

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2014] QIRC 194

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

CASE NO: TH/2014/5

PROCEEDING: Application to amend trading hours order

DELIVERED ON: 21 November 2014

HEARING DATES: 18, 19 August 2014

MEMBER: Deputy President O'Connor

ORDERS: **1. The application is granted;**
2. The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with sch 1 of the application filed on 8 April 2014; and
3. The operative date for the amendment is 28 November 2014.

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS - APPLICATION TO AMEND ORDER - *Trading Hours - Non-Exempt Shops Trading by Retail - State* - Where the applicant sought to amend the order by inserting a clause allowing extended trading hours on 23 and 24 December - Where the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees applied for and was granted leave to appear and be heard as an interested party - Matters relevant to s 21 order considered

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

CASES: *National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)* (2004) 177 QGIG 677
National Retail Association v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (2005) 180 QGIG 1211
Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and

Shopkeepers Association (Industrial Organisation of Employers and Others (2003) 174 QGIG 1339
Retailers' Association of Queensland, Union of Employers v Queensland Traders and Shopkeepers Association (Industrial Organization of Employers) (1996) 153 QGIG 164
Retailers' Association of Queensland, Union of Employers v Shop, Distributive and Allied Employees Association (Queensland Branch) (1991) 138 QGIG 95

APPEARANCES:

Mr M. Cole for the National Retail Association Limited, Union of Employers.

Mr D. Gaffy for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Decision

- [1] The National Retail Association Limited, Union of Employers ("NRA") applies for an amendment to the order *Trading Hours - Non-Exempt Shops Trading by Retail - State* ("the order") pursuant to s 21 of the *Trading (Allowable Hours) Act 1990* ("the Act"). The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees ("SDA") was granted leave to appear and be heard in the hearing of the application as an interested party.
- [2] The application seeks to amend the order by adding a new paragraph to cl 3.3(3) in the following terms:

"Provided that the trading hours of non-exempt shops located within the Westfield Garden City Shopping Complex described Lot 1 on Survey Plan 258311, County of Stanley, Parish of Yeerongpilly on Title Reference 50916623, and situated on the corner of Logan and Kessels Roads, Upper Mount Gravatt, Brisbane on December 23 and December 24 of each year shall be:

	<u>Opening Time</u>	<u>Closing Time</u>
December 23	8.00 am	12.00 midnight
December 24	12.00 am	9.00 pm

Provided however that when December 23 falls on a Saturday or a Sunday, the following trading hours shall apply in lieu of the hours set out above:

	<u>Opening Time</u>	<u>Closing Time</u>
Thursday prior to Christmas Day	8.00 am	12.00 midnight
Friday prior to Christmas Day	12.00 am	9.00 pm

Provided further that when December 23 falls on a Friday, the following trading hours shall apply in lieu of the hours set out above:

	<u>Opening Time</u>	<u>Closing Time</u>
Friday December 23	8.00 am	12.00 midnight
Saturday December 24	12.00 am	6.00 pm"

Legislative requirements

[3] Section 21 of the Act provides:

"21 Trading hours orders on non-exempt shops

- (1) The industrial commission may decide trading hours for non-exempt shops.
- (2) However, the industrial commission 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.
- (3) The industrial commission 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.
- (4) In this section—
public holiday includes, if another day is substituted for a public holiday under the *Holidays Act 1983*, section 3, the day that would have been the public holiday if the substitution had not happened."

[4] Section 26 provides that, in relation to making an order under s 21, the Industrial Commission must have regard to the following:

- "(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."

Application of s 26 criteria

- [5] In dealing with the statutory elements in s 26 of the Act, reference is often made to the Full Bench decision in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 1339. In that case, the Full Bench said:

"Section 26 of the Trading Hours Act requires the Commission to have regard to a number of elements in relation to whether it will make an Order under s 21 of the same Act. In that respect, we note another Full Bench of this Commission stated ... that:

'It should not be inferred in all applications for an extension of trading hours that all (matters identified in s 23 of the Trading Hours Act) would be weighted equally, e.g. some applications may substantially rely upon one or two (2) of the matters outlined in s 26 of the Act, whilst in other applications substantial reliance will be placed on many more of the s 26 matters.'

That statement was recently endorsed by another Full Bench... We similarly endorse the statement."¹

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

- [6] The evidence before the Commission is that Westfield Garden City is a major shopping centre for the southern suburbs of Brisbane. It first started trading in October 1970. In 1987 it was the largest shopping centre in Queensland and has now undergone a significant \$400 million expansion which includes four levels of car parking, additional major retailers acquiring tenancies, an additional 100 specialty stores, and a total of 11 non-exempt anchor tenants within the shopping complex.
- [7] The applicant submits that the location of Garden City on the southern side of the Brisbane River at Upper Mount Gravatt is significant, citing the identification of the suburb as a "principal regional activity centre" in the State government's South East Queensland Regional Plan 2009-2031. According to the plan, which was admitted into evidence as an attachment to the statement of Mr Stuart Elder, Upper Mount Gravatt shares its status as a principal regional activity Centre along with

¹ *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 1339, 1344, quoting *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2002) 172 QGIG 542, 546 and citing its endorsement in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Union of Employers and Others)* (2003) 174 QGIG 912, 918 (citations omitted).

Chermside, in Indooroopilly and Carindale. Upper Mt Gravatt, and particularly Westfield Garden City, is recognised as a significant service centre and transport hub.

[8] Mr Elder's statement also refers to research undertaken by Roy Morgan Research which identifies Garden City as the most visited shopping centre in southern Brisbane amongst consumers who have purchased from a Brisbane shopping centre in the last four weeks (average of January 2012 to December 2013). That research suggests that there is a significant north/south divide in consumer shopping habits. According to the research, 33.4% of visitors to Westfield Garden City were from the "Brisbane - Southern" area. Only 3.2% of visitors came from the "Brisbane - City & Northern" area. A similar pattern emerges from the statistics taken at Westfield Chermside, in Brisbane's northern suburbs. There, 44.1% of visitors were from the "City & Northern" area, compared with 4.1% visiting from the south. The research also indicated that Westfield Garden City draws a greater proportion of shoppers from East Brisbane, with 12.9% visiting the centre from that region compared to only 3.9% who ventured all the way to Westfield Chermside. In Mr Elder's view, these statistics further highlight the additional opportunity for Garden City to cater to residents in both the southern and eastern suburbs of Brisbane with continuous 36 hour trading over Christmas.

[9] In cross-examination before the Commission, Mr Elder observed:

"...what I'm saying is I believe there's a compelling argument for 36-hour trade to occur in a super regional shopping centre. What we're also then saying is that there is almost negligible cross-shop between Chermside and Garden City and, at the moment, Chermside is the only centre in Queensland that runs 36-hour trade. So we're saying that we believe with the split of the river, the \$400 million redevelopment, the addition of retail jobs, the additional retail trade, that there is an opportunity for this event to exist south of the river in Brisbane as well and that the cross-shop between those two centres is negligible."

[10] The evidence of Mr Steed of Pandora's jewellery and Mr Scott Wallace of Woolworths was to the effect that there is a distinct north-south divide in retail in Brisbane.

[11] In cross-examination, Mr Elder gave evidence that a pre-Christmas continuous trade event, as is proposed for Westfield Garden City, requires a certain type of shopping centre "to maximise and make this an event that people come to." When asked whether he was suggesting that Westfield Garden City was that type of shopping centre, he said, "Absolutely." He went on to observe:

"Garden City becomes a bigger shopping centre on a GLA [gross lettable area] basis, excluding commercial tenancies, in Queensland when it finishes in four weeks' time. So it absolutely has the – what I would call the retail power to be able to run this. It has every one of the major supermarket chains, every one of the major department store chains, every one of the major discount department store chains, 15 plus specialty stores, 15 plus restaurants and over 300 speciality stores."

- [12] The SDA accepts that the Garden City complex is a discrete area which is undergoing significant redevelopment and will house an extensive number of businesses. Nevertheless, the SDA submits that the geographical area in which Garden City is situated is not so unique as to allow the Commission to set it apart from other centres such as Sunnybank Hills, Sunnybank Plaza, Carindale and Logan Hyperdome. The SDA did not, however, lead any evidence in relation to the composition of the other regional shopping centres to support that submission.
- [13] In my view, the evidence supports a conclusion that the location of Westfield Garden City on the southern side of the Brisbane River at Upper Mount Gravatt is significant, having regard to the evidence of a north/south divide in shopping habits and market research statistics before the Commission.

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

(c) *the needs of an expanding tourist industry;*

- [14] The next two matters to which the Commission must have regard can be conveniently dealt with together.
- [15] The applicant does not rely heavily on these criteria in advancing its argument for the orders that it seeks, but it does submit that the redevelopment of Westfield Garden City would be attractive to tourists and may well become a reason for travellers to visit Brisbane in the pre-Christmas period, especially those visiting friends and relatives.
- [16] In support of that submission, and drawing on Queensland Tourism and Events' Regional Snapshot, the applicant refers to what is described in Mr Elder's statement as the "visiting friends and relatives" (VFR) category of tourism. When asked in cross-examination what he meant in referring to that category, Mr Elder responded:

"What we're saying is that we have a significant proportion of – we're probably one of the most significant proportions of beyond – or non-Australian background from a catchment point of view in – in – certainly in the Westfield portfolio, which is what we use as our data point. You know, we've got a significant Asian population around us, and that Asian catchment has a lot of visiting family and friends. So that's where we're drawing that conclusion, that, you know, this gives those people an opportunity to shop in Australian retail that they may not see overseas. No different from when we go overseas we shop in international retail."

- [17] Mr Elder said that the demographic makeup of the catchment area for Garden City, with its high Asian population was significant and led him to the conclusion that VFR sector was a growing one and would have an impact on Garden City.

(d) *the needs of an expanding population;*

- [18] The evidence before the Commission is that the population of Greater Brisbane (excluding the Gold Coast and the Sunshine Coast) was 2.19 million. In his statement, Mr Elder refers to Australian Bureau of Statistics data which suggests that, between 2011 and 2012, the population of Greater Brisbane increased by 2%, or approximately 43,300 people. The Queensland Government Statistician's Office forecasts that the combined population for all of the suburbs within Garden City's catchment area will grow to 665,322 in 2021, representing a growth rate of 1.15%.
- [19] The South-East Queensland Regional Plan 2009-2031² notes that Brisbane's residential and employment growth will be achieved primarily within established areas through renewal, particularly in and around the CBD, regional activity centres and growth corridors. One of the identified regional activity centres is Upper Mount Gravatt. The report further notes that the regional activity centres outside the CBD will accommodate residential development in identifiable precincts and mixed-use settings.
- [20] Whilst I note the SDA's submission that the evidence before the Commission focuses to a large extent on the general population growth of Greater Brisbane, it is apparent from the evidence, in particular, the forecast growth in the local catchment area of Garden City and the establishment of Upper Mt Gravatt as a regional activity centre that these factors lend support to a conclusion that the extension of trading hours at Westfield Garden City will support the needs of a growing population.
- (e) *the public interest, consumers' interest, and business interest (whether small, medium or large);***
- [21] The Commission has previously stated that: "[A]s a matter of general comment," the Full Bench in *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)* observed, "it is reasonable to state that the interests of consumers are facilitated by extending trading hours."³
- [22] There is no evidence before the Commission from small, medium or large businesses in opposition to the application.
- [23] The amendments to the Act in 2002 enable the Commission to decide rather than regulate trading hours.⁴ It must be recognised that any decision of the Commission to enlarge trading hours for non-exempt shops does not impose upon those shops an obligation to trade in accordance with the extended hours.

² Exhibit 2, app B, p 17.

³ (2003) 174 QGIG 1339, 1345, citing *Retailers' Association of Queensland Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers and Others)* (2003) 174 QGIG 912.

⁴ *National Retail Association v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)* (2005) 180 QGIG 1211, 1212.

- [24] In his statement Mr Elder says that on 31 March and 1 April 2014, Garden City centre management conducted four specialty retailer group presentations. Those presentations were designed to give specialty retailers an update on the redevelopment of Westfield Garden City and to appraise them of the application to the Commission for a 36 hour continuous pre-Christmas trade event. Mr Elder states that over 100 specialty retailers attended, and none of them raised any objection.
- [25] The applicant submits that granting the application for a 36 hour continuous pre-Christmas trade event at Westfield Garden City would be in the interest of consumers by providing additional flexibility, convenience and choice during this peak retail period. It was further submitted that the ability for non-exempt stores to open at Garden City would have a spin-off effect for other retailers in the centre by increasing the number of customers visiting the shopping centre.
- [26] It was the view of Mr Elder that the additional trading hours would be a benefit to all retailers at Westfield Garden City. In cross-examination, he stated:
- "So we assume from our knowledge – and our knowledge is 54 years' worth of redeveloping shopping centres – that post development the centre will grow in traffic and the centre will grow in turnover. We also know from our experience having run these events in South Australia since 2003 and in New South Wales and Queensland for similar periods of time that we will increase traffic and we will increase turnover, which is dollars in our retailers' tills."
- [27] The weight of the evidence before the Commission is that the experience of many retailers at Westfield Chermside suggests that the proposed 36 hour pre-Christmas trade event at Garden City would replicate the same level of consumer interest.
- [28] Mr Xynias, the owner of Healthyworld Pharmacy, said that at Chermside, sales during the 36 hour trade event recorded significantly higher returns. He said in his evidence to the Commission that his takings in that 36 hour period were higher than one week's trade. He also noted that the 36 hour trading event at Chermside saw people walking around in costumes, singing carols, giving away samples and generally the enjoying the pre-Christmas environment.
- [29] Andrew Vaz noted in his evidence that contemporary shopping behaviour reflects consumer preference for more opportunities to shop, particularly over the busy Christmas period. He observed that, during the Christmas period, many workers have additional work responsibilities and deadlines of their own, stay at work later, or have social commitments which limit their ability to shop within the existing shopping hours.
- [30] Mr Vaz said that trade at Chermside for that period "absolutely grew", and it has still maintained its business for the periods outside the 36 hour trade event. He further observed:
- "... we've certainly seen that our transaction counts increase quite dramatically, and I guess the reality is because there is the ability of that additional eight hours, we do have customers who shop to take advantage of that."

[31] The SDA submits that there is no evidence before the Commission to support a conclusion that there is consumer demand for a 36 hour continuous trade period. In dealing with this submission, it is possible to draw on the experience at Westfield Chermside which has operated extended pre-Christmas trading hours for more than seven years. The evidence before the Commission suggests that consumers have embraced the change. By way of example, in the statement of Mr Vaz it is noted that for the financial year ending 30 June 2014, sales grew 8.77% in comparison to the relevant trading period in the previous financial year.

[32] Mr Scott Wallace of Big W said in his evidence to the Commission that his store would often receive phone calls leading up to the Christmas period enquiring when late trading hours would commence. He went on the state:

"Certainly, our experiences regard - through Chermside have been that customers are adopting those hours and certainly shopping within the hours between midnight and 8 AM, and year on year, it has been getting better and better for us. So there seems to be an adoption from our customers that use that service when it's available each year."

[33] It is open for the Commission to conclude on the evidence before it that the introduction of a 36 hour pre-Christmas trading period at Garden City will provide for consumers additional flexibility, convenience and choice, during what is recognised as a peak retail period. In my view, the experience at Westfield Chermside suggests that a similar extension of trading hours at Westfield Garden City would generate the same consumer demand. In *National Retail Association Limited, Union of Employers and Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)* the Full Bench observed:

"We note that while this has not been a consumer generated application, the take up rate by consumers of extended trading hours at Westfield Chermside showed that a significant number of consumers are interested in shopping during hours generally thought to be unsocial."⁵

[34] As noted earlier, there is no evidence before the Commission of opposition to the application from any small, medium or large businesses, and indeed, the evidence suggests that a significant proportion of the specialty retailers at Westfield Garden City support the application for the extension of trading hours.

[35] I am satisfied on the material before the Commission that this criteria has been satisfied.

(f) traffic congestion;

[36] The applicant submits that allowing an additional 8 hours of trade over the Christmas shopping period by granting the application for a continuous 36 hour trading event would assist in alleviating traffic congestion in and around Garden City.

⁵ (2004) 177 QGIG 677, 679.

[37] As noted elsewhere, Christmas time is a peak retail period which naturally increases the volume of traffic at major shopping centres.

[38] The evidence before the Commission is that additional multi-level parking is included as part of the re-development of Westfield Garden City which will increase capacity from 4,863 spaces to approximately 6,200 spaces. An additional 400 spaces will be available in an "overflow" on a site off Link Road which will be owned and managed by Westfield. The statement of Mr Elder outlines a car park management plan which will be implemented for the 36 hour trade event. The plan would include the positioning of traffic controllers at key entry and exit points, giving the Queensland Police Service access to traffic light sequencing to manage traffic volumes, stationing traffic controllers on MacGregor Ring Road, and a higher-than-normal presence of police and security staff.

[39] In evidence before the Commission, Mr Elder said:

"This time of year absolutely has incremental traffic, and it has absolutely incremental traffic - car traffic as a result of that. And it does cause congestion. We know that. But what we do is we work with local council and local police to mitigate that and build plans around how that we can minimize that disruption."

[40] Whilst recognising the nature of the Christmas retail period and the resultant traffic congestion that naturally produces, I am of the view that the 36 hour trade event, coupled with the increase in the number of parking spaces brought by the redevelopment of the shopping centre and the proposed traffic and car park management plan, will alleviate rather than exacerbate traffic congestion in and around Garden City.

(g) *the likely impact of the order on employment;*

[41] The SDA submits that, at best, the increase in employment which the applicant suggests will result from granting the orders sought, is in reality only an increase in the number of hours worked by existing employees, rather than an increase in the number of employees.

[42] Whilst I note the concerns of the SDA witnesses who feel they may be pressured by their employers into working longer during the extended trading hours, I am not of the view that those concerns are warranted.

[43] The evidence before the Commission is that major retailers at Westfield Chermiside, which has operated a 36 hour trade event for some time, have not experienced any difficulty in securing staff to voluntarily work during periods of extended trading hours. With regard to smaller businesses, the evidence of Mr Steed of Pandora Jewellers was that he has no difficulty in securing casual staff for Christmas trading.

[44] In dealing with the likely impact on employment, the Commission has to look at both the positive impact that an order made by the Commission to extend trading would have on employment as well as any negative impact that might also flow from an order.

- [45] As far as the negatives are concerned, the Commission, after considering the evidence of the witnesses called by the SDA, and noting the provisions of the certified agreement, believes that their concerns can be readily addressed by the recognition that the working of any additional hours would be voluntary.
- [46] A number of the SDA witnesses raised both personal safety concerns and security within the shopping centre. The Commission notes these concerns are not unique to those workers working in the retail sector and are of general application particularly during peak retail periods.
- [47] The Commission is satisfied on the evidence, in particular the evidence of Mr Elder, that appropriate steps have been taken to address these concerns.
- [48] Whilst it is not possible to determine with any degree of certainty whether or not the granting of an order for extended trading hours will create new jobs, it is in my view possible to say that it will create new opportunities for those workers who wish to avail themselves of the additional hours on offer.
- [49] On balance, the Commission takes the view that the granting of an order will have a positive result for those who may seek additional hours if the extending trading hours are permitted.
- (h) *the view of any local government in whose area the order is likely to have an impact;***
- [50] There is no evidence before the Commission in relation to the position of the Brisbane City to the application.
- (i) *such other matters as the industrial commission considers relevant.***
- [51] The Commission's attention was drawn to the Report of the Productivity Commission titled *Economic Structure and Performance of the Australian Retail Industry* and, in particular, Chapter 10 of that report. However, these are matters of policy which are the domain of the Executive Government and not properly the province of the Commission.

Conclusion and orders

- [52] I note the comments of the Full Bench in *Retailers' Association of Queensland, Union of Employers and Shop, Distributive and Allied Employees Association (Queensland Branch)*, who observed:

"Shopping during the period immediately preceding Christmas each year involves special and unique circumstances. It is a period of substantially increased shopping demand and a period of when many consumers have limited time to shop due to their own increased work demands prior to the Christmas holiday period. In our view, it is in the interests both the public and

consumers that adequate trading hours be available to permit persons to shop in reasonable comfort."⁶

[53] In *Retailers' Association of Queensland, Union of Employers and Queensland Traders and Shopkeepers Association (Industrial Organization of Employers)* it was said:

"Midnight shopping expeditions have become part of the pre-Christmas commercial and social landscape. We would be reluctant to withdraw the permission now without good reason. Whilst we adhere to the view adopted by earlier Full Benches that midnight shopping has not been granted in perpetuity, we consider the time has come at which we should cease canvassing the matter on an annual basis."⁷

[54] The SDA submitted that the "notion of the status quo" is central and the onus rests on the applicant to demonstrate to the Commission that there are "special circumstances of a sufficiently significant nature", or that the situation is "unique" or "clearly distinguishable" from the normal situation.

[55] I am of the view that the Christmas retail period does create "special and unique circumstances" which clearly distinguish this application from others.

[56] Having regard to the matters prescribed by s 26 of the Act, I am of the view that the evidence before the Commission is, on balance, sufficient for the application to be granted. Accordingly, I believe that an order in the terms sought should be made pursuant to s 21 of the Act.

[57] I order that:

1. The application is granted;
2. The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with sch 1 of the application filed on 8 April 2014; and
3. The operative date of the amendments take effect as and from 28 November 2014.

⁶ (1991) 138 QGIG 95, 96.

⁷ (1996) 153 QGIG 164, 165.