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# Shop trading hours amendment bill

Draft submission to the Commerce Select Committee

21 December 2015

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## We are. LGNZ.

LGNZ is New Zealand's national organisation of local authorities. All 78 councils are members and membership is voluntary. We represent the national interests of councils and lead best practice in the local government sector. Our purpose is to deliver our sector's vision: "Local democracy powering community and national success," which we deliver through the provision of advocacy, advice, business support and member training.

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This final submission was endorsed under delegated authority by Lawrence Yule, President, Local Government New Zealand. We would like to the opportunity to speak to our submission.

## Summary

LGNZ supports the principle behind this Bill however we disagree strongly with certain aspects, namely the proposal to use a bylaw as the mechanism for showing community support for an exemption. Our concerns at the choice of the bylaw mechanism are:

- Cost
- Risk of legal challenge
- Administrative complexity
- The need for review
- Inconsistency with good practice regulatory guidelines

We believe that a policy containing details on the relevant area(s) adopted in accordance with a council's Significance and Engagement Policy (section 76AA of the Local Government Act 2002) is all that is required.

## Introduction

Thank you for the opportunity to comment on this Bill. If enacted it will allow territorial authorities, through the adoption of a bylaw, to trigger an exemption to the Shop Trading Hours Act 1990 and so allow trading on Easter Sunday for all or parts of their districts. The Bill reinforces a fundamental principle, supported by LGNZ, which is that local matters should, as far as practicable, be resolved by local communities through and with their elected representatives.

LGNZ supports the intent of this Bill but recommends changes to the process for signalling community preferences so as to reduce complexity and cost.

## Reflecting local preferences

Effective public policy involves balancing the interests of the public as a whole with the interests of individuals and their communities. In certain cases the national public interest requires that policy or regulations are applied consistently throughout New Zealand. In other cases, however, it is in the public interest to allow local diversity. Easter Sunday is such an example, as the existing exemptions testify.

The ability to allow local diversity is appropriate for a number of reasons. On the one hand it allows communities which have a strong religious or spiritual belief in the importance of Easter Sunday to ensure that it remains a day with no or minimal commerce. On the other hand it allows communities which have different values or host significant visitor populations to allow trading in a controlled manner.

Although exemptions to trading restrictions on Easter Sunday already exist there is no fair or equitable process for extending these exemptions in response to changing circumstances. The result is that some cities and districts are disadvantaged compared to their peers, particularly tourist destinations. LGNZ's view on this matter dates back to 2005 when our annual general meeting adopted a resolution on the matter. The resolution stated:

*That LGNZ in partnership with Rotorua District Council lead a national campaign to gain an amendment to the Shop Trading Hours Act Repeal Act 1990 that will allow territorial local authorities in consultation with their communities throughout New Zealand to make a decision as to whether Easter Sunday trading should be allowed in the region.*

## An equitable process for deciding exemptions

The argument made to the annual general meeting highlighted the number of domestic and international visitors in many cities and towns during Easter and the importance, from an economic development perspective, of offering those visitors a full range of activities and experiences. Communities need the opportunity to benefit from New Zealand's increasing visitor and tourism sector, if that is their wish.

LGNZ supports the principle behind this Bill and especially the fact that it is empowering. We note that this is not a view shared by all our members, however the Bill imposes no new duties on local authorities and only those councils which wish to have an exemption for Easter Trading are required to make use of the provision. Councils possess the discretion to not trigger the exemption process.

Despite our support for the intent of the draft legislation which is to empower communities through their councils only to allow trading on Easter Sundays we do have a number of concerns, particularly about the process required for councils to seek an exemption. The proposed bylaw making process is expensive, cumbersome and involves legal risk. LGNZ believes a simpler process is justified.

## Specific comments

### 1. Section 5A (1): Power to make bylaws to permit shops to open on Easter Sunday

The Bill, if enacted, will enable councils to make bylaws to permit shops to open on Easter Sunday. LGNZ believes that a bylaw is the wrong instrument for this purpose. Bylaws by their nature are designed to stop or diminish behaviours that are harmful to a community or individuals within it. Bylaws are very poorly suited to this purpose.

This Bill seeks to put in place a framework that will enable councils to signal to the Government, or more specifically the Ministry for Business Innovation and Employment, that a request for an exemption to the Shop Trading Act has the support of its community, either in full or the affected part of their community.

In our view all that is required is that a council consults, in accordance with its Significance and Engagement Policy, on a proposal for an exemption that includes a description or map of the area to which the exemption would apply – not dissimilar to the information required for a Class 4 Gaming Policy. Support for an exemption will provide a sufficient signal to government officials that an exemption is warranted. There is no need for the following:

- Bill of Rights assessment;
- A draft bylaw; and
- Review within five years.

The bylaw process involves unnecessary legal risks and costs. In the first place the bylaw making process itself, as well as the bylaw, is complex and the stages are susceptible to judicial review. Secondly, the regular review process is both costly and unnecessary and we would note that existing exemptions are not subject to a regular review. The democratic process itself is sufficient to ensure that any decisions with regard to trading or not should reflect local preferences. That is, should a community wish to remove an exemption then citizens and organisations can, for example, make submissions to their councils, approach elected members individually or raise a petition to request a review.

We completely disagree with the conclusions of the Regulatory Impact Statement that a 'bylaw' is the preferred approach – in fact rather than being more accessible and transparent quite the opposite is true, we would not describe bylaws as either transparent or accessible when compared to a council policy and the costs, including legal costs, are unnecessarily high. We certainly cannot agree with the comment about ease of enforcement.

We believe the Bill as currently drafted is inconsistent with the recommendations regarding fit for purpose regulations made by the Productivity Commission in its report Better Local Regulations<sup>1</sup> and is also inconsistent with the findings of the Rules Reduction Taskforce<sup>2</sup>.

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<sup>1</sup> Productivity Commission Report Towards Better Local Regulations May 2013.

<sup>2</sup> Productivity Commission Page 241

**LGNZ recommends** that the Bill is amended to replace the requirement to adopt a bylaw with a requirement to adopt a policy in accordance with a council's Significance and Engagement Policy. Given that the overall purpose of the Bill is to provide evidence that a request for an exemption has community support then a policy based on appropriate consultation is all that is required.

## 2. Section 5A (2&3): Maps and description<sup>3</sup>

Sub-section 5A(2) requires that a bylaw include "either or both" a map of the area or a "description of the locality of the area" to which the bylaw, permitting shops to open, applies. Sub-section 5A(3) states there where both are employed and there is an inconsistency the description prevails. In our experience a map is probably a clearer indication of boundaries than text which is likely to be more ambiguous.

**LGNZ recommends** that where a council includes both a map and a description of the area to which a bylaw should apply and there be an apparent inconsistency between the two then the map should then prevail.

## 3. Section 5B: Bylaw must be consistent with the NZ Bill of Rights

The Bill requires, consistent with the LGA 2002, that each council must, when developing a bylaw to allow shop trading, consider the implications of the New Zealand Bill of Rights. LGNZ sees no reason for this requirement for a number of reasons:

1. The purpose of this proposed bylaw making power is very specific (unlike the bylaw making powers in the LGA 2002) and we do not believe that Parliament should enact a Bill where there is a likelihood that implementation would infringe the Bill of Rights. Therefore by definition this requirement should be redundant;
2. The requirement unnecessarily increases the cost to councils of developing the bylaw, as legal advice will inevitably be required. It also exposes councils to a risk of judicial review;
3. The impact of the bylaw should be the same in every city or district therefore if clarification was required a specific statement to the effect that any bylaw made under this Act was consistent with the Bill of Rights would be appropriate.

**LGNZ recommends** that Section 5B is either removed or replaced with a statement to the effect that any bylaws made under this Act are deemed to be consistent with the NZ Bill of Rights Act.

## 4. Section 5D: Review of bylaws

This Section deals with the process for reviewing bylaws. Sub section (1)(b) states that a territorial authority "must review a bylaw ..... no later than 5 years after the date on which it is made". This is consistent with the LGA 2002 provision that bylaws are reviewed five years after adoption. However, the LGA 2002 goes further by requiring that bylaws must be reviewed every ten years following their initial five year review (S. 159). The current Sub-section (1)(b) as drafted may create some uncertainty as to the frequency of reviews after the five year period.

**LGNZ recommends** that Sub-section (1)(b) is amended to make it clear that, after a bylaw made under this act is reviewed, further reviews must occur in accordance with S. 159 of the LGA 2002 (i.e. every ten years).

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<sup>3</sup> Paragraphs 2, 3 and 4 only apply if the bylaw option is retained.

## 5. Existing exemptions retained

The Bill makes no changes to the existing exemptions to Easter Sunday trading. These exemptions apply, in full or part, to a number of districts and cities. These exemptions should continue on the same basis as any new exemptions created as a result of a council policy or bylaw.

**LGNZ recommends** that the existing exemptions that apply to Easter Sunday only are subject to this Bill and thus should continue until communities decide, through their local councils, to revoke them.

## Conclusion

We are pleased that the Bill addresses the unfairness in the current legislation which allows only a select few to trade on Easter Sunday. The current framework is too inflexible to respond to the speed of change in our regions and districts. Not only do community values change over time but as we have seen it is impossible for legislation to predict which cities and districts will successfully, over time, reconstruct themselves as popular visitor centres

The Bill also recognises that there are some situations where there is no over-riding policy rationale for national consistency and that in these situations territorial authorities, working with their communities, are the appropriate level of government to determine locally appropriate policy and regulatory settings.

LGNZ looks forward to discussing these matters with the Select Committee.