



SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF
EMPLOYERS AND INDUSTRIES (AFEI)

RESPONSE TO REVIEW OF BANK AND BANK HOLIDAYS ACT 1912
OPTIONS PAPER

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1. The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction.

2. With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.

3. The major preoccupation of the Options Paper (the paper) is to devise a means by which every worker, regardless of differing working patterns and compensation, is to *"enjoy the benefit of every public holiday"*. The *"ideal solution"* is identified as *"every employee who is rostered to work during a week in which a public holiday falls is entitled to a paid day off during that week."*¹ Part time employees would be granted this right on a pro rata basis.

¹ Options paper page 18

4. The constraints to achieving this outcome are identified as the current provisions of the *Fair Work Act 2009* and the limited application of state legislation. It is observed that changes to federal legislation would be needed to enshrine this objective but that is well beyond the capacity of this review.² Consequently the options canvassed are explicitly intended to achieve the paper's "ideal solution" within these constraints, primarily by providing that additional holidays be named.

5. This solution is proposed for
 - Christmas Day and Boxing Day
 - New Year's Day falling on a Sunday
 - Australia Day
 - Anzac Day.

6. It is described as a "*small step*"³ to provide additional days when Christmas or Boxing Day fall on a Sunday. We do not agree, given the cost implications for employers arising from the creation of an additional holiday and do not see alignment with Western Australia, the only state to make this provision, as an adequate justification for the creation of a new entitlement.

7. While variation in working patterns is noted in the paper for the purpose of demonstrating the suggested inequity in access to public holidays, ("*employees working different rosters are already at risk of differential treatment*"⁴) little attention is given to the fact that because workers do have different working patterns they also have different entitlements.

² op cit

³ Options Paper page 21

⁴ Options Paper page 17

8. For example, the casual loading includes payment for personal, annual leave and public holidays. Shift loadings are intended to compensate for working “non standard” hours, and as noted in the earlier Discussion Paper, seven day shift workers receive additional leave to compensate for work scheduled on public holidays.

9. Awards, including all modern awards, stipulate the spread of ordinary working hours. An employee such as Non Standard A and Non Standard B will be in receipt of penalty payments for working “non standard” hours; ie ordinary hours worked on Saturday or Sunday carries a penalty payment. See, for example, the Banking Finance and Insurance Award 2010, General Retail Award 2010 and the Hospitality Industry (General) Award 2010. The paper asserts that penalty rates for working Sunday and public holidays have traditionally been similar but that in the contemporary industrial climate, higher penalty rates are paid for public holidays.⁵ This is not correct. Public holidays have long been paid at a higher rate, commonly 250%, and the “contemporary industrial climate” has not changed this, although a number of modern awards have substantially increased the Sunday penalty rate for NSW employers. The difference in penalty rates for Sundays and public holidays, well established by industrial tribunals in specific awards, is not a reason to create additional holidays.

10. Similarly, little consideration is given to the additional cost impact which would be imposed on employers by creating, by statute, additional holidays to redress the alleged inequity for “non standard” workers. Other negative cost impacts, such as the potential for employees working on both legislated

⁵ Options Paper page 22

days, the declared holiday and the additional day, are dismissed as "*to be dealt with by industrial negotiation*". The paper's preference is to legislate expanded entitlements for employees and leave adverse consequences for employers to be ameliorated, where possible, by negotiation. It is poor regulation to impose new and more costly standards and to rely on the duty holder's ability to negotiate a remedy.

11. Legislative provisions form the minimum basis for industrial negotiation, a platform on which enterprise arrangements are developed. It is an unrealistic presumption that, once legislated, the penalty entitlements for the additional day could be later removed. Additionally there are many awards, including modern awards, for example, the Manufacturing and Associated Industries and Occupations Award 2010, which do not have provisions to ensure a double entitlement is not paid. Employers would subsequently face a costly and uncertain process in attempting to vary awards in an endeavour to avoid double dipping.

12. The paper is critical of the current arrangements by which states declare public holidays on a "*one size fits all basis*" with no facility to allow for occupation based variation.⁶ Yet the option of creating additional holidays adopts precisely this approach; the imposition of additional holidays by legislation and the assumed facility on the part of all employers for re-negotiation of working arrangements to accommodate the legislative provisions.

⁶ Options Paper pages 9 and 17

13. Creating additional days is also a departure from the current standards established by the NSW Industrial Relations Commission and the Australian Industrial Relations Commission; and contrasts with the provisions of the *Fair Work Act 2009* which expressly provides for substitute, not additional, days (where a substitute day is declared by or under a state or territory law, the substitute day is the public holiday (FWA s 115(2))). This in no way assists with achieving a degree of consistency in state and federal workplace regulation.
14. We note from the paper's comparison table ⁷ that Western Australia and to a lesser extent, Victoria are the only other states to impose additional, rather than substitute days for Christmas, Boxing Day and New Years Day. We do not see alignment with these states as a reason for further change in NSW. Alignment with one other state and partial alignment with another do not amount to harmonisation. In any event, national harmonisation and consistency in regulation is not a sufficient goal if the standard around which harmonisation is occurring is inappropriate. Harmonised legislation needs to be workable and affordable.
15. The second concern of the paper is to extend as widely as possible the bargaining rights of workers to refuse to work on proclaimed public holidays. While the paper refers to the Ministerial stated intention that this review is not intended to increase the number public holidays, there is apparently no similar restraint on extending public holiday coverage as widely as possible. The additional days are evidently not to be regarded as additional holidays, but as extensions of existing holidays.

⁷ Options Paper page 16

16. Any new legislation should maintain the status quo and not extend public holiday provisions. Option A in "Options for Reform" should be adopted for
- Christmas and Boxing day
 - New year's Day
 - Australia Day.
17. Anzac Day should always be observed on 25 April, with no substitute or additional day proclaimed. August Bank Holiday should not be retained and restrictions on trading removed. Equally, the August Bank Holiday should not be named a new public holiday in NSW. No cogent argument has been made to support this option. The proposal that bank employees would lose this entitlement is an insufficient basis for creating an additional general holiday, as is the reference to the alleged loss of union picnic day entitlements.⁸
18. The problems which have emerged through the declaration of show days and local holidays and their interaction with federal legislation demonstrate that if any such holidays are to be proclaimed by NSW they should be specifically confined to state system employees.

10 September 2009

⁸ Options Paper page 31.