

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2018] QIRC 118

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

The Honourable Grace Grace, Minister for Education and Industrial Relations
(Intervenor)

CASE NO: TH/2018/2

PROCEEDING: Application

DELIVERED ON: 14 September 2018

HEARING DATE: 10 September 2018

MEMBER: O'Connor DP

HEARD AT: Brisbane

ORDER: **1. Application dismissed.**

CATCHWORDS: INDUSTRIAL LAW – TRADING HOURS – APPLICATION FOR DECLARATION OF SPECIAL EVENT – Whether extended Christmas trading at Westfield Chermside and Westfield Garden City constitute a special event.

LEGISLATION: *Acts Interpretation Act 1954* (Qld) s 3, s 5

Trading (Allowable Hours) Act 1990 (Qld) s 3, s 5, s 16F, s 16G, s 21, s 57, s 59

CASES: *Refrigerated Express Lines (A' Asia Pty Ltd) v Australian Meat and Live-stock Corp*
(1980) 29 ALR 333

*Retailers' Association of Queensland Ltd,
Union of Employers AND Queensland Retail
Traders and Shopkeepers Association
(Industrial Organisation of Employers) and
Ors (2003) 174 QGIC 1339*

APPEARANCES: Mr M Cole for the applicant

Mr A James for the Minister

Reasons for Decision

[1] Since 2003 Westfield Chermside shopping complex has been permitted to trade overnight on one evening in the week prior to Christmas. Westfield Garden City shopping complex has also been allowed the same extension of trading hours since 2014. The extended trading lasts for a total period of 38 hours at each shopping complex. The continuance of those overnight trades at both centres was given statutory recognition in the *Trading (Allowable Hours) Act 1990* (the Act) by the insertion of s 16G. That section is in the following terms:

16G 24-hour Christmas trading for particular shops

- (1) This section applies to a shop in—
- (a) the Westfield Chermside shopping complex; or
 - (b) the Westfield Garden City shopping complex.
- (2) The shop's extended trading hours for 23 and 24 December are—

Day	Opening time	Closing time
23 December	8a.m.	Midnight
24 December	12a.m.	6p.m

- (3) In this section—

Westfield Chermside shopping complex means the shopping complex located on the corner of Gympie Road and Hamilton Road, Chermside, Brisbane.

Westfield Garden City shopping complex means the shopping complex located on the corner of Logan Road and Kessels Road, Upper Mount Gravatt, Brisbane.

[2] Section 16G partially reflects the Christmas trading hours scheme available to both shopping complexes prior the section's inclusion in the Act. The previous arrangements under the now repealed 2017 Trading Hours order made provision for the overnight trade to occur on the Thursday and Friday before Christmas Day if December 23 fell on Saturday or Sunday. This year 23 and 24 December will respectively fall on Sunday and Monday.

- [3] The Act establishes a scheme whereby certain shops are exempt from the Act's operation. Those types of shops are, unsurprisingly, called "exempt shops". A shop can become an exempt shop in certain circumstances. For the purposes of the current application, shops can become exempt if they are within the specified location of an event which is declared to be special. Section 5 of the Act, extracted below, governs those types of declarations:

5 Exempt shops

- (1) An exempt shop is—
- (a) a shop of a description mentioned in schedule 1AA used predominantly for selling goods by retail, or for supplying services, a reasonable person would expect to be sold or supplied in that shop; or
 - (b) an independent retail shop; or
 - (c) a shop operating in a stated area for an event—
 - (i) that is a unique or infrequent event of local, State or national significance; and
Examples—
 - the 2018 Commonwealth Games
 - the Weipa Fishing Classic event
 - (ii) declared by the industrial commission to be a special event for this paragraph.
- (2) A declaration for subsection (1)(c)—
- (a) may be made by the industrial commission on an application by an organisation, chief executive, local government or any other person; and
 - (b) must state the following—
 - (i) details of the event the subject of the declaration;
 - (ii) the period for which the declaration applies;
 - (iii) the area to which the declaration applies; and (c) must be published on the QIRC website.
- (3) In deciding whether to declare an event to be a special event for subsection (1)(c), the industrial commission—
- (a) must consider—
 - (i) the cultural, religious or sporting significance of the event; and
 - (ii) the significance of the event to the economy and the tourism industry; and
 - (b) may consider a submission made by a local government for an area in which the declaration is likely to have an impact.
- (4) A class of shop may be declared for the purposes of schedule 1AA, item 23 by reference to—
- (a) the business conducted in shops of the class; or
 - (b) the location of shops within any area or areas of the State defined in the relevant regulation; or
 - (c) such other criteria as the Governor in Council thinks fit.

- (5) In respect of the sale of goods wholesale in an exempt shop the provisions of this Act apply to the shop and a reference in this Act to an exempt shop does not include the shop.

- [4] Whilst not evident on the face of the application filed on 10 July 2018, the applicant now seeks a declaration from this Commission to the effect that a special event for the purposes of s 5(1)(c) will occur from 7.00am on 20 December 2018 until 9.00pm on 21 December 2018 at both Westfield Chermside and Garden City shopping complexes.¹
- [5] The Minister, who intervened shortly after the application was filed,² opposes the application and has challenged whether there is an "event" within the meaning of s 5. The applicant and the Minister's representative were directed to provide submissions on that preliminary point.
- [6] This decision is concerned only with answering the threshold question of whether Christmas trading at Westfield Chermside and Westfield Garden City on 20 and 21 December is capable of being considered an "event" within the meaning of s 5 of the Act. For the reasons that follow, that question is answered in the negative and the application is dismissed.

Submissions

- [7] The Minister submits that the 38 hour trade at Westfield Chermside and Westfield Garden City cannot be considered as an event as such a consideration would be inconsistent with the Act. The inconsistencies arise in the following ways:
1. The declaration sought is inconsistent with the nature of an exempt shop. Exempt shops have unrestricted trading hours, i.e. they may trade 24 hours a day, 7 days a week. The application before the Commission seeks a "partial declaration" which will only operate for 38 hours without covering a full calendar day. Such a limit is inconsistent with the unrestricted nature of an exempt shop.
 2. The application is set out in the matter of an application for an amendment to the previous trading hours order under s 21. Section 59 of the Act imposes a five year moratorium on the application for s 21 amendments to trading hour orders. Consequently, s 5 should not be used as an alternate route for altering the trading hours of the shopping complexes.
 3. Sections 16F and 16G specifically contemplate the extension of trading hours in the week prior to Christmas and should read so as to prevent a s 5 declaration.
- [8] Further submissions from the Minister address the inconsistencies with the concept of an "event":

¹ Reply Submissions of the Applicant filed on 6 September 2018, [1].

² *Trading (Allowable Hours) Act 1990* s 43(4)(e).

4. The extension of trading hours are temporary changes and do not, of themselves, create or constitute an event for the purposes of s 5(1)(c).
5. The activities which occur inside the centre (visiting Santa, gift wrapping, cooking and catering demonstrations, carol singing) occur through December, and in some cases the entire year, throughout the world and are not limited or unique to the complexes and/or the period. These activities are not capable of making the proposed trading period an "event".
6. The Full Bench decision cited by the applicant is not relevant to the determination of this matter,³ in that it was determined in accordance with provisions of the Act which have since been substantially amended.
7. The event is not a unique or infrequent event of local, State or national significance. In making that submission the Minister compares the current application with the 2018 Commonwealth Games, the Weipa Fishing Classic, and the Mt Isa Mines Rotary Rodeo respectively:
 - a) The Commonwealth Games is an international sporting event that occurs once every four years and has only been held in Queensland twice since its commencement in 1930. The 2018 Commonwealth Games were held in the Gold Coast and Brisbane between 4 and 15 April 2018.
 - b) The Weipa Fishing Classic is an annual event that attracts local and interstate competitors to the town of Weipa for a long weekend in June (this year, 8 to 10 June 2018). It officially commenced in or about 2005 and is the largest community event in Cape York (which covers an area of 288,804 square kilometres).
 - c) The Mount Isa Mines Rotary Rodeo is an annual four-day event in the town of Mt Isa (this year, 9 to 12 August 2018) that commenced in 1959. It is the largest rodeo event in the Southern Hemisphere.

[9] The applicant's submissions on the other hand can be summarised into three broad categories:

1. The overnight trade itself is an event because of the changes in cultural norms and the activities which occur within the centre.
2. Parliament's intention cannot be divined, given its composition at the time of the Act's amendment and that there were amendments to the amending legislation itself. Consequently, the Minister's views should not be accepted.

³ *Retailers' Association of Queensland Ltd, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Ors* (2003) 174 QGIC 1339.

3. The Commission has previously made provision for the overnight trade and, in doing so, has described it as an "event".

[10] The applicant also submits that it will expand on how the overnight trade falls within the meaning of "special event" if this matter is permitted to continue further.

[11] The applicant submits that it is not asking the Commission to create an event, but rather to "...allow non-exempt retailers to also participate in an event on the traditional last week night before Christmas, which they currently would not be able to do." It is contended that s 5 of the Act will allow "...non-exempt retailers to open their doors to enhance the experience of an existing event."

[12] The applicant seeks "to temporarily change the event date of the 2018 event (only) for Westfield and Chermside and Garden City...."⁴ It wishes to move the "event" from 23 and 24 December to 20 and 21 December 2018. The purpose for doing so is said to address an apparent anomaly caused by the amendments to the Act which passed the Legislative Assembly in 2017. The submissions of the Minister emphasised that the current arrangements are not an "anomaly."

[13] If the declaration is granted, the applicant has offered an undertaking that non-exempt stores will not trade for the s 16G hours on 23 or 24 December.

Consideration

[14] The applicant has not articulated with any precision the "event" the subject of this application. In oral submissions, the applicant contended that the "event", is the shopping experience at Westfield Chermside and Garden City on the last two week nights before Christmas, namely, 20 and 21 December in circumstances where they could trade on an overnight basis. The characteristics said to make the event "unique" is the extended hours of trade coupled with the activities associated with the extended trading including, Santa Claus, gift wrapping, demonstrations and entertainment. It is infrequent because it occurs in the lead up to Christmas.

[15] During argument, much was made of the examples contained within s 5(1)(c)(i). The two examples identified within s 5 are the 2018 Commonwealth Games and the Weipa Fishing Classic.

[16] Section 14D of the *Acts Interpretation Act 1954* (Qld) provides that:

14D Examples

If an Act includes an example of the operation of a provision—

⁴ Application filed 10 July 2018.

- (a) the example is not exhaustive; and
- (b) the example does not limit, but may extend, the meaning of the provision; and
- (c) the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.

[17] Accordingly, the examples set out in s 5 are not exhaustive. They act as an aid to interpretation as they elucidate what type of "event" might appropriately be considered to come within the meaning of the section.

[18] It is useful to look at s 5 as a whole when considering the interpretation of "event".

[19] Section 5(3)(a)(i) suggests that the event must have a cultural, religious or sporting quality. For the purpose of declaring the event a special event the quality must be significant.

[20] In deciding whether an "event" is a "special event" the Commission must consider the cultural, religious or sporting significance of the event, and the significance of the event to the economy and the tourism industry. Further, the Commission may consider a submission made by a local government for an area in which the declaration is likely to have an impact.

[21] Notwithstanding the assertion of the applicant, the Commission, in considering whether to grant the declaration, does not have an unfettered discretion. In subsection (3)(a) of s 5, "and" between (i) and (ii) must be read as being conjunctive. It places on the Commission a requirement to consider both limbs of s 5(3)(a) of the Act.

[22] It is contended by the applicant that the pre-Christmas overnight shopping events at both centres are significant "cultural" experiences in South East Queensland. It is asserted that society has become increasingly secular and that shopping and the festive side of Christmas represents the entire experience of the day and season for many people.

[23] There are two approaches in determining the meaning to be given to the adjective "cultural" in s 5 of the Act. The first, is to give the word "cultural" a meaning which relates to the ideas, customs, and social behaviour of a society.⁵ The second approach relates to use of the word "cultural" in the sense of the arts and to intellectual achievement.⁶ In my view, the context of "cultural" within s 5 of the Act reflects and sits more comfortably with the latter interpretation. The example being, for the purposes of s 5(3)(a)(i), a "cultural festival".

⁵ Oxford University Press, *Oxford English Dictionary* (at 9 September 2018), 'Cultural'.

⁶ *Ibid.*

- [24] Trading occurs at Westfield Chermside and Garden City in accordance with the core hours and more relevantly for Christmas, in accordance with ss 16F and 16G of the Act. If the applicant's submissions are to be accepted, the thing that makes this an "event" and one which is "unique", is the extended nature of the trading coupled with the associated activities that have been identified. What gives it the unique quality is the additional seven hours of trading.
- [25] At its most fundamental, the event, said to constitute an "event" for the purposes of s 5 is the opening of Westfield Chermside and Garden City on 20 and 21 December. Section 16F permits a non-exempt shop to trade between 18 and 23 December until midnight. What makes trading on 20 and 21 December as opposed to trading on 18, 19 or 22 December so unique? The answer is, nothing. The trading which occurs from 18 to 23 December is in all material respects the same. Many of the activities identified by the applicant as assisting to create the so called event also occur at other times of the year.
- [26] I cannot accept the submission of the applicant that the unique aspect of the event is the extended trading hours allowing for overnight trading. Under s 16G of the Act, this does not occur until 23 and 24 December. Consequently, it cannot be properly said that trading on 20 and 21 December is unique, "being the only one of its kind; unlike anything else."⁷
- [27] Sections 16F and 16G were inserted as a consequence of the 2017 amendments to the Act. Those sections make specific provision for Christmas trading hours at both Westfield Chermside and Garden City. Those provisions give both centres the ability to open for periods as determined by the Act.
- [28] The inclusion of those provisions is set against the background that one of the objects of the Act is to decide the allowable trading hours of non-exempt shops and independent retail shops throughout Queensland.⁸ Section 57 of the Act is also relevant in that it repealed all trading hours orders made by the Commission before commencement.
- [29] The question which arises is whether the Parliament intended the specific provisions contained in ss 16F and 16G to exhaustively govern Christmas trading generally and specifically for Westfield Chermside and Garden City. Of relevance to that question is the syntactical presumption *generalia specialibus non derogant*, that where there is a conflict between general and specific provisions, the specific provision will prevail.
- [30] The Minister referred the Commission to *Refrigerated Express Lines (A' Asia Pty Ltd) v Australian Meat and Live-stock Corp.* Deane J wrote:

As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. "This rule is, that wherever there is a particular enactment and a general

⁷ Oxford University Press, *Oxford English Dictionary* (at 9 September 2018), 'Unique'.

⁸ *Trading (Allowable Hours) Act 1990* s 3(a).

enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative"(per Romilly MR: *Pretty v Solly* (1859) Beav 606 at 610). Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention encroaching on that subject matter.⁹ (Emphasis added)

- [31] The presumption, as articulated in *Refrigerated Express Lines*, is important in the current context as Christmas trading hours are expressly addressed within Part 4 *Trading hours in shops*, Subdivision 3 *Extended trading hours* of the Act.
- [32] The power to make a declaration that an event is a special event and thereby an exempt shop is not, in my view, intended to be a power for the Commission to lay down an alternative arrangement in relation to trading hours or more specifically Christmas trading hours beyond what is already provided for by ss 16F and 16G.
- [33] Importantly, the extended trading hours before Christmas are temporary changes to trading hours and do not, of themselves, create or constitute an event for the purposes of section 5(1)(c) of the Act. In order to succeed, the applicant must first establish that there is an event for the purposes of the Act. In my view, they have failed to do so.
- [34] Further, it is clear that the intent of Parliament in relation to trading hours for Christmas is expressed in ss 16F and 16G of the Act. The special provisions relating to Westfield Chermside and Garden City were intended exhaustively to govern Christmas trading.
- [35] Section 5 of the Act does not vest the Commission with the power to "temporarily move" the event date from 23 and 24 December to 20 and 21 December 2018.
- [36] The applicant's expressed concerns cannot be addressed by the Commission in reliance on s 5. If an anomaly exists then it is a matter for the Parliament to address and not for the Commission. In truth, this application is more about dealing with the legislative arrangements for Christmas trading in 2018 which are inconvenient or may prove more cost intensive than the alternate arrangements proposed by the application.

Order

1. Application dismissed.

⁹ (1980) 29 ALR 333, 347.