

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2015] QIRC 200

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

CASE NO: TH/2015/8

PROCEEDING: Application to amend Trading Hours - Non-Exempt Shops Trading by Retail - State

DELIVERED ON: 24 November 2015

HEARING DATES: 16 and 17 November 2015

HEARD AT: Brisbane

MEMBERS: Industrial Commissioner Neate

ORDERS: **1. The Trading Hours - Non-Exempt Shops Trading by Retail - State order is amended to include:**

**"Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Monday 28 December 2015:**

<b>Monday, 28 December 2015</b>	
<b>Opening Time</b>	<b>Closing Time</b>
<b>8.00 a.m.</b>	<b>5.00 p.m."</b>

**2. The operative date for the amendment is 24 November 2015.**

CATCHWORDS: INDUSTRIAL LAW - TRADING HOURS ORDER - Application to amend the *Trading Hours - Non-Exempt Shops Trading by Retail - State* Order in relation to areas of regional Queensland to allow trading on Sunday 27 December 2015 and Monday 28 December 2015 - four consecutive non-trading days because Christmas is on a Friday - criteria to which Commission "must have regard" when making an order - application opposed by independent stores and one union - application to be decided on evidence in relation to it

## CASES:

*Trading (Allowable Hours) Act 1990*, ss 21, 26

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

*National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employees) and Others (TH/2010/3) - decision*  
<<http://www.qirc.qld.gov.au>>

*National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Another (TH/2009/5) - decision*  
<<http://www.qirc.qld.gov.au>>

*National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (2005) 180 QGIG 1211*

*National Retail Association Limited, Union of Employers AND Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees AND The Australian Workers' Union of Employees, Queensland (TH/2011/7) - decision*  
<<http://www.qirc.qld.gov.au>>

*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

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

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

*Re: National Retail Association Limited, Union of Employers* [2015] QIRC 044

*Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (2000) 165 QGIG 174*

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

*Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (2003) 174 QGIG 1339*

*Trading Hours - Non Exempt Stores Trading by Retail - State (TH/2010/3) (TH/2010/12) (TH/2010/14) - Decision*

<<http://www.qirc.qld.gov.au>>

*Trading Hours - Non-Exempt Shops Trading by Retail - State* [2008] 189 QGIG 569

APPEARANCES: Ms D. Lamb, for the National Retail Association Limited, Union of Employers, the Applicant  
 Ms M. Brown, for Master Grocers Australia Limited  
 Mr D. Kerr, for the Shop Distributive and Allied Employees' Association (Queensland Branch)

**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* ("the Act").

[2] The application seeks the amendment to the Order by adding a new paragraph to clause 3.2(1) as follows:

"Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Sunday December 27 2015 and Monday December 28 2015:

	<u>Opening Time</u>	<u>Closing Time</u>
Sunday December 27	8.00 a.m.	5.00 p.m.
Monday December 28	8.00 a.m.	5.00 p.m."

[3] For reasons set out below (see [22] - [24]) the amended order would apply only to areas of regional Queensland.

[4] The application is made in the context of Christmas Day being on a Friday and Boxing Day being on a Saturday. By the combined operations of the Act and the *Holidays Act 1983*, there will be four consecutive non-trading days for non-exempt stores in the locations affected. This is a relatively infrequent event. The most recent years when Christmas was on a Friday were 1998 and 2009. The event will recur in 2020 and 2026.

[5] The *Holidays Act 1983* provides that a public holiday is to be observed on the days set out in the Schedule, and that the Minister may, by Gazette notice, substitute another day for a public holiday (ss 2, 3). No party was able to identify a Gazette notice declaring Monday 28 December 2015 to be a public holiday.

[6] The Schedule provides that:

- (a) a public holiday for Christmas Day is to be observed on 25 December;
- (b) a public holiday for Boxing Day is to be observed on 26 December;
- (c) a public holiday is to be observed on 28 December only if 26 December is a Saturday or Sunday.

I am satisfied that, by operation of the *Holidays Act 1983*, there will be a public holiday on 28 December 2015 because 26 December 2015 is a Saturday.

- [7] Master Grocers Australia Limited ("MGA"), the Australian Workers' Union of Employees, Queensland ("AWUEQ") and the Shop, Distributive and Allied Employees' Association (Queensland Branch) ("SDA") were granted leave to be heard in relation to the application. The MGA and SDA oppose the application. The AWUEQ does not support or oppose the application. The nominated representative of the AWUEQ was unable to attend the hearing, but communicated the submissions of the AWUEQ by letter and email before and during the hearing.

### **Witnesses**

- [8] Oral evidence was given and written statements were provided by witnesses called by the NRA and MGA. Neither union called any witnesses.

- [9] Witnesses for the NRA were:

- Darren McClarty (State General Manager for Coles in Queensland) (Exhibit 6)
- Gerard Winzenberg (Queensland District Manager for Target Australia Pty Ltd ("Target")) (Exhibit 9)
- Brett McLean (Assistant State Manager in Queensland for Woolworths Ltd) (Exhibit 7)
- Angus Nardi (Executive Director of the Shopping Centre Council of Australia) (Exhibit 8)
- Jeffrey Wilson (Zone Manager Queensland South, Kmart) (Exhibit 5)
- Bert Schafer (Regional Manager for Big W Discount Stores ("Big W")) (Exhibit 10)
- Dr Gary Mortimer (Senior lecturer, Business School of the Queensland University of Technology) (Exhibit 4).

- [10] Witnesses for the MGA were:

- Wayne Morris Mason (Queensland State Operations Manager, Australian United Retailers Ltd trading as FoodWorks Pty Ltd ("FoodWorks")) (Exhibit 15)
- Paul Faust (an owner of the IGA store in Proserpine) (Exhibit 18)
- Sharon Amara Lee (Chairman of the Board of the Goondiwindi Co-operative Limited) (Exhibit 12)
- Shane Smith (owner of the IGA store in Pittsworth) (Exhibit 16)

- Gregory James Dempsey (owner/manager of IGA stores in Bowen and Homehill) (Exhibit 17)
- Peta MacRae (owner and operator of MacRae News Newsagency, Turanga Shopping Centre) (Exhibit 19)
- John Joseph Constanzo (General Manager - Retail Operations and Business Development, SPAR Australia Ltd) (Exhibit 11)
- Robert Katter (State Member of Parliament for Mount Isa) (Exhibit 20).

### **Some general issues**

[11] Before considering the evidence and submissions, it is appropriate to make some general observations in relation to:

- (a) the role of the criteria in s 26 of the Act; and
- (b) whether the application has to be decided by reference only to evidence in relation to it.

These observations draw on statements in a decision of a Full Bench of the Commission in *Re: National Retail Association Limited, Union of Employers*.<sup>1</sup>

[12] ***The s 26 criteria:*** 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."

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<sup>1</sup> *Re: National Retail Association Limited, Union of Employers* [2014] QIRC 157.

- [13] 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.
- [14] 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 may involve a degree of repetition or cross-referencing to other parts of the reasons for decision.
- [15] 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.
- [16] In relation to the requirement of s 26, I 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 considered the proper construction of s 26. 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.<sup>2</sup> I 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.<sup>3</sup>
- [17] 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.<sup>4</sup> However, as another Full Bench concluded, 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:

"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".<sup>5</sup>

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<sup>2</sup> Re: *National Retail Association Limited, Union 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.

<sup>3</sup> See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) [12.15]; *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2003) 174 QGIG 1339, 1344.

<sup>4</sup> 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 AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2005) 180 QGIG 1211.

<sup>5</sup> Re: *National Retail Association Limited, Union of Employers* [2014] QIRC 50, [10].

- [18] It might also be the case that the absence of evidence or submissions in relation to one or more of the matters listed 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.<sup>6</sup>
- [19] ***Application to be decided on its facts:*** In light of the operation of s 26, 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.
- [20] When making its decision, the Commission will not be restricted to material provided by the NRA 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).
- [21] 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.

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

- [22] ***Evidence:*** Described most broadly, the area covered by this application is all of the State of Queensland other than locations for which other orders have been made previously. Those orders are set out in clause 3.2 of the Order "Allowable trading hours of non-exempt shops". They apply to the South-East Queensland Area, Ipswich Central Business District, Tourist and/or Seaside Resorts (as defined), Gold Coast and Sunshine Coast Areas, Cairns Tourist Area, Cairns CBD area, Townsville Tourist Area, Mossman and Port Douglas Tourist Area, Whitsunday Shire Tourist Area, Great Barrier Reef Wonderland Tourist Complex, Fraser Coast Area, Townsville and Thuringowa Area, Yeppoon Tourist Area, Moranbah Area, Cooloola Cove Area, The City of Rockhampton Area, The City of Toowoomba Area, The Mackay Area, The Innisfail Area, The Emerald Area, The Tablelands Area, the Gladstone Area, the Bundaberg Area (which includes Elliot heads, Bundaberg and Bargara), Gympie Area, The Biloela Area, The Marian Area, Emu Park Tourist Area, Hamilton North Shore Area and Dalby Area.
- [23] When the locations just listed are excluded, it is apparent that this application can be described as applying to extensive areas of regional Queensland.
- [24] Evidence was given in relation to the exempt and non-exempt retail operations in the following 20 locations:
- (a) Mount Isa (Coles, Woolworths, Kmart)
  - (b) Cloncurry (Woolworths)

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<sup>6</sup> 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.

- (c) Weipa (Woolworths)
- (d) Mission Beach (Woolworths)
- (e) Ingham (Coles, Woolworths, Target Country)
- (f) Ayr (Coles, Woolworths, Target Country)
- (g) Bowen (Woolworths, Target Country)
- (h) Charters Towers (Woolworths, Target Country)
- (i) Proserpine (Woolworths)
- (j) Childers (Woolworths)
- (k) Murgon (Target Country)
- (l) Kingaroy (Woolworths, Target Country, Big W)
- (m) Chinchilla (Woolworths, Target Country)
- (n) Pittsworth (Woolworths)
- (o) Roma (Woolworths, Target Country)
- (p) Warwick (Bi-Lo, Woolworths, Target Country, Big W)
- (q) Stanthorpe (Woolworths, Target Country)
- (r) Goondiwindi (Coles, Target Country)
- (s) Longreach (Target Country);
- (t) Blackwater (Coles, Woolworths).

[25] It was apparent from that evidence that there are differences between some of those regional towns. The differences included their populations, relative proximity to or distance from major cities or regional centres, the number and types of non-exempt stores trading there, and the extent of tourism. There was, however, little evidence directed to this criterion.

[26] **Submissions:** The NRA submits that the towns have different needs and facilities, including the number and range of retailers.

[27] The MGA referred to the decision in *Trading Hours - Non-Exempt Shops Trading by Retail - State*<sup>7</sup> where a Full Bench of the Commission wrote:

"[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."

[28] The MGA submits that, although this application did not specify the affected towns, the evidence is that all the regional towns in which the retailers for whom the NRA appears have independent shops there or nearby. The populations vary between towns. There was, however, no evidence of changed patterns of work, tourism and leisure that warrant change to trading hours in these areas.

[29] The MGA submits that the NRA should have produced evidence for the locality and not simply suggest the benefits that deregulated (or at least extended) trading hours would bring. There was, however, evidence from MGA members in relation to local business conditions. In the MGA's submission, the application should not succeed by reference to this criterion.

[30] In its submission, the SDA also referred to the difficulty in dealing with this criterion and, in essence, adopted the submissions of the MGA. It noted the differences between locations within the region, contrasting such things as the nature of the tourist industry in Mission Beach and Mount Isa. The SDA also referred to decisions of the Commission as differently constituted in relation to applications to allow Sunday trading in Warwick<sup>8</sup> and Mount Isa,<sup>9</sup> and to an application being considered currently by the Commission in relation to Goondiwindi.<sup>10</sup>

[31] **Consideration:** The evidence, such as it is, suggests that there are differences between the 20 towns identified as affected by this application. Perhaps the only common features are that each is located in a part of regional Queensland, each has six day trading and most of them are located some distance from cities or regional centres with seven-day trading. This criterion is not significant to the decision in relation to the present application.

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<sup>7</sup> [2008] 189 QGIG 569.

<sup>8</sup> *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employees) and Others (TH/2010/3) - decision* <<http://www.qirc.qld.gov.au>>.

<sup>9</sup> *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Another (TH/2009/5) - decision* <<http://www.qirc.qld.gov.au>>; *Re: National Retail Association Limited, Union of Employers* [2015] QIRC 044.

<sup>10</sup> *Application by the National Retail Association Limited, Union of Employers to amend the Trading Hours Order in relation to Goondiwindi (TH/2015/1)*.

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

- [32] **Evidence:** The MGA highlighted the references to "needs" in s 26(b) (and s 26 (c)), emphasising that this criterion refers to what is essential or important, rather than what is desirable for the tourist industry (or other industry). It was apparent from the evidence adduced (which largely comprised the observations or assumptions of retailers) that the focus was on the perceived needs, desires or behaviour of tourists rather than the needs of the tourist industry. No evidence was given in relation to any other industry.
- [33] Witnesses called by the NRA suggested that the majority of intrastate and interstate tourists are from jurisdictions that enjoy longer trade on all days of the week and hence:
- (a) have a high level of expectation in relation to the quality of services and facilities available to them during their stay; and
  - (b) may become confused and frustrated with the trading hours available and the closure of shopping centres because their anchor retailer cannot trade, with the potential to disrupt their holiday experience.<sup>11</sup>
- [34] Mr McLean went so far as to suggest that the closure of shops on 27 and 28 December 2015 would also represent "a significant blow to the tourism industry, particularly in Regional Queensland" and would "tarnish Queensland's reputation and image as a tourist destination." He contended that tourists (including Queenslanders and domestic and international tourists) should have the opportunity to shop during this period.<sup>12</sup> In more restrained terms, Mr Nardi contended that "artificial and unnecessary barriers should not be imposed on their need to access, by way of example, essential consumables from supermarkets."<sup>13</sup>
- [35] Witnesses called by the MGA offered observations and opinions to the following effect:<sup>14</sup>
- (a) tourists who are likely to visit Queensland over the Christmas period do not come to Queensland as a shopping destination but for leisure, dining and other activities;
  - (b) tourists are not likely to be shopping in supermarkets and department stores on the Sunday or Monday following Christmas;

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<sup>11</sup> Exhibit 5, [18]; Exhibit 6, [17] - [19]; Exhibit 7, [21]; Exhibit 8, [13] - [14]; Exhibit 9, [18]; Exhibit 10, [16] - [17].

<sup>12</sup> Exhibit 7, [20].

<sup>13</sup> Exhibit 8, [14].

<sup>14</sup> Exhibit 11, [12]; Exhibit 12, page 5; Exhibit 15, [10], [21]; Exhibit 18, [13].

- (c) in any event, tourists are well serviced by the stores that are open at the times they may seek to shop, and tourists will visit whatever store provides what they want or need at a reasonable price;
- (d) even if some tourists want to stock up their caravans before moving on to the next place, they can do so at one of the independent stores;
- (e) the assertion that tourists are confused and frustrated by local trading hours is without substance.

[36] Some of the regional centres are not tourist destinations at this time of the year. For example, Mr Dempsey gave evidence that the Bowen area does not attract a great number of tourists because it is too hot and sometimes there are cyclones.<sup>15</sup> Mr Constanzo pointed out that, although some family members visit relatives in this period, "a lot of these towns empty out to a degree" and most tourists would be at the coast.<sup>16</sup>

[37] **Submissions:** The NRA notes that there is limited evidence about this criterion, and refers to caravanners and others who often require groceries and other items at this time of the year.

[38] The MGA refers to the evidence in relation to this criterion as speculative, describing it as an "evidentiary vacuum." More particularly, the MGA submits that there is no need for non-exempt stores to trade for the benefit of the tourist industry. Tourists can obtain what they need during the Christmas period from other stores, and they do not "need" non-exempt stores to trade at that time.

[39] **Consideration:** The evidence suggests that there are relatively few tourists in the region covered by this application over the Christmas period and that at least some of those are people visiting their families in regional centres. Others include "grey nomads" travelling through the region. Although it is reasonable to expect, or at least infer, that tourists would gain some benefit from an expanded range of retail options on 27 and 28 December 2015, there is nothing in the evidence to suggest that their needs, particularly in relation to groceries and other basic items, cannot and would not be met by the exempt independent stores. As some witnesses suggested, tourists are able to find stores that provide for their needs and do not depend on the major supermarkets to do so. Accordingly, I am not satisfied that the application must be granted in order to meet the needs of the tourist industry or any other industry in regional Queensland.

### **The needs of an expanding tourist industry**

[40] **Evidence:** The evidence in relation to this criterion is the same as for the previous criterion.

[41] **Submissions:** No additional submissions were made in relation to this criterion.

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<sup>15</sup> Exhibit 17, [13].

<sup>16</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 72.

- [42] **Consideration:** In the absence of any evidence of an expanding tourist industry in regional Queensland, particularly around Christmas time, I am not satisfied that the application must be granted in order to meet the needs of an expanding tourist industry.

### **The needs of an expanding population**

- [43] **Evidence:** No evidence was called in relation to this criterion.
- [44] **Submissions:** No party submitted that this criterion was relevant to a determination in relation to the application.
- [45] **Consideration:** There is no evidence or suggestion that the needs of an expanding population would have any impact on whether non-exempt stores should be permitted to trade on 27 and 28 December 2015. Accordingly, there is no need to give any weight to that criterion in relation to a decision about the current application.

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

- [46] 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.
- [47] **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*,<sup>17</sup> Mason CJ, Brennan, Dawson and Gaudron JJ wrote that:

"... 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.'"

- [48] 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"<sup>18</sup> and "any competing interests."<sup>19</sup>
- [49] 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.

<sup>17</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210.

<sup>18</sup> *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2000) 165 QGIG 174, 177.

<sup>19</sup> *Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others* (2000) 165 QGIG 128, 130.

[50] The evidence relevant to this criterion put in support of the application was, in summary, that:

- (a) major retailers such as Coles make a significant "community investment" directly and indirectly through financial and product donations, customer and office fund raising, in-kind support, team member volunteering and workplace giving,<sup>20</sup> and hence it is in the public interest for them to trade longer hours so that they can contribute more;
- (b) the additional training hours would provide employment, and hence additional income, for people who want it in communities that are facing financial difficulties.

[51] Some similar evidence was given by witnesses called by the MGA to the effect that:

- (a) independent stores make donations and other contributions to their local communities, and their capacity to do so would decrease significantly if non-exempt stores were allowed to trade on Sundays;<sup>21</sup>
- (b) all of the profits of at least some of those stores remain in the local community and surrounding districts allowing their towns to benefit and prosper, particularly when (as at present) towns are struggling economically including as a result of a slowdown in mining activity;<sup>22</sup>
- (c) those stores provide employment opportunities for a range of people within their communities, and their capacity to provide such employment might be eroded if the non-exempt stores expanded trading hours to the detriment of the level of business (and hence profitability) of independent stores.

[52] The only other significant suggestion in relation to the public interest was advanced by Robert Katter MP. He contended, as a part of a general submission against Sunday trading, that Sundays should be kept free to allow Mt Isa residents to enjoy social events including sports. Indeed he went so far as to contend that to allow Sunday trading at any time for the major retail stores would threaten a way of life which permanent residents enjoy (as well as threatening the existence of smaller suburban convenience stores, pharmacies, butchers, newsagents and florists in Mt Isa).<sup>23</sup>

[53] **Consumers' interest:** A key issue is whether there is evidence that the making of the order sought would be in the interests of consumers and whether there is consumer support for trading on 27 and 28 December 2015.

[54] Some witnesses who support the application made wide-ranging statements to the effect that:

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<sup>20</sup> Exhibit 6, [5]-[7].

<sup>21</sup> Exhibit 12, page 3; Exhibit 15, [8]; Exhibit 19, [13]; Exhibit 20, [4].

<sup>22</sup> Exhibit 12, page 3; Exhibit 19, [11]-[12].

<sup>23</sup> Exhibit 20, [4], [5].

- (a) there have been significant changes in customer habits over recent times, including the desire to shop at times that suit changing work patterns (reflected in an increasing preference for mobile and other technology which allows customers to shop around the clock);<sup>24</sup>
- (b) trading hours restrictions are increasingly out of touch with changing patterns of work, tourism, leisure and shopping, as shown by the widespread take-up of extended shopping hours in other jurisdictions throughout Queensland and interstate;<sup>25</sup>
- (c) restrictions on trading hours impinge on customer choice regarding when (and where) to shop, causing inconvenience and congestion costs;<sup>26</sup>
- (d) the highest proportion of main grocery buyers are aged between 35 and 44, when most people are likely to have their highest level of attachment to the labour market and a significant level of commitment to parenting and domestic responsibilities over the Christmas period, and they would benefit from an extension of trading hours to enable them to access supermarkets and grocery stores at a time that is convenient to them;<sup>27</sup> and
- (e) non-exempt stores should be able to service their customers, as well as visitors and tourists to the area, in the same way that they do in nearly every regional area and Australia, by providing a good range of quality products at national prices over seven days of the week utilising extended trading hours.<sup>28</sup>

Such statements, although not irrelevant, are more appropriate in the context of applications for general variations to restrictions on trading hours rather than to the narrow objective of this application.

[55] More specifically, it was suggested in behalf of the larger retailers that:

- (a) there is significant customer demand in regional stores on the days following Christmas Day and Boxing Day, including customers who want fresh items and to "top up" on grocery items that they had not anticipated and require replenishment;<sup>29</sup>
- (b) a four-day closure will lead to customers purchasing essential items that they would otherwise normally get from supermarkets from convenience stores which are more expensive on everyday goods, resulting in additional household budget pressures;<sup>30</sup> or
- (c) the closure of a shopping centre or supermarket might also lead people to drive to a neighbouring region to purchase items, with consequent costs of

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<sup>24</sup> Exhibit 5, [14].

<sup>25</sup> Exhibit 5, [7]; Exhibit 6, [10].

<sup>26</sup> Exhibit 7, [12].

<sup>27</sup> Exhibit 6, [14].

<sup>28</sup> Exhibit 5, [11], Exhibit 10, [12].

<sup>29</sup> Exhibit 6, [20].

<sup>30</sup> Exhibit 6, [12].

time and money to facilitate expenditure that could (and would otherwise) have been done locally.<sup>31</sup>

[56] The following table provides evidence about the number of customer transactions in regional stores used by Coles' customers on Friday 27 December 2013 and Saturday 27 December 2014. This evidence was provided to suggest that customers are looking for fresh food items and top up on grocery items that they might not have anticipated require replenishment.<sup>32</sup> What is not apparent is the nature and extent of those transactions.

<b>Store</b>	<b>27/12/13</b>	<b>27/12/14</b>
Warwick	1322	1164
Goondiwindi	1676	1475
Ayr	2028	1679
Ingham	1463	1203
Mount Isa	2709	2467

[57] The following table shows the numbers of customers served at the Big W stores in Kingaroy and Warwick on Thursday 27 and Saturday 29 December 2012.

<b>Store</b>	<b>Date</b>	<b>Customers</b>
Kingaroy	27 and 29/12	3,274
Warwick	27 and 29/12	4,336

[58] Dr Gary Mortimer, a Senior Lecturer employed at the Business School of the Queensland University of Technology, gave expert opinion evidence at the request of the NRA. Dr Mortimer's qualifications include relevant university degrees, and his research record and publications about shopping behaviour and retail operations. Dr Mortimer also has relevant experience working for specialty retail businesses, discount department stores, department stores and supermarkets. His evidence did not go unchallenged. Mr Mason contended that his opinion is based on a skewed view as he does not understand the contribution to retailing of independent supermarkets. Mr Mason expressed that view on the basis that Dr Mortimer has worked for large retailers (and is currently funded as a researcher by Woolworths) but appears to have little or no experience in independent retailing and small business.<sup>33</sup> Despite that critique, I am content to record Dr Mortimer's opinions and give them appropriate weight in light of the evidence adduced in these proceedings.

[59] Dr Mortimer advised that the closure of major non-exempt retailers on four consecutive days between 25 and 28 December 2015 would pose "a significant inconvenience and financial hardship for shoppers living in affected communities." The basis for that advice is, in summary, that:

- (a) shoppers would experience financial hardship because they would be required to stockpile food before the period of closure (as evidenced by the increase in average spending on food and groceries in the lead up to

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<sup>31</sup> Exhibit 6, [12].

<sup>32</sup> Exhibit 6, [20].

<sup>33</sup> Exhibit 15, [17].

the normal two-day closure period from \$279 per household to \$564 per household in 2012);

- (b) extra volumes of highly perishable fresh foods purchased before the closure will deteriorate over four days, adding to the costs of living;
- (c) although convenience stores and service stations will be able to trade over this period, they offer a small range of food and groceries and such products are mostly offered at higher prices in comparison to larger supermarkets so that shoppers will be faced with higher prices if they engage in "top up" shopping at those venues;
- (d) the mix of products purchased in supermarkets and grocery stores in the lead up to Christmas shifts from dry (shelf tolerant) groceries to fresh, highly perishable food (such as hams, meats, seafood, stone fruit, custards and bakery), and convenience stores and service stations do not provide a large range of such products, hence consumer choice is restricted;
- (e) shoppers living in regional areas depend more highly on shopping centres for access to groceries, clothing and apparel and other retail services;
- (f) shoppers ordinarily return to stores and shopping centres directly after Christmas closure to take advantage of post-Christmas discounts on sales and to purchase required products (such as batteries for electronic toys), return unwanted gifts, exchange or repair faulty products, replenish food stocks and redeem gift cards;
- (g) as discount department stores, supermarkets and shopping centres will be closed from 25 to 28 December 2015 (unless the proposed order is made), shoppers will be forced to wait until Tuesday 29 December to return faulty products or exchange items that do not fit (such as footwear, clothing or swimwear), which creates inconvenience for residents in these communities.<sup>34</sup>

[60] In reply to Dr Mortimer's opinion or advice, Mr Mason (who holds a Masters of Business Administration and has worked in the retail industry for almost 25 years) stated that:

- (a) shoppers would not experience financial hardship because they would only spend the same amount of disposable income to have reserves for the extra day (in other words, they will not consume more than if the stores were open), and the statistics cited by Dr Mortimer do not support an argument that consumption will increase and they ignore the shopping facility provided by independent supermarkets;
- (b) waste need not be created because shoppers will be able to buy what they need from independent supermarkets;

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<sup>34</sup> Exhibit 4, [13]-[20], [22].

- (c) independent supermarkets (such as IGA and FoodWorks stores) are not in the same category as convenience stores and service stations, and they will be able to provide services and products that consumers need over the Christmas period, as they do at other times of the year; and
- (d) shoppers will wait an extra day to return faulty or unwanted gifts and will have more leisure time if the major stores are closed (given that not everyone sees shopping or exchanging/returning gifts as leisure/relaxing - it is a chore).<sup>35</sup>

[61] Witnesses called by the MGA provided evidence consistent with those statements. Before considering that evidence I note that, as I understand it, there was no issue that:

- (a) stores such as Coles and Woolworths have a greater number of products within the categories of goods that they sell;<sup>36</sup>
- (b) private brand products of Coles and Woolworths are sold at a lower price than other brands of the same products which are also stocked by independent stores;<sup>37</sup>
- (c) independent stores do not have the same range of non-food products as are carried by some non-exempt stores; and
- (d) there are convenience stores within regional centres (e.g. Mt Isa) that have a limited range of stock (including basic or essential items) and whose prices for those items are generally higher than the prices of comparable items in stores such as Coles and Woolworths.

[62] Witnesses called by the MGA took issue with the contrast drawn in some of the evidence for the NRA between the non-exempt stores and "convenience" stores. Detailed evidence was provided about the size and storage capacity of the independent stores and the range of categories of goods which they stock to demonstrate that those stores cannot and should not be categorised as "convenience" stores. For example, there was evidence that:

- (a) IGA, FoodWorks and SPAR stores range in size from 100 m<sup>2</sup> to 1,800 m<sup>2</sup> and vary in size from convenience stores to full supermarkets with fresh food departments;<sup>38</sup>
- (b) FoodWorks supermarkets may be smaller than most Coles stores but they are not convenience stores and they carry a wide range of items (including fresh food, delicatessen, meat and bakery products) to cater for the needs of shoppers in the communities in which they are situated;<sup>39</sup>

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<sup>35</sup> Exhibit 15, [18].

<sup>36</sup> See Exhibit 7, [13].

<sup>37</sup> See Exhibit 6, [13]; Exhibit 17, [10].

<sup>38</sup> Exhibit 15, [8].

<sup>39</sup> Exhibit 15, [11], [19]-[20].

- (c) the IGA store in Proserpine is comparable in size (1,800 m<sup>2</sup>) to Coles and Woolworths stores, has a full range of supermarket products, and is competitively priced;<sup>40</sup>
- (d) the IGA store in Pittsworth has fresh food departments including meat, delicatessen, produce, bakery and seafood;<sup>41</sup>
- (e) the Goondiwindi Co-op is a full size supermarket (2,000 m<sup>2</sup>), has a larger operation size than Coles, and sells groceries, fruit and vegetables, delicatessen products, fresh meat and fish as well as household items;<sup>42</sup>
- (f) the IGA stores at Bowen (2,000 m<sup>2</sup>) and Homehill near Ayr (1,100 m<sup>2</sup>) carry a full range of goods and services including fresh produce, bakery, meat and delicatessen items;<sup>43</sup>
- (g) SPAR stores in Queensland range in size from approximately 150 m<sup>2</sup> to 1,200 m<sup>2</sup> and offer a full range of supermarket products, purchased in volume from a warehouse.<sup>44</sup>

[63] There was also extensive evidence (which was not challenged in cross-examination or by contrary evidence) to the effect that the independent stores attempt to match or better the prices of the same or comparable products sold by Coles and Woolworths.<sup>45</sup>

[64] In his oral evidence, Dr Mortimer said that a FoodWorks or Supa IGA store would not be a "convenience" store, and that an independent store could service community sufficiently over a four day period, at least for "top up" shopping.<sup>46</sup> Mr Nardi also agreed that if shopping centres were not open, customers could buy essentials elsewhere.<sup>47</sup> There was, however, a suggestion that in Warwick the competitor to Woolworths would find it difficult to meet local grocery needs if there are "significant spikes in business."<sup>48</sup>

[65] The NRA stressed that the closure would be for four consecutive days, and highlighted the different capacities of retailers to handle perishable foods over that period. Portable coolers and the cooler rooms of convenience stores and independent stores could not replicate the storage facilities of Coles and Woolworths. In its submissions, people would need to top up on perishable products over that period and

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<sup>40</sup> Exhibit 18, [7], [8].

<sup>41</sup> Exhibit 16, [5].

<sup>42</sup> Exhibit 12, pages 2-3.

<sup>43</sup> Exhibit 17, [1], [5], [7]-[10].

<sup>44</sup> Exhibit 11, [6].

<sup>45</sup> See Exhibit 11, [6] - [8], Attachment A; Exhibit 12, page 5; Exhibit 15, [12] - [14], Attachment A; Exhibit 16, [10]; Exhibit 17, [7]; Exhibit 18, [7] - [10], Attachment A.

<sup>46</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 7, 9.

<sup>47</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 49.

<sup>48</sup> See evidence of B. McLean at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 33.

that at least one centre, Warwick, could not be serviced by smaller stores. The NRA also stressed that most shoppers do grocery shopping three or four times a week, tourists require groceries and will not be able to locate stores in the suburbs and, if Coles and Woolworths are not open, the money that would otherwise be spent in those stores will be spent in other towns, to the detriment of the local communities.

- [66] The MGA submits that, to the extent that local residents or tourists require food and beverages and a range of other products during the Christmas period (other than on Christmas day), the independent stores can provide those products at prices comparable to or better than the non-exempt stores. In other words, consumers will not be disadvantaged if the non-exempt stores are unable to trade on 27 and 28 December 2015.<sup>49</sup>
- [67] ***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.
- [68] As the evidence concerning consumer interests suggests, the retailers for whom the NRA appears expect that business on 27 and 28 December 2015 would be profitable in relation to food products and a range of other goods, particularly in the post-Christmas sales.
- [69] The evidence in support of the proposed order also focused on the business benefits to other stores that are located in shopping centres or near the places where non-exempt stores trade. In particular, some witnesses called by the NRA stated that food businesses (such as cafes and restaurants) rely on retail businesses to give life and vibrancy to a precinct and at least some of their customers are people who visit the shopping centre or shopping precinct for the purpose of purchasing items at a non-exempt store. Consequently, such smaller businesses would (or at least could) benefit from extended trading hours, particularly if a shopping centre can only open if the anchor tenant is trading. Conversely, restricting the hours that large anchor retail businesses can operate negatively affect such other businesses.<sup>50</sup>
- [70] I accept the import of that evidence, but note that it came entirely from the major retailers. Its effect would have been strengthened had it been supplemented by evidence from some of the smaller businesses who, it was suggested, would benefit from being able to trade on 27 and 28 December 2015. There is no evidence before the Commission to indicate whether such businesses would welcome and take up the opportunity to trade on either or both of those days if the application is successful. At best, Mr Nardi gave evidence that an analysis of other jurisdictions shows a participation rate of about 60 to 70 percent.<sup>51</sup>

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<sup>49</sup> See Exhibit 15, [15].

<sup>50</sup> Exhibit 5, [9] - [10]; Exhibit 6, [11]; Exhibit 7, [15]; Exhibit 8, [10] - [12]; Exhibit 10, [14] - [15]; evidence of B McLean at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 33-34.

<sup>51</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 46; see also evidence of G Winzenberg at Transcript of Proceedings, *Re: National Retail Association Limited, Union*

[71] The evidence in support of the proposed order also focused on two key aspects of business of non-exempt stores that, it was said, would be affected adversely if the application is unsuccessful, namely:

- (a) the availability of fresh food supplies, and the potential waste of produce that could not be stored over the four day closure period; and
- (b) the delay in holding Boxing Day sales.

[72] *Stocks of food*: Oral evidence and written witness statements by employees of Woolworths<sup>52</sup> and Coles<sup>53</sup> emphasised the risk that their companies will suffer stock losses if they cannot trade for four days. In summary, the evidence was that:

- (a) shoppers increasingly use fresh food for meals;
- (b) each year Woolworths experiences the same problem from closure for any extended duration, with 40 to 45 per cent of items being purchased from fresh food departments;
- (c) to deal with the extra demand, stock levels need to be increased substantially (e.g. Woolworths has approximately two and a half times the usual monthly stock levels at the beginning of December) and stock has to be replenished daily;
- (d) retailers would bear an additional cost if they have to remove and reduce the price of all perishable items (including meat, delicatessen, fresh produce and bakery products) on 24 December;
- (e) better efficiencies of energy usage would result from an extension of trade as refrigeration and air conditioning systems must continue when the stores are closed;
- (f) replenishing the stores after a four-day break would pose challenges for employees and suppliers (e.g. given the limited shelf-life of goods such as poultry), particularly as the stores covered by this application are in remote locations and it can take days not hours for stock to arrive from central distribution centres, and customers on 29 December would face significant delays early in the day until the areas of fresh produce could be replenished;
- (g) smoothing out peaks in scheduled deliveries and store replenishment processes would result from a more even spread of trade across the week, providing a more efficient work environment for staff and a better shopping environment for customers;

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*of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 51-52.

<sup>52</sup> Exhibit 7, [9], [10], [16]-[19], [23].

<sup>53</sup> Exhibit 6, [15], [16].

- (h) the days following a four day closure would be marred by congestion and difficulty in ensuring a timely replenishment of stock on supermarket shelves.

- [73] Dr Mortimer gave evidence about consumers stockpiling food before Christmas, and said that although people could do so for four days, that period can be "a little bit excessive" for certain perishable products, both for consumers (with limited fridge capacity at home) and some stores.<sup>54</sup>
- [74] Experienced retailers called by the MGA<sup>55</sup> sought to refute or at least minimise the significance of the evidence given in relation to Coles and Woolworths. They acknowledged that customers stock up on food before Christmas. In particular, they contended that forward purchasing of appropriate amounts of perishable stock is something which retailers large and small have to do. The large stores have automated ordering systems and can receive daily deliveries. Some perishable items can be stored in freezers for extended periods. Although some loss or wastage might be expected, an experienced manager should be able to predict with some precision the types and amounts of stock necessary and hence minimise the risk of wastage in relation to stock that cannot be stored and resold after the closure period.
- [75] They also gave oral evidence about the number, size and uses of cooler rooms and freezers operated by independent stores (including in the case of some SPAR stores, portable cold rooms and freezer rooms to hold extra product). That evidence demonstrates the extent of their capacity to store perishable food items.
- [76] *Boxing Day sales*: Mr McLean from Woolworths stated that Boxing Day sales trading is not limited to acquiring supplies such as food products. His evidence was that, for a large part, it is about annual post-Christmas sales where families seek to purchase discounted goods, including clothing, footwear, cosmetics, off-white goods and furniture. He also stated that, although the well-known rush for bargains in department stores is the most visible evidence of this, specialty retailers also take the opportunity to clear stock and hold sales after Christmas, leveraging off the consumer's mindset for shopping for bargains.<sup>56</sup>
- [77] According to Mr Schafer, the Boxing Day sales are one of the biggest sales events of the year for Big W, and continue for 14 days. His written evidence was that:

"Massive crowds attend our Boxing Day sales and a fun and festive atmosphere prevails. Customers enjoy the excitement generated by the event and the prospect of securing a great bargain. Customers continue to show their eagerness for the event throughout the day and remain very enthusiastic about a bargain and trying to get one. Boxing Day sales trade on these days proves to be very popular and part of an annual event. It is a rare opportunity for families to shop together, and the Boxing Day sales provide such a platform."<sup>57</sup>

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<sup>54</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 9-10, see also evidence of B McLean at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 34.

<sup>55</sup> See Exhibit 15, [16]; Exhibit 16, [12] - [14]; Exhibit 17, [6], [12]; Exhibit 18, [11].

<sup>56</sup> Exhibit 7, [14].

<sup>57</sup> Exhibit 10, [6].

Mr Wilson and Mr Winzenberg made written statements which were in almost identical terms.<sup>58</sup> They added that the growth in Boxing Day sales has outpaced the growth in consumer volumes demonstrating the increasing importance of Boxing Day to Kmart and Target.

[78] The striking similarity of that written evidence (much of it identically worded) in relation to this key issue detracts from its overall effect. However, the import of that evidence is that Boxing Day sales attract customers and are popular and profitable events in the retail stores' calendar. Mr Winzenberg supplemented that with oral evidence that historically, "Boxing Day when we're open is our second biggest trading day of the year" (being surpassed only by midnight trade before Christmas).<sup>59</sup> However, the application is not for trading to be permitted on Boxing Day (i.e. 26 December 2015).

[79] To support a decision that stores in regional Queensland should be able to trade on 27 and 28 December 2015, it is necessary to consider any more specific evidence about post-Christmas sales activity at those stores in recent years, or about proposed promotions for Boxing Day sales there in 2015.

[80] Mr Wilson, Mr Schafer and Mr Winzenberg gave evidence that:<sup>60</sup>

- (a) the total number of gift vouchers redeemed on and after Boxing Day sales represents several times more than the number normally redeemed on a normal November day, and four times more than the number redeemed immediately before Christmas;
- (b) the total returns from customers is approximately double the amount returns normally accepted on a Friday in November;
- (c) the categories of products that perform above average in the post-Christmas period comprise family apparel and footwear, nursery, art and craft, home wares, stationery and office, toys and sporting, health and beauty, books, and home entertainment (electronic, electrical, audio, visual, music, DVDs, games, and CDs).

[81] In a similar vein, Mr Wilson stated that many of the goods that Kmart sells at Christmas time are gift cards. Many customers are "eager to get into the store and redeem their gift cards for wanted items and items that supplement the presents they received over Christmas." The items which are being collected tend to be large and bulky and there can be high levels of congestion in the store.<sup>61</sup>

[82] Mr Wilson also gave evidence that the Christmas and post-Christmas trading period is "extremely important" to Kmart because a "high proportion" of the company's annual sales is achieved during December and early January. The number of transactions processed each day grows significantly in December and, from the start of that month,

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<sup>58</sup> Exhibit 5, [13]; Exhibit 9, [12].

<sup>59</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 52.

<sup>60</sup> Exhibit 5, [16]; Exhibit 9, [11], [16]; Exhibit 10, [7]-[9].

<sup>61</sup> Exhibit 5, [12].

transactions increased by approximately 20 per cent compared with a normal trading day in the non-Christmas period. This increases steadily until the post-Christmas sales, when transaction levels "peak exponentially." There is a strong focus on marketing throughout December, with new brochures being issued each week.<sup>62</sup>

- [83] According to Mr Winzenberg, the trading month of December provides over 50 per cent of Target's profit for the year.<sup>63</sup> Mr Schafer gave evidence that the Christmas period is the busiest trading time of the year for Big W stores. In most stores, there are "large spikes" in consumer numbers at the start of December.<sup>64</sup> Boxing Day sales provide an important commercial benefit for the business, enabling Big W to clear seasonal merchandise and sell through remaining Christmas stock that would otherwise suffer significant loss of profit.
- [84] Mr Wilson confirmed that Kmart will still have post-Christmas sales whenever the store can open, as those sales are very important to their business.<sup>65</sup> Mr Schafer gave evidence that the closer sales are to Christmas Day, the easier and smoother it is for customers, including those who want to spend gift cards received for Christmas. If stores are closed, then part of the lost trade will not be recovered on subsequent days.<sup>66</sup> According to Mr Winzenberg, a Boxing Day sale on Tuesday, 29 December 2015 would be "very diluted" and "almost a non-event."<sup>67</sup>
- [85] Dr Mortimer described anything that delays customers being able to exchange faulty or ill-fitting products, or getting refunds for other products as an "inconvenience."<sup>68</sup> Mr Wilson described those circumstances as a delay in accessing services which the community relies on stores such as Kmart to provide.<sup>69</sup>
- [86] Evidence was also given for some non-exempt stores that, although they would gain trade if their stores are open on 27 and 28 December 2015, they might lose some trade to local specialty stores or to stores in other regional centres (such as Toowoomba) if they were prevented from opening.<sup>70</sup>
- [87] For completeness, I note that Mr Nardi for the Shopping Centre Council of Australia ("SCCA"), which supports the application, stated that:

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<sup>62</sup> Exhibit 5. [15], [17].

<sup>63</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 55.

<sup>64</sup> Exhibit 10, [13].

<sup>65</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 17-18.

<sup>66</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 62, 65-66.

<sup>67</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 58.

<sup>68</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 10.

<sup>69</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 16.

<sup>70</sup> See evidence of B. Schafer at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 60, 62, and evidence of B. McLean at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 41.

- (a) the SCCA believes that non-exempt shops in these areas of regional Queensland should not be prevented from trading on 27 and 28 December 2015, and that all shops should be able to exercise their choice to take the business risk to open and trade in order to respond to customer demand when people have the time and inclination to shop due to their personal circumstances;
- (b) it is possible that local consumers in, and visitors to, these areas may have the time and inclination to shop on these days, and may require essential consumables following the Christmas period;
- (c) if the application is successful and a shopping centre opens on either 27 or 28 December as a result of an anchor tenant being able to trade, there would be no obligation on any specialty retailers in a shopping centre to trade the additional hours; and
- (d) if a shopping centre chooses to open, each exempt or independent retailer would make the decision whether to trade or not based on what is best for their business and on customer demand.<sup>71</sup>

[88] Written statements provided by witnesses called by the MGA included statements to the following effect:

- (a) to remain sustainable and competitive, independent stores need to trade as many hours as possible and take advantage of times when Woolworths and Coles are closed;<sup>72</sup>
- (b) the expansion of trading hours for non-exempt stores has had a detrimental effect on small businesses and family-run stores;<sup>73</sup>
- (c) it is important to consider the survival of small businesses, which depend on the community supporting them;<sup>74</sup>
- (d) the cost of more trading hours is fewer local jobs and a decline in the economies of rural and regional communities (because, by comparison with the revenue of non-exempt stores, much of the revenue of local businesses recirculates in the local economy, and because some local produce is brought by the independent stores);<sup>75</sup>
- (e) the non-exempt stores are aware of the current legislative restrictions on trading hours, and those restrictions should remain unless those stores provide a compelling reason to the Commission about why the law should be changed;<sup>76</sup>

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<sup>71</sup> Exhibit 8, [6]-[9], [15].

<sup>72</sup> Exhibit 12, page 6; Exhibit 16, [6], [9]; Exhibit 19, [9], [17].

<sup>73</sup> Exhibit 15, [6].

<sup>74</sup> Exhibit 13, [22].

<sup>75</sup> Exhibit 15, [22]; Exhibit 12 pages 4-6; Exhibit 17, [8]-[9].

<sup>76</sup> Exhibit 18, [6].

- (f) any change to current trading hours would undermine the purpose of regulation;<sup>77</sup>
- (g) this application is the beginning of the move toward Sunday trading for non-exempt stores, which would be detrimental to small businesses.<sup>78</sup>

[89] As with some other contentions made on behalf of the NRA (summarised earlier in these reasons), those contentions are not irrelevant to this application. However, they would be made more appropriately in the context of an application for a general variation to restrictions on trading hours rather than to the narrow objective of this application.

[90] The MGA criticised the focus of the application and supporting evidence on the interests of large business, and submitted that there was insufficient evidence that the proposed order would result in any benefits to small, medium or large businesses. Nor is there a demonstrated public interest in all stores being open in the days immediately following Christmas Day. The MGA did not dispute that Coles, Woolworths, Kmart, Target and Big W expect to experience increased sales and profits during the Christmas season. It submitted, in relation to those large businesses, that expenditure will occur when the stores reopen after the Christmas season break. The possible inconvenience to some customers is not a valid reason to change the law.

[91] The MGA stressed that small businesses and their suppliers rely on trade at the time of the year. Any reduction in trade as a consequence of the proposed order would be detrimental to them. There is a community benefit to trading restrictions because they assist local independent businesses and hence the broader community. The Commission should not consider that the fact that the circumstances that gave rise to this application occur only once every five years supports the making of the proposed order. Furthermore, if this application is successful it will lead to future applications for extended trading hours.

[92] **Consideration:** Matters considered earlier in relation to the public interest can be invoked in support of and in opposition to non-exempt stores trading on 27 and 28 December 2015. In the absence of a clear overarching public interest in a specific outcome, this application can be dealt with under s 26(e) of the Act by reference to consumer and business interests.

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<sup>77</sup> Exhibit 15, [11].

<sup>78</sup> Exhibit 17, [14], Exhibit 19, [5], [9], [13].

- [93] Having regard to the evidence summarised above, I am satisfied that the requirements of consumers (be they local residents, visitors or tourists) for food and other necessities can be met over the Christmas period without the need for non-exempt stores to trade. It is clear that most people stock up on additional food and other items in preparation for Christmas, and that the independent stores have a sufficient range and number of items, with capacity to store perishable items, to meet consumers' needs in the days immediately following Christmas day. Given that non-exempt stores do not trade on Sundays throughout the year, the communities are used to not having the convenience of shopping for groceries and other basic items at major supermarkets. Although there would be some business advantage for larger grocery stores to be able to trade on 27 and 28 December 2015, it is not necessary for them to do so to meet consumer needs. Furthermore, although it is arguable that other stores might take the opportunity to trade if shopping centres with large anchor tenants were open on either or both of those days, there was no evidence to demonstrate any desire by such stores to do so.
- [94] There is more evidence to support the interests of consumers and businesses coinciding in the provision of post-Christmas sales in stores such as Big W, Target and Kmart. As noted earlier, the application does not extend to 26 December 2015, hence there will not be Boxing Day sales. I accept, however, that the department stores rely on revenue from post-Christmas sales and that the degree of consumer interest in post-Christmas shopping declines to some degree in the days after Christmas. Such stores in regional Queensland do not trade on Sundays, and Sunday trading is still a contentious issue (considered later in these reasons). However, there is a case for stores to be open on Monday, 28 December 2015, particularly as there is another public holiday on the following Friday, 1 January 2016.

### **The alleviation of traffic congestion**

- [95] **Evidence:** The few references to "congestion" were in relation to queues at the checkout counters at some stores (such as Kmart) at peak purchasing times, particularly when large items (such as trampolines) were to be purchased. It was also suggested that restrictions on trading hours cause consumers inconveniences and congestion costs.<sup>79</sup>
- [96] There was some evidence there is a high demand for car parking in the post-Christmas period.<sup>80</sup> But there was also evidence that traffic congestion is not a problem within Goondiwindi during the week or on weekends, even when a store is overcrowded,<sup>81</sup> and that there is no congestion of traffic in or around Bowen.<sup>82</sup>
- [97] **Submissions:** The NRA submits that, in the circumstances of this application, the criterion is not relevant. The MGA submitted that there is not likely to be any traffic congestion.

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<sup>79</sup> Exhibit 7, [12]; evidence of J. Wilson at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 16-17.

<sup>80</sup> Exhibit 9, [20]; evidence of B. McLean at Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 34.

<sup>81</sup> Exhibit 12, page 7, attachment SL6.

<sup>82</sup> Exhibit 17, [15].

[98] **Consideration:** In my view, s 26(f) refers to the alleviation of motor vehicle traffic congestion. There is no evidence or suggestion that traffic congestion will be alleviated or affected in any other way if the application succeeds. Accordingly, there is no need to give any weight to that criterion in relation to a decision about the application.

### **The likely impact of the order on employment**

[99] **Evidence:** The focus of the evidence in relation to employment was on:

- (a) additional employment (and hence income earning) opportunities for some staff on 27 and 28 December 2015;
- (b) the social impact on employees of shops trading on those days; and
- (c) the voluntary nature of that employment.

[100] *Extent of additional employment opportunities:* Evidence was given on behalf of major retailers about the possible extent of additional working hours that would be available to their employees if the application is successful. In particular:

- (a) Coles estimates that stores would provide an average of 100 hours per store across the state;<sup>83</sup>
- (b) Kmart estimates that it will engage team members for an additional 80 to 100 hours of employment per day;<sup>84</sup>
- (c) Big W estimates that it would engage team members for an additional 80 to 100 hours of employment per day;<sup>85</sup>
- (d) Woolworths estimates potentially 100 hours per store per day across the region;<sup>86</sup>
- (e) Target estimates it would engage team members for an additional 25 to 50 hours of employment per day.<sup>87</sup>

[101] The converse of that evidence is that, if the proposed order is not made, the potential for those hours of work (and the income for employees that it offers) will be denied to those employees who would volunteer to work on 27 or 28 December 2015.

[102] There was relatively little examination of what those numbers of hours represent. However, it appears from the oral evidence of Mr Wilson, Mr McClarty and Mr Schafer that the numbers of people who might be employed on 27 and 28 December

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<sup>83</sup> Exhibit 6, [22].

<sup>84</sup> Exhibit 5, [22].

<sup>85</sup> Exhibit 10, [18].

<sup>86</sup> Exhibit 7, [25].

<sup>87</sup> Exhibit 9, [21].

2015 at their stores were estimated as numbers sufficient to open and operate the stores. For example, Mr Wilson said that the estimate of additional work hours for Kmart was based on "the bare minimum" of staff who would be needed to operate the store for that day (or days), based on current like-for-like stores.<sup>88</sup> Mr McClarty said that 50 to 70 per cent of full-time or part-time employees of Coles elect not to work on a public holiday, and the hours calculated for their store(s) are the replacement hours that are needed to open and run the store for that day.<sup>89</sup> Indeed, it seems that the expected trade in at least some stores will be relatively modest. Mr Schafer gave evidence that "things are fairly quiet." The extra 80 to 100 hours for stores of that size is "actually not that much."<sup>90</sup>

[103] That evidence seems somewhat at odds with the evidence concerning the significance of post-Christmas trading for the larger stores. However, decisions about the numbers of employees are commercial ones having regard to such things as the expected volume of trade and the penalty rates being paid to staff. I note, however, that the evidence of Mr Smith to the effect that the week after Christmas is fairly quiet for his IGA store in Pittsworth.<sup>91</sup> Mr Dempsey gave evidence that his business "quietsens right off after Christmas for a good week or two" as people have already purchased food.<sup>92</sup>

[104] *Social impact on employees:* According to Mr Winzenberg, the extension of trading hours would not be to the detriment of existing team members. Indeed the experience of Target suggests that the opposite is true. Target believes that:

- (a) only employees who want to work the additional hours will do so;
- (b) typically employees who work additional hours do so because it suits them. For example:
  - i. many casual employees are young students who are attracted to working early in the mornings or later in the evenings to generate an income;
  - ii. mothers with children at home commonly complete casual hours in Target stores early in the morning or later of an evening, including weekends, and the employment provides an opportunity for them to supplement the family income without any offsetting childcare cost;
  - iii. some employees prefer to work early in the morning or later of an evening including weekends because their partners work on

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<sup>88</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 18.

<sup>89</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 31.

<sup>90</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 16 November 2015) 66.

<sup>91</sup> Exhibit 16, [7], [15].

<sup>92</sup> Transcript of Proceedings, *Re: National Retail Association Limited, Union of Employers* (Queensland Industrial Relations Commission, TH/2015/8, Industrial Commissioner Neate, 17 November 2015) 12.

weekends, and these arrangements allow time off work to coincide with partners' days off;

- iv. some employees work casually in retail as a second job and prefer to do so early in the morning or later in the evening, including weekends.<sup>93</sup>

[105] Although that evidence could be used to support applications for extended hours generally, it gives an indication that some people, or categories of employees, would benefit from and take advantage of additional trading hours on 27 and 28 December 2015.

[106] As a corollary, Dr Mortimer expressed the view that, if non-exempt stores and shopping centres are closed for four days from 25 to 28 December 2015, retail employees will be excluded from voluntarily taking advantage of penalty rates which would be paid if they worked during this time. This suggests that retail workers depending on extra income during this time will be disadvantaged by such closures.<sup>94</sup>

[107] In reply, some witnesses called by the MGA suggested that:

- (a) workers might enjoy not having to work on those days;<sup>95</sup>
- (b) the use of self-serve checkouts in major stores might mean that casual staff are not employed on 27 and 28 December 2015.<sup>96</sup>

[108] *Voluntary nature of employment:* Written and oral evidence was given on behalf of Coles,<sup>97</sup> Woolworths,<sup>98</sup> Kmart,<sup>99</sup> Big W<sup>100</sup> and Target<sup>101</sup> to the effect that, if the application is successful:

- (a) the additional hours would be voluntary for existing employees;
- (b) there would be no reprisals against an employee who chose not to work the additional hours;
- (c) additional hours that would become available under the amended Order may go to existing full-time, part-time or casual employees or may lead to employing extra staff to cover the additional hours;
- (d) the provisions of the relevant Enterprise Bargaining Agreement ("EBA") would be applied to manage any new rostering requirements;

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<sup>93</sup> Exhibit 9, [22].

<sup>94</sup> Exhibit 4, [21].

<sup>95</sup> Exhibit 15, [18]; Exhibit 18, [14].

<sup>96</sup> Exhibit 11, [11]; Exhibit 18, [12].

<sup>97</sup> Exhibit 6, [26] - [29].

<sup>98</sup> Exhibit 7, [26] - [31].

<sup>99</sup> Exhibit 5, [23] - [26].

<sup>100</sup> Exhibits 10, [19] - [23].

<sup>101</sup> Exhibit 9, [23] - t [26].

- (e) the employer would work to ensure the best rostering outcomes for all parties;
- (f) if issues arose, there is a resolution process in the EBA.

[109] Each representative of those retailers seem confident that they would have no difficulty in recruiting sufficient volunteers to work in their stores on 27 and 28 December 2015 should the order be varied as proposed. In some instances, staff had already been approached. In other instances, the retailer was awaiting the outcome of these proceedings before discussing voluntary work arrangements with employees. Although some witnesses agreed that, should they fail to attract voluntary workers for those days, their stores would remain closed, they seemed unconcerned that there would be closures for that reason.

[110] There was evidence that employees at independent stores will be paid appropriate penalty rates over the Christmas period, and there was no suggestion otherwise.

[111] **Submissions:** The NRA calculates that approximately 3,000 hours per day of additional employment for people in regional Queensland would be created under the proposed order. Such employment, particularly at the rates applicable on a Sunday or public holiday, would be of particular benefit in areas where people are struggling financially. Depending on how the work is allocated, some full-time and part-time employees would benefit from additional pay and some casual workers would be given work that they would not otherwise have. Because current employees do not work on a Sunday, they would benefit from additional work on 27 December 2015.

[112] The MGA pointed to the absence of direct evidence from employees (e.g. about how they might be affected if the additional hours are available) and about the numbers of full-time, part-time or casual employees who might be affected if this application is successful.

[113] The AWUEQ did not expressly support or oppose the application. Having regard to the written and oral evidence given by witnesses from the major retailers which confirmed that:

- (a) they undertake to ensure all work on 27 and 28 December 2015 is done on a voluntary basis;
- (b) there will be no reprisals against employees who do not wish to work on those days; and
- (c) employees who are usually rostered on Sundays on Mondays will have first choice as to whether they wish to work on 27 and 28 December 2015,

the AWUEQ is satisfied that its members will not be disadvantaged in any way. Hence it did not make any submissions in opposition to this matter.

[114] The SDU opposed the application, but submitted that (essentially for the reasons advanced by the AWUEQ) if the application was successful its members' interests would be protected. Experience suggests that such undertakings as were given in these proceedings are honoured.

[115] **Consideration:** I am satisfied that, if the proposed order is made, many if not all of the stores to whom the order would apply are likely to take the benefit of it and, as a consequence, there would be some employment opportunities for some existing full-time and part-time employees and some casual employees to work additional hours at the relevant rates. I am also satisfied that such employment would be voluntary and that no one who declined the offer of employment on 27 and/or 28 December 2015 would be prejudiced in their employment as a consequence.

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

[116] In accordance with the Directions Order of Vice President Linnane dated 28 August 2015, the applicant served a copy of the application on the Local Government Association of Queensland Ltd and 64 specified Councils (Exhibit 1). No local government applied for leave to appear and be heard.

[117] By letters dated 29 October 2015, the MGA wrote separately to councils:

- (a) drawing their attention to the application and attaching a copy of the application to each letter;
- (b) advising that the MGA is opposing the application on the basis that the welfare and sustainability of small businesses in regional Queensland would be adversely affected by the extension of trading hours to the bigger stores on 27 and 28 December 2015;
- (c) stating the belief of the MGA that the needs of the public in the affected areas of regional Queensland would be well provided for over those two trading days by independent shops who are already allowed to trade on those days;
- (d) referring to the requirement in s 26(h) of the Act that the Commission must have regard to "the view of any local government in whose area the order is likely to have an impact;" and
- (e) seeking the views, and hopefully the support, of each council in the opposition to the application.

[118] So far as the Commission is aware, only three councils have formally expressed a view in relation to the application.

- (a) By letter addressed to the Commission dated 24 September 2015, an officer of Cairns Regional Council advised the Commission that the application was considered at Council's Ordinary Meeting on 23 September 2015 and Council resolved to support the application (Exhibit 13).

- (b) By letter addressed to the NRA dated 15 September 2015, the chief executive officer of the Townsville City Council advised that (despite its history of opposing the NRA's applications to extend trading hours in the Townsville region) the Council has the view that the application should be supported in the community interest because the proposed extension of trading hours will not have an unreasonable adverse impact upon exempt traders (Exhibit 14).
- (c) By email addressed to the Commission dated 18 November 2015, an officer of the Cloncurry Shire Council advised that the Council resolved to support the MGA in opposing the application as it believes the application would impact on the Shire's smaller businesses (Exhibit 22).

As noted earlier, some areas in Cairns and Townsville are not covered by the application.

[119] On the basis of that evidence alone, and in the absence of submissions on behalf of most local governments, the Commission can only assume that local governments generally throughout Queensland neither support nor object to the application.

**Such other matters as the Industrial Commission considers relevant**

[120] ***Broader issues about extension or deregulation of trading hours:*** As noted earlier, some witnesses who support the application made wide-ranging statements to the effect that trading hours restrictions are increasingly out of touch with changing patterns of work, tourism, leisure and shopping (as shown by the widespread take-up of extended shopping hours in other jurisdictions throughout Queensland and interstate) and that those restrictions impinge on customer choice regarding when and where to shop (see especially [54]). Witnesses who oppose the application also made wide ranging statements about the need to retain sustainable and competitive independent stores, and the detrimental effect on small businesses that the expansion of trading hours for non-exempt stores (see especially [88]). Such statements, although not irrelevant, are more appropriate in the context of applications for general variations to restrictions on trading hours rather than the specific and somewhat unusual circumstances which prompted this application. Some of the witnesses called by the MGA, and the MGA in its submission, expressed concern that the making of the proposed order would have the effect of encouraging, and potentially providing support for, future applications by the NRA for extensions of trading hours.

[121] Those statements and submissions provide the context or background to submissions made in relation to the application which relates only to two trading days, and a set of circumstances that arises approximately once every five years. Those factors alone cannot determine the outcome of this case. Rather the result must reflect evidence led in relation to relevant statutory criteria as they apply to the particular circumstances of this application.

[122] ***Sunday trading:*** Although the matter of Sunday trading has been mentioned earlier, it is appropriate to refer to it briefly again. Sunday trading is currently prohibited in the

region covered by the application.<sup>102</sup> Applications to permit Sunday trading in Warwick<sup>103</sup> and Mount Isa<sup>104</sup> have been refused by the Commission. An application to permit Sunday trading in Goondiwindi<sup>105</sup> is currently before another member of the Commission. If that part of the present application that relates to 27 December 2015 is allowed, it would be contrary to both the Order and (at least in respect of Warwick and Mount Isa) contrary to relatively recent decisions of the Commission in relation to those localities.

[123] Those factors on their own are not fatal to the present application. Indeed, it was submitted by the NRA that the application is made in unusual circumstances and that, in effect, any Sunday trading allowed by the making of the proposed order would be a "one off," at least in the sense that the circumstances giving rise to this application occur only once every five years.

[124] As noted earlier, some witnesses called by the MGA expressed concerns that the grant of that part of the application would be a precursor to more general applications for Sunday trading in the region.

[125] *Onus borne by NRA*: If the application related to the entire State, including those areas where Sunday trading is permitted, this issue would not have had the significance that it has assumed in this case. However, given that Sunday trading is not currently permitted in the region and has been successfully opposed in relatively recent decisions of the Commission (differently constituted on each occasion) and is the subject of a pending decision, that situation needs to be given some weight when deciding the application.

### **Summary of consideration of evidence and submissions**

[126] As noted earlier, although strictly speaking there is no onus of proof in relation to applications such as this, in a practical sense the NRA carries the onus of satisfying the Commission that the application should succeed, and that there should be a departure from the *status quo*. Its submissions in relation to the individual criteria were considered earlier. In essence, the NRA submits that:

- (a) the present circumstances constitute a one in five years event;
- (b) no amount of planning can prevent wastage;
- (c) not all regional areas have independent stores that are able to service their needs;

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<sup>102</sup> Clause 3.1 of the Order provides that, except where specifically prescribed by the Order, non-exempt shops shall be kept closed on Sundays and public holidays (as defined).

<sup>103</sup> *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employees) and Others (TH/2010/3) - decision* <<http://www.qirc.qld.gov.au>>

<sup>104</sup> *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Another (TH/2009/5) - decision* <<http://www.qirc.qld.gov.au>>; *Re: National Retail Association Limited, Union of Employers* [2015] QIRC 044.

<sup>105</sup> *Application by the National Retail Association Limited, Union of Employers to amend the Trading Hours Order in relation to Goondiwindi (TH/2015/1)*.

- (d) surrounding businesses would benefit from the non-exempt stores trading on 27 and 28 December 2015, and would be disadvantaged if they cannot gain additional hours of work.

The NRA also submits that even if relatively few people were to be employed in some stores because anticipated trading was at a relatively low level, those stores would be open because they are customer oriented and wish to assist shoppers who want to return or exchange products, collect lay-bys and use gift cards.

[127] In addition to its submissions on the evidence, the NRA urged the Commission to apply the following reasoning of the Commission in the Christmas Trading Hours 2010 case:<sup>106</sup>

"[37] In rejecting the SDA and AWU applications to close non-exempt retail stores on Boxing Day (26 December 2010) [a Sunday] across Queensland, the Full Bench has accepted that Boxing Day represents to retailers and consumers alike a special day for retail trade. Boxing Day sales draw a large number of consumers who avail themselves of those sales."

However, as will be seen, the outcome in that case does not assist the NRA's application.

[128] *Statutory criteria:* Consistently with the approach outlined earlier under "Some general issues," I have had regard to 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 the following criteria are of little or no significance to the making of an order in relation to this application:

- (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 a locality or part;
- (c) the needs of an expanding tourist industry;
- (d) the needs of an expanding population;
- (e) the alleviation of traffic congestion;
- (f) the view of any local government in whose area the order is likely to have an impact.

[129] Consequently, little weight should be given to those criteria and the application is to be assessed by reference to:

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

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<sup>106</sup> *Trading Hours - Non-Exempt Shops Trading by Retail - State (TH/2010/5) (TH/2010/12) (TH/2010/14) - Decision* <<http://www.qirc.qld.gov.au>.

- (b) the likely impact of the order on employment; and
- (c) whether it is appropriate to permit Sunday trading in those towns.

The evidence and my consideration of it is set out earlier and need not be repeated.

[130] *Special features of this application:* When considering whether the application should succeed it is important to recognise that:

- (a) the application is made in unusual circumstances. Christmas Day is on a Friday, and as a consequence of the operation of the *Holidays Act 1983* and the Order, non-exempt stores cannot trade for four consecutive days. As New Year's Day follows on a Friday, there will be only three trading days between Christmas and New Year;
- (b) the application relates to two days only and is not an application for a variation of trading hours generally;
- (c) the application raises a Sunday trading issue that is expressly perceived by smaller businesses as a threat to their profitability on 27 December 2015 and potentially a greater threat to their businesses if trading on that day were to be used as a basis (in separate proceedings) for obtaining a right to trade on Sundays generally; and
- (d) the retailers who would benefit from the proposed order conduct a range of businesses which, to a greater or lesser degree, could be adversely affected if the order is not made or would be beneficially enhanced if the order is made.

[131] For the reasons outlined earlier, there is no compelling reason for non-exempt stores to trade on Sunday 27 December 2015, but I am persuaded that it would be in the consumers' interests and of benefit to retailers if non-exempt stores could trade on Monday 28 December 2015 as a day reasonably proximate to Boxing Day.

[132] During the course of the hearing, the Commission raised with the parties an option of an order that would permit non-exempt stores to trade on Monday, 28 December 2015 but not on Sunday, 27 December 2015. The representatives of the NRA and MGA took instructions in relation to that option. They advised the Commission that, although their positions in relation to the proposed order were unchanged:

- (a) the MGA said there was considerable room for movement on the issue and that the option was a viable proposition; and
- (b) the NRA would be amenable to such a partial order.

## **Conclusion**

[133] I have concluded that the most appropriate order in the circumstances of this application is to order that clause 3.2 of the Order be varied only in relation to the nominated trading hours on Monday, 28 December 2015.

[134] That conclusion might be thought to be somewhat out of step with recent decisions of Full Benches of the Commission in circumstances where Christmas Day fell on a Sunday or Saturday. I note, however, that:

- (a) in the 2011 decision, the Full Bench recorded that there had been no representation made on behalf of exempt traders to that application;<sup>107</sup> and
- (b) in the 2010 decision, the Full Bench decided that non-exempt stores could trade on Sunday 26 December 2010 in areas permitted to trade on Sunday, but those areas of Queensland which had not been granted seven day trade were not permitted to trade on that day.<sup>108</sup>

I am satisfied that the conclusion I have reached in this case is supported by the evidence provided by the parties.

[135] For the reasons given above, the application is granted in part. Accordingly:

- (a) The *Trading Hours - Non-Exempt Shops Trading by Retail - State* order is amended to include:

"Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Monday 28 December 2015:

	<u>Opening Time</u>	<u>Closing Time</u>
Monday, 28 December 2015	8.00 a.m.	5.00 p.m."

- (b) The operative date for the amendment is 24 November 2015.

[136] Order accordingly.

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<sup>107</sup> *National Retail Association Limited, Union of Employers AND Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees AND The Australian Workers' Union of Employees, Queensland (TH/2011/7) - decision* <<http://www.qirc.qld.gov.au>>, [38].

<sup>108</sup> *Trading Hours - Non Exempt Stores Trading by Retail - State (TH/2010/3) (TH/2010/12) (TH/2010/14) - Decision* <<http://www.qirc.qld.gov.au>>