

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2019] QIRC 127

PARTIES: **National Retail Association Limited, Union of Employers**
(Applicant)

CASE NO: TH/2019/4

PROCEEDING: Application

DELIVERED ON: 3 September 2019

HEARING DATE: 2 September 2019

MEMBER: Industrial Commissioner Dwyer

HEARD AT: Brisbane

ORDER:

1. Pursuant to s 5(1)(c) of the *Trading (Allowable Hours) Act 1990* ('the Act') the Commission declares that the Brisbane Festival is a special event for the purposes of s 5 of the Act as it is a unique event of local and State significance.
2. This declaration applies for the nominated period of 5 September 2019 to 29 September 2019.
3. The area to which this declaration applies is the geographic area of the Wards of the City of Brisbane as identified in the map attached to the affidavit of Mr Stout dated 15 August 2019 and marked Exhibit B, namely:
 - Central Ward
 - The Gabba Ward

- **Morningside Ward**
- **Coorparoo Ward**
- **Tennyson Ward**
- **Walter Taylor Ward**
- **Paddington Ward**

4. **In addition to the areas identified in 3 above, the declaration also applies to the geographic area referred to in s 16A of the Act as the Hamilton North Shore Area.**
5. **The statutory protections set out at s 36B of the Act will apply to all employees engaged by non-exempt shops covered by this declaration during the nominated period.**

CATCHWORDS:

INDUSTRIAL LAW – TRADING HOURS – APPLICATION FOR DECLARATION OF SPECIAL EVENT – application to classify all non-exempt shops as exempt shops in specified wards of the City of Brisbane for a specified period during a special event, namely, the Brisbane Festival.

LEGISLATION:

Trading (Allowable Hours) Act 1990 (Qld) s 5, 36B

Industrial Relations Act 2016 (Qld) s 539

APPEARANCES:

Mr M. Cole, of the applicant

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

Reasons for Decision

Introduction

- [1] By way of application filed on 8 August 2019, the National Retail Association, Union of Employers ('NRA') applied for a declaration pursuant to s 5 of the *Trading (Allowable Hours) Act 1990* ('the Act').
- [2] A declaration was sought in relation to the upcoming Brisbane Festival. The declarations being sought proposed to cover what was described in the application as 'the Local Government Area of Brisbane' for a period running between 5 September 2019 and 29 September 2019 inclusive.
- [3] The application was supported by two affidavits by David Stout, Manager Policy, with the NRA. Mr Stout filed affidavits on 8 August 2019 and 15 August 2019.
- [4] The affidavit of 8 August 2019 attached written submissions for the NRA at Exhibit A. The affidavit of 15 August 2019 attached, at Exhibit B, a map produced by the Electoral Commission Queensland setting out the divisional boundaries for the local government area of Brisbane as that 2015. Exhibit B was said to be the geographic area proposed to be covered by the declaration.
- [5] On 21 August 2019 the Shop Distributive and Allied Employees (Queensland Branch) Union of Employees ('the SDA') applied for leave to be heard in this application pursuant to s 539 of the *Industrial Relations Act 2016*. Mr Darren Gaffy, Senior Industrial Officer for the SDA filed an affidavit supporting the SDA application to be heard on 21 August 2019.
- [6] The SDA was subsequently granted leave to be heard on this application and filed written submissions on 22 August 2018. The SDA filed amended submissions on 30 August 2019.
- [7] The matter proceeded to hearing on 2 September 2019.

Hearing

- [8] There were extensive written submissions by the NRA with respect to the unique nature of the Brisbane Festival, and its significance for cultural, economic and tourism reasons. The Brisbane Festival is an event with which most residents will be familiar. It incorporates a wide variety of theatre, cabaret, musical and other artistic performances at venues throughout central Brisbane and concludes with a colossal display of fireworks, known well to all residents as 'Riverfire'.
- [9] While the SDA questioned the need for a declaration in their written submissions, they did not disagree that the Brisbane Festival was a significant event locally.¹

¹ Paragraph 10 of the Amended Submissions of the SDA.

[10] It was apparent from their written submissions, and submissions made orally at the hearing, that the SDA was predominately asking the Commission to make a vigorous assessment of this application and to apply appropriate limitations and protections for its members.

[11] At the commencement of the hearing I indicated to the parties that I held some concern about the broad geographic scope sought in the declaration and invited comment from the parties. Having regard to the map provided by Mr Cole, it was apparent that the NRA were seeking to extend the geographic coverage of the declaration to the very outer reaches of the City of Brisbane including e.g. D'Aguiar National Park in the north west, Deagon in the north and Calamvale in the south. These locations are all very geographically remote from the venues and areas that are utilised for the festival in and around central Brisbane.

[12] The broad scope was acknowledged by Mr Cole as unique for such an application.

[13] Mr Gaffy for the SDA assisted to narrow the issues in dispute between the parties by confirming that the concerns held by the SDA with respect to the application were limited to:

- the geographic scope of the application; and
- the need for protections for their members that were consistent with the protections set out for employees in s 36B of the Act.

[14] Mr Cole, who appeared for the NRA, agreed that the NRA might be amenable to a reduced geographic scope of their application. Mr Cole also indicated that the NRA had no difficulty with an order including protections for employees consistent with s 36B of the Act.

[15] The matter was briefly stood down to allow the parties to attempt to achieve a consent position with respect to the geographic application of any subsequent declaration. Notwithstanding the efforts of the parties, a complete agreement with respect to the geographic application of any declaration could not be fully achieved.

[16] What did appear to be acceptable was a geographic scope that would be limited to the following areas by reference to their Brisbane City Council Ward names as they appear in Exhibit B to the affidavit of Mr Stout filed 15 August 2019:

- Central Ward
- the Gabba Ward
- Morningside Ward

- Coorparoo Ward
- Tennyson Ward
- Walter Taylor Ward
- Paddington Ward

[17] In addition to these Wards, there was agreement as to the limited application of any declaration to an area contained within the Hamilton Ward, and which is referred to at s 16A of the Act as 'Hamilton North Shore Area'. This was an area commonly understood between the parties as the strip of restaurants and other retail venues along the Hamilton reach of the Brisbane River.

[18] Where the parties differed with respect to the geographic scope of the declaration was with respect to its application to the retail stores at the venues operated by Westfield Group at Chermside, Carindale, and Garden City.

[19] Mr Cole for the NRA sought to include these retail venues in the scope of the declaration. He submitted that each of these venues was an important public transport 'hub' for persons travelling to and from events that formed part of the Brisbane Festival. For comparison, he alluded to anecdotal accounts of increased retail activity at such venues during the Commonwealth Games on the Gold Coast.

Statutory Provisions

[20] The applicant submits that Brisbane Festival fits the description of a special event under the Act. Relevantly, s 5 of the Act provides:

5 Exempt shops

(1) An *exempt shop* is–

- (a) a shop of a description mentioned in schedule 1AA used predominantly for selling goods by retail, or for supplying services, a reasonable person would expect to be sold or supplied in that shop;
- (b) an independent retail shop; or
- (c) a shop operating in a stated area for an event –
 - (i) that is a unique or infrequent event of local, State or national significance; and
 - (ii) declared by the industrial commission to be a special event for this paragraph

(2) A declaration for subsection (1)(c) –

- (a) May be made by the industrial commission on an application by an organisation, chief executive, local government or any other person; and
- (b) must state the following–

- (i) the details of the event the subject of the declaration;
 - (ii) the period for which the declaration applies;
 - (iii) the area to which the declaration applies; and
- (c) must be published on the QIRC website.
- (3) In deciding whether to declare an event to be a special event for subsection (1)(c), the industrial commission–
- (a) must consider–
 - (i) The cultural, religious or sporting significance of the event; and
 - (ii) The significance of the event to the economy and the tourism industry; and
 - (b) May consider a submission made by a local government for an area in which the declaration is likely to have an impact.

[21] The Act provides for non-exempt shops operating in a stated area for an event to be considered exempt for the period of that event if the Commission declares the event to be a "special event".

[22] In deciding whether an event is a "special event", the Commission must consider the cultural, religious or sporting significance of the event, and the significance of the event to the economy and the tourism industry.

[23] Further, the Commission may consider a submission made by a local government for an area in which the declaration is likely to have an impact. In this regard I note that no submissions were received from the Brisbane City Council in this matter.

Consideration

[24] The statutory regime set out in s 5 of the Act provides the Commission with a broad discretion with respect to the making of a declaration. The discretion at s 5(2)(a) is unfettered save for certain matters as s 5(3). Section 5(3) contains mandatory considerations on the discrete issue of determining whether the Brisbane Festival is a 'special event' within the meaning of the Act.

[25] Section 5(3) requires me to have regard to:

- the cultural significance of the Brisbane Festival; and
- the significance of the Brisbane Festival to the economy and the tourism industry.

- [26] Having reviewed the submissions of the NRA and a program for the 2019 Brisbane Festival that is accessible online,² I have no difficulty concluding that the Brisbane Festival is both culturally significant (at least on a local and State level) and, significant in respect of the local economy and the tourism industry.
- [27] I note that there was no opposition by the SDA to these propositions in submissions or at the hearing.
- [28] For these reasons I find that the Brisbane Festival is a 'special event' for the purposes of the Act because it has cultural, economic, and tourism industry significance at a local and State level, however, that is not the end of the matter. I remain concerned about the geographic breadth of the declaration sought by the NRA.
- [29] While s 5(3) imposes certain mandatory considerations with respect to the question about whether a matter is a 'special event', it does not detract from or limit the discretion found at s 5(2)(a) of the Act. Section 5(2)(a) allows for a broad discretion which, in my view, may be informed by other relevant matters.
- [30] An object of the Act is to decide trading hours for non-exempt shops and independent retail shops throughout Queensland.³ Section 5 of the Act, upon which the NRA now relies, allows for retailers to be granted exemption from the regulations imposed by the Act, in limited circumstances. Given the objects of the Act, it is necessary to ensure that any exemptions are carefully considered.
- [31] The NRA conceded at the outset of the hearing that this application covered a uniquely broad geographic area by comparison to other such applications. As such, I consider that the application requires careful consideration.
- [32] Having regard to the program for the Brisbane Festival available on line, it is clear that the events that make up the festival are at venues that are almost exclusively contained within the central precincts of Brisbane e.g. the CBD and Southbank. The vast majority of events are at the various theatres within the Queensland Performing Arts Complex ('QPAC'), City Hall, the river stage at Gardens Point, or the Tivoli in Fortitude Valley.
- [33] I note also a number of events being held at the 'Spiegeltent'. While I was not provided with any information about the venues, I am aware that the Spiegeltent is temporary theatre venue which has, in previous years, been constructed on parkland adjoining QPAC or in King George square in the CBD.

² A 2018 program was available at hearing, and the parties agreed it contained similar content to the 2019 program.

³ *Trading (Allowable Hours) Act 1990* (Qld) s 5(a).

- [34] There are very few exceptions during the three-week festival to this otherwise clear and consistent distribution of venues throughout central Brisbane. No evidence was produced to inform the Commission as to varied needs or patterns of retail operators in affected areas, or patrons of the festival. However, the common experience is that there is typically a significant increase in activity amongst patrons of the festival and retail operators of all kinds in and around the venue areas. Such activity is both directly related and ancillary to events that make up the festival.
- [35] For this reason, I am inclined to exercise my discretion to grant the declaration, but in more limited geographic terms than those sought by the NRA. I am satisfied of the need to extend exemptions to the geographic areas of the City of Brisbane Wards identified above. I do not consider it appropriate or necessary to grant exemptions at any of the Westfield retail venues at Chermside, Carindale, or Garden City.

Declaration

- [36] The application for declaration sought by the NRA is, subject to the amendments made at my discretion, granted and is as follows:

- 1. Pursuant to s 5(1)(c) of the Act the Commission declares that the Brisbane Festival is a special event for the purposes of s 5 of the Act as it is a unique event of local and State significance.**
- 2. This declaration applies for the nominated period of 5 September 2019 to 29 September 2019.**
- 3. The area to which this declaration applies is the geographic area of the Wards of the City of Brisbane as identified in the map attached to the affidavit of Mr Stout and dated 15 August 2019, marked Exhibit B, namely:**
 - Central Ward**
 - The Gabba Ward**
 - Morningside Ward**
 - Coorparoo Ward**
 - Tennyson Ward**
 - Walter Taylor Ward**
 - Paddington Ward**
- 4. In addition to the areas identified in 3 above, the declaration also applies to the geographic area referred to in s 16A of the Act as the Hamilton North Shore Area.**

5. The statutory protections set out at s 36B of the Act will apply to all employees engaged by non-exempt shops covered by this declaration during the nominated period.

[37] This declaration will be published on the Queensland Industrial Relations Commission website pursuant to s 5 of the Act.

[38] I order accordingly.