

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 Another (TH/2009/4)

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

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER THOMPSON

5 March 2010

DECISION

CITY OF TOOWOOMBA AREA

- [1] The National Retail Association Limited, Union of Employers (NRA) has made an application to amend the *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* (the Order) to include the city of Toowoomba.
- [2] The amendment sought is as follows:

"1. By inserting a new clause (17) in clause 3.2 as follows:

(17) The City of Toowoomba 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 (except 25 December, Good Friday, 25 April, and Labour Day)	8.30 a.m.	5.30 p.m.

2. By inserting a new clause (24) in Schedule 1 as follows:

(24) *The City of Toowoomba Area* - the area within the following boundaries:

Commencing at the junction of the New England Highway and Meringandan Road in Cabarlah; then in a straight line in a north westerly direction until the intersection of Yalangur Lilyvale Road and Gowrie Lilyvale Road, then in a straight line in a south westerly direction to the junction of the Gore Highway and Muller Road; then in a straight line in an easterly direction to the intersection of the Nelson Street and Rowbotham Street; then in a straight line in a north-easterly direction to the junction of Prince Henry Drive and Jubilee Court; then in a straight line in a north westerly direction to the point of commencement."

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

Applicants and Respondents

[5] The application has been made by the NRA. The application is supported by the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) and opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA).

Inspections

[6] At the request of the parties, inspections were undertaken by the Full Bench at the following locations. [Note: Most inspections were undertaken by driving past the location, however, the Full Bench conducted some walk-through inspections. These will be identified hereunder.]

- 5 Star Supermarket, 138A South Street (Drive past)
- Kelly's 5 Star Handimarket, 228 Alderley Street (Drive past)
- Middle Ridge Handimarket, Cnr Spring & Ramsay Streets (Drive past)
- SPAR Express, 462 West Street (Drive past)
- Homemaker Centre, 910-932 Ruthven Street (Drive past)
- Kmart Plaza, Ruthven Street (Drive past)
- IGA Express, Westridge Meats, 300 West Street (Drive past)
- 5 Star Handimarket, 65 Drayton Street (Drive past)
- SPAR Express Central, 692 Ruthven Street (Drive past)
- Bernoth Centre, 663-667 Ruthven Street (Drive past)
- Coco's Foodmarket, Cnr Hume & Herries Streets (Drive past)

SPAR Express, 36 Campbell Street (Drive past)
 FoodWorks Northlands, 8 Hume Street (Drive past)
 FoodWorks Blue Mountains, Cnr Griffith & Ruthven Streets (Drive past)
 SPAR Express, 89 West Street (Drive past)
 Store 309, 309 Bridge Street (Drive past)
 IGA Supa, Cnr Bridge Street & Boundary Road (Drive past)
 Clifford Gardens Shopping Centre, Cnr James Street & Anzac Avenue (Walk through)
 5 Star Handimarket, 259 Herries Street (Drive past)
 Centrepoint on James, Cnr James & Prescott Streets (Drive past)
 Toowoomba Homemaker Centre, Prescott Street (Drive past)
 Grand Central Shopping Centre, Margaret Street (Walk through)
 Garden Town Shopping Centre, Cnr Margaret & Victoria Streets (Walk through)

- [7] The evidence which has been adduced during this hearing will be considered pursuant to the requirements of s. 26 of the Trading Act. After considering all evidence under these specific headings, the Full Bench will make either a consideration or finding.

Other issues of relevance to the conduct of the proceedings

- [8] **Note 1:** In response to questions posed by SDA, all retailing businesses which would be affected by the granting of this application stated that work on a Sunday for employees would be on a voluntary basis.
- [9] **Note 2:** The Full Bench was advised by the State Reporting Bureau on 1 September 2009 that the first day of recording of the hearing in the Toowoomba Court House could not be reproduced accurately because of difficulties encountered with the recording system. The Full Bench made the decision to rehear the evidence from that first day and consequently, the first day of evidence and transcript was discarded. All parties were advised of this and all agreed that this would be the most appropriate course to adopt.
- [10] **Note 3:** When final submissions were made by the parties on 13 November 2009, QRTSA advised that it wished to utilise the services of a firm of solicitors. No objection was raised by either the NRA or SDA and, pursuant to s. 319 of the *Industrial Relations Act 1999*, leave was granted by the Full Bench.
- [11] **Note 4:** Requests had been made by parties for leave to adduce evidence via telephone. From the requests made, it was seen that a reasonable number of witnesses sought to give telephone evidence. We note from witness statements that those witnesses were located in New South Wales, Victoria, South Australia and Western Australia.
- [12] Correspondence was sent to the parties by the Registrar of the Commission, prior to the hearing. *Inter alia*, that correspondence contained the following:

"Practice Note No. 1 of 2000 [Taking Evidence by Telephone] issued by the President of the Queensland Industrial Relations Commission states:

1. Telephone evidence will be taken from expert witnesses and on formal and uncontroversial matters. Telephone evidence will not be taken where credibility is an issue.
2. Where consent is forthcoming for the hearing of evidence by telephone the Commissioner hearing the matter should be informed of that circumstance at the earliest opportunity. It is consistent with this note for the Commissioner hearing the matter to organise a directions hearing to further consider the question whether evidence should be taken by telephone.'

For the purpose of the hearing to be held in Toowoomba 1, 2, 3 and 4 September 2009, point 1 of the Practice Note will be adhered to by the Full Bench. However, if special circumstances exist such that a witness is unable to attend the hearing in Toowoomba then consideration will be given to hearing those witnesses in Brisbane at a time and date to be determined. Further, these issues must be addressed at the outset of proceedings on 1 September 2009."

- [13] The Full Bench determined that had this practice of hearing so many witnesses on the telephone been allowed to continue (and in the absence of special circumstances), a large part of the hearing (and perhaps other hearings) would be conducted via telephone.
- [14] The Full Bench accepts that there are occasions upon which telephone evidence might be appropriate, but each case turns on its own facts and each Full Bench will make its decision as and when required on that point.

Consideration of criteria under s. 26 of the Trading Act

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

[15] NRA submitted that:

- Toowoomba is situated some 100kms from Brisbane.
- Toowoomba is the economic and commercial hub of the Darling Downs region.
- Toowoomba is Queensland's largest inland provincial city with 156,967 people currently living in the region, which represents an increase of 2% of population over the previous year.
- Over the previous year, the population in the Toowoomba region grew faster than that of Sydney, Melbourne, Adelaide and Hobart, and was equal to the growth rates of all other capital cities. [Applicant's Statement of Facts and Circumstances, point 5]
- Toowoomba provides commercial businesses, services and amenities to its population.
- Toowoomba also has several major hospitals, extensive public and private education facilities, 2 university campuses and a range of retail shopping centres. NRA says that retail trade is the leading industry of employment in Toowoomba. NRA states that the top industries for employment in the Toowoomba region are:
 - Retail trade (15% share of total employment);
 - Health and community services (13% share of total employment);
 - Manufacturing (11% share of total employment);
 - Education (9% share of total employment);
 - Property and business services (9% share of total employment); and
 - Construction (8% share of total employment).
- The retail industry is a key industry sector in Toowoomba providing the third highest contribution to gross national product behind manufacturing and health and community services. [Exhibit 10, point 15]
- The Toowoomba region encompasses the following Council areas of South Burnett, Dalby, Goondiwindi, Southern Downs and Lockyer Valley, amongst other areas in South West Queensland.
- The Toowoomba region is underpinned by a solid agricultural sector and the emergence of significant energy resources in the Surat Basin. The Surat Basin is expected to become the country's largest energy province by 2011. [Exhibit 9, para 15; Exhibit 10, paras 15-19; Exhibit 15, Attachment SWI]
- The Toowoomba Regional Council has invested almost \$1 million in a CBD renewal study. [Exhibit 10, para 7]

[16] During the inspections which were conducted by the Full Bench, the following was noted:

- Grand Central shopping centre has 151 tenants;
- Clifford Gardens shopping centre has 90 tenants;
- Garden Town shopping centre (with Supa IGA and Best & Less being the anchor tenants) has approximately 70 tenancies, many trading over 7 days;
- Kmart Plaza (where Kmart and Coles are the anchor tenants) has approximately 20 tenants;
- Kmart Homemaker Centre comprises approximately 15 retailers, trading 7 days;
- Bernoth Centre has approximately 12 retailers, trading 7 days;
- Toowoomba Homemaker Centre has approximately 6 retailers, trades 7 days; and
- Centrepoint on James with BCF/Pillow Talk also trading 7 days.

[17] Evidence was given by Mr White from the Queensland Investment Corporation that annual customer numbers in Grand Central shopping centre is around 7.7 million, with 3,200 people per hour visiting the centre during peak trading times on Thursday nights and Saturdays. [Exhibit 2, paras 19-20]

[18] There was evidence of some consumers travelling to Brisbane for the purpose of shopping on Sundays.

[19] Evidence was given that if the application was successful, it would permit tenants of enclosed shopping centres in Toowoomba to exercise their discretion to trade or not to trade on Sundays. There are nearly 300 retailers who are tenants of enclosed shopping centres in Toowoomba, however, only 6 of those tenants are supermarkets. [Exhibit 11, point 3]

[20] QRTSA points to evidence that shows that Toowoomba is a unique town offering a unique lifestyle. The evidence from the local member of Parliament, the Hon. M. Horan highlights this point.

Consideration and/or finding re: (a)

- [21] Like many larger cities, Toowoomba is not without a considerable number of shopping outlets. It is reasonable to state that without the application being granted, consumers in Toowoomba would have ample opportunity to shop in surrounding retail outlets for many of the goods they might require on a Sunday.
- [22] The noted difference, however, is that consumers could engage in one-stop shopping within a shopping centre if the application was to be granted.
- [23] A further consideration is that other larger scale retail outlets in the area enjoy a monopoly of trade on a Sunday. The goods they sell often replicate the goods provided for in the retail outlets, the subject of this application. Many of these stores are in close proximity to the stores under consideration in this application.
- [24] Of further particular note is that Toowoomba is a large provincial city with a significant population.

(b) the needs of the tourist industry or other industry in such locality or part

- [25] NRA stated that Toowoomba attracts around 3.3 million visitors each year. Toowoomba hosts the annual "Carnival of Flowers" each year and around 20,000 people take part in the week-long event.
- [26] Mr Gschwind, for Queensland Tourism Industry Council, says that "the adoption of a uniform set of Sunday trading hours across Queensland will assist in lessening confusion for tourists". [Exhibit 16, point 8]
- [27] Mr Gschwind also referred to the co-dependence between the tourism and retail industries. He states that research has consistently established that shopping is a priority activity for both domestic and international visitors to Queensland. [Exhibit 16, point 9]
- [28] Reference was also made to a "multiplier effect" where visitors to an area purchase goods and services and this spending injects new dollars into the local economy. "A percentage of each new dollar spent in the community by the recipient and this is spent and re-spent, creating a 'multiplier effect'.". [Exhibit 16, point 15]
- [29] Mr Gschwind stated that tourism also creates job opportunities for young people within the community.
- [30] Mr Gschwind provided statistics detailing the substantial intrastate market in tourism which he says mitigates in favour of consistency in trading hours for Queensland's regions.

	Visitors ('000)	Visitor Nights ('000)	Average Length of Stay (Nights)
Total	16,362	78,083	4.8
Intrastate (Qld)	11,527	39,552	3.4
Total Interstate	4,835	38,531	8.0

[Exhibit 16, point 20]

- [31] Mr Stirling (Managing Director, Lauder Pty Ltd a company which has developed Highfield Village and other residential and commercial developments in Toowoomba and Brisbane) is involved in the Toowoomba community as a Board Member of the Toowoomba Regional Economic Board, a member of the Highfields Better Business Group and a member of the Toowoomba Chamber of Commerce. Mr Stirling's evidence relating to tourism was as follows:
- In the year ending March 2009, domestic visitation to Toowoomba was 947,000 visitors and 2,588,000 visitor nights. Intrastate visitation was 744,000 visitors and 1,901,000 visitor nights, while interstate visitation was 203,000 visitors and 688,000 visitor nights.
 - Day trip visitation to Toowoomba for the same year was 2,168,000 - representing a 17% increase on the previous year's numbers.
 - Domestic visitation to Toowoomba of 947,000 persons compared favourably with other tourist regions. [Exhibit 10, points 10, 11, 12]
- [32] QRTSA stated that because of Toowoomba's uniqueness, the attraction for tourists to the region was the parks, the environment and the relaxed lifestyle which could be threatened by the 7 day trading sought in this application.
- [33] Under the "other industry" category, NRA states that the retail industry should be considered.

- [34] It is the case that shopping centre owners make significant investments in their businesses and would naturally seek the maximum return on those investments.
- [35] Likewise, smaller and medium-size traders make significant investments in their businesses. Neither group could be aware, long-term, with any certainty of prospective trading hours regimes. However, NRA points to commentary from the 1996 Knox Inquiry into trading hours where it was stated:

"National Competition Policy

The Queensland Government is a signatory to the National Competition Policy Agreement which require each 'participating jurisdiction' including Queensland, to develop a time table for the review of legislation that contains measures that restrict competition.

Trading hour's legislation in Queensland is currently scheduled for review under the National Competition Policy Agreements in 1998/00. If the public benefit test requirements are not met, an appropriate reform program must be commenced by 31 December 2000. It is quite possible that the appropriate reform program will result in the deregulation of trading hours in Queensland. It is therefore the opinion of the Inquiry that small retail traders should be aware of this possibility and make the appropriate business contingency plans.

Benefits of Extended Trading

A detailed examination of the evidence revealed that extended trading hours have had an overall positive effect on the retail industry as demonstrated by the fact that since the introduction of extended trading hours, the retail industry has seen growth in retail turnover, below average growth in prices and employment growth.

Consumer Preferences

It is also evident that extended hours are in line with mainstream consumer preferences. The consumer survey undertaken for the Inquiry found that the majority of people surveyed had a positive attitude toward extended trading hours and were utilising the extended trading hours."

Consideration and/or finding re: (b)

- [36] Tourism does form a significant part of the profile of Toowoomba. It is a city renowned for its parks and gardens and garden festivals. Certainly, the tourist statistics for the city are significant.
- [37] While tourists would be able to access many of the smaller retail outlets in Toowoomba on a Sunday for their immediate needs, it seems to be the case that consistent statistical data shows that tourists equate tourism with shopping. [Gschwind, Exhibit 16, point 9]
- [38] Statistics provided by Mr Gschwind show the following:

"Top six (6) activities participated in by domestic visitors to Queensland

Visit Friends and Relatives	38%
Eat Out at Restaurants	36%
Going to the Beach (Inc swimming, diving)	34%
Go Shopping	27%
Walking Around / Sightseeing	24%
Pubs / Clubs / Discos	20%

Top six (6) activities participated in by international visitors to Queensland

Go Shopping (for pleasure)	86%
Go to the Beach	73%
Visit National Parks	58%
Visit Wildlife Park / Zoos	52%
Visit Botanical Gardens or Other Public Gardens	48%
Go On Guided Tour / Excursions	46%

[Note: Percentages may add to more than 100 as respondents may have participated in more than one activity.]. [Exhibit 16, point 10]

- [39] In our view, we are unable to disregard the general extent of tourism within Toowoomba and the evidence which goes to the interaction between tourism and shopping, which is often categorised as "pleasure shopping". Having said that, however, we have considered the further evidence of Mr Gschwind where he stated that tourism in Toowoomba, as well as in other areas of Australia, was suffering from the global financial crisis. This situation has affected many economies but in our view should not be seen as a reason to disregard the general growth in tourism enjoyed by Toowoomba.
- [40] With regard to the category of "other industries", what should be said is that most retailers would be aware of the changing nature of trading hours. There is considerable publicity given to trading hours hearings and outcomes and, within the industry generally, there are a range of organisations to which many retailers belong. The role of these organisations, amongst other things, is to provide information to their constituents which would include trading hours' applications.
- [41] The Commission is unable to place any significant weight upon a submission which suggests that retailers are taken by surprise by trading hours applications.

(c) the needs of an expanding tourist industry

- [42] There was not extensive evidence given around this topic. Mr Gschwind's evidence was that tourism in Toowoomba was suffering the same fate as that of other cities around Australia. There was either a marginal increase in tourism or it remained static. In the case of Toowoomba, as a consequence of the global financial crisis, tourism has held its own without any significant growth.
- [43] Mr Gschwind's evidence also related to the previously mentioned "multiplier effect" and also to factors such as employment opportunities, diversification, improved facilities for residents, and increased opportunities for business as a consequence of an increased tourist trade.
- [44] From his evidence, Mr Gschwind stated that tourism directly accounts for more than 50% of employment in accommodation, cafes and restaurants, 21% of the retailing industry, 19% of the cultural and recreational industry and 13% of the transport and storage industry.
- [45] Mr Stirling said that tourism played a significant role in supporting local economic growth and referred to the range of annual festivals held in Toowoomba (e.g. the Toowoomba Carnival of Flowers, the Hampton High Country Food and Arts Festival; the Australian Heritage Festival and the Australia Camp Oven Festival). These events bring tourists into the city. [Exhibit 10, point 9]
- [46] Mr Stirling also stated that day trip visitation to Toowoomba during the previous year had totalled 2,168,000 representing a 17% increase on the previous years' numbers. [Exhibit 10, point 11]

Consideration and/or finding re: (c)

- [47] While accepting that the global financial crisis has put a hold on some tourism activity, there is still sufficient evidence to show that Toowoomba remains a significant tourist destination. There is no reason to consider that tourism would not continue to grow when the economic situation improves. The evidence given by Mr Gschwind that the "multiplier effect" of an expanded tourist dollar could have a significant impact upon the economy of a particular destination has been considered. As well, due consideration has been given to the noted increase in day trip visitors to Toowoomba. [Exhibit 10, point 11]

(d) the needs of an expanding population

- [48] The population of the Toowoomba Region in 2006 was 156,967. This represented an annual increase of 2% which was marginally lower than the average growth for Queensland of 2.4%. Population projections to the year 2026 show that the Toowoomba region's average population growth is expected to increase by 1.2% per annum, to a population of approximately 193,718 persons. The Toowoomba city population is almost 100,000. [Exhibit 10, point 17]

Consideration and/or finding re: (d)

- [49] There is sufficient evidence to show that the population of Toowoomba is increasing each year and the projections for further growth are in similar vein.

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

Public interest

- [50] Generally, a consideration of the mandatory requirements of s. 26 of the Trading Act, ensure that the "public interest" is addressed.
- [51] Specifically, QRTSA states that the public interest would be served by the Commission giving appropriate consideration to the "individual locality and uniqueness" and "lifestyle" of the Toowoomba community. [Transcript, p. 9-22]
- [52] NRA believes that because most Australians enjoy 7 day trade, it would be in the best interests of the community generally to have access to that trade. The public interest is also served by reducing escape expenditure from Toowoomba and the consequential transfer of job opportunities from Toowoomba to the capital city. There would also be a public interest in ensuring that there was a more efficient utilisation of capital in Toowoomba's retail sector. Further considerations include assisting in the long-term economic well being of the city's retail sector, stimulating economic growth and the improvement of profitability through increased sales and increased employment.

Consideration and/or finding re: (e) public interest

- [53] There will always be competing factors under this particular heading and, after a consideration of all of the mandatory factors under s. 26 of the Trading Act, a determination will be made which in our view satisfies an appropriate public interest test.

Consumers' interest

- [54] Consumers' interest is usually provided to the Commission by way of public surveys. In this particular case, there have been problems associated with all of the surveys sought to be tendered as evidence.
- [55] On 28 August 2009, the Toowoomba Regional Council wrote to the Industrial Registrar of the Commission as follows:

"I refer to Matter No. TH/2009/4 in respect of the application to the Queensland Industrial Relations Commission ('QIRC') made by the National Retail Association Limited, Union of Employers ('NRA') to extend retail trading hours.

The Toowoomba Regional Council is a local government in whose area an Order of the QIRC is likely to have an impact.

Toowoomba Regional Council understands that the QIRC has the power to inform itself on a matter it considers appropriate pursuant to s. 320(2)(b) of the Industrial Relations Act 1999. Should the QIRC consider it appropriate to use the enclosed information, Toowoomba Regional Council provides it to the QIRC for that purpose.

Enclosed are copies of:

1. Council Report entitled 'Amended Application to Amend Order - Trading Hours - Non-Exempt Shops Trading by Retail - State, City of Toowoomba Area' and Council Decision 16 June 2009 (Committee of the Council - 9 and 10 June 2009 - Item 21); and
2. Community Survey entitled 'Toowoomba Regional Council Retail Trading Hours Community Survey 2008.'

The above documents were provided to the NRA, the Retailers Association and the Shop, Distributive and Allied Employees Association Union of Employees to inform them in the matter. In the case of the Shop, Distributive and Allied Employees Association Union of Employees, Toowoomba Regional Council did not provide the hard copy of the Community Survey but referred them to the Toowoomba Regional Council website (www.toowoombarc.qld.gov.au under 'Hot Topics') where the Community Survey may be accessed. Also enclosed is a copy of the covering letter that was sent with the above documents to the Retailers Association and the NRA.

This information includes a community survey commissioned by Toowoomba Regional Council to determine community attitude towards retail trading hours. Toowoomba Regional Council has formally considered this matter and is of the opinion that it can best represent the views of the general public by providing the survey report without added interpretation.

The Toowoomba Regional Council does not propose to be a party or make submissions in the proceedings.

Yours faithfully
Ken Gouldthorp
Chief Executive Officer."

- [56] At the commencement of the hearing, the Full Bench made reference to the communication received from the Toowoomba Regional Council. QRTSA sought to tender the survey as evidence before the Commission and, in doing so, reaffirmed that the Toowoomba Regional Council had not sought to make an appearance.
- [57] The Full Bench determined not to accept the survey as evidence because it could not be tendered through any person/organisation involved in its formation. There would be no opportunity for those who might arguably question the content of the survey to cross-examine those commissioned to conduct the survey on any aspect of the methodology involved in the composition of the survey, amongst other things.
- [58] The Full Bench, however, did not prohibit QRTSA from raising the issue of the survey with witnesses [see, for example, evidence of Messrs Chapman, Hammersla, Stout, Ernst, Stirling, Cockburn and Wallace]. Some witnesses were aware of the survey, and some were aware that the Toowoomba Regional Council had remained neutral on the question.
- [59] Mr Stirling (a member of the newly appointed Economic Development Board for Toowoomba Regional Council) gave independent evidence in support of the application, but had not been given a mandate to speak on behalf of that Board save to state that the Board had not formed a position on the application.
- [60] With regard to the survey, Mr Stirling believed that the individual questions asked of consumers were misleading.
- [61] Mr Cockburn [Executive Director of the Shopping Centre Council of Australia] gave evidence with regard to the survey as follows:

In response to the following question from the QRTSA:

"Mr Cockburn, are you aware that the - Toowoomba Regional Council undertook a survey last year and found that the majority were opposed to any change to the present trading hours regime?". [Transcript, p.6-4]

Mr Cockburn replied:

"I am aware of the survey. It was - I didn't really interpret it that way, Mr Murphy. It was a strange survey in the sense, as I recall. It required a person to actually return a form to the council. So generally it was probably only those people who had strong feelings one way or another who took part in the survey."

- [62] With all but one NRA witness to give evidence, QRTSA sought the leave of the Full Bench to call a representative of Toowoomba Regional Council and also Lawrence Consulting (the organisation which had conducted the survey) by way of subpoena to tender the survey as evidence. [Transcript, p. 6-2] QRTSA was aware that there would be a 3 day turn-around between issuing the subpoenas and gaining evidence from those persons. It should be noted however, that the Commission has the discretion to waive those rules.
- [63] NRA opposed QRTSA's application for leave. The opposition was based upon the following grounds:
- Toowoomba Regional Council had released to the public and the parties a copy of the survey well in advance of the dates required for witnesses and evidence to be adduced.
 - At the commencement of the hearing, the Full Bench had made its views known to QRTSA. QRTSA could have sought to subpoena those witnesses at that time but, for reasons only known to themselves, they chose not to.
 - In response to a question from the Full Bench as to whether NRA had a view with regard to any prejudice its witnesses who had already given evidence might suffer, if the survey was admitted into evidence by a relevant witness, NRA responded as follows:

"... That would certainly be the case that Mr Murphy did question probably a majority of witnesses around the report, and a few of them had some reasonable knowledge of the content of that report, but the majority were not familiar with it, and were unable to provide expansive responses given that the report was not before them, or this Commission. As such their response in evidence would be prejudiced by the late admission of the survey.". [Transcript, p. 6-4]

[64] In response to those assertions, QRTSA's response was:

- "... as advised by the Toowoomba Regional Council lawyers that the Full Bench has discretion on this matter, and the Full Bench have used the discretion that they won't allow the evidence to be adduced on that survey, we are very concerned and perplexed by that. And as Mr Moore has stated, we have endeavoured to get the Council to the hearing on many occasions which resulted in this legal advice, and we just believe it is important that the Bench do have an appreciation of that survey. And I think that on the matter of the validity of it, the methodology of it, and the fact that the Council did take that survey onboard and distribute it as its already been mentioned by Mr Moore, and Mr Horan will also attest to the fact that he's got that survey as an attachment to his witness statement, that the survey's been made public. So we believe that the Commission also should have some appreciation of that survey, and what we are trying to do at this stage is get someone to the hearing to attest to the validity, the methodology, and the adoption of such survey." [Transcript, p. 6-4]
- The Full Bench adjourned to consider the submissions which had been made and determined as follows:

"At the commencement of the proceedings before the Commission, the QRTSA sought to have a survey (which has been attached to correspondence received by the Commission from the Toowoomba Regional Council), tendered into evidence.

It should be noted that the Toowoomba Regional Council neither supported nor opposed the results of the survey. Rather, the Toowoomba Regional Council left the matter to be determined by the Commission. The Commission determined not to admit the survey into evidence because there was no body and/or organisation directly involved in its commissioning and conduct able to give evidence before the Commission. There would be no opportunity for any party to question the methodology involved in drafting the questions to be asked in the survey or participants, where the survey was conducted, when the survey was conducted et cetera.

During the course of the case, the Bench did permit the QRTSA advocate to ask questions of witnesses and their knowledge of the survey. Witnesses were advised by the Bench that whilst the survey was not formally before it, those witnesses were at liberty to respond to direct questions as they saw fit.

We are now towards the end of witness evidence being heard in this matter. As of today's date, there is one further NRA witness to be heard and another five witnesses from the QRTSA. On today's date, the NRA has responded to the views expressed by the QRTSA to have the material entered into evidence by way of a summons to either an officer from the Toowoomba Regional Council or the body who conducted the survey.

NRA opposes the application on a number of grounds. These are that the attempt to have the survey put into evidence has occurred too late in the day. All but one of the NRA witnesses have been heard and there will be no opportunity for those other witnesses to make any comment on the survey. The NRA believes that the QRTSA has made several requests to the Toowoomba Regional Council to support the survey, but those requests have failed.

Our decision is as follows. Whilst, under normal circumstances, the Commission must permit a party to conduct its case as it sees fit, the only caveat on that would be irrelevant evidence would be excluded by the Commission or at least not considered by the Commission. The difficulty we face in this matter is as follows. The QRTSA has always had the opportunity from the commencement of the hearing and specifically after hearing the decision of the Commission with regard to the survey, the opportunity to call, via summons or otherwise, any witness it pleased and that it believed necessary in the support of its own case. The QRTSA did not seek to do this.

There is nothing novel in the Commission hearing witness evidence via subpoena. It is not for the Commission to permit or disallow a party to a proceeding to summons whichever witnesses they believe they wish to. That is a decision the party directly involved in the process makes.

We would question why a body such as the Toowoomba Regional Council would send a survey to the Commission in circumstances where they were not prepared to come and support or oppose the survey. We believe it would be seriously prejudicial to all witnesses in this matter to permit the survey to be tendered into evidence when none of those witnesses will have a chance to make their own comments known with regard to the survey and also would not permit the NRA the opportunity to cross-examine the commissioning and conduct of the survey. For those reasons, we refuse the application to prolong proceedings and to have the survey tendered as evidence. We order accordingly." [Transcript, pp. 6-6, 6-7]

- [65] The Full Bench was prepared, however, to consider the evidence given from witnesses as to their knowledge and understanding of the survey.
- [66] The second survey to consider had been commissioned by the NRA and undertaken by Dr M.J. Morgan and Dr J. Summers from the University of Southern Queensland ("Toowoomba City Shopping Hours Survey"). [Exhibit 19]
- [67] During the course of Dr Morgan's evidence, it was drawn to her attention by a member of the Full Bench, that there were significant errors in the material supplied. These errors are best explained by reproducing some examples:

3.2 FREQUENCY

The following table 9 gives responses to Question 8 indicating that 31% shop on Sundays about every couple of weeks or more often and 14% shop every Sunday.

Table 9: Frequency of Sunday Shopping		
	No.	%
Every Sunday	117	14
About every couple of weeks	143	17
About once a month	180	21.5
Every couple of months	119	14
Less Often	88	10.5
Total	841	100

- [68] When one attributes the relevant percentages to the various categories, it can be seen that what purports to equal 100% in fact equals 77%. As well, instead of 841 persons being surveyed as stated, the figure shows that only 647 persons were surveyed.

	Clifford Gardens	Grand Central	Homemaker Centre	Total
Table 10: Frequency of Sunday Shopping				
Every Sunday	45 (15%)	42 (42%)	30 (15.7%)	117
About every couple of weeks	51 (17%)	51 (14.6%)	41 (21.5%)	143
About once a month	57 (19%)	73 (20.9%)	50 (26.2%)	180
Every couple of months	47 (15.7%)	44 (12.6%)	28 (14.7%)	119
Less Often	23 (7.7%)	23 (6.6)	42 (22%)	88
Total	300 (100%)	350 (100%)	191 (100%)	841

[Exhibit 19, Attachment MJM1]

The errors occur in the compiling of statistics under the headings of "Clifford Gardens", "Grand Central", "Homemaker Centre" and "Total" in Table 10.

- [69] As it transpired, mistakes were uncovered in the Executive Summary, and Tables 3, 4, 5, 7, 8, 9, 10, 11 and 13.
- [70] Dr Morgan believed the errors to have occurred as a result of the transmission of figures from cross-tabulations.
- [71] As a consequence of this, NRA sought the indulgence of the Full Bench to have Dr Morgan revisit the survey and correct any mistakes. NRA also believed that there should be no disadvantage suffered by QRTSA because that organisation had not asked Dr Morgan any questions concerning the actual statistical data.
- [72] This proposition was opposed by QRTSA.
- [73] The Full Bench adjourned and considered the matter. The following decision was made:

"The survey before the Commission is significantly flawed in terms of statistics provided. That survey is entitled "Toowoomba City Shopping Hours Survey, July 2009 - Dr Melissa Johnson Morgan and Dr James Somers, University of Southern Queensland.

The flaws were identified by Commissioner Thompson and the witness, Dr Morgan, agreed that the statistics had been incorrectly recorded. The Commission queried the parties as to whether it would be acceptable for Dr Morgan to rectify what was viewed as errors in statistics, and to resubmit another survey as soon as possible and Dr Morgan said she would be able to do that. The QRTSA objected to this, and the NRA sought

to have rectification made by Dr Morgan and for the new survey details to be provided to the parties and to the Commission.

In our view, this situation is not similar to the situation in which the QRTSA found itself with the survey that had been sought to be tendered into evidence, that survey being one that had been attached to correspondence from the Toowoomba Regional Council. Dr Morgan's survey is now in evidence, and evidence has been drawn by both advocates around the material in the survey. Unfortunately, we are left in the position where we can only consider the survey in its current form. The parties can address the significance or otherwise that the Commission should attach to the current survey, and the survey before the Commission in the final submissions."

- [74] Dr Morgan provided a "Summary of Corrections Made" to the Commission on 5 October 2009.
- [75] In final submissions, NRA stated that, "It's our submission that despite those inaccuracies in the report, the survey itself and its results are still valid and support the application.". [Transcript, p. 9-9]
- [76] QRTSA addressed the point stating that no weight should be given to the survey. To do so would be prejudicial to QRTSA because the survey presented to the Commission was not the corrected document. [Transcript, p. 9-29]

Consideration and/or finding re: (e) consumers' interest

- [77] This consideration has been particularly difficult because of the issues associated with the two surveys in question.
- [78] The Full Bench's position with regard to the survey attached to the correspondence received from the Toowoomba Regional Council has been made during the course of the hearing and for reasons outlined within the body of this decision. However, we are aware of the views expressed by various witnesses with regard to the survey through evidence given.
- [79] The situation concerning the second survey, i.e. that commissioned by NRA (Toowoomba City Shopping Hours Survey) is not analogous to the situation concerning the Toowoomba Regional Council survey.
- [80] The survey was seriously flawed. Contrary to the submissions made by NRA, it was not possible for the Full Bench to draw from that survey (even in its flawed state) any reliable conclusion, (save for 2 exceptions which will be listed below). For example, were one to consider the aforementioned Table 9 (3.2 Frequency), it has been claimed that 841 persons responded to the survey - those numbers were then broken down into categories of persons frequently shopping on a Sunday, e.g. "Every Sunday - 117"; and "About every couple of weeks 143". Given that the statistics actually show that only 647 persons responded to the survey (while the document says 841 persons responded), it is impossible to extrapolate from that what the preferences of the missing 194 persons were. As well, much of the commentary around the survey was drawn from the statistical data within the survey.
- [81] The Full Bench believes that it would be unwise to accept NRA's submissions that, though flawed, the survey generally, as tendered, should be accepted.
- [82] The second limb of the NRA's submission went to whether the Full Bench should accept the corrected survey figures provided on 5 October 2009. The difficulty with this proposition is that each party's case is prepared around the documents and evidence exchanged prior to the hearing. If minor amendments are to be made, they are made, and usually accepted, at the time of tendering a document into evidence. In this case, this did not occur. The witness had sworn to the truth and correctness of the document attached to her affidavit. Examination-in-chief had been concluded and cross-examination was part way completed.
- [83] A further consideration was that an outline of the errors "Summary of Corrections Made" was handed into the Commission later in the day (5 October 2009) after other witness evidence had been taken.
- [84] The Full Bench is aware that 2 of the tables within the original survey have no errors in terms of mathematical calculation. These areas are as follows:

Table 11: Would it be more convenient to shop at retail centres on a Sunday?		
	<u>No.</u>	<u>%</u>
Yes	538	64
No	301	46
Total	839	100

Table 12: Would it be more convenient to shop on a Sunday?		
	No.	%
Yes	143	75.4
No	48	25
Total	191	100

[Exhibit 19, Attachment MJM1]

- [85] These responses (although part of the flawed survey) have been considered by the Full Bench.
- [86] QRTSA submit that consumers' interests are highlighted through consideration of evidence given by 2 local politicians, i.e. Mr M. Horan MP, Member for Toowoomba South and Mr R. Hopper MP, Member for Condamine.
- [87] Mr Horan was opposed to 7 day trade for Toowoomba. He believed that it would have an adverse affect upon "the very special Sunday lifestyle of our city". [Exhibit 18, point 3] Mr Horan also stated that "The Toowoomba lifestyle is unique and enjoyable. Weekends in Toowoomba are largely associated with sport, recreation, family time and church. Sunday in particular is a relaxed and pleasant day in Toowoomba and attracts many visitors because of this enjoyable orientated atmosphere.". [Exhibit 17, point 6]
- [88] Mr Horan also viewed the "shop until you drop" mentality would destroy the special Sunday atmosphere in Toowoomba. He claimed that the value of a Sunday for family time, recreation time, church time and a day off were of far greater lasting value to the community than "the constant push for more market share for particular commercial interests". [Exhibit 17, point 8] Mr Horan was also aware of the survey which had been undertaken by the Toowoomba Regional Council.
- [89] Mr Hopper's evidence was that there were many small towns surrounding Toowoomba such as Clifton, Pittsworth, Oakey and Dalby which would be affected by the introduction of 7 day trade in Toowoomba. Mr Hopper said that many small traders had spoken to him in opposition to the application. Many people from these surrounding towns came to Toowoomba on the weekends for sporting events and, with the introduction of 7 day trade, they would most likely be drawn to the shopping centres to purchase their requirements. This would have a "massive impact on most small towns". [Transcript, p. 8-3]
- [90] We are conscious of the fact that the issue of 7 day trade in Toowoomba has somewhat divided the community. Were both surveys to have been considered *in toto*, there would be evidence of the clear division because, *prima facie* there were markedly different results with Toowoomba Regional Council survey recording disapproval for 7 day trading and the NRA survey recording support for 7 day trade.
- [91] We are mindful that the 2 Members of Parliament did not have any statistical data to support their views. However, in our view, these Members of Parliament do represent citizens in and around the city of Toowoomba (and have done so for a considerable period of time) and, in the absence of any reliable statistical data reflecting consumer views, due consideration must be given to their knowledge of community needs and standards. Their job is to interact with and represent the needs of their constituents and in our view, their express views must be considered by the Commission. Their views primarily go to upholding what they view as the unique lifestyle offered by the city of Toowoomba. They view 7 day trade as having the potential to seriously disturb the balance between retail opportunities and Toowoomba's lifestyle.
- [92] Our view on this component of s. 26 of the Trading Act is that, on balance, we are prepared to accept that there is marginally less consumer support than support for the application.

Consideration and/or finding re: (e) Business interest (whether small, medium or large)

- [93] Large businesses (within the context of this matter) are those represented by NRA. One of the concerns expressed by these businesses (within Grand Central and Clifford Gardens shopping centres) was that their major competitors are permitted to trade on Sundays while they are restricted from so doing. [Exhibit 2, Exhibit 7]
- [94] NRA believes that, notwithstanding the difficulty with the survey which was commissioned by them, there is significant consumer support for 7 day trade in Toowoomba.
- [95] The primary reasons proffered by NRA in support of its claims were as follows:
- 7 day trade in Toowoomba would ensure that consumers did not have to travel to other regions/cities to avail themselves of retail opportunities on a Sunday.
 - Shopping centres offer an important social interaction and family activity for consumers.
 - Extended trading benefits all stakeholders - retailers, customers and property-owners.

- Shopping centre managers are keen to invest in shopping centre infrastructures where benefits are generated for all stakeholders.
- Trading over 7 days ensures that overheads are minimised.
- Because tenant participation (in shopping centres) in Sunday and holiday trading is voluntary, there is no disadvantage to those otherwise exempt retailers if they chose not to open their stores on those days.
- Seven day trade would lessen confusion for tourists who most probably would be used to shopping on any day of the week. [Exhibit 16, point 8]
- The Queensland retail industry is the state's single largest employing industry. It is the largest employer in Toowoomba city accounting for more than 16% of total employment. Seven day trade opens up more opportunities for employment. [Exhibit 2, point 9(a)]
- "Sunday trade would ensure the continued allocation of funds for property investment to this state rather than a preference for investment flowing to the southern seven day trading states, where the performance of retail assets are able to be maximised.". [Exhibit 2, point 11]
- Sunday trade could also, over time, impact significantly upon the Superannuation fund members who are the owners of the assets. [Exhibit 2, point 15]
- Reference was made to the increase in dual-income households which has highlighted the need for more flexible shopping hours. [Exhibit 2, point 31]
- The scale and diversity offered by the larger retailers provides a greater service to customers. [Exhibit 4, point 8]
- Particular larger stores provide a service to target markets - e.g. Best & Less have a strong parents' market, particularly the larger households on lower incomes. In this store, the majority of customers are young parents. Seven day trade would provide a greater opportunity for these customers to shop at leisure on a Sunday. [Exhibit 14, points 5, 23]

[96] Evidence from Mr Wallace (Regional Retail Support Manager - Queensland, Woolworths Limited) was that:

"Customers appreciate the savings they make by being able to purchase food at supermarket prices on Sunday.

Young people that traditionally play sport on Saturdays now have the opportunity to earn an income (on Sundays).

Tourists or visitors whose schedule does not recognise any difference between the days of the week have benefited from shops opening on Sundays.

Sunday trade has contributed to a reduction in trading peaks on Saturdays which used to place pressure and stress not only on the store and staff, but also on consumers. Over crowding and over trading of the store on Saturdays is a cause of customer dissatisfaction and frustration.". [Exhibit 15, point 27]

[97] Mr Stirling (Managing Director, Lauder Pty Ltd) operates a family company which has developed the Highfields Village and other residential and commercial developments in the Toowoomba and Brisbane regions. Mr Stirling believed that the introduction of 7 day trade would substantially assist the local Highfields residents who have had to travel up to 13 km into the central business district or other parts of Toowoomba to look for "top up" grocery stores. Mr Stirling believed that the introduction of Sunday trade in Toowoomba would be important as it would "encourage development and improve the livability of our city". [Exhibit 10, point 7] The reasons for this are as follows:

- Toowoomba Regional Council is presently undertaking a CBD renewal design study. There is a fee of \$900K to undertake the study. Mr Stirling says that "unless the operational parameters are set up for proper Urban Renewal, such as Sunday trade, there will not be any developers willing to take the risk to invest in the Town Centre redevelopment". [Exhibit 10, point 7] Without Sunday trade, the centre of town would become a dead urban precinct.
- Sunday trade would ensure less congestion and less stress on the available parking in the central business district on Saturdays.
- Mr Stirling did not accept the argument that Sunday trade would adversely affect the uniqueness and livability of Toowoomba. He cited Brisbane, with its 7 day trade, as an example of a city which still continues to retain its livability.
- Employment on Sundays in Toowoomba has been a factor of life in Toowoomba for many years. It is not a novel concept. Those who work on a Sunday include employees within the hospitality or tourism industries, leisure and entertainment industries, in service stations, bakeries, take-away food outlets and cafes and restaurants, hotels, at markets and in all the retail outlets in Toowoomba which have been trading on Sundays for decades.
- Sunday trade will assist contractors, small businesses, tradespersons and others who typically work over 6 day per week.

- Sunday trade would also assist people in country areas who would otherwise be busy on a Saturday. Sunday would provide a free day upon which to do their shopping.
- Escape expenditure from Toowoomba is estimated to be \$133m per annum.

[98] While not all evidence given has been referenced, the above represents an acceptable cross-section of the NRA witness evidence and perspective, with the exception of evidence from Professor J. Mangan, Professor of Economics and Associate Dean (Research) University of Queensland. Professor Mangan's evidence was not specifically related to the application as it related to the city of Toowoomba. His analysis was more concentrated upon "the extensive research which has been undertaken into the socio-economic impacts of the deregulation of retail shopping hours, both in Australia and overseas". [Exhibit 5, Executive Summary]

[99] Professor Mangan said "a number of stylised facts are now well established into the medium and longer term impacts of shopping hours deregulation as a result of extensive research internationally and in Australia.". These include the following:

- After taking into account other explanatory factors, deregulation of shopping hours (especially Sunday trading) increases the aggregate level of retail spending by a significant degree.
- "Longer shopping hours (especially in times when consumers have more leisure time such as weekends) allow for more time to compare prices, search for bargains and make more efficient shopping decisions."
- "There are positive employment impacts as a consequence, in terms of total jobs, although the mix of employment between full-time, part-time and casual component may change.". There are greater opportunities for increased female and youth participation.
- "Some studies have found higher wages and increased total hours among retail employees following deregulation."
- Post-deregulation, shoppers tend to shop more between Friday and Sunday than the other days of the week.
- Consumer attitudes towards shopping change as shopping encapsulates entertainment and leisure components.
- There has been an increase in multi-functional shopping due to de-regulation.
- Where large firms are not more efficient than small stores, "deregulation can harm large stores by driving up their costs of extended trading". However, where large stores are more efficient, then increased hours benefits them in terms of sales growth in comparison to smaller outlets.
- Post 2000 deregulation in many areas, the market position of the major chains has not grown and the profit levels of the independent stores and their wholesaler Metcash have grown substantially.
- "The ACCC found that these smaller stores were using the advantages of location, flexibility and convenience to engage in extensive non-price competition with the major chains."
- "The ACCC also found that the absence of extensive price competition in the grocery market was not the fault of the major chains and noted the downward impact on prices brought by the entry of ALDI into the Australian market.". [Exhibit 5, Executive Summary].

[100] Professor Mangan also stated:

"While the overwhelming body of evidence has shown positive macro-economic effects from increased shopping hours both internationally and in Australia, in the short term some structural change may occur. Consumer preference for multi-purpose shopping has produced a long-term trend for some small single purpose outlets such as butchers and bakeries to decline in terms of percentage of total sales. These trends will continue with or without increases in shopping hours. The experience of shopping hours deregulation in Australia has shown that extended trading hours have allowed efficient producers to use the location, convenience and flexibility factors that extended shopping hours promote, to compete successfully in a post-deregulation world.". [Exhibit 5, Executive Summary].

Small business interests

[101] There was significant evidence adduced from small traders within the Toowoomba area. The primary points made by these witnesses are as follows:

- For some independently owned stores (e.g. Hannas), great reliance is placed upon the involvement of family members to maintain a viable business. The store opens from Monday to Friday, 8.35 a.m. to 5.15 p.m., with the exception of Thursday evening when the store opens to 8.00 p.m. and Saturday where the store is open from 9.00 a.m. to 1.00 p.m. By working in this manner, employees can have a day off on Sunday for "rest, worship and all important family gatherings". If the application was successful, it would represent "merely a shift in trading patterns leading to many unproductive periods during the week. This will have a direct effect on our ability to maintain regular stable working hours for our staff, all of whom have little desire to work on Sundays." [Exhibit 20, points 4, 5]

- Mr Wilson's store is the 5 Star Supermarket at Southtown. The business is a family owned, 7 day convenience supermarket that operates all days from 8.00 a.m. to 5.00 p.m. The weekend trade can represent up to an additional 50% on a normal day's trading. Mr Wilson believed that small stores had to stay open and trade because failure to do so would cause loss of employment and possibly loss of one's home. He anticipated that he may lose up to 25% of his profits if the application was successful. He also believed that he would also have to lose employees as well. [Exhibit 21, points 5, 7]
- Mr Gillam is the franchisee and operator of Boost Juice Grand Central, Health Habits Toowoomba and Bucking Bull Grand Central. All 3 stores are located within Grand Central shopping centre. Sixty casual staff are employed, from school age employees through to mature-aged employees. Mr Gillam believes that the introduction of 7 day trade would have a negative financial effect on his businesses. He holds this view after discussing the issue with other franchisees within the group who have changed their working days from 6 per week to 7. He believes that Thursday night and Saturday trade decreases by the amount of the Sunday trade. As well, one must consider increases in labour and electricity costs and product wastage. When shopping centres have been permitted to trade for the 2 weeks leading up to Christmas Day, there has been "mixed financial gain". Mr Gillam had conducted a small survey amongst other retailers in the centre to ascertain the views of the majority of store owners and operators. Unfortunately, while Mr Gillam sent the survey and its results to QRTSA, it was inadvertently not included in the material provided to the parties or the Commission. The QRTSA advocate stated that the survey had been sent to his organisation sometime after Mr Gillam's affidavit had been received and an error occurred on the part of QRTSA in not forwarding the survey to all relevant parties.
- Mr Rogers, owner/manager of Westridge IGA Convenience Store and the Wyalla Plaza IGA gave evidence that, if the application was successful, smaller traders would have to increase the price of their goods and that families would find it difficult to have time off work.
- Mr Henrick (Chief Executive Officer, National Association of Retail Grocers of Australia [NARGA]) gave the following evidence:
 - Deregulation of trading hours anywhere in Australia has led to a shift of market share to the 2 major supermarket chains, i.e. Woolworths and Coles.
 - In 1975, the market share of Woolworths and Coles was 34% and it is now close to 80%.
 - Despite the market share of those 2 chains, the independent grocery retailers, with 20% of the market, employ 57% of the full-time equivalent employees.
 - There was sufficient evidence from the United States of America that local businesses reinvest substantially greater percentages of their profits into local communities than do the retail chains.
 - "The exertion of market power by Woolworths and Coles down the supply chain to the farming and primary production sector impacts on the long-term survival of the primary production sector." [Exhibit 24, point 9]
 - Both chains offer illusory "benefits" to consumers, such as petrol discount shopper docket, which are clearly cross-subsidised by their other businesses, meaning that higher prices in markets where competitive pressures are low cross-subsidise the shopper docket discounts.
 - Reference was made to the various offers made by these chains to consumers - e.g. a QANTAS partnership for frequent flyer points and an offer to "pay the GST" on certain products. Both offers were an example of "illusory" benefits.
 - Price inflation of 4.7%, which is significantly above the inflation rate of 1.5%, highlights the fact that consumers are not well served by the market dominance of Woolworths and Coles. [Exhibit 24]

[102] Mr John Cummings (President, Western Australian Independent Grocers Association Inc and Chairman, of National Association of Retail Grocers of Australia [NARGA]) gave the following evidence:

- Western Australia has similar trading hours to that of Toowoomba where small to medium-sized retailers can trade extended hours by way of gaining a permit.
- Research undertaken in the deregulated markets of New South Wales and Victoria show that larger stores (e.g. Harvey Norman, David Jones and Myer) close their businesses at 5.30 p.m. or at the latest, 6.00 p.m. because there are no customers after that time. The only 2 retailers which stay open after those hours are Woolworths and Coles.
- The "Moss Report" into the Extension of Retail Trading Hours in South Australia showed that where there had been an extension of trading hours around the world, the only outcome was a shift in market share from the small traders to the larger traders.
- Mr Cummings claimed that this had a "multiplying effect" in local communities as "the number of service businesses supplying the retailers that lose market share also lost out." [Exhibit 25, point 6]
- The most pertinent example of this occurred with Bunnings in Western Australia. By way of regulation, that store was able to open extra hours some 12 years ago. This saw the demise of many independent hardware stores. This has resulted in a lack of competition generally.

Medium business interests

[103] There was no evidence drawn from any business which might be classified as a "medium" sized business. There was no evidence drawn from any retailers permitted to open for trade on a Sunday in locations such as the various Homemaker Centres.

Consideration and/or finding re: (e)

[104] The first consideration is that any major shopping centre within the boundaries of the application does not open on a Sunday because their major anchor stores (the non-exempt stores within those centres) are unable to trade on a Sunday. Many "exempt" retailers who operate businesses within those shopping centres can trade on a Sunday. That they choose not to, is understandable, when the anchor tenant is not open for trade on that day.

[105] The Full Bench is conscious of the fact that, surrounding the shopping centres, (e.g. those stores within the homemaker centres) the subject of this application, are many stores which sell identical goods to those within the shopping centres. Those stores are able to trade on Sunday. Those stores have a monopoly of trade on a Sunday for the types of goods which they sell.

[106] It may be the case that smaller traders would be impacted if the application were to succeed. The extent to which this might occur is always unknown. Usually, the only comparative direct evidence which can be given by small traders relates to the period pre-Christmas when the non-exempt stores can open on a Sunday. It has previously been stated that the pre-Christmas period is significantly different to the rest of the year. Buying patterns differ and it is reasonable to accept that consumers, for their Christmas shopping, might wish to undertake "one stop shopping" at a shopping centre where all of their shopping needs might be met without having to travel from one shop to another outside of the shopping centre environment. Within this context, caution is required when comparing this period of the year to the rest of the year.

[107] One of the major advantages for many small traders is the convenience factor. For many shoppers, the advantages of being able to park easily, to get in and out of a store quickly, and to get assistance if required to take goods to their cars should not be undervalued. Hence the term "convenience stores". Also, for many small traders, the advantage they have is being open at times when the larger stores are not trading - e.g. early in the morning or later in the evening.

[108] It is fair to say that for many small traders, the goods they offer are those immediately required by consumers (e.g. milk, newspapers, bread etc.). They are not competing with the major retail chains on many products peculiar to the larger stores (e.g. crockery, bed linen, clothing etc.). From the evidence heard in this case, the opposition to the application came from the small retailers whose businesses usually sold food items. Their interest centred upon the larger businesses (e.g. Coles and Woolworths) selling similar food items. However, there was also evidence given around the question of shopping centres *per se* and the desirability of having children congregating in such areas and that shopping centres lured consumers away from family oriented activities which had traditionally occurred on a Sunday in Toowoomba.

[109] The attraction for the consumer of the larger shopping centre is that all types of shopping can be conducted with relative ease. As well, we accept that for many consumers, shopping with the family at a major shopping centre represents a form of entertainment. There are a variety of stores to visit within a shopping centre and Sunday represents a more leisurely day upon which to undertake shopping.

[110] In our view, there has been a strong argument mounted by larger businesses that the economic spin-off effect of a successful application would benefit employees, the community (through more competitive prices and variety of goods) and the economic base of Toowoomba, by way of capital investment. In our view, on the basis of what is required to be considered under this section of s. 26 of the Trading Act, the more meritorious evidence and submissions have been presented on behalf of larger businesses.

(f) the alleviation of traffic congestion

[111] There was some evidence around the question of traffic congestion. The evidence was more to the point that there was congestion in the central business district of Toowoomba on a Saturday, and 7 day trade may assist in alleviating that problem. [Exhibit 10, point 7]

Consideration and/or finding re: (f)

[112] That evidence is noted. However, there was insufficient evidence around the issue to place particular weight on this element of s. 26 of the Trading Act.

(g) the likely impact of the order on employment

- [113] Each of the retailers who would be able to open their stores if the application was to be granted attested to providing more hours for employees. [Woolworths: an additional 1,365 employment hours per week equalling 70,000 employment hours per year; Coles: an additional 120 to 170 employment hours per week; Kmart Australia: an extra 8,320 employment hours per year; Big W: 244 additional employment hours per week; and Target, in its Townsville/Thuringowa stores experienced an extra 14,700 employment hours per year when 7 day trade was introduced.
- [114] For the smaller traders, most anticipated that they would either lose staff if the application was successful, or alternatively they would have to reduce working hours for current employees. However, no detailed figures were provided.

Consideration and/or finding re: (g)

- [115] The increased employment hours which would be created if the application was successful is significant. The jobs which could be lost are an unknown factor, but it is accepted that any job losses are matters for concern.
- [116] In our view, the likely impact upon employment is that increased employment hours will be made available for either current or new employees if the application was granted and the extra hours of employment are significant.

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

- [117] The local government authority, the Toowoomba Regional Council, has taken a neutral stance on this application.

Consideration and/or finding re: (h)

- [118] There is no finding to be made under this consideration.

(i) such other matters as the industrial commission considers relevant

- [119] There are no other matters for consideration.
- [120] The Full Bench has accepted that employees would only be engaged to work on a Sunday in a voluntary capacity.

Conclusion

- [121] The Commission is required to consider all the factors detailed in s. 26 of the Trading Act.
- [122] When considering the locality in which the non-exempt shop or class of non-exempt shops are situated, it is clear from the inspections and evidence that there are a range of retail stores within this locality.
- [123] These stores include small "exempt" traders whose businesses primarily sell food products. These stores rely upon their location and convenience for attracting consumers generally. Many of the medium sized "exempt" stores are contained within Homemaker Centres, for example. These stores include Harvey Norman, The Good Guys, Rugs a Million, Freedom, Curtain Wonderland, Carpet Call, Bunnings and A Mart Furniture. These stores can trade on Sundays. There was no evidence from any proprietors of these stores.
- [124] Of the enclosed shopping centres within the location under consideration, these centres contain both exempt and non-exempt stores. The non-exempt stores are usually the anchor tenants for the centre and when they trade, so do the smaller exempt stores. It is fair to state that if the application was successful, many of these exempt stores would trade on Sunday as well.
- [125] Considering the location under consideration, it is clear that there a number of stores at which consumers can purchase many products over 7 days per week.
- [126] When considering the needs of the tourist industry or that of an expanding tourist industry, it is noted that Toowoomba, like most other centres which usually attract tourists, has suffered as a consequence of the global financial crisis. The consideration of the tourist industry and the needs of an expanded tourist industry require, to some degree, consideration within this context. What was not refuted was the number of day visitors to Toowoomba, which has grown each year.

- [127] When considering the needs of tourists and the tourism industry generally, any application for an extension of trading hours would have to consider the affect and aftermath of the global financial crisis and any impact that might have had on the tourism industry. In the circumstances of this case, the Full Bench accepts the evidence from Mr Gschwind where he stated that tourism had held its own without any significant growth.
- [128] Of significance was Mr Gschwind's evidence which highlighted the tourism accounted for more than 50% of employment in accommodation, cafes and restaurants, 21% of the retail industry, 19% of the cultural and recreational industry and 13% of the transport and storage industry. The "multiplier effect" of the expanded tourist dollar has been considered a significant factor in our consideration. The Full Bench acknowledges the nexus between tourism and retail shopping.
- [129] We have previously stated that the only available evidence gauging consumer support for the application showed that consumers were, at the margin, not supportive of the application. In our view, for reasons previously outlined, it would be unwise to draw any firm conclusion from the various surveys conducted.
- [130] We believe the more meritorious submissions around the interests of small and large business have been provided by the NRA through its witness evidence, for reasons previously stated.
- [131] The impact upon employment would be positive if the application was granted.
- [132] Having weighed all the considerations referred to in s. 26 of the Act, we propose to grant the application.
- [133] The operative date for the amendment to the Order is 16 May, 2010.
- [134] NRA is directed to prepare and file a draft Order in the Registry within 22 days of the date of release of this decision.
- [136] Order accordingly.

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

J.M. THOMPSON, Commissioner.

Hearing Details:

2009 2, 4, 14, 17, 18 September
5, 6, 15 October
13 November

Released: 5 March 2010

Appearances:

Mr J. Moore, of National Retail Association Limited, Union of Employers.
Mr L. Keane, of Neumann & Turnour Lawyers, and Mr K. Murphy, of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).
Ms P. Town, of Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.