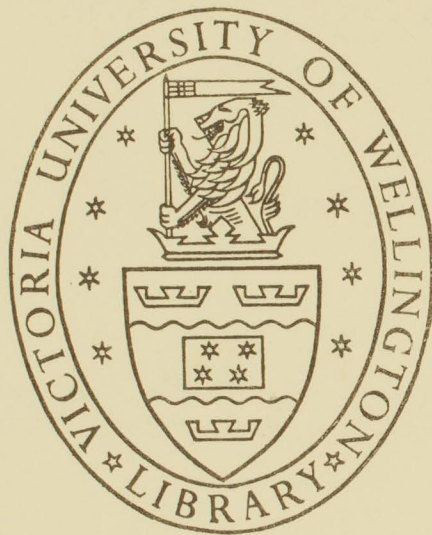


X Ma MAHONY, D.M. The Shop Trading Hours Act 1977



Report 1977 was the main work of the Shop Trading Hours Act 1977. The statute contains a number of purposes which necessarily divide the functions of the Commission. On the one hand, the legislation fixes retail trading hours and the Commission hears applications seeking extensions of these hours. On the other hand, there are two lists of goods in the statute designating what goods may be sold and at what times, and the Commission may after consulting public opinion make recommendations for their alteration. From another aspect the Commission is also concerned with individual or "group" applications and attempting to establish a national trading pattern.

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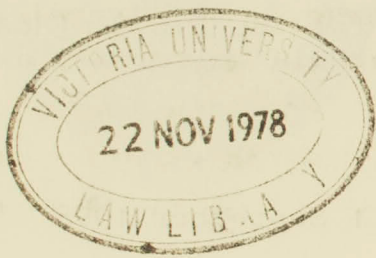
The Shop Trading Hours Act 1977

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A natural focal point of attention, arising out of the legislation, is the Commission (established by section 4 of the Shop Trading Hours Act 1977). Its three members have travelled the country hearing applications for extended trading hours in various centres. Although decisions are made on individual applications, the Commission was confronted in Wellington by a campaign among hardware retailers for extended weekend trading of non-accepted goods. This "hard effort" resulted in the filing of the comparatively few written decisions of the Commission to which public reasoning of the decision is given. Then, in May of this year, public notice was given of an intended review by the Commission of the First and Second Schedules of



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I INTRODUCTION

August 1977 saw the enactment of the Shop Trading Hours Act and establishment of the Shop Trading Hours Commission. The statute contains a duality of purpose which necessarily divides the functions of the Commission. On the one hand, the legislation fixes retail trading hours and the Commission hears applications seeking extensions of these hours. On the other hand, there are two lists of goods in the statute designating what goods may be sold and at what times, and the Commission may after consulting public opinion make recommendations for their alteration. From another aspect the Commission is making decisions concerning individual or "group" applicants and attempting to establish a national trading pattern.

In the twelve months of its existence, this 1977 legislation has been an issue of intense public interest. Public attention has been held by newspaper headlines sensationalising apparent anomalies in the Act ¹ and quoting illegal traders as "throwing down the gauntlet". ² There have been editorials calling for the protection of the "small trader" ³ and factory inspectors in Auckland have refused to enforce the legislation in protest at their already over-burdening workload. ⁴

A natural focal point of attention, arising out of the legislation, is the Commission (established by section 4 of the Shop Trading Hours Act 1977). Its three members ⁵ have travelled the country hearing applications for extended trading hours in various centres. Although decisions are made on individual applications, the Commission was confronted in Wellington by a campaign among hardware retailers for extended weekend trading of non-exempted goods. This "team effort" resulted in the first of the comparatively few written decisions of the Commission in which fuller reasoning of the decision is given. Then, in May of this year, public notice was given of an intended review by the Commission of the First and Second Schedules of

the Act. The Commission spent seven weeks on this review travelling the country and hearing submissions.⁶ During this time the Commission has also been the subject of a review itself.⁷ Recently, the Minister of Labour stated in Parliament that a report by the Commission on the performance of the Act was due to be completed at the end of August.⁸

This paper attempts an analysis of the Shop Trading Hours legislation and an examination of the attendant workings of its Commission. Several matters to be discussed include the Commission's procedure in hearing applications, and the form its decisions take and their adequacy. Related discussion will explore the Commission's discretionary power in granting exemptions and the accompanying fetters upon it. Illustrating these matters will be a look at some of the substantive decisions of the Commission, followed by a brief examination of the appeal structure.

II HISTORY

The present 1977 shop trading hours legislation repeals sections 3 - 12 (inclusive) and section 49 of the Shops and Offices Act 1955. As the immediate forerunner to the 1977 Act the earlier statute provided, naturally enough, the guideline along which the existing provisions have been drafted. Like its predecessors, beginning in 1904, the Shops and offices Act of 1955 was, and still is, very much concerned with the conditions of employment for shops and office assistants. Reasons for the impetus (social and political concerns) giving rise to such legislation is really beyond the ambit of this paper.⁹

Prior to World War 2, it was industrial awards that decided the trading hours of shops. By 1947 the relevant unions and employers had negotiated a five and one-half day week. However, it became government policy to remove shop trading hours from the direct control of the unions through the awards system. Section 3 in Part 1

of the 1955 Act dealt with the fixing of opening and closing hours of shops by the Court of Arbitration. Exemptions from hours so fixed could be granted by the local Magistrate's Court. An amending Act was passed in 1959 which placed this task before a one-man tribunal - a Magistrate, in fact. A desire for more consistent and uniform decisions was said to have been the basis for the move.¹⁰ Instead of presenting an affidavit stating the nature of the exemption sought and appearing before a Magistrate, who simply granted or refused the application, a slightly more sophisticated process may have been expected. In essence, however, appearing before the Tribunal was little different from the appearance before a Magistrate. Two further changes occurred before the 1977 Act. The industrial Commission became the new mediator of awards in 1973 and a new Shops and Offices Exemptions Tribunal was substituted for the old one in 1975. Again the tribunal consisted of one man and, again, he was a Magistrate. Under the Amending Act, an assistant (working in the South Island) was also appointed. A reading of the Parliamentary debates before the second reading of the present legislation indicates that this was not considered to be a very satisfactory arrangement.¹¹

Parliament has now set up new legislation to deal with what recently has become an issue of some public interest. It was further said in Parliament that "the Government initially brought in the Bill to produce orderly marketing in New Zealand, to try to recognise what had grown up as practice in New Zealand".¹²

It has been said¹³ that between the 1955 and 1977 legislation "there was practically no change except that a few things have been added to the list of saleable goods". This statement is only superficially true - its validity lasting only as far as a comparison of the sorts of provisions contained in both Acts.¹⁴ A greater opportunity for debate has been provided by a number of things, especially the setting up of a

three member independent Commission. Other factors include the effect of provisions with regard to the hearing of applications and the criteria examined therein.

III MACHINERY

Section 4 of the Act establishes the Shop Trading Hours Commission which is composed of three members. They are a barrister or solicitor of the Supreme Court of New Zealand of at least seven years practice and two others appointed by the Governor-General on the recommendation of the Minister. Each member's term of office is for three years with the possibility of re-appointment. Any member may resign or be removed from office for disability, bankruptcy, neglect of duty, or misconduct.

The Commission's present members are: The Commissioner, C.P. Hutchinson, a retired magistrate; Mrs L.A. Redstone, "a person with knowledge of the retail trade"; and Mr H. Brock, "a person with some knowledge of union activities".¹⁵ It would seem therefore that the Commission has some expertise in the matters they must confront. It is also interesting to note that the balancing of union and retail representation can hardly be coincidental, though section 4 provides for no special requirements or qualifications regarding the other two members.

At least two members of the Commission are required in order to make any decision, except in the case of application by an individual shop occupier where a decision may be made by the Commissioner alone. In pursuance of section 8, the Commission must provide an annual report of its proceedings along with any recommendations relating to the trading hours of retail shops.

As under the Shops and Offices Act 1955, it is the Labour Department who "shall provide for the Commission such administrative and secretarial services as may be necessary...".¹⁶

The Labour Department also polices the Act ¹⁷ and Factory Inspectors may appear and be heard at hearings of applications. ¹⁸ In view of these facts, it is surprising that in such recent legislation the Public and Administrative Law Reform Committee's suggestion about the servicing of tribunals was not followed. The Committee stated in its first report and reiterated in its 1974 report that in fact and in appearance tribunals must be seen to be completely independent. It said ¹⁹:

there is the suggestion that if a department normally appears as a party before the tribunal it should not supply the premises at which the tribunal sits nor should the secretary be an officer of the Department. We think this suggestion should be adopted wherever economically practicable.

The remaining important provisions can be loosely grouped under three general headings of the Commission's work. Firstly there are the provisions setting out the limits of the Commission's jurisdiction to hear applications; then there are those setting out the procedure by which applications are made; and finally, there are provisions detailing the procedure of hearings.

Shopkeepers, singly or as a majority in any "area", have the right under section 18 to apply to the Commission for extended hours of their own nomination. Pharmacies, ²⁰ postal businesses ²¹ and bookstalls ²² are exceptions to the Commission's wide authority and have direct statutory authority to open when necessary. ²³

Special statutory mention is also made of bazaars etc. for religious, public, or charitable purposes ²⁴ and bona fide commercial travellers ²⁵ as not being affected by the fixed hours of opening laid down in section 11, and, therefore, requiring no authorisation by the Commission. Any orders made by the Commission apply to the premises of a specified shop and the type of business therein conducted. ²⁶ A change in the latter automatically ceases the order applying. ²⁷

There are two provisions which lay down the statutory scheme against which all applications are made. Section 9 defines in detail "approved" and "special" goods listed in the First Schedule and Second Schedules to the Act respectively. Any goods not on these lists are "restricted" goods. The hours during which special goods can be sold are also fixed by the Second Schedule. These lists may be changed by regulations made under the Act, but only on the recommendation of the Commission. In its turn, the Commission must ask for and consider submissions from the public before making its recommendations. Section 11 is also a definitive provision. It fixes normal opening hours available at an individual's discretion. These hours are ²⁸:

- (a) For restricted goods, 7am to 9pm on weekdays (other than public holidays).
- (b) For approved goods, any hours.
- (c) For special goods, the hours during which restricted goods can be sold, and Saturday Mornings. Cut flowers, wreaths, vegetables and new and used motor vehicles make up the short "special goods" list. The first three items may be sold as approved goods between 8am and 1pm except on public holidays.

It should be noted that although the statute fixes hours of opening it cannot fix hours of work. Section 25 of the Act provides that nothing in an award or agreement shall effect the provisions concerning opening hours, but neither shall the Act require any shop employee to work in any way that contravenes an award or agreement.

There is a detailed process by which an application for extended hours may be made and section 19 sets this out. An application will come to the Commission via the Magistrate's Court and the applicant must notify a number of interested parties. They are the Secretary of Labour; unions of both workers and employers registered under the

Industrial Relations Act and representatives of the shop assistants or shop occupiers concerned; territorial local authorities; and regional planning authorities.

Under section 20, all the above parties are entitled to attend the hearing of the application as well, along with the applicant, any Inspector of Factories, the occupiers of shops likely to be affected and any other organisations which the Commission thinks might be affected. All may be represented by a lawyer. Section 20 is of paramount importance, being the source of the Commission's power to authorise extended hours. This particular provision lays down the procedure to be followed for the hearing of an application, the grounds on which it can succeed, and the effect the resulting order will have.²⁹ Three types of orders that the Commission may make are expressed under subsection (2) of section 20. The Commission can:

- (a) Refuse the application.
- (b) Grant the application unconditionally.
- (c) Grant the application subject to such conditions as it thinks fit.

Here is a hint that the Commission commands a very wide discretionary power. Subsection 5 of the same section provides that applications be granted "to the extent only that (the Commission) is satisfied that its granting is in the best interests of the public generally". Eight matters have been listed in the following subsection as things the Commission must think about when considering the public interest.

The eight criteria are:

- (1) Public demand;
- (2) Effect of granting on retail prices; and
- (3) On the family and social patterns in the area concerned;
- (4) The nature of the surrounding area and the class of intended patron with particular regard to the desirability of providing service to the public at all reasonable times in tourist and holiday resort areas;

- (5) The stability, and orderly and economic planning and development, of any wider area, and of the transport and other services in any wider area, of which the area in which the shop or shops concerned are situated forms part;
- (6) The interests of the occupiers of other shops;
- (7) The need to minimise the amount of commercial activity taking place of Sundays;
- (8) The application of the principle of the 40 hour week, as embodied in sections 93 and 94 of the Industrial Relations Act 1973, and any derogation from that principle that may be caused by the granting of the order. 30

The list is comprehensive yet not exclusive. It is, however, difficult to ascertain the way in which the above criteria are handled, let alone what other, if any, are discussed. The real difficulty exists in the inadequacy of reasons given in support of decisions.

Section 21 of the Act places a duty on the Secretary of Labour to keep firstly a copy of all orders and exemptions relating to extended hours and secondly, to ensure District Superintendents and District Officers to keep copies of the same, relating to shops within the district of each. Subsection (2) of that section permits anyone to inspect any register so kept. Examination of what is called, the Central Register of Applications housed in the Wellington Department of Labour reveals only those applications that have been granted. The orders, still in force, include affidavits signed or stamped with a simple "Granted" from the 1950s, and exemption order forms by the Tribunals through to the present Commission's standard forms.

Throughout the various order the amount of detailed information is patchy. Some of the exemptions granted do not state the type of business concerned giving rise to further problems with revocation of exemptions and orders under section 20(7) and (8). The lack of information is, however, the main problem. Only applications granted are kept. It may be argued that applications refused would have been more useful to the interested parties. A complete register of applications

could provide an understanding of the Commission's application of criteria so that applicants may discover the best approach and others need not waste the Commission's time. Even the standard forms of the present Commission with their allotted spaces for grounds of the decision and conditions etc. are not much help. The majority of orders merely state the effect of the order, i.e. the specific hours of opening and any conditions which may on occasion indicate any particular concern the Commission had. Whether or not the Commission did in fact consider all the relevant criteria in each decision is not evidenced in the applications. ³¹

At common law, it seems, the bulk of authority is in favour of the view that there is no duty on a tribunal to provide reasons for its decisions. ³² In a report, the Public and Administrative Law Reform Committee said ³³:

The legislature has, however, imposed the obligation [to give reasons] in some cases and a majority of tribunals do in fact give reasons. The Committee considers this to be highly desirable: the tribunal decisions will be fairer to those concerned; the decision is apt to be better if the reasons are set out in writing; a better assessment can be made of the possibility of an appeal; and the giving of reasons may provide a basis for review of a decision which is erroneous in law. On the other hand the Committee realises that this obligation could be burdensome if imposed in respect of all decisions. It accordingly considers that the general rule should be that reasons should be given if a party so requests.

Various offences and penalties set out in section 23 are not a primary concern of the Commission. The Act is policed by Factory Inspectors ³⁴ and breaches of it are dealt with by the Magistrate's Courts, which have the power to impose a maximum fine of \$500. ³⁵

IV PROCEDURE

It is the Commission alone who makes decisions in regard to applications for extended hours. No right of appeal is provided for within the statute after an order

has been made and a review of the Commission's decision may take place only on the grounds of lack of jurisdiction.³⁶ In acknowledging its sole jurisdiction throughout the whole of New Zealand the Shop Trading Hours Commission has said³⁷:

The importance of this exclusive jurisdiction is that the Commission is entrusted with developing an overall pattern or design for the opening of shops at times other than the normal prescribed times.

The jurisdiction has given rise to the duty.

Different functions of the Commission, described within the 1977 legislation, have given rise to different jurisdictions. There is, firstly, the jurisdiction of the Commission in hearing applications for extended hours of trading. Another jurisdiction may be found in the Commission's task of conducting a review of the approved and special goods lists. Although the jurisdiction of the Commission in exercise of its power is, prima facie, extremely wide, an examination of three provisions of the Act and a written decision of the Commission may alter this impression.

Firstly, section 14 authorises that, without reference to the Commission, an occupier of a shop in which telephonic, telegraphic or postal business is transacted on behalf of the Postmaster-General to open at any time on certain conditions.

The three conditions are that:

- (a) The shop is open for the said postal business.
- (b) The shop is closed immediately after the business has been transacted.
- (c) Except for the admission and exit of the customer, the door of the shop is kept closed.

The second and third provisions, section 13 and section 15, relate to separate exemptions for bookstalls and pharmacies respectively. Both the bookstalls at any public passenger transport terminals and pharmacies may be issued with an authority from the Secretary of Labour as to the days and

times specified they may remain open, subject to whatever conditions he sees fit. The rationale behind these separate exemptions seems to be firstly that the services of the bookstalls are required during the various irregular hours of passenger transport. In addition pharmacies are permitted to open at any time where medical and surgical appliances are urgently required. In the case of pharmacies there is an obvious emergency need to be fulfilled in the public interest so that where there are, say, three pharmacies in one town an exemption may be granted to all three to open on a roster basis to meet emergencies.

It would seem that the Commission is either timid in its interpretation of its statutory powers or conceives narrowly the extent of those powers. Both these reactions could easily arise on reading one or two of its decisions. It is perhaps too early to decide this query definitely, mainly because it is difficult to gauge the Commission's attitude from only a few more fully written decisions.

However, a written decision of the Commission in the matter of an application by the New Zealand International Sheep Skin Centre Limited provides an interesting aspect of the Commission's view of its jurisdiction. The application was made in respect of the premises situated on the first floor of the foyer of the Auckland International Airport. A Deed of Licence was granted to the occupier by the Auckland Regional Authority which is the Airport Authority under section 6 of the Airport Authorities Act 1966.

The Airport Authority has been given clear control over the premises concerned. However, under the Shop Trading Hours Act 1977 "shop" is defined in section 2 as meaning any building, place, or part thereof where goods are kept exposed or offered for sale by retail. The applicant sold a variety of products made out of sheep skins and the premises therefore came within the definition. In these

circumstances the Commission found that it had jurisdiction to grant extended hours to this particular shop. Then, rather unnecessarily, the Commission pointed out that the Airport Authority retained control over the conduct of the shop.

In taking into account the clarity of the Shop Trading Hours Act in giving the Commission jurisdiction over all shops, this decision shows some hesitancy on the Commission's part in asserting its statutory power.³⁸

Procedure at hearings both of applications and of submissions relating to the First and Second Schedules ran along the same lines.³⁹ Various interested parties are notified of an intended hearing (and if they are not, the Commission has been known to have refused to hear the application) and although they may show as objectors to the application there is no burden on them to disprove the validity of the application. Rather, it is the applicant who has to prove the public interest is best served by the granting of his application.

This principle has been firmly adopted in a comparable area in planning law, where a person applies for a departure from a district scheme under the Town and Country Planning Act 1977, section 74. Further, in decisions under that legislation the appeal authority has held that the district scheme is itself something which supports the public interest and that, therefore, any departure from it is, prima facie, against the public interest.⁴⁰ In other words, the burden of proof is on the applicant, and it is likely to be a heavy one. "The parallel between this and the Shop Trading Hours Act is quite a convincing one. Here the normal opening hours provide the standard pattern, as do district schemes, and the Commission has the job of permitting departure from the standard pattern. One can assume, therefore, that the standard pattern is itself consistent with the public interest and that extended hours will be contrary to it".⁴¹

An applicant, then, must produce evidence of public

interest including, more specifically, evidence in relation to the eight statutory criteria.

After reading his application, having first been sworn in, an applicant may call on witnesses (also sworn in) to give evidence on his behalf. Oral hearsay evidence is not accepted. Objectors to the application may question the applicant and cross-examine his witnesses. They may then sum up their view on the matter and the applicant has the right of final summary. All the while the members of the Commission may ask questions of those present. Evidence in the form of letters is also accepted though its importance varies according to the circumstances of the case. It was interesting to note the occasions on which questions from the members of the Commission arose from their own knowledge (of the situation) of which they were prepared to take notice. This seems a desirable practice. It has been said that an authority must not so fetter its own discretion by precluding itself from applying its mind to the merits of an individual case before it.⁴² Proceedings were reasonably informal but respectful.

As mentioned, the same procedure was adopted at the hearing of submissions during the Commission's review of the approved and special goods lists, a brief summary of which follows.

The hearing of submissions by the Commission was conducted in the four main centres. Various retail trading associations, associations of flower, fruit and vegetable growers, private enterprise and the Shops Employees Association were represented.⁴³ In presenting submission as regards changes to the lists each group or individual took the opportunity to express various general considerations that should be noted in the Commission's review. Those advocating an extension of the approved goods list quoted public demand as the motive behind their request, though in most cases there was an honest admission that the hope of increased sales was also a spur. Those rejecting any extension of the list

were able to show in cross-examination of witnesses that concrete evidence of public demand was in fact missing. For instance petitions carried out in some Wellington hardware shops were isolated cases - similar demand was not evidenced else where in the country. This latter group also brought forward evidence in the form of graphs, and surveys in support of their contention that popularly held theories like working mothers/married women required weekend trading were myths. Many applicants including the Retailers Association and the Caravan Resellers Association (caravans are on the approved goods list) were against extension of trading hours on the weekend.

V SUBSTANTIVE DECISIONS

Substantive decisions should be the source of a better understanding of the Commission's operation. They should illustrate how the various criteria are being handled or even created, provisions interpreted and difficulties encountered. It is difficult, however, to see any of this clearly in the decisions presently made by the Commission.

Standard forms are used for the making of an application under the Act and for the making of an order granting or refusing that application. Orders made on these forms, by the Commission, are usually terse. An order may contain a statement to the effect that an application was granted in the public interest with occasionally a few facts pertaining to the situation added. It is usually only the conditions, if any, to the order that give an indication of the Commission's main concerns as regards the application. Mention has been made of the difficulties arising from the retention, in the Central Register, of only granted applications.⁴⁴ Some refusals of applications are, however, kept on file.⁴⁵ As to giving reasons for refusal of an order, the Commission is usually content to state that it was not satisfied granting of the order would be in the best interests of the public generally.⁴⁶

It is evident that all these short decisions are inadequately reasoned. More fully written decisions that do exist are not necessarily more adequately reasoned. Does the failure to give proper reasons amount to an abuse of discretion by the Commission? ⁴⁷ Use or abuse, by the Commission of its discretion can only be measured in its handling of the statutory fetters placed on it, i.e. the criteria to be used in determining the public interest. Investigation of this matter is limited by the material available.

Of the comparatively few written decisions some are concerned with more technical matters, such as, whether particular circumstances should give rise to applications by individual shop occupiers or whether a single "area" application by the majority of shop occupiers should be made.

Others are seen to take into account various of the statutory criteria which when pieced together throw some light on, say, the impact of public demand on the larger criterion of public interest.

To one applicant, the Deputy Registrar (L. M. Rattray) advised that the Commissioner's reserved decision was as follows ⁴⁸:

It is ordered that the application be refused on the grounds that it is not in the public interest since there was insufficient evidence of public demand that the said premises should be open during the winter period from 1 May to 14 October (both inclusive).

In another decision ⁴⁹ the Commissioner, sitting alone, also talked about public demand. In a one page decision various facts were touched on. The two applicants (from dairy shops) were each in separate premises "on opposite sides of the road and in a way in competition with each other".

A supermarket in the same locale had made no application for extended hours. It was noted that both sets of premises had been prosecuted on several occasions for

breaches of the Act. In an earlier decision concerned with hardware shops ⁵⁰ the Commission had warned applicants that evidence of illegal trading by them would not be seen in a good light. Nevertheless, the application was granted, the Commissioner saying "I was satisfied that there was a public demand and that it was in the public interest that the applicants should be granted extended hours...". The successful evidence consisted of letters of support from the Gisborne Harbour Board, the Public Relations Officer, the Youth Hostel, the Watties Fishing Fleet and various fishermen saying the shops a necessity.

The only evidence called in support of the letters concerned the Youth Hostel. Commissioner Hutchinson added that but for the fact that the applications had 1) a considerable amount of support; and 2) the applicants already had partial exemptions for trading on Sunday, both applications would have been refused. -

Public demand it would seem is head and shoulders above the other criteria in consideration of applications. It is clearly separate from the overall criterion of public interest but seems to be of prime importance so that the dividing line, especially in the first decision discussed, seems blurred. ⁵¹

There are, naturally, decisions which deal with both the aspects of technical details and statutory criteria. One such decision involved an area application from Kawhia. ⁵² The area application failed on two bases. Firstly, because the shops involved in the area application were not consistent in their application for extended hours. Secondly, because the Commission further decided that the area defined in the application must be confined to one already zoned under the Town Planning Scheme as a Commercial Zone, which it was not. Thus, the matter was dealt with as six individual applications. Then, invited to give its view as to the effect of section 20(6)(d) ⁵³ - one of the statutory

criteria - the Commission proceeded to do so. In relation to the Kawhia area, the Commission looked at seasonal variances in population; the distance to other towns; noted that a tourist and holiday area were distinct, the former having more to do with things of historical note; and took notice of the existing trading pattern. Thus much is known of the Commission's view of one statutory criterion.

Written decisions, it must be kept in mind, are also a forum for the Commission to declare its policy on various matters. For example, one decision⁵⁴ could be seen as the Commission's contribution to the development of the East Coast. No where in the one page decision is mention made of any provision of the Act. Facts concerning the "improvement of the road between Christchurch and Westport", the resulting attraction of tourists and visitors, the exhibition of a not too distant gold mining town, and the presence of a "large-ish commercial fishing fleet" were all cited. Reading between the lines, a number of criteria could have been involved whereby the applicant obtained an order for extended hours.

VI APPEALS

Where an administrative body like the Commission performs a judicial function in the granting of applications for extended hours, a safeguard imposed on such mixing of power might be expected. However, it has been observed that there is no appeal system, other than reapplication, after an order has been made by the Commission. An application for the revocation of any order may be brought by named parties on limited grounds.⁵⁵

There is a possibility of review⁵⁶ of the Commission's decisions but only on the grounds of lack of jurisdiction, which has its own problems. The privative clause, that which protects proceedings from being bad for want of form and prevents decisions being reviewed except on the grounds of lack of jurisdiction, is contained in subsection 12 of section 20. Initially, the issue is what errors go to

jurisdiction? It has been said ⁵⁷ that the question is asked less often because of the revitalisation of the principle that errors of law can be reviewed whether or not the error goes to jurisdiction. Further, in many other statutory tribunals, appeals now lie on questions of law to a superior court. ⁵⁸ As well, de Smith ⁵⁹ and Keith ⁶⁰ agree that the Anisminic case ⁶¹ almost obliterated the jurisdictional/non-jurisdictional distinction. Lord Reid, in that case, listed five examples ⁶² in a list not intended to be exhaustive, which have the effect that "almost all misconstructions of relevant legislation now come within ... jurisdictional error". ⁶³ At the top of the list were decisions given in bad faith then came decisions made ultra vires. Thirdly, there were breaches of natural justice and fourthly, misconstructions of provisions. Finally, there were the situations where the tribunal refused to take into account relevant material or where it considered irrelevant material.

In the case of review from the Commission's decision the handling of the statutory criteria that must be taken account of is vital. In this respect, the failure of the Commission to give reasoned decisions also comes to the fore. ⁶⁴ Where there is a refusal of application of the grounds that the public interest generally was not satisfied, two avenues are open to the reviewing court. On the one hand the court may see the above sort of decision as failing to take account of the criteria expressed in the statute, and so open to review. On the other hand, the court may feel hesitant in reviewing such a generally based decision where, though not apparent, any number of criteria may have been considered. Where some of the more narrow criteria are mentioned in decisions it is still unlikely that the courts will review such decisions unless they are manifestly bad considerations. The courts then, though jealous of their power to review administrative tribunals face real difficulties when it comes to an appeal.

In establishing a statutory Commission the legislature

has indicated that an independent body with some expertise is required to perform the task of regulating retail trading hours. The need for expertise is the impetus behind the establishment of many tribunals and the qualifications of the present Commission have already been mentioned.⁶⁵ Any appeal from this independent expert body should obviously go to a more expert body. There is none, and there seems little point in having two similar authorities, after all, only one Commission was set up in a bid for consistency of decisions. Neither should an appeal be directed to the Minister if the Commission's independence is to be maintained. No reform need be proposed in the area of appeals.

VII APPRAISAL

The Shop Trading Hours Act 1977 has established yet another administrative body in the shape of the Shop Trading Hours Commission. This paper has included an examination of the Act and the Commission. From this investigation two jurisdictions of the Commission have been located. They are the determinative and the recommendatory jurisdiction. Under the former, the Commission has a duty to entertain applications for the determination of extended trading hours. Connected with this duty is a wide discretionary power to grant, what is in effect, a licence for extended hours. Fettering this power are eight matters written into the statute requiring examination in any application.

The recommendatory jurisdiction of the Commission plays a valuable part in the continued success or otherwise of both the statute and tribunal. The Commission's activities within this jurisdiction have been confined to its undertaking a review of the "approved" and "special" goods lists in the Act. Despite a lack of statutory guidance in the matter, the Commission carried out the inquiry in much the same way as it had heard applications. With the Commission's report still to be presented to the Minister conclusions on this exercise of jurisdiction must be limited. It can be said, however, that the review

provided a well-represented forum for discussion of the rationale behind the two lists of goods, and the apparent anomalies within them. It must be said that it is a pity the Commission may only make recommendations as a result of the review, with any final decision being that of the Minister of Labour. Certainly the Commission has expertise and experience and given its function to regulate retail trading hours, it would seem to be more likely to reach a decision based more on the public interest and less on political considerations.

In relation to the determinative jurisdiction it has been seen, as far as practicable given the few fuller written decisions, how the criteria are applied and what development there is of other criteria. It became apparent at the submissions for the Review of the "approved" and "special" goods lists that public demand was recognised by most applicants as an important, and even over-riding factor, in applications. Applicants and objectors alike find "public demand" is an easily manipulated consideration. This honing down of criteria to the more "vital" factors in applications may be seen to be assisted by the Commission. Certainly, "public demand" is often cited in its decisions and sometimes as being conclusive.

The development of other criteria began in the very first of the more lengthy written decisions.⁶⁶ At the end of discussing the hardware application the Commission sounded a note of warning that "intending applicants will not enhance the chances of obtaining an order if such an applicant is now selling restricted goods outside normal trading hours and continues to do so". Illegal trading by applicants is undoubtedly a factor considered in the application. Then in another decision⁶⁷ where illegal trading by the applicant had been discussed, the Commission bore in mind an influencing factor that "it would have been unjust and inequitable if the application had been entirely refused".

There are other comments of a more general nature to be made. The lack of reasoned decisions is a situation that must be corrected. So as to avoid the accusation of abusing its discretion, it would be better policy for the Commission to elucidate to a far greater extent on the reasons for its decisions.

More generally, comment can be made on the Commission's operation in relation to the intent behind the Act and the overall picture this presents. To return to comments made during the reading of the Shop Trading Hours Bill⁶⁸ one of its purposes was seen as producing "orderly marketing in New Zealand" - in effect, a national trading pattern. It could be argued that the trading hours scheme laid down in the Act represents the public interest and that any thing deviating from this (exemption orders) does not. This would, of course, defeat the purpose of having a Commission.

As the legislation stands, there are fixed trading hours during week days for all shops. Those wishing to extend these hours (during the week or weekend) must apply for authority from the Commission to do so. Applications are made by single or small groups of shop occupiers who nominate the hours of trading they want. These numerous applications⁶⁹ directed at the premises of shop occupiers have necessarily resulted in regional variations.⁷⁰ This phenomenon is highlighted by the case of hardware retailers in Wellington. In its November 1977 decision on this matter the Commission remarked that:

There had been prior to the passing of the Act a concerted effort by upwards of twenty or more hardware shopkeepers in or around Wellington in extending Saturday trading although their representations to the Minister had not resulted in excluding Saturday trading in the Act as far as they would have desired.

It was submitted in the Review of the "approved" and "special" goods lists that "public demand" for extended hardware retailing was evidenced no where else in the country.

The result is that shops (sometimes within the same commercial sector) have various trading hours with differing conditions attached. Is legislation the solution in establishing uniformity? It can be argued that government has gone as far as to legislate on the matter of shop trading hours, and that if unfair competition is not to result between sectors of the retail industry, firmer more definitive legislation is required. Buck-passing to an independent body is not the answer. Possibly the government could regularise the country's trading pattern more easily by assigning trading hours (both week day and weekend) to various types of shops. Within the applications made to the Commission there is a discernible pattern in the type of business pursuing extended hours. Some of these are:

- Craft markets
- Hardware outlets
- Tourist shops
- Mixed dairy/grocery businesses
- Ships' chandleries

There are, however, problems with this line of argument. Unfair competition is also bound up with the question of what may be sold in extended hours. In the special cases of ships chandleries and even emergency chemists, there is an easily definable business and need for which assigning hours of trading present no problem. More importantly items handled by these outlets are not handled by other types of businesses.

Problems of definition of what is a craft market and what are craft goods are more difficult (though the Commission has made an in road into this area).⁷¹

The most easily recognisable difficulty is in the area of grocery businesses. If legislation is passed permitting such businesses to remain open for given hours during the week and weekend undoubtedly they will and the small "corner dairy" will find itself at a disadvantage to the larger concerns.

Thus legislation would go only part of the way and the Commission may be left with problems of definition and of course public interest. It appears public supervision of private retailing activity will continue by way of the Commission's activities.

- 1 on 6 July 1978.
- 2 For further mention see Part III post, p. 4.
- 3 6 June - 20 July, 1978.
- 4 Source: Interview with G. James (Factory Inspector, Department of Labour), 21 April 1978.
- 5 Evening Post, 2 August 1978. The Report is to be released to the public.
- 6 Suffice to say that discussed in this general area can be traced through Parliamentary Debates to 1957.
- 7 Parliamentary Debates, Vol. 320 p. 119 (6 August 1958).
- 8 Parliamentary Debates, Vol. 419 p. 757 (13 May 1973).
- 9 *ibid.* p. 759.
- 10 Evening Post, 9 February 1978. Statement made by L.J. Cope (District Superintendent of Department of Labour).
- 11 The first written decision of the Commission contains the Commission's own views of differences in the legislation.
- 12 The descriptions of Mrs. Redwood and Mr. Brock are derived from recent submissions, concerning the proposed shop trading hours, 20 June 1978.
- 13 Shop Trading Hours Act 1977, s. 7.
- 14 *ibid.* s. 27.
- 15 *ibid.* s. 20(1)(b).
- 16 Public and Administrative Law Reform Committee Report (January 1968), p. 25.
- 17 Shop Trading Hours Act 1977, s. 13.
- 18 *ibid.* s. 15.
- 19 *ibid.* s. 16.
- 20 These exceptions are discussed in Part IV post, p. 10.
- 21 Shop Trading Hours Act 1977, s. 16.
- 22 *ibid.* s. 17.
- 23 *ibid.* s. 20(3).
- 24 *ibid.*
- 25 *ibid.*

FOOTNOTES

- 1 Evening Post, Thursday 16 February 1978.
- 2 Evening Post, Wednesday 14 June 1978.
- 3 Evening Post, Monday 19 June 1978.
- 4 Source: Interview with Mrs J. Reid (Union Consultant) on 6 July 1978.
- 5 For further mention see Part III post, p.4.
- 6 6 June - 20 July, 1978.
- 7 Source: Interview with G. Kamau (Factory Inspector, Department of Labour), 21 April 1978.
- 8 Evening Post, 2 August 1978. The Report is to be released to the public.
- 9 Suffice to say that discussion in this general area can be traced through Parliamentary Debates to 1897.
- 10 Parliamentary Debates, Vol. 320 p. 1124 (6 August 1959).
- 11 Parliamentary Debates, Vol. 410 p. 757 (13 May 1977).
- 12 *ibid.* p. 759.
- 13 Evening Post, 9 February 1978. Statement made by L.J. Cope (District Superintendant of Department of Labour).
- 14 The first written decision of the Commission contains the Commission's own summary of differences in the legislation.
- 15 The descriptions of Mrs Redstone and Mr Brock are derived from recent submissions, concerning the exempted goods lists, on 10 June 1978.
- 16 Shop Trading Hours Act 1977, s. 7.
- 17 *ibid.* s. 22.
- 18 *ibid.* s. 20(1)(b).
- 19 Public and Administrative Law Reform Committee Report, (January 1968), p. 28.
- 20 Shop Trading Hours Act 1977, s. 13.
- 21 *ibid.* s. 14.
- 22 *ibid.* s. 16.
- 23 These exceptions are discussed in Part IV post, p. 10.
- 24 Shop Trading Hours Act 1977, s. 16.
- 25 *ibid.* s. 17.
- 26 *ibid.* s. 20(8).
- 27 *idem.*

- 28 The summary of s. 11 is taken from Notes about the
Act by J. Reid for Mr Brock (Member of the Commission).
- 29 For who may attend hearings refer ante, p. 6.
- 30 The provisions mentioned in this last criteria relate
to the forty hour/five day week.
- 31 For further discussion of the application of
statutory criteria see Part V. See also Appendix 1
setting out a standard form on which orders are
written.
- 32 For a study of the common law authority see Flick, G.A.,
"Administrative Adjudications and the Duty to Give
Reasons - a search for Criteria" (1978) P. L. 27.
- 33 Public and Administrative Law Reform Committee Report
(30 March 1973) p. 13.
- 34 Shop Trading Hours Act 1977, s. 22.
- 35 ibid. s. 23.
- 36 ibid. s. 24. There is, however, no restriction on the
number of applications an applicant can make.
- 37 Wellington Hardware Retailers decision, dated
3 November 1978.
- 38 Mrs J. Reid speculates that the Minister had wanted the
Commission to clearly state its jurisdiction but for
reasons of its own it did not.
- 39 Sources for this section are interviews with Mrs J. Reid
during June - July and the author's observance of review
submissions in Wellington between 10 - 20 July 1978.
- 40 There is an onus on the applicant to establish a prima
facie case not only that one of the conditions
prescribed in subs. (2) has been fulfilled, but also
that the effect of the departure will not be contrary
to the public interest. Taylor v. Upper Hutt City
(1968) 3 NZTCPA 131; Caltex Oil v. Hutt County (1969)
3 NZTCPA 156.
- 41 Mrs Reid's Notes for Mr H. Brock ante, n. 28.
- 42 R v. Port of London Authority ex p. Kynoch [1919]
1 K.B. 176. and see de Smith, S.A., Constitutional and
Administrative Law (2nd ed.), 1973 p. 589.
- 43 Representatives included lawyers, company directors,
marketing managers, business owners (e.g. Alan Martin of
L.V. Martin and Son) and the National Council of Women.

- 44 ante, p. 8.
- 45 File no. 2/4/65 kept at Department of Labour
(Head Office) Wellington.
- 46 Appendix 2.
- 47 The issue raised here is related to appeals discussed
in Part VI.
- 48 A letter to the occupier of a Waikanae dairy, dated
3 April 1978.
- 49 Reasons for the Decision in respect of Lyalls Dairy Ltd
and Ideal Dairy Co. Ltd, dated 6 April 1978.
- 50 ante, n. 37.
- 51 Returning to the analogy in planning law, public interest
was discussed in National Trading Co. of N.Z. Ltd. v.
Rotorua City (1969) 3 NZTCPA 203. Luxford S.M. found
in this case that public interest could embrace public
need as distinct from public demand. Public need could
exist if it was of such importance to the general public
or a large section of the general public that the
adverse effect of a refusal of the departure outweighs
all other considerations.
- 52 Reasons for Decisions in the Kawhia Area Application,
dated 8 February 1978.
- 53 This criterion takes into account the nature of the area
and the class of patron intended to be served, having
regard to the desirability of providing service to the
public at all reasonable times in tourist and holiday
resort areas.
- 54 Reasons for the Decision in an Application made by
Mrs Gutzlag for Extended Hours, dated 4 May 1978
- 55 Shop Trading Hours Act 1977, s. 20(7) and (8).
- 56 ibid. s. 20(12). Reviews are taken to the Supreme Court
and may be referred to the Administrative Division : see
Practice Note $\sqrt{2\text{NZLR}}$ [1975] 345
- 57 Keith, K.J., "Judicial Review of Administrative Action :
Jurisdictional Error" (1976) NZULR 66.
- 58 E.g. the Indecent Publications Tribunal, see Indecent
Publications Act 1963, s. 19.
- 59 de Smith, op. cit., p. 571.
- 60 Keith, loc. cit., p. 68.
- 61 $\sqrt{1969}$ 2 A.C. 147.

- 62 *ibid.*, 171.
- 63 Keith, *loc. cit.*, p. 68.
- 64 *ante*, p. 14.
- 65 *ante*, p. 4.
- 66 *ante*, n. 37.
- 67 Reasons for the Decision in an Application by R. and N.A. Toy Ltd, dated 28 April 1978.
- 68 *ante*, n. 12.
- 69 232 applications have been heard by the Commission up until 31 July 1978. 161 have been granted; 71 have been refused. Source: D. Marsh (Chief Inspector of Factories, Wellington).
- 70 Much of the pressure in applications originates from the North Island - applications from the South Island being limited to small grocery outlets because of the different trading patterns; Woolworths already has weekend trading in Invercargill. Source: J. Reid *ante*, n. 4.
- 71 Decision in respect of the application of Terence Shepherd Ltd, (Craft Village), dated December 1977; Decision in respect of the application of Windsor St. Market, dated 28 February 1978.

APPENDIX 1

SHOP TRADING HOURS COMMISSION

IN THE MATTER of the Shop
Trading Hours Act 1977
and
IN THE MATTER of an
application for an order

ORDER OF THE COMMISSION

Upon reading the application of and hearing submissions on the
application by _____

(name of applicant)

in respect of a shop situated at _____

* IT IS ORDERED THAT THE APPLICATION BE REFUSED.

* IT IS ORDERED THAT EXTENDED HOURS OF OPENING BE GRANTED
to the following effect:

The said Order is granted subject to the following conditions:

Dated at _____ this _____ day of _____

19 _____

NOTE: The attention of the occupier is drawn to Section 20(13)
of the Shop Trading Hours Act 1977 which requires prominent
display in the shop of a notice setting out the full terms
of this Order. The notice may be a copy of this Order.

*delete as appropriate.

APPENDIX 2

Order of the Commission

(Form 3)

Jim's Seven Day Dairy

Pleasant Point

It is ordered that the application be refused.

On the grounds that the Commission is not satisfied that the granting of the Order sought would be in the best interests of the public generally.

Dated at 14 July 1978.

Order of the Commission

(Form 3)

Progressive Dairy

Fairy Springs Rotorua

It is ordered that the application be refused.

The above-mentioned premises are situate some four kilometers from the centre of the city and are not situate in Fairy Springs Road itself, which latter road is the main from the North, but in Bidois Road. Although Rotorua City is itself a tourist and holiday resort, there was no evidence that tourists and visitors were or would be likely to be customers except possibly travellers who stopped at the Service Station. The surrounding area is residential. Accordingly it is not in the least interests of the public generally to grant an order extending the hours of opening.

Dated at 27 April 1978.

APPENDIX 2

Order of the Commission

(Form 3)

Jim's Seven Day Dairy Pleasant Point

It is ordered that the application be refused.

On the grounds that the Commission is not satisfied that the proposed order sought would be in the best interests of the public generally.

Dated at 15 July 1978

Order of the Commission

(Form 3)

Progressive Dairy Fairy Springs Pottery

It is ordered that the application be refused.

The above-mentioned applicant is situated some four kilometers from the center of the city and the site is in Fairy Springs Road which is a main road in the district. Although the site is a holiday resort, there are no evidence that the site is not a residential area. The surrounding area is residential. Accordingly it is not in the least interests of the public generally to grant an order extending the hours of trading.

Dated at 27 April 1978

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