

20 July 2017

Associate to Vice President Hatcher
Fair Work Commission
80 William Street
East Sydney NSW 2011

By email: chambers.hatcher.vp@fwc.gov.au

ABN 76 486 092 631

Contact

Tim McDonald
Partner
tmcdonald@moray.com.au

Partner

Tim McDonald

Our reference

TDM:343877

Dear Associate

AM2014/301 – Public Holidays Common Issue

1. We advise that Clubs Australia (Industrial) ('CAI') no longer presses its proposal in relation to limiting the number of holidays under the Registered and Licensed Clubs Award ('the Award'). It does so in light of the findings of the Full Bench that '*the NES governs the question of the number of public holidays to which employees should be entitled*'¹
2. CAI continues to press, however, to vary the Award for the removal of clause 34.3(a) and (b) and to clarify the operation of the Christmas Day loading at clause 29.3(c). The amended draft determination sought by CAI is **attached**.
3. We also **attach** the Second Reading Speech for the *Public Holidays Bill* 2010 (NSW) to which we will refer in submissions.

Yours faithfully
MORAY & AGNEW



¹ *Penalty Rates Decision* [2017] FWCFB 1001 at [1959]

**AMENDED DRAFT DETERMINATION
CHANGES SOUGHT TO THE PUBLIC HOLIDAY PROVISIONS OF THE REGISTERED AND
LICENSED AWARD 2010**

1. Vary clause 29.3(c) to add the words in italics as follows:
 - (c) An employee other than a casual working on Christmas Day when it falls on a weekend, *and is not prescribed as a public holiday under the NES*, will be paid an additional loading of 50% of their applicable ordinary hourly rate for the hours worked on that day and will also be entitled to the benefit of a substitute day.

2. Vary clause 34.3 to delete (a) and (b) as follows:
 34. **Public holidays**
 - 34.1 Public holidays are provided for in the NES.
 - 34.2 By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday instead of any of the days prescribed in s.115 of the Act.
 - 34.3 **Additional arrangements for full-time employees**
 - (a) ~~A full-time employee whose rostered day off falls on a public holiday must, subject to clause 29.3:~~
 - (i) ~~be paid an extra day's pay;~~
 - (ii) ~~be provided with an alternative day off within 28 days; or~~
 - (iii) ~~receive an additional day's annual leave.~~
 - (b) ~~Clause 34.3(a) does not apply in relation to Easter Saturday, if employees have their ordinary hours rostered only on Monday to Friday.~~
 - (e) A full-time employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day.

**SHOP TRADING AMENDMENT BILL 2010
PUBLIC HOLIDAYS BILL 2010**

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Second Readings

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [6.11 p.m.], on behalf of the Hon. John Robertson: I move:

That these bills be now read a second time.

The amendment to the Public Holidays Bill 2010 in the other place is designed to do no more than preserve the well-publicised and relied upon proclamation of Monday 3 January 2011 as a public holiday, in addition to the New Year's Day holiday on Saturday 1 January. The intention of this amendment is to make clear that despite the repeal of the Banks and Bank Holidays Act 1912, Monday 3 January 2011 will still be a public holiday. The Government would like also to reiterate that the Sydney Trading Precinct in the Shop Trading Amendment Bill is never intended to be extended beyond its original boundaries as it encompasses all those areas that have traditionally traded on Boxing Day in Sydney. The precinct is designed to ensure that those areas in and directly around the central business district are able to trade without the yearly confusion that had surrounded previous Boxing Day sales. Further, it is worth noting that it is not the intent of the Shop Trading Act that the Sydney Trading Precinct would ever extend to metropolitan centres such as those found at Parramatta, Chatswood, Burwood, North Ryde or Miranda. I seek leave to incorporate the remainder of my second reading speech in *Hansard*.

Leave granted.

I rise today to seek agreement to two related bills:

- the Public Holidays Bill 2010 and
- the Shop Trading Amendment Bill 2010.

Although public holidays and shop trading are distinct issues dealt with by separate Acts of Parliament, there is some overlap between each policy issue.

This is because the days that are restricted trading days are by and large public holidays also.

Further, concerns about the operation of both public holiday and shop trading legislation have been recently raised by a number of parties in New South Wales.

On this basis, proposals for amendment have been developed together and are now presented to Parliament as package of proposals for consideration.

PUBLIC HOLIDAYS

I will deal firstly with the Public Holidays bill 2010 which will ensure the modern, clear and consistent determination of public holidays in New South Wales.

In 2009 the New South Wales Government commissioned a review by Professor Joellen Riley into the *Banks and Bank Holidays Act 1912*, requesting that the Professor provide a report and recommend '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'.

While the 1912 Act's primary concern was bank trading hours it also became the means by which workers in New South Wales came to enjoy the benefit of public holidays. This was largely because industrial awards, and later enterprise agreements, adopted the nomination of 'bank holidays' under the Act as days upon which workers were entitled to paid days off or penalty rates.

This adaptation of the Act has operated well enough through most of the century since its enactment. However, the commencement of the Howard Government's Work Choices legislation in 2006 and the forcible transfer of many New South Wales businesses and their workers into the Commonwealth workplace relations system caused widespread confusion about how the State public holiday scheme interacted with new industrial rights and obligations under Commonwealth law.

The commencement of new public holiday entitlements on 1 January 2010, as part of the *Fair Work Act's* National Employment Standards, coupled with the progressive relaxation of restrictions on trading by banks, provides an

opportune time for New South Wales to reassess and clarify the operation and effect of its public holiday regime.

To ensure any new scheme reflects community expectations, a full independent review of public and bank holidays was undertaken by Professor Joellen Riley from the University of Sydney between May and October 2009.

To effectively gauge the views of the community, Professor Riley released a Discussion Paper and later an Options Paper. A total of 49 public submissions were received in response. A further 222 submissions were received from members of the public, primarily those who work in the retail and banking sectors in New South Wales, indicating how widely and deeply the issue of public holidays is felt in the community.

Professor Riley also met with a number of organisations during two rounds of consultations.

I would like to thank Professor Riley for her efforts in undertaking the review and providing a comprehensive report of her findings to the New South Wales Government.

The primary purpose of the Public Holidays bill 2010 is to make predictable and transparent, the provisions identifying days of cultural, social and religious significance to the New South Wales community.

While the clear and certain identification of the days that are public holidays in this State will assist employers and employees to understand when and how various rights and duties attaching to public holidays will arise, it is essential to emphasise that the State's power over public holidays is limited to only providing for the days on which they occur.

The Fair Work Act 2009 makes it very clear that providing for the rights and obligations of employers and employees is not a matter that State law can deal with. The industrial consequences of public holidays are matters dealt with under the Fair Work Act—both under the National Employment Standard relating to public holidays, and under modern awards and enterprise agreements made under that Act.

Given that the focus of this bill is on public holidays, the provisions of the *Banks and Bank Holidays Act* relating to the requirement to keep banks closed on certain days will be transferred to the *Shop Trading Amendment Bill 2010*, which I will address after I have provided members with an overview of the intended operation and effect of this Public Holidays bill.

Public holidays are recognised throughout the world as days of commemoration and celebration.

The practice in New South Wales is to recognise six periods, encompassing 10 days, of such significance each year to warrant observation with public holidays. Apart from the Christmas/New Year and Easter periods where several holidays are recognised, each within a period of one week, there are 4 single day occasions, Australia Day, Anzac Day, Queen's Birthday and Labour Day that are interspersed throughout the calendar year.

Under this bill, the Government will ensure the most important occasions for a holiday will be observed on whichever day of the week they occur—including a Sunday. This will apply to Sunday occurrences of Christmas and Boxing Day, New Year's and Anzac Days and Easter Sunday.

The fact that Easter Sunday is not currently a holiday may come as a surprise to many in the community who work in businesses that never operate on Sundays. The current public holiday law was passed in times before the liberalisation of Sunday trading, when it was assumed business would not be conducted on a Sunday.

Apart from the requirement for general shops to remain closed on a Sunday that from time to time is also Christmas Day, Boxing Day, Anzac Day or at Easter, contemporary working patterns have resulted in Sundays routinely becoming ordinary working days in various industries, particularly the services sector, public transport and emergency workers, and hospital staff and the like.

In conducting her review Professor Riley received many submissions on the impact on family life of the inability of some workers in the services sector to access the long break for Easter available to so many other workers.

It is clear that the absence of public holiday status for Easter Sunday and indeed, a Sunday occurring Anzac Day, Christmas Day and New Year's Day, is a historical anomaly.

The current legislation dictates that Sunday occurrences of named holidays are automatically substituted to the next available weekday—usually the Monday.

In recognition of the importance of traditional family celebrations over the Christmas—New Year period, Christmas Day, Boxing Day and New Year's Day will, from 2012, be recognised as a holiday whenever coinciding with a Sunday. The customary practice of providing a subsequent week day holiday for such occasions will be retained to ensure all workers enjoy the benefit of a holiday on those occasions.

It has also been long standing practice to grant an additional day when Christmas Day falls on a Saturday. A similar approach was applied to Saturday occurring Boxing Days on six of eight occasions since 1959 and to eight occasions since 1955 for New Year's Day. That customary practice will be retained in the new legislation.

In practice, that will mean that, from 2012, when Christmas Day falls on a Saturday or Sunday that day will be a holiday as will the following Monday or Tuesday respectively. Similarly when Boxing Day falls on a Saturday or Sunday that day will be a holiday as will the following Monday or Tuesday respectively.

The bill proposes a 12 month period before new practice regarding the addition or substitution of weekend occurrences of standard holidays. A new schedule of standard public holidays is programmed to commence on 31 December 2011.

The first weekend occurrence of a standard public holiday will be the following day, 1 January 2012 which is a Sunday. Both the Sunday and following Monday will be public holidays.

Boxing Day in 2015 coincides with a Saturday and under this bill, will result in an additional holiday on the following Monday.

The delayed commencement of the new practices means that for this forthcoming 2010/11 Christmas/New Year period, the public holidays will be as follows: Saturday 25 December, Monday 27 December, Tuesday 28 December, Saturday 1 January and Monday 3 January.

Members should note that only the actual Christmas Day and Boxing Day remain mandatory Bank Close Days without exception and a restricted trading day under the Shop Trading Act.

The new legislation will provide clarity and certainty so that all residents, workers and businesses in New South Wales know when public holidays will fall. This is a useful piece of law reform.

It ensures that employers and employees can prepare for their responsibilities and understand their obligations and entitlements about work on those days.

I now turn to detail the major provisions contained within this bill.

The enactment of this bill will mean that the *Banks and Bank Holidays Act 1912* will be repealed, to be replaced by a new Public Holidays Act 2010.

The bill at clause four, names eleven occasions to be observed by a public holiday in New South Wales. Apart from the Easter period in any given year, which is determined by reference to ecclesiastical tables, the bill fixes relevant occasions to the day of the year on which the holidays are to occur. Further, when certain of the holidays coincide with a Saturday or Sunday, the bill provides for an automatic additional or substitute day in the following week.

The eleven occasions are: New Years Day, Australia Day, Good Friday, Easter Saturday, Easter Sunday, Easter Monday, Anzac Day, the Queen's Birthday, Labour Day, Christmas Day and Boxing Day.

These days include the eight nominated days provided for under the relevant National Employment Standard. The extra days not specifically provided for in the National Employment Standard are Easter Saturday, Easter Sunday and Labour Day.

However, because the National Employment Standard recognises public holidays declared or prescribed under a State law to be observed generally as public holidays, the rights and obligations set out under the Standard will apply to all of these days.

Clause five of the bill provides procedures for the appointment by the Minister of an additional public holiday in a particular year for the whole or a specified part of the State. The Minister will be able to declare public holidays other than those specifically named, including a public holiday for a defined locality or region within the State. A recent example of such a day was the APEC public holiday for local Government areas within the greater Sydney region in 2007.

Clause Six of the Public Holidays Bill allows the Minister to substitute another day for any public holiday in a particular year.

To ensure consistency across the whole New South Wales workforce, clause seven of the bill proposes to apply, as laws of New South Wales, section 114 and section 116 of the Commonwealth *Fair Work Act 2009*.

This will mean that State industrial relations system employees will have the same rights to be absent with pay on a public holiday consistent with those employees under the national industrial relations system.

The extension of these particular public holiday entitlements under the Fair Work Act conforms to the principle of harmonising arrangements, where possible.

Clause 8 of the bill provides for the Minister to declare a local event day or part day in an area of the State at the request of the local council. This declaration does not confer the status of a public holiday to that occasion.

Since 2006, federal workplace relations laws have created obligations on all federal system employers in a region in which a public holiday is declared to allow their employees paid time off on those holidays and more recently under modern awards, penalty rates if work is undertaken on those occasions.

As revealed in the Riley review, federal law has disturbed customary practices in a way that has created considerable confusion and legal expense.

Many local and regional areas have traditionally observed whole or half day holidays specific to a particular region or community. While the proposed legislation will preserve the capacity of communities through consultation with their local councils to recognise those occasions with a public holiday, the introduction of local event days provides an option to return, as far as possible, the industrial arrangements for these occasions to that existing prior to 2006.

This legislation will provide for the declaration of certain days for local events (such as show days or race days) for certain localities, without calling them 'public holidays'. This prevents those days from attracting the rights and entitlements on public holidays that are provided for under the Fair Work Act. Where an enterprise agreement or

contract specifies employee rights to time off or penalties for the particular local event, those requirements will still apply.

Clause 12 provides for a review of the proposed Act, five years after the date of assent. This will ensure that the proposed Act remains relevant and does not wait another 98 years to be reviewed.

The legislation will maintain holiday declarations that are already in place for 2011. This includes appointed local holidays and the special arrangements for the coincidence next year of Anzac Day and Easter Monday agreed at the Council for the Australian Federation in 2008. Anzac Day will be commemorated on the Monday and the Easter Monday holiday will be observed on Tuesday 26 April.

Businesses in New South Wales will welcome this bill. This bill will provide all businesses and employers with the ability to plan with certainty.

That is, rather than having to wait until the proclamation of public holidays by the Governor, businesses will be able to reliably predict when public holidays will occur and when an additional or substitute day will apply.

Employees are protected under this bill. As I have already mentioned, employees will continue to enjoy customary public holidays and be able to plan their family and community activities with confidence.

This was not secured in New South Wales legislation until now. The community will benefit from this bill by continuing to enjoy the commemoration of public holidays.

This bill is good for business, good for employees and good for the community.

I feel this bill strikes the right balance.

It establishes a public holiday framework that provides businesses with predictability, employees with protections in employment and the community with an opportunity to share in days of celebration as well as family and community activities.

SHOP TRADING AMENDMENT BILL 2010

I now turn to the Shop Trading Amendment Bill which is being introduced together with the Public Holidays Bill.

The main purpose of this bill is to make amendments to the *Shop Trading Act 2008* to address a range of issues that have arisen with regard to its operation, particularly in relation to Boxing Day trading in the inner areas of Sydney.

The other major aspect of the bill is that it incorporates provisions about bank trading that were previously provided for in the Banks and Bank Holidays Act 1912.

As a result, the Shop Trading Act will be renamed the Retail Trading Act 2008.

Turning first to Boxing Day ...

Members will recall that under the *Shop Trading Act 2008*, four and a half days per year are named as being restricted trading days. These days are Good Friday, Easter Sunday, Anzac Day until 1 pm, Christmas Day and Boxing Day.

Last year, the Act was amended to clarify that an exemption for a shop to trade on any of these restricted days would not be granted unless the Director-General of the Department of Services, Technology and Administration was satisfied that it is in the exceptional circumstances of the case in the public interest to do so.

On this basis, very few exemptions have been granted under section 10 of the Act.

Shops are also permitted to trade on a restricted day if they have a relevant exemption that was made under the former *Shops and Industries Act 1962*. These exemptions were preserved under a special provision of the *Shop Trading Act 2008*.

In December 2009, a transitional regulation was made carrying forward the effect of a Ministerial Order made in 2007 which provided that Boxing Day trading was permitted for shops in an area called the Sydney commercial business district. This was consistent with the intention of the preservation provisions that exemptions under the old Act should be preserved.

However, that regulation was transitional in nature and it expired on 1 July 2010.

Thus, without amendment, the current State of the law would be that only those shops with specific exemptions, either preserved from the old Act or granted under section 10 of the 2008 Act, would be allowed to trade on Boxing Day 2010 (and in any year thereafter).

Given the 'exceptional circumstances' requirement of section 10 of the Act, it is likely that very few shops would be able to obtain future exemptions.

Members will be aware of the tradition that has developed of Boxing Day sales in the Sydney CBD and surrounding areas.

A range of actions including Ministerial orders such as the one made in 2007 and other orders and declarations made in

earlier years, the transitional regulation made in 2009, as well as specific shop exemptions, have led to the general practice of many shops in the CBD and surrounding areas opening on Boxing Day.

Boxing Day sales are a well-known and accepted feature of life in inner Sydney. Consumer expectation that these sales will continue is high.

On the basis of developed expectation and practice in relation to Boxing Day trading, the Government has decided that it is now time to put this matter beyond doubt and to provide for a new 'Sydney Trading Precinct', within which all shops that wish to open on Boxing Day will be free to do so.

This amendment in clause 5 of the bill will provide certainty to retailers, their employees and to the community at large about the right of shops within the new Precinct to open on Boxing Day and for the tradition of Boxing Day sales to continue.

The boundaries of the Precinct will be provided for by way of regulation. Schedule 2 of the bill sets out the provisions of that regulation, identifying the boundaries of the area within which Boxing Day trade will be permitted.

The regulation contains a map which clearly identifies the boundaries of the new Sydney Trading Precinct.

To provide maximum certainty and continuity, the boundary is the same as the boundary that was set out in the 2009 transitional regulation that I referred to earlier.

I emphasise that the provision only relates to Boxing Day and only relates to the area within the prescribed boundary.

Shops outside the Sydney Trading Precinct wishing to trade on Boxing Day will still be required to apply for an exemption under the Act.

And any shop within the Sydney Trading Precinct that wishes to trade on any other restricted trading day will also be required to apply for an exemption under section 10.

Before turning to the bank trading amendments, I wish to also advise members of the other shop trading elements of the bill.

Clause 6 of the bill seeks to clarify that nothing in the Liquor Act 2007, or in a packaged liquor licence under that Act, operates to exempt a shop from a requirement in the Shop Trading Act to be kept closed. This amendment gives legislative effect to the finding of the Supreme Court in *Chambers Pty Limited v State of New South Wales* ([2010] New South WalesSC 271) where it was held that a packaged liquor store had to apply for an exemption to open on a restricted day under the *Shop Trading Act*, notwithstanding any provisions of the *Liquor Act 2007*.

Of course, any packaged liquor stores within the Sydney Trading Precinct will, like other shops in that area, be able to open on Boxing Day.

Under clause 8 of the bill, the voluntary work conditions that already apply to any exemptions granted or preserved under the Act, will be extended to apply to employees in shops that are exempt from the Act. These include, but are not limited to, shops such as newsagents, chemists, take-away food outlets, restaurants and cafes, video shops and so on. Under the Act, these shops are not required to be kept closed on restricted trading days.

The Government feels that it is appropriate and equitable that the employees of these exempt shops, like the employees of shops that have to apply for an exemption, should be able to 'freely elect' whether to work on a restricted trading day. Restricted trading days are generally days of celebration on which many employees prefer to spend time with their friends and family. Staff who want to work on such a day will of course be able to 'freely elect' to work.

This right will not, however, be extended to the employees of small shops. Small shops are basically shops with four or fewer employees. It would be unrealistic for small shop keepers to find alternative staff if their employees chose not to work on a restricted day. The amendment represents an appropriate balance between ensuring that as many employees as is reasonable are able to 'freely elect' whether to work on a restricted day, with the right of small shops to open and continue to provide the community with essentials like bread and milk and other basics.

Clause 10 of the bill will allow an industrial organisation of employees that has members who are employed or engaged in shops to apply to the Administrative Decisions Tribunal for reviews of decisions relating to exemptions granted under the *Shop Trading Act*. At present, that organisation would of course be the Shop, Distributive and Allied Employees' Association New South Wales.

This amendment would bring the rights of this union into line with the rights of the union representing workers in banks and other financial institutions, that is the Finance Sector Union, under the bank trading provisions that have been in place under the *Banks and Bank Holidays Act* for some years.

Clause 14 specifies further circumstances in which shops are taken not to be closed. Shops will not be able to call their staff in to undertake the receipt, unpacking or other preparation of goods for sale, or stocktaking in respect of goods for sale, on days that are restricted trading days. This addresses a not-uncommon practice that is of great concern as it amounts to an evasion of the right of shop employees to not work on a restricted trading day unless the shop has an exemption under the Act.

Finally, clause 16 of the bill provides that compensation is not payable by or on behalf of the State arising from certain matters relating to the operation of the Principal Act.

As noted earlier, the other significant change proposed by this bill is the movement of the bank trading provisions that have been a part of the *Banks and Bank Holidays Act 1912* for many years to the *Shop Trading Act 2008*, which will, as a consequence of that movement, be renamed the *Retail Trading Act 2008*.

This change arises out of the Government's response to the review of the *Banks and Bank Holidays Act 1912* undertaken by Professor Riley in 2009, about which I have spoken earlier. That review provided an opportunity to consider the best location for the bank trading provisions.

Therefore, while the Public Holidays Bill will provide for public holidays, the new *Retail Trading Act 2008* will provide for retail trading by both shops and banks.

This is logical and rational.

The broad scheme of the bank trading provisions remains similar to what it was when the provisions were located in the *Banks and Bank Holidays Act*.

The provisions clarify the days on which banks must be kept closed. These are Saturdays, Sundays, the Bank Holiday (which is the first Monday in August), and public holidays.

In the past, banks have been able to apply for exemption from the requirement to be kept closed on Saturdays and/or Sundays. A major change made by this bill is to extend that right to apply for an exemption to the August Bank Holiday and to some of the public holidays.

However, no bank will be able to apply for an exemption to trade on Good Friday, Easter Sunday, Anzac Day before 1 pm,

Christmas Day or Boxing Day. These days will always be closed days for banks.

In relation to August Bank Holiday, the Government is concerned that changes in national workplace relations regulation have meant that many non-bank financial institutions that previously observed the August Bank Holiday under awards or industrial agreements have ceased to do so.

Significantly, August Bank Holiday is not identified as a public holiday in the Finance Sector Modern Award. This means that many employees in the broader financial sector who have been accustomed to enjoying the August Bank Holiday are no longer able to do so.

While the NSW Government is not able to affect the industrial arrangements between financial institutions and their staff, it is able to regulate trading hours.

Therefore, an important feature of this bill is the extension of the August Bank Holiday provisions to non-bank financial institutions. Like banks, these institutions will be required to close on August Bank Holiday, thereby continuing a practice that most have observed for many years.

This requirement will not apply to financial institutions that provide for an extra or substitute holiday for their staff, or to very small financial institutions.

Like banks, however, financial institutions to whom the August Bank Holiday applies will also be able to apply for an exemption from those provisions.

Any institution that obtains such an exemption will be required to observe the requirement that staff working on a day to which an exemption applies have freely elected to work on that day.

The Government believes that these changes will provide continuity and certainty for employees at financial institutions who have long enjoyed a day off for August Bank Holidays.

Taken together, these two pieces of legislation will provide a clearer and more logical approach to the declaration of public holidays on the one hand, and appropriate restrictions on retail trading by shops and banks on the other.

I commend both the Public Holidays Bill and the Shop Trading Amendment Bill to the House.