



51 Walker Street,
North Sydney NSW 2060
Australia

ABN 76 369 958 788

Tel: 02 9466 5566
Fax: 02 9466 5599

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

By email: review@oir.commerce.nsw.gov.au

Dear Professor Riley

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

Ai Group welcomes the opportunity to provide input in relation to the Review of the *Bank and Bank Holidays Act 1912* (NSW) (“the Act”). The Review represents an excellent opportunity to modernise arrangements for public holidays in NSW and provide greater certainty about their interaction with the *Fair Work Act 2009* (Cth) (“FW Act”).

Ai Group has previously made representations to the NSW Government addressing our issues and concerns regarding the operation of the Act and arrangements for declaring public holidays in NSW. Ai Group appreciates the Government’s preparedness to consider appropriate options for resolving these issues.

Modern legislation for public holidays

Ai Group supports the preliminary view in the Discussion Paper that special legislation dealing with public holidays should be enacted. We submit that modern legislation dealing with public holidays should:

- recognise the interaction between days proclaimed as public holidays under State legislation and entitlements to public holidays under federal legislation in respect of national system employees; and
- clarify the significance of public holidays for non-national system employees, in terms of whether, or in what circumstances, employees are entitled to a paid holiday on that day.

The modern legislation should also take into account distinctions between different groups of employees (for example, national system employees and State system employees, and those which are covered by awards/agreements and those which are not). The operation of the arrangements for the different groups of employees should be clear.

The Discussion Paper notes (on page 5) that in announcing the Review, the Minister for Industrial Relations, the Hon John Hatzistergos, stated that there was no intention to reduce or increase the number of public holidays. Ai Group has no difficulties with this proposition but the Review should, in our view, make clear that the number of public holidays can vary between individuals, or from year to year. The Review should not be used as a means for entrenching Newcastle Show Day (for example) as a public holiday which cannot be the subject of sensible negotiation between employers and employees. The problem of Newcastle Show Day is considered in more detail later in these submissions.

Questions for the Review identified in the Discussion Paper

Ai Group provides the following responses in relation to “Questions for the Review” identified in the Discussion Paper. Only those questions with which our members have an interest are addressed.

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

The first issue identified in the Discussion Paper (on page 17) is what arrangements should be made when:

- a public holiday falls on a Saturday or Sunday, and whether the Monday should be an additional or a substituted public holiday;
- more than one public holiday falls on the same day.

In regards to the first point above, Ai Group’s view is that State legislation should not mandate or enable “additional” public holidays to be created. Where an applicable award or agreement provides for penalty rates, the effect is that the business is required to pay public holiday penalty rates on two days rather than one. This creates additional costs for businesses, which is of particular significance for businesses operating on a 7 day week basis.

The National Employment Standards (NES), contained in the FW Act, which will operate from 1 January 2010, expressly provide that where a substitute day is declared by or under a State or Territory law, the substitute day is the public holiday (s 115(2)). It would appear to be contrary to the policy represented by this subsection for an arrangement to be made at the State level to establish additional public holidays for the celebration of the named public holidays in the Act.

Certainly, the creation of “additional” public holidays where a public holiday falls on a weekend may be an issue for enterprise bargaining, contracts of employment or informal workplace arrangements.

In regards to whether public holidays should be substituted, Ai Group is not opposed to substitute days where this is consistent with established arrangements. However, it is not necessary in the case of every public holiday falling on a weekend to substitute an alternative day. The Discussion Paper notes that it is not customary in respect of every public holiday falling on a weekend to declare an alternate day. Ai Group’s view is that such public holidays should only be substituted where it is customary to do so.

As indicated above, the Discussion Paper raises the issue about the approach to be taken in the unusual circumstance where more than one public holiday falls on the same day, as in the case of Anzac Day and Easter Monday in 2011. Ai Group's concern with substituting another day where this occurs is that it will result in the clustering of public holidays around the same time (unless a substitute day was declared some weeks or months apart, which is unlikely to be acceptable in most cases), which poses an issue for business productivity. In general, public holidays should be spread as evenly as possible throughout the year to minimise business disruption whilst ensuring the opportunity for employees to celebrate or seek respite. Where the decision is made to substitute a public holiday in these circumstances, arrangements for substituting should be made well in advance and appropriate steps taken to communicate the decision to businesses.

2. The Queen's Birthday and Labour Day

The second issue identified in the Discussion Paper (page 19) is whether the Queen's Birthday and Labour Day holidays should be fixed by a provision in the legislation, rather than be left to annual proclamation in the Gazette, and which dates are the most appropriate dates for celebration of these holidays.

It may be preferable for the dates (or arrangements for how dates will be worked out) to be fixed by legislation, to provide certainty for employers and employees from year to year. However, the issue may not be of great relevance in practice as the same day has generally been proclaimed for these public holidays each year in NSW, namely, the second Monday in June each year (for the Queen's Birthday) and the first Monday in October (for Labour Day).

The current days for celebrating these public holidays appear appropriate as well given that they effectively spread the public holidays in NSW throughout the year. Ai Group notes that in some States, Labour Day is celebrated in early March, which generally causes greater disruption, given that it may coincide with the Easter public holidays and falls relatively close to the Anzac Day public holiday.

3. Local public holidays and half-holidays

An issue of great concern to Ai Group members at present in regards to public holidays in NSW is the effect of appointing local holidays (specifically the Newcastle Show Day) under the Act. This has been the subject of previous representations by Ron Baragry, Legal Counsel, Ai Group, to the Office of Industrial Relations.

In 2007 and 2008, Newcastle Show Day was appointed as a local public holiday in the Newcastle and Lake Macquarie City Council areas. As set out in the Discussion Paper (page 12), this resulted in an additional public holiday for many employees to which they had not previously been entitled. National system employees within those areas became entitled to a day off (or a right to reasonably refuse to work) as a result of the *Workplace Relations Act 1996* (Cth) ("WR Act") or, if they worked on that day, to penalty rates where such were provided under an applicable award or agreement (for example, under the *Metal, Engineering and Associated Industries Award 1998* and the *Clerical and Administrative Employees (State) Award* [operating as a NAPSA]). There were also consequences for State system employees.

The decision to appoint Newcastle Show Day as a local public holiday gave rise to particular unfairness to the many businesses in the affected areas which have workplace agreements which already provide for 11 public holidays. In a number of cases, the effect was to confer a 12th public holiday where it had not previously existed. The date declared for Newcastle Show Day in 2008 and 2009 has been close in time to the Easter public

holidays and Anzac Day, exacerbating the impact on business productivity. Greater lead time between the decision to declare the day as a local public holiday and when the public holidays will occur would also be of assistance in forward planning.

In principle, Ai Group is not opposed to the existence of a mechanism in State legislation to enable the proclamation of local public holidays. However, Ai Group is concerned to ensure that any such power is used with full recognition of the implications under federal legislation. On the authority of the decision of the Chief Industrial Magistrate in *Trunk v Waratah Engineering Pty Ltd* (7 October 2008, unreported), when a regional public holiday is proclaimed under the Act, then that gives rise to an entitlement for national system employees to the right to reasonably refuse to work, and to be paid where they do not work (under s 611(b) and s 612 of the WR Act). Furthermore, because of s 612(4) of the WR Act, it is not possible for employers and employees to bargain away an entitlement to a day off on a local public holiday, whether through an enterprise agreement or otherwise.

As is evident from the Office of Industrial Relations' website, the Government's intention in appointing Newcastle Show Day as a local public holiday was to give rise to a right of paid absence (or penalty rates in lieu) on the local public holiday only in respect of employees covered by an award or agreement which expressly provides for such rights or entitlements. As the *Trunk* Case made clear, this unfortunately was not the effect.

Ai Group does not have any difficulty with the Government's stated intention behind appointing Newcastle Show Day. The issue however is that the current practice, in combination with federal legislation, is giving rise to new entitlements which did not previously exist.

It is understood that the types of employees who have historically enjoyed Newcastle Show Day as an eleventh public holiday include school teachers, Local Council employees and employees of State instrumentalities. Many of these employees would appear to be covered by the State system, and it may be that the least problematic approach would be for legislation to enable public holidays to be declared only in relation to such employees. An alternative and less formal option would be for employers to voluntarily continue the practice of recognising a day for Newcastle Show Day, without the need for a public holiday to be declared on that day. In the case of State government employees, this could easily be achieved by the Government issuing an internal directive or policy, without the need for the day to be declared.

The extent to which employees who are now in the national system have traditionally been entitled to Newcastle Show Day is not clear. Assuming that some groups of employees do exist, the means by which a State could declare a local public holiday which would only have effect in relation to limited groups of employees within the region is unclear. On the one hand, a day declared as a local public holiday only to be enjoyed by those which have that entitlement under a relevant federal instrument would not appear to meet the definition of being a day "observed generally" in the region (see s 611(b) of the WR Act). If this is correct, no entitlement to the day under federal legislation would arise for national system employees in the region. It would be necessary to examine the terms of relevant federal instruments to see whether a declaration in these terms would be effective to be recognised as a public holiday for the purpose of entitlements under that instrument.

Local holidays and half-holidays under the NES

There is a further issue regarding the interaction with Federal legislation to which, in our view, particular attention must be had.

Under the WR Act, only full day holidays are recognised. Part day holidays, which include the majority of local show days, are not recognised, although they may be recognised in industrial instruments or under contract of employment or informal arrangements.

However, as part of the NES that will operate from 1 January 2010, employees will be entitled to a paid day off on any part day holiday declared by or under State law (see s 115(1)(b) of the FW Act). This would include local show days where they are “observed generally” in a region of the State.

The vast majority of local show days declared in NSW are part day public holidays. If the Government continues the practice of declaring part day local show days into next year, it will result in a right of employees in the relevant area to a paid day off (or to reasonably refuse to work). Furthermore, most modern awards adopt the definition of public holidays from the NES, and most apply penalty rates for work done on such days. For many employees, this will give rise to a new entitlement and will expand the number of public holidays to which they have traditionally been entitled.

For these reasons, Ai Group would urge the Government to consider confining the declaration of part day show days to State system employees from 1 January 2010, as continuing with current practice would have great significance under federal legislation and modern awards.

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

We look forward to the release of the Options Paper in due course.

Yours sincerely

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

Mark Goodsell
Director – NSW
Australian Industry Group