



# Shop Trading Hours Amendment Bill

81—1

Report of the Commerce Committee

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# Shop Trading Hours Amendment Bill

## Recommendation

The Commerce Committee has examined the Shop Trading Hours Amendment Bill. The votes were tied, and we were unable to reach agreement on whether to recommend that the bill be passed.

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## Introduction

The Shop Trading Hours Amendment Bill seeks to give territorial authorities the power to create a bylaw to allow shops to open in all or part of their districts on Easter Sunday. The bill also seeks to provide shop employees with the right to refuse to work on Easter Sunday without giving a reason. Employees would be able to bring a personal grievance against their employer if their employer compelled them to work on Easter Sunday or treated them adversely for refusing to do so.

The bill does not propose any changes to existing exemptions from trading restrictions or to the penalties for breaching the law. The Ministry of Business, Innovation and Employment would remain responsible (through the Labour Inspectorate) for enforcing the Shop Trading Hours Act Repeal Act 1990. The bill would also not change the current status of Easter Sunday by proposing to create a new holiday. Nor would it change restrictions on the sale and supply of alcohol on Easter Sunday.

## National or regional decision-making for Easter Sunday shop trading

The stated intention of this bill is to allow the community to choose whether shops open on Easter Sunday. This would be achieved by amending the Shop Trading Hours Act Repeal Act 1990 to grant territorial authorities a power to create bylaws to allow shops to trade in their district or in defined areas of their district on Easter Sunday.

We could not agree whether the ability to allow shops to trade on Easter Sunday should be set at a local or national level.

## Views of National Party members

National Party members of the committee support the bill's approach of allowing territorial authorities to decide whether they want to allow areas in their district to trade on Easter Sunday and, if they do, to make bylaws to permit Easter Sunday shop trading. We believe that this is an appropriate approach because it provides choice to local communities and recognises that different communities may have different views.

The current exemptions from the public trading restrictions for Easter Sunday are inconsistent, creating unfairness between regions. Moreover, the exemption regime is dated and cannot create further exemptions. National Party members believe that this bill provides a pragmatic solution to this problem.

**Views of Labour Party and Green Party members**

Opposition members of the committee (Labour Party and Green Party members) believe that changes to legislation affecting Easter Sunday shop trading should be decided at a national level and that it is inappropriate to give territorial authorities this responsibility. The bill as introduced would place a significant financial burden on territorial authorities and open authorities up to the threat of legal action. It would also create further inconsistencies, because some shops in districts would be allowed to open and others not. Opposition members of the committee believe the bill is not fit for purpose because we believe it does not meet the Government's stated policy intention of removing inconsistencies in the way Easter Sunday shop trading occurs.

**New Zealand First minority view**

New Zealanders work the second longest hours in the OECD.

New Zealand First does not support the amendments presented to the Commerce Committee.

We note that New Zealand has some of the most liberal shop trading hours in the world with only 3.5 days annually restricted and absolutely no restriction (aside from certain sectors) on opening hours.

Fundamentally the main purpose of the bill was, initially, to allow councils to consult with their communities regarding Easter Sunday shop trading, with employees given the opportunity to decline work without repercussion. However this has unintended consequences on employees and employers.

*Example:*

Because any employment history must be disclosed, during the recruitment process.

A majority of submitters were, however, opposed to this. It was discussed that by allowing for policy provisions, rather than a bylaw, this concern would be adequately addressed.

Nevertheless, submitters said it would place undue financial burden upon councils and therefore ratepayers. New Zealand First agrees.

New Zealand First believes that such nationwide change is undemocratic when local elections can be used for a local referendum on whether to liberalise local trading hours further. While some would say it is too late for the 2016 local elections, that is not the case. It would be suitable to hold a local referendum saving costs for territorial authorities and allowing for each community to decide for itself. As the bill in no way facilitates this we cannot support it in its current state.

**Using a local policy rather than bylaws to make the change**

The bill as introduced would enable territorial authorities to adopt a bylaw to permit shops to trade on Easter Sunday in their district or in defined areas of their district. National Party members would have supported recommending amendments requiring authorities to adopt a local policy, rather than a bylaw, to allow Easter Sunday shop trading. Several further recommendations flow from this change to local policies, which are outlined below.

We are aware of widespread concern among territorial authorities that the bylaw process is costly and prescriptive, and involves legal risk. National Party members believe that adopting a local policy process would help mitigate these concerns. Opposition members disagree because the change would not change the cost to territorial authorities and local policies would still be open to legal challenge.

In the view of National Party members, adopting a local policy mechanism instead of the bylaw mechanism in the bill as introduced would have several advantages:

- It would ensure consistency with other regulatory regimes administered by territorial authorities. An advantage of local policies is that they are more appropriate than bylaws for the purpose of enabling an activity in a district. (Bylaws are generally used to restrict an activity.) Local policies would therefore lead to better regulatory consistency, something recommended in the Productivity Commission's report *Towards Better Local Regulation*.
- The process for creating local policies is generally more flexible than the process for making bylaws set out in the bill. This would reduce the legal risk, although local policies can still be legally challenged. However, the review process for local policies would have a similar process to the bill's review process for bylaws.

To reflect this change, National Party members would have proposed rewriting proposed new sections 5A to 5F to change references to bylaws to local policies. We concluded there would be little difference between the bylaw-making process in the bill and a proposed local-policy making process in terms of total cost, time to produce, consultation, and review requirements. This change would ensure that local communities are consulted on any local policies introduced by the territorial authority.

As noted in the report from the Regulations Review Committee, which follows, Opposition members of the committee are concerned that the shift from a bylaw approach to a policy approach weakens the constitutional safeguards embedded in the bylaw process which are particularly important given the Henry VIII issues raised by that committee. In particular we believe the removal of proposed new section 5E significantly weakens the requirements for the review process of the policy, worsening the general constitutional problems with the bill.

Opposition members do not support the bill and do not support the proposed amendments to move from a bylaw to a policy-based approach.

### **Consequential amendments**

National Party members consider that the bylaw mechanism would offer some safeguards relating to community choice, transparency, and accessibility that should be retained. Therefore, National Party members would have proposed retaining some of the requirements of the bylaw process under the bill as introduced and applying them to local policies.

National Party members would have proposed retaining the Special Consultative Procedure for the local-policy process when a territorial authority proposes to adopt, amend, revoke, or replace a shop trading policy, as well as when reviewing a shop trading policy created by the territorial authority.

The Special Consultative Procedure requires a territorial authority to publicise proposals in a way that can be easily understood and allows interested parties to express their views in written and oral form. Without this provision, territorial authorities' general consultation procedures, guided by their significance and engagement policies, would have set the level of community engagement on Easter Sunday shop trading. Legislating that the Special Consultative Procedure must be used would ensure that territorial authorities carry out a high level of community engagement and that any decision reflects the views of the community.

National Party members would also have retained the requirement for a territorial authority to review its first Easter Sunday shop trading policy created under the bill no later than five years after adopting it, with no compulsory reviews after that.

National Party members would have proposed including a provision to make local policies available for the public to view, which would have ensured their transparency. National Party members would also have recommended retaining the clause to require territorial authorities to inform the Ministry of Business, Innovation and Employment within 10 working days after they make, amend, or revoke a local policy relating to shops trading on Easter Sunday.

### **New Zealand Bill of Rights Act requirement**

The bill as introduced contains a clause that would require territorial authorities to ensure that any bylaws are consistent with the New Zealand Bill of Rights Act 1990. Several territorial authorities and Local Government New Zealand stated that this requirement is unnecessary and likely to open them to future legal challenge.

National Party members would have proposed removing this clause because it is unnecessary for the purposes of this bill. A bylaw is made at the discretion of a territorial authority to address a problem or to regulate an activity. When exercising this discretion, the territorial authority must ensure that the proposed bylaw is consistent with the Bill of Rights Act.

The bill would not allow territorial authorities any discretion to make a bylaw or policy that could be inconsistent with the Bill of Rights Act. Further, section 3 of the Bill of Rights Act states that its provisions apply to the decisions of a body carrying out a public function, and this would include territorial authorities.

### **Employee rights**

Subpart 2 of the bill seeks to protect the right of employees to not work on Easter Sunday. National Party members would have proposed several changes to provide additional protections for employees and still maintain the intent of the bill. Opposition members believe that these protections for employees would have been unlikely to be effective and that some workers would still be required to work on Easter Sunday.

National Party members would propose clarifying the meaning of "treating an employee adversely" by giving it the same meaning as in section 67F of the Employment Relations Act 2000. National Party members would also propose changes to the personal grievance provision to ensure that it is clear.

### **Views of National Party members**

For consistency and clarity, National Party members would have recommended amendments that would have extended the right to refuse to work to all shop employees working in or from shops on Easter Sunday. The bill as introduced would not extend the right to refuse to work to employees doing “non-trading” work, such as stock-taking in a shop in an area where a territorial authority has not allowed shops to trade.

Extending this right would ensure that all shop employees have the right to refuse to work on Easter Sunday without being required to give a reason. This would reflect the significance the day has for many and that some shop employees will not want to work during it.

To ensure that employees are able to adequately exercise their right to refuse to work on Easter Sunday without constraint, we would have proposed amendments prescribing a time requirement for employers giving employees written notice of their right to refuse to work. This would have provided that employers could not give the notice of the right to refuse to work to their employees any more than eight weeks before the relevant Easter Sunday. We would also support a corresponding obligation on the employee to respond within 14 days of the date the notice was made.

To be clear about the consequences of an employer failing to notify employees of their right to refuse to work, we would have amended the bill to clarify that requiring a shop employee to work without providing written notification to employees of their right to refuse to work no earlier than eight weeks and no later than four weeks before the relevant Easter Sunday would have been considered as compelling a shop employee to work on Easter Sunday.

For shop employees who start work within four weeks of Easter Sunday, we would have recommended that the shop employee be notified of their right to refuse work as soon as reasonably practicable after their employment starts. We also would have recommended that employees who start work within two weeks of Easter Sunday and have received notice of their right to refuse to work should notify the employer of their intention to exercise their right to refuse to work as soon as is reasonably practicable.

To reduce confusion for employers about whether or not an employee will be working on Easter Sunday, we would have introduced an obligation on shop employees to notify their employer in writing no later than two weeks from the date of their employer’s notice that they will be exercising their right to refuse to work on Easter Sunday. A shop employee whose employment with the employer started 14 days or less before the relevant Easter Sunday would be required to give written notice as soon as is reasonably practicable after the shop employee received the right to refuse notice from their employer.

### **View of Labour Party and Green Party members**

While Opposition members (Labour Party and Green Party members) are supportive of additional employee protections, we believe that the protections in the bill that would allow retail employees to refuse to work on Easter Sunday are unlikely to be effective. The employment relationship is inherently unbalanced, with the power resting with the employer. This is acknowledged in the Employment Relations Act 2000. A shop employee

refusing to work or taking a personal grievance would inevitably have a detrimental effect on their employment relationship and could undermine their job security.

We also believe that it is important certain days are set aside for workers to spend time with their families and communities knowing that they will not be required to work. This bill would enable the removal, by councils, of one of only three and a half days currently set aside for that purpose. We heard from many submitters about the importance of having set non-trading days so that community and family events can be organised and that families can spend time together.

In our view, it is illogical to allow trading to occur on Easter Sunday while continuing to restrict trading on Christmas Day, Good Friday, and ANZAC Day. We remain concerned that this bill sets a precedent that will lead to the end of trading restrictions on these family and community days.

### **Report from the Regulations Review Committee**

We received three letters dated 15 February, 17 March, and 7 April 2016 from the Regulations Review Committee (RRC) about the delegated legislation-making powers in the bill.

The RRC's letter of 15 February stated its view that "proposed new section 5A authorises the making of bylaws to permit shops to open in specified districts, or parts of districts, despite the requirement in section 3 of the Act for shops to remain closed on that day". It further stated that this proposed new provision was a "Henry VIII" clause; that is, a provision authorising delegated legislation to amend, suspend, or override primary legislation.

In that letter the RRC stated its view that new Subpart 1 of Part 2 as inserted by clause 15, raises issues in respect of the following general principles applying to delegated legislation:

- Henry VIII provisions should be used only in rare or exceptional circumstances
- Matters of significant policy belong in primary legislation.

Departmental advisers did not consider that the bill contains a Henry VIII clause.

We invited the Legislative Counsel of the RRC to give an oral briefing on the written advice at our next meeting.

In its letter of 17 March the RRC noted officials' views but reaffirmed its initial advice. It further noted that even if there was a potential Henry VIII risk, the constitutional process protections embodied in the bill were important.

The RRC letter of 7 April provided advice on whether there were constitutional differences between the bill as originally drafted and the proposed amendments. It highlighted the following material differences:

- Section 5(B): New Zealand Bill of Rights Act 1990 would not be specifically required

- Section 5(D): Deferring of appropriations and the New Zealand Bill of Rights Act implications under section 155 of the Local Government Act would no longer be required
- Section 5(E): Meeting of full council no longer specifically required to adopt report and release for consultations
- Section 5(E): Meeting of council committee no longer required to consider submissions
- Section 5(E): Meeting of full council no longer required to resolve to adopt bylaw and set commencement date
- Section 5(E): In respect of the review provisions, requirements for meeting of council committee to consider submissions and of full council to resolve, amend, revoke, repeal or continue bylaws are not required.

In its letter dated 7 April 2016, the RRC submitted three recommendations for the consideration of the committee about:

- Preventing territorial authorities delegating decision-making powers to a committee or other subordinate decision making body. In particular, it was recommended a meeting of the full council was required to adopt a policy or a review of a policy.
- The importance of the requirement to use the special consultative procedures.
- The bill should specify that local policies made under the bill are disallowable, but not legislative, instruments for the purposes of the Legislation Act 2012.

National Party members agreed with the advice of departmental advisers and Parliamentary Counsel that the bill does not contain a Henry VIII clause. National members therefore do not accept the RRC recommendation “to remove the ability for territorial authorities to make bylaws to override the statutory prohibition on opening on Easter Sunday” because the overriding of the statutory prohibition is being effected by clause 13 of the bill. For this reason, National Party members did not support the RRC’s initial proposals to amend the bill.

Opposition party members remained concerned about matters raised in the RRC’s advice. Opposition members note the weakening of the constitutional protections in the amendments proposed by the National Party, and support the recommendations of the RRC, and cannot support the National Party’s proposed amendments.

#### **Territorial authorities delegating decision-making powers**

Had the committee voted in favour of passing this bill, the committee would have supported a recommendation inserting proposed new section 5E along with the change to local policies into clause 15 of the bill so that a territorial authority is prevented from delegating its decision-making powers and obligations under the bill to a committee or other subordinate decision-making body, community board, or member or officer. In particular, a meeting of the full council should be required to adopt a policy or a review of a policy.

**Special consultative procedures**

National Party members would have also recommended using the Special Consultative Procedure for local policies. This would be a consequential amendment following from the recommendation to require territorial authorities to adopt local policies, rather than bylaws, as the mechanism for permitting shops to trade on Easter Sunday.

National Party members would have supported an amendment to proposed new section 5C in clause 15 that would have required the use of the Special Consultative Procedure in the process to develop local policies. This would have ensured that decisions reflect community choice and would have been in addition to the requirements for local policies in the Local Government Act 2002.

**Disallowable instruments**

Labour Party and Green Party members support a recommendation by the RRC to specify that local policies made under the bill are disallowable, but not legislative, instruments for the purposes of the Legislation Act 2012.

Opposition members consider that, without such a statement, these policies would be disallowable instruments in light of the operation of section 38(1)(c) of the Legislation Act 2012 because such policies would have significant legislative effect. Therefore, Opposition members consider that an explicit provision to that effect would have been helpful to aid understanding of this position.

National Party members do not support specifying that local policies are disallowable instruments. This is because making an explicit reference would create a requirement that the instrument be presented to Parliament. This would require the responsible Minister to present each new local policy to Parliament within 16 sitting days of it being made.

This requirement does not exist for any other local policies or bylaws created by territorial authorities. Since local policies are already disallowable instruments for the purposes of the Legislation Act, National Party members consider that including this requirement would place an unnecessary impediment between central and local government.

## **Appendix**

### **Committee procedure**

The Shop Trading Hours Amendment Bill was referred to the committee on 3 November 2015. We called for public submissions with a closing date of 21 January 2016. We received 107 submissions from organisations and individuals and heard oral evidence from 17 submitters. We received advice from the Ministry of Business, Innovation and Employment. The Department of Internal Affairs served as assisting advisers. The Regulations Review Committee reported to the committee on the delegated legislation-making powers in the bill. Evidence and advice received on the bill is available on the Parliament website [www.parliament.nz](http://www.parliament.nz).

### **Committee members**

Melissa Lee (Chairperson)  
Kanwaljit Singh Bakshi  
Ria Bond  
Dr David Clark  
Hon David Cunliffe  
Clare Curran  
Gareth Hughes  
Brett Hudson  
Alfred Ngaro  
Simon O'Connor

Iain Lees-Galloway replaced Dr David Clark for much of this item of business.  
Denise Roche replaced Gareth Hughes for this item of business.