

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2015] QIRC 048

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

CASE NO: TH/2012/13

PROCEEDING: Application to amend the trading hours order - Non-exempt shops trading by retail – State, Area of New Farm of Inner City of Brisbane

DELIVERED ON: 12 March 2015

HEARING DATE: 9 December 2013

MEMBERS: Deputy President O'Connor
Industrial Commissioner Thompson
Industrial Commissioner Knight

ORDERS:

- 1. The application is granted.**
- 2. The Trading Hours Order - Non - Exempt Shops Trading by Retail - State be amended in accordance with sch 1 of the application filed on 3 December 2012.**
- 3. The operative date of the amendments take effect as and from Friday 27 March 2015.**

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS - ORDER - APPLICATION TO AMEND - *Trading Hours - Non-Exempt Shops Trading by Retail - State* - Where the applicant sought to amend the application by extending the boundary of the included area - Objectors granted leave to appear and be heard - Matters relevant to s 21 order considered - Application granted.

CASES: *Trading (Allowable Hours) Act 1990*, s 21, s 26
National Retail Association v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (2005) 180 QGIG 1211
O'Sullivan v Farrer (1989) 168 CLR 210

Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (2003) 174 QGIG 1339

Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others (2003) 174 QGIG 1339, 1344

Re: National Retail Association Limited, Union of Employers [2014] QIRC 150

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

APPEARANCES:

Ms A. Lamb for the National Retail Association Limited, Union of Employers.

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

Mr C. Dorber for Master Grocers Australia Limited.

Decision

- [1] The National Retail Association Limited, Union of Employers ("NRA") applies for an amendment to the order *Trading Hours - Non-Exempt Shops Trading by Retail - State* ("the order") pursuant to s 21 of the *Trading (Allowable Hours) Act 1990* ("the Act").
- [2] The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees ("SDA") and Master Grocers Australia Limited ("MGA") were granted leave to appear and be heard in relation to the application.
- [3] The applicant seeks to amend the order as follows:

"By deleting clause (4) from Schedule 1 and inserting the following in lieu thereof:

- (4) *Area of New Farm of Inner City of Brisbane* - That area as bound by the Brisbane River to the East, South and West, and to the North by a line connecting the River to Harcourt Street to Chester Street to Ann Street to Breakfast Creek Road to Waterloo Street and following a line North-East from Waterloo Street to the River."

Legislative requirements

- [4] Section 21 of the Act provides:

"21 Trading hours orders on non-exempt shops

- (1) A full bench of the industrial commission may decide trading hours for non-exempt shops.
- (1A) However, the full bench is not to decide trading hours that are less than the following hours on a stated day, other than a public holiday—
 - (a) 8.00 am and 9.00 pm for Monday to Friday;
 - (b) 8.00 am and 5.00 pm for Saturday.
- (2) The full bench 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.
- (3) In subsection (1A)—

public holiday means—

 - (a) a public holiday under the *Holidays Act 1983*; or
 - (b) a day that would have been a public holiday had there not been a substitution under the *Holidays Act 1983*, section 2(2) or (3) or 3."

[5] Section 26 provides that, in relation to making an order under s 21, the Industrial Commission must have regard to the following:

- "(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."

Application of s 26 criteria

- [6] In dealing with the statutory elements in s 26 of the Act, reference is often made to the Full Bench decision in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)*¹. In that case, the Full Bench said:

"Section 26 of the Trading Hours Act requires the Commission to have regard to a number of elements in relation to whether it will make an Order under s 21 of the same Act. In that respect, we note another Full Bench of this Commission stated ... that:

'It should not be inferred in all applications for an extension of trading hours that all (matters identified in s 23 of the Trading Hours Act) would be weighted equally, e.g. some applications may substantially rely upon one or two (2) of the matters outlined in s 26 of the Act, whilst in other applications substantial reliance will be placed on many more of the s 26 matters.'

That statement was recently endorsed by another Full Bench ... We similarly endorse the statement."²

- [7] The MGA submitted, in short, that the Act requires the Commission to take all the matters listed in subsections 26 (a) to (i) into account when making a decision under s 21 of the Act. It was the submission of the MGA that the language of the statute is unequivocal, that is, the Commission must, consider "... every matter enunciated by subsection 26(a) to (h) ..."
- [8] In light of the recent decisions in *Re: National Retail Association Limited, Union of Employers*³ and *Re: National Retail Association Limited, Union of Employers*⁴ it is not necessary to repeat the reasoning adopted by the Full Bench in both of those matters. However, it is worthwhile repeating the passage from the decision of the Full Bench in *Re: National Retail Association Limited, Union of Employers*⁵:

"It may well be unwise for an applicant not to address those matters, but the Commission is still capable of having regard to them in the manner required by the Act, notwithstanding any failure by the applicant to address or adduce evidence in respect of them."⁶

¹ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 1339.

² *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 1339, 1344, quoting *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2002) 172 QGIG 542, 546 and citing its endorsement in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Union of Employers and Others)* (2003) 174 QGIG 912, 918 (citations omitted).

³ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 150.

⁴ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157.

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

⁶ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 150, 10.

[9] The approach therefore to be adopted by the Commission in dealing with applications such as this is to consider and evaluate the evidence (if any) and submissions in relation to each criterion, and then to make a decision based on an overall evaluation of the criteria specified in s 26.⁷ In doing so, the Commission is not restricted to material provided by the applicant but may have regard to other relevant material.

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

[10] The area under consideration encompasses Newstead Riverpark, a 17 hectare urban renewal project incorporating residential, retail, and commercial elements and areas of open space. The Commission was advised that the development is on the site of the old Brisbane Gas Company Gasworks. The significant commercial development currently on the site includes the headquarters of Energex and the Bank of Queensland. In addition, the development will provide a further 60,000m² of office space.⁸

[11] The Gasworks Plaza, a retail development, which incorporates the ornate framework of the original Gasometer Frame and is a key component of the urban renewal project.

[12] The Newstead and Teneriffe Waterfront Neighbourhood Plan was endorsed by Brisbane City Council on 7 December 2010 and came into effect on 1 January 2011. That plan relevantly provides:

"The western part of the precinct is to be developed as a mixed-use destination providing a gateway into the parkland area and Fortitude Valley. A district shopping centre including a supermarket may be established in the vicinity of Longland Street. It is intended that residential uses dominate towards the riverfront, with active uses at ground level throughout the precinct. Buildings on the periphery of the precinct present active frontages to surrounding streets and facilitate safe and convenient pedestrian access to and from adjoining precincts."⁹

[13] The Newstead precinct's proximity to the Brisbane CBD, New Farm and the Bowen Hills urban renewal project is also a relevant consideration.

[14] The Full Bench is of the view, having considered to the evidence and submissions made in relation to this criterion, that the locality in question is significantly different to other areas within Brisbane, incorporating, as it does, high density residential, retail, and commercial elements. It is likely therefore that the area will attract a different customer base and requiring different considerations as to the availability of appropriate trading hours.

(b) *the needs of the tourist industry or other industry in such locality or part;*
(c) *the needs of an expanding tourist industry.*

⁷ Re: National Retail Association Limited, Union of Employers [2014] QIRC 157, 22.

⁸ Statement of Geoff Bell (Exhibit 5).

⁹ Attachment B to the Statement of Geoff Bell (Exhibit 5).

- [15] These two matters to which the Commission must have regard can be conveniently dealt with together.
- [16] The NRA does not rely heavily on these criteria in advancing its argument for the orders that it seeks, but it does submit that the new Newstead development would be attractive to tourists and may well become a reason for travellers to visit Brisbane.
- [17] The Full Bench recognises and accepts the NRA's submission that Newstead is an area of significance to Brisbane in terms of its growing recognition as a popular entertainment and arts precinct, with a diverse range of restaurants, all of which generate interest in the suburb. The Gasworks development itself has a mix of restaurants which enhance the area as a destination.
- [18] The needs of the tourist industry or other industry in the Newstead locality whilst important, is not, in the view of the Full Bench, a significant factor for consideration in relation to this application.

(d) the needs of an expanding population;

- [19] The Queensland Government population projections, 2011 published by the Government Statistician, Queensland Treasury and Trade¹⁰ shows a projected population growth of 125.7% by 2031. By contrast, the Brisbane CBD is projected to grow by 12.6% and New Farm by 11.7%. The population growth for the Newstead area is third behind South Brisbane (190.5%) and Woolloongabba (176.5%).
- [20] The 2011 Census figures show that Newstead has a population density of 4,300 people per square kilometre. New Farm, by comparison has a population density of 5,600 people per square kilometre. It is anticipated that by 2021 the population density for Newstead will 7,522 people per square kilometre.
- [21] It is evident from the material before the Commission that the demographic composition of Newstead has altered as a consequence of a number of residential and commercial developments in an area that was once purely industrial.
- [22] The trading data presented by Mr Bell represented the first month of trade for the Gasworks Woolworths. It is difficult therefore to predict how future demand will grow. It is anticipated by Woolworths that employees of the commercial business located within the Gasworks development and new residents will utilise additional morning trading hours to access the store prior to work.
- [23] The SDA accepts that the Gasworks precinct and the development of the area is not disputed. Nevertheless, the SDA submits that the land development is not so peculiar to justify its "annexure to New Farm".
- [24] It was further submitted that there was no evidence from the residents of the Gasworks development or the commercial tenants to demonstrate that they are so different in attitude and habit from their counterparts in other surrounding suburbs to justify the granting of additional hours.

¹⁰ Attachment C to the Statement of Geoff Bell (Exhibit 5).

[25] The evidence supports in the view of the Full Bench a conclusion that the Newstead area will be the subject of a significant increase in population. The statistical evidence shows a population increase of 127% by 2031. In addition, the population density for Newstead will outstrip New Farm by 2021. Accordingly, based on the statistical information alone, it is the Full Bench's view that the needs of an expanding population will be met by the granting of the application.

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

[26] In the Full Bench decision of *Re: National Retail Association Limited, Union of Employers*¹¹ "public interest" was described in the following terms:

"The concept of 'public interest' is referred to in many statutes. It has been described as being of the widest import. In *O'Sullivan v Farrer*,¹² Mason CJ, Brennan, Dawson and Gaudron JJ wrote that:

"... the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'."¹³

As differently constituted Full Benches of the Commission have observed, public interest matters "encompass a variety of considerations, amongst which is a requirement to weigh and balance relevant issues" and "any competing interests."

The "public interest" in relation to the extent of trading hours might differ from one location to another. In some places, there might be a clear public interest in having extended trading hours (including for reasons referable to other criteria listed in s 26). In other locations, the public interest might favour a different outcome. There is no reason to adopt a narrow construction of the expression "public interest" for the purpose of deciding this or any other trading hours application.

[27] The Commission has previously stated that: "[A]s a matter of general comment," the Full Bench in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)*¹⁴ observed, "it is reasonable to state that the interests of consumers are facilitated by extending trading hours."¹⁵

¹¹ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157.

¹² *O'Sullivan v Farrer* (1989) 168 CLR 210.

¹³ *O'Sullivan v Farrer* (1989) 168 CLR 210, 76.

¹⁴ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)* (2003) 174 QGIG 1339.

¹⁵ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)* (2003) 174 QGIG 1339, 1345, citing *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 912.

[28] In his evidence to the Commission, Mr Bell said that the figures for weekend trading at the Newstead store showed demand existing at the 8am opening time steadily increasing until it reaches a peak in the final hour of trade. He noted that whilst the Saturday figures contained in his statement may look like trade decreases after 5.00 pm, the last data point represents the last 30 minutes of trading between 5.00 pm and 5.30 pm. He stated that if the last trading point was doubled to represent 60 minutes of trade then the Saturday trade would reflect the same pattern as Sunday trading.

[29] When explaining the weekday morning trading patterns for the Newstead store, Mr Bell commented that:

"They're to give an impression of an understanding that we believe the store will grow, like you stated. New stores take a while to settle down, for people to find the store, for habits and routines to change. And since those September numbers were pulled for Newstead, we're experiencing an additional 1000 customers a week already a couple of months down the track. So, hence, those customer numbers would grow and we would see those morning numbers grow as the overall store grows as well."¹⁶

[30] When queried about whether the basis for the application was an unfair advantage for Coles to trade extended hours at the expense of Woolworths, Mr Bell answered that:

"The real reason for the application is to improve our business. Obviously Coles do have an advantage and it would be nice to see the customers in that area have the same choice between Coles and ourselves and it also give the customers in their local area the same opportunities as the customers in the New Farm area."¹⁷

[31] Mr Bell went on to say that:

"Through the process of trading hours, and we follow the system that is given to us, and that's what we're doing here today and it makes common sense that a store just down the road is given the same opportunity as the store in New Farm and the customers and the residents residing closer to our store the same opportunity at the New Farm residents."¹⁸

¹⁶ T. P. 31, L 20.

¹⁷ T. P. 21, L 15.

¹⁸ T. P. 21, L 35.

- [32] The MGA submitted that no evidence was adduced by the NRA in relation to the public interest. However, in considering the public interest, it is worth remembering the reasoning of the Full Bench in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others*¹⁹ where it was observed, "it is reasonable to state that the interests of consumers are facilitated by extending trading hours."²⁰
- [33] The MGA called Bradley Hopper, the Managing Director of The Hopper Group. Mr Hopper owns six independent stores in Queensland, employs approximately 500 employees and his stores do not trade as non-exempt stores.
- [34] Mr Hopper said in his evidence that his New Farm store opened in November 2007 on the site of former Rivoli Theatre on Brunswick Street. The New Farm store is the poorest performing store within the Hopper Group and is, according to Mr Hopper, struggling to compete with Coles at Merthyr Village and Woolworths at Newstead.
- [35] To support his contention that sales have declined at his New Farm store as a consequence of the opening of Woolworths at Newstead, Mr Hopper refers to sales figures for trading on Sunday 8 September 2013 which reveals a decline of approximately \$1,500 when compared to the Sunday sales for the 11 August 2013.
- [36] Woolworths at Newstead opened for trading on 28 August 2013. The statement of Mr Hopper contained statistics only for trading on 8 September 2013. In the absence of a proper spread of trading figures it is not possible for the Full Bench to properly evaluate his evidence in relation to the potential impact extended trading hours might have on weekend trading for the IGA at New Farm.
- [37] Mr Wayne Mason, the Queensland State Operations Manager for Australian United Retailers (Foodworks) gave evidence on behalf of the MGA.
- [38] Mr Mason's evidence was broad in character, reflecting, no doubt, his position as State Operations Manager for AURL. Whilst Mr Mason gave evidence about the general impact of extended trading hours on independent retailers, the market share of Coles and Woolworths and the potential negative impact on employment of the granting of extended trading hours in Newstead, he was unable to give specific examples which would assist the Commission in determining the application.
- [39] The evidence of Mr Mason lacked particularity and in some instances could not be supported by the evidence. By way of example, Commissioner Thompson asked Mr Mason:

"Mr Mason, at paragraph 18 you say it's notable that Coles and Woolworths employ 43 per cent of full-time employees compared to the independent retailer of 57 per cent. Where do you get those figures from? --- They're anecdotal evidence from various documents over the years.

¹⁹ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2003) 174 QGIG 1339.

²⁰ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2003) 174 QGIG 1339, 1345.

So there's nothing scientific about that? --- Nothing scientific about it. No."²¹

- [40] Dr Derek Lundberg, the Director of Innovate Coaching Pty Limited was called by the MGA. Dr Lundberg works with IGA storeowners in Queensland and New South Wales. Prior to August of 2012 he worked for Metcash Trading for more than 10 years.
- [41] It is Dr Lundberg's evidence the granting of the application would have an adverse effect on independent supermarkets in New Farm. He argues that the application "distorts economic efficiency and redistributes wealth in an inequitable manner. This has the effect of increasing the dominance of the two major retailing chains in Australia without, as contended by the NRA, improving levels of service to the community of New Farm of (*sic*) Inner City Brisbane or, filling a gap in response to new or emerging changes to consumer behaviour."²²
- [42] It is contended by Dr Lundberg that the granting of the application will result in sales of the independent supermarket decline as much as 25% and Gross Profits decline as the retailer attempts to recover.²³ However, he accepted that the decline could be much less as the following exchange with the bench illustrates:

"DEPUTY PRESIDENT O'CONNOR: Before we move on, how do you come to a figure of 25 per cent? How is that calculated? --- Your Honour, that's from experience of seeing a – generally, that is the peak and what I'm saying there is as much as, meaning that adverse effects on market places such as this could have an impact of up to 25 per cent in sales.

COMMISSIONER THOMPSON: Is that by – is that – are you talking about just by opening a couple of hours or an hour earlier and going a bit later? Is that – or are 30 you talking about when Sunday trade comes in, for example? -- Sunday trade, your Honour. I've seen it with Sunday trade. In terms of just opening – extending by a few hours. I haven't seen it to 25 per cent. For just a few hours? --- For just a few hours.

DEPUTY PRESIDENT O'CONNOR: Well, you say here, "The approval of this application". So in relation to this application, you think it will be as much as 25 per cent? --- As much as. Yeah. Up to 25 per cent.

So that's the upper point, but it could be far less? --- That's correct. That's correct, your Honour. Yes."²⁴

- [43] Ms Svjetlana Conn, the owner of the Terry White Chemist franchise at Gasworks Plaza, gave evidence in support of the application for extended trading hours.

²¹ T. P. 76, L 45.

²² Statement of Dr Lundberg (Exhibit 9) P. 21.

²³ Statement of Dr Lundberg (Exhibit 9) P. 36.

²⁴ T. P. 88, L 25 - 40.

[44] Ms Conn maintained that the extension of trading hours at Gasworks would be of benefit to all business within the shopping precinct. She saw a number of positive things flowing from the extended trading hours. Ms Conn did not accept the proposition that her business would be harmed by the extended trading hours. Rather, she was of the view that the more people that were attracted to the Gasworks the greater the benefit all tenants. Whilst the application may increase the potential impact on smaller food retailers in the locality or in neighbouring New Farm, Dr Lundberg suggests that "Good retailers target their retail offer to their unique market attributes such as, consumer behavior (*sic*) and demographics."²⁵ It is conceivable therefore, that independent retailers can offer something different and unique compared to the major supermarket industry and thereby maintain market share.

[45] The Full Bench is of the view that the extension of trading hours would benefit large business interests but the extent to which the increased trading hours would impact on small business was not clear on the evidence. Some small businesses may benefit from increased foot traffic and increased exposure while some smaller independent supermarkets may potentially be impacted.

[46] On balance, the granting of the application will provide greater choice for the individual consumer. It is ultimately a question for the consumer to choose their preferred retail experience.

(f) the alleviation of traffic congestion;

[47] There was no evidence before the Commission in regard to any congestion in the vicinity of the Gasworks development or the Newstead precinct. There was some evidence from Mr Bell in relation to the potential for a reduction in congestion in the vicinity of Coles at New Farm should this application be successful. However, that view was not based on any research or traffic analysis. It is noted that the Gasworks development incorporates significant off-street parking.

[48] Traffic congestion is not a significant factor for consideration in relation to this application.

(g) the likely impact of the order on employment;

[49] The NRA submits that the additional trading hours applied for are expected to have a positive impact on employment, providing additional earning opportunities for existing permanent and casual employees employed by non-exempt retailers, and new employment opportunities.

²⁵ Statement of Dr Lundberg (Exhibit 9) P. 27.

- [50] The SDA expressed its general opposition to extended trading hours, in particular, on Saturday and Sunday evenings when employees have traditionally know that on these nights they will not be rostered for work and can use the time for leisure and family pursuits. The SDA contended that whilst it did not formally oppose the extension of trading hours in New Farm most of those employees who had been supportive of the extended trading hours at Coles "... were casual employees who have since moved on to other employment leaving longer term employees to reluctantly man the store."²⁶ Unfortunately, the SDA was unable to produce any evidence from employees in the New Farm area to support their contention.
- [51] In evidence before the Commission, Mr Bell expressed the view that any additional hours would be voluntary for existing and future staff. He noted that Woolworths was bound by the terms of the certified agreement. In cross examination, Mr Bell gave an assurance that all employment required for the additional hours would be voluntary for all existing and new employees.
- [52] In dealing with this criteria, the Commission must assess the likely impact, if any, that an order might have on employment should the Commission be minded to grant the application.
- [53] The Full Bench has come to the view that there is likely to be a positive impact on employment which would flow from an order extending trading hours. As noted elsewhere, the Newstead precinct is a significant urban renewal project with a mix of both commercial and residential elements. In light of the nature of the development and the anticipated growth in population the employment opportunities are likely to flow for both permanent and casual employees. The Full Bench, in particular, having regard to the evidence of Mr Bell, and after considering the provisions of the certified agreement, has come to the conclusion that any perceived concerns of the SDA can be readily addressed by the recognition that the working of any additional hours would be strictly on a voluntary basis.

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

- [54] The Brisbane City Council (BCC) was granted leave to appear and be heard in respect of this matter. However, by letter dated 5 September 2013 the BCC, through the City Solicitor, advised as follows:

"We now have instructions that Council does not wish to appear or participate in the hearing of the application."

- [55] It was the submission of the MGA that the BCC does not permit the Commission to dismiss the obligation enlivened by s 26(h) of the Act. They contend that s 26 of the Act requires that the views of the BCC should be obtained and, if necessary, through the Full Bench directing this to occur.
- [56] The MGA further submitted that the Council has an obligation to give its view on the application and should, acting in best interests of its ratepayers, and even if that opinion is potentially detrimental to the interests of any party to the proceedings.

²⁶ Written Submissions of SDA filed on 31 January 2014, P. 6.

[57] The submission of the MGA misconstrues the effect and operation of s 26 of the Act. The BCC is within its rights to determine whether or not to make a submission to the Commission in relation to an application before it. In exercising its rights, the BCC elected, as it is entitled to do, to withdraw from the proceedings and to take a neutral position in relation to the application.

[58] The SDA properly submitted that in light of the BCC's withdrawal from the proceedings that it can be inferred that the Council has taken a neutral stance in relation to the application. The SDA also made reference in their submission to the evidence of Geoff Bell in relation to the Council's Newstead and Tenerife Waterfront Neighborhood Plan and the Brisbane City Plan 2000 but contended that those plans should not be construed as being a statement of support for this application. It is, however, possible to conclude from both the City of Brisbane Plan 2000 and the Newstead and Tenerife Waterfront Neighborhood Plan that the BCC is committed to urban renewal of the area and the development of Newstead.

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

[59] As often is the case, the Commission's attention was drawn to the Report of the Productivity Commission titled *Economic Structure and Performance of the Australian Retail Industry* and, in particular, Chapter 10 of that report. However, these are matters of policy which are the domain of the Executive Government and not properly the province of the Commission.

Conclusion

[60] Consequently, the application is to be assessed principally by reference to:

- (a) the locality in which the non-exempt shop or class of non-exempt shop is located (s 26(a));
- (b) the needs of an expanding population (s 26(d));
- (c) the public interest, consumers' interest, and business interest (whether small, medium or large) (s 26(e)); and
- (d) the likely impact of the order on employment (s 26(g)).

[61] 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. Accordingly, we believe that the application should be granted and an order made pursuant to s 21 of the Act.

Orders

[62] We order that:

1. The application is granted.
2. The Trading Hours Order - Non-Exempt Shops Trading by Retail - State be amended in accordance with sch 1 of the application filed on 3 December 2012.

3. The operative date of the amendments take effect as and from Friday 27 March 2015.