

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 - s. 21 - trading hours orders on non-exempt shops

National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (TH/2011/11)

TRADING HOURS - NON-EXEMPT SHOPS TRADING BY RETAIL - STATE

DEPUTY PRESIDENT SWAN
COMMISSIONER FISHER
COMMISSIONER BROWN

20 April 2012

Application to amend trading hours order - Hours - New trading hours area - Appearances - Inspections - Evidence - Preliminary issue - Oral application by QRTSA to dismiss - Not granted - Locality - Tourist industry or other industry - Needs of expanding tourist industry and population - Public interest, consumers' interest and business interest whether small, medium or large - Alleviation of traffic congestion - Likely impact on employment - View of local government - Impact on social lives of employees - Legislative criteria overall considered - Positive case not established - Application refused.

DECISION

SUNSHINE COAST COASTAL TOURIST AREA

- [1] The National Retail Association Limited, Union of Employers (NRA) has applied to the Queensland Industrial Relations Commission (the Commission) to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* Order (the Trading Hours Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act) as follows:

"1. By inserting a new provision at the end of clause 3.2(8) as follows:

Provided that the allowable trading hours for non-exempt shops located in the Sunshine Coast Coastal Tourist Area (as defined) shall be as follows:

	Opening Time	Closing Time
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturday	8.00 a.m.	9.00 p.m.
Sunday (excluding Easter Sunday)	8.00 a.m.	9.00 p.m.
Public Holidays (as defined) (excluding Good Friday, Easter Sunday, 25 April, Labour Day, 25 December).	8.00 a.m.	9.00 p.m.

2. By inserting the following new clause (35) in Schedule 1:

(35) *Sunshine Coast Coastal Tourist Area*

Commencing at southern side of the mouth of the Noosa River; then in a line in a westerly direction to the intersection of Cullinane Street and Butler Street, Tewantin; then in a line in a southerly direction to the intersection of Caloundra Road and Corbould Way, Caloundra; then in a line in a south-easterly direction to the northern side of the mouth of Bells Creek; then following the sea coast in a northerly direction to the point of commencement."

Other Appearances and Attitudes to the Application

- [2] The Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA), the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) and the Master Grocers Australia (MGA) were granted leave to appear and be heard in relation to this matter.
- [3] The SDA opposed the application in toto.
- [4] The QRTSA opposed the application, arguing that the NRA had not produced sufficient evidence to demonstrate that the amendment to the Order as sought is reasonable or necessary.

- [5] The MGA opposed the application and submitted that the evidence presented by the NRA does not support the granting of the application.

Inspections

- [6] The Commission, in the presence of the NRA, QRTSA and the MGA inspected by way of drive-by various shopping centres and convenience stores located between Caloundra and Noosa.

Witnesses

The NRA called the following witnesses:

- Charles Hammersla, National Compliance Manager Facilities, Kmart Australia Ltd;
- Gerard Winzenberg, Queensland District Manager, Target Australia Pty Ltd;
- Barry Colin Waters, Regional Manager, Big W Discount Stores;
- Scott Anthony Wallace, Regional Retail Support Manager, Woolworths; and
- David Stout, State Compliance Manager, Coles.

The SDA called the following witnesses:

- Sandra Gai Mackay, Employee, Myer Limited, Maroochydore;
- Peter Gordon Thomas Clark, Employee, Bunnings Warehouse, Caloundra; and
- Debra Jayne Van Der Zanden, Employee, Coles Supermarkets, North Shore.

The QRTSA called the following witnesses:

- Julie Margaret Boland, Owner and operator, IGA X-press, Maroochydore;
- Melville William Luke, Director of several SUPA IGA, IGA and IGA X-press stores on the Sunshine Coast; and
- Roslyn Carol White, Owner/Operator, White's IGA Stores, Bli Bli and Mt Coolum.

The MGA called the following witnesses:

- Penelope Margaret Andrews, Retail Development Partner, Australian United Retailers Limited trading as FoodWorks Pty Ltd;
- Lin Xin Kai, Partner, FoodWorks Currimundi;
- Howard Charles Carrick Sugden, Director, Sugden Retailing Pty Ltd, FoodWorks Aroona;
- Gary Maurice Costello, Sole Trader, FoodWorks Maroochydore; and
- Ian William Perkins, Partner, FoodWorks Moffat Beach.

Preliminary issue

- [7] At the commencement of proceedings in Maroochydore the QRTSA raised as a preliminary point that on the face of the witness statements provided by the NRA there was insufficient evidence to cover the breadth of the nine factors listed under s. 26 of the Act. In particular, the QRTSA argued that only s. 26(a), (b) and (e) had been addressed in the evidence and with respect to s. 26(e) only business interests had been covered. On that basis the QRTSA made an application from the bar table that the application should be dismissed under s. 27(b) of the Act.
- [8] The SDA neither supported nor opposed the QRTSA's application.
- [9] The MGA, while accepting the basis of the application, considered that the preferable approach was to proceed with the substantive application and put the counter arguments to the NRA witnesses in cross-examination.
- [10] The NRA opposed the application. The NRA submitted that s. 27 of the Act has two limbs, the first of which requires that a decision has previously been made upon an application similar to that before it, and there is insufficient reason to warrant reconsideration of the matter. The NRA said that the last decision affecting trading hours on the Sunshine Coast was in 1994 and there had been no reconsideration of the hours by the Commission since then. In the submission of the NRA it was an unsustainable proposition that s. 27 of the Act contemplated an application could be dismissed on the basis of a decision made 17 years ago.
- [11] The second submission made by the NRA addressed the point raised by the QRTSA that there was insufficient evidence to support the granting of the application. The NRA rejected the proposition that s. 26 of the Act

requires an applicant to call evidence in support of an application. While evidence was desirable, the Act did not obligate an applicant to call evidence. The NRA also submitted that case law does not support the proposition that all of the s. 26 of the Act factors need to be positively satisfied before an application could be granted.

- [12] In conclusion the NRA submitted that no legal basis for the QRTSA's application had been made out.
- [13] In response the QRTSA submitted that the fact that trading hours in the area concerned by the present application had been considered 17 years ago was sufficient to bring it within the ambit of s. 27(a) of the Act. The QRTSA also rejected the submission of the NRA that calling evidence was unnecessary in applications made under s. 21 of the Act. Finally, the QRTSA submitted that case law established that all of the factors in s. 26 of the Act had to be weighed equally by the Commission in making its decision.
- [14] In giving its decision from the Bench the Commission said:

"The oral application made by QRTSA on today's date (pursuant to section 27 of the Trading (Allowable Hours) Act 1990) is deficient for the following reasons:

QRTSA had all of the evidentiary material to be presented by the relevant parties to today's application before it for some time. Consequently, there has been ample time for QRTSA to formally make an application to the Commission prior to the commencement of the hearing today, which is being heard at the Maroochydore Court House. Even on QRTSA's own submissions the application could have been made prior to today.

Section 27 of the Trading (Allowable Hours) Act 1990 reads as follows; the heading being

'Summary dismissal of application

If a full bench of the industrial commission is of opinion that -

- (a) a decision has previously been made upon an application similar to that before it, and there is insufficient reason to warrant reconsideration of the matter; and
- (b) having regard to the interests of the industrial organisations, other persons or other organisations immediately concerned and of the community as a whole, further proceedings are not necessary or desirable;

the industrial commission may dismiss, or refrain from further hearing or determining, an application made for an order under section 21 or 22(1).'

Regarding section 27(a) we believe that any application would have been supported by case law which would have been made available to the Full Bench and the other parties. QRTSA has not been able to provide the Full Bench with any copies of the cases to which general reference has been made by them. Clearly this means that the other parties have not been provided with copies as well.

Submissions made by QRTSA have been made on a general recollection of what might be contained in prior cases before the Commission. While the Full Bench offered the other parties the opportunity to consider this application they were only able to respond to the application in a general sense. The Full Bench and the other parties have not been in a position to access material to which general reference has been made (as the matter is being heard outside of Brisbane), therefore we do not have sufficient information upon which to further consider the application. Point 27(b), we believe that the interests of the industrial organization and other persons including witnesses would be adversely affected if QRTSA's application was to be granted.

We are mindful of the time, cost and resources invested by the parties to having this matter heard today which would be wasted in the event that the Full Bench were to grant the 11th hour oral application made by the QRTSA. For these reasons we would dismiss the oral application, however, we must state as part of this decision the following:

The substantive application will be heard and determined on its merits according to the requirements of the legislation.

While we are aware of the witness statements before us, we have no way of knowing what evidence might be elicited through cross-examination by the advocates. If, as QRTSA says, the NRA's application is deficient, that would be a matter which may or may not become evident in the course of the hearing. QRTSA can then address those issues in making its final submissions.

All of the submissions will be duly considered at the end of the hearing together with all of the evidence elicited during the hearing. The oral application and submissions made by QRTSA around that point have not convinced the Full Bench that the oral application should be granted. We dismiss the oral application and we reserve the right to edit and expand upon these reasons if we so choose. The application is dismissed; we'll continue with the trial. Thank you."

- [15] In its final submissions the QRTSA renewed its call for the application to be dismissed on the grounds of insufficient evidence.

Section 26 Factors

- [16] In deciding whether to make an order under s. 21 of the Act the Commission must have regard to the criteria listed in s. 26 of the Act. Set out below are the submissions made with respect to each of the factors with reference to relevant evidence where appropriate.

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

- [17] The NRA's application seeks to create a new trading hours area located in the coastal strip of the Sunshine Coast Area with uniform trading hours across that area. At present the Sunshine Coast Area as defined by the Trading Hours Order extends much further west to encompass Bli Bli, Nambour and Maleny.
- [18] The NRA explained that the basis of the application was that the current weekend closing times of non-exempt retail shops on Sundays and holidays in the coastal strip of the Sunshine Coast fails to cater for the reasonable requirements of visitors to one of Australia's leading tourism destinations and that some modification to the allowable hours of retailers which service tourist demand is warranted. The success of extended trading hours for tourist supermarkets on the Gold Coast provides an indication of consumer support likely to eventuate were this application to be successful, especially for supermarkets. The application does not seek to replicate the trading hours allowed in the Gold Coast Coastal Tourist Area but favours an extension of hours which delivers improved access to tourists and a standard set of hours on all days of the week.
- [19] In support of its application for the creation of a coastal tourist strip the NRA submitted that the Sunshine Coast area is less integrated than it was previously. Whereas population growth and residential development has occurred across the western corridor of the Sunshine Coast area the coast strip has experienced the continual development of high rise apartment style accommodation. There is now a basis upon which to differentiate the needs of tourists and visitors who predominantly visit the coastal strip.
- [20] The SDA rejected the basis of the application as set out by the NRA. The SDA said that the proposed new area transects the existing Sunshine Coast Area at seven points and excludes some shopping centres in close proximity which tourists would consider form part of the Sunshine Coast tourist precinct. In this regard the SDA gave examples of Chancellor Park, the Buderim shopping district and Nambour.
- [21] Although the NRA argued the application sought to standardise the trading areas across the proposed new area, the proposed hours do not match any of the other 25 or so trading hours areas across the State. In the view of the SDA, the application seeks to depart further from any standardisation of trading hours.
- [22] In considering the factor of "locality" the NRA also made reference to the evidence of Mr Clark who works at Bunnings, Caloundra. He said that Caloundra is very quiet at night due to the number of resident young families and retirees.
- [23] In summary, the SDA said that there was nothing peculiar to the proposed new area to set it aside from the surrounding suburbs.
- [24] The QRTSA submitted that the proposed new area captures areas with features that are distinguishable from each other. In this regard the QRTSA referred to the evidence of various NRA witnesses to show that the application encompasses several different areas with different demographics. The QRTSA used as an example the evidence of Mr Waters who said that the Big W store in Noosa trades different hours to the store in Kawana which is patronised during the week by local residents. Noosa has a different demographic - a higher customer count but lesser spend.
- [25] The QRTSA rejected the validity of comparing the Gold Coast and the Sunshine Coast trading hours areas and relied on the evidence of Mr Wallace who noted the differences between stores situated at Surfers Paradise and Broadbeach to those on the Sunshine Coast. Reference was also made to the evidence of Mr Waters who said that differences exist from store to store and area to area.

- [26] The QRTSA also submitted that the Commission should exercise caution in having regard to the inspections because the shopping centres may have been busier than usual given that the inspections were undertaken on a Friday, traditionally a higher trading day than other week days; the inspections were undertaken the day before the Noosa triathlon and that shopping centres viewed by the Bench during a lunch period were those closest to Noosa. It should be noted that there was no opposition from QRTSA when the date for inspections to be undertaken was raised.
- [27] In summary, the QRTSA submitted that there is nothing about the proposed new area which necessitates the extension to trading hours and that the existing definition is no longer warranted given the differences in demographics and retail needs in various locations across the Sunshine Coast area. In the submission of the QRTSA this factor weighed against the granting of the application.
- [28] Ms Andrews, in her evidence, highlighted the differences in the demographics between several of the 18 FoodWorks stores located in the Sunshine Coast. Some are situated where they cater to both the needs of tourists and residents while others are more dependent on residents. The evidence of Mr Costello, Mr Lin and Mr Perkins also showed that their stores serviced both the needs of tourists and residents.
- [29] In submissions, the MGA submitted that the claims made by the NRA about the different style of development in the western corridor as against the coastal strip was not supported by evidence. Moreover, the inspections demonstrate that all locations along the Sunshine Coast were well supported by large and small retail outlets and diverse retail categories.

(b) the needs of the tourist industry or other industry in such locality or part

- [30] In his evidence, Mr Wallace included data from "Queensland Tourism Facts, National and International visitor surveys". This data showed that for the year ended December 2009 domestic visitors accounted for 17% of the total visitation to Queensland and 14% of international visitors. In its submissions the NRA said, without reference to the source of the data, that the Sunshine Coast is a leading tourist destination with over 7.5 million visitors each year with tourism contributing \$2 billion annually to the Sunshine Coast region. Further, the Sunshine Coast is the third most popular destination in Queensland for domestic visitors, behind only Brisbane and the Gold Coast.
- [31] The NRA submitted that visitation peaks on the weekends with significant extra demand being generated from Friday afternoon to Sunday evening. In such circumstances retailers should be able to match their trading hours to demand thus satisfying customer demand, and enable retailers to maximise their sales and return on investment.
- [32] The NRA noted the range of accommodation provided on the Sunshine Coast - from luxury hotels to backpacker hostels and camping grounds. Mr Wallace referred to "tourism publications" which showed that staying in apartment style accommodation or with relatives and friends are the most common accommodation preferences. The NRA submitted that extended trading will enhance the tourist experience and the flow-on effects would allow accommodation providers and other tourism operators to improve facilities and services
- [33] The SDA acknowledged that the Sunshine Coast is a tourist destination but submitted that this of itself does not translate into a need for extended trading hours. The SDA noted that no evidence was called from the tourist industry and no evidence was adduced on the effect of the application on tourism.
- [34] The SDA also acknowledged that shopping is a leisure activity but referred to the evidence given by Mrs McKay and Mrs Van der Zanden who noted the increase in shoppers during adverse weather conditions.
- [35] Both the QRTSA and the MGA dealt with s. 26(b) and (c) together and their submissions with respect to these criteria are set out under the heading of s. 26(c).
- [36] For this reason our consideration and findings in respect of this factor are given under the next heading.

(c) the needs of an expanding tourist industry

- [37] The NRA conceded that tourism operators are under pressure from the high Australian dollar. With tourism being so competitive the NRA submitted that it was in the interests of tourism operators to have a more flexible set of retail trading hours in an endeavour to make the destination more appealing or, alternatively, to minimise dissatisfaction arising from restricted trading hours.
- [38] The MGA noted that the Sunshine Coast is an attractive tourist destination and the evidence presented shows a heavy reliance on tourism as an important growth industry. However, it was submitted that s. 26(b) required consideration of whether the tourism industry can sustain additional trading hours at the present time whereas

s. 26(c) required consideration of whether there is a growing tourism industry which warrants a change to trading hours. The MGA submitted that both of these questions must be answered in the negative.

- [39] The MGA relied on the tourism data [Sunshine Coast Regional Snapshot Year ended March 2011 No. 2] presented through its witness, Ms Andrews, to show that there is a decline in both domestic and international visitation to the Sunshine Coast due to the floods, the downturn in the economy and the Australian dollar. When this data was put to Mr Wallace he conceded that tourism on the Sunshine Coast had declined in recent times. The MGA concluded that tourism is in a weakened state on the Sunshine Coast.
- [40] The MGA also rejected the NRA's submission that tourism growth would be stimulated by more flexible trading hours because such hours would redress customer dissatisfaction with retail services, thus making the Sunshine Coast a more appealing destination. Further, the MGA refuted the proposition that expanded trading hours should be used to help stem the decline in tourism. The MGA noted there was no verifiable data presented by the NRA to show customer dissatisfaction with current weekend closing times. It was submitted that extended trading hours in such circumstances was neither a credible argument nor a credible solution.
- [41] The SDA noted that no evidence was adduced about an expansion of the tourist industry. Rather, the evidence produced by the MGA showed that tourism has been declining since the Global Financial Crisis. The statistics before the Commission showed that the number of overnight domestic visitors to the Sunshine Coast declined 6% in the 12 months to June 2010 and 12% in the preceding year. In this context this criterion was not satisfied.
- [42] The QRTSA also referred to the evidence produced by the MGA concerning the contraction of the tourist industry and noted the evidence of Mr Luke as to the poor state of the industry. Mr Luke has non-exempt IGA supermarkets in Noosa Junction, Coolumb and Caloundra. He said that the tourist industry was presently in the worst state he had seen and no increase in the number of day trippers, domestic or international visitation was being experienced in any area. For this reason he did not believe extended trading hours could be justified.

(d) the needs of an expanding population

- [43] The NRA submitted that the Sunshine Coast is one of the fastest growing Local Government Areas in Queensland and provided some statistics to support that assertion. As the SDA, the QRTSA and the MGA noted, that data was unsourced. On that basis the MGA submitted that this was new evidence and no opportunity was provided to rebut it. Accordingly, the NRA should not be entitled to rely on it and it should be disregarded.
- [44] However, Mr Wallace's Witness Statement included ABS statistics which show that the population of the Sunshine Coast has expanded over the years 2001-2009. However, when more recent data from that ABS publication was put to him in cross-examination by the MGA, Mr Wallace conceded that population growth in the area had declined in 2010.
- [45] The SDA also noted that the Local Government Area of the Sunshine Coast extends beyond the boundaries of the application and the NRA did not produce population data specific to the proposed new area as sought by the application.
- [46] The SDA also submitted that Big W, Target and Kmart presently do not trade all allowable hours. In all of the circumstances the SDA contended that the hours sought are unnecessary.
- [47] In an endeavour to refute the argument by the NRA comparing the Sunshine Coast to the Gold Coast, Ms White attached to her second Witness Statement population density data from the websites of the Gold Coast City Council and the Sunshine Coast Regional Council. The data was extrapolated from the ABS, Census of Population and Housing 2006. Aspects of the data were put to Mr Wallace in cross-examination, however, he was unable to comment on it. Neither Ms White nor the QRTSA in its submissions sought to highlight the relevance of the data.
- [48] The QRTSA submitted that as population growth had stalled in recent years and there was no evidence about linking the needs of the population to extended hours, this factor had not been satisfied.

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

- [49] For this factor the NRA relied on the evidence given by Mr Stout and Mr Wallace as to the success of extended trading hours for supermarkets in the Gold Coast Coastal Tourist Area to press for the granting of the application.
- [50] Mr Stout said that Coles has nine stores affected by the application. All trade the current allowable hours and experience high level of activity during those times. They service residents, tourists and visitors. Based on management reports, customer feedback and market assessment Coles believes that they would trade strongly

were the application to be granted. Coles said it would trade those extended hours should they be permitted to do so.

- [51] Mr Stout provided statistics showing the distribution of trade for the affected Coles stores across each of the seven days of the week. Those statistics showed that the distribution of trade for some stores such as Coles at Noosa, Peregrin Springs and Mooloolaba was reasonably consistent across all seven days whereas others show traditional strong demand on Thursday and Friday. This was attributed to holiday makers arriving for the weekend.
- [52] Data was also supplied by Mr Stout with respect to customer traffic numbers for Saturday afternoons from 3.30 p.m. to 7.00 p.m. for two stores affected by the application, and also Coles at Ballina, Tweed Heads, Surfers Paradise, Caboolture and New Farm. Except for Caboolture, the other stores mentioned trade to 7.00 p.m. The data show that consumers at Surfers Paradise and New Farm in particular take advantage of the later closing times to shop. More data was provided showing the number of customers served at three Coles stores (Surfers Paradise, Miami and Palm Beach) before and after extended trading hours were granted for the Gold Coast Coastal Tourist Area. These figures show that on a Saturday customer numbers remain strong at all three stores till 6.30 p.m. and then begin to taper off at Palm Beach. The Surfers Paradise store recorded reasonable levels of customers until about 7.30 p.m./8.00 p.m. when the numbers began to decline. The pattern was similar for Sunday. Mr Stout used this data to contend that customers will take advantage of the hours if given the opportunity to shop at supermarkets later on Saturday evening.
- [53] Mr Wallace also provided customer data for Woolworths stores located at the Gold Coast which showed the number of customers served before and after extended trading hours were granted. The data showed a not dissimilar pattern to that of Coles. The NRA submitted that these figures showed the beneficial impact of the decision to extend trading hours as it alleviated congestion in the late afternoons and satisfied consumer demand.
- [54] The NRA witnesses also referred to the experience of their stores in other states where extended trading on weekends (and during the week) is permitted. Mr Stout said that extended hours allowed retailers to set their hours to meet customer demand. Both Mr Stout and Mr Wallace said that their stores would trade all allowable hours if the application was granted. However, Mr Winzenberg and Mr Waters did not commit Target or Big W respectively to trading the extended hours at all times. However they said that the NRA application was supported because it would allow flexibility especially in peak periods if additional capacity was available.
- [55] The SDA noted that no evidence from consumers was given to the Commission other than anecdotal hearsay. On that basis there was no evidence before the Commission that consumers were requesting additional hours.
- [56] On the issues of consumer interest the QRTSA submitted that there was an absence of reliable evidence from the NRA. However, evidence given by Mr Sugden showed that consumers utilised convenience shopping after work hours and on weekends. The Witness Statement of Mr Luke attached productivity reports for the years ending 2009 and 2011. These reports show for the twelve month period the number of customers, the times they shopped and the percentage of total sales for each hour of the day. The data show that many fewer customers shop after 5.00 p.m. and that the numbers had declined over the two year period. For these reasons the QRTSA submitted that the NRA had not been able to positively satisfy that consumer interests weighed in favour of the application.
- [57] The witnesses called by the QRTSA were concerned that the proposed extension to trading hours would have a detrimental impact on their businesses. Ms White and Mr Luke also expressed concern over the flow-on effects to businesses that were co-tenants in the shopping centres where their supermarkets are located if their businesses were negatively impacted by the granting of the application. To highlight the potential impact the small business witnesses called by the QRTSA and the MGA gave evidence that a reasonable proportion of their stores' turnover is derived on weekdays and Sundays after 5.00 p.m. and on public holidays after 6.00 p.m. In the case of Sundays and public holidays trade after these times occurs after the large supermarkets have closed.
- [58] The NRA rejected the arguments advanced by the QRTSA and the MGA that granting of the application would irreparably damage small business. It noted that small businesses co-exist with larger supermarkets in deregulated trading hours environments interstate. Had small businesses suffered the impact in those areas as foreshadowed by the witnesses for the QRTSA and the MGA then those organisations should have been able to provide evidence of this. Such evidence was not given.
- [59] Mr Luke also gave evidence that his business would suffer if the application was granted because costs would rise without any increase in turnover.
- [60] The QRTSA submission then comments on that part of the criterion dealing with business interests. The Commission notes that the QRTSA submitted that the NRA has not provided sufficient justification to satisfy the Commission that the application should be approved with respect to this factor.

- [61] With respect to business interests, the SDA commented on the opposition to the claim by both small business owners and Mr Luke, who also owns a non-exempt supermarket in the affected area. The SDA concluded that only the needs of the larger non-exempt retail stores are being contemplated by the application, which, if granted, can only act to the detriment of small and medium businesses.
- [62] The MGA fairly submitted that it was in the interests of the larger retailers to obtain extended trading hours, however, the interests of smaller retailers would not be similarly served were the application to be granted.
- [63] The MGA rejected as valid the comparisons made by the NRA between the Sunshine Coast and the Gold Coast Coastal Tourist Area. The MGA referred to the unchallenged evidence of Ms Andrews that the Gold Coast has a range of attractions which entice tourists to visit. While extended trading hours may suit tourists on the Gold Coast the same reasons do not necessarily apply on the Sunshine Coast.
- [64] The MGA also criticised the evidence of Mr Stout for attempting to draw comparisons between the Sunshine Coast and the other States especially when some of the stores from which data was drawn and included in his Witness Statement were located in more densely populated areas of Victoria and New South Wales. Reference was made to his concession in cross-examination that differences existed between stores in Queensland locations such as New Farm, Surfers Paradise and the Sunshine Coast.
- [65] In its submissions the MGA highlighted the interdependence between local businesses (including non-retail businesses), suppliers, producers and customers and noted that these statements were not challenged in cross-examination by the NRA. The MGA concluded that retention of the current trading hours regime was essential as its removal would not only have serious ramifications for independent supermarket traders but also would have a deleterious flow-on effect to other industries in the area.
- [66] The NRA submitted that this application involves the traditional difference between some small business and large supermarket operators. The NRA argued that interests of consumers should prevail and that the take-up of extended hours on the Gold Coast by consumers provides some indication of the extent to which consumer demand could fairly be anticipated on the tourist strip of the Sunshine Coast.

(f) the alleviation of traffic congestion

- [67] The NRA submitted that traffic congestion is not a relevant factor in this application although the grant of the application may relieve congestion at registers on Saturday afternoons in particular and in shopping centre car parks during peak holiday periods.
- [68] The SDA submitted that no evidence was adduced with respect to this factor.
- [69] The QRTSA also submitted that the NRA had led no evidence on this factor. As a result the QRTSA contended that the other submissions made by the NRA with respect to alleviation of register and car park congestion were without foundation.
- [70] The MGA adopted a similar view to the QRTSA.

(g) the likely impact of the order on employment

- [71] The NRA submitted that the granting of the application was expected to have a positive impact on employment. Further, the 2006 Census showed that the retail industry was the largest employment sector on the Sunshine Coast with 14% of employment in the region. The NRA contended that the granting of the application would increase employment opportunities for those in the retail and tourism industries.
- [72] Only Mr Wallace gave evidence (under cross-examination by the QRTSA) of the likely increase in employment. The NRA witnesses however indicated that any increased hours would be offered to existing staff before being sourced externally.
- [73] The SDA contended that any increase in employment was likely to be marginal at best, with any impact likely to be in casual hours. Against that, the SDA submitted that were the application to be granted employment may be lost from independent and exempt stores throughout and adjacent to the area. In its submission there was no evidence that granting of the application would lead to a net increase in employment.
- [74] The QRTSA submitted that at best the evidence suggested that any increase in hours would go to existing employees. This evidence contrasted to that given by the SDA and small business owners that employment was likely to be negatively impacted. In the circumstances the QRTSA submitted that this factor weighs against the granting of the application.

[75] The MGA relied on the evidence of small business owners who expressed concern that extended trading hours would affect the viability of their businesses and hence employment of staff.

[76] The MGA also rejected the NRA's reliance on 2006 Census data, which, it was submitted was outdated and misleading as it does not take into account economic factors which had impacted on employment levels over the last six years.

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

[77] All parties noted that the relevant local government did not give evidence in the matter but that correspondence dated 17 October 2011 was received expressing some views on the matter. John Knaggs, Chief Executive Officer, on behalf of the Sunshine Coast Regional Council (the Council), addressed three matters, which in summary were:

(i) The impacts for the tourism industry in the region are likely to be minimal. Based on the region's Destination Marketing Organisation, Mr Knaggs said that while expanding retail trading hours may improve the amenity for tourists it is unlikely that it would impact on visitation, length of stay and expenditure. Further, retail expenditure is largely driven by residential households.

(ii) Although there are some arguments in support of the application such as potential economic efficiency gains, potential employment and social amenity, the Commission should consider these matters objectively and not through arguments of vested interests.

(iii) Approximately 93% of retail businesses in the Sunshine Coast region are small business. Concern was expressed about the potential negative impact on these businesses were the application to be granted. Further, there was no evidence that the application would reduce the unemployment rate of 6.2%, which is higher than the state average of 5.5%.

[78] Finally, the Council requested the Commission "robustly consider the economic and employment implication for this region" and note "that there is no evidence of overwhelming support for the application from the Sunshine Coast business community".

[79] In relation to these comments:

- the NRA said the Council had expressed an equivocal view;
- the SDA submitted that the Council did not express support for the application; and
- the MGA submitted that the Council had adopted a neutral position and chose not to provide any evidence.

[80] The QRTSA commented that while the letter had been read a copy had not been received. Given the absence of the copy of the letter QRTSA strongly objected to it being considered by the Commission. However, were the Commission to consider it then in light of the Council's ambivalence and the absence of a Council representative to be cross-examined on its contents then this factor could not be weighed in support of the application.

[81] The QRTSA was critical of the NRA for not disclosing the letter. Such criticism is unfounded. The letter was forwarded to the Queensland Industrial Registry and it was the Full Bench which, on the first full day of hearing, drew it to the parties' attention and stood the matter down so that they could view it. The letter was not the property of the NRA and it was not for the NRA to disclose it.

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

[82] Under this heading the NRA referred to the evidence given by the witnesses called by the SDA concerning rostering of staff. The NRA asked that their evidence be considered in the context of the national industrial regulation of their employment conditions negotiated between the SDA and the various employers.

[83] The SDA submitted that the Commission should give consideration to the impact on the family and social lives of retail workers were the application to be granted. Such workers would be deprived of leisure time to spend with family and friends at hours traditionally considered to be available for socialising. Reference was also made to the evidence about the unreliability of public transport and concerns expressed about personal safety.

[84] The QRTSA did not make any submissions under this heading.

[85] The MGA used the opportunity to reinforce that its opposition to the claim was not limited to independent supermarket retailers and was directed to retail generally; not just major supermarkets albeit the evidence from the MGA focussed on supermarket food retailing.

- [86] The MGA also said that its evidence was not directed to a concern about competition but a concern about the power of the larger supermarkets in the market place. Small retailers recognise that competition in the grocery sector exists and will continue to exist.

Conclusion

- [87] In making a decision in relation to this application the Commission has considered all of the evidence and the submissions in relation to each of the factors listed in s. 26 of the Act.
- [88] The Commission granted an application by the NRA to create a new coastal strip within the Gold Coast Area in 2010, *Trading Hours - Non-Exempt Shops Trading by Retail - State*.¹ The new Gold Coast Coastal Tourist Area was approved in light of the evidence, facts and circumstances of the case in question. In the present application, all of the interested parties have objected to the creation of a new coastal tourist trading hours area within the Sunshine Coast Area. The SDA has criticised the proposed new trading hours area arguing that some parts of what could be considered the tourist precinct would be excluded from the new area. In addition, the SDA criticised a fundamental premise of the NRA, that is, it would standardise trading hours servicing the tourist and visitor population of the Sunshine Coast. These matters were not addressed in the submission in reply by the NRA.
- [89] Like the Gold Coast Coastal Tourist Area there may well be merit in designating a coastal tourist area for the Sunshine Coast. The inspections highlighted the extent of tourist accommodation along the coastal strip from Caloundra to Noosa. However, we accept the arguments of the SDA that the proposed area has the potential to cause confusion for tourists. One of the bases of the application was to minimise confusion especially for interstate tourists with respect to trading hours. In light of the submissions of the SDA we consider that the application is unlikely to achieve that objective. In the present circumstances we do not consider that s. 26(a) of the Act has been satisfied.
- [90] Section 26(b) and (c) are considered together. We note the correspondence of the Sunshine Coast Regional Council expressing the view that expanded hours are unlikely to be of much benefit to tourists. However, in the absence of direct evidence from a Council member or other authorised officer of Council, there is limited weight that can be attached to this submission. The Full Bench will primarily rely on the evidence given and submissions made by the parties to the proceedings.
- [91] Some of the evidence is problematic. Although Mr Wallace referred to "Queensland Tourism Facts" as the source of the data included in his Witness Statement, the publication was not attached to it. Cross-examination and the Commission's understanding of the statistics was made more difficult without the publication being provided.
- [92] Other data was presented by the MGA through the evidence of Ms Andrews. We accept this data as being more reliable given its currency. "The Sunshine Coast Regional Snapshot Year ended March 2011" shows that both domestic and international visitation has declined over the past three years. Domestic visitors also reduced the number of nights spent in the region with the result that expenditure also declined. International visitors' average length of stay increased but their expenditure remained stable.
- [93] The statistics show that the tourist industry is regrettably suffering a decline on the Sunshine Coast. It is purely speculative as to whether expanded trading hours will increase visitation and we do not intend to consider an extension to trading hours based on an unsubstantiated assertion.
- [94] The evidence from the non-supermarket non-exempt retailers is that they are not presently utilising all of the available hours and they could not commit to utilising extra weekend hours if this application was accepted. We are prepared to accept that the supermarket non-exempt retailers would utilise such hours and some tourists may find this to be of benefit. However, we do not have evidence to persuade us that the needs of tourists are not adequately catered for by the existing retail trading hours for non-exempt stores. The inspections and evidence from independent retailers highlighted that convenience offerings are available and are accessed by tourists. Based on the evidence and submissions presented we are not satisfied that either the needs of the tourist or other industry or the needs of an expanding tourist industry have been demonstrated so as to justify the extension to the hours as sought.
- [95] Before moving to consider the other factors some comment needs to be made about the trend for statistics on such matters as tourism and population to be included in witness statements. We have previously commented on the difficulties that arise when the publication from which the data are drawn is not attached.

¹ *Trading Hours - Non-Exempt Shops Trading By Retail - State (TH/2008/3) - Decision* <http://www.qirc.qld.gov.au>.

- [96] In the case of tourism data, for example, this could be given by tourism organisations. Where this is not available (and we are not unaware of the difficulties encountered by the NRA in past cases in having such a witness available) we consider the best approach is for the publications which are to be relied on to be disclosed in advance to the other parties. The submissions made at the conclusion of the hearing can then draw the relevant data from those publications and the other parties will have the opportunity to comment on those matters in their submissions. Such an approach does not preclude a witness from referring to statistical data in a Witness Statement. In that case however, the Commission would expect the witness to append the publication and to be able to be sensibly cross-examined about the data.
- [97] We note that the last trading hours decision in this general area was made on 8 March 1994, *Sands Merchants Association v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others*². It is, in our view, a matter of common knowledge that the area has changed considerably since that period. While we might take judicial notice of some of these changes, i.e. building density within the area, we are not prepared to make findings on issues relating to matters generally arising under s. 26 of the Act in the absence of appropriate submissions and documentary evidence where relevant. The MGA supplied recent demographic data concerning the region under consideration. In considering the "needs of an expanding tourist industry" for example, this material was of assistance to those opposing the application. Notwithstanding that, it would have been of assistance to the Commission if a party or parties to the proceedings had provided a statistical overview of the relevant area since the period of the last trading hours application where changes pursuant to some of the criteria listed in s. 26 of the Act would have been evident.
- [98] While some emphasis has been placed upon the 2006 Census material, we would inform the parties that there is current reliable statistical information available which could have been put to the Commission, [e.g. Queensland Government economic statistical material and projections covering various regions and townships within Queensland]. NRA failed to support its application with the provision of sufficient relevant statistical evidence which would permit those opposed to the claim to appropriately challenge the evidence and permit the Full Bench to make an appropriately considered decision.
- [99] Section 26(d) of the Act concerns the needs of an expanding population. The population data provided to the Commission shows that while still growing, the rate has been in decline for the last two years. We note though, that the factor concerns an expanding population and we acknowledge that on the basis of the data provided that this continues to occur. However, the data has its limitations as it is not specific to the area being proposed by the application.
- [100] Further, given the absence of area specific population data, justification for extended trading hours on the basis of the needs of an expanding population in the area in question is made more difficult. In the circumstances we do not consider that this factor has been satisfied.
- [101] With respect to s. 26(e), no evidence is before the Commission with respect to the public interest. Evidence was given about consumer interests anecdotally through the witnesses called by the NRA and by reference to the experience of Coles and Woolworths since the extension to trading hours granted for the Gold Coast Coastal Tourist Area and the deregulated hours operating in other states.
- [102] Clearly the best evidence about consumer interest is drawn from consumers themselves. In the absence of such information large retailers have relied on the customer counts in the last hour of trade and allegedly comparable experiences from the Gold Coast and elsewhere.
- [103] The data provided by Mr Wallace in particular and to a lesser extent by Mr Stout as to the customer transactions in the last hour of trade on specified Saturdays and Sundays on the Sunshine Coast establishes a high level of demand which, we accept, may be alleviated if a later closing time was introduced.
- [104] We also acknowledge that inferences may be drawn from comparable areas, for example, the potential shopping habits of tourists. However, we consider that in this case the differences between the Gold Coast and the Sunshine Coast have at least as many differences as similarities. We especially note that the Sunshine Coast does not have the number and diversity of tourist attractions as are present on the Gold Coast. Mr Wallace acknowledged that there are differences between the two tourist regions which may warrant a difference in the allowable hours for the Sunshine Coast.
- [105] Like all trading hours cases the large business interests support the granting of the application whereas the independent and exempt retailers' interests are threatened by increased hours. Here, the Commission also has the benefit of the evidence of Mr Luke who owns three non-exempt supermarkets in the affected area. Based on data provided to the Commission he concluded that extended trading hours would have detrimental effect on his

² *Sands Merchants Association v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others* (1994) 145 QGIG 627-631.

business because costs would rise without increase in turnover. We accept that that view is not shared by the NRA witnesses. In circumstances where the business interests are divided we consider that this aspect of the criterion is neutral.

[106] We have previously commented that no evidence was adduced with respect to the public interest and only inferences have been made or anecdotal evidence given regarding the consumer interest. Business interests have been determined to be neutral. Considering the totality of this factor we are not satisfied that it has been positively satisfied.

[107] The Commission accepts that in the absence of evidence, traffic congestion is not relevant to our consideration.

[108] Section 26(g) addresses employment considerations. In this case, the witnesses appearing from non-exempt stores generally did not provide estimates about the likely impact of the order on employment. This stands in stark contrast to most other trading hours cases that this Commission has considered in recent years. Only Mr Wallace, in cross-examination by the QRTSA, gave an estimate of the additional hours likely to be generated in the event the application was successful. Mr Wallace and Mr Waters also said that any increase in hours would be offered to existing employees before new employees were recruited.

[109] Against that, the small business owners expressed concerns about the likely negative impact on employment. Although we have reservations about the accuracy of their estimates we cannot be satisfied, in the absence of evidence about the matter, that the likely impact on employment would, overall, be positive. In the circumstances we consider this factor weighs against the grant of the application.

[110] With respect to s. 26(h), the view of the relevant local government is ambivalent on the issue. Despite the Commission and the parties being unable to examine grounds for that view, it will be considered together with all of the other s. 26 factors.

[111] Other matters that the Commission considers relevant to our determination of the matter are the impact of the extended hours on the social lives of employees, especially those in the non-supermarket non-exempt stores who do not have the same history of working extended trading hours as those in non-exempt supermarkets. The issue raised about the unreliability of public transport is another relevant factor. We consider that these concerns weigh against the extended trading hours sought.

[112] We have considered all of the criteria under s. 26 of the Act. Not all are relevant to our determination of the matter, for example, the alleviation of traffic congestion. The legislation does not require each criterion or even the majority of criteria to be positively satisfied before an application can be granted. What is required under s. 26 is for the Commission to have regard to each criterion and then for the evidence and submissions with respect to the criteria overall to be weighed and balanced in reaching a decision.

[113] In this case the evidence and submissions do not establish a positive case for granting the application. The Commission refuses the application.

[114] Order accordingly.

D.A. SWAN, Deputy President.

G.K. FISHER, Commissioner.

D. K. BROWN, Commissioner.

Hearing Details:

2011 6 June
29 July
25 October

Inspections:

2011 28 October

Written Submissions received:

11 November 2011 (NRA)
18 November 2011 (SDA)
22 November 2011 (MGA)
25 November 2011 (QRTSA)
2 December 2011 (NRA in reply)

Appearances:

Mr G. Black and with him Mr P. Dube, National Retail Association Limited, Union of Employers on behalf of the Applicant.

Mr C. Mills, Neumann & Turnour Lawyers on behalf of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

Mr T. Martin, Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Ms M. Brown, Master Grocers Australia.

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