

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Trading (Allowable Hours) Act 1990* - s. 21 - trading hours orders on non-exempt shops

**National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) and Others (TH/2011/9)**

**TRADING HOURS NON-EXEMPT SHOPS TRADING BY RETAIL - STATE**

DEPUTY PRESIDENT SWAN  
COMMISSIONER FISHER  
COMMISSIONER BROWN

28 September 2012

DECISION

**AYR AREA**

- [1] This application is made by the National Retail Association Limited, Union of Employers (NRA) seeking an amendment to the *Trading Hours Order - Non-Exempt Shops Trading by Retail - State* (the Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act).
- [2] The amendment sought is as follows:

"1. By inserting a new clause (26) in clause 3.2 as follows:

(26) Ayr Area:

	Opening Time	Closing Time
Monday to Friday	8.00 a.m.	9.00 p.m.
Saturday	8.00 a.m.	5.30 p.m.
Sunday	9.00 a.m.	6.00 p.m.
Public Holidays (except 25 December, Good Friday, 25 April, Labour Day)	8.30 a.m.	5.30 p.m.

2. By inserting a new clause (35) in Schedule 1 as follows:

(35) Ayr Area

Commencing at the intersection of Beach Road and Hanson Street; then by a line in a south westerly direction to the intersection of the Bruce Highway and Railway Street; then by a line in a southerly direction to the intersection of the Bruce Highway and Conlan Street; then by a line in an easterly direction to the intersection of Rita Island Road and Nutall Road; then by a line in a northerly direction to the point of commencement."

*Parties*

[3] In support of the application:

- NRA

[4] Neutral position

- The Australian Workers' Union of Employees, Queensland (AWU)

[5] In opposition to the application

- Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers)(QRTSA)

- [6] The Registry of the Queensland Industrial Relations Commission [the Commission] received correspondence from a number of Ayr citizens opposing the application. These people were not called to give evidence before the Commission, however, the correspondence was forwarded to all parties for their information.
- [7] When material such as this is received from persons expressing a view upon an application, the views are not considered by the Commission in the making of its decision unless those persons seek and are granted leave to be heard in the matter, where those views can be submitted as evidence before the Commission.

### *Inspections*

- [8] Inspections were undertaken by the parties of the primary area under consideration in this application.

### *Relevant legislation*

- [9] Section 21 of the Act states:

#### **"21 Trading hours orders on non-exempt shops**

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

- [10] Section 26 of the Act states:

#### **"26 Matters relevant to s 21 order**

In relation to making an order under section 21 the industrial commission 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."

*NRA witnesses*

[11] Witnesses called by NRA

- Mr Peter Tapiolas - Parkside Development (Exhibit 2)
- Mr Bill Cummings - Compass Research (Exhibit 1)
- Mr David Stout - Coles (Exhibit 4)
- Mr Gerard Winzenberg - Target Exhibit 3)
- Mr Scott Wallace - Woolworths (Exhibit 5)

[12] QRTSA witnesses

- Ms Debbie Szendrey - President Ayr Chamber of Commerce (Exhibit 6)
- Ms Rosemary Menkens - Member of Parliament for Burdekin Shire (Exhibit 7)
- Ms Lynette McLaughlin - Mayor of Burdekin Shire Council (Exhibit 8)
- Mr Ronald Farry - Farry's IGA Supermarket, Home Hill (Exhibit 9)

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

- [13] Ayr is located 85 km south of Townsville. It is the commercial and administrative centre of the Burdekin Shire.
- [14] The population of Ayr is approximately 19,000 persons.
- [15] NRA states that it is a 'significant consideration' that Sunday and holiday trading is available in Townsville to the north and Mackay to the South of Ayr, but not in Ayr itself. (Submissions of the NRA – point 8)
- [16] Mr Tapiolas' evidence, which centred upon the question of 'locality', was as follows:
- The Burdekin area is one of the strongest agricultural regions in Australia.
  - The main commercial centres of the region are found in Ayr, Home Hill with smaller centres in Brandon, Giru, Jerona, Alva, Wunjunga, Clare, Millaroo and Dalbeg.
  - The Burdekin Falls Dam holds four times more water than does Sydney Harbour. This water supply is the region's main asset and one which "underpins the confidence that local farmers, business people, residents and investors have in the community."
  - This supply of water makes the Burdekin area the most productive sugarcane growing area in Australia. The Burdekin also has strong fruit, vegetable, beef and aquaculture industries.
  - There are three high schools in the Burdekin Shire, many primary schools, a TAFE College and the North Queensland Centre for Tropical Agriculture (Burdekin).
  - Several emerging investment opportunities have been identified within the Burdekin Shire and these include: Sugar Cane Value Adding, Aquaculture, Lifestyle, Business and Industry, Nature Based Tourism and Agriculture (horticultural processing).
  - A \$149 million cassava and cattle feedlot project is underway in the area as well as projects such as the Conquest Mining Project; Water for Bowen project and the Abbot Point Coal Expansion. (Exhibit 2)
- [17] Mr Stout stated that Burdekin growers were an important part of the supply chain for Coles Supermarkets. Further, Mr Stout stated:

"A significant part of our fruit and vegetable offer is supplied by a local grower, Rocky Ponds Produce. This company supplies capsicum, pumpkin, honeydew, rockmelons and watermelons to Coles stores across most states of Australia including Queensland, New South Wales, Victoria and South Australia. Coles stores are also supplied significantly by fruit and vegetable growers in Bowen. These growers supply our stores with tomatoes, capsicum, beans, corn, pumpkin and melons from June through October". [Exhibit 4 Paragraph 21]

*Consideration*

- [18] The general description of the locality under consideration is not in contention between the parties. QRTSA, however adds that "*retail trade has only marginal import to the Ayr locality,(and) it cannot be said that the features of the locality are such as support the NRA's application.*". (QRTSA submissions point 23)
- [19] It is also stated by QRTSA that Ayr is:
- "a. predominantly industrial;
  - b. that far away from Townsville that legal principle excludes it from being a factor when considering the retail market; and
  - c. not far enough away from Townsville to make it a necessary rest-stop for passers-through.". (QRTSA submissions - point 24)
- [20] These factors will be considered within the context of the overall application.
- (b)(c) the needs of the tourist industry or other industry in such locality or part and the needs of an expanding tourist industry*
- [21] NRA submitted that Ayr was situated on the main north-south tourist route and visitor spending in Ayr would be improved if retailers were open all days of the week.
- [22] There was considerable back-packer accommodation in Ayr and back-packers worked on farms and picking fruit during a season which extends from March to December.
- [23] Evidence produced from Mr Cummings showed that there was some tourism within the area, but the Wet Tropics area to the north of Ayr attracted greater tourism numbers.
- [24] NRA claimed that tourists were confused by the different trading hours within the State and standardisation of trading hours would create a more beneficial outcome for them.
- [25] QRTSA held the view that tourism was not a significant factor to be considered within this locality. For any tourists who might travel through the area, there were sufficient opportunities for retail shopping from a range of retailers trading on Sundays.
- [26] This perspective was shared by a local witness Ms Menkins [elected Member of Parliament for Burdekin Shire], who also claimed that local businesses would suffer if the application was granted.

*Consideration*

- [27] There is little under these two criteria to support the application.
- (d) the needs of an expanding population*
- [28] All that is submitted under this criterion by the NRA is that the Burdekin Shire local government area has been experiencing modest population growth over recent years and between 2005 and 2010, the average annual growth rate in the Shire was 0.5%.
- [29] Ms Szendrey stated that population projections showed that there would be no material change to the populations statistics in the foreseeable future. [Exhibit 6 – point 24]

*Consideration*

- [30] As there is no notable expansion in population figures for the area, this criterion is insignificant.
- (e) the public interest, consumers' interest, and business interest (whether small, medium or large)*
- [31] Referring specifically to "business interests", NRA states that a number of business persons gave evidence in support of the application. The only business person to oppose the application was Mr Farry.
- [32] Generally, the evidence given by those in support of the application covered the following issues:
- Consumers would be offered greater variety in the type of retail goods available.
  - Employment opportunities will be available for Ayr residents.

- Hotels, movie theatres, gaming establishments, cafes, restaurants, leisure and sporting facilities all trade on a Sunday without restriction. It is illogical that some retail outlets are restricted from trading on a Sunday.
- There has been considerable leakage of retail trade to Townsville on Sunday.
- The local commercial sector has provided ongoing sponsorships and support for community groups and junior sporting teams.
- Quality goods, supplied by non-exempt stores, should be available to consumers in Ayr.
- Non-exempt stores which trade on a Sunday in other areas of Queensland and Australia, experience good sales on that day. This reflects a heightened desire by consumers to access these stores on a Sunday.
- When stores are closed, refrigeration must be maintained. This significant operational overhead is lessened if revenue is able to be generated over seven days.
- If stores are open over seven days, there is no need to run perishable stock down or deplete stock on Saturday afternoons before closure.
- A six day trading pattern leads to significant operational inefficiencies particularly in relation to fresh foods.
- Saturday trade in non-exempt stores in Ayr is very busy and the greatest sales were experienced during the last period of the day.
- Congestion at the registers would be reduced if trade was permitted on a Sunday.
- Sunday trade would permit better efficiencies of energy usage specifically relating to refrigeration and air conditioning systems.
- Customers benefit from Sunday trade in non-exempt stores as they can purchase their goods at supermarket prices.
- Young people will have the opportunity to earn an income on Sundays at a premium rate of pay.

[33] Mr Farry gave evidence in opposition to the application. The primary thrust of his evidence was that the bulk of his trade occurred on a Saturday and Sunday and if the application was granted, then there would be a significant decrease in his sales on those days.

[34] Mr Farry also expressed concern on behalf of sole traders in Ayr whom he believed would be adversely affected by a successful application.

[35] Under cross-examination from NRA, Mr Farry appeared unable to identify his trading patterns for the week. The line of enquiry from the NRA was not inappropriate, in our view, in that it attempted to ascertain whether Saturday trade in Ayr [when Mr Farry's store was in direct competition with non-exempt stores] showed any marked depletion in trade. What was ascertainable by NRA from Mr Farry's evidence was that his trade on a Saturday was 17.75% of his weekly trade and trade on a Sunday was 21.25% of his weekly trade.

[36] After many questions posed by NRA, the conclusion it drew that "this pattern of trade would tend to suggest that Mr Farry's store did not lose a significant proportion of his customers to the major supermarkets in Ayr on Saturdays" is perhaps well founded. [NRA submissions - page 16]

[37] Upon the question of 'consumer interest', NRA relied upon a survey conducted on its behalf by Compass Research.

[38] The key results taken from this Survey were as follows:

- 41% of respondents said that they had shopped in Townsville on Sunday. Shopping in Townsville was most popular with the 25 to 34 years age group and the 35 years to the 44 years age group.
- 54% of respondents agreed that retailers in Ayr should be entitled to trade on all seven days if they wanted to. While 4% of those in favour of the application were identified under the category "two adults with children under 18 years".
- 63 of respondents agreed that if people in Townsville were able to shop on Sundays, then it should be acceptable for residents of Ayr to do likewise.
- Young people and families with children were the groups most in favour of Sunday trade.

[39] Some of the responses from respondents in support of the application were as follows:

- It would be good for the local economy as people would be drawn to the town from outlying areas.
- The town centre would become more lively.
- Shopping could be conducted in a less hurried environment.
- There would be a saving on time and costs if travelling to Townsville was the only option for non-exempt shopping on a Sunday.

- [40] Criticism mounted by QRTSA of the survey conducted by Compass Research highlighted, amongst other things, the following:
- The distinction between non-exempt and exempt retail stores as identified in the Act was not drawn to the attention of respondents.
- [41] Ms Menkens spoke in opposition to the application. She believed that there was no identifiable need being expressed by residents for seven day trade in Ayr.
- [42] Ms Menkens stated that the local community had a strong affinity and concern for local businesses. She claimed that the granting of the application would cause significant financial detriment to small family owned businesses as well as other small and medium traders in Ayr.
- [43] Reference was made to the difficult year which had been experienced by Ayr residents as a consequence of the floods and cyclones which had occurred in the local area. These concerns had been expressed by Ms Menkens in a speech she had given to the Queensland Parliament in May 2011.
- [43] Reference was made of a grocery store in Home Hill, Friendlys Grocers, which, in Ms Menken's view, provided an appropriate shopping facility on a Sunday for consumers in the region. Ms Menkens believed that this store was well patronised by local consumers on a Sunday.
- [44] Ms Menkens stated that there was a strong sense of community in Ayr and this was evidenced by the enmeshment of services provided for and utilised by consumers in the region. For example, Ms Menkens referred to the small family owned businesses that help grow the community; the use of local workers for most business needs; the use of local contractors for work performed in the region and the sense of community which prevailed within the region. [Transcript – 3-71]
- [45] Ms Szendrey [President of the Ayr Chamber of Commerce] was authorised on behalf of that organisation to give evidence opposing the application.
- [46] Ms Szendrey's evidence was similar to that given by Ms Menkens. Additional evidence was to the effect that tourists and/or backpackers in the town were readily able to access all retail shopping needed. There had been no complaints recorded, to her knowledge, from any of these persons as to a requirement to have better or more diverse shopping available on a Sunday.
- [47] The Chamber of Commerce had conducted a survey of residents through the local newspaper, the Ayr Advocate, to ascertain views with regard to the application. There were 400 recorded responses. With the exception of one vote in support of the application, all others opposed the application.
- [48] Reasons attributed to those opposing the application included:
- Continuous sugar cane crushing 15-20 years ago destroyed sporting and family life in the Burdekin.
  - Some responses stated that they were happy for the small traders to 'have a go' on a Sunday.
  - Small businesses would suffer if the application was successful.
  - People need time to relax with family on a Sunday.
- [49] Ms Szendrey stated that many small retailers were anxious that they would have to dismiss employees if the application was granted.
- [50] Overall, Ms Szendrey's evidence highlighted the sense of community spirit in Ayr which supported the smaller traders in their opposition to the application.

#### *Consideration*

- [51] As in all trading hours cases, this criterion is one where many competing opinions are required to be weighed and considered by the Commission.
- [52] The Compass Survey initiated by NRA, in our view, reasonably reflects the views of those interviewed. However, as previously stated by the Full Bench in TH/2011/8, we express some concerns around the manner in which the questions were drafted for response.
- [53] In our view, there is a requirement for those drafting such Surveys to explain the difference between a non-exempt and exempt store. The differences are profound in terms of who can or cannot trade on a Sunday. It is our view that most respondents to the Survey would not appreciate that there were different categories of retail shops and permitted trading hours within the Act.

- [54] With regard to the survey conducted by the local newspaper in Ayr which was undertaken on behalf of the Chamber of Commerce, we note the results were not supportive of the extension of trading hours. However, we have some concerns about the validity of the survey methodology which leads us to the view that the results should be considered with caution.
- [55] Having said, we also acknowledge that there are many questions posed in the Survey which accurately provide a response which is positive to the granting of the application.
- [56]
- [57] We have also considered the evidence of those retailers supporting the application. We acknowledge that there are real benefits for consumers generally in terms of pricing and variety of goods if non-exempt stores were to trade on a Sunday. However the Act requires a broader consideration of a range of other factors identified in Section 26 and those matters must also be weighed accordingly by the Full Bench.
- [58] In weighing the competing interests, we have also previously stated that the views of local elected representatives of the people require considerable consideration by the Commission. There is a general acceptance, we believe, that elected local representatives are in contact with their communities at such a level as to accurately reflect community opinions.
- [59] We have been influence in this consideration by the degree to which representatives have addressed the community spirit within Ayr and the desire of residents to support local small traders over and beyond supporting non-exempt stores trading on a Sunday.
- [60] Overall, we are of the view that this significant opposition to the application outweighs the benefits of the application as espoused by NRA witnesses in support of the application.

(f) *the alleviation of traffic congestion*

- [61] This is not a factor for consideration in this matter.

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

- [62] NRA witnesses state that there would be enhanced employment opportunities offered to Ayr citizens if the application was to be granted.

- [63] The particulars of these claims are as follows:

- Based on the 2006 Census, agriculture, forestry and fishing accounted for 21.8% of the workforce with a further 15.3% in manufacturing (largely employed in the sugar mills). 10.5% of the workforce was employed in retail trade.
- The granting of the NRA application is expected to have a positive impact on employment providing new employment opportunities and additional earning opportunities for existing permanent and casual employees employed by non-exempt retailers.
- Mr Stout's statement noted the particular benefit for youth employment arising from extended trading hours. His statement included the following:

"Our Ayr store employs 117 employees of whom 42 are under 21. We make a significant contribution to youth employment in Ayr which provides young people with significant benefits in terms of increased wealth, valuable work experience and socialisation benefits. It also creates young consumers, savers and taxpayers who contribute to the economy in a very real way. Productive and motivated youth also benefit society by reducing the incidence and costs associated with social problems such as drug abuse and crime. Many of the volunteers for Sunday work in other areas are young workers who are keen to earn much higher rates of pay for Sunday work than any other day of the week. It also is often more suitable for those employees who have other commitments on Saturday, but still want to be able to earn money by working on the weekend."

- Coles estimated that an additional 190 hours of employment will result from the grant of the NRA application (Statement – para. 19).
- Woolworths estimated that an additional 250 to 350 hours per week of employment will result from the grant of the NRA application (Statement – para. 20).

*Consideration*

[64] This is a factor supportive of the application.

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

[65] Mr McLaughlin is the Elected Mayor of the Burdekin Shire Council. Mr McLaughlin is authorised to express the views of the Council in this hearing.

[66] The Council, at its meeting held on 30 August 2011, passed the following Motion:

"1. The Council objects to the application by the National Retail Association Limited, Union of Employers to the Queensland Industrial Relations Commission to amend the Trading Hours Order – Non Exempt Shops Trading by Retail – State [reference TH/2011/9] on the following grounds:

- Sunday trading by Coles and Woolworths will have a detrimental effect on existing businesses which will affect their long term viability.
- Current surveys indicate a strong opposition to the application.

2. The Council authorises a representative to appear at the hearing which is scheduled to be held at the Ayr Magistrates Court at 9-30 am on 2 November 2011 if called upon by parties opposing the application."

[67] The Council document shows that the motion was carried by a vote of 4/3.

*Consideration*

[68] This factor is not supportive of the application.

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

*Conclusion*

[69] Having considered all of the relevant criteria in s.26 of the Act, we have found, on balance, that the application should be dismissed. The reasons for reaching this conclusion are encapsulated under the heading of "Consideration" beneath each criterion.

[70] There is such strong community opposition against the granting of the application, that, this, coupled with the lack of any supporting evidence upon the questions of tourism and population growth, have led to this conclusion.

[71] Order accordingly.

D. A. SWAN, Deputy President.

G. K. FISHER, Commissioner.

D. K. BROWN, Commissioner.

*Hearing Details:*

2012 22 February

Released: 28 September 2012

*Appearances:*

Mr G. Black, of National Retail Association Limited, Union of Employers.

Mr C. Donati, of The Australian Workers' Union of Employees, Queensland.

Mr C. Mills, of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).