

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 Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others (TH/2010/5)

Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees AND National Retail Association Limited, Union of Employers (TH/2010/12)

The Australian Workers' Union of Employees, Queensland AND National Retail Association Limited, Union of Employers (TH/2010/14)

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

DEPUTY PRESIDENT SWAN
COMMISSIONER FISHER
COMMISSIONER THOMPSON

12 November 2010

DECISION

CHRISTMAS TRADING HOURS 2010

- [1] There are three applications before the Commission - TH/2010/5; TH/2010/12 and TH/2010/14.
- [2] The applications have been the subject of considerable witness evidence and submissions from the parties. In releasing this decision, we are conscious of the need for an expeditious determination of the applications given that the Christmas/New Year period is drawing near. Retailers and employees both require sufficient time in which to prepare for the season ahead.
- [3] The parties are aware that while all evidence and submissions have been given appropriate consideration by the Full Bench, the detail of all of the material presented to the Commission has not been referenced in this decision.

TH/2010/5

- [4] The first application TH/2010/5 is made by the National Retail Association Limited, Union of Employers (NRA) under the *Trading (Allowable Hours) Act 1990* (the Act) for an amendment of the trading hours fixed by the Order - *Trading Hours - Non-Exempt Shops Trading by Retail - State* (the Order) as follows:

"By inserting a new proviso in clause 3.1:

Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Monday, 27 December 2010 and Tuesday, 28 December 2010 and Monday 3 January 2011.

	Opening Time	Closing Time
Monday 27 December 2010	8.00 a.m.	5.00 p.m.
Tuesday 28 December 2010	8.00 a.m.	5.00 p.m.
Monday 3 January 2011	8.00 a.m.	5.00 p.m.

TH/2010/12

- [5] The second application TH/2010/12 is made by Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) for an amendment of the trading hours Order as follows:

"By inserting a new clause 3.2A:

3.2A Closed days

Notwithstanding the provisions of clauses 3.1 and 3.2, all non-exempt shops shall be kept closed on the following days:

Sunday 26 December 2010; and
Saturday 1 January 2011."

TH/2010/14

- [6] The third application TH/2010/14 is made by The Australian Workers' Union of Employees, Queensland (AWU) for an amendment of the trading hours fixed by Order, as follows:

"By inserting a new clause 3.2A:

3.2A Closed days

Notwithstanding the provisions of clauses 3.1 and 3.2, all non-exempt shops shall be kept closed on the following days:

Sunday 26 December 2010; and
Saturday 1 January 2011."

- [7] It was determined by the Full Bench, with the consent of the parties, to hear all applications concurrently.

Legislative Amendments

- [8] In 2010, Christmas Day (25 December 2010) and Boxing Day (26 December 2010) fall on a Saturday and Sunday respectively. Further, New Year's Day (1 January 2011) falls on a Saturday.

- [9] Consequently, in terms of Christmas Day 2010, the Queensland Government [Gazette Notice, 28 August 2009] amended the *Holidays Act 1983* as follows:

"Particular public holidays in 2010

...

Both the following days are to be observed as public holidays for Christmas Day in 2010 -

25 December 2010
28 December 2010."

- [10] It should be noted that Boxing Day (26 December 2010), falling on a Sunday, was not declared a public holiday and a substituted public holiday was granted on 27 December 2010.

- [11] With regard to New Year's Day (1 January 2011), the Queensland Government (by amendment passed on 7 October 2010 and assented to on 14 October 2010) further amended the *Holidays Act 1983* as follows:

"Particular public holidays in 2011

Both of the following days are to be observed as public holidays for New Year's Day in 2011 -

1 January 2011
3 January 2011."

Further Legislative Considerations

- [12] The parties were requested to consider whether there were any legislative impediments to the granting of any component of the applications.

- [13] In terms of application TH/2010/5, the parties agreed that there were no legislative impediments against the granting of the application *in toto*.

- [14] As 26 December 2010 falls on a Sunday and would have been a public holiday had there not been a substitution under the *Holidays Act 1983*, the provisions outlined in s. 31B(6) of the Act do not apply to the south-east Queensland area by virtue of s. 31B (6A). Those sections of the Act are as follows:

"31B Industrial commission order amended ...

- (6) However, the industrial commission must not make an order prescribing for the south-east Queensland area an opening time later than 9 a.m., or a closing time earlier than 6 p.m., on a Sunday or public holiday.

- (6A) Subsection (6) does not apply to 26 December or 1 January if that date -

(a) falls on a Sunday; and

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

- [15] Applications TH/2010/12 and TH/2010/14 suffered one impediment as it relates to 1 January 2011 (New Year's Day). By application of s. 31B(6) of the Act, the Industrial Commission is prohibited from making an order prescribing for the south-east Queensland area an opening time later than 9 a.m., or a closing time earlier than 6 p.m. on a Sunday or public holiday.
- [16] In *NRA AND QRTSA and Others (C/2005/63) and Barton, Minister for Employment, Training and Industrial Relations AND QRTSA and Others (C/2005/64)*¹ President Hall, in considering a like trading hours application, stated as follows:
- "I unstintingly accept that s. 14A of the *Acts Interpretation Act 1954* requires that a provision of an Act is to be given the interpretation which best achieves the purpose of the Act. But there is nothing in the extrinsic materials to suggest that the literal meaning was not the intended meaning. On the contrary the second reading speech of the then Minister at p. 47 of Hansard for 19 February 2002 contains the following passage (emphasis added):
- 'Section 31B(5) and (6) confirm that the Queensland Industrial Relations Commission will continue to decide trading hours for non-exempt shops by way of the trading hours order however, the Commission must not reduce the hours of 9 a.m. to 6 p.m. on Sundays and public holidays in the south east Queensland area.' "
- [17] Both SDA and the AWU accepted that there was a prohibition in seeking to close non-exempt retail stores in south-east Queensland on Saturday 1 January 2011. However, the claim for closure of non-exempt stores in other areas of Queensland on this day was still pressed.
- [18] In fairness, it should be stated that during the course of the hearing, the Queensland Government passed legislation to the effect that 1 January 2011 (New Years Day) would retain its public holiday status and 3 January 2011 would be the substituted public holiday. This result required an amendment to comments which had already been made during the hearing by the parties.

The Claims

- [19] If the current trading Order remained unaltered for the Christmas/New Year period for 2010/2011, NRA submitted that the following would occur in regional areas where non-exempt stores did not have seven day trade/or could not trade on public holidays:
- | | |
|---------------------------------|----------|
| Christmas Day, 25 December 2010 | [closed] |
| Boxing Day, 26 December 2010 | [closed] |
| Monday 27 December 2010 | [closed] |
| Tuesday 28 December 2010 | [closed] |
| Saturday 1 January 2011 | [closed] |
| Sunday 2 January 2011 | [closed] |
| Monday 3 January 2011 | [closed] |
- [20] In response to the SDA and AWU applications, NRA stated that Boxing Day (26 December 2010) was a major trading day for its members. Boxing Day sales were of significance to customers.
- [21] The SDA and AWU called a number of witnesses from Brisbane and regional areas who expressed four major concerns regarding application TH/2010/5.
- [22] Firstly, employees required to work on Boxing Day would be deprived of the usual Christmas break where they could enjoy that time with their families and friends.
- [23] Secondly, witnesses expressed concerns about tiredness experienced by employees who, having to work considerably hard prior to the Christmas period, had then to attend work on a particularly busy day. There was a considerable amount of preparation required by employees to be ready for the Boxing Day sales.
- [24] Thirdly, as Boxing Day (26 December 2010) fell on a Sunday and had not been declared a public holiday, ordinary Sunday penalty rates would apply, rather than the added penalty for working on a public holiday. Three stores stated that, notwithstanding the fact that public holiday penalty rates were not required to be paid on Boxing Day (26 December 2010), they would pay those rates. These stores were David Jones, EB Games and City Beach.

¹ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (C/2005/63) and Thomas Alfred Barton, Minister for Employment, Training and Industrial Relations AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (C/2005/64)* [2005] 180 QGIG 738

[25] Fourthly, while all non-exempt stores stated that work on a Sunday was of a voluntary nature, there was evidence before the Commission which more than suggested that employers required their employees to work. For some employees it was not the case that they simply notified of their intention not to work on the Sunday. Rather, they were required to discuss their decision with a supervisor and provide an explanation for that decision.

[26] The NRA made the following brief submissions with regard to s. 26 of the Act.

[27] Section 26(a) "the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated":

The localities of relevance in this application require a consideration of a range of factors. Many of the localities already have seven day trade. These areas include towns and regions such as Cairns, Townsville, Mackay, Rockhampton, Hervey Bay, Sunshine Coast, Brisbane, Gold Coast and Toowoomba. There are, however, a number of localities in regional areas where there would be limited legislative opportunities to trade over the Christmas period. This detail has been identified in paragraph [19] of this decision.

[28] In making our decision, we are mindful of those regional areas in Queensland where there would be limited trade by non-exempt stores over the Christmas/New Year period.

[29] Section 26(b) "the needs of the tourist industry or other industry in such locality or part":

No specific evidence was adduced during this hearing as to the shopping needs of tourists and the tourist industry generally throughout this period. Notwithstanding that, it is reasonable for the Full Bench to state that there would be tourist needs to be met during this period and to that end, we have ensured that non-exempt stores will be permitted to open in areas to which tourists are generally attracted.

[30] Section 26(c) "the needs of an expanding tourist industry" and s. 26(d) "the needs of an expanding population":

No evidence was adduced regarding the needs of an expanding tourist industry.

[31] Section 26(e) "the public interest, consumers' interest, and business interest (whether small, medium or large)":

We are satisfied that the public interest has been satisfied through our consideration of the evidence surrounding the application to have Boxing Day open and also for the opening of non-exempt stores throughout Queensland on the days proclaimed to be the substituted/extra public holidays. The reasons for reaching this conclusion are contained in our "Consideration of Evidence" hereunder.

[32] Section 26(f) "the alleviation of traffic congestion":

No evidence was adduced with regard to the alleviation of traffic congestion.

[33] Section 26(g) "the likely impact of the order on employment":

The granting of application TH/2010/5 will have a positive impact upon employment in the affected locations. Non-exempt retailers confirmed that work on these days by employees would be voluntary. However, we have expressed concern around some evidence which has been adduced from employees concerning the "voluntary" nature of employment on these days. This has been addressed in our "Consideration of Evidence" hereunder.

[34] Section 26(h) "the view of any local government in whose area the order is likely to have an impact":

We note that there have been objections to application TH/2010/5 by two local Councils - Central Highlands Regional Council and Tablelands Regional Council. We have duly noted these objections. However, overall, it can only be assumed that Local Councils generally throughout Queensland have neither support for nor objection to the various applications.

[35] In our consideration of these mandatory provisions contained within s. 26 of the Act, we believe that the evidence and submissions largely support the granting of application TH/2010/5 and, in part application TH/2010/12 and TH/2010/14.

- [36] The *rationale* for the granting of application TH/2010/5 and, in part, TH/2010/12 and TH/2010/14 is founded in the findings made with regard to s. 26 of the Act and the further elaboration of those reasons is found in "Consideration of Evidence" hereunder.

Consideration of Evidence

- [37] In rejecting the SDA and AWU applications to close non-exempt retail stores on Boxing Day (26 December 2010) across Queensland, the Full Bench has accepted that Boxing Day represents to retailers and consumers alike a special day for retail trade. Boxing Day sales draw a large number of consumers who avail themselves of those sales.
- [38] We propose to permit non-exempt retail trade on Boxing Day (26 December 2010) in accordance with the current trading hours regime as it relates to Sunday trade, that is, those non-exempt stores which are in areas permitted to trade on Sunday will be granted the right to trade on Sunday 26 December 2010. Those areas of Queensland which have not been granted seven day trade will not be permitted to trade on this day.
- [39] We are not without concern for employees who will be required to work on Boxing Day (26 December 2010). While we have not had any evidence from consumers with regard to trade on this day, we have given consideration to the evidence from retailers concerning the high level of sales experienced at this time of the year. In our view it is not unreasonable to draw from that evidence that there is a high demand from consumers for non-exempt stores to open on this day.
- [40] We are aware of the SDA and AWU submissions that consumers would presumably be able to shop (and enjoy buying sales items) on Monday 27 and Tuesday 28 December 2010 *in lieu* of Boxing Day (26 December 2010), however we believe that the reality of the "Boxing Day Sales" must be positively addressed by the Commission.
- [41] The usual added attraction of receiving public holiday penalty rates on Boxing Day (26 December 2010) is not available this year. Some stores have stated that those rates would be paid regardless. However, for the bulk of employees, the penalty rates applicable to employees on Sundays would apply. It should be noted that employees engaged to work Monday 27 and Tuesday 28 December 2010, both being public holidays, would be paid public holiday penalty rates.
- [42] Of some concern to the Full Bench has been the evidence from employees around the issue of "voluntary" work on a Sunday.
- [43] The Full Bench accepts the veracity of this evidence. The voluntary nature of work on a Sunday for retail employees in non-exempt retail stores has been part of Enterprise Bargaining outcomes between the major non-exempt retail stores and the various Unions of Employees for a considerable period of time.
- [44] Religiously, SDA and AWU advocates further query representatives of those non-exempt stores seeking seven day trade (and in cases such as this) to reaffirm that they are implementing that provision appropriately. Just as religiously those representatives state that there is no coercion exercised by their stores in requiring employees to work on a Sunday.
- [45] The Full Bench believes that it is timely to remind retailers subject to these Enterprise Bargaining agreements that employees should be able to choose not to work on a Sunday without fear of having to explain their position, and/or face repercussions in terms of future work. We also believe that retailers should remind local store managers of their obligations under Enterprise Agreements as to the voluntary nature of work on a Sunday.
- [46] With regard to the SDA and AWU applications to close all non-exempt stores in Queensland on Saturday 1 January 2011, we have already stated that those non-exempt retail stores in South-East Queensland will be permitted to trade their normal public holiday trading hours. We do not propose to extend trading hours on this day to non-exempt stores outside of the prescribed south-east Queensland region, except to those stores which are presently permitted by the Order to trade on public holidays.
- [47] There has been no opposition to the NRA's application TH/2010/5 as it relates to non-exempt stores throughout Queensland trading on 27 and 28 December 2010 and 3 January 2011. We do propose to grant these components of the NRA claim. We believe in so doing that this will help alleviate the concerns for both retailers and consumers especially in regional areas of Queensland during the Christmas/New Year period.
- [48] In reaching this decision, we believe that due consideration has been made for regional non-exempt retail stores to have adequate trading hours over the Christmas/New Year period.

Decision

[49] Having considered all of the matters put before the Full Bench, we determine as follows:

TH/2010/5

A new proviso will be included in clause 3.1 of the Order as follows:

	Opening Time	Closing Time
Monday 27 December 2010	8.00 a.m.	5.00 p.m.
Tuesday 28 December 2010	8.00 a.m.	5.00 p.m.
Monday 3 January 2011	8.00 a.m.	5.00 p.m.

GRANTED**TH/2010/12 and TH/2010/14**

Notwithstanding the provisions of clauses 3.1 and 3.2 of the Order, all non-exempt shops shall be kept closed on the following days:

Sunday 26 December 2010

NOT GRANTED.

Saturday 1 January 2011

IN PART GRANTED.

[50] The applicant is required to provide the Commission with the draft Order to reflect this decision within seven days from the release of the decision.

[51] Order accordingly.

D.A. SWAN, Deputy President.

G.K. FISHER, Commissioner.

J.M. THOMPSON, Commissioner.

Hearing Details:

2010 18 June
21 July
31 August
11, 22 and 29 October
4 November

Released: 12 November 2010

Appearances:

Mr J. Moore of National Retail Association Limited, Union of Employers.
Ms L. Hogg of Sciaccas Lawyers and Consultants for Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.
Ms R. Broanda of The Australian Workers' Union of Employees, Queensland.