

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *National Retail Association Limited, Union of Employers* [2020] QIRC 031

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

CASE NO: TH/2020/1

PROCEEDING: Application

DELIVERED ON: 27 February 2020

HEARING DATE: 21 February 2020

MEMBER: Merrell DP

HEARD AT: Brisbane

DECLARATION:

1. Pursuant to s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, I declare that the Toowoomba Royal Show is a special event.
2. The declaration shall apply for the period commencing on Thursday, 26 March 2020 and concluding on Saturday, 28 March 2020.
3. The declaration applies to:
  - from the point of the intersection of North Street and Ruthven Street travelling north until the intersection with Griffiths Street;
  - travelling west on Griffiths Street then to the western end of Hogg Street;
  - from that point drawing a line south-west to the intersection of Devine Road and Drayton-Wellcamp Road;
  - then travelling south-east on Drayton-Wellcamp Road and then Euston Road until the intersection with Boundary Street South;

- from that point drawing a line to the intersection of West Street and Nelson Street;
- then travelling east along Nelson Street then north-east along Rowbotham Street to its intersection at Tourist Road;
- then drawing a line from the intersection of Rowbotham Street/ Tourist Road to the intersection of Mary Street and North Street;
- from that point, drawing a line north-west to the intersection of Mary Street and North Street; and
- then travelling west from Ruthven Street and concluding.

## CATCHWORDS:

INDUSTRIAL LAW - TRADING HOURS - APPLICATION FOR DECLARATION OF SPECIAL EVENT - application to classify all non-exempt shops as exempt shops in part of the Toowoomba area for a specified period during a special event, namely, the Toowoomba Royal Show - whether the Toowoomba Royal Show is a special event within the meaning of s 5 of the *Trading (Allowable Hours) Act 1990* - whether power exists to make ancillary orders about protection of employees - declaration made

## LEGISLATION:

*Acts Interpretation Act 1954*, s 32CA(1)

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

## CASES:

*Alice Springs Town Council v Mpweteyrre Aboriginal Corporation* (1997) 94 LGERA 330

*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194

*Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153

*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24

*Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187

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

*R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 180 CLR 322

*Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125

*Trading Hours-Exempt Shops-Commonwealth Games* (Queensland Industrial Relations Commission, Deputy President Swan, 13 December 2017)

*Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26; (2008) 166 FCR 108

**APPEARANCES:**

Mr A Millman of the National Retail Association Limited, Union of Employers

Ms L Armstrong of the Shop, Distributive and Allied Employees Association (Queensland Branch), Union of Employees

**Reasons for Decision**

**Introduction**

- [1] By application filed on 4 February 2020, the National Retail Association Limited, Union of Employers ('the NRA') applied for a declaration, pursuant to s 5(2) of the *Trading (Allowable Hours) Act 1990* ('the Act'), that the Toowoomba Royal Show ('the Show'), to be held from Thursday, 26 March 2020 to Saturday, 28 March 2020, is a special event within the meaning of s 5(1)(c)(ii) of the Act ('the NRA's Application'). Accompanying the NRA's Application was an affidavit of Mr David Stout, affirmed on 3 February 2020 ('Mr Stout's affidavit').
- [2] The effect of such a declaration, if made, would be that a non-exempt shop operating in the Toowoomba area as particularised in the NRA's Application would be an exempt shop for the period for which the declaration applies. Part 4 of the Act restricts the trading hours of non-exempt shops.
- [3] On 5 February 2020, a Directions Order was issued which required that the NRA's Application and the Directions Order be served on the Toowoomba Regional Council, the Shop, Distributive and Allied Employees Association (Queensland Branch), Union of Employees ('the SDA'), The Australian Workers' Union of Employees, Queensland, the Local Government Association of Queensland Limited, the Executive Director,

Industrial Relations, Office of Industrial Relations, Department of Education and the Chief Industrial Inspector, Office of Industrial Relations, Department of Education.

- [4] The Directions Order provided that those who may be affected by the Application may make a formal application seeking leave to be heard and, if leave was granted, such a person was to file an outline of submissions and serve those submissions on the NRA by 10 February 2020.
- [5] The Application and Directions Order were published on the Commission's website.
- [6] On 5 February 2020, the SDA made an application seeking leave to be heard. On 6 February 2020, the SDA's application for leave to be heard was approved. The SDA filed and served an outline of submissions.
- [7] The question for my determination is whether I should make the declaration as sought.

### **The provisions of the Act**

- [8] Section 5 of the Act relevantly 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; or
  - (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
 

*Examples—*

      - the 2018 Commonwealth Games
      - the Weipa Fishing Classic event
    - (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) 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.

[9] In deciding whether an event, that is a unique or infrequent event of local, State or national significance, is a special event for the purposes of s 5(1)(c)(ii) of the Act, 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.

[10] 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.

[11] The Toowoomba Regional Council did not make a submission.

### **Should the Show be declared to be a special event?**

#### ***The NRA's material and submissions***

[12] The NRA contends that the Show meets the description of a special event within the meaning of s 5(1)(c)(ii) of the Act.

[13] Mr Stout, in his affidavit, deposes that:

- boasting one of Australia's most diverse economies, the Toowoomba region is a vibrant community that spans almost 13,000 square kilometres including Toowoomba City, the regional centres of Cambooya, Clifton, Crows Nest, Goombungee, Greenmount, Highfields, Millmerran, Oakey, Pittsworth and Yarraman along with numerous other small townships and, according to the Toowoomba Regional Council's current annual report, the region has an estimated resident population of approximately 167,657;<sup>1</sup>
- the Show is held annually in the Darling Downs and attracts interest from across the Toowoomba region and further afield which includes exhibitors, competitors and visitors to the Show;<sup>2</sup>
- the Show is principally an agricultural event which focuses on the primary industries of Queensland and the rural lifestyle of many Queenslanders, with events

<sup>1</sup> Affidavit of Mr David Stout, affirmed on 3 February 2020 ('Mr Stout's affidavit'), Annexure A, page 2.

<sup>2</sup> Mr Stout's affidavit, Annexure A, page 1.

such as livestock judging, equestrian events, animal breeders' competitions, produce competitions and wood chopping, live entertainment, sporting events, food tasting and fashion shows;<sup>3</sup>

- according to the Show's website, the Show '... is an unrivalled production of the very best in entertainment and agriculture displays on the Darling Downs since 1860';<sup>4</sup>
- the 2020 Show's schedule indicates there are 37 separate areas of show competition, some of which have a number of subcategories for competitors, and that these events reflect a large part of the cultural heritage of Queensland;<sup>5</sup>
- the Show's website lists over 150 businesses as sponsors for the Show and includes a number of local businesses;<sup>6</sup>
- there is an expectation that over 40,000 patrons will attend the Show over the three days;<sup>7</sup> and
- the commercial activity generated by the Show would benefit local main street businesses if non-exempt stores were able to trade and draw visitors into the business region throughout the day.<sup>8</sup>

### *The SDA's submissions*

[14] The SDA opposed the making of the declaration sought.<sup>9</sup>

[15] The SDA submitted that:

- an application made pursuant to s 5(1)(c) of the Act gives the Commission a significant power, having the ability to declare a 'non-exempt shop' to be an 'exempt shop' for a specified event and that such a declaration, if granted, extends the possible trading hours of non-exempt shops and has significant impacts on employees and its members;<sup>10</sup>
- by reason of the declaration having the potential to extend trading hours in non-exempt shops, employees may be required to work within a set of 'extended hours' as defined under the Act without the requisite protections afforded to employees of non-exempt shops pursuant to s 36B of the Act;<sup>11</sup>

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<sup>3</sup> Mr Stout's affidavit, Annexure A, page 1.

<sup>4</sup> Mr Stout's affidavit, Annexure A, page 1.

<sup>5</sup> Mr Stout's affidavit, Annexure A, page 2.

<sup>6</sup> Mr Stout's affidavit, Annexure A, page 3.

<sup>7</sup> Mr Stout's affidavit, Annexure A, page 3.

<sup>8</sup> Mr Stout's affidavit, Annexure A, page 3.

<sup>9</sup> The written submissions of the Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees filed on 14 February 2020, para. 10 ('the SDA's submissions').

<sup>10</sup> The SDA submissions, para. 3.

<sup>11</sup> The SDA's submissions, para. 4.

- the NRA's Application does not afford the Commission an absolute discretion to grant the declaration and that it is imperative the Commission vigorously assess and only declare an event a '... unique or infrequent event of local, State or national significance' when the factual circumstances and evidence strongly dictate that circumstance;<sup>12</sup> and
- its concern is that the NRA will utilise s 5 of the Act to suggest that any event, no matter of what significance held in any area '... will procedurally be declared and hence all retail stores in the proximity of any event should be afforded the expansion of hours as contemplated by s 5 of the Act.'<sup>13</sup>

[16] The SDA then submitted that:

- Coles and Woolworths appear to be the predominant 'non-exempt stores' that would be affected by an order and it would:
 

... surprise us that visitors will travel to shop at these stores in extended hours. Other non-exempt stores, for example Myers and Big W, in the area currently do not trade until 9pm (except on Thursdays) despite their ability to do so and there is no evidence to suggest the event would increase the necessity to trade past 9pm or 6pm on a Sunday.'<sup>14</sup>
- the event is scheduled to run until 9.00 pm on the days it is to take place, with food and drink available at the event and this considerably reduces the possibility that a person attending the event might be required or desire to visit a non-exempt shop such as a supermarket to purchase these items;<sup>15</sup>
- there has been nothing provided to support the position that visitors attending require 24/7 shopping hours;<sup>16</sup>
- visitors to the area can utilise stores usually open at those times to service their needs;<sup>17</sup> and
- Toowoomba is a rural, family focused area and it is an overextension of s 5 to suggest that the availability of 24/7 trading hours over the three days would provide any real or genuine benefit for the event.<sup>18</sup>

[17] The SDA submitted that while s 5(3) of the Act describes the matters the Commission must consider when making a determination about whether an event is a 'special event', there is:

'...a deficiency within the Act whereby the Commission has no guidance or any reference to considerations for matters such as:

- (a) The necessity of non exempt shops to actually trade as exempt shops during the special event.

<sup>12</sup> The SDA's submissions, para. 5.

<sup>13</sup> The SDA's submissions, para. 5.

<sup>14</sup> The SDA's submissions, para. 7 iv).

<sup>15</sup> The SDA's submissions, para. 7 v).

<sup>16</sup> The SDA's submissions, para. 7 vi).

<sup>17</sup> The SDA's submissions, para. 7 vii).

<sup>18</sup> The SDA's submissions, para. 7 viii).

(b) The impact such a declaration has on employees of shops affected by the granting of such a declaration.

(c) The necessity to limit any retail hours during the special event period.<sup>19</sup>

[18] The SDA ultimately submitted that in determining whether or not to make the declaration, the Commission should consider the matters it refers to as summarised in paragraph [17] of these reasons.<sup>20</sup>

[19] Because of the use of the word 'may' in s 5(2)(a) of the Act, the power conferred on the Commission to make a declaration that an event is a special event for s 5(1)(c) of the Act, is discretionary.<sup>21</sup> In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*,<sup>22</sup> Gleeson CJ, Gaudron and Hayne JJ relevantly stated:

"Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.<sup>23</sup>

[20] The factors a decision-maker is bound to consider in making a decision is determined by the construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors that the decision-maker is bound to consider are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.<sup>24</sup>

[21] Section 5 of the Act is contained in pt 2 which is headed 'Interpretation'. Section 5 defines the phrase 'exempt shop'. The main effect of such a declaration is that a non-exempt shop operating in the area to which the declaration applies and during the period for which the declaration applies, is an exempt shop and not subject to the trading hours restrictions referred to in pt 4 of the Act.

[22] An obligation, in a statute, to have regard to specified matters when making a decision may have the effect of requiring the decision maker to take the specified matters into account and to give weight to them as a fundamental element in making the determination, but not to make the determination by reference to them exclusively.<sup>25</sup>

[23] Section 5(3)(a) of the Act sets out the matters the Commission must consider in deciding to declare a unique or infrequent event of local, State or national significance, to be a

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<sup>19</sup> The SDA's submissions, para. 6.

<sup>20</sup> The SDA's submissions, para. 8.

<sup>21</sup> *Acts Interpretation Act 1954*, s 32CA(1).

<sup>22</sup> [2000] HCA 47; (2000) 203 CLR 194 (*Coal and Allied*).

<sup>23</sup> *Ibid* [19] (footnotes omitted).

<sup>24</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39-40 (Mason J) (*Peko*).

<sup>25</sup> *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 180 CLR 322, 329 (Mason J) and *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, 194 (Burchett, Branson and Tamberlin JJ).

special event for s 5(1)(c). These include the cultural, religious or sporting significance of the event and the significance of the event to the economy and the tourism industry. Section 5(3)(b) sets out a matter the Commission may consider, namely a submission made by a local government for an area in which the declaration is likely to have an impact.

- [24] The text in s 5(1)(c) and s 5(3) of the Act is very clear in respect of the matters that the Commission must and may consider in determining to make a declaration under s 5(1)(c)(ii) of the Act. The Commission must consider the matters referred to in s 5(3)(a). The Commission must give weight to these matters as a fundamental element in making a determination about whether or not an event, which meets the description in s 5(1)(c)(i), is a special event.
- [25] By s 5(3)(b) of the Act, the Commission may give consideration to a submission made by a local government for an area in which the declaration is likely to have an impact.
- [26] However, s 5(3) of the Act does not direct the Commission to decide whether or not to declare an event to be a special event exclusively by reference to the matters in s 5(3). For example, s 5(3) does not provide that in deciding whether or not to make the declaration, the Commission must have regard *only* to the matters specified in that section.<sup>26</sup>
- [27] Because s 5(3) of the Act does not provide that the Commission must have regard only to the matters specified in that section, any other matters that the Commission is bound to consider must be determined by implication from the subject matter, scope and purpose of the Act.<sup>27</sup>
- [28] I have not had argument from the parties about whether the necessity of non-exempt shops to actually trade as exempt shops during the special event, the impact such a declaration has on employees of shops affected by the granting of such a declaration or the necessity to limit any retail hours during the special event period, are relevant matters in determining whether or not to declare an event to be a special event, having regard to the subject matter, scope and purpose of the Act.
- [29] In the absence of that argument, these questions should be left to another day.

***The Show is a 'special event' within the meaning of s 5(1)(c)(ii) of the Act***

- [30] Having regard to the evidence contained in Mr Stout's affidavit, I am of the view that the Show is a unique event of local significance to the Toowoomba area.
- [31] I am also of the view that the Show is an event of cultural significance to the people of the Toowoomba area because of:
- the Show's long history; and

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<sup>26</sup> *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153, 177 (Burchett J).

<sup>27</sup> *Peko* (n 24), 39-40 (Mason J).

- the events that take place during the Show and the connection between those events and the rural nature and rural history of the Toowoomba region.

[32] Having regard to the number of expected patrons that will attend the Show over the three days, I accept that the commercial activity generated by the Show would benefit local businesses if non-exempt shops were able to trade and draw visitors into the area throughout the days of the Show.

[33] For these reasons, I am also of the view that the Show is significant to the economy of the Toowoomba area and to the tourism industry of the Toowoomba area.

**What should be the area to which the declaration applies?**

[34] Annexure B to Mr Stout's affidavit was a copy of a map of the Toowoomba region, published by the Toowoomba Regional Council, which had marked on it an area purporting to be the area to which the declaration, the subject of the application, was to apply. The map upon which this area was marked did not contain a great deal of detail apart from describing some smaller townships in the Toowoomba region.

[35] Annexure A to Mr Stout's affidavit relevantly stated:

A declaration must state the details of the event the subject of the declaration, the period for which the declaration applies, and the area to which the declaration applies. Accordingly, the NRA asks the Commission to grant an order under sub-section (1)(c) of the Act for a specific area of the Toowoomba region as described at Appendix A to this application, beginning on 26<sup>th</sup> March 2020 and concluding on 29<sup>th</sup> March 2020, to support visitors who remain in town over the weekend. Please note this application is not for the entire Toowoomba Regional Council area. This application covers the following suburbs: Highfields, Birnam, Gowrie Junction, Charlton, Blue Mountain Heights, Mount Kynoch, Wellcamp, Torrington, Wilsonton, Newtown, Glenvale, Harristown, Drayton, Darling Heights, Kearneys Spring, Top Camp and Westbrook.

[36] I was concerned about the manner in which the NRA, in its application filed 4 February 2020, described the area to which the declaration was to apply.

[37] In oral submissions, the NRA submitted that the areas referred to in its application were all '... localities and suburbs of the greater Toowoomba area'<sup>28</sup> and that they were not townships near Toowoomba.<sup>29</sup> The submission made was that the areas referred to in its application were the outlying suburbs with major shopping centres that service the area.<sup>30</sup>

[38] The SDA submitted that:

- the application covers an unnecessarily broad section of the Toowoomba region and includes areas up to 20 kilometres in distance from where the event is located;
- these are areas where the event is not physically occurring or impacting; and

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<sup>28</sup> T 1-8, ll 35-36.

<sup>29</sup> T 1-8, l 41.

<sup>30</sup> T 1-9, ll 13-18.

- visitors are primarily attracted to the local area of the event for the purposes of attending the Show and there is no significant evidence to suggest that visitors come with the intention to shop at unusual or later hours.<sup>31</sup>

[39] I expressed my concern that as the areas the subject of the NRA's Application were merely identified as suburbs, that could lead to uncertainty as to whether a particular shop, because of its location, was an exempt shop.<sup>32</sup>

[40] I gave the NRA some time to consider whether it wanted to make further submissions or amend its application to more precisely define the areas in its application. I also gave the SDA some time to make any further submissions if the NRA made such submissions or amended its application.

[41] On 26 February 2020, Mr Stout filed an amended affidavit ('Mr Stout's amended affidavit') which narrowed (and in effect amended) the area the subject of the NRA's Application to:

- from the point of the intersection of North Street and Ruthven Street travelling north until the intersection with Griffiths Street;
- travelling west on Griffiths Street then to the western end of Hogg Street;
- from that point drawing a line south-west to the intersection of Devine Road and Drayton-Wellcamp Road;
- then travelling south-east on Drayton-Wellcamp Road and then Euston Road until the intersection with Boundary Street South;
- from that point drawing a line to the intersection of West Street and Nelson Street;
- then travelling east along Nelson Street then north-east along Rowbotham Street to its intersection at Tourist Road;
- then drawing a line from the intersection of Rowbotham Street/Tourist Road to the intersection of Mary Street and North Street;
- from that point, drawing a line north-west to the intersection of Mary Street and North Street; and
- then travelling west from Ruthven Street and concluding.

[42] The SDA, in further submissions filed on 26 February 2020, submitted that:

- the location of the Show is Frank Thomas Avenue in Glenvale and that, having regard to the intent and wording of s 5 of the Act, if an order is made, it should be limited to non-exempt stores in the immediate vicinity of the event;

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<sup>31</sup> The SDA's submissions, paras. 7 iii) and iv).

<sup>32</sup> T 1-8, 1 28 to T 1-10, 1 4.

- while Toowoomba may be considered a rural area and distances of retail shopping might be expanded, having a rural show event did not provide a genuine basis for 24/7 trading to be available across a wide geographical expanse simply so that the NRA might encapsulate non-exempt stores;
- section 5 refers to a geographical area or vicinity relating to the actual event and therefore the scope of any s 5 application should be limited to the area of the event or close to it, and that the area should be within the immediate vicinity of the event.<sup>33</sup>

[43] Other than that, the SDA relied on its original submissions.<sup>34</sup>

[44] As best as I can make out, it seems that the area which is now the subject of the NRA's application concerns suburbs adjacent or close to the Toowoomba CBD. The NRA submitted that the area subject of its application included accommodation services and other entities including shops, likely to be utilised by the estimated 40,000 patrons to the Show, having regard to the decentralised nature of the businesses in the Toowoomba area.<sup>35</sup> On the uncontested material before me, I accept this submission by the NRA.

[45] Furthermore, I accept the NRA's submission that limiting the declaration to the area in the immediate vicinity of the Show, namely, the suburb of Glenvale, would be of no utility. It seems to me that local patrons to the Show and those visiting the Toowoomba area for the Show would not be engaging in commercial activity solely in that suburb.

#### **What should be the period for which the declaration applies?**

[46] The contention of the NRA is that the declaration should apply up to Sunday, 29 March 2020 to support visitors who remain in town over the weekend.

[47] The NRA submitted that:

- the fact the event concludes on the evening of Saturday, 28 March 2020, does not mean that patrons of that event will similarly vanish into the night and that those persons are likely to remain in the area, at least overnight into the next day; and as the next day is Sunday, consideration is required for otherwise narrower trading hours available on that day;<sup>36</sup> and
- the Commission has previously granted orders of such a nature, extending no more than one day from the conclusion of the relevant event and in this regard, the NRA referred to the decision in *National Retail Association Limited, Union of Employers*<sup>37</sup> which concerned an application for a declaration pursuant to s 5 of the Act for the 2019 Brisbane Festival, where the declaration applied for the period

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<sup>33</sup> The written submissions of the Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees filed on 26 February 2020, paras. 1 i. and ii. ('the SDA's further submissions')

<sup>34</sup> The SDA's further submissions, paras. 1 iii and iv.

<sup>35</sup> T 1-4, ll 16-24.

<sup>36</sup> T 1-3, ll 28-32.

<sup>37</sup> [2019] QIRC 127.

5 September 2019 to 29 September 2019<sup>38</sup> notwithstanding, as submitted by the NRA, the Brisbane Festival concluded on 28 September 2019.<sup>39</sup>

[48] The SDA submitted that:

- the Show is set to run from 26 to 28 March 2020, however the application covers 26 to 29 March 2020 and, as the event is not taking place on 29 March 2020, if an order is to be made it should be limited to the event period in accordance with s 5 of the Act; and
- the application for an order to cover 29 March 2020 is a misuse of the section and operates outside the boundaries of the intention of the section, namely, to make allowances for shops operating for the event and, as such, the application should not be an opportunity for non-exempt shops to capitalise on the event when this would provide no real benefit to the event or the people attending.<sup>40</sup>

[49] I am not persuaded by the NRA's argument.

[50] Pursuant s 5(1)(c) of the Act, an exempt shop is a shop operating in a stated area for an event declared by the Commission to be a special event. In my view, the period for which the declaration applies would ordinarily be limited to the duration of the event.

[51] While s 5(2)(b)(ii) of the Act seems to confer some latitude as to the period for which the declaration applies, if that period is to be extended beyond the date or dates of the event, some evidence tending to support the need or desirability for such an extension should be led.

[52] There was no evidence led by the NRA that tends to prove that patrons of the Show would remain in the area the subject of its application on Sunday, 29 March 2020.

### **The SDA's claim for an ancillary order for the protection of employees**

[53] The SDA contends that the Commission '... has to some extent' set a precedent in relation to the SDA's concerns about the protection of employees in non-exempt shops regarding extended trading hours.<sup>41</sup> In this regard, the SDA refers to the decision of Swan DP in *Trading Hours-Exempt Shops-Commonwealth Games* where her Honour stated that the rights and conditions of employment by employees engaged by non-exempt stores, would be retained during the period of the declaration made in the that case.<sup>42</sup>

[54] The SDA submitted that the Commission:

- can '... provide ancillary orders that specifically reflect the considerations the SDA submit to be necessary in such a decision.';<sup>43</sup> and

<sup>38</sup> Ibid [36] (Industrial Commissioner Dwyer).

<sup>39</sup> T 1-3, ll 33-38.

<sup>40</sup> The SDA's submissions, paras. 7 i) and ii).

<sup>41</sup> The SDA's submissions, para. 9.

<sup>42</sup> *Trading Hours-Exempt Shops-Commonwealth Games* (Queensland Industrial Relations Commission, Deputy President Swan, 13 December 2017), [27] ('the Commonwealth Games Case').

<sup>43</sup> The SDA's submissions, para. 11 d.

- should provide to all employees in any affected shops, as part of such declaration, a protection from working extended trading hours by reason of s 36B of the Act.<sup>44</sup>

[55] I raised with the SDA<sup>45</sup> and the NRA<sup>46</sup> the source of the power for the Commission to make such an ancillary order.

[56] In its further submissions, the SDA submitted that the Commission had previously considered and ordered such protections and that the Commission should also take into account the '... agreement by all parties that such protections are applicable in the circumstances' and that the Commission may be guided by the precedent set by previous orders made by the Commission.<sup>47</sup> The NRA made no further submissions about the issue.

[57] I am not persuaded the Commission has the power to make such the order as sought by the SDA.

[58] The only express power the Commission has under s 5 of the Act is to make a declaration that an event, which is a unique or infrequent event of local, State or national significance, is a special event. The mandatory terms of the declaration are those set out in s 5(2)(b) of the Act.

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<sup>44</sup> The SDA's submissions, para. 11 e. Section 36B of the *Trading (Allowable Hours) Act 1990* creates a criminal offence and provides:

**36B Protection for employees—extended hours under Trading (Allowable Hours) Amendment Act 2017**

- (1) An employer must not require an employee to work during extended hours unless the employee has freely elected to work during extended hours.

Maximum penalty-

- (a) for a first offence-16 penalty units; or  
(b) for a second or later offence-20 penalty units.

- (2) However, subsection (1) does not apply in relation to an employee if an industrial instrument provides arrangements under which the employee may refuse or agree to work during extended hours.

- (3) For subsection (1), an employee has not freely elected to work during extended hours-

- (a) if the employee elects to work during extended hours because the employee has been coerced, harassed, threatened or intimidated by or for the employer; or  
(b) only because the employee is rostered, or required under an industrial instrument, to work during those hours.

- (4) In this section-

*elect* means agree in writing for a stated or indefinite period.

*employer* means an employer of an employee in a non-exempt shop.

*extended hours* means the permitted trading hours under this Act for a non-exempt shop on any day (other than a closed day), but only to the extent the hours are greater than the shop's permitted trading hours immediately before the commencement.

*industrial instrument* means any of the following within the meaning of the *Industrial Relations Act 2016*—

- (a) a modern award, bargaining award or certified agreement;  
(b) a federal industrial instrument.

<sup>45</sup> T 1-6, ll 7-15.

<sup>46</sup> T 1-12, ll 1-11.

<sup>47</sup> The SDA's further submissions, paras. 1 v and vi.

- [59] It is true that there is a long standing principle that where the exercise of power is conferred by statute, the conferral of such power is said to carry with it the powers that are 'necessary' for, 'incidental' to or 'consequent' upon the exercise of that power granted.<sup>48</sup> So, for example, the statutory power conferred on a court to extend the time for compliance with the requirements of a bankruptcy notice when application has been filed to set it aside, carried with it the power to set aside the notice itself.<sup>49</sup>
- [60] However, the courts formulating the principle have not tended to use words like 'ancillary', 'convenient' or 'reasonable'.<sup>50</sup> The question is whether the further power is indispensable to, or fairly incidental to or consequential upon the statutory power.<sup>51</sup>
- [61] I am not persuaded that an order of the kind sought by the SDA is indispensable to, fairly incidental to or consequential upon the statutory power to make a declaration under s 5(2) of the Act. This is because a declaration may be made under s 5(2) of the Act, and have operative effect, without the necessity to make an order of the kind as sought by the SDA.
- [62] None of these considerations, or any other source of power for the Commission to make an order of the kind sought by the SDA, appeared to have been argued before Swan DP in *Trading Hours-Exempt Shops-Commonwealth Games*.<sup>52</sup>
- [63] While an order of the kind sought by the SDA, and the means to enforce such an order, have merit having regard to the potential effect of the making of a declaration under s 5(1) of the Act, in my view, the Commission has no power to make such an order under the Act.

### Conclusion

- [64] The Toowoomba Royal Show is a special event within the meaning of s 5(1)(c)(ii) of the Act because the Show is an event of cultural significance to the people of the Toowoomba area and is significant to the economy of the Toowoomba area and to the tourism industry of the Toowoomba area .
- [65] For the reasons set out above, I am satisfied that I should make a declaration. The period for which the declaration applies is limited to the length of the event, namely from Thursday, 26 March 2020 to Saturday, 28 March 2020. Further, the area to which the declaration applies is that set out in Mr Stout's amended affidavit.
- [66] I make the following declaration:
1. Pursuant to s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, I declare that the Toowoomba Royal Show is a special event.

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<sup>48</sup> *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26; (2008) 166 FCR 108, [37] (Gray and North JJ) (*TWU*).

<sup>49</sup> *Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125, 130 (Lockhart J).

<sup>50</sup> *TWU* (n 48), [38] (Gray and North JJ).

<sup>51</sup> *Alice Springs Town Council v Mpweteyrre Aboriginal Corporation* (1997) 94 LGERA 330, 342 (Milden J, Martin CJ at 332 agreeing).

<sup>52</sup> *The Commonwealth Games Case* (n 42), [25]-[28].

2. The declaration shall apply for the period commencing on Thursday, 26 March 2020 and concluding on Saturday, 28 March 2020.
3. The declaration applies to:
  - from the point of the intersection of North Street and Ruthven Street travelling north until the intersection with Griffiths Street;
  - travelling west on Griffiths Street then to the western end of Hogg Street;
  - from that point drawing a line south-west to the intersection of Devine Road and Drayton-Wellcamp Road;
  - then travelling south-east on Drayton-Wellcamp Road and then Euston Road until the intersection with Boundary Street South;
  - from that point drawing a line to the intersection of West Street and Nelson Street;
  - then travelling east along Nelson Street then north-east along Rowbotham Street to its intersection at Tourist Road;
  - then drawing a line from the intersection of Rowbotham Street/Tourist Road to the intersection of Mary Street and North Street;
  - from that point, drawing a line north-west to the intersection of Mary Street and North Street; and
  - then travelling west from Ruthven Street and concluding.