



SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES'
ASSOCIATION, NEW SOUTH WALES BRANCH
AND SHOP ASSISTANTS AND WAREHOUSE
EMPLOYEES' FEDERATION OF AUSTRALIA,
NEWCASTLE AND NORTHERN NEW SOUTH WALES

**BETTER REGULATION OFFICE
ISSUES PAPER**

**REFORM OF SHOP TRADING HOURS
IN NEW SOUTH WALES
Part 4 of the *Shops and Industries Act 1962***

SUBMISSION

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1. EXECUTIVE SUMMARY

- 1.0.1 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 ("the Unions") support the retention of the existing prohibitions on Sunday and public holiday trading under Sections 84 and 85 of the *Shops and Industries Act 1962* ("the Act").
- 1.0.2 The Unions support appropriate measures undertaken to reduce needless complexity and / or genuine uncertainty, which may arise under the Act, but which do not substantively change its intent to prohibit Sunday and public holiday trading for general shops.
- 1.0.3 The Unions strongly oppose any measures which have the consequence of further undermining the opportunity of retail employees to fully participate in the rich and diverse experiences of life.
- 1.0.4 The Unions respectfully submit that further deregulation would be inconsistent with community unease at the steady deterioration of the work / life balance.
- 1.0.5 The role of Government is to facilitate a meaningful balance between commercial, employee and community interests. The maintenance of the existing modest but fair prohibitions on Sunday and public holiday trading, which are both subject to exemption arrangements, is the proper balance point.
- 1.0.6 The Unions note that further deregulation would no longer occur in the industrial context which prevailed in 1991 when the vast majority of retail employees working in general shops were entitled to a suite of voluntary work, rostering and remuneration benefits under the relevant state-based industrial instrument, the *Shop Employees' (State) Award*. These conditions of employment operated as a buffer to protect employee interests when trading is allowed and, consequently, work is required on Sundays and public holidays. The adverse deregulation of industrial legislation, most notably under the Federal Government's WorkChoices laws, have in practice abolished these minimum standards for many employees, particularly in retail workplaces which are governed by the proliferation of industrial instruments now in operation, other than the *Shop Employees' (State) Award* and larger union negotiated workplace agreements.
- 1.0.7 Where exemptions are granted in accordance with the Act there must be comprehensive safeguards in place to ensure appropriate voluntary work, rostering conditions and fair remuneration (including appropriate penalty rates) are enshrined.
- 1.0.8 The Unions recommend and strongly urge the Government to adopt the following measures:
 - (a) The existing prohibition on Sunday trading under Section 84 of the Act should be preserved;

- (b) The existing prohibition on public holiday trading under Section 85 of the Act should be unequivocally maintained;
- (c) The public holidays defined under Section 78 of the Act should be maintained;
- (d) Amend the Act and, if required, the *Banks and Bank Holidays Act 1912* (NSW) to ensure that New Year's Day, Australia Day, ANZAC Day, Christmas Day and Boxing Day, as identified in the Act, are prohibited from trading on both the actual day and the substituted day when such days fall on weekends and the relevant day is, therefore, "publicly observed" on the substituted day;
- (e) Provide a right for the Unions to be notified and consulted by the Director-General when considering an application for an exemption under Section 78A and require the Director-General to consider all relevant matters, including voluntary work, rostering and remuneration matters, raised by the Unions as part of the assessment process;
- (f) Provide a right for the Unions to be notified and consulted by the Minister when considering an application for an exemption under Section 85(2) or 89B and to require the Minister to consider all relevant matters, including voluntary work, rostering and remuneration matters, raised by the Unions as part of the assessment process;
- (g) Provide for an appeals right for the Unions under Section 78AA akin to the right provided to the relevant industrial organisation of employees in Section 9(2) and 9(3) of the Act;
- (h) Provide for a requirement that where an exemption is granted under Section 85(2) of the Act in relation to public holidays, the right to open for trade on such days is strictly conditional on the right for persons (including employees and contractors) to freely elect to work or not work on such a day. This voluntary work condition would also apply to shops and locations subject to existing Section 78A or 89B exemptions; and
- (i) The redefinition of "small shop" and "scheduled shop" should be limited in its scope to ensure that shopkeeper(s) operating under a single retail brand or banner on the same or adjoining premises do not artificially rearrange their business and / or employment affairs to avoid the trading prohibitions which would otherwise apply.

2. INTRODUCTION

- 2.0.1 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 ("the Unions") represent the interests of retail, fast food, warehousing and distribution and pharmaceutical manufacturing employees throughout New South Wales and the Australian Capital Territory.
- 2.0.2 The Unions welcome the opportunity to jointly comment on the Issues Paper on behalf of retail employees in New South Wales and trust that their recommendations be duly considered and adopted in every respect.
- 2.0.3 The Unions support appropriate measures undertaken to reduce needless complexity and / or genuine uncertainty, which may arise under the Act, but which do not substantively change its intent to prohibit Sunday and public holiday trading for general shops.
- 2.0.4 The Unions strongly oppose any measures which have the consequence of further undermining the opportunity of retail employees to fully participate in the rich and diverse experiences of life, including:
- (a) Raising children and sharing valued time with the immediate family;
 - (b) Spending time together with friends and relatives;
 - (c) Participating in community activities, including volunteering;
 - (d) Participating in sport and recreation;
 - (e) Improving knowledge and skills through further education and study; and
 - (f) The expression and observation of religious beliefs.
- 2.0.5 Preceding deregulation of trading hours has progressively undermined the ability of retail employees to attend to these responsibilities and to participate in these activities, all of which are beneficial to a functional and balanced society. Much study and commentary, such as the research of Barbara Pocock, has focused in more recent years on the work / life balance and the tension experienced by those in the community, including retail employees, who are required to work at times which have traditionally been reserved or more readily available for these responsibilities and activities.¹ The Unions submit that any further deregulation of trading hours, which would effectively eliminate the remaining minimal, rational and reasonable prohibitions which exist under the current trading hours legislation, would be contrary to:
- (a) the community's growing unease with the increasing intrusion of work into the time available for employees to devote to their families and / or participate in these activities; and
 - (b) the community's expectation that Government ensure a fair balance is maintained between business, consumer and employee interests.

¹ "The Work / Life Collision", Barbara Pocock, Federation Press June 2003

2.0.6 The Unions respectfully suggest that solely commercial interests, which are once again driving a further deregulation agenda, have neither their employees' nor the wider community's best interests at heart.

2.0.7 The Unions submit that NSW is essentially already deregulated with respect to Sunday trading and note that there is no substantial or unjustified regulatory burden associated with the exemption arrangements under Section 78A, as is clear from:

- (a) the widespread utilisation of exemptions where shopkeepers have made application;
- (b) there is no evidence that the Director-General has ever refused such an application;
- (c) there are no additional regulatory requirements to be observed by the shopkeeper other than to make the application and pay the required fee; and
- (d) The cost associated with making an application (\$100) is not prohibitive and is arguably undervalued given the significant economic benefit derived by the shopkeeper from the additional day's trading each week

2.0.8 The Unions also submit that NSW sits comfortably within the range of the public holiday trading comparison to other jurisdictions:

State / Territory	Unrestricted trade	Trading Prohibited	Total
Australian Capital Territory	11	0	11
Northern Territory	11	0	11
Tasmania	8	3	11
Victoria	7	4	11
Queensland	5	6	11
New South Wales	4	7	11
South Australia	2	9	11
Western Australia	1	10	11

2.0.9 NSW is neither the most restrictive nor the most permissive with respect to the various public holiday arrangements across the States and Territories, once more suggesting that the balance is right and further interference is not justified.

2.0.10 The assessment of the National Competition Council in 2002 in its review of NSW compliance with National Competition Policy that trading hours in NSW are essentially deregulated also serves to demonstrate that the current arrangements are appropriate, satisfactory and require no further change.

2.1 SCOPE OF THE ISSUES PAPER

- 2.1.1 The Unions are concerned that the Issues Paper goes well beyond the scope of Recommendation 70 of the IPART Report, which was framed in relatively narrow and prescriptive terms as follows:

“That the Government consider simplifying the current regime governing trading hours for general shops in NSW in relation to Sunday trading exemptions and clarifying the definition of ‘general shops’ to ensure small businesses are not unintentionally caught up in the regulations.”²

- 2.1.2 There is simply no foundation within the IPART Recommendation to support the removal of the public holiday trading prohibition or make changes to the specified days to which it applies.

- 2.1.3 There is also no basis under the IPART Recommendation to support the removal of the Sunday trading prohibition. A process of simplification and clarification infers there shall be no diminution of the entitlements under the regime but rather a process of reducing complexity and resolving uncertainty should they exist.

- 2.1.4 Notwithstanding these observations, the Unions do suggest, however, that reasonable and fair reforms should be adopted in relation to matters such as the interaction of the general shops trading prohibition with substituted public holidays, as it would have the following benefits:

- (a) Remove the necessity for Government to expend significant and costly regulatory resources (each time on a “one off” basis) to address an anomaly which will continue to arise under the existing legislation because the trading prohibition follows the public *observation* of the particular public holiday, and perversely leaves the actual day unrestricted for trade;
- (b) Remove an inherent inconsistency between the operation of the provision and the underlying objective of the legislation;
- (c) Provide clarity and certainty for retailers to make operational plans well in advance of the relevant days;
- (d) Provide clarity and certainty for employees to make family, holiday and other arrangements when these long weekends occur; and
- (e) Improve compliance by having a provision which is more readily understood and not subject to “one off” amendments currently required to address the anomaly.

- 2.1.5 The Unions recommend that, given the narrow terms of reference under the IPART Recommendation, submissions made by any retail stakeholder seeking to abolish or diminish the existing general shop trading prohibitions should be summarily rejected. In this context, the Unions highlight that there is no submission made on behalf of retail employees at this time to extend the scope of the trading prohibitions as they presently exist.

² Recommendation 70 of the “Investigation into the Burden of Regulation and Improving Regulatory Efficiency” Final Report, Independent Pricing and Regulatory Tribunal, 5 October 2006

2.2 THE SDA

- 2.2.1 The Unions are branches of the Shop, Distributive and Allied Employees' Association, which is the largest trade union in Australia with over 220,000 members.
- 2.2.2 The membership of the Unions currently exceeds 70,000.
- 2.2.3 In New South Wales and the Australian Capital Territory, the Unions have collective coverage of a wide range of occupational areas, most notably extending throughout the retail industry. The vast majority of members are engaged in the retail industry, which is the subject industry of the Issues Paper.
- 2.2.4 Members are employed to work across the full range of retail formats including all three categories of "shop" as defined under Section 78 of the Act, being "*General shops*", "*Small shops*" and "*Scheduled shops*".
- 2.2.5 The Unions' membership is highly concentrated with major retailers operating shops which are defined under the Act as "*General shops*".
- 2.2.6 The Issues Paper broadly considers trading hours reform which would, if certain options under consideration were adopted, substantially relax and / or further deregulate those existing prohibitions in the Act which apply to general shops. Given the considerable number of employees who are members of the Unions working in general shops, the Unions submit they are uniquely placed to make authoritative comment on the impact such reform would have on the interests of retail employees.
- 2.2.7 The Unions are committed to promoting, improving and safeguarding the interests of its members industrially, morally, socially, legally, intellectually and otherwise by all lawful means.
- 2.2.8 The continued operation of fair and balanced trading hours arrangements in New South Wales serves to ensure that all retail employees are provided with the opportunity to both work and live. It is certainly arguable that the trading hours pendulum has already swung too far and that retail employees, in particular, have lost any meaningful ability to control their hours of work, in large measure due to the rampant extension of trading hours in New South Wales over the last two decades. The Unions are strongly opposed to any further extension of trading hours, particularly with respect to the few remaining days left in the calendar where trading is restricted for good public policy reasons.

3. REGRESSIVE INDUSTRIAL CLIMATE

- 3.0.1 The employment conditions of retail employees working in general shops, particularly in workplaces governed by industrial instruments other than the relevant state industry award – the *Shop Employees’ (State) Award* (NSW), has undergone substantial and sometimes retrograde change in recent years.
- 3.0.2 The diminishment of employment conditions in the retail industry in New South Wales has become even more pronounced under amendments in 2006 to the Commonwealth *Workplace Relations Act* 1996 (“WorkChoices legislation”).³

3.1 SUNDAY INDUSTRIAL ENTITLEMENTS

- 3.1.1 When the last significant reform to trading hours occurred in 1991, the Industrial Relations Commission of New South Wales established new employment conditions as a direct consequence of the deregulation of Sunday trading. Those new conditions of employment were broadly:
- (a) Ordinary hours of work were established on Sundays for those shops which were legally entitled to open for trade;
 - (b) Existing employees at the time a general shop gained the lawful right to trade on Sundays were entitled to volunteer to work on Sundays but could not be unilaterally rostered to work on such days;
 - (c) New rostering standards were established to ensure that permanent employees rostered to work on Sundays were entitled to at least one in every four Sundays off as part of a three day long weekend; and
 - (d) All employees working on Sundays were entitled to be paid + 50% penalty rate on the ordinary hours worked.
- 3.1.2 This was the minimum industrial standard which evolved hand in hand with the deregulation of Sunday trading.
- 3.1.3 Progressive industrial deregulation since 1991, which has accelerated with the introduction of the Federal Government’s regressive and punitive WorkChoices legislation, has in large measure broken the nexus.
- 3.1.4 The integrity of the link between industrial arrangements applicable to employees working in “general shops” on Sundays, where exemptions have been or may be granted, and the ability to trade on those days can no longer be maintained or controlled by either the New South Wales Government nor the Industrial Relations Commission of New South Wales.
- 3.1.5 Most employers operating “general shops” are constitutional corporations and, as a consequence of the federal WorkChoices legislation, are no longer covered

³ “Lowering the Standards” Synthesis Report, Workplace Research Centre (Sydney University), September 2007, is the most comprehensive and recent study conducted on behalf of the NSW, Queensland and Victorian Governments into the impact of WorkChoices on agreement making and enforceable employment conditions in the retail and hospitality industries.

by the *Shop Employees' (State) Award* and are no longer obliged to provide any rostering protection, voluntary work arrangements or penalty rates for Sunday work.

- 3.1.6 The federal WorkChoices legislation relies in part upon the corporations power under Section 51(xx) of the Constitution to regulate the industrial affairs of constitutional corporations and their employees.
- 3.1.7 Many hundreds of thousands of employees who were previously entitled to the benefit and protection of the NSW *Industrial Relations Act 1996* and industrial instruments made under that Act, including the *Shop Employees' (State) Award*, are now subject to the reach of these laws.
- 3.1.8 Whilst the vast majority of pre-reform certified agreements and Union Collective Agreements negotiated by the SDA have maintained these conditions of employment to ensure appropriate employment conditions operate for employees engaged to work on Sundays, there has been an increasing incidence of
- Australian Workplace Agreements;
 - Pre-reform non-union certified agreements;
 - Non-union Employee Collective Agreements; and
 - Employer Greenfields Agreements

which do not maintain these important conditions of employment.

3.2 PUBLIC HOLIDAY INDUSTRIAL ENTITLEMENTS

- 3.2.1 Most industrial instruments negotiated by the Unions which are applicable in general shops also expressly provide for a suite of industrial entitlements for work on public holidays. These include:
- (a) Work on the public holiday is expressly voluntary;
 - (b) Permanent employees ordinarily rostered to work on the day are entitled to the day off without loss of earnings;
 - (c) All employees working on public holidays are entitled to be paid + 150% penalty rate on the ordinary hours worked; and
 - (d) Non-working day entitlements for employees working non-standard (i.e. rotating and weekend) rosters.
- 3.2.2 These entitlements have been built upon the conditions arbitrated and negotiated into the *Shop Employees' (State) Award*.
- 3.2.3 Once more industrial deregulation, which accelerated under the Federal Government's regressive WorkChoices legislation, has fundamentally undermined these Award-based conditions.
- 3.2.4 Under the WorkChoices legislation these conditions have been often reduced and / or altogether abolished in many of the industrial instruments, including:

- Australian Workplace Agreements;
- Pre-reform non-union certified agreements;
- Non-union Employee Collective Agreements; and
- Employer Greenfields Agreements

in operation, which have not been negotiated by the Unions.

3.2.5 There is no obligation under the WorkChoices legislation to provide these entitlements and the legislation expressly undermines voluntary work arrangements for public holidays pursuant to Section 612 of the Commonwealth *Workplace Relations Act 1996*.

3.3 BROKEN NEXUS

3.3.1 The assurance by the Government, when writing to stakeholders seeking comment on the Issues Paper, that it is *“not seeking to alter current arrangements or benefits from an industrial point of view”* is of no comfort in this context of regressive Federal WorkChoices legislation.

3.3.2 The Unions submit that there are now many more retailers who enjoy the commercial benefit of predominantly unrestricted trading hours:

- All small shops;
- All scheduled shops;
- All general shops – Monday to Saturday;
- General shops on Sundays and / or public holidays, subject to Section 89B holiday resort exemptions;
- General shops on Sundays, having acquired the appropriate exemption under the Section 78A of the Act; and
- General shops on public holidays, having acquired the appropriate exemption under the Section 78A of the Act.

3.3.3 Many of these general shopkeepers have now shed the voluntary work, rostering and penalty rate conditions which previously compensated employees for working on Sundays and public holidays.

3.3.4 The “double whammy” of both trading hours and industrial deregulation has left vulnerable employees, including women, young persons and regional workers, without any control over their working hours or fair remuneration for work performed on those days.

3.3.5 There are now many thousands of NSW retail employees trapped on substandard industrial instruments and who may be required by their employer to work on these socially unattractive days with little or no additional remuneration.

3.3.6 The Unions invite the Office to review the terms of the non-union Employee Collective Agreement attached at **Annexure “A”** which abolishes voluntary work entitlements and rostering protections on both Sundays and public holidays for all employees. Penalty rates for work on Sundays and public

holidays have been abolished for new employees and reduced for existing employees. It will operate for the next 5 years.

3.3.7 The Agreement was made under federal WorkChoices laws and operates in supermarkets in Blaxland, Cremorne and Pymont in New South Wales, which are defined under the Act as general shops. It is but one example of many which have proliferated across the industry following the commencement of the federal WorkChoices laws.⁴

3.3.8 The Unions submit that retailers should not enjoy the commercial benefit conferred by the right to open for trade on Sundays, where an exemption has been granted, in the absence the relevant minimum standards including:

- Voluntary Sunday work protections for existing employees at the time the right to lawfully trade is granted;
- Comprehensive rostering protection to ensure permanent employees regularly engaged to work Sundays as part of their ordinary hours are entitled to a three day long weekend including the Sunday at least once every four weeks; and
- The payment of a minimum + 50% penalty rate for Sunday work during ordinary hours and the payment of the Sunday overtime rate of + 100% for Sunday work outside ordinary hours (or satisfactory additional remuneration in the ordinary base rate of pay).

3.3.9 The Unions submit that retailers should not enjoy the commercial benefit conferred by the right to open for trade on public holidays, where an exemption has been granted, in the absence the relevant minimum standards including:

- Work on the public holiday is expressly voluntary;
- Permanent employees ordinarily rostered to work on the day are entitled to the day off without loss of earnings;
- Permanent employees ordinarily rostered to work on the day are entitled to the day off without loss of earnings;
- The payment of a minimum + 150% penalty rate on the hours worked (plus casual loadings where applicable); and
- Non-working day entitlements for employees working non-standard (i.e. rotating and weekend) rosters.

3.3.10 The Unions also submit, as detailed below, that there is an appropriate community standard for prohibition to be maintained on certain public holidays due to their cultural and / or religious significance. Even where comprehensive industrial arrangements are in place, such as in workplaces covered by most union negotiated instruments, the maintenance of the public holiday trading prohibition on these days is necessary and appropriate to ensure that all retail workers can enjoy the day off with family and friends to share and celebrate the occasion consistent with public expectations.

3.3.11 There is a proper nexus between trading hours and industrial arrangements which plays a critical role for employees, traditionally providing protection and

⁴ See "Lowering the Standards" Synthesis Report, Workplace Research Centre (Sydney University), September 2007.

additional reward for employees when employers have enjoyed the right, when in receipt of the relevant exemption, to trade on such days.

3.3.12 In the Unions' respectful submission that nexus is now broken. Further deregulation is completely unjustified in this context.

4. SUNDAY TRADING

- 4.0.1 The Sunday trading prohibition under Section 84 of the Act should be preserved until such time as all locations in NSW have been granted the right to trade.
- 4.0.2 The widespread granting of Section 78A Sunday trading exemptions suggests that there is no significant regulatory burden associated with the operation of these provisions and that they have been widely utilised to the distinct commercial advantage of those general shopkeepers who have made application since 1991.
- 4.0.3 The widespread use of the Sunday trading exemption is not a proper basis for the abolition of the prohibition itself.
- 4.0.4 The Unions reject the notion there is any unreasonable cost or administrative burden associated with the current exemption process:
- (a) The widespread utilisation of Sunday trading exemptions where shopkeepers have made application demonstrates it has been relatively easy to obtain the exemption;
 - (b) There is no evidence that the Director-General has ever refused such an application;
 - (c) There are no additional regulatory requirements to be observed by the shopkeeper other than to make the application and pay the required fee; and
 - (d) The cost associated with making an application (\$100) is not prohibitive and is arguably undervalued given the significant economic benefit derived by the shopkeeper from the additional day's trading each week.
- 4.0.5 The Unions suggest that, if there are any outstanding locations and / or shopkeepers which are yet to be granted the right on trade on Sundays, it is most likely that these locations / shopkeepers have not made application because the relevant community has no requisite need nor appetite for 24 hour per day / 7 day per week shopping. This may be because there is no compelling business need (contrary to what may be asserted by those who would urge complete deregulation) or because the prevailing community standard in that location supports the observance of Sunday as a day of rest and recreation.
- 4.0.6 Once a Section 78A Sunday trading exemption certificate has been granted, the right to voluntary work arrangements accrues to existing employees under state industrial instruments and most union negotiated workplace agreements from the date that lawful trading is granted. The relevant provision from the NSW *Shop Employees' (State) Award* is extracted below:

"Clause 13 Savings Clause

(A) General Shops

...

- (iv) *The following provisions shall apply in general shops which may lawfully trade on a Sunday:*
 - (a) *All work on Sundays within ordinary hours of work shall be voluntary for all employees (including casuals) employed in that shop at 25 October 1991.*
 - (b) *Where a shop gains the right to trade lawfully on a Sunday after 25 October 1991 all work on Sundays within ordinary hours of work shall be voluntary for all employees (including casual employees) employed in that shop at the date that the Sunday trading becomes lawful.”*

4.0.7 A significant cost of repealing the prohibition will be the loss of this voluntary work protection for many future retail employees working in general shops.

4.0.8 All future employees, from the date of abolition of the prohibition (i.e. the date lawful Sunday trading is granted) in those locations and shops without a current right, will immediately lose their practical entitlement to have the day off and may be lawfully rostered to work ordinary hours on that day. This is the industrial consequence, notwithstanding that the relevant employers in those outstanding locations may currently neither require nor desire Sunday trading any time in the near future. Once again the Unions reiterate that there is no evidence that the Director-General has refused a Section 78A exemption application with respect to Sunday trading under the current legislative framework.

4.0.9 A significant cost of repealing the prohibition will also be the loss of this voluntary work protection for many existing retail employees working in general shops.

4.0.10 Many existing employees, from the date of abolition of the prohibition (i.e. the date lawful Sunday trading is granted) in those locations and shops without a current right, will also immediately lose their practical entitlement to the day off and may be lawfully rostered to work ordinary hours on that day. This is a direct consequence of the substandard nature of their industrial entitlements. The provisions, which have been retained as extracted above from the *Shop Employees' (State) Award*, and similar provisions provided by the vast majority of union negotiated collective agreements, are not contained in most if not all other non-union industrial instruments. Numerous waves of state and, particularly, federal industrial deregulation since 1991 have left these employees without terms and conditions of employment which reflect the NSW *Shop Employees' (State) Award* minimum standard.

4.0.11 The Unions submit that consideration of the ongoing function of the prohibition must not occur in isolation of the industrial reality for NSW retail employees. There remain sound policy and practical grounds to retain the prohibition in its current terms.

5. PUBLIC HOLIDAY TRADING

- 5.0.1 The public holiday trading prohibition under Section 85 of the Act should be unequivocally maintained.
- 5.0.2 These days remain significant cultural and religious occasions in the life of the broader Australian community.
- 5.0.3 They are occasions when the vast majority of Australians share increasingly rare time with their immediate family, celebrate together with friends and relatives and commonly express and observe their religious beliefs.
- 5.0.4 Any further deregulation would relegate retail workers to second class status compared to the broader community who rightly and fully enjoy these days celebrating and observing these important milestones in every calendar year.
- 5.0.5 Retail employees overwhelmingly support the retention of the prohibition of trading on these days. For most employees these are the only guaranteed days in the year they can plan to make leave arrangements. This is due to expansive employer rostering discretion, the use of annual leave “blackout periods” and the increasing span of trading hours directly associated with the sales which occur at these times of the year.
- 5.0.6 These days also commonly, if not exclusively, fall on days in the midst of school holidays when working parents, particularly the high proportion of working mothers in the industry, depend upon the practical effect of the prohibition to ensure they can spend guaranteed time with their children.
- 5.0.7 The Section 85 prohibition applies to the following days, as defined under Section 78 of the Act:
- (a) New Year’s Day,
 - (b) Australia Day,
 - (c) Good Friday,
 - (d) Easter Sunday,
 - (e) Anzac Day,
 - (f) Christmas Day, and
 - (g) Boxing Day.
- 5.0.8 The Unions are vehemently opposed to any regulatory change which removes or detracts from the closed shop status of these days.

5.1 MAINTAINING THE PROHIBITION

- 5.1.1 The prohibition on trading on Christmas Day, Boxing Day and New Year’s Day is indispensable to most retail employees. It enables them to enjoy time with family and friends to observe and celebrate these occasions following the busy Christmas trading period, when many general shopkeepers require them to work

additional shifts during extended trading hours and often prohibit them from taking annual leave. During the Christmas school holidays these may be the only occasions an employee is guaranteed to spend time with their spouse, children, siblings and immediate family. It is increasingly common for retailers to impose annual leave “blackout period” policies during these periods to ensure sufficient staffing for pre- and post- Christmas sales. It is a small opportunity in the midst of extended trading hours over a number of weeks for employees to enjoy the very occasions upon which the sales are premised.

- 5.1.2 Similarly, the prohibition on trading on Good Friday and Easter Sunday is imperative to enable retail employees to enjoy a long weekend following the busy Easter trading period. Once again, the prohibition operates to facilitate a practical opportunity for them to enjoy time with family and friends to observe and celebrate these occasions. The widespread use of additional hours of work and leave “blackout” periods by retailers are again characteristic of this trading period. These days also, once more, commonly fall during a period of school holidays. It is an increasingly rare opportunity for all retail employees to plan and rely upon time with their family and / or friends following a busy trading period in which they are commonly denied the opportunity to take leave under various company policies.
- 5.1.3 It is paradoxical to suggest that the significant economic benefits derived by general shopkeepers from the Christmas / New Year and Easter trading periods are of critical importance but the celebration and observance of those days upon which the sales depend are not sufficiently important to justify closing the doors on those very few days.
- 5.1.4 Christmas, Easter and End of Year sales depend upon the community’s celebration and observance of these occasions. If they were meaningless or merely insignificant dates in the calendar worthy of the same trading arrangements as any other date, implicit from the proposition to remove the prohibition by some stakeholders, the Unions submit that there would simply not be sales to mark their occasion.
- 5.1.5 For the same reasons that these occasions are important enough for retailers to recognise and mark the events with extensive sales they are important enough to maintain the existing trading prohibition on those occasions and thus enable their hard working staff to take the day off to celebrate and observe those occasions along with the vast majority of the Australian community.
- 5.1.6 The prohibition on trading on Australia Day and ANZAC Day fulfils a different but no less important function. These are the only two occasions in the calendar of a uniquely Australian character when all Australians celebrate our nation, its achievements and its place in the world. For many Australians they are an opportunity to pause and reflect on the sacrifices of those who are served and defended our nation, to celebrate those who have made our community a better place and to consider those who are less fortunate and have not received a fair share in our democracy.
- 5.1.7 The Unions submit that the treatment of these days as just another retail trading day would demean their significance and effectively further diminish the broader community’s recognition of these days.

- 5.1.8 The maintenance of the prohibition will conversely signify that the NSW Government and the community hold these days in the highest civic regard and recognise the right of all citizens to briefly pause from commercial consumption on up to 358 days in the balance of the year.
- 5.1.9 In the Unions' respectful submission the fact that general shopkeepers have previously successfully sought Section 85B exemptions to override the prohibition on Australia Day and after 1pm on ANZAC Day neither reflects well on those businesses' nor on the Government's respect for those occasions. It is also not grounds to remove the prohibition.

5.2 MAINTAINING THE BALANCE

- 5.2.1 The Unions' membership have overwhelmingly made very clear that any theoretical opportunity for additional work and income on these dates pales into insignificance compared to the opportunity for retail workers to celebrate and observe these occasions made available through the continued operation of the prohibition.
- 5.2.2 Those general shopkeepers which have been granted unrestricted Sunday trading exemptions under Section 78A of the Act are currently entitled to trade on over 98% of the available days in the calendar year.⁵ There are more than enough opportunities for such retailers to sell their goods and services without interfering with the less than 2% of remaining days when they are required to close their doors and enable retail employees to celebrate and observe the days which the Australian community holds to be culturally and / or religiously significant.
- 5.2.3 The Unions suggest that consumers are in practice only prevented from purchasing goods on less than 2% of the available days in the year. This is a very small price for the community to pay to ensure that all retail workers in general shops can enjoy an increasingly rare opportunity to spend time with family and friends on these significant cultural and religious occasions.
- 5.2.4 Whilst some employers may suggest lifting the prohibition will provide employment opportunities for casual or part-time staff such as students, it is increasingly common for retail employers to direct their more experienced full-time staff to work on days, which were previously subject to trading restrictions. This has been a feature of the changing pattern of rosters across all types of retail formats operating as general shops including supermarkets, department stores and discount department stores.
- 5.2.5 The Unions submit that the fault for any potential confusion brought about by the operation of the current arrangements does not lie with the current structure of the Act but by the past actions of some retailers seeking to extend trading to as many available dates as possible.

⁵ An unrestricted Section 78A exemption for Sunday trade lawfully allows a general shopkeeper to open for trade on 358 of 365 days per year.

- 5.2.6 A good illustration of this is the right to trade on Boxing Day having been extended to major Sydney CBD retailers. The Section 78A exemption to trade on Boxing Day was granted a number of years ago. This exemption has allowed a major retailer to heavily promote its “Boxing Day” sale, notwithstanding the vast majority of its metropolitan and regional stores are prevented from trading on the day. It is public knowledge that this retailer seeks to open for trade in all stores on Boxing Day. One of the grounds for this request has been to clear any public confusion surrounding the trading hours across its stores on this day. This is a unmistakable example of where past actions combined with the use of the term “Boxing Day” sale, marketing around that term and the historical high discounting associated with the sale (all actions by the retailer and not initially driven by consumer sentiment) have encouraged an appetite from some consumers to expect that all stores other than the Sydney City store will also open for trade on that day. The demand or appetite, in the Unions’ respectful submission, has evolved from a deliberate strategy undertaken by the retailer rather than a genuine demand from the community. The sale being put back one single day would have no dire consequences.
- 5.2.7 In the Unions’ discussion with some other retailers, it has become apparent that their respective business decisions to seek to trade on the same date have been tactically based (i.e. to maintain market share) rather than any strategically based decision to gain some competitive advantage on that day.
- 5.2.8 This is yet another good public policy reason to maintain the current general trading prohibition on all these public holidays. It is also reason why the Director-General must in these circumstances exercise great caution and err against granting any Section 78A exemption with respect to public holidays, as once any exemption is granted there will be incessant pressure by that shopkeeper and its competitors to extend the exemption beyond any single shopkeeper and / or beyond any particular locality.

5.3 SUBSTITUTED PUBLIC HOLIDAYS

- 5.3.1 The Unions support the reform of Part 4 of the Act with respect to its operation on substituted public holidays.
- 5.3.2 The current provisions do not ensure that general shops remain closed on all the days provided for under Section 78 of the Act. This occurs when the following public holidays fall on a Saturday or Sunday:
- (a) New Year’s Day,
 - (b) Australia Day,
 - (c) Anzac Day,
 - (d) Christmas Day, and
 - (e) Boxing Day.⁶

⁶ Good Friday and Easter Sunday are “observed” as intended on their unique days of the week and do not substitute to another day of the week.

5.3.3 It has also meant that the Government has been required to introduce and pass special legislation to maintain the integrity and intention of legislation.⁷

5.3.4 The interaction of the following legislative provisions:

(a) Section 15 of the *Banks and Bank Holidays Act 1912*, which provides:

“The several days in the Fourth Schedule (and which days are in this Act hereinafter referred to as bank holidays) shall be kept as close holidays in all banks in New South Wales.”

(b) Section 21 of the *Banks and Bank Holidays Act 1912*, which provides:

“When in any industrial agreement, or in any agreement relating to work, made either before or after the commencement of this Act, reference is made to a public or bank holiday, such reference shall be deemed to relate to the day on which such holiday is publicly observed.” (underlining added)

(c) Fourth Schedule of the *Banks and Bank Holidays Act 1912*, which provides (as relevant):

“Part 1

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

When the first day of January, or the twenty-sixth day of January, or the twenty-fifth day of April (Anzac Day), or Christmas Day, or the twenty-sixth day of December falls upon a Sunday, the next following Monday shall be a Bank Holiday; and whenever the twenty-sixth day of December falls upon a Monday, the day following shall be a Bank Holiday.”

(d) Section 78 of the *Shops and Industries Act 1962*, which provides (as relevant):

*“**Public holiday** means any day on which the following holidays are publicly observed:*

- (a) New Year’s Day,*
- (b) Australia Day,*
- (c) Good Friday,*
- (d) Easter Sunday,*
- (e) Anzac Day,*
- (f) Christmas Day, and*
- (g) Boxing Day.”* (underlining added)

⁷ For example see *Shops and Industries Amendment (Special Shop Closures) Act 2004* and *Shops and Industries Amendment (Special Shop Closures) Act 2005*.

and

(e) Section 85 of the *Shops and Industries Act 1962*, which provides (as relevant):

“(1) *General shops (other than small shops) shall be kept closed on public holidays.*”

means, perversely that retailers are not prohibited from trading on the “actual” days, being New Year’s Day, Australia Day, Anzac Day, Christmas Day and Boxing Day, when those days fall on a Saturday or on a Sunday (subject to an appropriate Sunday trading exemption).

5.3.5 The Unions respectfully submit that this is clearly not the intention of the legislation and has only become apparent as a practical difficulty as a result of the expansion of trading hours into weekends in more recent years (Saturday afternoons post-1984 and Sundays post-1991).

5.3.6 The current arrangements have resulted in the following difficulties:

- (a) The Government is required to expend significant and costly regulatory resources (each time on a “one off” basis) to address an anomaly which will continue to arise under the existing legislation because the trading prohibition follows the public *observation* of the particular public holiday, and perversely leaves the actual day unrestricted for trade;
- (b) There is a lack of clarity and certainty for many retailers and retail employees as to which day is closed for trade, the “actual” day or the substituted “observed” day;
- (c) Retailers and retail employees are uncertain, often as late as November in the relevant years, as to the status or treatment of the relevant days whilst Government makes the necessary arrangements (e.g. 2004 and 2005) to address the anomaly. The flow on effect is that retailers delay making important operational plans for trade and employees delay making holiday and family plans for the public holidays; and
- (d) Consumers are unaware or confused about trading arrangements necessitating additional resources from Government, retailers and the Unions to provide information and education to customers, employees and less well educated retailers about trading arrangements on these occasions.

5.3.7 The Unions recommend, therefore, that the anomaly be finally addressed so that Section 85 of the Act applies to both the “actual” day(s) and the “substituted” day(s).

5.3.8 The benefits of the amendment would be to:

- (a) Remove an inherent inconsistency between the operation of the provision and the underlying objective of the legislation;
- (b) Remove the necessity for Government to expend significant and costly regulatory resources (each time on a “one off” basis) to address an anomaly which will continue to arise under the existing legislation because the trading prohibition follows the public *observation* of the particular public holiday, and perversely leaves the actual day unrestricted for trade;

- (c) Provide clarity and certainty for retailers to make operational plans well in advance of the relevant days;
- (d) Provide clarity and certainty for employees to make family, holiday and other arrangements when these long weekends occur;
- (e) Improve the knowledge and understanding of retailers, employees and customers; and
- (f) Improve compliance by having a provision which is more readily understood and not subject to “one off” amendments currently required to address the anomaly.

5.3.9 The Unions submit that the anomaly be addressed in this particular manner to ensure that shops remain closed on these days and, thus, enable all retail employees to enjoy the same entitlements that the vast majority of the NSW workforce take mostly for granted.

5.3.10 When these public holidays fall on a weekend it would be heresy in most parts of the NSW economy for employees to be required to report for duty on the following Monday and / or Tuesday. As detailed above, federal industrial deregulation has left thousands of retail employees exposed to the obligation to attend work on these days notwithstanding their nominal “public holiday” status.

5.3.11 The extension of trading hours into weekends, since 1984 with the introduction of Saturday afternoon trading and since 1991 with the introduction of Sunday trading, by virtue of the exemption system, has been a significant economic benefit for retailers. It is self-evident that taking the minimalist approach in ensuring that only the “actual” public holidays remain closed provides those retailers holding weekend trading rights with a double windfall.

5.3.12 By example, under the existing Act, the underlying principle is that the general shop remains closed for trade on both the Sunday and the following Monday (the “observed” public holiday). If a minimalist approach were adopted, this would be diminished to the Sunday only (being both a closed day for the purpose of Sunday trading and public holiday trading).

5.3.13 Not only are many general shopkeepers now entitled to open for trade on seven days per week, by virtue of their appetite to trade on all these days, but upon the adoption of any minimalist amendment to this provision the shopkeeper would enjoy a two for one deal. These types of bargains may be attractive to their customers purchasing goods and services but are not good public policy and diminish the practical ability of retail employees to enjoy the standards enjoyed by the vast majority of the NSW workforce.

5.3.14 The self-professed purpose of this review is to simplify and clarify, and not to diminish entitlements under the Act. In those circumstances, the only proper course, in the Unions’ respectful submission, is to ensure that the trading prohibition applies to both the “actual” day(s) and the “substituted” day(s) when such days fall on weekends. It is a standard enjoyed by the vast majority of the NSW community and retail employees are no less deserving.

5.4 CONSULTATION AND REVIEW

- 5.4.1 The Unions submit that the powers of the Director-General under Section 78A and of the Minister under Sections 85(2) and 89B to grant exemptions from the operation of Section 84(1) and / or Section 85(1) of the Act should only be exercised in accordance with clear principles.
- 5.4.2 Firstly, there is a presumption against the granting of any exemption.
- 5.4.3 Secondly, exemptions shall be only granted under the Act and the relevant Regulations in circumstances where the Minister or Director-General, as appropriate, is fully satisfied that there is a genuine business reason which benefits the employer, employees and the community (as opposed to a mere desire by business to trade longer and / or on more days per year).
- 5.4.4 Thirdly, exemptions shall only be granted under the Act and the relevant Regulations in circumstances where the Minister or Director-General, as appropriate, is fully satisfied that employees affected by the exemption are entitled to or shall be provided with appropriate industrial arrangements including voluntary work arrangements and appropriate rates of pay (including penalty rates).
- 5.4.5 Fourthly, exemptions shall not be granted under the Act and the relevant Regulations with respect to day(s) where there is a clear community expectation that those certain days hold cultural and / or religious significance and are generally recognised as days for spending time with family, friends and / or for religious observance.
- 5.4.6 Consistent with these principles, the Unions recommend the Act be amended to require that the Director-General and the Minister exercise powers granted under Sections 78A(3), 85(2) and / or 89B only after notifying and consulting relevant parties including the relevant industrial organisation(s) of employees.
- 5.4.7 The Unions note that the Director-General is required under Section 6(4) of the Act to consider a number of matters including:
- (4) "In determining an application for an approval, the Director-General is to consider whether granting the approval would be in the interests of the public, taking into account the likely effect of granting the approval on particular sections of the public, including ... persons employed or engaged (whether or not by the bank) to perform services for the bank."*
- 5.4.8 The Unions, therefore, recommend that the Act be amended to require that the granting of any exemption under Section 78A(1) of the Act be subject to the Director-General:
- (a) Notifying in writing the relevant industrial organisation(s) of employees, being the Shop, Distributive and Allied Employees' Association, New South Wales Branch (SDA) and the Shop Assistants and Warehouse Employees' Association, Newcastle and Northern New South Wales (SAWEFA) of the application for exemption;

- (b) Providing a copy of the application for exemption to the relevant industrial organisations of employees, being the SDA and SAWEFA;
- (c) Consulting with the relevant industrial organisations of employees, being the SDA and SAWEFA;
- (d) Considering all relevant matters raised by the relevant industrial organisations of employees, being the SDA and SAWEFA, prior to making any decision; and
- (e) Relevant matters for the purpose of the Director-General's consideration shall include, but not be limited to, the following:
 - i. Whether both existing and new employees affected by granting of an exemption are entitled under an industrial instrument to voluntary work arrangements on public holidays with respect to applications for exemption from Section 85;
 - ii. Whether both existing and new employees affected by granting of an exemption are entitled under an industrial instrument to public holidays, without loss of pay, with respect to applications for exemption from Section 85;
 - iii. Whether existing employees affected by the granting of an exemption are entitled under an industrial instrument to rostering conditions which make the performance of work voluntary on Sundays, with respect to applications for exemption from Section 84; and
 - iv. Whether existing and new employees affected by the granting of an exemption are entitled under an industrial instrument to appropriate rates of pay (including penalties) for the performance of work on Sunday(s) and / or public holiday(s) with respect to applications for exemption from Sections 84 and / or 85.

5.4.9 Similarly, the Unions, therefore, recommend that the Act be amended to require that the granting of any exemption under Section 85(2) or 89B of the Act be subject to the Minister:

- (a) Notifying in writing the relevant industrial organisation(s) of employees, being the Shop, Distributive and Allied Employees' Association, New South Wales Branch (SDA) and the Shop Assistants and Warehouse Employees' Association, Newcastle and Northern New South Wales (SAWEFA) of the application for exemption;
- (b) Providing a copy of the application for exemption to the relevant industrial organisations of employees, being the SDA and SAWEFA;
- (c) Consulting with the relevant industrial organisations of employees, being the SDA and SAWEFA;
- (d) Considering all relevant matters raised by the relevant industrial organisations of employees, being the SDA and SAWEFA, prior to making any decision; and
- (e) Relevant matters for the purpose of the Minister's consideration shall include, but not be limited to, the following:
 - i. Whether both existing and new employees affected by granting of an exemption are entitled under an industrial instrument to voluntary

work arrangements on public holidays with respect to applications for exemption from Section 85;

- ii. Whether both existing and new employees affected by granting of an exemption are entitled under an industrial instrument to public holidays, without loss of pay, with respect to applications for exemption from Section 85; and
- iii. Whether existing and new employees affected by the granting of an exemption are entitled under an industrial instrument to appropriate rates of pay (including penalties) for the performance of work on Sunday(s) and / or public holiday(s) with respect to applications for exemption from Section 85.

5.4.10 The Unions also note that Section 9(2) and (3) of the Act provides the following:

(2) "A representative of an industrial organisation of which persons employed or engaged to perform services for a bank are entitled or eligible to belong may apply to the Administrative Decisions Tribunal for a review of any of the following decisions:

- (a) a decision of the Director-General to grant an approval under this Part to the bank (whether with or without conditions),*
- (b) a decision of the Director-General to vary the conditions of an approval granted to the bank under this Part.*

(3) In this section, "industrial organisation" means an industrial organisation within the meaning of the Industrial Relations Act 1996 , or an organisation registered under the Workplace Relations Act 1996 of the Commonwealth"

5.4.11 The Unions, therefore, recommend that commensurate rights are made available under Section 78AA as is available to the FSU under Section 9(2) of the Act to ensure that decisions made which harm the welfare of retail employees be made subject to review.

5.5 VOLUNTARY WORK

5.5.1 The Unions submit that, consistent with the general approach adopted by the Government in its 2004 and 2005 Special Shops Closure amendments to the Act⁸, all Ministerial exemptions made under Section 85(2) of the Act should be utterly conditional upon the shop being staffed by persons (including employees and contractors) who freely elect to work on the day.

5.5.2 This condition would also apply to general shops which would otherwise be entitled to open for trade pursuant to an existing Section 89B holiday resort exemption.

⁸ *Shops and Industries Amendment (Special Shop Closures) Act 2004 and Shops and Industries Amendment (Special Shop Closures) Act 2005*

- 5.5.3 This condition would also apply to general shops which would otherwise be entitled to open for trade pursuant to an existing Section 78A individual shopkeeper exemption.
- 5.5.4 The Unions seek for amendments to be made to Section 85(2) of the Act to mandate that this condition would apply on every occasion that an exemption under this provision of the Act is granted.
- 5.5.5 The benefit of such a provision is that retail employees may be safely assured that the granting of the right to open for trade does not in effect activate an obligation to work on a day that the general NSW population enjoys as a public holiday. The Minister, having made a decision consistent with the legislative obligations, may be satisfied that trading on the day will not in effect force many thousands of retail employees, who are now without satisfactory industrial protection under substandard Australian Workplace Agreements, non-union Employee Collective Agreements and the like, into working on the day at their employer's unilateral discretion.

6. DEFINITIONAL MATTERS

6.1 GENERAL SHOPS

- 6.1.1 The Unions submit that any redefinition of “small shop” and / or “scheduled shop” should be limited in its scope to ensure that shopkeeper(s) operating under a single retail brand or banner on the same or adjoining premises do not artificially rearrange their business and / or employment affairs to avoid the trading prohibitions which would otherwise apply.
- 6.1.2 The Unions are unaware of any “inadvertent” capture by the Act of shopkeepers being classified as “general shops” who should otherwise be classified as “small shops” or “scheduled shops”.
- 6.1.3 Conversely, the Unions are aware of at least one retail “brand” which has arranged its business affairs in a manner which at face value is clearly a “general shop” having a wide range of goods and services available under the one roof but upon closer inspection has structured its affairs in a manner which appears intent upon avoiding that definition.
- 6.1.4 The Unions strongly reject any redefinition of “scheduled shops” to include supermarkets. These retailers typically trade in a wide range of goods from dry groceries to fresh meat, fruit and vegetables, bakery product, delicatessen products, frozen and dairy goods and, in more recent times, non-prescription pharmacy products. The typical staffing levels vary from as few as 50 employees to over 200 employees. Most supermarkets already hold Section 78A or Section 89B Sunday trading exemptions and the net effect of any redefinition would be to allow these businesses to trade on an unrestricted basis 365 days per year, hence avoiding their public holiday obligations under the present Act.
- 6.1.5 The Unions also note that some retail brands, which are currently defined as general shops, are also part of a larger group of retail businesses which in more recent times have acquired and / or developed related corporate entities which may open for trade on an unrestricted basis (e.g. service stations). These businesses sell dry grocery, dairy and frozen goods in addition to fuel and other “every day” products.
- 6.1.6 The net effect of any redefinition of “general shop” would also be to open a Pandora’s Box in large suburban shopping centres, which currently remain closed on those public holidays primarily because their “anchor tenants” must remain closed. Were a significant number of anchor tenants, which include large supermarkets, to be redefined in a manner to become “scheduled shops” the Unions submit that it would soon follow that these large suburban shopping centres would soon decide to open for trade and require all tenants, consistent with the terms of their lease, to open on those same days. This would necessarily force many small and scheduled shops to open on days when many would prefer to close on the day.

- 6.1.7 It has been the Unions' experience over the years that many small retail business owners rely upon the protection of the general shops trading prohibition, on public holidays in particular, to allow the owner, who often works up to 7 days a week, and their staff to have a well earned rest.
- 6.1.8 Any redefinition of the terms of the Act should, therefore, be limited to capture the large retail brands restructuring their business to avoid the general shops trading prohibitions but not relax the definitions concerning small and scheduled shops.

7. RECOMMENDATIONS

- 7.0.1 The Unions thank the Government for the opportunity to comment on and contribute to the Reform of Shop Trading Hours in New South Wales Issues Paper.
- 7.0.2 The Unions strongly support the maintenance of the current provisions of the Act, subject to the suggested practical amendments, for all of the aforementioned grounds and reasons.
- 7.0.3 The Unions recommend and strongly urge the Government to adopt the following measures:
- (a) The existing prohibition on Sunday trading under Section 84 of the Act should be preserved;
 - (b) The existing prohibition on public holiday trading under Section 85 of the Act should be unequivocally maintained;
 - (c) The public holidays defined under Section 78 of the Act should be maintained;
 - (d) Amend the Act and, if required, the *Banks and Bank Holidays Act 1912* (NSW) to ensure that New Year's Day, Australia Day, ANZAC Day, Christmas Day and Boxing Day, as identified in the Act, are prohibited from trading on both the actual day and the substituted day when such days fall on weekends and the relevant day is, therefore, currently only "publicly observed" on the substituted day;
 - (e) Provide a right for the Unions to be notified and consulted by the Director-General when considering an application for an exemption under Section 78A and require the Director-General to consider all relevant matters, including voluntary work, rostering and remuneration matters, raised by the Unions as part of the assessment process;
 - (f) Provide a right for the Unions to be notified and consulted by the Minister when considering an application for an exemption under Section 85(2) or 89B and to require the Minister to consider all relevant matters, including voluntary work, rostering and remuneration matters, raised by the Unions as part of the assessment process;
 - (g) Provide for an appeals right for the Unions under Section 78AA akin to the right provided to the relevant industrial organisation of employees in Section 9(2) and 9(3) of the Act;
 - (h) Provide for a requirement that where an exemption is granted under Section 85(2) of the Act in relation to public holidays, the right to open for trade on such days is strictly conditional on the right for persons (including employees and contractors) to freely elect to work or not work on such a day. This

voluntary work condition would also apply to shops and locations subject to existing Section 78A or 89B exemptions; and

- (i) The redefinition of “small shop” and “scheduled shop” should be limited in its scope to ensure that shopkeeper(s) operating under a single retail brand or banner on the same or adjoining premises do not artificially rearrange their business and / or employment affairs to avoid the trading prohibitions which would otherwise apply.

7.0.4 The Unions would welcome the opportunity to discuss any aspect of this submission in further detail and respectfully request the opportunity to pass comment on the submission of any other stakeholder at the appropriate time.

7.0.5 The Unions look forward to reading your recommendations.

Authorised by:

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Annexure “A”