

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157

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

CASE NO: TH/2012/7

PROCEEDING: Application to amend Trading Hours Order
(Toowong Retail Precinct)

DELIVERED ON: 7 October 2014

HEARING DATES: 5 and 6 May 2014
30 May 2014 (Applicant's submissions)
12 June 2014 (submissions of the Queensland Retail Trade and Shopkeepers Association, Industrial Organisation of Employers)

MEMBERS: Industrial Commissioner Fisher
Industrial Commissioner Knight
Industrial Commissioner Neate

ORDERS :

- 1. The application is granted in part.**
- 2. The Trading Hours - Non-Exempt Shops Trading by Retail - State order is amended to allow non-exempt retailers within the boundary of the Toowong Retail Precinct to trade until 7.00 pm on Saturdays.**
- 3. The operative date for the amendment is 3 November 2014.**

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER
- Application to amend trading hours order -
Application to create Toowong Retail Precinct -
criteria Commission must have regard to in making
an order - application opposed by SDA and QRTSA
- application to be decided on evidence in relation to
it - application granted in part

CASES: *Industrial Relations Act 1999* (Qld)
Trading (Allowable Hours) Act 1990 (Qld), ss 21, 26
National Retail Association Limited, Union of Employers [2014] QIRC 063
National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of

Employers) and Others (2005) 180 QGIG 1211
National Retail Association Limited, Union of Employers v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees & Queensland Retailers and Shopkeepers Association Industrial Organisation of Employers [2014] QIRC 150
O'Sullivan v Farrer (1989) 168 CLR 210
R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
Re Kirby Street (Holding) Pty Ltd [2011] NSWSC 1536
Retailers' Association of Queensland Limited, Union of Employees 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 and Others v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Another [1992] 142 QGIG 477
Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (B178 of 2000) (2000) 165 QGIG 128
Retailers' Association of Queensland limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) (Nos B579/00 and B1301/00) (2000) 165 QGIG 174
Watson on behalf of Nyikina and Mangala v Backreef Oil Pty Ltd [2013] FCA 1432

APPEARANCES:

Ms A. Lamb, for the National Retail Association Limited, Union of Employers, the Applicant
 Mr T. Martin, for the Shop Distributive and Allied Employees' Association (Union of Employees)
 Mr C. Dorber, for the Queensland Retail Traders and Shopkeepers Association, Industrial Organisation of Employers

Decision

[1] The National Retail Association Limited, Union of Employers ("NRA") has applied to the Queensland Industrial Relations Commission ("Commission") for an order to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* ("the Order") under s 21 of the *Trading (Allowable Hours) Act 1990* (Qld) ("the Act").

[2] The application seeks the amendment to the Order to allow:

- (a) for a Toowong Retail Precinct; and
- (b) non-exempt retailers located within the proposed boundary of the Toowong Retail Precinct to trade from 7.00 am on Monday to Saturday each week, and to trade up to 7.00 pm on Saturdays.

There is no application to change the trading hours on Sundays or specified public holidays.

[3] The amendment to the Order would allow non-exempt retailers in the Toowong Retail Precinct to open for trading:

- (a) one hour earlier than 8.00 am Monday to Saturday, as currently provided in the Order; and
- (b) two hours later than 5.00 pm on Saturdays, as currently provided in the Order.

The net effect of the change would be that such retailers would be able to trade for an additional eight hours each week.

[4] The geographic extent of the proposed Toowong Retail Precinct is shown on maps tendered in evidence (Exhibit 2 and Exhibit 10 Attachment 2). The boundary runs from the intersection of Jephson Street and Lissner Street eastward along Lissner Street, and across to the intersection of Archer Street and Coronation Drive, then in a generally southerly direction to the intersection with High Street, then along High Street to the intersection of Jephson Street then northward along Jephson Street to the intersection with Lissner Street. Within that boundary are Toowong Village Shopping Centre (in which a Coles supermarket is located), a Woolworths supermarket and other smaller retail outlets.

[5] The NRA states that the boundary has been "drawn narrowly, as a freestanding area" containing most of the non-exempt stores that operate in the Toowong locality.

[6] The Queensland Retail Traders and Shopkeepers Association, Industrial Organisation of Employers ("QRTSA") and the Shop, Distributive and Allied Employees' Association (Union of Employees) ("SDA"), who were granted leave to be heard, oppose the application.

Witnesses

[7] Witnesses for the NRA were:

- Rickie James Lee (Store Manager for Coles' Toowong Store);
- Geoffrey James Bell (Queensland Support Manager for Woolworths); and
- David James Stout (Queensland Compliance Manager for Coles).

[8] With the agreement of the other participants in the proceedings, written statements in support of the application were accepted in evidence from persons who were unavailable to give oral evidence in support of the application or be cross-examined on their statements:

- Charles Hammersla (National Compliance Manager Facilities for Kmart Australia Ltd); and
- Christine Winslett (Manager, Nextra Newsagency, Toowong Village).

[9] The only witness to give oral evidence for the QRTSA was Dr Derick Kenneth Lundberg (Director of Innovate Coaching Pty Ltd).

[10] With the agreement of the NRA and the SDA, a written statement was received in evidence from Roslyn White (chair of the IGA/QNN Trading Hours Review Committee), although she was unavailable to give oral evidence or be cross-examined.

[11] Witnesses for the SDA were:

- Julie Anne Powell (an employee of Kmart Toowong store); and
- Andrew Lamb (an employee of Woolworths Toowong store).

Some general issues

[12] Before considering the evidence and submissions, we make some general observations in relation to the following matters raised by or with the participants:

- (a) the role of the criteria in s 26 of the Act;
- (b) whether the application is part of a series of applications with an overarching purpose/objective, and whether a particular outcome in this case could result in some fragmentation of trading hours;
- (c) whether the application is an "all or nothing" application, or whether the Commission might rule in favour of something less than the range of trading hours sought by the NRA; and
- (d) whether the application has to be decided by reference only to evidence in relation to it.

[13] ***The s 26 criteria:*** A Full Bench of the Commission may decide trading hours for non-exempt shops under s 21 of the Act. Section 26 of the Act states that, when the Commission is making an order under s 21, it "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."

[14] There is no common thread running through the criteria. Indeed the Commission is required to take into account quite diverse, and what might sometimes be competing or conflicting, interests in coming to its decision. The Act does not provide guidance about the priority or relative weight to be given to those criteria.

[15] There is a degree of overlap between some of the criteria. Because the evidence and submissions in relation to one criterion (e.g. the needs of the tourist industry) can be relevant to one or more of the other criteria (e.g. the needs of an expanding tourist industry), the consideration of some criteria involves a degree of repetition or cross-referencing to other parts of the reasons for decision.

[16] The Act does not prescribe how the Commission is to have regard to each criterion or how it is to express its findings in relation to them.

[17] The QRTSA submitted, in summary, that:

- (a) the Commission must consider every matter listed in s 26(a) to (h);
- (b) there must be evidence (or "proof") in relation to each of the issues before the Commission;
- (c) each criterion must be considered after examining the evidence in relation to it;

- (d) the requirement of s 26 should prevent issues that are relevant to the proceedings, but may not necessarily assist the applicant's application, being overlooked;
- (e) if no evidence was presented in relation to one of more of the criteria, it is not sufficient for the Commission to record simply that no evidence was presented;
- (f) neither the applicant nor the Commission should rely on knowledge of some evidentiary matters being imputed to the Commission on the basis that some members of the Commission may have heard Trading Hours applications in other areas, i.e., matters referred to in other s 26 proceedings are not matters about which judicial notice may be taken by the Commission;
- (g) the Commission should be more proactive and require the applicant to address these issues or, at least in relation to s 26(h), should compel a proper and considered response from any local government in whose area the order is likely to have an impact.

[18] In relation to the requirement of s 26, we note that the phrase "have regard to" is frequently used in legislation that vests decision-making power in a person or body. A differently constituted Full Bench recently considered the proper construction of s 26 in response to a similar submission by the QRSTA. In summary, that Full Bench referred to judicial interpretations of "have regard to" which stated that the decision maker is required to take the specified matters into account and to give weight to them as a fundamental element in coming to a conclusion.¹ We would only add that it is for the decision-maker to determine the weight to be given to the matter (or matters), provided that the consideration of the matter is genuine.²

[19] Although, strictly speaking, there is no onus of proof, the Commission has previously stated that a decision to enlarge trading hours for non-exempt shops requires a departure from the *status quo*. To that extent an applicant for orders under s 21 of the Act, in this case the NRA, carries the onus of satisfying the Commission that the application should succeed.³ However, as another Full Bench concluded recently, failure by an applicant to adduce sufficient evidence in respect of any matters to which the Commission "must have regard" under s 26 does not preclude the Commission from making the orders sought. That Full Bench stated:

¹ *National Retail Association Limited, Union of Employers v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees & Queensland Retailers and Shopkeepers Association Industrial Organisation of Employers* [2014] QIRC 150, [7]-[9] citing *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 and *Re Kirby Street (Holding) Pty Ltd* [2011] NSWSC 1536.

² See DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 7th edn, [12.15]; *Retailers' Association of Queensland Limited, Union of Employees AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2003) 174 QGIG 1339, 1344.

³ See e.g. *National Retail Association Limited, Union of Employers* [2014] QIRC 063, [80] and cases cited there including *National Retail Association Limited, Union of Employers v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2005) 180 QGIG 1211.

"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".

- [20] It might also be the case that the absence of evidence or submissions in relation to one or more of the matters linked in s 26 merely indicates that the matter is (or matters are) of no relevance to a particular application and would not affect the Commission's ability to make a decision or the validity of that decision.⁴
- [21] When making its decision, the Commission will not be restricted to material provided by the applicant but may have regard to other relevant material (e.g. evidence and submissions provided by an organisation or person who is granted leave to appear and be heard on the matter). However, the Commission will not require a person or organisation who is not a party or participant in the proceeding to provide evidence or make a response in relation to any of the criteria listed in s 26 of the Act.
- [22] It follows that the appropriate approach is to consider and evaluate the evidence (if any) and submissions in relation to each criterion, and then to make a decision based on an overall evaluation of the criteria specified in s 26.⁵
- [23] ***Overarching purpose of this and other applications:*** The current application by the NRA is one of a series of applications that have been considered, or remain to be considered, by the Commission for precincts in south-east Queensland and elsewhere. The Commission asked for submissions regarding the implications of this application for the wider Brisbane area, and the potential for the creation of new precincts to cause fragmentation of trading hours.
- [24] The NRA's written submission states that the allowable hours sought for non-exempt retailers located within the proposed Toowong Retail Precinct "are, deliberately, identical to the allowable hours for the Inner City of Brisbane Area under the Order." (para 2) If the application is successful, it would achieve "better consistency, by creating a broader singular zone that contains more of the inner city retail precincts north of the Brisbane River." The Inner City of Brisbane Area presently includes localities such as Petrie Barracks, the Kelvin Grove Urban Village, Spring Hill, Bowen Hills and parts of Fortitude Valley near Newstead.

⁴ On occasions, it has been found that not all criteria require consideration because one or more of them are not relevant to the circumstances of a particular application, e.g. when there is no evidence or concern regarding traffic congestion, or where there are few, if any, tourists in the locality.

⁵ For a similar analysis of an analogous statutory scheme see *Watson on behalf of Nyikina and Mangala v Backreef Oil Pty Ltd* [2013] FCA 1432, [22] - [30].

- [25] In the NRA's submission, the grant of the application in relation to the proposed Toowong Retail Precinct would not create a precedent or new type of arrangement because many other trading hours zones within the Order cover non-adjacent or non-contiguous areas. The NRA also suggests that, if the Commission is concerned about geographic fragmentation, the most sensible solution would be to merge the boundaries of the proposed Toowong Retail Precinct with the existing Inner City of Brisbane Area. That would be achieved by alternative boundaries (such as Milton Road to Croydon Street to Jephson Street to High Street to Coronation Drive). According to the NRA, those boundaries would not cover any additional non-exempt stores or retail precincts, but would achieve a single set of boundaries covering all localities to which the inner city allowable hours apply. The NRA would support this approach.
- [26] The NRA submits generally that unnecessary fragmentation caused by having many different zones with different rules, especially if the different zones are geographically nearby, may lead to regulatory complexity that would impact retailers who operate multiple (non-exempt) stores. However, it accepts that, having regard to local circumstances, some localities warrant individual arrangements which may be different to the norms prevailing more broadly, and that the individual needs of different localities are to be balanced with the aim of regulatory simplicity.
- [27] The NRA acknowledges that s 26 of the Act refers to "the locality" and "such locality." Those phrases have the practical effect of limiting the capacity or willingness of the Commission to hear or determine applications that apply to a broad zone or region. Consequently there is a degree of fragmentation and inconsistency with respect to trading hours in Brisbane, taking into account the Brisbane City Heart, New Farm and Inner City of Brisbane areas.
- [28] However, the NRA submits that the current application is predicated on the available evidence demonstrating how Toowong exhibits most of the same characteristics, demographics and other relevant factors as the localities within the Inner City of Brisbane Area, notably including a strong commuter/worker component. An order in the terms sought would move the Toowong Retail Precinct from the standard set of arrangements applying to most outer Brisbane suburbs to the standard arrangements already applying to inner city locations, albeit without a continuous boundary.
- [29] The QRTSA submits that the purpose of the Act is to provide a mechanism to allow variance of trading hours between areas. The protection of the needs of the community and the businesses in the relevant area, and allowance for variation between areas, are central elements of the Act. Seeking to achieve uniformity of trading hours would undermine the fundamental purpose of the Act. The QRTSA submits that the greatest benefit of reducing complexity and achieving consistency would be to the retail operations of the major retail chains.
- [30] Although we note that the NRA's application is aimed at having trading hours for non-exempt stores at Toowong that match the allowable hours of such stores in the Inner City of Brisbane Area, the Commission will proceed to decide the application on the basis of relevant evidence without any preconceived, overarching objective to achieve uniformity between the two areas (or merely to avoid fragmentation of trading hours in adjacent areas).

- [31] *An "all or nothing" claim?* The NRA submits that its application is not an "all or nothing" claim, and it acknowledges that the Commission's role is to decide whatever it considers appropriate with respect to the application.
- [32] Subject to specific qualifications, the QRTSA agrees with the position adopted by the NRA. In particular, the QRTSA considers that the Commission has discretionary power to approve some aspects of the application while refusing other parts (e.g. in relation to the hours sought by the Applicant). However, the QRTSA suggests that if the Commission intends to make a decision that is a variation of what has been sought, the Commission should:
- (a) invite written submissions about the possible variation; or
 - (b) under s 24 of the Act invite the Applicant and those organisations that were granted leave to appear and be heard, to attend before the Commission informally in conference mode and discuss the Commission's proposed variation.
- [33] We note that the application is not an "all or nothing" claim and will decide it on that basis, without engaging further with the applicant and the organisations that were granted leave to participate in these proceedings.
- [34] *Application to be decided on its facts:* In light of the operation of s 26 and the other matters just considered, it should be apparent that the decision in relation to the present application will be made by reference to the evidence adduced and the submissions made in these proceedings in relation to each of the criteria listed in s 26 of the Act.

The locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated

- [35] *Evidence:* It is clear from the evidence that Toowong is located five kilometres west of the Brisbane CBD and has an area of 3.9 square kilometres. It combines commercial and retail space with residential areas (including medium to high density residential units to cater for young professionals and university students), and has a vibrant and thriving commercial and shopping precinct. Toowong services the densely populated inner city suburbs of Milton, Auchenflower, Rosalie and St Lucia, as well as the University of Queensland community and several hospitals including the Wesley Hospital.
- [36] Toowong is a major transport hub, with almost all bus and train routes passing through it from the western suburbs. The Brisbane City Council Bus Interchange is located at the front of Toowong Village Shopping Centre, and Toowong Railway Station is located within the building accommodating Toowong Village with:
- (a) an average of 3,698.50 weekday alightings in March 2013⁶ (of which an average of 555 (15%) were between 7.00 and 8.00 am, and 360.6 (9.7%) were between 8.00 and 9.00 am) (Exhibit 6 paras 5,6); and

⁶ March data was used as this is the busiest month of the year: Exhibit 6 Attachment A.

- (b) an average of 3,995.8 boardings each weekday (with 385.4 (9.7%) boarding between 7.00 and 8.00 am, and 339.4 (8.5%) between 8.00 and 9.00 am); and

Toowong is also serviced by the City Cat river ferry service.

- [37] According to 2011 census data, the percentage of families in Toowong with both parents working full-time or one parent working full-time and the other in part-time employment (50.7%) is higher than for the State (43.8%). At the time of that census, the largest industry of employment for usual residents in the region was Professional, Scientific and Technical Services, and Professionals were the largest occupation group of employment.
- [38] *Consideration:* The features of the locality provide part of the factual context in which the application is to be assessed.

The needs of the tourist industry or other industry in such a locality or part

- [39] *Evidence:* There was no evidence about the needs of the tourist industry in the Toowong locality, and no evidence about any other industry in that locality.
- [40] Mr Lee seemed to suggest that some tourists shop at the Coles store at Toowong Village and that their numbers vary from week to week, but was unable to estimate how many of Coles' 36,494 weekly customers are tourists. It was clear from the customer survey data on which he relied that 87 per cent of those supporting extended opening hours (89 per cent) lived locally. Similarly, the Toowong customer survey data on which Mr Bell relied indicated that 93 per cent of those supporting extended opening hours (83 per cent) lived locally, and he stated in his oral evidence "I wouldn't call Toowong a tourist strip."
- [41] *Submissions:* The NRA acknowledges that, on its own, Toowong would not be considered a tourist area. However, the NRA refers to previous decisions of the Commission that the Inner City of Brisbane is a tourist area and, on that basis, submits that, by virtue of its proximity to the Brisbane CBD, Toowong arguably falls into this category. There is no evidence to support that suggestion, or the NRA's submission that improving access to non-exempt shops through additional trading hours is likely to improve the experience of tourists staying in accommodation within the Toowong area.
- [42] *Consideration:* The needs of the tourist industry or other industry in the Toowong locality are not significant factors for consideration in relation to this application.

The needs of an expanding tourist industry

- [43] There is no evidence of the needs of the tourist industry that might be relevant to the Commission's decision about this application. Consequently, there is nothing to suggest that there is an expanding tourist industry that might affect, or be affected by, the range of trading hours in that locality.

The needs of an expanding population

- [44] *Evidence and submissions*: Between 2001 and 2011, the population of the Toowong Statistical Local Area grew from 13,124 to 16,569, an increase of 2,945 or 22.2 per cent. The current and projected population levels for Toowong over the period 2012 to 2031 are:

| 2012 | 2016 | 2021 | 2026 | 2031 | Growth (2013-31) |
|--------|--------|--------|--------|--------|------------------|
| 16,603 | 17,066 | 17,596 | 17,891 | 17,956 | 8.2% |

When compared with statistics for 11 other statistical areas in and around Brisbane City,⁷ it appears that, although the projected rate of population growth in Toowong over that period is toward the lower end of the range (10th of the 12 statistical areas), the current population and projected population numbers for Toowong are higher than for any of the other statistical areas.

- [45] Both Mr Bell and Mr Stout expressed the view that the growth of residential developments on the city fringe is fuelled partly by the working communities' desire for close proximity to work and leisure,⁸ and an expanding student population attracted to educational establishments. They suggested that it is important that the inner parts of Brisbane provide first class amenities to service the growing residential and business population; a view fortified, presumably, because families in the location have a higher than average proportion of both parents employed full-time, or one full-time and one part-time.
- [46] In particular, Mr Stout argued that it is important that both the retail infrastructure of Toowong and the hours of trading of "this critical infrastructure" keep pace with such things as increased population and increased employment opportunities near to, or on the fringe of, the CBD. The grant of the NRA's application, he suggested, would be consistent with this aim.
- [47] *Consideration*: The evidence demonstrates that the steady growth in the local population is expected to continue. Read with the evidence of the locality, and such other factors as the upgrade of the Toowong Village Shopping Centre presently underway, it is apparent that a strong consumer demand can also be expected to continue. Whether that demand could or should be met by granting the application for extended trading hours is assessed best by reference to other criteria, considered below.

The public interest, consumers' interest, and business interest (whether small, medium or large)

- [48] The three criteria listed in s 26(e) are among the most significant for the decision in relation to the application, and each merits separate consideration.
- [49] *Public interest*: The concept of "public interest" is referred to in many statutes. It has been described as being of the widest import. In *O'Sullivan v Farrer*,⁹ Mason CJ, Brennan, Dawson and Gaudron JJ wrote that:

⁷ Brisbane City, Fortitude Valley, Newstead, New Farm, Spring Hill, Kelvin Grove, East Brisbane, Paddington, Bulimba, South Brisbane, and Woolloongabba.

⁸ A view which Mr Bell described as "an assumption".

⁹ *O'Sullivan v Farrer* (1989) 168 CLR 210.

"... the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'"

- [50] As differently constituted Full Benches of the Commission have observed, public interest matters "encompass a variety of considerations, amongst which is a requirement to weigh and balance relevant issues"¹⁰ and "any competing interests."¹¹
- [51] The "public interest" in relation to the extent of trading hours might differ from one location to another. In some places, there might be a clear public interest in having extended trading hours (including for reasons referable to other criteria listed in s 26). In other locations, the public interest might favour a different outcome. There is no reason to adopt a narrow construction of the expression "public interest" for the purpose of deciding this or any other trading hours application.
- [52] *Submissions:* Submissions in relation to this criterion focussed on the nature of competition in this type of market. The NRA submitted that the interests of one group of supermarkets (presumably the IGA stores) should not outweigh the benefits to consumers of the Toowong area (including residents, University of Queensland students, commuters working in Toowong or travelling through Toowong, and tourists staying in or around Toowong) of having more hours to access a wider range of retailers than the current allowable hours provide.
- [53] In reply, the QRTSA submitted that it would be wrong to make an inference that the Hopper Group is like a chain and therefore like Coles and Woolworths, or to then infer that they can withstand the competition brought about by the increased market dominance of Coles and Woolworths, both locally and nationally.
- [54] The NRA described competition as "an integral part of a dynamic and healthy retail sector and takes many different shapes and forms." It submitted that the competing interests in this case go beyond a contest between convenience stores, medium format IGA supermarkets and full-line supermarkets; and that it would be wrong to characterise competition in the retail sector in any simple or limited form by drawing the conclusion that the ability of non-exempt stores in Toowong (which include non-supermarket retailers) to trade for additional hours will result in a loss of sales for all other retailers to the point where they can no longer compete.
- [55] *Consideration:* Although in a broad sense these are matters that could be covered by "public interest" considerations, they are discussed in more detail later in these reasons for decision under "business interest."

¹⁰ *Retailers' Association of Queensland limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers)* (Nos B579/00 and B1301/00) (2000) 165 QGIG 174, 177.

¹¹ *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (B178 of 2000) (2000) 165 QGIG 128, 130.

[56] *Consumers' interest:* A key issue is whether there is evidence of consumer support for earlier trading on Monday to Saturday, later trading on Saturdays, or both.

[57] *Evidence:* The evidence was in the following forms:

- (a) the result of surveys of customers at the Coles and Woolworths stores at Toowong in October 2013;
- (b) data showing trading trends at the stores in Toowong;
- (c) data showing trading trends at stores in other cities (and towns) around Australia; and
- (d) the observations of some staff at Toowong stores as to the extent of customer demand for additional trading hours.

There were also various statements of opinion by witnesses about what they perceived, or assumed, customer demands to be.

[58] *Customer survey:* The NRA engaged Marketmetrics, an independent market research company, to conduct a survey of customers of Coles and Woolworths at Toowong in relation to their support for the proposed extended trading hours.

[59] The survey was conducted outside the Coles store and the Woolworths store between 8.30 am and 7.00 pm on Thursday 3 October 2013, Friday 4 October 2013 and Saturday 5 October 2013. It involved 310 participants, of whom 155 were Coles customers and 155 were Woolworths customers. There was evidence that the Coles store serves an average of 36, 494 customers each week, and the Woolworths store has about 20,000 customers each week.

[60] Relatively little information was provided in relation to the methodology of the survey. In particular there was no evidence as to the adequacy of the sample size or how people were selected for interview. Nor was there any analysis of the graphs and statistics. Despite the absence of such material, we are willing to place some reliance on the survey results because, unlike some of the other evidence, they give a sense of local attitudes and possible behaviours that are relevant to the Commission's assessment of the application.

[61] The survey results provided to the Commission show that 266 (86%) of the participants supported the proposed extension to trading hours for Toowong (comprising 138 (89%) of the Coles customers and 128 (83%) of the Woolworths customers). Of those that supported the extended trading hours:

- (a) most live locally (87% of Coles customers, 93% of Woolworths customers);
- (b) most do the majority of their grocery shopping in Toowong (88% of Coles customers, 94% of Woolworths customers);

- (c) most indicated that their grocery shopping habits involved multiple visits to the supermarket each week (75% of Coles customers, 69% of Woolworths customers).

The level of support was relatively high across all categories of participants.

[62] In response to the more particular questions:

- (a) 35% of the Coles customers and 45% of the Woolworths customers surveyed said it would be more convenient if they could shop from 7.00 am on Monday to Saturday rather than from 8.00 am;
- (b) 68% of the Coles customers and 71% of the Woolworths customers surveyed said it would be more convenient if they could shop until 7.00 pm on Saturdays;
- (c) supporters of the extended hours indicated that:
 - i. 83% of Coles customers and 87% of Woolworths customers would be most likely to use the extended hours on Saturdays between 5.00 pm and 7.00 pm;
 - ii. 43% of Coles customers and 47% of Woolworths customers would be most likely to use the extended hours on weekdays between 7.00 am and 8.00 am; and
 - iii. 30% of Coles customers and 27% of Woolworths customers would be most likely to use the extended hours on Saturdays between 7.00 am and 8.00 am.

[63] The reasons cited most often by other respondents for opposing the extension of trading hours were that the person would not use the extended hours, and that the shops are open long enough already.

[64] *Trading trends at Toowong stores:* Evidence was provided about current trading at the Woolworths, Coles, and Kmart stores at Toowong that would be affected if the application succeeds.

[65] Evidence was given to the effect that the Toowong Coles store is one of the three busiest stores in Brisbane for Coles. Customers at Coles (and presumably other stores) include not only residents of Toowong and surrounding inner-west suburb residents, but also students from local schools and the University of Queensland, workers based in surrounding commercial buildings, tourists and commuters who use the train and bus stations located within Toowong Village. It was not possible to calculate how many commuters are customers of Toowong stores.

[66] Mr Stout described Toowong as more of a service hub than a residential shopping centre, so the people using it are either on their way to something or from something. If that analysis describes at least a significant component of those who pass through Toowong, there was little evidence of the extent to which such people are customers of stores in Toowong. Mr Stout highlighted the specific features of the Toowong application in comparison with approximately another 20 applications in suburban Brisbane (some 10 to 15 kilometres from the CBD). He described the 7.00 am starting time in this application as "very specific to a commuter demographic" and described the problem with the closing time on Saturday afternoon as "probably more of a symptom of an expanding CBD rather than the normal suburban Brisbane expectation."

[67] Mr Stout suggested that the number of motor vehicles parked at the Toowong Village Shopping Centre from time to time includes the vehicles of commuters, who are not necessarily shoppers. No estimate was given of the numbers of commuters' vehicles parked at the Centre at any of the times during which non-exempt stores may trade or could trade if the application is successful, nor of the proportion of commuters' vehicles compared with shoppers' vehicles.

[68] Mr Bell provided data for the Toowong Woolworths store showing the numbers of customers served between 8.00 am and 10.00 am on Saturdays:

| Date | Customers Served from 8am to 9am | Customers Served from 9am to 10am |
|-----------------------|---|--|
| Saturday 6 July 2013 | 56 | 89 |
| Saturday 13 July 2013 | 58 | 94 |
| Saturday 20 July 2013 | 51 | 96 |
| Saturday 27 July 2013 | 57 | 73 |

He suggested that, in all probability, this pattern would be replicated between 7.00 am and 8.00 am if the store were allowed to open earlier.

[69] Mr Bell did not agree with the assumption that (extrapolating back from the numbers of customers at the Toowong store between 9.00 and 10.00 am, and 8.00 and 9.00 am), the number of customers would be about half of those in the store between 8.00 and 9.00 am. He stated that, although those Woolworths customers surveyed who said they would like the flexibility of being able to shop between 7.00 and 8.00 am did not stipulate that they would shop during that period, he read that survey result as indicating that they would use those extended hours.

[70] Mr Bell also noted that the number of customers served at that store on Saturdays between 4.00 pm and 5.00 pm is much greater than the morning numbers, and is the period during which the largest numbers of customers are served in the store on Saturdays. The peak in demand between 4.00 pm and 5.00 pm is shown on the table below:

| Date | Customers served | | | | | |
|-------------|-------------------------|--------------------|-------------------|------------------|-------------------|-------------------|
| | 11am to 12pm | 12pm to 1pm | 1pm to 2pm | 2pm - 3pm | 3pm to 4pm | 4pm to 5pm |
| Saturday 6 | 122 | 153 | 113 | 120 | 144 | 242 |

| | | | | | | |
|-----------------------------|-----|-----|-----|-----|-----|-----|
| July 2013 | | | | | | |
| Saturday 13 July 2013 | 138 | 129 | 145 | 149 | 157 | 269 |
| Saturday 20 July 2013 | 120 | 146 | 112 | 141 | 164 | 273 |
| Saturday 27 July 2013 | 122 | 153 | 113 | 120 | 144 | 245 |

[71] No comparable data was provided for weekday morning trading at the Toowong Woolworths store.

[72] Mr Stout provided a graph showing the sales per hour per day for the Toowong Coles store from May 2012 to May 2013 which, he suggested, shows a "strong demand" from the time the store opens at 8.00 am on Monday to Saturday, and that demand on Saturdays "hits its peak" at 5.00 pm, the current closing time (approximately three times the volume of sales as between 8.00 am and 9.00 am).

[73] In support of extended trading hours on Saturday afternoon, Kmart provided the following data in relation to the trading of Kmart stores in the greater Brisbane area.

| | Mon | Tue | Wed | Thur | Fri | Sat | Sun |
|---|------|------|------|------|------|------|------|
| Percentage of Weekly Sales on Average | 10.8 | 10.7 | 11.7 | 23.2 | 15.2 | 18.2 | 10.2 |
| Hours of Trading | 13 | 13 | 13 | 13 | 13 | 9 | 9 |
| Percentage of Weekly Sales per Hour on Average | 0.8 | 0.8 | 0.9 | 1.8 | 1.2 | 2.0 | 1.1 |

That table shows that Saturday trading provides the second highest percentage of average daily sales each week (behind Thursday), even though the stores trade four fewer hours on a Saturday, and the highest percentage of sales on an hourly basis.

[74] According to Mr Hammersla, the Store Manager at the Toowong Kmart advised that the average numbers of transactions per hour on Saturdays for much of 2013 were 185 between 8.00 am and 4.00 pm, and 200 between 4.00 pm and 5.00 pm. In Queensland, the highest percentage of sales after 4.00 pm was recorded at the Toowong Kmart store (13.9%), followed closely by Sunnybank (13.6 %), then the tourist stores at Southport (13.2%) and Broadbeach (13.0%) which close at 5.30 pm. According to Mr Hammersla, these figures accord with consumer preferences to shop late on Saturday in Kmart stores, and he noted that an average of 20 percent of Saturday sales in Victoria are in the 4.00 pm to 7.00 pm trading period.

[75] Mr Hammersla stated that, if the application is successful, Kmart would extend its opening hours for the Toowong store on Saturdays, and Kmart would possibly open at 7.00 am on weekdays for special trading periods (e.g. Christmas) and events (e.g. toy sale).

- [76] *Trading hours at stores elsewhere in Australia:* Although the more relevant, and potentially more persuasive, evidence relates to customer activity in Toowong stores, those who advocate in favour of the application also provided statistical data about trading activity in other stores in Brisbane and in many other parts of Australia. Much of that evidence was criticised for lack of relevance to this application, primarily on the basis that:
- (a) the trading hours of stores in other states reflect different legal regimes (including de-regulation) and so provide little or no relevant comparison to shops in Toowong; and
 - (b) the other stores in Brisbane and the Gold Coast (with large numbers of tourists) were not sufficiently comparable to stores trading in Toowong. That much was acknowledged by those supporting the application. However, the evidence was submitted on the basis that there are relatively few stores in south-east Queensland that are permitted to trade beyond standard trading hours.
- [77] The evidence of levels of trading at other stores at particular hours on particular days of the week has to be considered with those criticisms and concessions borne in mind. At best, some of the data is useful in providing statistical comparisons with trends in Toowong.
- [78] Mr Bell referred to the average numbers of customer transactions between specified hours in July 2013 at the Woolworths stores at Macarthur Central, Oasis Broadbeach and Surfers Paradise. He acknowledged, however, that "particular characteristics" are associated with the Macarthur Central store's trading patterns, and he described the other stores as "tourist strip supermarkets".
- [79] In a similar vein, Mr Stout provided data about trading at the Myer Coles Central in the Brisbane CBD, the three Coles supermarkets on the Gold Coast tourist strip (Palm Beach, Miami, and Surfers Paradise) and the New Farm Coles store. Those stores have distinguishing features that limit any direct comparison with trading patterns at Toowong. Mr Stout noted, for example, that the Myer Centre store has unique CBD features, and he described the Gold Coast as a "completely different demographic," but said that the trading figures were provided to show that, when trading hours are more liberal, consumers will gravitate toward them.
- [80] Speaking more generally, Mr Stout described the growth in Coles' business as being on Saturdays and Sundays. At Toowong the busiest hour of the week is around the time when they are closing their doors on a Saturday afternoon. That is consistent with consumer patterns elsewhere in south-east Queensland. Mr Stout suggested that an extension of trading hours on Saturday afternoon would result in both a spread of existing customers and the attraction of new customers.
- [81] *Observations of employees:* Two employees of Woolworths and Kmart at Toowong provided direct observations about the extent of demand for early morning trading at those stores:

- (a) Mr Lamb suggested that opening the Woolworths store earlier on a Saturday morning "seems a futile effort" as there would be an average of two or three people who arrive no earlier than five minutes before the current opening time of 8.00 am. He is not aware of anyone asking if the store could open earlier.
- (b) Ms Powell said that, although the Toowong Kmart store opens at 8.00 am and she would be willing to start work at 7.00 am, few people are in the store between 8.00 am and 9.00 am. People do not line up at the front door before 8.00 am, and the only shops that she sees with a line up at 7.00 am are coffee shops.

[82] Ms White suggested, on the basis of the volume of trading at IGA stores between 7.00 and 8.00 am on Saturday and between 5.00 pm and 6.00 pm (and after 6.00 pm) on Saturday that consumers shop primarily between 8.00 am and 6.00 pm on Saturday. That might indicate that the extended trading hours on Saturdays applied for by the major supermarkets are not required.

[83] *Other opinions and observations:* The submissions in relation to consumers' interests also relied, in part, on other witness statements and oral evidence some of which, when tested in cross-examination, were shown to be assumptions made by witnesses rather than statements based on empirical data.

[84] Mr Stout gave written and oral evidence that consumer grocery shopping behaviour has changed considerably over recent years. Grocery shopping is no longer dominated by one major food shop each week with one or two "top up" shops. Today consumers shop much more frequently for groceries with behaviour reflecting multiple smaller shops across the week. The following table gives an insight into current grocery shopping behaviour:

| Day of Week | Main Shop | Big Top Up | Small Top Up | Emergency |
|-------------|-----------|------------|--------------|-----------|
| Monday | 16% | 15% | 35% | 34% |
| Tuesday | 15% | 15% | 37% | 34% |
| Wednesday | 11% | 14% | 36% | 39% |
| Thursday | 11% | 14% | 38% | 36% |
| Friday | 14% | 16% | 38% | 32% |
| Saturday | 15% | 15% | 38% | 32% |
| Sunday | 12% | 13% | 38% | 38% |

Note:

Main Shop = More than 24 Items

Big Top Up Shop = between 12 and 24 items

Small Top Up Shop = Between 3 and 12 items

Emergency Shop = less than 3 Items

In general in Coles stores, 15% of sales each week comprise a main shop, 15% a big top up shop, 36% a small top up shop, and 34% an emergency shop.

[85] Mr Stout characterised this consumer trend as being akin to using supermarkets "more like an extended fridge." Of relevance to this application, Mr Stout said that:

- (a) Saturday and Sunday are where the growth is, as people tend to do the majority of their shopping on weekends (reflected in larger basket purchases than on Monday to Friday); and
- (b) people top up during the week, particularly on the way home, with a few items.

[86] There was oral and map evidence to illustrate the range of smaller stores that sell food and beverages in the area of the proposed Toowong Retail Precinct (e.g. cafes, bakery, takeaway food stores). References were made to grocery stores outside the boundary of that precinct (e.g. medium size IGA stores at St Lucia and Milton) which trade during extended hours and can meet the "top up" and broader needs of consumers outside (as well as during) the trading hours of the major stores.

[87] Dr Lundberg argued that irrespective of the growth and population figures for the Toowong catchment, the convenience shopper is already being serviced by nearby IGA stores at Milton and St Lucia. Furthermore, the submission of the NRA provides no level of detail to demonstrate that the needs of consumers within Toowong would be met through the approval of this application.

[88] *Submissions:* The NRA submits that the focus of the application is to improve choice, convenience and flexibility for consumers in Toowong from Monday to Saturday. In support of its contention that longer trading hours are in the interests of consumers, the NRA states, among other things, that:

- (a) in New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory trading hours have been deregulated (apart from on certain public holidays);
- (b) the choice and flexibility of shopping hours for consumers in Toowong lags behind the access to non-exempt shops experienced by consumers in Sydney, Melbourne, Canberra, Hobart, Darwin and Adelaide (as well as Warrnambool and the Gold Coast);
- (c) the survey of customers of Coles and Woolworths stores in Toowong is a valid measure of the interests of consumers and provides clear support for the application;
- (d) consumers will utilise extended trading hours when they are available;
- (e) the percentages of working families in Toowong with both parents employed full-time or one working part-time are higher than the average for the State, and busier couples working longer hours would benefit from greater flexibility and choice about where they can shop;

- (f) indeed, having regard to their employment status, consumers in Toowong (and comparable Brisbane inner-city suburbs) demand retail servicing with greater flexibility than the existing trading parameters set for non-exempt shops in South-East Queensland;¹²
- (g) it is important that the retail infrastructure of Toowong and the hours of trading of the infrastructure keep pace with the development, changing land use, increased population of inner city areas, and increased employment opportunities near to, or on the fringe of the CBD;
- (h) the extension of trading hours as sought would provide greater flexibility for consumers in Toowong regarding their main weekly shop, even if they could choose to patronise other retailers in Toowong with a limited range of products on offer (e.g. for top up or emergency shopping); and
- (i) the respondents who oppose the application did not present any alternative findings regarding consumer preferences.

[89] The QRTSA submits, in summary, that:

- (a) on the basis of specific criticisms of the customer survey, the Marketmetrics study could not be classified as research;
- (b) the absence of alternative research does not counter the argument that the Marketmetrics research must be dismissed;
- (c) much of the evidence of witnesses called by the NRA showed little, if any, real perception of demand prior to 8.00 am and almost no evidence in respect of times after 5.30 pm on a Saturday;
- (d) no direct, reliable evidence was presented to establish a sound basis for the proposed boundaries; and
- (e) most of the documentary attachments provided on behalf of the NRA are generic in nature and (at least in the case of data on store opening times in other States) was irrelevant in determining the opening hours of stores in Queensland (which are governed by State specific legislation).

¹² Mr Bell stated that this was an assumption made from personal experience on the basis that couples are busier and working longer hours, and so they have less flexibility for shopping and enjoy the choice of when to shop.

- [90] *Consideration*: As is apparent from aspects of the evidence summarised in other parts of these reasons for decision,¹³ the proponents of the extended trading hours referred to the volume of commuter traffic through Toowong. The evidence does not provide significant support for the application. In summary, the evidence demonstrates that many people pass through the Toowong Railway Station and/or the Bus Interchange each weekday, and that some of those people (whose numbers were not known or estimated) park their motor vehicles in Toowong before using public transport. However, there was no direct evidence about how many (if any) of the commuters purchase items from shops before boarding or after alighting, or would do so if the trading hours were extended.
- [91] The survey data casts little, if any, light on the potential commuter market at Toowong on a weekday morning. The survey was conducted with people using the Woolworths and Coles stores, which are located some distance from the bus and train stations. Each day the surveying commenced at 8.30 am, after the 7.00 am to 8.00 am period which is the subject of the application. As a result, the Commission has no direct evidence about the extent of commuter demand for earlier morning trading. The assertions or assumptions put in support of the application lack an evidentiary basis.
- [92] The evidence does not make a strong case for consumer interests being met by allowing the non-exempt supermarkets to trade earlier. In essence:
- (a) the survey data shows that a minority of those who support extended trading hours would be likely to use the extended hours of 7.00 am to 8.00 am on weekdays or Saturday;
 - (b) the figures for morning shopping at Toowong show relatively few customers and transactions during the first trading hour each day;
 - (c) during the week some "top up" shopping is done by people on the way home (rather than in the morning); and
 - (d) the limited evidence from employees suggests there is little customer demand for earlier trading hours.

By contrast, the evidence of consumer interest shows stronger support for later trading on Saturdays. That is apparent from both the survey results and the trading figures for stores in Toowong (and elsewhere).

- [93] ***Business interest (whether small, medium or large)***: This criterion invites consideration of the business interests of the retailers on whose behalf the application is brought and other retailers whose interests might be affected if the application is successful.

¹³ See the discussion of the overarching purpose of the application (at [28]) and the locality of the class of non-exempt shops (at [36]), and consumers' interest (at [65] – [67]).

- [94] It was on the criterion of "business interests" (whether small, medium or large) that the parties substantially joined issue. In essence, the case for each protagonist relied on its perception of the interests of consumers. Indeed, when it was put to Mr Stout that his primary task was to future proof Coles' interests he replied: "Coles' interests are the consumers' interests ... the future of Coles supermarkets, our business, is in the consumer and meeting the needs of those consumers." He stated later: "Customers are our business." It would seem to follow from such an assertion that the business interests of stores are served best if they are able to trade at hours which are not only convenient to consumers but also during which sufficient numbers of consumers purchase sufficient products to make opening on those hours economically viable.
- [95] It was submitted that the retail chains on whose behalf the application was made, want to service their customers with opening hours that can be tailored to a particular area and provide flexibility for customers as to when it is convenient for them to shop. There is an inexorable link between business interests and consumers, and the application is to allow non-exempt retailers to use their retail space more effectively and accommodate changing consumer shopping patterns
- [96] The evidence in relation to the interests of consumers has already been considered (at [56] to [92]) and need not be repeated. It is appropriate, however, to summarise additional evidence on the part of Coles, Woolworths, Kmart, IGA and other stores in relation to their respective business interests.
- [97] *Coles*: In his witness statement, Mr Stout noted that the great majority of Coles stores across Australia trade extended hours. He expressed the belief that it is reasonable for Coles, as a national retailer, to want to service its customers across Australia on a consistent basis. However, Mr Stout agreed that each application had to be decided by reference to local circumstances and he considered that the grant of this application would be consistent with the aim of servicing the growing population of this high density area.
- [98] Coles advises that it has one store affected by the application and would trade all allowable hours should the application be successful and the order made.
- [99] *Woolworths*: As noted earlier Mr Bell gave evidence, based on the trading patterns of the Toowong Woolworths store, Woolworths stores at Macarthur Central in the Brisbane CBD, and the Gold Coast Supermarkets at Broadbeach and Surfers Paradise, and also the customer survey. He also referred to the longer trading hours of the Woolworths supermarkets in the Sydney CBD and Melbourne CBD, and provided examples from eastern Australia and South Australia to illustrate the proposition that most Woolworths stores across Australia trade longer hours than are allowed in Queensland. Mr Bell noted that, in general terms, the hours of trading of Woolworths stores in Queensland are substantially less than the trading hours available to stores in most other jurisdictions. Woolworths' preference is to service its markets in Queensland in broadly the same way as it does in other states.
- [100] According to Mr Bell, Woolworths stores in Queensland are generally open on any allowable hours.

[101] As noted earlier, there was evidence from one employee at the Toowong Woolworth's store that, from his observations, there are few customers who arrive just before 8.00 am on Saturday morning and he is not aware of any customer asking the store could open earlier. Mr Bell's evidence on this issue was that Woolworths has employees preparing their stores before current opening hours, and that the stores do not open in a "full blown ready to go condition," but open "progressively," so to open their doors an hour earlier would not come at a large cost. Indeed, he suggested that the cost would be "reasonably minimal in the scheme of things."

[102] *Kmart*: Mr Hammersla's evidence was that (in contrast to the flexible trading jurisdictions of New South Wales, Victoria and Tasmania) Kmart in Queensland cannot set the trading hours of its stores to meet local circumstances and respond to local needs. In particular, its stores in south-east Queensland trade well towards the end of the trading day on Saturdays, but might not be trading to their full potential given the early closing time. Evidence in support of this contention is summarised at [73] to [74] in relation to consumer interest. Customer preference for shopping late on Saturdays is illustrated by trading data from Victoria and New South Wales.

[103] As noted earlier, Mr Hammersla said that, if the application succeeds, Kmart would extend its opening hours for the Toowong store on Saturdays, and the earlier opening time on weekdays of 7.00 am would probably be utilised for special trading periods (e.g. Christmas) and events (e.g. toy sale).

[104] *Smaller stores other than IGA*: Ms White's witness statement included the following published operating times of specialty stores and some non-exempt stores at the Toowong Village Shopping Centre.

| | COLES | DAVID JONES | KMART | SPECIALTY STORES |
|------------------|--------------|--|--------------|-------------------------|
| Monday to Friday | 8am - 9pm | 9:30am - 6pm *trades until 7pm on Fridays | 8am - 9pm | 9am - 5:30 pm |
| Thursday | 8am - 9pm | 9:30am - 9pm | 8am - 9pm | 9am - 9pm |
| Saturday | 8am - 5pm | 9am - 5pm | 8am - 5pm | 9am - 4pm |
| Sunday | 9am - 6pm | 9:30am - 5pm | 9am - 6pm | 10am - 4pm |

[105] Ms White noted that, although the major stores generally take advantage of the currently available trading hours, the speciality stores and some non-exempt stores have a shorter trading period. On that basis, she expressed the view that the published trading hours would not seem to support the suggestion that an increase in trading hours is required.

[106] The only direct evidence in relation to the business interests of traders other than IGA stores came from Ms Winslett, the manager of the Nextra Newsagency located in the Toowong Village Shopping Centre. Her statement was brief and to the point.

"3. I am of the view that change within the retail sector is inevitable and as a small business, we are better off spending our energy adapting to the change rather than fighting it

4. Our newsagency already opens earlier than 8am, but we would consider trading later on Saturdays if the application is granted. The centre does get very busy towards 5pm on Saturdays and any additional foot traffic brought to the centre by Coles being open until 7pm would be beneficial for our sales."

[107] That evidence is consistent with Mr Stout's statement that some other businesses are affected by the growth and trading hours of Coles, and that, in particular, shops such as newsagents, coffee shops and bakers tend to open when Coles is open so as to benefit from the additional foot traffic.

[108] *IGA stores:* The QRTSA provided evidence from Dr Lundberg and Ms White. It was made clear that Dr Lundberg's costs were paid by the IGA Board of Queensland, and that he did not represent or speak for stores outside the IGA brand. When asked whether he could give evidence in relation to any of the other 57 retail outlets in the Toowong area,¹⁴ he said that, based on his experience with Metcash some years ago, those stores that Metcash supplied would buy under the same independent model as IGA stores. Beyond that, he gave no evidence in relation to those or any of the other stores.

[109] Despite his experience and the formal qualifications that underpin much of his written and oral evidence, it was apparent that Dr Lundberg was as much an advocate as a witness. The thrust of his evidence is evident from the following passage from his witness statement:

"I oppose the application on the grounds that the new boundary definition proposed by the applicant distorts economic efficiency and redistributes wealth in an inequitable manner. This has the effect of increasing the dominance of the two major retailing chains in Australia without, as contended by the NRA, improving levels of service and convenience to the community of Toowong or, filling a gap in response to new or emerging changes to consumer behaviour."

[110] The extent of Dr Lundberg's opposition to this application is illustrated in the following passage from his oral evidence:

"Granting this extension of the hours is not going to be a positive thing for either the suppliers, the people that service those businesses, the businesses that service them in their communities or the store themselves ... if it gives \$1 to the chains because of this, then it's wrong in my view."

[111] When analysing the impact of this application succeeding, Dr Lundberg included references to consumers and business outside the proposed Toowong Retail Precinct to what he described as the "Toowong catchment", an area which takes in neighbouring suburbs and the medium size IGA stores in Milton and St Lucia.

¹⁴ See Exhibit 10 Attachment 1 - maps showing the identity and location of retail outlets in Toowong.

[112] According to Dr Lundberg, approval of the application would increase the market power of the two dominant supermarket chains and lessen competition and distort economic efficiency. Approval would adversely affect independent supermarkets in the Toowong catchment area with:

- (a) their sales declining by as much as 25 per cent,¹⁵ and gross profits declining (on the basis that sales to Coles and Woolworths have to come from somewhere, and extending trading hours will not create new markets); (t/s 1:100);
- (b) a decline in business value;
- (c) loss of jobs in IGA stores and Queensland-based suppliers, manufacturers and farmers (some of which might be offset by any increased employment at Coles and Woolworths); and
- (d) downstream and upstream impact on local small businesses from whom the independent supermarket draws products and services (due to reduced demand from independent supermarkets which is not offset by increased demand from Coles and Woolworths because they have to purchase through their corporate supply chains and are unable to purchase from local service providers and manufacturers, farmers and suppliers).

[113] Dr Lundberg accepted that independent supermarkets have a competitive advantage in their ability to cater to local demand and specific requirements of their local communities, but suggested that advantage is qualified because such stores do not have the resources of Coles or Woolworths for such important aspects of business as extensive advertising and property development. He expressed the view that the fact that independent operators are able to compete is attributable, in the case of IGA stores, to maintaining certain standards in their stores, providing a suitable range and quality of products, being able to target their ideal markets, and having some support from Metcash (a large national wholesaler who negotiates with suppliers, though not on the same scale as Woolworths or Coles). Dr Lundberg noted, however, that the supermarkets are independent retailers rather than franchisees, and Metcash is not obliged to provide any level of service or support to those stores. Furthermore, he contended that Woolworths and Coles will use their market share to influence their suppliers to produce a better deal for their stores. Metcash attempts to use the collective volume of IGA¹⁶ for the same purpose. Indeed, as Dr Lundberg confirmed, Metcash will do everything it can to compete with the other larger retailers. However, it does not have the dominance over suppliers that Woolworths and Coles have.

[114] When giving his oral evidence in relation to the need for retailers to adapt in deregulated trading hours environments, Dr Lundberg stated:

¹⁵ In his oral evidence, Dr Lundberg explained that, in his experience of seeing distortion in the marketplace with trading hours and other things, the maximum impact that generally occurs to a store is 25 per cent. There could be anything from zero to 25 per cent.

¹⁶ Not all IGA products are supplied through Metcash. According to Dr Lundberg, IGA stores average about 65 per cent of their purchase through Metcash, and 35 per cent are from other suppliers.

"They have had no choice to adapt to survive, but at what cost? ... [I]t is a slowly, slowly, ... step by step taking small chunks, and there's slightly more power to the chains, ... for the sake of, in this case, two IGA stores, two independent supermarkets and so, you know, we can look at it in terms of ... just Toowong just a small precinct, but the big picture here is that ... Coles and Woolworths have dominated the marketplace over many years through a step by step slow - slowly eating away of things like extended trading hours. So it's ... just one more nail in the coffin for an independent, ultimately."

[115] Dr Lundberg's other objections to the application are noted earlier, and include that the categories of grocery buyers that are "top up" and "emergency" are being serviced (e.g. by IGA stores in Milton and St Lucia) and do not need to be serviced via the proposed extended trading hours.

[116] Dr Lundberg also sought to put this application in a broader market context. He contended that, because the Australian supermarket industry is dominated by Coles and Woolworths (with "an industry concentration never seen anywhere else in the world"), the market in Australia can no longer be seen as being workably competitive - leaving shoppers with little or no choice and no real downward pressure on prices. In his view, the lack of a competitive market affects all small business, suppliers and service providers who have the opportunity to provide products and services to an independent supermarket that they do not have with Coles and Woolworths

[117] Ms White's witness statement, on behalf of the IGA/QNN Trading Hours Review Committee and the IGA State Board and operators in the broader Toowong area, set out reasons for opposing the application which were similar to those advanced by Dr Lundberg. Her evidence is to the effect that, although the bodies on whose behalf she appeared "welcome fair competition," it is the "gradual creep of deregulated hours" into early mornings and late evenings and weekends that is "killing the independent retail sector." According to Ms White, the consequences extending the trading hours of non-exempt retail grocery stores (predominantly Woolworths and Coles) include:

- (a) decline of custom, turnover and profitability of small retailers;
- (b) increased working hours for the principals, and the destruction of family lifestyles for those small retailers who decide to persist;
- (c) increased wholesale costs due to lack of bargaining power;
- (d) long term reduction in the capital value of assets;
- (e) closure of many small retailers, and the destruction of many full-time, part-time and casual jobs (with no clear evidence that these jobs will transfer into the non-exempt sector e.g. because employers and unions prefer that the working hours of existing employers be extended);
- (f) reduced choice for customers; and

- (g) because markets will be controlled increasingly by a small number of large companies, competition will be stifled and consumers will be liable to pay higher prices for products and services.

[118] In particular, Ms White contended, IGA stores are most likely to be affected by decisions to extend trading hours and that any increase in trading hours allowed for the major supermarkets will potentially reduce foot traffic in the neighbourhoods where those and other IGA stores exist. In an effort to quantify the effect of such potential reduction in custom, Ms White stated that:

- (a) a typical Saturday's trade for the periods 7.00 am to 8.00 am and 5.00 pm to 7.00 pm would contribute an average of approximately 22.43 per cent of trade for the day across the average IGA stores;¹⁷
- (b) if a reduction of 40 per cent of trade was affected due to the extended trading hours, that would reduce Saturday turnover significantly and create a detrimental impact on IGA businesses; and
- (c) most IGA stores operate with a wages budget of approximately 11.5 per cent of store turnover, and a decrease in trade brought on by a reduction of foot traffic would mean that the rate of employment would need to be adjusted accordingly to maintain economic viability.

[119] *Submissions*: The NRA submits that there was no evidence from small or medium businesses who are opposed to the application, or from business owners or farmers said to be adversely affected by the application. Nor have the respondents presented evidence of the impact of previous trading hours decisions on independent retail shops. They submit that Dr Lundberg's evidence that the granting of the application will lessen competition and distort economic efficiencies is at odds with findings in the Productivity Commission's 2011 report into the Economic Structure and Performance of the Australian Retail Industry that there are good reasons why trading hours in Australia should be fully deregulated. Furthermore, although Dr Lundberg and Ms White refer to a "gradual creep" of deregulated hours into early mornings/late evenings and weekends which they believe, is "killing the independent retail sector," the "evolutionary pace" of trading hour extension in Queensland means that the independent retail sector has been afforded plenty of time to adjust and prepare for changes to trading hours.¹⁸

¹⁷ According to Ms White;

- (a) on average 2.95 per cent of those stores' trade occurs between 7.00 and 8.00 am on Saturday (but the rate can vary quite significantly across regions, being closer to 6 per cent in the Ipswich region);
- (b) a larger percentage of trade occurs from 5.00 to 6.00 pm;
- (c) the volume of trade reduces after 6.00 pm. (para 56)

¹⁸ The NRA submits that this is consistent with the view of the Commission as per the following observation by the Full Bench in *Retailers' Association of Queensland Limited, Union of Employers and Others v Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Another* [1992] 142 QGIG 477, 481: "Change which evolves in an orderly manner is more likely to give retailers in a weak and vulnerable position a greater opportunity for adjustment."

[120] In response to the evidence given by Dr Lundberg and Ms White, the NRA also submitted that Dr Lundberg's statements regarding the anticipated impacts are speculative. At a local level, any Queensland based business and supplier whose viability is threatened by two non-exempt supermarkets trading an additional eight hours per week is operating an unsustainable business model. In a broader context, if the survival of the independent retail sector depends on restricted trading hours for non-exempt retailers then it follows that the independent retail sector would no longer exist in deregulated states - but that is not the case.

[121] The NRA submits that IGA operators have a significant advantage over other stand alone small grocery retailers, because, as Dr Lundberg agreed, Metcash Food & Grocery provides marketing, merchandising, buying and retail operations support to IGA operators. Furthermore, the NRA submits, it is unlikely that the eight hours extension to trading hours sought will threaten the viability of the Hopper Group of supermarkets, or any Queensland local suppliers, manufacturers or farmers.

[122] The NRA also submits that the issue of market share and the domination of Coles and Woolworths are largely related to planning issues and decisions of the relevant authority. These matters go beyond the Commission's jurisdiction and are subject to broader investigations and review in terms of the resolution of market share, competition or fair trading matters.

[123] *Consideration:* Much of the evidence, and the focus of the submissions, about business interests relate to broad issues about market trends, the nature of competition in the marketplace, and the extent to which the success of the application might affect independent stores (primarily IGA).

[124] Although there was disagreement about the precise extent of the grocery market share currently held by Coles and Woolworths, there was no dispute that they are the major companies with substantial market share or that both Wesfarmers and Woolworths have sought to expand their businesses in recent years. The NRA also stated that Metcash is no exception, having announced a strategy to compete against Coles and Woolworths.

[125] It might be thought that, given the relatively few additional trading hours being sought, the extent of the argument about those broad issues was disproportionate to the subject matter of the application. Such a conclusion would miss the point being made by those who oppose the application, namely that it is the incremental extension of trading hours in favour of major retailers that over time gradually distorts the market and adversely affects independent retailers, their suppliers and employees. We have had regard to the submissions in light of that understanding of the context in which the argument was waged.

[126] In our view, however, the key business interest issue in relation to this application is whether something like a business case has been made for the extended trading hours. If, as the proponents contend, business interest is inextricably linked to the interests of consumers then, the evidence demonstrated:

- (a) little support for trading hours being extended for the period from 7.00 am to 8.00 am on Monday to Saturday; and

- (b) strong support for trading hours being extended for the period from 5.00 pm to 7.00 pm on Saturdays.

The fact that Kmart would probably only use an earlier opening time on weekdays for special trading periods (e.g. Christmas) and events (e.g. toy sale) supports that conclusion. The willingness of Woolworths to operate a store on less than a "full blown" basis (and perhaps absorb the costs) for early trading does not demonstrate that the application should succeed.

The alleviation of traffic congestion

[127] *Evidence:* There was no evidence, statistical or anecdotal, about traffic congestion in the vicinity of the Coles or Woolworths stores, or the neighbouring shopping areas. The survey of customers at Coles and Woolworths confirms that. Of the eight specified reasons why people would support the application for extended trading hours, "It will reduce traffic congestion around the shopping centre" rated 6th with the Coles customers surveyed and 5th with Woolworths customers. The related option, "It will reduce congestion during the peak shopping periods on weekends and holidays," was not in the top six reasons on either survey.

[128] *Consideration:* Traffic congestion is not a significant factor for consideration in relation to this application.

The likely impact of the order on employment

[129] The NRA submits that the additional trading hours applied for are expected to have a positive impact on employment, providing additional earning opportunities for existing permanent and casual employees employed by non-exempt retailers, and new employment opportunities.

[130] *Additional earning opportunities:* The witness statements from representatives of Woolworths and Coles, and the focus of some of the questioning by Mr Martin for the SDA, was aimed at establishing that, if the application is successful, existing employees would not be compelled to work the additional hours. Both Mr Bell (on behalf of Woolworths) and Mr Stout (on behalf of Coles) gave a commitment, or expressed the expectation, that employees would only work the additional hours voluntarily. Mr Lee for Coles noted that their certified agreement allows for the rostering of staff during the extended hours sought in the application. However, any additional hours resulting from the granting of the application would be offered to employees on a voluntary basis.

[131] Mr Hammersla stated that, if the application is granted, work by existing Kmart employees on Sundays and public holidays would remain voluntary. The practical consequences of that statement are unclear, given that the application does not include trading hours on Sundays or public holidays. As Mr Hammersla did not give oral evidence, it is not apparent whether existing employees would be given the option of working additional hours on weekday mornings or Saturday evenings. His written statement (referred to below), suggested that new staff might be employed to work those additional hours.

[132] *New employment opportunities:* The NRA submits that, particularly if current employees did not volunteer to work the additional hours, new employment opportunities would be created by employers who wish to trade in those periods.

[133] Mr Hammersla highlighted the additional employment opportunities that would be generated if Kmart stores are permitted to trade during the additional hours sought in the application. Based on experience of its interstate stores, Kmart estimates that it will require a minimum of nine additional persons for each extra hour of trading.

[134] However, Ms Powell, an employee of Kmart at the Toowong store for more than 25 years, gave oral and written evidence to the effect that previous extensions of trading hours have not led to increased employment. Rather, staff numbers have been spread over a longer period resulting in fewer staff on the selling floor at any given time. Consequently, an increased workload is placed on individual employees to maintain expected standards of customer service. That results in increasing levels of stress.

[135] Mr Lamb thought it unlikely that Woolworths would hire someone to work an extra two or three hours on a Saturday.

[136] As a counter to the evidence given for, or in relation to, Coles, Woolworths and Kmart, Ms White gave evidence (noted above) that most IGA stores currently operate with a wages budget of approximately 11.5 per cent of store turnover. If store turnover was to reduce due to a decrease in trade, the rate of employment would need to be adjusted accordingly to maintain economic viability. In other words, increased employment opportunities at the larger stores might come at the cost of reduced employment at smaller stores in the Toowong catchment area.

[137] *Possible adverse effects on employees:* Ms Powell gave evidence to the effect that those extended hours would adversely affect many employees. In particular she stated that:

- (a) because there would not be sufficient sales to warrant increasing the wage budget, employees would be stretched to cover the additional hours. Fewer staff would be on the selling floor at any given time. They would be expected to maintain expected standards of customer service and so would experience ever increasing levels of stress, regardless of when they work;
- (b) some employees (such as her) would not work on Saturday evenings, as that would result in them being unable to attend social outings with friends and family;
- (c) some employees (such as her) would be prepared to start work at 7.00 am because it suits her lifestyle, but she knows others who would find it very difficult to start work then.

[138] Ms Powell also gave evidence that Kmart employs large numbers of young casual staff, the workforce is dominated (particularly after 5.30 pm) by casual employees of around 15 years of age, and the company does not roster any more employees than are absolutely necessary. The consequences of this trend include that these employees rely on their parents for transport and there would be potential risks for 15 year old employees who have to find their way home some time after 7.00 pm on a Saturday, if their parents have other commitments.

[139] Ms Powell conceded in cross-examination that individual employees have different preferences for ideal rosters. Additional rosters would have to be created if Kmart were to trade from 7.00 am until 7.00 pm each Saturday, with employees working different hours during the day. She also agreed that it is possible that additional trading hours would not automatically translate to longer working hours for those who do not want them.

[140] Mr Lamb, a university student and part-time employee of Woolworths since 2009 (including at its Toowong store), gave oral and written evidence about the practical implications of extended hours for employees. In his opinion some employees' rosters might have to change and any changes to his roster would make the juggling of study and work/life balance considerably harder, particularly if he was required to work on a Saturday night after closing at 7.00 pm. Some other employees would have substantial problems in getting children to school during the week, and the additional hours on a Saturday night would interfere with the children's mealtimes, etc.

[141] Mr Lamb agreed in cross-examination that individual employees have different preferences for ideal rosters, and additional rosters would have to be created if Woolworths were to trade from 7.00 am until 7.00 pm each Saturday. However, he had not spoken to any employee at the Toowong store who was in favour of extended trading hours.

[142] *Submissions:* The NRA highlighted the evidence to support its submission that the grant of the application will have a positive impact on employment, providing new employment opportunities and additional earning opportunities for existing permanent and casual employees employed by non-exempt retailers. The NRA also noted that any additional hours of work would be voluntary for existing staff.

[143] The NRA also submitted that:

- (a) the evidence of Ms Powell and Mr Lamb in relation to their own employment demonstrated that the large companies are willing to accommodate their employees' requests in relation to such things as roles and transfers;
- (b) the evidence showed that different employees would have different preferences for roster and shift times, and the different preferences would not translate automatically to working longer hours;
- (c) if existing employees did not wish to take up the additional hours, additional employees would be sought to help cover those shifts; and

- (d) the safety of school aged casual employees finishing work after 7.00 pm on Saturdays would be catered for (e.g. under the Kmart enterprise agreement) as they are for the same employees who finish work after 9.00 pm on Fridays.

[144] *Consideration:* If the application is successful, in part or in whole, arrangements would need to be made for existing and/or additional employees to serve the additional hours. If existing employees were invited to work additional hours, their agreement to do so would need to be voluntary. Appropriate arrangements would need to be made in relation to employees (particularly junior staff) leaving work premises on Saturday evenings.

The view of any local government in whose area the order is likely to have an impact

[145] There is no evidence before the Commission about the view of local government in relation to the application or the order sought. According to the NRA, Brisbane City Council was served with the application but the NRA understands that the Council has not passed any resolution in relation to it. This criterion is not a significant factor for consideration in relation to this application.

Such other matters as the Industrial Commission considers relevant

[146] *Submission:* The NRA makes the following over-arching submission in relation to this criterion:

"In today's more competitive, globalised retail trading environment, where consumers have greater access to goods from all over the world through online suppliers, there is now an even stronger imperative for non-exempt retailers to not be inhibited in their ability to respond to changing consumer tastes and preferences."

[147] If one accepts the premise on which that submission proceeds, the logical conclusion might be that there be a complete deregulation of trading hours. That is not what is being applied for in these proceedings. It is not a separate matter that the Commission considers relevant in making a decision in relation to the application. At most the submission should be characterised as providing a commercial context in which the particular evidence in relation to the other statutory criteria could be evaluated.

[148] *Consideration:* There are no other matters that the Commission considers relevant to making a decision in relation to the application.

Summary of consideration of evidence and submissions

[149] Consistently with the approach to our task outlined in [13] to [22], we have considered evidence and submissions in relation to each of the criteria listed in s 26. It will be apparent from the summaries and analyses above that some of these criteria are of little or no significance to this application. No other matters were identified which the Commission considers relevant to deciding whether the application should succeed. Consequently, the application is to be assessed by reference to:

- (a) the locality in which the non-exempt shop or class of non-exempt shop is located (s 26(a));
- (b) the needs of an expanding population (s 26(c));
- (c) the public interest, consumers' interest, and business interest (whether small, medium or large) (s 26(e)); and
- (d) the likely impact of the order on employment (s 26(g)).

[150] There was an overlap in evidence and submissions in relation to some criteria. It is sufficient to note, in summary, that the evidence in relation to the relevant criteria demonstrates:

- (a) little support for trading hours being extended for the period from 7.00 am to 8.00 am on Monday to Saturday; and
- (b) strong support for trading hours being extended for the period from 5.00 pm to 7.00 pm on Saturdays.

Consequently, we consider that the case has been made only for an extension of trading hours from 5.00 pm to 7.00 pm on Saturdays.

[151] If trading hours on Saturday evenings are extended, arrangements would need to be made for existing and/or additional employees to serve the additional hours. If existing employees were invited to work additional hours, their agreement to do so would need to be voluntary. Appropriate arrangements would need to be made in relation to employees (particularly junior staff) leaving work premises on Saturday evenings.

Conclusion

[152] For the reasons given above:

- (a) The application is granted in part.
- (b) The *Trading Hours - Non-Exempt Shops Trading by Retail - State* order is amended to allow non-exempt retailers within the boundary of the Toowong Retail Precinct to trade until 7.00 pm on Saturdays.
- (c) The operative date for the amendment is 3 November 2014.

[153] Order accordingly.