

SHOPPING CENTRE COUNCIL OF AUSTRALIA

REFORM OF SHOP TRADING HOURS IN NSW ISSUES PAPER

Shopping Centre Council Submission

1. Executive Summary

NSW once led Australia in the push for sensible shop trading hours. It now lags behind most other states and territories. It comes as a surprise to most people to learn that NSW has more restrictive trading hours than any other state or territory, except for the highly regulated states of Western Australia and South Australia.

Sunday trading is in fact still prohibited in NSW although a complex system of exemptions allows most shops to trade. Trading is also prohibited on seven public holidays - more than any other eastern state or territory (see the **attached** chart).

The continued regulation of trading hours on Sundays and public holidays is costly (for taxpayers, retailers and shopping centres), inefficient, confusing, discriminatory and anachronistic. The current laws are discriminatory because they only apply to one group of shops. The vast majority of shops in NSW can open whenever they want, including Christmas Day and Easter Sunday. Only 'general shops' such as supermarkets, national and state retail chains, department stores, and discount department stores are prohibited from opening on Sundays and most public holidays.

In 2006 the Independent Pricing and Regulatory Tribunal (IPART) held an inquiry into the burden of red tape. Its final report commented that the current laws have resulted in "a piecemeal regulatory regime, which can be confusing for both retailers and the public" (p.245). IPART further noted that "trading hours is an area where the Government can achieve immediate, though less significant, gains through initiating reforms. In particular, it believes the Government should consider simplifying the current regime governing trading hours for general shops in NSW, including simplifying Sunday trading exemptions" (p.244).

This submission recommends that NSW remove all restrictions on trading hours, as is the case in the ACT and Northern Territory. At the very least, NSW should adopt the Tasmanian model of removing all restrictions except for Christmas Day, Good Friday and the morning of Anzac Day.

The Shopping Centre Council of Australia (SCCA) believes it is past time for the 'premier state' to move into the 21st century and stop dictating when and where people can shop. This would mean NSW was truly 'open for business'

2. The Shopping Centre Council of Australia

This submission is made by the Shopping Centre Council of Australia which represents the owners and managers of shopping centres. Our members are: AMP Capital Investors, Centro Properties Group, Colonial First State Property, DB RREEF Funds Management, GPT Group, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Multiplex, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and the Yu Feng Group. Some of our members, while endorsing this submission, will also be making their own individual submissions to the review.

Shopping centre owners are in reality managers of the investments made in retail property by more than nine million Australians through their superannuation funds and life insurance policies or through direct investments in listed property trusts (or real estate investment trusts), property syndicates and other property investment vehicles. Any regulation that reduces the returns to owners of shopping centres directly impacts on the retirement savings and retirement incomes of these Australians.

Restrictions on trading hours are a major issue for shopping centres and their retailers. The major drawcards in shopping centres are department stores, discount department stores, and supermarkets and when these shops are unable to open, it is generally uneconomic for the shopping centre to open, even though many of the specialty shops in the centre are legally able to trade because they are 'small shops' or 'scheduled shops'.

3. Coverage of the regulation

As noted above, the NSW Government only regulates the trading hours of one group of shops. Only 'general' shops (such as large supermarkets, national and state retail chains, department stores, discount department stores etc.) are regulated by the *Shops and Industries Act*. The vast majority of shops in NSW are defined as "small shops" or "scheduled shops" and are not restricted in any way in terms of the hours they can open.

By imposing trading restrictions on one group of shops and not on others, the Government is discriminating against this group of retailers. The National Competition Council found that this discrimination among retailers is anti-competitive and contrary to the public interest. Moreover, the restrictions imposed on general (or large) retailers ultimately harms 'small' and 'scheduled' shops too if they are located in shopping centres because the shopping centre will not open if its major drawcards, the department stores, the supermarkets and so on, cannot open.

In relation to the questions in the Issues Paper concerning the various definitions of shops in the *Shops and Industries Act*, no definitions would be necessary if the Government adopts our recommendation for the deregulation of trading hours and the repeal of the Act.

4. Objectives of the regulation

The fact that most shops in NSW are currently allowed to trade on Sundays, public holidays and indeed on any day they want, demonstrates the absence of any 'in principle' policy objection to shopping on these days. This therefore cannot be the objective of the current regulation.

The social and cultural institutions which historically underpinned a restrictive policy - not only for retail shops, but also for hotels, clubs and most other economic activity - are no longer relevant to modern society, which requires flexibility, convenience and choice. Balancing family obligations and work commitments, particularly in dual income households, is now a major challenge. Australians are working longer hours, with more than half of all full-time employees regularly working more than 40 hours per week. Liberalising trading hours alleviates time pressures on families by giving them more hours to shop, at times that are most convenient to them, thereby helping to reduce the stress on families. Trading hours reform has certainly not proved to be unpopular with the electorate. Governments which introduced major reforms to trading hours (Queensland in 2002, Tasmania in 2002 and South Australia in 2003) have been overwhelmingly re-elected after the changes were announced and implemented.

In the past it may be that the objective of regulating the trading hours of large shops was to provide an economic advantage to 'small shops' by enabling them to trade when 'general' shops cannot. Fortunately, over time, the interests of consumers have been given greater priority by policy makers and the restrictions on when general shops can trade have been gradually removed. First, the prohibition on Saturday afternoon trading was removed. Next, the limitations on trading hours on Monday to Saturday were removed. Then, by a system of exemptions, the prohibition on Sunday trading was effectively removed. The protection of one group of shops from competition from others, at the expense of consumers, thankfully no longer seems to be an objective of the regulation.

It is sometimes suggested that the objective is to protect the industrial interests of shop workers. But if that was true then surely all shops and not just general shops would be prevented from opening on Sundays and certain public holidays. Indeed, it is also not clear why shop employees and not employees in any other seven-day-week industry should have special legislative protection. In any case the retailers who are restricted in when they can trade are generally the larger chain retailers, which tend to be fully unionised and strictly observe industrial awards or enterprise agreements (which provide for penalty rates or other concessions when employees work on Sundays, public holidays or after normal working hours).

In this context, IPART noted in its final report that "industrial relations regulation is independent of trading hours regulation, and should not be affected by moves to simplify and clarify existing trading hours regulation" (p.246).

There is no doubt that consumers want extended trading hours and there is no contemporary justification for governments telling people when they can shop.

5. Sunday Trading

Sunday trading has effectively existed in NSW for almost 20 years and has become one of the most popular days to shop. Yet under the Shops and Industries Act, Sunday trading is prohibited for 'general shops' except for the two Sundays before Christmas. NSW is now the only state to prohibit Sunday trading by law across the entire State (even Western Australia allows Sunday trading in some areas).

Sunday trading exists in NSW only by virtue of widespread exemptions. Under section 78A of the Act, shopkeepers (but apparently not shopping centre owners) can apply for an exemption from the ban on Sunday trading at a cost of \$100. There is no criteria set out in the Act or regulations which would indicate when or where the Government intends an exemption to be granted.

The complexity (and absurdity) of the current system is highlighted in the recent Regulatory Impact Statement on a proposed *Shops and Industries (Trading) Regulation 2007*. Among other things, the regulation requires shops to be partitioned if they are selling goods that can be sold on Sundays as well as goods that cannot. The RIS states that "if a non-exempted department store wanted to open on Sundays it would only be legally able to trade in (say) books or videos (being trade descriptions of scheduled shops which on that day can be sold), but not (for example) furniture items. Articles of furniture would have to be partitioned or barricaded to prevent public access and sale. Clause 8, having the limited application above described, imposes an obligation on the shopkeeper to construct any necessary partition of 'strong and durable materials', being a partition which is 'of sufficient height to prevent access from the part of the shop that is kept open'. We strongly doubt whether any shops are actually complying with these requirements.

It is our understanding that no applications to trade on Sunday have ever been rejected. There can be no objection therefore to the Government removing the legislative ban on Sunday trading which would simply bring the law into line with current practice. More importantly it would save retailers the cost and time of applying for an exemption to trade and save the Government the cost of administering the exemption system.

As IPART noted, "such simplifications would be unlikely to have any real impact on shop trading practice (in terms of hours and days of operation). However, they may reduce the administrative burden for retailers and Government, and provide greater clarity to consumers".

In terms of the specific questions in the Issues Paper, the SCCA considers that, as noted above:

- the regulation of Sunday trading does *not* provide benefits to retail employees and small shop owners and is prejudicial to consumers;
- the costs of the restrictions outweigh the benefits;
- the implications of removing the Sunday trading prohibition altogether would simply be to formalise current practice; and
- the exemption process cannot be streamlined and would be unnecessary if the current restrictions were removed.

6. Public Holiday Trading

NSW once led Australia in the push for sensible shop trading hours. It now lags behind most other states and territories. Despite NSW's status as the nation's 'economic powerhouse', and Sydney as its 'global city', the premier state is now the only eastern state or territory to prohibit most shopping centres from opening on Boxing Day, New Year's Day and Australia Day. While shops in Brisbane, Melbourne, Hobart, Canberra and Darwin can trade, those outside the Sydney central business district, Cabramatta and Newcastle must remain shut. As the **attached** chart shows, NSW restricts trading on seven (7) public holidays, more than any other jurisdiction except the highly regulated states of South Australia and Western Australia.

The Minister can make an order to suspend this ban in relation to a specified public holiday (for NSW generally or in a specified areas) if "the Minister is satisfied that it will be of benefit to the public" (s.85). In recent years the Minister has exercised

his discretion to permit trading on some of these public holidays but this requires a ministerial order each year published in the Government Gazette. The process of gazetting orders is confusing and time consuming and the policy rationale is far from clear. This creates uncertainty every year among retailers and shopping centre owners, and among consumers, about whether public holidays are trading days or not.

The retail industry, like so many other industries, is a seven-day industry and there is no justification for treating most public holidays differently from other days of the year. It is not as if retailers want to close their doors on these days – quite the opposite - since the experience of other states and territories has shown that retail trade is traditionally very brisk on public holidays. In most other jurisdictions public holidays are an opportunity for families to be able to shop together and for working parents to shop at leisure. The Government would not think of shutting down public transport (another seven-day industry) over this period, or preventing newspapers from publishing, or preventing movie theatres from opening; why should it permit that to happen in the retail industry?

For many retailers the Christmas-New Year period (with the exception of Christmas Day itself) is one of the most important trading periods of the years and is often an opportunity to make up for poor sales at other times of the year. It is also a time when there are many international and interstate visitors in Sydney. It is not a positive tourism image for these visitors to be greeted with a 'closed' sign on Boxing Day and New Year's Day or Easter Sunday. Although trading is allowed in the Sydney central business district on certain public holidays, contrary to common perception not all tourists shop in the CBD – many are visiting friends and relatives (who live in the suburbs) over the holiday period and would like to be able to shop at their local shopping centre.

Local councils outside the County of Cumberland, Newcastle and Wollongong can also apply to the Minister for an exemption from trading restrictions for all or part of an area on tourism grounds (s.89B of the Act). In addition, even though neither the Act nor the regulations make special mention of the Sydney CBD, Newcastle CBD or Cabramatta, it appears that these areas are treated as special areas by the Government and are automatically permitted to trade on certain public holidays (Boxing Day, New Years Day, Australia Day and Easter Sunday) while other metropolitan areas are not. It is not clear on what public policy basis these areas are singled out for special treatment. On what basis, for example, are general shops in Cabramatta, Newcastle and the Sydney CBD permitted to trade on Boxing Day and New Year's Day when all other shops are forced to close? Why Cabramatta and not, say, Parramatta, Chatswood or Bondi? Why Newcastle and not Wollongong? There is no public policy justification for granting an economic advantage to some retailers and shopping centres, and not others, based solely on geography.

The Shopping Centre Council believes it is past time for Australia's largest State to catch up with other states and rationalise its trading hours regulation. The Government should either totally deregulate or legislate along the lines of the Tasmanian Shop Trading Hours Act 1994 which clearly and simply prohibits trading on 25 December, Good Friday and the morning of 25 April – no need to gazette orders; no reason for confusion; no need to maintain expensive government regulatory apparatus.

In relation to the specific questions in the Issues Paper, the SCCA considers that:

- ideally trading restrictions of any kind should be abolished but at the very least, trading restrictions should be removed for all public holidays except for Christmas Day, Good Friday and the morning of Anzac Day;

- any trading restrictions on public holidays should not *also* be imposed on the following closest weekday as this would reduce retailer's earnings and undermine certainty for both retailers and customers; and
- as noted above, removing public holiday trading prohibitions altogether would be to the benefit of consumers, retailers and government alike. It would give consumers greater choice because they would not be limited to shopping at 'small shops' and 'scheduled shops'; it would allow retailers to decide for themselves when to open based on customer demand; and it would eliminate the need for government to maintain a bureaucracy to administer trading restrictions.

7. Cost of Regulation

The continued regulation of trading hours is costly for retailers and shopping centres. The regulations are complex and confusing. Retailers are uncertain about whether they can or cannot open for business. For the last two years, special legislation has had to be passed by the NSW Parliament to prevent what would otherwise have meant a four-day retail shutdown over Christmas-New Year. Last year the legislation was not passed until mid-November leaving retailers, who often have to prepare work rosters several months in advance, only around one month to finalise staffing over this period. Customers are also confused and, for this reason, shopping centres and retailers have to engage in major advertising campaigns, therefore adding to operating costs, simply to publicise the fact that they will be open on certain public holidays.

The ministerial order suspending the restrictions on trading on the Australia Day public holiday (26 January 2006) was not gazetted until the afternoon of Friday 23 December, the eve of the Christmas weekend. This order was not notified on the Office of Industrial Relations website. On 25 January 2006, the day before the public holiday, the OIR website was still advising people that this was a non-trading day. Retailers were also unable to take full advantage of this concession since there was insufficient time for shopping centres to adequately publicise that they would be open for business on this public holiday.

It is obvious that this is time-consuming for retailers. It is therefore costly. The department also charges retailers a \$100 fee for a process that it admitted to IPART is largely "rubberstamping". Charging fees to retailers to deliver an outcome which most other governments in Australia have delivered by removing regulation is a classic example of absurd 'red tape'. Removal of the current restrictions would deliver certainty in public holiday trading days each year thereby reducing the ongoing cost for shopping centres and retailers in adjusting staff rosters and informing customers that they are open for business on those particular days.

The continued regulation of trading hours for large shops also requires maintenance of an administrative bureaucracy to administer the regulation. We have no details of how many staff are involved in the issuing of section 78A and 89B certificates but, since the law requires these certificates from shopkeepers to enable them to trade on Sundays and certain public holidays, it must be extensive. If there is *not* a large staff involved in the administration of the scheme then this suggests that the department is not enforcing the regulations raising further doubt about why they should continue. The repeal of the trading hours laws would therefore mean a significant saving in staff resources in the Office of Industrial Relations.

Permitting trading on all but a limited and specified number of public holidays (25 December, Good Friday and the morning of 25 April) would generate cost savings all round and be popular with consumers and retailers. There would be no need to gazette orders; no reason for confusion; no need to maintain expensive government regulatory apparatus.

8. SCCA recommendations

- 8.1** The simplest and most efficient means of removing this regulatory burden would be to repeal trading hours regulation for all shops in NSW, irrespective of their size. This is not a radical step. Successive governments in the Australian Capital Territory and in the Northern Territory have taken the attitude that it is not the role of government to tell consumers when and where they can shop. In these jurisdictions shopping centres and large retailers voluntarily choose to close on significant public holidays, such as Christmas Day and on the morning of Anzac Day. Deregulating in this way would eliminate current administrative costs and Government staff could be deployed to more productive tasks. It would provide certainty for retailers and shopping centres who can make up their own minds about when they open their doors depending on customer demand.
- 8.2** An alternative, but less satisfactory, approach would be to adopt the model of Victoria and Tasmania. In these States all restrictions on trading hours were removed for all retailers for all days (including Sundays) with the exception of Christmas Day, Good Friday and the morning of Anzac Day. In Victoria this was legislated in 1996 and in Tasmania in 2002. (In Victoria, in 2003, the Government added Easter Sunday to the list of prohibited trading days. This was a very unpopular move with retailers and consumers because Easter Sunday was one of the most popular trading days of the year. Since then the Government has progressively 'watered down' this prohibition by progressively exempting more and more shops from the prohibition including hardware shops, nurseries and shops in more than 20 local government areas.) This model also provides certainty to retailers and shopping centre owners. It has the disadvantage, however, that the Government still has to maintain some limited administrative apparatus.
- 8.3** So far as Sunday trading is concerned, the Government should bring the law into line with current practice and remove the statutory prohibition on Sunday trading, allowing all retailers, irrespective of size, to trade on Sundays by law rather than by the cumbersome means of exemption certificates.

9. Contact

The Shopping Centre Council would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

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Public Holiday Trading Restrictions around Australia

	Good Friday	Anzac Day ³	Christmas Day	Easter Sunday	New Year's Day	Boxing Day	Australia Day	Labour Day	Easter Monday	Queen's Birthday	Other	Total Closed Days
ACT	Closed ¹	Closed ¹	Closed ¹	Open	Open	Open	Open	Open	Open	Open	Open	Nil
NT	Closed ¹	Closed ¹	Closed ¹	Open	Open	Open	Open	Open	Open	Open	Open	Nil
TAS	Closed	Closed	Closed	Open	Open	Open	Open	Open	Open	Open	Open	3 Days
VIC	Closed	Closed	Closed	Closed	Open	Open	Open	Open	Open	Open	Open	4 Days
South-East QLD	Closed	Closed	Closed	Closed	Open	Open	Open	Closed	Open	Open	Open	5 Days
NSW	Closed	Closed	Closed	Closed ²	Closed ²	Closed ²	Closed ⁴	Open	Open	Open	Open	7 Days
SA	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed Adelaide Cup Day	11 Days
WA	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed	Closed Foundation Day	11 Days



1. Voluntarily closed as trading hours are not regulated at all in the Territories
2. Except for Sydney CBD, Newcastle, Cabramatta and s.89B tourist areas
3. TAS, VIC, and NSW permit trading on the afternoon of Anzac Day
4. A Ministerial Order is usually gazetted each year permitting trading on Australia Day