



**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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Executive Director  
Review of Retail Trading  
NSW Industrial Relations  
Department of Finance and  
Services  
2-24 Rawson Place  
Sydney NSW 2000

Dear Ms Telfer,

**Review into shop trading provisions of the *Retail Trading Act 2008***

The Australian Bankers' Association (ABA) welcomes the opportunity to provide comments to NSW Industrial Relations on the review of the *Retail Trading Act 2008* ("the Act").

The ABA is the peak national body representing 23 banks authorised by the Australian Prudential Regulatory Authority (APRA) to carry on the business of banking in Australia. The ABA's membership includes the four large banks, foreign banks and smaller retail banks, all of which operate on a national scale.

The ABA's comments are restricted to Section I of the discussion paper relating to banking trading under Part 3A of the Act.

**1. Opening remarks**

The ABA welcomes the repeal of the trading provisions under the *Banks and Bank Holidays Act 1912* and their replacement under Part 3A of the Act.

The ABA notes our previous submissions made as part of the Professor Joellen Riley's review of the *Banks and Bank Holidays Act 1912*. The ABA appreciated the opportunity to provide comments to Industrial Relations NSW on the draft guidelines for bank trading applications under section 14G of the Act earlier this year.

We are however disappointed that the introduction of legislation relating to banking trading under the Act was done without industry consultation and apparently without a Regulatory Impact Assessment. As a result, there are substantial problems with some of the provisions of the law.

## 2. Overview of the law

Under s 14C of the Act a bank must not open for retail banking business on a 'bank close day'.

A bank will be able to seek approval from the Director-General under Part 3A of the Act to open the bank, or one or more branches of the bank, in NSW on a bank close day (other than a *restricted trading day* being Good Friday, Easter Sunday, Anzac Day before 1pm, Christmas Day and Boxing Day).

The Act draws a distinction between a "bank"<sup>1</sup> and a "financial institution"<sup>2</sup>. The Regulations can also exclude an authorised deposit taking institution (ADI) from the definition of "bank" for the purposes of the Act.

## 3. Discussion Paper

Section I of the discussion paper raises two specific questions:

### 3.1 What are the issues surrounding inconsistent treatment imposed on banks and financial institutions regarding 'bank close days'?

The ABA notes that under Part 2 of the Act 'shops' are only to be closed on 'restricted trading days' including Good Friday, Easter Sunday, before 1pm on Anzac Day, Christmas Day and Boxing Day.

Furthermore, certain shops are exempted from this requirement if its predominant business is a business of a kind specified in Schedule 1 of the Act or the shop is a small shop within the definition of the Act<sup>3</sup>. Schedule 1 covers a broad range of shops including take away food stores, petrol stations, chemists and souvenir stores. Scheduled or small shops are therefore permitted to trade 24 hours a day, 7 days a week, including on restricted trading days. Shops that are not exempted in Schedule 1 can apply to the Director-General to open on 'restricted trading days'.

Conversely, the days included in the definition of 'bank close days' under Part 3A of the Act are much broader and include not only 'restricted trading days' (whether or not they are public holidays in a particular year), but also:

- A public holiday under the *Public Holidays Act 2010* (including New Year's Day, Australia Day, Easter Saturday, Easter Monday, Queen's Birthday and Labour Day);

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<sup>1</sup> Meaning an authorised deposit-taking institution (ADI) (within the meaning of the *Banking Act 1959*)

<sup>2</sup> Meaning a body (other than a bank) that is a body regulated by APRA pursuant to section 3(2)(a) – (e) of the *Australian Prudential Regulatory Authority Act 1998*.

<sup>3</sup> Part 3, Division 1, section 8. Broadly defined as retail businesses with four or less employees.

- A local public holiday or part holiday;
- A Saturday or Sunday; and
- the first Monday in August (known as 'Bank Holiday' in NSW).

A bank, unlike a 'shop', cannot apply to trade on any 'restricted trading days'.

Furthermore, the only 'bank close days' to apply to 'financial institutions' in section 14D of the Act is the August 'Bank Holiday'. The other 'bank close days' such as weekends and restricted trading days<sup>4</sup> do not apply to financial institutions other than banks. Furthermore, the exemptions to the requirement to close on the August 'Bank Holiday' in section 14D (3)(b) and (c) only apply to financial institutions and not to banks.

Section 14D (3) of the Act requires financial institutions and their branches to close for retail business only on the August 'Bank Holiday' unless:

- a) An approval to open has been sought and obtained, in the same manner as for banks, from the Director-General of the Department of Finance and Services;
- b) An applicable industrial instrument provides for employees to receive a substituted day off in lieu of the Bank Holiday for working on the Bank Holiday; or
- c) The financial institution employs no more than five employees.

The ABA submits there are no compelling reasons for retaining arrangements specifically for banks that do not apply to other businesses or industries, especially financial institutions that provide similar products and services to banks. Legislation which codifies differences between banks and financial institutions and other retail businesses and service providers creates uneven regulatory burdens and impacts on competition in the provision of financial products and services.

Furthermore, the ABA notes that under section 14A (2) of the Act, the Regulations can exclude an ADI from the definition of "bank" for the purposes of Part 3A of the Act. This would effectively reduce the number of close days that those institutions are required to apply to trade on, in particular codifying additional differences between banks and other financial institutions, such as credit unions and building societies. Banks should be able to compete on the basis of customer service and not be hampered by legislation that does not operate evenly across the financial services sector.

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<sup>4</sup> Arguably, financial institutions do not have to close on 'restricted trading days' as they are not a bank nor are they a "shop" for the purposes of the definition in Part 1, Section 3 of the Act. Shop means premises used wholly or predominantly for the retail sale of goods.

### 3.2 Given the August 'Bank Holiday' is not a general public holiday should it remain a 'bank close day'?

The ABA notes the opportunity for banks to apply to trade on the August 'Bank Holiday'. We welcome this as a positive outcome in comparison to the previous situation in which banks were unable to apply for an exemption to trade on this day. However, we are disappointed that the August 'Bank Holiday' is deemed to be a 'bank close day' in section 14B of the Act. We submit that banks should be permitted to trade equally with other retail businesses and service providers, and therefore the 'Bank Holiday' should be removed as a 'bank close day'.

Currently only NSW and the ACT (and only some financial institutions within these jurisdictions) observe a bank holiday on the first Monday in August. This results in unequal trading rules for banks and other financial institutions and also means that banks operating nationally have different arrangements for various aspects of their business. Inconsistency creates unnecessary complexity for banks in terms of working arrangements for staff and systems for managing trading and payments.

Trading restrictions imposed on banks with regards to the August 'Bank Holiday' cause unnecessary confusion for customers in terms of access to banking products and services as well as inconvenience for retail customers and business disruption for business customers across the NSW community. For example, small business customers who trade on the first Monday in August are forced to defer transactions conducted in bank branches until the following day<sup>5</sup>. In this instance, small business customers could be faced with cash handling and other transaction difficulties because their retail business continues to operate, yet their bank may be closed. Many of these bank branches are co-located with these small businesses in shopping centres and other retail centres.

We continue to maintain that there is significant demand for banking services on the August 'Bank Holiday'. The ABA re-submits that the August 'Bank Holiday' should not remain a 'bank close day'.

### 3.3 Professor Riley's review of public holidays in NSW

The discussion paper references Recommendation 10 of Professor Riley's report on public holidays in NSW. Professor Riley advocates a 'phased approach' to the liberalisation of bank trading arrangements and suggests *restrictions in place are there to protect the interests of bank employees and that those provisions should operate until it can be shown that banks are able to observe their commitments to maintaining leave entitlements for their staff.*

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<sup>5</sup> The ABA's members have advised a significant increase in customer demand in some NSW branches on the days before and after the Bank Holiday. An increase in retail trade and consumer activity around public holidays can be inferred from this data. Anecdotally, the increased demand relates to increased small business trading and consumers 'tying up loose ends' before or after the bank close day.

The ABA had proposed in previous submissions to Professor Riley and to NSW Industrial Relations that the August 'Bank Holiday' be removed as a gazetted holiday and that existing employees instead be provided with leave entitlements, for example, a day in lieu, in industrial instruments. We submitted that the removal of the August 'Bank Holiday' and institution of a day in lieu for employees would ensure that the commercial needs of the bank were balanced with the protection of existing employees' entitlements by enabling employees accustomed to the holiday to be treated fairly and not face a reduction in the number of holidays to which they are currently entitled. The ABA therefore argues that banks have adequately demonstrated their willingness and ability to observe their commitments to maintaining leave entitlements for their staff. This barrier to the removal of the Bank Holiday has therefore been removed.

The ABA supports the extension of the Bank Holiday as a 'bank close day' to other financial institutions regulated by APRA in section 14D of the Act. However, as noted above, a financial institution, which is not a bank, is not prevented from opening on the Bank Holiday if under section 14D(3)(b) an industrial instrument provides for employees employed in the retail business of the financial institution to receive a substituted day off in lieu of Bank Holiday, for working on the August 'Bank Holiday'.

The ABA strongly advocates that the August 'Bank Holiday' be removed from the Act as a 'bank close day'. However, if the 'Bank Holiday' is retained, in the interests of commercial neutrality, we consider that the same provision applicable to financial institutions in section 14D(3)(b) should apply to banks i.e. a bank is not prevented from opening on the Bank Holiday if an industrial instrument provides for employees employed in the retail business of the bank to receive a substituted day off in lieu of the Bank Holiday. Banks could adequately implement this same condition in their industrial instruments thereby obviating the need for banks to apply to trade on the Bank Holiday under section 14G of the Act.

### **3.4 Recommendations**

In the first instance, the ABA submits that the August 'Bank Holiday' should be removed from the Act as a 'bank close day'.

In the second instance, if the August 'Bank Holiday' is retained the same exemptions that apply to 'financial institutions' should apply to 'banks' in relation to the Bank Holiday as outlined in section 14D(3).

## **4. Other comments on the Act**

### **4.1 Weekends should not be bank close days**

The ABA is disappointed that the Act has been used as a mechanism for regulating employment on the weekend, under which Saturdays and Sundays remain as 'bank close days' (section 14B).

The process prior to the introduction of the legislation remains in place, whereby banks are required to seek an exemption from the Director-General of the Department to permit weekend trading. We strongly believe it should not be necessary for banks in NSW to apply to the Director-General to trade on weekends.

We submit that the deeming of weekends as 'bank close days' results in unnecessary regulatory burden for banks and impacts on competition in the provision of financial products and services, and also the broader retail services industry. For example, financial institutions that are not deemed 'banks' may operate without these specific trading restrictions, yet can offer the same or similar retail banking products and services.

The Act also creates advantages for banks in other States where arrangements operate effectively for banks and their employees. For example, in Queensland and Victoria, banks are entitled to, and do open, on weekends, subject only to relevant local council regulations.

The ABA notes that bank customers today are seeking greater flexibility and convenience in the way they conduct their banking in terms of how and when they do their transactions and other banking business. Public attitudes to weekend trading are changing and weekend trading is increasingly recognised as standard practice across many industries, in particular, the retail industry. Various customer surveys conducted by individual banks indicate that the majority of their customers consider weekend trading as important and believe that bank branches should be open on the weekend.

Furthermore, the ABA notes that employees' entitlements relating to weekend work, including the basis on which an employee commences such arrangements, are adequately provided for in the industrial instruments that apply to each of the banks. These working arrangements are reflected in institutional policy statements. These industrial arrangements and policies have worked well to ensure employees' interests are protected. Additionally, many employees have a preference to work flexible hours to accommodate their other commitments and supplement their incomes.

The ABA believes there are no compelling reasons for retaining additional regulatory conditions or imposing unnecessary administrative burden on banks. Banks should not be treated differently to other financial institutions or other retail businesses or service providers with regard to weekend trading provisions. We continue to maintain that Saturdays and Sundays should not be deemed 'bank close days' and banks should be able to trade on weekends without restrictions. We emphasise the need for regulatory neutrality across the financial services and retail services industries.

#### **4.2 Local holidays should not be legislated**

The ABA had previously submitted that local holidays or part holidays should not be explicitly provided for in the new legislation and should not be proclaimed as public holidays.

We note, contrary to our submissions to Professor Riley, a local public holiday or part holiday has been included in the definition of a 'bank close day' under section 14B of the Act.

### 4.3 Recommendations

In addition to the August 'Bank Holiday', the following 'bank close days' should be removed from the Act:

- Public holidays;
- Weekends; and
- Local public holidays or part holidays.

The ABA's preference is for consistency across the retail industry and therefore consistency between the provisions which apply to 'shops' and 'banks'. Shops are only required to be closed on 'restricted trading days' and even then shops contained in Schedule 1 of the Act and small shops (within the definition of the Act) are exempted from this requirement.

Applying the provisions of the Act for "shops" to "banks" would remove public holidays (within the meaning of the *Public Holidays Act 2010*), weekends and local public holidays (or part holidays) as 'bank close days'. Only 'restricted trading days' would be retained as 'bank close days' in the Act i.e. Good Friday, Easter Sunday, Anzac Day (before 1pm), Christmas Day and Boxing Day.

In order to achieve consistency for trading across the retail sector, banks could either be included in Schedule 1 of the Act and therefore exempted from 'restricted trading days' or alternatively the Act could be amended to enable banks to apply to the Director-General to open on 'restricted trading days' (as is the case for shops that are not small or contained in Schedule 1 of the Act). The ability to apply to open is preferable to the current blanket prohibition on banks opening on 'restricted trading days'.

### 4.4 Definition of 'retail banking business'

The ABA notes the clarification of the definition of 'retail banking business' in section 14C(2) of the Act, within the meaning of the *Banking Act 1959*, i.e. business that is conducted with customers in person at the bank or a branch of the bank. We welcome this clarification and support the exclusion of non-branch distribution channels, such as call centres and internet banking from this definition. Non-branch distribution channels operate nationally, and therefore the inclusion of these types of services would have created significant practical issues for banks and adversely impacted on bank customers around Australia.

However, it is unclear whether other distribution channels, such as Internet kiosks (manned or unmanned) would be captured e.g. sales centres where staff help clients apply for products through internet portals. Sales kiosks and shop fronts that purely perform a sales function, as opposed to offering traditional banking services such as teller cashiers, do not appear to be any different from

the functions of other retail shops. Such sales-only branches therefore seem analogous to standard retail shops and should be treated as a "shop" for the purposes of the Act.

One suggestion would be to limit the definition of 'retail banking business' to only include a bank or a branch of the bank that offers traditional banking i.e. cash functionality. However, it would be necessary to provide carve outs for non-traditional branches where cash handling occurs, such as:

- Foreign exchange bureaus; and
- Self service options that provide cash functionality.

## 5. Final comments

The ABA notes the commencement of the *Public Holidays Act 2010* as a positive outcome. We consider that legislated public holidays promote certainty and consistency, and remove the need for holidays to be proclaimed and gazetted each year.

Nevertheless, the ABA submits there should be uniformity and consistency for how retail trading is managed within the NSW. It is confusing for businesses and customers, and unfair for workers, where State and Territory governments take different views on the proclamation and operation of public holidays. The ABA believes there is an opportunity for NSW to ensure that the creation and observance of public holidays is as consistent and uniform with other States and Territories as far as possible, including, the removal of the August Bank Holiday as a bank close day.

Finally, we strongly support consistency across the retail industry and the manner in which the Act applies to shops, banks and other financial institutions. There are no compelling reasons for retaining arrangements specifically for banks that do not apply to other businesses or industries, especially financial institutions that provide similar products and services to banks. Legislating differences between banks and financial institutions and other retail businesses and service providers creates uneven regulatory burdens and impacts on competition in the provision of financial products and services. Banks should be able to compete on the basis of customer service and not be hampered by legislation that does not operate evenly across the financial services and retail sectors.

Yours sincerely



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**Steven Münchenberg**