

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 Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (TH/2008/3)

TRADING HOURS - NON-EXEMPT SHOPS TRADING BY RETAIL - STATE

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER FISHER

12 July 2010

Application to amend trading hours order - Further amended application - Inspections - Legislation - Evidence - Changes to trading hours Gold Coast - Locality - Needs of tourist industry - High-rise development - Expanding population and tourist industry - Business interest - Employment - No evidence to the contrary - Application granted.

DECISION

GOLD COAST COASTAL TOURIST AREA

[1] On 3 July 2008 the National Retail Association Limited, Union of Employers (NRA) applied to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* (the Trading Hours Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Trading Hours Act). Due to an error in the boundary definition contained in the original application an amended application was filed on 11 July 2008. A further amended application was filed on 29 October 2009 seeking as follows:

"1. **In the current provision setting out trading hours for the Gold Coast and Sunshine Coast Areas [clause 3.2(8) of the Order], insert the following new provision at the end of the clause:**

Provided that the allowable trading hours for supermarkets located in the Gold Coast Coastal Tourist Area (as defined) shall be as follows:

	<i>Opening Time</i>	<i>Closing Time</i>
<i>Monday to Friday</i>	<i>6.00 a.m.</i>	<i>12.00 midnight</i>
<i>Saturday</i>	<i>6.00 a.m.</i>	<i>12.00 midnight</i>
<i>Sunday (excluding Easter Sunday)</i>	<i>6.00 a.m.</i>	<i>12.00 midnight</i>
<i>Public Holidays (as defined)</i> <i>(excluding Good Friday, 25 April, Labour Day,</i> <i>25 December)</i>	<i>6.00 a.m.</i>	<i>12.00 midnight</i>

<i>Monday to Friday</i>	<i>7.00 a.m.</i>	<i>10.00 p.m.</i>
<i>Saturday</i>	<i>7.00 a.m.</i>	<i>10.00 p.m.</i>
<i>Sunday (excluding Easter Sunday)</i>	<i>8.00 a.m.</i>	<i>8.00 p.m.</i>
<i>Public Holidays (as defined)</i> <i>(excluding Good Friday, <u>Easter Sunday</u>, 25 April,</i>	<i>8.00 a.m.</i>	<i>8.00 p.m.</i>
<i>Labour Day, 25 December)</i>		

(Supermarkets located in the Gold Coast Coastal Tourist Area (as defined) are deemed to be non-exempt shops wherein the majority of retail floor and shelf space is used for the sale of food products including fruit and vegetables, packaged groceries, dry food goods and/or packaged foods, frozen foods, delicatessen items, uncooked packaged meats, cooked chickens, dairy products, bakery products, take-away food and prepared food items, confectionery and soft drinks).

2. **By inserting the following new clause in Schedule 1 (Definitions):**

~~(24)~~ (25) *Gold Coast Coastal Tourist Area*

Commencing at Sea World Drive, The Spit; from there in line due east to the sea coast; then following the sea coast in a south-easterly direction to the Queensland/New South Wales border; from there following

Boundary Street in a south-westerly direction until its intersection with Griffith Street; from there following Griffith Street in a westerly direction until its intersection with Lanham Street; from there following Lanham Street and Gordon Lane in a south-westerly direction until Gordon Lane's intersection with Tweed Street, from there following Tweed Street in a westerly direction until its intersection with Coolangatta Road; from there following Coolangatta Road in a north-westerly direction until its intersection with the Gold Coast Highway; from there following the Gold Coast Highway in a north-westerly direction until its intersection with Tweed Street; from there following Tweed Street in a northerly direction until its intersection with the Gold Coast Highway; from there following the Gold Coast Highway in a north-westerly direction until its intersection with Remembrance Drive; from there following Remembrance Drive in a northerly direction until its intersection with Ferny Avenue; from there following Ferny Avenue in a northerly direction until its intersection with the Gold Coast Highway; from there following the Gold Coast Highway in a northerly direction until its intersection with Waterways Drive; from there in a north-easterly direction until its intersection with Macarthur Parade; from there in a north-easterly direction until its intersection with Sea World Drive; from there in a northerly direction along Sea World Drive to the point of commencement at Sea World Drive, The Spit:

Provided that non-exempt shops located on either side of any of the roads mentioned herein shall be deemed to be included within the definition of the Gold Coast Coastal Tourist Area."

Legislation

[2] Section 21 of the Trading Hours 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."

[3] Section 26 of the Trading Hours Act provides as follows:

"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."

Hearing the application

- [4] The application filed on 3 July 2008 was originally allocated to a differently constituted Full Bench. For reasons given by the President in *NRA v QRTSA and Others*¹ the application was reallocated to the Bench as currently constituted.
- [5] At a Mention of the matter on 1 July 2009, the NRA advised they had complied with the directions in relation to the original application, filed on 3 July 2008, however the matter was adjourned prior to the scheduled commencement of the inspections and hearing. As the NRA had complied with the earlier directions the Full Bench agreed to rely on that material and, in view of the time since the documents were filed, accepted supplementary material could be provided.
- [6] The Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA) sought to review the material already submitted as well as the opportunity to provide further evidence. The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) submitted there would be no change to their material as presented. The Australian Workers' Union of Employees, Queensland (AWU) indicated they would be relying on the submissions of the SDA and sought leave to withdraw from the proceedings.
- [7] In concurrence with the parties, the Commission agreed to issue a Directions Order setting the matter down for inspections and hearing commencing on 17 November 2009.
- [8] Following a request from the NRA on 12 October 2009, the matter was listed for a further Mention on 15 October 2009. The NRA advised of its intention to file an amended application seeking a reduced span of hours from 7.00 a.m. to 10.00 p.m. Monday to Saturday and 8.00 a.m. to 8.00 p.m. on Sundays and Public Holidays. This was a significant reduction from the original application seeking a span of hours from 6.00 a.m. to midnight seven days per week. Further, the NRA stated that as a result of discussions with the SDA an acceptable arrangement had been reached and the SDA would not oppose the application. The QRTSA objected to the significant alteration of the application in that it impacted upon their submission of witness statements and surveys already carried out. The matter was relisted on 20 October 2009 to enable the parties to make further submissions in relation to the proposed amended application.
- [9] At the further Mention on 20 October 2009 the NRA sought to file an amended application to avoid a delay to the hearing of the proceedings or any readvertising process.
- [10] The SDA reiterated that following discussions with the NRA and a survey of their members an agreement was reached along with the arrangement for voluntary work during the extended hours should the application be granted. On the basis of an amended application being filed the SDA said it would not be opposing the application and would be seeking to withdraw the statements already filed in the proceedings.
- [11] The QRTSA, as stated, strongly opposed the filing of an amended application because of its significance and the changes it may have to some of their witness statements as well as a survey which had been undertaken by Miller Communications Group of residents in the Main Beach to Broadbeach areas.
- [12] The Full Bench considered the submissions of the parties and determined not to accept the NRA's submission that an amendment be made to the original application. The reasons for that decision were that the matter had been on foot for a considerable period of time and there had never been any mention from the NRA of the possibility that the application might be amended or altered in any way until very recently, some two weeks after all witness statements had to be filed with the Commission.
- [13] In the view of the Full Bench the amendments sought represented a significant alteration to the original application so much so that it required a fresh application to be made to reflect this significant change. The

¹ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (2009) 190 QGIG 63.

changes were made much too close to the hearing date and this in itself had the potential to seriously disadvantage any party or body opposing the application.

- [14] The Full Bench agreed the QRTSA should be given sufficient time to prepare its case to meet the application now being proposed. The proceedings were adjourned to permit the NRA to reodge its application.
- [15] Following the filing of the Further Amended Application by the NRA on 29 October 2009 a further Mention was listed on 11 December 2009. The NRA sought directions in terms of exchange of material and hearing dates and indicated their intention to call four or five witnesses. The SDA submitted that with the reduction in trading hours now sought they would not be opposing the amended application and sought to withdraw the witness statements previously filed.
- [16] The QRTSA opposed the application in its entirety and indicated their intention to call approximately five to seven witnesses.
- [17] The Full Bench issued directions listing the matter for inspections and hearing commencing on 13 April 2010. The SDA was given leave to withdraw its witness statements.
- [18] On 1 April 2010 correspondence was received from Neumann and Turnour Lawyers on behalf of the QRTSA advising as follows:

"We are instructed to advise the Full Bench of the Queensland Industrial Relations Commission that our client, the QRTSA, now formally seeks to withdraw their participation as an interested party in the Gold Coast Trading Hours Application - TH/2008/3 currently before the Queensland Industrial Relations Commission.

Although our client does not seek to participate in the current proceeding beyond this juncture the QRTSA wishes to state for the record that it strongly opposes to the Application as sought by the Applicant in full."

Inspections

- [19] The Full Bench conducted an inspection of the area subject to this application and observed the tourist accommodation developments in the Gold Coast Coastal Tourist Area. Inspections were also undertaken by driving past the locations identified hereunder:

Coles Supermarkets - Surfers Paradise, Miami and Palm Beach;
 Woolworths Supermarkets - Surfers Paradise and Broadbeach;
 Supa IGA - Surfers Paradise;
 IGA - Surfers Paradise;
 IGA Express - Broadbeach; and
 7Eleven Convenience Stores - two at Surfers Paradise and two at Broadbeach.

Evidence

- [20] The NRA called four witnesses to give evidence and this is summarised as follows:

Rowena Howe, Chief Executive Officer, Surfers Paradise Alliance (SPA)

- [21] Ms Howe stated SPA is the "Official Marketing Authority for Surfers Paradise" and represents over 700 businesses. SPA's goal is to increase visitation to Surfers Paradise for the economic benefit of the businesses. SPA supported the application by the NRA and considered that the extended trading hours for supermarkets in the Gold Coast Coastal Tourist Area will enhance the experience for many international and interstate visitors accustomed to the convenience of shopping at a time suitable to them, particularly on week-ends and public holidays.
- [22] In relation to tourism Ms Howe said the Gold Coast is an internationally renowned tourism location and that tourism continues to grow steadily with a three year trend growth of 3.5% in both domestic and international markets.
- [23] In her opinion, Surfers Paradise has seven day late night shopping and yet the supermarkets are not able to trade such hours to cater to visitor demand. Ms Howe stated that visitors on holidays are occupied during the day and then expect to be able to get their groceries in the evening or at times convenient to them.
- [24] Ms Howe's evidence revealed that the Gold Coast has experienced phenomenal growth with 52 new developments completed since 2004, including a number of buildings in Surfers Paradise ranging from 20 floors

up to 80 floors. There are currently 13 high-rise developments under construction and a further 17 with development approval.

Don Jones, Former Chairman, Broadbeach Alliance Limited (Broadbeach Alliance)

- [25] Mr Jones said that Broadbeach Alliance is responsible for the promotion of the Broadbeach precinct including event management and destination promotion. In the view of Broadbeach Alliance, a more flexible shop trading hours structure will reflect the expectations of visitors, many of whom are from deregulated trading hours environments.
- [26] In his evidence, Mr Jones said "Broadbeach is one of Australia's favourite holiday and business tourism destinations on the Gold Coast offering a unique village-like atmosphere, vibrantly sophisticated lifestyle and a relaxed ambience".
- [27] Mr Jones stated that development is booming in Broadbeach with almost \$3.3 billion of development planned or currently underway.

David Stout, State Compliance Manger, Coles

- [28] Mr Stout stated that Coles supports the application and, if approved, all three stores located at Miami, Surfers Paradise and Palm Beach will trade all allowable hours. These stores cater not only to the shopping needs of the local residents, but also the large number of tourists who frequent the area, and the stores trade at high levels during the current trading hours.
- [29] In his evidence Mr Stout said most of the Coles' stores located in other States and Territories where trading hours are deregulated trade extended hours. In particular, Mr Stout highlighted the trading hours of the Coles Tweed Heads store and said that if the application was granted, Coles anticipated even higher trading figures given the greater population numbers in the coastline strip.
- [30] Mr Stout provided data about customer transactions in a number of Coles' stores on the Gold Coast. This data showed the congestion experienced at checkouts at the stores affected by this application in the first and last hour of trade which was quite unlike the pattern of trade experienced by the more suburban supermarkets.
- [31] Mr Stout also provided evidence about the number of tourists shopping in Coles' stores affected by the application through the usage of customer loyalty cards. He said Coles concluded from this data that a high proportion of customers who live interstate shop at Coles Surfers Paradise, Miami and Palm Beach in comparison with nearby suburban supermarkets which are predominantly frequented by local residents.
- [32] In cross-examination by the SDA, Mr Stout agreed that any work by existing employees during the new extended hours, should the application be successful, would be voluntary. He also agreed that no adverse action would be taken against any employees who chose not to work during those times.

John Rusk, Regional Retail Support Manager in Queensland, Woolworths Limited

- [33] Mr Rusk said that Woolworths has over 700 supermarkets in Australia and two of these are affected by the application with one in Surfers Paradise and the other in the Oasis Shopping Centre, Broadbeach. These stores are two of the busiest Woolworths' stores on the Gold Coast because both are located in prime tourist locations set amongst many high-rise holiday apartments in the vicinity. Both stores have strong customer patronage during the last hour of trade compared to the Woolworths' supermarkets located in Gold Coast suburbs.
- [34] Woolworths supports the application and, if granted, both stores will trade the allowable hours. Mr Rusk said he had no doubt that customers will utilise the extended shopping hours sought by the application.
- [35] Mr Rusk said extra employment opportunities for staff would be generated with approximately 145 additional hours of work per week at the Surfers Paradise store and an additional 164 hours per week at the Oasis store. Increased employment will also be generated in the contracted service areas of cleaning and trolley collection.
- [36] In cross-examination by the SDA, Mr Rusk agreed that existing staff would be offered the option of volunteering for the additional hours however new employees would be employed if volunteers are not available. He also agreed that no adverse action would be taken against any employee who chose not to volunteer during the extended hours.

Submissions of the NRA

s. 26(a) locality

[37] The NRA outlined the following changes to trading hours on the Gold Coast:

- in 1965 the Gold Coast attracted "tourism" status in the first Trading Hours Order and the Gold Coast City was permitted to trade Monday to Saturday and designated public holidays;
- in 1979 the Order was amended to expand the Gold Coast trading hours area;
- in 1990 the Order was amended to include Thursday night trade for the Gold Coast area; and
- in 1992 Sunday trading was introduced.

[38] The NRA submitted that, since the last change to the Trading Hours Order, the Gold Coast has continued to boom which has led to a rapid expansion of new building approvals and a concentration of tourism accommodation along the coastline. Accordingly, further amendments are considered necessary to meet visitor demand in the defined coastal strip.

[39] Reliance was also placed on the evidence of Ms Howe concerning the number of high-rise developments that have been constructed on the Gold Coast since 2004, including the number of buildings in Surfers Paradise ranging from 20 to 80 floors. In addition reference was made to the number of buildings presently under construction or recently completed to show that substantial investment in this area is continuing.

[40] The NRA also referred to the evidence of Mr Jones which showed the extent of development planned or underway in Broadbeach.

s. 26(b) the needs of the tourist industry or other industry

[41] The NRA referred to the evidence of Ms Howe that the Gold Coast is an internationally renowned tourism location, attracting 10.6 million visitors in 2007, who spent \$4.5 billion in the region. Visitors accounted for 40% of the Surfers Paradise population on census night in 2006. Ms Howe also gave evidence about the number of tourism businesses in the region and the fact that tourism and retail accounted for almost 30% of employment in Surfers Paradise.

[42] Mr Stout's evidence showed that interstate visitations were also important to the region. In both the Surfers Paradise and Miami stores the highest usage of customer loyalty cards was by interstate visitors.

s. 26(c) the needs of an expanding tourist industry

[43] The NRA relied on the evidence of both Ms Howe and Mr Jones that domestic and international visitation to the Gold Coast has increased progressively, with the three year trend growth of 3.5%.

[44] Reference was also made to their evidence concerning the continuing development and investment in the Surfers Paradise and Broadbeach areas to cater for the needs of the expanding tourist industry.

s. 26(d) the needs of an expanding population

[45] The NRA acknowledged that it had not adduced evidence about this criterion. However, the Full Bench notes Mr Stout's evidence concerning the congestion experienced at registers in the Surfers Paradise store each Saturday on closing time.

s. 26(e) the public interest, consumers' interest, and business interest (whether small, medium or large)

[46] The NRA noted that the QRTSA did not call any evidence opposing the application while the SDA had recorded that it did not oppose the application.

[47] Reliance was placed on the evidence of the retailer witnesses to show large business supported the application and the evidence of Ms Howe and Mr Jones that the experience of visitors would be enhanced if the application was granted.

s. 26(f) the alleviation of traffic congestion

[48] The NRA acknowledged that it had not adduced evidence about this criterion.

s. 26(g) the likely impact of the order on employment

[49] The NRA referred to the evidence of Mr Stout and Mr Rusk about the increase in hours that would be made available should the application be granted. Further, both agreed that the working of such additional hours, should they be granted, would be voluntary for all current employees and no employee would suffer any detriment should they elect not to work during the extended hours.

s. 26(h) the view of local government

[50] The NRA noted that despite being approached by the QRTSA to oppose the application when it was first lodged and a subsequent approach by the NRA upon re-advertising the application, the Gold Coast City Council had consistently decided not to take a position in relation to the application.

s. 26(i) any other relevant matters

[51] For this criterion the NRA referred to the trading hours regimes which operate in other states and territories. In addition the NRA submitted that the absence of opposition to the application should be a matter that the Commission consider favourably.

Conclusion

[52] The Commission has given consideration to the evidence and submissions made and has noted the positions adopted by the QRTSA and the SDA in respect of the application. Without going to the evidence and submissions in detail we are satisfied that the part of the Gold Coast which is the subject of this application is continuing to experience significant tourism development. Further, we acknowledge that domestic and international visitation is still high. Although we were not provided with data for visitor numbers post the global financial crisis, it is clear from the evidence of Ms Howe, Mr Jones and Mr Stout (as it relates to customer loyalty card usage) that the Gold Coast tourist strip remains a popular holiday destination.

[53] Mr Stout provided data in his written evidence showing the customer transactions during the first and last hour of trade in the week commencing 3 March 2008 for the Coles' stores located at Surfers Paradise, the Pines, Nerang, Runaway Bay and Arundel. Similar data was also provided for the Coles' stores located at Miami and Palm Beach from 14 July 2008 until 17 August 2008, an off-peak period for the Gold Coast. This data depicts the consistently higher volume of transactions in the stores on the coastline compared with those located in the more suburban areas.

[54] A similar pattern of transactions was shown in the evidence of Mr Rusk for the Woolworths' stores located at Surfers Paradise and the Oasis (Broadbeach). Mr Rusk noted the proximity of their coastline supermarkets to high-rise holiday apartments.

[55] From the evidence of the volume of customer transactions, particularly at closing times at the coastal stores, we think it is reasonable to infer that customers who are likely to be tourists, may be confused about the trading hours which presently exist and are showing a preference for extended trading hours in order to accommodate their shopping needs.

[56] Mr Stout said that the Coles store located at Tweed Heads trades the following hours:

- Monday to Friday: 6.00 a.m. to 10.00 p.m.;
- Saturday: 6.00 a.m. to 11.00 p.m.; and
- Sunday: 8.00 a.m. to 8.00 p.m.

[57] He also provided data from this store showing the average customer transactions during the first and last hour of trade in the period between 14 July 2008 and 17 August 2008. The application does not seek the same trading hours as those found in Tweed Heads. However, we are prepared to accept as valid the evidence of Mr Stout that given the substantially increased population concentration along the Gold Coast strip, the supermarkets located there are likely to record higher customer numbers during the extended hours, if granted, than the Tweed Heads store.

[58] Having considered the evidence and submissions the Commission is satisfied that the application should be granted in light of the following factors:

- the locality in which the changed trading hours are sought;
- the needs of the tourist industry;
- the needs of an expanding tourist industry;
- the interest of consumers, in this case represented by tourists;

- large business interest;
- the increased number of working hours to be generated; and
- the lack of any evidence opposing the application.

[59] The operative date for the amendment to the Trading Hours Order is 29 August 2010. In making this decision the Commission records that the working of the additional hours granted is voluntary for all current employees and no employee is to suffer any detriment should they elect not to work during the extended hours.

[60] The NRA is directed to prepare the amendment to the Trading Hours Order and to submit it to the Registry within 22 days of the date of release of this decision.

[61] Order accordingly.

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

G.K. FISHER, Commissioner.

Hearing Details:

2009 1 July;
15 and 20 October
12 November
11 December and
2010 13 April

Submissions received:

2010 23 April - NRA

Released: 12 July 2010

Appearances:

Mr J. Moore, National Retail Association Limited, Union of Employers.
Ms S. Schinnerl, The Australian Workers' Union of Employees, Queensland.
Mr K. Murphy, Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and later Ms C. Schiller, Neumann and Turnour Lawyers.
Mr D. Gaffy and Ms P. Town, Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.