

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/2011/4)

TRADING HOURS NON-EXEMPT SHOPS TRADING BY RETAIL - STATE

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER BROWN

16 December 2011

DECISION

TOWNSVILLE, THURINGOWA AND TOWNSVILLE TOURSIT AREA

[1] The National Retail Association Limited, Union of Employers (NRA) has made an application to the Queensland Industrial Relations Commission (the Commission) to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* Order (the Order) to vary the Trading Hours regime in the Townsville region.

[2] The amendment sought is as follows:

"1. By deleting clause 3.2(10) 'Townsville Tourist Area'

2. By deleting clause 3.2(15) 'Townsville and Thuringowa Area (excluding the Townsville Tourist Area)', and inserting in lieu thereof:

(15) Townsville Area:

	Opening Time	Closing Time
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturday	8.00 a.m.	5.30 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.

3. In Schedule 1 - 'Definitions':

(a) by deleting clause (9) 'The Townsville Tourist Area'

(b) by deleting clause (22) 'Townsville and Thuringowa Area (excluding the Townsville Tourist Area)' and inserting the following in lieu thereof:

(22) *Townsville Area* - The local authority area of the City of Townsville."

[3] The affect of the application is twofold. Firstly, if granted, the application will remove the separate trading hours provisions applying to "The Townsville Tourist Area" (the Tourist Area) and "The Townsville and Thuringowa Area (excluding the Townsville Tourist Area)" (the Suburban Area) from the existing Order and to establish a single trading hours area comprised of the local authority area of the City of Townsville. Secondly, the application seeks to extend trading hours on a Sunday for all non-exempt stores located outside the existing Tourist Area, with trading to commence at 9.00 a.m. instead of 11.00 a.m., such that all stores within the local authority area will be able to open at 9.00 a.m. on that day of the week.

Relevant legislation

[4] 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."

[5] Section 26 of the Trading Act states:

"26 Matters relevant to s 21 order

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

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

Participants in the proceedings

- [6] In addition to NRA as the Applicant, The Australian Workers' Union of Employees, Queensland (AWU), Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA), Master Grocers Australia (MGA), the Local Government Association of Queensland Ltd (LGAQ) and the Townsville City Council (TCC) each sought leave, and was granted, a right to participate in the proceedings as an interested party.
- [7] NRA's application was opposed by QRTSA, MGA, LGAQ and TCC. The AWU's position was that it did not oppose the application.

Inspections

[8] As part of its consideration of NRA's application, the Full Bench of the Commission conducting this hearing was taken on inspections of the Suburban Area as well as the Tourist Area. The inspections included a drive by of the Domain Central Homemaker Centre precinct as well as the major suburban enclosed shopping centres and a number of neighbourhood and smaller regional shopping centres, as follows:

- Willows Shopping Centre (Willows) - drive by;
- Stockland - drive by;
- Castletown Shoppingworld (Castletown) - walk through;
- Stockland North Shore (North Shore) - drive by;
- Centro Townsville Shopping Centre at Aitkenvale (Centro Townsville) - drive by;
- Vincent Centre - drive by;
- Annandale Central - drive by;
- Fairfield Waters - drive by;
- Hermit Park Centre - drive by;

[9] The Full Bench also undertook a drive by of the Bi Lo store and Woolworths store located in the existing Tourist Area as well as a walk through of the recently redeveloped Flinders Street Mall precinct.

Witnesses called by the respective parties in support of their case

[10] NRA called evidence from the following persons (listed in order of appearance):

- Mr William Cummings, Principal of Compass Research which conducted market research regarding consumer views in relation to the application;
- Mr Gerard Winzenberg, Queensland District Manager for Target Australia Pty Ltd. Target has two stores in the Townsville area, one located in Castletown and the other at Willows;
- Mr David Stout, State Compliance Manager for Coles. Coles has four stores that would be affected if the application is successful. These are located at Centro Townsville, the Rising Sun Shopping Centre at Mundingburra, Willows and Annandale Central. Coles also has a Bi Lo store in the existing Tourist Area at North Ward;
- Ms Sandy Prosdocimo, Owner/Manager of Wendy's, located in Castletown. This store has been operating since September 2010;
- Mr Scott Wallace, Regional Retail Support Manager in Queensland for Woolworths Limited. Woolworths has ten stores affected by the application, located at Castletown, Fairfield Central, Hermit Park, Kirwan, Nathan Plaza, Vincent, Willows, Woodlands, the Avenues and North Shore;
- Mr Charles Hammersla, National Compliance Manager Facilities for K-Mart Australia Limited. K-Mart has one store which would be affected by the application, at Centro Townsville;
- Mr Andrew Thompson, Owner/Manager of Jamaica Blue Coffee Shop, located in Castletown. This business commenced operation in September 2010 after an expansion of Castletown;
- Ms Debi Tolcher, Retail Manager for Stockland Townsville and the Centre Manager for North Shore (both shopping centres). Stockland Townsville comprises over 120 stores and is undergoing a \$180 million redevelopment. This will house Townsville's first Myer store and a new 4,500m² Woolworths store, with an additional 60 specialty stores. North Shore is located in the suburb of Burdell and is a neighbourhood centre anchored by a new concept Woolworths supermarket with 13 other specialty stores;
- Mr Jeffery Gooch, Senior Centre Manager for McConaghy Retail Pty Ltd, Owner of Castletown;
- Ms Belinda Hartas, Centre Manager for Centro Townsville and Centro Woodlands. Centro Townsville is anchored by a Coles store and the region's only K-Mart store and has 27 specialty retailers. Centro Woodlands is located in the suburb of Deeragun and is anchored by a Woolworths supermarket with 17 specialty retailers;
- Ms Melynda Peppas, Store Manager for Big W at Willows. Big W operates three stores in the area affected by the application. These are located in Willows, Domain Central and Castletown; and
- Mr Bill Lysaght, Regional Manager for Queensland for Best & Less Pty Ltd. Best & Less has three stores which would be affected by the application. These stores are located in Willows, Castletown and Nathan Plaza. A fourth store, located in the existing Tourist Area, closed at the end of August 2011.

[11] MGA called the following witnesses:

- Mr Bernd Hartmut Scharf, Owner/Operator of Foodworks at Warrina and Owner of the Warrina Shopping Centre. Mr Scharf has operated his store since 1994 and has given evidence in previous hearings involving trading hours applications relating to Townsville; and
- Mr Kenneth Henrick, Chief Executive of the National Association of Retail Grocers of Australia (NARGA). He gave evidence about the impact deregulation of trading hours was said to have on independently owned and operated small and medium sized businesses in the grocery retailing sector.

[12] LGAQ and TCC (which were jointly represented) called evidence from the following persons (in order of appearance):

- Mr John Carey, President of the Townsville Chamber of Commerce. The Chamber comprises approximately 520 members, 75-80% of which are small business operators with less than ten full-time employees;
- Mr David Crisafulli, Deputy Mayor of TCC. TCC has recently undertaken a redevelopment of the Flinders Street precinct including the Flinders Street Mall, at a cost of around \$56-57 million, as part of TCC's overall strategy to revitalise Townsville's central business district (CBD);
- Mr David Lynch, Manager of the Economic Development and Strategic Projects Department of TCC. Mr Lynch gave evidence about the newly released Townsville CBD Master Plan;
- Ms Lucy Downes, Proprietor of Gecko Interiors which is located in the former Flinders Street Mall (at 280 Flinders Street, Townsville). Between 1998 and 2006 her store was located within Castletown but relocated to Northtown, in the Flinders Street Mall, later in 2006.

Consideration of the evidence in accordance with the provisions of the Trading Act

(a) Locality

- [13] NRA's application described the city of Townsville as the largest urban concentration outside South East Queensland with an existing population of 180,000 persons. Average annual population growth in recent years has been above the State average, with continuing above average growth bringing the area's expected population to over 218,000 people by 2016.
- [14] Townsville is a key regional hub in North Queensland and provides many key services to the region because of its situation on the A1 National Highway and the A6 Flinders Highway. It is the northern link for many State and Federal Government Departments, as well as for private enterprise in primary and secondary industries, mining, commerce, retail and community and cultural services. In addition, the North Coast railway line passes through Townsville, with the City being a major destination for rail freight services, including containers. Many goods received at the freight depot are transported by road and rail to other destinations in North Queensland and Far Western Queensland.
- [15] The city houses the James Cook University, the Laverick Army Base and the Townsville RAAF base. The Townsville Hospital is the largest hospital in Australia outside of a capital city and services northern communities all the way up to Papua New Guinea. The Hospital, which is located less than 500 metres from the James Cook University, is also one of only 11 teaching hospitals in Australia.
- [16] Townsville also has a significant port facility at the mouth of the Ross River. The port handles cement and nickel ore, for processing at the nearby Yabulu nickel refinery, and is also an export point for sugar and other products from mines in western and north-western regions of the State, including copper and zinc originally mined in Mt Isa.
- [17] NRA said that tourism is an important component of the Townsville economy, with the region serving as a gateway to the Great Barrier Reef, nearby islands, the rainforest and the outback. The city attracted almost one million overnight visitors as well as over 1 million daytrip visitors in the 12 months to September 2010. Tourism made an important contribution to the local economy, with Townsville accounting for around 5% of total domestic visitation in Queensland.
- [18] A number of daytrip visitors and other visitors come to Townsville to attend National sporting competitions, including those conducted by the National Rugby League and National Basketball League.
- [19] NRA also pointed to the evidence of Cr Crisafulli relating to a number of planned and current projects, including:
- a new Army Battalion in January 2012 (1,500 persons including Army personnel and their families);
 - a new ocean liner terminal operational in mid-2013?;
 - commencement of Queensland Nickel's second production line in 2011 (at Yabulu); and
 - a new \$120 million Marine Industry Precinct which will be operational by the end of 2011.

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

(c) The needs of an expanding tourist industry

Tourist industry

- [20] In addition to Townsville acting as a hub for tourists to visit the Great Barrier Reef, tropical island, the rainforest and the outback, NRA's submissions highlighted the existence of a number of other tourist facilities in Townsville, including:
- The Museum of Tropical Queensland;
 - Great Barrier Reef Wonderworld;
 - Living Aquarium;
 - Imax Theatre;
 - The Billabong Sanctuary;
 - Magnetic Island; and
 - The Strand.
- [21] NRA also referred to the evidence of Mr Cummings and Cr Crisafulli, which confirmed there were almost one million overnight visitors as well as an estimated 1.6 million daytrip visitors to Townsville annually. Overnight visitation increased 8% on the previous year but was almost entirely attributable to increases in the visiting friends/relatives (VFR) and business categories, which increased 18% and 21% respectively, more than offsetting the 18% decline in holiday visitors.
- [22] NRA submitted that while many of the holiday visitors would concentrate their attention to the existing Tourist Area it was highly likely that many of the visitors in the VFR and business categories, as well as daytrip visitors, would be exposed to the Suburban Area during their visits. Indeed, Ms Prosdocimo and Mr Thompson said that they and their staff were regularly asked by visitors on Sunday mornings why the major retailers in Castletown were not open before 11.00 a.m.

Other industry

- [23] NRA submitted that the needs of the retail industry should be considered under this criterion, arguing that it is "common knowledge" that most segments of the retail sector have faced extremely difficult trading conditions over the past two years. Current conditions were such that the possibility of a recovery through 2012 was looking increasingly unlikely due to world economic conditions. It was argued that granting of the application would assist to stimulate some growth in the local retail economy, providing additional employment opportunities and incremental sales growth.
- [24] Reference was also made to the evidence of Ms Tolcher and Mr Gooch who referred to the significant expansions, either currently underway or recently undertaken, at their respective shopping centres of Stockland and Castletown. Each of these redevelopments involved considerable expenditure and a significant increase in gross lettable area. Many retailers in these centres who were willing to trade from 9.00 a.m. on Sundays, were prevented from servicing the significant numbers of people queuing outside non-exempt retailers prior to 11.00 a.m., waiting for them to open. This restriction limited retailers' and the shopping centre owners', return on investment.

(d) The needs and expanding population

- [25] NRA pointed to the evidence of Mr Cummings in which he said that the population in the local area had grown at 3.2% per annum over the 2004-09 period which was significantly higher than the Queensland average growth over the same period of 2.6%. Mr Cummings also said that data provided by the Office of Economic and Statistical Research showed that population growth in Townsville was projected to continue to outpace the Queensland average (2.0% versus 1.7%) in the period 2006 to 2031. Further, in the 12 month period to 31 December 2010 there were 1,423 new residential dwellings approved, representing a value of \$361.5 million. This data was indicative of strong population growth in the area affected by the Application.
- [26] Other data presented by Mr Cummings revealed:
- 2006 census data recorded that Townsville residents had a 4% higher average annual wage and salary income than the Queensland average;
 - the unemployment level in the area, of 4.3% at September 2010, was substantially lower than the Queensland average of 5.6%; and
 - the retail industry is the second largest employer in the area, at 11% of all employment (slightly lower than the State level of 11.6%).

[27] NRA also pointed to Cr Crisafulli's evidence to the effect that Townsville's population was predicted to grow by 37% between 2008 and 2021 and by a further 18% between 2021 and 2031. This was said to represent growth of between 3.5% and 4.1% over the next ten and 20 years, respectively.

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

Public interest

[28] NRA argued that different shopping hours in different areas was a cause of unnecessary confusion for travellers and visitors when moving through Queensland. It said that at least 90% of Queensland's population now reside in areas where Sunday trading is permitted. Only Yeppoon and the Suburban Area do not permit a 9.00 a.m. opening (where Sunday trading is allowed). Having two sets of regulated Sunday trading hours in one city was said to be particularly confusing and detrimental to non-exempt retailers located outside the Tourist Area. The introduction of uniform trading hours throughout the local authority area of Townsville would minimise confusion and inconvenience for visitors and contribute to a more equitable and sensible set of arrangements for residents.

[29] NRA said that a telephone survey of 300 Townsville residents undertaken by Mr Cummings showed that almost a quarter of respondents (23%) did not care whether shops were able to open at 9.00 a.m. instead of 11.00 a.m., while 55.2% of those who had a view on the additional trading hours sought on a Sunday supported its application. However, with respect to the NRA's submission, Mr Cummings survey needs to be considered in full, rather than selectively. What the survey actually showed was that only 42.7% (128 persons) of the 300 persons surveyed "would like all retailers in Townsville to be able to open on Sundays from 9.00 a.m.", while 34.7% (104 persons) were opposed to opening at that time, with 22.6% (68 persons) not caring either way.

[30] On the other hand, Cr Crisafulli said that he and the other 12 TCC Councillors, particularly himself, made it their business to be "in tune" with the views of local residents. It was his position, based upon his extensive discussion with other Councillors and residents, that many people in the City were opposed to any changes in the existing trading hours regime.

Consumers' interest

[31] A number of NRA's witnesses (particularly Ms Peppas from Big W at Willows) gave evidence about the number of shoppers congregating outside the doors of the larger non-exempt retailers, especially in the enclosed shopping centres, waiting for those stores to open at 11.00 a.m. on Sundays. Ms Peppas said it was common for 60 to 80 customers to be gathered outside the store at 11.00 a.m. on Sundays.

[32] Data in the witness statement of Mr Stout (paragraph 21 of Exhibit 5) showed the rapid rise in trading volume in its Annandale store in the first half an hour or so of trading on Sundays compared to the trading level of the same store on Saturdays, as well as a comparison between the Annandale store on a Sunday and the Bi Lo store in North Ward, which opened at 9.00 a.m. on Sundays. Mr Stout said that the immediate high volume of activity as the Annandale store opened on a Sunday caused unnecessary congestion and placed additional demands on staff in relation to servicing and maintaining stock levels.

[33] Data produced by Mr Wallace (paragraph 40 of Exhibit 7) showed that the average volume of sales per hour on Sundays was higher than on any other day of the week in seven out of its ten stores affected by the application while it was the second busiest volume of trade by hour, behind Saturdays, in its three other stores in the region. Like Mr Stout, Mr Wallace said that the high trading volumes on a Sunday placed substantial demands on staff to maintain service delivery standards and to keep items in stock. A 9.00 a.m. opening would allow for a more gradual commencement of trading and would allow Woolworths to better meet consumer demands.

Business interest

[34] The majority of those witnesses who supported NRA's application could be described as representatives of large non-exempt business or representatives of major shopping centre owners.

[35] Without being exhaustive, NRA's witnesses advanced the following general arguments to support the extension of trading hours on a Sunday from 11.00 a.m. to 9.00 a.m.:

- the late opening time on a Sunday is a constant cause of criticism from customers, with many customers often having waited outside stores for a considerable period of time for the doors to open;
- the high concentration of trading on a Sunday placed considerable pressure on staff as well as creating congestion for customers;
- an earlier commencement of trading on Sunday would help redistribute sales across nine hours of trade, rather than seven hours;

- earlier Sunday trading would reduce the immediate spike in trade as the store opened and redistribute it across a greater number of trading hours;
- the current 11.00 a.m. opening time on a Sunday is a cause of unnecessary inconvenience and frustration for customers;
- on a per hour basis, Sunday trading is the busiest day of the week in a number of stores;
- an earlier opening time would help spread this trade across a greater number of hours, allowing for better service delivery to customers; and
- additional Sunday trading would allow at least one of the businesses concerned to maximise its sale volumes because it advertised on television on Wednesday nights and most people are paid towards the end of the week. Further, additional Sunday trading would allow it to maximise sales as a result of the distribution of catalogues on the weekends because the details of the catalogue would still be fresh in peoples' minds.

- [36] Two small retailers, being Ms Prosdocimo of Wendy's and Mr Thompson of Jamaica Blue Coffee Shop, supported NRA's application. Both of these retailers, located in Castletown, said they expected an increase in sales volume if the non-exempt stores in Castletown were allowed to open earlier. These same retailers said that, at the moment, a number of consumers already came into Castletown when the doors opened around 9.00 a.m. However, this traffic volume was expected to increase, as was their sales volume, if the non-exempt retailers were allowed to open earlier.
- [37] Mr Scharf, of Foodworks Warrina, strongly opposed any further extension of trading hours for non-exempt stores, such as Coles and Woolworths, because of the detrimental impact an earlier opening of stores belonging to those companies would have upon his business.
- [38] Mr Scharf based his opposition on his experience following the last deregulation of trading hours in Townsville, in July 2007 when non-exempt stores in the Suburban Area were given approval to trade between the hours of 11.00 a.m. and 6.00 p.m. on Sundays. He said that his total turnover reduced significantly following that change such that it was now approximately one third of the sales volume he enjoyed prior to 2007. Further, the number of staff he employed had reduced from 16 full-time staff and 22 casual staff to 3 full time staff and 19 casuals.
- [39] In addition to his concern about the future of his Foodworks store, Mr Scharf was also concerned about the future of the Warrina Shopping Centre, which he owned, if further deregulation of trading hours was permitted. At the moment, other retailers in the Centre were heavily dependent upon the viability of his store to maintain traffic through the shopping centre. If his store was forced to close he believed he would inevitably lose tenants in the Warrina Shopping Centre.
- [40] Ms Downes, of Gecko Interiors, also opposed NRA's application. In doing so she expressed grave concern about the viability of her business if non-exempt retailers in the Suburban Area were permitted to trade from 9.00 a.m. on Sundays. Ms Downes said that while she was trading in Castletown she was restricted, by lease conditions, in terms of the particular classes of product she could stock and sell. As a result of her move to the Flinders Street Mall she was able to alter her product range to meet consumer demands and to move with purchasing trends.
- [41] In the immediate period following the her move to the Flinders Street Mall she found that Sunday was Gecko's busiest trading day, with approximately 30% of the value of her total weekly sales being made before 12 noon on that day. However, when Sunday trading commenced in the Suburban Area in 2007 her sales were immediately impacted and ceased to improve. As a result of the official reopening of the Flinders Street Mall precinct in June 2011, only weeks before she prepared her witness statement, she had seen an immediate surge in her trade which she believed to be a direct result of the redevelopment. Her Sunday trading figures had rebounded to the extent where they represented 30% of weekly sales (as they had essentially done previously).
- [42] Ms Downes expressed her concern that the granting of the application would immediately provide an advantage to suburban shopping centres in terms of their convenience, marketing and price and that the potential which the Flinders Street Mall redevelopment promised would not be realised. In her view this would be a loss to the Townsville community as well as to small retailers such as herself.

(f) The alleviation of traffic congestion

- [43] NRA submitted that the evidence provided by its witnesses disclosed significant consumer traffic congestion on Sunday mornings in suburban shopping centres. This was because of queuing outside of non-exempt stores prior to 11.00 a.m. and congestion within stores immediately after that time.
- [44] NRA said that it had been unable to locate any reference as to the intention of the Government at the time of the creation of the Trading Act that would indicate an intention to limit the consideration under this criterion to vehicular traffic. On this basis, NRA submitted that it was also appropriate for the Full Bench to consider pedestrian traffic within this criterion.

[45] While we accept that a previous Full Bench of the Commission has referred to consumer traffic as being a relevant consideration against the criteria mentioned at s. 26 of the Trading Act, we believe, with respect to that Full Bench, that this heading contemplates alleviation of vehicular traffic congestion rather than consumer traffic congestion. As such, we note that there was no evidence presented during these proceedings as to what impact, if any, granting of NRA's application would have on vehicular traffic.

(g) The likely impact of the Order on employment

[46] Most of the non-exempt retailers who gave evidence identified the likely positive impact on employment levels if NRA's application was granted. The estimates of the additional hours of employment they provided were as follows:

- Mr Winzenberg for Target - 40 additional hours per week;
- Mr Stout for Coles - 120 additional hours per week;
- Mr Wallace for Woolworths - 368 additional hours per week;
- Mr Hammersla for Kmart - 832 additional hours per annum (16 hours per week); and
- Mr Lysaght for Best & Less - between 10 and 20 additional hours per week.

[47] Each of these witnesses confirmed that if NRA's application was granted work on Sundays would be voluntary for existing employees. In response to questions from the AWU they assured that Union, and the Full Bench, that no employee would be adversely affected should they decline to work on a Sunday or during the additional hours of trade on a Sunday sought in NRA's application.

[48] As noted above, Mr Scharf gave evidence that he would need to review the viability of his Foodworks store if the application was granted. If the store was closed there would be the loss of three full-time staff and 19 casuals. There might also be a consequential (unquantified) loss in overall employee numbers if some of his tenants also decided to close their doors.

(h) The view of any local government

[49] Cr Crisafulli, who was authorised to represent TCC in the proceedings, voiced TCC's strong opposition to NRA's application. In doing so, he provided a number of reasons why TCC had adopted that position.

[50] Firstly, TCC considered that NRA's application failed to achieve a balance between freedom of trade and the betterment of the Townsville community through encouraging and facilitating attendance at community activities and the like. TCC believed that the right balance has existed for the last four years and viewed NRA's application as an attempt to disturb that balance in a way that TCC, on behalf of its community, has traditionally campaigned against. TCC considered Townsville presently achieves a balance between being a progressive city and a place where family and community still matter.

[51] Secondly, TCC believed that retailers in the redeveloped Flinders Street Mall precinct have experienced a great degree of hardship during the construction phase of the redevelopment project over the 15 month period up to June 2011. CBD retailers, including traders in Cotters Market, were only just starting to get back on their feet following the conclusion of construction. They now faced the further challenge of potentially competing against major retailers in suburban shopping centres drawing customers away from the CBD on Sunday mornings.

[52] Thirdly, TCC considered that NRA's application will have the effect of reducing the trade of small retailers in the Tourist Area by encouraging a significant number of their current patrons not to visit the CBD area but, instead, to shop in the large suburban shopping centres on Sunday morning. If that reduction in trade led to the closure of some small retailers in the city then TCC considered there would be a further long-term effect of reduced competition in favour of the major retailers.

[53] Elsewhere in his evidence Cr Crisafulli said TCC planned for the CBD worker and resident population to increase from approximately 14,000 persons currently to reach 30,000 by 2030 as a result of TCC's plans to revitalise the CBD.

[54] Under cross-examination by Mr J. Moore, who represented NRA, Cr Crisafulli gave the following evidence:

- one of the key reasons for TCC's opposition to the application was its desire to protect the CBD and the small business sector;
- TCC prided itself on having a great sense of community and made a conscious effort to run events on a Sunday morning;

- recent successful events included: a junior fishing competition; a junior triathlon; an open day at a new swimming pool; a Heritage Day;
- Sunday morning was well known in the region as "community time";
- Townsville was a city coming of age but was a place where people still mattered. A big part in that approach was maintaining a great balance and keeping Sunday morning as a "special time";
- the decision to oppose NRA's application was reached unanimously by the Mayor and 12 Councillors. That group comprised people of a variety of backgrounds, political persuasions and occupations, including some who had previously worked for Coles and Woolworths;
- since the Suburban Area was granted approval to trade from 11.00 a.m. on Sundays in 2007, TCC had taken the decision, supported by the Commonwealth and State Governments, to spend over \$56 million in redeveloping the Flinders Street Mall precinct in an attempt to make the CBD viable;
- the expenditure of that money had been a conscious attempt to try to create a point of difference between the CBD and suburban shopping centres because the CBD was struggling;
- TCC had worked hard to better the community and he believed it was now striking "*the perfect balance between a city that has the facilities it needs but that is also a place where people still matter.*";
- the city's strong growth was something which occurred "*on the back of having a point of difference and that is of being a strong lifestyle place that balances big and small.*";
- TCC had undertaken surveys which showed that three quarters of visitors to the city never left postcode 4810 (the CBD), which is one of the reasons why the existing differential in trading hours was granted by the Commission in 2007; and
- while the suburban shopping centres were successful and did a great job, it was TCC's hope that the Flinders Street Mall redevelopment, provided it was given an opportunity to provide its point of difference, could do the same.

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

NRA submission

- [55] Under this heading, NRA referred the Commission to a draft report on the retail industry released by the Productivity Commission on 4 August 2001. NRA said a chapter of that draft report was dedicated to the issue of trading hours which concluded with draft recommendation 9.1, as follows: "*Retail trading hours should be fully deregulated in all States (including on Public Holidays).*".
- [56] NRA also said that the draft report provided that there are good reasons why trading hours in Australia should be fully deregulated:
- increased consumer welfare benefits associated with greater convenience and product choice;
 - reduced discrimination and greater competition between retailers;
 - a less artificially distorted retail sector; and
 - potentially lower retail prices and higher retail employment.

Flinders Street Mall precinct redevelopment

- [57] Mr Lynch, as a further representative of TCC, said that over the past four decades there had been a significant transitioning and decline in the Townsville CBD. This had been particularly so since the 1970s with the advent of suburban shopping centres, particularly Castletown. High end main street shopping had moved to suburban shopping centres with their relative comfort and ease of access. The growth in suburban shopping centres had resulted in a major decline in main street retail, amenity and property values in the CBD.
- [58] In June 2001 TCC released the new Townsville CBD Master Plan, with the redevelopment of Flinders Street Mall (at an approximate cost of \$57 million) a preliminary step in the overall Master Plan. Mr Lynch said that a primary motivator for TCC in the redevelopment of Flinders Street was the revitalisation of the CBD, with a focus on retail.
- [59] Mr Lynch also said the Master Plan acknowledged the importance of the CBD as a window to the Townsville regional community. Accordingly, it was vital that the growth, confidence and pride shown throughout the Townsville area was reflected in the CBD. The new CBD had the potential to attract high end main street retailers which would enhance the cosmopolitan atmosphere of a thriving city heart.
- [60] One of the main focuses of TCC, as well as the Federal and State Governments which helped fund the Flinders Street redevelopment, was to invigorate the retail offering through direct investments, incentives, promotion and facilitation of development. This was evidenced in the recent release of the CBD Development Incentives Program to promote private investment in redevelopment of the land available in the CBD. Traditionally the CBD was industrially based, however over time it had transitioned into a more service-oriented base with the

opening of professional offices. There were significant areas of land available for development within the CBD that had existing services such as roads, footpaths, drains, water, sewerage and parks. The existence of these services meant that TCC and potential developers would save on costs in the redevelopment of the land.

- [61] TCC introduced the CBD Incentive Program in March 2011 with the intention to leverage off investments and physical infrastructure and to promote private investment. As part of the Incentive Program TCC will provide:
- a development advocate to assist with development applications;
 - direct financial concessions on head works;
 - remissions on land rates during construction; and
 - concessions on parking requirements.

It was estimated that the Incentive Program will cost approximately \$7 million over the next four to five years, which was a significant investment by TCC in the CBD's revitalisation.

- [62] Revitalisation of the CBD also involves the relocation of the Entertainment Centre to Deane Street which is within walking distance of the CBD. This proposed \$142 million investment, of which \$95 million has already been raised by TCC, is based on utilising the amenities to be provided by the revitalised CBD.
- [63] Mr Lynch said that since the last application for extended trading hours in 2007 (see immediately below) TCC had made significant investment in the CBD and was now at a point where that investment could be realised. It was therefore vitally important that the CBD be given every opportunity to flourish and to achieve its potential. Mr Lynch also opined that extended trading hours in the Suburban Area would negatively impact on the CBD and its redevelopment and would therefore be counterproductive to TCC's plans and the community's wishes for revitalisation. It would also be contrary to the aim and intent of the Master Plan.
- [64] Mr Lynch said that Rotary operated two Sunday morning markets being the Cotters Market, which takes place in the CBD, and the Willows Markets, which takes place in the car park of Willows. Subsequent to the last application for extended trading hours in 2007, the hours for the Willows Market were reduced from a 12.30 p.m. closing to an 11.00 a.m. closing (to coincide with the opening of the non-exempt stores). Mr Lynch also expressed the view that "*it is known that Sunday is the most profitable trading day for CBD retail, with this significantly being due to the appeal of the CBD Cotters Markets and the lack of alternative retail offering.*".

The 2007 Suburban Area trading hours' case (the 2007 Decision)

- [65] In July 2007 a Full Bench of the Commission considered an application by NRA which, in effect, sought to allow all non-exempt retailers in the Townsville and Thuringowa local government areas to trade between 9.00 a.m. and 6.00 p.m. on Sundays (*National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others*¹).
- [66] In those proceedings TCC opposed the application to the extent that it would allow trading in suburban non-exempt retail stores between 9.00 a.m. and 11.00 a.m. on a Sunday. In doing so, TCC informed the Full Bench which decided that application that a primary motivation for the position it adopted was its desire to strike a balance between the competing social and community views as well as its interests in the Cotters Market and the CBD revitalisation.
- [67] The 2007 Decision traversed much of the history of trading hours' applications in Townsville and fully explained the Commission's reasons for establishing the present trading hours regime which allows non-exempt retailers in the Tourist Area to trade from 9.00 a.m. on Sundays with similar stores in the Suburban Area being able to commence trade at 11.00 a.m.
- [68] In the course of its decision, the Full Bench accepted that the retention of the Tourist Area, with its different trading hours, represented a continuation of an earlier acknowledgement of TCC's ongoing commitment to the revitalisation of the CBD area of Townsville.

Conclusion

- [69] With two important exceptions, the issues involved in this application are not dissimilar to the issues confronting the Full Bench which made the 2007 Decision. The two major differences are:
- non-exempt stores in the Suburban Area have now been trading for over four years on a Sunday between 11.00 a.m. on 6.00 p.m. and are able to draw upon their experiences during that period; and

¹ *National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* [2007] 185 QGIG 287.

- the significant expenditure made by TCC and the Federal and State governments, respectively, in the redevelopment of the Flinders Street Mall precinct.

[70] NRA seeks to utilise the experience of successful trading by non-exempt retailers in the Suburban Area to show that that success warrants relaxation of the existing 11.00 a.m. opening time restriction to an earlier opening time of 9.00 a.m., in common with many other areas of the State.

[71] On the other hand TCC, LGAQ, QRTSA and MGA oppose that position, for different reasons, arguing that the different opening times between the Tourist Area and the Suburban Area should be maintained.

[72] The case mounted by TCC (supported by LGAQ) was based upon clear beliefs and objectives which have been strongly held, and advocated, by TCC over many years. These include:

- achieving a balance between freedom of trade and the betterment of the Townsville community through encouraging and facilitating attendance at community activities and the like, especially on Sunday mornings;
- achieving a balance between being a progressive city and a place where family and community still matter;
- revitalising the Townsville CBD by, initially, investing approximately \$57 million (in conjunction with the Federal and State governments) to redevelop the Flinders Street Mall precinct;
- developing the Townsville CBD Master Plan as part of its attempt to revitalise the CBD by trying to attract high end main street retail operations as well as other private investment;
- as part of the revitalisation project, to relocate the Entertainment Centre to within walking distance of the CBD, at a cost of \$142 million; and
- providing an opportunity for those businesses in the Flinders Street Mall precinct, which had been adversely affected during the 15 month reconstruction phase up to June 2011, to regain patronage lost during the reconstruction period.

[73] Irrespective of all of the arguments which have been mounted, s. 26 of the Trading Act identifies those matters the Commission must have regard to in deciding an application lodged under s. 21 of that Act. In that respect, the evidence in these proceedings is to the following effect:

- non-exempt shops in the local authority area of the TCC are all presently able to trade between the hours of 11.00 a.m. and 6.00 p.m. on a Sunday, with those shops located in the Tourist Area able to open from an earlier time, namely 9.00 a.m.;
- other than anecdotal evidence from several of NRA's witnesses there was no evidence that the needs of the tourist industry are not being met by the present trading hours regime;
- population growth in the region is healthy, and is expected to remain that way, with several shopping centres having undertaken, or being in the process of undertaking, significant redevelopment and extensions;
- the present trading hours regime does not appear to have been a deterrent to people electing to move to Townsville to live;
- although consumers must wait until 11.00 a.m. for non-exempt stores to open they are, nonetheless, able to access non-exempt retailers across the full seven days of each week;
- there is some queuing outside the doors of non-exempt retailers in the larger shopping centres prior to them opening at 11.00 a.m.;
- there is some congestion in both Coles and Woolworths in the immediate aftermath of those stores opening at 11.00 a.m.;
- both Coles and Woolworths enjoy a high level of demand from customers on Sundays, to the extent where their trade on a per hour basis that day is either the first or second highest volume compared to all other days of the week;
- granting of the application is likely to lead to increased employment (see paragraph [46]);
- TCC is strongly opposed to NRA's application (see especially paragraph [72]);
- TCC (in conjunction with the Federal and State governments) has now invested over \$56 million in the redevelopment of the Flinders Street Mall precinct as part of its overall plans to try to revitalise the CBD area;
- TCC has developed a CBD Master Plan with an accompanying CBD Incentives Program which will cost approximately \$7 million over the next four to five years as part of its revitalisation efforts; and
- TCC will invest a further \$142 million in the relocation of the Entertainment Centre, to be closer to the CBD, as part of its overall plan to revitalise the CBD.

[74] In our considered view the case mounted by TCC, in opposition to NRA's application, is compelling. Our inspections revealed a stark difference between the CBD and the suburban shopping centres. Whereas the

suburban shopping centres seemed to be thriving the CBD area over time seemed to be struggling and virtually lifeless. There were empty stores and empty buildings down much of Flinders Street.

- [75] However, the recent redevelopment of the Flinders Street Mall seems to have created a new vibrancy in the city heart which, in our view, is vital to Townsville's ultimate future as a thriving city, positioning to attract new investment into what has been a fairly run-down area. In our view, any change in the existing trading hours regime, even if it be of only two hours per week, could defeat all of TCC's plans and endeavours to attempt to revitalise the CBD area and to grow it.
- [76] In a general sense, TCC's evidence and submissions made the point that a city without a heart is no city at all. The evidence demonstrated that the non-exempt retailers located in the Suburban Area are doing very well under the present trading hours regime. However, the same cannot be said for the CBD. It is clearly struggling. TCC, comprising 13 members elected by the local community, must be presumed to have some reasonable idea as to what is in the best long-term interests of the community members they represent. In this instance it has enunciated a clear vision for the city overall, including revitalising the CBD, which does not involve an opening time of 9.00 a.m. in the Suburban Area.
- [77] TCC's vision involves, *inter alia*, trying to achieve a balance between big and small, the Suburban Area and the Tourist Area, family/community and free trade, while still trying to foster development and growth in the city.
- [78] Taking all of the above matters into account, and assessing them against the criteria at s. 26 of the Trading Act, we have come to the conclusion that the case in favour of the retention of the existing trading hours regime outweighs the case mounted by NRA to extend trading hours in the Suburban Area.
- [79] For the foregoing reasons we refuse NRA's application.
- [80] The Commission determines and orders accordingly.

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

D.K. BROWN, Commissioner.

Hearing Details:

2011 14 April (*For Mention*)
 19 May (*For Mention*)
 20 July (*Inspections & Hearing*)
 21 July (*Hearing*)
 26 August (*NRA and AWU written submissions*)
 8 September (*LGAQ/TCC written submissions*)
 9 September (*QRTSA and MGA written submissions*)

Appearances:

Mr J. Moore for National Retail Association Limited, Union of Employers.
 Mr J. Huang of Neumann Turnour Lawyers for Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).
 Ms S. Schinnerl for The Australian Workers' Union of Employees, Queensland.
 Ms M. King for Master Grocers Australia.
 Mr R. H. Steinitz of R.H. Steinitz and Associates instructed by Ms S.A. Cohen of Boulten Cleary and Kern Lawyers for the Local Government Association of Queensland Ltd and the Townsville City Council.

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