

# QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2019] QIRC 154

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

CASE NO: TH/2020/4

PROCEEDING: Application

DELIVERED ON: 1 September 2020

HEARING DATE: 1 September 2020

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 4 September 2020 to 26 September 2020 (inclusive).
3. The area to which this declaration applies is the geographic area of the Wards of the City of Brisbane namely:
  - Central Ward
  - The Gabba Ward

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:	<i>Trading (Allowable Hours) Act 1990 (Qld)</i> s 5, 36B  <i>Industrial Relations Act 2016 s 539</i>
APPEARANCES:	Mr. D Stout of the applicant.  Ms. L Armstong of the Shop, Distributive and Allied Employees Association (Queensland Branch), Union of Employees.

## Reasons for Decision

### Introduction

- [1] By way of application filed on 20 August 2020, 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 declaration being sought proposed to cover a broad area of what was described in the application as 'the Local Government Area of Brisbane' for a period running between 3 September 2020 and 27 September 2020 inclusive.
- [3] The application was supported by an affidavit by David Stout, Director of Policy, with the NRA also filed 20 August 2020.
- [4] The affidavit of Mr Stout attached written submissions for the NRA at Exhibit A and a map of the greater Brisbane area at Exhibit B. Exhibit B was marked to demonstrate the geographic area proposed to be covered by the declaration being sought.

- [5] On 26 August 2020 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*. Ms Laura Armstrong, Industrial Officer for the SDA filed an affidavit supporting the SDA application to be heard on 26 August 2020.
- [6] The SDA was subsequently granted leave to be heard on this application and filed written submissions on 31 August 2020.
- [7] The matter proceeded to hearing on 1 September 2019.

### **Hearing**

- [8] The NRA adopted their written submissions with respect to the unique nature of the Brisbane Festival, and its significance for cultural, economic and tourism.
- [9] The SDA was broadly opposed to the application. Their written submissions predominately asked the Commission to make a vigorous assessment of this application and to apply appropriate limitations and protections for its members.
- [10] During the hearing Ms Armstrong made certain concessions on hypotheticals with respect to an appropriate geographic scope for an order if it transpired that I was inclined to grant an exemption. In response to a question put to her from the bench, Ms Armstrong indicated that if I were inclined to grant an exemption, the geographic scope need not extend beyond the Central and Gabba Wards of the City of Brisbane.
- [11] Having regard to the map provided by Mr Stout, 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.
- [12] Mr Stout made submissions as to the need to extend the geographic scope to incorporate certain transport hubs in the expectation that festival patrons would be likely to utilise public transport to access the festival venues.
- [13] During the hearing I provided the parties with Ward maps for the City of Brisbane Wards designated as 'Central' and 'Gabba'. Both parties appeared to accept that these Wards covered the geographic scope for the majority of the events making up the festival.
- [14] I note that neither party produced any evidence in the form of testimony from either retailers or employees of retailers as to the impact of an exemption on their respective positions during previously granted exemptions. Even the anecdotal evidence offered from the bar table was limited in detail.

[15] Finally, in the submissions filed by the SDA there is a request that if the exemption were to be granted, that a further order be made preserving the protections available to their members under the Act at s 36B. The NRA are not opposed to the making of such orders.

### **Statutory Provisions**

[16] 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.

- [17] 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".
- [18] 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.
- [19] 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. No submissions were received from the Brisbane City Council.

### **Consideration**

- [20] 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. S 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.
- [21] 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.
- [22] The Brisbane Festival is well known annual event on the arts calendar. It showcases a mixture of theatre, cabaret, musical and other artistic performances at venues throughout central Brisbane. In previous years it has been a vibrant and well patronised event with attendances from around the country and overseas.
- [23] Relevantly, it must be observed that due to the global pandemic caused by COVID-19, society in Brisbane and around the world has been subject to significant restrictions since the festival was last held in 2019. Since the first quarter of the 2020 calendar year, Queensland has been subject to varying degrees of restrictions and lockdowns. These have included restrictions on public gatherings with respect to the number of persons who may gather in one place for an event.
- [24] Queensland has done exceptionally well at managing the pandemic over the course of the last eight months. Nevertheless, the pandemic is far from over and outbreaks continue to create risk to the greater population. The Brisbane Festival has been impacted by the virus like many, many other events. It will be smaller this year and will not include its signature event, 'Riverfire', but 'the show will go on' as the saying goes.

- [25] Having reviewed the submissions of the NRA and a program for the 2020 Brisbane Festival that is accessible online<sup>1</sup>, I conclude that the Brisbane Festival, even in its altered form, is both culturally significant (at least on a local and State level) and significant in respect of the local economy and the tourism industry.
- [26] For these reasons I have no difficulty finding 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. Notwithstanding this conclusion, I remain concerned that the geographic scope of the declaration proposed by the NRA is unnecessarily broad.
- [27] The program for the Brisbane Festival that is available online identifies that the venues are predominately contained within the central precincts of Brisbane e.g. the CBD, Southbank, West End and Fortitude Valley. There are a few exceptions but for the most part, there is a consistent distribution of venues limited to central Brisbane.
- [28] No evidence was produced to inform the Commission as to varied needs or patterns of retail operators in affected areas that might justify the broad scope. Mr Stout submitted, and I accept, that food service retailers in and around the venues would be those most likely derive the greatest benefit from the proposed exemptions. But beyond those retailers within the geographic zone of the greater majority of festival events, I am unable to discern any need for the exemptions proposed.
- [29] For this reason, I am inclined to exercise the discretion to grant the declaration for exemption sought, but only within the geographic bounds of the festival. In all of the circumstances, I consider that a geographic scope that is limited to the Central and Gabba Wards of the City of Brisbane will be adequate.
- [30] With respect to the dates of operation, the NRA seeks the declaration to run from 3 September until 27 September 2020.<sup>2</sup> These dates commence and end one day either side of the start and end dates of the festival. Mr Stout suggested that the additional days were to allow for preparation and 'travel'. I do not consider that there is any need for the exemption to apply on dates other than those dates during which the festival is running. I intend to limit the exemption to operate from 4 September to 26 September 2020 (inclusive).
- [31] Finally, with respect to the request from the SDA for an order preserving the rights protected by s 36B of the Act, I am not satisfied my discretionary powers under s 5 of the Act extend to the making of such an order. Accordingly, I decline to make it.

---

<sup>1</sup> See - <https://www.brisbanefestival.com.au/uploads/Brisbane-Festival-2020-Brochure-WEB.pdf>.

<sup>2</sup> Note – the Application refers to 2019 which is undoubtedly a typographical error.

[32] In doing so, I note that s 36B is not the only protection available to employees who may find themselves subject to duress or coercion etc with respect to being directed to work during extended hours. There are any number of scenarios where an employee might reasonably and lawfully refuse such a direction or seek protection available under other statutes or instruments.

[33] I hasten to add that if the SDA identifies any cases of its members being compelled to work involuntarily during extended hours, such evidence is likely to be a relevant consideration in future applications of this type. I would expect that the NRA will ensure that its members appreciate that while the protections for employees under s 36B are not applicable during the period of the exemption, they ought to conduct themselves as if they were.

### **Declaration**

[34] The application for declaration sought by the NRA is, subject to the amendments made at my discretion, granted in the following terms:

- 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 period of 4 September 2019 to 26 September 2020 (inclusive).**
- 3. The area to which this declaration applies is the geographic area of the Wards of the City of Brisbane namely:**
  - Central Ward**
  - The Gabba Ward**

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

[36] Order accordingly.