APEC PUBLIC HOLIDAY BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Joe Hockey MP)
OUTLINE

The purpose of this Bill is to ensure that all employees in the federal workplace relations system that are affected by the public holiday on 7 September 2007 (the APEC public holiday) are entitled to public holiday entitlements on that holiday.

The New South Wales Government has appointed Friday, 7 September 2007 as a public holiday for certain local government areas of metropolitan Sydney, to coincide with the Asia-Pacific Economic Cooperation (APEC) Economic Leaders Meeting.

Employees covered by the federal workplace relations system who are employed in workplaces within those local government areas may receive public holiday entitlements for that day, under Part 12, Division 2 of the Workplace Relations Act 1996. The Act provides a statutory public holiday entitlement to a paid day off on this day.

The statutory public holiday entitlement does not apply to employees covered by a range of pre-reform industrial instruments made prior to WorkChoices. The public holiday entitlements of these employees derive from the terms of their industrial instrument. Some of these employees who are affected by the APEC public holiday may not be entitled to any holiday entitlements on this day if their industrial instrument does not allow for it as a public holiday and does not provide for how employees are to be paid on that day. For example, the instrument may only provide for a paid day off or penalty rates for a holiday declared for the entire State, but not for a holiday declared for certain local government areas.

This Bill would ensure that these federal system employees receive the same public holiday entitlements on the APEC public holiday as they would receive for other public holidays under their instrument.

FINANCIAL IMPACT STATEMENT

The measures in this Bill would have no significant impact on Commonwealth expenditure.
NOTES ON CLAUSES

Clause 1 – Short title

1.1 Proposed clause 1 is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

2.1 The Bill would commence on the day it receives the Royal Assent.

Clause 3 – Object of Act

3.1 The object of the Bill is to deem 7 September 2007 a public holiday for the purposes of certain federal industrial instruments under the *Workplace Relations Act 1996* (the WR Act), but only in respect of employment in the local government areas in which the public holiday is to be observed.

Clause 4 – Definitions

4.1 Proposed clause 4 would define key terms for this Bill:

*Employee* would mean either:
- an employee within the meaning of subsection 5(1) of the WR Act;
- an employee within the meaning of subclause 2(1) of Schedule 6 to the WR Act.

*Employment* in relation to a pre-reform industrial instrument would mean either:
- employment by an employer, within the meaning given in subsection 6(1) of the WR Act, who is bound by the pre-reform industrial instrument;
- employment by an excluded employer who is bound by the pre-reform industrial instrument.

*Excluded employer* would have the same meaning as in Schedule 6 to the WR Act.

*New South Wales Gazette notice* would refer to the notice published under subsection 19(3) of the *Banks and Bank Holidays Act 1912* of New South Wales in Gazette No. 36 of 2 March 2007. This notice appoints 7 September 2007 as a day to be observed as a public holiday in the local government areas specified in the Schedule to the notice.

*Pre-reform industrial instrument* would mean any of the following federal industrial instruments, as defined in the WR Act:
- a transitional award within the meaning of subclause 2(1) of Schedule 6 to the WR Act;
- a pre-reform AWA as defined in clause 1 to Schedule 7 to the WR Act;
- a pre-reform certified agreement as defined in clause 1 of Schedule 7 to the WR Act;
- a section 170MX award as defined in clause 1 to Schedule 7 to the WR Act;
- an old IR agreement as defined in section 1 to Schedule 7 to the WR Act, to the extent that it binds an excluded employer; and
- a preserved State agreement (either collective or individual) as defined in subclause 1(1) of schedule 8 to the WR Act.

The statutory entitlement to public holidays under Part 12, Division 2 of the WR Act does not apply to these industrial instruments.

*The APEC public holiday* would mean 7 September 2007.
Clause 5 – APEC public holiday

5.1 Proposed subclause 5(1) would provide that any reference in a pre-reform industrial instrument to a public holiday, regardless of the specific terms or wording used to describe the public holiday, is taken to include a reference to the APEC public holiday. Subclause 5(1) would only apply in respect of employment in a local government area that has been specified in the Schedule to the New South Wales Gazette notice as an area in which that holiday is to be observed.

5.2 Proposed subclause 5(2) would limit the operation of proposed clause 5 so that it would only apply in relation to an employee whose employment is subject to a pre-reform industrial instrument if the employee is also not otherwise entitled to a holiday on the APEC public holiday under the Industrial Relations Act 1996 of New South Wales, or an instrument made under that Act (so far as the instrument is of a legislative character).

5.3 The intention of the proposed provision is to ensure employees affected by the APEC public holiday who are subject to a pre-reform industrial instrument, and who are not otherwise entitled to public holiday entitlements under that instrument, receive any public holiday entitlements that apply under their instrument for public holidays. That is, the APEC public holiday is to be treated in the same way as any other public holiday under the instrument.

Clause 6 – Concurrent operation of New South Wales laws

6.1 Proposed clause 6 would provide, for the avoidance of doubt, that the intention of the Parliament is that the Bill is not to apply to the exclusion of a law of New South Wales to the extent that that law is capable of operating concurrently with this Bill.

Clause 7 – Regulations concerning APEC public holiday

7.1 Under these proposed provisions, the Governor-General would be able to make regulations dealing with matters of a transitional, savings or application nature in relation to the Bill (see proposed subclause 7(1)).

7.2 Proposed subclause 7(2) would allow for the regulations to provide that the APEC public holiday is taken to be or is not taken to be a public holiday, for the purposes of a specified law of the Commonwealth or an instrument made under such a law. The meaning of the term ‘law of the Commonwealth’ would be provided for in proposed subclause 7(5) and would include a provision of a law of the Commonwealth. Proposed subclause 7(3) would allow regulations made under these provisions to have retrospective effect.

7.3 It is possible that under a particular law of the Commonwealth, or under an instrument made under such a law, anomalous circumstances could arise which have not been provided by the provisions of the Bill, or in which the provisions of the Bill would have unintended consequences. Proposed subclause 7(2) would allow regulations to be made to remedy any unforeseen or unintended consequences that may arise. Such anomalous outcomes that arise after the APEC public holiday would only be capable of being remedied through law with retrospective effect.

7.4 Consequently, a broad regulation making power allowing retrospective legislation to be made is desirable to ensure that federal system employees get the appropriate public holiday entitlements that should apply under their instrument for the APEC public holiday. The broad regulation making power in proposed subclause 7(3) would, however, be confined by operation of proposed subclause 7(4). Under that proposed provision, the power to make retrospective regulations would not extend so far as to allow the Commonwealth to create, modify, or otherwise affect a provision that makes a person liable to an offence or civil penalty.
Clause 8 – Regulations

8.1 Proposed clause 8 would allow the Governor-General to make regulations about matters that are required or permitted by the Bill to be made, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Bill.