

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
(TH/2013/16)**

**TRADING HOURS - NON-EXEMPT SHOPS TRADING BY RETAIL - STATE
WESTFIELD CHERMSIDE SHOPPING COMPLEX**

INDUSTRIAL COMMISSIONER FISHER
INDUSTRIAL COMMISSIONER THOMPSON
INDUSTRIAL COMMISSIONER KNIGHT

30 October 2013

Application to amend trading hours order - Application seeks to empower Westfield Chermiside management to determine when the Christmas continuous trade event will be held on either 23 December or 24 December each year or the Thursday and Friday prior to Christmas Day - Proviso when 23 December falls on a Saturday or a Sunday the designated days will be Thursday and Friday prior to Christmas Day - Application to summarily dismiss - Power of the full bench - Determined application outside of jurisdiction of the commission - Application refused.

DECISION

- [1] This application, as amended, by the National Retail Association Limited, Union of Employers (NRA) seeks to amend the *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* (the Trading Hours Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act) by inserting a new clause 3.3(3) in the Order as follows:

"Provided that the trading hours of non-exempt shops located within the Westfield Chermiside Shopping Complex (described as Lot 10 on Survey Plan 128115, County of Stanley, Parish of Kedron on Title Reference 50358209, and situated on the corner of Gympie and Hamilton Roads, Chermiside, Brisbane) on 23 December and 24 December or the Thursday and Friday prior to Christmas Day as designated by Westfield Chermiside management each year shall be:

	<u>Opening Time</u>	<u>Closing Time</u>
Designated Day 1	8.00 a.m.	12 midnight
Designated Day 2	12.00 a.m.	9.00 p.m.

Provided however that when 23 December falls on a Saturday or a Sunday, the designated days will be the Thursday and Friday prior to Christmas Day."

History of Christmas Continuous Trade at Westfield Chermiside

- [2] To properly understand the present application before the Full Bench of the Queensland Industrial Relations Commission (the Commission) it is useful to provide a brief history of the event.
- [3] In 2003 the Retailers' Association of Queensland (the predecessor organisation to the NRA) filed an application seeking to amend the Trading Hours Order to allow Westfield Chermiside to extend the trading hours of non-exempt shops located at that Centre beyond the midnight closing time on 23 December and continue trading until 8.00 a.m. the next morning: *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others*.¹ The import of the application was to allow non-exempt shops to trade continuously from 8.00 a.m. on 23 December until 5.30 p.m. on Christmas Eve. For reasons set out in its decision the Full Bench granted the application on a one year trial basis subject to certain conditions.
- [4] The trial was reviewed by a Full Bench in 2004. In its decision the Full Bench extended the trial for another two years for a number of reasons including the limited notice given for the first trial; that some teething problems had occurred with respect to staffing the event and the occurrence of 23 and 24 December 2006 on a weekend:

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

*Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others.*²

- [5] The two year trial was further reviewed by the Full Bench in 2006 following an application by the NRA for the making of a permanent Order. In making a permanent Order the Full Bench was satisfied that its concerns had been addressed and in addition, there was an absence of evidence from those who opposed the application: *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others.*³ The resulting Order amending the Trading Hours Order set out the opening and closing times of non-exempt shops on 23 December and 24 December of each year with a proviso which set out the days on which the continuous trade would occur when 23 December falls on a Friday, Saturday or Sunday. That Order remains in place.

Present Application

- [6] The application as originally filed by the NRA sought the establishment of a two week window between 12 and 24 December each year in which Westfield Centre Management could decide to hold the event. Following consultation with the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) the NRA amended the application. The present application seeks to empower Westfield Chermside management to determine when the Christmas continuous trade event will be held - either on 23 December or 24 December each year or the Thursday and Friday prior to Christmas Day. The application retains the proviso that when 23 December falls on a Saturday or a Sunday, the designated days will be Thursday and Friday prior to Christmas Day.
- [7] Despite the amendment the SDA remain opposed to the application.
- [8] The Brisbane City Council requested and was granted leave to appear in the proceedings. Subsequent advice was received from the Brisbane City Council that it did not wish to appear or participate in the hearing.

Application to summarily dismiss

- [9] At the commencement of the hearing on 8 October 2013, the SDA requested the Full Bench to exercise its power under s. 27 of the Act to dismiss the application. The SDA contended that the application, as amended, seeks the decision making power of the Full Bench under s. 21(1) of the Act to be delegated to Westfield Centre Management. The SDA was also concerned about the precedent such a decision would set were the Full Bench to grant the application.
- [10] In response, the NRA submitted that the 2002 amendments to the Act changed the role of the Commission from "regulating" trading hours for non-exempt shops to "deciding" trading hours. The Trading Hours Order provides the parameters of hours within which non-exempt shops could choose to trade and such shops have the discretion to determine whether to open for the full extent of those hours.
- [11] Without finally determining the matter, the Full Bench advised that it was not confident that the SDA's application met the two limbs of s. 27 of the Act.
- [12] On further consideration we are satisfied that the application made by the SDA from the bar table did not meet s. 27 of the Act. The first limb of s. 27 deals with the situation where a decision has been previously made on an application similar to that before the Commission and there is insufficient reason to warrant reconsideration of the matter. As the history shows, although applications concerning the Christmas continuous trade event have been previously made, none has required consideration of whether centre management has the power to determine when the event will be conducted. In our view, this distinguishes the present application from those previously heard and determined by the Commission.

Decision

- [13] After responding to the application made by the SDA, the Full Bench proceeded to hear the evidence and at the conclusion of proceedings, the Commission raised the issue of its power under s. 21 of the Act to grant the application. The Full Bench invited the parties to address in their closing submissions the effect of s. 21 in light of the issue raised by the SDA. The written submissions of the NRA and the SDA expanded on their respective oral submissions that had been made on the first day of hearing. We consider the issue of whether the Commission has power to grant the application needs to be determined before any consideration can be given to the merits of the application.

² *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2004) 176 QGIG 510.

³ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (2006) 183 QGIG 812.

- [14] In our view the past decisions of the Commission as set out under the earlier heading have determined that the non-exempt shops located at Westfield Chermside may trade continuously from 23 to 24 December each year. The Trading Hours Order allows some variation to the day the event may be held when 23 December falls on a Friday, Saturday or Sunday. This application by the NRA seeks to delegate the decision as to when the Christmas continuous trading is to occur to Westfield Centre Management - the event may be held on 23 and 24 December *or* on the Thursday and Friday prior to Christmas Day at the discretion of Westfield Centre Management.
- [15] The Full Bench accepts that the 2002 amendments to the Act changed the focus or role of the Commission from regulating trading hours to deciding them. As Hall P said, "[t]he purpose of the changes were to make clear, or to use the language of the Explanatory Notes 'clarify', that the Act does not seek to promote a restriction in hours.": *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others*.⁴ We think that the argument advanced by the NRA with respect to "deciding" versus "regulating" trading hours is not relevant to the matter we have to determine. This case, and the arguments advanced by the NRA and the SDA, do not concern the hours the event may be conducted. Rather, the application is about the days or dates the event is held and whether Westfield Centre Management is allowed to decide the days or dates the event is to be held.
- [16] In our view in deciding that non-exempt shops located at Westfield Chermside may trade continuously over 23 and 24 December each year, the Commission exercised its power under s. 21(1) of the Act having regard to the matters listed in s. 26. We accept that any new application to vary the days or dates when the Christmas continuous trade is permitted is also subject to the provisions of s. 26. However, once a decision is made pursuant to s. 21(1) then s. 21(2)(a) gives discretion to the Full Bench to make any order it considers necessary or convenient to give effect to that decision including, for example, the earliest time when non-exempt shops may open and the latest time when non-exempt shops must close on *any day* (our emphasis). By seeking an amendment to the Trading Hours Order, the NRA inevitably wishes the Full Bench to firstly make a decision under s. 21(1), having regard to the s. 26 factors, and then to make an order pursuant to s. 21(2)(a) of the Act. The inclusion of the words "any day" leads us to conclude that the Trading Hours Order must specify the day(s) upon which the Christmas continuous trade is permitted. That can either be by way of specifying the day(s) of the week or the date(s). Neither s. 21(2) nor any other section of the Act permits the Full Bench to delegate to a shopping centre manager or owner the power to decide the days or dates when non-exempt shops are permitted to trade the hours decided by the Commission. The Act only gives power to a Full Bench to make decisions about trading hours for non-exempt shops including the days or dates they can trade provided those hours are not less than those prescribed by s. 21(1A) of the Act.
- [17] For these reasons we consider that the application is outside of the jurisdiction of the Commission and it is refused.
- [18] For completeness, we note that the opportunity was given to the NRA at the conclusion of the hearing for it to indicate in its submissions whether the application was an "all or nothing" application or whether it wished to put a fall back position. These remarks were made in light of some of the evidence supporting a change in the holding of the event on the Thursday/Friday prior to Christmas largely on the basis that it was less stressful to staff. However, no alternative position was put to the Full Bench for its consideration and accordingly, we have declined to consider any other outcome.
- [19] Order accordingly.

G.K. FISHER, Industrial Commissioner.

J.M. THOMPSON, Industrial Commissioner.

M. KNIGHT, Industrial Commissioner.

Hearing Details:

2013 13 August
8 and 9 October

Released: 30 October 2013

Appearances:

Ms A. Lamb for the National Retail Association Limited, Union of Employers, the Applicant.
Mr T. Martin for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

⁴ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (2005) 180 QGIG 1211.