

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association, Union of Employers [2021] QIRC 238*

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

CASE NO: TH/2021/8

PROCEEDING: Application

DELIVERED ON: 09 July 2021

HEARING DATE: 8 July 2021

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 the Charters Towers Show a special event.
2. The declaration shall apply for the period commencing on Sunday 25 July 2021 and concluding on Tuesday 27 July 2021.
3. The declaration applies to the following stated area:
 - Starting at Mary St at Charters Towers Showgrounds, travelling the length of Mary St and turning south onto Dan Ln
 - Travelling though Gill St and onto Vulture St southbound
 - Turning west onto Hodgkinson St, travelling the length of Hodgkinson St and then turning south onto Deane St and immediately northwest onto Jackson St, turning north onto Mosman St and then immediately northwest onto Marion St
 - Travelling on Marion St and then turning northeast onto Cambridge St
 - Turning northeast onto Mary St and travelling back to starting point on

**Mary St at Charters Towers
Showgrounds**

- 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 Charters Towners Regional area for a specified period during a special event, namely the Charters Towers Show - whether the Charters Towers Show is a special event within the meaning of s 5 of the *Trading (Allowable Hours) Act 1990* - declaration made
- LEGISLATION:** *Industrial Relations Act 2016* (Qld), s 539
Trading (Allowable Hours) Act 1990 (Qld), s 5
- CASES:** *National Retail Association Limited, Union of Employers* [2020] QIRC 031
National Retail Association Limited, Union of Employers [2020] QIRC 154
National Retail Association Limited, Union of Employers [2020] QIRC 168
National Retail Association Limited, Union of Employers (the 2021 Burdekin Show case) [2021] QIRC 220
- APPEARANCES:** Mr D. Stout and Ms L. Charlton of the National Retail Association Limited, Union of Employers

Ms S. Purton of the Shop Distributive and Allied Employees Association (Queensland Branch), Union of Employees

Mr T. McQuillan of the Australian Workers' Union of Employees, Queensland

Reasons for Decision

Introduction

- [1] On 18 June 2021, the National Retail Association Ltd, Union of Employers ("NRA"), applied for a declaration pursuant to s 5(2) of the *Trading (Allowable Hours) Act 1990* (Qld) ("the Act"), that the Charters Towers Show, to be held on Sunday 25 July to Tuesday 27 July 2021 is a special event within the meaning of s 5(1)(c)(ii) of the Act.

- [2] The effect of the relief sought by the NRA that it, if made, would provide for non-exempt shops, operating in a stated area during the period of the event (the Charters Tower Show), to be exempt shops for the period of that event.
- [3] The area that is sought to be covered by the application is a geographical area described by the NRA¹ as follows:

*Starting at Mary St at Charters Towers Showgrounds, travelling the length of Mary St and turning south onto Dan Ln
Travelling though Gill St and onto Vulture St southbound
Turning west onto Hodgkinson St, travelling the length of Hodgkinson St and then turning south onto Deane St and immediately northwest onto Jackson St, turning north onto Mosman St and then immediately northwest onto Marion St
Travelling on Marion St and then turning northeast onto Cambridge St
Turning northeast onto Mary St and travelling back to starting point on Mary St at Charters Towers Showgrounds*

- [4] The period for which the declaration is sought is Sunday 25 July, Monday 26 July and Tuesday 27 July 2021. The NRA noted in its submissions that Tuesday 27 July has been declared a public holiday for the purpose of the Charters Towers Show.
- [5] On 21 June 2021, a Directions Order was issued, which provided that those who may be affected by the Application to make an application seeking leave to be heard. The Application and Affidavit was published on the Queensland Industrial Relations Commission ("the Commission") website on 18 June 2021 and the Directions Order was published on the Commission's website on 21 June 2021.
- [6] On 25 June 2021, the Shop Distributive and Allied Employees Association (Queensland Branch), Union of Employees ("the SDA"), made an application seeking leave to be heard. On 25 June 2021, the Commission granted leave for the SDA to be heard² and the SDA subsequently filed written submissions.
- [7] At the hearing of the matter, the Australian Workers Union of Employees, Queensland ("the AWU") sought leave to appear. That appearance was not objected to by the parties and I granted leave for the AWU to appear.
- [8] The question for my determination is whether I should make the declarations sought by the NRA in its application.

The relevant provisions of the Act

- [9] Section 5 of the Act provides the definition of an exempt shop as follows:

5 Exempt shops

- (1) An *exempt shop* is-

¹ See map and description filed by the NRA on 8 July 2021 following the hearing of the matter.

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

- (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.

...

[10] 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

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

⁴ *Ibid* s 5(3)(a)(ii).

- [11] 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 The Charters Towers Regional Council did not file any submissions.
- [12] The NRA submits that the Charters Towers Show meets the criteria under the Act as being a "unique or infrequent event of local, state or national significance". The NRA further submits that there is evidence available that supports a conclusion that the event is also of cultural significance is significant to the economy and tourism.
- [13] The Charters Towers Show is scheduled to be held at the Charters Towers Show Ground over three days. The NRA submits that the event schedule includes show jumping, sideshows and amusement rides, roving entertainers, and section competitions. The NRA further submits that the event is a major tourist drawcard in regional Queensland, providing tourism and employment opportunities.
- [14] The Charters Towers Show will celebrate its 140th year of operation in 2021.
- [15] Whilst the SDA's written submissions do not identify whether it consents or objects to the application made by the NRA, Ms Purton, who appeared at the hearing, clarified that the SDA objected to the application on the basis that the Charters Towers Show was not a special event for the purpose of the Act.
- [16] The SDA made general written submissions with respect to the operation of the Act. Those submissions, in summary, include as follows:
- (a) whilst s 5(3) of the Act describes matters the Commission must consider when making a determination whether to declare an event to be a "special event", there is a deficiency within the Act for not providing guidance or any reference to considerations on such matters as:
 - (i) the necessity of non-exempt shops to actually trade as exempt shops during the special event;
 - (ii) the impact such a declaration has on employees of shops effected by the granting of such a declaration;
 - (iii) the necessity to limit any retails hours during the special event period.
 - (b) recommendations arising out of the Office of Industrial Relations review in December 2016, stated that a change to the trading hours legislation was considered in terms of assisting tourism by specifically providing "shops operating within a designated area around and during international special events (example Commonwealth Games) and for local festivals to be able to be declared exempt from trading hours regulation after consideration of an application to the QIRC and the QIRC will decide the appropriateness and time frame for the exemption";
 - (c) the review recommendations were not intended to make every event significant nor to make all non-exempt activities in a location near an event free from trading regulation and that these types of applications are simply a false

⁵ Ibid s 5(3)(b).

suggestion by the NRA that there is a necessity for de-regulation of trading hours to assist the economy and tourism without approving the actual necessity for extending trading hours in the events or into the future;

- (d) the application by the NRA raises concerns around the immediate and long-term consequences for the SDA's members including:
 - (i) where s 5 applications are used to suggest the significance of any event without demonstrating real necessity for extending trading by major retailers, the application undermines the existing trading regime. This consequence may benefit some major retailers but is likely to put significant pressure on the availability required of retail workers in the future and removes the competitive advantage of late night trading relied upon by many small business owners and operators.
 - (ii) the existing protections around voluntary work available under statutes or other instruments are not always adequate in preventing the reality or other relational pressures in store. Whilst it is ideal to hypothesise additional hours will be available to those employees who request work, employers usually direct employees to work a particular roster for the relevant period on the basis of operational needs or requirements. The SDA submits that it is regularly informed by its members that they experience relationship breakdown and other consequences if those rosters are declined, regardless of the reason for declining.
- (e) due to the current situation in Queensland relating to Covid-19, if the event does proceed, the SDA is not confident it will hold the same level of significance it has in previous years. It submits it is likely the economic and tourism interests of the area would be better served by minimising any unnecessary gathering opportunities such as shopping at Woolworths in extended hours, to avoid increasing fears of community transmission. The SDA also submits that the current situation with Covid-19 is very likely to have a significant impact on any domestic tourism in the month of July and this will not only reduce attendance numbers at the event, but locals to the area are accustomed to the existing regime and will not have an expectation of additional shopping opportunities;
- (f) it is submitted that if the event does proceed, the existing trading regime is sufficient for the period of the Charters Towers Show and that the application does not serve any genuine need of patrons attending the event;
- (g) the term "significance" was not intended to be used as an unmeasured benchmark available to the NRA to point to any cultural, religious or sporting aspect of an event to satisfy an application for extended trading.

[17] The SDA indicated that if the Commission is minded to grant the orders sought, then it does not object to the requested period or to the requested area sought in the application.

[18] Finally, the SDA requests that the importance of work within the extended hours as remaining voluntary to be expressed in any order made by the Commission.

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

- [19] 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.
- [20] 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.⁶ However, any other matter that the Commission is bound to consider must be determined by implication from the subject matter, scope and purpose of the Act.⁷
- [21] It may well be that some of the matters raised by the SDA in its submissions including, for instance, the impact on employees if a declaration is made fall within consideration of whether a declaration be made if it can be established those matters are relevant to the subject matter, scope and purpose of the Act. The SDA's submissions are of a general nature and do not establish by reference to evidence or any other information the relevance of such matters in the context of this application.
- [22] Further, I do not accept the SDA's submissions that the word "significance" in s 5(3)(a) of the Act was intended to be used as an unmeasured bench mark available to an applicant to point to any cultural, religious or sporting aspects or any event to satisfy an application for extended trading.
- [23] The word significance should be read within its ordinary context. That is, it is of importance and/or consequence.⁸
- [24] The SDA submitted that the event would not be a "special" event as the number of attendees this year would likely be diminished because of the impact of the Covid-19 pandemic. Further, it submits that the attendees of the show are likely to purchase food and drink at the show and not provide genuine retail opportunities to the shops in the area sought by the NRA.
- [25] I accept that due to the current Covid-19 pandemic, that there may be a reduction in patrons attending particularly from interstate, to the event in 2021. However, I do not accept that a reduction in attendance rates from interstate to be a reason not to determine the event to be a special event. An event that is of unique local significance, such as the local agricultural show, need not draw vast interstate attendees to be considered significant.
- [26] Whilst the Commission must have regard to the significance of the event to the economy and tourism industry, that does not require the Commission to only declare an event when the Commission considers that the event creates the real possibility of retail opportunities in the extended hours. However, I am satisfied, on the material, that the nature and

⁶ *National Retail Association Limited, Union of Employers* [2020] QIRC 031, [24] – [26].

⁷ *Ibid*, [27].

⁸ *National Retail Association Limited, Union of Employers (the 2021 Burdekin Show case)* [2021] QIRC 220, Merrell DP, [18].

declaration of this event will mean the event is important and of consequence to the economy and tourism industry in Charters Towers.

- [27] Having regard to the matters I must consider to s 5(3) of the Act, I am of the view that the Charters Towers Show is a unique event of local significance to the Charters Towers area.
- [28] In consideration of the evidence contained in Mr Stout's affidavit, I am satisfied that the Charters Towers Show is of cultural significance to the people of the Charters Towers area due to the significant history of the show dating back 140 years. Further, I am also cognisant of the role that agricultural shows play in leading development in agricultural and rural communities and that they form an important part of the social fabric and emotional wellbeing for residents in the area.
- [29] Further, I accept the submissions made by the NRA that the commercial activity generated by the show will benefit local business, particularly in the current economic climate, if non-exempt shops were able to trade and draw visitors into the area throughout the three days of the event.
- [30] For these reasons, I have determined that the Charters Towers Show is significant to the economy and tourism of Charters Towers. Accordingly, I will exercise my discretion to declare the Charters Towers Show a special event.

The operation of s 36B of the Act

- [31] Section 36B of the Act provides, inter alia, that an employer must not require an employee to work during extended hours unless the employee has freely elected to work during extended hours.
- [32] Section 36B is a penalty provision meaning that a penalty may be imposed if it is found an employer has contravened s 36B of the Act.

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

- [33] The SDA requests the importance of voluntary work within the extended hours be expressed in any order made by the Commission.
- [34] I have addressed a similar claim by the SDA in *National Retail Association Limited, Union of Employers*.⁹ For the same reasons, I decline to make an order in the term sought by the SDA.
- [35] However, it is noted that the NRA's submissions addressed this concern and confirmed its position that any additional work during extended hours will continue to be on a voluntary basis. The NRA also referred to Commissioner Dwyer's statement in *National Retail Association Limited, Union of Employers*¹⁰ which stated, inter alia, that there are a number of protections available under other statutes or instruments to employees who

⁹ [2020] QIRC 168, [41] – [45].

¹⁰ [2020] QIRC 154, [32].

may find themselves subject to duress or coercion with respect to being directed to work during extended hours, as is there right, to ensure that work is of a voluntary nature.

The AWU's position

- [36] The AWU appeared at the hearing and indicated that it did not oppose the making of the declaration but sought to emphasise the operation and effect of s 36B of the Act.

What should be the area to which the declaration applies?

- [37] On 8 July 2021, the NRA, at my request, filed a further detailed map and description of the area to which the application seeks to apply.

As noted above, the SDA does not object to the geographical area sought in the declaration. At the hearing, the AWU confirmed that it did not object to the geographical area sought by the NRA.

What should be the period for which the declaration applies?

- [38] The Charters Towers Show is scheduled to operate from 25 July 2021 to 27 July 2021 inclusive. The NRA has sought that the declaration only apply for the period of the Charters Towers Show and the SDA and AWU do not object to the period of time sought.
- [39] Accordingly, the period for which the declaration applies will be period commencing on 25 July 2021 and concluding on 27 July 2021.

Conclusion

- [40] The Charters Towers 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 Charters Towers area and is significant to the economy and tourism industry of the Charters Towers area.
- [41] 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 25 July 2021 to 27 July 2021.
- [42] Further, the area to which the declaration applies is that set out in paragraph [3].
- [43] I make the following declaration:

1. **Pursuant to s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990 (Qld)*, I declare the Charters Towers Show a special event.**
2. **The declaration shall apply for the period commencing on Sunday 25 July 2021 and concluding on Tuesday 27 July 2021.**
3. **The declaration applies to the following stated area:**
 - **Starting at Mary St at Charters Towers Showgrounds, travelling the length of Mary St and turning south onto Dan Ln**
 - **Travelling though Gill St and onto Vulture St southbound**

- **Turning west onto Hodgkinson St, travelling the length of Hodgkinson St and then turning south onto Deane St and immediately northwest onto Jackson St, turning north onto Mosman St and then immediately northwest onto Marion St**
- **Travelling on Marion St and then turning northeast onto Cambridge St**
- **Turning northeast onto Mary St and travelling back to starting point on Mary St at Charters Towers Showgrounds**