

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers [2016] QIRC 106*

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

v

Master Grocers Australia Limited
(granted leave to appear and be heard)

&

Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees
(granted leave to appear and be heard)

CASE NO: TH/2014/23

PROCEEDING: Application to amend Trading Hours Order (South-East Queensland Area)

DELIVERED ON: 14 October 2016

AMENDMENT: 26 October 2016 - Revised Decision
Amendment to Original Decision of 14 October 2016 at paragraph [14] deleting the words "the Ipswich Central Business District"

HEARING DATES: 16 to 19, 23 to 26 and 30 November 2015
1, 2, 3 and 10 December 2015
2 October 2015 (AWU Submissions)
7 March 2016 (SDA Submissions)
30 March 2016 (NRA Submissions)
29 April 2016 (MGA Submissions)

HEARD AT: Brisbane

MEMBERS: Deputy President Swan
Industrial Commissioner Fisher
Industrial Commissioner Thompson

ORDERS **1. The application is granted.**

2. **The *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* be amended in accordance with Schedule 1 of the application filed on 31 October 2014 and as amended.**
3. **The operative date of the amendments is 1 December 2016.**
4. **The shops and shopping centres specified in the Order may trade in accordance with that Order on the condition that employees have freely elected to work the extended hours without any coercion, harassment, threat or intimidation by or on behalf of the shop owner, or occupier of the business.**
5. **The Commission or Industrial Magistrates Court may, at its discretion, require employers to produce written evidence that employees have actively indicated their willingness and availability to work these hours as a result of the extension of allowable hours.**

CATCHWORDS:

INDUSTRIAL LAW - TRADING HOURS - Application to amend trading hours order - *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* - Objectors granted leave to appear and be heard - Witness evidence - Greater coherence of allowable trading hours - s 26 criteria considered and satisfied sufficiently to grant the application.

CASES:

Trading (Allowable Hours) Act 1990, s 21, s 26
Trading Hours - Non-Exempt Shops Trading by Retail - State (Order)
Trading (Allowable Hours) Amendment Act 2002
Corporations Act 2001 (Cth)
National Retail Association Limited, Union of Employers AND The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (No. 1) (B/2004/1489) (2004) 177 QGIG 773
Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (No. B810 of 2001) (2001) 167 QGIG 362
National Retail Association Limited, Union of Employers [2014] QIRC 150

National Retail Association Limited, Union of Employers [2014] QIRC 157

National Retail Association Limited, Union of Employers (No 2) [2014] QIRC 160

R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327

Re Kirby Street (Holdings) Pty Ltd [2011] NSWSC 1536

National Retail Association Limited, Union of Employers [2014] QIRC 194

APPEARANCES:

Mr M. Cole for the National Retail Association Limited, Union of Employers, the Applicant.

Mr C. Dorber Employment Advocacy Solutions Pty Ltd for Master Grocers Australia Limited.

Mr D. Gaffy for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Mr J. Harding for The Australian Workers' Union of Employees, Queensland.

The application is opposed by :

Master Grocers Australia Limited (MGA).

Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA).

The Australian Workers' Union of Employees, Queensland (AWU). The AWU does not have membership of employees in the area under consideration as its similar membership is in the central and northern regions of Queensland.

Revised Decision

- [1] The National Retail Association Limited, Union of Employers (the "NRA"), lodged several amended applications with the Queensland Industrial Relations Commission (the Commission). The final application requested the following amendments to the *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* (the "Trading Hours Order"):

"a) Deletion of the following sub-clauses from the order:

- (i) Clause 3.2(2) - South East Queensland (excluding the inner City of Brisbane, the Ipswich Central business District, Toowong Retail Precinct, the Gold Coast and Sunshine Coast Areas);
- (ii) Clause 3.2(3) - Inner City of Brisbane (excluding the Area of City Heart of Inner City of Brisbane and Area of New Farm of Inner City of Brisbane);
- (iii) 3.2(4) - Area of City Heart of Inner City of Brisbane;

- (iv) Clause 3.2(5) - Are of the City Heart of Inner City of Brisbane (Supermarkets);
 - (v) Clause 3.2(8) - Gold Coast and Sunshine Coast Areas;
 - (vi) Clause 3.2(30) - Ipswich Central Business District; and
 - (vii) Clause 3.2(32) - Toowong Retail Precinct
- b) Introduction of the following new sub-clauses 3.2(2) and 3.2(8) within the order:
1. South East Queensland Area (excluding Area of New Farm of Inner City of Brisbane, Gold Coast Coastal Tourist Area and Hamilton North Shore Area, respectively)

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Saturday	7.00 am	9.00 pm
Sunday (excluding Easter Sunday)	9.00 am	6.00 pm
Public Holidays (as defined) (excluding Good Friday, Easter Saturday, 25 April, Labour Day, 25 December)	9.00 am	6.00 pm

Notwithstanding the opening and closing time prescribed herein for public holidays, the opening and closing times for non-exempt shops on Easter Saturday shall be:

	<u>Opening Time</u>	<u>Closing Time</u>
Easter Saturday	8.00 am	6.00 pm

- (8) Gold Coast Tourist Area:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Saturday	7.00 am	10.00 pm
Sunday (excluding Easter Sunday)	8.00 am	8.00 pm
Public Holidays (as defined) (excluding Good Friday, Easter Saturday, 25 April, Labour Day, 25 December)	8.00 am	8.00 pm

(Supermarkets located in the Gold Coast Coastal Tourist Area (as defined) are deemed to be non-exempt shops where in the majority of retail floor and shelf space is used for the sale of food products including fruit and vegetables, packaged groceries, dry food goods and/or packaged foods, frozen foods, delicatessen items, uncooked packaged meats, cooked chickens, dairy products, bakery products, take-away food and prepared food items, confectionery and soft drinks)

Provided that the allowable trading hours for non-exempt stores within the Australia Fair Shopping Centre located in the Gold Coast Coastal Tourist Area (as defined) shall be as follows:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Saturday	7.00 am	10.00 pm
Sunday (excluding Easter Sunday)	8.00 am	8.00 pm
Public Holidays (as defined) (excluding Good Friday, Easter Saturday, 25 April, Labour Day, 25 December)"	8.00 am	8.00 pm

[2] The effect of the of the amendment sought by the NRA is to create a new trading area in South-East Queensland ("SEQA") wherein non-exempt shops within that area gain an extra hour of trade in the mornings Monday to Saturday inclusive, and to allow those shops to close at 9.00 pm on Saturdays, generally four hours later than what is currently allowable.

[3] The NRA states that while the MGA claims that the focus of the application is to "harmonise" the trading hours in the SEQA, it says:

"It was always the NRA's stated position - reiterated by Mr Evans in his testimony - that the focus of the application was to create a trading hours regime for the locality of the SEQA that better served the interests of business and consumers than the current arrangements. The NRA always held that, in achieving such an arrangement, a side benefit would be the ability to remove a number of definitions and sub-clauses from the Order. Given that the NRA's application did not seek any changes to Sundays and public holidays, it stands to reason that it would not be possible to achieve complete harmonisation."

[4] The NRA challenged an assumption it believed the MGA had concerning allowable trading hours. This concern related to the MGA's perceived view that the hours sought in the application should be mandatory for non-exempt retailers. The NRA submitted that "this is clearly not, and never has been, either the letter or the spirit of the *Trading Hours Allowable Act 1990*."

[5] The NRA further stated:

"Some hours are more valuable to some stores and their customers, while other hours are more important to other stores and customers. During the hearing, various non-exempts indicated that they would like to open early on week days; some indicated they would like to trade later on Saturdays; some said they would trade all available hours, and others said it would be a matter of testing demand from their customers. However, the fact that one store currently chooses not to trade for an allowed hour in the morning, for example, in no way diminishes the demand for that store and its customers to be able to transact business on a Saturday night. It is highly simplistic to argue that one trading hour is the same as any other. It would be churlish to argue that, if major stores were allowed to open between 2am and 3am, but declined to do so, they therefore should not be able to trade an additional hour on Saturday afternoon. The Commission heard a significant amount of evidence, from both NRA and MGA witnesses, that they

adjust their trading hours to meet customer needs. This would continue to be the case should this application be granted. However, stores would have greater leeway to test and meet the needs of their customers. In other words, we do not accept that the decision of one non-exempt store not to open for all available hours should prevent other non-exempt stores from being able to open for some or all of the hours sought in this application."

THE LEGISLATION

[6] Section 21 of the *Trading (Allowable Hours) Act 1990* (the Act) states:

- "(1) The industrial commission may decide trading hours for non-exempt shops.
- (2) However, the industrial commission is not to decide trading hours that are less than the following hours on a stated day, other than a public holiday -
- (a) 8a.m. and 9p.m. for Monday to Friday;
- (b) 8a.m. and 5p.m. for Saturday.
- (3) The industrial commission may make any order it considers necessary or convenient to give effect to a decision made under subsection (1), including, for example, an order specifying -
- (a) the earliest time when non-exempt shops may open on any day and the latest time when non-exempt shops must close on any day; or
- (b) hours for trading wholesale different from the hours fixed for trading retail; or
- (c) different trading hours by reference to -
- (i) classes of non-exempt shops; or
- (ii) localities, or parts of localities, where non-exempt shops are situated.
- (4) In this section -

public holiday includes, if another day is substituted for a public holiday under the *Holidays Act 1983*, section 3, the day that would have been the public holiday if the substitution had not happened."

...

"26 Matters relevant to s 21 order

In relation to making an order under section 21 the industrial commission must have regard to -

- (a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated;

- (b) the needs of the tourist industry or other industry in such locality or part;
- (c) the needs of an expanding tourist industry;
- (d) the needs of an expanding population;
- (e) the public interest, consumers' interest, and business interest (whether small, medium or large);
- (f) the alleviation of traffic congestion;
- (g) the likely impact of the order on employment;
- (h) the view of any local government in whose area the order is likely to have an impact;
- (i) such other matters as the industrial commission considers relevant".

WITNESSES

[7] Witnesses for the NRA were:

- Mr J. Branigan - Lead Author Ergas Report "*Economic Impacts of Retail Trading Hours in Queensland*";
- Mr A. Nardi - Executive Director, Shopping Centre Council of Australia;
- Mr N. Gatehouse - Scentre Group, Westfield;
- Mr J. Mackay - State Manager, Myer;
- Mr B. Schafer - Regional Manager, Big W;
- Mr J. Wilson - Zone Manager, Queensland South, Kmart;
- Mr D. McClarty - State Renewal Manager, Coles;
- Mr B. McLean - Assistant State Manager, Woolworths, Queensland;
- Mr G. Winzenberg - Queensland District Manager, Target Australia Pty Ltd;
- Mr T. Evans - CEO, National Retail Association;
- Ms K. Xavier - Senior Research Account Manager, Evolve; and
- Mr T. Scales - Store Manager, Coles Toowong.

[8] Witnesses for MGA were:

- Mr G. Ward - Director and Co-owner, IGA Varsity Lakes;
- Mr A. Dier - Principal, Factuality;
- Mr J. Constanzo - General Manager, SPAR Australia Pty Ltd;
- Mr M. Barea - Owner, Food Works, Burleigh Heads;
- Mr J. Singh - Manager, IGA Robina Village;
- Mr A. Lamas - Owner, FoodWorks, Runaway Bay;
- Mr W. Mason - Queensland State Operations Manager, FoodWorks Pty Ltd;

- Dr R. Baker - Adjunct Professor in Geography and Planning, University of New England;
- Mr M. Luke - Luke's IGA;
- Mr J. Pryer - Beaudesert SPAR Express;
- Mr T. Slaughter - Director, Slaughter Enterprises Pty Ltd, Springfield Lakes IGA;
- Mr B. Hopper - Managing Director, 7 IGA Supermarkets;
- Mr M. Nicolaou - Chris' IGA, Carina;
- Mr C. Lorenti - Owner, Clayfield Markets;
- Mr P. Antonieff - Owner, Oxley FoodWorks Supermarket;
- Mr M. White - Director, White's IGA Stores;
- Mr R. Sayle - Owner, Harvest Markets;
- Mr J. Khan - Owner, IGA Sorrento;
- Mr L. Catalano - Owner, Fruit & Vegetable Store, Garden City;
- Mr S. Chalasani - Manager, Mudgeeraba IGA; and
- Ms A. Nugent - CEO, Australian Newsagents Federation.

[9] Witnesses for the SDA were:

- Ms P. Vickers - Employee, Coles Supermarkets, Toowong;
- Ms D. Downey - Employee, Myer Limited, Brisbane City Store;
- Ms S. Marsh, Employee, Woolworths Karalee;
- Mr S. King - Employee, Officeworks North Ipswich; and
- Mr C. Gazenbeek - Queensland Branch Secretary, SDA.

Section 26(a) Locality

[10] The SEQA was established by the *Trading (Allowable Hours) Amendment Act 2002*. At that time the SEQA was defined as the Brisbane statistical division, the Sunshine Coast and parts of the Gold Coast not included in the Brisbane statistical division and certain other areas. The definition of the SEQA, now found in Clause 1 of Schedule 1 of the Trading Hours Order, has been expanded since then to include the towns of Woodford, Beaudesert, the area as defined that includes the towns of Fernvale, Plainland and Gatton and another area (see paragraph (g)). In all, it extends approximately 240 kilometres from Noosa to Coolangatta and the border of Queensland and New South Wales.

[11] The SEQA incorporates all or parts of 11 city and regional local governments including:

- Brisbane City Council;
- Gold Coast City Council;
- Ipswich City Council;
- Lockyer Valley Regional Council;
- Logan City Council;
- Moreton Bay Regional Council;
- Noosa Council;
- Redland City Council;
- Scenic Rim Regional Council;
- Somerset Regional Council; and

- Sunshine Coast Regional Council.

- [12] The NRA submits that "There is an existing definition of the SEQA currently set out in the Order". That definition is different to the boundaries of all the Local Government Authorities (LGAs) that would be broadly considered to be situated within the SEQA. The existing definition more closely follows the (smaller) urban footprint located within the SEQA LGAs.
- [13] The SEQA is quite diverse - a significant portion is heavily urbanised, includes tourist destinations and some rural areas.
- [14] The NRA does not seek to change the SEQA definition but seeks to preserve certain discrete trading hours areas within it which have trading hours in excess of that sought by the application. Those zones which seek to be preserved are the Area of New Farm of Inner City of Brisbane, the Gold Coast Coastal Tourist Area and the Hamilton North Shore Area.
- [15] A significant factor in the NRA's claim is that consumers are confused by the different trading hours for non-exempt stores located in Queensland's South-East corner.
- [16] Primarily the proliferation of trading hours for non-exempt stores within this region has been brought about by the NRA applications made over the years for discrete townships and areas in South-East Queensland. Various applications have sought extended trading hours for non-exempt stores in designated tourist areas within the SEQA for example, while others have sought extended hours for trade on Sundays and other days in regional areas of South-East Queensland. There have often been different outcomes for these regional areas, dependent upon the application made and the evidence adduced when weighed against the criteria which the Commission must have regard to in s 26 of the Act: see *National Retail Association Limited, Union of Employers AND The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees*¹; *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others*.² It is also noted by the Full Bench that these applications are time-consuming and often costly for all involved as the Commission must have regard to all of the criteria contained within s 26 of the Act.
- [17] Within that context, the "locality" in which the trading hours is sought in this application is significant in that it encompasses all non-exempt stores within the SEQA. The NRA submissions are that, within the region, there are in excess of 60,000 retail shopfronts including 6,000 stores which are classified as non-exempt. Clearly there are many small to medium traders within this region who would also be affected by a successful application.
- [18] Mr Gazenbeek, Queensland Branch Secretary of the SDA said in his evidence that the SEQA:

¹ *National Retail Association Limited, Union of Employers AND The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees* (2004) 177 QGIG 773.

² *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (2001) 167 QGIG 362.

"...represents a large geographical area ranging from highly populated, high density living to rural and country regions having sparse populations and large travel distances. It is my experience that in city and regional centres certain increased trading hours become a necessity to account for increased populations and activities of time restrained customers, whilst the necessity for such extensive trading hours is lessened in country or rural areas due to less population and demand for non-exempt retailing." (Exhibit 43)

[19] Mr Gazenbeek went on to add that in his view:

"...the real intent of the application is to extend trading hours with particular focus on Saturday evenings covering geographical areas that would not otherwise provide sufficient merit to extend trading hours in such an expansive region and in particular regions where populations and customer preferences may not necessarily reflect extension of trade hours." (Exhibit 43)

[20] The NRA says that the current allowable hours on Saturday have remained in place since 1994 for most parts of the SEQA. Most non-exempt shops in the SEQA are permitted to trade between the hours of 8.00 am and 9.00 pm from Monday to Friday and 8.00 am to 5.00 pm on Saturdays. In other SEQA areas, non-exempt shops can trade from 7.00 am to a range of other hours (for example, 5.30 pm, 6.00 pm, 7.00 pm or 10.00 pm on various days).

[21] Trading zones within the SEQA which are included in this application include Brisbane, the Gold Coast and the Sunshine Coast.

[22] The NRA states that "the suggested 7.00 am to 9.00 pm Monday to Saturday allowable trading hours for the SEQA would merge around 10 zones into one, achieve some better consistency in a further three zones, and would make redundant around 10 of the 26 individual orders that currently exist to support different shows, expos and events on the Queensland Calendar."

[23] In formulating a view on this criterion, the Full Bench must consider the scope of the application and weigh those considerations in accordance with the provisions of s 26 of the Act.

Section 26(b) the needs of the tourist industry or other industry

Section 26(c) the needs of an expanding tourist industry

[24] Tourism Research Australia "indicates that tourism in South-East Queensland contributed \$10.85 billion to the local economy, with each visitor spending an average of \$360 during their time in the region". An analysis conducted by the NRA suggests that despite a decline in tourism in the SEQA in recent years, the number of visitors in the SEQA is predicted to grow by an average of 2.4 per cent across the next three years.

[25] The witnesses called by the NRA and the MGA had opposing views on whether the proposed extension to trading hours would benefit tourists. Mr Mackay of Myer, said that the additional hours will enable Myer and other non-exempt stores to better service the reasonable requirements of visitors and tourists during special events run by Myer or peak trading periods in the retail calendar. Mr Wilson of Kmart, said that longer

hours provide better service to tourists and holiday makers who are often accustomed to late night or all night shopping. Mr Schafer of Big W referred to the 12.6 million intrastate visitors to South-East Queensland³ to argue that extended trading hours would allow retailers to access their spending. He agreed that tourists and visitors did not necessarily engage in shopping as a primary part of their visit but wanted to ensure that shops were open when tourists and visitors want to engage in shopping.

- [26] The NRA witnesses such as Mr Winzenberg of Target, Mr McClarty of Coles and Mr Wilson gave anecdotal evidence of their experience of tourists coming to their stores late on a Saturday afternoon only to be surprised at the 5.00/5.30 pm closing time because there were used to later closing hours in other States.
- [27] The witnesses called by the MGA did not accept that tourists wanted or needed longer trading hours. In their view, the needs of tourists were being met by the existing number of hours available. Further, shopping was not a primary motivation in tourists' holidays. For example, Mr White, who operates three IGA stores on the Sunshine Coast, considered that tourists want to rest and enjoy the beaches, tourist attractions and local restaurants rather than shopping. In his experience at Mt Coolum, during the school holidays, tourists traditionally shop between 11.00 am and 5.00 pm.
- [28] Other small retailers noted tourists were not attracted to their locale. For example, Mr Sayle, who owns the Harvest Markets in the Booval Fair Shopping Centre, commented that there are no tourists going through that shopping centre.
- [29] Section 26 (b) and (c) of the Act stress the importance of tourism as a factor to which the Commission must have regard. This incorporates the needs of the tourist industry generally and the needs of an expanding tourist industry.
- [30] Information concerning the tourist industry was presented by the NRA in the "Tourism Key Facts" Bulletin published by Tourism and Events Queensland. However, while providing data on such matters as the value of tourism to the Gross State Product and employment, the Bulletin does not provide data specific to the SEQA as defined by the Trading Hours Order or even to particular council areas that are encompassed by the Order.
- [31] The following statistical data provided to the Full Bench by the NRA concerning the tourism industry within Queensland was as follows:
- "a. Tourism Economic Key Facts (a Tourism and Events Queensland) publication as of September 2014 [Exhibit 13 TE3] provided the key highlights relating to Tourism in Queensland. That statistical data was as follows:
 - i. In 2012/13 tourism directly accounted for 140,000 jobs and indirectly accounted for another 101,000 jobs - ie. 10.3% of employment in the State. Cafes, restaurants and takeaway food services had the largest share of tourism employment (26%) followed by retail trade (18%) and accommodation (13%).

³ Not necessarily the same area as defined by the Order.

- ii. Gross State Product attributable to tourism (direct and indirect) was \$23 billion, or 7.9% of total GSP. Tourism contributes \$10.93 billion directly to the Queensland economy, accounting for 3.8% of Queensland GSP. Tourism indirectly contributes an additional \$12 billion to the Queensland economy.
 - iii. 9 in 10 tourism businesses are small businesses employing fewer than 20 persons. As at June 2012, these businesses represented 12.5% of all registered businesses in the state.
 - iv. Net taxes on tourism arising from tourism consumption in Queensland raised \$951 million in federal, state and local government revenues.
 - v. For the year ended June 2013, overseas tourism exports were \$5.9 billion.
- b. Tourism and Events Queensland in "Tourism Facts and Figures" in the year ended June 2014 shows that tourism in Queensland contributes \$23 billion to the Queensland economy or 7.9% of Queensland's Gross State Product.
 - c. Tourism directly contributes \$10.93 billion to the Queensland economy.
 - d. Indirectly contributes an additional \$12.0 billion to the Queensland economy.
 - e. Tourism generates \$5.9 billion annually as an export earner and is the second largest in the area under consideration, export earner for Queensland."

[32] The NRA submits that the SEQA accounts for approximately 70 per cent of the population, employment and industry of the whole of Queensland. The tourism industry is a significant component of that percentage. Statistics show that the industry employs around 90,000 people and, combined with the retail industry, these two industries account for almost a quarter of a million jobs in the region, or 1.7 per cent of the total labour force.

[33] International visitor numbers to Brisbane are predicted to reach more than 27 million international nights in 2020, which would represent an increase of 70 per cent on 2010 levels, "while the more conservative Tourist Forecasting Committee forecasts would show growth of 39 per cent over the same period."

[34] With regard to the question of tourism, and projections for future tourism growth, Deloitte Access Economics "Queensland Tourism - *Industry Outlook and Potential to 2020 (Department of Tourism, Major Events, Small Business and Commonwealth Games - August 2012)*" (the Deloitte's Report), records that Brisbane, the Gold Coast and the Sunshine Coast, within the SEQA, together with Far North Queensland are the four largest tourist destination regions for domestic overnight visits.

[35] However, in the case of domestic day trips, the three dominant growth areas are those identified in the SEQA. The NRA cites the evidence given by Mr McLean which identifies the domestic day trips within the SEQA to be at 65 per cent. From that data the NRA says that it is reasonable to conclude that the increases in population in the

SEQA of 2.3 per cent will increase and have an equivalent increase in tourism via the day trip segments at the rate of population growth.

[36] The NRA submits that there has always been:

"...a symbiotic relationship between tourism and retail. Shopping for leisure has long been a preferred pastime for tourists. Superimposed on this consideration is satisfaction of the essential shopping needs of tourists. An appropriate set of shopping hours is important for a locality that depends on tourism. This application would improve access and convenience and also reduce confusion for visitors to the SEQA".

[37] The Deloitte's Report concluded that:

"In terms of the industry growth outlook, baseline TFC forecasts predicts steady international growth and flat domestic growth in visitor nights. The industry potential anticipates a growth in international and domestic visitor nights of 17% and 30% above TFC forecasts respectively. In addition, the industry potential indicates that real per night expenditure by international tourists will remain constant, while TFC forecasts a fall."

[38] From the statistical data before the Full Bench, it is apparent that the primary tourism areas within the SEQA continue to attract significant numbers of tourists and the projection for growth in these areas is also noted.

[39] We accept that tourism is a valuable contributor to the State's economy and employment, but it is evident that the primary concentration of tourists lies in the already identified tourist areas of the SEQA. It should be noted, however, that it is not to suggest that tourists do not venture away from those coastal areas to travel to regional areas within the SEQA. It is difficult to ascertain the volume of tourists who travel further afield in the SEQA, but it is within the knowledge of the Commission that some of those areas are not devoid of some, albeit limited, tourist trade when compared with the coastal tourist trade.

[40] The NRA witnesses provided evidence to the Commission concerning the links between retail trade and tourism. The NRA submitted that the inclusion of tourism twice in s 26 of the Act clearly demonstrates the Parliament's understanding that the two sectors are inextricably linked. Further, the NRA said that:

"All non-exempt stores will service an element of the tourism market, although the degree of their support for tourists will depend on factors such as product range, geography and - most importantly - trading hours." (Submissions - point 15)

[41] The MGA does not accept that the NRA has provided sufficient evidence to support its claim, describing its submissions as very "broad".

[42] The NRA provided statistical projections by independent Government bodies and believed that evidence to be the "best possible evidence".

- [43] As stated, the Full Bench accepts that the tourist industry is a major and valuable contributor to the Queensland economy, and particularly so within nominated tourist areas within the SEQA and to a lesser extent within the remainder of the SEQA. These factors will be taken into consideration in the determination of this application.

Section 26(d) the needs of an expanding population

- [44] Mr Evans' evidence addresses this criterion. Included in his Witness Statement were references to statistical data which generally show that the population in South-East Queensland will continue to grow. Mr Evans cited the *Australian Government - Department of Infrastructure and Transport Research Report 134* dated May 2013, which shows that population in the Ipswich City Council is expected to have the highest population growth in the State of 5.5 per cent over the 10 years to 2021. In the same period Logan City Council population is expected to increase by 2.4 per cent, the Gold and Sunshine Coast Councils by 2.2 per cent each, Moreton Bay by 1.8 per cent and Brisbane by 1.1 per cent.
- [45] Within the next six years to 30 June 2021, the NRA says that the population of the SEQA will grow by 405,734 people, if current population growth trends continue. This represents growth of 13.14 per cent.
- [46] In his evidence, Mr Terry Slaughter, owner of the Springfield Lakes IGA store, said that although the Ipswich area may be subject to potential growth, it was debatable whether the area is growing at such a rapid rate to warrant an extension of trading hours, particularly in circumstances where a substantial number of supermarkets already exist and there are no current plans for department stores to open in the area.
- [47] Many of the witnesses who gave evidence opposing the application said that their stores could easily accommodate population increases in their localities.
- [48] Overall, the statistical data identifies the projected growth in population in the SEQA. The question is whether population growth at the levels predicted contributes towards extending further retail hours for non-exempt stores.

Section 26(e) the public interest, consumers' interest, and business interest (whether small, medium or large)

The public interest

- [49] As part of the evidence to be considered during this Hearing, the Full Bench had received an affidavit from Professor Henry Ergas who was scheduled to give evidence for the NRA. Attached to that Affidavit was a Report entitled "*Economic Impacts of Deregulating Retail Trading Hours on Queensland's Economy*" under the hand of Professor Ergas (Green Square Associates) dated March 2014 ("the Ergas Report").
- [50] Professor Ergas was unable to attend the hearing and his affidavit was withdrawn by the NRA. However the Ergas Report was also attached to Mr Branigan's affidavit. (Mr Branigan is a Senior Research Fellow at the SMART Infrastructure Facility at the University of Wollongong and Professor Ergas is the inaugural Professor within that Facility).

[51] Mr Branigan's evidence was that as he was the lead author of the Ergas Report he was in a position to make comment on its content. Mr Branigan's affidavit together with the Ergas Report is Exhibit 1. No objection to Mr Branigan giving evidence on the Ergas Report was made by any of the organisations opposing the application.

[52] In February 2013, Green Square Associates, together with Deloitte Access Economics, were commissioned by the NRA to perform an economic and statistical analysis of the costs/benefits of trading hours regulation in Queensland. This research resulted in the Ergas Report.

[53] Major findings from that Report were:

- Lost Gross State Product (GSP) as a result of current trading hours regulations in Queensland was \$253m per annum. This equated with over 3,100 full-time equivalent jobs throughout Queensland.
- This impact upon Queensland's GSP was divided into \$177m for South-East Queensland and \$76m for the remainder of Queensland. These statistics are roughly proportionate to the spread of population between those two areas. [Note - these impacts are based upon the status quo and full deregulation of trading hours]
- The Ergas Report claims that modest changes to trading hours "might achieve a significant share of the potential economic gains for Queensland."
- To support that proposition, the data suggested that the highest proportion of transactions occur in the last hour of trade, and more so on weekends, with the most significant impact occurring on Saturday afternoons.
- With greater female participation in the workforce, there are a larger number of dual income households which in turn highlights that people are working longer and often irregular hours. Mr Branigan said that "the availability of shopping hours outside of traditional work hours would likely be appreciated by residents of South-East Queensland, especially the 60 per cent of women aged between 15 and 64 years that are now in the labour force".
- The Ergas Report identified factors which it says supports the case for extended trading hours in South-East Queensland. These include:

- *Cost of living*

This is identified as the result of trading hours restrictions where higher prices are paid for goods at stores currently exempt from trading hours restrictions, and the lower level of convenience and choice available to consumers when trading hour restrictions are applied.

- *Community Benefits*

Through deregulation of trading hours the benefits for consumers include increased choice and convenience; lower prices; increased retail sales and higher employment; benefits for suppliers; better use of fixed stock of retail industry capital and attracting skilled migrants to areas where the demand for workers is high.

Also, if the larger supermarkets trade, it often benefits smaller traders because of the increased foot traffic in shopping centres and malls.

- The Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry (September 2014 - Chapter 5 - *Trading* on page of 117) states "Overall the evidence does not support the claim that deregulation of trading hours has a material impact on the structure of the retail sector and the viability of small retailers".
- The Productivity Commission Report also commented on what it described as a "patchwork" of regulation across and within jurisdictions.
- The Productivity Commission Report found that the most restricted trading hours were found in Queensland, Western Australia and South Australia.
- Deregulation of trading hours in other Australian states has not led to 24 hour a day, seven days a week trading in those areas. "Instead, bricks and mortar retailers are able to open when they consider it is in their commercial interests and opening hours reflect consumers' shopping patterns."
- While concern for small traders has been a significant factor in ensuring that applications for deregulated or extended trading hours for non-exempt stores has not always been successful, the evidence shows that restricting trading hours does not appear to have a material impact on the viability of small businesses in the retail sector.

[54] Contained within the Ergas Report under the heading "What do the consumer surveys say?", is a summary of some two trading hours matters where consumer surveys had been conducted:

- New Farm consumer survey (September 2011) -

"Consumers were surveyed on their attitudes on a proposed extension of the trading hours of Coles New Farm. In total 304 respondents participated in the survey.
 - Overall, there was strong support of the proposed extension of trading hours on Saturday, Sunday and public holiday evenings at Coles New Farm, with 75% of respondents favouring longer trading allowances. Around 14% opposed any retail trading extension and 11% were unsure.
 - Survey results indicated relatively similar support across different groups of workers. The highest percentage of support was from casual workers (79% of casual employees favoured

the proposal), compared to people working full-time (75%), part-time (76%) and not working (72.5%).

- Respondents from shared households showed more support (86%) than couples without children at home (77%), people living alone (71%) and couples with children at home (65%). Single parents with children at home showed the lowest level of support (50%). There was little difference in support or otherwise between males and females.
- By far, the largest reason for supporting longer retail trading was customer convenience (52%). This was followed by lifestyle advantages (7%) and to be in line with other capital cities (4%)".
- Gympie consumer survey (December 2011) -

"Consumers were surveyed on their attitudes towards proposed Sunday trading and limited holiday trading at the shopping centres in Gympie. In total, 314 respondents participated in the survey.

- Overall, there was clear support for the proposed extension of retail trading hours in Gympie. About 64% of respondents favoured the longer trading allowances, with 33% opposing any changes and 3% indicating they were unsure.
- Around 87% of respondents agreed that Gympie should have the same choice of shopping hours as South-East Queensland.
- The highest percentage of supporters was from part-time workers, with 80% of those respondents agreed that Gympie should have the same choice of shopping hours as South-East Queensland.
- The highest percentage of supporters was from part-time workers, with 80% of those respondents supporting the proposal. In contrast, the lowest percentage of support was from non-working respondents where only 53% favoured the proposal.
- Similar to the New Farm survey, convenience was cited as the major reason for support (51%) followed by lifestyle considerations (36%).
- The most cited reasons for opposing the proposal was that 'it is unnecessary' (29%) and 'it will disadvantage smaller businesses' (13%)."

[55] The NRA referred to the range of reviews and inquiries undertaken into retail trading both at the State and Commonwealth level. These included:

- Western Australia (2005);
- Queensland (early 2000s);
- Tasmania (early 2000s);
- ACT (mid 2000s);
- National Competition Council (2002); and
- Productivity Commission (2011).

[56] The most recent Inquiry (Productivity Commission Inquiry) was conducted in 2011. This Inquiry was formed to consider the economic structure and performance of the Australian retail industry.

[57] The Inquiry's primary findings were that:

- "Retail trading hours should be fully deregulated in all states (including on public holidays)".
- "The retail industry comprised almost 140,000 businesses in Australia and accounted for 4.1 per cent of GDP and 10.7 per cent of employment".
- "In Australia, deregulation of trading hours does not appear to have had a deleterious effect on the viability of small retail businesses".
- "High volume, low margin retailers like Woolworths generally bring improved convenience and range to consumers together with lower prices".
- "Prescribed shop trading hours discriminate amongst sellers on the basis of location, size or produce and prevent them from trading, and consumers from shopping, at the times they consider appropriate. Such regulations are out of step with social and demographic characteristics of modern economies where many people reside in two income households and desire flexibility in where and when they make their purchases of goods and services".
- "Over the past two to three decades a number of Australian jurisdictions, including Queensland, have deregulated retail trading hours with no discernible ex post community-wide protest (the sky didn't fall in), but with notable improvements in retail sector performance".
- "Similarly in Queensland, the first wave of deregulation in the early 1980s brought significant economic and social benefits to Queensland shoppers and workers when Thursday night and Saturday morning shopping was allowed". [Exhibit 1]

[58] The MGA, in its submissions, highlighted evidence given by Mr Branigan which it says diminishes the relevance of the Ergas Report for the purpose of this application.

[59] Mr Branigan stated that the Ergas Report was not prepared specifically for this application. Its intent was to outline the impacts of trading hours restrictions on the Queensland economy.

[60] Mr Branigan was able to comment upon the major thrust of the Ergas Report but was unable to comment with any certainty upon the SEQA or the Act as it relates to trading hours Orders.

[61] Mr Branigan, having made the point that the Ergas Report was not specifically focused on the SEQA but rather on Queensland as a whole, was unable to appropriately respond to some of the more precise questions concerning the SEQA - for example, the

geographical boundaries of the SEQA and the various trading hours Orders relating to a number of discrete areas within the SEQA.

[62] Consequently, parts of his affidavit were withdrawn. He admitted that some of the propositions put in his affidavit had been poorly drafted. Rather than attempt to restate those points, on occasion Mr Branigan admitted he did not understand and/or deleted those statements and attachments from his Affidavit. These included, by way of example:

- Appendix B of the Ergas Report under the heading of "Model of the Convenience Value of Extended Shopping Hours, the distribution of the gains". Mr Branigan did not understand this attachment.
- It is fair to state that, given the attachment contained algebraic formulae and without appropriate submissions, the attachment was unable to be comprehended in any realistic way by the Full Bench.

[63] It also became problematic for Mr Branigan to distil parts of the Ergas Report for the purpose of the NRA's application.

[64] The MGA submits that the NRA did not adduce any real evidence from its witnesses about the public interest. The NRA rejects the proposition and referred to evidence which had been given by its witnesses concerning the economic, employment, consumer and tourism benefits which would flow from a successful application. The NRA submitted that these matters were clearly matters of public interest.

[65] The MGA cited Mr Hopper's statement:

"If the application was granted, there will be an erosion of the point of difference in terms of the unique service provided by independent supermarkets as against the major supermarket chains. This flow-on effect is a growth of market share of Woolworths and Coles, and the extinction of independent supermarkets. The growth in their market share is contrary to the public interest, and severely harms competition in the sector."

[66] Although some of Mr Hopper's contentions will be considered more fully under the heading of "business interest", the MGA submits that market share and competition are relevant considerations in determining the public interest.

[67] The SDA contends that the public interest is the welfare or wellbeing of the general public and not confined to the interest of individuals or the interests of a particular class or sector of the public and submitted that the public interest is also separate from consumers' interest given the separation of the interests of consumers in this criterion.

[68] The NRA submitted that it was in the public interest to have better consistency in hours across the SEQA because it assisted residents, who, out of necessity, travel significant distances when their local retail infrastructure may be unable to fulfil their needs. However, there is little evidence to support the proposition of residents travelling significant distances when local retailers are not open.

- [69] The NRA also gave evidence about the economic benefits that would flow from granting the application. Mr Evans referred to the Final Report released in March 2013 by the Office of Best Practice Regulation then located in the Queensland Competition Authority. While we are unaware of the current status of this Report, we note that it estimated the trading hours regulations cost the Queensland economy approximately \$200 million per year.
- [70] The NRA also relied on the Ergas Report to further support its view that the current trading hours regulations negatively impact on the GSP in the amount of \$253 million annually. As this (and other costs) were calculated on the basis of total deregulation, and this was not the NRA's application, the economic benefits were recalculated. The total potential economic value to Queensland resulting from the granting of the application was calculated to be \$111.4 million.
- [71] We have determined that the basic tenet of the NRA's application (identified in paragraph [3] of this decision) is a matter which may be considered under the heading of "the public interest" and also under the heading of s 26(i) "such other matters as the industrial commission considers relevant".

Business Interest - whether small, medium or large

- [72] Mr Evans gave evidence on the issues of business interests associated with the current trading hours regime. His evidence also addressed the benefits of creating a trading hours regime for the SEQA that created a better trading regime for business and consumers than the current arrangements.
- [73] Mr Evans said the NRA membership ranges from small businesses to large businesses, including non-exempt stores and is drawn from 15 categories of retail, including fashion, food and liquor, department stores, household goods, recreational goods, hardware, fast food, cafes and personal services such as hair and beauty. Members across the retail categories have expressed concerns about various aspects of trading hours regulation in Queensland.
- [74] Mr Evans referred to the business costs associated of complying with the trading hours rules. As the NRA is a national organisation, it provides information and advice to members across Australia. Mr Evans said the NRA provides annual, summary advice to its members on how to comply with the various trading hours rules around Australia. Whereas two pages or fewer were required for New South Wales, Victoria, Tasmania, the ACT and the Northern Territory and four pages were required for South Australia and Western Australia, five pages were required for Queensland to explain the geographic locations and store classifications. Businesses in Queensland were then advised to ask the NRA for an additional page of advice for each zone where they had a store to view the maps, boundaries and time restrictions available for each store.
- [75] Mr Evans said where the rules are more complex, as they are in Queensland, the costs of compliance for businesses increase. Businesses are required to devote time and resources to understand the trading hours regulations and this is particularly acute for businesses that operate in multiple zones or for new businesses.
- [76] Mr Evans stated that it was difficult to estimate the cost of business compliance in Queensland and the only real barometer of that cost could be seen when one considered

the more onerous requirements of compliance within the Act when compared with comparable legislation in other jurisdictions.

Large business interests

- [77] The Scentre Group has interests in and operates Westfield branded shopping centres in Australia and New Zealand. The Australian portfolio includes smaller community-based centres anchored by supermarkets as well as super-regional centres with multiple department stores and several hundred speciality retailers.
- [78] The Shopping Centre Council of Australia represents Australia's major owners, managers and developers of shopping centres. Its members include family businesses, private companies, industry superannuation funds and Australian Real Estate Investments Trusts listed on the Australian Stock Exchange.
- [79] Mr Nardi said many of the members of the Shopping Centre Council own or manage shopping centres in South-East Queensland. The Charter of the Shopping Centre Council is to "represent investors in shopping centres in working for public policy outcomes which are conducive to the wellbeing of the industry and assist member companies to achieve business objectives". This was achieved by, among other things, "highlighting the responsibility of shopping centre management to generate competitive returns on assets which are held in trust for the millions of Australians who invest in retail property."
- [80] The evidence given by Mr Gatehouse, Scentre Group, and Mr Nardi had similar themes in respect of large business interests:
- Online shopping allows consumers to shop at a time to meet their own preferences. Shopping centres should be allowed to respond to consumer preferences.
 - Retailing is a continuous industry which should have the ability to operate extended hours.
 - Retailing competes with other economic activities such as hotels and cinemas which have fewer restrictions in their hours of operation.
 - Investment funds for developments and growth as well as the return on investment may be impacted if the owner is unable to maximise its performance by meeting consumer expectations.
 - Increased trading hours would allow a retailer to spread its fixed (and unavoidable) costs over a longer period and potentially larger volume of sales, leading to lower average costs. An increase in scale may also allow a retailer to adopt a technology with a lower unit cost of operation or provide consumers with a wider range of offerings.
- [81] Most of these themes were repeated in the evidence of witnesses from the non-exempt stores. However, a particular focus of the evidence of these witnesses was premised on the contention that meeting consumers' preferences advances their business interests. Much of the evidence set out below elaborates on that point.

- [82] The evidence from witnesses from Coles and Woolworths was that all would trade the full extent of any additional hours granted.
- [83] The benefits of the additional hours, from the perspective of Coles and Woolworths, involve both improved customer responsiveness, particularly in relation to Saturday closing times, and business interests.
- [84] They consider that the confusion over inconsistent trading hours in the SEQA and interstate would be lessened for those who prefer to shop later in the day, particularly on Saturdays when there is a much earlier closing time than weekdays. In addition, and particularly in relation to Saturday closing times, the extra hours would reduce congestion at registers and would provide greater convenience to shoppers. Mr McLean of Woolworths, put it this way: extending trading hours would provide more consistency, choice, convenience and flexibility for both residents and visitors.
- [85] He noted that Saturdays and Sundays are the busiest trading days for Woolworths' stores with the highest proportion of sales being recorded in the last trading hour of the day. The increase in trade is particularly evidenced in those supermarkets which are not located in shopping centres. Mr McLean said the failure to open when customers want to shop means a failure to service customers' expectations and needs. He also commented that in financial terms Woolworths' return on investment is less than optimal.
- [86] Mr McClarty said that it was a misconception that extended trading hours provides a redistribution of sales across the week and not incremental sales growth. He gave the example of extended trading hours in the Ipswich CBD which commenced on 13 October 2014.⁴ In this case sales increased between 15 to 18 per cent.
- [87] Target, Kmart, Myer and Big W want to be able to modify their trading hours to accommodate circumstances that are out of the norm without having to make a special application to the Commission. Unique store factors might include one-off shopping centre promotions, tourism promotions for stores that operate in tourist precincts, new store openings as well as other types of special events. Other circumstances might be store specific or relate to special days on the retail calendar like Mother's Day, Father's Day, Valentine's Day or special promotional events. In New South Wales, Victoria, Tasmania and the ACT, stores that would be classified as non-exempt in Queensland can modify their hours in response to these considerations.
- [88] Mr Wilson said it was the intention of Kmart to trade all of the allowable hours sought but reserved the right not to do so if it was not in their commercial interests. Mr Wilson said that where trading hours have been extended, sales grow progressively as customers become more familiar with the trading hours.
- [89] Mr Schafer, of Big W, said that at present stores trade all allowable hours on a Saturday but not during the week. Were the application to be granted, stores in all locations may not choose to trade all of the allowable hours sought. However, the additional hours would allow stores to better respond to customer preferences and to better service the reasonable requirements of visitors and tourists during special events and the peak

⁴ From 7.00 am Monday to Saturday and to 7.00 pm on Saturdays.

trading times on the retail calendar. The additional hours would also allow Big W to make judgments on a store by store basis about whether customer satisfaction, customer service or store profitability would be improved if a longer trading day were implemented. Mr Schafer noted that opening longer hours would be beneficial both for customers and shareholders.

[90] Mr Winzenberg said that with the permission of the landlord of the centres, Target stores would trade the full allowable hours if granted except for the four small format Target stores. He added that "chances were" those four smaller stores would also trade the extended hours. Mr Winzenberg said it was commercially viable for Target stores to be open to 9.00 pm on weekdays and it was not envisaged that it would be any different on Saturdays. Moreover, Target has staff in the stores working till 9.00 pm on Saturdays and it would not be a great impost to trade.

[91] Myer operates 11 stores in the SEQA, although one of those has been announced for closure at the end of January 2017. Mr Mackay said Myer stores in the majority of locations around Australia set their trading hours by reference to corporate objectives and policies which are guided by what customers want and when they want to shop. Currently, Myer does not open all of the hours allowable in the Trading Hours Order but states that if the extended hours were granted it would utilise them, review them, and make a decision upon those findings.

[92] In relation to the promotional activities, Mr Mackay said Myer would look at closing between 6.00 pm and 7.00 pm on Saturdays but would need to gauge customer response as to the appropriate closing time. It was unlikely that Myer would open at 7.00 am. Mr Mackay rejected the proposition put in cross-examination that Myer could make an application for extended hours to accommodate circumstances that are outside the norm because notification for promotional events which occurred weekly and monthly was often only received on a Wednesday or Thursday for the forthcoming Saturday.

[93] The MGA in its final submissions stated:

"Some of the major retailers who are supporting the application for extended trading hours have acknowledged in their evidence-in-chief that they may elect not to trade the extended trading sought even if the application is granted. Effectively 96 major retail stores in South-East Queensland could be affected and may choose not to open depending on customer demand."

[94] The SDA also questioned the need for extended trading hours for similar reasons.

[95] The NRA refuted the MGA's assertion that "96 stores may not follow any order granted" was inaccurate.

[96] Exhibit 42 showed that:

"Target	22 stores will trade all available hours
Target Small	4 will extend hours, then review
Big W	27 will extend hours, then review
Kmart	29 will trade all available hours
Myer	11 will extend hours, then review
Coles	106 will trade all available hours

Woolworths 138 will trade all available hours"

- [97] The NRA also mentioned that many thousands of small businesses co-located with non-exempt stores in shopping centres also stand to benefit from the hours sought. (Evidence of Mr Nardi and Mr Gatehouse)
- [98] The MGA and the SDA questioned the need for extended trading hours given that some non-exempt stores, other than supermarkets, had not guaranteed they would trade all of the allowable hours were the application to be granted. In response, the NRA submitted that the allowable hours are not mandatory and it was a matter for individual retailers to determine those hours within the allowable hours that best suited their needs and those of their customers. Further, in cross-examination Mr Evans said he anticipated the additional hours that were made available by the application being granted would be taken up by more than supermarkets, department and discount department stores. This is because almost every fashion chain, homemaker chain, household goods and some recreational goods stores are non-exempt retailers. He also explained that the evidence from the shopping centre owners and managers reflects more that the views of the anchor tenants, which are supermarkets, and a large number of retailers would benefit from the extended trading hours sought by the application.
- [99] The witnesses from Myer and the discount department stores spoke of the impact of online retailing for bricks and mortar stores. Their consistent view was that "current trading hours are an unnecessary barrier to competitiveness for bricks and mortar retailers who are required to comply with inconsistent legislation that does not allow them to compete with domestic and international retailers who operate on a 24 hour, 7 day a week basis." The evidence of Mr Gatehouse supported these views. He added that grocery retailers are also starting to lose market share to online businesses.
- [100] Both Mr Schafer and Mr Winzenberg noted their modest online presence. Mr Winzenberg also noted that in relation to the online trade, the biggest growth is in "Click and Collect" with the majority of customers coming into the store to collect their purchases between 6.00 pm and 9.00 pm.

Small and medium business interest

- [101] Mr Evans attached to his Witness Statement the results of a survey conducted by the Chamber of Commerce and Industry Queensland in September 2014.
- [102] The introduction to that survey states:
- "As part of the CCIQ Westpac Group Pulse Survey of Business Conditions, Queensland businesses were asked for their views on shop trading hours, to understand the types of issues being experienced and to gauge the desire for reform. The Survey findings show that full deregulation of shop trading hours remains contentious, with Queensland businesses divided in their preferences. However the Survey results point to broad support for incremental reform to achieve greater simplicity and consistency."
- [103] The survey showed that in those retail businesses which employed up to 20 people, 58 per cent were opposed to the deregulation of shop trading hours.

- [104] 77 per cent of the 516 businesses participating in the survey were in favour of treating the SEQA as a single trading zone.
- [105] The NRA submits that on the separate question of full deregulation of trading hours, 57 per cent of respondents supported deregulation, including 59 per cent of businesses located within the SEQA and 55 per cent of those located in regional Queensland. While this application does not propose total deregulation of trading hours, it is reasonable to assume that the 59 per cent of the SEQA businesses in favour of total deregulation would also be in favour of a partial relaxation of existing regulated hours, as is proposed in this application.
- [106] While those who undertook the survey did not give evidence in this hearing, the survey was conducted by a well-known Queensland organisation of employers. It is not unreasonable for the Full Bench in those circumstances to acknowledge the outcome of the survey to the extent that the question of full deregulation of Queensland trading hours remains contentious. On the question of some relaxation of trading hours regulations, there is broad based support for incremental reform to achieve greater simplicity and consistency.
- [107] Mr Luke, Mr White and Mr Hopper own multiple IGA stores. Mr Luke owns three Luke's IGA supermarkets on the Sunshine Coast and Hinterland. Mr White is a Director of White's IGA Independent stores which also operates three stores at the Sunshine Coast.
- [108] Mr Hopper is the Managing Director of a group of companies that owns and operates seven IGA supermarkets and a fresh food store all within the SEQA. They are classified as independent shops. Five of the IGA stores are in Brisbane, one is on the Sunshine Coast and one is in Cleveland. These stores differ in size and all stores provide a full range of supermarket products. He stated:
- "We provide competition for the benefit of the public with prices similar to, if not below, the major chains."
- [109] The group of companies employs 600 staff but all of the stores are classified as independent stores because a maximum of 20 employees are engaged at any one time or 60 employees are engaged across an ownership group. On 1 October 2014, HG Retail Pty Ltd was established. It is a management company that provides services to individual stores within the "Hopper Group" and others.
- [110] Mr Hopper said there is no demand from customers in his stores from about 5.00 pm on a Saturday. Accepting Mr Hoppers' evidence on that point, it would seem that any opposition from him with regard to Saturday trade in non-exempt stores, after 5.00 pm for example, would be academic.
- [111] While there is no suggestion that IGA stores have operated outside the allowable hours in the Act, it is becoming more unrealistic to consider those stores within the constraints of the Act - i.e., whether they fit into the small, medium or large sized stores. Super IGAs, for example, and other IGA stores often trade favourably with larger non-exempt stores, and, according to Mr Hopper's evidence, often under-price those stores on product.

[112] Overall, the NRA submitted that:

"All of the above MGA witnesses, and many others, have articulated to the Commission a compelling case that their businesses are different from major supermarkets, and have carved out or discovered their own competitive niches in the market. These examples indicate that independent businesses need not fear additional hours from non-exempt stores, as they are clearly trading in a different market where convenience and speciality product trump the (real or perceived) price advantage of major supermarkets. For all of the reasons they themselves have outlined, these store owners are servicing a distinct clientele, and should have every confidence that they will continue to do so should this application be granted."

[113] The majority of witnesses called by the MGA are small business owners or operators. Other direct retailing evidence was given by the Newsagents Federation and from a whole of business perspective from SPAR and FoodWorks. Mr Costanzo said SPAR has 70 stores affected by the application of which 57 are SPAR branded stores, either SPAR or SPAR Express, and others are affiliate stores which are non-branded and operate under their own name. Mr Mason said that there are 37 branded FoodWorks stores and many other unbranded stores operating under their own name in the SEQA. Mr Mason, Mr Costanzo and all of the independent store owner and operators consider that their main competition to be the non-exempt supermarkets.

[114] It is not possible in this decision to outline all of the evidence given by the MGA witnesses opposing the application. However, the evidence had a number of consistent themes:

- the negative effect on independent retailers either as a result of extended trading hours being granted to non-exempt stores in the past or the proliferation of non-exempt supermarkets in their localities;
- the projected losses if the application is granted;
- the flow of customer trade on weekdays and Saturdays;
- the need for the continued viability of small business; and
- the erosion of the point of difference between independent and non-exempt supermarkets.

Past negative impacts

[115] Mr Luke gave evidence about his negotiations for the sale of his business in Woodford. The negotiations occurred during the time that the NRA had made an application for Woolworths to be granted Sunday trading. Two sale prices were mentioned in the contract with a lower price becoming operational in the event Woolworths were granted Sunday trading. The MGA submits that this evidence shows the financial impact of the granting of any extended trading hours on other, smaller retailers.

[116] Mr Hopper attested to the losses incurred by his Milton IGA store when the Coles store at Petrie Terrace was allowed to trade from 7.00 am Monday to Saturday and to 7.00 pm

on Saturday. The Milton store is less than 1.5 kilometres away from Coles at Petrie Terrace. Mr Hopper estimated that the impact of the extended trading hours was a drop in turnover of about six to seven per cent.

[117] Mr Hopper's New Farm IGA store was also negatively impacted when Woolworths at the Gasworks opened in 28 August 2013. A direct impact on weekly sales was felt, dropping by 6.5 per cent when Woolworths opened. When Woolworths was granted extended trading hours in March 2015, a drop in turnover of between three and six per cent was experienced.

[118] Mr Pryer and Mr Lorenti both gave evidence of the negative impact Sunday trading had on their respective sales and asserted that the extension of the trading hours sought would have similar effects.

[119] Some of the small business owners or operators have had direct experience of non-exempt stores opening in their locality. For example, Mr Nicolaou said that when the second Aldi store opened on Creek Road, his Carina IGA store experienced an 11 per cent reduction in turnover. He was also aware that the Greenbank IGA, which is owned by family members, lost 50 per cent of its sales when Woolworths opened. Mr Antonieff said his store at Oxley, which he has operated for 12 years, suffered a significant net loss when a non-exempt store opened 40 metres from his business.

[120] Similar evidence was given by Mr Barea who had a Woolworths store open 50 metres from his store entry in March 2014. Comparing the June to August quarter 2014 to the same quarter in 2015, his customer count reduced by 9.85 per cent and his sales reduced by more than \$75,000 in the same period. Mr Lamas said that until Aldi opened in November 2011, about five minutes drive away, his store had experienced a growth in sales from the same month in the previous year. On Aldi's opening, his sales decreased and his store has had negative growth year on year. Under cross-examination by the NRA, both of these witnesses conceded that their sales had increased from the corresponding time for a short period after the non-exempt supermarkets had opened.

Projected losses

[121] Various witnesses from the small businesses provided estimates of the financial impact on their particular store in the event the application was granted. These estimates ranged between five per cent and 70 per cent loss in weekday sales in the hour between 7.00 am and 8.00 am and between 20 per cent and over 75 per cent loss of sales on Saturdays after 5.00 pm.

[122] Mr Costanzo estimated that the 70 SPAR stores would suffer a 30 per cent loss in sales annually if the application was granted.

[123] While not doubting the genuineness of the concerns, the NRA questioned the estimated losses provided by the MGA witnesses from independent supermarkets. In cross-examination by the NRA, the MGA witnesses were asked to inform the Commission as to the basis for their projected losses. Very few were able to do so. One exception was Mr White, who owns three IGA stores on the Sunshine Coast. He estimated his losses as a result of the granting of the application to be between \$10,000 and \$15,000 per store. Using hourly reads from the Mt Coolum store, Mr White calculated his losses based on the difference in turnover between 4.00 pm and 5.00 pm

as against 5.00 pm and 6.00 pm when the non-exempt shops are closed and when there is a dramatic difference in trade. He also took into account the hour between 7.00 am and 8.00 am when again the non-exempt shops are closed. In contending his stores would suffer losses, Mr White also relied on his experience in Tin Can Bay where his two Night Owl stores were affected when the non-exempt stores were granted additional trading hours.

Customer Flow

- [124] In general, the evidence from the MGA witnesses showed that convenience shopping tends to occur between 7.00 am and 8.00 am, especially on weekdays and after 5.00 pm on Saturdays. For some stores, the hour between 7.00 am and 8.00 am on weekdays is popular with tradespeople and other workers as well as parents stopping to make food and drink purchases for children on their way to school.
- [125] The MGA witnesses from independent supermarkets were also asked by the NRA to identify their peak trading periods on weekdays. Significantly there was some variation between the witnesses as to this time, all witnesses identified their peak trading hours occurred when the major supermarkets were open.
- [126] On Saturday, the peak periods of the smaller stores often start before the closing time of non-exempt supermarkets and extended to about 7.00 pm depending on the store in question.
- [127] The NRA submits this evidence shows that the case advanced by independent retailers that extended trading hours by an hour in the morning or on a Saturday night will cause a significant reduction in sales cannot be sustained. In its view, the trading patterns demonstrate that independent businesses not only survive but thrive when trading in competition with the non-exempt stores.
- [128] Ms Nugent from the Newsagents Federation gave evidence about the potential weekly losses that might be experienced by newsagents if the application was granted. 41 newsagents who responded to a survey of newsagents in the SEQA provided sales data for the hour of trade between 7.00 am and 8.00 am Monday to Saturday and between 5.00 pm and 9.00 pm on Saturdays. The maximum potential total averaged weekly loss per newsagent was \$3,945 for the hour between 7.00 am and 8.00 am Monday to Friday (\$205,140 annually) and \$1,329 on Saturdays after 5.00 pm (\$69,108 annually). These figures assume total loss of sales in these periods.

Small Business Viability

- [129] The MGA witnesses expressed concern over their continued viability in light of their estimates of the negative impact that would occur from the granting of the application. They advanced the case for the continued viable operation of small business to provide a sustainable future for themselves and their families, a measure of competition to non-exempt stores and choice for consumers.
- [130] A number of witnesses expressed dissatisfaction with the market domination of non-exempt supermarkets, especially Coles and Woolworths, and concern that granting the application would intensify this and further lessen competition. For some witnesses,

as identified earlier, this was compounded by the proliferation of non-exempt supermarkets within their localities.

- [131] Both Mr Costanzo and Mr Mason expressed concern about the impact of the proposed extension of trading hours on the businesses within their frameworks. Mr Mason said all FoodWorks, IGA and SPAR stores are independently owned and operated and generally form the major investment for family/personal enterprises. They are usually the main source of income as well as a major part of owners' superannuation strategy. The push by non-exempt supermarkets to increase their market share by extending their hours into the domain of those usually reserved for the independent shops where a significant proportion of their sales are made was seen by Mr Mason as leading to reduced competition and increased business failure.
- [132] Mr Costanzo supported this view, foreshadowing that the return on investments for owners would be unviable and some would leave their businesses on the expiry of their leases.
- [133] The continued extension of trading hours and the proliferation of non-exempt supermarkets impact on the non-exempt supermarkets has forced independent stores to reduce their employment levels and owners of small, independent family businesses to work additional hours in order to generate a reasonable income. This, however, has placed strain on their family lives as they work lengthy hours. Mr Chalasani, amongst others, said that the extension of trading hours on Saturday evenings would be particularly devastating. He noted that when Coles and Woolworths are open, shoppers may do a top-up shop of one or two items from his store but buy more items when the non-exempt stores are closed. If the non-exempt stores are permitted to trade to 9.00 pm on Saturdays, Mr Chalasani believed his store would "most certainly" lose a lot of these customers.
- [134] The MGA witnesses said they already provided shopping opportunities at the times when non-exempt supermarkets now wish to open. Most shopping done before 8.00 am Monday to Saturday or after 5.00 pm on Saturdays was convenience shopping rather than trolley shops. A number of witnesses gave evidence that their stores could easily absorb more customers shopping at their stores, including those which offer more than convenience shopping. In addition, witnesses particularly under the IGA banner, argue that they compete with the major non-exempt supermarkets on price.
- [135] Ms Nugent said that the hour between 7.00 am and 8.00 am provides the last competitive advantage that newsagents have over non-exempt stores. She explained that while newsagents receive a commission from the publisher for newspapers that are supplied by newsagents to Coles and Woolworths, no commission is received from the sale of magazines that are supplied directly to those stores. However, a commission is received to newsagents which supply magazines to sub-agents such as petrol stations and IGA stores.
- [136] The NRA submitted that the evidence shows that thousands of small business such as bakeries, fruit stores, newsagents and pharmacies are co-located with non-exempt stores in shopping centres in retail precincts in the SEQA. Although these businesses are not in direct competition with the anchor tenants, they rely on the anchor tenant to attract shoppers to the centres. It pointed to the evidence of Mr Sayle and Mr Catalano, both fruit and vegetable store owners, who made the decision to locate closer to a non-exempt

store in a shopping centre as this generated more foot traffic past their businesses. Although they were opposed to the application, the NRA contended that the evidence from these witnesses showed that competition is not only possible but beneficial for businesses which are co-located as they would not be able to trade profitably in the absence of the non-exempt stores. The NRA went on to submit that there is an entire, and not insignificant small business community suffering from financial harm as a result of the trading hours laws supposedly in place to protect small retailers.

[137] However, a number of the independent store owners disputed these contentions arguing that the additional operating costs and penalty rates involved in extended hours would not be viable for the small shops in shopping centres. Further, they were concerned that permitting a non-exempt supermarket to open at 7.00 am would draw trade from other independent stores. In addition, some remarked that those non-exempt supermarkets which have in-house coffee shops or sushi shops also draw trade away from independent retailers.

[138] The NRA's submission about the advantages of extending trading hours was supported by an example given by Mr Winzenberg in his evidence. He said that specialty stores and food business in shopping centres tend to look to the non-exempt stores for "trading hours guidance". He gave the example of Sunshine Plaza where the non-exempt stores close at 5.30 pm. Despite the cinemas and the bowling alley being open after that time the food stores tend to close because the non-exempt stores are not open. Further, as it is too early to eat then, customers drift away. In contrast, during the week, especially on Thursdays and Fridays when the non-exempt stores are open to 9.00 pm customers might stay and patronise the food businesses.

[139] A different perspective was put by Mr Singh. He anticipated the extension to trading hours would alter shoppers' behaviour especially on Saturdays. His store is located in the vicinity of the Robina Town Centre. He believed that rather than shoppers visiting his store on a Saturday evening after seeing a movie, shoppers would remain at the Robina Town Centre to do their shopping thus resulting in a loss of sales for his business.

[140] The NRA noted the "irony" in the arguments made by the majority of the MGA witnesses about the importance of the continued viability of small business when many of those businesses, such as IGA and Friendly Grocer are supplied by the Metcash chain. According to the NRA, Metcash supplies 2,400 stores across Australia, a number which is higher than the number of sites held by Coles and Woolworths combined.

Point of Difference

[141] The NRA referred to evidence given by various MGA witnesses where references were made to the uniqueness of one's store, or of the service given by the store owner to customers and the convenience nature of their businesses. The NRA submits this evidence shows that the case advanced by independent retailers that extended trading hours by an hour in the morning or on a Saturday night will cause a significant reduction in sales cannot be sustained. In its view, the trading patterns demonstrate that independent businesses not only survive but thrive when trading in competition with the non-exempt stores.

[142] Mr Hopper explained that viable independent stores provide a point of difference that was appreciated and desired by consumers. Mr Ward said that the point of difference for his independent store was the ability to trade outside those hours granted to non-exempt stores. These hours draw customers to his store and maintains his viability.

[143] The MGA witnesses said they endeavoured to provide a point of difference so as to ensure the continued viability of their businesses. The following examples are drawn from the evidence. For Mr Nicolaou, this was providing meals freshly prepared in house by chefs. Other examples were stocking specific products requested by customers; stocking fresh produce direct from the markets or local suppliers; knowing customers' names and packing, carrying and delivering purchases. Mr Slaughter said supporting local suppliers was beneficial for customers, his store and the community alike. Mr Kahn spoke of the value of his store to elderly residents who undertake a full shop in his store. He said they do not want to go to the major supermarkets where they struggle with taking trolleys back to the car park. At his store, customers can park out the front and are assisted with their purchases back to the car. Mr Lorenti reacted to the losses incurred with the introduction of Sunday trading by making a major change to his store by the addition of a delicatessen and new lines to his business. He said that as a result he slowly regained his losses over time.

[144] Mr Luke stated:

"Strip shopping - the consumers and locals I've spoken to, strip shopping has a - a more community feel about it and there's lots of different small shops that can afford to be on the strip shopping than in a large shopping centre."

[145] Mr Catalano stated:

"Well, because we offer a fresh product... Like we - we source our - our fruit fresh from the market and we get it on our shelves within four or five hours of buying it. Now, the supermarkets don't work that way."

[146] Further, Mr Catalano stated:

"Well, it's all about the wow factor. If you walk past our shop and you see the offering that we have, nine times out of 10 you'll most likely compare what you want to buy. So - and then once - once you've made that decision and you have chosen to shop with us, secondly, you'll - you'll be - you'll be won over on the taste for a start."

[147] Mr Chalasani referred to the morning being the busiest time for him. Most customers were tradespersons whom he said would be unlikely to go to the Robina Town Centre even if it were open, and then parents of school children arrived to buy essential items *en route* to school.

[148] Mr Ward spoke of his IGA Varsity Lake store which largely catered for the student population nearby at Bond University. He said much of his trade related to small purchases with an average basket size of \$12.00. NRA submitted that:

"Mr Ward goes on to express a concern that extended hours for non-exempt supermarkets will take these customers away from his store. However, this

argument completely ignores the convenience factor for his nearby customers in not having to make the trip to a large supermarket for their snacks and *ad hoc* needs. The NRA submits that a store such as Mr Ward's is servicing an almost completely distinct market from the large supermarkets inside a major shopping centre such as Robina Town Centre."

[149] The above evidence strongly suggests that some stores opposed to the application have differentiated their product-line to the degree that they offer goods and services beyond that offered in the non-exempt stores under consideration in this application. The NRA questions how extended hours for non-exempt stores would cause any detriment to their business.

Consumer's interest

[150] NRA Survey: Evolve Research & Consulting (Evolve), conducted both qualitative and quantitative market research in relation to the application at the request of the NRA. Ms Xavier, Senior Research Account Manager, Evolve gave evidence about the research.

[151] Ms Xavier said:

"The survey was conducted on the 7th - 12th May 2015 with 500 main grocery buyers. Customers were selected at random from an online panel supplied by Nine Rewards to ensure the sample was representative of South-East Queensland. The Nine Rewards panel is an actively managed research panel recruited through a variety of channels across the Nine Entertainment Co Group e.g. Ticketek, Nine Network and Ninemsn. These may be through advertisements within publications, banner ads or commercials and recruitment from consumer databases via email analysis."

[152] Evolve gave the recruiter a list of applicable postcodes within the area and the survey was only administered to those who lived within those postcodes. 500 respondents were recruited.

[153] Ms Xavier was also cross-examined about her statement that the respondents were a nationally representative sample. She explained that the Nine Rewards panel has sufficient population to be a nationally representative view. Quotas were applied to ensure that only main grocery buyers participated. Further, steps were taken to ensure that it was representative of the age and gender within the trading hours areas that would be impacted by the proposal.

[154] 55 per cent of the respondents were male and 45 per cent female. 23 per cent were aged 18 to 34; 44 per cent between 35 and 54, and 33 per cent were aged 55 and over. The margin for error in the responses was 4.4 per cent.

[155] Three focus groups were also conducted, each with eight female, main grocery buyers on 12 and 13 May 2015 at Westfield Shopping Centres located at Helensvale, Garden City (Mt Gravatt) and North Lakes. The respondents to this survey were recruited through another customer research firm which also uses multiple different databases from which to recruit. However, the firm had to apply the same filters as the online survey and to ensure that only the main grocery buyers were identified.

- [156] Ms Xavier was pressed in cross-examination on the reasons that only women were interviewed and whether this was representative of main grocery buyers. She said women are 76 per cent of the main grocery buyers. In her experience, historically men have not provided as much feedback as women in qualitative surveys. As only a limited amount of qualitative research was being undertaken, respondents were skewed towards the majority which is also where the most depth of information is gleaned in a qualitative setting.
- [157] Ms Xavier said the questions in the qualitative survey followed the "same flow" as the quantitative survey. A qualitative survey is not as rigid as a quantitative one as discussion may "go off on tangents". Ms Xavier explained that the purpose of the qualitative survey was to "give more depth" to the quantitative survey. It was an opportunity for respondents to discuss why they gave certain ratings to questions. It is not statistically robust and was not designed to test the responses given in the quantitative survey.
- [158] Ms Xavier said that the survey was confined to supermarkets as the respondents were the main grocery buyers. As a result, survey responses did not include reference to Big W, Myer or Kmart.
- [159] The survey showed that Coles and Woolworths are the shops of choice for the majority of shoppers. Convenience was noted as the key driver for store choice, however price of goods was also an important factor. Choice of stores also depended upon where the store was located, ease of access to the store, good parking and the ability to do an overall shop in the one store.
- [160] The survey also showed that when discussing "convenience stores" customers cited stores such as 7-Eleven or petrol stations, but did not regard IGA or other small independent supermarkets as convenience stores.
- [161] For the majority of shoppers surveyed, Saturday was the preferred shopping day and particularly so for shoppers who were employed full-time from Monday to Friday. Those working full-time preferred to shop on a Saturday (35 per cent), followed by Sunday (24 per cent). Those employed part-time or casual did not have a preferred day - shopping was reasonable evenly distributed across all days of the week, although Monday and Tuesday was the least preferred.
- [162] Consumers surveyed preferred shops to be open later than 5.00 pm on a Saturday.
- [163] When considering trading hours, the survey showed that seven per cent of those surveyed believed that smaller stores and larger stores should be restricted in their trading hours; 38 per cent believed that smaller stores should be exempt from restrictions and 55 per cent believed that all stores should be able to open on any day or time whether small or large.
- [164] When asked to express an opinion as to whether Saturday trade for non-exempt stores should open one hour earlier at 7.00 am, 65 per cent of those surveyed this contention and 61 per cent supported the opening of non-exempt stores from 7.00 am to 8.00 pm on a Saturday.

[165] 67 per cent of shoppers generally shop at the same stores each week; the most preferred shopping day is Saturday and Coles and Woolworths attract a high percentage of those shoppers.

[166] Other key results from this survey are:

- 46 per cent of respondents shopped more than once per week and 44 per cent shopped about once a week.
- 64 per cent of respondents supported the NRA's application for non-exempt shops to open at 7.00 am. 16 per cent were opposed.
- The most common reason for supporting the 7.00 am proposed start was that it provided greater convenience and would allow customers to shop at quieter times. 67 per cent of customers working full-time said that opening at this time would allow them to drop into the supermarket prior to starting work to pick up supplies for the day.
- Although 60 per cent supported the NRA's application to extend trading hours to 9.00 pm on Saturdays, 23 per cent were opposed.
- Customers with children and those aged between 18 and 34 supported later trade on Saturdays with convenience being cited as the main reason.

[167] The report prepared by Evolve from the survey responses states that:

"Many customers are unaware that there is different trading hour regulations for smaller supermarkets compared to the larger stores. When talking about the convenience of supermarket trading hours, most customers said they would prefer supermarkets to be open later than 5.00 pm on a Saturday, with very little acknowledgement that IGA is open after 5.00 pm."

[168] The responses collected show that 55 per cent supported the view that stores should be able to open on any day or time for reasons including convenience (24 per cent), more choice (18 per cent), to suit lifestyle/working patterns (18 per cent). 38 per cent of respondents were of the opinion that small stores should be exempt from restrictions that applied to larger stores because that helped to support and protect small business (50 per cent) for reasons including competition (17 per cent), fairness/equality (10 per cent) or to stop or slow down monopolies (seven per cent). Only seven per cent of respondents were of the view that both smaller and larger stores should be restricted in their trading hours.

[169] Ms Xavier did not accept under cross-examination that the survey did not test consumers' attitudes to the effects of longer trading hours on competition. In this regard she referred to the question that asked respondents about their attitudes to the current regulations, which provided four answers. The following question then asked respondents to explain why they had selected a particular response. This question was open-ended, asking respondents to express their views on the issue. The answers given then determined the importance of each of the attitudes.

[170] MGA Survey: Mr Dier, Principal of Factuality, a Sydney-based consultancy business that includes conducting public opinion research, gave evidence in support of the MGA. Mr Dier conducted research and carried out surveys to determine the impact the NRA's application may, or may not, have on exempt stores in the SEQA. In his Witness Statement, Mr Dier explained:

"The survey was conducted between 7th July and 7th August 2015 with a sample of 1,023 residents of South-East Queensland, covering eleven affected local government areas (there set out). The sample was obtained through the managed panel of ADP Performance Pty Ltd (address cited). Its panel members are recruited through a variety of sources, primarily advertising, with the intention of obtaining people who represent the Australian population from all English-speaking demographic classification and across all attitudinal categories. The sample was weighted so that it reflected the ABS statistical breakdown of the region, for age, gender and LGA population."

[171] The panel he used is one that much of the market research industry uses; it has about 400,000 people signed up to it. Mr Dier explained that telephone polling is now expensive to conduct and the respondents are not necessarily reflective of the population given the small percentage of the population who have landlines. As a result, quotas are placed on the number of older respondents but the imposition of quotas increases costs. However, the total percentage of people over 50 years of age participating in the first survey was 51 per cent whereas it was 55 per cent for the supplementary survey. Mr Dier accepted that these figures showed that the weighting to older people was too great.

[172] The main findings of the online survey were:

- 76 per cent of respondents claim they do "all or most" of the shopping. This was broken down into 83 per cent women and 67 per cent men. Only 51 per cent of people under 25 years were found to do all or most of the shopping.
- 89 per cent say they do at least one big grocery shop once a month on average and the same percentage say that do at least one supplementary grocery shop to buy a few times in the same period.
- Each month, 82 per cent of respondents buy from a Coles store, 83 per cent from a Woolworths store, 53 per cent from Aldi and 50 per cent from an independent.
- 74 per cent undertake most big shopping trips between Monday and Friday or in the mornings or early afternoons on weekends, especially Saturdays. Only 4 per cent do "big shops" after 3.00 pm on Saturdays. Only three per cent say they shop on weekends after 5.00 pm but these are more likely to shop on Sundays (two per cent) than Saturdays.
- 70 per cent of respondents say they undertook small shopping trips on weekdays, 19 per cent on Saturdays and 12 per cent on Sundays. Three per cent did small or supplementary trips between 7.00 am to 8.00 am

Monday to Friday and only one per cent did such a trip between these hours on a Saturday.

- Full-time workers are more likely to shop on week nights for both big and small shops.
- Part-time or casual workers mostly undertake big shops on weekdays with 52 per cent doing this between the hours of 8.00 am and 5.00 pm. 19 per cent shop on Saturdays and 15 per cent on Sundays. The figures are similar in relation to when small shops are done.
- 83 per cent of respondents are satisfied with the current shopping hours and 14 per cent were dissatisfied.
- 69 per cent believed the NRA application would benefit big supermarkets like Coles and Woolworths whereas as 60 per cent believe it would hurt smaller independent supermarkets and 58 per cent believe it will hurt smaller shops like butchers, fruit shops and newsagents.
- 53 per cent expect consumers to be better off and 10 per cent worse off were the application to be granted.
- 57 per cent were not expecting the application to make any difference to themselves. 36 per cent expected the application to benefit them and 15 per cent thought they would be worse off.
- 36 per cent expect a boost to the local economy; 15 per cent think that it will be made worse.
- 49 per cent expect more local area jobs to result whereas 12 per cent think it will make the job situation worse.

[173] Mr Dier also gave evidence about a supplementary survey he conducted among 358 residents across the areas affected by the application. Fieldwork was conducted between 15 and 18 August 2015. Mr Dier said this short survey was conducted to investigate a point not made in the main survey that had arisen spontaneously, *viz*, who would bear the costs in keeping the stores open for the extra hours.

[174] He said he did not "like to influence the outcome of surveys in finding out what people's position is, but when you do issues-based research you should make sure that they understand all the positions." When Mr Dier realised that the point above had been omitted from the survey, he persuaded the MGA to undertake the additional survey. In undertaking it, "we're actually informing people of the reality of the situation, and then finding out their view of that reality. So the purpose is not to influence people, but it's to influence people in a way that is actually accurate and objective for the situation." When pressed on this issue under cross-examination, Mr Dier said the issue had been raised by a couple of people who had worked in retail and because of this he thought the issue was worth pursuing. He rejected the proposition put by the NRA that, in effect, those responding to the supplementary survey have no knowledge of the operations of supermarkets and thus their opinions would not carry weight. Mr Dier said that the respondents believed that the supermarkets would pass on the extra costs to consumers

and armed with this view, the support for the application diminished significantly. For this reason, he considered the issue a legitimate question to pursue.

[175] The respondents who participated in the supplementary survey were given a series of statements either for or against the application to determine how convincing each one was. The sets were rotated: half received the arguments for the application first while the other half heard the arguments against it first.

[176] The statement in support of the application which considered the most convincing was that "increased shopping hours will give customers more choice about when they do their grocery shopping." A total of 64 per cent of respondents found this statement either very or fairly convincing.

[177] After considering arguments both for and against, but not specifically the impact of longer opening hours, 51 per cent of respondents supported the application. In the supplementary survey, after specific consideration of extra hours from longer opening hours, the following results were obtained:

- 11 per cent strongly supported the longer hours being sought regardless of the impact on grocery prices;
- 45 per cent supported the application but would oppose it if it caused grocery prices to rise;
- 20 per cent opposed it because of the expectation that it would lead to higher grocery prices; and
- six per cent were unsure.

[178] SDA Survey: Mr Gazenbeek informed the Commission that his union had conducted an electronic survey of members working for major non-exempt supermarkets in the area covered by the NRA application. The results of that survey were:

- A majority of the respondents estimated there were very few customers (less than five and up to 10) waiting at opening times during Monday to Friday. On weekend days these numbers rose to estimates of 10 to 15 customers per day.
- There was some confusion amongst customers on Saturdays as to why the stores did not have the same hours as Sundays.
- 77.4 per cent of responses indicated that stores were generally not considered busy at current closing times. The remaining 20.6 per cent considered shops were busy or very busy but this was equated to not having sufficient numbers of registers open to service customers.

Section 26(f) the alleviation on traffic congestion

[179] There were no relevant submissions concerning this criterion.

Section 26(g) the likely impact of the order on employment

[180] Mr Evans' evidence was that the granting of the application to extend trading hours would create 1,000 jobs and this estimate had been found in the Ergas Report. He stated that he gained the following perspective from the Ergas Report and his own research that:

"...approximately 36.17 per cent of the total potential economic and employment benefits would be achieved by allowing trade between 7.00 am and 9.00 pm from Monday to Saturday, equating to \$111.4m of economic value and the creation of approximately 1,000 jobs." (Exhibit 13)

[181] Mr Branigan's direct evidence was that 2,000 jobs would be created by the granting of the application.

[182] When queried as to the creation of the 2,000 jobs, Mr Branigan explained that it was his "best estimate" for employment if trading hours were completely deregulated. As that claim was not before the Commission, the debate upon that point requires no further consideration.

[183] The Full Bench determined to recall Mr Evans to expand upon his evidence given concerning the creation of 1,000 jobs if the application was granted.

[184] Mr Evans firstly said he believed that the Ergas Report in terms of its conclusions was very similar to the opinion of the Queensland Competition Authority when it had attempted to estimate the value of total deregulation of trading hours for Queensland.

[185] Secondly, in summarising his view, Mr Evans said that when approaching his conclusion from a "bottom-up approach", 1,000 new jobs in South-East Queensland is about the equivalent of three jobs per shopping centre in South-East Queensland. Or alternatively, it is about one job for every 60 shopfronts that exist in South-East Queensland.

[186] Mr Evans further clarified his position when he stated that the 1,000 jobs did not actually relate to 1,000 full-time jobs *per se*, but rather that there would be some new jobs which would be part-time and casual and some would actually provide extended hours for current employees. Half of those jobs would be created at the shopfront and the other half would be categorised as secondary process jobs *viz*, security guards, trolley collectors etc.

[187] Given that in most matters before the Commission, the NRA have quoted the extra hours which would be created if a particular application was granted, the Commission requested the NRA to provide information concerning two trading hours cases by way of example where extra trading hours had been granted for non-exempt stores. The trading hours matters nominated related to an application by the NRA in Ipswich⁵ and Toowong.⁶

[188] Various mathematical calculations were attempted by both advocates for the NRA and MGA when Mr Evans was giving his evidence, in order to determine the actual increase

⁵ *National Retail Association Limited, Union of Employers* [2014] QIRC 150.

⁶ *National Retail Association Limited, Union of Employers* (No. 2) [2014] QIRC 160.

in hours (and jobs) in the Toowong store over a period of time. There was no consensus reached in identifying how many new jobs if any were created by the introduction of an expanded trading hours regime in that store. What is clear from the evidence however, is that more hours are required to be worked and this would be achieved by either extra hours being worked by existing employees or new jobs by employees who are either full-time, part-time or casual.

[189] The SDA, in its opposition to the application, expressed its concern for its members and how they might be adversely affected by an extension of trading hours.

[190] Firstly, its members had expressed the view that there was no apparent need for extra hours beyond those the hours already in existence. Secondly, its members generally had not noticed customers being turned away from stores as trading finished at the end of a Saturday.

[191] There was also significant concern expressed by the SDA as to how these stores would utilise employees for these extra hours.

[192] The SDA submitted that appropriate staffing levels could only occur by extending the hours of employees already rostered to work on a particular day, or, as already discussed, by engaging casuals, part-time workers or new employees.

[193] The SDA was concerned that employees would be coerced into working longer hours or that they may feel that they had no option but to agree to longer hours.

[194] Mr Gazenbeek was asked the following question from the NRA in cross-examination:

"And would you - would you feel that it's beneficial for your members and, I guess, all workers or potential workers in the retail sector for there to be additional employment available?"

I think that's - that's a fair statement to make."

[195] When extra hours are extended to non-exempt stores, it follows that there will be a positive impact upon employment whether that be by way of casual or part-time employment, new jobs, or extended hours for existing employees. That is a matter of common sense. While the NRA estimates concerning the creation of new jobs in the industry if the application was granted is challenged by the MGA and the SDA, it is our view that there would be the creation of significant new employment opportunities in the retail industry by the extension of the hours sought.

[196] We acknowledge the concerns expressed by the SDA regarding its members and the "voluntary" nature of employees who may be rostered for extra trading hours. While commitments have always been given from non-exempt stores that employees would only work any extra hours granted on a voluntary basis, there have been concerns expressed in this matter as to whether those commitments were always honoured.

Section 26(h) views of any local governments in whose area the Order is likely to have an impact

[197] The Deputy Industrial Registrar wrote to all councils which may be potentially affected to seek their views on the application made by the NRA.

[198] The following responses were received:

In support

[199] By letter dated 2 September 2015, the Council of the City of Gold Coast advised that it endorsed and supported the NRA's application to merge as many different trading hours zones as possible within the SEQA.

[200] In correspondence dated 28 July 2015, the Chief Executive Officer of the Brisbane City Council advised that Council supports longer trading hours in the Area of the City Heart of Inner City of Brisbane in the Trading hours Order. Further, Council considered that "streamlining retail trading zones and aligning trading hours may provide benefits for visitors to and residents of Brisbane. An active, vibrant 24 hour city is a key element of the *Brisbane 2022 New World City Action Plan*."

[201] The CEO also referred to a statement made on 26 May 2015 that the Lord Mayor, Councillor Graham Quirk, supports extended trading hours in the CBD to boost tourism but the retail sector would decide when it was appropriate to open.

[202] The Somerset Regional Council advised by letter dated 24 June 2015 that it has no objection to the NRA's proposed trading hours.

Opposed

[203] The Sunshine Coast Regional Council advised of its opposition to the application by letter dated 1 June 2015. The grounds for its opposition are that such a review and accompanying changes to trading hours should be considered only after the outcomes of the Productivity Commission's Harper Review and associated Industrial Relations reviews are finalised

[204] In correspondence dated 24 June 2015, the Lockyer Valley Regional Council advised it had received representations from the MGA seeking Council's support to oppose the NRA application. The matter was considered by Council at a workshop on 12 May 2015 and its ordinary Council meeting on 27 May 2014 where representations were again received from the MGA expressing concerns of their members that the proposed changes would have detrimental impacts to their predominantly small businesses. Following such considerations the Council resolved to support the MGA and the small businesses they represent.

[205] In the letter dated 3 August 2015, from the Mayor of Redland City Council, Karen Williams, reference was made to the decline of 4.58 per cent in the number of small businesses from 2012 to 2014 despite the efforts by Council to stimulate economic conditions. The Council was thus "loath to see an extension in trading hours for major retailers that would put further pressure on a small business sector that employs so many Redlands residents.

[206] The Mayor went on to say:

"Council is concerned that the proposed extension would be likely to have the following negative consequences:

- The market dominance of major retailers will be further enhanced.
- The commercial viability of small businesses, many of which are already operating to tight margins such that they could not sustain even a small decrease in turnover, will be jeopardised.
- Further reduction in the size of the small business sector will lead to reduced competition, a reduction in consumer choice and ultimately higher prices."

[207] The Mayor further commented on the "significant flexibility" already provided to consumers under the existing trading hours and doubted whether, given the finite budgets of households, any significant increase in spending would be achieved or the existing spending pool would be spread across a broader number of hours.

[208] By letter dated 6 August 2015, the Noosa Council advised of its resolution at the 30 July 2015 Ordinary meeting of Council to oppose the application.

[209] The Moreton Bay Regional Council advised of its opposition by letter dated 21 July 2015. The letter from this Council was attached to Mr Costanzo's statement and not directly received by the Registry. Mr Costanzo, the General Manager, Retail Operations and Business Development Manager, SPAR Australia Ltd, said in his evidence that SPAR has five stores within the council area and took the opportunity given by the Moreton Bay Regional Council to address it on the NRA application. SPAR wanted to highlight the effects on SPAR stores and other small businesses within the council area.

[210] In its correspondence the Moreton Bay Regional Council advised that it "does not support the opening up of trading hours which essentially support the large supermarket chains at the expense of smaller convenience stores." It remains supportive of small business in the region and wished to see them continue to thrive as they add to the character and sustainability of local communities. Council considered the granting of the NRA application would:

- "adversely impact on the viability of smaller convenience stores, which rely on the ability to trade outside of the hours that are available to the larger supermarket chains;
- adversely impact on a significant employer group which provide a valuable employment base and which, in many cases, provides the first job for many of our younger residents;
- potentially result in the closure of local convenience stores which are located in close proximity to residential communities, leading to less sustainable and more care dependent communities by impacting on the ability to walk or cycle to local retail outlets;

- negatively impact on the support which small businesses provide to local sporting and charitable organisations (in many cases small business is more willing to support local groups and charities); and
- result in less competition and greater dominance/market control of the bigger supermarket chains."

CONCLUSION

[211] The Full Bench has accepted the NRA's submission that the focus of its application was to create a trading hour regime for the locality of the SEQA which better serves the interests of business and consumers than its current arrangement. Its application makes that clear where some areas within the SEQA have been excluded and Sunday trading hours are not included in this application.

[212] Full "harmonisation" of allowable trading hours in the SEQA was not sought by the NRA.

[213] In applications for extended hours pursuant to the Act, s 26 requires that the Full Bench "must have regard to" matters relevant to the s 21 Order.

[214] The Full Bench of the Commission in *Re National Retail Association Limited, Union of Employers* stated:

"What s 26 requires is that the Commission 'must have regard to' the matters listed under that section. The phrase 'must have regard to' is not defined in the section in which it appears, and it does not appear in the dictionary in sch 1. There does, however, seem to be a settled judicial interpretation of that phrase as it appears in similar provisions in other Acts."⁷

[215] The leading authority appears to be the judgment of Gibbs CJ in *R v Toohey; Ex parte Meneling Station Pty Ltd*. His Honour said:

"When the section directs the Commissioner to 'have regard to' the strength or otherwise of the traditional attachment by the claimants to the land claimed (sub - s (3)), and to the principles set out in sub - s (4), it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation. When the section directs him to comment on the matters mentioned in paras (a) to (d) of sub - s (3), it requires him to remark upon those matters and to express his views upon them. The change in language is so significant that, notwithstanding the difficulties of the section, I find it impossible to reach any conclusion other than that a significant change of meaning is intended, and that the matters which form the subject of the comment are not matters to which the Commissioner is bound to have regard in making his recommendation."⁸

⁷ *Re National Retail Association Limited, Union of Employers* [2014] QIRC 150.

⁸ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327.

[216] In *Re Kirby Street (Holdings) Pty Ltd*, Barrett J applied that interpretation of the phrase "have regard to" in a similar type of provision in the *Corporations Act 2001* (Cth):

"The direction to 'have regard to' the specified matters requires that the court 'give weight to' those matters 'as a fundamental element' in coming to a conclusion. The inquiry in the course of which the specified matters must be given that weight is as to what is 'just and equitable'."⁹

[217] While the Commission must have regard to those matters specified in s 26, there are occasions upon which some criteria contained within s 26 are not relevant to the application. The most common example of this is found in s 21(f) "the alleviation of traffic congestion". In many applications, the question of traffic congestion is not relevant to any of the parties.

[218] The Commission has stated that a decision to extend trading hours for non-exempt shops requires a departure from the *status quo*. To that extent an applicant for orders under s 21 of the Act, in this case the NRA, carries the onus of satisfying the Commission that the application should be granted.

[219] In considering the relevant criteria under s 26 of the Act, the Full Bench concludes:

Section 26(a) Locality

[220] The locality in which this application is made (SEQA) covers a somewhat diverse area. Along the coastal regions, the locality incorporates many tourist precincts. There are also large urbanised areas and some rural areas.

[221] The location also encompasses a large number of retail shopfronts and roughly 6,000 stores which are described as non-exempt stores for the purposes of the Act.

[222] There has been recognition and ultimately an extension of trading hours for non-exempt stores, in the tourist precincts and certain areas within the more urbanised parts of the SEQA.

[223] The Full Bench acknowledges that this has led, over time, to a fragmentation of trading hours generally for non-exempt stores in the SEQA.

[224] The geographical footprint of the SEQA is not large by Queensland standards.

[225] The Full Bench does not view the location in this application as a deterrent to NRA's application. It is a criterion which will be considered in the overall context of the application.

⁹ *Re Kirby Street (Holdings) Pty Ltd* [2011] NSWSC 1536, 71.

Section 26(b) the needs of the tourist industry or other industry in such locality or part; and

Section 26(c) the needs of an expanding tourist industry

- [226] The statistical data provided in the body of this decision relevant to these criteria need not be replicated here.
- [227] It is clear that tourism contributes significantly to the SEQA.
- [228] Trading Hours decisions frequently refer to the symbiotic relationship between the retail industry and tourism. In our view, that is a factor for positive consideration in determining this matter.
- [229] The MGA witnesses generally did not accept the proposition that tourists' needs were not met by the current trading hours regime in the SEQA. To some extent that criticism may be correct, but from a broader perspective, many small retailers are unable to provide, at the same price, the range of products that can be provided by a larger non-exempt store. This, coupled with the reality that many tourists are drawn to the SEQA, provides added impetus to the claim that trading hours must not only accommodate tourism but must also be prepared for an expansion in tourism over the foreseeable future.
- [230] Given that the SEQA incorporates approximately 70 per cent of the population, employment and industry in Queensland and that tourism is a significant component of that percentage, in our view extended trading hours are necessary to meet those needs.
- [231] Our consideration upon the two criteria relating to tourism in s 26 of the Act is that it is a growth factor of major significance to the economy of the State and specifically the SEQA for the purposes of this application.

Section 26(d) the needs of an expanding population

- [232] Similarly for this criterion, those opposing the application believe that their retail infrastructure of smaller and medium sized stores is sufficiently well established to cater for any increase in population in the SEQA.
- [233] This criterion requires a consideration of the needs of an "expanding" population. Available statistical data shows that the population in the SEQA will continue to grow.
- [234] Some witnesses opposed to the application referred to their local areas in which they operate their stores stating that they did not believe that those areas would be subject to any particular growth in population. As a matter of common sense, to some degree that may be the case in some urban and regional areas.
- [235] However, in considering the needs of an expanding population the Full Bench primarily relies upon economic predictions and projections.
- [236] These projections require consideration of current trends in population growth or decline as well. There has been a decline in the mining boom in Queensland, but the impact of that, in terms of population, is difficult to ascribe to any specific area as

workers come from a number of areas in and outside of the State to work in the mining industry.

[237] The primary source of information concerning this criterion is taken from statistical data referenced under the heading of s 26(d) *the needs of an expanding population*.

[238] Taking those matters in consideration, there is a projection of growth in the SEQA and this is a positive factor to be considered in this application.

Section 26(e) the public interest

[239] The Full Bench is of the view that the breadth of the NRA's claim may properly be considered under this criterion and also under s 26(i) *such other matters as the industrial commission considers relevant*.

[240] While the term "harmonisation" of trading hours by NRA for non-exempt stores with SEQA has been referenced by both the NRA and those opposed to the application, the concept was addressed by Mr Evans in his evidence.

[241] Mr Evans said that clearly "harmonisation" of these hours was not possible and not sought. Rather, the focus by the NRA was to create a trading hours regime "that better served the interests of business and consumers than the current arrangements".

[242] To this end, the NRA sought trading hours which provided flexibility for non-exempt stores to choose the hours they wished to trade within the allowable hours granted.

[243] In application *National Retail Association Limited, Union of Employers*, His Honour Deputy President O'Connor stated:

"The amendments to the Act in 2002 enable the Commission to decide rather than regulate trading hours. [*National Retail Association v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)* (2005) 180 QGIG 1211, 1212)]. It must be recognized that any decision of the Commission to enlarge trading hours for non-exempt shops does not impose upon those shops an obligation to trade in accordance with the extended hours."¹⁰

[244] We respectfully endorse those comments.

[245] It is acknowledged that the Ergas Report was not specifically written for the purpose of this application. Mr Branigan was the primary contributor to the Ergas Report and he gave evidence concerning it.

[246] Mr Branigan was unfamiliar with the peculiarities of the SEQA as it related to the Act, but that is not to suggest that he did not understand the broader concepts of the Ergas Report. In our view, notwithstanding those exceptions, the significance of the Ergas Report cannot be diminished. Mr Evans, in reliance upon the Ergas Report was more than able to comment upon that broader perspective within the context of the SEQA. The Ergas Report's title was "Economic Impacts of Deregulating Retail Trading Hours

¹⁰ *National Retail Association Limited, Union of Employers* [2014] QIRC 194.

on Queensland's Economy" and it cannot be afforded little weight even though what has been sought by NRA is not total deregulation of trading hours for the SEQA.

- [247] While deregulation is not sought, there is also contained within the Ergas Report an economic analysis which would apply to the SEQA as much as it would be in other parts of the State. Those elements of the Ergas Report which would be applicable to the SEQA relate, amongst other things, to cost of living impact, community benefits, the "patchwork" of trading hours regulations within the State and the overall effects of deregulation in other Australian States.
- [248] The Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry found that deregulation of trading hours did not have a material impact upon the structure of the retail sector and the viability of small traders.
- [249] The number of trading hours Orders applicable in the SEQA is a significant factor for consideration. Some of the more urbanised areas within Brisbane, for example, have different trading hours. The geographically seamless connection between some of those areas with neighbouring suburbs does, we accept, have the potential to cause confusion with consumers if trading hours differ for similar stores. Likewise, the differing trading hours applicable to other areas of the SEQA is, because of the reasonably compact area under consideration, likely to also cause confusion for consumers, whether those persons are residents of the SEQA or whether they are tourists and those persons on day trips around the region. This evidence has been given by witnesses for non-exempt stores and is accepted by the Full Bench as accurate as it relates to this application.
- [250] Mr Hopper's evidence may be, and is, considered under this criterion as it is under the heading of "business interests" (whether small, medium or large) (s 26(e)).
- [251] His concern primarily centres upon an "erosion" of the point of difference in terms of the unique service provided by independent supermarkets as against the major supermarkets. The Full Bench has considered the evidence given by Mr Hopper and other store owners who pointed out quite clearly to the Full Bench how they had differentiated their product sufficiently to permit them to compete favourably (and sometimes more favourably) with the larger non-exempt stores. In our view, at the moment those store owners have an advantage over the non-exempt stores in that while they can and do compete effectively with those stores, they are permitted to trade longer hours than the non-exempt stores because of the manner in which the stores are structured and staffed. We reiterate, there has been no evidence put before the Full Bench to state that those stores are trading unlawfully.
- [252] We accept the view that current regulations have the capacity to negatively impact upon the GSP. The Ergas Report cites an amount of \$253 million annually, but those statistics relate to total deregulation of trading hours in Queensland. As the application does not seek deregulation of trading hours in Queensland *en masse*, one is unable to extrapolate from the total monetary figure what may be the case for the SEQA even in the case where deregulation is not sought. But whatever the outcome of any calculation, it is fair to state that statistical data from the SEQA would contribute to some degree to that negative impact upon GSP.

[253] In our view, the matters addressed under this criterion are matters of public interest and are considered to be matters positive to the granting of this application.

Section 26(e) consumers' interest, business interest (whether small, medium or large)

[254] The application seeks extended trading hours for non-exempt stores within the SEQA. The rationale for this is that these stores require flexibility to trade at times which best suit consumers, visitors and tourists.

[255] There is a clear distinction in non-exempt stores between those stores which are primarily food supermarkets and others which provide more general merchandise. The distinction is not referenced in the Act, but the evidence in this matter shows that "food supermarkets" place more emphasis on trading all allowable hours than do those stores which deal in non-food merchandise. The latter mentioned stores seek the ability to utilise allowable hours at times when it was beneficial to trade - for example, Mothers' Day and tourist promotions. The NRA says this flexibility would be beneficial for consumers.

[256] The main opposition to this application comes from smaller and medium sized stores which deal mainly in foodstuffs and who believe that their sales would be adversely affected if the application was granted. Some of these stores carried a range of foodstuffs, but not on a par with what was offered in the larger non-exempt stores.

[257] There would be some smaller stores, for example FoodWorks, at which a consumer could do a full weekly shop if required. But the reality is that the larger non-exempt stores do offer a greater variety of products usually at less cost than these stores.

[258] The Commission has previously noted in other trading hours decisions that some of the smaller stores are in effect "top up" stores. This point has been made in the consumer survey conducted by NRA. These stores rely upon those consumers (whether local consumers or those passing-by) wishing to purchase goods quickly thereby obviating the need for example to queue up at check-outs or, from our perspective, arguably because of the small number of purchases, price is not a factor. These stores are infrequently used as a store where a typical full weekly shop occurs. This may be the case for some consumers, but in the main the evidence shows that this does not occur.

[259] There are also the larger type of store (Supa IGA for example) to which reference has been previously made.

Consumers' interest

[260] In its consideration of consumers' interests and how these stores may be affected by extended trade, the Commission has noted:

[261] The only gauge of the extent of consumers' interest in the application is found in the various surveys conducted by the NRA, MGA and SDA.

[262] There has been considerable detail of these Surveys in the body of this decision.

[263] Summarised, the NRA Survey found:

- Coles and Woolworths were the shops of choice for the majority of shoppers;
- convenience was a key driver for store choice;
- the price of goods was also a significant factor for consumers;
- Saturday was the preferred shopping day for full-time workers employed from Monday to Friday;
- consumers surveyed preferred shops open later than 5.00 pm on Saturdays;
- 65 per cent of those surveyed believed that trade for non-exempt stores on a Saturday should open one hour earlier at 7.00 am;
- 61 per cent of those surveyed supported NRA's application to extend trading hours to 9.00 pm on Saturdays; and
- consumers with children and those aged between 18 and 34 supported later trade on Saturdays with convenience being cited as the main reason.

[264] Summarised the MGA Survey found:

- The major stores frequented by those surveyed were Coles and Woolworths;
- 74 per cent of those surveyed did their larger shopping between Monday and Friday or on Saturday morning. Only four per cent did a big shop on a Saturday after 3.00 pm;
- 83 per cent of those surveyed were satisfied with the current shopping hours;
- 53 per cent of consumers said they would be better off if the application was granted. However, 57 per cent were not expecting the application to make any difference to them;
- 36 per cent of those surveyed expected a boost to the local economy if the application was granted and 15 per cent thought that it would be made worse;
- 49 per cent thought a successful application would create more local jobs, and 12 per cent thought it would make the situation worse; and
- Overall in that survey, 51 per cent of those surveyed supported the application.

Note - a supplementary survey was conducted by MGA for reasons cited in this decision. The results of this were:

- 11 per cent of those surveyed supported the application regardless of the impact on grocery prices;
- 45 per cent supported the application but would oppose it if it caused grocery prices to rise;
- 20 per cent opposed the application on the expectation that it would lead to higher grocery prices; and
- six per cent were unsure.

[265] Summarised the SDA Survey found:

- there was some confusion amongst customers as to why Saturday and Sunday had different closing times;

- SDA members had noticed only a small number of customers awaiting the opening of a store on Monday to Friday and on weekdays the numbers rose only slightly; and
- 77.4 per cent of responses indicated that stores were generally not considered busy at current closing times.

[266] In forming a view on consumers' interests from these surveys, it is apparent that there are more consumers, of those surveyed, who were supportive of the application. The support was qualified in some circumstances - i.e. there would be support for the application if prices did not rise in the non-exempt stores if the application was granted. There was no evidence before the Commission to the effect that prices had risen in non-exempt stores because of an extension of trading hours.

[267] What evidence was given with regard to price between the stores, was that some of the larger stores (not categorised as non-exempt stores) claimed to compete effectively with the non-exempt stores and on occasions undercut the prices in non-exempt stores.

[268] Overall, there is more support for the granting of the application, than opposition from consumers. The degree of difference between those interests is not overwhelming, but it is there nonetheless in support of the application.

Small/medium business interest

[269] The outcome of the Chamber of Commerce and Industry Queensland survey has been referenced in the decision. It is interesting to note that while retail businesses which employed up to 20 people recorded 58 per cent opposition to the application, 77 per cent of the businesses *in toto* surveyed were in favour of treating the SEQA as a single trading zone.

[270] Primarily that survey found that while the question of full deregulation of trading hours remained a contentious issue, there was approval for an incremental relaxation of trading hours regulations.

[271] Small to medium sized retail traders have had their concerns and opposition to the application detailed extensively in this decision.

[272] Some of these witnesses attested to the loss of business, as a matter of history, when larger non-exempt stores located near to their stores. As well, witnesses referred to "projected losses" which they may incur if the application was to be granted. From the projections given - in some cases the possibility a 75 per cent loss of trade on a Saturday after 5.00 pm if the application was granted - caused the NRA to doubt the genuineness of some of the projections.

[273] It was noted in the hearing that when asked in cross-examination as to the basis of these projections, very few witnesses were able to realistically address the question.

[274] The MGA witnesses, when addressing their peak trading hours, gave evidence which showed that these hours occurred when the non-exempt stores were open.

[275] The projections were given on the basis that consumers would stop going to smaller retailers - for example, newsagents - if the non-exempt shops were open earlier on a

Saturday morning. In our view that is a projection which requires consideration. Many of the smaller stores are convenience stores. They do not purport to be anything more than that. There was evidence that, for some small traders, most shopping done before 8.00 am in the morning and after 5.00 pm in the evening on a Saturday was convenience shopping rather than "trolley shops".

[276] It is questionable, in our view, that the element of convenience for consumers would somehow diminish or disappear altogether if a larger non-exempt store was to open earlier on a Saturday. Some of the projections nominated a loss in terms of a total loss of sales in the periods when non-exempt stores may open. In our view those statistics are unrealistic and unreliable.

[277] In considering all of the submissions and evidence on this point, it is clear that there was at times conflicting evidence given by some small traders. Some MGA witnesses gave evidence that they had made "point of differences" in the product they sold from their shops in order to remain viable against non-exempt stores. Some gave evidence that their customers did not want to go to a non-exempt store to purchase their goods, preferring to go to the smaller store.

[278] Earlier reference has been made in this decision to the position of some of the larger stores (those still outside of the restrictions for non-exempt stores) who have managed to command a strong place in the market through product differentiation, for example.

[279] Overall, in considering this criteria, we have formed the view that the larger non-exempt stores have established that there is support and therefore a need for the extension of hours.

[280] For the small traders, there were in some cases valid reasons given for apprehension that non-exempt stores with greater hours would affect their businesses, but at the same time for many there would be little difference to the viability of their businesses especially in instances where they already trade favourably against non-exempt stores when both are open at the same time.

Large business

[281] Mr Nardi said many members of the Shopping Centre Council of Australia own or manage centres in South-East Queensland and its members include major owners of retail stores, managers and developers of shopping centres, family run businesses, and hundreds of speciality retailers.

[282] A summary of the evidence given by Mr Nardi and Mr Gatehouse (Scentre Group, Westfield) is detailed in the decision. Highlighted in that evidence was that retailing is a "continuous industry" and should have the ability to operate extended hours. Retailing as such also competes with other economic activities (e.g. hotels and cinemas) which have fewer restrictions in their hours of operation.

[283] Both held the view that increased trading hours would enhance the retailer's opportunity to spread fixed costs over a longer period of time. In their view, this would lead to lower average costs of products.

[284] Stores such as Coles and Woolworths supermarkets would trade the full extent of any additional hours.

[285] The Full Bench has accepted the submissions from the NRA that there is a requirement to align the shopping hours in the SEQA. In our view this is a matter of public interest. The consistent submission put by the NRA is accepted by the Full Bench - i.e. that extended trading hours would provide more consistency, choice, convenience and flexibility for both residents and visitors.

Section 26(f) the alleviation of traffic congestion

[286] This is a criterion upon which no submissions have been made.

Section 26 (g) the likely impact of the order on employment

[287] Any increase in trading hours for non-exempt stores produces more employment hours for employees. As previously stated, those extra hours may be given to current employees, or to casual, part-time or full-time employees. This represents a benefit to the order on employment.

[288] Reference has been made in this decision to evidence given by Mr Evans and the Ergas Report as to the actual increase anticipated. The original statistics from the Ergas Report are a prediction of what might occur to the employment order if full deregulation of trading hours were to occur in Queensland.

[289] The debate around this criterion has been addressed in the body of this decision.

[290] The Full Bench also is unable to predict with any degree of particularity what any increase in hours would have on employment numbers. However, the Full Bench accepts that the hours proposed in this application would create greater employment opportunities for employees than would a retention of the *status quo*. This represents a positive factor for the NRA's case. In saying this, the Full Bench has considered the evidence of some MGA witnesses that increased allowable trading hours for non-exempt stores could result in loss of employment for some of their employees.

[291] The Full Bench has considered the SDA's concern for its members working extended hours. For many years it has been the case that trading hours decisions have made reference to the voluntary nature of work for employees required to work extended hours.

[292] With this in mind, we have respectfully adopted an Order issued on 11 October 2016 by a Full Bench of the Commission in matter numbers TH/2016/3 to TH/2016/12 (inclusive) and propose to incorporate this into the decision:

- the shops and shopping centres specified in the Order may trade in accordance with that Order on the condition that employees have freely elected to work the extended hours without any coercion, harassment, threat or intimidation by or on behalf of the shop owner, or occupier of the business; and

- the Commission or Industrial Magistrates Court may, at its discretion, require employers to produce written evidence that employees have actively indicated their willingness and availability to work these hours as a result of the extension of allowable hours.

Section 26(h) the view of any local government in whose area the order is likely to have an impact.

[293] There was divided opinion from the Local Government Regional Councils which responded to the application.

[294] In the circumstances of this case, in determining this criterion, it is not simply a matter of comparing the actual numbers of those in favour with those opposed to the application.

[295] By way of example, we note that an objection from the Sunshine Regional Council was dependent upon the outcome of a Queensland Government proposed review of trading hours generally and the outcome of the Harper Competition Policy Review.

[296] The Review of the trading hours legislation has been announced by the Queensland Government but has not commenced as yet. The Harper Competition Policy Review has now been finalised and it has made positive commentary concerning deregulation of trading hours.

[297] Councils from two designated tourism areas - the Gold Coast and the Sunshine Coast - held contrary views of the application.

[298] The competing views generally between those in favour of and those opposed to the application are largely categorised as follows.

[299] Those Councils supporting the application referenced:

- the benefits of merging the many different trading hours;
- streamlining retail trading zones and aligning trading hours for the benefit of residents and visitors to Brisbane;
- boosting tourism and the flexibility of permitting non-exempt traders to trade on hours which best suited business and consumer; and
- simply that there was no opposition to the application.

[300] Those Councils opposing the application referenced:

- the possible detrimental impact upon small businesses;
- opposition based upon the decline of small businesses even though the Council concerned had attempted to stimulate economic conditions in its region;
- that extended trading hours only supported non-exempt stores to the expense of small traders;
- the impact upon residential communities where it was important to retain small traders; and
- the possible impact upon sporting and local charities which are supported by small business.

[301] These divergent views have been acknowledged by the Full Bench. No clear conclusion can be drawn from these views, but due consideration has been given to the import of those views.

s 26(i) such other matters as the industrial commission considers relevant

[302] In the circumstances of this case, we have found that the focus of the NRA to create a trading hours regime for the locality of the SEQA would better serve the interests of business and consumers than the current arrangements.

[303] The Full Bench has stated its reasons for making this decision under the heading of "public interest". We submit that one can consider the basic tenet of NRA's application under both criteria.

[304] In making our decision to accept NRA's application, we have had regard to and appropriately considered all of the relevant criteria under s 26 of the Act.

[305] With the exception of s 26(h) "the view of any Local Governments in whose area the order is likely to have an impact" which in our view was indecisive, the significant majority of the criteria within s 26, has been positively satisfied by NRA. The "locality" in question cannot require a finding of the Commission, but rather an appreciation of the type of area under consideration.

[306] There has been extensive evidence given in this matter together with detailed submissions to which the Full Bench has given due consideration. Every aspect of the evidence and submissions has not been mentioned in this decision but all have been appropriately considered.

[307] Whilst we accept that there is not total consistency across the SEQA concerning allowable trading hours, this decision provides for a more coherent trading hours regime.

[308] Having regard to the matters prescribed by s 26 of the Act, the Full Bench is of the view that the evidence before the Commission is, on balance, sufficient for the application to be granted and an Order is made pursuant to s 21 of the Act.

Orders

[309] We order that:

1. The application is granted.
2. The *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* be amended in accordance with Schedule 1 of the application filed on 31 October 2014 and as amended.
3. The operative date of the amendments is 1 December 2016.
4. The shops and shopping centres specified in the Order may trade in accordance with that Order on the condition that employees have freely elected to work the extended hours without any coercion, harassment, threat or intimidation by or on behalf of the shop owner, or occupier of the business.

5. The Commission or Industrial Magistrates Court may, at its discretion, require employers to produce written evidence that employees have actively indicated their willingness and availability to work these hours as a result of the extension of allowable hours.

[310] The NRA is to provide a draft order reflecting the terms of this decision within seven days.