

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2020] QIRC 112

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

CASE NO: TH/2020/3

PROCEEDING: Application

DELIVERED ON: 3 August 2020

HEARING DATE: 30 July 2020

MEMBER: McLennan IC

HEARD AT: Brisbane

DECLARATION:

1. Pursuant to s 5(1)(c) of the *Trading (Allowable Hours) Act 1990*, I declare that the **Townsville 400** is, for the purposes of s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, a special event.
2. The declaration shall apply for a period commencing on **29 August 2020** and concluding on **30 August 2020**.
3. The declaration applies to an area in **Townsville** from a point on the corner of **Woolcock Street and Hugh Street**:
 - Travelling south along **Hugh Street** until its intersection with **Ross River Road**;
 - Travelling east along **Ross River Road**, turning onto **Cross Street**, then onto **Bowen Road**, and then onto **Queens Road**;

- **Travelling north east on Queens Road and turning south west onto First Avenue and turning onto Railway Avenue heading north;**
- **Turning onto Saunders Street and travelling across Ross Creek and turning onto Flinders Street; and**
- **Travelling east and turning onto King Street and then travelling the length of The Strand turning onto Howitt Street and then turning onto Bundock Street heading west through to Hugh Street and back to the starting point at the corner of Woolcock Street and Hugh Street.**

CATCHWORDS:

INDUSTRIAL LAW – TRADING HOURS – APPLICATION FOR DECLARATION OF SPECIAL EVENT – application to classify all non-exempt shops as exempt shops in part of Townsville for a specified period during a special event, namely, the Townsville 400.

LEGISLATION:

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

APPEARANCES:

Mr D Stout 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

- [1] By application filed on 13 July 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 Townsville 400, to be held from Saturday 29 August 2020 to Sunday 30 August 2020 inclusive, is a special event within the meaning of s 5(1)(c)(ii) of the Act. Accompanying the NRA's application was an affidavit of Mr David Stout, affirmed on 13 June 2020.

- [2] The effect of such a declaration, if made, would be that a non-exempt shop operating in an area in Townsville as specified in the Applicant'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] The area in Townsville, as specified in the Applicant's application, is the area from a point on the corner of Woolcock Street and Hugh Street:
- Travelling south along Hugh Street until its intersection with Ross River Road;
 - Travelling east along Ross River Road, turning onto Cross Street, then onto Bowen Road, and then onto Queens Road;
 - Travelling north east on Queens Road and turning south west onto First Avenue and turning onto Railway Avenue heading north;
 - Turning onto Saunders Street and travelling across Ross Creek and turning onto Flinders Street; and
 - Travelling east and turning onto King Street and then travelling the length of The Strand turning onto Howitt Street and then turning onto Bundock Street heading west through to Hugh Street and back to the starting point at the corner of Woolcock Street and Hugh Street.
- [4] The period for which the declaration is sought is from Saturday 29 August 2020 to Sunday 30 August 2020 inclusive.
- [5] On 14 July 2020, a Directions Order was issued which required that the Applicant's application and the Directions Order be served on the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees, 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.
- [6] 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 party was to file an outline of submissions and serve those submissions on the Applicant by 28 July 2020.
- [7] The Application and Directions Order were published on the Commission's website.
- [8] On 14 July 2020, the SDA made an application seeking leave to be heard. The SDA's application for leave to be heard was approved that same day. The SDA filed and served an outline of submissions on 28 July 2020.
- [9] The question for my determination is whether I should make the declaration as sought.

Should the Commission grant the declaration sought?

[10] The Applicant contends that the Townsville 400 meets the description of a special event within the meaning of s 5(1)(c)(ii) of the Act.

[11] 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;
- (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) 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.

[12] As is evident from s 5(1), the Act provides for non-exempt shops, operating in a stated area for an event, to be exempt shops for the period of that event if the Commission declares the event to be a special event.

[13] In deciding whether an event is a special event for the purposes of s 5(1)(c) 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.

[14] 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. The Townsville City Council did not make a submission.

Should the Townsville 400 be declared to be a special event?

The NRA's submissions

[15] The NRA contends that the Townsville 400 meets the description of a special event within the meaning of s 5(1)(c) of the Act.

[16] In his affidavit accompanying the Applicant's application, Mr David Stout, NRA Policy Director, deposes that:

- The Townsville 400 is an annual motor racing event for Supercars, held every year since 2009. It is a drawcard for North Queensland tourism, injecting around \$36 million into the local economy and with almost 130,000 spectators last year;
- The Townsville City Council's extended five-year contract for the Townsville 400, together with community support, shows a commitment to growing the event into the future to attract more tourists to North Queensland. Supporting statements and endorsements from government and industry evidence the significance of this sporting event;
- Minister Kate Jones has made public comment about the significance of the major event to local jobs and its importance in boosting tourism revenue for local businesses;
- The majority of businesses to benefit from such revenue injection in the local economy would be Townsville retailers;
- Public endorsements from the Premier, Townsville Mayor, Minister, and Member for Townsville combine to demonstrate the significance of the Townsville 400 event to the local economy, jobs and tourism industry;
- The Townsville 400 meets the criteria under the Act as "a unique or infrequent event of local, State or National significance."

The SDA's submissions

[17] The SDA opposed the making of the declaration sought by the NRA.

[18] 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. This has significant impacts on retail employees;
- 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. (S 36B(1) states that “an employer must not require an employee to work during extended hours unless the employee has freely elected to work during extended hours”);
- 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;
- It is concerned that the NRA utilises this section of the Act to suggest that any event, no matter what its 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”;
- 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:¹

“...a deficiency within the Act for not providing guidance or any reference to considerations on matters such as:

 - (a) The necessity of non-exempt shops to actually trade as exempt shops during the special event.
 - (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.
- It was not the intention to make every event significant. There is no evidence of any necessity for deregulation of trading hours to assist the economy and tourism;
- Whilst the Townville 400 event has occurred since 2009, the NRA has provided no evidence that the current trading hours are deficient to meet demand;
- There is no evidence provided by the NRA to suggest that extended trading hours are required by patrons or tourists attending the Townsville 400 event. The event has sufficient food and beverage venues within the race circuit to cater for patrons’ needs;

¹ The SDA’s submissions filed 28 July 2020, [8].

- The current non-exempt shop weekend trading hours for the area enable stores to open from 8 am – 6 pm. It is contested that significant numbers of people would wish to shop before or after the Townsville 400 event;
- Economic recovery and the promotion of tourism cannot be at the expense of appropriate regulation of trading hours in any situation;
- There is no indication that the numbers of patrons attending this year’s event will be as large as years past, due to continuing community caution about crowds in an ongoing COVID-19 aware climate;
- Some people in the Townsville region may choose not to attend the event, in order to avoid the crowds. It is expected that attendance numbers from interstate will also be reduced due to border restrictions;
- The application seeks an extension to trading hours that includes an area that is too distant from the actual location of the Townsville 400 event;
- “Of particular importance to the SDA is the implementation of the protections afforded to employees in non-exempt shops via Section 36B of the Act where they are protected from work in any extended hours unless voluntarily accepted. The SDA submits that all employees should be afforded such protections and if the commission was minded to grant the order the application seeks then it would do so with a protection of voluntary work in extended hours.” The SDA referenced the precedent set by Her Honour Deputy President Swan in matter TH/2017/26;
- The SDA reported results member surveys in other regional locations, in circumstances where such orders for extended trading hours were granted. Their experience was that there generally was not widespread take up of any extended hours opportunity.

The AWU’s submissions

[19] The AWU did not seek leave to be formally heard but did make the following written submission on 14 July 2020:

- The Commission should take into consideration all matters referred to in s 5 of the Act and whether there is any necessity for a non-exempt shop to be redefined as an exempt shop for the purpose of such application;
- Whilst s 5 of the Act focuses on the Commission’s ability to decide that the Townsville 400 Supercars should be a special event, it can ensure that all employees in the affected shops receive a protection from working extended trading hours by reason of s 36B of the Act.

The Townsville 400 is a 'special event' within the meaning of s 5(1)(c)(ii) of the Act

[20] Having regard to the evidence contained in Mr Stout's affidavit, I am of the view that the Townsville 400 is a unique sporting event in the Townsville region.

[21] I am also satisfied of the significance of the Townsville 400 to the North Queensland economy and tourism industry more broadly.

[22] In making this decision, I am persuaded by:

- The Townsville 400 event taking place in Townsville since 2009;
- The recent announcement of the event's contract extension in Townsville for a further five years;
- Proven track record of the event providing stimulus to the North Queensland economy;
- High attendance numbers in previous years; and
- Public statements by local and state leaders regarding the economic, employment and tourism significance of the event to the North Queensland region.

[23] However, I do appreciate the point well made by the SDA about the (as yet) unknown impact of the COVID-19 public health pandemic on any benefits that may be realised from Townsville 400 event. Regardless of the cash injection to the regional economy, tourism bump and high spectator numbers reported for previous years, this year may well be very different. We simply cannot know.

[24] In making this argument, the SDA suggested that attendance numbers at the Townsville 400 this year may be reduced, as locals prioritise 'caution' above 'crowds'.

[25] The union further contended that interstate tourism would be largely curtailed due to travel restrictions. While this is almost certainly true, the flipside of the argument is the potential boost of intra-regional tourism, as North Queenslanders seek out the opportunity for family entertainment closer to home.

[26] I accept that we are in uncharted waters – and that either the submission of the NRA or the SDA will ultimately be proven correct after the Townsville 400 is over for 2020. However, the public comments of the Townsville Mayor, Cr Jenny Hill, back in May ring true:

“...With many local businesses hurting because of the COVID-19 pandemic, the economic boost that the event will provide will be very welcome...and an important boost to community spirit, which has also taken a hit because of the pandemic.”

[27] I entirely agree with the SDA's comments that “...it is imperative the Commission vigorously assess...” such applications for extended trading hours and that such decision should not be taken lightly. In circumstances where the experience of past years demonstrates the Townsville 400 event is one of sporting significance, with economic and tourism benefits to the regional economy, I am prepared to accept the application.

[28] For a community severely impacted by floods last year, and COVID-19 this year, I believe a decision favouring local businesses' opportunity to trade and draw visitors into the area throughout that weekend both complied with the mandatory criteria in the Act and is the right call for Townsville at this time.

What should be the area to which the declaration applies?

- [29] Exhibit B ‘Description of location’ to Mr Stout's affidavit was a copy of a map of Townsville, which had marked on it an area to which the declaration, the subject of the application, was sought to apply.
- [30] The SDA submitted that the NRA’s application “...appears to be an overreach...in relation to the area it covers...”, with respect to the distance from where the Townsville 400 event is located.
- [31] This point was addressed comprehensively in Mr Stout’s affidavit. He explains that traffic diversions in place due to the installation of event road infrastructure has meant that patrons are urged to use public transport, with a dedicated bus service to and from the race precinct connecting to transport hubs.
- [32] I accept this submission by the NRA. It follows that limiting the declaration to the area in the immediate vicinity of the Townsville 400 in those circumstances would be of rather limited utility to spectators and tourists in town for the event.

The SDA and AWU's claim for the protection of employees

- [33] The SDA contends that the Commission “...has to some extent set a precedent in how it may deal with the concerns of the SDA in reference to the protections of employees in non-exempt stores regarding extended trading hours.”² 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.³
- [34] Section 36B of the *Trading (Allowable Hours) Act 1990* 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

² The SDA's submissions, filed 28 July 2020, [19].

³*Trading Hours-Exempt Shops-Commonwealth Games* (Queensland Industrial Relations Commission, Deputy President Swan, 13 December 2017), [25] - [27] (‘the *Commonwealth Games Case*’).

(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.

[35] The unions submitted that the Commission had previously considered such protections to ensure that affected employees who work extended hours outside of the normal range of hours in their Certified Agreements and Awards only do so on a voluntary basis.

[36] The NRA indicated their acceptance of the combined unions' proposal.

[37] I absolutely agree that such protections for affected employees are appropriate, applicable and necessary in these circumstances.

[38] I can well understand that some employees working in non-exempt shops (within the defined declaration area) will prioritise time with family and friends or their own participation in sporting, cultural or religious activities over the weekend in preference to working additional hours. On the other hand, there would also be many struggling local families for whom some extra money would be very welcome at this time. These two possible scenarios further emphasise the good sense of leaving each affected retail worker to make their own decision about whether or not to accept any additional hours that may be offered to them over the Townsville 400 weekend, depending on their personal circumstances.

Conclusion

[39] Having regard to the submissions, I am satisfied that the Townsville 400 is a special event within the meaning of s 5(1)(c)(ii) of the Act in that it is an event of sporting significance to the people of North Queensland and beyond. It is significant to the economy of Townsville and to the tourism industry of North Queensland more broadly.

[40] For the reasons set out above, I am satisfied that I should make the declaration sought. The period for which the declaration applies is limited to the dates of the event, namely from Saturday, 29 August 2020 until Sunday, 30 August 2020 inclusive. Further, the area to which the declaration applies is that set out in Mr Stout's amended affidavit.

[41] I will make the following declaration:

1. **Pursuant to s 5(1)(c) of the *Trading (Allowable Hours) Act 1990*, I declare that the Townsville 400 is, for the purposes of s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, a special event.**

2. **The declaration shall apply for a period commencing on 29 August 2020 and concluding on 30 August 2020.**
3. **The declaration applies to an area in Townsville from a point on the corner of Woolcock Street and Hugh Street:**
 - **Travelling south along Hugh Street until its intersection with Ross River Road;**
 - **Travelling east along Ross River Road, turning onto Cross Street, then onto Bowen Road, and then onto Queens Road;**
 - **Travelling north east on Queens Road and turning south west onto First Avenue and turning onto Railway Avenue heading north;**
 - **Turning onto Saunders Street and travelling across Ross Creek and turning onto Flinders Street; and**
 - **Travelling east and turning onto King Street and then travelling the length of The Strand turning onto Howitt Street and then turning onto Bundock Street heading west through to Hugh Street and back to the starting point at the corner of Woolcock Street and Hugh Street.**