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No. 13

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999  
Industrial Relations (Tribunals) Rules 2000*

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Certified on and certificate issued	Cancelling
CA495/04	D & D Air Conditioning Services Pty Ltd On Site Sheet Metal Employees and AMWU Queensland – Certified Agreement 2003-2005	18/10/04	
CA544/04	Pozzolan Enterprises Tarong 2004 – Certified Agreement	08/11/04	CA177/01
CA520/04	Cerebral Palsy League of Queensland – Certified Agreement 2004-2005	09/11/04	CA236/01
CA523/04	Bendemere Shire Respite Service Support Workers – Certified Agreement 2004	09/11/04	
CA525/04	Cittamani Hospice Service Limited – Certified Agreement 2004	09/11/04	
CA526/04	Professional Video & Hi-Fi Pty Ltd t/a Videopro & Electrical Trades Union of Employees of Australia, Queensland Branch – Certified Agreement – 2003/2005	11/11/04	
CA551/04	IGA Distribution Pty Ltd – Morningside – Certified Agreement 2004	11/11/04	CA34/02

The following Agreement has been amended by the Commission:

CA476/02	Crowd Control Industry – LHMU – Certified Agreement	09/11/04
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G.D. SAVILL,  
Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

*Workers' Compensation and Rehabilitation Act 2003* – s. 561 – appeal against decision of industrial magistrate

**Kevin Alva Mayo AND Q-Comp (No. C36 of 2004)**

PRESIDENT HALL

9 November 2004

DECISION

The Appellant's application for compensation under the then *WorkCover Queensland Act 1996* was rejected by WorkCover on 22 July 2002. The Appellant sought a statutory review of the decision. By decision of 6 December 2002 the Statutory Review Unit confirmed WorkCover's decision. There was an unsuccessful appeal to the Industrial Magistrate at Townsville. It is against that decision that this appeal is brought.

It has at all times been common ground that at the time the Appellant left his position as a field officer with the Aboriginal and Torres Strait Islanders' Community Legal Service he suffered "either from an adjustment disorder or a major depressive disorder". The issue has always been whether his employment with the legal service was a significant contributing factor to the injury. The Industrial Magistrate found that his employment was not a significant contributing factor to the psychiatric/psychological condition from which the Appellant suffered. On the contrary, the Industrial Magistrate found that the Appellant was afflicted by the condition prior to his appointment as a field officer. The Appellant attacks that finding on the basis that the Industrial Magistrate "does this in the absence of any medical evidence".

The issue whether the psychiatric/psychological disorder was a compensable injury was a matter for the Industrial Magistrate, not for the medical profession; *Chattin v WorkCover Queensland (1999)* 161 QGIG 531 at 533 and *WorkCover Queensland v Comore (199)* 162 QGIG 190 at 191. Here, it was entirely understandable that the Industrial Magistrate would turn his mind to the question whether the Appellant carried the disorder to the workplace. The history was that the Appellant who had been employed on a probationary basis in August 2000, was confirmed in his position on 26 September 2000. Within approximately six weeks he began to manifest what (with hindsight) were symptoms of the disorder. The Appellant's evidence was that a particular female supervisor was the principal cause of the stress which he experienced in the workplace. The symptoms began to manifest themselves within three to four weeks of her appointment. The Industrial Magistrate was not, of course, entitled to swim against the tide of medical evidence. But the proposition that the disorder had arisen from the Appellant's "long and difficult life's experience" (as His Worship put it) was put to both the psychologist who gave evidence and to the psychiatrist who gave evidence. The psychologist said that it was entirely possible that the Appellant's disorder could have arisen from his "long and difficult life's experience". The psychiatrist (Professor James) was of the view that the disorder could have been caused by the "long and difficult life's experience". In fairness to the Appellant, I hasten to add that Professor James also said that he had not noticed any sign of that when he interviewed the Appellant. But that interview did not occur until August of the following year and, as the Industrial Magistrate found, Professor James had not been given access to an earlier unsuccessful Workers' Compensation Claim by the Appellant which showed the symptoms to have been present in early 2001. I am not persuaded that the Industrial Magistrate's decision was not open to His Worship.

The way in which the Industrial Magistrate expressed the decision has given rise to some comment. His Worship said:

"36. In conclusion, on this aspect it is my view that Mr Mayo was probably suffering from this disability prior to his appointment or at least that the necessary underpinning for the development of this disability was evidence from his past experiences.

37. If I am wrong in this, I proceed to consider the other elements of the Act in this matter if the disability had totally arisen within the Service (which is not my considered view). On the alternative view, it may still be open that his employment was a significant factor to the injury."

The essential criticism is that the definition of "injury" includes the "aggravation" of a disorder of the mind, that paragraph 36 flags "aggravation" as an issue but that the issue was not dealt with. In fairness, to the Industrial Magistrate who's reasons were both lengthy and considered, I should record that "aggravation" was not an issue at the trial. An examination of the written submissions (the submissions were taken in writing), shows that the only point at which Counsel who then appeared for the Appellant referred to "aggravation" was in an attempt to derive some comfort from *WorkCover Queensland v Kehl (2002)* 170 QGIG 93. *WorkCover Queensland v Kehl, ibid*, is authority for the proposition that in assessing whether "management action" is reasonable management action reasonably taken, one should take into account a propensity to decompensate known to the employer. Counsel who then appeared for the Respondent rightly replied that the proposition had no relevance. Counsel was correct about that. There had been no evidence in chief or cross-examination directed to the matter. I have no difficulty in accepting the submission that this is a case at which in some point the employer must become aware that the Appellant was decompensating, nor any difficulty in accepting that an argument might have been developed that after that point the employer should have modified the work practices of the organisation to ensure that all that was occurring might be characterised as reasonable management action reasonably taken. On such an argument, I should have great sympathy for the submission of Counsel for the Appellant that the task is to assess the conduct of the employer, and that task is not to assess whether the employee made the employer's task unduly difficult by being uncooperative and unresponsive. The difficulty is that the argument discussed was not developed at first instance. If the argument had been developed evidence might have been lead which was directed to it. Witnesses would have been cross-examined about their state of knowledge, and would have the opportunity to give their explanation of events. With respect to Counsel for the Appellant who has picked up a difficult brief and has argued it well, the damage was done at first instance.

I should also say that it is entirely possible the Industrial Magistrate omitted to deal with the matter of "aggravation" because His Worship was of the view that the disorder which the Appellant took to the workplace was automatous. In taking such a view the Industrial Magistrate would not have been making a medical judgement which His Worship was not qualified to make. Professor James had referred to the "internal developmental (sic)" of "very private and personal" stress.

In any event, as foreshadowed at paragraph 37 the Industrial Magistrate went on to consider whether anything that occurred within the workplace prior to the onset of the symptoms might properly be described as other than reasonable management action reasonably taken. The Industrial Magistrate gave the enquiry a negative answer. Once again, I am unable to conclude that the Industrial Magistrate's decision was not reasonably open to His Worship. After all, very little had occurred. Granted that the position to which the Appellant was appointed was inherently stressful, he had voluntarily sought out the position and had been given the benefit of a (brief) period of probation before being permanently appointed. The issues raised by the employer and in particular by the female supervisor in the short period before the Appellant commenced what the Industrial Magistrate (not unreasonably) described as "a campaign of attacking" the female supervisor, were issues which it was necessary for the employer to raise and which seem to me (on the employer's then state of knowledge) to have been discreetly and appropriately raised.

In all the circumstances I dismiss the appeal.

I reserve all questions about costs.

Dated 9 November 2004.

D. R. HALL, President.

Released: 10 November 2004

*Appearances:*  
Mr B. Shaw of Counsel instructed by Alex Nelson and Associates,  
Lawyers, for the Appellant.  
Mr P. Major directly instructed for the Respondent.

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INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999* – s. 282 – case stated

**The Queensland Public Sector Union of Employees AND Department of Corrective Services (No. C65 of 2004)**

DECISION

On 4 August 2004, whilst undertaking inspections at the Townsville Correctional Centre in respect of Dispute D309 of 2004 (“the dispute proceeding”), Deputy President Swan was presented with a document bearing the crest of an entity known as the Queensland Prison Officers’ Association Inc. (“QPOA”). The document contained written submissions about the dispute. The submissions purported to be made by Ms Naomi Castles, in her capacity as the Assistant State Treasurer of the QPOA, on behalf of a member of the QPOA, Custodial Correctional Officer, Steven Crowley (“Mr Crowley”). Neither QPOA nor Mr Crowley is a party to the dispute proceedings; neither QPOA nor Mr Crowley has been ordered or permitted to appear.

On 14 September 2004 Deputy President Swan stated a case for the opinion of the court on a question of law articulated as follows:

“In the absence of registration, pursuant to Chapter 12 of the *Industrial Relations Act 1999* (QLD), of the Queensland Prison Officers’ Association Inc as an employee organisation, can the Queensland Prison Officers’ Association Inc represent the Industrial interests of its members, under the *Industrial Relations Act 1999* (QLD) and before the Commission in relation to the current dispute at the Townsville Correctional Centre?”.

The matter was mentioned on 30 September 2004. The QPOA was given the opportunity to make submissions upon the issue whether this Court had a discretion to allow QPOA to make submissions upon the case stated and upon the issue how any such power should be exercised. QPOA declined the invitation. The Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees (“LHMU”), an organisation of employees under the *Industrial Relations Act 1999* (the Act), attended at the mention, and submitted that the Court did have a power to grant registered organisations the right to be heard and that the power should be exercised in favour of the Union. In the end result LHMU was granted leave to be heard.

It is clear that the question must be given a negative answer.

Since Mr Crowley who was neither a party to the dispute proceedings nor a person ordered to be permitted to appear in those proceedings, Mr Crowley could not appoint QPOA to act as his agent. Since QPOA is not itself a party to the dispute proceedings nor a person ordered or permitted to appear in those proceedings, QPOA could not appear on its own behalf. Even if QPOA might have appeared on its own behalf, it could not appear by way of an officer or member because the right so to be represented is conferred only upon “organisations” (s. 319 (1)(b)). The definition of “organisation” at schedule 5 adopts the definition of “organisation” at s. 409 which confines the meaning of the noun to bodies registered under Chapter 12 as an organisation or whose continuity of registration as an industrial organisation or union under the Act has been continued or preserved by the Act.

For completeness, I should say that I have assumed that the question is about the “right” or “entitlement” of QPOA to appear. I have not considered whether the Commission might, as a matter of discretion, allow QPOA to appear. Neither have I considered whether only a natural person may be appointed as an agent under s. 319(1)(a) nor whether it is the effect of *Gartrell and Smev v The Federated Engine Drivers’ and Firemen’s Union of Employees, Queensland* (1989) 132 QGIG 1421 that the system of registration of organisations under the *Industrial Relations Act 1999* may not be circumvented by the use of agency arrangements. All those matters can await another day.

The question is answered “no”.

There can be no issue about costs.

Dated 10 November 2004.

D. R. HALL, President.

*Appearances:*  
 Mr J. Merrell directly instructed by Mr M. Thomas of The Queensland Public Sector Union of Employees.  
 Mr S. Donovan of the Department of Corrective Services.  
 Mr A. K. Herbert instructed by Hall Payne, Solicitors for the Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees.

Released: 10 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Trading (Allowable Hours) Act 1999* – s. 21 – trading hours orders on non-exempt shops

**Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees AND National Retail Association Limited, Union of Employers (No. B1320 of 2004)**

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

DEPUTY PRESIDENT BLOOMFIELD  
 COMMISSIONER BLADES  
 COMMISSIONER THOMPSON

11 November 2004

DECISION

Currently before the Commission is an application by the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees under the provisions of the *Trading (Allowable Hours) Act 1990* for an amendment to the Order entitled *Trading Hours – Non-Exempt Shops Trading by Retail – State* that all non-exempt shops be kept closed on Saturday 1 January 2005. The application is opposed by one organisation but supported by four others.

By way of the *Workers’ Compensation and Rehabilitation and Other Acts Amendment Bill 2004*, the Explanatory Notes relating to the “Achievement of the Objectives” contain the following passage:

“The Queensland Industrial Relations Commission does not have the jurisdiction under the *Trading (Allowable Hours) Act 1990* to reduce the allowable trading hours on Sunday 26 December 2004 in the South East Queensland area.”.

If this statement be correct, it raises the related question of whether this Commission may also lack the jurisdiction to require that non-exempt shops be closed on Saturday 1 January 2005.

There has been a precedent in this Commission where the Christmas holiday period coincided similarly as in 2004/2005. In a decision in case No B349 of 1993, reported at (1993) 144 QGIG 671-673 a Full Bench ordered that there be no trade in certain areas on Saturday 1 January 1994, nor on Sunday 26 December 1993 in the Area of City Heart of Inner City of Brisbane. However, the Legislation upon which those Orders were based has changed.

The provisions of the Act as it existed on 18 November 1993 (the date of that decision) provided in s. 5.1:

*“(1) A Full Bench of the Industrial Commission may, by its order, fix hours during which business may be conducted in non-exempt shops, whether or not employees are engaged therein.”.*

The long title of the Act at that time was *“An Act to regulate the trading hours of shops and for related purposes.”.*

The current provision is contained in s. 21. It reads:

*“21.(1) A full bench of the industrial commission may decide trading hours for non-exempt shops.*

*(1A) However, the full bench is not to decide trading hours that are less than the following hours on a stated day, other than a public holiday –*

- (a) 8 a.m. and 9 p.m. for Monday to Friday;*
- (b) 8 a.m. and 5 p.m. for Saturday.”.*

(Saturday 1 January 2005 is, by definition, a public holiday.)

At the same time, the long title reads *“An Act to decide the trading hours of shops and for related purposes.”.*

There appears therefore to be a significant variance between those provisions and the earlier provisions which might render ineffective any precedent value of the 1993 decision.

While the 1993 provision appears to give a jurisdiction to the Commission to set hours during which business may be conducted, and apparently, whether any at all, the current provision merely provides for the Commission to decide trading hours suggesting that on a given day, there must be at least some hours of trade.

The resolution of this question of law may have a substantial impact upon the view of this Commission as to whether it will permit trading on the substituted New Year’s Day holiday on Monday 3 January 2005 which is a question also currently before this Commission in application No. B1230 of 2004.

Accordingly the question of law:

*“Does the Queensland Industrial Relations Commission have the jurisdiction under the Trading (Allowable Hours) Act 1990 to order that non-exempt shops be kept closed on Saturday 1 January 2005?”*

is referred under s. 282 of the *Industrial Relations Act 1999* to the Court as a case stated for its opinion.

- |                                    |  |
|------------------------------------|--|
| A.L. BLOOMFIELD, Deputy President. | Mr L. Gillespie for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.            |
| B.J. BLADES, Commissioner          | Mr G. Black for the National Retail Association Limited, Union of Employers.   |
| J.M. THOMPSON, Commissioner        | Mr J. Martin for The Australian Workers’ Union of Employees, Queensland.   |
| Released: 11 November 2004         | Mr J. Price for the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).              |
|                                    | Mr R.E. Wotherspoon for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers. |

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association  
(Industrial Organization of Employers) and Others (No. B1212 of 2004)**  
**National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association  
(Industrial Organization of Employers) and Others (No. B1213 of 2004)**

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

DEPUTY PRESIDENT BLOOMFIELD  
COMMISSIONER EDWARDS  
COMMISSIONER BROWN

17 November 2004

Applications to amend the Trading Hours Order – Non-Exempt Shops Trading By Retail – State – Continuous trade proposed on 23/24 December at Pacific Fair Shopping Complex and Robina Town Centre Shopping Complex – Witness evidence – Nothing special, unique or telling about either application – Both applications dismissed.

DECISION

This decision relates to 2 applications lodged by the National Retail Association Limited, Union of Employers (NRA) to amend the Trading Hours Order – Non-Exempt Shops Trading by Retail – State (the Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act).

The first application (Matter No. B1212 of 2004) seeks to amend the Order to allow the Pacific Fair Shopping Complex (Pacific Fair) to trade from 12.00 midnight on 23 December until 8.00 a.m. on 24 December of each year provided that where 23 December falls on a Saturday or Sunday additional hours will operate from midnight on the Thursday prior to Christmas Day until 8.00 a.m. on the Friday prior to Christmas Day.

NRA also lodged an application seeking the Order be amended in an identical way in respect of the Robina Town Centre Shopping Complex (Robina) (Matter No. B1213 of 2004).

The applications were supported by the Hardware Association of Queensland, Union of Employers (HAQ) which chose not to call any evidence. The applications were opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA), the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (NMAA), and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA).

The Commission inspected the 2 centres on the afternoon of Wednesday, 6 October 2004. During the course of the inspections the Members of the Full Bench and representatives of each of the parties which participated in the proceedings (above), were given a briefing on the history of each of the centres before being taken on an inspection of the whole of each complex. That inspection has greatly assisted us in understanding the evidence and in arriving at our ultimate conclusion in respect of these applications.

By agreement between the parties the 2 applications were heard concurrently. This was because evidence given by several witnesses was common to the 2 applications and it was convenient to deal with that evidence in a single sitting, rather than have it repeated.

#### **Evidence on behalf of the applicant**

Evidence was called by NRA from the following persons:

- Ms Alyssa McChesney-Clark, Store Manager of David Jones at Robina;
- Mr Des Carroll, Queensland State Manager for New Price Retail Pty Ltd, which operates a Price Line store in each of Pacific Fair and Robina;
- Mr Don Jones, President of the Gold Coast City Combined Chambers of Commerce and President of the Broadbeach-Mermaid Beach Chamber of Commerce;
- Ms Lee-Anne Kielar, Divisional Marketing Manager for AMP Retail Pty Limited (AMP), which manages Pacific Fair;
- Mr Paul Loughnan, a franchise owner of Howard's Storage World which is a tenant at each of Pacific Fair and Robina;
- Ms Melanie Hourigan, Queensland State Manager for Angus and Robertson, which operates a store at Pacific Fair;
- Mr Wayne C. Atkinson, President of the Robina Chamber of Commerce Inc;
- Ms Tanya Krause, Marketing Manager for Zelows Stores, which operates a store at Robina;
- Mr Malcolm Miller, who is employed by the Queensland Investment Corporation Robina Pty Ltd (as trustees) (QIC) as Centre Manager for Robina;
- Mr Andrew Vaz, Store Manager for Myer at Pacific Fair;
- Mr Scott Wallace, Regional Support Manager in Queensland for Woolworths Limited, which operates a supermarket at Robina;
- Mr Steve O'Meara, Manager of Anthony's Fine Jewellery, a specialty store located at Pacific Fair;
- Mr John Reid, the current Queensland State Project Manager for Coles, which operates supermarkets at each of Pacific Fair and Robina;
- Mr Jeffrey Wilson, Store Manager at Kmart Broadbeach, as representative for Kmart which operates stores at each of Pacific Fair and Robina;
- and
- Mr Gerard Winzenberg, District Manager for Target Australia Pty Ltd in Queensland, which operates stores at each of Pacific Fair and Robina.

We do not intend to record all of the evidence given by each of the above witnesses. Rather, we shall record the salient features of that evidence – including the descriptions of each of the shopping centres given by Ms Kielar and Mr Miller, respectively.

Pacific Fair (situated on a site bounded by the Gold Coast Highway, Hooker Boulevard, Sunshine Boulevard, Melody Street and Pacific Fair Drive) is Queensland's largest shopping centre with annual customer visitations exceeding 16 million. The centre is currently one of the top 10 performing shopping centres in Australia with annual sales exceeding \$500 million. The centre was first opened in August 1977 and extended in 1982, 1990, 1992, 1996, 1998 and 2002. The last development included the reconfiguration of the former Daimaru department store to incorporate a new homeware and leisure precinct featuring 22 small, medium and large format tenancies.

Pacific Fair incorporates 4 major retailers (Myer, Kmart, Target and Coles), 13 mini-majors, over 300 speciality stores and a 12 cinema Birch Carroll and Coyle complex. The centre is situated on a 16.6 hectare site and has a gross lettable area of 102,152 square metres. It also has parking for 5,247 vehicles.

Pacific Fair services two distinct and diverse markets – the residential local market and the tourist market. The tourist market accounts for approximately 40% of the centre's visitation and spend. The high level of tourist visitation is attributable, in part, to the location of Pacific Fair.

The evidence suggested that 23 and 24 December are two of the busiest trading days of the year at Pacific Fair. In 2003 more than 100,000 customers visited the centre on 23 December, with more than 80,000 visiting it on 24 December. This level of visitation created excessive demand on the available car parking facilities, resulting in some traffic build up in streets feeding into the centre. Some of this congestion was alleviated by vehicles being "moved-on" to other entrances. Nonetheless, customers still spent considerable time waiting to find an available parking space and further time waiting to exit the car parking facilities after they had completed their purchases. It was said that additional trading hours between 12.00 midnight and 8.00 a.m. on 23/24 December would help to alleviate this considerable traffic congestion.

Evidence was also given that the high tourist season in 2004 would commence on Monday, 20 December 2004, with the expectation that many visitors would arrive later during that week. Based on the traditional make-up of Pacific Fair's customer base, this would result in many extra customers visiting the centre on 23 and 24 December.

Robina (situated on a site bounded by Robina Town Centre Drive and Collier Quays) is a major regional shopping centre located in the middle of the Gold Coast strip, on its western border. The centre was developed in 1996 at a cost of \$360 million and is now owned by QIC. Robina is themed on a cascading Italian mountain village and promotes a feeling of an open air plaza. The centre's main retail level comprises 4 linear malls which radiate from an open town square. Two of the linear malls are fully air-conditioned, whilst the remaining two are in a plaza style, yet protected from the elements.

The centre comprises 79,380 square metres of lettable area and also includes 5,294 car parks. Additional parking for approximately 500 vehicles will be available on open land, recently purchased by QIC, adjacent to the centre.

Although the centre did not enjoy an auspicious beginning, it has enjoyed considerable growth in recent years and now enjoys sales approaching \$350 million per annum with a total customer count in excess of 10 million. The traffic counts on 23 and 24 December 2003 at Robina were the highest and second highest daily counts on record. With traffic volumes increasing by approximately 12% on a year to year basis, centre management is concerned about how the centre will cope with the numbers expected to visit the centre on 23 and 24 December 2004. In this respect, it was said that increased trading hours between 12.00 midnight and 8.00 a.m. on 23/24 December would help the centre, and the retailers within it, to cope with the expected levels of demand.

The respective centre managers were aware of the applications lodged by NRA on behalf of the other centre and supported the granting of both applications.

The evidence disclosed the estimated resident population of Gold Coast city at 30 June 2003 was 455,473 people. Over recent years the population of the Gold Coast has been growing at a rate of 3.7% per annum, with annual growth over the previous 5 years averaging 3.46%. This was significantly higher than the rates for Australia (1.2% per annum) and Queensland (1.8% per annum). The Gold Coast population is projected to increase to between 563,000 and 584,000 by 2011.

Mr Jones gave evidence that available data suggested that during the December/January peak season over 100,000 visitors visit the region each week, with in excess of 77,600 in the region at any one time. Research undertaken by the Gold Coast City Council disclosed that shopping was the most popular activity for international visitors and the third most popular activity for domestic visitors. This suggested a significant number of tourists would visit Pacific Fair, in particular, if it was open for the extended hours proposed. This research was supported by statistics presented by Ms Kielar who said 40% of the centre's visitors were tourists and that they accounted for more than 43% of the centre's takings.

The main industries of employment in 2001 were the retail trade (17.8%), property and business services (11.4%), manufacturing (10.4%), construction (9.3%) and accommodation, cafés and restaurants (9.1%). The employment profile of the Gold Coast differs from the patterns found across Queensland and Australia. For example, there are more persons employed in accommodation, cafés and restaurants in the Gold Coast region than for the rest of Queensland (5.7%) and for Australia (4.9%). The Gold Coast is Queensland's most prominent tourist destination, and the third most popular in Australia after Sydney and Melbourne. In 1998/1999 the tourism industry provided approximately 44,200 jobs. The industry also contributed nearly \$2.4 billion to the local community.

Mr Miller said whilst Robina did not enjoy that level of tourist support it nonetheless enjoyed a healthy custom from persons outside its main catchment areas – especially from tourists participating in home stays. Other customers came to the centre from the southern Gold Coast area, Nerang and the hinterland, northern New South Wales and Brisbane metropolitan areas by use of the Pacific Highway which ran close by the shopping centre. Many people from these areas were expected to visit the centre if it was allowed to trade overnight on 23/24 December 2004.

The majority of the witnesses who gave evidence on behalf of retailers said stores with which they were associated, or with which they had links, had traded successfully during similar 24 hour trading events at Chadstone in Melbourne and/or Parramatta in Sydney and/or Chermside in Brisbane. They said the success of the events conducted at those centres convinced them that 24 hour trading, if allowed, at Pacific Fair and/or Robina would be a successful retail event.

Under cross-examination, a number of the witnesses said they believed that the applications lodged by NRA sought the Order to be amended to allow them to trade in 2004 on a trial basis only with the success, or otherwise, of the respective events to be examined before any decision was made about trading in future years.

A number of the retailers located at Robina also indicated they had not traded beyond either 10.00 p.m. or 11.00 p.m. on 23 December 2003 in circumstances where the Order allowed them to trade until 12.00 midnight. In response to questions about why they had not traded the available hours, one witness said the decision had been taken by head office not to trade beyond 10.00 p.m. whilst another said that the traffic demands did not warrant remaining open beyond 11.00 p.m.

Whilst the vast majority of witnesses said they would call for volunteers to work the additional hours, if allowed, one witness – representing a significant retailer – said the hours would be voluntary *except for* Christmas casuals.

#### Evidence on behalf of the respondents

QRTSA called evidence from the following persons:

- Mr Peter Lawson, Owner of MOMBASA@Pacific Fair;
- Mr Brendan Hayes, Managing Director of Music Express, which has 2 stores located in Robina, one of which is in the centre and the other of which is adjacent;
- Mr Don Gilbert, Proprietor of Queensland Lease Consultants, a firm which specialises in retail management and leasing issues;
- Mr John Duncan, Owner of SOBI Clothing Co, which has stores at Pacific Fair and Robina;
- Mr Phillip A. Chapman, Proprietor of Advantage Retail Management, which specialises in retail management and leasing issues, and who consults to Bright Eyes Sunglasses, which is a franchisee located at Robina;
- Ms Sheila Durrington, Owner of Jamaica Blue, a café/restaurant located at Robina;
- Ms Pamela Hannaford, Store Manager of 5th Avenue Jewellery at Pacific Fair;
- Mr Neil Geoffrey Dellaca, General Manager of Pillow Talk Pty Ltd, which has a store at Robina;
- Mr Ian Hart, Owner of Australian Homemade, an ice-cream and confectionary business located at Pacific Fair;
- Mr Matthew Delpont, Owner of Danny's Coffee Garden, a café located at Pacific Fair; and
- Mr Steve Walkinshaw, Owner of Wildlife Café, a restaurant and bar located at Pacific Fair.

A number of the witnesses with stores located at Pacific Fair said they were not made aware of the application by the centre's manager (AMP) and only found out about the application after reading it in QRTSA's journal. Every QRTSA witness said they opposed the application in respect of their own centre, with the majority of them opposed to the concept of 24 hour trading in general.

The witnesses said there were already enough shopping centres located on the Gold Coast with consumers having ample choice and time to shop without the need for additional trading hours within either Pacific Fair or Robina. Mr Gilbert said the occasion was "*simply engineered as a continuing process to transfer market share from small business interests in shopping precincts to large retail groups and shopping environments*". He, and others, said granting of the applications would cause further unfair competition in the market place, would be detrimental to the well being of families, and would reduce the quality of family time for both family owned interests and shop floor assistants.

Mr Chapman said independent specialty retailers outside the respective centres would feel the effects of the centres being open 24 hours. Any foot traffic in the 2 centres simply meant a transfer of potential purchases from other stores which would be closed at the time. Small retailers located within Pacific Fair and Robina would be forced to incur further expenses if they traded during the additional hours and many small retailers would try to avoid these costs by operating the stores themselves. However, this would leave them (and/or their staff who did work) overly exhausted for one of the peak trading days of the year, being Christmas Eve. Further, Mr Chapman (as well as Mr Gilbert) expected retailers would be faced with additional rental charges, when it became time to renew leases, because of the inflated figures derived from the additional trading hours.

One of the witnesses said working the extra hours proposed was an inefficient way to run a business because it basically involved spreading the potentially available sales over extra hours, thereby increasing one's costs.

Several witnesses said they were small employers and would not be able to roster their staff in such a way that they would have enough staff numbers to cover the extra hours required. Further, they did not believe they would generate enough sales to cover their costs. One of these witnesses said that if a number of small retailers decided not to open, any that did would be "swallowed in the dark".

Under cross-examination, the majority of witnesses acknowledged that whether they chose to trade or not would be voluntary. Several witnesses also agreed that they would reconsider their decision not to trade if it appeared that a substantial number of other retailers – especially those with whom they were in traditional competition – chose to trade on the evening in question. A number of them also indicated they had not been informed they would not be required to contribute to any special marketing fund because the respective centre owners would market the event from their own resources.

NMAA called evidence from Ms Pamela Davis, the proprietor of the Pacific Fair Butchery which is located adjacent to the entry of Coles supermarket at Pacific Fair.

Ms Davis said she employed 4 qualified butchers, one apprentice and one sales assistant. In addition, she also employed a manager to run the store and she worked personally in the store on an as required basis. She said that because of the unavailability of qualified staff she was not able to, and did not wish to, open for the proposed additional hours. As it was, she was required to trade some 69.5 hours over the 7 days. As per her lease requirements she traded until midnight on the pre-Christmas midnight trading in 2003. However, whilst trade remained relatively strong until around 9.00 p.m. she experienced very few sales between that time and midnight.

Ms Davis believed that if the adjacent Coles store was permitted to trade the additional hours she would expect some of the food and grocery shopping by its customers would include meat. However, she would lose those sales because she would not be able to trade in competition because of the unavailability of staff. She felt that if Coles traded the additional hours it would have a detrimental effect on her trade over 23/24 December.

SDA called evidence from the following members:

- Ms Denise Kelly, a Shop Assistant employed by Myer Stores Limited at the Myer store, Pacific Fair;
- Ms Amanda Louise Marshall, a Shop Assistant employed by Myer Stores Limited at the Myer store, Pacific Fair;
- Mr John Styles, a Shop Assistant employed by David Jones Limited at the David Jones store, Robina; and
- Ms Michele Georgopoulos, a Shop Assistant employed by David Jones Limited at the David Jones store, Robina.

Each of these employees indicated that if the Commission granted the additional trading hours sought they would decline to work the additional hours. They each said they were concerned about the safety of themselves and their vehicles if they were expected to walk to their vehicles during the early hours of the morning. They also each expressed a view that there were sufficient trading hours available around Christmas and it would place too much stress on retail workers if they were expected to work any more hours.

One of them said travelling home in a sleep deprived state was more dangerous than driving at 0.05. Employees were not used to working graveyard shifts and all that would be required would be a micro-sleep on the way home for a disaster to happen. Another witness said he was not attracted by the extra penalty rates on offer because of the tax impositions. Another said her family came first and she would prefer to be with them rather than working all night on 23 December, which would have a lasting physical impact.

One of the witnesses also said that tired workers made mistakes and this caused additional problems for other shop assistants, later, when customers came back to the store to complain about a particular sale.

Under cross-examination, two of the witnesses said they worked fixed rosters and would not be likely to be called upon to work the additional hours in any event. Further, each of the witnesses conceded they understood that working any additional hours, if the application was granted, would be voluntary and that they would be perfectly entitled to refuse to work any additional hours which may be offered to them, without recrimination.

### Submissions

**NRA** – Without being exhaustive, Mr Black made the following submissions in support of the granting of the respective applications:

- In terms of matching trading hours with demand, the few days before Christmas are the time when demand is greatest.
- Trading at that time of the year represented a multiplier of 3 or 4 times ordinary trading periods.
- The evidence showed there was a trend in consumer behaviour towards shopping much later before significant events, such as Christmas, and this trend, compounded by traditional last minute shopping, created a particularly congested trading environment just prior to Christmas each year.
- This year was expected to be worse than normal because 23 December 2004 fell on a Thursday, the traditional late shopping night.
- The car parking facilities at both Pacific Fair and Robina traditionally experienced significant congestion on 23 and 24 December. Granting of the additional hours would help to re-distribute this traffic, and trade, causing some reduction in inconvenience and frustration for consumers.
- Each centre serviced a large primary, and secondary, trade area. This would be exacerbated because of the influx of tourists to the Gold Coast in the week commencing 20 December 2004.
- The applications currently before the Commission are supported by precedents set in Chadstone, Parramatta and Chermside where 32 hour events have been successfully conducted.
- The respective applications involved only an incremental change in trading hours. The last changes effecting the Gold Coast appeared to be in 1994 when the Act was changed to allow a 9.00 p.m. close Monday to Friday.
- The applications only sought an additional 8 hours trade prior to Christmas, to meet demonstrated extra demand at that time of the year, in circumstances where tenant participation was totally voluntary.

- There was no evidence at all that there would be any damage caused to retailers outside either of the 2 centres if one, or both, of the applications was granted.
- QRTSA's witnesses seemed to have taken an in-principle view that they did not want to have a bar of the event "*and once that decision was taken all other things followed*". There was no objective business process undertaken which resulted in them arriving at that conclusion. However, some witnesses did have good reasons not to trade, such as their reliance on heavily qualified staff, but none of those stores would be required to trade because of the voluntary nature of the event.
- The extra trading hours would generate additional employment, just as it had done at Chermside in 2003.
- Each of the applications was supported by the Gold Coast City Council, which was a very telling factor given the statutory requirements on the Commission pursuant to s. 26 of the Act.
- The Gold Coast region was an area of rapidly growing population. That population – in combination with the extra tourists who came to the region at that time of the year – had placed such demands on the available infrastructure over 23 and 24 December that additional trading hours were required.
- The Voluntary Work Award – Extended Trading Hours – Non-Exempt Shops Award – State protected a number of individuals from being required to work if the applications were granted.
- It was a fallacy for QRTSA to argue that the applications should not be granted because retailers did not trade all of the available hours now. It was a fact of life that retailers only traded when it was profitable to do so. The evidence showed it would be profitable for them to trade between midnight and 8.00 a.m. on the night of 23/24 December if allowed.
- The applications were not about large business versus small business. The evidence from Chermside suggested otherwise. All traders who opened during that centre's 32 hour event had traded successfully. Further, there was no evidence, when that trial was reviewed, to suggest there had been a transfer of custom from other centres to Chermside. It was not expected that the case would be any different on the Gold Coast.
- The motivation behind the applications was that wherever they had been held, 32 hour events had been well supported by customers and had been profitable for retailers. That was the basis behind the applications. NRA had adopted a business like approach to the applications and had been motivated by good business principles.

**HAQ** – Mr Law made the following general submissions in support of the case for granting of the applications:

- The 2 applications should be granted because each of the shopping centres fell within the "special, unique and telling features" required by the Commission in earlier decisions in that both centres catered for extensive local customer traffic and for a tourist influx.
- None of the retailers in either centre would be required to contribute towards the promotion for the special trading event. That cost would be borne by the centre owners.
- All employees would be able to choose to work, or not work at their will, and there would be no retributions.
- Similarly, retailers would be able to trade, or not trade, at their own volition.
- The constant from the evidence was that additional staff would need to be engaged to cope with the additional hours. This would be either extra hours worked by current employees or extra hours worked by additional staff engaged to work over the Christmas period, which included the additional hours.

**QRTSA** – Again, without being exhaustive, Mr Price made the following general submissions on behalf of his organisation in opposition to the applications:

- The applicant's witnesses attempted to draw favourable comparisons between Chermside and either Pacific Fair or Robina on the basis "*if it works at Chermside it must work at Pacific Fair or Robina Town Centre or both*". It was inappropriate for the Commission to draw any comparison with the Chermside trial in 2003. The Brisbane market was quite considerably larger than the Gold Coast market. Further, there were 2 applications to trade in the Gold Coast region when the Commission had accepted, in the Chermside case, that 24 hour trading was essentially a "*one centre per city event*".
- The applications raised important issues for the Full Bench to consider in relation to the merits of extending the trading hours under s. 26 of the Act.
- Previous Full Benches had decided that whilst each case would be heard and determined on its specific merits there would need to be some special, unique or particularly telling feature about an application before it would be granted.
- There was nothing special, unique or particularly telling about either of the current applications.
- The Commission should take particular note of the fact that no other shopping centres, apart from Chadstone in Melbourne, Parramatta in Sydney and Chermside in Brisbane, had participated in a 24 hour event. There was no evidence to demonstrate that a similar event located at a provincial centre, let alone 2 events, could trade successfully.
- Whilst it was not denied that Pacific Fair was a tourist destination, the question for the Full Bench to consider was how much of an attraction would it be for an additional 8 hours of trading.
- The applicant had provided no evidence that existing stores were not meeting the needs of tourists or the existing population over 23 and 24 December. The NRA's witnesses conceded there had been no complaints from tourists about the lack of trading hours and none of them mention any particular push for extended trading hours over 23/24 December.
- There was no evidence before the Commission to suggest that either event would attract additional tourists to the Gold Coast, or that the Gold Coast would lose tourists as a result of either centre being closed for the extended hours applied for.
- There was no evidence that existing stores on the Gold Coast were not meeting the public interest or consumer demands over 23 or 24 December. No evidence had been presented concerning unmet consumer needs or demands.
- There was limited evidence – mainly anecdotal – to suggest that the extra hours would meet the needs of shift workers. However, the extensive extra hours around Christmas already allowed shift workers ample shopping opportunities.
- The applicant had not provided any link between the extended hours and the alleviation of traffic congestion. If anything, the evidence from Chermside suggested that congestion might be worse.
- The applicant had provided insufficient evidence to demonstrate any employment growth if the applications were granted.
- Granting of the applications would be detrimental to small business in terms of their rostering arrangements over the Christmas period.
- Mr Black's argument in relation to Thursday late night trading occurring this year on 23 December did not justify granting of the applications.
- A number of retailers in the centres subject to the applications had not traded the available hours on 23 December 2003. To QRTSA, that simply reflected that there was insufficient demand for the stores to remain open until midnight, let alone beyond that time.

**NMAA** – Mr Wotherspoon made the following general submissions:

- The applicant's case seems to have been entirely prefaced on the basis that at Christmas time there is a heightened level of retail trading activity and this was an opportunity for, in particular, the large non-exempt shops to capitalise upon that opportunity.
- NMAA's questioning of the various witnesses tended to universally draw the response that the strongest motivation for their support of the applications was that they saw it as an opportunity to increase sales.

- There was no debate that the period leading up to Christmas was not a heightened level of retail activity. However, that, in itself, did not justify the additional trading hours sought.
- The Chermiside experience could not be relied upon in support of the present applications. Chermiside was a one centre per city event. The current applications, if granted, would mean 2 centres – located within a 10 to 20 minute distance of each other – attempting to trade in opposition to each other in a market one half of the size of Brisbane.
- Although well intentioned, the representatives of the Chambers of Commerce who gave evidence did not generally speak for small retailers. Consequently, that evidence had to be discounted.
- Whilst it had been proposed that trading during the extra hours was optional for small retailers the reality was quite different. It was a fact of business life that if centres were open for trade the small retailers either traded, perhaps unprofitably, or did not trade and ran the risk of losing their competitive edge against other traders of like products.
- The additional labour costs impacted less on large non-exempt businesses than it did on small retailers. There was also greater potential for coverage of the extra hours by the larger retailers.
- The evidence from a number of witnesses called by the respondents demonstrated that trade gradually fell off on the night of midnight trading at both Pacific Fair and Robina. It was thus questionable how much extra demand there would be if the additional hours were offered.
- It was undesirable, from a community stand point, for small children to be dragged around shopping centres early in the morning, even if their parents chose to shop at that time.
- The applicants had failed to address many of the issues set out in s. 26 of the Act. When particular elements **had** been addressed there was insufficient material to justify granting of the applications, or either of them.
- If the applications, or either of them, was granted it would be opening the flood gates to further applications on the Gold Coast, the rest of Brisbane and on the Sunshine Coast.

SDA – Mr Gillespie made the following primary points on behalf of SDA:

- There was no evidence of any public enthusiasm for, or demand for, the applications.
- What enthusiasm there was lay solely in the eyes of the applicant and those witnesses called in support of the applications.
- There was already a multitude of shopping centres and stand-alone shops on the Gold Coast, from Runaway Bay to Coolangatta and inland to Nerang, which meant that the whole of the Gold Coast area was well and truly saturated by non-exempt shops that were quite capable of replicating services which were available to consumers at both Pacific Fair and Robina. There was simply no need for the outcome sought.
- The concept of “voluntarism” was tenuous in the extreme. While the Commission was assured by certain witnesses, especially centre management representatives, that voluntarism would be the means of staffing the additional hours requested that was by no means guaranteed.
- Several witnesses from major organisations knew nothing of the Voluntary Work – Extended Trading Hours – Non-Exempt Shops Award – State, which called into question the level of protection employees would have. Further, that Award only applied to existing employees at the time any Order might be made by the Commission. It would not protect employees engaged after any Order was made this year, or in future years.
- Evidence available to SDA indicated that the Chermiside experiment did not “*enjoy the universal approbation*” of those who were required to staff the enterprises during the course of the extended trading hours.
- Retail workers who worked checkouts, and the like, were not conditioned to work overnight hours, as was the case with supermarket re-fillers. This was especially so where they were called upon to work a single night shift.
- The Commission had previously taken account of the extra hours worked by shop assistants around Christmas time when deciding to reject an NRA application for extended hours on Boxing Day in 2003 (174 QGIG 913 at 918).
- It would be appropriate for the Commission to replicate that logic in rejecting the current applications.
- The Chermiside application had been based upon the concept of a “*one centre per city event*” which had been consistently addressed in the evidence in that case. Nothing of that ilk had been presented here. Nothing suggested the applications had any special interests.
- The current applications, as well as another application lodged in respect of the Indooroopilly shopping centre, demonstrated that the NRA had undermined the concept of the “*one centre per city event*”.
- If the Commission granted the present applications it could expect a line up of other centres putting up their hands and saying “me too”.

## Conclusion

Section 26 of the Act requires the Commission to have regard to a number of elements in deciding whether it will make an Order under s. 21 of the same Act. In that respect we note that previous Full Benches of this Commission have stated:

*“It should not be inferred in all applications for an extension of trading hours that all (matters identified in s. 26 of the Trading Hours Act) would be weighted equally, e.g. some applications may substantially rely upon one or 2 (two) of the matters outlined in s. 26 of the Act, whilst in other applications substantial reliance will be placed on many more of the s. 26 matters.”*. (172 QGIG 542, 174 QGIG 912, 174 QGIG 1339).

We endorse that statement.

Relevantly, s. 26 of the Act is in the following terms:

*“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) the likely impact of the order on employment;*
- (h) the view of any local government in whose area the order is likely to have an impact;*

*other matters as the Industrial Commission considers relevant.”*

Taking all of these elements into consideration, we have decided to reject both applications.

Pacific Fair and Robina, respectively, are located towards the centre of the Gold Coast strip which is one of the most rapidly growing areas of Australia. As noted above, the population growth has been of the order of 3.5% per annum over each of the last 5 years. At the current time the estimated resident population of the Gold Coast city is in excess of 455,000 people. The population is expected to increase by more than 100,000 people in the next 6 to 7 years.

The Gold Coast City Council estimates that at peak tourist times there are, on average, more than 77,600 visitors in the Gold Coast region at any one time. It also estimates that one in every 7 people in the region at any one time is a visitor. These figures reflect in the trading activities of Pacific Fair and, to a significantly lesser degree, at Robina. Surveys conducted by the centre owner of Pacific Fair (AMP) disclosed that 40% of its visitors are tourists.

Notwithstanding the significant tourist numbers coming to the Gold Coast region on an annual basis, and also during December and January each year, there was no evidence before us to suggest that the needs of the tourist industry, or other resident population, are not being met by the existing trading hours. One witness agreed that accommodation was already heavily booked in the week leading up to Christmas 2004 and that no extra tourists were likely to come to the Gold Coast simply because Pacific Fair might be open overnight on 23/24 December.

There was also no evidence to suggest that there was unmet tourist demand because tourists could not shop between 12.00 midnight and 8.00 a.m. on 23/24 December. Even if such evidence existed that would not, of itself, be sufficient to support the case for granting of the applications. The evidence would have to show a significant unmet demand, rather than just unmet demand for the applications to warrant increased consideration.

On the same point, there was no evidence to suggest that the needs of local consumers were not being filled because of the current available shopping hours over Christmas. Indeed, insofar as Robina is concerned, the evidence coming from some witnesses was to the effect that they closed their doors well before the allowable midnight cut-off on 23 December 2003 because of lack of custom. This does not establish unmet demand or consumers being turned away at the doors as the clock struck 12.00 midnight. In fact, it suggests the reverse.

Whilst the population of the Gold Coast is expanding at a rapid rate, the evidence from several of the witnesses was to the effect that the number of retailers is expanding at a comparable, if not greater, rate. Further, whilst the population of the region might have been expanding at a compound rate of the order of 3.5% the evidence also suggests that the traffic at each of Pacific Fair and Robina has improved at a significantly greater rate. Notwithstanding that increased level of traffic, there was no suggestion that either centre was not coping with the existing trading hours over the general Christmas period. Whilst there was evidence of traffic congestion on 23 and 24 December – especially at Pacific Fair – that evidence did not suggest that the congestion was worse than at any other comparable shopping centre at the same time of the year.

Although Gold Coast City Council did not oppose the granting of either application, we do not regard that position as significant. We also note that non-opposition is quite different to endorsement.

Although each of the centre owners (AMP and QIC) is keen to trial an event in 2004 (notwithstanding that the applications seek the extended hours on a permanent basis) in circumstances where participation for retailers and employees, alike, will be voluntary the Commission has the duty under s. 26(e) to consider the public interest, consumers interests and business interests (whether small, medium or large). In this respect, we note the particularly strong objections to the proposed extra trading hours coming from many small businesses within both Pacific Fair and Robina. We also note the lack of evidence to suggest that the interests of consumers was not catered for because either centre was forced to close at midnight on 23 December last year, and in previous years (see the comment below in respect of the Chermside case). Further, given the comparative size of the Gold Coast population vis a vis that of Melbourne, Sydney and Brisbane, we are not convinced, on the material presently before us, that the traffic volume coming through either centre if one of them is allowed to open between 12.00 midnight and 8.00 a.m. – let alone if both of them open – will be all that significant.

In the end result, we have decided that there is nothing special, unique or telling about these applications which should cause us to depart from the “standard” trading hours established by the *Trading (Allowable Hours) Amendment Act 2002* or the current Order (see pronouncements of other Full Benches of the Commission, 174 QGIG 912 and 174 QGIG 1339). Overall, the applications seemed, to us, to simply be an attempt to ride on the back of the successful 23/24 December 2003 Chermside shopping centre continuous trading event approved by the Commission at 174 QGIG 1339-1348. It seems to be the classic case of “me too” and “they’ve got it, why not us?”.

If the Commission approved either of these applications based on the case presented by NRA it would effectively be giving the green light to virtually every other centre owner which wished to trade on the evening of 23/24 December to lodge its own application. We believe we should guard against that possibility by dismissing the two applications on their merits and, in doing so, by clearly restating that additional trading hours are not there just for the asking or on the basis they have been granted elsewhere. There must be some particularly special or telling aspect – something distinguishable – about an individual application before it will be granted.

In this regard, whereas the Chermside application was based on a particular concept – a special promotion centred around a “one centre per city event” – neither of these applications had any similar compelling feature. Representatives of each of the centre managements who gave evidence suggested they were motivated to support the NRA applications solely because of the success of the Chermside event and their belief that they could successfully replicate such an event within their own centre. Their motivation seemed to be that it was simply a further opportunity to increase sales. There is nothing special, unique or telling about that.

Further, whereas those involved in the Chermside application demonstrated detailed traffic flow analyses showing the number of consumers entering the centre – and various stores within it – during the whole of 23 and 24 December (which showed a considerable number of people in the centre effectively right up until midnight on 23 December), nothing of that ilk was produced in support of these applications. The applications were grounded not so much on what had happened within Pacific Fair and Robina previously which warranted extended trading hours, but, rather, on what had happened elsewhere. There was none of the comparable data, or special features, which convinced the Commission to approve the Chermside trial.

Taking all of the above matters into consideration we believe that the applicant has not established a sufficient case for either of the applications to be granted. As stated above repeatedly, there is nothing special, unique or telling about either application which justifies their granting. We dismiss both applications. In doing so, we note that another Full Bench in Matter No. B1180 of 2004 (released concurrently with this decision) has refused a similar application in respect of Indooroopilly Shopping Centre because of the lack of any special feature in that case, but also because of local traffic issues.

The Commission determines and orders accordingly.

As a post script, we raise our general concern about the applicant’s repeated practice of lodging applications of this type well after mid-year. Whilst the Commission has been able to deal with these applications on this occasion, the same guarantee cannot be given in the future should the practice continue.

A.L. BLOOMFIELD, Deputy President.

K.L. EDWARDS, Commissioner.

D.K. BROWN, Commissioner.

*Hearing Details:*

2004 17 September  
6 October (Inspections)  
25, 26, 27 October  
9 November

*Appearances:*

Mr G. Black, of National Retail Association Limited, Union of Employers.  
Mr K. Law, of Hardware Association of Queensland, Union of Employers.  
Mr J. Price, of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).  
Mr R. Wotherspoon, of National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.  
Mr L. Gillespie, of Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Trading (Allowable Hours) Act 1990 – s. 21 – trading hours order on non-exempt shops***National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association  
(Industrial Organization of Employers) and Others (No. B1180 of 2004)****TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE**DEPUTY PRESIDENT BLOOMFIELD  
COMMISSIONER FISHER  
COMMISSIONER BROWN

17 November 2004

Application to amend Trading Hours Order – Non-Exempt Shops Trading by Retail – State – Continuous trade proposed on 23/24 December at Indooroopilly Shopping Centre – Witness evidence – Elements of s. 26 of *Trading (Allowable Hours) Act 1990* considered – Whether special, unique or telling features associated with application – Residential impact a major consideration regarding traffic congestion – Previous undertakings examined – One centre per city event – Application refused.

## DECISION

This is an application by the National Retail Association Limited, Union of Employers (NRA) to amend the Trading Hours Order – Non Exempt Shops Trading by Retail – State (Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act). The application seeks that the Indooroopilly Shopping Centre situated at 322 Moggill Road, Indooroopilly, be permitted to trade the following hours on December 23 and December 24 for the years 2004 and 2005:

<b><u>December 23 and December 24, 2004</u></b>	Opening Time	Closing Time
Thursday December 23, 2004	0800 Hours	2400 Hours
Friday December 24, 2004	0000 Hours	2100 Hours
<b><u>December 23 and December 24, 2005</u></b>		
Friday December 23, 2005	0800 Hours	2400 Hours
Saturday December 24, 2005	0000 Hours	1700 Hours

In effect the application seeks to extend trading hours beyond the current midnight closing time on 23 December 2004 and 2005 to allow non-exempt shops located in the Indooroopilly Shopping Centre to continue trading until 8.00 a.m. the next morning. Such an extension of trading hours results in 32 hours of continuous trading.

The application follows the granting by this Commission of the same extended hours for the Westfield Chermide Shopping Complex (Westfield Chermide) for 2003 on a trial basis (2003) 174 QGIG 1339 and an extension of that trial for 2004 and 2005 (2004) 176 QGIG 510.

The application was opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers (QRTSA), National Meat Association of Australia (Queensland Division) Industrial Organization of Employers (NMAA) and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA). The Hardware Association of Queensland Union of Employers (HAQ) advised the Industrial Registrar by letter dated 1 November 2004 that it had no objection to the amending of the Order as sought.

Inspections were undertaken at the Indooroopilly Shopping Centre on the evening of Thursday 30 September 2004. A Thursday evening was selected to show the busyness of the Centre on the late night trading night and to provide a taste of how busy the Centre could be in the lead up to Christmas. At the commencement of the inspections the Commission and the parties were provided with a range of information about the Centre including an overview of its location, size and tenancies as well as the parking issues confronting the Centre.

Evidence

Evidence was called from a number of witnesses both in support and opposition to the application. Listed below are the details of the witnesses who appeared in the proceedings.

*National Retail Association Limited, Union of Employers*

Ian Ross Ferguson, Centre Manager, Gandel Indooroopilly  
Justin Mills, Centre Manager, Chadstone Melbourne  
Scott Wallace, Regional Retail Support Manager, Woolworths  
Gerard Wizenberg, District Manager, Target Australia Pty Ltd  
Brian Kinneally, Manager, Kmart Indooroopilly  
Aaron Bennett, Store Manager, Myer Indooroopilly  
Melanie Hourigan, State Manager, Angus and Robertson  
Des Carroll, Queensland State Manager, New Price Retail Pty Ltd

*Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)*

Phillip A. Chapman, Proprietor, Advantage Retail Management and consultants to Bright Eyes  
Valerie Lambard, Proprietor, Sparkles Car Detailing, Indooroopilly  
David Handley, co-General Manager Ron Handley Retravisision, Indooroopilly Central  
Peter Lawson, Proprietor Mombasa @ Indooroopilly  
Selwyn Haynes, Proprietor, K & K Creative Toys

*Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees*

Heather Yrtiaho, Shop assistant, Kmart Indooroopilly  
Christine Brown, Shop assistant Myer Indooroopilly  
Neville Sharland, Shop assistant Myer Indooroopilly

We do not intend to summarise the evidence given by each of the witnesses. We will refer to parts of the evidence in this decision. We would also record that all of the evidence has been taken into account in reaching our decision.

#### The Application

The Indooroopilly Shopping Centre is owned by Gandel Retail Management Pty Ltd (Gandel). Ian Ferguson, Centre Manager for Indooroopilly Shopping Centre (employed by Gandel) gave evidence that he had been aware of the application made in 2003 to extend trading hours for Westfield Chermshire. He did not seek to secure approval for similar trading hours for the Indooroopilly Shopping Centre at the same time because he did not think the application would be successful and was uncertain whether the event would be viable. In light of the apparent success of the event at Westfield Chermshire he had decided that such extended hours could also prove successful at the Indooroopilly Shopping Centre.

Gandel originally instructed a law firm to make an application to the Commission on its behalf seeking to extend the Order. On learning that Gandel had no standing to make such an application, the NRA was approached. Gandel joined the NRA and subsequently the Executive of the NRA approved that organization making an application to the Commission for extended trading hours on 23 and 24 December for the Indooroopilly Shopping Centre.

A significant argument in opposition to the application raised by both the QRTSA and the NMAA related to the NRA's prosecution of the Westfield Chermshire case on the grounds that it was a "one centre per city event". Until 2003, Chadstone Melbourne had been the only shopping centre in that city to conduct a 32 hour trading event. In that year High Point Shopping Centre also traded these hours. In Sydney, Westfield Parramatta traded for 32 hours in 2002 and 2003. The QRTSA and NMAA contended that the NRA should be required to be held to its original contention underpinning the prosecution of the case, that is, one centre per city, and should not be permitted to depart from that to satisfy the demands of a new member.

In response the NRA submitted that only Westfield Chermshire had committed to the concept of one event per city and referred to the evidence given by Mark Northern, General Manager, Shopping Centres, Queensland and New South Wales for Westfield Limited, that Westfield would not be seeking the same trading hours for other of its centres. The NRA claimed that it should not be constrained as an industrial organisation from prosecuting claims on behalf of other members.

It was clear that the application presently before the Commission is in the nature of a "me too" application, that is, Gandel, not having made the first application, but having seen the apparent success of the trial, wishes to enjoy the same extended trading hours. We have more to say about this and the one event per city argument later in this decision.

#### Consideration of the statutory elements

Section 26 of the Act requires the Commission to have regard to a number of elements in relation to whether it will make an Order under s. 21 of the Act. In that respect, we note another Full Bench of this Commission stated in Matter No. B1156 of 2002 (172 QGIG 542) that:

*"... It should not be inferred in all applications for an extension of trading hours that all (matters identified in s. 26 of the Trading Hours Act) would be weighed equally, e.g. some applications may substantially rely upon one or two (2) of the matters outlined in s. 26 of the Act, whilst in other applications substantial reliance will be placed on many more of the s. 26 matters."*

That statement was recently endorsed by another Full Bench in Matter No. B1354 of 2003 (174 QGIG 912). We similarly endorsed the statement in the original Westfield Chermshire decision and do so again.

With those considerations in mind, we turn to each of the various elements we are required to consider at s. 26:

- (a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated

The locality in which the Indooroopilly Shopping Centre is situated is described as:

Lot 4 on RP 121450, County of Stanley, Parish of Indooroopilly, on Title Reference 50356054; and  
 Lot 6 on RP 178626, County of Stanley, Parish of Indooroopilly, on Title Reference 50356055; and  
 Lot 3 on RP 908839, County of Stanley, Parish of Indooroopilly, on Title Reference 50183443; and  
 Lot 7 on SP 112975, County of Stanley, Parish of Indooroopilly, on Title Reference 40017201.

The Indooroopilly Shopping Centre is an 86,133 square metre major regional retail complex situated on 6.2 hectares of land. It contains 8 major stores, 205 speciality stores and national chains and 50 other tenants such as banks, beauty parlours, medical benefit funds, travel services etc. The centre also houses the Pig n' Whistle English Pub and a Birch Carroll & Coyle cinema complex. It offers parking for 3,933 vehicles.

As at August 2001 the "primary trade area", i.e. population area, was 148,936 people. The combined total of the secondary trade areas was 167,851. This compares with a primary trade area at Westfield Chermshire of 71,000 and a secondary trade area of 238,800. Interstate, the trade area of Parramatta is approximately 300,000 and approximately 357,000 in the area in which the Chadstone shopping centre is located.

A number of other shopping centres are located in the primary trade area of the Indooroopilly Shopping Centre, however, of those, the Indooroopilly Shopping Centre is the largest.

We think however that the consideration of the merits of this application is not limited to the area in which the Indooroopilly Shopping Centre is situated or its combined trading area. We acknowledge the evidence of witnesses called by the NRA that only minimal overlap exists between the trading area of Westfield Chermshire and the Indooroopilly Shopping Centre. However, we believe that because of the grant of the 32 hour trading event at Westfield Chermshire we also need to give consideration to the application in the context of the potential for 32 hours trading occurring in two shopping centres in Brisbane.

- (b) the needs of the tourist industry or other industry in such locality or part  
 (c) the needs of an expanding tourist industry

There was no evidence about either of these elements and they are not relevant to our consideration of the application.

- (d) the needs of an expanding population

The only evidence before us on population was the brief statistical evidence given by Mr Ferguson that the population growth in the main trade area for the period 1996 to 2001 was 1.7% per annum compared to the Brisbane average of 1.6% and the Australian average of 1.2% over the same period.

We do not consider that this minor percentage increase in the main trade area is particularly significant. This element has not impacted on our decision.

(e) the public interest, consumers' interest, and business interest (whether small, medium or large)

Cross-examination of Messrs Ferguson, Kinneally and Bennett in particular revealed that there had not been any consumer agitation for the extension of trading hours at the Indooroopilly Shopping Centre to mirror those at Westfield Chermiside. In fact, the evidence established that the application was generated by Gandel in light of the outcome of the trial of extended trading hours at Westfield Chermiside on 23 and 24 December 2003.

Mr Ferguson gave evidence of the customer counts in December 2002 and December 2003. While more than a million customers visited in each of those years we note that the Centre suffered a small drop in patronage in December 2003 when compared to the previous year. On the statistics before us it is clear that December 23 is the busiest day of the year for the Centre. Customers are still in the Centre in significant numbers at 11.00 p.m., an hour before closing. We accept that some of these consumers would opt to continue shopping past midnight if the Centre remained open.

The present application has garnered the support of the major retail chains which believe that the apparent success of Westfield Chermiside can be replicated at the Indooroopilly Shopping Centre. It was the consensus view of the witnesses called by the NRA that although some overlap in trading areas exists between Westfield Chermiside and the Indooroopilly Shopping Centre, it was insignificant and should not be considered as an impediment to the granting of the application. These witnesses believed that by and large a different group of consumers would be attracted to the Indooroopilly Shopping Centre and should be given the opportunity to benefit from extended trading hours.

We acknowledge the general comment expressed by other Full Benches of this Commission in recent times (172 QGIG 142 and 174 QGIG 912) and adopted by us in the first Westfield Chermiside decision, that the interests of consumers are facilitated by extending trading hours. We note that while this has not been a consumer generated application, the take up rate by consumers of extended trading hours at Westfield Chermiside showed that a significant number of consumers are interested in shopping during hours generally thought to be unsocial. Whether this interest continues of course is a matter yet to be determined.

Accordingly, in light of Westfield Chermiside experience and the number of consumers remaining in the Centre at 11.00 p.m., we accept that there would be a level of consumer interest in extending the trading hours to those sought by the application.

The witnesses called by the QRTSA expressed concern about the impact the granting of the application would have on their businesses. Some of these businesses are located outside of the Indooroopilly Shopping Centre precinct whilst others are tenants of the Centre. In general, these witnesses indicated that they did not wish to trade the extended hours largely because of staffing and cost considerations. Not participating however would mean that they would be unable to compete with those that decided to open.

In relation to business interests, we note, as is usually the case in trading hours matters, that non-exempt stores and other large stores, such as national chains, seek and apparently benefit from extended trading hours. The results of extending trading hours for small business are usually conveyed to the Commission as being damaging, hence their consistent opposition to such applications.

The NRA questioned whether, in the absence of any substantial evidence led by the QRTSA or the NMAA regarding hardship or adverse effects, the Commission should usurp the role of letting the market decide. In this respect we note that the Act requires us to take into account a number of elements in deciding a trading hours application. Business interest is a subset of one of those statutory elements.

(f) the alleviation of traffic congestion

In his evidence, Mr Ferguson acknowledged that the Indooroopilly Shopping Centre suffers from traffic congestion, particularly on Thursday nights (the late night trading day) and at Christmas. He gave evidence about the extensive efforts made to increase the parking spaces available outside the Centre. Regrettably, none of these had come to fruition.

Mr Ferguson contended that traffic congestion would be alleviated if the application was granted. He believed the longer hours would spread out consumer visitations to the Centre. He based his belief on the experience of the introduction of Sunday trading which has had the effect of reducing traffic congestion on a Saturday.

In their submissions both the NMAA and the QRTSA referred to the trial of the 24 hour trade at Westfield Chermiside in 2003. The evidence in that matter showed that traffic congestion had continued for longer and that it had not been in fact alleviated by the additional trading hours.

We consider the element of traffic congestion as being a major negative factor in the consideration of this claim. It is the case that the Indooroopilly Shopping Centre has too few car spaces to cater for consumers on busy trading days. Despite their best endeavours Gandel have been unable to secure any offsite car parking spaces. We note the NRA witness evidence that there is limited overlap between the trading areas of the Indooroopilly Shopping Centre and Westfield Chermiside and hence customers that attended Chermiside are unlikely to visit the Indooroopilly Shopping Centre if the application is granted. In light of the submission that a different pool of customers are likely to be attracted to the event at Indooroopilly, the expectation that those customers would attend in significant numbers and given the experience at Westfield Chermiside in 2003, we are concerned that the traffic situation at the Indooroopilly Shopping Centre could be effectively unmanageable in the event this application was to be granted.

We also have a further concern. The Indooroopilly Shopping Centre is largely surrounded by residential accommodation, unlike Westfield Chermiside which is mainly bordered by other retail and public facilities. We consider that residents living near the Indooroopilly Shopping Centre should not have to tolerate a reasonable volume of traffic going to and from the Centre between midnight and 8.00 a.m. on December 24.

(g) the likely impact of the Order on employment

Each of Mr Wallace, Mr Winzenberg, Mr Kinneally and Mr Bennett gave evidence that there would be additional working hours made available for existing staff if the application was granted. However, because the event only involves an additional 8 hours of work, none of the witnesses intended to engage additional labour especially for it. Rather, the extra hours would be accommodated by inserting additional hours into the roster and rearranging the working hours of existing staff.

As such, granting of the application would have a neutral effect on employment.

(h) the view of any local Government in whose area the Order is likely to have an impact

At the Directions Hearing, the Full Bench requested that the Brisbane City Council advise its position with respect to the application. By letter dated 2 November 2004, the Council responded in the following terms.

“... Council neither supports or opposes the application.

Council notes that the Industrial Relations Commission, when making its decision on the Application, must have regard to a range of matters in addition to the view of any Local Government in whose area the Order is likely to have an impact.

In providing this advice to the Commission, Council has not undertaken a comprehensive review of all development permits and approvals which may apply with respect to the conduct of the Indooroopilly Shopping Centre. Council understands that any variation to the Trading Hours Order to permit extended trading at the Indooroopilly Shopping Centre will only have effect for the purposes of the Trading (Allowable Hours) Act and that any trader who wishes to utilise extended trading hours will continue to be bound by any existing restrictions upon their commercial activities that may be found in the range of development permits and approvals that apply to the Indooroopilly Shopping Centre. It will be incumbent upon shopping centre management and the individual traders to satisfy themselves that, in the event that the application for extended trading hours is successful, existing development permits and approvals are not infringed and/or that necessary development permits and approvals are obtained.

In arriving at its decision Council has noted the apparent success of a similar trial at the Chermide Shopping Centre.”.

The Commission notes the position of the Council.

- (i) such other matters as the Industrial Commission considers relevant

Mr Ferguson advised the Commission that the Centre proposed to commence trading weeknights until 9.00 p.m. in the week commencing 13 December 2004 however in the event the application was granted, then the Centre would defer the commencement of the 9.00 p.m. trading until the following week. Although this would mean that the Centre would suffer an overall reduction in allowable trading hours it was considered that the additional eight hours made available by trading midnight to 8.00 a.m. on 24 December would compensate for this loss. It was the view of Gandel that consumer trends are changing with more and more people leaving their shopping until closer to Christmas Day. This year the Centre expects even more customers than usual on 23 December as that day is a Thursday, the traditional late night trading day.

The NRA submitted that added to this is the expectation that more people will work up until Christmas Day, unlike other years when Christmas Day falls during Monday to Friday. It is believed that this will also contribute to consumers leaving their shopping until closer to Christmas.

We acknowledge the concession that Gandel proposes to make with regard to trading hours in the event the application is successful. The reduction in allowable hours will certainly alleviate the concerns about tiredness expressed by smaller retailers and shop assistants who work extended hours in the lead up to Christmas. This concession is a positive consideration. However, this reduction would only relate to the Centre's core hours i.e. the hours that tenants are compelled to trade. Non-exempt shops could still elect to trade to 9.00 p.m.

There are several other factors that should be mentioned under this heading. We note that Gandel intends that retailers will be able to freely elect whether to participate in any or all of the extended hours. Further, shops will be staffed on a purely voluntary basis. We acknowledge the submissions made by the SDA that this has its limitations especially in relation to employees engaged after any amendment to the Order. Finally, we note the evidence of Mr Ferguson that funding of the promotional budget will come from retailers. This contrasts with the initial event at Westfield Chermide and the proposed events at Pacific Fair and Robina where Centre Managements advised they would be providing the funds for the marketing of the event. For reasons that shortly become apparent none of these additional issues have impacted on our decision.

#### Conclusions

In our review decision relating to extended trading hours for Westfield Chermide on 1 July 2004, we commented that:

“Finally, we note that an application on behalf of Gandel Retail Management Pty Ltd has been filed for similar hours of trade in respect of the Indooroopilly Shopping Complex (No. B419 of 2004). Whilst that matter has not presently been listed for a hearing we record we have not taken it into consideration in reaching our decision in this matter. When (and if) that application is pursued it will be treated on its merits. However, *there will need to be some special, “unique” or particularly telling feature about an application before it will be granted* (174 QGIG 912 at 918 repeated at 174 QGIG 1339 at 1347).”

The applicant has had the opportunity to present its case to be heard and determined on its merits. After consideration of all of the evidence and submissions we have decided to refuse the application. In our view the location of the Indooroopilly Shopping Centre is a significant factor counting against the granting of the application. As mentioned earlier the Indooroopilly Shopping Centre is located in an area which is substantially residential. This stands in marked contrast to Westfield Chermide. The traffic congestion which occurs just with trading to midnight could, we believe, cause disruption and dislocation to residents living around the Indooroopilly Shopping Centre. We believe it is undesirable to extend this disruption to the hours between midnight and 8.00 a.m. immediately before Christmas.

Moreover, we do not consider that the applicant has been able to demonstrate that there is something special, unique or particularly telling about this application. In fact enabling two centres to open from midnight to 8.00 a.m. on December 24 would mean that the uniqueness that attaches to one event is lost.

Notwithstanding the arguments advanced by the witnesses called in support of the application that the trading areas of the Indooroopilly Shopping Centre and Westfield Chermide have little commonality, we have very real doubts that the current population of Brisbane can sustain two centres opening these hours. In this regard we note that the High Point Shopping Centre in Melbourne traded for 32 hours for the first time in 2003. Until that time Chadstone had been the only centre in that city to trade those extended hours and had been doing so successfully for eight years. We note the evidence given by Justin Mills, Gandel's Centre Manager at Chadstone Shopping Centre in Melbourne that even with the entry of High Point Shopping Centre into the 32 hour trading over December 23 and 24 last year, Chadstone still managed to hold its customer numbers and trade successfully. In Sydney, Westfield Parramatta also only traded for 32 hours continuously for the first time in 2002. These shopping centres operate in a deregulated trading hours environment. Given that and the significantly larger populations of each of Melbourne and Sydney, we harbour reservations about the success of more than one shopping centre in Brisbane offering 32 hours trading on December 23 and 24.

To date, Brisbane has only had one year of experience of a 32 hour trading event on these dates. We remain to be persuaded as to continued patronage of such an event and for this reason we decided to permit only a further two year trial for Westfield Chermide before making any decision about the permanency or otherwise of this event.

In light of the interstate experience and our decision in the Westfield Chermide matter, we believe we should approach the whole matter cautiously. When the review of the trial at Westfield Chermide is undertaken by the Commission in 2006 the whole issue of 32 hour trading on 23 and 24 December will be considered. At that time the Commission will need to take into account the interstate experience as well as the experience of Westfield Chermide. We record that the concession on trading hours made by Gandel ultimately was insufficient to persuade us that overall the application should succeed.

We also need to make some specific comment about the one centre per city argument. This argument was relied on extensively by the NMAA, and to a lesser extent by the other opposing parties, to argue that the application should not succeed. The case conducted by the Retailers' Association of Queensland Limited, Union of Employers (RAQ) (as it then was) for Westfield Chermshire relied heavily on the single event per city character of the application. No other shopping centre sought to be heard in relation to the application. We accept that Gandel was aware of the application relating to Westfield Chermshire and that discussions took place at the time between the RAQ and Gandel. An application for Gandel was ultimately not pursued in 2003.

In our 2003 decision relating to Westfield Chermshire we were influenced to grant the application by the single event per city argument. In particular we commented that:

"We believe this history – in a deregulated environment – lends weight to Westfield's assertion that the proposed extended trading hours are essentially a 'one centre per city' event."

Further, we took into account the undertakings given by Westfield that it would not seek to extend the trading hours in other of its centres in Brisbane and noted that importantly, no other major shopping centre owner appeared to oppose the application. For those reasons we concluded that the potential for flow-on was extremely limited. In our review decision we remarked again that nothing in the evidence suggested that such an event was other than a one centre per city event.

We had thought that such comments would have indicated that although any other application would be considered on its merits, it was unlikely to be successful unless there was some compelling reason or feature about it to persuade us to the contrary. In the decision relating to the applications seeking 32 hour trading on 23 and 24 December for Pacific Fair and Robina released concurrently with this decision, the Full Bench commented on the particular features that had led the Commission to grant such hours for Westfield Chermshire. We endorse those remarks and repeat that those features referred to were not present in this case. There has been nothing put in the evidence that leads us to depart from our views expressed in the two Westfield Chermshire decisions that this is a one centre per city event. Moreover, the traffic congestion issue is a particularly compelling argument against the grant of this application. In our view this application is simply a belated attempt to climb on the bandwagon.

For all of the foregoing reasons, the application is refused.

The Commission orders accordingly.

A.L. BLOOMFIELD, Deputy President.

G.K. FISHER, Commissioner.

D.K. BROWN, Commissioner.

*Hearing Details:*

2004 17 September  
30 September (Inspections)  
8 and 9 November

Released: 17 November 2004

*Appearances:*

Mr G. Black, of National Retail Association Limited, Union of Employers.

Mr K. Law, of Hardware Association of Queensland, Union of Employers.

Mr J. Price, of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

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

Mr L. Gillespie, of Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Gail Edith Edwards AND Castle Bay Projects Sales and Marketing Pty Ltd (No. B734 of 2004)**

DEPUTY PRESIDENT BLOOMFIELD

17 November 2004

Application for reinstatement – No appearance by respondent – Dismissal found to be harsh, unjust and unreasonable – Reinstatement impracticable – Compensation awarded in respect of unfair dismissal – Application for costs – Respondent's behaviour found to have caused the applicant to incur costs – Costs awarded with respect to the respondent's unreasonable acts or omissions in connection with the conduct of the application – Compensation of \$22,750 and costs of \$14,193.74 to be paid within 22 days.

DECISION

This decision relates to an application, pursuant to s. 74 of the *Industrial Relations Act 1999* (the Act), lodged by Ms Gail Edith Edwards. Ms Edwards was employed as a Customer Relationship Manager by Castle Bay Projects Sales and Marketing Pty Ltd (ACN 099 109 305) (Castle Bay) between 18 August 2003 and 19 April 2004.

The applicant's duties were to sell and promote several building development projects that the respondent had either completed or was in the process of building and completing. She enjoyed a salary of \$50,000 per annum (inclusive of superannuation and annual leave loading) with additional remuneration by way of commission on sales.

Although witness statements were prepared and filed on behalf of the respondent a week prior to the hearing, three days later, on 14 October 2004, the solicitor engaged by the respondent wrote to the Commission in the following terms:

"... On Tuesday 12 October 2004, and after various discussions with various company representatives, I was given certain instructions with which I could not, in all conscience, comply. ... As a result, I indicated to the company it had left me in a position where I had no alternative other than to withdraw from the matter. ... I therefore formally seek leave to withdraw from the matter."

The solicitor lodged a formal Notice of Withdrawal of Appointment of Lawyer or Agent (Form 23) under Rule 103 on the following day.

When the matter came on for hearing on 18 October 2004 there was no attendance by the respondent. On my instructions, my Associate attempted to make contact with the respondent to ascertain its intentions. After unsuccessfully attempting to contact several of Castle Bay's directors, on whose behalf witness statements had been filed, my Associate spoke to Mr Andrew Wayne Cook, Castle Bay's Corporate Communications Manager. Mr Cook informed my Associate that he would check what the respondent's intentions were regarding the proceedings and would telephone her back in a few minutes. When he called back a few moments later, he informed my Associate – and later myself, by speaker-phone, in the presence of my Associate – that he had spoken to the respondent's Financial Controller, Mr Ross Chapman, about the company's intentions in relation to the matter.

Mr Cook said the information he had been given by Mr Chapman was to the effect that the company would not be attending the proceedings and on that basis it was his (Mr Cook's) assumption that the case was not to be contested on the basis that the company had decided not to appear.

On the basis of this advice, I proceeded to hear the matter *ex parte*. In doing so, I nonetheless admitted all of the affidavits which had been filed by the applicant and by the respondent prior to the proceedings so that I could consider all of that material in arriving at my decision.

#### **The applicant's case**

Counsel for the applicant, Mr Alford, made the applicant available for cross-examination. However, as there was no one available to cross-examine her, her statements were admitted as being uncontested, and have been treated accordingly.

In her evidence, Ms Edwards said she was primarily engaged to market the "Sonoma" project at Noosaville for off-the-plan sales through an associated company of the respondent. At the time of her engagement the respondent had a sole agency agreement with a real estate agent in Noosa Heads which impacted upon her ability to market the project. In the initial weeks of her employment she was also asked to arrange the furnishing of 4 of the completed units in the development as a means of gaining rental income for the company, as well as for the purposes of marketing. At the same time, she assisted in furnishing several other properties being marketed by the respondent, as well as its new company offices in Noosaville.

Ms Edwards said she met with Mr Andrew Cook and Mr Marc Withnall, the Principal Director of the respondent, on or about 15 December 2003 to discuss the potential holiday lettings of the 4 furnished units in the Sonoma project over the Christmas/New Year period. She suggested she and her husband move into possession of the "manager's unit" within the complex so as to provide on-site management of the project and maintenance of its facilities until a full-time manager purchased the management rights. She said Mr Withnall was very satisfied with this proposal and instructed her to put these arrangements in place as soon as practicable. Ms Edwards said a verbal on-site management agreement was also entered into between Mr Withnall and her whereby she and her husband would carry out all caretaking and associated duties for an initial term of 12 months at an annual salary of \$60,000 per annum with an ability to reside in Unit 10 until all units in the Sonoma project had been sold and settled. The use and occupation of Unit 10 was to be on a rent free basis until all the units in Sonoma were sold, and thereafter on a rental basis.

It was Ms Edwards' understanding that Mr Withnall saw the offer as an opportunity to develop the letting rights for the complex, which would further increase the price at which the management rights could ultimately be sold.

Ms Edwards said she continued to work conscientiously, marketing the respondent's product until she was called into a meeting at 2.30 p.m. on 19 April 2004 with Ms O'Keefe, Director of Operations for Castle Bay, and Ms Swan, a consultant engaged by Castle Bay. During the course of that meeting, Ms O'Keefe verbally advised her that:

- (i) the respondent wished to terminate her, and her husband's, employment agreements;
- (ii) it was no longer feasibly viable for the respondent to employ both her and her husband;
- (iii) Ms Swan had recommended to Mr Withnall that the arrangement between the respondent and herself was no longer working satisfactorily; and
- (iv) it would be much cheaper for the respondent to employ outside contractors instead of continuing her, and her husband's, employment.

Ms Edwards said she was then handed a sealed envelope, as well as a second sealed envelope addressed to her husband. The first envelope contained a letter, of even date, which informed her:

*"... you have not been performing your duties in accordance with the position description detailed in clause 3.3 of your employment agreement and (we) note the following specific occasions when you are advised by Dianne Swan that your performance was unsatisfactory:*

1. 24 March 2004 in regard to inspections with clients; and
2. 7 April 2004 in regard to the proposed opportunity to promote a sale of another client's property for commission gain.

*As a result of the above, pursuant to clause 7.2 of the terms and conditions of your employment agreement and in accordance with the Industrial Relations Act your employment is hereby terminated.*

*Enclosed is a cheque for 2 weeks salary in lieu of 2 weeks notice."*

Ms Edwards said that at no time from the date of commencement of her employment was she given any guidelines, or provided with required performance criteria, associated with her job description. Further, the respondent did not conduct a review of her performance at the conclusion of her 3 month probationary period as was required by her employment agreement. In addition, Ms Edwards refuted that she had ever been informed by Ms Swan, or anyone else, that her performance was unsatisfactory. Similarly, she rejected the comments in the letter of 19 April 2004 that Ms Swan had warned her that her performance was unsatisfactory. I accept Ms Edwards' uncontested evidence on these points.

Mr Alford said it had taken a considerable period of time for the respondent to pay the 2 weeks' notice mentioned in the termination letter. Further, it had taken a considerable period of time for Ms Edwards to recover commissions which were due on several sales which were completed just several days prior to her termination.

#### **The respondent's position**

As noted above, the affidavits filed prior to the proceedings on behalf of the respondent were admitted by the Commission notwithstanding the non-appearance of the respondent, or any of its witnesses. Mr Alford, rightly, said that the material contained within such affidavits should be treated cautiously by the Commission because none of the contentions could be tested by cross-examination. In particular, Mr Alford indicated that some of the contentions set out in the respondent's statements were totally rejected by the applicant, as was recorded in her statement-in-reply.

On the basis that the applicant was available for cross-examination and none of the respondent's witnesses were, I have taken the view that I should prefer the evidence of the applicant over that of the respondent wherever there is any inconsistency.

Without being exhaustive, the general tenor of the respondent's evidence was to the effect that it was unhappy about the length of time it was taking to sell the various units in the Sonoma complex. Because of its general concerns it retained Ms Dianne Swan, an experienced sales and marketing consultant, to conduct a review of the current marketing of the project.

Ms Swan's report seems to have laid much of the blame for the poor sales results at the feet of Ms Edwards. Mr Withnall said Ms Swan informed him that the reason for the units not selling was that Ms Edwards was not trying to sell the property. Ms O'Keefe said Ms Swan's report recommended that Ms Edwards' and her husband's contracts be cancelled and also recommended that the ground services contract be outsourced, with the on-site management to remain with a particular real estate agency.

It appears that as a result of some discussions about Ms Swan's report, between the directors of the respondent, a decision was taken on 18 April 2004 to effect Ms Edwards' termination on the following day. Ms O'Keefe was assigned that task and effected Ms Edwards' termination, as above.

**Submissions on behalf of the applicant**

Mr Alford submitted that the applicant's termination was harsh, unjust and unreasonable "in the extreme". He said the respondent failed entirely to communicate in an effective and fair minded way with Ms Edwards that her position was under review or that there was any possibility of dismissal. Nor was she given any opportunity to respond to any complaint Castle Bay might have had about her conduct, capacity or performance before she was peremptorily dismissed.

In such circumstances, he argued, the respondent failed to accord any procedural fairness to Ms Edwards in accordance with the 5 rules set out in *Byrne v Australian Airlines Ltd.* (1994) 120 ALR 274 per Beaumont and Heerey JJ, following Hill J, as follows:

- a. to conduct a reasonable investigation to determine what circumstances should be taken into account when deciding whether to dismiss the employee;
- b. to be clear about what the employee has done or failed to do;
- c. all allegations should be put to the employee;
- d. the employee must be given a fair opportunity to be heard on the allegations; if the employee is regarded as guilty, she must be given a fair opportunity to be heard on whether a dismissal *should* take place;
- e. the employer must take into account matters not directly connected with the alleged offence which might mitigate the penalty."

Mr Alford also said the respondent's evidence suggested the termination was based largely on hearsay and unsubstantiated opinion. I agree with that submission. On the available material it seems the respondent had some concerns about the success of the project and decided to retain Ms Swan to examine the situation and to make recommendations in an endeavour to turn things around. The applicant was given no notice that such a review was underway and was not invited to participate in Ms Swan's deliberations. Ms Swan's report makes a series of allegations and conclusions, many of which are based upon personal observation and/or opinion, which are not necessarily supported by the facts. Her conclusions are also based upon certain conclusions about Ms Edwards' role and authority when the assumptions upon which the conclusions are based appear to be plainly wrong.

Mr Alford submitted:

*"The evidence strongly suggests that the reason for termination was a management decision concerning the structure of the organisation, a desire to reduce costs, and the management on-site, and a wish to appoint a different marketing 'entity' more to the personal style of Ms Swan, not related to the employee's competence, conduct or performance. Redundancy was not the reason as the applicant was immediately replaced in the then vacant position."*

I totally agree with that submission. The respondent appears to have accepted the recommendation of Ms Swan, that Ms Edwards (and her husband) be terminated, without query or challenge and has immediately set in train a course of events which led to Ms Edwards' termination, as above, on 19 April 2004.

On the information available the termination was completely without merit and was conducted without any regard to the requirements of s. 77 of the Act whatsoever. It was thus harsh, unjust and unreasonable.

**Remedy**

In the circumstances of this case, I have decided it is impracticable for me to order the applicant's reinstatement to her former employment. Not only has the employment relationship broken down, the employer has been placed into administration (see below). Accordingly, I turn to consider the only other remedy available, viz. compensation.

At the time of her termination the applicant, and her husband, had taken up residence in one of the units at the Sonoma complex in accordance with the agreement reached in mid-December 2003 with Mr Withnall. As a result of that agreement, they had taken steps to lease their own house for a period of 12 months. Because of that lease commitment they could not return to their own house when they were forced to relocate themselves from Sonoma several weeks after Ms Edwards' termination. As a consequence of the termination Ms Edwards (and her husband) have been forced to pay for a second set of relocation costs (said to be \$1,570.40) in circumstances where those costs should not have been incurred.

Mr Alford invited me, by way of a well reasoned written submission, to take the applicant's commission income into account in determining the compensation I might award pursuant to s. 79 of the Act. He sought compensation in the amount of \$37,850 being 6 months' "wages", calculated by reference to her earnings during the period of her employment. However, by virtue of the President's decision in *Bettina O'Connor v Electroboard Administration Pty Ltd* 168 QGIG 90, I am limited to the actual wages (not remuneration) Ms Edwards was receiving at the time of her termination. At that time, Ms Edwards was in receipt of a wage of \$50,000 per annum (including 9% superannuation and annual leave loading) plus commissions.

The object of compensation is to restore an unfairly dismissed employee, as far as practicable, to the financial position in which he or she would have been but for the wrongful dismissal (*Atkin v Hymix Industries* (1999) 160 QGIG 165 at 167 and *Stewart v Creek Gold Pty Ltd* (2003) 174 QGIG 104).

The maximum amount of compensation which I am able to award is capped at \$22,750, being one-half of \$45,500 (\$50,000 less 9% superannuation in the amount of \$4,500). In the circumstances, I have decided to award that amount. The applicant's employment was terminated without warning in a pre-meditated way. There was an absence of merit and a total lack of procedural fairness. She (and her husband) were also effectively "thrown out of" the unit she occupied, on 2 weeks' notice. She was also forced to incur additional relocation costs in the order of \$1,500. She only found alternative employment a few days prior to the hearing at what appears to be a lesser rate of pay. She was thus deprived of income for virtually 6 months and will also suffer some on-going loss. She should be compensated for the whole of that loss – including the relocation cost – but the maximum amount I can award is dictated by s. 79 of the Act.

**Costs**

On behalf of the applicant Mr Alford asked the Commission to make an Order requiring the respondent to pay the following costs incurred by the applicant in her pursuit of the application:

• costs of one up-lift and removal	\$1,520.40*
• costs to regain entitlements earned up to date of dismissal	\$1,687.40
• costs of the application up to and including the hearing	\$18,967.18
• costs of one day's pay for Ms Edwards to attend hearing on 18 October 2004	\$153.84
	<b>Total</b>
	<b>\$22,328.82</b>

\* This has already been considered above. With respect to Mr Alford it is not a "cost".

In his written submissions in support of his application that costs be awarded pursuant to s. 335 of the Act, Mr Alford stated:

*"A Full Bench of the Commission in Doyle Construction Lawyers v. Serratore (No 2) 2002 170 QGIG 103 considered that the decision of McKenzie President, in Goldman v. Data General Australia Pty Ltd 144 QGIC (sic) 379, albeit based upon the provisions of Industrial Relations Act 1990 was descriptive of the correct approach to be adopted in assessing whether there had been unreasonable acts or omissions in connection with the conduct of an application.*

*In Goldman, McKenzie P said:*

*'Nonetheless it does make the point that some reinstatement cases by reason of the procedural steps involved and their nature, length and complexity have rather got away from the ideal of inexpensive dispute resolution. There may be cases where at the end of the day it can be seen that a party has acted unfairly, unreasonably or improperly in or in the course of pursuing or resisting such relied and that those actions were so unjustified that the proceedings have worked as an act of oppression to the other side. It goes almost without saying that cases where such a finding could properly be made will be rare and would have to fit the description frivolous, vexatious or otherwise abnormal. The mere fact that a party fails to succeed would be far removed from this kind of case and would be far from sufficient to found an argument for costs. No one with a reasonably arguable case need be deterred from proceeding by fear of the consequences of costs unless abnormal unfair aspects enters into the conduct of the proceedings...'*

Mr Alford said the respondent's behaviour – involving the applicant in a costly exercise to recover her entitlements, its refusal to settle the matter through the conciliation process, and then putting the applicant through the entire legal expense to prepare for the full hearing only then to fail at the hearing, and to only then inform the Commission that it did not seek to contest the matter – certainly met the definition of a continuing act of oppression and abnormal and unfair conduct of the proceedings.

Further, he said, the respondent's failure to advise the Commission of its decision on or around 12 October 2004 not to contest the matter was contemptuous of due processes and the rights of the applicant. At that juncture, the respondent should have informed the Commission and the applicant there would be a "no-contest".

Mr Alford said the applicant should be paid her full costs in the matter, including all of the items mentioned above. In support of his contention he referred me to a number of other decisions of the Commission where costs had been awarded, which I do not propose to repeat here. Nonetheless, all of those decisions have been considered in reaching my conclusion on the matter (see below).

#### **Post hearing events**

By way of letter dated 22 October 2004 (the same day Mr Alford's written submissions about costs and the maximum amount that might be awarded under s. 79 of the Act were received) the Commission received correspondence from Horwath Sydney Partnership advising that Neil Robert Cussen of Horwath Sydney Partnership and Gerald Thomas Collins of Horwath Jefferson Stevenson were appointed Joint Administrators of SCPM Pty Limited (Administrators Appointed) (formerly known as Castle Bay Projects, Sales and Marketing Pty Ltd) ABN 81 099 109 305 on 15 October 2004.

The letter indicated the Joint Administrators were aware of the proceedings before the Commission and sought to be informed of its current status.

The only conclusion that can be drawn from that correspondence is that the respondent knew prior to 18 October 2004 of the appointment of Joint Administrators. Not only were the directors of the respondent remiss in not informing the Commission of that appointment but Mr Chapman, the respondent's Financial Controller, should have informed Mr Andrew Cook, and in turn the Commission, of that fact when my Associate attempted to contact the senior executives of the respondent on Monday, 18 October 2004.

One is entitled to assume, and I do assume, that the respondent had no intention of alerting either the applicant's solicitor or the Commission to the facts because either they did not care that the applicant was incurring extra costs or, alternatively, that they wanted her to incur those costs. Whatever the respondent's reasons, it's behaviour is reprehensible and the applicant should not be forced to carry the whole of the costs of her conduct of the matter. In my view, the respondent caused the applicant to incur costs because of its unreasonable act or omission connected with the conduct of the application by failing to inform her solicitors, of the appointment of Joint Administrators to the respondent.

Further, the material available to the Commission suggests that the respondent should have known that its defence of the application was doomed from at least 4 weeks prior to the date of hearing i.e. approximately 17 September 2004. That was the date upon which it engaged an agent/solicitor to act on its behalf in its preparation of its defence of the matter.

Accordingly, the respondent's actions in attempting to defend the matter, on the basis of the case it presented, was an unreasonable act connected with the conduct of the application. On the material filed, the respondent had no defence to the claim for unfair dismissal. While there might have been some argument about whether Ms Swan had spoken to Ms Edwards about her performance, the way that the termination was effected – and the principle reasons for the termination – meant that there was always going to be a finding that the termination was harsh, unjust or unreasonable. In such circumstances, the respondent's behaviour was always going to cause the applicant to incur costs, for a potentially limited outcome.

In the circumstances, I propose to award the applicant all of her costs in connection with the conduct of the reinstatement application (only) from 17 September 2004 onwards on a party to party basis. On my calculations, this amounts to \$12,903.40 plus GST of \$1,290.34, equalling \$14,193.74. The Commission has no jurisdiction – in these proceedings – to award costs related to Ms Edwards' pursuit of her unpaid entitlements (\$1,687.40).

I do not propose to award Ms Edwards her income foregone as a result of her attendance on 18 October 2004. Ms Edwards was always going to have to attend the hearing, whether the application was defended or not.

#### **Summary of the Commission's decision**

As stated above, the Commission has determined that the applicant was terminated harshly, unjustly or unreasonably on 19 April 2004 and has awarded her \$22,750 in respect of her unfair dismissal. The Commission has also decided the applicant should be awarded costs of \$14,193.74 (as above) because of the respondent's unreasonable acts or omissions connected with the conduct of the application.

It is the Commission's order that the amount of \$36,943.74, being the total of the amounts described immediately above, be paid, in accordance with Australian taxation laws, within 22 days of the date of release of this decision.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Deputy President.

#### **Hearing Details:**

2004 18 October  
22 October (Written submissions)

#### **Appearances:**

Mr L. Alford, Counsel instructed by McKenzie Lawyers for the Applicant.  
No appearance for the Respondent.

Released: 17 November 2004

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 156 – application for approval of agreement**Lindsay Brothers Management Pty Ltd AND Transport Workers' Union of Australia, Union of Employees  
(Queensland Branch) (No. CA489 of 2004)****LINDSAY BROTHERS DEPOTS – CERTIFIED AGREEMENT 2004**

COMMISSIONER THOMPSON

11 November 2004

Application for approval of Agreement – Objection raised – Amendments made to Agreement – TWU not to be bound by the Agreement – Agreement certified – Agreement cancels CA142 of 2001.

## DECISION

An application was filed with the Industrial Registrar on 30 September 2004 seeking the certification of an agreement between Lindsay Brothers Management Pty Ltd (Lindsay Brothers) and Lindsay Brothers Management Pty Ltd Employees.

In the application, it was stated that all the parties signatory to the Agreement supported the application.

The Agreement was intended to replace the *Lindsay Brothers Depots Agreement 2001* (No. CA142 of 2001).

Correspondence was received by the Industrial Registrar on 23 September 2004 (prior to the filing of the application) by the Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (TWU) seeking pursuant to Division 2 – Certifying Agreements, s. 155(1) to (4) of the *Industrial Relations Act 1999* (Act), to be heard in the certification proceedings.

Further correspondence was received from the TWU on the same date (23 September 2004) in which they identified their “key concerns” in respect of the company’s handling of the ballot for the proposed Agreement.

These were listed as:

- (a) Eligible employees;
- (b) Limited voting period; and
- (c) Proposal change within 14 days of the ballot.

A hearing was held on 19 October 2004 where both Lindsay Brothers and the TWU were given the opportunity to address the Commission on the matters raised by the TWU in their previous mentioned correspondence of 23 September 2004.

The TWU indicated that, in relation to the current Agreement (No. CA142 of 2001), arguments had been advanced by the Union opposing the certification of that Agreement and that in respect of the application before the Commission, the Union would again be seeking to present opposition.

An agreement was reached between the parties that the matter be heard in full with each party undertaking to provide the other with all relevant material prior to the hearing.

**Lindsay Brothers**

Evidence was given in support of the certification of the proposed Agreement by Mr Thomas Lindsay, a director of Lindsay Brothers Management Pty Ltd.

His evidence went to material filed by Mr Peter Ferguson on 25 October 2004 and to references that were made to certain employees to be covered under the proposed Agreement being disadvantaged.

Mr Lindsay provided a document that purported to show a dissection of hours over the past 12 months for three employees from depots at Rocklea, Stanthorpe and Bundaberg.

The information provided went to all hours worked including those at ordinary time, time and a-half, and double time, in addition to total hours and stored hours adjustment.

Cross-examination of Mr Lindsay covered a range of matters including:

- nature of the business including reliance upon the horticultural industry
- seasonal aspect of the business
- stored benefits – banking of hours (at page 24, line 35 of transcript):

“Duffin: So the way it works is on a dollar for dollar basis, an employee who works more than – say they’re working their 45th to their 46th hour, Monday to Friday, so they would receive 110 per cent of the award rate of pay put away into the bank for that hour?”

Lindsay: The hours are banked in a monetary value not an hour value so if they work on a weekend or they work over the 50 hours those hours that they chose to bank are converted into the dollars that is equal to the hours they worked.

Duffin: So – well, that – it works out on a monetary basis that for each dollar that you would receive while you were working one gets put into the bank?

Lindsay: Correct.

Duffin: And you're able to draw down upon that – ?

Lindsay: Whenever you like.”.

- metro allowance
- line haul rates
- night shift allowance
- hours of work applying to various drivers in a number of locations.

#### **TWU**

The TWU called evidence from Mr Ferguson, a truck driver with the company for the past 25 months.

He indicated that he was currently the workplace spokesperson of the TWU and that he was familiar with the terms of the *Transport Workers Award 1998* (Award).

In evidence, he indicated that he did not support the certification of the proposed Agreement in its current form as it would disadvantage employees.

The proposed Agreement when compared to the Award disadvantaged those employees working in excess of 50 hours per week but was also disadvantageous to employees working 50 hours per week.

He acknowledged that the proposed Agreement provided for an option to work more than 50 hours but also contained a provision to work 50 hours if the company required.

His evidence was that employees required to work weekends were disadvantaged as the loadings did not compensate employees for the loss of overtime received on a weekend.

An attachment to his affidavit went to the hours worked by himself over the time of his employment.

It showed that over the 103 week period he had worked in excess of 50 hours on 75 occasions and less or equal to 50 hours on a further 28 occasions.

It was his understanding that his pattern of work was consistent with that performed by a majority of his colleagues.

He provided a further attachment that set out the dollar situation when comparing the proposed agreement to the Award.

Mr Tom Bradley, of Counsel, conducted a brief cross-examination, which basically surrounded the witnesses access to information relied upon in his evidence.

#### **Submissions**

#### **TWU**

Written and oral submissions were presented on behalf of the Union by Mr Linton Duffin.

The written submissions provided were extensive going to some 99 paragraphs covering areas including:

- procedural failures
- misleading documentation
- no-disadvantage test  
– application of the test
- public holidays
- casual employment
- night shift
- permanent day workers
- line haul

Oral submissions sought to highlight a number of other matters including:

- the relevant Award
- the legislation to be relied upon by the Commission
- no-disadvantage test in relation to employees other than permanent day workers
- increase in night shift allowance to 20%
- rostering scenarios

Arguments were also presented in line with authorities tendered in the proceedings.

Those authorities included:

- *Wade Sawmill Pty v Ussher* (No. C37 of 2003) – Hall P
- *The Pine Factory – Certified Agreement 2004* (No. CA285 of 2004) (15 July 2004) 176 QGIG 575 – Blades C
- *John Goss Projects Pty Ltd v The Employees of John Goss Projects Pty Ltd* (No. CA255 of 1998) (18 August 1998) – Fisher C
- *Sporting Wheelies Certified Agreement 2001* (No. CA429 of 2001) (24 October 2001) 168 QGIG 219
- *Mossman Central Mill Company Ltd – Certified Agreement 2004* (No. CA337 of 2004) (19 August 2004) 177 QGIG 37.

#### **Lindsay Brothers**

Submissions were provided on behalf of Lindsay Brothers along the same lines as the Union.

The written submissions addressed the reasons advanced supporting the certification of the proposed Agreement in addition to challenging the arguments put on behalf of the Union to have the Commission refuse the certification.

Matters addressed included:

- procedural matters
- identification of employees
- voting times and opportunity to vote
- no-disadvantage test
- TCR entitlements
- public holidays
- casual employees
- permanent night shift workers
- permanent day workers
- line haul.

In his submissions to the Commission, Mr Bradley placed emphasis upon the cyclical nature of the industry in particular as it related to the country depots and the absence of the flexible working arrangements in terms of hours and rates would find numbers of drivers not employed all year round.

It was submitted that when applying the benefits to the staff at country depots over the course of the year, there is a benefit to drivers of significant value.

For Brisbane employees (a minority of employees overall) there can be situations where employees working more than 48 hours start not to benefit from the agreement.

The payment of the metro allowance goes towards compensating those employees.

The Commission was requested to take on board the evidence that 52% of freight carried is seasonal freight.

Mr Bradley went to a number of undertakings given during the course of the proceedings which would be incorporated in the agreement.

#### **Decision**

The application filed on 30 September 2004 by Lindsay Brothers sought to certify a replacement agreement for CA142 of 2001.

The TWU exercised a right under s. 155(1) to (4) of the Act to be heard on the application.

From the outset, the TWU expressed their opposition to the certification of the Agreement firstly on the grounds of the company's handling of the ballot process, and secondly challenging the ability of the proposed Agreement to meet the no-disadvantage test.

The affidavit of Mr Lindsay that accompanied the application filed with the Registrar went to specific details of the processes associated with the negotiations around the Agreement.

In that affidavit, at paragraphs 16(u), (v) and (w), he provided testimony as to the mechanics of the ballot:

- “(u) On 7 September 2004, memos were issued to all the depots explaining the changes and also outlining the procedures for the vote (Appendix M). We had informed all of the employees during our meetings that the vote would be conducted by way of a secret ballot on Monday, 13 September 2004. Each of the Depot Managers were instructed to insert the times in each of the memos that employees would be able to vote at each of the depots.
- (v) The voting procedures were explained to all the employees in those memos. Particularly, the employees were told that the ballot would be a secret vote and that they were under no compulsion to vote. The employees who wished to vote were told they could place a ballot paper in a secured ballot box located at each of their depots. Each of the ballot boxes were secured by way of a lock with the keys to that lock being retained by Rechenberg Security who is an independent security company. At the close of the ballot we arranged for a representative of Rechenberg Security to take possession of each of the ballot boxes from the depots and to transport those ballot boxes overnight to Rechenberg's Brisbane Offices which are located at unit 2, 36 Curzon Street, Tennyson.

- (w) The ballot boxes were then opened at Rechenberg Security's Brisbane office on Tuesday, 14 September 2004 in the presence of myself, Josh Lindsay, Graham Garrett and Peter Ferguson and also in front of Jason Rechenberg from the security company. The votes were tallied with 54 yes votes and 34 no votes (Appendix N)."

Whilst some of the questions raised by the TWU were in the view of the Commission worthy of consideration, there was little advanced that would convince the Commission that the process was flawed to an extent that the certification of agreement would be at risk.

There was clearly a majority vote in favour of accepting the terms of the agreement.

The content of the Agreement came under the scrutiny of the TWU as they developed their argument in that the Agreement failed to meet the no-disadvantage test.

Lindsay Brothers showed a preparedness to accept a series of variations in response to matters raised by the TWU.

Each of the variations in the view of the Commission added favourably in benefit of the employees to be covered by the Agreement.

The changes are:

- New clause 3.3 providing as follows:

"To avoid any doubt, the references to 'pick and delivery drivers' in clauses 3.1 and 3.2 are to persons employed in classifications from Grade 1 to Grade 10 in the Transport Workers Award – Federal."

- The TCR reference to "Queensland" has been replaced with "Australian" in clauses 7.1.1 and 7.1.3.
- Clause 8.1(b) has been amended providing that Casual employees will be paid in accordance with the Award.
- Clause 8.6 has been amended to provide that "a loading of 20% on top of the Award rate x 110% will apply (that is, at 132% of the Award rate)."
- A new clause 8.10 as follows:

**"8.10 Metro Allowance**

For Brisbane depot employees a metro allowance will be paid in addition to any other payment under this agreement on the following basis:

Hours worked in a weekly pay cycle	Allowance Paid	Allowance Amount \$	Amount Payable \$
45 to 49	2	9.00	18.00
50 to 54	3	9.00	27.00
55 to 59	4	9.00	36.00
60 hours plus	5	9.00	45.00

Brisbane depot employees will be rostered to perform their 50 hours from Monday to Friday and not over the course of the weekend."

In respect of the no-disadvantage test, the Commission must decide whether the Agreement disadvantages the employees conditions of employment.

In making such a determination the Commission has an obligation to make such an assessment based upon a "global" comparison with the Award and not simply a clause-by-clause comparison whereby one clause could rule an agreement out.

For all hours worked, employees will receive 110% of the Award rate of pay and on the evidence and submissions before the Commission, it is abundantly clear that any employee working up to 47 hours per week on that basis alone fairs better under the Agreement.

Once an employee works beyond 50 hours per week there is, in the view of the Commission, a disadvantage.

*Note: Hours beyond 50 per week are optional and at the employees discretion.*

For Brisbane employees, this is partially offset by the payment of the metro allowance, but this is not the case for the country based employees who make up the bulk of the workforce.

However, the agreement provides significant advantages for those country employees who, in the main, work within the seasonal requirements of the Horticultural Industry and through the stored time arrangements available in the Agreement, are able to enjoy full-time year round employment which would not be the case if they were covered by the Award only.

The proposed Agreement provides benefits above those of the Agreement it seeks to replace.

Whilst under some circumstances (overtime in excess of 50 hours per week), there are disadvantages to the employment conditions, the Agreement on a whole, in the view of the Commission, does meet the requirements as contained at s. 160 of the Act and, as such, passes the no-disadvantage test to a point where the Agreement can be certified.

In reaching this conclusion the Commission has taken into account the benefits of year round employment for those employees residing within country Queensland employed on work of a seasonal nature.

In the decision of *Asbury C in Mossman Central Mill Company Ltd – Certified Agreement 2004*, reference was made to flexible working hours arrangements:

"Weighing all of these factors and the competing interests of MCM, employees, their Unions, shareholders, the local community and the Queensland economy generally, I am satisfied that the Agreement should be certified. However, I remain of the view that when employment conditions are considered as a whole, that there will be a disadvantage to employees as a result of the flexible working hours arrangement. In my view the public interest considerations justify the ability for the flexible working arrangements to be implemented for the 2005 crushing season."

The TWU in submissions indicated that, in the event that the Agreement was certified pursuant to s. 166 of the Act they would seek to become a party to the Award.

The Act at s. 166(2) states:

- “(2) For a certified agreement made between the employees and employer, the commission must decide that the agreement also binds an employee organisation if –
- (a) before the agreement is certified, the organisation gives the commission and employer notice that it wants to be bound by the agreement; and
  - (b) the organisation satisfies the commission that –
    - (i) the organisation has at least 1 member –
      - (A) whose employment will be subject to the agreement; and
      - (B) who asked the organisation to give the notice; and
    - (ii) the organisation –
      - (A) is bound by an award or industrial agreement that binds the employer, or would bind the employer apart from an award under the Commonwealth Act; or
      - (B) if there is no award or agreement that binds, or would bind, the employer – is entitled to represent the industrial interests of the relevant employees.”.

The Commission, in consideration of the TWU’s request, is satisfied:

- the Union before the certification of the Agreement gave both the Commission and the employer notice that it wished to be bound by the Agreement;
- the Union has satisfied the Commission that, through the evidence of Mr Ferguson, they have at least one member in the employ of Lindsay Brothers whose employment is subject to the Agreement; and
- the Union is bound by an Award that binds the employer.

The Commission, however, does not have evidence before the proceedings that a member had asked the organisation to give notice.

The evidence from Mr Ferguson in terms of the Agreement was to oppose it in its current form, that being the document attached at the time of the filing the application.

The fact that the employer consented to some five variations, all of which were beneficial to the employees and made at the behest of the Union does not necessarily allow the Commission to conclude that a member of the Union has, as required by s. 166(2)(b)(i)(B) asked the organisation to give notice that it wants to be bound by the Agreement.

Therefore the Commission rejects the request of the Union to be bound by the Agreement.

I find that the proposed Agreement meets the requirements of the Act and, accordingly the Agreement is certified in the terms and dates sought from today.

I order accordingly.

J.M. THOMPSON, Commissioner.

*Appearances:*

Mr T. Bradley, of Counsel, instructed by Mr L. Hancock of McCullough Robertson Hancock) for Lindsay Brothers Management Pty Ltd.  
 Mr L. Duffin, for Transport Workers’ Union of Australia, Union of Employees (Queensland Branch).

*Hearing Details:*

2004 19 and 29 October

Released: 11 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Sidney Alan Wilkins AND PRD Consulting Services Pty Ltd (No. B1350 of 2003)**

COMMISSIONER BECHLY

DECISION

10 November 2004

The matter before the Commission is the determination whether jurisdiction exists to hear an application for reinstatement by Mr Sidney Alan Wilkins to the position of Associate Director PRD Projects Marketing a division of PRD Realty Pty Ltd (PRD), a position from which he was dismissed on 1 August 2003 with one month’s notice.

In 2002 the respondent advertised for applications for the position of Sales Manager. Mr Wilkins applied for that position and, apparently at his instigation, negotiated an upgrade of the role to that of Associate Director reporting to the Director Mr Peter Evans. The Associate Director role had the responsibility for managing the roles of a Sales Manager, Communications Manager and Network Manager. Mr Wilkins was appointed to that position by a letter of appointment of 23 September 2002. The salary structure provided for an annual salary of \$91,743.12, Superannuation \$8,256.88 and incentives based on performance of the organisation as a whole. Mr Wilkins worked from the corporate office of the respondent at Eagle St in Brisbane.

Chapter 3 at s. 72 of the *Industrial Relations Act 1999* excludes from the jurisdiction of this Commission persons who are not employed under an Industrial Instrument and whose annual salary at the relevant time, was greater than \$75,200. It is clear that Mr Wilkins' base salary of \$91,743.12 exceeds the limits set by the legislation. The question to be considered is whether the applicant was employed under an industrial instrument, that is an award, certified agreement, QWA, industrial agreement, EFA or order under chapter 5 parts 5 and 6.

It is contended by Mr Wilkins that he was employed under the Property Sales Award Queensland – State. Should this be the case, notwithstanding the salary level, the Commission would have jurisdiction to hear Mr Wilkins' application for reinstatement.

Could it be held that Mr Wilkins was “employed under an industrial instrument”?

The employment arrangement entered into between the parties at no time, either in the negotiations prior to commencement of employment or during the employment, considered the terms of the Property Sales Award Queensland – State as being a part of the employment arrangement entered into.

If the use of the word “employed” with respect to the term “employed under an industrial instrument” is to be taken to refer to the terms agreed at the commencement of the employment relationship between the parties then it is clear that Mr Wilkins was not employed under the Property Sales Award Queensland – State nor, in these circumstances, would he have been employed under that industrial instrument during his period of employment with PRD as the terms of the initial contract did not change during the life of the contract.

It is proposed however that the terms of the Property Sales Award Queensland – State have application to the duties performed by Mr Wilkins and therefore he should be considered to be a person employed under an industrial instrument.

The parties to that Award are described in clause 1.2.1 as being “employees engaged in listing, sale, auction, tender, purchase and/or leasing of real estate and their employers”.

Mr Wilkins acknowledged that he was not at any time during his employment with PRD engaged in the sale, auction, tender, purchase and or leasing of real estate and that he was not employed by PRD at any time as a real estate salesperson.

That leaves the issue of “listing” of real estate to be considered. I accept the proposition put by Mr Merrell acting for Mr Wilkins that the Application of Award description at clause 1.2.1 would not require an employee to be involved in each of the nominated tasks in that description to fall within the definition of “Party” or “Property Sales Person” which relies on the definition of “Sale of Real Property” for its meaning.

Mr Wilkins' evidence is that he had involvement in the execution of only one agreement between PRD and a developer, that being the Fusion development at Commercial Rd, Newstead and that he had some peripheral involvement in a few others.

PRD Project Marketing is headed by Mr P. M. Evans, the Director to whom Mr Wilkins reported to as Associate Director. His evidence is that the role of PRD Project Marketing was to seek engagement by developers prior to the construction of a development to assist the developer to plan a market strategy for the site, to price the proposed individual units for sale, and to implement a sales strategy including placement of sales employees on site to sell the unit stock. A sole on site marketing agent agreement is usually entered into with the developer with a view to ultimately selling the product of the developer.

It was proposed for Mr Wilkins that this process was that of listing of real property for sale and, as such brought Mr Wilkins' employment within the coverage of the Award.

Mr Wilkins' role as Associate Director is defined through the Position Description for the job which is set out below.

The Associate Director will be responsible for the overall marketing of PRD nationwide Project Sales Divisions, Brisbane Corporate Office and Sunshine Coast:

1. Be responsible for the job description, structure and management of all other managers within PRD Nationwide, Brisbane Corporate Office as outlined in attached structure.
2. Be responsible for implementing new marketing initiatives to grow the PRD nationwide Project Marketing Division in Brisbane and Sunshine Coasts.
3. Accept responsibility for the efficient interface between PRD nationwide and develop clients for the whole value adding and risk management service promoted by PRD nationwide Project Marketing Team.
4. Appoint, train and manage a professional Sales Manager to manage the on-site Projects Managers, Sales Consultants and Sales Assistants.
5. Manage the whole marketing process from marketing to sales to contract to settlement.
6. Train, Motivate and incentivise all staff.
7. Promote a single point of contact for clients/developers.
8. Seek new clients, projects and stock.
9. Grow the business through the promotion of PRD nationwide Project & Residential Marketing to new clients and new markets.

While it was proposed for Mr Wilkins that his principal responsibilities were those at point 3 which could be classified as listing for sale I accept that his principal responsibilities are listed at Point 1 with diminishing responsibilities following.

While it is apparent from the Organisation chart tendered by PRD that Mr Wilkins was required to liaise with developers on site and be aware of residential stock listings and other projects, the principle role was to manage all other managers and be responsible for the management structure of the organisation including job descriptions of managers, develop new marketing efficiencies and accept responsibilities for the efficient interface between PRD and developers. This could include personal contact with developers, contact through and with his managers and contact in association with the Director.

Mr Wilkins did not directly manage on site sales staff. An early requirement was for him to appoint, train and manage a Sales Manager to manage on site Project Managers, Sales Consultants and Assistants. It is apparent that Mr Wilkins was principally engaged in managing Managers.

To be employed under the Award as a Property Sales Person a person is required to be engaged in the Sale of Real Property (1.6.1 – Definitions). To be engaged in the sale of Real Property it would be necessary, in accordance with the definition of “Sale of Real property” to demonstrate that the principal responsibilities of Mr Wilkins were those of listing real property for sale (1.6.1 Definitions). This has not been demonstrated on the evidence before me.

It was put that “a job title may mislead as to the nature of the job” (Grey J in *Joyce v Christofferson*) 1990 33 IR 390 at 405. One must look at the Award and the classifications contained therein and roles covered by those classifications and compare them with the role of the applicant to determine whether such a circumstance exists in this case.

The Award when first made in 1997 was a consent document between the Property Sales Association of Queensland, Union of Employees (PSAQ) and the Queensland Real Estate Industrial Organisation of Employers (REIQ). That Award provided for the employment of persons engaged in management of real property. It is of some interest that in 2002 the parties to the Award concluded that that management role was not a suitable one for inclusion in the structure of that Award and the role was removed from the Award.

The 1997 Award was repealed in 2002 and a new award made to reflect changes to classifications covered by the Award and the assessment as to how some employers may be categorised as certain levels.

The Award provides for the employment of Property Sales Trainee, Property Sales Person and Property Sales Person (Advanced). The Classification of Property Sales Trainee is not relevant to this matter. The wage rate prescribed for a Property Sales Person is comparatively low at \$476.00 per week and for a Property Sales Person (Advanced) a loading of 12% on that rate. Commission earnings are provided for which may be offset against wages paid.

Employment arrangements may be entered into for which allow employees and employers covered by the Award to arrive at arrangements which differ from the above requirements. It is the intent of these agreements according to proposals put by the PSAQ during the making of the 2002 Award, to recognise the unique nature of the Real Estate Industry and practices and procedures which were said to have been proven over time including the payment of total or partial commission based upon transactions and performance.

It is appropriate in my view to regard the words “based on transactions and performance” as relating to transactions completed by the individual and the individual’s own performance.

Stage 1 employment can be opted out of where it can be demonstrated that a person has held at least three months full time recent experience in the industry, can demonstrate a capacity to earn 115% of the award rate for a Property Sales Person and is guaranteed to earn more than 115% of the rate for a Property Sales Person.

Written employment agreements for Stage 1 and Stage 2 employees may be entered into which are to be registered with the Property Sales Association of Queensland, Union of Employees. While such registration does not constitute membership of the Union the Award requires that the employer “shall encourage the employee to be a member” of the Union.

The registration and approval of these agreements requires the use of a form contained as a schedule to the Award.

Some relevant matters for consideration arising from the making of an agreement under the Award are the following:

- the agreement ceases to operate after three years unless the parties nominate a shorter period of agreement or mutually agree to terminate the agreement;
- the agreements are subject to approval of the Secretary of the Union;
- the agreements must be reregistered or renegotiated each twelve months or such longer period as approved by the Secretary of the Union at the Secretary’s sole discretion;
- the agreements are to be investigated by the Secretary of the Union as deemed appropriate;
- the agreement may be referred to the Employer Union for Consideration;
- both organisations jointly may refer the agreement to this Commission for consideration which:
  - may suggest alternatives to the agreement
  - may refer the agreement back to the parties if they agree that the agreement does not reach the required criteria; and
- the agreement shall cease to operate if the two Unions agree.

The above is a précis of only some of the provisions as to regulation of employment agreements under the Award.

It is absurd to suggest that such terms are applicable to the contract for or the role of Associate Director as negotiated between Mr Wilkins and PRD Management, a role far removed from the role of Property Sales Persons contemplated in the Award.

I have considered the various evidence provided during the course of the hearing about the duties performed by Mr Wilkins and those the respondent contracted with him to perform. On a consideration of that evidence I find that Mr Wilkins’ employment is not covered by the Property Sales Award Queensland – State or any other industrial instrument referred to in the Act.

The Commission therefore does not have jurisdiction to deal with his application for reinstatement.

R.E. BECHLY, Commissioner.

*Appearances:*

Mr J. Merrell instructed by Deacons Lawyers on behalf of the applicant.

Mr J. Murdoch SC instructed by McCullough Robertson on behalf of the respondent.

*Hearing Details:*

2004 22 October

Released: 11 November 2004

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 125 – application for a new award**Queensco-Unity Dairyfoods Co-operative Association Limited and Malanda Dairyfoods Limited AND The Australian Workers' Union of Employees, Queensland (No. B1267 of 2004)**

COMMISSIONER BLADES

12 November 2004

Obsolete Industrial Agreement – Application for a new Award incorporating terms and conditions – Enhancement of allowances – Not to be regarded as a precedent – New Award to also cover other employees – Consent – Award incorporating terms of a Certified Agreement – Award made.

## DECISION

This is an application under s. 125 of the *Industrial Relations Act 1999* (the Act) for the making of a new award entitled *Dairy Products Industry – Queensco-Unity Dairyfoods Co-operative Association Limited and Malanda Dairyfoods Limited Award – State 2004*.

On 30 June 2004, the Commission issued a Statement of Policy (2004) 176 QGIG 497-498 (the Policy) which signalled the clear intention of the Commission to declare obsolete all industrial agreements that continue in force. Employees of Queensco-Unity Dairyfoods Co-operative Association Limited (Queensco) are subject to such an industrial agreement being the *Dairy Products Industry – Queensco-Unity Dairyfoods Co-operative Association Limited – Industrial Agreement (IA5/1993)* (the QUD Agreement). The application seeks to convert those terms into a new award in accordance with the Statement of Policy referred to.

Queensco is owned by Australian Co-operative Foods Limited which also owns Malanda Dairyfoods Limited (Malanda). Employees of Malanda are covered by State Common Rule Awards, namely the *Butter and Cheese Manufacturing Award – Northern and Mackay Divisions 2003* and the *Milk Treatment, Milk Products Manufacture and Milk etc., Distribution Award – Northern and Mackay Divisions 2003*. There is no Industrial Agreement which applies to employees of Malanda.

During discussions with The Australian Workers' Union of Employees, Queensland (the Union), it was requested by the Union that if the QUD Agreement applying to the employees of Queensco was to be converted into an award in accordance with the Policy, the relevant employees of Malanda should also be covered by that new Award. Hence this application seeks to create one award to cover the employees of both Queensco and Malanda to the exclusion of other State awards. The new Award will not apply to those employees presently covered by the following Awards:

- *Retail Industry Award – State 2004;*
- *Commercial Travellers' Award – State 2003;*
- *Clerical Employees Award – State 2002;*
- *Engineering Award – State 2002; and*
- *Storeworkers and Packers' Award – Northern and Mackay Division 2003.*

The proposed Award will operate as a safety net award for two certified agreements which currently cover these employees. The employees of Queensco are covered by the *Dairy Farmers (South-East Queensland) – Certified Agreement 2002 (CA563/2002)* and the employees of Malanda are covered by the *Dairy Farmers (Excluding South-East Queensland) – Certified Agreement 2003 (CA404/2003)*. Those certified agreements will continue to prevail over the terms of this new Award. It is the intention of the parties that there would be no reduction in any current entitlements, conditions of employment or changes to existing customs and practices presently applicable under the QUD Agreement or the operation of the Common Rule Awards. It is the further intention of the parties that no employee would be disadvantaged as a result of the process of conversion of the QUD Agreement to an award and the introduction of a specific award to cover the employees of Malanda. It is the further intention of the parties that any interpretations utilised for the QUD Agreement would be the same as for the new Award. The intention of the parties is also to remove any unnecessary or obsolete clauses and to modernise the content and format where required as necessary and to conform to the current Commission standards and to comply with the Practice Note PN10 Review of Industrial Agreements (2004) 176 QGIG 509-510.

Certified Agreements CA563/2002 and CA404/2003 will continue to operate and it is not intended that these Certified Agreements will be affected by this application other than by some consequential and necessary amendments because of the introduction of the new Award. Those will comprise amendments to the names of the Industrial Instruments acting as the various safety nets. There will also need to be amendments to various awards to ensure there is no duplication of coverage.

The content of the proposed Award has been reached by agreement as a package.

The *Review of Industrial Agreements* decision (the Review) (2004) 176 QGIG 494-497 requires the parties to an application where terms of an Industrial Agreement exceed any General Ruling or Declaration of Policy to append a note to the provision to clearly specify that the provision will not have precedent value. The Shift Allowance in clause 5.2.2 of the new Award is such a provision. The Commission's General Ruling on Shift Allowances published at (2000) 164 QGIG 54-62, provides for an Afternoon Shift Allowance of 12.5% as from 1 November 2001 and for a Night Shift Allowance of 15% as from 1 November 2001. The proposed Award at clause 5.2.2 provides for a Shift Allowance for other than day shifts of 15%. Thus there is a partial enhancement. The QUD Agreement at clause 3.2(3)(b) and (c) provides for 15% for both the afternoon and night shift allowances. Certified agreements covering the employees reflect a 15% shift allowance. In terms of Principle 3A(a) and (b) of the Policy, the allowances as proposed clearly pre-date the Commission's standard as reflected in the General Ruling on Shift Allowances and it is also clear that it is sought to incorporate the terms of the QUD Agreement into the new Award. The Policy at clause F prohibits the use of the provision as a precedent. It is therefore appropriate that a clause which reflects the provisions of Practice Note P10, No. 5, be inserted in clause 5.2.2 of the proposed Award. The parties have indicated they would have no objections to that course of action.

The Long Service Leave provision falls into a different category. The QUD Agreement at clause 5.4 provides for 8 weeks' leave after 10 years' service. The awards relevant to these employees contain provisions for long service leave in accordance with Part 3 of Chapter 2 of the Act (i.e. 8.6667 weeks after 10 years). At clause 7.4 of the proposed Award, the Act's provisions are carried forward but as from 1 January 2005, there is an enhancement whereby long service leave will accrue at the rate of 1.3 weeks per year of service. This long service leave enhancement is designed to reflect what is currently contained in the two Certified Agreements applicable to these employees. The Policy does not appear to have application to these circumstances, in particular by way of requiring a reference to a Full Bench. The Wage Fixing Principles, (2004) 176 QGIG 698-700, at clause 9 provide that subject to s. 129 of the Act, the Commission may include in an award provisions that are based on a certified agreement and to consider whether the inclusion of that provision will act as a disincentive to enterprise bargaining. The provisions of Principle 10 also have application and draw the Commission's attention to those matters set out in Chapter 5 of the Act. In particular s. 129 of the Act requires the Commission to be satisfied the provisions are consistent with those Wage Fixing Principles and are not contrary to the public interest. I do not consider that there will be any

disincentive to enterprise bargaining. I am satisfied the provisions are consistent with the Wage Fixing Principles. In regard to the public interest, the parties have pointed to a number of awards of this Commission which provide for long service leave of 13 weeks after 10 years' service and of course, all employees of Queensco and Malanda, whether they be covered by this proposed Award or not, at present enjoy the benefits of the enhanced long service leave because of the application of the two Certified Agreements. I am satisfied that the enhanced provision is not contrary to the public interest.

The parties have indicated that there are to be separate consent applications for amendments to the two Certified Agreements to reference the correct title of the new Award. There will also be an application for a consent amendment to the:

- *Butter and Cheese Factories Award – Southern Division 2003;*
- *Milk Treatment, Milk Products Manufacture, and Milk etc., Distribution Award – South-Eastern District 2003;*
- *Butter and Cheese Manufacturing Award – Northern and Mackay Divisions 2003; and*
- *Milk Treatment, Milk Products Manufacture and Milk etc., Distribution Award – Northern and Mackay Divisions 2003;*

to avoid duplication of coverage.

I make an award to be entitled the *Dairy Products Industry – Queensco-Unity Dairyfoods Co-operative Association Limited and Malanda Dairyfoods Limited Award – State 2004* with an operative date from 10 November 2004. The form of the Award is to be settled by the Registrar in compliance with the document filed in the Registry together with the addition to clause 5.2.2 referred to herein.

The Registrar is to take the necessary steps to have declared obsolete as from 10 November 2004 the QUD Agreement.

B.J. BLADES, Commissioner.

*Hearing Details:*

2004 11 October  
10 November

Released: 12 November 2004

*Appearances:*

Mr L. Moloney, of Livingstones, with him Ms H. Sandell, for Queensco – Unity Dairyfoods Co-operative Association Limited and Malanda Dairyfoods Limited.  
Mr C. Simpson for The Australian Workers' Union of Employees, Queensland.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – application for amendment*

**Chief Executive Officer, Department of Industrial Relations AND The Construction, Forestry, Mining & Energy,  
Industrial Union of Employees, Queensland and Others  
(No. B1861 of 2003)**

**BUILDING TRADES PUBLIC SECTOR AWARD – STATE 2002**

COMMISSIONER THOMPSON

11 November 2004

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 11 November 2004, Commissioner Thompson stated:

“This matter came before the Commission as a result of an application received on 13 November 2003 from the Department of Industrial Relations (DIR), where they indicated that the *Building Trades Public Sector Award – State 2002* was amended from 10 March 2003 to include, amongst other things, a new classification structure. They further went on to indicate that the weekly wage rates described for the various classifications were incorrect as they were calculated by applying the percentage relativities to rates that were inclusive of safety net adjustments.

The application itself sought to correct the rates which should have applied from 10 March 2003.

This matter has been subject to numerous hearings in the Commission over that period of time, where the parties, in the view of the Commission, have worked constructively towards reaching consent for the changes to occur.

An example of the cooperation that existed between the parties was that the Local Government Association of Queensland (Incorporated) (LGA) through Mr Roger Beer corresponded with 60 plus Councils advising of what was occurring and seeking information back from those Councils in respect of persons that may have been potentially negatively impacted by the said changes that the application sought to make.

The disadvantaged persons, as such, in general terms, appear to be, on the submissions that have been put in this matter, tradespersons who are likely to suffer reduction in their rate of pay if this amendment is granted by the Commission.

Despite all the good intentions, The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU) and The Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees (PGEU) are still maintaining a position of concern in respect of those persons. However, in the view of the Commission, the time has come for this matter to be finalised.

Mr Nicholas Gillespie (DIR) sought to have the matter determined by the Commission today with Mr Beer supporting the application. Support also came from Mr Rhett Moxham on behalf of the Australian Building Construction Employees and Builders' Labourers' Federation (Queensland Branch) Union of Employees (BLF). In the case of Mr Moxham, it would appear from the submissions before the Commission that members that he might represent, or be able to represent, would benefit from the amendment. Mr Jason Stein (CFMEU), whilst indicating to the Commission concerns in respect of persons that have been paid rates as per the previous decision would now be somewhat disadvantaged by the granting of the amendment. He left the decision to the Commission but sought a recommendation in how those concerns might be best dealt with.

It is the intention of the Commission to, in effect, grant the amendment as sought, from the date sought, that being 10 March 2003. In granting that application the Commission does feel though, having had the opportunity over the past 12 months to deal with this matter and to hear all of the concerns raised by the Unions, to put the following recommendation on record.

Following the gazetting of the amendment, in the view of the Commission, it would assist in maintaining good industrial relations within the workplace for employers who have employees that are likely to be disadvantaged as a result of the correction to make every effort to firstly communicate with those employees and where those employees are identified as suffering a negative income reduction, then the Commission is of the view that no deduction should occur and what would be appropriate would be that the rate of pay for that particular person continue until such time as the next increase in remuneration is applicable to that person and the rate over and above what the true and correct rate is to be absorbed into that amount.

In terms of the amounts already paid, there would, on the surface, be a case for a recovery of such monies, but the Commission would call upon the employers to give consideration to, in effect, not issuing a request for the recoveries of that money.

The reason that the Commission would make such a recommendation is that the employees have received those monies not for any reason other than the fact that there was a mistake made in the original rates that were put before the Commission.

Should any differences arise in respect of the persons who are likely to be disadvantaged, the Commission is of the view that it may be best dealt with by coming back to the Commission if the matter is unable to be resolved at a workplace level, then dealt with in accordance with a notification of dispute whereby the parties would have the benefit of being able to rely upon this recommendation of the Commission.

I order accordingly.”.

Dated 11 November 2004.

By the Commission,  
[L.S.] G.D SAVILL,  
Industrial Registrar.

*Appearances:*

Mr N. Gillespie, of Department of Industrial Relations, Applicant.  
Mr J. Stein, of The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland, Respondent.  
Ms P. Rogers, of The Plumbers and Gasfitters Employees Union of Australia, Queensland Branch, Union of Employees.  
Mr R. Moxham, Australian Building Construction Employees and Builders’ Labourers’ Federation (Queensland Branch) Union of Employees, Respondent.  
Mr R. Beer, Local Government Association of Queensland (Incorporated), Interested Party.

*Hearing Details:*  
2003 5 December  
2004 16 September  
4 and 11 November

Released: 15 November 2004

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QUEENSLAND INDUSTRIAL REGISTRAR

*Industrial Relations Act 1999 – s. 482 – arrangement for conduct of elections*

**Queensland Mechanical Cane Harvesters Association, Union of Employers (No. Q30 of 2004)**

REGISTRAR SAVILL

15 November 2004

Request for Conduct of Elections – Prescribed Information – Method of Election – Electoral Commission to Conduct Elections.

DECISION

On 11 November 2004 the Queensland Mechanical Cane Harvesters Association, Union of Employers lodged in the Registry under s. 481 of the *Industrial Relations Act 1999* the information as prescribed in s. 36 of the *Industrial Relations Regulation 2000*, in relation to the conduct of an election by the Electoral Commission for the following positions of office:

Office	Number of Positions	Method of Election
<b>State Executive Member of a Branch:</b>		Direct vote of members of a Branch
Mulgrave	1	
Mossman	1	
Innisfail	1	
Babinda	1	
Herbert River	1	
Burdekin	1	
Proserpine	1	
Mackay	1	
Sarina	1	
Bundaberg	1	
Isis	1	
Maryborough	1	
Rocky Point	1	
State President	1	Elected by and from State
Senior Vice President	1	Executive Members
Junior Vice President	1	

Office	Total Number of Positions	Method of Election
Branch Executive - President, Vice President and Secretary/Treasurer		
Mulgrave	3	Direct vote of members of a Branch
Mossman	3	
Innisfail	3	
Babinda	3	
Herbert River	3	
Burdekin	3	
Proserpine	3	
Mackay	3	
Sarina	3	
Bundaberg	3	
Isis	3	
Maryborough	3	
Rocky Point	3	

**Method of Election**

The methods of elections under the Rules of the Organisation for the above offices are as stated above.

**Branches**

The Industrial Organisation advises the current Branches for the purposes of these elections are as stated above. The Branch Executive consists of a President Vice-President and Secretary/Treasurer as well as the State Executive Representative for each Branch.

**Conduct of Elections**

I have considered the request, the Act and Rules and I find that the elections being sought are for positions of office within the meaning of the Act and are required to be held under the Rules of the Industrial Organisation.

Under section 482 I am making arrangements for the elections of the above-named positions to be conducted by the Electoral Commission of Queensland.

Dated 15 November 2004.

G. SAVILL,  
Industrial Registrar.

Released: 15 November 2004

#####

QUEENSLAND INDUSTRIAL REGISTRAR

*Industrial Relations Act 1999 – s. 482 – arrangement for conduct of elections*

**Queensland Teachers Union of Employees (No. Q31 of 2004)**

REGISTRAR SAVILL

15 November 2004

Request for Conduct of Elections – Prescribed Information – Casual Vacancies – New Position – Expired Terms – Methods of Elections – Electoral Commission to Conduct Elections.

DECISION

On 11 November 2004 the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in s. 36 of the *Industrial Relations Regulation 2000*, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:

Office	Number of Positions	Method of Election
<i>Area Council Representative of a Branch</i>		
<b>Metropolitan North and Central Area Council</b> .....		Direct vote by members of the Branch
Brisbane Central (term expired) .....	2	
Camp Hill (term expired).....	1	
East Moreton (term expired).....	2	
The Gap (term expired) .....	1	
<b>Metropolitan South and East Area Council</b>		
Macgregor Rochedale (term expired).....	2	
Woodridge (term expired) .....	1	

**Metropolitan West Area Council**

Centenary (new positions) .....2  
 Ipswich Central (term expired).....1  
 Ipswich East (casual vacancy).....1  
 Sherwood (casual vacancy) .....1

**North Queensland Area Council**

Thuringowa (term expired).....1  
 Townsville (term expired) .....1

**South Coast Beaudesert Area Council**

Coomera (new position) .....1  
 Gold Coast North (term expired).....1  
 Gold Coast South (term expired).....2  
 Merrimac (term expired).....1  
 Nerang (casual vacancy).....1

**South Queensland Area Council**

Balonne (term expired) .....1  
 Darling Downs Central (term expired).....1  
 Lockyer (term expired) .....1  
 Western Downs (term expired).....1

**Sunshine Coast Area Council**

Caboolture (term expired).....1  
 Coolum (term expired) .....1  
 Pine Rivers North (term expired) .....1  
 Redcliffe (term expired) .....1

*Area Council Officers*

**North Queensland Area Council** .....  
 Treasurer 1  
**South Coast Beaudesert Area Council** .....  
 Treasurer 1, Secretary 1

Collegiate vote by members of the Area Council

**Timing of Elections**

The Rules prescribe that nominations shall be called by advertisement in the "Queensland Teachers' Journal" with the closing date of nominations no earlier than twenty-one days after the date upon which such notice first appears in the Journal. I am advised that the next Journal is to be printed on 25 November 2004.

**Method of Election**

I am satisfied that the methods of election are as specified above.

**Conduct of Elections**

I have considered the request, the Act and Rules and I find that the elections being sought are for positions of office within the meaning of the Act and required to be held under the Rules of the Industrial Organisation.

Under s. 482 of the *Industrial Relations Act 1999*, I am making arrangements for the elections of the above named positions to be conducted by the Electoral Commission of Queensland.

Dated 15 November 2004.

G. SAVILL,  
Industrial Registrar.

Released: 15 November 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 125 – application for amendment

**Department of Industrial Relations AND The Queensland Public Sector Union of Employees**  
(No. B1527 of 2004)

QUEENSLAND PUBLIC SERVICE AWARD – STATE 2003

COMMISSIONER ASBURY

9 November 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 9 November 2004, this Commission orders that the said Award be amended as follows as from 9 November 2004:

By deleting Section 9 of Schedule 3 and inserting the following in lieu thereof:

**“Section 9 – Department of Justice and Attorney-General**

**S3.9.1 *Supreme and District Court Bailiffs***

(a) Hours of Work

The ordinary hours of duty are 36.25 hours per week to be worked between the hours of 8.30 a.m. and 5.30 p.m. Monday to Friday inclusive.

(b) Overtime

Where a bailiff is required to remain with a jury on lock-up, overtime shall be paid in accordance with the following:

*Weekdays*

5.30 p.m. to 8.30 p.m.	time and a-half
8.30 p.m. to 12.30 a.m.	double time
12.30 a.m. to 4.30 a.m.	sleep time (ordinary time)
4.30 a.m. to 7.00 a.m.	time and a-half
7.00 a.m. to 8.30 a.m.	double time

*Weekends*

Friday	5.30 p.m. to 8.30 p.m.	time and a-half
	8.30 p.m. to 12.30 a.m.	double time
Saturday	12.30 a.m. to 4.30 a.m.	sleep time (ordinary time)
	4.30 a.m. to 7.00 a.m.	time and a-half
	7.00 a.m. to 12.30 a.m.	double time
Sunday	12.30 a.m. to 4.30 a.m.	sleep time (ordinary time)
	4.30 a.m. to 12.30 a.m.	double time
Monday	12.30 a.m. to 4.30 a.m.	sleep time (ordinary time)
	4.30 a.m. to 7.00 a.m.	time and a-half
	7.00 a.m. to 8.30 a.m.	double time

All other overtime performed by Bailiffs shall be in accordance with clause 6.4 of this Award.

(c) Rest pauses and meal breaks

Employees are entitled to rest pause(s) totalling 20 minutes per day to be taken at times to suit operational requirements as determined by the employer.

When on jury lock-up, the hours of duty will be inclusive of meal times and no deduction shall be made from the employee's wages.

Employees on jury lock-up are to be provided with meals.

(d) Casual Employees

The minimum engagement for a casual employee shall be 4 hours

(e) Public Holidays

Entitlements to public holidays shall be in accordance with clause 7.7 of this Award and the *Industrial Relations Act 1999* provided that no additional public holiday penalties shall be payable in relation to sleep time (i.e. 12.30 a.m. to 4.30 a.m.) where a bailiff is required to remain with the jury on lock-up.

**S3.9.2 *Court Reporters***

(a) Hours of Work

The ordinary hours of duty are 37 hours per week.

(b) Annual Leave

Court reporters are entitled to an additional 2 weeks annual leave per year as special leave in part compensation for any overtime worked.”.

Dated 9 November 2004.

By the Commission,  
[L.S.] G.D. SAVILL,  
Industrial Registrar.

Operative Date: 9 November 2004  
Amendment – Schedule 3  
Released: 12 November 2004

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – making, amending and repealing awards*

**Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND  
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others  
(No.3) (No. B1033 of 2003)**

**SECURITY INDUSTRY (CONTRACTORS) AWARD – STATE**

AMENDMENT

PRESIDENT HALL  
COMMISSIONER ASBURY  
COMMISSIONER THOMPSON

23 April 2004

This matter coming on for hearing before the Full Bench of the Commission at Brisbane on 23 April 2004, this Commission orders that the said repealed Award be amended as follows as from 24 June 2003:

1. By deleting clause 5.1.6 and inserting the following in lieu thereof:

“5.1.6 All employees – The minimum weekly wage payable to employees in the Southern Division (Eastern District) shall be as follows:

<u>Classification Level</u>	Wages Per Week From 01/09/2002
	\$
Security Officer Level 1.....	470.80
Security Officer Level 2.....	488.80
Security Officer Level 3.....	501.40
Security Officer Level 4.....	514.00
Security Officer Level 5.....	538.70

<u>Classification Level</u>	Wages Per Week From 24/06/2003
	\$
Traffic Controller Level 1 (first 12 months in the industry)	\$473.20
Traffic Controller Level 2 (after 12 months in the industry)	\$481.60
Traffic Controller Level 3 (after 16 months in the industry)	\$491.50

<u>Classification Level</u>	Wages Per Week From 01/09/2003
	\$
Security Officer Level 1.....	489.65
Security Officer Level 2.....	508.35
Security Officer Level 3.....	521.45
Security Officer Level 4.....	534.55
Security Officer Level 5.....	560.25

<u>Classification Level</u>	Wages Per Week From 01/09/2003
	\$
Traffic Controller Level 1 (first 12 months in the industry)	\$492.15
Traffic Controller Level 2 (after 12 months in the industry)	\$500.90
Traffic Controller Level 3 (after 16 months in the industry)	\$511.20

<u>Classification Level</u>	Wages Per Week From 01/09/2004
	\$
Security Officer Level 1.....	509.25
Security Officer Level 2.....	528.70
Security Officer Level 3.....	542.30
Security Officer Level 4.....	555.95
Security Officer Level 5.....	582.65

<u>Classification Level</u>	Wages Per Week From 01/09/2004
Traffic Controller Level 1 (first 12 months in the industry)	\$511.85
Traffic Controller Level 2 (after 12 months in the industry)	\$520.95
Traffic Controller Level 3 (after 16 months in the industry)	\$531.65

**Note:** The above rates include safety net adjustments of \$8.00 per week and \$10.00 per week. They also include increases of 5% (effective 19 January, 1998), 4.5% (effective 19 January, 1999), 3% (effective 20 March, 2000), 3% (effective 20 March, 2001), 4% (effective 1 September 2002), 4% (effective 1 September 2003) and 4% (effective 1 September 2004).

The above rates are not to be adjusted for State Wage Case increases which have been, or may be, awarded by the Queensland Industrial Relations Commission in 2002, 2003 or 2004. The percentage based increases are as a result of special cases B1521 of 1994, B1658 of 1999 and B771 of 2002.”.

2. By inserting a new clause 5.3.13 as follows:

“5.3.13 *Travel Allowance – (Traffic Controller)* – Employees travelling directly between their home and a traffic control workplace at which the employee is rostered to work using transport not supplied by the Employer will be paid the following allowance:

Per shift from 10/09/2003	Per shift from 01/09/2004
\$12.60	\$13.10

This allowance does not apply where the Employer offers to provide transport.”.

Dated 23 April 2004.

By the Commission,  
[L.S.] G.D. SAVILL,  
Industrial Registrar.

Operative Date: 24 June 2003  
Amendment – Classification of wages and travel allowances  
Released: 17 November 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 125 – making, amending and repealing awards

**Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND  
Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others  
(No.3) (No. B1033 of 2003)**

**SECURITY INDUSTRY (CONTRACTORS) AWARD – STATE 2004**

AMENDMENT  
(Correction of Error)

PRESIDENT HALL  
COMMISSIONER ASBURY  
COMMISSIONER THOMPSON

15 November 2004

Whereas an error occurred in the amendment to the abovementioned award as published in the *Queensland Government Industrial Gazette* of 12 November 2004, Vol. 177, No. 11, pages 617-618, the following correction is made to be effective as from 1 December, 2003:

1. By deleting the preamble to the amendment and inserting the following in lieu thereof:

“This matter coming on for hearing before the Full Bench of the Commission on 23 April 2004, this Commission orders that the said Award be amended as follows as from 1 December 2003:”.

2. By deleting the phrase “24 June 2003” from the ending of the amendment and inserting “1 December 2003” in lieu thereof.

Dated 15 November 2004.

By the Commission,  
[L.S.] G.D. SAVILL,  
Industrial Registrar.

Operative Date: 1 December 2003  
Amendment – Classification of wages and travel allowances (Correction of Error)  
Released: 17 November 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 137 – application for order

**Training and Employment Recognition Council AND The Australian Workers’ Union of Employees,  
Queensland And Others (No. B1625 of 2004)**

**ORDER – APPRENTICES’ AND TRAINEES’ WAGES AND CONDITIONS  
(EXCLUDING CERTAIN QUEENSLAND GOVERNMENT ENTITIES) 2003**

COMMISSIONER BROWN

15 November 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 15 November 2004, this Commission orders that the said Order be amended as follows as from 15 November 2004:

By deleting clauses 3.2.1 and 3.3 from Schedule 4 “Building and Construction and Civil Construction Industries” and inserting the following in lieu thereof:

“3.2.1 *Civil Construction Training Package*

(a) Trainees registered in traineeships based on AQF 2 qualifications in the above training package in the following:

- Bituminous Surfacing and,
- Civil Construction Labouring

shall receive wages in accordance with the following Table.

Wage Level	Minimum Training Requirements on Entry	% of CW 5 rate or equivalent specified in the relevant industrial instrument
1	Prior to the attainment of the minimum training requirements specified for Wage Level 2	68
2	On attainment of 11 of the competencies required for the Certificate Level II in Construction, <i>or</i> twelve months after commencing Wage Level 1 whichever is the earlier	78

NOTE:

Upon successful completion of the Certificate Level II in Construction, the trainees shall exit at the CW3 (92.4%) rate of the Award. However, should a person who has successfully completed Certificate Level II in Construction enter into a training contract to undertake a Certificate Level III in Construction, apprenticeship or traineeship, they shall commence at Wage Level 3, i.e. 90% of the CW5 rate of the Award, for the remaining period of the training period of the training program as per the following table.

(b) Trainees registered in traineeships based on AQF 3 qualifications in the above training package in the following:

- Bituminous Surfacing,
- Bridge Construction and Maintenance,
- Foundation Works,
- Pipelaying,
- Railway Construction,
- Road Construction and Maintenance,
- Road Marking,
- Trenchless Technology and
- Tunnel Construction

shall receive wages in accordance with the following Table.

Wage Level	Minimum Training Requirements on Entry	% of CW 5 rate or equivalent specified in the relevant industrial instrument
1	Prior to the attainment of the minimum training requirements specified for Wage Level 2	68
2	On attainment of one third of the competencies required for the Certificate Level III in Construction, <i>or</i> twelve months after commencing Wage Level 1 whichever is the earlier	78
3	On attainment of two thirds of the competencies required for the Certificate Level III in Construction, <i>or</i> twelve months after commencing Wage Level 2 whichever is the earlier	90

3.3 All references in clause 3 to the CW5 rate means the CW5 rate as specified in the Civil Construction, Operations and Maintenance General Award – State 2003.”.

Dated 15 November 2004.

By the Commission,  
[L.S.] G.D. SAVILL,  
Industrial Registrar

Operative Date: 15 November 2004  
Amendment – Schedule 4  
Released: 17 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*

**MILK TREATMENT, MILK PRODUCTS MANUFACTURE AND MILK ETC., DISTRIBUTION AWARD – NORTHERN AND MACKAY DIVISIONS 2003**

**(Gazette 29 August 2003)**

(AR181 of 2002)

DEPUTY PRESIDENT SWAN  
COMMISSIONERS EDWARDS AND BECHLY

15 November 2004

AWARD REVIEW  
(Correction of Error)

WHEREAS an error occurred in the Award as published in the *Queensland Government Industrial Gazette* of 29 August 2003, Vol. 171, No. 18, pages 1481-1498, the following correction is made to be effective as from 18 August 2003:

By deleting clause 5.3.4(a) and inserting the following in lieu thereof:

- “(a) Afternoon shift 12.5% (or \$9.70 whichever is the greater)
- Night shift 15% (or \$9.70 whichever is the greater)”.

Dated 15 November 2004.

G.D. SAVILL,  
Industrial Registrar.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 474  
Industrial Relations Regulation 2000 – s. 20*

*(No. U23 of 2004)*

**NOTICE OF APPLICATION FOR AMENDMENT OF ELIGIBILITY**

**RULE OF AN INDUSTRIAL ORGANISATION**

NOTICE is hereby given that an application has been made to register an amendment to the Eligibility Rules of **Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers**. Interested persons may obtain a copy of the application from the Applicant.

All Notices of Objection to such registration must be lodged in the Registry within thirty-five days from the date of publication of this Notice.

Dated 15 November 2004.

G. SAVILL,  
Industrial Registrar.