

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 The Australian Workers' Union of Employees, Queensland and Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Local Government Association of Queensland Limited (TH/2011/2)

TRADING HOURS NON-EXEMPT SHOPS TRADING BY RETAIL - STATE

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER THOMPSON

1 April 2011

DECISION

TUESDAY 26 APRIL 2011

- [1] This Decision relates to an application made by the National Retail Association Limited, Union of Employers (NRA) for an amendment of the trading hours fixed by Order, *Trading Hours - Non-Exempt Shops Trading by Retail – State* (the Order).
- [2] The amendment sought by NRA is as follows:

"By inserting the following new proviso in clause 3.2(1):

Provided further that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Tuesday, 26 April 2011:

	<i>Opening Time</i>	<i>Closing Time</i>
<i>Tuesday, 26 April 2011</i>	<i>8.00 a.m.</i>	<i>5.00 p.m. "</i>

Relevant Legislation

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

"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 a.m. and 9 p.m. for Monday to Friday;
- (b) 8 a.m. and 5 p.m. 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."

[4] Section 26 of the Trading Act states:

"26 Matters relevant to s 21 order

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

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

Participants in the proceedings

- [5] In addition to NRA as the applicant, the Shop, Distribute and Allied Employees Association (Queensland Branch) Union of Employees (SDA), The Australian Workers' Union of Employees, Queensland (AWU), Local Government Association of Queensland Limited (LGAQ) and Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA) each sought, and was granted, leave to participate in the proceedings as an interested party.
- [6] NRA's application was opposed by AWU and QRTSA. LGAQ had received responses from ten of the Local Governments listed on the Directions Order, with the majority of those responses indicating that the local government concerned had no interest in the matter. However, each of the Banana Shire Council and the Central Highlands Regional Council, respectively, opposed the application.
- [7] In advising of its opposition to the application, QRTSA stated that it would not be attending the hearing as there was insufficient time available in which to prepare its case.
- [8] QRTSA made an initial request when the Directions Order was issued to have extra time in which to respond. That request was granted by the Queensland Industrial Relations Commission (the Commission). A late application from QRTSA to participate in the hearing was also granted by the Commission without objection by any other party.
- [9] QRTSA made no further request to have either additional time in which to prepare its case or to seek that the proceedings be adjourned until a later date. That being so, the Commission notes QRTSA's objection to the application.
- [10] The decision by QRTSA not to participate in the proceedings was taken without any attempt by that organisation to contact the Commission to request additional time to prepare for the proceedings or to request that the proceedings be adjourned to a later date. In such circumstances, we simply note the correspondence without further comment.

Is there any Jurisdictional impediment to hearing the application?

- [11] Mr J. Moore, who appeared on behalf of NRA, said the Commission was empowered under s. 21 of the Trading Act to hear and decide NRA's application to allow non-exempt stores, other than those prescribed within clause 3.2 of the Order, to open for trade on Tuesday 26 April 2011 between the hours of 8.00 a.m. and 5.00 p.m.
- [12] Ms S. Schinnerl, who appeared on behalf of AWU, Mr T. Martin on behalf of SDA and Mr K. Ryalls on behalf of LGAQ also agreed that there was no legislative impediment preventing the Commission from considering, and determining, NRA's application.
- [13] We agree that there is no legislative impediment that might prevent us making a decision in this matter. As such, we shall now proceed to consider the application as required by ss. 21 and 26 (see above) of the Trading Act.

Consideration of the provisions of the Trading Act

(a) *Locality*

- [14] The localities to which this application relates are all those areas in the State which are currently not permitted to trade on Sundays and Public Holidays under the Order (colloquially referred to as "six day trading areas"). Examples of the localities which will be affected, if the application is granted, are Gympie, Maryborough, Bundaberg, Warwick, Dalby, Emerald, Charters Towers, Ayr, Ingham, Atherton, Mareeba and Mt Isa.
- [15] NRA submitted that if the Order remained unaltered the trading regime for the Easter/Anzac Day weekend and the May Day weekend, respectively, in 2011 would be as follows:

	Six day trading areas	Seven day trading areas
Good Friday, 22 April 2011	[closed]	[closed]
Easter Saturday, 23 April 2011	[open]	[open]
Easter Sunday, 24 April 2011	[closed]	[open, except in South-East Queensland]
Anzac Day, 25 April 2011	[closed]	[closed]
Easter Tuesday, 26 April 2011	[closed]	[open]
Saturday 30 April 2011	[open]	[open]
Sunday 1 May 2011	[closed]	[open]
Labour Day, Monday 2 May 2011	[closed]	[closed]

- [16] NRA submitted that if its application is not granted, non-exempt stores in six day trading areas will be forced to close their doors for four out of five days over the Easter/Anzac Day weekend, with three days in succession, followed by two further days over the following long weekend. This is to be compared to retailers in seven day trading areas which will be allowed to trade for at least two out of the five days over the Easter/Anzac Day weekend and two out of three days on the following long weekend.

(b) *The needs of the tourist industry or other industry*

(c) *The needs of an expanding tourist industry*

- [17] NRA acknowledged that a number of localities subject to the application could not be characterised as major tourist destinations. However, it also submitted that because Easter is traditionally the busiest holiday period of the year there is likely to be larger numbers of tourists and visitors in many areas due to the number of people travelling on holidays or visiting friends and relatives.
- [18] In support of this general submission Mr Moore highlighted that the overlap of Easter and Anzac Day this year, followed on the following weekend by Labour Day, provided an opportunity for many people to extend holidays or visits to friends and relatives to a total period of 11 days. He submitted that the level of traffic across all travel routes in Queensland during this period will be substantial and there will be a significant shift of people across all areas of the State.
- [19] Mr Moore also sought to rely upon data produced by, in particular, Tourism Queensland to support his argument about the number of tourists in the areas impacted by the application.
- [20] SDA highlighted the apparent contradiction in NRA's submission where, on the one hand, it stated that none of the localities to which the application related could be described as major tourist destinations but, on the other hand, sought to use statistics about tourism to advance its case.
- [21] SDA also refuted NRA's suggestion that tourists would be unable to purchase groceries or other essentials in towns they might be visiting or passing through. It submitted that there were many independent stores in the

towns affected by the application which would be able to cater for any influx of visitors and/or tourists on the single day in question.

(d) Needs of an expanding population

[22] NRA submitted that data produced by the Office of Economic and Statistical Research recorded Queensland's population was projected to grow at an average annual rate of 1.9% between 2006 and 2031.

[23] SDA submitted that while there might be some population growth in the areas affected by the application "*the opening of non-exempt stores on one day will not meet the criterion implied in this subclause.*".

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

[24] NRA submitted that it was in the public interest to grant the application for a number of reasons, as follows:

- the localities to which the application relates will be disadvantaged compared to seven day trading areas, many of which are within a short driving distance;
- it would provide some consistency in trading hours over "*this peak holiday and leisure period.*";
- residents and visitors alike will be substantially inconvenienced by stores being closed on four out of five days in many regional shopping centres;
- consumers generally wish to be able to shop during holiday and leisure periods but would be denied that opportunity for an excessively long period if stores were not allowed to open on 26 April 2011;
- the five day Easter/Anzac Day break generates "*an unprecedented opportunity for consumers to access retail precincts.*";
- it is "self-evident" that to succeed in business retailers must open during periods when consumers want to shop. It was thus vital that all parts of the retail sector be allowed to trade for as many days as possible during the Easter/Anzac Day period;
- a three consecutive day closure will generate extremely high levels of consumer demand on the day before and the day after the closure;
- the substantial increase in demand will result in some stores experiencing significant delays and inconvenience caused by in-store congestion and difficulty in ensuring timely replacement of stock on shelves;
- consumers in regional areas may suffer unreasonable hardship if access to food and groceries supplied by non-exempt supermarkets is denied for three consecutive days;
- in a number of communities there is no alternative supplier of fresh food and packed groceries;
- non-exempt supermarkets will suffer significant losses of perishable stock if they are required to remain closed for three days;
- the Easter period is already one of the busiest trading times of the year and a three day closure will require non-exempt stores to have additional stock in stores, prior to the closure, to meet the expected demand;
- there will be difficulties and delays in bringing non-exempt stores, particularly supermarkets, back to full trading conditions following the closure with some items likely to remain out stock, or in very limited supply, for some time after the stores re-open on 27 April 2011;
- local residents attempting to cater for friends and visiting family members will have difficulty sourcing adequate fresh food and other grocery lines; and
- speciality retailers located in enclosed shopping centres and other non-exempt speciality retailers are likely to lose sales due to significant leakage of expenditure to seven day trading precincts.

[25] SDA rejected many of NRA's arguments (above), stating that the suggestion that consumers would be substantially inconvenienced if non-exempt stores were closed on 26 April 2011 was "*patently untrue*". There were exempt stores, independent supermarkets and convenience stores in the affected localities which were capable of meeting any extra demand. While consumers might have to pay marginally more for goods they might purchase that did not constitute an inconvenience.

[26] In relation to NRA's submissions about the impact that a three day closure would have on major supermarkets, SDA submitted that supermarket shopping did not feature very highly on the agenda of most Australians as a preferred Easter activity.

(f) The alleviation of traffic congestion

[27] NRA submitted that significant car-park and some local traffic congestion was likely to occur in some areas on the days either side of the three day closure if the application was not granted. This was particularly the case on Easter Saturday, which was one of the busiest trading days of the year.

[28] SDA suggested that NRA had overstated the impact on traffic that any three day closure in rural towns would have. In many towns a reasonable number of residents would be out of town, either on school holidays or visiting friends and relatives themselves. As such, there was likely to be little impact on traffic congestion if trading hours remained as presently scheduled.

(g) The likely impact of the Order on employment

[29] NRA submitted that the granting of the application would have a significant positive impact on employment by virtue of the additional earning opportunities it would provide for permanent and casual employees at public holiday penalty rates.

[30] NRA also highlighted that retail was generally in the top three areas of employment in locations of the type affected by its application and submitted that many employees would be pleased to have the opportunity to work additional hours at penalty rates. Further, the additional earnings would generally be expended in the local community, providing an economic boost to those economies. NRA also said that the majority of non-exempt retailers affected by its application had enterprise agreements with either SDA or AWU which provided that any work performed on public holidays was purely voluntary.

[31] SDA said that the application was for a one-off event and its granting would "*not result in the employment of one additional person*".

[32] SDA also submitted that not all non-exempt retailers affected by the application had agreements which mandated voluntary work on public holidays. In the absence of such provision there was likely to be argument between employers and employees about whether work to be performed on the day in question was voluntary or otherwise. This was because of the operation of The National Employment Standards, under the *Fair Work Act 2009*, Part 2.2, which enabled an employee to refuse a request to work on a public holiday if:

- the request is not reasonable; or
- the refusal is reasonable.

[33] Further, even where an enterprise agreement stipulated that work on a public holiday was voluntary, many senior staff were not covered by those agreements.

[34] AWU was even more vocal in expressing its concern about the potential impact on employees if NRA's application was granted. It said that as more and more applications of this nature are made there is increased pressure placed on retail employees to work during holiday periods which other members of the general public are able to enjoy away from work. In this respect, AWU said it was wrong to assert that employees in the retail sector are less entitled to a break from work than other workers.

[35] AWU also said that the true "voluntary nature" of work to be performed is frequently tested in holiday periods of the type under discussion. Many employees, especially section heads, department heads and managers, were not covered by Enterprise Agreements which stipulated that work on public holidays is to be voluntary. Even where they were, many employers "expected" that such employees would "volunteer" to work.

[36] Ms Schinnerl said the AWU was particularly concerned about the position of people who had made plans to travel, or to take holidays, over the Easter/Anzac Day period. She said retail employees, like every other member of the workforce, had been under the impression since 29 October 2010 that the Queensland Government had declared a public holiday for Tuesday 26 April 2011 and that that day would be a holiday. In the absence of any suggestion of the application now being pressed by NRA they had made their plans based on this understanding.

[37] AWU was concerned that some employees might be "requested" to alter those plans, at the last minute, if NRA's application was granted.

[38] Finally, Ms Schinnerl said that the unavailability of child care facilities on a public holiday would be of concern to many retail employees. If they were not protected by the provisions of a Certified Agreement, providing for voluntary work on public holidays, then the issue of child care could become quite problematic if their employer required them to work.

(h) The view of any local government

[39] As noted above, the Banana Shire Council and Central Highlands Regional Council, respectively, have signified their opposition to NRA's application.

(i) Such other matters as the Industrial Commission considers relevant

- [40] NRA said that Queensland State Schools, and many other educational facilities, will recommence on Wednesday 27 April 2011 after school holidays. This meant that persons who had travelled away from their local community during the school holidays, and returned to that locality over the Easter/Anzac Day period, would be unable to access non-exempt retail stores prior to their children returning to school.
- [41] SDA refuted the importance of this submission, stating that consumers would be well aware of the days when non-exempt stores would be open and they would be able to make necessary purchases on the available trading days.

Conclusions

- [42] After considering the provisions of s. 26 of the Trading Act and subject to several qualifications, which we deal with below, we have decided to approve NRA's application to vary the Order to allow non-exempt shops throughout Queensland to trade on Tuesday 26 April 2011.
- [43] In our view, the closure of non-exempt shops for three successive days between Sunday 24 April and Tuesday 26 April 2011 would not be in the public interest nor the particular interests of tourists, consumers or business (whether small, medium or large).
- [44] While many small supermarkets and convenience-type retailers might view the opportunities presented by a three day closure of their major competitors to be a "once in a lifetime opportunity", we have concerns about their ability to cope with the additional demand which they will almost certainly be exposed to if non-exempt stores are closed for four out of five days over what is likely to be a very busy period. In any event, small retailers will still be able to benefit from the opportunities presented by the closure of non-exempt stores on other days during the period under question (see paragraph [15] above).
- [45] We are also concerned about the impact that a three day closure of non-exempt stores might have on the capacity of parents to prepare for their children's return to school on Wednesday 27 April 2011, following the school holidays. For example, parents who prepare their children's lunch could be expected to have difficulty finding the supplies they would need in small supermarkets and convenience-type stores after those stores have been servicing (or attempting to) the local community for four out of the previous five days.
- [46] In addition, the forced closure of non-exempt shops on Tuesday 26 April 2011 will deprive those retail workers who wish to work of the opportunity to earn additional penalty rate income on that day. Such opportunity is undoubtedly likely to be attractive to not only full-time and part-time employees, who will be paid single rates for the public holiday even if stores remain closed, but more particularly for casual employees, who would (otherwise) not have any potential to earn any income on that day.
- [47] Finally, looking at the criteria at s. 26(i) of the Trading Act, we believe that the extended nature of the Easter/Anzac Day break this year requires special consideration. As such, given that nothing in this Decision will require any store to open or any employee to work on 26 April 2011, we believe the decision about whether a particular non-exempt store opens or not should be left to individual store owners in consultation with their employees. Our decision to approve NRA's application will simply facilitate the opening of a non-exempt store if that is the decision which is taken.

Qualifications attached to the approval of NRA's application

- [48] We make it very clear that it is a condition of our approval of NRA's application that:
- any work to be performed by any worker on Tuesday 26 April 2011 is to be on a purely voluntary basis;
 - any employee who has previously applied for, and been granted, annual leave covering 26 April 2011 is to have that approval honoured;
 - no employee is to be disadvantaged in his or her employment because they choose not to volunteer to work on Tuesday 26 April 2011; and
 - the variation to the Order is to include the words "By order of the Queensland Industrial Relations Commission, pursuant to s. 21(2) of the *Trading (Allowable Hours) Act 1990*, any work performed on this day is to be purely voluntary in nature."
- [49] NRA has already committed to making any such conditions known to its members if the Commission approved its application, but we think the matter needs to go beyond that.
- [50] As such, in accordance with the provisions of s. 21(2) of the Trading Act, we Order that the following Notice be conspicuously displayed in the sign-on area and/or lunch rooms of any non-exempt shop which might wish to open on Tuesday 26 April 2011.

NOTICE

The Queensland Industrial Relations Commission (QIRC) has approved an application by the National Retail Association Limited to allow non-exempt shops in this area to open on Tuesday 26 April 2011 between the hours of 8.00 a.m. and 5.00 p.m.

The QIRC has made it clear in its Decision that work to be performed by any employee on 26 April 2011 is to be purely voluntary in nature. This means that no employee can be forced to work on 26 April 2011 if they choose not to.

The QIRC has also made it a condition of its approval of NRA's application that any employee who has previously applied for, and been granted, annual leave covering 26 April 2011 is to have that approval honoured.

The QIRC has also made it clear in its Decision that no employee is to be disadvantaged in his or her employment because they choose not to volunteer to work on 26 April 2011.

- [51] Each of NRA, AWU and SDA is requested to make the requirement in paragraph [50] known to their respective membership as soon as possible.
- [52] NRA is to provide the Commission with the draft amendment within 72 hours of the release of this Decision. The variation to the Order will take effect on and from Tuesday 5 April 2011.
- [53] The Commission determines and orders accordingly.

[Footnote: NRA has been fortunate that the Commission and the parties were able to co-ordinate their diaries to allow its application to be determined prior to the event to which it relates. The decision of the Queensland Government to Gazette 26 April 2011 as a public holiday was made on 29 October 2010, but NRA's application was lodged with the Registry of the Commission in February 2011. NRA is strongly advised to lodge any similar application of this type nearer to the Gazettal of the event than to the date to which the Gazettal relates.]

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

J.M. THOMPSON, Commissioner.

Hearing Details:

2011 16 March (*For mention*)
25 March (*Hearing*)

Appearances:

Mr J. Moore for National Retail Association Limited, Union of Employers.

Ms S. Schinnerl for The Australian Workers' Union of Employees, Queensland.

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

Mr K. Ryalls for Local Government Association of Queensland Limited.

Released: 1 April 2011