

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: Master Grocers Australia Limited* [2015] QIRC 008

PARTY: **Master Grocers Australia Limited**
(Applicant)

CASE NO: TH/2014/7

PROCEEDING: Application to amend Trading Hours Order
(Emu Park Tourist Area)

DELIVERED ON: 14 January 2015

HEARING DATE: 22 September 2014
30 October 2014 (Applicant's Submissions)
10 November 2014 (Respondent's Submissions)

MEMBER: Industrial Commissioner Thompson

ORDERS:

- 1. The application is granted.**
- 2. The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with the Schedule attached to the application filed on 20 May 2014 (as amended).**
- 3. The operative date for the amendment is 14 January 2015.**

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER - Application to amend trading hours order - Witness evidence - Insert clause allowing Sunday trading - National Retail Association Limited, Union of Employers granted leave to be heard as an interested party and opposed the application - The Australian Workers' Union of Employees, Queensland granted leave to be heard as an interested party - Matters relevant to ss 21 and 26 considered - Application granted.

CASES: *Trading (Allowable Hours) Act 1990*, s 21, s 26
Trading Hours - Non-Exempt Shops Trading by Retail - State (TH/2007/7) - Decision)
<<http://www.qirc.qld.gov.au>>
Trading Hours - Non-Exempt Shops Trading by Retail - State (2009) 190 QGIG 63
Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial

Organization of Employers) and Others (2000)
165 QGIG 128

Re: National Retail Association Limited, Union of Employers [2014] QIRC 063

Property Council of Australia Limited (Queensland Division) and Others v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (South-East Corridor Case) (1998)
159 QGIG 310

Trading Hours Order - Non-Exempt Shops Trading by Retail - State (2003) 174 QGIG 1339

APPEARANCES:

Ms M. Brown, for Masters Grocers Australia Limited, the Applicant.

Mr J. Franken, for the National Retail Association Limited, Union of Employers.

Ms C. Woodhouse, for The Australian Workers' Union of Employees, Queensland.

Decision

- [1] An application was lodged by the Master Grocers Association Limited (MGA) on 20 May 2014 to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* (the Order) pursuant to s 21 of the *Trading (Allowable Hours) Act 1990* (Act) in the Emu Park Tourist Area.

Current Trading Hours

- [2] The current trading hours are as follows:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	5.30 pm
Sunday	Closed	
Public Holidays (as defined) (excluding Good Friday, 25 April, Labour Day, 25 December).	8.30 am	5.30 pm

- [3] The application sought to amend the order in the following terms (as amended):

"Insert a new subclause (33) of clause 3.2 of the Order:

(33) Emu Park Tourist Area

	<u>Opening Time</u>	<u>Closing Time</u>
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	5.30 pm
Sunday	10.30 am	5.30 pm
Public Holidays (as defined) (excluding Good Friday, 25 April, Labour Day, 25 December).	8.30 am	5.30 pm

Delete the reference to Emu Park in subclause (5) of Schedule 1 (Definitions) of the Order:

- (5) *Tourist and/or Seaside Resorts* - Rainbow Beach; Tin Can Bay; Burrum Heads; Woodgate; Moore Park; Keppel Sands; ~~Emu Park~~; and the islands off the sea coast of Queensland being part of the State of Queensland.

Insert a new subclause (41) in Schedule 1 (Definitions) of the Order:

- (41) *Emu Park Tourist Area* - the area within the following boundaries:

Commencing from the point where Connor Street intersects with Hartley Street; from that point in a straight line in a northerly direction to the intersection of Phillip Street and Yeppoon-Emu Park Road; from that point in an easterly direction until the sea coast; and then following the sea coast in a southerly direction until the eastern most end of Connor Street; then by a western direction to the point of commencement.

Legislation

[4] Section 21 of the Act states:

"21 Trading hours orders on non-exempt shops

- (1) The industrial commission may decide trading hours for non-exempt shops.
- (2) However, the industrial commission is not to decide trading hours that are less than the following hours on a stated day, other than a public holiday -
- (a) 8a.m. and 9p.m. for Monday to Friday;
 - (b) 8a.m. and 5p.m. for Saturday.
- (3) The industrial commission may make any order it considers necessary or convenient to give effect to a decision made under subsection (1), including, for example, an order specifying -
- (a) the earliest time when non-exempt shops may open on any day and the latest time when non-exempt shops must close on any day; or
 - (b) hours for trading wholesale different from the hours fixed for trading retail; or
 - (c) different trading hours by reference to -
 - (i) classes of non-exempt shops; or
 - (ii) localities, or parts of localities, where non-exempt shops are situated.
- (4) In this section -
public holiday includes, if another day is substituted for a public holiday under the *Holidays Act 1983*, section 3, the day that would have been the public holiday if the substitution had not happened."

[5] Pursuant to s 26 of the Act, when the Industrial Commission is making an order under s 21 of the Act, 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."

Inspections

[6] The Commission was not requested to conduct inspections of the area subject to the application.

Parties to the Proceedings

[7] Parties to the proceedings were as follows:

- MGA - Applicant;
- National Retail Association Limited, Union of Employers (NRA) - opposed the application - granted leave to be heard; and
- The Australian Workers' Union of Employees, Queensland (AWU) - granted leave to be heard.

Applicant

[8] Witnesses for the MGA were:

- George Pezaros (Pezaros);
- Amanda Neubecker (Neubecker);
- Luke Skurray (Skurray); and
- John Drake (Drake).

Pezaros

[9] Pezaros, a Director and owner of Degani - Central Queensland, oversees the operation of 72 bakeries and cafes throughout Australia, one of which is located at Emu Park. He supported the application to extend trading hours on Sundays on the basis it would be beneficial for:

- his business;
- other businesses in the area;
- the community; and
- tourism.

[10] In deciding to open his business some 12 months previous, he had undertaken research of the area, finding that Emu Park was basically a beach resort with the weekends extremely busy more so than during the week. The business attracts customers from areas including:

- Rockhampton;
- Keppel Sands;
- Rosslyn Bay;
- Zilzie; and
- Carwaral.

[11] Pezaros gave further evidence around residential growth in the area in recent times as well as the development of Emu Park by the Council, all of which had contributed to the area become a "thriving vibrant community".

[12] In terms of his own business, there are no restrictions on the times he can operate.

[13] Under cross-examination, Pezaros did not accept that when he had opened his business he had taken business from the existing bakery [Transcript p. 1-9]. If the application was not granted custom would decrease and it would be difficult to maintain existing staff levels. When the business opened in November 2013 there were over 200 applications for 12 positions [Transcript p. 1-14].

Neubecker

[14] Neubecker and her husband have operated the Emu Beach Resort since 2008 which offers budget accommodation catering for the domestic and international tourism market. Neubecker supported the application because it would be beneficial for businesses in Emu Park, including her own business.

[15] Since the opening of their business the tourist numbers have grown and they have subsequently doubled the available accommodation with demand for such accommodation increasing with a similar facility having been opened in Yeppoon in 2013.

[16] Neubecker gave evidence of attractions in the area which included:

- beaches;
- fishing;
- Sunday markets;
- Classic Car Show;
- Bell Park Fair; and
- Emu Park Surf Life Saving Club - hosted Junior State and Branch titles in the past two years.

[17] Additionally in November there is an Oktoberfest held that attracts more than 5,000 people to the town.

[18] A number of bus operators regularly bring tourists to the area with tourist groups utilising their accommodation as a stopover between the Whitsunday and Fraser Islands.

- [19] The Resort itself has an onsite bar but no restaurant however there are facilities available for guests to prepare their own meals which necessitates access to a supermarket seven days a week.
- [20] There have been major developments in the Emu Park region over recent years that include:
- Zilzie Bay - housing development;
 - Reef Palms Golf Resort; and
 - Seaspray.
- [21] If the application was approved it would be important to their business.
- [22] Under cross-examination she indicated that at present Emu Park was like a seaside village but developing towards a seaside tourist destination [Transcript p. 1-17]. Neubecker was questioned in respect of the current situation regarding Sunday trade in Emu Park [Transcript p. 1-18].

Skurray

- [23] Skurray, the Queensland Area Manager of Dramet Pty Ltd (Dramet) which operates Drakes Supermarkets Pty Ltd (Drakes) including the Emu Park store, gave evidence of his retail industry experience and his overall knowledge of trading hours including areas such as Rockhampton and Yeppoon that are able to trade on Sundays.
- [24] Skurray gave evidence of being closely associated with the Emu Park community and of the high concentration of tourism in the area. The Livingstone Shire Council were actively promoting tourist attractions in the area and were exploring cost effective ways to revitalise and reinvigorate both the Yeppoon and Emu Park areas with the goal of attracting more people into the area.
- [25] Extended trading hours according to Skurray would benefit enormously local residents and other commercial outlets including a pharmacy, new cafe and a bakery. The ability to purchase fresh produce for local residents was important as the alternative was for persons to travel long distances to do their shopping.
- [26] The Emu Park store has around 10,000 customers each week and would increase significantly with Sunday trade. There are currently 28 employees with those working on Sunday receiving additional payments in the form of a 50 per cent penalty rate. Sunday trading would see another 80 hours per week available to the employees with Sunday work being voluntary.
- [27] Under cross-examination Skurray gave evidence of 20 independent stores operating in Queensland through a joint arrangement between Drakes and Metcash. Skurray was not sure of the definition of non-exempt stores under the Act [Transcript p. 1-25] confirming there would be 25 to 30 staff on the Emu Park store floor on a Sunday [Transcript p. 1-28]. Drakes had purchased the Emu Park store from another company as a store that traded on a Sunday [Transcript p. 1-29]. The 10,000 customers per week referred to in his evidence-in-chief were said to be 10,000 transactions per week [Transcript p. 1-34].

Note: Attached to Skurray's affidavit were a number of source documents supporting the argument for increased trading on Sunday, however those responsible for the preparation of the documents were not called to attest to their content.

Drake

- [28] Drake, the Queensland Manager of Dramet, supported the extension of shopping hours and the insertion of Emu Park in the Order as a tourist area.
- [29] Drake gave evidence in terms of the operation of 28 independent supermarkets in Australia, 20 of which are in Queensland. The Emu Park store was purchased in August 2012 and if the current application was approved it would be beneficial to tourists, community and other businesses in the area.
- [30] The Emu Park area is located 17 kilometres south of Yeppoon and 44 kilometres east of Rockhampton with both those areas having been granted extended trading hours enabling trade on Sundays. Drake gave evidence of significant population growth in the area over the last few years and the many attractions for tourists which have served to increase tourist numbers to the region.
- [31] The Emu Park supermarket is the only supermarket in the township and is used by tourists to purchase food supplies necessary to prepare their own meals due to limited restaurant facilities in the town. The inability to open on Sundays causes the inconvenience of having to travel to Yeppoon and Rockhampton to obtain supplies.
- [32] The extended hours if granted would benefit other businesses in the area and would have the effect of limiting traffic congestion on the roads between Emu Park and destinations that include Rockhampton and Yeppoon.
- [33] Drake attached to his affidavit correspondence to the MGA (dated 11 July 2014) from the Acting Chief Executive Officer of the Livingstone Shire Council which confirmed that Council had resolved to fully support the proposed extended trading hours for Sundays between 10.30 am and 5.30 pm.
- [34] Employment opportunities were likely to be enhanced with an estimated 28 staff being employed on Sundays, generating an estimated \$4,200 in wages.
- [35] Also attached to his affidavit was a survey carried out by the Emu Park supermarket which contained "hundreds" of signatures supporting Sunday trading.
- [36] Under cross-examination Drake explained details relating to the joint venture between Drakes and Metcash [Transcript p. 1-39] and also the operation of supermarkets in South Australia under another company structure [Transcript p. 1-41]. There was extensive questioning about the operation of other Drakes supermarkets beyond that of the Emu Park business. The tendered survey was confirmed as having been conducted "in house" around six weeks prior to the hearing [Transcript p. 1-55].

Submissions

MGA

- [37] The MGA provided extensive written submissions which initially explained difficulties associated with the lodgement of the application and representation arrangements which had a life in excess of one year.
- [38] In relation to the application, the evidence and submissions would demonstrate that the Emu Park area had experienced significant growth in population and tourism levels to the extent Emu Park would be designated as a tourist area therefore permitting Sunday trading for non-exempt shops.
- [39] The submission dealt with the criteria contained in s 26 of the Act which, for the purposes of this decision, are précised as follows:

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

- located in the Capricornia Region of Central Queensland;
- Rockhampton and Yeppoon located 44 kilometres and 17 kilometres (respectively) from Emu Park have had Sunday trading since 2010 and 2008 (respectively);
- Emu Park has expanded significantly since 2009 with increased residential and business activity;
- Emu Park serves as a focal point for the surrounding area making it a viable consumer hub and is no longer a small insignificant location;
- in respect of this criterion, MGA referred to the comments of the Full Bench in *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (Trading Hours - Non-Exempt Shops Trading by Retail - State*¹) where it said at paragraph [234]:

"In our view the Legislature does not impose any test of 'uniqueness' in relation to the factor of locality, either expressly or by reference to the extrinsic material. The factors contained in s. 26 are matters to which the Commission must have regard when determining applications made pursuant to s. 21 of the Trading Hours Act. In our view a non-exhaustive list of the types of matters to be considered includes the geographic location of the town or area; the retail infrastructure; other relevant infrastructure and other relevant features of the town or area concerned."

¹ *Trading Hours - Non-Exempt Shops Trading by Retail - State (TH/2007/7) - Decision*
<<http://www.qirc.qld.gov.au>>

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

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

- as a preliminary point, MGA referred to the comments of President Hall in *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (Trading Hours - Non-Exempt Shops Trading by Retail - State²)* where his Honour said:

"It is an object of the Act 'to facilitate trading in tourist areas', s. 3(c). The object was added by the *Trading (Allowable Hours) Amendment Act 1994*. Of the addition of the object the Explanatory Note observes:

'A specific object to facilitate trading in tourist areas gives expression to the intent to assist the growth and development of tourism.'

In articulating the matters to which the Commission must have regard in making an order under s. 21 of the Act, s. 26 twice refers to the tourist industry. Section 26(b) refers to the 'needs of the tourist industry' in the locality or part thereof to which the application relates and s. 26(c) refers to the 'needs of an expanding tourist industry'. Like s. 3(c), s. 26(b) and (c) were also added by the *Trading (Allowable Hours) Amendment Act 1994*. Reference to the Explanatory Note reveals the observation:

"The intent of this change is to place a particular emphasis on the needs of the tourist industry ...!";

- extension of Sunday trading will facilitate the growth and development of tourism in the Capricorn Region which is an important source of income for Emu Park through increased accommodation and visitation of tourist attractions including attractive beaches;
- the submission relied upon information prepared by Capricorn Enterprise showed a total of 64,201 international visitors spending one night or more in the Capricorn Region and 686,000 domestic visitors staying one night or more;
- Emu Park according to Drake's evidence had a number of backpackers and caravan park tourists needing access to a supermarket;
- Neubecker, a tourism operator, identified significant growth in tourism business in Emu Park identifying tourist attractions including:
 - Sunday markets
 - Oktoberfest
 - Junior State and Branch Surf Life Saving titles;

² *Trading Hours - Non-Exempt Shops Trading by Retail - State* (2009) 190 QGIG 63

- Neubecker firmly believes that the viability and sustainability of her business contracts and other entities is contingent on the availability of seven day trading;
- Pezaros' evidence also referred to tourist attractions.

(d) *the needs of an expanding population*

- Queensland Treasury and Trade figures indicate in the period of 2007 to 2012 the Emu Park region grew at 4.0 per cent as opposed to 2.1 per cent for Queensland as a whole in the same period;
- Emu Park is a popular destination for tourists, residents and backpackers;
- statistics in material attached to affidavits were from reputable organisations and are compelling and consistent with an expanding population and growing tourist sector;
- Emu Park services the customer needs of Carwaral.

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

Public Interest

- prior to the purchase of the Emu Park store by Dramet the previous owner was able to trade as an "independent retail shop" and in that capacity the local community had been able to access less restrictive hours;
- this view of the public interest was adopted by the Full Bench in *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others*³ where the issues involved determining the public interest with respect to an application were outlined as follows:

"In assessing the public interest this Commission is required to weigh up any competing interests. On the one hand we have the interests of consumers in being able to purchase products in the extended trading hours sought and the interests of Coles Express in wishing to trade the extended hours. On the other hand we have the interests of the twelve independent operators, whether they be small or medium businesses, trading in or around the Brisbane City Heart whose businesses may be affected adversely by the grant of the application."

³ *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others* (2000) 165 QGIG 128

Consumer Interest

- an in store survey overall supported trading on Sunday between 10.30 am and 5.30 pm with the community not wishing to travel long distances to shop;
- in reference to the interests of consumers, MGA referred to the comments of the Full Bench in *Re: National Retail Association Limited, Union of Employers*⁴ wherein at paragraph [95] it stated:

"...it is...fair to state that the Commission has often acknowledged that the interests of consumers are generally advanced by extended trading hours."

Business Interest

- there was no business opposition or negativity to the application;
- Pezaros' observations suggest the viability of businesses in the Emu Park area is contingent on the ability for the Emu Park IGA store to trade on Sundays;
- Neubecker's evidence was similar to Pezaros with fears her business will be substantially compromised without the Emu Park IGA trading on Sundays;
- In *Re: National Retail Association Limited, Union of Employers*⁵ the Full Bench made the following comment at paragraph [91]:

"There has been no evidence adduced from any business (whether small, medium or large exempt stores) which operates in the area under consideration, to enable the Full Bench to weigh the competing interests of those stores with the non-exempt stores being considered in this application. While acknowledging that the onus rests with the Applicant in this matter, it is open to draw the inference in these unusual circumstances that the application is of no concern to any other exempt business within the proposed boundary."

(f) *the alleviation of traffic congestion*

- in this respect, MGA referred to the Full Bench's comments in *Re: National Retail Association Limited, Union of Employers*⁶ at paragraph [72]:

"The Full Bench has previously stated that it should not be inferred in all applications for an extension of trading hours that all matters identified in s 26 of the Act would be weighed equally. Further, it is

⁴ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 063

⁵ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 063

⁶ *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 063

the case that in some applications some s 26 criteria are more relevant than others and occasionally other criteria are deemed irrelevant because of the discrete nature of the application.";

- it would appear that traffic congestion is not an issue germane to this application although if the application was granted there was evidence of less traffic on the roads between Emu Park and Rockhampton and Yeppoon.

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

- there will be a positive impact on employment if the application is granted by way of additional earning capacity for existing employees at the IGA store with Sunday and Public Holidays remaining voluntary;
- Pezaros gave evidence of the potential for his business to shrink without Sunday trading.

(h) *the view of any local government in whose area the order is likely to have an impact*

- correspondence (dated 23 June 2014) had been received from the Livingstone Council under the signature of Acting Chief Executive which confirmed they "did not have any issues or concerns with the Application".

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

- matters relating to trading in contravention of the Act should not be condoned however this hearing is not about whether a transgression of the Act has been committed;
- the purpose of the application is to seek approval for non-exempt stores to legally trade on Sunday.

[40] In conclusion there was reliance upon *Property Council of Australia Limited (Queensland Division) and Others v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (South-East Corridor Case)*⁷ mentioned in *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (Trading Hours - Non-Exempt Shops Trading by Retail - State)*⁸ where the Full Bench stated:

"Each case must be determined on its own merits according to its circumstances. However, the Commission has, in deciding applications for an extension of trading hours in the past, reiterated that, to justify an extension of trading hours for non-exempt shops, it must be shown there are 'special circumstances of a

⁷ *Property Council of Australia Limited (Queensland Division) and Others v Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (South-East Corridor Case)* (1998) 159 QGIG 310

⁸ *Trading Hours - Non-Exempt Shops Trading by Retail - State* (2009) 190 QGIG 63

sufficiently significant nature', that the situation is 'unique' or 'is clearly distinguishable' from the normal situation."

It was submitted the MGA had satisfactorily discharged the required onus to allow approval of the application.

NRA

- [41] The NRA submitted it supported the extension of trading hours especially in rural communities and had not intended to oppose the application however it was inequitable that an expectation exists where non-exempt stores comply with the legal requirements of the Act whilst some stores knowingly flout the applicable laws.
- [42] In terms of this application, the NRA opposes the granting of extended hours on the basis of acquired knowledge that impacts on the integrity of the application.
- [43] The evidence identified that Dramet had 20 supermarkets in Queensland of which the majority were classed as non-exempt stores, one of which was the Emu Park store which is currently not permitted to trade on Sunday however does so in contravention of the provisions of the Act.
- [44] Questions were raised over the truthfulness regarding certain aspects of Drake's evidence but it was clear there was an awareness as far back as July 2013 of advice being given by the Department of Justice and Attorney-General that the Emu Park store was not classed as an exempt store. There had been a blatant disregard of the legal requirements which had not occurred "inadvertently". Whilst the nature of the hearing is not to establish whether a transgression of the Act had been committed it is factual that is what occurred.
- [45] The Commission was being requested to overlook the blatant breach of the Act as the "benefits to customers, businesses, and the local community, as well as the expanding tourist industry and growing population in the area" outweighs the "unlawfulness". This should be rejected as there are no circumstances where a public interest can outweigh unlawful action as that would negate the important principle of the "rule of law".
- [46] The NRA does not seek to "castigate" anyone however the Commission should have regard to the behaviour of the business and the wilful disregard of the legal requirements of the Act by Dramet who have mocked the powers of and the role of the Commission under the Act.
- [47] It was submitted the application should be refused on the basis of:
- since mid-2013 the Emu Park store had traded on Sundays which were deliberate and wilful breaches of the Act;
 - the evidence-in-chief had not disclosed the breaches it only emerged as a result of cross-examination;
 - the MGA seeks an order to legitimise the existing and unlawful longstanding Sunday trading practices of Dramet; and

- the longstanding "dirty hands/clean hands" doctrine in law has been evoked and does not allow the help of a court if a person has done anything unethical in relation to the subject of the proceedings.

Conclusion

- [48] In terms of this application there was an unusual aspect in that the protagonists in the form of the MGA and the NRA had adopted stances quite unique from their traditional positions. The MGA generally opposed applications more often than not lodged by the NRA to extend trading hours with the NRA being quite the proponent of the concept of extended trading hours.
- [49] The NRA in opposition to the application did not pursue an evidentiary case relying solely on submissions. There was a concession by the NRA at the outset of their submissions that they generally "supported the extension of trading hours especially in rural communities" however in this application they opposed Sunday trading being granted at Emu Park on the basis of the supermarket trading on Sundays whilst knowingly in breach of the Act and that the application sought to legitimise the "existing and unlawful longstanding Sunday trading practices of Dramet".
- [50] The fact that Sunday trading in contravention of the Act has occurred at the Emu Park supermarket operated by Dramet is not of contention and was confirmed in evidence by witnesses for the MGA in the course of cross-examination. However this is not a matter for which the Commission has the jurisdiction with the enforcement provisions of the Act being the property of a body beyond the Commission.
- [51] Therefore in consideration of this application it is necessary to address only the criteria pursuant to s 26 of the Act and not the grounds relied on by the NRA in relation to breaches of the Act.
- [52] The Commission has a statutory obligation to have regard for nine criteria identified in s 26 of the Act although the weight that may be apportioned to each of the criteria is discretionary.
- [53] In the matter of *Trading Hours Order - Non-Exempt Shops Trading by Retail - State*⁹ the Full Bench in addressing s 26 of the Act made the following statement:

"Section 26 of the Trading Hours Act requires the Commission to have regard to a number of elements in relation to whether it will make an Order under s. 21 of the same Act. In that respect, we note another Full Bench of this Commission stated in Matter No. B1156 of 2002 (172 QGIG 542) that:

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

- [54] Subsequently other Full Benches have relied upon this view as I do in this matter.

⁹ *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* (2003) 174 QGIG 1339

Application of s 26 criteria

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

- [55] The application relates to the Emu Park area of Central Queensland which is situated some 44 kilometres to the east of Rockhampton (the largest provincial city in the region) and 17 kilometres south of Yeppoon.
- [56] The Emu Park store services a growing community with evidence (uncontested) of substantial residential and tourist growth in recent years along with a significant level of similar growth foreshadowed in the coming years.
- [57] The locations of Rockhampton and Yeppoon adjacent to Emu Park have trading hours that permit Sunday trading however to visit these locations for purposes of supermarket shopping on a Sunday would require a level of travel beyond what normally would apply in other areas of the State. Further for those without transport the ability to supermarket shop would be nigh impossible.
- [58] The application satisfies the requirements of s 26(a) in that it clearly identifies the locality subject to consideration by the Commission.

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

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

- [59] The application extensively relied upon the evidence of Neubecker, a tourist operator in the Emu Park area who gave direct evidence of tourist activities in which she had involvement as an accommodation provider. Since the establishment of their business in 2008 they have doubled their accommodation offer to tourists.
- [60] Neubecker gave further evidence of attractions in the Emu Park area that were considered as attractions which drew tourists to the area. These included:
- beaches;
 - fishing;
 - Sunday markets;
 - Classic car shows; and
 - State and Branch Surf Life Saving titles.
- [61] There was no evidence adduced to challenge the veracity of Neubecker's assertions regarding the tourist activities in the area nor was her evidence disturbed in the course of cross-examination.
- [62] Neubecker, in cross-examination, expressed a view that Emu Park was developing towards a tourist destination as opposed to a seaside village.
- [63] There was documentation attached to Skurray's affidavit of evidence including "The Capricornia Destination Tourism Plan Final Report" March 2014 that had been authored by an economic development organisation for the Capricorn Region that identified "tourism is both a major economic activity and lifestyle driver for the Capricorn Region".

[64] The Commission is of the view that in terms of s 26(b) and (c) of the Act the evidence supports a finding that the needs of the tourist industry, in particular, and an expanding tourist industry would benefit from the granting of this application.

(d) the needs of an expanding population

[65] The Commission, whilst not taking evidence directly from an "expert" witness regarding the expansion or otherwise of the Emu Park area population did have the benefit of being able to consider documentation which included Queensland Treasury and Trade statistics which indicated that the region of Emu Park had experienced growth in the period of 2007-2012 of 4.0 per cent in comparison to the average annual growth of 2.1 per cent for Queensland as a whole. Population grown annually for other locations in the region were recorded as:

- Glenlee - Rockyview - 1.7 per cent;
- Rockhampton Region - East - 1.7 per cent;
- Rockhampton Region - North - -0.1 per cent; and
- Yeppoon - 3.1 per cent.

[66] Clearly on those figures Emu Park out of all locations contained within the information had experienced the most significant growth.

[67] A further document prepared for the Livingstone Shire Council (attached to Drake's affidavit) provided information around Emu Park's population projections going forward in the following terms based on a conservative 6 per cent annual population rate:

<u>2011</u>	<u>2016</u>	<u>2021</u>
4,050 persons	5,885 persons	8,551 persons

[68] Skurray gave evidence of increased sales at the Emu Park store which he attributed to population and tourist growth gleaned from his personal observations of customer foot traffic and interaction with customers.

[69] The evidence and documentation available to the Commission supported the proposition that the needs of an expanding population would be served by the granting of the application.

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

[70] On the matter of public interest, it was argued that prior to the purchase of the Emu Park store by Dramet it had operated as an independent retail shop within the meaning of the Act and serviced the needs of the community from the time of opening.

[71] Effectively as a consequence of the sale of the business there had been a negative impact on persons within the area not being able to access shopping needs for food and the like on Sundays.

[72] Consumer's interests were addressed in the form of the "in house" survey conducted by Dramet in the three months leading up to the hearing of the application. The survey identified overwhelming support from the majority of those who participated for

Sunday trading between the hours of 10.30 am and 5.30 pm. Whilst it may be open to criticise the survey on the basis of having not been conducted independent of Dramet, I am satisfied the responses contained in the tendered survey are supportive of the application.

- [73] There was no evidence adduced in the proceedings from businesses of any size that opposed the application for extended hours with the only evidence from business interests being supportive of the application.
- [74] The evidence of Pezaros was that without the increased hours his business would be significantly affected to the extent that 50 per cent of his Sunday custom would disappear. Neubecker a small business operator gave evidence of their business being heavily relevant upon the ability of the supermarket to operate on Sunday.
- [75] The NRA whilst generally not addressing the s 26 of the Act criteria did make submissions around the public interest in that the unlawfulness of Dramet in breaching the Act by trading illegally they could not rely upon a public interest argument to negate the rule of law.
- [76] The Commission, in considering the criteria of s 26(e) finds the evidence before the proceedings clearly demonstrated in all facets that the granting of the application would satisfy the criteria of the public interest, consumer and business interests in the positive.

(f) the alleviation of traffic congestion

- [77] There was no evidence or submissions of any standing advanced in the proceedings around this criterion with passing reference only being made by Pezaros under cross-examination of substantial parking being available and of parking being freely available due to "street-scaping" of the village.
- [78] As such the alleviation of traffic congestion is not a factor in play in terms of the determination of the application.

(g) the likely impact of the order on employment

- [79] The granting of the application would, on the evidence, see current employees offered some form of additional employment on Sundays. All engagements would attract the payment of a penalty as prescribed under the certified agreement applicable to their employment and such engagements would be voluntary. The number of hours additional to hours already worked would be 80 hours per week.
- [80] In evidence Pezaros recalled that when opening his business in Emu Park there were in excess of 200 applications for 12 positions which would indicate any employment opportunity in the area would be regarded at a premium.
- [81] Accordingly the granting of the application would have a positive effect for employees who wish to avail themselves of additional hours of work and the potential for creating further opportunities for employment.

(h) *the view of any local government in whose area the order is likely to have an impact*

[82] The relevant local authority being the Livingstone Shire Council did not seek leave to appear in the proceedings or for that matter provide correspondence supporting or otherwise the application however there was correspondence under the signature of the Acting Chief Executive Officer of Council (attached to Drake's affidavit) that indicated they did not have issues or concerns with the application.

[83] That in my view is sufficient to establish tacit support for the application as there was certainly no evidence of their opposition to the application.

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

[84] The NRA as mentioned earlier focussed their objection to the application based upon the conduct of Dramet in operating on Sundays in breach of the Act and questioned the intent of the application.

[85] The illegal trading activities by Dramet as previously mentioned were outside the jurisdiction of the Commission and should the application be successful the operative date would not be a retrospective one therefore rendering the argument of lodging the application to rectify an unlawful action is unfounded.

Conclusion

[86] On consideration of the s 26 criteria of the Act I am satisfied the evidence before the proceedings is sufficient to allow the granting of the application and for the relevant order to be granted pursuant to s 21 of the Act.

Orders

[87] It is ordered that:

- The application be granted;
- The *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* be amended in accordance with the Schedule attached to the application filed on 20 May 2014 (as amended); and
- The operative date of the amendment is 14 January 2015.

Note: The amendments to the attached Schedule related to subclause numbering as a consequence of other Trading Hours applications having been determined since the lodgement of this application.

[88] I order accordingly.