

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 114

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

CASE NO: TH/2014/3

PROCEEDING: Application to amend Order - Trading Hours Non - Exempt Shops Trading by Retail - State (Marian Area)

DELIVERED ON: 21 July 2014

HEARING DATE: 27 June 2014

MEMBER: Deputy President Swan

ORDERS: **1. The application is granted.**
2. The operative date is Friday 22 August 2014.

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER - Application to amend trading hours order - Inspections - Support of the application by AWU - Different configuration of shopping centre - Growth in population - No opposition from exempt stores - Application granted.

CASES *Trading (Allowable Hours) Act 1990, s 21, s 26*

APPEARANCES: Mr M. Cole, for National Retail Association Limited, Union of Employers, the Applicant.
Ms D. Screen, for Australian Workers' Union of Employees, Queensland.

Decision

- [1] This application is made by the National Retail Association Limited, Union of Employers (NRA) to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* (the Order) pursuant to s 21 of the *Trading (Allowable Hours) Act 1990* (the Act).
- [2] The application seeks the amendment to the Order as follows:
1. In clause 3.2 of the Order by inserting the following new sub clause (29):

(29) The Marian Area

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturday	8.00 a.m.	5.00 p.m.
Sunday	9.00 a.m.	6.00 p.m.
Public Holidays (as defined) (excluding Good Friday, 25 April, Labour Day, 25 December)	8.30 a.m.	5.30 p.m.

2. In Schedule 1 (Definitions) of the Order by inserting the following new definition:

(38) The Marian Area - The area within the following boundaries:

Commencing at intersection of Mackay-Eungella Road and Boundary Road; then in a westerly direction to the intersections of Newmans, Mirabellas and Vickers Roads; then in a south-westerly direction to the intersection of Markeys Road and Mackay-Eungella Road; then in a south-easterly direction to the intersection of Clares Road and Kennys Road; then along Kennys Road to the intersection of Newbury Mount Vince Road; then along Newberry Mount Vince Road and Boundary Road to the point of commencement.

Provided that where the boundary is comprised of a street, road or highway, shops on both sides of the street, road or highway shall be regarded as being within the area.

The Legislation

[3] Section 21 of the 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) 8.00 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."

[4] Pursuant to s 26 of the Act, when the industrial commission is making an order under s 21 of the Act, it 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."

Party to the Proceeding

[5] In support of the application:

- National Retail Association Limited, Union of Employers Queensland (NRA).

[6] Organisation granted leave to be heard:

- The Australian Workers' Union of Employees, Queensland (AWU) in support of the application.

Witnesses

[7] Witnesses for the NRA were:

- Mr Geoff Bell (Queensland Support Manager for Woolworths);
- Mr Scott Spanton (Managing Director of Tipalea Partners);
- Mr Gary Choy (Owner/Manager of Jade Garden Chinese Restaurant).

Re s 26(a) "the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated"

- [8] This application relates to a Woolworths store operating within the township of Marian. Marian is approximately 30 kilometres west of Mackay.
- [9] Marian is situated in the Pioneer Valley and the area is renowned for its sugar production.
- [10] The Marian Mill is owned and operated by Mackay Sugar Limited. It is Australia's second largest sugar milling company with an annual turnover exceeding \$300 million.
- [11] The Marian Mill employs over 600 people and, during the crushing season, another 300 people are employed.
- [12] NRA stated that Sunday and holiday trading occurs in Mackay, to the east of Mackay and to Sarina in the south. NRA's submission was that:

"We submit that there are good reasons for consistency in retail shops trading hours between those locations including the minimization of escape expenditure, less confusion for those travelling through the region and greater convenience and choice for residents."

- [13] Through Exhibit 4 (an outline of the trading regime in the Mackay area and that immediately outside of those city boundaries) it was seen that within the city boundaries of Mackay there are five Woolworths stores, four Coles stores and other stores, presumably "exempt" for the purposes of the Act. These stores include two IGA stores and a Foodworks store. There was no evidence drawn as to the location, number and type of convenience stores selling basic foodstuffs in the area. In areas outside of Mackay, towards the west, there was a Woolworths store at Walkerston and at Marian.

Re s 26(b) "the needs of the tourist industry or other industry in such locality or part"

- [14] The NRA had not sought to rely to any extent upon this criterion. The area has not been touted as a tourist area, however, NRA submitted that the greater uniformity in trading hours within this area would assist tourists to the Mackay area generally.

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

- [15] This criterion has been viewed within the same context as s 25(b) of the Act.

Re s 26(d) "the needs of an expanding population"

- [16] NRA relied upon Australian Bureau of Statistics (ABS) statistics from the 2011 Census to highlight that there had been growth in population of approximately 440% between 2001 and 2011 in the area under consideration. The Census also showed that there had been projected population growth for the area from 9,445 by 2021 and 13,453 by 2031 for the Pioneer Valley.
- [17] The population growth in Marian had been fuelled by its proximity to the coal mining operations of the Bowen and Galilee Basins.
- [18] As a consequence of the population growth, a new shopping centre has been developed in Marian. The Marian Town Centre is anchored by the largest Woolworths store west of Mackay. Examples of exempt stores within the complex include a Subway store, a Reject Shop, a restaurant and a pharmacy.
- [19] The configuration of this new Centre is such that Woolworths is in effect a stand-alone store with entry from the car parking area in front of its store. However, under the same roofing as Woolworths, other stores have their entries independent from Woolworths. These stores only entry point is from the front of the building and removed from the entry into the Woolworths store. This is a very different configuration from what normally exists within most shopping centres.

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

- [20] NRA's submits that there is a strong public interest consideration in allowing the Marian residents the opportunity to shop in their own area without the necessity to have to travel to Mackay for their shopping needs.
- [21] The public interest is also served by the addition of other small businesses in the Marian Town Centre complex which will receive independent and additional trade from residents visiting the Woolworths store.
- [22] The evidence of Mr Choy was that the additional trading hours for the Woolworths store would enhance trade in his restaurant which was one of the stand-alone buildings at the front of the Woolworths store.
- [23] Mr Stanton (Managing Director of Tipalea Partners) said there was a strong expectation that smaller stores would open on a Sunday if Woolworths was permitted to do so. In the discrete circumstances of this shopping facility, the opening of small stores to trade on a Sunday and public holidays would be voluntary and there would be no shared public utility charges if only Woolworths opened its doors during extended trading.

[24] Efficiencies which could be utilized by the introduction of extended trading hours included reduced congestion at registers; better energy usage as refrigeration and air-conditioning systems currently must continue to run when the store is closed; smoothing out peaks in scheduled deliveries and improvements in store replenishment processes.

[25] Mr Bell (Queensland Support Manager for Woolworths) stated that where Sunday trading has been introduced in regional areas it has proven to be well utilized by the community generally.

[26] In terms of the local community, many of whom work in the mining industry, enhanced trading hours will be of benefit as shift work does not follow of necessity a 9.00 a.m. - 5.00 p.m. weekly pattern. Also to benefit from enhanced trading hours would be fly-in/fly-out workers who would no longer have to travel to Mackay for their shopping needs.

Re s 26(f) "the alleviation of traffic congestion";

[27] This criterion was not a significant factor for consideration in this application.

Re s 26(g) "the likely impact of the order on employment";

[28] Mr Bell gave evidence that if the application was successful, then employment opportunities would increase by 112 hours. The total additional hours required would involve new or additional opportunities for approximately 20 people.

[29] The AWU was assured that the extra hours would be worked by employees on a voluntary basis only.

Re s 26(h) "the view of any local government in whose area the order is likely to have an impact"

[30] The local government authority, the Mackay Regional Council, has supported the application. Correspondence to that effect had been received by the Commission from that body on 7 May 2014.

Re s 26(i) "such other matters as the industrial commission considers relevant"

[31] Under this criterion, NRA submits that the Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry (4 November 2011) at Chapter 10 should be considered. The particular commentary drawn to the Commission's attention related to "reasons why trading hours in Australia should be fully deregulated". Those reasons were:

- Increased consumer welfare benefits associated with greater convenience and product choice.
- Reduced discrimination and greater competition between retailers a (Sic) less artificially distorted retail industry; and
- Potentially lower retail prices and higher retail employment" [NRA submissions - page 7].

Conclusion

- [32] In considering the submissions and evidence adduced during this hearing, it is determined to grant the application.
- [33] While there has been no opposition to the claim, it does not automatically follow that the application should be granted.
- [34] The Act stipulates the various criteria that must be considered pursuant to s 26 of the Act.
- [35] NRA has submitted that certain criteria under s 26 of the Act are of little to no relevance to the application. These are s 26(b) and (f). As previously stated in many trading hours decisions, there will be occasions when criteria bear no relevance to an application. A usual example given is that of s 26(f) – i.e. the 'alleviation of traffic congestion' – in many cases this is simply not a matter of concern to the application. As well, in this matter, the question of tourism is not a factor to be considered.
- [36] In terms of the relevant criteria, all have been positively addressed in the application.
- [37] The 'location' in question has not had a non-exempt store in its vicinity previously until the development of the Marian Town Centre with the Woolworths store as the primary tenant.
- [38] In terms of public interest considerations, residents of Marian will now not have to travel primarily to the township of Mackay for their primary grocery needs.
- [39] The public interest has further been served by the addition of many small businesses situated within and adjacent to the Marian Town Centre.
- [40] The submissions made pursuant to s 26(i), while generally informative, relate to a global perspective of deregulation of trading hours nationally. As stated on numerous occasions by the Commission, trading hours in each state of Australia operates under discrete legislation particular to each state. As such, the matters raised therein are more for consideration by governments than by the Commission.
- [41] The Census statistics provided by Mr Bell highlight the increase in population for the township together with significant projections in population growth for the township. This growth has primarily been attributed to the workforce which has been drawn to the township as a consequence of coal mining operations in the Bowen and Galilee Basins.
- [42] The application has also drawn local Government support.
- [43] There will be an increase in employment within the local community by the granting of the application and, significantly, that employment utilized for the extended hours will be of a voluntary nature.
- [44] The Commission is satisfied that the relevant criteria in s 26 of the Act have been positively addressed by the NRA.

[45] The Application is granted.

[46] The effective date for commencement of trade pursuant to the application will be Friday 22 august 2014.

[47] Order accordingly.