

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Industrial Relations, Vice President of the Executive Council) [8.06 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government now moves to introduce legislation so as 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 in order 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, being 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The 2008 Act permits retailers to trade on these days if they held an exemption to trade under the now-repealed Shops and Industries Act 1962, including those in the Sydney CBD and in designated tourist zones in regional New South Wales.

The Act also exempts small family businesses and shops of necessity, such as chemists and service stations, from any restrictions.

Those retailers not automatically entitled to an exemption 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 and the general public.

After listening to industry representatives, business owners and workers, this Government created an equal playing field for all 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, those who are medium to large retail outlets such as department stores, supermarkets, hardware stores,
In October 2008 the Better Regulation Office estimated the value of these reforms at \$1.2 million per annum.

Since the commencement 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 now appropriate to amend this State's Shop Trading Act to clarify its operation.

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 4 1/2 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 extremely stringent 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 rigorous approval test:

1. The bill will establish a clear presumption against the granting of an exemption;
2. Exemptions will only be granted in exceptional circumstances; and
3. Applicants will need to fully substantiate any and all claims they make in their application.

This threshold reflects the importance of Christmas Day, Boxing Day, Good Friday, Easter Sunday and ANZAC Day in our community.

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 only be granted in exceptional circumstances given that there are no restrictions on trading on all but 4 1/2 days per year.

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.

This goes to the heart of the bill- the bill is about fairness fairly balancing the interests of retailers, consumers, retail workers and the general community.

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 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.

As I have stated, there is a clear presumption against trading on the 4 1/2 restricted trading days in order to preserve the status of these days in community life.

The Shop Trading Act 2008 currently only obliges the decision maker to take 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, those being:

- (a) the nature of the shop and the kinds of goods sold by the shop;
- (b) the need for the shop to be kept open on the day concerned;
- (c) the likely effect of the proposed exemption on the local economy, tourism and other businesses in the area; and
- (d) the likely effect of the proposed exemption on employees of, or persons working in, the shop.

The bill adds a new criterion for consideration by the decision maker- the impact of approving the application on small businesses operating in the local vicinity.

It is being introduced because the rights of small businesses should be considered in the approval process.

All of the criteria must be considered in determining an application for an exemption.

No other factors aside from these elements may be considered by the Director General.

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.

A feature of the bill is the restriction on applications for an exemption. 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 approach will effectively oblige the applicant retailer to substantiate any claims they make in their application.

A failure of an applicant to substantiate any claim they make will result in the application failing to meet the stringent test in the Act.

To ensure that the appropriate criteria is addressed, Regulations established under the Act will require an applicant to address all of the necessary criteria in their application.

To ensure that there are appropriate checks and balances in the administration of the Act the bill provides interested parties with a right to appeal a decision to grant an exemption to the Administrative Decisions Tribunal.

The Act currently provides retailers who are denied an exemption a right to appeal that decision to the ADT this bill ensures that appeal rights flow both ways.

This avenue of appeal may be exercised by any party who demonstrates an interest in an exemption.

Hence, the RSL might appeal a decision concerning ANZAC Day.

A church may appeal in relation to Christmas Day or Good Friday.

A union might appeal on behalf of retail workers.

Another feature of the Shop Trading Act 2008 is the obligation on retailers who gained an exemption to only use 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.

A worker employed in a shop who has one of these historic exemptions may be forced to work on a restricted trading day against their will.

This bill will extend the protection in the 2008 Act to workers covered by the 1962 Act exemptions.

Christmas Day, Boxing Day, Good Friday, Easter Sunday and ANZAC Day are of such importance that retail workers should not be forced to work.

As I noted earlier, a provision of this type stands lock-step 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 only engage 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 only use workers who have willingly agreed to work on the restricted trading day.

This is to be encouraged. 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.

The 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 the 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 which does not yet exist cannot demonstrate how the retailer will ascertain that staff will work voluntarily.

The bill enhances the compliance powers possessed by the Office of Industrial Relations.

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.

Setting defined processing times in legislation will forestall future opportunistic behaviour by some retailers.

Defined processing times will also enshrine a reasonable opportunity for the community to voice their 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 which will void the provision of any retail lease which forces a retailer to open on a restricted trading day.

Currently retail leases can be used by the owners of shopping centres to force small stores, including many small family businesses, to open on restricted trading days.

The status of restricted trading days are as important to such small business owners as they are to retail workers.

Accordingly the bill contains a provision to provide that 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 this 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.

Promoting a positive work-life balance across the New South Wales working community is an important issue for the Rees Government.

Putting the onus on retailers to meet the exemption requirements set by these new reforms will ensure that they fully consider 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 this family and community occasions which 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 this bill to this House.