

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2016] QIRC 148

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

CASE NO: TH/2016/15

PROCEEDING: Application to amend the trading hours order - Non-exempt shops trading by retail - State

DELIVERED ON: 28 November 2016

HEARING DATE: 28 November 2016

MEMBERS: Deputy President O'Connor

ORDERS:

- 1. The application is granted.**
- 2. The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with Schedule 1 of the amended application filed on 21 September 2016.**
- 3. The operative date of the amendments take effect as and from 1 January 2017.**

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  
*O'Sullivan v Farrer* (1989) 168 CLR 210  
*Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157  
*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

## APPEARANCES:

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

Ms J Mann for the Australian Workers' Union, Union of Employees.

### Decision from the Bench

[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"). The Australian Workers' Union of Employees, Qld (AWU) and the Hinchinbrook Shire Council was granted leave to appear and be heard.

[2] The application seeks to amend the order as follows:

"1. By inserting a new sub-clause 3.2 of the Order as follows:

(36) Ingham Area:

Day(s)	Opening time	Closing time
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	5.00 pm
Sunday	9.00 am	6.00 pm
Public Holidays as defined (excluding Good Friday, 25 April, Labour Day and 25 December)	8.30 am	5.30 pm

2. By inserting the following new definitions Schedule 1 of the Order (Definitions):

(44) The Ingham Area

The area within the following boundaries:

Commencing at the intersection of the Bruce Highway and Hawkins Creek Road; then by a line in a south westerly direction to the intersection Ingham-Abergowrie Road and Hamleigh Road; then by a line in a south easterly direction to the intersection of the Bruce Highway and Tokalon Road; then by a line in a north easterly direction to the intersection of Victoria Mill Road and Four Mile Road; then by a line in a north westerly direction to the point of commencement."

### Legislative requirements

[3] 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."<sup>1</sup>

[4] 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."<sup>2</sup>

### **Application of s 26 criteria**

[5] The approach to be adopted by the Commission in dealing with application's 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.<sup>3</sup> In doing so, the Commission is not restricted to material provided by the applicant but may have regard to other relevant material.

<sup>1</sup> *Trading (Allowable Hours) Act 1990*, s 21.

<sup>2</sup> *Trading (Allowable Hours) Act 1990*, s 26.

<sup>3</sup> *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157, [22].

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

- [6] The NRA's application seeks to amend Schedule 1 of the Order by inserting a definition for the Ingham Area which would allow non-exempt stores within the proposed boundary to trade the amended hours.
- [7] Ingham is located approximately 110 km north-west of Townsville and about 25 km from the mouth of the Herbert River. Ingham is the principal administrative centre for the Hinchinbrook Shire. It boasts golf courses, swimming, horse racing, other sporting venues. It has, in addition, an aerodrome, showgrounds, schools and a hospital. It is a large regional shopping centre precinct both within the CBD, having major retailers such as Target Country, Coles and Woolworths.
- [8] The Commission is of the view that the proposed definition of the area is an appropriate and logical one.

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

**(c) *the needs of an expanding tourist industry.***

- [9] These two matters to which the Commission must have regard can be conveniently dealt with together. They are, in essence, regarding the tourist industry or other industry in that locality and whether there is a need for an expanding tourism industry. The NRA submits that the application would support the needs of an expanding tourism industry and tourism in general.
- [10] In considering this aspect of the application, I note, in particular, the evidence of Cr Ramon Jayo, the Mayor of Hinchinbrook Shire Council:

"The CBD is the primary point of call for visitors to the Shire. It offers dining, shopping and accommodation. It is the primary focus for business tourism in the Shire and is popular with tourists. Tourists also patronise the Visitor Information Centre which is close the Ingham CBD and other key locations such as the TYTO Facility which has a gallery and cultural precinct. As identified by the Economic Development Strategy Hinchinbrook 2020, the Shire can also be positioned as a centre for nature-based and cultural tourism. One of the opportunities for growth identified by the Strategy is to ensure community and service infrastructure requirements keep pace with community and visitor expectations so as to support sustainable tourism growth. We interpret this to mean increased access to a larger range of retail services for tourists, which this application facilitates."

- [11] Having regard to the evidence of the Shire Council, the Commission recognises and accepts the NRA's submission that this application will assist tourism in Ingham and the Hinchinbrook Shire. Whilst the evidence relevant to a consideration of the criteria in s 26 (b) and (c) is not expansive it is, in my view, possible to say that the needs of the tourist industry in the Ingham Area would be served by granting the application.

**(d) *the needs of an expanding population;***

[12] Looking at the needs of an expanding population, as the application properly recognises there is likely to be only a modest growth in the per-annum-basis population until 2036. As the application notes, this reflects increasing opportunities available in the region driven by expansion of the residential agricultural population and tourism industries. On this basis, there is an increasing need to support an expansion of industry through the service and retain facilities available. That statement within the application is supported by the evidence of the Shire Council. Having regard to that aspect, there is no further evidence that can be of assistance to the Commission in dealing with this application.

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

***Public Interest***

[13] Under 26(e), the public interest, consumer interest and business interest – whether that is small, medium or large – looking at the evidence as a whole, it's first appropriate to look at the public interest. This Commission, in Full Bench decisions, has examined the definition of "public interest". In particular, I turn my attention to the Full Bench decision of *Re: National Retail Association Limited, Union of Employers*<sup>4</sup> "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*,<sup>5</sup> 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.'"

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."

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

<sup>5</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210.

### ***Consumer Interest***

- [14] Turning my attention to consumer interest, again, the Commission has on previous occasions stated that, as a matter of general comment – and in particular the matter of the Full Bench in *Retailers Association of Queensland Limited, Union of Employers, Queensland Retail Traders and Shopkeepers Association*,<sup>6</sup> where it was observed:

"It is reasonable to state that the interests of consumers are facilitated by extended trading hours."

- [15] The evidence of the small retailers before the Commission leads me to the conclusion that there is consumer interest or benefit in the extending of the trading hours as proposed by the application to extend hours on Sundays and certain public holidays. More particularly, the evidence demonstrates in my mind that consumers will generally support the application for expanded trading hours and, amongst other things, they will find it more convenient, to better suit their lifestyles and provide more options and flexibility.

### ***Business Interest***

In turning to business interests, there was no evidence before the Commission to indicate any negative impact from any business interest by reason of this application. I'm proposing, in consideration of this provision, to conclude that the business interests of the Hinchinbrook Shire and Ingham in particular would benefit from this application. The Commission is of the view generally that the trading hours would benefit both large and small businesses, which is supported by the evidence.

#### ***(f) the alleviation of traffic congestion;***

- [16] This criterion is not a relevant factor for consideration in this application.

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

- [17] The NRA submits that there is likely to be a modest increase or benefit on employment. In relation to this criteria, the main evidence before the Commission is contained in the statements of Allen Wright (Woolworths), Michael Vorassi (Coles) and Gerard Winzenberg (Target). The additional hours of employment envisaged by Woolworths on the evidence was approximately 100 hours. The evidence of Coles was an additional 50 hours and of Target Country, another 25 hours. There was some evidence that if there is an increased demand and usage of the extended trading hours, there may be an opportunity for increased casual employment. The NRA submits there would be an increase of five full-time equivalents.

- [18] Ms Mann on behalf of the AWU submitted that any new hours be offered to existing employees, that any additional hours required to be worked would be on a voluntary basis, there would be no undue influence or coercion exerted on any employee to work the additional hours, and that any additional hours worked by any employee would be paid in accordance with the relevant award conditions and provisions, in particular, penalty rates.

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<sup>6</sup> (2003) 174 QGIG 912.

[19] The NRA, in discussions with the AWU, has agreed to the insertion in any order granted the following principal clauses:

- (1) That shops and shopping centres specified in the amended order may trade in accordance with that order in the condition that employees have freely elected to work the extended hours without coercion, harassment, threat or intimidation by, or on behalf of, the shop owner or the occupier of the business.
- (2) The Commission or the Industrial Magistrate may, at their discretion, require employers to produce written evidence that employees have actively indicated their willingness and availability to work these extended hours as a result of the allowable hours.

[20] Having regard to the acceptance of those provisions, and having heard the evidence of the three major retailers, and after noting the provisions of the certified agreement, I've come to the conclusion that any perceived concerns of the AWU regarding the working of extended trading hours can be adequately addressed by the new orders and by the undertakings already given in evidence by the three principal retailers.

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

[21] The view of the local government in this area is an important one. Under section 26(h) of the Act, it's noted that the Hinchinbrook Shire Council has resolved at council to support the application. The reasons for supporting the application are ably and succinctly set out in the statement of the mayor.

### **Conclusion**

[22] Having regard to the evidence that's been before the Commission, I accept that the application is one which should be granted, and in doing so, the application has been assessed principally by reference to the locality in which the non-exempt shop or class of non-exempt shop is located, that being section 26(a); the needs of the tourist industry or other industry in the locality or part thereof; and the needs of expanding tourism, being section 26(b); to a lesser extent, the needs of an expanding population under 26(d); of course, the public interest, consumer interest and business interest under 26(e); and the likely impact of the order on employment under 26(g). Having regard to the matters prescribed by the Act, the Commission is of the view that the evidence before it, on balance, is sufficient for the application to be granted. Accordingly, I believe that the application ought to be granted and an order made in the terms set out in the application pursuant to section 21 of the Act.

[23] Orders

I order that:

1. The application is granted.

2. The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with Schedule 1 of the amended application filed on 21 September 2016.
3. The operative date of the amendments take effect as and from 1 January 2017.