

RETAIL TRADING AMENDMENT BILL 2012

PROOF

28 MARCH 2012

Bill introduced on motion by Mr Mike Baird.

Agreement in Principle

Mr MIKE BAIRD (Manly—Treasurer) [8.13 p.m.]: I move:

That this bill be now agreed to in principle.

I am pleased to introduce the Retail Trading Amendment Bill 2012. The purpose of this bill is to amend the Retail Trading Act 2008 to provide a new balance to trading restrictions, to allow families to go shopping when they want to and businesses to open when they have customers, and to provide opportunities for more jobs and more income for employees, including students, young people and casuals. The bill introduces amendments to liberalise the restrictions on retail trading and to maximise the productivity of the sector by allowing retail shops—including supermarkets, electrical and furniture shops, department and hardware stores—to open on Boxing Day when they believe they have customers; by releasing small to medium sized shops from the trading restrictions on any other day; by removing the constraints that prevent shops from being ready to serve customers as soon as they open; by revoking the decade-old patchwork of regional exemptions that distort the market place; and by providing for new, discrete trading zones whereby local communities, with the support of tourism authorities, can provide shopping services to holiday-makers and tourists during holiday times.

To provide an appropriate balance to the trading preferences of retailers, each of these liberalised arrangements will be available only on the condition that the staff in the shop has freely elected to work on that day, without any coercion, harassment, threat or intimidation by, or on behalf of, the occupier of the shop. A review of shop trading legislation by the Department of Finance and Services commenced on 13 September 2011. The terms of reference for the review focused on issues surrounding the mandatory closure of shops on the current 4½ specified days per year and the static patchwork of exemptions that operate based on location but take no account of changed circumstances over time. The review elicited 26 submissions from organisations such as large corporate retailers and representative organisations of employers and employees, faith groups, an academic and more than 200 letters from individuals expressing their very personal and heartfelt views. While some organisations advocated for complete deregulation, a number of the larger retailers conceded that customer demand to open on an otherwise restricted day was largely confined to Boxing Day and Easter Sunday. The major retailers particularly referenced their previous experience with strong demand associated with the commencement of popular Boxing Day sales in current exempt locations.

However, the personal comments of shop assistants expressed concern about any reduction in

family time that would result from the liberalisation of restricted trading day arrangements and the consequent need to staff shops on those days. In responding to the submissions of those who contributed to the review, the Government considers that the proposals in this bill represent an appropriate balance between the commercial interests of shop owners in a rapidly changing market, the demands of consumers who want to shop at times convenient to them and the work-life balance of employees. In particular, the liberalisation of restrictions on Boxing Day will free whole shopping centres and malls in every suburb, every city and every region across New South Wales to provide shopping services to their communities and support the shops, restaurants, cinema multiplexes and other businesses that are already permitted to trade on that day.

The bill will provide opportunities for thousands of shop employees across the State to maximise their earnings, particularly around holiday times, which are always a drain on tight household incomes. To make it abundantly clear, for the occupier of a shop to take advantage of the liberalisation of any of the restrictions contained in the bill before the House, they must use only staff who have freely elected to work without coercion, harassment, threat or intimidation. Importantly, Boxing Day, as with other restricted trading days, remains a named public holiday under the Public Holidays Act and therefore continues to be recognised as a public holiday for the purposes of employment entitlements under the relevant national employment standard in the Commonwealth Fair Work Act.

The bill does not interfere with the entitlements of employees under the national industrial relations system to paid time off, nor does it diminish any employer's responsibility to pay public holiday penalty rates in accordance with a relevant award or enterprise agreement. Many employers, including Coles and Kmart, have noted in their submissions that there is no shortage of staff willing to work on Boxing Day, and they support arrangements where staff have freely elected to work on those days without coercion or harassment. Indeed, Kmart's submission states that it is its experience that the demand for work on public holidays can outweigh available shifts.

The Government has listened to the concerns of retailers, representatives and individuals, and today presents a bill that will provide a more appropriate balance between the commercial interests of retailers seeking to maximise the potential of their investment on the one hand and the family interests of retail workers on the other. As I alluded to earlier, the Government's response to the review into the shop trading provisions of the New South Wales retail trading regime covers a number of issues of importance to retailers, consumers and employees. In the meantime, given that the next restricted trading days are fast approaching, it is essential that the bill is passed and legislation commences in time for retailers and employees to make suitable arrangements to facilitate the orderly opening of shops to provide full services to customers, particularly from 1.00 p.m. on Anzac Day. I now turn to the elements of the bill.

Relevantly, section 4 of the Retail Trading Act 2008 currently provides that all shops, except those that are otherwise exempt, must be closed 4½ days during the year: Good Friday, Easter

Sunday, before 1.00 p.m. on Anzac Day, Christmas Day and presently Boxing Day. The bill would amend the Act at section 8B to exempt these shops from the requirement to remain closed on Boxing Day, 26 December. The exemption is subject to the shop occupier staffing the shop with persons who have freely elected to work on that day. The "freely elect to work" condition that is placed on retail shops seeking to trade on days when they would otherwise be restricted, has operated in respect of other exemption processes contained in this Act since 2008. It remains an integral characteristic of the balance that is achieved in further liberalising trading restrictions contained in the bill. Given this commonality, the bill provides at new section 3A the full meaning of the short term "freely elect to work" as it is used throughout the Act. Section 4 (3) of the Act currently exempts an area known as, and defined in the regulations as, the Sydney Trading Precinct from the requirement to keep shops closed on Boxing Day.

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Given the substantive proposal in the bill to bring uniformity to the exemption of shops around the State on Boxing Day, it is clear that the Sydney Trading Precinct is no longer required and the provision is therefore deleted.

Since this Government was elected by the people of New South Wales in March of last year, a number of retail stakeholders have expressed concerns about the over-regulation of shops in this State. There was concern about subsection 18 (e) of the Act, which had the effect of preventing a retailer from even preparing their shop to be ready to serve customers with fresh goods immediately upon opening at 1.00 p.m. on Anzac Day. Supermarkets require time to bake bread, prepare salads, and display fruit and vegetables before receiving customers. Until 2010 the New South Wales evidentiary requirement that a shop is held not to be closed was relatively consistent with other jurisdictions. In practice, many retail stores commence operations several hours prior to opening a store for trade, and the 2010 amendments did not take this into account. The bill amends the Act by inserting new section 8A, which provides that shop occupiers can undertake those essential preparatory tasks provided they do not trade and the work is undertaken by persons who freely elect to do so. To be clear, the task of stocktaking as identified in current section 18 (f) is not subject to this amendment. Stocktaking is not permitted in any circumstances when a shop is required to be closed at a restricted trading time.

New section 8 deals with a new category of exempt shop based on the size of the retailer's workforce, as well as the simplification of the existing category of "small shop". The new medium sized shop exemption is closely aligned with the model operating under the Victorian shop trading legislation and will bring benefits to those retail businesses operating in both States through common requirements. It will permit any shop to trade on any day where there are no more than 20 employees working on the day, and no more than 100 full-time equivalent employees within a seven-day period prior to that day. Consistent with the approach in Victoria, should the employees be employed by a body corporate then the last element would include those employees employed by that business and related entities working within a seven-day period prior to the restricted trading day.

The types of shops that may fall within this category of exemption include, amongst others, independent furniture, hardware or electrical retailers and liquor stores, as well as smaller fashion chains and supermarkets. Importantly, as with other categories of conditionally exempt shops in the legislation, reliance on this exemption will be predicated on the requirement that the shop is staffed by persons who have freely elected to work on the day in question. This medium sized shop category, as defined, will effectively subsume the longstanding category that was established under the previous legislation to allow very small, often family-run shops to open as they choose. We have decided, however, that, given the longstanding arrangement for these shops to open on restricted days and acknowledging that such businesses will have a very small roster of employees to call upon, small shops with fewer than five employees will not be compelled to comply with the freely elect to work condition.

Submitters to the inquiry also noted that the complexity of the "small shop" definition often created difficulties for these small businesses in assessing whether their business structure qualified for that exemption. We have therefore decided that the definition should be simplified and made consistent with the approach adopted for the definition of a medium sized shop. The category of "small shop" will retain its basic premise of fewer than five employees working in the shop on the restricted day but with the additional characteristic of fewer than five effective full-time employees in the previous seven days, in aggregate, across all aspects of the employer's businesses in New South Wales. The current "small shop" definition was largely directed at retail micro businesses with a particularly convoluted limitation on ownership arrangements and with four or fewer employees and no more than two natural persons as owners.

In effect, the experience of these micro businesses in expending scarce resources to establish their small shop, and thus exempt, status is largely diminished. The purpose of retaining the small shop category and not removing it altogether is simply to ensure that those micro businesses, with a very small roster of employees to call upon, are not burdened with the medium sized shop condition that persons working on a named restricted day have freely elected to work. It is expected that the above proposal will be relatively easy to understand for retailers and subsequently resolve much of the current confusion and potential problems associated with compliance. "Preserved exemptions under the current Act" is a generic term for exemptions in force immediately before the 2008 repeal of the former Shops and Industries Act 1962. They relate to some tourist areas or holiday resorts in regional New South Wales, as well as individual shops. These exemptions largely allowed shops to trade at times when they would otherwise be restricted, predominantly around the Christmas and Easter periods.

Under current arrangements, a shop relying on a preserved exemption to open on a restricted day must be staffed by persons who have freely elected to work. Some of the preserved holiday resort exemptions extend back to 1972, with most covering all remaining restricted trading days. While these zones must have established their credentials as a holiday resort at

the time of being granted exempt status, there is no process for ongoing assessment of the changing preferences of holiday-makers and other circumstances that have occurred over the ensuing decades. Although in 2008 the original section 10 exemption process was designed to accommodate a locality or precinct-based exemption, amendments commenced in 2009 quickly limited this opportunity by allowing applications from shop occupiers only.

There is now no opportunity for a representative community organisation, such as a local council, to build upon the efforts of businesses to attract tourism by obtaining an exemption to allow trading by shops to service tourist needs during peak periods such as the Christmas and Easter breaks. The current trading exemption zones and their geographical boundaries commonly raise issues about loss of trade for those shops not located within designated zones. Such arbitrary exemptions are perceived as discriminatory and confer a misplaced competitive advantage, leading to economic inefficiency. The bill provides for the phasing out of former regional holiday resort exemptions by way of a sunset clause on 30 June 2013. Individual shop exemptions under section 78A of the former Shops and Industries Act 1962 will continue to have effect.

Recognising that the remaining restricted days largely fall during peak holiday times when there are significant numbers of tourists holidaying away from home or attending major events, the bill inserts new section 10A, which provides for the establishment of tourist trading precincts. Local councils, in consultation with their communities and with the support of tourism and other relevant organisations, may seek exemption from the Director General of the Department of Finance and Services to allow all shops to open in a defined locale on Good Friday, Easter Sunday, Anzac Day morning and Christmas Day if there are likely to be tourism-related needs. The director general must not grant a tourist trading precinct exemption unless he or she is satisfied that the location is an area that during a particular period, or periods, of the year has a tourist population that is greater than its normal resident population.

If an exemption is granted by the director general it will apply to the relevant precinct for up to five years and a local council may apply in respect of one or all of the restricted trading days. To assist local councils when drafting their applications, regulations will be developed in consultation with other government agencies in order to provide guidance to the director general regarding the matters that may be considered relevant when deciding whether to grant an exemption. Consistent with the holiday resort exemptions, in order for a shop to rely on a tourist trading precinct exemption they must use staff who have freely elected to work on that occasion. Finally, the bill inserts new section 14CA, providing for bank branches to open on the August bank holiday without the need first to apply to the Director General of the Department of Finance and Services. Opening branches on that day will, however, also be conditional upon staff freely electing to work. I commend the bill to the House.

Debate adjourned on motion by Mr Brad Hazzard and set down as an order of the day for a future day.