

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *National Retail Association Limited, Union of Employers* [2020] QIRC 177

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

CASE NO: TH/2020/6

PROCEEDING: Application

DELIVERED ON: 12 October 2020

HEARING DATE: 6 October 2020

MEMBER: McLennan IC

HEARD AT: Brisbane

DECLARATION:

- Pursuant to s 5(1)(c) of the *Trading (Allowable Hours) Act 1990*, I declare that the AFL Grand Final is, for the purposes of s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, a special event.**
- The declaration shall apply for a period commencing on 24 October 2020 and concluding on 25 October 2020.**
- The declaration applies to The Gabba ward and Central ward areas of Brisbane, as set out in Exhibit B of the Affidavit of Mr Stout filed 17 September 2020.**

CATCHWORDS: INDUSTRIAL LAW – TRADING HOURS – APPLICATION FOR DECLARATION OF SPECIAL EVENT – application to classify all non-exempt shops as exempt shops in part of Brisbane for a specified period during a special event, namely, the AFL Grand Final.

LEGISLATION: *Trading (Allowable Hours) Act 1990* s 5, s 36B

CASES: *Application filed by National Retail Association, Union of Employers* (TH/2017/26) (13 December 2017) (unpublished)

APPEARANCES: Mr D Stout of the National Retail Association Limited, Union of

Employers

Ms L Armstrong of the Shop, Distributive and Allied Employees Association (Queensland Branch), Union of Employees

Reasons for Decision

- [1] By application filed on 17 September 2020, the National Retail Association Limited, Union of Employers (the NRA) applied for a declaration, pursuant to s 5(2) of the *Trading (Allowable Hours) Act 1990* (the Act), that the AFL Grand Final, to be held from Saturday 24 October 2020 to Sunday 25 October 2020 inclusive, is a special event within the meaning of s 5(1)(c)(ii) of the Act. Accompanying the NRA's application was an affidavit of Mr David Stout, affirmed on 17 September 2020.
- [2] The effect of such a declaration, if made, would be that a non-exempt shop operating in an area in Brisbane, as specified in the Applicant's application, would be an exempt shop for the period for which the declaration applies. Part 4 of the Act restricts the trading hours of non-exempt shops.
- [3] The area specified in the Applicant's application is The Gabba ward and Central ward, as set out in Exhibit B of the Affidavit of Mr Stout filed 17 September 2020.
- [4] The period for which the declaration is sought is from Saturday 24 October 2020 to Sunday 25 October 2020 inclusive.
- [5] On 21 September 2020, a Directions Order was issued which required that the Applicant's application and the Directions Order be served on the Brisbane City Council, Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees, The Australian Workers' Union of Employees, Queensland, the Local Government Association of Queensland Limited, the Executive Director, Industrial Relations, Office of Industrial Relations, Department of Education and the Chief Industrial Inspector, Office of Industrial Relations, Department of Education.
- [6] The Directions Order provided that those who may be affected by the application may make a formal application seeking leave to be heard and, if leave was granted, such a party was to file an outline of submissions and serve those submissions on the Applicant by 2 October 2020.
- [7] The Application and Directions Order were published on the Commission's website.
- [8] On 23 September 2020, the SDA made an application seeking leave to be heard. The SDA's application for leave to be heard was approved that same day. The SDA filed and served an outline of submissions on 2 October 2020.
- [9] The question for my determination is whether I should make the declaration as sought.

Should the Commission grant the declaration sought?

- [10] The Applicant contends that the AFL Grand Final meets the description of a special event within the meaning of s 5 of the Act.
- [11] Section 5 of the Act relevantly provides:

5 Exempt shops

(1) An *exempt shop* is -

- (a) a shop of a description mentioned in schedule 1AA used predominantly for selling goods by retail, or for supplying services, a reasonable person would expect to be sold or supplied in that shop;

- (b) an independent retail shop; or
- (c) a shop operating in a stated area for an event –
 - (i) that is a unique or infrequent event of local, State or national significance; and

Examples—

- the 2018 Commonwealth Games
- the Weipa Fishing Classic event

- (ii) declared by the industrial commission to be a special event for this paragraph
- (2) A declaration for subsection (1)(c) –
- (a) May be made by the industrial commission on an application by an organisation, chief executive, local government or any other person; and
 - (b) must state the following–
 - (i) the details of the event the subject of the declaration;
 - (ii) the period for which the declaration applies;
 - (iii) the area to which the declaration applies; and
 - (c) must be published on the QIRC website.
- (3) In deciding whether to declare an event to be a special event for subsection (1)(c), the industrial commission–
- (a) must consider–
 - (i) the cultural, religious or sporting significance of the event; and
 - (ii) the significance of the event to the economy and the tourism industry; and
 - (b) may consider a submission made by a local government for an area in which the declaration is likely to have an impact.

[12] As is evident from s 5(1), the Act provides for non-exempt shops, operating in a stated area for an event, to be exempt shops for the period of that event if the Commission declares the event to be a special event.

[13] In deciding whether an event is a special event for the purposes of s 5(1)(c) of the Act, the Commission must consider:

- the cultural, religious or sporting significance of the event; and
- the significance of the event to the economy and the tourism industry.

[14] Further, the Commission may consider a submission made by a local government for an area in which the declaration is likely to have an impact. The Brisbane City Council did not make a submission.

Should the AFL Grand Final be declared to be a special event?

The NRA's submissions

[15] The NRA contends that the AFL Grand Final meets the description of a special event within the meaning of s 5(1)(c) of the Act.

[16] In his affidavit accompanying the Applicant's application, Mr David Stout, NRA Policy Director, deposes that:

- The AFL Grand Final will be held in Brisbane on 24 October 2020. It is the first time in 123 years that the event will be held outside Victoria, due to that state’s second COVID-19 wave;
- Supporting statements and endorsements from government and industry evidence the significance of this sporting event;
- Premier Palaszczuk announced the Queensland hosting of the event as a “once-in-a-lifetime opportunity”;
- AFL Chief Executive Gillon McLachlan noted activities leading up to the AFL Grand Final would include an “...extensive promotional campaign for the sport of Australian football, including multiple regional locations throughout Queensland...”;
- Minister Kate Jones has made public comment about the significance of the major event to showcase Queensland as “...not only an events destination, but a tourism destination...”, emphasising its importance in boosting tourism revenue for local businesses now and in the future;
- Minister Cameron Dick stated that the AFL Grand Final was expected to pump \$17 million to Queensland’s economy and generate about 80 jobs;
- Queensland Tourism Industry Council CEO Daniel Gschwin pointed to the boost to Queensland’s reputation as an “events centre”;
- These public endorsements demonstrate the sporting significance of the NRL Grand Final event – and also its significance to the Queensland economy, jobs and tourism industry;
- The combination of free public transport in the four hours before and after the event, limited refreshments available onsite at the event, and a potentially later start time all means patrons would benefit from extended trading hours. The NRA asserts that extended trading hours in such circumstances would better support event attendees’ opportunities for off-site refreshments, with respect to staggered arrival and departure times mindful of social distancing accommodations;
- Extended trading hours covering both the day of the event and the following day “...would allow major retailers to cater better to the needs of visitors to the event...”;
- The NRL Grand Final meets the criteria under the Act as “a unique or infrequent event of local, State or national significance;”
- Extended trade opportunity around this event is important to promote economic recovery;
- “Granting of this application will not come at the expense of regulation and employees as any additional work during extended hours will be on a voluntary basis as per section 36B of the Act”;
- The importance of the work undertaken by retail workers was also recognised.

The SDA’s submissions

[17] The SDA opposed the making of the declaration sought by the NRA.

[18] The SDA submitted that:

- An application made pursuant to s 5(1)(c) of the Act gives the Commission a significant power, having the ability to declare a ‘non-exempt shop’ to be an ‘exempt shop’ for a specified event and that such a declaration, if granted, extends the possible trading hours of non-exempt shops. This has significant impacts on retail employees;
- By reason of the declaration having the potential to extend trading hours in non-exempt shops, employees may be required to work within a set of ‘extended hours’ as defined under the Act without the requisite protections afforded to employees of non-exempt shops pursuant to s 36B of the Act. (S 36B(1) states that “an employer must not require an employee to work during extended hours unless the employee has freely elected to work during extended hours”);
- “The SDA understands from previous applications that both the NRA and the Commission recognise that it is appropriate for any affected employees who work extended hours outside of the normal range of hours to only do so on a voluntary basis. We request that the necessity of such protections be acknowledged if the Commission is minded to grant the order requested by the application”;
- The NRA’s application does not afford the Commission an absolute discretion to grant the declaration and that it is imperative the Commission vigorously assess and only declare an event a “unique or infrequent event of Local, State or National significance” when the factual circumstances and evidence strongly dictate that circumstance;
- It is concerned that the NRA utilises this section of the Act to suggest that any event, no matter what its significance, held in any area “...will procedurally be declared and hence all retail stores in a large area of proximity to the event should be afforded the expansion of hours as contemplated under Section 5 of the Act”;
- While s 5(3) of the Act describes the matters the Commission must consider when making a determination about whether an event is a ‘special event’, there is:¹

“...a deficiency within the Act for not providing guidance or any reference to considerations on matters such as:

 - (a) The necessity of non-exempt shops to actually trade as exempt shops during the special event.
 - (b) The impact such a declaration has on employees of shops affected by the granting of such a declaration.
 - (c) The necessity to limit any retail hours during the special event period.
- It was not the intention to make every event significant. There is no evidence of any necessity for deregulation of trading hours to assist the economy and tourism;
- The SDA has surveyed members who worked extended trade periods, granted under the Act, for designated special events. Anecdotally, SDA members reported that “stores do not generally implement the extended hours despite the NRA’s suggestion that these applications are desired by retailers”;
- There is no evidence provided by the NRA to suggest that extended trading hours are “desired or required” by patrons or tourists attending the AFL Grand Final event;
- The current non-exempt shop weekend trading hours for the area is sufficient for the AFL Grand Final and patrons. It is contested that the event “will create new opportunities for trade outside of the existing trading regime”;
- Economic recovery and the promotion of tourism cannot be at the expense of appropriate regulation of trading hours in any situation;

¹ SDA's submissions, filed 28 July 2020, [8].

- Given COVID-19, border closures and existing restrictions, the event is not likely to attract great crowds. The merits of the application is therefore questionable;
- Continuing community caution about crowds in an ongoing COVID-19 aware climate may mean that people elect to “watch the game from the safety of their home and patrons who do choose to attend will limit their public presence to the space of the event rather than venturing out to shopping venues in extended hours”;
- The AFL Grand Final’s prior success in Melbourne cannot be used as a measure this year, given the major difference in circumstances;
- The geographical area and dates sought in the application is “an overreach of the intent of Section 5”;
- The SDA submissions strongly advocated for the voluntary nature of work in any extended hours that may be granted through the NRA’s application. In closing, the union urged the Commission “That in the event a declaration is granted, it be acknowledged in the declaration that it is appropriate and necessary for any work within the extended hours to be voluntary.” The SDA sought the implementation of the protections afforded to employees in non-exempt shops where they are protected from work in any extended hours unless voluntarily accepted. The SDA submitted that all employees should be afforded the protection of voluntary work in extended hours.”

The AFL Grand Final is a 'special event' within the meaning of s 5(1)(c)(ii) of the Act

[19] Having regard to the evidence contained in Mr Stout's affidavit, I am of the view that the AFL Grand Final is a unique sporting event of local, State or national significance.

[20] I am also satisfied of the significance of the AFL Grand Final to the Queensland economy and tourism industry more broadly.

[21] In making this decision, I am persuaded by:

- The AFL Grand Final event will be held outside Victoria for the first time in 123 years. It will be held this year at The Gabba in Brisbane, relocated due to Victoria’s second COVID-19 wave;
- Proven track record of the event providing a major boost to the local economy, by attracting sporting fans to Melbourne in years past. Queensland Treasurer Cameron Dick expected the AFL Grand Final to add \$17 million to Queensland’s economy and generate about 80 jobs;
- High attendance numbers in previous years. Even with the COVID-Safe measures in place this year, 30,000 sporting fans are able to be accommodated at The Gabba for the event; and
- Public statements by industry and state leaders regarding the economic, employment and tourism significance of the event to Queensland.

[22] However, I do appreciate the point well made by the SDA about the (as yet) unknown full impact of the COVID-19 public health pandemic on the benefits that may be realised from the AFL Grand Final event. Whilst recognising the cash injection into the economy, tourism bump and high spectator numbers associated with the event in previous years, this year may well be very different. We simply cannot know.

[23] In making this argument, the SDA suggested that attendance numbers at the AFL Grand Final this year may be reduced, as sporting fans prioritise ‘caution’ above ‘crowds’.

- [24] Notwithstanding interstate tourism would be curtailed due to travel restrictions for some states, intra-state tourism is likely to soar as Queenslanders (and those in certain states beyond) seek out the opportunity for family entertainment closer to home.
- [25] I entirely agree with the SDA's comments that "...it is imperative the Commission vigorously assess..." such applications for extended trading hours and that such decision should not be taken lightly. In such circumstances where the experience of past years demonstrates the AFL Grand Final event is one of sporting significance, with economic and tourism benefits to the economy, I am prepared to accept the application.
- [26] I believe a decision favouring local businesses' opportunity to trade and draw visitors into Brisbane throughout that weekend both complies with the mandatory criteria in the Act and is the right call for Queensland at this time.
- [27] The words of Minister Kate Jones ring true, as she speaks of the welcome boost the game would bring to the state:²

"Very few industries have been as hard hit by COVID-19 as our tourism and events businesses, so to be able to host the AFL Grand Final in Queensland for the first time ever is a huge confidence boost. This is so much more than a game of footy, this is a chance to show Australia exactly what Queensland offers when it comes to being not only an events destination, but a tourist destination."

What should be the area to which the declaration applies?

- [28] Exhibit B 'Description of location' is a copy of a map of the Central and The Gabba wards within Brisbane, marking the areas to which the declaration was sought to apply.³
- [29] The SDA submitted that "...the present application and the dates it attempts to include appear to be an over reach." The Union's submission goes on to elaborate reasons why the date range is an overreach but does not contest the geographical area subject of the application in the written submission.
- [30] This point was addressed comprehensively in Mr Stout's affidavit. He explains that events patrons are urged to use public transport, with free public transport to and from The Gabba. Additionally, patrons will likely stagger their arrival and departure times to better accommodate social distancing. As a COVID-safe precaution, a limited menu and no water bubblers will be available at the venue, making it likely that many patrons will purchase food and drinks in the surrounding area before or after the event.
- [31] I accept this submission by the NRA.

The SDA's claim for the protection of employees

- [32] The SDA expressed concern that "...retail employees may be required to work within a set of 'extended hours' as defined under the said Act without the requisite protections afforded to employees of Non Exempt Shops pursuant to Section 36B of the Act. Section 36B(1) of the Act states that an employer must not require an employee to work during 'extended hours' unless the employee has freely elected to work during extended hours."⁴
- [33] Section 36B of the *Trading (Allowable Hours) Act 1990* provides:

36B Protection for employees—extended hours under Trading (Allowable Hours) Amendment Act 2017

- (1) An employer must not require an employee to work during extended hours unless the employee has freely elected to work during extended hours.

Maximum penalty-

² Affidavit of Mr David Stout, filed 17 September 2020, Exhibit A, page 3.

³ Ibid Exhibit B, page 1 - 2.

⁴ SDA's submissions, filed 28 July 2020, page 2, [4] – [5].

- (a) for a first offence-16 penalty units; or
 - (b) for a second or later offence-20 penalty units.
- (2) However, subsection (1) does not apply in relation to an employee if an industrial instrument provides arrangements under which the employee may refuse or agree to work during extended hours.
- (3) For subsection (1), an employee has not freely elected to work during extended hours-
- (a) if the employee elects to work during extended hours because the employee has been coerced, harassed, threatened or intimidated by or for the employer; or
 - (b) only because the employee is rostered, or required under an industrial instrument, to work during those hours.
- (4) In this section-

elect means agree in writing for a stated or indefinite period.

employer means an employer of an employee in a non-exempt shop.

extended hours means the permitted trading hours under this Act for a non-exempt shop on any day (other than a closed day), but only to the extent the hours are greater than the shop's permitted trading hours immediately before the commencement.

industrial instrument means any of the following within the meaning of the *Industrial Relations Act 2016*—

- (a) a modern award, bargaining award or certified agreement;
- (b) a federal industrial instrument.

[34] The NRA has acknowledged the union's concerns. Mr Stout states in his Affidavit:⁵

“Granting of this application will not come at the expense of regulation and employees as any additional work during extended hours will be on a voluntary basis as per section 36B of the Act.”

[35] This Commission has previously considered such protections to ensure that affected employees who work extended hours outside of the normal range of hours in their Certified Agreements and Awards only do so on a voluntary basis. In *Trading Hours-Exempt Shops-Commonwealth Games*, Swan DP stated that the rights and conditions of employment by employees engaged by non-exempt stores, would be retained during the period of the declaration made in the that case.⁶

[36] I absolutely agree that such protections for affected employees are appropriate, applicable and necessary.

[37] On the basis of the parties' agreement – as evidenced by both their written submissions and oral submissions at the Hearing of this matter - and with respect to Her Honour's Decision (cited at [35] above), I have determined that any additional work during extended hours will be on a voluntary basis as per section 36B of the Act

[38] I can well understand that some employees working in non-exempt shops (within the defined declaration area) will prioritise time with family and friends or their own participation in sporting, cultural or religious activities over the weekend in preference to working additional hours. On the other hand, there would also be many struggling families for whom some extra money would be very welcome at this time. These two possible scenarios further emphasises the good sense of leaving each affected retail worker to make their own decision about whether or not to accept any additional hours that may be offered to them over the AFL Grand Final weekend, depending on their personal circumstances.

Conclusion

⁵ Affidavit of Mr David Stout, filed 17 September 2020, Exhibit A, page 4.

⁶ Application filed by National Retail Association, Union of Employers (TH/2017/26) (13 December 2017) (unpublished) [25] - [27] (*'the Commonwealth Games Case'*).

[39] Having regard to the submissions, I am satisfied that the AFL Grand Final is a special event within the meaning of s 5(1)(c)(ii) of the Act in that it is an event of sporting significance to the people of Queensland and beyond. It is significant to the economy of Brisbane in particular and to the tourism industry of Queensland more broadly (both now and in the future).

[40] For the reasons set out above, I am satisfied that I should make the declaration sought. The period for which the declaration applies is from Saturday, 24 October 2020 until Sunday, 25 October 2020 inclusive. Further, the area to which the declaration applies is that set out in Exhibit B of Mr Stout's affidavit.

[41] I will make the following declaration:

1. **Pursuant to s 5(1)(c) of the *Trading (Allowable Hours) Act 1990*, I declare that the AFL Grand Final is, for the purposes of s 5(1)(c)(ii) of the *Trading (Allowable Hours) Act 1990*, a special event.**
2. **The declaration shall apply for a period commencing on 24 October 2020 and concluding on 25 October 2020.**
3. **The declaration applies to The Gabba ward and Central ward areas of Brisbane, as set out in Exhibit B of the Affidavit of Mr Stout filed 17 September 2020.**