

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 151

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

CASE NO: TH/2014/4

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

DELIVERED ON: 30 September 2014

HEARING DATE: 4 July 2014
1 August 2014 (Applicant Submissions)
18 August 2014 (Submissions)

MEMBER: Deputy President Swan

ORDERS: **1. The application is granted;**
2. The operative date is to take effect as and from 12 November 2014.

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER
- Application to amend trading hours order - Inspections - Opposition to the claim by Organizations of Employees - No opposition to the claim by any other Organization or Retailer - Application granted.

CASES *Trading (Allowable Hours) Act 1990, s 21, s 26*
National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (TH/2011/5) - Decision<<http://www.qirc.qld.gov.au>>

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

Decision

- [1] This application is made by the National Retail Association Limited, Union of Employers (NRA) to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* (the Order) to allow all non-exempt retailers located in the Cairns CBD Area (as defined) to trade the same hours as supermarkets (as defined) are permitted. Non-exempt shops which fall outside of the definition of a supermarket are currently allowed to trade the following hours in Cairns CBD Area:

Current Trading Hours

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturdays	8.00 a.m.	5.30 p.m.
Sundays	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] The NRA states that in 2010 an application was approved in relation to extended hours for the Cairns CBD Area which was limited to supermarkets in the Cairns CBD Area such that they are all permitted to trade the following hours:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturdays	8.00 a.m.	9.00 p.m.
Sundays	9.00 a.m.	9.00 p.m.
Public Holidays (except 25 December, Good Friday, 25 April, and Labour Day)	8.30 a.m.	5.30 p.m.

- [3] The application seeks the amendment to the Order as follows:

"1. Delete the following paragraph of subclause (9) of Clause 3.2 of the Order:

Provided that the allowable trading hours for supermarkets located in the Cairns CBD Area (as defined) shall be as follows:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturday	8.00 a.m.	9.00 p.m.
Sundays	9.00 a.m.	9.00 p.m.
Public Holidays (except 25 December, Good Friday, 25 April, and Labour Day)	8.30 a.m.	5.30 p.m.

(Supermarkets located in the Cairns CBD Area are deemed to be non-exempt shops wherein the majority of retail floor and shelf space is used for the sale of

food products including fruit and vegetables, packaged groceries, dry food goods and/or packaged foods, frozen foods, delicatessen items, uncooked packaged meats, cooked chickens, dairy products, bakery products, take-away food and prepared food items, confectionery and soft drinks.)

2. Insert a new subclause (29) of Clause 3.2 of the Order:

(29) Cairns CBD 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.	9.00 p.m.
Sundays	9.00 a.m.	9.00 p.m.
Public Holidays (except 25 December, Good Friday, 25 April, and Labour Day)"	8.30 a.m.	5.30 p.m.

The Legislation

[4] Section 21 of the Act states:

"21 Trading hours orders on non-exempt shops

- (1) A full bench of the industrial commission may decide trading hours for non-exempt shops.
- (1A) However, the full bench is not to decide trading hours that are less than the following hours on a stated day, other than a public holiday-
- (a) 8.00 am and 9.00 pm for Monday to Friday;
 - (b) 8.00 am and 5.00 pm for Saturday.
- (2) The full bench may make any order it considers necessary or convenient to give effect to a decision made under subsection (1), including, for example, an order specifying -
- (a) the earliest time when non-exempt shops may open on any day and the latest time when non-exempt shops must close on any day; or
 - (b) hours for trading wholesale different from the hours fixed for trading retail; or
 - (c) different trading hours by reference to -
 - (i) classes of non-exempt shops; or
 - (ii) localities, or parts of localities, where non-exempt shops are situated.

(3) In subsection (1A) -

public holiday means -

- (a) a public holiday under the *Holidays Act 1983*; or
- (b) a day that would have been a public holiday had there not been a substitution under the *Holidays Act 1983*, section 2(2) or (3) or 3."

[5] Pursuant to s 26 of the Act, when the industrial commission is making an order under s 21 of the Act, it must have regard to:

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

Inspections

[6] Inspections of the local retail area of the Cairns CBD Area were conducted by the Commission with all representatives involved in the matter present.

Party to the Proceeding

[7] In support of the application:

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

[8] Organizations granted leave to be heard and opposed to the application:

- The Australian Workers' Union of Employees, Queensland (AWU);
- Shop, Distributive and Allied Employees Association (SDA).

Witnesses

[9] Witnesses for the NRA were:

- Mr Charles Hammersla (National Compliance Manager Facilities, Kmart Australia Ltd);
- Mr Gerard Winzenberg (Queensland District Manager, Target Australia Pty Ltd);
- Mr Jamie Mackay (General Manager of Stores, Queensland for Myer Holdings Limited).

s 26(a) - Locality

[10] Under the trading hours regime currently existing within the CBD Area, the non-exempt stores permitted to trade extended hours are supermarkets.

[11] The trading hours currently permitted for those stores would not alter with a successful application. Rather, this application seeks the same trading hours for remaining non - exempt stores within the CBD Area, which do not operate as supermarkets.

[12] Cairns Central Shopping Centre (Cairns Central) within the CBD Area (which was inspected by the Commission and those involved in this hearing) has a Coles Supermarket that can currently trade extended hours. Within that complex, there are three other non-exempt stores considered by NRA in this application. These stores are Myer, Kmart and Target which currently trade until 5.30 p.m. on a Saturday and 6.00 p.m. on a Sunday. For this type of store within the CBD Area, the same closing hours of Saturday 9.00 p.m. and Sunday 9.00 p.m. is sought.

[13] NRA states that the pursuit of consistency in trading hours for supermarkets and other non-exempt stores in the Cairns CBD Area underpins this application.

[14] The Cairns Regional Council has developed a master plan for the CBD Area (the Cairns City Centre Master Plan) with the aim of ensuring that the centre becomes the best regional centre in Australia.

[15] The Cairns City Centre Master Plan Report (Final 14-10-2011) in its Executive Summary states *inter alia* that:

"It is important that the economy of the City diversifies, building on its existing tourism strengths while opening new markets for visitation. Also of key importance is creating more reasons for local residents to come to the City Centre and to spend time there by deepening and accentuating the difference between the City Centre and suburban centres." [Exhibit 5].

[16] NRA submits that by granting the application, consumers and tourists alike would be able to access retail outlets within this defined area where consistency of trading hours for all non-exempt stores would prevail.

[17] The Commission enquired of NRA as to what stores would be affected by the application, if it was to be successful. The nominated stores were Kmart, Target and Myer to the extent that those were the stores where witnesses were being called by the NRA for the purpose of the application. The fact that other retail outlets may be affected by the application is not uncommon in this type of matter. However, there were no witnesses called by those in opposition to the claim for any other perspective to be considered, primarily with regard to location and the potential impact of a successful application generally.

[18] The "locality" relates to a discrete area within the CBD Area of Cairns.

s 26(b) - the needs of the tourist industry, or other industry in such locality or part and s 26(c) the needs of an expanding tourist industry.

[19] It is unchallenged that the Cairns region is an internationally known tourist destination.

[20] Mr Hammersla's evidence with regard to the significance of tourists in the Cairns Region was drawn from "Tourism Research Australia" - *The Economic Importance of Tourism in Australia's Regions*, (published April 2011) [Exhibit 5]. In that document, it states that the income from tourism in Tropical North Queensland at that time was approximately \$2.3 billion, which is almost 10% of the region's economy extending from that industry [Exhibit 5 - point 19]. As well, during 2013, 2,354,000 persons visited the area.

[21] Further in that Report, it is recorded that of the 77 tourism regions in Australia, Tropical North Queensland ranks 9th for its economic importance to the tourist industry.

[22] The particular destinations visited by tourists included the Great Barrier Reef, Wet Tropics Rainforest, Port Douglas, Palm Cove and Cairns beaches, Daintree and Cape Tribulation, Cape York and the Torres Strait Islands, Cooktown, Kuranda and Atherton Tablelands and the Gulf Savannah Outback [NRA Submissions - Page 4].

[23] The relevance of that to the application is that Cairns city operates as the hub for most of these activities with as many as 600 tours departing daily from Cairns heading to a range of destinations and returning to Cairns at the end of the tour each day.

[24] Together with predictions for increased population growth in the Cairns region (considered at point s 26(d)), it is claimed that there would be a continuation of tourism growth in the region.

[25] Mr Mackay's evidence was that it would be of benefit to the local population and tourists generally to have extended hours in stores such as Myer at Cairns Central during periods when there is a heightened number of people shopping in the CBD Area – for example, when special events were being held in the CBD Area of Cairns and at peak trading periods on the retail calendar [Exhibit 3 - point 9].

- [26] Mr Mackay also believed that the extension of trading hours in the CBD Area for other than supermarket non-exempt stores would provide a draw card for consumers (whether local people or tourists) when it could occur in conjunction with the gradual transformation of the CBD Area as foreshadowed by the Cairns Regional Council.
- [27] When questioned by the representative for the AWU as to whether the Myer store in Cairns Central utilised all of its allowable hours for trade, Mr Mackay said that it did not do so. His evidence was that the Myer store in Cairns Central opened at 10.00 a.m. on a Sunday and closed at 4.00 p.m. While acknowledging that this store in Cairns did not trade its allowable hours under the Trading Order, Mr Mackay stated that "the instances that we would choose to open would be limited but there would be certain times of the year when we may seek to, you know, trade, you know, around that 6.30/7, 7.30 p.m. mark. We are very unlikely to stay open until 9.00 p.m., but we would seek, you know, an advancement on the current trading hours but only at peak times of the year." [T2-10].
- [28] Under this criterion, Mr Winzenberg reaffirmed Mr Mackay's comments concerning the ability of Target to have the opportunity to extend its trading hours at periods of heightened local and tourist activity during the year [Exhibit 4 - point 7].
- [29] Mr Winzenberg said that Target had questioned around 228 of its customers on 5 April 2014 asking the following question "If Target was to open until 9.00 p.m. on Saturday and Sunday would you find it convenient for shopping". He states that 67% responded "Yes" [Exhibit 4 - point 8]. No other material relevant to this point was provided by Mr Winzenberg.
- [30] Mr Hammersla made reference to the number of Chinese tourists visiting the Cairns region. He states that there has been a 27% increase of Chinese tourists up to March 2014 over the prior year [Exhibit 5, Attachment E].

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

- [31] NRA submitted that as of 30 June 2012, the estimated population of the Cairns Local Government Area was 165,388. Queensland Treasury projects that this will increase to 190,657 by 2015 and 241,494 by 2031. The predictions of the average growth rate is mostly on par with that of Queensland generally [Queensland Government - "*Population Growth, Regional Queensland 2012*" - Exhibit 5 Attachment A].
- [32] The opposition to the claim was to the effect that, while there may be some growth in population in the Cairns area generally, there was nothing to show that there was any population growth *per se* in the Cairns CBD Area.
- [33] It was further added that there were other shopping centres in Cairns, other than in the CBD Area, where any increase of population would have needs met by those centres where Target and Kmart were located.

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

- [34] In gauging the 'public interest', those opposed to the claim stated "Public interest must stand apart from consumer interest in these matters, as consumers are treated as a separate class under this criterion."
- [35] NRA submitted that in retail, "there is an inexorable link between business interests and consumers. Put simply, one is unable to exist without the other. We submit that any measures that assist in making a destination more attractive to consumers and benefits other businesses in the same location is ultimately in the public interest. More flexible hours is one such measure." [NRA submissions - page 7].
- [36] To support its claim, under this criterion, NRA relied upon the evidence of three witnesses and supporting documentation from the Queensland Government - "*Population Growth, Regional Queensland 2012*", "*Queensland Government Population Projections by Statistical Area 2011 to 2036*" and "*Tropical North Queensland Regional Snapshot, Year Ending 2013*". NRA believed that by extending the trading hours of non-exempt shops in the CBD Area (other than non-exempt supermarkets), the flow on effect would be felt by other retailers in Cairns Central regardless of whether those stores were non-exempt or exempt traders.
- [37] NRA witnesses also confirmed that there would be "no additional costs" borne by retailers within the Cairns Central who choose not to trade during the extended hours being sought.
- [38] It is notable that there had been no opposition to this application by any retailer in the area under consideration. However, this of itself does not mean that the application must succeed. The criteria contained in s 26 of the Act to which the Commission must have regard must be considered and weighed by the Commission.

s 26(f) - the alleviation of traffic congestion

- [39] This criterion is not a significant factor for consideration in this application.

s 26(g) - the likely impact on the order on employment

- [40] There has always been some contention in trading hours matters that it does not necessarily follow that an extension of trading hours means the creation of new jobs. This issue has been raised by those opposed to the claim, however, there is no direct evidence from any employee to enable the Commission to consider another perspective.
- [41] Certainly, it has been the case, as in this matter, that Organisations of Employees will seek assurance that any additional hours worked by employees would be on a voluntary basis. This has occurred in this matter, and those assurances have been given.

[42] The reality of this application, if granted, is that extra hours would be available to employees who volunteered to work those hours. It is assumed, quite rightly in my view, that this would be of benefit to those employees.

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

[43] The Cairns Regional Council resolves to:

- "A. Support the National Retail Association's application to amend the Trading Hours Order for non-exempt shops trading by retail, located within the Cairns CBD Area (as defined);
- B. Note that independent and exempt shops are restricted by the Trading Hours Order;
- C. Note that non-exempt shops outside of the Cairns CBD Area (as defined) will be restricted to the trading hours set, established in the Trading Hours Order for non-exempt shops trading by retail either the Cairns Tourist area (as defined) or the remainder of the State; and
- D. Delegate authority to the Chief Executive Officer in accordance with the *Local Government Act 2009* to finalise any and all matter in relations to this matter." [Exhibit 5 Attachment D].

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

[44] There are no other matters that the Commission deems relevant to consider under this criterion.

Consideration of the Evidence and Conclusion

[45] The locality under consideration in this application, is a discrete locality in the centre of the CBD Area of Cairns. The Cairns Regional Council has adopted plans to completely revive this area into "the best regional city centre in Australia".

[46] The evidence of Mr Hammersla (which contained the reports provided by the Cairns Regional Council) more than suggests that there be a greater emphasis on the CBD Area of Cairns thereby encouraging more people into the CBD, and this is a factor which weighs in favour of granting the application. The full support from the Cairns Regional Council, to the extension of trading hours also gives impetus to the application.

[47] Within the criteria to be considered under s 26 of the Act, there is a heightened emphasis upon tourism generally (i.e. the s 26(b) "needs of the tourist industry" and s 26(c) the "needs of an expanding tourist industry").

[48] In *National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)* (2009) 190 QGIG 63, his Honour President Hall said:

"It is an object of the Act 'to facilitate trading in tourist areas', s 3(c). The object was added by the *Trading (Allowable Hours) amendment Act 1994*. Of the addition of the object the Explanatory Note observes: 'A specific object to facilitate trading in tourist areas gives expression to the intent to assist the growth and development of tourism.'

In articulating the matters to which the Commission must have regard in making an order under s 21 of the Act, s 26 twice refers to the tourist industry. Section 26(b) refers to the 'needs of the tourist industry' in the locality or part thereof to which the application relates and s 26(c) refers to the 'needs of an expanding tourist industry'. Like s 3(c), s 26(b) and (c) were also added by the *Trading (Allowable Hours) Amendment Act 1994*. Reference to the Explanatory Note reveals the observation: 'The intent of this change is to place a particular emphasis on the needs of the tourist industry...'¹

- [49] There is no significant challenge that the tourist industry is a significant industry within the Cairns area and that the growth in numbers of tourists to the area increases on a steady basis.
- [50] This, coupled with the Cairns Regional Council plans for the regeneration of the CBD Area, more than suggests that tourists to Cairns would be drawn into the CBD Area. The proposition of "uniformity and consistency" proffered by NRA is reasonable when one considers what is being proposed by the Council.
- [51] The documentation tendered by Mr Hammersla in this matter shows that population growth and projections for the area are positive. While there are shopping precincts in Cairns outside of the CBD Area, the evidence produced in this case more than suggest that the local community and tourists will be drawn into a reinvigorated, lively area of the CBD. The description provided by the Cairns Regional Council supports this perspective [Exhibit 5, Attachment D].
- [52] The fact that all available hours are not often utilised by those stores wishing to trade longer hours has been a matter for some consideration. In the circumstances of this case, however, there has been no opposition that has been mounted to the application by any other retailer, whether exempt or non-exempt. In my view, this lessens the concern which might otherwise have been expressed.
- [53] The impact of a successful application would have a positive effect upon the order of employment.
- [54] In all, considering all of the criteria to which the Commission must have regard under s 26 of the Act, the outcome provides a positive result for the application.
- [55] The application is granted.
- [56] The date for the implementation of the extended hours is to be 12 November 2014.

¹ (2009) 190 QGIG 63, 69, quoted in *National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (TH/2011/5)-Decision, <http://www.qirc,.qld.gov.au>. [79].