

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 The Australian Workers' Union of Employees, Queensland (TH/2011/7)

DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER THOMPSON

2 November 2011

DECISION

[1] This application, made by the National Retail Association Limited, Union of Employers [NRA], seeks to amend the *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* pursuant to s. 21 of the *Trading Hours (Allowable Hours) Act 1990* [the Act].

[2] The relevant amendment is as follows:

"In subclause 3.2(1) of the Order by deleting the further proviso in relation to trading hours for the dates of 27 and 28 December, 2010 and 3 January, 2011, and inserting the following in lieu thereof:

'Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Tuesday December 27, 2011, except where clause 3.2 provides for a wider spread of allowable trading hours:

	Opening Time	Closing Time
Tuesday 27 December 2011	8.00 a.m.	5.00 p.m.'."

Opposition to the claim

[3] The application was opposed by both the The Australian Workers' Union of Employees, Queensland (AWU), and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA).

Statement of Facts and Circumstances [NRA]

[4] As background to the application, the NRA supplied the following details:

- The application seeks to redress the situation for non-exempt shops in Queensland (not permitted to trade on public holidays) which would not be able to trade for three consecutive days over the Christmas period (namely - December 25, 26 and 27, 2011).
- This situation has arisen because of the gazettal of Christmas Day and Boxing Day public holidays on 26 and 27 December 2011. [Queensland Government Gazette 62 at 588, published 29 October 2010]
- As it now stands, non-exempt retailers in regional Queensland would be closed for 5 out of the 10 days over the busiest trading period of the year.
- This situation had previously been considered by the Commission in B/2005/672. In that matter, the variation sought was granted as it was considered appropriate for six day trading areas.

Evidence

[5] The NRA called five witnesses:

- Mr Barry Waters [Regional Manager for Big W Discount Stores] [Exhibit 1];
- Mr David Stout [State Compliance Manager for Coles] [Exhibit 2];
- Mr Scott Wallace [Regional Retail Support Manager in Queensland for Woolworths Limited] [Exhibit 3];

- Mr Angus Nardi [Deputy Executive Director of the Shopping Centre Council of Australia] [Exhibit 4]; and
- Mr Gerard Wizenberg [Queensland District Manager for Target Australia Pty Ltd.] [Exhibit 5].

[6] It is not necessary to individually record all of the evidence given by these witnesses. The evidence was essentially similar in content and highlighted difficulties which would be encountered by non-exempt stores not permitted to trade on 27 December 2011. The areas covered are as follows:

- Inconvenience for customers;
- Increase in dissipation of stock due to extended closure;
- Congestion both on the day prior to and the day following the closure;
- Logistics problems for both Distribution Centres and Suppliers;
- Customer confusion over trading hours;
- Loss of additional hours opportunities for full time and casual staff due to reduction in trading hours;
- An inability to maintain fresh stock levels and a general depletion of stock including stock-outs;
- Will impede operational efficiencies (setting up/closing down departments);
- Increase in stock weight due to heavy trading before and after closure - ie supply chain will not cope;
- Loss of sales revenues;
- Loss of customer loyalty - customers who elect to take advantage of the more extended trading hours in nearby seven day trading areas may not be recovered in future years;
- The condensed selling period will give rise to congestion and potential safety concerns for both customers and staff;
- Less than optimal arrangements will be made in terms of the timing of promotions;
- Advertising and marketing costs will be less efficiently deployed over a shorter sales period;
- Less than optimal arrangements will apply in terms of the timing, co-ordination, and delivery of both post-Christmas and "sale" catalogues; and
- The closure of these stores on six days out of ten will adversely affect preparation for sales.

Final submissions of the parties

[7] The NRA identified the towns and cities within Queensland which retained a six day trading regime. These included the following:

Gympie;
 Maryborough;
 Bundaberg;
 Bowen;
 Ayr;
 Ingham;
 Charters Towers;
 Mt Isa;
 Warwick;
 Dalby;
 Roma;
 Charleville;
 Biloela;
 Blackwater; and
 Weipa.

- [8] The NRA stated that if the application was successful, employees working on December 27 2011 would be paid penalty rates. Work performed by employees would also be of a voluntary nature.
- [9] The AWU said that the evidence showed that the majority of affected localities were situated within two hours' drive of a seven day trading area. In its view, if consumers wished to avail themselves of trade on 27 December 2011, they would be able to do so with reasonable ease.

Consideration of s. 26 of the Act

- [10] The legislation at s. 26 of the Act details with the criteria which must be considered by the Queensland Industrial Relations Commission (Commission) in determining this application.

s. 26(a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated

- [11] While it is accepted that the majority of non-exempt shops subject to this application are situated primarily within two hours' drive of a seven day trading area, the NRA says that there is a significant retail infrastructure identified in the areas without seven day trade. Those areas would lose sales to the areas with extended trade and consequently would be significantly disadvantaged by the loss of revenue.
- [12] The AWU rejected that proposition and added that it was highly probable that certain traders (i.e. exempt and independent retailers) would be advantaged by the closure of the larger retailers in their town on that day.
- [13] The SDA believed that there would be no expectation on the part of consumers in the six day trade towns identified by the NRA that their non-exempt stores would open on 27 December 2011 because that day would be no different to other closed days.
- [14] As well, the SDA believed that many residents of these smaller towns would travel during the Christmas and New Years Eve period to see friends and relatives in other larger townships.
- [15] The SDA claimed that the applicant had not differentiated between the differing community needs throughout the identified townships under consideration for extended trade on 27 December 2011. This is explained as follows:

"We submit that the applicant and its witnesses are relying on experience in metropolitan and coastal tourist or holiday regions and applying that understanding to country and rural communities.". [SDA Written Submissions page 3]

Consideration

- [16] After considering the submissions around this criterion, we have formed the view that while we accept that consumers in different regions may have different needs to be met (and this is evident when one considers the size of the State of Queensland), the Christmas period is one where the public entertain and shop more than during other periods of the year. To this end, we have viewed the NRA's submissions around this criterion as being supportive of its case.

s. 26(b) the needs of the tourist industry or other industry in such locality or part

- [17] There was no specific evidence drawn by the NRA around this criterion. None of the areas identified by the NRA in this application requiring extended trade on 27 December 2011 are considered "tourist destinations".
- [18] The NRA believed that there was considerable activity and movement on the part of the community (and tourists) to other townships during this period. To this end, consumers required access to a wide range of retail shopping.
- [19] The SDA claimed that if tourists were travelling through the regions and townships identified by the NRA, then they would not be expecting to find a replica of the trading hours available in the city areas. Similar views were expressed by the AWU.

Consideration

- [20] In considering this criterion, we have not been able to form a particular view due to the lack of relevant evidence and submissions around the point.

s. 26(c) the needs of an expanding tourist industry

[21] As the application relates to one day only, we have received no specific evidence around this criterion. In many respects, it is not a criterion which would lend itself to any further consideration because of the limited scope of the application.

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

[22] This criterion is considered within the same context as for s. 26(c).

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

[23] The NRA submits that it is in the public interest to grant the application for the purpose of minimising the disadvantage to these localities in comparison to seven day trading areas of Queensland.

[24] In its view, post-Christmas sales are a significant feature of the retail calendar. The NRA states that retail is the largest employing sector in Australia and many casual employees would be financially disadvantaged if they were denied the opportunity to earn extra money during this period.

[25] The NRA witnesses who gave evidence stated that there was considerable support for trade around Queensland in this period and this was evidenced by the sales volumes being substantially higher than average.

[26] The NRA witnesses also claimed that a three day closure would have a substantial detrimental affect upon the ability of the larger traders to meet the needs and expectations of their customers over this period.

[27] Witnesses for Coles and Woolworths said that 24 December in any year is one of the busiest trading days of the year. If 24 December was to precede a three day closure, there would be severe store congestion.

[28] The summary of the evidence given by the NRA witnesses has previously been outlined in this decision and this has been challenged by both the SDA and the AWU on the basis that the applicant was unable to produce any empirical evidence regarding questions of public interest. There had been no surveys conducted by the NRA to support the many contentions it had made under this criteria.

[29] The SDA claims that the NRA witnesses had stated that many of the sales that would have been made on the day in question could still be made in advance.

[30] Further, the SDA says that there would be an advantage to the exempt traders in the identified towns on the day in question if the non-exempt traders could not trade.

[31] The SDA challenged the NRA's assertions regarding "escape" expenditure if the application was not granted. In its view, the term is misleading because it implies that any disposable consumer expenditure rightly belongs to the non-exempt stores.

[32] Similar evidence was given by the AWU. In its view, the Boxing Day "basket" of goods is different to the Christmas Eve "basket" of goods in that Boxing Day shopping is usually a "top up" shopping day. The AWU believed that various leisure activities are undertaken by people during the Christmas period and it is not a period where retail shopping is of pre-eminence.

Consideration

[33] We have accepted evidence and submissions that the Christmas period is one where the opportunity to shop for either foodstuffs or other purchases is of significance to the community. In our view, it represents a highly relevant retail event in the yearly calendar.

[34] To that end, we accept the public interest is served by permitting consumers in the areas where normally non-exempt stores would be closed, to avail themselves of the opportunities of shopping to suit their needs at this time.

[35] As well, the bulk of employees who would work on this day would do so on a voluntary basis and would be paid appropriate penalty rates.

[36] We would state, however, that the concept of loss of sales for one group of traders [in this case the non-exempt traders] must be weighed against the prospective increase in sales for other smaller traders. In saying this we acknowledge that the actual range of goods available in many non-exempt stores (and particularly so at this time of the year) is broader than what might be required by consumers during the course of the rest of the year.

[37] We have noted the views of the SDA and AWU when they say that consumers could shop in advance of the public holiday for all of their purchases. We believe that it would be generally accepted that the Christmas period is a busy one for many people and the inconvenience of pre-planning for all purchases might be of significant inconvenience for many consumers.

[38] We also note that there has been no representation made on behalf of exempt traders to this application.

[39] In our overall consideration of this criteria, we accept that there are particular difficulties faced by non-exempt traders in areas of the State (at this time of the year) where the closure of their stores in the non seven day trading areas is likely to create problems such as:

- Logistics problems relating to Distribution Centres;
- Difficulties in maintaining fresh stock levels and a general depletion of stocks;
- Operational difficulties (i.e. the setting up and closing down of departments); and
- The closure of non-exempt stores on six days out of ten would have the potential to adversely affect appropriate preparation for sales.

s. 26(f) the alleviation of traffic congestion

[40] There were no submissions around this point.

s. 26(g) the likely impact on the order of employment

[41] The NRA said that the granting of the application would provide employment for primarily casual employees on a day where penalty rates would apply. This employment would be of a voluntary nature.

Consideration

[41] Against any submission that jobs would be lost on this day, this is a positive outcome for the NRA.

s. 26(h) the view of any local government in whose area the order is likely to have impact

[42] Correspondence had been received by the Commission from the Charters Towers Regional Council (Council). This Council had determined to support the local "small shop owners" and thus offered no support for the application. The Council did not wish to be heard on this matter before the Commission.

[43] There was no other communication received from any other Council whose area might be included within the scope of the application.

[44] It is noted that this Council's view are not in support of the application.

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

[45] Under this criterion, the SDA pointed out that not all enterprise agreements contain provisions ensuring that work for employees on this day would be voluntary. The SDA said that the evidence given by Mr Wallace and Mr Stout failed to confirm that certain employees within their stores would not be disadvantaged if their stores were to open.

Consideration of Evidence and Conclusion

[46] In making our decision, we are conscious of the fact that we are considering submissions from the bar table in opposition to the application, and direct evidence and submissions from the applicant in support of its claim.

[47] We have considered the criteria under s. 26 of the Act. In doing so, we accept that some of the criteria are not specifically relevant to this particular case. For example, the criteria relating to an expanding tourist industry and the needs of an expanding population bear little relevance when considering an application which is only for one day of the year.

[48] We have, in the course of considering all criteria which must be considered under s. 26 of the Act, determined to grant the application. In our view, the case litigated by the NRA is the more meritorious.

[49] A Draft Order has been supplied to the Commission by the applicant. The application is effective from the date of release of this decision.

[50] Order accordingly.

D.A. SWAN, Deputy President.

A.L. BLOOMFIELD, Deputy President.

J. M. THOMPSON, Commissioner.

Hearing Details:

2011 20 April 2011

15 September 2011

Released: 2 November 2011

Appearances:

Mr P. Dube, National Retail Association Limited, Union of Employers.

Mr T. Martin, Shop, Distributive and Allied Employees' Association, (Queensland Branch) Union of Employees.

Ms S. Schinnerl, The Australian Workers' Union of Employees, Queensland.