

**UNIONS NSW SUBMISSION TO**

**REVIEW OF THE**

**BANK AND BANK HOLIDAYS ACT 1912 (NSW)**

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## Introduction

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On 29th May 2009, the NSW Minister for Industrial Relations, the Hon. John Hatzistergos announced a review into the Bank and Bank Holidays Act 1912.

Unions NSW welcomes the review and the ability to comment, particularly in light of the history of the introduction to the Workchoices legislation and the loss of rights to certain public holidays for many workers employed in NSW. Further, Unions NSW and affiliates agree that the Act needs to be 'updated' to take into account changes that have occurred during the 97 years since the Act was made.

This submission by Unions NSW and its affiliates is in response to the Discussion Paper released on 29<sup>th</sup> June 2009 by Professor Joellen Reilly.

Unions NSW is a State Peak Body as defined by the Industrial Relations Act 1996 (NSW). Unions NSW has over 60 affiliated unions, with each union representing members from many diverse backgrounds and industries. NSW unions represent members employed in a wide range of industries including public sector, teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, engineering, construction, finance, administrative etc

Collectively Unions NSW and its affiliates represent approximately 600,000 workers employed in NSW.

Unions NSW has had a long history of seeking to enhance the conditions of NSW working people through legislative and arbitral means.

Unions NSW and its affiliates do not support any changes to the Bank and Bank Holidays Act 1912 that would result in a loss of entitlements, rights or a reduction in benefits currently enjoyed by NSW workers and their families.

NSW workers have already seen a reduction in their rights to public holidays when in 2006, the then Howard Federal Government introduced the [Workplace Relations Amendment \(Work Choices\) Act 2005](#).

As a direct result of the introduction of the Workchoices Legislation, many NSW workers lost their entitlement to an 11<sup>th</sup> public holiday – the Union Picnic Day. Unions NSW and its affiliates see this review as an appropriate mechanism to reinstate and 11<sup>th</sup> public holiday for all NSW workers, which should be enshrined in the legislation. This matter is discussed later in the submission.

Whilst this submission is made by Unions NSW and its affiliates, some affiliates have made additional submissions to this inquiry, particularly where matters affect their own industries/areas of coverage. Unions NSW supports such submissions made by our affiliates.

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## History of Public Holidays and the Bank and Bank Holidays Act 1912

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At the time of the introduction of the Bank and Bank Holidays Act 1912 ("The Act"), most employees were working a minimum of a 44 hour week (making Saturday a 4 hour or 8 hour working day). Further in 1912, Sunday was a day of rest for all. At this time unmarried women made up a small percentage of the workforce (and were also paid at a lower rate). Employment was generally on a full time basis.

Since 1912, working hours and patterns have changed dramatically. Working hours have been reduced to 40 hours per week in approximately 1947, and in 1983 a 38 hour week generally became the norm. Not only have more women entered the workforce, types of employment vary i.e. casual, temporary, contractors, full time, part time, fixed term etc.

Also changed are the days of work each week and changes to hours of work. Some industries still work Monday to Friday, others are 7 day a week or 24 hours a day industries. Since the introduction of enterprise bargaining, we have seen a shift away from the award system at the federal and also at the state level. Such change has been accompanied by enterprise agreements that have more "flexibility" in when hours are worked. Staggering of start and finish times, the spread of normal hours and longer shifts in fewer days have been part of this trend.

The Bank and Bank Holidays Act 1912 has had little amendment since it was first proclaimed in 1875 as the Bank Holidays Act.

A number of amendments to the Act were debated extensively before federation. In particular there was one debate involving Arthur Griffith in 1896 which aimed at celebrating all public holidays on a Monday. The aim was stated to be minimising disruption to business by avoiding a mid week break, and to ensure that workers get a block of time away from work to be with their families. In supporting this amendment, **Griffith stated that "without injuring anybody it will be a material benefit to thousands who are most in need of a holiday". He noted the boost it would give to tourism and travel as it "would make a material difference to the railways revenue of the colony."**

In summing up Mr Griffith again urged Parliament to support “the poor wretches who seldom get a chance of having two holidays together”.<sup>1</sup>

The bill had been defeated in 1896 because Monday was the major mail day and a holiday on that day was seen as too disruptive to merchants. (Again, to reiterate, at the time of this debate, Sunday was a day of rest and Saturday was worked as either a 4 or 8 hour day.)

Whilst many things have changed since this debate over 110 years ago, many things remain constant. That is that public holidays are a “material benefit to thousands who are in most need of a holiday.” We further submit that public holidays still contain much importance to tourism and leisure industries, and most importantly, public holidays still allow for time off work for all to spend time with family and friends.

Since 1912, we have seen few amendments which would ‘update’ the Act to reflect current community standards relating to public holidays and be relevant to the current social and industrial environments.

Public holidays assist with allowing employees to take time off work for family and community interaction. There should always remain a good balance of work, family, and community. Unions NSW submits that this has become even more important in 2009 and into the future considering how much work has changed and will continue to do so.

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<sup>1</sup> Hansard 1896

## Public Holidays – National Standards

Public Holidays Gazetted for 2009

Public Holiday	NSW	Vic	ACT	QLD	SA	Tas	WA	NT
New Years Day	✓	✓	✓	✓	✓	✓	✓	✓
Australia Day	✓	✓	✓	✓	✓	✓	✓	✓
Good Friday	✓	✓	✓	✓	✓	✓	✓	✓
Easter Saturday	✓	✓	✓	✓	✓			✓
Easter Monday	✓	✓	✓	✓	✓	✓	✓	✓
Easter Tuesday						✓		
Anzac Day	✓	✓	✓	✓	✓	✓	✓	✓
Queens Birthday	✓	✓	✓	✓	✓	✓	✓	✓
Labour Day	✓	✓	✓	✓	✓	✓	✓	✓
Picnic Day								✓
Family & Community Day			✓					
Canberra Day			✓					
Melbourne Cup		✓						
Christmas Day	✓	✓	✓	✓	✓	✓	✓	✓
Boxing Day	✓	✓	✓	✓	✓	✓	✓	✓
Foundation Day							✓	
Adelaide Cup					✓			
<b>TOTAL</b>	<b>10</b>	<b>11</b>	<b>12</b>	<b>10</b>	<b>11</b>	<b>10</b>	<b>10</b>	<b>11</b>

Sources: NSW OIR website, Wageline QLD, Chief Ministers Department, DIR ACT, [www.ocpe.nt.gov.au](http://www.ocpe.nt.gov.au), [www.dafework.sa.gov.au](http://www.dafework.sa.gov.au), Dept. Of Justice, Workplace Standards Tasmania, [www.vic.gov.au](http://www.vic.gov.au), Department of Commerce WA.

The above table (and that in the Discussion paper) shows that NSW is one State within Australia that has the lowest number of public holidays in each year. Further, WA also has public holidays on Monday 28 December and Monday 27<sup>th</sup> April pursuant to the additional days provision in the Public and Bank Holidays Act 1972 (WA).

It should also be noted that Victoria also has an additional day legislated for the 28<sup>th</sup> December pursuant to the Public Holidays Amendment Act 2008.

## Discussion Paper Responses

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

The Discussion paper examines whether or not a public holiday falling on a Saturday or a Sunday should be dealt with by an additional public holiday or a substituted public holiday. This question arises because the concept of a weekend, providing Saturday and Sunday off work for most workers as understood by the Parliament since the introduction of the 40 hours week in 1947, has been eroded and clouded by the advent of enterprise bargaining, the introduction of new technologies allowing services to be delivered cheaply and efficiently 24 x 7 and the progressive de-regulation of shop trading hours. The practice of substitution came about because of the assumption that Saturdays and Sundays were already days off work. Where this assumption does not reflect reality, problems occur. It is of great concern to Unions NSW and affiliates that many public holidays are substituted for another day, thus leaving the real day of celebration or commemoration as one that does not attract public holiday status. (This is stated in the context of both industrial and social expectations.)

In 2009 we have already had one example of a public holiday falling on a Saturday being 25<sup>th</sup> April 2009- Anzac Day and we will see another example on Saturday 26<sup>th</sup> December 2009 – Boxing Day. Both of these days have been treated differently by the Minister in deciding whether or not to proclaim an additional day, substitute day or no amendment.

In the case of Anzac Day the Minister's office stated:

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

In the case of Boxing Day, the Monday 28<sup>th</sup> December 2009 has been substituted as the public holiday thus exposing the actual day of significance, being the 26<sup>th</sup> December 2009 as an ordinary day.

With respect to the Minister, neither treatment of these days has adequately dealt with the concerns that Unions have regarding these days.

In both of the cases outlined above there is a strong argument for creating an additional day on the following Monday, and also keeping the actual day of significance as a public holiday. It is important to note that in making this submission, Unions NSW and its affiliates do not wish to remove or diminish the significance of such days. Whether it be for reasons of religious significance or for commemoration of Australians that have served and/or perished in wars, conflicts or peacekeeping activities or a day of national significance, each public holiday is important in their own right. There is a general sense of community entitlement to a certain amount of public holidays in each year and for celebration or commemoration to occur on specific days.

Substitution of public holidays does not solve any of the problems associated with employees who may work in 7 day week industries. Unions NSW and affiliates submit that the only logical way for these issues to be remedied is to allow for an additional day mechanism to operate within the legislation. In this way, the original intent of providing respite from the normal working week for all workers to commemorate specific holidays is satisfied.

An example of the problems associated with the substitution of public holidays is outlined on page 9 of the submission of the Shop, Distributive and Allied Employees' Association New South Wales Branch and the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales to this inquiry.

Unions NSW submits that the practice of creating additional days already exists in other States throughout Australia. The WA legislation, the Public and Bank Holidays Act 1972 (WA) and more recently the Victorian Public Holidays Amendment Act 2008 create additional days when holidays fall on a Saturday or Sunday (although the list of additional days is limited in Vic).

The Victorian Public Holidays Amendment Act 2008 amends Section 6 of the Public Holidays Act 1993 as follows:

*"6. Public Holidays*

*The following days are appointed as public holidays –*

- (a) 1 January (New Year's Day);*
- (b) The Monday after 1 January (New Year's Day) when New Year's Day is a Saturday or Sunday;*
- (c) 26 January (Australia Day) or the Monday after Australia Day when Australia Day is a Saturday or Sunday;*
- (d) The second Monday in March (Labour Day);*
- (e) Good Friday;*
- (f) The Saturday before Easter Sunday;*
- (g) Easter Monday;*
- (h) 25 April (Anzac Day);*
- (i) The second Monday in June (the day on which the anniversary of the birthday of the Sovereign is observed);*
- (j) The first Tuesday in November (Melbourne Cup Day);*
- (k) 25 December (Christmas Day) or the Monday after Christmas Day when Christmas Day is a Saturday or the Tuesday after Christmas Day when Christmas Day is a Sunday;*
- (l) 26 December (Boxing Day);*
- (m) The Monday after 26 December (Boxing Day) when Boxing Day is a Saturday or the Tuesday after Boxing Day when Boxing Day is a Sunday."*

*The WA legislation the Public and Bank Holiday 1972 in its Second Schedule lists the public holidays as:*

*New Year's Day (1<sup>st</sup> January).*

*Australia Day (26<sup>th</sup> January or, when that day falls on a Saturday or Sunday, the first Monday following the 26<sup>th</sup> January).*

*Labour Day (Monday on or first Monday following the 1<sup>st</sup> March).*

*Good Friday.*

*Easter Monday.*

*Anzac Day (25<sup>th</sup> April).*

*Foundation Day (Monday on or first Monday following the 1<sup>st</sup> June).*

*Celebration Day for the Anniversary of the Birthday of the Reigning Sovereign (day to be appointed for each year by proclamation published in the Government Gazette at least 3 weeks before the day so appointed).*

*Christmas Day (25<sup>th</sup> December).*

*Boxing Day (26<sup>th</sup> December).*

*When New Years Day, Anzac Day or Christmas Day falls on a Saturday or Sunday the next following Monday is also a public holiday and bank holiday.*

*When Boxing Day falls on a Saturday the next following Monday is also a public holiday and bank holiday.*

*When Boxing Day falls on a Sunday or Monday the next following Tuesday is also a public holiday and bank holiday.*

Unions NSW believes that the concept in both the WA and Vic legislation is an appropriate way to deal with any public holidays that fall on a Saturday or Sunday. The legislation automatically allows for the creation of an additional day on the Monday and/or Tuesday after such day.

Unions NSW and affiliates believe that the above 2 Acts that allow for additional days is the most appropriate way for dealing with public holidays that fall on a Saturday and/or Sunday. Further, it is the recommendation of the Unions that all public holidays which may fall on a Saturday and/or Sunday have an additional day legislated on the Monday and/or Tuesday.

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?

Unions NSW and affiliates support the permanent inclusion of the Queen's Birthday and the Labour Day holiday into the Bank and Bank Holidays Act. They are widely considered to be public holidays and form part of the general community standard (and expectations) regarding public holidays.

Of particular concern is that Labour Day is not a public holiday under the Act. It is the practice of the Governor to proclaim such a public holiday pursuant to Section 19 of the Act each year. Such proclamation has occurred each year, thus creating the community standard and expectation of such public holiday each year. The practice of proclamation by the Governor on the advice of the Government needs to be remedied, so that the day is part of the legislated entitlements under the Act.

By fixing such days in the legislation it will provide certainty for employees as well as business for the coming years.

It is the recommendation of the Unions that the most appropriate dates to be legislated are those that reflect current practice and have been traditionally observed in recent years; i.e.

Queen' Birthday – Second Monday in June of each year

Labour Day – First Monday in October of each year

The dates should not be altered to be in line with the celebration of these events in other states for two important reasons. Firstly, there are no common dates throughout the states for the celebration of these holidays; they vary from State to State. Secondly, these public holidays in June and October allow for a more even spread of public holidays throughout the year.

Further, if we were to celebrate the Queen's birthday on the actual day of her Majesty's birthday does this mean that when we have a new Sovereign at some point in time in the future, that such public holiday will be changed? Unions NSW submit that this would not provide certainty to employees and business and therefore such day as outlined above should be fixed in the legislation.

For the above reasons we recommend that the public holidays of the Queen’s Birthday and Labour Day be enshrined in the legislation as set out above.

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

Local public holidays were introduced in the Act on the 22 November 1899. The Act was at that time, amended to allow gazetting of days in regional areas. Since their introduction 110 years ago they have played an important part of our social and community life.

Unions NSW and its affiliates submit that local public holidays, are important fixtures in many local community calendars. Local public holidays are generally proclaimed at a time when a community event is scheduled.

Unions NSW suggests that local areas benefit from community events by boosting the local economies, regional tourism and jobs, thus emphasising the importance of local public holidays on such days which enables members of the community to take part in such events and socialise with family and friends. Local public holidays promote social inclusion and help build communities.

Whilst we do not seek to disturb the current arrangements for choosing and proclaiming local public holidays, we believe that the current arrangements should 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 and spend time with family and friends at such local community events.

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

Unions NSW and its affiliates believe that the August Bank Holiday should be retained as a “close bank holiday” in NSW. If the August Bank Holiday were not to be retained as a ‘close bank holiday’ then employees within the banking sector and a number of related industries would lose their present entitlement to a day off. Such an outcome would be contrary to the ministerial request that the number of holidays not be reduced.

There is no meaningful evidence that the August Bank Holiday has had a detrimental effect on the success of NSW banks or their ability to effectively compete in the NSW banking market. Banks in Australia are some of the most profitable in the world. Sydney is the hub of the Australian banking system with most licensed banks being headquartered here including our two largest banks, the Commonwealth and Westpac. All nationally operating banks have some presence in the NSW market. While observing the first Monday in August as a closed bank holiday throughout NSW, our largest banks have achieved very high market share and productivity, with average cost to income ratios at or near 40%. This is world’s best practice in economic terms and makes Australia’s banks among the strongest in the world.

Outside the submissions of some of the banks themselves, there is no discernable strong public or consumer led pressure for the abolition of the August Bank Holiday. The developments in electronic banking, such as ATM’s, EFTPOS, phone and internet banking have meant that less than 10% of all banking transaction are now branch based and the community is well served with access to banking services 24x7.

Unions NSW submits that the argument that the major banks are not providing competitive service is not reflected in their ever increasing share of the banking market. Since the onset of the global financial crisis it has been estimated that the market share of the big four banks (ANZ, CBA, NAB and Westpac) has increased from 80% to almost total domination at 92% of the available market. (Skynews.com.au 21/07/09).

There is community expectation that banks will be closed on public holidays and bank holidays. Abolition of the August Bank Holiday would have a detrimental effect on tourism and hospitality in NSW as the first Monday in August is one of only two winter long weekends in the calendar (with

Queen's Birthday in June). The Bank Holiday weekend is in the middle of the official ski season with benefits to regional tourism throughout NSW and Sydney has a metropolitan race meeting held at Randwick every Bank Holiday Monday.

The August Bank Holiday is immaterial to the continued success in the market place of our banks but the abolition of it would be a serious erosion of the rights and entitlements of bank employees with no compensation given that the Commonwealth has almost complete jurisdiction over the industrial entitlements of employees in the banking sector through the Fair Work Act and that Act has no mechanism for compensating employees on an industry wide basis for the loss of the bank holiday. If the holiday was abolished, employees in the sector would be forced to seek compensation through the enterprise bargaining process. This would necessarily result in a variety of outcomes over a period of time with no requirement on the banks to agree to anything in the process. Unions NSW believes that the enterprise based bargaining system is not a satisfactory vehicle to provide equity in the circumstances where a holiday was removed from an entire industry.

Unions NSW Supports the position of the FSU in its submission to the Bank and Bank Holiday Review.

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?

Unions NSW and its affiliates submit that the Saturday and Sunday 'close bank holiday' not be repealed, and submits that the present arrangement for granting permits to open on weekends should be retained. Unions NSW relies upon and supports the written submissions of the FSU in these matters. Unions NSW submits that the current ability of the FSU, as the relevant industrial organisation with standing to challenge exemption licenses on the basis of "public interest" is an essential part of maintaining protections for employees within bank branches, which as the June discussion paper states are predominantly working women with families. The mechanism for review is an essential safety net that must be retained.

As is articulated in the June discussion paper, every large bank – including all 4 pillars, have applied and have been granted weekend trading exemptions by the Director General of the Department of Commerce. The application process is not onerous and for the most part is non-controversial. Present provision of Schedule 6 of the BBHA do however allow for review of the decision of the Director General through administrative review. The test for the provision is that of whether such a licence would be in the public interest.

Presently the FSU as the organisation entitled to represent employee who work in Banks has standing as under Schedule 6 of the Bank and Bank Holidays Act 1912 to call for review of decisions made by the Director General. The key test is whether the licence and its conditions are in the "public interest." Since the inception of the current arrangements in 2001, in all but one instance banks have been able to satisfy the public interest test after making specific arrangements to protect the interests of those employed or engaged in the banks in question.

The one exception to this process was when the FSU recently challenged the granting of an unrestricted license to the Commonwealth Bank of Australia (CBA). In that case, the employees who were to be impacted were predominantly women and many of them were employed upon AWA's which removed their ability to only "voluntarily" work on weekends and gave the bank complete

prerogative to set and alter working hours with no recourse to an effective independent disputes resolution process. The AWA's also removed the entitlement to penalty rates either in the form of weekend loadings or overtime. In that matter, where the FSu produced evidence or coercion by the CBA to force staff to work weekends against their will, the Administrative Review Tribunal found that the protection of the public interest was best served by placing a condition on the CBA's weekend license that ensured that all labour was performed on a voluntary basis with informed consent from the bank employees involved.. The maintenance of the current licensing regime is an essential aspect of our community's ability to ensure that banking services are available at the times there is consumer demand while preserving the capacity for those who deliver those services to balance work and family commitments.

## **Additional Matters to be Considered in the Review**

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### **Loss of Union Picnic Day as a Public Holiday**

As discussed earlier in this submission and in the Discussion Paper, many employees in NSW have lost the entitlement to an 11<sup>th</sup> public holiday following the introduction of the Workchoices legislation in 2005.

Further, the Fair Work Act through the National Employment Standards and award modernisation process does not remedy the loss of such an important community standard in NSW. Union picnic day was a traditional award based entitlement that was not legislated through the Bank and Bank Holidays Act, as there was never a reason to as most employees in NSW were award reliant, or they were bound by enterprise agreements which relied upon the Common rule award. Thus the 11<sup>th</sup> public holiday was enjoyed by all in the Community until 14 December 2005 when Workchoices came into effect.

The issue of the loss of the 11<sup>th</sup> public holiday was acknowledged by the former Federal Workplace Relations Minister, The Honourable Kevin Andrews in 2006. He claimed that states who gazetted extra holidays to compensate workers who lost a day's holiday under the WRA would damage the nation's productivity.<sup>2</sup> No evidence was presented to support this claim and no evidence of any increase to national productivity attributable to the loss of the 11<sup>th</sup> NSW public holiday has been produced. In fact the evidence is to the contrary with Griffith University's Professor David Peetz reporting in 2007 that, in relation to the impact of Workchoices on productivity, "Productivity has fallen - so far there is no positive impact on productivity due to WorkChoices and there is a chance that the effect will be negative."(ABC News online Tuesday, February 13, 2007. 7:41am (AEDT)

Such lost entitlement enjoyed by NSW employee's needs to be remedied.

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<sup>2</sup> Minister issues public holidays warning April 12, 2006 - 1:53PM AAP on smh.com.au

### **Building and Construction Industry – an example.**

Industry Union Picnic days have been a feature of many industries. In the building and construction industry, the building industry unions organise a family picnic day which occurs on the first Monday in December.

This picnic has been organised by the building industry unions on the first Monday in December continuously since at least 1963, following the February 8<sup>th</sup> 1963 decision of The President His Honour Justice Taylor in the *Carpenters and Joiners and Bricklayers, Construction (State) Award* that established the annual picnic day as an award right. This provision was then flowed onto the rest of the relevant construction industry Awards.

For those workers covered by the CFMEU, the picnic currently consists of a number of events around NSW. Two events are held in the Sydney Metro area at Luna Park and Taronga Zoo. A Wollongong based event is held at Jamberoo Action Park. A picnic is held in Newcastle, Tweed Heads and members organise their own family picnics in various regional centres around NSW.

Approximately 30,000 people per year have attended the picnic days in the last two years which are the largest of their kind in Australia.

The picnic day is a truly significant cultural event in this industry. Given the itinerant and dynamic nature of this industry these events give workers in the industry a rare opportunity to socialise with their workmates and their families.

It is understood that the reason the first Monday in December was chosen is that the first half of the year has the majority of the years' public holidays, thus putting it in December gave workers the picnic two months after the previous public holiday the Labour Day Public Holiday in October. Also the average weather conditions in early summer are conducive to holding a picnic.

The CFMEU expects that thousands of workers will again participate in picnic day events.

In NSW, the entitlement is protected under awards, such as *Building and Construction Industry (State) Award*. In that award, the clause 36.2 provides

In addition to the holidays prescribed in subclause 36.1 of this clause, an additional public holiday shall apply to employees in the manner set out below. Provided that an employer whose business is situated near a State or Territory border and whose operations traverse the border may elect to follow a particular State or Territory's public holidays, subject to agreement with the employees and/or their nominated representative (where applicable).

(i) The first Monday in December of each year shall be the industry picnic day.

(ii) All employees shall, as far as practicable, be given and shall take this day as industry picnic day without deduction of pay. Any employee required to work on this day shall be paid at the rate of double time and one-half for all time worked. Provided that an employee who attends for work as required on this day shall be paid for not less than four hours' work.

(iii) An employer may require from an employee evidence of her or his attendance at the industry picnic and the production of the butt of an industry picnic ticket issued for the industry picnic shall be sufficient evidence of such attendance. Where such evidence is requested by the employer payment need not be made unless evidence is produced.

(iv) Where an employer holds a regular picnic for their employees on some other working day during the year such day may be given and may be taken as the industry picnic day in lieu of the industry picnic day here fixed.

(v) This clause shall apply to employees working within the Counties of Cumberland, Northumberland and Camden and in such other areas where an industry picnic is organised in the industry.

Similar provisions apply, by common rule in the Building Employees Mixed Industries (State) Award, the Glass Workers' (State) Award, the Joiners (State) Award, the Plant, &c., Operators on Construction (State) Award, the Building Crane Drivers (State) Award, Engine Drivers & c., General (State) Award and Plasterers, Shop Hands and Casters (State) Consolidated Award.

The introduction of [Workplace Relations Amendment \(Work Choices\) Act 2005](#) rendered picnic days in Federal awards “not allowable award matters” (see s515(i) of the *Workplace Relations Act 1996*). This for all employees covered by Federal Awards, provision for an additional day for Union picnic day, was abolished.

With the introduction of the *Fair Work Act* 2009 and the National Employment Standards this loss can be rectified by the NSW State Government. This can be accomplished for all employees in NSW who had previously the benefit of a union/industry picnic day, by legislating for another day to replace the lost public holiday – Union Picnic Day.

The National Employment Standards, Chapter 2, Part 2-3, Division 10 of the Fair Work Act provides that:

#### **Division 10—Public holidays**

##### 114 Entitlement to be absent from employment on public holiday

###### *Employee entitled to be absent on public holiday*

- (1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

###### *Reasonable requests to work on public holidays*

- (2) However, an employer may request an employee to work on a public holiday if the request is reasonable.
- (3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
  - (a) the request is not reasonable; or
  - (b) the refusal is reasonable.
- (4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
  - (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
  - (b) the employee's personal circumstances, including family responsibilities;
  - (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
  - (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;

- (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);
- (f) the amount of notice in advance of the public holiday given by the employer when making the request;
- (g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;
- (h) any other relevant matter.

#### 115 Meaning of *public holiday*

##### *The public holidays*

- (1) The following are *public holidays*:
  - (a) each of these days:
    - (i) 1 January (New Year’s Day);
    - (ii) 26 January (Australia Day);
    - (iii) Good Friday;
    - (iv) Easter Monday;
    - (v) 25 April (Anzac Day);
    - (vi) the Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);
    - (vii) 25 December (Christmas Day);
    - (viii) 26 December (Boxing Day);
  - (b) 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, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

##### *Substituted public holidays under State or Territory laws*

- (2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the *public holiday*.

*Substituted public holidays under modern awards and enterprise agreements*

- (3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

*Substituted public holidays for award/agreement free employees*

- (4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

#### 116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

Crucially, the National Employment standards, in the definition of "public holiday" recognises as a minimum standard, at section 115. The *Fair Work Regulations* 2009 do not exclude any day from counting as a public holiday.

In its decision in the *Shop Employees (State) Award* [2006] NSW IR Comm 5, the Full Bench of the NSW IRC acknowledged and accepted that majority of Awards of the Commission entitled employees

to 11 holidays per year.

The inclusion of the Union Picnic day into the legislative framework of the Bank and Bank Holidays Act 1912, would simply rectify the lost public holiday for all NSW workers following the introduction of Workchoices in 2005.

As to the appropriate day to be chosen for Union Picnic Day to be legislated in the Bank and Bank Holidays Act, the Unions would recommend that further discussions occur between the NSW Government and the NSW Union movement.

### **Interaction between the Shop Trading Act and the Bank and Bank Holidays Act**

Unions NSW supports and notes the submissions of the Shop, Distributive and Allied Employees' Association New South Wales Branch and the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales to this inquiry regarding the Shop Trading Act 2008.