

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 150

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

CASE NO: TH/2012/6

PROCEEDING: Application to amend trading hours order

DELIVERED ON: 26 September 2014

HEARING DATE: 17, 18 & 22 October 2013

MEMBERS: Deputy President O'Connor
Industrial Commissioner Thompson
Industrial Commissioner Knight

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 25 June 2012; and**
- 3. The operative date of the amendments take effect as and from 13 October 2014.**

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER - APPLICATION TO AMEND - *Trading Hours - Non-Exempt Shops Trading by Retail - State* - Where the applicant sought to amend the order by extending the boundary of the relevant area and extend the allowable trading hours within that area - Objectors granted leave to appear and be heard - Matters relevant to s 21 order considered

WORDS AND PHRASES - "MUST HAVE REGARD TO" - MEANING OF - Whether failure by an applicant for orders under s 21 to address or adduce sufficient evidence in respect of the matters to which the Commission must have regard pursuant to s 26 precludes the Commission from making an order under s 21

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Corporations Act 2001 (Cth)
Industrial Relations (Fair Work Act Harmonisation

No 2) and Other Legislation Amendment Act 2013 (Qld), ss 110, 111
Trading (Allowable Hours) Act 1990 (Qld), ss 21, 26, sch 1

CASES:

National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (2009) 190 QGIG 63

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>>

R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327

Re Aboriginal Connections Aboriginal Corporation (in liq) and Guri Western Australian Ngundagar Aboriginal Corporation (in liq) [2012] NSWSC 491
Re Hunt; Ex parte Sean Investments Pty Ltd (1979) 53 ALJR 552

Re Kirby Street (Holding) Pty Ltd [2011] NSWSC 1536

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 Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (2002) 172 QGIG 542

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

APPEARANCES:

Ms A. Lamb for the National Retail Association Limited, Union of Employers.

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

Mr C. Dorber for the Queensland Retailers and Shopkeepers Association Industrial Organisation of Employers.

- [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* (Qld) ("the Act"). The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees ("SDA") and the Queensland Retailers and Shopkeepers Association Industrial Organisation of Employers ("QRTSA") were granted leave to appear and be heard in relation to the application, pursuant to s 23 of the Act. Master Grocers Australia Limited applied for leave under the same section but subsequently withdrew it.
- [2] The NRA's application relates to the Ipswich Central Business District. It seeks to amend sch 1 of the Order in two ways. The first is by inserting a new sub-cl in cl 3.2 of the Order in the following terms:

"(26) Ipswich Central Business District

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	7.00am	9.00pm
Saturday (including Easter Saturday)	7.00am	7.00pm
Sunday (excluding Easter Sunday)	9.00am	6.00pm
Public Holidays (as defined) (excluding Good Friday, Easter Saturday, 25 April, Labour Day, 25 December)"	9.00am	6.00pm

The second is by inserting the following new clause in sch 1 of the Order (definitions):

"(35) The Ipswich Business Central District - The area within the following boundaries:

Commencing at the intersection of Roseberry Parade and Ellenborough Street; thence along Ellenborough Street to its intersection with Roderick Street; thence along Roderick Street to its intersection with Milford Street; from that point in a straight line to the intersection of Flint Street and Lamington Parade; thence along Flint Street to its intersection with Colvin Street; from that point in a straight line to the intersection of Panton Street and Macgregor Street; from that point in a straight line to the point of commencement.

Provided that where the boundary of the Ipswich Business Central District is a street, road or parade, shops on both sides of the street, road or parade, shall be regarded as being within the boundary."

Legislative requirements

- [3] At the relevant time, s 21 of the Act provided:

"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."¹

[4] Section 26 provides that, in relation to making an order under s 21, the 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."

¹ The Act has since been amended to allow a single member of the Commission to hear applications and make orders under s 21: see *Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Act 2013* (Qld) ss 110, 111, inserting new s 23A; Explanatory Notes, *Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Bill 2013* (Qld) 2. Those changes came into effect after the present application was filed and heard.

The authorities on what s 26 requires

- [5] In dealing with the statutory elements 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."²

- [6] The QRTSA submitted that the NRA has failed to adduce evidence sufficient or, in some cases, any evidence, in respect of the matters listed under s 26 of the Act. As a consequence, the QRTSA submits that the Commission's power to make an order under section 21 of the Act has not been enlivened. With respect to the QRTSA, that submission relies on an incorrect interpretation of what s 26 of the Act requires the Commission to do in relation to making an order under s 21.

The proper construction of s 26

- [7] What s 26 requires is that the Commission "must have regard to" the matters listed under that section. The phrase "must have regard to" is not defined in the section in which it appears, and it does not appear in the dictionary in sch 1. There does, however, seem to be a settled judicial interpretation of that phrase as it appears in similar provisions in other Acts.
- [8] The leading authority appears to be the judgment of Gibbs CJ in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327. In that case, his Honour was dealing with s 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which provided that, on application to the Aboriginal Land Commissioner by Aborigines making a traditional land claim, the Commissioner had to ascertain whether they were the traditional owners and report his findings to the Minister. Sub-section (3) provided that, in making such a report, the Commissioner "shall

² *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).

have regard" to certain matters. By sub-section (4), the Commissioner was required, in carrying out his functions, to "have regard to" certain principles set out therein. His Honour said of those provisions:

"When the section directs the Commissioner to 'have regard to' the strength or otherwise of the traditional attachment by the claimants to the land claimed (sub-s (3)), and to the principles set out in sub-s (4), it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation. When the section directs him to comment on the matters mentioned in paras (a) to (d) of sub-s (3), it requires him to remark upon those matters and to express his views upon them. The change in language is so significant that, notwithstanding the difficulties of the section, I find it impossible to reach any conclusion other than that a significant change of meaning is intended, and that the matters which form the subject of the comment are not matters to which the Commissioner is bound to have regard in making his recommendation."³

- [9] In *Re Kirby Street (Holding) Pty Ltd* [2011] NSWSC 1536, Barrett J applied that interpretation of the phrase "have regard to" in a similar sort of provision in the *Corporations Act 2001* (Cth):

"The direction to 'have regard to' the specified matters requires that the court 'give weight to' those matters 'as a fundamental element' in coming to a conclusion. The inquiry in the course of which the specified matters must be given that weight is as to what is 'just and equitable'.⁴

- [10] Returning to the QRTSA's submission - that failure by an applicant for orders under s 21 to adduce sufficient evidence in respect of any the matters to which the Commission must have regard under s 26 has the consequence of precluding the Commission from making the orders sought - it should be clear from the authorities outlined above that this is not the case. It is the Commission which must have regard to the matters specified under s 26, not the applicant. It may well be unwise for an applicant not to address those matters, but the Commission is still capable of having regard to them in the manner required by the Act, notwithstanding any failure by the applicant to address or adduce evidence in respect of them.

NRA Evidence

- [11] Evidence in support of the application was given by the following witnesses at the hearing on Thursday 17, Friday 18 and Tuesday 22 October 2013:

- Ken Lothian - Coles, whose affidavit was also admitted into evidence,⁵
- Geoff Bell - Woolworths, whose affidavit was also admitted into evidence;⁶

³ *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 333, citing *Re Hunt; Ex parte Sean Investments Pty Ltd* (1979) 53 ALJR 552, 554 (citations omitted).

⁴ [2011] NSWSC 1536 [71], quoting *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 333 (Gibbs CJ). See also *Re Aboriginal Connections Aboriginal Corporation (in liq) and Guri Western Australian Ngundagar Aboriginal Corporation (in liq)* [2012] NSWSC 491 [28] (Barrett JA).

⁵ Exhibit 5.

⁶ Exhibit 6.

- Charles Hammersla - Kmart, whose affidavit was also admitted into evidence;⁷
- David Stout - Coles, whose affidavit was also admitted into evidence;⁸ and
- Janet Roberts - ACE Computer World, whose affidavit was also admitted into evidence.⁹

Opposing Evidence

[12] Opposing evidence adduced in support of the SDA's objection to the application came from the following witnesses:

- Susan Hamling - Coles, whose affidavit was also admitted into evidence;¹⁰
- Shay King - Officeworks, whose affidavit was also admitted into evidence;¹¹ and
- Helen Windle - Kmart, whose affidavit was also admitted into evidence.¹²

[13] The following witnesses were also called by the QRTSA to give evidence in opposition to the application:

- Derek Lundberg - Innovate Coaching Pty Ltd, whose affidavit was also admitted into evidence;¹³
- Roslyn White - IGA Trading Hours Committee, whose affidavit was also admitted into evidence;¹⁴ and
- Laurie Mundt - Ipswich City Council.

[14] Various other documents - including, for example, maps, video footage, and photographs - were also admitted into evidence or formally marked for identification at the hearing of the application. Although not all of those documents are explicitly referred to in these reasons for decision, the Full Bench has considered each of them in reaching its decision.

Application of s 26 criteria

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

[15] The first matter to which the Commission must have regard in relation to making an order under s 21 is "the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated".

⁷ Exhibit 7.

⁸ Exhibit 8.

⁹ Exhibit 13.

¹⁰ Exhibit 9.

¹¹ Exhibit 11.

¹² Exhibit 12.

¹³ Exhibit 15.

¹⁴ Exhibit 19.

[16] The NRA's application effectively seeks to amend the Order by introducing a new definition for the Ipswich Central Business District so as to expand the allowable trading hours for non-exempt shops within that area. We note the SDA's submission that the effect of the amendment sought by the NRA is to *create* a new area to be called the Ipswich Central Business District, in an apparent attempt to avoid employing the NRA's phraseology of introducing a new definition for that area (which logically presupposes the existence of such an area) and thereby draw the Commission's attention to the distinction between those two choices of words. With respect, however, all this distinction raises is a question of semantics to which the Commission need not have regard; what we must have regard to is "the locality". Determining the locality is a question of fact and it may be answered without reference to any formal or informal designation assigned to the locality in question; a locality may be determined as bound by streets, watercourses, or geographic coordinates of latitude and longitude, to mention just a few possibilities. What the locality is called, by whom it is so-called, or whether it has any name at all is irrelevant.

[17] That said, exhibit 1 - which is a map of Ipswich marked up with the proposed boundaries of the area which the applicant seeks to redefine within sch 1 of the Order as the "Ipswich Central Business District"¹⁵ - demonstrates that the locality under consideration is the administrative, cultural and commercial centre of Ipswich.

[18] The evidence of Mr Laurie Mundt further confirmed that the Ipswich City Council recognises that Ipswich has a defined central business district.¹⁶ Moreover, in an extract from the Ipswich City Planning Scheme attached to the letter of Mr Mundt dated 7 August 2013, cl (12) of the scheme states:

"(12) There is a focus for commercial activity within Ipswich directed towards development of the local government area as a 'City of Centres', [sic] with the Ipswich City Centre as the Key Regional Centre, Springfield Town Centre as a 'Gateway CBD' (refer Part 14), a network of other major centres (including major future urban centres) and neighbourhood centres and local shopping/commercial areas as shown on Map 3 in Schedule 7."¹⁷

[19] Furthermore, the Department of Infrastructure and Planning's "South East Queensland Regional Plan 2009-2031", an extract of which was attached to Mr Stout's statement, contains the following telling paragraphs:

"The Ipswich CBD is the historic centre for commerce, and is strategically located to function as the principal administrative, cultural and community centre for Ipswich and surrounding areas. This centre will also act as the main retail and commercial centre for Ipswich's central and western suburbs and surrounding rural areas.

This centre is serviced by rail and bus public transport and will include residential uses. Office-based business and government administration

¹⁵ There were no objections to the map being admitted into evidence as exhibit 1: see Transcript of Proceedings T1-4.

¹⁶ T2-71, Line 35.

¹⁷ Exhibit 18.

precincts will be expanded and integrated into mixed-use areas, promoting a range of housing options and small businesses."¹⁸

[20] It follows that, in having regard to the relevant locality as required by s 26(a), the Commission finds that the application relates to an area determined by the boundaries adduced in evidence, which may for convenience be called the "Ipswich Central Business District".

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

[21] The next two matters to which the Commission must have regard can be conveniently dealt with together.

[22] 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...'¹⁹

[23] The primary evidence before the Commission in relation to the matters contained in s 26(b) and (c) came from the statement of Mr Stout. The following paragraphs are most pertinent:

- "11. Ipswich has a confident outlook for continued tourism development. Key attractions and destinations include the world class Workshops Rail Museum in North Ipswich, the expansion of the Ipswich Motorsport Precinct, Ipswich Art Gallery, Ipswich Festival, Queens Park and a number of wineries within the City.
- 12. The Regional Tourism Profiles for 2010/11 and 2011/12 published by Tourism Research Australia (Attachments G & H) both show that Central Ipswich (as per the Statistical Local Area defined by the ABS) was the second most visited destination by domestic overnight visitors

¹⁸ Exhibit 8, attachment C.

¹⁹ (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].

after Brisbane city. This visitation grew from 159,000 visitors in 2010/11 to 164,000 visitors in 2011/12. Tourism considerations dictate that we service this market to the optimum extent."²⁰

- [24] The Full Bench is of the view that the matters contained in s 26 (b) and (c) are not of significant weight to the determination of this application. That said, the evidence reflects that the Ipswich CBD is the cultural centre for the region and that a number of tourist attractions are located within the region. We also note the statistical information which show that Central Ipswich is a highly visited area. There is no doubt that the extended trading hours would provide an opportunity or a service to those visiting the Ipswich CBD.

(d) the needs of an expanding population;

- [25] Mr Stout's statement refers to the "Regional Profiles Summary" for the "Ipswich Local Government Area", a publication of the Queensland Treasury and Trade's Government Statistician.²¹ In his statement, Mr Stout describes the statistical data reflected in that document in the following terms:

"The average annual growth rate in Ipswich City LGA between 2007 and 2012 was 3.6%, compared with 1.8% for Queensland (Attachment A). The population is forecast to grow to 461,990 residents by 2031, representing growth of approximately 250% (Attachment A)"²²

- [26] With reference to Australian Bureau of Statistics data, Mr Stout goes on to state:

"ABS data (Attachment B) shows that between 2001 and 2011, Ipswich (Statistical Area Level 4) had the largest growth in Queensland with an increase of 70,800 people, representing growth of 32%, which also made it one [of the] fastest growing major centres in the state."²³

- [27] The SDA submits that the Full Bench should be cautious in accepting the statistical data contained in Mr Stout's statement because it includes statistics pertaining to Springfield and Springfield Lakes, which have seen significant growth over the last ten years. Whilst acknowledging the submission of the SDA, the Full Bench does not see why s 26(d) ought to be construed so narrowly as to limit its consideration of the matter to the area the subject of the application. Whilst the matter to which the Commission must have regard under s 26(b) specifically refers to the locality as determined under s 26(a), s 26(d) contains no reference to "the locality", or indeed any explicit statement as to exactly what population the expanding needs of which the Commission must have regard. Accordingly, the matter to which the Commission must have regard under s 26(d) is not constrained to "the locality" or any particular area at all. What must be considered is whether the needs of "an expanding population" would be served by granting the application in question.

²⁰ Exhibit 8.

²¹ Exhibit 8, attachment A.

²² Exhibit 8, paragraph [4].

²³ Exhibit 8, paragraph [5].

[28] Nevertheless, the Full Bench is of the view that the evidence supports a conclusion that the Ipswich City Council Local Government Area is a significant population growth area. Further, we are of the view that the needs of an expanding population would be served by the granting of this application.

(e) *the public interest, consumers' interest, and business interest (whether small, medium or large);*

[29] "[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) and Others* (2003) 174 QGIG 1339 observed, "it is reasonable to state that the interests of consumers are facilitated by extending trading hours."²⁴

[30] In this regard, Mr Bell gave evidence that "...it's about the customer and the community having choice, flexibility and an opportunity to shop where and when they would like to shop."²⁵

[31] Further evidence came from the cross-examination of Mr Stout, during the course of which he was asked, "All I'm seeking from you is confirmation, based on the evidence you've given in the cross-examination thus far, that the interests of small and medium businesses outside Coles, Woolworth, Kmart, Target were not a consideration in your evidence?" In answer to that question, Mr Stout said:

"I think, as far as I'm concerned, the small business was considered. Small business for us is obviously all around us in the CBD. We're a part of small business. We understand we're an anchor tenant. In the larger shopping centre, we all understand that we're anchor tenant and we're a draw card.

Some of those people are small business, fit into the non-exempt. Some are a middle-sized business and are still in that classification. As far as the convenience stores go, I think there's always a place for the convenience store. There's – there's always a proposition for us to coexist, and we'll probably continue to coexist from here and for a long time into the future."²⁶

[32] In our view, even the evidence of Dr Lundberg supports the NRA's submission that the extended trading hours sought would, if granted, provide non-exempt retailers within the proposed boundary greater flexibility and opportunity. This is reflected in the evidence he gave to the Commission:

"DEPUTY PRESIDENT O'CONNOR: Sorry. Before you move on, can I ask, in relation to paragraph 29, [D]r Lundberg, is it – is that paragraph prefaced on the – on the belief that, say, between 7 am and 8 am in the morning or outside the trading hours in the afternoon, that you base that statement on what you call top-up and emergency items only, or is that not general shopping?---No, I – your Honour, I agree with the NRA that there are different – now different

²⁴ (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.

²⁵ T1-69, Lines 18-20.

²⁶ T2-11, Lines 1-12.

*categories of grocery buying, of consumers and that those – those categories – that the traditional shopper of the – the main shopper of the household doing the one main shop per week is – is not necessarily the whole category anymore
- - -*

Yes?--- - - - that there are these other categories.

And the motivation for you to shop, say, early in the morning might not be for a top up for the whole of your grocery shopping or part of your grocery shopping for the week?---Some, given the varying lifestyles in this day and age, your Honour.

Yeah?---I'd - - -

So the patterns have changed, in other words?---Patterns have changed.

Yes?---And some people do shop early in the mornings - - -

Yes?--- - - - the same as some people do shop late at night.

Late at night, because of their work commitments or otherwise?---That's right."²⁷

- [33] Mr Bell gave evidence that, from his experience with Woolworths, in those cases where additional hours have been introduced in other locations, the additional hours have been well received:

"The additional hours, we see evidence in other locations that our clientele, our community and our customers wish to choose when they wish to shop, and outside those traditional normal trading hours, our stores have been well patronised, and anecdotal evidence is they appreciate that."²⁸

- [34] The statement of Mr Ken Lothian, Store Manager of the Coles Ipswich CBD store, describes how the current store reopened on 6 February 2013 after the devastating floods of January 2011. He goes on to state:

- "● The store is located in the heart of Ipswich approximately 200 metres from the Ipswich Train Station.*
- This store serves 18,835 customers on average per week.*
- Peak trading periods are considered to be the early morning period from 8am to 9am, lunchtime trade, and afternoon trade from 4pm to 7pm."²⁹*

- [35] It is apparent to the Commission from the evidence of Mr Lothian that there is present consumer demand to shop at the Coles Ipswich CBD store. As noted in his evidence, the Coles Ipswich store was closed for a period of approximately 2 years after the January 2011 floods. Following its reopening in February 2013, the store now services some 18,000 customers per week. The customer figure is also instructive when regard is had to the fact that, when the figure was recorded, the

²⁷ T2-59, Lines 19-43.

²⁸ T1-50, Lines 28-32.

²⁹ Exhibit 5, paragraph [8].

store had only been trading for four months. This is, in our view, illustrative of an obvious demand to shop at the Coles CBD store. It follows that consumers' interest in shopping there would be serviced by additional trading hours.

- [36] Mr Lothian's statement also recorded the result of a survey conducted by Coles outside the Ipswich CBD and Riverlink stores during the period from 20 July to 27 July 2013. 280 people participated in the survey, of whom 259 (93%) lived locally. Of the 280 customers surveyed, 209 (75%) indicated support for the application to extend trading hours. The level of support among participants surveyed at the Ipswich store was higher (at 80%) than those surveyed at the Riverlink store (69%).³⁰ Although the SDA and QRTSA challenged the probative worth of this survey, we regard it as indicative of support for the extended trading hours sought.
- [37] The NRA submits that the extension of trading hours will, if granted, provide existing customers of Coles, Woolworths, Kmart and any other non-exempt retailers within the proposed boundary, greater opportunity and more flexibility with respect to when they shop with these retailers. We agree.
- [38] There is merit in the NRA's submission that there is no reason to assume consumers will cease patronising any particular retailer simply because another retailer is able to trade for longer. In support of that submission, the NRA points to the evidence of Mrs Roberts of ACE Computer World, who, when questioned by the SDA regarding the potential loss of business to smaller stores from extended trading hours, responded "Not necessarily..."³¹ She further rejected the proposition put to her by the QRTSA that the possibility of new competitors opening in the vicinity of her business might be harmful to her business, saying: "Wouldn't bother us. We've got JB Hi-Fi. We've got Harvey Norman's. We've got Good Guys. We've got RT Edwards. The more the merrier. Everyone will trial it, and generally, they still come back to us..."³²
- [39] The SDA criticises Mrs Roberts' evidence, submitting that she was not a credible witness. The Full Bench rejects that submission. Mrs Roberts was, in our view a credible and impressive witness who indicated support for the application for extended trading hours and gave evidence that she believed the proximity of Coles to her store had a positive impact on her business. There is no reason to doubt that she honestly holds that belief. As she says in her statement:

"I believe allowing Coles to trade longer will help to draw more customers into the CBD area and that would be a positive step for all of the businesses in the area."³³

- [40] Mrs Roberts identified the parking provided by Coles as a positive for her business and others in the area.³⁴ Indeed, even the SDA in its submissions accepts (correctly, in our view) that Mrs Roberts' business suffered during the period that Coles was closed.³⁵ The evidence is that the Coles Ipswich CBD store brought more than

³⁰ Exhibit 5, paragraph [10].

³¹ T2-44, Line 30.

³² T2-50, Lines 8-10.

³³ Exhibit 13, paragraph [7].

³⁴ T2-41, Lines 43-46.

³⁵ Exhibit 13, paragraphs [4]; T2-41.

18,000 customers to the area per week, which Mrs Roberts noticed as resulting in "a definite improvement in trade in the week after the New Coles Store opened."³⁶

- [41] The NRA also draws attention to the evidence of Ms Roslyn White, the Chair of the IGA/QNN Trading Hours Review Committee and the person responsible for recommending policy and procedural matters to the IGA Queensland State Board, whom the QRTSA called as a witness. In particular, the NRA points to the following comments made by Ms White in her evidence before the Commission, which outline the factors that attract consumers to particular retailers, as well as the potential benefit to be derived from geographical concentration of competing retail stores:

"Oh, well, the customers are very savvy today, so you have to try and please them as best way that you – I mean, they have a choice so you've just got to do the best you can; you've got to put prices out that are competitive as you can possibly be within the means that you're able to continue to exist; customer service; easy shopping; friendly, you know, convenient sort of shopping, where customers can drive up to your front door and – and be able to nip in and nip out quickly, and that type of thing. Plus our fellow traders, that we all trade with in – generally in neighbourhood centres, so, the butcher, the baker, the candlestick maker, which – they're all – you know, they're all usually locally owned businesses. And, so, it's good if you can, sort of, be a – a – in a – in a neighbourhood centre where you can actually feed off each other, and – and all, you know, sort of, trade together in a – in a way that everyone works together..."³⁷

- [42] There was no evidence before the Full Bench by any independent grocery retailers either from within the proposed boundary or in the area immediately surrounding it. As a consequence, there is no evidence before the Full Bench to assist it to determine whether granting the order sought would have a deleterious impact or otherwise on any independent grocery retailers, or indeed any business.
- [43] In Ms White's evidence she gave, from the perspective of her organisation, a larger state wide perspective of the trading hours issue and to provide to the Full Bench an overview of the IGA State Board's approach to deregulation of trading hours in Queensland. To that extent, the evidence of Ms White had a distinct policy complexion. With that qualification, Ms White's evidence could not therefore provide any specific evidence of the impact that extended trading hours, the subject of this application, would have on local businesses.

(f) the alleviation of traffic congestion;

- [44] It was submitted by the NRA that ability of Coles to open earlier would assist the alleviation of traffic congestion. In support of that submission, reference was made to the statement of Mr Stout and, in particular, the traffic data recorded by the Ipswich City Council for Thursday 2 May 2013. That data suggested that, between 7.15am and 7.45am, the vehicle count was 645, as compared to the count of 1635 between 8am and 9am.

³⁶ Exhibit 5, paragraph [8]; Exhibit 13, paragraph [5].

³⁷ T3-10, Lines 26-37.

[45] The Commission is of the view that question of the alleviation of traffic is not a significant determining factor in this application. This is particularly so having regard to the proposed trading hours and the evidence before the Commission which suggests that the new Coles development can accommodate 300 vehicles in an undercover car park.

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

[46] On the evidence before the Commission, it is unlikely that the proposed trading hours will have a significant impact upon employment.

[47] Mr Lothian states that the terms of the relevant certified agreement allow for "the rostering of staff during the extended trading hours sought in this application." "However," he goes on to state, "any additional hours resulting from the granting of this application will be offered to employees on a voluntary basis."³⁸

[48] The SDA's submission is 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] The evidence presented by the SDA came from Ms Susan Hamling an employee from the Coles Ipswich CBD store, Ms Helen Windle, an employee of K-Mart at Riverlink (North Ipswich) and Mr Shay King, a part-time employee of Officeworks.

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

[51] As far as the negatives are concerned, the Full Bench, after considering the evidence of the witnesses called by the SDA, and noting the provisions of the certified agreement believe that their concerns can be readily addressed by requiring that the any order made would be conditioned on employment being voluntary. In this regard the Full Bench refers to the following evidence of Mr Bell:

"We work with our employees. We ask for voluntary - volunteers to work those hours. If they don't wish - and we have discussions with them around the circumstances - their personal circumstances across all our employees. And we talk about the why - what may need to happen, what might not happen, etcetera, etcetera. And if the need arose and we can give greater employment to the community, fantastic and - yes. We'll go and hire additional people."³⁹

[52] In terms of the safety concerns raised in the evidence, the Full Bench notes that these concerns are not unique to those workers working in the retail sector and are general application. However, the Full Bench is satisfied that appropriate steps have been taken to address these concerns.

³⁸ Exhibit 5, paragraph [12].

³⁹ T1-74, Lines 1-7.

[53] On balance, the Full Bench 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;

[54] In the letter of Mr Laurie Mundt, the Economic Development Manager for Ipswich City Council dated 7 August 2013, he wrote:

"The City of Ipswich has traditionally had uniform trading hours within the local authority boundary and Council has adopted a City of Centres policy that acknowledges the significance of the Central Business District and also recognises the importance of equity between the various centres.

Pursuant to this policy Council does not support the adoption of a geographical boundary for the Central Business District that defines specific trading hours for any particular centre which are different from the hours approved for any other centres."⁴⁰

[55] In his evidence before the Commission, Mr Mundt confirmed that the Council had not made a formal resolution to oppose the present application.⁴¹ He further clarified that the Council "has a neutral view in that it believes it should leave that up to the retail sector to decide the hours to best suit their customers and their – the operation of the business."⁴²

[56] While Mr Mundt's letter stated that the Council could not support the application on the basis of planning considerations and equity across its "City of Centres" planning policy, he confirmed that the Council has a neutral view on trading hours. In cross-examination Mr Mundt stated:

"So, while the council does not support the application as per the last paragraph of your letter where you talk about "does not support the adoption of geographical" – sorry, "of a geographical boundary for the central business district that defines specific trading hours that any particular centre which are different from the hours approved for any other centres," would it be correct to say that the council does not oppose the application?---*No, it doesn't oppose the application, no.*"⁴³

[57] The Ipswich City Council has adopted the view that, whilst it might prefer uniformity in trading hours across the city, it has taken a neutral stance on the question of extension of trading hours, preferring instead to leave to the retail sector the question of the hours best suited to their customers and the operation of their businesses.

⁴⁰ Exhibit 18.

⁴¹ T2-73, Lines 1-3.

⁴² T2-73, Line 9-11.

⁴³ T2-72, Lines 1-6.

[58] In our view, it is understandable why the Ipswich City Council would prefer uniformity in trading hours across the City of Ipswich. However, the legislative scheme under which trading hours are determined does not necessarily encourage uniformity.

[58] The Full Bench, whilst noting the Council's preference expressed in paragraphs [54]-[57] above, accepts that, at the highest, the Ipswich City Council neither supports nor opposes the application. In saying that, the Full Bench notes the Ipswich City Planning Scheme dated 7 August 2013 and, in particular, clause (12) which encourages the development of the Ipswich LGA as a 'City of Centres', with the Ipswich City Centre as the Key Regional Centre.⁴⁴

(i) *such other matters as the industrial commission considers relevant.*

[59] The Commission does not consider that there are any further matters relevant to the present application. As such, we will not have regard to any further matters under s 26(i), notwithstanding our discretion to do so.

Conclusion

[60] Having regard to the matters prescribed by s 26 of the Act, the Full Bench is of the view that the evidence before the Commission is, on balance, sufficient for the application to be granted. Accordingly, we believe that the application should be granted and an order made pursuant to s 21 of the Act.

Orders

[61] We 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 25 June 2012; and
3. The operative date of the amendments take effect as and from 13 October 2014.

⁴⁴ Exhibit 18.