

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [10.03 a.m.]: I move:

That this bill be now agreed to in principle.

The Government moves to introduce legislation to ensure the continuation of balanced and effective laws governing public holiday retail trading. On 1 July 2008, the New South Wales Shop Trading Act 2008 commenced operation. That Act introduced the first major reform of this State's retail trading laws since the deregulation of Saturday and late-night trading in the 1980s. The Shop Trading Act 2008 followed an extensive consultation process. This included reviews by the Independent Pricing and Regulatory Tribunal in 2006 and the Better Regulation Office in 2007. Both reviews recommended repeal of the former Shops and Industries Act 1962 to completely deregulate Sunday trading and to reform the restrictions on public holiday trading.

When introduced, the Shop Trading Act 2008 restricted retail trading on just five days: Christmas Day, Boxing Day, Good Friday, Easter Sunday and the morning of Anzac Day. These days are recognised as being of such civic, religious and community significance that restrictions on retail trading are warranted. The 2008 Act permits retailers to trade on these days if they held an exemption to trade under the now repealed Shops and Industries Act 1962. Exempted retailers include small shops, shops selling certain categories of goods and shops operating in major tourist zones. Alternatively, a retailer may be approved to trade on a restricted day by the Director General of the Department of Services, Technology and Administration. These significant changes simplified the rules in relation to opening hours for retailers.

After listening to industry representatives, business owners and workers, this Government created an equal playing field for businesses. The 2008 Act significantly reduced red tape by removing unnecessary regulation of the retail industry in several respects. Importantly, the changes clarified the arrangements around Sunday trading and ensured that the option to trade was available to all retailers across New South Wales. All general shops, medium to large retail outlets such as department stores, supermarkets, hardware stores, furniture outlets and clothing shops are now free to trade on any day except on those five restricted trading days. In October 2008, the Better Regulation Office estimated the value of these reforms at \$1.2 million per annum.

Since the commencement of operation of the Shop Trading Act 2008, the Commonwealth's Fair Work Act 2009 has come into force. The Fair Work Act 2009 will regulate the industrial relations aspects of public holiday trading for many retailers and retail industry workers from 2010 onwards. As all major retailers are corporations, the public holiday trading regime set in the Fair Work Act 2009 overrides any New South Wales law where inconsistent. Nevertheless, the Fair Work Act 2009 recognises the authority of State governments to continue to regulate shop trading generally and the appointment of public holidays. Now that the Commonwealth legislation is in place, it is appropriate to amend this State's Shop Trading Act to clarify its operation.

In addition to this, the Act has been in operation now for more than one year. This period of time has provided an opportunity for business owners, retail workers and the community to witness the operation of the legislation. During this time, it has become apparent that amendments were required to provide greater certainty as to the operation of the Act. Divergent determinations were made with respect to the restricted trading days. The changes contained in this bill will provide further guidance to retailers who may be considering seeking an exemption to open their doors on a restricted trading day. The Government recognises that these five restricted trading days are very important to many Australians and provide a timely opportunity for families to be together.

Under the bill, any requests from larger shops to open on these identified days will need to meet clearly defined guidelines and show evidence of real community need and support. In addition, all staffing must be voluntary, and absolutely no-one can be forced to work on these days. The Government will take action against any abuse of this requirement. Requests for an exemption will need to pass a clearly defined approval test. Applicants will need to fully substantiate any and all claims they make in their application. This threshold strikes an appropriate balance between the rights of retailers, consumers and workers, while recognising the importance of days that have special community significance.

As was noted in relation to the 2008 Act, given that trading restrictions now apply only on our most significant public holidays, the need for such exemptions should be significantly reduced. Put simply, this bill confirms that exemptions should be granted only in exceptional circumstances. There should be a general presumption against trading on these restricted days.

I now turn to detail the major provisions contained within this bill. The bill seeks to amend the long title of the Act to state that the Act is an Act with respect to the "fair regulation" rather than "deregulation" of shop trading. The introduction of the Shop Trading Act in 2008 reduced red tape by substantially re-regulating retail trading. Now that unnecessary regulation has been removed, the title should recognise that the object of the Act is to provide

for a fair recognition of days of community significance. In a similar vein, the bill provides the director general with clear and explicit direction as to how to determine applications. It is appropriate that there be a clear presumption against trading on the five restricted trading days to preserve the status of these days in community life.

The Shop Trading Act 2008 currently obliges the decision-maker to take only general account of the statutory criteria when considering an application. The bill amends this test. The decision-maker is obliged to approve an application only if satisfied that it is in the exceptional circumstances of the case in the public interest to grant the exemption. The bill retains the existing statutory criteria established under the 2008 Act for consideration in the approval process. The bill adds a new criterion for consideration by the decision-maker. It is being introduced because the rights of small businesses should be considered in the approval process.

Accordingly, this bill also obliges the decision-maker to explicitly recognise the impact of approving the application on small businesses operating in the local vicinity. The approval test is also amended in one further respect. It abolishes the scope for the decision-maker to consider any other matters in the decision-making process. The removal of this part of the approval test will more closely align the outcome of decisions with the criteria decided by Parliament to be the only relevant considerations when determining applications. As I have stated earlier, in remodelling the test for an exemption, the bill puts beyond doubt that exemptions should be granted only in exceptional circumstances. This puts the intention of the Act beyond question and provides greater certainty.

The Shop Trading Act 2008 is currently silent on who may make an application to trade on a restricted trading day. The bill limits the application process to only retailers. This will enable the decision-maker to seek specific information and undertakings about each retailer's compliance with the Act. Coupled with this, the bill also gives the decision-maker an explicit power to request a retailer to provide information and documents in support of an exemption application. This power will enable the department to set specific guidelines about the information that is required to be provided in support of an application. For example, retailers will be obliged to nominate the numbers of employees working on a restricted trading day, their hours of work and rest periods.

Similarly, retailers will be obliged to outline the lines of merchandise being sold and why it is necessary that the shop be opened for trade on the restricted trading day. Consistent with good regulatory practice, the department has provided a set of guidelines to assist retailers when they are making an application. These guidelines will be revised following the passage of this legislation to give further guidance to retailers about the types of information required by the decision-maker. This approach will ensure the applicant retailer quantifies the anticipated public benefit accruing from an application.

Another feature of the Shop Trading Act 2008 was the obligation on retailers who gained an exemption to use only workers who willingly agreed to work on the restricted trading day. Currently this condition does not apply to those historic exemptions carried over from the former 1962 Act, resulting in significant inequities. This bill will extend the protection in the 2008 Act to workers covered by the 1962 Act exemptions. As noted earlier, a provision of this type stands lockstep with the new public holiday protections introduced in the Commonwealth Government's Fair Work Act 2009.

I can foreshadow that the requirement for retailers to engage only workers who willingly agreed to work on the restricted trading day will be publicised widely in the lead-up to restricted trading periods. Equally, any retailer who ignores this requirement stands to lose the exemption to trade on a restricted trading day, or have additional conditions imposed on the exemption. Many retailers, large and small, have demonstrated a willingness to use only workers who have willingly agreed to work on the restricted trading day. It is a simple process to seek volunteers, rather than to impose a roster on staff. Such arrangements enable retail workers to balance their work, family, religious and civic commitments. It is now time that all retailers adopt this sensible approach.

The bill also makes a number of consequential amendments to the exemption process. Currently exemptions may be granted for an indefinite period. Experience with exemptions under the 1962 Act has shown that the conditions justifying an exemption may change over time. That is, issues can arise that would either preclude the granting of an exemption or justify the imposition of specific conditions on an existing exemption. So, in order to ensure that exemptions remain relevant and appropriate, this bill limits an approval to a maximum of three years. To avoid difficulties associated with an exemption application concerning a shop not currently trading, the bill restricts applications to shops in existence at the time of the application. This recognises that an application relating to a shop that does not yet exist cannot demonstrate how the retailer will ascertain that staff will work voluntarily. The current legislation does not empower inspectors to compel retailers to provide documents such as roster sheets and commercial records such as business receipts. This bill amends the legislation to enable these powers to be conferred on inspectors authorised under the Industrial Relations Act 1996.

Returning to the approval process, section 11 of the Shop Trading Act 2008 currently permits the approval process to be determined by the director general. This provides a maximum degree of flexibility to adjust the process in extenuating circumstances. However, this degree of flexibility also permitted retailers to argue for an exemption at an extremely late stage, which left objectors with little time to respond. After consideration, the Attorney General decided that setting defined processing times in legislation will provide greater equity. Defined

processing times will also enshrine a reasonable opportunity for the community to voice its opinions about trading hours on days of significant commemoration. Accordingly, the bill establishes that applications must be made at least 28 days before the nominated restricted trading day. Further, all applications must be subject to a 21-day public review process, and there will be a 40-day period in which a decision must be made. Any application not determined within the 40-day period will be deemed to be refused. This is consistent with the Bank Trading Act.

Another important feature of this bill is the introduction of a new section that will void the provision of any retail lease that forces a retailer to open on a restricted trading day. Currently retail leases can be used by the owners of shopping centres to require small stores, including many small family businesses, to open on restricted trading days. The status of restricted trading days is as important to such small business owners as it is to retail workers who are protected by the Shop Trading Act. Accordingly, the bill contains a provision to provide that no retail lease may be used to force a shop to open on a restricted trading day.

Finally, two procedural matters are dealt with as part of the bill. First, references to the director general and the department are updated to reflect current administrative arrangements. Second, the bill permits the online publication of applications, orders and reasons for decisions. This will be undertaken on the appropriate departmental website. In conclusion, promoting a positive work-life balance across the New South Wales working community is an important issue for the New South Wales Government. Requiring retailers to meet the exemption requirements set by these new reforms will ensure that they consider fully the needs of their workers and the community in which they operate.

The passage of this bill will create a balanced, workable safety net in the retail industry in this State. Retailers, large and small, are given certainty about trading hours on days of real community significance. Most retail workers are provided with scope to participate in family and community occasions that define our society. Small business owners are also given the scope to decide whether or not to open for trade on these days of significance. I commend the bill to the House.