

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2021] QIRC 029

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

CASE NO: TH/2021/1

PROCEEDING: Application

DELIVERED ON: 28 January 2021

HEARING DATE: 22 January 2021

MEMBER: McLennan IC

HEARD AT: Brisbane

ORDER: **1. The application is dismissed.**

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

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

APPEARANCES: Mr D Stout and Ms L Charlton 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 January 2021, 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 BrisAsia Festival, to be held between 1

and 28 February 2021 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 January 2021.

- [2] The effect of such a declaration, if made, would be that a non-exempt shop operating in the Central Ward area of Brisbane, 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 specified in the Applicant's application is the Central ward of Brisbane, as set out in Exhibit B of the Affidavit of Mr Stout filed 13 January 2021.
- [4] The application initially sought for the trading hours to be extended for the period from 1 and 28 February 2021 inclusive. In oral submissions during the hearing of this matter, the applicant elected to amend the date range sought.
- [5] On 14 January 2021, a Directions Order was issued which required that the Applicant's application and the Directions Order be served on the Brisbane City Council, 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 20 January 2021.
- [7] The Application and Directions Order were published on the Commission's website.
- [8] On 15 January 2021, 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 20 January 2021.
- [9] The question for my determination is whether I should make the declaration as sought.

Should the Commission grant the declaration sought?

- [10] Relatively recently, the Legislature made amendments to the *Trading (Allowable Hours) Act 1990*.¹ While discretion is provided to the Commission to depart from those hours, I bear in mind that those hours are the recent and precise expression of the legislature. Any departure from these terms must be on a compelling basis – to do so is not a trivial matter.
- [11] The Applicant contends that the BrisAsia Festival meets the description of a special event within the meaning of s 5 of the Act.
- [12] Section 5 of the Act relevantly provides:

¹ The Act was amended in 2017.

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.*

[13] 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.

[14] 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.

[15] 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. At the hearing of this matter, Mr Stout tabled a short letter of support from Lord Mayor Adrian Schrinner² in which he stated:

Council supports liberalising trading hours generally and supports this application specifically. We believe that increased access to trading hours during major events and celebrations is critical to helping businesses recover from the recent economic downturn and enhances Brisbane's reputation as a liveable and prosperous city.

Should the BrisAsia Festival be declared to be a special event?

The NRA's written submissions

[16] The NRA contends that the BrisAsia Festival meets the description of a special event within the meaning of s 5(1)(c) of the Act.

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

- Now in its ninth year, the BrisAsia Festival will be held in Brisbane between 1 and 28 February 2021 inclusive. An order is sought under s 5(1)(c) of the Act for the duration of the festival (that is, the month of February) for the entire Central Ward area.
- "Whilst the NRA recognises that the duration of the application is ambitious, we are willing to accept a shortened period between Monday 8 February 2021 and Sunday 14 February 2021."
- Supporting statements from current and former Lord Mayors of Brisbane City Council endorse the significance of this cultural event.
- "Anecdotal feedback from a major Brisbane CBD shopping centre management anticipated increased foot traffic throughout the Lunar New Year period."
- "The impacts of the COVID-19 pandemic on the local economy and tourism industry cannot be understated with retailers and shopping centre managers highlighting a dire need to solve low traffic issues in the Brisbane CBD. Some retailers have experienced drops of 30% or more in revenue and landlords have seen mass exits from centres of up to 50%. These issues have serious impacts on the reputation and viability of the Brisbane CBD as a vibrant retail precinct and unemployment. The NRA submits that events such as the BrisAsia Festival are increasingly crucial to ensure Queensland's economic recovery."
- As almost all the festival events are free, attendees may be more willing to shop whilst out.

² Brisbane City Council.

- Extended trading hours would allow major retailers to cater better to the needs of visitors to the event, as well as residents.
- “Our experience says that it is not likely that retail stores will use the full range of hours available to them and that they usually only open one to two hours on either side of their regular trading hours. We also suggest that not all stores will implement additional trading hours and it will likely be just certain stores in the CBD and suburban areas surrounding event venues, transit routes and car parks.”
- The order sought is in keeping with the letter and intent of the Act, and in line with similar applications previously granted by the Commission.
- The BrisAsia Festival meets the criteria under the Act as “a unique or infrequent event of local, State or national significance.”
- The granting of this application will not come at the expense of regulation and employees as any additional work during extended hours will be on a voluntary basis as per section 36B of the Act.
- The importance of the work undertaken by retail workers was also recognised.

The NRA’s oral submissions

- [18] At the hearing of this matter, Mr Stout handed up letters of support for the NRA’s application from Brisbane City Council³ and Queens Plaza Centre Management.⁴
- [19] Mr Stout also stated that the application dates had been further revised down to a range of 12 – 14 February 2021 inclusive.⁵ The compressed dates of the application were said to coincide with the Lunar New Year celebrations in the 2021 event program in the Chinatown Mall and the greater CBD,⁶ with the major event occurring in the Chinatown Mall on 13 February 2021.⁷
- [20] When I inquired about the intended purpose of the application - in terms of specifically ‘who’ it was envisaged to affect – Mr Stout advised “Specifically the attendants of Queens Plaza and associated businesses in the Edwards Street strip.”⁸ When pressed about the much smaller scope of the intended store beneficiaries versus the entire Central Ward area so claimed in the NRA’s application, it was explained that “The area claimed in the application is something we’re used to and working to and familiar with”⁹; notwithstanding there was just one festival event in that ward¹⁰ within the revised date range proposed.¹¹

³ Correspondence from Lord Mayor Adrian Schinnerer dated 21 January 2021.

⁴ Correspondence from Ms Pamela Wakeford, Centre Manager, Queens Plaza, dated 21 January 2021.

⁵ Transcript, page 3, [17] – [18].

⁶ Transcript, page 3, [25] – [32].

⁷ Transcript, page 10, [35] – [46] and page 11, [1] – [4].

⁸ Transcript, page 5, [8] – [9].

⁹ Transcript, page 10, [4] – [5].

¹⁰ Lunar New Year, Chinatown Mall.

¹¹ 12 – 14 February 2021.

- [21] It was confirmed that the location of that sole event in the Chinatown Mall is not in the immediate vicinity of Queens Plaza, but was instead potentially a walk of 15 – 20 minutes.¹²
- [22] The Lunar New Year event in the Chinatown Mall was scheduled to run from 6 – 9 pm.
- [23] The allowable trading hours for non-exempt shops in the Central Ward area (subject of the NRA’s application) is 7 am – 9 pm Monday to Saturday and 9 am – 6 pm on Sunday. Mr Stout further advised that the area of New Farm falls within the definition of a tourist area under the Act and that “...There is one exempt shop, possibly two, in the New Farm catchment which would trade an additional hour either side, so 6 am to 10 pm.”¹³
- [24] Whilst the BrisAsia Festival is in its ninth year, an application for extended trading hours has not previously been made with respect to this particular festival until this year.
- [25] With respect to the SDA’s observation of the patterns of attendance in recent years, Mr Stout commented that “I think the fact that there is dwindling numbers is probably entirely the point of this application. We probably understand that the CBD retailers have – throughout COVID have very, very unique set of circumstances where the majority of the catchment has left is now in the suburbs rather than the CBD. We are looking to attract people back into the CBD in a safe setting and possibly something unique to the CBD which they couldn’t find in the suburbs. So we’re making this very much about a CBD proposition.”¹⁴ He later added that “This is probably led by Queens Plaza and they do think that this is an opportunity, especially for the exclusive brands and those higher end brands, to have an opportunity to do something different; you know, collaborate and work together to have maybe a bid night or a trading opportunity throughout. That’s probably yet to be determined.”¹⁵

The SDA’s written submissions

- [26] The SDA opposed the making of the declaration sought by the NRA.
- [27] 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.
 - 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.

¹² Transcript, page 11, [5] – [12].

¹³ Transcript, page 6, [10] – [47].

¹⁴ Transcript, page 7, [46] – [47] and page 8, [1] – [5].

¹⁵ Transcript, page 8, [16] – [20].

- 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 a large area of proximity to the event should be afforded the expansion of hours by a declaration under Section 5 of the Act”.
- “The SDA submits that expected attendance is a necessary consideration when determining the significance of an event...” and goes on to compare the reported attendance numbers of events such as the Toowoomba Carnival of Flowers¹⁶ and Brisbane Festival,¹⁷ compared with much fewer numbers attending the BrisAsia Festival.¹⁸
- “The NRA also provided as evidence the BrisAsia Festival attracted a crowd of 171,000 in 2017. The SDA submits the substantial decrease in attendance over the following years (80,000 in 2018 and 34,000 in 2019) prior to the pandemic, suggests a decline in the events popularity...”
- “...it is common knowledge non-exempt stores such as Coles and Woolworths have profited from the pandemic due to instances of panic buying, whilst other major retailers have been able to...trade online when necessary. The SDA submits it is small businesses and independent retailers who are most in need of assistance with economic recovery and these exempt shops rely on the competitive advantage of unrestricted trading.”
- “Although the relevant legislation does not provide further clarity of the threshold for cultural, religious or sporting ‘significance’ of an event, the SDA does not believe this was intended to be utilised as an unmeasured standard available for the NRA to suggest the significance of every event taking place.”
- The SDA refuted the importance of extended trade during a period of the BrisAsia Festival to restoring Queensland’s reputation as a tourism destination. It was instead suggested that the majority of attendees would most likely be locals, accustomed to shopping within the existing trading hours.
- The dates sought in the NRA’s application is “an overreach of the intent of Section 5 and this period is not appropriate in light of the small number of events which form part of the Festival and the dates and times those events take place.”
- The SDA submissions strongly advocated for the voluntary nature of work in any extended hours that may be granted through the NRA’s application.

The SDA’s oral submissions

[28] At the hearing of this matter, Ms Armstrong further advocated that:

¹⁶ 294,000 attendees reported in 2019.

¹⁷ More than 1 million attendees reported each year.

¹⁸ NRA submitted that there were 34,000 attendees in 2019. SDA submission noted that this constituted scattered attendance across the entire month, rather than on a single night.

- The SDA maintains objection to the NRA’s application on the grounds it is questionable as to whether the event is ‘significant’ within the parameters of the legislation.
- Depressed attendance numbers over recent years, combined with the pandemic, suggest the general public do not support the need for extended trade in this period.
- Comparable attendance numbers were realised for the AFL Grand Final, however that was over one night – not over a month.
- In terms of defining ‘significant’, “...we just would press that it wasn’t meant to be used as an unmeasured...catchphrase to capture any event that takes place...”¹⁹
- “...the NRA submitted that because of the dwindling numbers the extended trading might be important to draw people into the CBD area. But I would submit that is not the purpose of the legislation. The event has to stand on its own significance for the order to be granted.”²⁰

The BrisAsia Festival is *not* a 'special event' within the meaning of s 5(1)(c)(ii) of the Act

[29] Having regard to the parties’ submissions, I am of the view that the BrisAsia Festival is not a 'special event' within the meaning of s 5(1)(c)(ii) of the Act.

[30] My reasons follow.

[31] The Act mandates consideration of a number factors in determining such applications:

Is the event a unique or infrequent event of local, State or national significance?²¹

[32] The NRA submits that “The BrisAsia Festival is an annual event hosted by the Brisbane City Council.”

[33] The Festival program has attracted varying numbers of attendees in past years, with 34,000 in 2019 and 28,000 in 2020.²²

[34] I find that the BrisAsia Festival complies with the criteria at s 5(1)(c)(i) of the Act.

Does the event have cultural, religious or sporting significance?²³

[35] I accept the NRA’s submission that the BrisAsia Festival is “...centred around the Lunar New Year and showcases contemporary and traditional Asian arts, community events and celebrates Brisbane’s cultural diversity.”

¹⁹ Transcript, page 4, [39] – [41].

²⁰ Transcript, page 12, [8] – [10].

²¹ *Trading (Allowable Hours) Act 1990 (Qld)* s 5(1)(c)(i).

²² The event in 2020 was held at the beginning of the COVID-19 outbreak.

²³ *Trading (Allowable Hours) Act 1990 (Qld)* s 5(3)(a)(i).

[36] The NRA submission further explained that “The festival is centred around two of the biggest cultural and religious events of the year, Lunar New Year and Holi.”

[37] I have considered s 5(3)(a)(i) of the Act and concur that the BrisAsia Festival is an event of cultural and religious significance.

Is the event significant to the economy and the tourism industry?²⁴

[38] I am not satisfied that the BrisAsia Festival is significant to the Queensland economy and tourism industry more broadly.

[39] The NRA submission stated “In 2017, then Brisbane Lord Mayor Graham Quirk said the effect of BrisAsia on the Brisbane economy was hard to quantify accurately but the event will help present Brisbane as a city that is lively.”

[40] With respect to the stated purpose of the application, Mr Stout advised “Specifically the attendants of Queens Plaza and associated businesses in the Edwards Street strip.”²⁵ It was acknowledged that the primary businesses that this particular application purports to advocate for are “categories of fashion and giftware.”²⁶ He added “...fundamentally, this is an event that we’re looking to categorise by very exclusive brands across several shopping centres and some of those shops that actually face Edward Street. And I liken that as to the Gucci and Channels and those types of things...”²⁷

[41] There is no evidence before me regarding either the extended trading hours aspirations of, or indeed support for, the application from those particular stores beyond Mr Stout’s report of their view on the authority of the Queens Plaza Centre Manager.²⁸ I cannot rely on this alone, given that the interests of individual tenant retail stores and a shopping centre’s centre management may not always align.

[42] When pressed about the much smaller scope of the intended store beneficiaries versus the entire Central Ward area so claimed in the NRA’s application, it was explained that “The area claimed in the application is something we’re used to and working to and familiar with.”²⁹ This geographical area was persisted with, despite it being clarified that there was just one festival event in the scheduled program taking place in that ward within the revised date range proposed.³⁰ That is, the Lunar New Year event being held on 13 February 2021 in Chinatown Mall, Fortitude Valley. It was further acknowledged that Chinatown Mall was some distance from Queens Plaza and the Edward Street luxury brand stores – a walk of potentially 15 – 20 minutes.³¹

[43] It is also noteworthy that the date range of the application was initially the entire month of February, with the NRA themselves concluding “...that the duration of the application is ambitious...” and indicating a willingness to accept 8 – 14 February instead.³² At the

²⁴ *Trading (Allowable Hours) Act 1990 (Qld) s 5(3)(a)(ii)*.

²⁵ Transcript, page 5, [8] – [9].

²⁶ Transcript, page 9, [34].

²⁷ Transcript, page 9, [38] – [41].

²⁸ Transcript, page 6, [1] – [6].

²⁹ Transcript, page 10, [4] – [5].

³⁰ 12 – 14 February 2021.

³¹ Transcript, page 11, [5] – [11].

³² Affidavit of Mr D. Stout, NRA, filed 13 January 2021.

hearing of this matter, the date range was further reduced to three days³³ in light of the primary Lunar New Year event on 12 February 2021.³⁴

- [44] The current trading hours have been reported at paragraph [23] above. Mr Stout suggested that the particular retailers were unlikely to elect to open earlier but may take advantage of any opportunity to trade later in the evenings, beyond 9 pm.³⁵ Given the Lunar New Year event in the Chinatown Mall was scheduled to run from 6 – 9 pm, I believe that attendees are already sufficiently served by the existing trading hours.
- [45] Quite simply, I find it rather unlikely that someone attending the Lunar New Year event in Fortitude Valley from 6 – 9 pm would then walk 15-20 minutes to Queens Plaza to do some high-end fashion shopping at that time of night. I am not convinced this application is about capturing ‘opportunistic shoppers’ who would be required to walk some distance from the event to make a luxury, discretionary spend. If indeed there were some attendees of a mind to do just that, it would surely be very few.
- [46] In either case, it is not a sufficiently compelling argument to disturb the allowable trading hours prescribed by the Legislature.

Consideration of correspondence from the Brisbane City Council

- [47] The Act states that a submission made by a local government may also be considered in determining such applications:
- [48] At the hearing of this matter, a letter of support from Brisbane City Council was presented. However that brief correspondence outlines Council’s view of trading hours more broadly. It does not provide specific evidence or any detailed submission of the significance of the event in particular – the mandatory criteria that informs consideration of such applications.

Conclusion

- [49] In coming to this decision I have carefully considered the parties’ submissions and all the material before me. 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. The BrisAsia event is of some cultural and religious significance. However, in such circumstances where the experience of past years (even pre-COVID) demonstrates dwindling attendance numbers, flow-on economic and tourism benefits to the economy are unlikely to be realised as a result of the BrisAsia Festival.
- [50] Having regard to the submissions and balancing those relevant factors, I find that the BrisAsia Festival is not a ‘special event’ within the meaning of s 5(1)(c)(ii) of the Act.
- [51] For the reasons set out above, I will not make the declaration sought.

³³ 12 – 14 February 2021.

³⁴ Transcript, page 3, [18] – [30].

³⁵ Transcript, page 9, [10] – [23].

[52] Order:

- 1. The application is dismissed.**