



The Queensland Government

Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297

ISSN 0155-9362

Vol. 165

FRIDAY, 27 OCTOBER, 2000

No. 9

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Court Rules 1997

NOTICE

The following Agreements have been certified by the Commission:-

| No/s | Title | Date certified | Cancelling |
|----------|---|----------------|------------|
| CA513/00 | Allsafe Platforms Pty Ltd - Certified Agreement | 26/9/00 | |
| CA514/00 | Brian Grieve Bricklaying Pty Ltd - Certified Agreement | 26/9/00 | |
| CA515/00 | Bob Dyson Bricklaying Pty Ltd - Certified Agreement | 26/9/00 | |
| CA519/00 | Gordon Clements t/a Gordon Clements - Certified Agreement | 26/9/00 | |
| CA520/00 | Telsar Carpentry Pty Ltd - Certified Agreement | 26/9/00 | |
| CA521/00 | Bosform Pty Ltd - Certified Agreement | 26/9/00 | CA118/97 |
| CA522/00 | Blockwork (Aust) Pty Ltd - Certified Agreement | 26/9/00 | |
| CA503/00 | Forest Resources - Boral Hancock Plywood Collective Unions – Certified Agreement 2000 | 5/10/00 | CA305/98 |
| CA504/00 | TAB Queensland Limited - Certified Agreement 2000 | 6/10/00 | CA517/97 |
| CA530/00 | Cathedral of Praise Christian College Limited Teaching Staff - Certified Agreement 2000 | 11/10/00 | |
| CA531/00 | Cathedral of Praise Christian College Limited Non-Teaching Staff - Certified Agreement 2000 | 11/10/00 | |
| CA542/00 | QFleet - Certified Agreement 2000 | 11/10/00 | CA273/99 |
| CA528/00 | Graham's Plant Hire - Certified Agreement | 16/10/00 | CA398/97 |
| CA545/00 | Boonah Shire Council Enterprise Bargaining - Certified Agreement 2000 | 16/10/00 | |
| CA548/00 | Butter Producers' Co-Operative Federation Limited - Certified Agreement 2000 | 16/10/00 | CA449/98 |
| CA550/00 | Tiderun Investments Pty Ltd - Certified Agreement | 16/10/00 | |
| CA551/00 | Outlet Holdings Pty Ltd - Certified Agreement | 16/10/00 | |
| CA552/00 | Doraville Pty Ltd - Certified Agreement | 16/10/00 | |

| No/s | Title | Date certified | Cancelling |
|----------|--|----------------|------------|
| CA553/00 | Mark Davidson t/a D-Bar Shopfitting - Certified Agreement | 16/10/00 | |
| CA554/00 | Ultimate Painting Contractors Pty Ltd - Certified Agreement | 16/10/00 | CA145/97 |
| CA555/00 | Mitch Leaney t/a MML Construction Design & Interiors - Certified Agreement | 16/10/00 | |
| CA556/00 | John Fuller t/a John Fuller Master Painter - Certified Agreement | 16/10/00 | |
| CA557/00 | Tilecorp Pty Ltd - Certified Agreement | 16/10/00 | CA104/97 |
| CA558/00 | Rod Ballinger t/a Ballinger Trust - Certified Agreement | 16/10/00 | |
| CA559/00 | J & LJ Constructions Pty Ltd - Certified Agreement | 16/10/00 | |
| CA570/00 | Resolve Engineering Pty Ltd - Queensland - Certified Agreement 2000 | 16/10/00 | CA541/96 |
| CA575/00 | John Lewis Foodservice North Queensland - Certified Agreement | 16/10/00 | |
| CA547/00 | Ashdown Enterprises (Wholesale) Pty Ltd - Certified Agreement | 17/10/00 | CA492/98 |

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

WorkCover Act 1990 – s. 509 – appeal against decision of industrial magistrate

Debra Cumming AND WorkCover Queensland (No. C53 of 2000)

PRESIDENT HALL

18 October 2000

DECISION

The appellant was employed at Jo Jo's restaurant, Queen Street, Brisbane, for a period of approximately three months. She found the work physically demanding. Her back began to ache. Since her legs ached also, the appellant made the assumption that she was unfit. Over time, her back became worse. She began to experience a burning sensation between the shoulder blades. She experienced hot and cold chills up and down her spine. Her condition eased after she ceased work, but was still sufficiently severe to awaken her at night. The ache across the shoulders was present when she got up in the morning. She sought medical assistance. Whether the suggestion that her employment was at fault came from the general practitioners and physiotherapists whom she consulted, or was volunteered by the appellant as a possible cause, does not emerge from the transcript. In the result, and on medical advice, she took a week off work to see if her back improved. At the end of the week she returned and worked for a day on lighter duties. After the completion of that trial (on 6 June 1997), the appellant did not work at the restaurant again. On 25 June 1997 WorkCover Queensland received an application for compensation dated 19 June 1997.

On receipt of the application WorkCover Queensland referred the appellant to an orthopaedic surgeon, Dr James Downes. Dr Downes concluded that the appellant suffered from fibrositis, a condition which comes and goes and to which condition her employment at the restaurant had made no contribution. It may be conceded that when Dr Downes gave evidence to the Industrial Magistrates Court on 22 June 2000, he expressed the view that if the appellant continued to suffer from the problem across her shoulders which she had described to him at the consultation of 16 October 1997 he would, if he had been the treating doctor, have looked for another possible cause. It was Dr Downes' view that the fibrositis should have gone by then. The concession is of little assistance to the appellant. Speculation that an undiagnosed condition may be present falls well short of establishing the presence of an injury which arose out of or in the course of the appellant's employment at Jo Jo's restaurant. The circumstance that Dr Downes was prepared to agree in cross-examination that because the pain started when the appellant was working at Jo Jo's restaurant the employment "could" have been a factor causing or contributing to the (unknown) condition takes the matter no further.

By a letter dated 9 December 1997 WorkCover Queensland advised the appellant that her application for compensation had been unsuccessful. The appellant sought a review. In support of her review she attended upon another orthopaedic surgeon, Dr Robert Cooke who (relevantly) concluded that she suffered from "right paracentral C4/5 and C5/6 disc protrusion with no neural impingement". Dr Cooke does not, of course, assert that the condition which was present in May 1998 was present when the appellant worked at Jo Jo's restaurant. He was in no position to do so. He was in a position to express an opinion about the matter, and he did. Rather cautiously, I think, he said that the symptoms from which the appellant then claimed to have been suffering were consistent with the condition being present at that time. By a letter dated 21 May 1998 the Statutory Review Unit confirmed the decision to reject the appellant's claim for compensation. The appellant appealed to the Industrial Magistrate's Court. On 31 July 2000 the Industrial Magistrate dismissed the appeal. The appellant now appeals to this Court.

There is no fresh evidence. The appeal is by way of a re-hearing on the evidence before the Industrial Magistrate. The Industrial Magistrate of course had the advantage of hearing Dr Downes on the telephone, and of hearing and seeing the appellant and Dr Cooke. However, nothing seems to turn on that advantage. The Industrial Magistrate has said nothing about credibility. In those circumstances, it seems to me that I should proceed on the basis that all witnesses were credible. It was not a case where His Worship formed a view about the reliability of the views expressed by Dr Downes and by Dr Cooke, compare *Pleming v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1181 at 1183 per de Jersey, President. In those circumstances, I am just as favourably placed as the Industrial Magistrate to draw inferences from the evidence, compare *Warren v Coombes* (1979) 142 CLR 531, *WorkCover Queensland v Alcorn* 156 QGIG 568 at 568 per de Jersey, President, and *Pridle v WorkCover Queensland* 162 QGIG 170 at 171 per Hall, President.

The difficulty confronting the Industrial Magistrate is clear enough. There was a chasm between the evidence of Dr Downes and Dr Cooke. It was not a case of Dr Downes diagnosing one condition in October of 1997 and of Dr Cooke examining the same patient and diagnosing a different condition in May 1998. As the cross-examination reveals, the differences of opinion descended to matters of basic anatomy. Materially, Dr Cooke was of the opinion that the condition diagnosed by Dr Downes, viz fibrositis, did not exist. Dr Cooke accepted that inflammation might exist, but insisted that inflammation was always caused by something and that it was the cause of the inflammation which was the condition. The only concession which Dr Cooke was

prepared to grant was that whilst there was no tenderness when he examined the appellant in May 1998 tenderness and inflammation may have been present when Dr Downes examined the appellant in October 1997. (Dr Cooke was silent upon the question whether any tenderness or inflammation in October 1998 might have been caused by the disc protrusion which he located in May of 1998. Dr Downes was equally forthright. Having explained that protrusions of the type identified by Dr Cooke might have been expected in a woman of the appellant's age and might or might not have been accompanied by pain, Dr Downes went on to express the opinion that if the disc protrusions at C4/5 and C5/6 had pressed on the nerve the appellant would have experienced pins and needles in the (relevant) arm whilst, if the protrusions did not press on the nerve, any discomfort would have been felt as an ache at the base of the neck. If caused by disc protrusion, the pain described by the appellant would have been attributable to protrusion at T2 to T7. (Dr Cooke, I should add, flatly rejected that proposition when it was put to him in cross-examination.)

The Industrial Magistrate made a finding which, if correct, would go some way towards a conclusion that Dr Cooke should be preferred to Dr Downes. His Worship found:-

"This doctor [Dr Downes] also conceded, in effect, that if Dr Cooke had seen Ms Cumming on some 5 different occasions and had the benefit of a CT Scan and a MRI Scan then he would be in a better position to observe her and make a diagnosis."

Regrettably, the evidence does not support the finding. Dr Downes did concede that because he had seen the appellant once and Dr Cooke had seen her on some 5 occasions, Dr Cooke had a better opportunity to make an accurate diagnosis. But Dr Downes did not accept that the CT Scan and the MRI Scan gave Dr Cooke an advantage. In Dr Downes' view, the scans would locate bulges. The skill lay in determining whether particular bouts of pain might be linked to the bulges.

The case was admittedly a difficult one. I have sympathy for the Industrial Magistrate. However, I do not accept the way in which the Industrial Magistrate dealt with the matter. In the penultimate paragraph His Worship observed:-

"I have considered the whole of the evidence, submissions, reported cases to which I have been referred and relevant legislation. The onus lies with the Appellant to prove on the balance of probabilities that her employment at Jo Jo's restaurant was the major significant factor that caused her injury that she claims for. I can find no justification to reject the diagnosis made by Dr Downes on 16/10/1997 and only accept the diagnosis of Dr. Cooke which was not formed until he first saw M/s Cumming on 3/3/1998. Whilst their independent diagnosis are clearly at odds with each other, I point out that they were made almost 5 months apart, and considering all the evidence before me, and the varying activities carried out by the Appellant in the interim period, on the balance of probabilities, I am unable to accept Dr. Cooke's diagnosis and totally reject Dr. Downes', which I would have to do for the appellant to satisfy her required onus. Whilst I accept that M/s Cumming had the specific injury as diagnosed by Dr. Cooke on 3/3/1998 at that time, on the balance of probabilities, I cannot be satisfied that such injury existed on 10/6/1997 as M/s Cumming alleges in her claim (Exhibit 1) due to the evidence of Dr. Downes and his diagnosis on 16/10/1997."

It was not a case which might be resolved by accepting the diagnosis of each of the two doctors. The inconsistencies in the evidence of the two doctors is such that the matter cannot be resolved by finding that Dr Downes found that which was there to be found in October 1997, whilst Dr Cooke found that which was there to be found in May 1998. If the case had been of the type referred to in *Pleming, op cit*, one might have preferred one or other of Dr Downes or Dr Cooke. But I do not see how, on that basis, one might accept Dr Downes' evidence about October 1997 whilst rejecting his opinion about whether the protrusions located by Dr Cooke were capable of causing the pain suffered by the appellant. Equally, on the *Pleming, op cit*, approach, it would be difficult to accept that Dr Cooke's diagnoses of May 1998 was correct whilst his opinion about fibrositis was incorrect. There is the additional difficulty that on the approach taken by the Industrial Magistrate it is necessary to explain how a condition which was present in May 1998 was not present in October 1997. His Worship does that by referring to "the varying activities carried out by the appellant in the interim period". I rather suspect that that refers back to an earlier finding:-

". . . When he (Dr Cooke) reviewed her on 11/9/1998 Ms Cumming reported that her pain was worse, troubling her continuously, like something pulling and burning. That she had been sitting at a computer for up to 18 hours per day and found that using the computer tended to aggravate her symptoms. One would reasonably think, I would suggest, that even if one was 100% healthy, that such an arduous task would create problems by just having to maintain the correct posture for such a long period."

An appeal to an Industrial Magistrate pursuant to s. 498 is not an oral examination for a medical specialist seeking further professional recognition. The Industrial Magistrate is to determine whether the claimant has suffered an injury as defined at s. 34 as a matter of fact and of law. The Industrial Magistrate is entitled to look at all of the evidence and draw inferences from that evidence based on his understanding of the common course of events. However, the Court does not control the conduct of the trial. If the parties largely draw on the common law history of trial by battle, substituting specialists for champions, it is not appropriate to act on the view taken by the Industrial Magistrate here where it was not put to each of the specialists in order that each might comment upon the accuracy of the view propounded. The omission to take that course is aggravated here by the circumstance that the burden of the appellant's evidence, and it must be remembered that the appellant was accepted as credible, was that the pain experienced whilst sitting at the computer was revisitation of a pain long-known.

All of that said, I have decided to confirm the decision of the Industrial Magistrate. In the absence of any finding by the Industrial Magistrate that having heard Dr Downes and having heard and observed Dr Cooke, His Worship assessed Dr Cooke as more reliable, there is no basis for going behind the opinion of Dr Downes. Certainly, the evidence of Dr Cooke, cautious and restrained as it is, provides no legitimate foundation for going behind the evidence of Dr Downes. To draw the conclusion on Dr Cooke's evidence that the condition which he diagnosed in May 1998 was present in October 1997 and, indeed, was present earlier still when the appellant was working at Jo Jo's restaurant, is to draw a conclusion on the basis of Dr Cooke's evidence which Dr Cooke himself declined to draw. And there is an additional consideration. The "injury", if any, was suffered after February of 1997. It was necessary for the appellant to establish on the balance of probabilities that the work that she performed at Jo Jo's restaurant was the major significant factor causing the "injury", s. 34. Assume that Dr Cooke's diagnosis is correct, and that the employment at Jo Jo's either -

- (a) caused the disc protrusion; or
- (b) caused an existing but asymptomatic deteriorating back to become painful,

there is no material to support a conclusion that the employment was the major significant factor causing the "injury". There was evidence that the appellant had secured employment in the hospitality industry over a period of four to four and a-half years performing tasks comparable to those which she performed at Jo Jo's restaurant. If the task performed at Jo Jo's restaurant, in accumulative way over a period of three months, caused or brought on the injury why, as Dr Downes noted in his written opinion, would the earlier employment for a period in excess of four years be thought not to have made a contribution?

I dismiss the appeal.

The matter of costs is a difficult one. At the end of the day there is a discretion about costs. After agonising somewhat I have concluded that an appellant who failed, but whose attack upon the reasoning of the Industrial Magistrate succeeded, should not have to bear the burden of costs. There is no order as to costs.

Dated this eighteenth day of October, 2000.

D.R. HALL, President.

Released: 18 October 2000

Appearances:-

Mr P. Goodwin instructed by Hall Payne Solicitors for the appellant.

Mr P. Major instructed by WorkCover Queensland for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 21 – trading hours orders on non-exempt shops

Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (Nos. B579/00 and B1301/00)

TRADING HOURS – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE

VICE PRESIDENT LINNANE
COMMISSIONERS EDWARDS AND SWAN

9 October 2000

Application to vary trading hours relating to Christmas – Application granted.

DECISION

There are two applications before the Commission – B579/00 and B1301/00. Both matters were formally joined for hearing by the Commission.

Retailers' Association of Queensland Limited, Union of Employers Application B579 of 2000

Application B579/00, made by the Retailers' Association of Queensland Limited, Union of Employers (RAQ) seeks to vary the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* (the Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* in the following manner:-

Schedule 1

Relief Sought:

1. By deleting clause 3.3 **Christmas Trading Hours** and inserting the following in lieu thereof:-

3.3 Christmas Trading Hours

(1) Notwithstanding the provisions of clause 3.2 the following trading hours shall apply in all the areas specified in clause 3.2 for the period between 18 and 23 December as follows:-

| | Opening Time | Closing Time |
|------------------|--------------|--------------|
| Monday to Friday | 8.00am | 9.00pm |
| Saturday | 8.00am | 5.30pm |

(2) The following trading hours shall apply to the last Saturday prior to 25 December:

| Opening Time | Closing Time |
|--------------|--------------|
| 8.00am | 6.00pm |

(3) The following trading hours shall apply to the four Sundays mentioned below:-

(i) First Sunday of the four (4) Sundays prior to Christmas Day (25 December)

| Area | Opening Time | Closing Time |
|---|--------------|--------------|
| <ul style="list-style-type: none"> • Gold Coast Area • Sunshine Coast Area • Cairns Tourist Area • Area of the Brisbane City Heart • Townsville Central Business District • Douglas Shire Tourist Area • Whitsunday Shire Tourist Area | 8.00am | 6.00pm |

(ii) Second Sunday of the four (4) Sundays prior to Christmas Day (25 December)

| Area | Opening Time | Closing Time |
|---|--------------|--------------|
| <ul style="list-style-type: none"> • Gold Coast Area • Sunshine Coast Area • Cairns Tourist Area • Area of Brisbane City Heart • Townsville Central Business District • Douglas Shire Tourist Area • Whitsunday Shire Tourist Area | 8.00am | 6.00pm |

| Area | Opening Time | Closing Time |
|---|--------------|--------------|
| <ul style="list-style-type: none"> Brisbane & Near Metropolitan Area (including the Woolloongabba Central Business District and Inner City Brisbane) | 10.30am | 4.00pm |

(iii) Third Sunday of the four (4) Sundays prior to Christmas Day (25 December)

| Area | Opening Time | Closing Time |
|---|--------------|--------------|
| <ul style="list-style-type: none"> Gold Coast Area Sunshine Coast Area Cairns Tourist Area Area of the Brisbane City Heart Townsville Central Business District Douglas Shire Tourist Area Whitsunday Shire Tourist Area | 8.00am | 6.00pm |
| <ul style="list-style-type: none"> Brisbane & Near Metropolitan Area (including the Woolloongabba Central Business District and Inner City Brisbane) | 10.30am | 4.00pm |
| <ul style="list-style-type: none"> Remainder of the State | 10.30am | 4.00pm |

(iv) Fourth Sunday of the four (4) Sundays prior to Christmas Day (25 December)

| Area | Opening Time | Closing Time |
|--|--------------|--------------|
| <ul style="list-style-type: none"> All of State | 8.00am | 6.00pm |

(4) Notwithstanding the provision of subclause (1) hereof, the following trading hours shall apply in all the areas specified in clause 3.2 for the following date each year:—

| | Opening Time | Closing Time |
|-------------|--------------|--------------|
| 23 December | 8.00am | 12 midnight |

(5) Notwithstanding the provision of subclause (4) hereof, the following trading hours shall apply for the calendar year 2000:

| Area | Day | Opening Time | Closing Time |
|--|---------------------------|--------------|--------------|
| All of State except the Area of the Brisbane City Heart | Thursday 21 December 2000 | 8.00am | 12 midnight |
| Area of the Brisbane City Heart | Friday 22 December 2000 | 8.00am | 12 midnight |

The application is generally opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA) (with the exception of proposed trade on 24 December 2000 where QRTSA oppose the 10:00am to 5:00pm hours requested, but consent to a 10:30am to 4:00pm span of hours on that day). It is opposed in its entirety by the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (NMAA), and in part by the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) and The Australian Workers' Union of Employees, Queensland (AWU). The SDA and AWU consent to the following:—

- the variation to the opening time from Monday to Saturday during the period 18-23 December;
- the removal of the midnight closing-time on Saturday 23 December, 2000;
- the extension to midnight trading on either Thursday, 21 December, 2000 or Friday, 22 December, 2000;
- an opening time of 10:00 a.m. and a closing time of 5:00 p.m. on those Sundays in respect of claims 3(i), (ii), and (iv); and
- an opening time of 10:00 a.m. and a closing time of 5:00 p.m. in respect of the first seven areas identified in 3(iii).

Both organisations of employees gave their consent to the application on the basis that, were it to be granted, all work performed in non-exempt shops beyond currently existing allowable hours be on a voluntary basis. Those assurances were given by the RAQ. That being so, both the SDA and AWU sought and were granted leave to withdraw from the case.

Previously, in cases B592/96 and B785/96, a Full Bench of this Commission stated that there would be a review of Christmas Trading Hours “on the first occasion on which 23 December falls on a weekend”. This situation has now arisen with 23 December, 2000 falling on a Saturday.

RAQ in its application further sought a permanent extension to the trading hours for the four Sundays prior to 25 December and the first Saturday immediately prior to 25 December according to the application as lodged and an order to alter the applicable pre-Christmas midnight trading night for the calendar year of 2000.

The following is a summary of the RAQ's claim:—

- The period in question covers a “traditionally peak retail season”;
- Retailers have difficulty in accommodating customer demand under the current trading hours regime;
- Workplace Health & Safety issues need extra consideration by employers during this heightened trading period;
- With the extended trading hours sought, retailers would be able to more appropriately manage their stock and service levels;
- Christmas Eve for the year 2000 falls on a Sunday and the current available hours would not suffice for customer demand; and
- Other areas where improvements would be noted were the extended hours to be granted include:—
 - less strain on employees;
 - increased employment opportunities;
 - meeting consumer demand and alleviating traffic congestion; and
 - a changed perspective by the public towards the appropriateness of the need for Sunday trading.

The following is a summary of the QRTSA's claim (supported by NMAA) in opposition to B579/00:—

- Previously in case B381/95 (150 QGIG 893) a Full Bench of the Commission viewed Saturday to be an inappropriate occasion upon which to grant midnight trading;
- The evidence would show that extra trading hours, previously granted by the Commission during this period, were not well patronised by the public; and
- Small and medium businesses would be adversely affected by any increase in trading hours, amongst other reasons.

The following witnesses were called to give evidence by the RAQ:—

- Mr Chris Gallagher, General Manager, Sales and Operations of the Colorado Group Ltd;
- Ms Carol Cross, Occupational Health and Safety Manager for Big W;
- Mr Kevin Goodchild, Southern Area Regional Manager for Coles Supermarkets;
- Mr Bruce Dier, Chief Project Director for UMR Research, Marketing and Issues Management Consultants; and
- Mr Steve Bridges, Joint Managing Director of Byvan (QLD) Pty Ltd.

The following witnesses were called to give evidence by the QRTSA:—

- Mr Rod Keating, Brendale Shopping Centre;
- Mr William Bowden, Brendale Shopping Centre;
- Mr Phillip Chapman, Owner Operator of Advantage Retail Management;
- Mr David Baker, Part owner/operator Beachfront Supermarket – Hervey Bay;
- Mr Alf Musimeci, Proprietor of Foodstore Home Hill; and
- Ms Glenda Jordan-Wort, owner/operator of the Australian Made Shop in Cairns.

The following witnesses were called to give evidence by the NMAA:—

- Terry Orreal, Manager, Terry Orreal's Quality Meats - Brendale Shopping Centre;
- Desmond Dearlove, Partner in FitzSimmons Meats; and
- Mark Strachan, Sole Director of Vitellin Investments Pty Ltd (operating a meat retail outlet at Milton, Brisbane).

The evidence adduced by RAQ witnesses focussed primarily upon those points raised in the summation outlined above.

Briefly, that evidence is as follows:—

Mr Gallagher's evidence concentrated in part upon the growth potential of his organisation within the Queensland market. Matters such as investment growth, employment opportunity and the need to co-ordinate appropriate Christmas advertising were paramount to this organisation and the granting of the application would facilitate those needs.

Ms Cross' evidence related primarily to occupational health and safety issues arising during the period in question. Issues raised included increased customer numbers, longer queues, consumers' frayed tempers, decreased availability of car parking at retail outlets and greater demand for stock fills, amongst other matters.

Issues previously raised by RAQ witnesses thus far were reiterated by Mr Goodchild. He further stated that customers sought to trade as close to Christmas Day as possible because of the large volume of perishable goods available in Coles Supermarkets. Mr Goodchild claimed that consumers would utilise extended trading hours if granted as the period in question is traditionally one of the busiest trading periods of the year. Further, employment opportunities would be enhanced by the granting of extended hours and other Australian States (ie. NSW, Victoria, ACT, South Australia) and the Northern Territory trade on more Sundays than those sought in the application under consideration.

Mr Bruce Dier, whose organisation conducted research into "consumer attitudes towards extended Sunday trading hours leading up to Christmas, based on proposals provided by the Retail Association of Queensland (RAQ)", stated as follows:—

Over 75% of people surveyed supported the RAQ's proposals as it applied to their local areas and 64% of people surveyed stated that they would make use of the extra trading hours.

In the State wide survey there was noted increase for the RAQ's proposals in tourist areas.

Reasons underpinning such support went to:—

- Difficulty experienced by consumers in finding sufficient time in which to pursue Christmas shopping;
- The need for greater flexibility and convenience in shopping and the desire to see trading hours deregulated;
- Those occupational categories most in support of the RAQ's claim include full-time workers, students, and younger people; and
- Consumers require a variety of shopping outlets during the Christmas shopping period.

The evidence of Mr Bridges also largely reiterated views expressed by other RAQ witnesses and needs no further comment in this decision. Statistics were produced to the effect that there is, on average, an increase of 6% in sales turnover during December. The increased demand covered a wide category of purchases.

Further evidence and statistics went to retail sales generally throughout 2000, the impact of the GST upon the retail industry, the adverse impact of economic factors upon Department stores and fashion retailers, problematic retail sales forecasts and falling retail sales for Regional Retail Centres.

NMAA witnesses' general evidence has previously been cited. Specifically, Mr Orreal stated that he opened his shop from 7:00am to 7:00pm, seven days per week. When trading hours for non-exempt retail outlets were extended in 1994, Mr Orreal's turnover decreased by approximately 15%. According to Mr Orreal "we rely heavily on this boost to trading in the last week before Christmas to carry us through January when traditionally our takings are much lower". Concern was expressed at the belief that, whilst supermarkets could trade until 9:00pm on weeknights, few utilised this facility.

Mr Dearlove's business interests include the operation of some five butcher shops in the Brisbane Metropolitan Area. Evidence was given that since 1997, trading losses were experienced, particularly on Sundays. Mr Dearlove queried earlier RAQ evidence that car parking at retail outlets during this

period caused a problem for consumers. In all, Mr Dearlove believed that there was no demand for shopping hours beyond those already approved; current shopping centre capacity is adequate to cater for increased shopping numbers during the period prior to Christmas; small retailers would be adversely affected by the granting of this application, and there appeared to be added stress upon employees.

Mr Mark Strachan stated that, when trading hours for non-exempt stores were extended in 1994, his turnover at that time declined by approximately 30%. Staff numbers consequently declined and nearby small businesses closed. A strong view was expressed that real jobs declined through increased trading hours for non-exempt shops and the growth in casual and part-time jobs in the retail sector offered no security to individuals and families.

Evidence was given that, during the 1999 Christmas period, it was intended that Mr Strachan's business would stay open until 7.00pm, however, due to a lack of customers, the store closed at 6.00pm. Immediately prior to Christmas Day, good trading occurred, however the view pressed was that any move to alter the *status quo* regarding Christmas trading hours would have a detrimental effect on small traders.

QRTSA witnesses generally addressed those matters cited in the earlier mentioned summary. An overview of the primary points in that evidence is as follows:-

Mr Bowden made reference to what he viewed as "unfair use of market power" which occurred when the non-exempt retailers could trade upon days when independent traders would normally rely upon increased trade and profits. While retail business was brisk around the Christmas period, there was only so much trade which could occur without adverse effects being inflicted upon small traders. Mr Bowden viewed the 1994 extended retail trade decision as a failure in that many retailers permitted to be open until 9.00pm, closed their doors much earlier.

Ms Jordan-Wort stated that midnight trading in the past had proved to be "a total waste of time". She claimed that shopping centre management wanted their retailers open upon the extended hours, but that trade during those hours was so minimal as to be ineffective.

Mr Musimeci, the proprietor of a small retail outlet in Home Hill, claimed that there is no noted demand for trade in his region on a Sunday, hence his store is closed on that day. Were the application to be granted, then he would be forced to open his store on a Sunday.

Mr Keating claimed that the full impact of the GST was being felt by his business. Small retailers would be relying upon "good Christmas trade" to balance this situation. Mr Keating suggested that the current push for extended trading hours could be reviewed as "an attempt to slowly introduce Sunday trading by breaking down the gazetted trading hours bit by bit". Mr Keating viewed the role of Chemist shops in large shopping centres as catering to different consumer needs (ie. the sale of perfume, cosmetics etc.) than those provided outside of those centres. In all, Mr Keating believed that existing pharmacies offered appropriate extended hours care to the public.

Mr Chapman made reference to the fact that few large retailers utilised the extended shopping hours granted in 1994. He also believed that many shopping centre administrators would enforce longer trading hours upon their tenants, through the tenants' lease obligations, were the application to be granted, regardless of the volume of sales.

Conclusion Re: B579/00

This is an application which relates to a particular period in time during the course of a year. The period is the pre-Christmas trading period and the application seeks to have an appropriate order made to reflect the proposed extended trade indefinitely.

This application is made pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990*. Section 26 of the abovementioned Act states:-

"Matters relevant to s 21 order

26. In relation to making an order under section 21 the Industrial Commission must have regard to -

- (a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated;
- (b) the needs of the tourist industry or other industry in such locality or part;
- (c) the needs of an expanding tourist industry;
- (d) the needs of an expanding population;
- (e) the public interest, consumers' interest, and business interest (whether small, medium or large);
- (f) the alleviation of traffic congestion;
- (g) such other matters as the Industrial Commission considers relevant."

This application has a broad ambit. Looking at the overall content of the claim, defined tourist areas are identified and more expansive hours are sought for those areas on particular dates. Likewise for the Brisbane and near Metropolitan areas. For the remainder of the State, 10.30am to 4.00pm hours are sought, with the extension of those hours being granted on the Sunday immediately prior to Christmas Day.

Midnight trade is also sought for the day of 23 December 2000.

In our consideration of all the evidence, we propose to grant application B579/00 *in toto*.

In applying the legislative requirements of the *Trading (Allowable Hours) Act 1990*, we state that we have, as a consequence of a series of trading hours cases heard before the Commission, recognised that there are defined tourist areas within the State. Extended trading hours have been granted over time to these areas as a consequence of that status. We see no need to reconsider the views expressed by various Full Benches of this Commission on these points, save to state that we accept, as a general proposition, that the needs of these regions are factors considered in the making of this decision.

As a matter of common knowledge, coupled with a consideration of the evidence put before the Commission, we accept that, during the Christmas period, there is greater traffic congestion around major and other retail areas. Statistics show that retail sales surge to varying degrees around the Christmas period. It is our view that an expansion of the trading hours as sought in the application would help alleviate that congestion.

Section 26 of the *Trading (Allowable Hours) Act 1990* lists those matters which this Commission must have regard to in any declaration under s. 21 of that Act.

Public interest matters encompass a variety of considerations, amongst which is a requirement to weigh and balance relevant issues. There is little doubt that the period of time in question (ie the pre-Christmas period) is a discretely different period of time from other months of the year because of the very nature of Christmas. Christmas, amongst other things, is a period which focuses upon family gatherings, extended social functions, gift giving and, in

general, accelerated social interaction. That being so, obvious events follow. We accept as a matter of fact, that consumers purchase more gifts, foodstuffs and particularly perishable foods, amongst other things, during this period.

As a general proposition, we would see that consumers' interests would be appropriately served if they were able to shop over an extended period prior to Christmas.

The survey presented by Mr Dier reflects that view. We make no further comment on the survey save to state that while we attribute our traditional weight to the survey, we do see it as being generally reflective of the community's views around this issue. We are unable to find any cogent or significant reason why consumers' interests would not be advanced by the granting of the application.

Weighed against these considerations, the Full Bench has had a strong case put by both QRTSA and NMAA primarily focussing upon a perceived adverse affect that the granting of the application would have upon the profitability of their members' businesses. Certainly other issues were raised of concern to those members – eg the life-style impact upon members who believed they would have to open their stores to be able to maintain some degree of market share etc.

We have taken those matters into consideration and find, on balance, that for the period of time in question the application sought would not cause disruption to small retailers of such magnitude as to outweigh the interests of consumers at this time of the year. We say this particularly as it relates to "life-style" questions relative to small traders. In terms of broader considerations as it goes to questions of market share and profitability as they relate to small traders, we would say as follows:–

Consumer needs during the pre-Christmas period, we believe, differ significantly from those which would apply normally at other times of the year. The "consumer" group in question is at its broadest during this period. It is reasonable to state that there would be very little variance in this grouping at this period of time. As a matter of common knowledge, the needs of consumers in any part of the State, and heightened in tourist areas, would be similar at this time of the year. We accept that consumer needs at this particular time widen to take into consideration, for example, gift buying. We find that it would be unreasonable to deny consumers the opportunity to pursue this particular activity, a quintessential Christmas activity, over an extended period of time.

Given that consumers' desires regarding the purchase of gifts can be extremely varied, we accept that it is in the public interest to permit an appropriate period of time and venue to enable the consumers' interest to be facilitated.

That there may be an adverse affect to varying degrees experienced by some small traders were the application to be granted, must be carefully weighed against the other needs recognised in this decision.

We find, on balance, that the evidence adduced by the RAQ in this case, together with an appropriate consideration of the Legislation, is more persuasive than that presented by QRTSA and NMAA. In making this decision, we are mindful of the fact that the two major retail unions of employees, reflecting the views of their membership, generally support the RAQ's application. Appropriate safeguards for employees, from the Unions' perspective, have been sought and granted by the employer organisation. We are satisfied that those elements have been appropriately addressed by the relevant parties.

In accordance with s. 26(g) of the *Trading (Allowable Hours) Act 1990*, we also accept evidence that there would be increased employment opportunities available to employees were the application to be granted.

We propose to grant the application in B579/00, however, the claim in respect of the Saturday trading hours in clause 3.3(1) ie. an opening time of 8:00 a.m. and a closing time of 5:30 p.m. appears to us to have no application given the claim in clause 3.3(2). The last Saturday prior to Christmas must fall within the period 18-24 December. Clause 3.3(1) should therefore read as follows:–

“3.3 Christmas Trading Hours

- (1) Notwithstanding the provisions of clause 3.2 the following trading hours shall apply in all the areas specified in clause 3.2 for the period between 18 and 23 December as follows:–

| | Opening Time | Closing Time |
|------------------|--------------|--------------|
| Monday to Friday | 8.00am | 9.00pm |
| ...”. | | |

Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) Application B1301 of 2000

The application by the QRTSA in B1301 of 2000 seeks a permanent deletion of clause 3.3(2) of the Order. Clause 3.2(2) of the Order provides as follows:–

- “(2) Notwithstanding the provisions of subclause (1) hereof, the following trading hours shall apply in all the areas specified in clause 3.2 for the following date each year:–

| | Opening Time | Closing Time |
|-------------|--------------|---------------|
| 23 December | 8.00am | 12 Midnight”. |

As indicated previously in this decision we have granted the RAQ's application in respect of Thursday 21 December 2000 and Friday 22 December 2000. The evidence before us is that as 23 December 2000 is a Saturday, it is an inappropriate day to have midnight trading. The matter has previously been dealt with by a differently constituted Full Bench on the last occasion when 23 December 2000 fell on a Saturday: see *Retailers' Association of Queensland Limited, Union of Employees and Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (1995) 150 QGIG 893. In that decision the Full Bench commented as follows:–

“... we are prepared to accept what we have been told from the bar table by the adversaries and to accept that Saturday, 23 December 1995 will, for many in the community, be a night of social activity with their relatives and friends. Given the trenchant opposition of the employee organisations and the circumstance that RAQ seeks permission to trade on midnight, not on Saturday 23 December but on Thursday 21 December or Friday 22 December (depending on locality), we are disposed to depart from past practice and to permit midnight trading on a night other than 23 December. Having heard the parties we are satisfied that, to a substantial extent, the previous (one night a week) late night in any particular locality continues to be the preferred night for late night shopping in that locality. It is the night to which customers and the employees who serve them have become accustomed. We think that we should adopt RAQ's submission.”.

In Retailers' Association of Queensland Limited, Union of Employees and Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (1996) 153 QGIG 164 a Full Bench stated as follows:-

"... The fact is that pre-xmas midnight trading was introduced. Midnight shopping expeditions have become part of the pre-xmas commercial and social landscape. We would be reluctant to withdraw the permission now without good reason. Whilst we adhere to the view adopted by earlier Full Benches that midnight shopping has not been granted in perpetuity, we consider the time has come at which we should cease canvassing the matter on an annual basis. That process is expensive, inhibits retailers in ordering stock and now achieves little purpose. It will in any event be necessary to revisit the question of pre-xmas midnight trading in any year in which 23 December falls on a Saturday or a Sunday. We propose to vary the Trading Hours Order - Non Exempt Shops Trading by Retail - State to permit mixed midnight trading throughout the whole of the State on 23 December in all years. We shall review the decision on the first occasion on which 23 December falls on a week-end. Any party is of course free in any year to make application to vary the Order by deletion of the provision relating to midnight trading on 23 December."

As we have granted the RAQ's application for midnight trading on either Thursday, 21 December or Friday, 22 December, 2000, we will amend the Order to prevent non-exempt shops to trade until midnight on Saturday, 23 December, 2000. On the evidence before us, we are not prepared to permanently delete clause 3.3(2) of the Order. We therefore dismiss that part of B1301/00 that does not relate to the year 2000.

The operative date for B579/00 will be 30 October 2000.

RAQ is requested to forward the appropriate draft Amendment reflecting this decision for processing by the Registry within fourteen days of release of this decision.

It is for the above reasons that this Bench decided to grant the application on transcript on 29 September, 2000.

Order Accordingly.

D.M.LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

D.A.SWAN, Commissioner.

Released: 12 October 2000

Appearances:-

Ms P. Spencer, with her Ms S. Lindsay, appearing for the applicant, the Retailers' Association of Queensland Limited, Union of Employers.

Mr D. Pratt appearing for the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

Mr C. Casey appearing for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Mr R. Wotherspoon appearing for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.

Ms T. Lane appearing for The Australian Workers' Union of Employees, Queensland.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 - s. 21 - trading hours orders on non-exempt shops

Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (No. B177 of 2000)

TRADING HOURS - NON-EXEMPT SHOPS TRADING BY RETAIL - STATE

VICE PRESIDENT LINNANE
COMMISSIONERS EDWARDS AND SWAN

13 October 2000

Application to vary Trading Hours - New Farm Area - Inspections - Evidence - Application Granted.

DECISION

This is an application by the Retailers' Association of Queensland Limited, Union of Employers (the RAQ) for extended trading hours for the area "bound by the Brisbane River to the East, South and West, and to the North by a line connecting the River to Harcourt Street to Commercial Road and following Commercial Road North-East to the River" (the New Farm area). The New Farm area was also described, during the course of the hearing, as the Urban Renewal Taskforce peninsula precinct.

Currently the only non-exempt shop located in the New Farm area is the Coles supermarket in Merthyr Village at 85 Merthyr Road, New Farm. The RAQ seeks to vary the Trading Hours Order - Non-Exempt Shops Trading by Retail - State (the Order) as follows:-

Relief Sought:

"1. By adding to 3.2(1) of the Trading Hours Order - Non-Exempt Shops Trading By Retail - State the following:

(i) New Farm Area

| | Opening Time | Closing Time |
|--|--------------|--------------|
| Monday to Friday | 7:00 a.m. | 9:00 p.m. |
| Saturday | 7:00 a.m. | 7:00 p.m. |
| Sunday | 9:00 a.m. | 6:00 p.m. |
| Public Holidays (as defined) (excluding the twenty fifth of December, Good Friday, the twenty fifth of April and Labour Day)..... | 8:30 a.m. | 5:30 p.m. |

2. By adding to Schedule 1 'Definitions' of the Trading Hours Order – Non-Exempt Shops Trading By Retail – State the following:

(22) New Farm Area:

That area as bound by the Brisbane River to the East, South and West, and to the North by a line connecting the River to Harcourt Street to Commercial Road and following Commercial Road North-East to the River.”

The New Farm area currently falls within the definition of “The Inner City of Brisbane” in the Order. The “Area of the City Heart” also falls within the same definition although since June, 1989 the “Area of the City Heart” has been specifically defined as an area within “The Inner City of Brisbane”.

The application is opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (the QRTSA) and the Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees (the SDA).

The Merthyr Village in New Farm comprises those stores at 85 Merthyr Road, those at 900 Brunswick Street and those at 83 Merthyr Road. Properties located at 86, 92-96 and 98 Merthyr Road are also included in what is known as the Merthyr Village. Merthyr Village has a mix of tenants including cafés and restaurants, fashion, jewellery, homewares/gifts/books, travel, entertainment, food and convenience, medical, dental, pharmacy and health foods, hair, health and beauty, banks, a post office, professional, office and real estate tenants. It is what Mr Alf Sorbello, the developer of Merthyr Village, describes as a “unique smaller ‘village’ shopping precinct connecting the street traders with the open mall atmosphere” and the full-line Coles Supermarket or a “neighbourhood convenience centre with extended trading hours”.

Members of the Full Bench inspected New Farm and the surrounding area on Sunday 23 July, 2000. During that inspection we had the opportunity to view the Coles Supermarket at Merthyr Village, Merthyr Village itself, the Nightowl Convenience Store and the IGA X-press Central Brunswick store. In inspecting the general area we were able to sight some of the work done by the Brisbane City Council’s Urban Renewal Taskforce.

As in the *Coles City Express Store* case, the Minister for Employment, Training and Industrial Relations intervened in the proceedings pursuant to s. 222 of the *Industrial Relations Act 1999*. We have taken into consideration the submissions made on behalf of the Minister in reaching our decision.

In support of its application the RAQ relied upon the evidence of the following witnesses:–

- Mr John Codd, the Area Manager of the New Farm Coles Supermarket;
- Mr Bruce Dier, Chief Project Director for UMR Research, Marketing and Issues Management Consultants;
- Ms Amanda Rattin, the second in charge of the Coles New Farm Deli Department;
- Mr Michael Norris, Co-Chairman of the Brisbane City Council’s Economic Development Steering Committee;
- Mr Trevor Reddacliffe, the Chairperson of the Urban Renewal Taskforce;
- Mr Alf Sorbello, the developer of Merthyr Village;
- Mr Lennie Catalano, operator of the fruit and vegetable store at Merthyr Village known as “All About Fruit”;
- Ms Lynnette Monaghan, operator of the Flerenze Shoe Shop in Merthyr Village;
- Ms Adele Ravallese, the operator of Adele Ravallese Fashion & Accessory store in Merthyr Village; and
- Mr Eddie Dolman, the operator of Baker’s Delight franchise in Merthyr Village.

The principal witness for the RAQ was Mr Codd, the Area Manager of the New Farm Coles Supermarket. Mr Codd gave evidence as to the operation of the New Farm Coles Supermarket and how it differed from the average suburban Coles supermarket. According to Mr Codd the Supermarket has more customer transactions per week than the ordinary suburban Coles supermarket and the average basket value is less than the average basket value in ordinary suburban Coles supermarkets.

What particularly differentiated the New Farm Coles Supermarket, according to Mr Codd, was the fact that the percentage of daily sales performed between 5.00pm and 9.00pm on Mondays is the highest in the State. This was said to be indicative of the high volume of customers shopping on the way home from work. Saturdays and Monday nights (ie the period surrounding Sunday) are, according to Mr Codd, the peak trading periods in the store. During those times the Supermarket is trading to capacity. It was Mr Codd’s evidence that 28% of the weekly trade at the New Farm Supermarket is done in the store on Saturday and Monday night after 5.00pm ie in a thirteen (13) hour period. The remaining 72% of the weekly trade is done over sixty-one (61) hours.

Mr Codd also gave evidence of a consumer survey undertaken by Coles staff during the period 10 to 16 March, 2000. That survey tended to support the conclusions drawn from the external survey conducted by UMR Research, Marketing and Issues Management Consultants.

Mr Codd also estimated that if the application were to be granted the store would generate a net additional 420 hours of work each week. According to Mr Codd, if the store was permitted to trade on the public holidays sought in the application an additional 48 positions would be needed on each of those public holidays which would result in an additional 324 hours of work on each such public holiday. Whilst it was confirmed during the course of the hearing that the enterprise bargaining agreement between Coles and the SDA stipulated that any work performed on a Sunday was to be performed on a voluntary basis, Mr Codd also provided an undertaking during the course of his evidence that any work in the extended hours sought would be on a voluntary basis.

The RAQ also relied upon the evidence of Mr Dier of UMR Research Marketing and Issues Management Consultants. Mr Dier managed a professional customer survey of residents of the New Farm area in relation to the extended trading hours sought in the application. It was Mr Dier’s evidence that even allowing for a margin of error in the results of his survey there was still a comfortable margin of support for each of the elements of the RAQ’s application.

In summary the UMR survey found that:–

- there was substantial support from amongst those New Farm residents surveyed for all aspects of the RAQ application;
- each demographic group in the survey group supported the application;
- full-time workers, casual workers and younger people indicated greater support for the extended hours than other sections of the surveyed group;
- 73% of the respondents indicated that they would shop on Sundays if the application were granted;
- 70% of the respondents indicated that they would shop between 5.00 p.m. and 7.00 p.m. on Saturdays if the application were granted;
- 49% of those surveyed expected to utilise the extra hour’s trading in the morning between 7.00 a.m. and 8.00 a.m. Monday to Saturday;
- 80% of respondents indicated a belief that the New Farm shops were crowded on Saturdays;
- there was a general expectation of reduced crowding and congestion, including parking and traffic, in Merthyr Village at peak times if the application were granted;
- most respondents believed that the extended hours would create jobs in the area;
- residents in the New Farm area value flexibility and see the hours sought as a benefit to themselves;

- New Farm residents strongly support their local shopping area.

Ms Rattin, a current employee of Coles New Farm and a New Farm resident, also gave evidence in support of the application. Ms Rattin indicated that she would be amenable to working on Sundays should the application be granted. She also indicated that she would like the opportunity to shop on Sundays.

In her evidence Ms Rattin described the difficulties faced by customers and staff on Saturdays, with queuing being a part of shopping on Saturdays at Coles New Farm.

Ms Rattin also gave evidence of team talks held with the employees of Coles at New Farm and how management had emphasised that any work performed on Sundays, should this application be granted, would be worked on a voluntary basis. It was her belief that most employees were comfortable with the extended hours sought and would welcome the opportunity for extra hours of work.

The evidence of Mr Norris, Co-Chairman of the Brisbane City Council's Economic Development Steering Committee (the Steering Committee), went to the Steering Committee's support for the RAQ's application. Mr Norris expressed the view that the extended trading hours sought would not only assist the convenience of a rapidly expanding population of consumers in Brisbane but it would also enliven Brisbane as a city and assist in selling Brisbane as a tourist destination.

Mr Reddacliffe's evidence went to the support of the Urban Renewal Taskforce for the RAQ's application. Mr Reddacliffe advised the Commission of the work of the Urban Renewal Taskforce and how the urban renewal program, commenced in 1991, was aimed at revitalising the inner north-eastern suburbs ie. New Farm, Fortitude Valley, Bowen Hills and along the Teneriffe and Newstead Waterfront. An Urban Renewal Masterplan was devised to cater for the changing dynamics of the inner north-eastern suburbs with the aim being to achieve a strong relationship between employment, housing, public transport and social infrastructure. The Taskforce was intent on preserving the built character and social fabric of the area whilst allowing it to continually mature over time in line with the rapidly changing needs of the growth in inner city suburbs.

According to Mr Reddacliffe, New Farm and the surrounding area has not only experienced a significant population increase but also had experienced significant changes to its demographics. One of the reasons for this has been the massive residential development in the area in recent times. Mr Reddacliffe also forecast significant development in the area for the future and apprised the Commission of some of the plans for the immediate and short term future.

Mr Reddacliffe saw the ability of residents in the New Farm area to trade on Sundays as fitting with the aim of the Taskforce to make the built infrastructure and the services compliment residents' lifestyles. Mr Reddacliffe sees Merthyr Village as a "lively shopping hub" and a "comprehensive neighbourhood shopping centre" which has contributed to the area's sense of community.

In his evidence Mr Reddacliffe also referred to the current tourist attractions and the tourist potential of the New Farm area which was said to include:--

- New Farm Park;
- the Powerhouse which is located on the bend of the river and flanked by New Farm Park to the south and the Powerhouse Park to the north;
- the riverside promenade which will ultimately provide people with the opportunity to cycle or walk along the 3.5 kilometre stretch of riverfront between New Farm Park and Newstead Park;
- the large number of art galleries in the New Farm, Newstead and Fortitude Valley area. There is an arts circuit which has seventeen stops in the area;
- the potential redevelopment of key sites along the riverfront such as the Howard Smith Wharves and the HMAS Moreton site.

Mr Sorbello, as developer of Merthyr Village, expressed his whole-hearted support for the RAQ application. Mr Sorbello has been associated with the New Farm area since 1967 in various capacities. According to Mr Sorbello Merthyr Village is a unique and successful smaller shopping village servicing a growing residential population within a 3km to 4km radius of the Coles store. That area encompassed residential developments such as Admiralty Towers, Spring Hill, Cloudland, Teneriffe units, Central Brunswick, Kangaroo Point Dockside and nearby Kangaroo Point apartment blocks as well as apartments, boarding houses and homes located in the City and New Farm district.

Mr Sorbello's support for the application was based on the customer needs of his tenants. Mr Sorbello has seen the New Farm precinct change markedly in recent years. Now many of the businesses are operating between five to seven evenings per week whereas some years back the Village was exceedingly quiet in the evenings. Mr Sorbello also gave evidence on how the demographics of New Farm, and customers of Merthyr Village, have changed over the years. He saw much of this resulting from the work undertaken by the Urban Renewal Programme. According to Mr Sorbello the newer residents in the area and the majority of the remaining long term residents are single persons or couples with few, if any, children. As a total percentage of residents, the number of families is very low and the shopping habits of residents is not consistent with those of most other suburbs. The number of elderly persons in the area is, according to Mr Sorbello, diminishing and the number of young people is rapidly increasing. There is also an increasingly large sector of residents that are time poor city workers.

It was the evidence of Mr Sorbello that Merthyr Village is at its busiest on Saturdays and Monday evenings i.e. the days surrounding Sunday. He expressed the view that if Coles were able to trade on Sundays it would take a little business away from Saturdays and some from Mondays although he remained confident that there would be a net increase in overall total business for both Coles and other traders in Merthyr Village. He was also of the view that trading on Sundays would ease congestion in the carpark on Saturdays. According to Mr Sorbello the carpark is often used to capacity on Saturdays and Monday nights.

Mr Sorbello in his evidence also referred to the various tourist attractions in the area. In particular Mr Sorbello referred to New Farm Park and the constant flow of traffic on Sundays going to the Park.

Mr Catalano operates a fruit and vegetable store in Merthyr Village and expressed his support for the application. His evidence was that the Coles trade was important in bringing customers to Merthyr Village and to his business. Mr Catalano gave evidence of the difficulties he has on Saturdays in terms of the volume of customers. According to Mr Catalano Saturdays are by far his busiest trading days. Mr Catalano's store currently opens from 4.30am on weekdays and trades on Sundays from 4.30am to 2.00pm. He says that he would trade any additional hours that Coles are granted as a result of this application.

Ms Monaghan operates a shoe shop in Merthyr Village and her evidence went to the benefit that extended trading for Coles would have for her shop. She sees Coles as the anchor tenant that draws customers to the Village and believes that if Coles were able to trade on Sundays this would bring more customers to her shop.

Ms Ravallese gave evidence both as a long term resident of New Farm (30 years) and as the operator of the Adele Ravallese Fashion & Accessory store for eight (8) years. Ms Ravallese spoke of the dramatic change she has witnessed in the demographics of New Farm. She said that New Farm was a growth area dominated by young professionals who wanted access to her store when it was most convenient for them. She indicated support for the application as Coles was the “draw-card to the centre”. Having Coles open for the extended hours would mean increased sales for her business. Like most of the other retail traders in Merthyr Village Ms Ravallese’s store currently trades on seven (7) days per week.

The Baker’s Delight franchise also trades on seven (7) days per week. Mr Dolman gave evidence that Saturday is his store’s major trading day, Sunday is the store’s second biggest trading day and Monday, the third biggest. He strongly supported the RAQ application. According to Mr Dolman his store has the capacity to produce three times the product that he is currently producing. Should Coles be granted the extended trading sought, Mr Dolman is of the belief that his sales would increase from the extra customers that would come to Merthyr Village. Mr Dolman also gave evidence of what he describes as the chronic congestion levels in Coles on Saturdays. He saw the ability of Coles to trade on Sundays as alleviating many of those difficulties.

A number of other stores in the Merthyr Village provided letters of support for the additional hours trading sought by Coles.

The SDA relied upon the evidence of Michael Zalewski. Mr Zalewski was not and is not a member of the SDA but rather a local resident of New Farm. Mr Zalewski lives at Welsby Street, New Farm opposite where delivery trucks enter and exit the Coles store. He was opposed to the application largely because he believes that extended trading by Coles would exacerbate the problems he now has with Coles operating close to his residence. According to Mr Zalewski extended trading hours would not alleviate traffic congestion or street parking problems at Merthyr Village but rather it would only result in further congestion over a longer period of trading hours. He also expressed concern for the viability of the independent operators in the New Farm area should the application be granted.

The QRTSA relied upon the evidence of the following witnesses:-

- Mr Ian Donald McLaughlan, the owner of the Nightowl Convenience Store in Brunswick Street, New Farm; and
- Mr John Hockings, the owner and operator of the IGA X-press Central Brunswick store in Brunswick Street.

Mr McLaughlan purchased the Nightowl Convenience Store in New Farm in 1988. According to Mr McLaughlan he and his business partner had worked hard to build the business up following its purchase. His evidence was that when the non-exempt shops were given extended trading on Saturdays the Nightowl Convenience Store lost approximately 10% of its business. The profitability of the business was further eroded when non-exempt shops were able to open until 9.00pm on weekdays. At that time he extended the trading hours of his store to 24 hours a day, 7 days a week. According to Mr McLaughlan if this application were to be granted he would see the profitability of his store being substantially reduced with the result being a likely reduction in employees and significant impact on his personal life as he and his partner would have to work extra hours rather than employ staff.

Mr McLaughlan also indicated that the extended hours application, if granted, may cause him to reduce the number of products in his store which may in turn require him to reduce the size of his store. The Sunday trade represents approximately 21% of the store’s weekly business.

Mr Hockings is the owner of a convenience store in the Central Brunswick centre. Mr Hockings and his wife built this store in 1997. They also operate the IGA X-press Spring Hill store. Mr Hockings gave evidence in respect of that store in the *Coles City Express Store Case*. The Central Brunswick store trades 24 hours per day and has done so for the past three (3) years. Mr Hockings’ evidence generally went to the potential adverse effects on his business should Coles at New Farm be allowed to trade the additional hours sought in the application.

Conclusion

In evaluating the merits of the application before us regard must be had to the matters referred to in s. 26 of the *Trading (Allowable Hours) Act 1990* (the Act). Those matters are as follows:-

- “(a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated;
 (b) the needs of the tourist industry or other industry in such locality or part;
 (c) the needs of an expanding tourist industry;
 (d) the needs of an expanding population;
 (e) the public interest, consumers’ interest, and business interest (whether small, medium or large);
 (f) the alleviation of traffic congestion;
 (g) such other matters as the Industrial Commission considers relevant.”

In what is known as the *South East Queensland Corridor Trading Hours Case* (1998) 159 QGIG 142 at 342 a Full Bench of this Commission stated:-

“Each case must be determined on its own merits according to its circumstances. However, the Commission has, in deciding applications for an extension of trading hours in the past, reiterated that, to justify an extension of trading hours for non-exempt shops, it must be shown there are ‘special circumstances of a sufficiently significant nature’, that the situation is ‘unique’ or ‘is clearly distinguishable’ from the normal situation.”

In that case at p. 310 the Full Bench referred to the evidence of Mr Sorbello that was before them in the following terms:-

“Mr Sorbello’s angst is also understandable. He entertained the view (shared with many who supported the application) that shop keepers should be permitted to open whatever hours they see fit in order to meet their customer demands. He also had a complaint about the non-inclusion of New Farm within the city heart tourist precinct which is permitted to trade on Sunday. There is some force in that complaint... It is a difficulty that there will always be those who only just fail a threshold test or who, once falling outside a boundary, are closer to it than anyone else. In any event, this case has been an all or nothing case.”

It was with such comments in mind that the RAQ pressed this application for a further area within “The Inner City of Brisbane” to be granted extended trading hours.

As has been referred to above, the New Farm area has always been included within the definition of “The Inner City of Brisbane” in the Order. That definition is as follows:-

“Commencing at the centre of the William Jolly Bridge; thence along such bridge north to Skew Street; thence along Skew Street to Saul Street; thence along Saul Street to Countess Street; thence along Countess Street to Kelvin Grove Road; thence along Kelvin Grove Road to Ithaca Street; thence along Ithaca Street to Gilchrist Avenue; then along Gilchrist Avenue to Bowen Bridge Road; then along Bowen Bridge Road to the centre of Bowen Bridge; thence along the midstream of Enoggera Creek to Breakfast Creek; thence along the midstream of Breakfast Creek to the Brisbane River; and then along the midstream of such river to the point of commencement at the centre of the William Jolly Bridge.”

The "Area of the City Heart" became an area within "The Inner City of Brisbane" in 1989 with the granting of extended trading hours, including Sundays, to that subset of "The Inner City of Brisbane". New Farm is included within the definition of "The Inner City of Brisbane".

Another "special circumstance of a sufficiently significant nature" or a "unique" factor in this application is the work that has been carried out in the New Farm area by the Urban Renewal Taskforce since it commenced its task in 1991. The work of the Taskforce is clearly visible to any person visiting the New Farm area. The residential development in the area has been substantial. Much of the industry that was prevalent in the area in the 1980's has now been moved out and people or residents have been moved into the New Farm area. The New Farm area is dominated by medium density housing, with nearly three-quarters of dwellings being semi-detached, terrace houses, units, flats or apartments.

There is evidence before us to show that the population of New Farm is a growing population.

The New Farm area also encompasses many tourist attractions. Where once New Farm Park may have been the only tourist attraction in the area there is now a substantial and growing artistic community with the Powerhouse Centre for the Live Arts having opened in mid 2000.

In assessing the public interest this Commission is required to weigh up any competing interest. In the external survey undertaken by UMR Research, Marketing and Issues Management Consultants we were given some indication of the interests of consumers in the New Farm area. In particular, that survey revealed that:-

- there was strong support for the RAQ's application among New Farm residents;
- respondents expected that the extended trading hours sought would reduce crowding and congestion, including parking and traffic, in the main shopping area at peak times ie Saturdays and Monday evenings;
- New Farm residents overwhelmingly do the bulk of their grocery shopping at New Farm and mostly at the Coles Supermarket;
- the New Farm resident is one that shops quite often with the median number of shopping trips per week being three and the median shopper visiting Coles twice a week;
- nearly a quarter of the full-time workers surveyed shop on four occasions or more during an average week
- the most common shopping time is weekdays after 5.00pm;
- there was a widespread perception that the New Farm shopping area was crowded on Saturdays.

The consumers in the New Farm area appear, from the UMR Survey, to strongly favour the grant of the application. The interest of large business, being that of the Coles Supermarket, also clearly favours the grant of the application. There was also strong support for the application from many of the small businesses located in Merthyr Village.

As opposed to these interests we have the interests of the small or medium businesses in the New Farm area which are not located in Merthyr Village. The evidence of both Mr McLaughlin and Mr Hockings was that they expected a downturn in their business should the application be granted. There is also the potential for a reduction in employment in those stores.

As mentioned in the *Coles City Express Store Case*, another factor that can be considered in assessing the public interest is the impact that the granting of any application would have on employment. Not only is such a matter a consideration in determining where the public interest lies but it is also another "relevant matter" in terms of s. 26(g) of the Act. In the case before us there was evidence that Coles Supermarket would require:-

- an additional 45 employees and 300 hours of work should the application to trade on Sundays be granted;
- an additional 48 employees and 324 hours per public holiday should the application with respect to public holidays be granted;
- an additional 34 employees and 72 hours of work should the application with respect to Saturday afternoons be granted; and
- an additional 14 employees and 84 hours of work should the extended trading hours sought on Monday to Saturday mornings be granted.

Having considered all of the evidence before us, we have formed the view that there are special circumstances of a sufficiently significant nature to warrant the granting of the RAQ application. The evidence also establishes that the Merthyr Village is currently busy on Sundays with most retail shops open for business on that day. The only retail outlet in the Village currently unable to trade on Sundays is the Coles Supermarket. Coles have indicated that they will trade the extended hours sought in the application should the application be granted.

The operative date of any Order we make will be 30 October, 2000. We direct the RAQ to prepare a draft order reflecting this decision and submit it within 14 days of the release of this decision. In the draft order the first claim should be inserted in clause 3.2(1)(a) and should be referred to as the "Area of New Farm of Inner City of Brisbane".

It is for the above reasons that this Bench decided to grant the application on transcript on 29 September, 2000.

Order accordingly.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

D.A. SWAN, Commissioner.

Released: 13 October 2000

Appearances:-

Mr C. J. Murdoch of counsel for the Minister for Employment, Training and Industrial Relations with him Ms R. DeCampo and Mr M. Piccini.

Ms P. Spencer, with her Ms S. Lindsay and Ms J. Dowding of the Retailers' Association of Queensland Limited, Union of Employers.

Mr D. Pratt of the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

Mr C. Casey of the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Ms K. Brown of the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – unpaid wages***Department of Employment, Training and Industrial Relations AND Sherrin Hire Pty Ltd (No. W138 of 2000)**

COMMISSIONER BLOOMFIELD

18 October 2000

Unpaid Wages – Employer contracted by Energex Limited – Applicant claimed that QTSC Group of Corporations Enterprise Bargaining Certified Agreement 1996 applied to contractor – Arbitrated Matter – Employer not party to Certified Agreement – Commission found that Certified Agreement could not apply to third party – Application dismissed.

DECISION

On 16 October 2000 I dismissed an application by David Francis Cox, of the Department of Employment, Training and Industrial Relations, which had asked the Commission to make an order under s. 278 of the *Industrial Relations Act 1999* requiring Sherrin Hire Pty Ltd to pay unpaid wages of \$9,506.39 to one Terry Anthony Douglas.

The application claimed that Mr Douglas was employed by Sherrin Hire Pty Ltd as a Level 2 Employee under the terms of the QTSC Group of Corporations Enterprise Bargaining Certified Agreement 1996 (No. CA225 of 1996).

The application said that Sherrin Hire was contracted by Energex Limited to clear vegetation and trees away from live power lines in the city of Gold Coast and environs. Mr Douglas was, in turn, employed by Sherrin Hire to perform that type of work.

Mr Cox's application said that the Certified Agreement contained a provision at clause 4.4 to the effect that all contractors performing "core work", as defined in the "Use of Contractors' Industrial Agreement" between the QTSC Group and various unions, were to be entitled to rates of pay and allowances which in aggregate were no less favourable than those payable to employees under the *Electricity Supply Industry Employees Award – State* and the *Electricity Generation, Transmission and Supply Award – State*.

It was alleged that Sherrin Hire had not paid Mr Douglas in accordance with the terms of the QTSC Certified Agreement and/or the terms of the "Use of Contractors' Industrial Agreement" mentioned at clause 4.4 of the Certified Agreement.

Although the QTSC Certified Agreement purports to confer obligations on contractors, and benefits to employees of contractors, Sherrin Hire is not a party to the Certified Agreement, nor to the Industrial Agreement, and is not bound to observe their respective terms.

The QTSC Certified Agreement was made between Queensland Transmission and Supply Group of Corporations and various unions. The Agreement, as a matter of law, can only apply to such parties and to the employees of the QTSC Group (see definition of "party" in Part 11 – "Promoting Bargaining and Facilitating Agreements" of the *Industrial Relations Act 1990*). Similarly, the "Use of Contractors' Industrial Agreement", which is sought to be relied upon, is only binding on the direct parties *viz.* QTSC and the signatory unions (see Part 10 – "Awards and Industrial Agreements" [especially s. 141] of the *Industrial Relations Act 1990*).

Chapter 6 – "Agreements", of the *Industrial Relations Act 1999* also makes it clear that a certified agreement only applies to the parties who made the agreement (see s. 141, s. 142 and s. 166). Accordingly, an agreement's terms cannot apply to, nor be binding upon, third parties.

Such statutory provisions reflect the common law position spelt out in such cases as *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

Sherrin Hire Pty Ltd was not a party to the QTSC Certified Agreement (No. CA225 of 1996) and, therefore, was not bound by its terms. Accordingly, Mr Douglas had no entitlement to the benefits supposedly conferred by that Certified Agreement.

Similarly, although the "Use of Contractors' Industrial Agreement" purports to confer obligations, and benefits, upon third parties, such provisions have no effect because the terms of the agreement have no application to third parties.

It was for these reasons that I dismissed the application of Mr Cox on 16 October 2000.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr D. Cox for the Department of Employment, Training and Industrial Relations.

Released: 18 October 2000

Mr C. Delaney and Mr I. Sherrin for Sherrin Hire Pty Ltd.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 230 – application for hearing and determination of dispute***The Australian Workers' Union of Employees, Queensland AND Tully Sugar Limited (No. B1728 of 1999)****SUGAR INDUSTRY AWARD – STATE**

COMMISSIONER EDWARDS

17 October 2000

Industrial Dispute – Conferences – Work in the Rain – Arbitration – Inspections – Evidence – Application Granted.

DECISION

On 15 December 1999 The Australian Workers' Union of Employees, Queensland (AWU) filed an application seeking relief as follows:-

1. The Commission hear and determine dispute number D258 of 1999 between The Australian Workers' Union of Employees, Queensland (the AWU) and Tully Sugar Limited (the Company) in relation to the Company's failure to comply with clause 29 of the Sugar Industry Award –

State (the Award) by making appropriate payment pursuant to that clause to members of the Union who were required by the Company to work in the rain on 11 February, 1999.

- 2. The Commission order that the Company make appropriate payment in accordance with clause 29 of the Award to Messrs Gary Blair, Stephen Olsen, Neil Wadsworth and Raymond Apolloni (the members) for work undertaken by them in the rain on 11 February 1999.”.

The following witnesses were called in Tully:–

- Gary Kenneth Blair
- Neil Deacon Wadsworth
- Raymond Robert Apolloni
- Thomas Henry Bridges
- Filippo La Fauci
- Paul Anthony Quagliata
- Brian David McNee

Mr Sharpe on behalf of the AWU stated that on Thursday 11 February 1999 employees were rostered to work for the Company performing pre-cyclone duties. The employees were provided with waterproof clothing, which they wore, for the duration of rainfall on that day.

Despite the employees wearing the waterproof clothing provided by the Company on 11 February 1999, the extreme weather conditions prevailing rendered such waterproof clothing ineffective to the extent that the work clothing of each employee was saturated.

Clause 29 of the *Sugar Industry Award – State* provides as follows:–

“Work in the Rain

29. When employees are required to work in rain they shall be paid for all time so worked at double rates and until such time as they finish work or are able to change into dry clothing, unless they are provided with waterproof clothing.”.

Mr Sharpe submitted that under normal circumstances the protective clothing provided would have protected the employees, however on the day in question the employees were requested to work in abnormal circumstances and that the combined effects of cyclonic wind and rain, rendered the provision of protective clothing nugatory.

He claimed the employees concerned should be paid at the appropriate rate as provided by clause 29 of the *Sugar Industry Award – State* for all hours worked in the rain on 11 February 1999 as follows:–

| | |
|------------------|---|
| Gary Blair | 9 hours normal duties |
| Stephen Olsen | 2 hours performing crane driver/dogman duties |
| Neil Wadsworth | 3 hours performing crane driver/dogman duties |
| Raymond Apolloni | 2 hours performing crane driver/dogman duties |

The witnesses disagreed on the degree of severity of the weather conditions prevailing at the time. The Commission is prepared to accept the evidence that Tully was experiencing the full force of a cyclone, ie extremely high winds and horizontal rain. Any outside work could only be performed with extreme caution. It is also of concern that the type of work being undertaken was of a nature that should have been carried out prior to cyclone warnings being issued. It is not uncommon for authorities to remind industry and residents to prepare for the cyclone season by making outside areas secure and as safe as could be expected. It would seem from the evidence that had a pre-cyclone audit of the yard been undertaken, the amount of work required on the day in question would have been considerably less. In regard to the clothing the Commission is satisfied it could not be regarded as waterproof in such extreme conditions.

The Commission has decided that on this occasion the payment of the allowance is warranted.

In giving the decision the Commission would stress that the severity of the conditions is the determining factor and not the fact that it was raining or waterproof clothing was on issue. It was more a case that the only waterproof and secure place on that day was within the confines of a substantive structure rather than relying on a type of clothing.

The application is granted.

I order accordingly.

K.L. EDWARDS, Commissioner.

Appearances:–
 Mr J. Sharpe for The Australian Workers’ Union of Employees, Queensland.
 Mr P. Warren for the Australian Sugar Milling Association, Queensland, Union of Employers on behalf of Tully Sugar Limited.

Released: 17 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to amend award

The Australian Workers’ Union of Employees, Queensland AND Tully Sugar Limited (No. B1729 of 1999)

SUGAR INDUSTRY AWARD – STATE

COMMISSIONER EDWARDS

17 October 2000

Amendment – Allowance – Dispute Conference – Inspections – Evidence – Confined Space – River Pump House – Work Area Not Classified as Confined Space – Application Refused.

DECISION

On 15 December 1999 The Australian Workers' Union of Employees, Queensland (AWU) filed an application seeking relief as follows:-

"The Commission amend subclause 26(12)(c) to the Sugar Industry Award – State by inserting a new paragraph as follows:-

'In the case of employees engaged at Tully Sugar Mill, the foregoing allowance shall be paid for all work performed inside the river pump house.' "

Employees of Tully Sugar Limited (the Company) are required to periodically undertake work inside the river pump house (the pit) located on the premises of the Company. The pit is cylindrically shaped and measures approximately 6.5 metres in diameter and 5.5 metres in depth below the ground surface with permanent lighting and mobile fans being used to induce and extract air for ventilation. Pumps are mounted on the lower surface. Entry to the pit, which is covered by a steel tread mesh, is via a ladder permanently affixed to the side. In the event of an injury to an employee special workplace health and safety extraction techniques are used to transport an injured employee from the site.

Mr Sharpe on behalf of the AWU submitted that the pit is unique constituting a confined space and that work required to be performed in it would attract payment of the confined space allowance as provided in the *Sugar Industry Award – State*.

The Commission undertook inspections of the pit and the surrounding area on 7 June 2000.

The following witnesses were called at Tully:-

Raymond Robert Apolloni
Thomas Henry Brydges
Brian David McNee
Veli Heikki Hyytinen

Clause 26(12)(c) of the *Sugar Industry Award – State* states:-

"(c) *Confined Spaces* – Except as otherwise herein provided, employees engaged in cleaning cold mill boilers, or employees required to work from inside the cleaning or maintenance of locomotive boilers, combustion chambers, water drums of boilers, fire boxes, flues, vapour pipes (including painting of such pipes), the base of chimneystacks, fly wheel or gearing pits, condensers, effets, evaporators, or vacuum pans, shall be paid 45.80c per hour extra whilst so engaged.

Employees who are required to work inside the following vessels or places when such vessels or places are enclosed, shall be paid 44.40c per hour extra whilst so engaged:-

Clarifiers, mud tanks, filter drums, effeet supply tanks, lime tanks, or lime mixer barrels, drier drums, distributors and crystallisers.

Employees required to work inside fugals or fugal baskets for cleaning and/or maintenance purposes shall be paid 45.80c per hour extra whilst so engaged."

As a result of the inspections and the nature of the evidence but especially the method of entry and lack of feeling of being within a confined space, the Commission is satisfied that the work area could not be classified as such within the meaning of the *Sugar Industry Award – State*.

The application is refused.

I order accordingly.

K.L. EDWARDS, Commissioner.

Appearances:-

Mr J. Sharpe for The Australian Workers' Union of Employees, Queensland.

Mr P. Warren for the Australian Sugar Milling Association, Queensland, Union of Employers on behalf of Tully Sugar Limited.

Released: 17 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 230 – application for action on industrial dispute

The Australian Workers' Union of Employees, Queensland AND Bundaberg Sugar Limited (B478 of 2000)

SUGAR INDUSTRY AWARD – STATE

COMMISSIONER EDWARDS

17 October 2000

Industrial Dispute – Correct Classification – Dispute Conferences – Evidence – Inspections – Weighbridge Clerk – Typical Tasks – Definitions – Application Refused.

DECISION

On 5 April 2000 The Australian Workers' Union of Employees, Queensland (AWU) filed an application for relief as follows:-

"1. The Commission hear and determine dispute number D257 of 1999 between The Australian Workers' Union of Employees, Queensland (AWU) and Bundaberg Sugar Limited, Millaquin Mill (the Company) in relation to the correct classification of Mr Mike Logan pursuant to the Sugar Industry Award – State (the Award).

2. The Commission order that Mr Mike Logan be classified as a Level 5 Operator pursuant to the Award as from the date of notification of dispute on 24 September 1999."

Prior to filing the formal application the Commission had chaired a dispute conference D257 of 1999 at which time it was agreed that the conciliation process could not resolve the matter.

Mr Logan is currently engaged as a Weighbridge Clerk with the Company and is currently classified as a Production, Transport and Services Operator – Level 4 pursuant to clause 26.1 of Division 3, *Sugar Industry Award – State* (the Award) and clauses 4.1 to 4.4 of Appendix 1 to the Award.

Other Weighbridge Clerks are employed as per the Award at classification Level 4. This application relates to classification level of Mr Logan and not all the Weighbridge Clerks employed at the Millaquin Mill.

In evidence Mr Logan explained the difference between Level 4 Weighbridge Clerk and Level 5 Weighbridge Clerk. The typical tasks for a Level 4 operator are operating a weighbridge, tippler and cane yards, whereas at level 5 the typical tasks are operating a cane receival system combining weighbridge, tippler, marshalling yards, extraneous matter and associated computer operations.

The relevant sections of clause 26(1) of Division 3 and clauses 4.1 to 4.4 of the Award state:–

“26(1) *Definitions* – All work shall be covered by the classification structure described in Appendix 1, namely:–

...

| | |
|---|-----|
| Production, Transport and Services Operator – Level 4 | 93% |
| Production, Transport and Services Operator – Level 5 | 97% |

...”.

“PRODUCTION, TRANSPORT AND SERVICES OPERATOR – LEVEL 4

4.1 (General)–

An employee appointed to this level shall perform work above and beyond the skills at Level 3, and shall have obtained proficiency and where required certification or qualification necessary to perform work at this level.

An employee at this level is required to:–

1. Work under supervision and may supervise other employees.
2. Exercise decision making/responsibility within their level of skill and training.
3. Demonstrate awareness of general quality control standards, in particular responsibility for their own work, advise of quality control problems where identified and in addition may carry out quality control checks on work performed by other employees.
4. Provide on-the-job training as required.
5. Service, adjust and install equipment according to their level of skill and training and advise of any additional maintenance required.
6. Demonstrate general housekeeping skills.
7. Demonstrate ability to use common language skills to engage in communication and to read and understand written and oral instructions plus prepare records that convey information accurately and concisely and able to effectively communicate instructions to other employees and may be required to interpret technical data and prepare written reports.

...”.

“4.2 Typical Tasks Include

...

(B) *Transport*:–

- Driving articulated vehicles.
- Operating weighbridge, tippler and cane yards.
- Operating a cane ferry.
- Operating tamping machine, simplex and malcolm moore.

...”.

4.4 Indicative Existing Classifications:–

- . Effet Operator
- . Articulated Vehicle Driver
- . Ferry Operator
- . High Grade Fugal Operator
- . Malcolm Moore Operator
- . Mobile Cranes
- . Operators of Other Tamping Machines
- . Simplex Operator
- . Splicers to Gear Riggers and or Licensed Scaffolder
- . Head Storeman
- . Sugar Mill Chemist
- . Weighbridge Clerk

- . Forklift Operators
- . Backhoe Operators
- . Bulldozer Operator up to and including D4 capacity
- . Front End Loader/Mobile Shovel Operators
- . Toft Loader Operator
- . Engine Drivers in Mills”.

Mr Sharpe went on to say that clause 26C(2)(c) of the *Sugar Industry Award – State* specifies, “Classification/Reclassification of employees shall be applied in accordance with Sections 2 and 4 of the Implementation Manual”.

The parties disagreed on whether the Millaquin operation includes a cane receival system that combines the weighbridge tippler with the marshalling yard nor does that system involve taking data on extraneous matter.

The main work performed by the applicant is weighbridge operation with limited other duties such as observation of the amount of dirty cane. The Commission is satisfied that the operation does not involve operation of a cane receival system including marshalling yard which is not in view of the operator. As already mentioned this application relates to Mr Logan even though there are other operators employed.

On consideration of all the evidence, exhibits and on reflection of the inspection, the Commission sees no reasons why Mr Logan should be paid at a level different to other operators.

The application is refused.

K.L. EDWARDS, Commissioner.

Appearances:-

Mr J. Sharpe for The Australian Workers’ Union of Employees, Queensland.

Mr R. Cullen for the Australian Sugar Milling Association, Queensland, Union of Employers on behalf of Bundaberg Sugar Limited.

Released: 17 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 75(4) – application to discontinue

Daniel Raymond Guymer AND ANA Hotel (B1192 of 1999)

COMMISSIONER BLADES

13 October 2000

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 11 October, 2000, Commissioner Blades said:-

“At the outset it is clear to me that this application under s.75(4) of the *Industrial Relations Act 1999* cannot succeed. The subsection provides that:-

‘(4) The application lapses if the applicant has not, within 6 months after the applicant has been informed by the commission under subsection (3) –

(a) taken any action in relation to the application; or

(b) discontinued the application.’.

The evidence, which must be accepted, is that at the conference held on 23 September 1999, the applicant was informed of the likely chances of success and of the requirement of pursuing the application within a period of six months. That oral information was followed up by a certificate dated 27 September 1999, which also reflects that the applicant had six months from 23 September within which to progress the application.

Learned counsel has today referred to two cases, *Allerup v. Heka Pty Ltd* (161 QGIG 268) and *Mr D v. Logan-Beaudesert District Health Service* (161 QGIG 267). There is also a case along similar lines, *Minnow v. Australian Meat Holdings* (159 QGIG 6), which is also an appeal decision.

The circumstances in this case are that the applicant wrote a letter to the Commission on 29 February 2000, and received in the Industrial Registrar’s Office on 6 March 2000, requesting a ‘rehearing’ after the conference had been held on 23 September. That period of time is within the six-month period set by s. 75(4). It transpired that the applicant failed to attend a second conciliation conference set for 5 April 2000, of which he claimed to have received no notice and there is a lack of proof that he did.

The cases require that the applicant takes action to progress his case within the six months and I think that he did, is the only conclusion to which I can come. There is evidence that the applicant has followed up on that request. Putting aside the letter of 14 April 2000, there was clearly a request sent on 23 July 2000 or thereabouts, but certainly received by the Industrial Registrar’s Office on 31 July 2000.

There may, of course, be an explanation for the failure of the applicant to receive correspondence and notices and his claim that he was not aware of the listing of the second conciliation conference may well in fact be credible. The applicant had been represented by a union, and it is reasonable to assume that the various documents were sent to that body. Unfortunately, the Registrar’s office does not tell us where various documents are sent. That union representation seems to have been imperfect because the union had apparently advised the applicant perhaps not to proceed or at least had warned him about costs. The union does not appear to have had its heart in the matter and the applicant certainly had some complaints about the union’s representation. So that may have contributed to the failure to receive the various notices. But, of course, all of this is irrelevant in my view.

This application is brought under s. 75(4) and circumstances just do not exist for such a ruling. The fact remains that the applicant applied within time to progress the matter. An application may have been brought under s. 331 to have the application struck out but it was not.

There was an argument about no follow up action. However, reference must be made to *Allerup’s* case and I quote the words of his Honour President Williams in the penultimate paragraph:-

'A letter to the Registrar requesting that the application be placed on the callover list for directions would suffice. Even if, because of some administrative problem, the application were not placed on a callover, the sending of such a letter would of itself satisfy the requirements of section 219(4).'

The reference to s. 219(4) is of the *Workplace Relations Act 1997*, which is in similar terms to s. 75(4).

The applicant, I don't think, can be criticised for using the word 'rehearing' because it is clear that whatever he wished to do, he wished to progress the application forward and it seems to me that the letter of 29 February 2000 falls squarely within the provisions of s. 75(4). It is within time. As I said, the application by the respondent must fail and that application is therefore dismissed."

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.

Appearances:-
Mr R. Reed, instructed by Stephens & Tozer, for the Applicant.
Ms S. Richards, of Queensland Hotels Association Union of Employers, with her Ms S. Rose, for the Respondent.

Released: 13 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 474 – approval for amendment to eligibility rule

Queensland Teachers Union of Employees (No. U16 of 2000)

VICE PRESIDENT LINNANE

16 October 2000

Applications to amend eligibility rule– application granted.

REPORT ON DECISION (as edited)

In giving a decision from the Bench on 11 October, 2000, Vice President Linnane said: –

"This is an application to alter the eligibility rule of the Queensland Teachers Union of Employees. The application has been made in accordance with the provisions of the *Industrial Relations Act 1999* and *Workplace Relations Regulations 1997*. The proposed alteration to the rules has been made in accordance with the rules of the applicant organisation. There is no objection to the alteration. There is no material before me on the basis of which I could conclude that the persons who will become eligible as a result of the proposed change might conveniently belong to any other organisation.

In those circumstances I am required by the provisions of the Act to approve the alteration and order accordingly."

Dated this sixteenth day of October, 2000.

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.

Appearances:-
Mr G. Moloney of on behalf of the Queensland Teachers Union of Employees.

Released: 16 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – order for unpaid wages

**Mark Lindsay Buglar of the Department of Employment, Training and Industrial Relations
AND Allcoast Concrete Contractors Pty Ltd (No. W119 of 2000)**

COMMISSIONER BLOOMFIELD

16 October 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 16 October 2000, this Commission, after having decided that Allan Charles Wilson was underpaid wages by Allcoast Concrete Contractors Pty Ltd, doth order as follows:-

1. That Allcoast Concrete Contractors Pty Ltd pay to Allan Charles Wilson the amount of two thousand seven hundred and thirty-seven dollars and fifty-eight cents (\$2,737.58) in respect of unpaid wages for the period between 2 September 1996 and 23 June 1998.
2. That the amount set out in paragraph 1 of this Order is to be paid in instalments of two hundred and thirty-seven dollars and fifty-eight cents (\$237.58) on 16 November 2000 and thereafter at the rate of two hundred dollars (\$200.00) per month commencing on 16 December 2000 with the final instalment on 16 December 2001 to be an amount of one hundred dollars (\$100.00).
3. That should the payment method set out in paragraph 2 not be complied with the total balance still owing shall become a debt due and payable as from the sixteenth of the month in which an instalment was not paid.

Dated this sixteenth day of October, 2000.

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.

Operative Date: 16 October 2000
Order – Unpaid wages
Released: 16 October 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 21 – application to amend order

Retailers Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (B178 of 2000)

TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE

VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS
COMMISSIONER SWAN

16 October 2000

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 31 July, 1, 2, 3 and 17 August and 29 September 2000, this Commission doth Order that the said Order be amended follows as from the thirtieth day of October, 2000:–

In paragraph 3.2(1)(a) by deleting the days and opening and closing times under the heading “Area of the City Heart of Inner City of Brisbane occupied by Coles Express at 240-248 Edward Street comprising and restricted to only the 720m2 ground floor retail space (covering Part Lot 10 of Section 10(RP696), Part Subs 1 and 2 of Lot 9 of Section 10(RP692) and part Resub 3 of Resubs 1 and 2 of Sub C of Lots 8 and 9 of Section 10(RP688) of the abovementioned address” and inserting the following in lieu thereof:–

Table with 3 columns: Day, Opening Time, Closing Time. Rows include Monday to Thursday, Friday, Saturday, Sunday, and Public Holidays (as defined).

Dated this sixteenth day of October 2000.

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.

Operative Date: 30 October 2000
Amendment: Coles Express
Released: 16 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

HOSPITAL NURSES’ AWARD – STATE

(Gazette, 1 November, 1986)

(Correction of Error)

Whereas an error occurred in the Correction of Error of the abovenamed Award as published in the Queensland Government Industrial Gazette of 29 October 1999, Vol. 162, No. 10, pages 249-250, the following correction is made:–

By deleting from columns 3 and 4 of Item 2 the amounts of “\$5.46” and “\$5.63” and inserting the amounts of “\$5.49” and “\$5.66” respectively in lieu thereof.

Dated this seventeenth day of October, 2000.

E. EWALD,
Industrial Registrar.