

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2020] QIRC 168

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

CASE NO: TH/2020/5

PROCEEDING: Application

DELIVERED ON: 16 September 2020

HEARING DATE: 11 September 2020

MEMBER: Hartigan IC

HEARD AT: Brisbane

DECLARATION:

1. Pursuant to s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990 (Qld)*, I declare that the Toowoomba Carnival of Flowers is a special event.
2. The declaration shall apply for the period commencing on Friday, 18 September 2020 and concluding on Sunday, 27 September 2020.
3. The declaration applies to the following stated area:
 - starting at New England Highway at Griffiths Street, turning onto North Street and continuing south onto Mary Street;
 - turning onto Margaret Street travelling through to Rowbotham Street and east onto Nelson Street;
 - travelling onto Baker Street through to Brisbane Street, Rudd Street and north east onto Anzac Avenue, turning onto Euston Road; and

- turning north west onto Drayton Wellcamp Road heading towards Wilsonton Heights, finishing at Hogg Street and the starting point on Griffiths 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 the Toowoomba area for a specified period during a special event, namely, the Toowoomba Carnival of Flowers - whether the Toowoomba Carnival of Flowers 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: *Industrial Relations Act 2016* (Qld), s 539

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

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

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

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

Introduction

- [1] The National Retail Association Limited, Union of Employers ("the NRA") has applied, pursuant to s 5(2) of the *Trading (Allowable Hours) Act 1990* ("the Act") for declarations to be made in relation to the Toowoomba Carnival of Flowers ("the Carnival").
- [2] The NRA seeks, inter alia, a declaration that the Carnival meets the description of a special event within the meaning of s 5(1)(c)(ii) of the Act.

- [3] The NRA's application was supported by an affidavit of Mr David Stout, affirmed on 21 August 2020. The affidavit included written submissions at Exhibit A and a map of the Toowoomba area at Exhibit B. Exhibit B was marked to demonstrate the area that the proposed declaration would apply to.
- [4] The effect of the proposed declaration, is that a non-exempt shop operating in the Toowoomba region as detailed within Exhibit B of the NRA's application, would be an exempt shop for the period for which the declaration applies.¹ Part 4 of the Act provides for the core trading hours of non-exempt shops.
- [5] On 3 September 2020, an Amended Directions Order was issued, which provided that those who may be affected by the Application may make an application seeking leave to be heard. The Application and Amended Directions Order were published on the Queensland Industrial Relations Commission ("the Commission") website on the same day.
- [6] On 4 September 2020, the Shop Distributive and Allied Employees Association (Queensland Branch), Union of Employees ("the SDA"), made an application seeking leave to be heard. On 4 September 2020, the Commission granted leave for the SDA to be heard² and the SDA subsequently filed written submissions.
- [7] The question for my determination is whether I should make the declarations sought by the NRA in its application.

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) –

¹ The period sought in the application is from Friday, 18 September 2020 to Sunday, 27 September 2020.

² *Industrial Relations Act 2016* (Qld) s 539.

- (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] Accordingly, the Commission must consider, in determining whether an event is a special event pursuant to s 5(1)(c)(ii) of the Act, the following:

- (a) the cultural, religious or sporting significance of the event;³ and
- (b) the significance of the event to the economy and the tourism industry.⁴

[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.⁵ No submission by a local government was made in this matter.

Should the Carnival be declared to be a special event?

The NRA's material and submissions

[11] In support of the application, the affidavit of Mr David Stout, in summary, relevantly states:

- (a) the Carnival is an annual ten-day festival with garden displays, parades, live music and parklands entertainment;

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

⁴ *Ibid* s 5(3)(a)(ii).

⁵ *Ibid* s 5(3)(b).

- (b) the Carnival was first founded in 1949 as a way for the city to use its "garden city" reputation to promote increased economic activity, following the hardships of World War II;
- (c) since its inception, the Carnival has attracted thousands of visitors to the region every year and is an integral part of Toowoomba's cultural and economic identity;
- (d) approximately 170,000 seeds, bulbs and seedlings have been planted across Toowoomba's major parks and public spaces in anticipation for the event in 2020;
- (e) the 2020 program features over 30 events and activities, with 48 local tour departures with COVID-19 safe plans in place;
- (f) the majority of events programmed for 2020 are free and are located at:
 - Queens Park;
 - Boyce Gardens;
 - Laurel Bank Park;
 - Gumbi Gumbi Gardens;
 - Spring Bluff Railway Station Gardens;
 - Picnic Point Parklands;
 - Japanese Garden Ju Raka En;
 - Peacehaven Botanic Park;
- (g) events include static installations of floral floats, the Itty-Bitty Grand Central Floral Virtual Parade, The Night Garden light display, Ferris Wheel, the #trEATS region-wide food trail, Talking Pubs Tour, Foodie Dinner Tour, four Walking Tours and other community events;⁶
- (h) the program also lists craft shows, floral displays, active parkland entertainment, light shows, markets and visits to local museums and a series of Walking Tours will also be conducted, including:
 - Laneways and Street Art Walking Tours;
 - Toowoomba During World War II Walk and Talk;

⁶ However, it is noted that events Heritage Bank Festival of Food and Wine, Sideshow Alley and Qantas Gala Dinner have been cancelled in 2020 due to COVID-19 restrictions.

- Toowoomba Trail – 150 Years of Rail;
 - Toowoomba Trails – Royal Bulls Head Inn Tour;
 - Toowoomba Trails – The Dark Side Tour;
 - Toowoomba's Architecture – Styles and Stories; and
 - Twilight Tours of Laurel Bank Park;
- (i) the Carnival is Australia's longest running floral event and a major tourism draw card with the following quote attributed to the Queensland Premier, Anastacia Palaszczuk as saying, "this is Australia's greatest celebration of horticulture, food, wine, music and local produce";
- (j) the submissions attribute a quote to the Minister for State Development, Tourism and Innovation, Kate Jones, as indicating that in 2019, 255,000 people attended the Carnival; and
- (k) the number one attraction for visitors in 2019 was the public park floral displays, with Laurel Bank Park recording over 79,000 attendees and Queens Park Botanic Gardens over 100,000 visitors during the course of the ten days of the festival.

The SDA's submissions

[12] The SDA opposes the making of the declarations sought. The SDA filed submissions before the hearing which, in summary, stated that:

- (a) the Commission vigorously assess and only declare an event as a "unique or infrequent event of local, State or national significance" when the factual circumstances and evidence strongly dictate that circumstance;
- (b) there is no evidence provided in support of the NRA's application to suggest that extended trading hours are desired or required by patrons or tourists attending the Carnival;
- (c) this year's event has been significantly modified to prevent a crowd of patrons from being attracted to one particular location due to the restrictions imposed because of COVID-19 and it is highly unlikely that the event would create new opportunities for trade outside the existing regime;
- (d) as the Carnival features a food trail called #trEATS which encourages patrons to visit participating cafes, restaurants and pubs in the area for the purchase of discounted food and drink, the possibility that a person attending the event may be required or desire to visit a non-exempt shop such as a supermarket to purchase items is considerably reduced; and

- (e) Toowoomba is a rural, family focussed area and it is an over extension of s 5 of the Act to suggest that the availability of 24/7 trading hours over the period of the event would provide any real or genuine benefit for the event.

[13] In addition to its filed submissions, the SDA sought to rely on additional written submissions at the hearing. The additional submissions relate to a statutory construction point, that the SDA submitted had not previously been considered in other similar applications. In summary, the SDA submitted that:

- (a) as s 5(1)(c) of the Act states that an exempt shop is a "shop operating in a stated area for an event", the use of the word "for" as opposed to "during" or "whilst an event is taking place" indicates that the extended operation of non-exempt shops must have some correlation to the event by way of providing a benefit to the event and the patrons attending, in order for the application to be made in accordance with the section; and
- (b) in light of the construction of s 5(1)(c) agitated by the SDA, consideration of the need for the exemptions proposed is not only relevant when deciding the geographical scope of an application but is relevant to the determination to grant the application "as a whole".

[14] I do not accept the SDA's submission as to the construction of s 5(1)(c), which it argues means that the non-exempt shops captured by the application are not shops operating "for" the event. I consider that the ordinary and plain meaning of the words are to be read within the context of the provision. Sections 5(1)(c)(i) and (ii) read, as follows: an exempt shop is a shop operating in a stated area for an event that is a unique, or infrequent event of local, State or national significance and declared by the industrial commission to be a special event for this paragraph.

[15] I consider that within the context of this provision, the word "for" relates to the area the shop is operating in, that it is, a shop operating in a stated area for an event. By way of example, if the Commission makes a declaration it must state, *inter alia*, the details of the event the subject of the declaration⁷ and the area to which the declaration applies. The stated area to which the declaration applies is the stated area for an event.

[16] The interpretation of s 5(1)(c) of the Act agitated by the SDA is strained and goes beyond the ordinary meaning of the words within the context of the provision read as a whole. Further, the SDA's interpretation requires establishing that the non-exempt shops must have some sort of correlation to the event and be of benefit to the event and patrons. I consider that the SDA's construction goes well beyond the ordinary words used in the provision and the intent and purpose of the Act.

Is the Carnival a "special event" within the meaning of s 5(1)(c)(ii) of the Act

[17] Section 5(3)(a) of the Act prescribes the matters the Commission must consider in deciding to declare an event to be a special event for the purpose of s 5(1)(c) of the Act. I will address those matters further below.

⁷ *Trading (Allowable Hours) Act 1990* (Qld) s 5(2)(b)(i).

- [18] The parties each raise matters in their submissions which go beyond the matters required by s 5(3)(a) of the Act. Section 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.⁸ However, 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.⁹
- [19] Whilst the parties have each raised matters regarding the benefit (or conversely, potential detriment) to be derived from the declaration and the sufficiency or otherwise of the current trading hours, they have done so without identifying how these matters are a relevant consideration to the determination to be made by the Commission, having regard to the subject matter, scope and purpose of the Act.
- [20] Accordingly, the submissions made by the parties do not establish the extent to which those other matters are relevant to my consideration of the application, having regard to the subject matter, scope and purpose of the Act.
- [21] Having regard to the matters I must consider pursuant to s 5(3) of the Act, I am of the view that the Carnival is a unique event of local significance to the Toowoomba area.
- [22] In consideration of the evidence contained in Mr Stout's affidavit, I am satisfied that the Carnival is of cultural significance to the people of the Toowoomba area due to the significant history of the Carnival dating back to 1949 and further, because of its association with and connection to Toowoomba's reputation as the "garden city".
- [23] I accept that due to the current restrictions in place due to COVID-19, that there will likely be a reduction in patrons that will attend the event in 2020. However, I also accept that the Carnival has historically attracted large numbers of tourists, including large numbers of domestic tourists, to Toowoomba. Even with an assumed reduction in the numbers of patrons from interstate, I consider the event will continue to attract patrons from within the state as well as from the local area. Accordingly, I accept the submissions that the commercial activity generated by the Carnival will benefit local businesses, particularly in the current economic climate, if non-exempt shops were able to trade and draw visitors into the area throughout the days of the Carnival.
- [24] For these reasons, I have determined that the Carnival is significant to the economy and tourism industry of Toowoomba. Accordingly, I will exercise my discretion to declare the Carnival a special event.

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

- [25] Exhibit B to Mr Stout's affidavit attaches a map, which purports to include a boundary as follows:
- Starting at New England Highway at Griffiths St, turning onto North St and heading south on Mary St
 - Turning onto Margaret St travelling thorough to Rowbotham St and east onto Nelson St

⁸ *National Retail Association Limited, Union of Employers* [2020] QIRC 031, [24]-[26].

⁹ *Ibid*, [27].

- Travelling down Baker St through to Brisbane Street, Rudd St and north east on Anzac Ave turning onto Euston Rd
- Turn north west onto Drayton Wellcamp Rd heading back towards Wilsonton Heights, finishing at Hogg St and the starting point on Griffiths St

[26] Mr Stout's affidavit addresses the reasoning for the proposed geographical boundary of the map, as follows:

The Carnival website encourages visitors to use the Shuttle Bus service to reduce emissions and limit traffic demands. The Shuttle Bus service will run between Picnic Point, Queens Park, Laurel Bank Park and Toowoomba CBD with access to connecting transport hubs at each stop. For this reason, the area of this application has been constructed to include the area immediately surrounding the parks and Grand Central as well as major retail centres and the CBD for visitors to take advantage of retail trading opportunities and the start or end of the days' official events.

Because of the #trEATS program encouraging residents and visitors to visit venues across the region and shuttle bus services activating suburbs outside of Toowoomba CBD, the area of this application has been proposed to include the major suburban transit hubs, carparks and the CBD for patrons to take advantage retail trade opportunities before and after events. The NRA believes such an order would allow major retailers to cater better to the needs of visitors to the event, as well as residents. We also contend that such an order is in keeping with the letter and the intent of the Act, and in line with similar applications previously granted by the Commission.

[27] During the course of the hearing, Mr Stout produced a version of the Exhibit B map, which identified relevant exempt shops, accommodation, venues and Carnival events within the proposed area. I am satisfied that the area proposed by the NRA in Exhibit B, covers an area which includes the spread of events throughout the Toowoomba area for the Carnival.

[28] The SDA submits that the application is an overreach in relation to the area it covers. In particular, it submits that the application is only intended to regulate shops operating around the designated event area and is not to be a catchment area that is routinely expanded out, so it can specifically incorporate shopping venues or suburbs that are several kilometres away from the heart of the event itself and have no correlation to it.

[29] The SDA submits that the primary location of the event, particularly during the hours requested to be made available by this application, is Toowoomba city. Consequently, it submits that it is necessary for the geographical area to be limited to a radius of no more than four kilometres from the corner of Ruthven Street and Margaret Street.

[30] During the hearing, I asked Ms Armstrong whether any of the Carnival events fell within a four-kilometre radius of Toowoomba city. She was unable to identify if that was the case.

[31] A further difficulty with the SDA's proposed geographical area is that it does not identify, for instance by reference to geographical markers, how the four-kilometre radius would be identified and defined for the purpose of making a declaration.

[32] As noted above, s 5(2)(b)(iii) of the Act requires the Commission to state the area to which the declaration applies. I consider that area must be identified with some precision in order for it to be consistent with s 5(2)(b)(iii) of the Act. This will aid in providing certainty as to the area subject to the declaration.

- [33] To this end, during the course of the hearing, I enquired of Mr Stout as to whether he was satisfied that the description of the area identified in Exhibit B, described the whole of the area and further whether the boundary followed identifiable markers, for instance, street names.
- [34] Mr Stout undertook to check these matters and revert to the Commission.
- [35] On 11 September 2020, Mr Stout forwarded correspondence to the Industrial Registry, providing a map of area which was larger in size than the proposed area of the map in Exhibit B. It was explained, that the larger map now follows major highways, rather than smaller Toowoomba streets. It was submitted that the larger map area was easier to follow and created clear, identifiable boundaries for the Commission.
- [36] The SDA were invited to respond to the altered map and on 15 September 2020, Ms Armstrong forwarded correspondence to the Industrial Registry, in summary, stating that a four-kilometre radius as identified by the map, is appropriate to ensure the geographical area is limited to the area of the event and the convenience of boundaries, such as major highways, does not become a basis for including areas or suburbs that are not in the direct vicinity of the event and are therefore outside the scope of s 5 of the Act.
- [37] I do not consider that the SDA's proposed area of a four-kilometre radius without further information, provides precision or certainty regarding the proposed area. Further, I am not satisfied that a four-kilometre radius would include all events and associated activities of the Carnival.
- [38] The NRA were invited to confirm that the description accompanying the map on Exhibit B provided a clear description of the boundary of the area. Instead of doing this, the NRA provided an altered map, larger in size and with a boundary marked by reference to major highways.
- [39] I do not consider that it is necessary for major highways to be used as a reference point, if other alternative geographical markers are available. Further, I do not consider that it is consistent with the purpose and intent of the Act to expand a proposed declared area in order for it to be identified by major highways when other geographical markers are readily available. A balance must be struck between ensuring that the stated area for an event covers all relevant activities without being unnecessarily large in scope.
- [40] The NRA did not indicate that there were any difficulties arising out of the map and accompanying boundary descriptors in Exhibit B. Accordingly, I will declare the area for the event to be that area described in Exhibit B, as follows:
- starting at New England Highway at Griffiths Street, turning onto North Street and continuing south onto Mary Street;
 - turning onto Margaret Street travelling through to Rowbotham Street and east onto Nelson Street;

- travelling onto Baker Street through to Brisbane Street, Rudd Street and north east onto Anzac Avenue, turning onto Euston Road; and
- turning north west onto Drayton Wellcamp Road heading towards Wilsonton Heights, finishing at Hogg Street and the starting point on Griffiths Street.

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

- [41] The SDA submits that in the event a declaration is granted, that the Commission provide to all employees in any affected stores, as part of such declaration, a protection from working extended hours by reason of s 36B of the Act, to allow work in extended hours to be voluntary.
- [42] The SDA contends that the Commission has to some extent set a precedent in relation to the SDA's concerns regarding the protection of employees in non-exempt shops and extended trading hours. In this regard, the SDA refers to the decision of *Trading Hours – Exempt Shops - Commonwealth Games*,¹⁰ where it was 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 that case.
- [43] The submissions made by the SDA in this application appear to reflect its submissions in earlier proceedings.¹¹ After considering the SDA's submission, which were in almost identical terms to those made in this proceeding, Deputy President Merrell relevantly stated:¹²
- [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.
- [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. 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.
- [60] However, the courts formulating the principle have not tended to use words like 'ancillary', 'convenient' or 'reasonable.' The question is whether the further power is indispensable to, or fairly incidental to or consequential upon the statutory power.
- [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.

¹⁰ *Trading Hours-Exempt Shops – Commonwealth Games* (Queensland Industrial Relations Commission, Deputy President Swan, 13 December 2017), [27].

¹¹ *National Retail Association Limited, Union of Employers* [2020] QIRC 031.

¹² *Ibid*, [58]-[62].

[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*.¹³

[44] During the course of the hearing, I enquired of the SDA whether it was in a position to identify the source of power for the Commission to make the orders sought. No source of power was able to be identified by the SDA.

[45] I am not persuaded that the Commission has the power to grant the relief sought by the SDA. Accordingly, I decline to make the declaration sought.

What should be the period for which the declaration applies?

[46] The Carnival is scheduled to operate for the period of 18 September 2020 to 27 September 2020 inclusive. The NRA has sought that the declarations apply only for the period of the Carnival. The SDA does not object to the period of time sought.

[47] Accordingly, the period which the declaration applies will be for the period commencing on 18 September 2020 and concluding on 27 September 2020.

Conclusion

[48] The Carnival is a special event within the meaning of s 5(1)(c)(ii) of the Act because the Carnival is an event of cultural significance to the people of the Toowoomba area, is significant to the economy and the tourism industry of the Toowoomba area. For the reasons set out above, I am satisfied that I should make a declaration to that effect. The period for which the declaration applies is limited to the length of the event, namely from 18 September 2020 to 27 September 2020.

[49] Further, the area to which the declaration applies is that set out in Exhibit B to Mr Stout's affidavit.

[50] I make the following declaration:

1. Pursuant to s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990* (Qld), I declare that the Toowoomba Carnival of Flowers is a special event.
2. The declaration shall apply for the period commencing on Friday, 18 September 2020 and concluding on Sunday, 27 September 2020.
3. The declaration applies to the following stated area:
 - starting at New England Highway at Griffiths Street, turning onto North Street and continuing south onto Mary Street;
 - turning onto Margaret Street travelling through to Rowbotham Street and east onto Nelson Street;

¹³ Footnotes omitted.

- travelling onto Baker Street through to Brisbane Street, Rudd Street and north east onto Anzac Avenue, turning onto Euston Road; and
- turning north west onto Drayton Wellcamp Road heading towards Wilsonton Heights, finishing at Hogg Street and the starting point on Griffiths Street.