

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 Another (TH/2011/6)

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

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER BROWN

11 May 2012

DECISION

FRASER COAST AREA

- [1] This application is made by the National Retail Association Limited, Union of Employers (NRA).
- [2] NRA seeks an amendment to the *Trading Hours - Non-Exempt Shops Trading by Retail - State Order* (the Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act).
- [3] The amendment sought is as follows:

"1. In clause 3.2 of the Order by deleting clause (14) and inserting the following is lieu thereof:

(14) Fraser Coast 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 25 December, Good Friday, 25 April, Labour Day)	8.30 a.m.	5.30 p.m.

2. In Schedule 1 (Definitions) of the Order by deleting clause (21) and inserting the following in lieu thereof:

(21) *Fraser Coast Area:*

Commencing from the point where the Mary River meets the sea coast; then by a line in a south westerly direction to the intersection of the Bruce Highway and Four Mile Road; then by a line in a northerly direction to the intersection of Maryborough-Biggenden Road and Mungar Road; then in a line in a north easterly direction to the point where the Eli Creek meets the sea coast; then by the sea coast to the point of commencement."

Relevant 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) 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 or 3."

[5] Section 26 of the 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."

Parties

- [6] Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) adopted a neutral position to the application subject to the following qualification. The qualification is that all work performed by employees in the extended trading hours (if granted) would be on a voluntary basis.
- [7] Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA) had originally been a party to these proceedings. However, on 12 July 2011, QRTSA sought to withdraw from these proceedings. That withdrawal was accepted by the Queensland Industrial Relations Commission (the Commission) as presently constituted. On 15 July 2011 QRTSA sought to rescind that withdrawal. That application was refused by the Full Bench on 18 July 2011 on the grounds that the matter was set for hearing in Hervey Bay on 26 July 2011 and it was too late in the day to attempt to become a party to the proceedings.
- [8] Master Grocers Australia (MGA) opposed the application.

Inspections

- [9] Inspections were conducted by the Full Bench and the parties and those inspections were undertaken in the Hervey Bay and Maryborough areas. The following retail businesses were viewed by all:
 - Urangan Central Shopping Centre;

- Pialba Plaza Shopping Centre;
- Stockland Hervey Bay;
- Woolworths Maryborough;
- Foodworks Maryborough;
- Food for Less Maryborough;
- Foodworks Tinana; and
- Station Square Shopping Centre.

Background to the application

- [10] Seven day trade for non-exempt stores was introduced to the Hervey Bay area on 18 January 2004. For non-exempt stores in Maryborough, Sunday trade is not permitted.
- [11] On 15 March 2008, the Fraser Coast Regional Council was formed. This amalgamation included the areas of Hervey Bay, Maryborough, Woocoo and Divisions 1 and 2 of the Tiaro Local Government area.

Witness evidence

NRA

- [12] NRA called evidence from the following persons (listed in order of appearance):
- Mr Paul Adams - Part-owner of Terry White Chemist situated in Station Square Shopping Centre in Maryborough (Exhibit 1);
 - Mr Charles Watson - Area Manager for Big W Discount Stores (Exhibit 2);
 - Mr Maurice Maddock - Manager of Bakers Delight stores in Maryborough and Pialba (Exhibit 3);
 - Mr Doug Sanderson - Centre Manager for Station Square Shopping Centre (Exhibit 4);
 - Mr Paul Mollard - Regional Manager for Queensland for Best & Less Pty Ltd (Exhibit 5);
 - Mr David Stout - State Compliance Manager for Coles (Exhibit 6);
 - Mr Scott Wallace - Regional Retail Support Manager in Queensland for Woolworths Limited (Exhibit 7); and
 - Mr Gerard Winzenberg - Queensland District Manager for Target Australia Pty Ltd (Exhibit 8).

MGA

- [13] MGA called the following witnesses:
- Mr Lance Stone - President of Maryborough Chamber of Commerce and CEO of Fraser Coast Training Employment Service (although not appearing on behalf of those bodies) (Exhibit 9);
 - Mr Gregory Tierney - Owner of Maryborough Plaza FoodWorks (Exhibit 10); and
 - Mr Mark Steffen - Owner of Tinana Place FoodWorks (Exhibit 11).

Consideration of the evidence in accordance with the provisions of s. 26 of the Act

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

- [14] The Fraser Coast is known as the gateway to the World Heritage listed Fraser Island. Within that area, Hervey Bay is the recognised tourist centre for the Fraser Coast.
- [15] Hervey Bay is the largest township in the Fraser Coast Regional Council area and is situated some 30 kilometres from the second largest township, Maryborough.
- [16] Within the township of Maryborough are significant manufacturing and engineering enterprises. Maryborough is also known for its historic sites and contemporary entertainment venues.
- [17] MGA states that evidence given by NRA witness, Mr Watson, was that, with the exception of clothing, all goods which could be purchased in non-exempt stores could also be purchased within currently existing stores in the area. Further, Hervey Bay is only 15 minutes drive south west from Maryborough in the event that consumers wished to also buy clothing on a Sunday.
- [18] The location under consideration shows that the primary townships of Maryborough and Hervey Bay are in close proximity to each other and it takes about 15 minutes to drive between the two.

- [19] In many other regions of the state where Sunday trade is permitted such proximity could represent moving from one suburb to another.
- [20] The area under consideration is not devoid of a wide range of retail outlets, both small, medium and large and it could be argued that, because of the proximity of the townships to each other, the demarcation between those non-exempt stores in Hervey Bay that can trade on a Sunday and those non-exempt stores in Maryborough that cannot could be viewed as somewhat academic.
- [21] The inspections highlighted the range of retail outlets within the area.
- (b) *the needs of the tourist industry or other industry in such locality or part*
(c) *the needs of an expanding tourist industry*
- [22] Mr Wallace provided evidence in relation to tourist visitation to the area. At Attachment 2 to Mr Wallace's Statement (Exhibit 7) was a document entitled "*Fraser Coast Regional Snapshot*" - for year ended September 2010.
- [23] That document highlighted the following:
- the Fraser Coast performed well during the Global Financial Crisis. During that period, locals and those from neighbouring regions travelled to the region. The document shows, however, that since that time, that market had "softened";
 - contrary to the state trend, Brisbane residents returned to the area for holidays;
 - a large proportion of the Fraser Coast's domestic holiday market increased their preference for caravan or camping accommodation over the year; and
 - the largest source of international tourists (the United Kingdom and Germany) also "softened" over the last year.
- [24] What was not provided by any party is statistical data upon whether tourism had increased in the region since the last trading hours application within the Hervey Bay area in 2004. While that statistical data may well be relevant in considering the "needs of the tourist industry" we accept that the current statistics do not assist NRA as it relates to the "needs of an expanding tourist industry".
- [25] In opposing this element of the claim, MGA says that there is nothing in NRA's evidence to show that visitors would not visit the region if non-exempt stores were closed on a Sunday. Further, MGA states that notwithstanding Mr Maddock's evidence that many customers frequent his Bakers Delight store on a Sunday, there was no specific evidence of this occurring.
- [26] MGA commented that "*Maryborough is well serviced by the larger supermarkets. Under the current trading hours regulations, the independent supermarkets have an opportunity on Sundays and public holidays to level the playing field.*" (see MGA submissions - point 16).
- [27] Considering the question of "*or other industry in such locality or part*", MGA raises the question of the share of the grocery market held by Woolworths and Coles which it says sits at around 78% - 79%. MGA raises this point because it says that Mr Wallace's perspective of the market share held by Woolworths and Coles is closer to 54%. MGA states that the difference lays in how one defines the market. It says Mr Wallace relies upon statistics relating to "food retailing" which in itself includes many other products that consumers "eat" across the country (Exhibit 7 - point 30). However, if one were to consider Woolworths' and Coles' market share of the grocery market, then the statistics would show the higher percentage cited.
- [28] Within that context, MGA claims that a "level playing field" does not exist within the grocery sector. MGA says that NRA relies only upon competition between larger retailers and ignores the question of competition between Coles and Woolworths and smaller independent supermarkets.
- [29] In terms of the requirement to consider "*the needs of an expanding tourist industry*", the statistical data shows that while numbers are down, there is a variance as to the profile of tourists visiting the area. It is noted that the day trip market is increasing while overnight tourism visitor numbers are declining.
- [30] On the question of tourism generally, we draw attention to the inclusion of the following commentary from President Hall of the Queensland Industrial Court (in Matter Nos C/2008/40; C/2008/43 and C/2008/44¹) which was relied upon by the Full Bench in Matter No. TH/2011/5²:

¹ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (C2008/40); National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Shop, Distributive and Allied Employers Association (Queensland Branch) Union of Employees*

"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 ...'.

- [31] The area under consideration has not previously been considered by the Commission, with the exception of Hervey Bay in 2004. It is clear, however, from statistical documentation put before the Commission that tourism has grown generally during that period in the area.
- [32] Those statistics show that there has been a marked increase of 8% in domestic day trip visitors. Further, there has been an increase of tourists from the New Zealand market and interstate visitors continue to stay longer than either intrastate or international visitors. What has remained stable with holiday visitors is that international holiday visitors have stayed in the region an average of 3-4 nights.
- [33] The statistical data also shows that the intrastate length of stay increased throughout the Global Financial Crisis, supported by the increase in locals and residents of neighbouring regions extending their holiday length of stay.
- [34] However, on the question of the needs of an "expanding tourist industry" the Full Bench does not see that criterion as being satisfied by NRA. In fact, statistical data shows that the Fraser Coast region suffered a 10% decrease in tourism for the year ending December 2010 with a decline in "all forms of visitation", including those conducting business and those visiting friends and relatives.
- (d) *the needs of an expanding population*
- [35] Mr Wallace's evidence was that there had been population growth in the Fraser Coast Regional Council area of 3.6% over the period 2005 to 2010 in excess of the Queensland average of 2% growth. The estimated resident population is currently 102,080 and the region is expected to attract a further 60,000 residents by 2031. This evidence was accepted by MGA. However, MGA stated that it did not accept the submission made by NRA to the extent that an expanded population necessitated a deregulation of trading hours.
- (e) *the public interest, consumers' interest, and business interest (whether small, medium or large).*
- [36] NRA's submissions were that different shopping hours cause unnecessary confusion for tourists and visitors when moving throughout Queensland. Over 90% of Queensland's population resided within seven day trading areas, and all major urban centres on the Queensland coast from Cairns to Gladstone and from Noosa to Coolangatta enjoyed extended trading hours. Given that Maryborough was a 15 minute drive from Hervey Bay, NRA said that uniform trading hours would be of benefit to tourists and residential consumers alike.
- [37] NRA also pointed to what it viewed as the "*indistinguishable features of Foodworks in Maryborough and the non-exempt supermarkets within the area*". Foodworks Maryborough had previously been a non-exempt supermarket owned by Coles "*which had been sold, rebadged and now trades from 6am to 9pm seven days per week*". Small business owners whose stores were within supermarket centres, but with outside access (Terry White Chemist in Station Square Shopping Centre and Bakers Delight stores in Station Square and Pialba Plaza Hervey Bay) gave evidence that their trade suffered on a Sunday because the shopping centres were closed.
- [38] Mr Winzenberg's evidence was that 21% of lay-bys made in the Target store at Hervey Bay were for Maryborough residents. Similar evidence was given from Mr Watson from the Big W store in Hervey Bay.
- [39] NRA submitted that uniform trading hours benefitted all consumers as it provided for more uniformity and certainty of trading hours together with greater choice for all consumers. There were also operational benefits for larger businesses in trading over seven days of the week.

(C/2008/43) and National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and The Australia Workers' Union of Employees, Queensland (C/2008/44) (2009) 190 QGIG 63.

² Trading Hours - Non-Exempt Shops Trading by Retail - State (TH/2011/5) - Decision <<http://www.qirc.qld.gov.au>>

- [40] Opposing the application, Mr Stone did not appear on behalf of the organisations with which he was involved. However, he gave personal evidence as a consequence of discussing issues with members of his various organisations. Mr Stone advised that the Maryborough Chamber of Commerce had 154 members (with about 90% of those persons being retailers). Of those members, 17 responses were received to an email seeking views in relation to the application.
- [41] NRA stated that Mr Stone had produced no verifiable evidence that shopping centre management would require smaller shops to open for seven day trade if the application was granted.
- [42] Mr Tierney, Owner of Maryborough Foodworks, gave evidence that his store had previously been a Coles store. His evidence was that his range of goods and pricing was similar to that of Coles and Woolworths. Mr Tierney believed that he would lose approximately \$45,000 of his Sunday turnover if the application was granted.
- [43] Under cross-examination by NRA, Mr Tierney stated that since he acquired ownership of the store he had doubled sales on each day of the week and regarded Sunday as "a bonus" because non-exempt stores were not allowed to trade on that day. He also varied his predicted loss of trade on a Sunday, if the application was granted, to \$40,000.
- [44] Mr Steffen, owner of a Foodworks store in Maryborough, said his store operates over seven days of the week and that it competes with other grocery retailers on the basis of service and convenience. Mr Steffen said that his store had experienced sales growth of 10% to 12% per annum over the past three years notwithstanding that during that period an Aldi supermarket had traded in Maryborough.
- (f) *the alleviation of traffic congestion*
- [45] There was no evidence adduced concerning this point.
- (g) *the likely impact of the order on employment*
- [46] All witnesses for the non-exempt stores stated that employment opportunities in their stores may be increased if the application was granted. 23,000 extra hours of additional employment was identified within the submissions made by NRA, however, we note that witnesses placed a caveat on those estimates to the extent that potential employment opportunities would be relative to how the business was performing at the time.
- [47] Mr Tierney said that 15 to 20 employees would lose their jobs if the application was granted.
- [48] In response to SDA's claim that work on a Sunday for employees should be of a voluntary nature, all non-exempt witnesses said there would be strict compliance with that requirement which formed a part of the respective industrial instruments.
- [49] We accept that it is difficult to identify how employment might alter if the application was to be granted. However, in our view the more likely outcome would be that if extended hours were increased, then greater hours for either existing or new employees should follow.
- [50] We do note, however, that there is a relatively high rate of unemployment in the Fraser Coast Area (7.9% as compared to the State average of 5.5%). Also, the retail industry is the largest industry of employment in the region followed by Health Care, Social Assistance and Construction (2006 Census).
- (h) *the view of any local government in whose area the order is likely to have an impact*
- [51] The Fraser Coast Regional Council was not involved in these proceedings and did not declare any view on the matter.
- (i) *such other matters as the industrial commission considers relevant*
- [52] There are no other matters for consideration.

Conclusion

- [53] The Full Bench has determined to grant the application.
- [54] In 2008, the Fraser Coast Regional Council was formed. It is within that Council's geographical boundary (i.e. the Fraser Coast Area) that this application is made.

- [55] As a consequence of this application being accepted by the Commission, the area of Hervey Bay and its surrounds will be subsumed within the newly created Fraser Coast Area.
- [56] As non-exempt stores in Hervey Bay can already trade on a Sunday, we are mindful of the fact that the application seeks to marry two different trading hours regimes, making the one set of trading hours for the area.
- [57] Firstly, the Full Bench can see the logic in dealing with an application that has a naturally defined geographical boundary, provided that the criteria as defined in s. 26 of the Act can be appropriately met within that application.
- [58] In this case, there is little travelling distance between the townships of Hervey Bay and Maryborough and there has appeared to be some degree of overlap in the shopping habits between consumers who reside in Maryborough and those residing in Hervey Bay. We should state that there has been no challenge by those opposing the application to the joining of the two previously separate trading hours regimes within the one application.
- [59] We accept that the Fraser Coast Area (as defined in this application) primarily encompasses a tourist oriented consumer base. As it is, Hervey Bay is recognised as the gateway to the World Heritage listed Fraser Island.
- [60] It has been put to the Full Bench by MGA that the shopping needs of local and tourist consumers can easily be met by exempt stores currently trading in Maryborough and, if more particular shopping was required, then access to the Hervey Bay stores was easily available to these consumers.
- [61] In our view, given the proximity of Maryborough to Hervey Bay, it would appear that the granting of the hours sought overall for non-exempt trade on a Sunday within the entire area would result in an outcome which may provide more convenience for consumers in Maryborough, but in all provides a practical and sensible outcome for all.
- [62] Mr Wallace provided relevant information concerning the tourist industry and the needs of the expanding tourist industry. That evidence showed that the Fraser Coast Area had responded to the Global Financial Crisis positively. It was accepted that there had been some "softening" in the tourism market, however, contrary to the State trend, there was the fact that Brisbane residents returned to the area for holidays. There also had been a softening in the overseas tourist market.
- [63] It is accepted that the area remains a tourism destination, but there is no substantial statistical evidence to support a claim that the needs of an increasing tourism industry are required to be met at the moment.
- [64] In many trading hours' applications, the question of "market share" of both Coles and Woolworths within Australia has been mentioned. It is primarily mentioned by those opposing an application for extended trading hours for non-exempt stores for the purpose of claiming that there is no "level playing field" in the grocery market between small traders and Coles and Woolworths.
- [65] For the Full Bench to consider this question within the context of s. 26(b) "*or other industry in such locality*" a more detailed debate would be required. Presently, the Full Bench is confronted with vastly different statistical data from Coles and Woolworths and those opposing the application. There is no statistical documentary evidence before the Commission on this point.
- [66] Mr Wallace provided evidence of population growth within the Fraser Coast Regional Council area, which was not insubstantial, and we have accepted that evidence within the context that generally a larger population requires more retail facilities.
- [67] In our view, the public interest is significantly met by providing a common set of trading hours with this area. We have accepted the proposition that common trading hours for non-exempt stores would alleviate any confusion on the part of consumers generally.
- [68] It is not uncommon in trading hours applications such as this for some small traders to support the application. In this case, some small traders whose stores are within supermarket centres, but with outside access, find that their trade suffered on a Sunday if the shopping centre was closed.
- [69] We have considered the evidence of small traders who were opposed to the application. Mr Tierney's evidence was that his store was previously a Coles store, and while his range of goods and pricing was similar to that of Coles, he would suffer a considerable monetary loss on a Sunday if the application was granted. Only inferences can be drawn from that statement - e.g. consumers were not looking at grocery shopping on a Sunday, but at shopping for a broader range of goods not found in a grocery store. However, that contention remains an inference only and is not relied upon in the making of this decision.

- [70] Mr Steffen's evidence of potential loss of trade on a Sunday if the application was granted was diluted somewhat by the fact that he appeared to be doing well on a Sunday notwithstanding that an Aldi supermarket had traded in Maryborough for a period of time.
- [71] In our view, there was a lack of any substantial or significant evidence from those opposing the application in this case.
- [72] In considering this criterion, we have formed the view that the evidence given by NRA's witnesses outweighed that of the smaller traders in terms of making its case for extended trading hours.
- [73] In terms of the likely impact of the order on employment, NRA's witnesses were able to estimate that an extra 23,000 hours of additional work would be generated in the region if the application was granted. Against that, Mr Tierney said that between 15 - 20 employees would lose their jobs if the application was to be granted. In our view, the fact that extra employment opportunities would arise is a positive factor in NRA's favour.
- [74] SDA was satisfied, as was the Full Bench by responses from NRA witnesses, that work on a Sunday for employees would be of a voluntary nature.
- [75] In considering all of the relevant factors pursuant to s. 26 of the Act, we have determined on balance, that the applicant has satisfied the Commission that extended hours should be granted within the boundaries so identified in the application.
- [76] Sunday trading can commence within the identified area as from 28 June 2012.
- [77] The Commission determines and orders accordingly.

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

D.K. BROWN, Commissioner.

Hearing Details:

2011 21 July (*Hearing re: Application by QRTSA to rescind withdrawal*)
 26 July (*Inspections and Hearing*)
 19 August (*NRA and SDA written submissions*)
 5 September (*MGA written submissions*)

Appearances:

Mr J. Moore for National Retail Association Limited, Union of Employers.
 Mr T. Martin for Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.
 Ms M. King for Master Grocers Australia.

Released: 11 May 2012