</sup> Australian Bankers Association, p.4.

<sup>38</sup> Australian Bankers Association, p.4.

<sup>39</sup> Finance Sector Union, p.15.

and socialising with families. These views of the FSU were supported by Unions NSW and the SDA.

The Anglican Church firmly opposed any extension of the arrangements for weekend bank trading. The submission discussed weekend trading as unnecessary on two key grounds: firstly, Banks currently provide their customers with *'their banking services via 24 hour a day internet banking, telephone banking, branches that are open 6 days per week, and via numerous ATM services and Post Office agencies'*<sup>40</sup>; and secondly, the ability not to work a full weekend and therefore have at least Sunday away from work means that *'Sunday remains an important day in the community's consciousness for the enjoyment of rest and relationships away from the workplace.'*<sup>41</sup> The Anglican Church's submission suggested that the need for weekend bank trading is minimal and that in providing a full week of trading to banks would be taking a very conscious step away from the community's value in days of rest, such as Sundays and public holidays.

#### 4.6 EASTER SUNDAY

The Options Paper included a discussion on naming Easter Sunday as a public holiday and the reasons for considering including it in the list of named public holidays. Many of the submissions received provided commentary on this issue.

ARA said that Easter Sunday was an *'extremely significant trading day'* for smaller retailers, so naming the day as a public holiday would cause an *'unsustainable wage Bill increase'*.

The ANRA said that Easter Sunday was already a restricted trading day for most ANRA members, so that anyone working on the day would be working under an exemption requiring that work be voluntary in any event. (This would not be true, however for anyone working in an area exempt from the *Shop Trading Act 2008* (NSW) restrictions.) The ANRA submission illustrated the significant cost increase of naming Easter Sunday as a public holiday by citing the pay rates from the General Retail Award 2010. From 1 July 2010, the ordinary hourly rate under this award will be

\$15.79, the Sunday rate will be \$25.26 and the public holiday rate will be \$39.60.

These figures do explain why employers in the retail sector who do choose to trade on Easter Sunday would prefer that it be treated as an ordinary Sunday. Possibly, it also explains why retailers in the past have chosen to apply for exemptions from the *Shop Trading Act 2008* (NSW) restrictions to allow them to trade on Easter Sunday. It is one holiday upon which they are presently not required to pay public holiday penalty rates. Naming Easter Sunday as a public holiday may create a disincentive to Easter Sunday trading.

David Jones submitted that Easter Sunday work was already voluntary (because it was a restricted trading day) and so work on that day should not attract public holiday penalty rates, because this would create an *'unfair financial burden on employers'*. David Jones operates nationally, so the fact that Easter Sunday is not presently a public holiday in other states would also create administrative inconvenience in managing payroll.

Mr Robin Sen, representing a family-run beachside restaurant in a tourist area, explained that Easter Sunday was a slow trading day, and was already unprofitable, so an obligation to pay public holiday penalty rates on the day would be particularly onerous for restaurant proprietors. When asked why such a business would not simply close on such a day, he responded that the restaurant employed permanent staff on regular weekend rosters, so they would be required to allow those staff paid leave on any public holiday Sunday on which they closed. He claimed that small restaurants have very low profit margins and cannot afford to allow their staff paid leave on public holidays.

ABI also strongly opposed the naming of Easter Sunday as a public holiday. Although not clearly articulated in the ABI submission, it would appear that the reasons for this are that Easter Sunday is not named in the FW Act, nor in the BBH Act, therefore to grant it public holiday status would be to increase the number of public holidays, contrary to the Minister's initial instructions for this Review.

<sup>40</sup> Anglican Church Diocese of Sydney, p.3.

<sup>41</sup> Anglican Church Diocese of Sydney, p.3.

The unions' submissions (Unions NSW and the SDA) on this issue remained consistent with those made in their submissions to the Discussion Paper: Easter Sunday should be named a public holiday so that those occupational groups who have begun in recent years to work regularly on Sundays are able to enjoy the same benefit to an Easter break as Monday to Friday workers. This is no more than was originally intended in the naming of the Easter holidays many decades ago. This step would restore a healthy balance between the commercial interests of traders and the interests of family and community.

The unions' submissions were also echoed, in many more personal modes of expression, by some 131 individual letters (all but one of them handwritten) by people who either work in retail themselves or have children or other family members who are frequently absent from family celebrations at Easter because of work commitments on Easter Sunday. The general tenor of these submissions was that people sorely missed time when the whole family could gather.

The letters received from retail workers highlight the very personal circumstances that affect individuals based on public holiday arrangements. A common theme in the submissions from retail workers related to the implications of a change in working hours for the industry. For example, Sundays have traditionally been a day of rest with most businesses closed for trade. However, now Sunday trading is an industry standard for many retail businesses. For some retail businesses the change in working hours can extend as far as 24 hours a day, seven days a week.

Similarly, some submissions noted that retail workers are regularly required to work weekends while many other workers enjoy a standard Monday to Friday work week. These altered working hours can lead to less family and personal time. An examination of the letters received, indicated that 76 per cent would like Easter Sunday to become a public holiday to ensure they can enjoy a break from work on the weekend.

A mother of three children in Goonellabah wrote that her husband works Monday to Friday every week and she works every Sunday. *'There is a lot*

*of strain on my family over the four day holiday as it restricts me and my family from going away over the four day (Easter) period'.*

For these retail workers, 62% supported the significance of a public holiday being on the day it falls. A parent of a young family and a worker in the retail sector says that moving a public holiday from a weekend to a weekday *'denies retail workers the opportunities to have a two day consecutive break'*. 42% of the letters know in the case of Easter public holidays this would mean a four day break for the workers. A worker in Queanbeyan valued *'...most of all the 4 day break, giving time for families and loved ones to spend time together especially where travel is concerned'*.

Retail submissions highlighted the need for a work and family life balance in today's busy times with 62% directly in support of this. A retail employee from Artarmon wrote *'I and my family look forward to the Easter break where the family can have a holiday together'*. A worker in Minto said her workplace is open seven days a week. She argues the day the public holiday falls on should be protected. She says she will lose the *'little precious family time I have'* without that protection.

Workers in tourist areas are unable to enjoy public holidays because shops in recognised tourist areas are exempt from the *Shop Trading Act 2008* (NSW) restrictions. Some 23% of letters proposed that workers in a tourist area should enjoy public holidays. A worker from Goonellabah told the Review that being in the retail industry and in a designated tourist area means her workplace is open Easter Sunday. This takes time away from her enjoyment of a four day Easter break. She is not able to travel to Brisbane and be with family as a working day (Sunday) is in the middle of the public holidays.

The Anglican Church argued that *'declaring Easter Sunday as a public holiday would give it the status that many people already believe it has'*. It would allow retail workers – who *'have arguably paid the greatest personal cost as a result of decades of deregulating trading hours'* – to choose whether to spend time with family, *'or to attend church'*. This submission generally supported a return to 'civic values', and resistance of the pressures of 24 hour trading

pushed by ‘the commercial needs and desires of merchants’.

The discussion of Easter Sunday – and particularly the reflection in the Options Paper that it was an historical anomaly that it was not named as a public holiday – drew some more general comment on Sunday trading more generally. Here, the division of opinion was sharply divided, between business owners who resent paying penalty rates for Sunday work, when Sunday has become a normal working day, and individual citizens who are sorry to see the erosion of weekend family time by the normalisation of Sunday trading.

Many of the issues raised by the small business people (like Mr Sen, above) are issues to be dealt with in the award modernisation process, and beyond that, the assistance of FWA may be sought to vary awards or make enterprise agreements. While the Review team has sympathy for the plight of small businesses operating in highly competitive markets, it would not be appropriate for legislation enacted for the whole of New South Wales to withdraw recognition of public holidays, because some sectors of the economy cannot trade profitably on public holidays. Those sectors who claim particular hardship need to bring their concerns to the regulators who can influence pay and conditions in particular business sectors.

The issue of penalty rates and what level they should be on Sundays and public holidays is not a matter within the control of State legislatures, following the federal takeover of industrial relations regulation for incorporated private sector business. Business owners aggrieved with the level of penalty rates now need to bring their complaints to FWA for consideration.

## 5. Recommendations

### 5.1 THE CASE FOR A NEW ACT

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 BBH Act is ripe for modernisation, particularly since the enactment of the Work Choices.

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. Given that this legislation will take effect nearly a century after the enactment of the legislation currently governing public holiday arrangements in New South Wales, it should take account of changed patterns of working hours by endeavouring to facilitate equitable treatment between workers, regardless of working patterns. Unfortunately, the options to achieve this end canvassed in the Options Paper attracted sharply divided views between those submissions made on behalf of unions representing weekend workers, and employer organisations. For example, some submissions from the retail and restaurant sectors were particularly insistent that there should be no additional public holidays when celebrated days fall on weekends.

Nevertheless, despite disagreement on how additional or substitute days should be managed, there was strong consensus for the view that most entitlements should be identified in legislation as clear entitlements, and only those matters which necessarily require the exercise of some executive or administrative discretion should be left to periodic gazettal. Local holidays (such as Newcastle Show Day and Albury Cup Day) would be one matter appropriately left for gazettal, principally because decisions about the choice of such days are best left to the local government authorities in the communities in which those celebrations are observed.

### Industrial arrangements for State system employees

As was explained in section 2 of this Report, 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 national system, to provide the same rights that federally covered employees have under Division 10 of the FW Act. This measure would assist in providing the kind of clarity and certainty that many employers have requested. 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.

#### Recommendation 1

A new public holidays Act should be enacted which names days to be observed as public holidays in New South Wales. Provision should be made in this legislation adopting Division 10 of the FW Act in respect of State system employees, so that all employers and employees in New South Wales are treated in the same way in respect of the entitlement to be absent from employment on a public holiday and the entitlement to be paid for absence on a public holiday.

Disputes over whether State system employees have been denied these rights would be a matter for the Industrial Relations Commission of New South Wales to resolve. Disputes of this nature would need to be treated in the same manner as a breach of an industrial instrument.

## 5.2 NAMED DAYS TO BE OBSERVED

### 5.2.1 Days named in the Fair Work Act

Some days are uncontroversial. All the days specifically named in section 115 of the FW Act should be named as public holidays in New South Wales.

These will be public holidays for national system employees, whether State legislation proclaims them as such or not. These days are:

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

### 5.2.2 Queen's Birthday

The Fair Work Act section 115(1)(a)(vi) also names 'the Queen's Birthday holiday (on the day which it is celebrated in a State or Territory or region of a State or Territory)' as a public holiday. New South Wales should enshrine its current practice of naming the second Monday in June as the Queen's birthday. Apart from a couple of submissions from small business proprietors suggesting that we should dispense with this long weekend, submissions to the Review generally supported the view that the Queen's Birthday holiday should remain as it is in New South Wales. 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.

### 5.2.3 Labour Day

FW Act section 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'. Labour Day is customarily gazetted as a public holiday in New South Wales under the BBH Act section 19. All Australian States and Territories

observe Labour Day, although the choice of day is not uniform. It has been traditionally observed in New South Wales on the first Monday in October. It should also remain on the day traditionally observed in New South Wales, and should be moved only if national consensus is reached on the observation of a different date.

### 5.2.4 Easter Saturday

Easter Saturday is presently a public holiday in New South Wales as a consequence of the BBH Act section 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) section 3(v); the *Public Holidays Act 1993* (Vic) section 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.

#### Recommendation 2

On the basis of broad consensus on the above days, the following days should be named as public holidays in the new public holidays Act:

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

### 5.2.5 A contentious proposition: naming Easter Sunday as a public holiday

Many Monday to Friday workers paying attention to publicity surrounding the Review expressed surprise that Easter Sunday is presently not named as a public holiday in any federal, State or Territory public holidays legislation.<sup>42</sup> Easter Sunday is, however, named as a 'restricted trading day' in the

<sup>42</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.

*Shop Trading Act 2008* (NSW). This is no doubt because all Sundays were traditionally holidays, before the extensive liberalisation of trading and working hours in recent decades. It is certain that the original framers of the BBH Act in 1912 would not have found it necessary to name any Sunday as a public holiday. Many of the other 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. To name Easter Sunday as a holiday would simply restore the recognition originally afforded to this day. Nevertheless, this proposal (raised in the Options Paper) provoked vociferous objections from all employer organisations, who claimed that naming this day as a public holiday would add an unwarranted cost burden to those employers in the State who regularly roster staff on to work on Sundays and who wish to continue trading on Easter Sunday.

On the other hand, submissions received from hundreds of shop workers, and from the union who represents their interests (the SDA) pleaded for the recognition of Easter Sunday as a public holiday, so that they too could enjoy an Easter break with their families, as other New South Wales citizens do. The principal protection provided by the FW 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.

### Recommendation 3

Further consideration should be given to naming Easter Sunday as a public holiday. The matter should be raised with the other States at the next COAG/CAF meetings, to seek national uniformity on this question. It is clearly an anomaly that Easter Saturday is a public holiday, but Easter Sunday is not. However while all other States do not name Easter Sunday as a public holiday, a decision to do so in New South Wales would hinder the objective of national harmonisation.

## 5.3 ADDITIONAL AND SUBSTITUTE DAYS WHEN CELEBRATED DATES FALL ON WEEKENDS

If new public holidays legislation is to provide certainty and clarity it should also prescribe what happens when certain named days fall on weekends. This is an issue with Christmas, Boxing Day, New Year's Day, Australia Day and Anzac Day.

This issue proved highly contentious in the Review submissions. On the one hand, employer groups have argued strongly for either leaving public holidays on the day upon which they fall, or providing a substitute holiday on the following Monday. With the exception of the banks (who support additional days for the Christmas period)<sup>43</sup>, no employer submission agreed that additional days should be named when any of the above days fell on a Saturday or Sunday. The employer objections to additional public holidays are based on the additional costs that employers face if two days attract public holiday penalty rates.

On the other hand, union submissions, especially from the SDA, argued that substituting holidays falling on Saturday or Sunday for Monday was inequitable to the armies of workers who now regularly work on weekends. This argument has some force when we consider history. The arrangements presently 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. In those times, moving observance of a public holiday to the following Monday would ensure that workers received a holiday in addition to their usual Sunday rest.

Today, however, 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 can be granted exemptions from these restrictions if they meet certain conditions (see section 2.3.7). Workers in many industries now regularly work on weekends. This means that some inequity has crept into arrangements for substituting public holidays. 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>44</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, but will be able to operate again under the FW Act, which does permit awards and agreements to deal with the substitution of public holiday entitlements.<sup>45</sup>

Employer submissions argue that any unfairness apparently suffered by regular weekend workers who lose a public holiday when it is substituted to the following Monday is already compensated by the additional loadings received for weekend work, and the additional week's annual leave afforded to shift workers. Nevertheless, many regular weekend workers do not classify as shift workers, so are not entitled to this extra leave. Also, the loadings for working on Saturdays and Sundays compensate workers for the inconvenience of working on weekends when many of their friends and family are enjoying the sporting and social activities that commonly populate weekend hours. Losing a public holiday is an additional inconvenience, not necessarily already compensated by weekend rates of pay.

In view of the considerable disagreement on this issue, it is useful to return to the objectives of the Review to seek a resolution.

- **Consistency with community values** warrants consideration of current practice in New South Wales and the importance of the particular holidays concerned.
- **National harmony** warrants consideration of the practices of other States.

Two factors are relevant in considering consistency with community values. One is present custom and practice, the other is evidence of the views expressed in submissions.

For those interested, a table of all gazetted public holidays (including additional days) in New South Wales since 1972 is available at [http://www.industrialrelations.nsw.gov.au/pdfs/Public\\_Holidays\\_observed\\_in\\_NSW\\_1972%20to2010.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/Public_Holidays_observed_in_NSW_1972%20to2010.pdf).

Current practice for determining additional and substitute days in respect to five common public holidays across other States and Territories is shown in the following table at Box Out 3:

<sup>44</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>45</sup> See *Fair Work Act* section 115(3).

### Box Out 3: Current practice for determining additional and substitute days across all States and Territories

	Christmas Day	Boxing Day	New Years Day	Australia Day	Anzac Day
NSW	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.
VIC	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.
WA	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.
QLD	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.
SA	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.
TAS	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.	-
NT	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.
ACT	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.

As current practice in all States demonstrates, different practices are adopted for different holidays. The following recommendations are also based on the fact that different public holidays have been valued differently. Some – especially the Christmas period – represent times of considerably greater importance for families seeking to reconnect with others. For this reason, it is recommended that the Christmas period holidays recognise the interests of non-standard workers in enjoying an equal entitlement to public holidays at that time.

### 5.3.1 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.

Presently, when either Christmas or Boxing Day falls on a Saturday it has been customary to grant an additional public holiday for the following Monday. This occurred when the 25 December was a Saturday in 1976, 1982, 1993, 1999 and 2004 and will occur next in 2010. It also occurred when 26 December was a Saturday in 1981, 1987 and 1992, although not in 1998. In 1998 – and again in 2009 – 26 December will fall on a Saturday, and the holiday has been moved to Monday.

It would be returning to the practices of the recent past to grant an additional holiday whenever Christmas or Boxing Day falls on a Saturday.

Presently, when either Christmas or Boxing Day falls on a Sunday, the Sunday is generally not a public holiday (although it will be a restricted trading day for the purpose of the *Shop Trading Act 2008*). 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.

Generally, in a year when Christmas Day falls on Sunday, the public holidays are Monday 26 December (as a Christmas substitute), and Tuesday 27 December for Boxing Day.

Given that practice already establishes that an additional day should be granted when either of these days falls on a Saturday, it is a relatively small step to grant an additional day also when these days fall on a Sunday.

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.

#### Recommendation 4

On the basis of strong submissions in support of the importance of guaranteeing family time for workers in all occupations at this time of year, additional days should be named as public holidays when Christmas or Boxing Day fall on a Saturday or Sunday.

This means that the legislation should provide that when 25 December (Christmas Day) falls on a Saturday, there should be:

- a public holiday on Saturday 25 December;
- a public holiday on Sunday 26 December;
- an additional day on Monday 27 December; and
- an additional day on Tuesday 28 December.

When 25 December (Christmas Day) falls on a Sunday, there should be:

- a public holiday on Sunday 25 December;
- a public holiday on Monday 26 December; and
- an additional day on Tuesday 27 December.

When 26 December (Boxing Day) falls on a Saturday there should be:

- a public holiday on Friday 25 December;
- a public holiday on Saturday 26 December; and
- an additional day on Monday 28 December.

### 5.3.2 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 is likely to be another relic of past expectations that Sunday is not an ordinary working day and will be enjoyed as a rest day in any event.

Recently enacted public holidays legislation in Victoria and Western Australia presently provide for an additional public holiday on the following Monday when New Year's Day falls on a Sunday. This is to ensure that Sunday workers are able to take the real day as a public holiday. In order to promote greatest harmony across the States, the practice adopted in Victoria and Western Australia should also be adopted in New South Wales.

#### Recommendation 5

When 1 January falls on Saturday or Sunday an additional day should be granted on the following Monday. (This is Option B in the Options paper and it would bring NSW practice into harmony with Victoria and Western Australia.)

### 5.3.3 Australia Day

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.

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 so harmonisation of arrangements across the nation would favour retaining this practice.

#### Recommendation 6

When 26 January falls on a Saturday or Sunday, the public holiday should be substituted for the following Monday (27 or 28 January).

### 5.3.4 Anzac Day

Presently in New South Wales, Anzac Day is commemorated 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. According to the RSL, proper observance of Anzac Day need involve 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.

The RSL's preferred position has been adopted in Victoria, so New South Wales would be conforming with Victoria by adopting this approach.

The RSL's arguments about the need for time off have some cogency. Anzac Day generally falls at a time reasonably proximate to Easter, when workers have already enjoyed family time, so the argument based on a need to provide additional holiday leave is weaker. For this reason, it is recommended that the RSL's preferred position be adopted.

There is one obstacle to this recommendation. Under the Terms of Reference, the Review is required to take account of the CAF Meeting of Premiers held on 12 September 2008<sup>46</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.

This means, that that the following recommendation would be out of step with the CAF recommendation, in failing to substitute the Anzac Day holiday on any occasion.

#### Recommendation 7

Anzac Day should be celebrated on 25 April, and no substitute or additional day should be given when it falls on a weekend.

### 5.4 LOCAL PUBLIC HOLIDAYS AND HALF-HOLIDAYS

Many local and regional areas have traditionally observed whole or half day holidays specific to a particular region or community (a table of local public holidays for NSW in 2009 is available at [http://www.industrialrelations.nsw.gov.au/About\\_OIR/Public\\_Holidays.html](http://www.industrialrelations.nsw.gov.au/About_OIR/Public_Holidays.html)). The practice until now has been for local councils to advise the Minister of the days that should be gazetted for the observance of these holidays. New public holidays legislation should preserve this practice. Local holidays are matters of local and regional significance, so it is most appropriate that local government take responsibility for consulting with local business and community groups and naming appropriate days for these celebrations.

Local councils are presently required to justify their reasons for seeking the proclamation of these days as well as undertake public consultation in support of the proposal, and this should continue. In the past, the industrial arrangements for employers and workers were dealt with in industrial awards and agreements, or by more informal negotiation between employers and employees. Since 2006, federal workplace relations laws have created obligations on all federal system employers operating in a region in which a public holiday is declared to allow their employees paid time off on those holidays. As has been explained in section 2, and in the submissions of employers to the Discussion and Options Papers, federal law has disturbed customary practices in a way that has created considerable confusion and legal expense.

One option for reform to avoid this confusion 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

<sup>46</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>.

the NES. 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. Industrial arrangements for observing these days by granting entitlements to paid time off would need to be made at a local level.

#### Recommendation 8

Local holidays should be determined by local councils. A provision should be included in public holidays legislation to enable gazettal of these days as either public holidays or local event days. It would be incumbent upon local government authorities to make a case for gazettal as a public holiday to be observed by all national system employers in the region. It is recommended that the government gazette them as local event days only, unless the local government authority is able to bring evidence of wide consultation and acceptance of the public holiday by the local community.

### 5.5 AUGUST BANK HOLIDAY

Presently banks in New South Wales are required to close on the first Monday in August.

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

Banks do not support continuation of the practice of observing an August Bank Holiday.

On the other hand, employees of banks have generally been able to enjoy the August Bank Holiday as a paid day off work, because it is a 'close Bank Holiday' under the BBH Act. While the banks remain closed on that day, few counter service staff of banks will be required to work on that day. (It should be noted, however, that many banks and other financial institutions employ call centre workers on seven day rosters.) Some employees in industries related to banking have also traditionally enjoyed either the August Bank Holiday or a substituted day as an additional holiday. If the BBH Act was amended to remove the August Bank Holiday, these employees would suffer a reduction in their employment conditions, in circumstances where it is no longer possible to negotiate for the inclusion of a union picnic day in a federal modern award. It is likely that only employees who enjoy strong collective representation will be able to negotiate for the retention of this day's leave in an enterprise agreement.

Although other States and Territories do not celebrate August Bank Holiday, some do celebrate an event of State significance. Victoria has Melbourne Cup Day on the first Tuesday in November. Western Australia has Foundation Day. The ACT has Canberra Day in March and Family and Community Day in November (a table of Australian public holidays is available at [http://www.industrialrelations.nsw.gov.au/pdfs/Australian\\_public\\_holidays\\_states\\_and\\_territories.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/Australian_public_holidays_states_and_territories.pdf)). Nevertheless, August Bank Holiday has never been celebrated as a special State holiday. Submissions to the Review did not evidence any community wide call for the addition of such a public holiday. On the contrary, a number of disinterested parties (i.e. parties who represented neither banks nor bank employees) saw the August Bank Holiday closure as an inconvenience.

Nor was there any strong community support for naming a new 'union picnic day'. Given the federal industrial relations environment, where picnic days are treated as a matter for industrial negotiation between unions and employers in those industries where workers have a strong commitment to unions, it is not appropriate for a State government to legislate a new public holiday to mandate those arrangements for the entire community. Although

some working people will lose a guaranteed long weekend as a consequence of not naming this day as a public holiday, the arrangements made above for additional days ensures that the times most valued by the broader community – the Christmas and Easter breaks – will be enjoyed by all people as family time. Compensation for bank employees for loss of this weekend can be addressed in the context of more general controls on bank trading hours, explained below at 5.6.

#### Recommendation 9

August Bank Holiday should not be named in the list of named days as a general public holiday.

### 5.6 BANK TRADING TIMES

Banks are not permitted to trade on public holidays, or on August Bank Holiday. BBH Act section 15A presently also requires banks to close on weekends (unless they obtain an exemption to permit trading). As the record of submissions in section 3 shows, banks have complained that this requirement interferes with their ability to compete with their non-bank competitors who are able to engage in trading activities on weekends. Banks in Victoria are entitled to, and do, open for Saturday morning trading.

To some extent, the banks' concerns have been alleviated by extensive use of the approvals process in Schedule 6 which allows banks to apply to the Director-General of the Department of Services, Technology and Administration to open on weekends.<sup>47</sup>

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

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

Bank trading hours remain an important factor in preserving the entitlement to a weekend break from work for many bank employees. Possibly, the practice of banks observing weekends has been an important factor in preventing the spread of working hours into weekends for many areas of commerce. Nevertheless, the banks have made cogent arguments about the benefits to their customers of being able to be open on weekends, particularly in shopping malls where small businesses are open, and in need of banking services.

The present arrangements under which banks are required to obtain exemptions in order to open on weekends ensure that only willing employees can be rostered to work on weekends. This is achieved by the imposition of conditions on the grant of exemptions. Presently, the BBH Act does not contain any provision similar to section 13 of the *Shop Trading Act 2008* (NSW) which mandates that exemptions from trading restrictions can only be granted on the condition that work on those days must be voluntary. Whether such conditions are imposed is a matter left to the discretion of the Director-General of the Department of Services, Technology and Administration. The Director-General makes a decision on whether to grant an exemption, and if so, on which conditions, after consultation with unions representing employees who will be affected by any exemption. The bank making the application and employee representatives can seek a review of the decision by the New South Wales Administrative Decisions Tribunal.<sup>48</sup>

These decisions have been contentious in the past. The banks have complained that the procedures for making applications are burdensome, and induce legal arguments with the unions which are costly and damaging. On the other hand, the FSU representing bank employees are fearful that liberalization of trading will adversely affect bank employees. The FSU argues that many bank counter staff are women with families. Without the freedom to refuse work on weekends, their family time on weekends may be eroded. The FSU's submission has been supported by the submissions of many individual bank employees.

<sup>47</sup> Further information on the process for banks to receive trading exemptions is available at: [http://www.industrialrelations.nsw.gov.au/About\\_OIR/Shop\\_trading\\_hours/Weekend\\_bank\\_trading.html](http://www.industrialrelations.nsw.gov.au/About_OIR/Shop_trading_hours/Weekend_bank_trading.html).

<sup>48</sup> See for example *Finance Sector Union of Australia (NSW) v Director-General, Department of Commerce (NSW) & Anor* [2008] NSWADT 338, where the FSU challenged the issue of an exemption for Saturday trading to the Commonwealth Bank, without any explicit conditions requiring that only volunteers should be rostered on for Saturday work. The Commonwealth Bank contested this application. The FSU was successful in part.

As has been explained in section 2, States are no longer able to directly legislate to confer any industrial entitlements on the employees of federal system employers. States can only do so indirectly, by refusing permission to trade except on the condition that the employer must afford certain rights to employees. The system presently in place for granting applications for an exemption from the bank weekend trading restrictions is able to achieve what more direct State industrial legislation cannot do under the current federal industrial relations laws.

In submissions to the Review, the banks have asserted a commitment to preserving existing entitlements of current staff in respect of leave entitlements (particularly to August Bank Holiday), and working rosters. The banks assert that sufficient numbers of staff find weekend work convenient that it is not necessary to roster involuntary workers on weekends in any event.

Anecdotal evidence was provided in both the ABA and FSU submissions detailing the cost to employers and employees in the industry. Whilst it is acknowledged that banks would like to engage in trading consistent with other States and institutions, it is difficult to assess whether these anecdotal statistics are a justification for a change in current practice. It is also unclear whether the views ascribed in their respective submissions are the likely outcome of a public interest test. As such, it would be necessary for the issue to be subject to a more rigorous public interest test if a substantial shift toward regular full week trade for banks is to occur.

In making new legislation that alters existing practices, it is incumbent upon governments to step cautiously. Although the banks made a strong claim for immediate liberalisation of trading, there was no correspondingly strong claim from bank customers for this need, and there were many bank workers who expressed considerable anxiety about the prospect of change to current arrangements. The recommendation proposed seeks to find an appropriate balance between these interests.

It is therefore recommended that a phased approach be taken to the liberalisation of bank trading arrangements and that the first step involve

allowing banks an automatic exemption from trading restrictions on public holidays and August Bank Holiday as well as on weekends, subject to a notification requirement, and a legislated condition that only voluntary staff may be rostered to work on those days. If after a trial period this system produces harmonious arrangements for banks and their staff consideration may be given to repealing the Part of the Act imposing these strictures on weekend and holiday bank trading.

#### Recommendation 10

A separate Part in a new public holidays Act should deal with bank trading hours. A provision should name as 'bank close days' all weekends, public holidays (those named in the Act for general observation) and the first day of August<sup>49</sup> (August Bank Holiday). Banks should however be permitted to apply for exemptions to allow trading on all of these days (including August Bank Holiday and other public holidays, but excluding the days restricted by the *Shop Trading Act 2008* (NSW) as amended in 2009). The legislation should provide that exemptions will be granted on condition that banks engage voluntary staff on these days (in terms similar to section 13 of the *Shop Trading Act 2008* (NSW)). 'Bank' should be defined according to the definition in section 14A of the *BBH Act* to ensure that this provision applies only to those financial institutions presently restricted from trading at these times. These provisions should be enacted to operate for a period of years, with a view to repeal to enable complete liberalisation of bank trading hours if over time it is shown that banks are able to observe their commitments to maintaining leave entitlements for their staff.

In addition, issues regarding bills of exchange, promissory notes and similar (to the extent that Commonwealth legislation does not deal with the issue) can be dealt with in this Part. A similar approach was taken in the Victorian public holiday legislation, for example see section 9 of the *Public Holidays Act 1993* (Vic).

<sup>49</sup> The August Bank Holiday is the first day of August when it is a Monday, if it falls on any other day of the week, the following Monday becomes the August Bank Holiday in lieu thereof, see Part 2 of Schedule 4 of the *Banks and Bank Holidays Act 1912*.

## 6. Other considerations for the proposed legislation

### 6.1 A TIMETABLE FOR ENACTMENT

Some of the recommendations proposed may have an effect on existing industrial arrangements in some occupational groups, notably in the banking sector, and in any sector where seven day trading is the norm.

For example, naming additional days for Christmas, Boxing Day and New Years Day when they fall on weekends may affect labour costs in those businesses which normally trade on Sundays and would remain open on those public holidays, but only in the years when the holidays do in fact fall on a Sunday. New South Wales already provided additional days when those days fell on Saturday. If these recommendations are adopted, it may still be open to industrial parties to bring knowledge of these arrangements to the attention of the AIRC currently undertaking the award modernisation process.<sup>50</sup> Beyond that, the assistance of FWA may be sought to vary awards or make enterprise agreements, so that appropriate arrangements can be made to prevent any 'double dipping' on the occasions when workers work on both the real and the additional public holiday. Some modern awards have already included such provisions (see section 2.3.5).

On the other hand, employers will benefit from the recommendations regarding Australia Day and Anzac Day. To some extent, there is a trade off in these recommendations, which industrial parties should acknowledge in considering their responses.

The recommendation regarding August Bank Holiday could be delayed until the banks and the FSU have negotiated arrangements to give effect to the banks' stated commitment to preserving the leave entitlements of existing employees. 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.

It should be noted that arrangements for the Christmas period in 2009 have already been settled and should not to be disturbed as part of any legislative reform arising out of the Review.

### 6.2 DEALING WITH FUTURE CONTINGENCIES

Notwithstanding that a new public holidays Act will stipulate the days that are to be declared as public holidays the legislation will need to include an enabling provision similar to the present BBH Act section 19 to allow the New South Wales Government to gazette a public holiday, generally or within a specific geographic location, where it is deemed necessary (for example, in order to declare a special day such as APEC day in 2007).

<sup>50</sup> The Full Bench Statement – Variations to Modern Awards (AM 2008/1, issued 26 June 2009) outlines the process for variations to modern awards and anticipates residual changes will need to be made in the final quarter of 2009.

# Appendices

## APPENDIX A

### Table of Submissions

The following public submissions were received over the course of this Review:

#### Submissions to Discussion Paper

Albury City  
Australian Bankers Association  
Australian Business Industrial  
Australian Industry Group  
Australian National Retailers Association  
Australian Retailers Association  
Coles Supermarkets (Australia) Pty Ltd  
Commonwealth Bank of Australia  
Finance Sector Union  
Mr N Ford  
GP Access  
Hunter Business Chamber  
Motor Traders Association  
Ms L McMorland  
National Retail Association  
Shop, Distributive and Allied Employees' Association, NSW Branch and Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern NSW  
Shopping Centre Council of Australia  
Mr D Spring  
The Returned and Services League of Australia (NSW Branch)  
Unions NSW  
Waste Contractors and Recyclers Association

#### Submissions to Options Paper

Anglican Church Diocese of Sydney  
Australian Bankers Association  
Australian Business Industrial  
Australian Federation of Employers and Industries  
Australian Industry Group  
Australian National Retailers Association  
Australian Retailers Association  
Clubs NSW  
Commonwealth Bank of Australia  
David Jones  
Denton Engineering  
Leading Edge Electronics Murwillumbah  
Finance Sector Union  
GP Access  
Housing Industry Association  
Hunter Business Chamber  
Master Grocers Association  
Motor Traders Association of NSW  
Mr L Rankin  
Mr R Sen  
Ms K Farley

Ms L Solomon  
Ms N Sheppard  
Resi  
The Retailers Association  
Shop, Distributive and Allied Employees' Association, NSW Branch and Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern NSW  
Unions NSW

## APPENDIX B

### Consultations

The following organisations participated in either one or both of the rounds of consultations. The first round was held just prior to the release of the Discussion Paper and the second round held just after the release of the Options Paper:

Australian Bankers Association  
Australian Business Industrial  
Australian Industry Group  
Australian National Retailers Association  
Australia New Zealand Bank (ANZ)  
Australian Retailers Association  
Coles Supermarkets (Australia) Pty Ltd  
Commonwealth Bank of Australia  
Finance Sector Union  
Health Services Union  
Liquor, Hospitality and Miscellaneous Union, NSW Branch  
National Retail Association  
NSW Nurses' Association  
Shop Assistants and Warehouse Employees' Federation of Australia (Newcastle and Northern New South Wales)  
Shop, Distributive and Allied Employees' Association (NSW Branch)  
Shopping Centre Council of Australia  
St George Bank  
The Returned and Services League of Australia (NSW Branch)  
Unions NSW  
Westpac Corporation  
Woolworths Supermarkets

## APPENDIX C

### List of Abbreviations

ABS Australian Bureau of Statistics  
ABI Australian Business Industrial

AFEI Australian Federation of Employers and Industries  
AiG Australian Industry Group  
AIRC Australian Industrial Relations Commission  
Anglican Church Anglican Church Diocese of Sydney  
ANRA Australian National Retailers Association  
APRA Australian Prudential Regulation Authority  
ARA Australian Retailers Association  
BBH Act Banks and Bank Holidays Act 1912  
CAF Council for the Australian Federation  
COAG Council of Australian Governments  
Coles Coles Supermarkets (Australia) Pty Ltd  
CommBank Commonwealth Bank of Australia  
David Jones David Jones Pty Ltd  
FW Act Fair Work Act 2008  
FWA Fair Work Australia  
FSU Finance Sector Union  
GPA GP Access  
HBC Hunter Business Chamber  
HIA Housing Industry Association  
MGA Master Grocers Association  
MTANSW Motor Traders Association of New South Wales  
NAPSA Notional Agreement Preserving State Awards  
NES National Employment Standards  
PSA Preserved State Agreements  
RA The Retailers Association  
RSL Returned and Services League of Australia  
SDA Shop, Distributive and Allied Employees' Association, NSW Branch and Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern NSW  
WCRANSW Waste Contractors and Recyclers Association of NSW  
Work Choices Workplace Relations Amendment (Work Choices) Act 2005  
WR Act Workplace Relations Act 1996