

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: National Retail Association Limited, Union of Employers* [2016] QIRC 103

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

CASE NO: TH/2016/1

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

DELIVERED ON: 7 October 2016

HEARING DATE: 27 June 2016
18 July 2016 (written submissions of National Retail Association Limited)
1 August 2016 (written submissions of Shop, Distributive and Allied Employees' Association (Queensland Branch))
1 August 2016 (written submissions of Master Grocers Australia Limited)
8 August 2016 (written submissions in reply by National Retail Association Limited)

HEARD AT: Brisbane

MEMBER: 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 Tuesday 27 December 2016 except where clause 3.2 provides for a wider spread of allowable trading hours:

Tuesday, 27 December 2016

<u>Opening Time</u>	<u>Closing Time</u>
8.00 a.m.	5.00 p.m."
- 2. The operative date for the amendment is 7 October 2016.**

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 Tuesday 27 December 2016 - by operation of *Holidays Act 1993* there will be three consecutive non-trading days because Christmas is on a Sunday - criteria to which Commission "must have regard" when making an order - application opposed by independent stores - application to be decided on evidence in relation to it

CASES:

Holidays Act 1993 ss 2, 3, Schedule
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 Employers) and Another (TH/2009/3) - 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 Others (2005) 180 QGIG 1211

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 [2014] QIRC 50

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

Re: National Retail Association Limited, Union of Employers [2015] QIRC 204

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

APPEARANCES:

Mr M. Cole, for the National Retail Association Limited, Union of Employers, the Applicant
 Mr D. Sztrajt, for Master Grocers Australia Limited
 Mr D. Kerr, for the Shop, Distributive and Allied Employees' Association (Queensland Branch)
 Mr J. Harding, for the Australian Workers' Union (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 Tuesday 27 December 2016 except where clause 3.2 provides for a wider spread of allowable trading hours:

	<u>Opening Time</u>	<u>Closing Time</u>
27 December	8.00 am	5.00 pm"

- [3] For reasons set out below (see [23] - [24]) the amended order would apply only to areas of regional Queensland.
- [4] 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).
- [5] 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 27 December only if 25 December is a Saturday or Sunday.
- [6] By operation of the *Holidays Act 1983*, there will be a public holiday on 27 December 2016 because 25 December 2016 is a Sunday. As a consequence, there will be three consecutive non-trading days for non-exempt stores in the locations affected.
- [7] The application is made in an unusual context. The most recent years when Christmas Day was on a Sunday were 2005 and 2011. The event will recur in 2022 and 2033.

- [8] The 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 opposes the application. The SDA gives conditional support to the application provided that any hours worked by employees on 27 December 2016 are voluntary. The AWUEQ did not explicitly support or oppose the application, but was concerned also that any work performed on 27 December 2016 be voluntary.

Witnesses

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

- [10] Witnesses for the NRA were:

- Allen Wright (State Support Manager for Woolworths Limited in Queensland ("Woolworths")) (Exhibits 3 and 4);
- Michael Vorrasi (State Finance Manager for Coles in Queensland) (Exhibit 5);
- Gerard Winzenberg (Queensland District Manager for Target Australia Pty Ltd ("Target")) (Exhibit 6);
- Lisa Brown (Area Manager, Big W Discount Stores ("Big W")) (Exhibit 7); and
- Jeffrey Wilson (Zone Manager Queensland South, Kmart) (Exhibit 8).

- [11] Witnesses for the MGA were:

- Wayne Morris Mason (Queensland State Operations Manager, Australian United Retailers Ltd trading as FoodWorks Pty Ltd ("FoodWorks")) (Exhibit 9);
- Sharon Amara Lee (Chairman of the Board of the Goondiwindi Co-operative Limited) (Exhibit 10);
- Bruce Mahony (a director of a company which owns the IGA store in Childers) (Exhibit 11);
- Paul Faust (an owner of the IGA store in Proserpine) (Exhibit 12); and
- Shane Smith (owner of the IGA store in Pittsworth) (Exhibit 13).

Some general issues

- [12] 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."

[13] 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*.¹

[14] ***The s 26 criteria:*** There is no common thread running through the criteria. Indeed the Commission is required to take into account quite diverse, and what might sometimes be competing or conflicting, interests in coming to its decision. The Act does not provide guidance about the priority or relative weight to be given to those criteria.

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

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

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

- [17] 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.² 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.³
- [18] 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.⁴ 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".⁵
- [19] 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.⁶
- [20] ***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.
- [21] 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).

² 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.

³ 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.

⁴ 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.

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

⁶ 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.

- [22] It follows that the appropriate approach is to consider and evaluate the evidence (if any) and submissions in relation to each criterion, and then to make a decision based on an overall evaluation of the criteria specified in s 26.

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

- [23] *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, specified parts of Brisbane, 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.
- [24] When the locations just listed are excluded, it is apparent that this application can be described as applying to extensive areas of regional Queensland. Evidence was given in relation to the exempt and non-exempt retail operations in a number of towns covered by this application. The MGA called witnesses who owned IGA stores in Pittsworth, Proserpine and Childers, and the chairman of the board of the Co-operative in Goondiwindi that operates the local FoodWorks supermarket. The NRA called witnesses from Kmart, Big W, Target, Coles and Woolworths. Collectively, those chains identified at least 24 different towns in which they operate stores.
- [25] Mr Wright stated that "in many of the regional centres that Woolworths stores currently serves, there is no other supermarket presence" (Exhibit 3 paragraph 10). Mr Mason nominated 31 independent supermarkets that are closely proximate to non-exempt stores and would be adversely affected if the application is successful⁷ (Exhibit 9 paragraph 14). According to the MGA, 17 independent supermarkets are located immediately within the regional centres where Woolworths or Coles stores are located. Thirteen other stores are "less than 40 minutes' drive to a Woolworths and/or Coles store affected by this Application".

⁷ Mostly IGA and Foodworks stores.

- [26] Mr Mason and Mr Mahoney argued that "around two-thirds of the revenue in local business recirculates in the local economy, whereas dollars spent in Coles or Woolworths ... generally benefit shareholders elsewhere with only 13.6% of revenue recirculating in local economies" (Exhibit 9 paragraph 20, Exhibit 11 paragraph 16). In support of this proposition, a 2014 "study" by a group called Civic Economics was cited. This study was a survey which "local organizers were responsible for recruiting businesses to complete". It was sponsored by a group called Monadnock Buy Local, whose slogan is "Help our local economy grow". A total of nine local businesses in Monadnock, New Hampshire (in the United States of America) completed the survey. For reasons that should be obvious (including its overseas data, small, selective sample-size, and interest-group sponsorship) this study is of no probative value in assessing the respective contributions of exempt and non-exempt stores to the economy of regional areas in Queensland.
- [27] More relevantly, Ms Lee gave evidence that all of the profits of the Goondiwindi Co-Operative remain in the community of Goondiwindi and surrounding districts, allowing the town to benefit and prosper. The Co-Operative also works with a large number of local suppliers, and makes donations to the community (Exhibit 10 paragraphs 9, 10, 22, 23).
- [28] ***NRA's submissions:*** The NRA submits that "in reality a positive order will affect a specific set of major regional centres which play host to non-exempt retailers". Their principal submission appears to be that there may be "leakage" (also described as "escape expenditure") from these regional centres if non-exempt stores are unable to trade on 27 December 2016. The NRA cites the oral evidence of Mr Winzenberg (from Target) that if unable to trade, "we would see a significant leakage out of those towns". However, there was no empirical evidence provided to substantiate that statement. The NRA's further submission on this criterion is that customers in these regional centres have "expectations ... that stores will be open when they want to shop."
- [29] ***MGA's submissions:*** The MGA submits that the evidence provided by the NRA in relation to this criterion was "exceptionally limited" and "vague". The MGA contends that the evidence fails to provide the Commission with the necessary information that is required to make an informed decision concerning the localities in which the non-exempt stores affected by this Application are located.
- [30] ***Consideration:*** It was apparent from the evidence that a diverse set of regional towns is covered by the application. 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 (discussed below). There was little evidence as to how the application would affect particular towns or regions. It appears that some regional centres do not have an independent supermarket within a 40 minute drive of a non-exempt Coles or Woolworths.
- [31] Overall, because of the lack of commonality of the towns, and the generality of the evidence provided, it is not possible to make useful findings about locality that apply across the area covered by the application. I am satisfied that this criterion is not significant to the decision in relation to the present application.

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

- [32] *Evidence:* Witnesses called by the NRA provided statistical data about the extent of interstate and intrastate tourism in Queensland, and speculated about the implications for tourists of this application being successful or unsuccessful.
- [33] In his written statement, Mr Wright referred to the Domestic Tourism Snapshot bulletin published by the Department of Tourism and Events Queensland for the year ending December 2015. That bulletin notes increasing tourism to Queensland, with interstate tourism growing by about 5.3% over the past year. Mr Wright stated that the performance and viability of many retailers in regional areas depend significantly on the tourist market. Regional towns affected by this application might see some of this increased tourism activity, and these tourists have a "high level of expectation" as to the services available to them, and "may become confused and frustrated" with the trading hours currently available (Exhibit 3, paragraphs 14-17, 42). He gave oral evidence based on his experience in rural towns in northern New South Wales and in Queensland of customers coming to towns on public holidays and being confused about trading hours, particularly on the day immediately after a public holiday.
- [34] Ms Brown gave written evidence that "Queensland does support a sizeable market of tourists and visitors, and requires the ability to trade at times that meet the expectations and needs of these people." She also noted that many interstate tourists might be used to major stores being open on public holidays and suggested that they "often become confused and frustrated" with limited trading hours (Exhibit 7, paragraphs 11-13).
- [35] Similar evidence and speculation was provided by Mr Vorrasi (Exhibit 5 paragraphs 20-22), Mr Winzenberg (Exhibit 6 paragraphs 16-17), and Mr Wilson (Exhibit 8 paragraph 10).
- [36] The MGA adduced no empirical evidence of consequence in relation to this criterion. However, witnesses called by the MGA gave specific and telling evidence that demonstrated the limited relevance of this criterion to the present application.
- [37] According to Mr Smith, Pittsworth is not a tourist area and residents usually leave for holiday places elsewhere after Christmas. He suggested that would be the case for most areas of regional Queensland (Exhibit 13 paragraphs 7, 8, 15). Mr Mahoney gave evidence to the same effect about Childers (Exhibit 11 paragraphs 11, 26).
- [38] Mr Faust refuted the proposition that tourists are confused or frustrated by the trading hours laws in Queensland. He did not know of any tourist complaining because they are unable to shop at Coles or Woolworths. Rather, tourists will visit whatever store is available (e.g. independent stores trading when non-exempt stores are closed) provided the store offers what they want or need at a reasonable price. He had not met tourists who complained about not being able to get what they wanted at the right price (Exhibit 12 paragraphs 13-15).
- [39] Ms Lee gave evidence to the same effect in support of a finding that the success of this application would have "zero impact over tourist flows" (Exhibit 10 paragraphs 35-37).
- [40] In response to Mr Wright's evidence, Mr Mason contended, in summary, that tourism seems to have little relevance to the issue of supermarkets opening in regional

Queensland following a two-day break after Christmas. There is no evidence to suggest there are likely to be significant gains from tourist activity in a supermarket located in regional Queensland based on evidence of tourism in such places as the Sunshine Coast or Gold Coast. Furthermore, he suggested that tourists who come to Queensland over the Christmas period do not come to Queensland as a shopping destination but for other reasons and do not shop in supermarkets or department stores on the days following Christmas. To the extent that they need to shop, they are well served by stores that would otherwise be open (Exhibit 9 paragraphs 9-11).

[41] **NRA's submissions:** The NRA submits that the period between Christmas and New Year is a "key time for tourism". It refers to the Regional Tourism Satellite Account - Outback 2013-14, published by the Department of Tourism and Events Queensland, which provides some general information about the contribution of tourism to the economy and employment. Finally, it reiterates that tourists (particularly those from jurisdictions in which trading hours are not regulated) may be frustrated by the closure of non-exempt stores.

[42] **MGA's submissions:** The MGA submit that the use of the term 'need' in s 26(b) "implies a requirement that is essential or important rather than just desirable". In support of this they cite the decision of *Re: National Retail Association Limited, Union of Employers*⁸ in which Swan DP stated that:

"Section 26(b) and (c) state that the Commission must consider the 'needs' of the Tourist industry and the 'needs' of an expanding tourism industry. Implicit in that would be a requirement of a party seeking to extend trading hours ... to show firstly that there are tourists in the town and that their requirements are not being met by the available shopping facilities."

[43] The MGA also submit that there is "no evidence establishing a nexus between tourism and retail shopping in the area" and that the evidence provided has been "both largely anecdotal and unsupported". It also notes that the "Queensland Outback, Gulf and Western Downs Tourism Opportunity Plan" does not highlight a need for extended retail trading hours.

[44] **Consideration:** The evidence adduced by the NRA in relation to this criterion went towards showing that tourism was increasing state-wide and in regional areas as a whole. However, none of that evidence referred specifically to the particular towns in which non-exempt stores were operating. Further, no evidence was adduced to demonstrate that the existing needs of tourists could or not would not be met by exempt stores in any of the towns on the date in question. I am not satisfied that the application must be granted in order to meet the needs of the tourist industry in regional Queensland.

[45] No evidence was called or submission made about the needs of any other industry in the area covered by the application.

The needs of an expanding tourist industry

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

⁸ [2015] QIRC 044 (TH/2014/9).

- [47] ***NRA's submissions:*** The NRA concedes that this is not a significant criterion in this matter, because it relates only to one day of trade in this year. However, it submits that future expansion of tourism will "rely on improved access to services, particularly retail".
- [48] ***MGA's submissions:*** The submissions of the MGA are the same on this criterion as they were for the previous criterion.
- [49] ***Consideration:*** There is some evidence of increasing tourism to regional areas. However, the need of an expanding tourist industry for additional retail hours on 27 December 2016 was not established. In any case, I agree with the NRA that this is not a significant criterion in this case.

The needs of an expanding population

- [50] ***Evidence:*** No evidence was called in relation to this criterion.
- [51] ***Submissions:*** No party submitted that this criterion was relevant to a determination in relation to the application.
- [52] ***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 December 2016. 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)

- [53] 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. By contrast with s 26(b) and (c), these criteria relate to "interests" rather than "needs".

Public interest

- [54] The concept of "public interest" is referred to in many statutes. It has been described as being of the widest import. In *O'Sullivan v Farrer*,⁹ Mason CJ, Brennan, Dawson and Gaudron JJ wrote that, subject to any statutory limitations:

"... 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".

- [55] As differently constituted Full Benches of the Commission have observed, public interest matters "encompass a variety of considerations, amongst which is a requirement to weigh and balance relevant issues"¹⁰ and "any competing interests."¹¹

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

¹⁰ *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.

¹¹ *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.

- [56] 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.
- [57] As the submissions and evidence summarised below indicate, some matters described as relevant to public interest also can be considered in relation to other, more specific criteria.
- [58] ***NRA's submissions:*** The NRA submits that the public interest is, generally, an expression of the collective interests of consumers and small, medium and large businesses, as well as some additional stakeholders such as employees. Although (as the Act prescribes) the interests of those groups are dealt with separately, the NRA submits that some items that are particular to this application deserve consideration as part of the public interest. These include:
- (a) greater clarity and consistency of trading hours;
 - (b) ability to redeem Christmas gift cards;
 - (c) planning for unusual circumstances; and
 - (d) lack of significant opposition.
- [59] ***Greater clarity and consistency of trading hours:*** The NRA highlights the evidence of some witnesses called by the MGA to the effect that their trading hours are consistent on all days of the week and allow customers to become familiar with those trading hours.¹² The NRA submits that members of the public in regional areas of Queensland would have a reasonable expectation that major stores will be open for trade on 27 December 2016, having been closed on 25 and 26 December 2016. This application, if successful, would allow consumers and all businesses the same consistency identified as important by the MGA's witnesses.
- [60] On the other hand, the NRA refers to Mr Wright's evidence that in his experience if his store is closed on the day after Boxing Day, people ring the store continually asking what time the store would be open. The NRA considers that forcing retailers to dedicate scarce advertising budget to advising their customers that they will not be servicing them on 27 December 2016 would defy both business sense and basic fairness, particularly as there was some evidence that newspaper advertising is the least effective form of advertising.

¹² See Mr Mahoney at T1:57; Mr Smith at T1:76

- [61] *Ability to redeem Christmas gift cards:* The NRA refers to evidence from its witnesses that customers were eager to redeem gift cards, particularly where those cards had been given as Christmas gifts. Some customers are eager to exchange Christmas gifts which were either unsuitable or unserviceable. The NRA refers to the evidence of the volume of customers and purchases at the Kmart store in Mt Isa on the Boxing Day holiday in 2015 (see [72]) and submits that these results for a single store demonstrate the clear public interest in being able to take advantage of Christmas gifts as close to 25 December as possible.
- [62] *Planning for unusual circumstances:* The NRA submits that variable circumstances in remote areas compound the issues of prolonged closures and operational planning. Issues can arise quickly, and the public expect to be able to have access to essential supplies. To illustrate that submission, the NRA refers to the evidence of Mr Wright¹³ that in 2015 Mt Isa experienced flooding in the surrounding areas which jeopardised (and apparently contaminated) the local water supply. Local stores ran out of water and the flooding made it difficult to transport goods into the area over several days. Consequently, customers were waiting for Woolworths in Mt Isa to open so they could obtain water.
- [63] *Lack of significant opposition:* The NRA submits that its application was opposed by a group of witnesses representing just one of 15 segments of the retail industry, and the vast majority of those witnesses were linked to the Metcash corporation. There was no significant ground swell of opposition from the public, consumers, local governments or any other stakeholder groups. The NRA submits that the reason for this lack of widespread opposition is because trading on Boxing Day is not only an accepted modern convention, but is expected by the public at large.
- [64] *MGA's submissions:* The MGA refers to statements in reasons for decision of a Full Bench of the Commission¹⁴ and Deputy President Swan¹⁵ to the effect that the public interest test is incorporated within, and largely served by taking into consideration, the specific requirements which the Commission must consider under s 26 of the Act (including such other matters as the Commission considers relevant). On that basis, the MGA submits that an application to extend trading hours would be supported by tangible evidence and consultations with the residents, visitors and tourists of the respective areas before any suggestion is made that it is in the interests of these groups to extend the trading hours of the non-exempt stores in the relevant areas. In the MGA's submission, this application is devoid of any such evidence. It describes the probative value of the hearsay, anecdotal, and opinion evidence of NRA witnesses as insubstantial. In relation to the specific matters listed by the NRA as relevant to the public interest, the MGA made the following submissions.

¹³ Mr Wright at T1:8

¹⁴ *National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Another* (TH/2009/3)

¹⁵ *Re: National Retail Association Limited, Union of Employers* [2015] QIRC 044 (TH/2014/9), [82].

- [65] *Greater clarity and consistency of trading hours:* The MGA notes that there was no direct evidence from customers about any confusion as to opening times, or any probative evidence from NRA witnesses that they have consulted with their customers about the alleged confusion. The MGA submits that without probative evidence provided by actual customers who may frequent the non-exempt stores, the sole basis for the NRA's assertion that there is confusion and frustration amongst interstate visitors stems from the different trading hours of select non-exempt stores in other jurisdictions, which is not relevant to this application.¹⁶ Any such confusion could be addressed by stores advertising their trading hours online and at times in local newspapers, enabling prospective visitors and tourists to plan their shopping activities.¹⁷
- [66] The MGA further submits that, if anything, confusion would be created (rather than alleviated) by changing the trading hours of non-exempt stores from a clear and concise regulation that they are closed on public holidays to a more convoluted provision that they are closed on some public holidays but not others pending the most recent order from the Commission.
- [67] *Ability to redeem Christmas gift cards:* The MGA submits that, given the evidence that Christmas gift cards are redeemable for a period of 12 months,¹⁸ it is unnecessary to alter existing trading hours by one day to allow such cards to be used. The same submission is made in relation to the return of unwanted gifts.
- [68] Furthermore, the alleged "customer urgency" to shop on 27 December 2016 using gift vouchers or to return items does not apply to grocery retail. When asked about the relevance of Boxing Day sales to Woolworths, Mr Wright was only able to list a handful of items that were on sale.¹⁹
- [69] *Planning for unusual circumstances:* The MGA submits that there is no evidence to suggest that an extremely unusual event like the water contamination concern in 2015 is likely to occur in 2016. The anomaly of that previous event in Mt Isa does not warrant a departure from existing trading hours for non-exempt stores throughout the area covered by the application in 2016.
- [70] *NRA's reply:* In response to the MGA's submissions, the NRA submits that:
- (a) the best available survey of public opinion is the results from the Boxing Day holiday trading in 2015 (see [72]), which make a compelling case for public support of this application;
 - (b) the evidence shows that the public want to be able to shop on the Boxing Day holiday, and that consumers in regional Queensland clearly understand that 25 and 26 December are "closed" days for the major retailers but also expect that 27 December is an "open" day;
 - (c) consumers (particularly children) do not want to wait many days until they are able to redeem their Christmas gifts or exchange unsuitable gifts;

¹⁶ See *Re: National Retail Association Limited, Union of Employers* [2015] QIRC 204 (TH/2015/1), [192].

¹⁷ See the evidence of Mr Vorrasi T1:15, Mr Winzenberg T1:20-21, Ms Brown T1:24.

¹⁸ See Mr Winzenberg T1:21, Ms Brown T1:25, Mr Wilson T1:31.

¹⁹ Generally Christmas merchandise such as bonbons, wrapping paper, Christmas trees and confectionery.

- (d) the retail sector is broader than simply groceries, and some customers will want to shop for groceries after a lengthy closure while others will want to engage in leisure or department store shopping;
- (e) severe weather events are the norm rather than extremely unlikely in Queensland in summertime, and experience suggests that the situation in Mt Isa could recur there or elsewhere in the state over the coming summer.

Consumers' interest

- [71] 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 December 2016.
- [72] There was no direct evidence from people who are consumers about the implications for them of the application being successful or unsuccessful. Rather, the evidence was indirect, comprising data about consumer purchasing trends. The most relevant evidence of the extent to which consumers might seek to take advantage of trading by non-exempt stores on 27 December 2016 is found in evidence of trading in such stores on the Boxing Day holiday in 2015 as a consequence of the Commission's order in TH/2015/8. Some 38,139 sales transactions were recorded on that day, as shown in the following table:

Transactions	Store
3,351	Target
6,943	Coles
23,491	Woolworths
2,709	Big W
1,645	Kmart
38,139	Total

The numbers of transactions across the Woolworths stores ranged from 553 at Pittsworth to 1926 at Warwick (Exhibit 3, paragraph 36). Data provided by Coles indicates that about 15% of those customers to its five stores travelled 30 minutes or more to make their purchases (Exhibit 5 paragraph 27). The number of transactions across the five Coles stores ranged from 699 at Warwick to 2,545 at Mount Isa (Exhibit 5 paragraph 33).

- [73] Ms Brown gave evidence that customer transactions in the Warwick Big W store represented an increase of 34% on average Monday, whereas the Kingaroy store's customer flow was on a par with an average Monday. In both cases, there was positive customer feedback (Exhibit 7 paragraphs 17).
- [74] According to Mr Vorrasi, customers who shopped in Coles stores on 28 December 2015 in general made more purchases from the fresh areas of the store than on a normal trade day. The stores had a higher proportion of items purchased from the meat, bakery and refrigerated sections of the store. In his view, that indicates that the customers sought goods of this nature because they were not able to stockpile them or because their preference was for fresh food (Exhibit 5 paragraph 35).

- [75] Witnesses called by the MGA gave evidence about how the interests of consumers are met by independent stores such as IGA, FoodWorks and SPAR stores.
- [76] Mr Mason described the range of produce (including fresh produce, delicatessen, meat and bakery products) sold by FoodWorks stores. He said that fresh sales currently form between 30% and 40% of store sales. Independent supermarkets would be able to provide services and products to meet consumers' needs at Christmas, as they do at other times of the year, and at competitive prices on staple items (Exhibit 9 paragraphs 17, 27).
- [77] Ms Lee gave evidence that the FoodWorks store operated by the Co-Operative in Goondiwindi is a full size supermarket and one-stop shop for the all household needs, selling groceries, fruit and vegetables, delicatessen products, fresh meat and fish. In particular, it has capacity to satisfy all of Goondiwindi's grocery needs on 27 December 2016. Consequently, consumers will not be disadvantaged if Coles in Goondiwindi is unable to trade on that day (Exhibit 10 paragraphs 15-16, 20, 26). Furthermore, the FoodWorks store does not operate at capacity on public holidays and so could "easily accommodate more customers" on 27 December 2016 (Exhibit 10 paragraph 30).
- [78] Mr Mahoney gave evidence that the IGA supermarket in Childers (which he and his partner operate) is a fully functional store, 800 square metres in area, with all fresh food departments including meat, deli, produce, bakery and seafood. The supermarket caters for the needs of customers seven days a week from 6.00am until 8.00pm (Exhibit 11 paragraph 4). He stated that it is a misconception to expect that there would be a great number of consumers looking to make grocery purchases after the Christmas break. Rather, most people make a "massive" purchases before Christmas, and a large number of people in the Childers community leave town on holidays after Christmas (Exhibit 11 paragraph 11, 26). In any case, because the IGA is open for long hours over a seven-day period, the public has access to the supermarket and is not disadvantaged (Exhibit 11 paragraph 18).
- [79] Mr Faust contended that the public will have access to stores that can service all their needs on 27 December 2016. In particular, he described his IGA store in Proserpine as being approximately 1800 square metres which, he stated, is comparable to any Coles or Woolworth stores in Queensland. He described it as "competitively priced" with a "vast range of goods" and "outstanding service." He stated, more generally, that IGA stores are located all over Queensland and, although they vary in size, the majority are not small and certainly not convenience stores (Exhibit 12 paragraphs 7, 8).
- [80] Mr Smith gave evidence that his IGA store opens long hours over a seven-day period so that consumers have access to supermarkets at all times to service their needs. Because his store can trade outside the hours when Coles and Woolworths are open, the public is not disadvantaged in any way (Exhibit 13 paragraph 9).
- [81] According to Mr Smith, it is incorrect to think that there would be a great number of consumers wanting to purchase groceries after the Christmas break. Rather, he also stated that most people make a "massive" purchase to stock up before Christmas. He pointed to the sales figures at his IGA store in Pittsworth in the post-Christmas period in 2015 to show that:

26 December (Saturday, Boxing Day) normal trading day, nothing different (public holiday, Woolworths closed) (staff had to be paid double time and a half)

27 December (Sunday) sales were down by 20% against normal Sunday (Woolworths closed)

28 December (Monday, Boxing Day holiday) sales were up 11% against a normal Monday (Woolworths open on public holiday) (staff had to be paid double time and a half)

29 December (Tuesday) sales were normal (Woolworths open)

30 December (Wednesday) sales were normal (Woolworths open)

31 December (Thursday) sales were up by 32% against normal Thursday (New Year's Eve) (Woolworths open until 9.00 pm)

1 January 2016 (Friday) sales were normal for Friday (staff paid double time and a half) (Woolworths closed)

2 January (Saturday) sales were normal for Saturday

3 January (Sunday) sales were down by 10% against a normal Sunday (Woolworths closed) (Exhibit 13 paragraph 7, T1:76-77).

- [82] Mr Smith observed that he had seen a decrease in sales due to the volume of families in his community leaving the area on holidays after Christmas (Exhibit 13 paragraphs 7, 8).
- [83] As will be seen later, these figures are also relevant to the submissions made in relation to the effect on small medium businesses of non-exempt stores opening on days such as 27 December 2016.
- [84] *Price comparisons - exempt and non-exempt stores:* Witnesses gave evidence in relation to the relative expense of grocery products sold by exempt and non-exempt stores.
- [85] Two witnesses called by the NRA gave evidence to the effect that convenience stores and service stations (who are able to trade over the post-Christmas period) offer food and grocery products usually at higher prices than larger supermarkets. However, customers appreciate the savings they make by being able to purchase food at supermarket prices (Exhibit 3 paragraph 32, 41; Exhibit 5 paragraphs 37, 43).
- [86] While that evidence might not be disputed, witnesses called by the MGA were keen to demonstrate why their stores could not and should not be classified as "convenience stores" and to provide evidence that they sell products at comparable prices to the prices at larger supermarkets.

- [87] Mr Mason gave evidence that it is common practice for FoodWorks to check pricing with competitors, and independent stores also benchmark prices on a regular basis. Prices are discounted to a level comparable to Coles or Woolworths. That forms part of the FoodWorks pricing strategy, and assists those stores to be "price competitive on specials on staple items such as meat, deli and produce items" (Exhibit 9 paragraphs 13, 15-17).
- [88] Mr Mahoney stressed that many exempt stores in Queensland with unrestricted trading hours are IGA, FoodWorks and SPAR stores which are well stocked supermarkets, not convenience stores that buy in bulk from a warehouse as well as local suppliers. Stores that are part of the IGA National Price Match Strategy have been pricing competitively with Woolworths, Coles and other retailers for some years. IGA matches the standard sale price of more than 2000 of the major lines across the store on a weekly basis. The IGA Price Match Promise matches the lower of the main prices between Woolworths and Coles stores. His store also regularly does price comparisons on fresh food to ensure that it is well situated in the marketplace and that customers get the best prices possible. He contended that the IGA Price Match Promise makes his store competitive with the chains. Even without that Strategy, he considered that grocery prices of IGA stores are fair and reasonable in comparison to the market (Exhibit 11 paragraphs 19-23).
- [89] Mr Faust described his IGA store as "competitively priced" and IGA stores generally as selling products that are competitive with the big chain stores. The products are purchased in volume from a warehouse, and IGA stores have implemented a Price Match system so that they are able to sell at the same or lower prices than Coles and Woolworths. He stated that his stores are able to compete strongly with the chain stores because "our prices are truly competitive and affordable" (Exhibit 12 paragraphs 7, 8). He acknowledged, however, that there remains perception that independent stores are more expensive. In order to change that perception, they endeavour to emphasise the quality of their personal and service, the value of their range, and their ability to offer customers flexible times to shop, as well as lower or equal prices on products (Exhibit 12 paragraphs 10).
- [90] Mr Smith also contended that his IGA store is not more expensive than Coles or Woolworths. Rather, it is part of the IGA National Price Match Strategy under which IGA matches the standard sell price of over 2000 major lines across the store on a weekly basis. They also regularly do price comparisons on fresh food. He contended that the IGA Price Match Promise "makes us competitive with the chains" (Exhibit 13 paragraph 10).
- [91] Ms Lee described as a "myth" that independent supermarkets are more expensive than Coles. In particular, the FoodWorks store in Goondiwindi operated by the Co-Operative is well supplied with all grocery lines and produce at competitive prices. Indeed, Ms Lee contended that a comparison of items in a shopping basket demonstrated that on an average spend of \$170 the Co-Operative was \$30 cheaper (Exhibit 10 paragraphs 16, 24, 31).
- [92] In a detailed reply to the evidence given by witnesses called by the MGA, Mr Wright stated, in essence, that:

- (a) in their price matching programs, IGA stores are following Coles/Woolworths/Aldi and are not price leaders or price setters in the market (thus indicating the important role played by non-exempt stores in keeping prices lower for the benefit of consumers);
- (b) the fact that some stores match standard sell prices of over 2000 of the major lines across stores on a weekly basis simply confirms that only a percentage of items on sale in those stores (2000 as compared with 20,000 lines in a Woolworths store) are competitively priced for the customers;
- (c) there are identified flaws in the price comparisons of individual items, and a selective "basket" of products is at best an irrelevant price comparison and potentially quite misleading;
- (d) it is fundamentally in the interests of customers to be able to choose to access the different and cheaper products available at major supermarkets when they are undertaking a major shop (Exhibit 4, see also Exhibit 5 paragraph 11).

[93] *NRA's submissions:* The NRA submits that consumers are indisputably the best placed to determine what is in their own interests so far as shopping and consumer choices are concerned. Modern consumers are well informed and discerning, and clearly demonstrate their preferences by attending the store of their choice to make purchases. According to the NRA, consumers particularly expect to be able to do this at times and days recognised as major shopping events or periods.

[94] The NRA refers to and relies on the evidence of sales transactions on the Boxing Day holiday in 2015 (see [72]). It acknowledges that the transaction numbers do not necessarily correspond with customer numbers (given that some customers might have made multiple transactions at one store or have shopped at more than one non-exempt store). However the NRA submits that there would have been many thousands of transactions which involved more than one customer (e.g., a married couple shopping for clothing items could put all their purchases through in one transaction, as could a parent purchasing items for a number of children). On that basis, the NRA submits that it can be reasonably argued that 38,139 is a conservative estimate for the number of consumers who took advantage of being able to shop in non-exempt stores on the Boxing Day holiday in 2015. It submits that that number is a very powerful empirical measure of consumers' interest in being able to shop on that day.

[95] The NRA submits that customers in these regional areas are accustomed to being unable to shop at major retail stores on Christmas Day and Boxing Day. Granting this application would not change the normal pattern of behaviour for shoppers. The evidence just quoted demonstrates that a significant number of shoppers took advantage of the additional trading day in 2015 and would likely do so in 2016. A decision not to grant this application would have a negative impact on shoppers who demonstrated in 2015 that they valued the additional trading day.

- [96] The NRA also submits that non-exempt stores provide customers with access to the widest range of goods at the most affordable prices. Consumers benefit from being able to shop at major stores whose prices are lower than independent grocers, and that access to affordable goods is a very real and highly motivating factor for consumers. To deny customers access to these stores denies choice and adds to the cost of living. The NRA refers to and relies on evidence that there are savings of 50% on a basket of Woolworths-branded goods as opposed to other branded products. It also refers to Mr Wright's evidence that the statements of Mr Mahoney, Mr Faust and Mr Smith indicate that IGA stores voluntarily participate in a price matching program. That evidence indicates that those stores are following prices set by Coles/Woolworths/Aldi and are not price leaders or price setters in the market. If so, those statements admit to the important role played by non-exempt stores in keeping prices lower for the benefit of consumers. The Price Match program that independent stores opt into covers only a limited range of selected merchandise which may have no net benefit to the consumer, depending on their individual preferences. Mr Wright gave evidence that significant further savings are made by customers who purchase Woolworths' "home" branded products. In light of that evidence, the NRA submits it is clearly in the interest of consumers to be able to shop at non-exempt stores when they need, and want, to undertake a major shopping trip.
- [97] Most aspects of the NRA's submission about the public interest (see [58] to [63] above) apply equally, if not more appropriately, to consideration of consumers' interests.
- [98] ***MGA's submissions:*** The MGA submits that:
- (a) there is an absence of any consumer evidence in relation to the application; and
 - (b) the transaction numbers on which the NRA relies (that resulted from the Commission's decision to allow non-exempt stores to trade on the Boxing Day holiday in 2015) confirm that the non-exempt stores made sales following a three-day break in trading in 2015, but do not indicate that a further change should be made in 2016.
- [99] The MGA also submits, in relation to those transaction numbers, that:
- (a) they simply indicate that the non-exempt stores were able to recommence trading successfully after a three day break in 2015 and that those stores are likely to be equally successful following a comparable break in 2016;
 - (b) there were unique circumstances in Mt Isa (with a demand for water at a time of water contamination) which would not be repeated in 2016;
 - (c) excluding the Mt Isa store, there are no other figures to put the transaction figures on 28 December 2015 into context;
 - (d) the figures are not remarkably high, and there is no indication from consumers that they were unable to satisfy their retail needs in 2015;
 - (e) the trading figures for stores at Mt Isa and Emerald on 28 December 2015, when considered relative to other days before and after Christmas, indicate that the three day break did not create any urgency or increased demand in retail, and

that there was no urgency for customers to recommence shopping following the three day break;

- (f) the consumer demand at the Kingaroy Big W on 28 December 2015 was on a par with an average Monday, affirming that a reduction from the prescribed three-day break to a two-day break for non-exempt stores is unnecessary in 2016.

[100] In more overarching terms, the MGA submits that there is no probative evidence before the Commission to indicate that consumers who will be affected by this application would be deprived of the opportunity to shop on 27 December 2016 for most of their retail needs. Further, it submits, no cogent or probative evidence was advanced by the NRA to show consumer dissatisfaction in 2015 to suggest that a change in allowable trading hours is required in 2016.

[101] In response to the NRA's submission about price, the MGA submits that:

- (a) there is no evidence before the Commission to show that products purchased in the non-exempt grocery stores following the three-day break in trading 2015 significantly favoured their "home brand" or cheaper products;
- (b) independent exempt stores also stock a significant number of products that are below, or equal to, the prices found in non-exempt stores;
- (c) in the context of this application, price variances between exempt stores and non-exempt stores should not be overstated as they are of negligible consequence given that the application concerns the extension of trading hours for non-exempt stores for a period of one day (and, if the application is unsuccessful, consumers will have the same retail opportunities as experienced in 2015, which the NRA has broadly indicated were fruitful based on the transaction numbers of the NRA witnesses' respective stores);
- (d) a significant number of independent exempt supermarkets will be operating on 26 and 27 December 2016 in the areas affected by this application, and those stores will offer a range of identical, equivalent and comparable lines of stock to those sold at Coles and Woolworths at equivalent prices, thus mitigating any need to further extend the trading hours of Coles and Woolworths.²⁰

[102] Finally, the MGA submits that the evidence before the Commission does not indicate that the circumstances in 2015 that led to a three-day break in trade were in some way defective or warrant a deviation from the status quo. Indeed, the MGA submits, the NRA did not provide direct consumer evidence and hence the NRA's application unreasonably requests the Commission to make a decision in favour of the application in an evidentiary vacuum where there is no probative consumer evidence. In other words, the NRA has failed to evidence a considerable consumer benefit to sway the Commission in favour of the application.

[103] ***NRA's reply:*** The NRA submits, in response, that:

²⁰ See evidence of Mr Faust (Exhibit 12 paragraphs 7 and 8), Mr Smith (Exhibit 13 paragraph 5).

- (a) it is fanciful and misleading to compare sales in the unmatched pre-Christmas period with activity immediately afterwards;
- (b) the very strong sales activity on 28 December 2015 indicates clear customer demand for the trading day;
- (c) NRA witnesses provided significant details about the number and value of transactions on 28 December 2015 which points very strongly to consumer demand for shopping on that day;
- (d) evidence called by the NRA shows that exempt grocery stores are significantly more expensive than non-exempt stores;
- (e) the MGA is holding food retailing as proxy for the entire retail sector when it is only a small segment.

Business interest (whether small, medium or large)

[104] 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.

[105] The submissions, and the evidence on which they were based, distinguished between small, medium and large businesses. Accordingly, it is appropriate to consider the evidence and submissions in relation to small and medium business interests separately from the evidence and submissions in relation to large business interests.

Small and medium businesses

[106] *Evidence:* There was evidence about how small businesses might be affected if the application is successful.

[107] Mr Mason stated that, excluding convenience stores and other independent stores that likely will be detrimentally affected by this application succeeding, approximately 31 independent supermarkets (which he listed) would be adversely affected as a result of their close proximity to non-exempt stores (Exhibit 9 paragraph 14).

[108] Ms Lee gave evidence that on those days when the chains are closed (e.g. public holidays) the FoodWorks store in Goondiwindi takes more money in sales. Trading on Sundays and public holidays (without Coles) is the store's "life line." However, when Coles was permitted to trade on the two Sundays preceding Christmas, the FoodWorks store had a 33% reduction in sales (approximately \$12,000 a week). In the period immediately following Christmas, they usually have a decrease in sales. They are also paying public holiday rates to employees. Consequently, Ms Lee contends, if Coles were to trade on 27 December 2016 that would adversely affect the Co-Operative's business operations and a combination of factors might lead to them trading at a loss (Exhibit 10 paragraphs 11-14, 21, 32, 38).

[109] According to Mr Mahoney, the IGA store in Childers trades for longer hours than the closest Woolworths in order to remain competitive and to meet its ever increasing costs. It is to the IGA's advantage to be open when Woolworths is closed. The IGA earns less profit on public holidays throughout the year even though Woolworths is closed. When Woolworths was permitted to trade on the two Sundays before Christmas in 2015, the IGA experienced a loss of one third of its normal profits on 13 December 2015, and half of its profits on 20 December 2015, when compared to a normal trading Sunday. The IGA store would "experience significant losses" if the much larger Woolworths store, approximately 500 metres away, were permitted to trade on 27 December 2016. He contended that is not in the interests of small businesses in Childers and other regional areas to allow non-exempt stores such as Woolworths to trade on that day or any public holiday. If the IGA store continued to experience such losses which flow from unrestricted trading hours, they might have to consider closing store (Exhibit 11 paragraphs 6-10).

[110] However, Mr Mahoney also gave evidence that even when Woolworths is open, people will also shop in his store. Both stores have equivalent prices, but people can purchase branded name products at his store rather than the Woolworths "home brand."

[111] Mr Mahoney also gave evidence that when stores in Bundaberg were granted unrestricted trading hours in or around 2013, the profits of IGA in Childers fell by 10% to 15% because many local people started to travel to retailers at Bundaberg. Those people also do supermarket shopping while in Bundaberg (Exhibit 11 paragraphs 10).

[112] He also reported that between 26 December 2015 and 4 January 2016, on the days when Woolworths in Childers was closed, the Childers IGA's sales increased by an average of 21% when compared to a normal trading period. However, on the days when Woolworths was open, the Childers IGA's sales were increased by an average of 10% when compared to a normal trading period. Mr Mahoney considered that the 11% decrease in sales was "wholly attributable" to Woolworths being open for trade on those days (Exhibit 11 paragraph 12). He also suggested that it was not clear whether the store makes a profit during this period, given the high wages paid to compensate staff are working on public holidays. Accordingly, he contended that if Woolworths was permitted to trade on 27 December 2016, the Childers IGA would have to consider rostering fewer employees during the Christmas period and reduce costs in other areas (such as reducing products from local suppliers) to assist the business cash flow (Exhibit 11 paragraph 13).

[113] Mr Faust gave evidence that although the serious consequences anticipated by Coles and Woolworths if the application is unsuccessful "simply do not exist," a successful application would have a "detrimental impact on small business operators" (Exhibit 12 paragraphs 17).

[114] Consistently with those witnesses, Mr Smith gave evidence that:

- (a) Woolworths is the main rival to his IGA store in Pittsworth;
- (b) his store does not have the same market share as Woolworths;
- (c) he needs to operate at times when the non-exempt stores cannot trade in order to remain sustainable and competitive;

(d) on the days when chains are closed (e.g. public holidays) his store takes more money in sales (but pays high wages to compensate staff for working on those days and that affects whether they make a profit);

(e) his business would be adversely affected if non-exempt stores could trade on 27 December 2016 (Exhibit 13 paragraphs 6, 9, 15).

[115] However, his evidence about the volume of trade in his store in the period from 26 December 2015 until 3 January 2016 (see [81]) seems to support the proposition that his business is not adversely affected by Woolworths trading during that period. Rather, it suggests that (irrespective of whether there is a causative link) business at his IGA store increases when Woolworths is trading. When asked whether for that period his trading was up or normal on days when Woolworths was open, and normal or worse when Woolworths was closed, he said "Yes, that's correct." Mr Smith reiterated that he had to pay his staff double and a half on the public holidays. He also stated that Woolworths is about 450 metres from his store, and people drive (rather than walk) between the stores.

[116] *Possible benefits for small business if large anchor tenant of shopping centre is open:* Some witnesses called by the NRA suggested that where a non-exempt anchor tenant is permitted to trade, other smaller businesses at a shopping centre would benefit from the foot traffic generated by the larger store. Conversely, restricting the hours that large anchor tenant retail businesses can operate has a negative impact on local business, particularly food service providers that operate in areas with a high proportion of tourists and travellers (See Exhibit 3 paragraph 46, Exhibit 7 paragraph 21, Exhibit 8 paragraph 11, 20-21).

[117] Mr Wright noted that on 28 December 2015 Woolworths attracted more than 23,000 customers to regional shopping centres. On that basis he advanced the "very logical conclusion" that small businesses such as cafes and restaurants would also have enjoyed additional customer traffic as a result. These businesses rely on non-exempt stores attracting customers "to give life and vibrancy to main streets, shopping centres and food service businesses in particular" (Exhibit 3 paragraph 46). In his oral evidence, Mr Wright observed that, although such stores do not have to trade on those days, those that choose to do so "have business on those days."

[118] Ms Brown suggested that because the Commission's decision granting trade for 28 December 2015 was made in the last week of November 2015, in some cases this did not allow the regional shopping centres enough time to alter advertising and promotional advertising. As a result, a limited number of tenants in the Warwick shopping centre opened for trade. At least 25% of the exempt tenants in the Kingaroy shopping centre opened for trade (Exhibit 7 paragraph 22).

[119] Mr Wilson also noted that, although Kmart in Mt Isa experienced better than expected customer support on 28 December 2015, the limited time frames for the store and shopping centre to promote that opening limited the marketing of the store's trading hours. The centre was quite busy, despite the specialty stores not trading on the day (Exhibit 8 paragraphs 15, 16).

- [120] Mr Mahoney cautioned against accepting the argument advanced by NRA witnesses that the extension of trading hours to non-exempt stores would assist other retail outlets in shopping centres increase their business as a consequence of additional patronage of those stores. He suggested, on the basis of untested information from store owners close to Woolworths in Childers, that small businesses would be closed over the Christmas period because of the effect of high penalty rates. That decision is unrelated to whether Woolworths is open for trade (Exhibit 11 paragraphs 17).
- [121] Ms Lee also noted that Coles in Goondiwindi is a "stand-alone store" and does not operate inside a shopping centre as the anchor tenant. Neither does Target (Exhibit 10 paragraph 18).
- [122] Mr Mason was critical of statements that there are operational benefits from extended trading because they ignore the impact (operational and financial) on small business, and there was no evidence that small businesses such as cafes and restaurants would enjoy additional customer traffic as a result (Exhibit 9 paragraph 21).
- [123] ***NRA's submissions:*** The NRA submits that, although there are some 15 categories of retail measured by the Australian Bureau of Statistics, objection to this application was centred on businesses in the food and grocery sector supplied by the Metcash Corporation. Most of the evidence opposing the application was directed at a concern about increased competition provided by the longer trading hours for non-exempt supermarkets. There was little evidence opposing the NRA application in so far as it related to non-exempt stores other than supermarkets.
- [124] The NRA criticises evidence from witnesses called by the MGA who predicted the likely adverse impact on their businesses from non-exempt stores being allowed to trade for an additional day, consistently with the orders sought by this application. Indeed, the NRA went so far as to suggest that some of the evidence "stretches credibility," with claims that the very viability businesses could be threatened by allowing non-exempt stores to trade on a single day (which, the NRA notes would be a normal trading day in most years). There was a general absence of empirical data outlining the impact on those businesses of the granting of the Boxing Day holiday trading on 28 December 2015 (as a result of the decision in TH/2015/8), even though the witnesses called by the MGA in the present proceedings were largely the same as those who appeared in the previous matter and despite the Commission inviting parties to provide such information.
- [125] The witness statement of Mr Smith provided the only statistical data in MGA witness statements relating specifically to the post-Christmas trading period in 2015. That evidence indicated that his store performed on par or better when non-exempt stores were trading, and on par or worse when they were closed. The NRA submits that the only logical conclusion to be drawn from Mr Smith's evidence is that all retailers benefit from increased consumer activity, driven by shopping choice, and suffer when major stores are closed. Accordingly, based on Mr Smith's evidence, the argument that extended trading hours on 27 December 2016 will cause a significant reduction in sales for independent stores cannot be sustained.

[126] Further, the NRA submits, the Commission must also consider the interests of other categories of small businesses in shopping centres or on high streets who rely for their success on the foot traffic generated by large retailers. In some instances, those small businesses rely on large retailers to share the cost of opening shopping centres. Those businesses are not generally in direct competition with the anchor tenants in their centres, but rely on the major stores to attract shoppers to the centre.²¹ If the non-exempt stores are closed, traffic volumes fall while smaller tenants are forced to absorb the centre operating costs. The net result is that these small businesses cannot trade profitably. Consequently, the NRA submits, there is a small business community that suffers financial harm as a result of laws supposedly in place to protect them.

[127] The NRA also submits that if the application is granted, exempt stores and independent grocers would trade unopposed for two days (25 and 26 December 2016). That is the normal state of affairs for regional areas at this time of year. Granting the application would represent no major setback or disadvantages of those retailers who normally enjoy two "unopposed" trading days.

[128] **MGA's submissions:** The MGA notes that the NRA led no direct evidence to indicate that any extension of trading hours for non-exempt stores would assist small business interests and made no reasonable indication that it consulted with any small business retailers within the affected areas. The MGA submits that the lack of probative consultation or communication between the NRA and other local small businesses in the areas concerned with this application affirms that the NRA does not have the capacity or authority to speak on behalf of the small businesses affected by this application. That was confirmed by each NRA witness who indicated that they were giving evidence only on behalf of their respective company.

[129] The MGA notes that the NRA's limited empirical evidence focused solely on the sales transactions of their witnesses' stores. Beyond those transaction numbers, the evidence provided by the NRA fails to acknowledge the nuances of the specific areas affected by the application. It had not been shown that there are special circumstances of a sufficiently significant nature in 2016 to depart from the identical scenario experienced in 2015 which NRA witnesses confirmed was broadly successful.

[130] By contrast, the MGA submits that it presented the Commission with the only probative evidence concerning small businesses. That evidence included the witness statements of Ms Lee (Exhibit 10), Mr Mahoney (Exhibit 11), Mr Faust (Exhibit 12), Mr Smith (Exhibit 14) and Mr Mason (Exhibit 9) representing the broader independent grocery industry. The evidence was to the effect that their businesses would suffer detriment if non-exempt stores extended their trade in 2016.

²¹ See witness statement of Mr Winzenberg, Exhibit [REDACTED], para 14.

[131] The MGA states that independent retail stores operate on smaller margins than the large non-exempt stores who appeared before the Commission. It submits that, regardless of whether the trading day on 27 December 2016 is profitable, any loss of income that affects those smaller margins can be detrimental to the store and its employees. It describes evidence concerning those losses as "alarming." In particular, it quotes evidence from Mr Mahoney (Exhibit 11) to the effect that when Woolworths in Childers was permitted to trade on the two Sundays before Christmas in 2015, the local IGA store experienced a loss of one third of normal profits on 13 December and one half of profits on 20 December when compared with a normal trading Sunday. Mr Mahoney said he believed that a consequence of the present application being granted would have "the same detrimental impact, if not worse," on Childers IGA and other small-business operators.

[132] In response to the NRA's submission that other small businesses (such as those in shopping centres or on high streets) might be affected by this application, the MGA submits that the NRA has failed to provide any probative evidence on behalf of those businesses. In the absence of such evidence, the NRA and its witnesses were in no position to comment on the interests of small business, and any suggestion that they represent shared interests in relation to this application was unsubstantiated.

[133] By contrast, the only probative evidence concerning small business interests was led by the MGA. It submits that the evidence would lead the Commission to conclude that all small businesses before the Commission unequivocally oppose the application because they and numerous small businesses across the affected area would suffer "a significant level of detriment" if the application is successful.

[134] The MGA made essentially the same submissions in relation to medium business interest. It pointed out that the NRA led no evidence to indicate that any extension of trading hours for non-exempt stores would assist medium business interests. Indeed, it suggested that the evidence indicated a lack of desire of small or medium size businesses to extend trading hours. In particular, the MGA refers to the evidence of Ms Brown that following the decision in TH/8/2015 approximately 75% of exempt tenants in the Kingaroy Shopping Centre remained closed for trade on 28 December 2015 (Exhibit 7 paragraph 22), and the similar evidence of Mr Wilson that all of the specialty stores in the shopping centre at Mt Isa did not trade on 28 December 2015 when Kmart was open (Exhibit 8 paragraph 16).

[135] The MGA submits that, by limiting its evidence to focus on large business interests, the NRA has provided insufficient evidence to support the order that the NRA seeks by the present application, that is, to depart from the identical scenario experienced in 2015 which the NRA witnesses confirmed was broadly successful.

[136] Further, the MGA submits that it provided probative first-hand evidence concerning the harm that would be caused to small and medium businesses across the affected area should the application be successful.

[137] ***NRA's reply:*** The NRA submitted in reply that:

- (a) the NRA is Australia's largest and most diverse retail industry association with many thousands of small businesses across the country with which it consults daily;

- (b) rather than providing evidence as to the detriment that their small businesses would suffer, the MGA's witnesses hypothesised about what they believe might be the impact of such a ruling but (other than Mr Smith) did not provide any empirical data to support these hypotheses (despite having the example on 28 December 2015 of the actual impact on the business of the additional trading day);
- (c) it rejects the claim that independent stores operate on smaller margins but, in any case, no such evidence was put before the Commission;
- (d) the evidence that 25% of businesses in Kingaroy traded on the corresponding day in 2015 shows a level of economic activity that would not have occurred without the Commission's ruling in TH/2015/8;
- (e) there is no better way to judge the needs and wants of each individual community, as well as the region generally, than by what consumers have done in the past were offered the opportunity;
- (f) those needs and wants are reflected in the comprehensive transaction numbers provided to the Commission, which deal with every location in the affected region;
- (g) by contrast, the MGA has not provided evidence of harm that will be caused (e.g. any turnover figures from Boxing Day 2015 that could have supported its claims of such harm).

Large business

[138] **Evidence:** The evidence called by the NRA had both a positive and a negative aspect. It sought to show the benefits to large businesses of trading on 27 December 2016 and the detriment to such businesses (particularly those dealing in fresh food) of being closed for three consecutive days.

[139] Mr Wright listed among the benefits that big business would experience if the application is successful: reduced congestion at store registers by effecting some redistribution of demand from a three-day closure, a more efficient use of trolleys, a generally improved service environment, smoothing out peaks in scheduled deliveries and the store replenishment process, a more efficient and safe working environment for staff leading to a better shopping environment the customers, and better efficiencies of energy usage (because refrigeration and air conditioning systems currently must continue to run when the store is closed) which provides a better economy of scale (Exhibit 3 paragraph 40, 43-44).

[140] Mr Vorrasi suggested that granting the application would promote competition, and enhance productivity and increased choice and value to consumers (Exhibit 5 paragraph 41).

- [141] On the other hand, Mr Wilson suggested that the closure of the non-exempt retailers on holidays would not only result in lost sales but also would undermine customer loyalty and would mean that some customers would simply choose not to shop (Exhibit 8 paragraph 12).
- [142] Ms Brown confirmed that, if the application is successful, the management of each Big W store would decide how many of those hours they would open and how many staff they would employ.
- [143] *Boxing Day sales:* Although much of the evidence called by the NRA (and most of the evidence called by the MGA) related to grocery shopping, some witnesses called by the NRA referred to the significance of Boxing Day sales for their businesses.
- [144] Mr Winzenberg described Boxing Day sales trade for Target as "very popular and part of an annual event." He contended that customers "love the excitement generated by the event and the prospect of securing a great bargain." The growth in Boxing Day sales has outpaced the growth in customer volumes, demonstrating the increasing importance of Boxing Day to Target. In the last week of December, the company's stores have historically done approximately three to four times a normal week's trade (Exhibit 6 paragraphs 23, 25). However he also noted that "escape expenditure is a real threat to regional Queensland" where adjacent areas (such as Rockhampton, Townsville and Toowoomba) trade over the Christmas and Boxing Day period, weakening the performance of non-exempt Target stores in the area covered by this application. "Escape expenditure means that fewer employees would be employed in retail, less money will be paid to employees in wages, and the overall local economy will suffer" (Exhibit 6 paragraphs 26-27).
- [145] Ms Brown gave evidence that Boxing Day sales form "an important element of Big W's overall business strategy," enabling the company to clear seasonal merchandise and sell remaining Christmas stock that would otherwise suffer significant loss of profit. She contended that when Big W is prevented from trading, some of the sales activity that would normally take place in a public holiday is "simply lost." In other cases, tourists do not stop in town and locals go out of town for their Boxing Day shopping (Exhibit 7 paragraph 23).
- [146] According to Mr Wilson (and in language reminiscent of Mr Winzenberg's evidence), Boxing Day sales trade "proves to be very popular and part of an annual event." Customers enjoy "the excitement generated by the event and the prospect of securing a great bargain." He stated that the growth in Boxing Day sales has outpaced the growth in customer volumes, demonstrating the increasing importance of Boxing Day sales to Kmart's customers. He also suggested that, if the application is unsuccessful, the Mount Isa Kmart store would be "overtrading" on 28 December 2016 (i.e., it would trade "well above" its normal trading pattern). That would put it under "immense pressure" to cope with the business on the day, and it would be "challenging for the store team."

- [147] Mr Wright gave written evidence that Boxing Day sales trading is not limited to acquiring supplies such as food products. For a large part, it is about annual post-Christmas sales where families seek to purchase discounted goods including clothing, footwear, cosmetics, white goods and furniture (Exhibit 3 paragraph 38). When asked to what extent Woolworths stores have Boxing Day sales, he stated that "generally all our Christmas merchandise goes to 50 per cent off on Boxing Day." Woolworths sells such items as bonbons, wrapping paper, Christmas trees and confectionery, and advertises that stock on Boxing Day.
- [148] There was also evidence about the significantly increased volume of transactions immediately after Christmas in relation to the redeeming of gift vouchers and the return of unwanted or unsuitable items (See Exhibit 6 paragraph 24, Exhibit 7 paragraph 15, Exhibit 8 paragraphs 17-19).
- [149] In more general terms, Mr Wilson gave evidence that the Christmas and post-Christmas trading period is "extremely important" to Kmart and its ability to sustain employment levels. A high proportion of the company's annual sales are achieved during December and early January, and there is a strong focus on planning events and marketing throughout December. The number of transactions processed each day increases steadily during December until the post-Christmas sales when transaction levels "peak exponentially" (Exhibit 8 paragraph 23).
- [150] Mr Mason also noted that the Commission's decision in TH/2015/8 provided for a three-day closure. Mr Vorrasi provided evidence to show that sales made in Coles stores after that break were quite successful. Should this application be unsuccessful, there would be a repetition of the three-day break experienced in 2015 and arguably Coles could anticipate a demand for access to those stores which would be as successful as in 2015 (Exhibit 9 paragraph 19).
- [151] *Potential stock wastage:* Some witnesses gave evidence about the potential for food to be wasted if non-exempt stores could not trade for three consecutive days.
- [152] According to Mr Wright, Woolworths experiences "significant issues" with maintaining the freshness of produce and ensuring supply when stores are closed for a lengthy period of time. The fresh food supply chain to supermarkets is complex and fast moving. Because all of the stores in this application area are remote, it can take days rather than hours for stock to arrive at the store from central distribution centres. Replenishing the stores after a three-day break poses challenges for team members and suppliers. In those circumstances in 2015, stock management was the cause of "significant expense and stress" for personnel. Nonetheless, Woolworths was able to "generally deliver outstanding results" for its customers (Exhibit 3 paragraphs 37, 47).
- [153] Mr Vorrasi gave very similar evidence on behalf of Coles. He also noted that customers could face significant delays early in the first day after the break until the team replenishes all fresh produce because produce would have been stripped and removed before the end of trade on Christmas Eve (Exhibit 5 paragraphs 36, 38).

[154] Mr Wright illustrated the potential loss Woolworths would face if his store was closed for three consecutive days. He stated that red meat which was cut on one day would be sold at full price for the next two days and cleared on the third day. Consequently, any meat cut on 24 December 2016 would have to be cleared that day. Any remaining meat would have to be dumped on the third day. Woolworths would have to start afresh on the next trading day. Because most stores would only have two qualified tradespeople to cut the meat, it would be physically impossible to prepare, and hence Woolworths would not provide an adequate service to its customers.

[155] On the other hand, Mr Smith gave evidence, drawing on his long employment experience in supermarkets (including 18 years at Woolworths in various management and support roles), that there were many occasions where stock needed to be replaced after a public holiday. In his experience, stores that have proper staff training and supervision are prepared for the situation. They are shipping smaller quantities more often. Automated ordering systems should ensure there is no over ordering, and daily deliveries enable stores to have fresh stock when required. In his opinion, it is an exaggeration to claim that the law should be changed because food will perish after a three-day break (Exhibit 13 paragraphs 4, 12-14, T1:79).

[156] Drawing on his experience of many years as a retailer, Mr Faust described as "very strange" reference by the major retailers to the difficulties of replenishing stock after a three-day break, the challenges in relation to the shelf life of goods, and the cost to remove or reduce the price of goods that are out of date. He contended that any good retailer orders stock according to the likely trading in the store (Exhibit 12 paragraph 11). Coles and Woolworths are experienced retailers and if they are closed for three days (as they have been in the past) they will not suffer any significant financial loss (Exhibit 12 paragraphs 17).

[157] Mr Mahoney gave evidence to the same effect as Mr Smith and Mr Faust adding that, as Rocklea markets near Brisbane will not reopen until Wednesday, 28 December 2016, Woolworths would be unable to order a fresh stock until then. In his opinion, the replacement of stock in the stores is not a major issue (Exhibit 11 paragraphs 28-30).

[158] Mr Mason simply noted that any delays in a non-exempt store while it replenishes produce are purely operational, and are effectively alleviated by the availability of produce at independent stores (Exhibit 9 paragraph 24).

[159] ***NRA's submissions:*** The NRA submits that:

- (a) it is clearly in the interests of large businesses to be able to trade when they believe their customers want to shop; and
- (b) it is self-evident that there is greater return on capital, more efficient energy use and increased goodwill among customers from being able to open when there is a consumer demand.

[160] Most of the NRA's submission focused on the challenges for stock management and shelf-life created by an enforced three-day closure. The context for those concerns is the modern supply chain which is designed to supply stores with smaller volumes of stock more often, rather than to store stock in stock rooms. According to the NRA, modern stores are designed with virtually no stock rooms. The challenge is to provide customers with a range of fresh goods during the available span of hours. Regional stores faced with prolonged closures have additional pressures because they are far away from distribution centres.

[161] More specifically, the NRA refers to the large volumes of stock that need to be stored to recover from Christmas Eve and prepare for the post-Christmas consumer demand. The additional stock needed to cater for the busiest time of the year can cause congestion in stock rooms, as stores are no longer built to carry several days of stock cover. The NRA refers particularly to the evidence of Mr Wright in relation to the provision, and potential loss, of fresh red meat over that period. It submits that witnesses called by the MGA (particularly Mr Mason and Mr Faust) were unfamiliar with these operational issues facing large businesses, and their evidence should be discounted accordingly.

[162] In the NRA's submission, the evidence demonstrates the clear financial and logistical impact on non-exempt retailers flowing from a three-day closure and supports the case for this application to be granted.

[163] **MGA's submissions:** The MGA submits that the material before the Commission:

- (a) does not indicate that the broadening of allowable trading hours for non-exempt stores would create an increase in discretionary spending;
- (b) confirms that an increase in the allowable trading hours for non-exempt stores will only redistribute existing spending patterns by spreading out consumer demand;
- (c) shows that a significant proportion of sales are redistributed away from exempt stores towards non-exempt stores.

The MGA also submits that, regardless of whether 27 December 2016 has potential to become a positive trading day for non-exempt stores, the value of such evidence remains negligible. The witnesses called by the NRA entered the Queensland retail market on the understanding that their trading hours were limited on public holidays and it is unrealistic for them to expect the Commission to change their allowable trading hours because they desire that change, particularly in the absence of evidence to suggest that existing trading hours are inadequate. The MGA also points to an absence of evidence about which (if any) of the non-exempt stores have limited or no stock rooms, and the implications of trading on 27 December 2016 for a safer working environment and better energy efficiencies.

[164] Accordingly, the MGA submits, the necessity for a change to the existing trading hours is not clearly articulated and the insinuations of significant gains for non-exempt stores are tenuous. There is insufficient probative evidence to indicate that small, medium or large business interests will be improved with the expansion of trading hours for non-exempt stores on 27 December 2016.

[165] ***NRA's reply:*** The NRA submits that:

- (a) if the consequence of allowing non-exempt stores to trade on 27 December 2016 would be simply a redistribution of sales that would occur later, any decision to trade on that day would harm only the non-exempt stores by drawing forward trade that would otherwise occur later, and would have no negative impact on MGA members - consistently with the NRA's case that shoppers are looking for different things from different retailers, and with Mr Smith's evidence that his sales were not negatively affected by Woolworths trading;
- (b) MGA witnesses enter the market knowing that trading hours may be varied by the Commission under the same legislation that regulates trading hours;
- (c) the model of fast-moving consumer goods is not a shortcoming but allows the companies represented by the NRA's witnesses to provide the widest range of the most competitive prices for their customers and to compete with international discounting retailers, and customers should not be disadvantaged by a regulatory regime that has not kept pace with the changing nature of global retailing.

The alleviation of traffic congestion

[166] ***Evidence:*** There was almost no direct evidence about traffic congestion in relation to stores in the area covered by this application.

[167] To the extent that there was evidence, Ms Lee stated that congestion is not a problem within Goondiwindi during the week or on weekends. The Co-Operative provides a full carpark adjacent to its building, and takes the benefit of other car parks nearby (Exhibit 10 paragraphs 34).

[168] ***NRA's submissions:*** The NRA refers to witnesses it called who gave evidence of high transaction numbers in the Boxing Day trading period (e.g. for restocking grocery items, accessing the traditional Boxing Day sales, exchanging or returning items such as Christmas gifts, and spending the proceeds of gift cards). The NRA also contends that the Christmas trading period generates heavy traffic flows in and out of these regional towns. As the NRA acknowledges, the level of traffic congestion (both for traffic in stores and vehicular traffic in and around car parks) will vary from county town and between different shopping centres. However, the NRA submits, it is undeniable logic that allowing non-exempt stores to trade for one additional day in a hectic retail period would spread out the consumer demand, and reduce traffic congestion for vehicles and for pedestrians inside shopping centres.

[169] ***MGA's submissions:*** The MGA submits that there is no evidence before the Commission that traffic congestion is a matter of concern in any of the areas affected by this application. Furthermore, the MGA observes that the graph provided by Mr Wright in relation to customer demand shows that sales following Christmas Day in 2015 were significantly lower than the store's customer capacity before Christmas. Such post-Christmas customer demand would therefore be unlikely to cause congestion. Accordingly, the MGA submits that the Commission should conclude that existing infrastructure and trading hours are sufficient to manage the current traffic flows.

[170] **Consideration:** In my view, s 26(f) refers to the alleviation of motor vehicle traffic congestion. There is no evidence that traffic congestion will be a particular issue in the affected towns on shopping days in the week after Christmas, or that any such congestion would be reduced significantly in any or all of the towns affected if this application is successful.

The likely impact of the order on employment

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

- (a) additional employment (and hence income earning) opportunities for some staff employed by non-exempt stores on 27 December 2016;
- (b) potentially reduced employment at exempt stores on 27 December 2016; and
- (c) the voluntary nature of employment at non-exempt stores on 27 December 2016.

[172] **Extent of additional employment opportunities:** Evidence was given on behalf of major retailers about the extent of additional employment in their stores on 28 December 2015 as a consequence of the Commission's decision in TH/2015/8, and the possible extent of additional working hours that would be available to their employees if the application is successful. In particular:

- (a) in 2015 Big W estimated that it would engage team members for an additional 80 to 100 hours of employment per day per store and exceeded that in both stores (Exhibit 7, paras 25, 26);
- (b) Coles estimated that in 2015 its stores would provide an average of 100 hours per day per store across the state, and that was exceeded in all five stores at an average of 224 hours per store (and a total of 1,120 hours); (Exhibit 5 para 46);
- (c) in 2015 Kmart estimated that it would engage team members for an additional 80 to 100 hours of employment per day, but reached 228.5 hours (Exhibit 8, paras 25, 26);
- (d) in 2015 Target engaged team members for an average of additional 26.5 hours of employment per day per store for its 11 stores (Exhibit 6 paras 31, 32);
- (e) Woolworths estimated that in 2015 it would engage team members for an additional 100 hours of employment per day per store and the average was 246 hours per store, and Woolworths estimates that if this application succeeds there will be potentially 200 hours per store per day across the region (Exhibit 3 paragraphs 52-55).

[173] The following table summarises the data provided by those witnesses and demonstrates the impact on employment of the Orders made by the Commission in TH/2015/8.

Store	Work hours
Big W	293
Coles	1,119
Kmart	228
Target	291
Woolworths	4,421
Total:	6,342

[174] The NRA contended that the capacity to earn additional income at this time of the year is attractive to some of their employees, including because penalty rates of pay are higher than usual rates.

[175] 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 December 2016.

[176] However, Mr Faust stated that the full-time and part-time employees of Coles and Woolworths who do not work on 27 December 2016 will still receive payment for those days under the relevant certified agreement. Casual staff might not be employed, but it is unlikely that they would be employed even if the application is successful because Coles and Woolworths use self-service checkouts to operate the business. As it is unlikely that stock will be arriving in the stores over the Christmas break, other areas are unlikely to need additional staff (Exhibit 12 paragraph 12). In his opinion, many employees would enjoy the time off following Christmas (Exhibit 12 paragraph 16).

[177] Mr Mahoney gave evidence to the same effect (Exhibit 11 paragraphs 31-32).

[178] Mr Mason also suggested that the one day of additional employment at non-exempt stores would be offset by the roster over time, because each store will still be required to meet their corporate KPIs of wage percentage. Any additional hours (and any additional impact of income earned) will be absorbed elsewhere in store rosters (Exhibit 9 paragraph 22).

[179] *Extent of potentially reduced employment opportunities:* Some witnesses called by the MGA suggested that if non-exempt stores trade on 27 December 2016 the exempt stores will lose trade and will employ fewer people, thus offsetting the additional employment offered by non-exempt stores.

[180] Mr Mason observed, in general terms, that the continued extension of trading hours will place unfair pressure on family-run businesses/independent supermarkets, and will gradually erode their ability to compete so that job losses will result (Exhibit 9 paragraph 5).

[181] Ms Lee described the 67 staff of the Goondiwindi Co-Operative Ltd as mostly full-time and part-time employees, some of whom had been with the company for 15 years or more. Trading on Sundays and public holidays (without Coles) is the store's "life line." She expressed the view that if non-exempt stores (such as Coles) continue to increase their trading hours, even by one or two days, that diminishes the Co-Operative's ability to support and retain staff (Exhibit 10 paragraphs 27, 32).

[182] According to Ms Lee, if this application is successful, the Co-Operative would expect a reduction of 30% in its trade on 27 December 2016 and would most certainly see a reduction in staff numbers on that day. She contended that such a reduction would offset any alleged increase in available hours that would be provided by Coles on the same night (Exhibit 10 paragraph 28).

[183] Mr Mahoney pointed out that if non-exempt stores are closed on the public holiday, most permanent employees would be entitled to receive pay in lieu of working on a public holiday and hence would not suffer any significant loss. Employees such as casuals might miss out on one day's work, but that work is not guaranteed. He and his partner operate the Childers IGA for extended trading hours and on public holidays to remain competitive (Exhibit 11 paragraphs 31, 32). Mr Faust suggested that Woolworths in Proserpine would cope with a three days break in trading, and many employees would enjoy the time away from work (Exhibit 12 paragraph 16).

[184] *Voluntary nature of employment:* Written and oral evidence was given on behalf of Coles, Woolworths, Kmart, Big W and Target 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;
- (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.

[185] *NRA's submission:* The NRA notes that witnesses called by it in TH/2015/8 had all met or exceeded the employment projections made in the evidence in the matter. Accordingly, it is submitted, there is no reason to believe those figures would not be matched or bettered if the present application is successful.

[186] The NRA submits that on 28 December 2015, more than a quarter of a million dollars was paid to employees in stores operated by the non-exempt retailers. That was calculated on the "conservative" figure of \$40 per hour as the average wage rate for the day. In addition to the wages paid in these regional economies, the NRA suggests that there was flow-on employment (e.g. shopping centre managers, cleaners and security personnel).

[187] In response to statements by some MGA witnesses that they will be forced to reduce the hours of their own personnel if the application is successful, the NRA contends that:

- (a) no empirical data was supplied in their witness statements to demonstrate the actual impact of the additional day of trading granted in TH/2015/8;
- (b) there was no empirical evidence of any staff reductions in the stores of MGA witnesses on 28 December 2015;
- (c) the evidence shows significant gains in in-store employment at non-exempt stores, and does not take into account additional work created in large shopping centres and in smaller businesses that opened, such as the 25% in Kingaroy cited by the MGA; and
- (d) even if some stores reduce employment hours on 27 December 2016, the likely impact of this application succeeding would be a significant net increase in employment.

[188] The NRA notes that all non-exempt stores appearing as witnesses in this matter gave undertakings to the Commission that team members would not be compelled to work should the application be successful. Witnesses also indicated that their businesses experienced no difficulty in filling the available roster places in the Boxing Day holiday in 2015.

[189] The NRA also submits that a decision not to grant this application would have a negative impact on employees who demonstrated in 2015 that they value the additional trading day.

[190] **MGA's submission:** The MGA submits that any alleged positive impact on employment that might flow from the granting of the application would be neutralised by the detriment to employment opportunities in independent stores across the region. As non-exempt stores engage employees, independent stores (such as the 31 stores listed by Mr Mason) would be forced to decrease staff numbers to reflect the losses in sales. The total number of staff reductions across at least those 31 stores would mitigate any significant gains in the order of employment.

[191] Accordingly, the MGA submits that, in light of:

- (a) the detriment that existing staff in exempt retailers will suffer if the application was successful; and
- (a) the negligible gains in the order of employment that may ensue,

there is insufficient evidence before the Commission to warrant a deviation from existing trading hours.

[192] **SDA's submission:** The SDA gave conditional support to the application on the basis of such hours being voluntary for staff of affected stores. In its written submission, the SDA noted that each of the witnesses who were called by the NRA to represent companies²² made oral and/or written statements to the effect that the additional hours would be voluntary for existing employees.

²² Namely Ms Brown for Big W, Mr Vorassi for Coles Queensland, Mr Wilson for Kmart, Mr Winzenberg for Target, and Mr Wright for Woolworths.

[193] The SDA, in reliance on the undertakings given by witnesses called by the NRA, does not oppose a grant of the application on the basis that such hours remain voluntary for all affected staff.

[194] Having noted the basis on which the SDA supports the application, the NRA submits that the application on balance meets the needs of the broader retail industry and would provide significant benefits to workers who were able to access additional work if they chose to do so.

[195] *AWUEQ*: The AWUEQ did not expressly support or oppose the application.

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

[196] In accordance with the Directions Order of the Deputy Industrial Registrar dated 27 April 2016, the applicant served a copy of the application on the Local Government Association of Queensland Ltd and specified Councils, as well as specified unions (Exhibit 1). No local government applied for leave to appear and be heard.

[197] So far as the Commission is aware, only one council formally expressed a view to the Commission in relation to the application. By letter addressed to the Deputy Industrial Registrar of the Commission dated 18 May 2016 the Central Highlands Regional Council advised that it supports the application (Exhibit 14).

[198] *NRA's submissions*: The NRA notes that:

- (a) only one council responded to the Registry and indicated its support for the application;
- (b) a response was sent by the Charters Towers Regional Council directly to the NRA (but that was not in evidence in these proceedings);
- (c) no local government has raised any objection to the application.

[199] *MGA's submissions*: The MGA notes that only one local council of a possible 16 local councils affected by this application provided evidence in support of the application. Further, no local industry group, employee organisation, local consumer group, local tourist organisations or local representatives voiced their support with the Commission for the extension of trading hours for non-exempt stores on 27 December 2016. Accordingly, the MGA submits that the application should fail.

[200] *Consideration*: On the basis of that evidence alone, and in the absence of submissions on behalf of local governments, the Commission can only proceed on the basis that local governments generally throughout the region affected by the application neither support nor object to the application.

Such other matters as the Industrial Commission considers relevant

[201] 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*.

[202] ***NRA's submission:*** The NRA reiterates that this application has been prompted by "an anomaly" in the Queensland legislation which provides for an additional public holiday when Christmas Day or Boxing Day falls on a weekend (as in 2016). The consequence of the application being granted would be to create trading conditions similar to those that exist in a "normal" year. In other words, stores will be forced to close for Christmas Day and Boxing Day, as they would be if both those days fell during a working week. On the other hand, if the application is not granted, shoppers will be denied access to non-exempt stores for an unusual three-day period. The fact that this unusual (if not "extraordinary") event will not occur again until 2022 warrants attention when considering the merits of this application. The NRA also relies on the Commission's decision in TH/2015/8 and submits that the conditions which existed in relation to the application in that case also exist in relation to the present application.

[203] ***MGA's submission:*** The MGA submits that, at least in terms of businesses that have presented evidence in support of this application, the NRA only represents the retail duopoly of Woolworths and Coles (i.e. the Wesfarmers group).²³ The NRA appears to have ignored the interests of any business outside Wesfarmers and Woolworths Limited. Consequently, only two conglomerates would benefit if the application is successful. That approach appears inconsistent with the well versed premise that the NRA carries the onus of satisfying the Commission that the application should succeed.

[204] By comparison, although the MGA has relied upon witnesses linked by their supplier Metcash, the witnesses that were called and those represented by Mr Mason²⁴ remain independently owned and operated businesses, that generally form the major investment for family/personal enterprises. Mr Mason listed 31 independent stores that would be affected detrimentally if the application is successful.

[205] The MGA submits that there are countless other independent businesses that would be detrimentally affected if the application is successful, but concedes that they have not provided evidence before the Commission. It cites a number of practical reasons for that absence of evidence, including:

- (a) the vast area covered by the application;
- (b) the difficulties associated with contacting and informing isolated independent businesses about the nature of the application;
- (c) the extremely limited timeframe provided to locate, contact and prepare witness statements in response to the application;
- (d) the limitations that smaller and medium-sized independent retailers face in leaving their businesses and appearing at the Commission in Brisbane, and the financial constraints on small business owners when they are asked to attend Commission hearings in Brisbane.

²³ These include Kmart and Target under the Wesfarmers banner, and Big W as a division of Woolworths Limited.

²⁴ Food Works, IGA, SPAR and Friendly Grocer stores.

[206] **NRA's reply:** The NRA rejects any claim that small retailers face challenges leaving their businesses to appear in this matter. It notes that it supported the MGA's small-business witnesses appearing via video link and that, when the video link was not available at very short notice, it supported those witnesses giving their evidence by telephone (despite the disadvantage to the NRA in relation to cross examination).

Suggested alternative order

[207] **MGA's submission:** Without resiling from its unconditional primary submission that the NRA's application should not be granted, and whilst submitting that the proposed amendments to the Order would affect many non-grocery retailers as well as grocery retailers, the MGA proffered an alternative amendment to the Order which would protect the interests of the independent grocery retailers on whose behalf the MGA appeared in these proceedings.

[208] The alternative amendment proposed by the MGA would allow Department Stores²⁵ to trade on Tuesday, 27 December 2016 between 8.00 am and 5.00 pm.

[209] The MGA submits that the evidence shows a "clear saturation" of grocery retailers within the areas affected by the application and that there is no need for non-exempt grocery retailers to trade on 27 December 2016 because the public is well serviced by grocery retail in the areas affected by this application. There is no consumer evidence to suggest that the public need or desire a departure from existing trading hours in 2016. The MGA notes that the NRA witnesses who operate department stores indicated their alleged reliance and emphasis on the Boxing Day sales period (although their sales products will continue to be available on and after 28 December 2016). It is unclear on the evidence whether there are competing retailers in the areas affected by this application who will be offering the same or substantially similar non-grocery products on 27 December 2016.

[210] The MGA maintains that the proposed order remains within the spirit of the Act, as the Act already provides trading hours' exemptions for specified retailers such as arts and crafts shops, camping equipment shops and sporting goods stores. The MGA proposal would simply add a new classification of retailer for 27 December 2016 only.

[211] **NRA's submission:** The NRA rejects, and raises two types of objection to, the MGA's alternative amendment.

[212] First, it submits that, although the *Industrial Relations (Tribunal) Rules 2011* provide a process for an applicant to seek an amendment (paragraph 20(1)), the Rules make no provision for any other organisation to do so. Furthermore, the MGA is not a party to the proceedings but is an organisation that was given leave to appear and be heard. Accordingly, the MGA has no grounds upon which to bring this proposed amendment.

[213] Second, if the Commission were minded to consider the alternative amendment, the NRA submits that:

²⁵ "Department Store" would be defined to mean "a retail shop stocking a variety of goods in varying product categories such as clothing, homewares, electrical and entertainment and does not mean a grocery supermarket."

- (a) its witnesses demonstrated a need for both grocery and non-grocery shopping on the day in question and, although these are different services, both are equally valued by customers and employees;
- (b) there has been no logical discussion or examination of any proposal to distinguish between the two types of retailers in this matter;
- (c) the proposed addition of a new retail category for a single application covering just one day is poor regulatory process;
- (d) there are significant deficiencies with the proposed definition of a "Department Store."

Consideration and conclusion

[214] *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.

[215] 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); and
- (b) the likely impact of the order on employment.

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

[216] It is worth observing that the criteria relevant to this application refer primarily to "interests" rather than "needs." Accordingly, the decision in this case requires the assessment of overlapping, and at times competing, interests. Although much of the evidence focused on stores that trade in grocery items, it must be remembered that the operation of the *Holidays Act 1993* or the outcome of this application will affect a wider range of stores than supermarkets.

[217] ***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 Sunday and, as a consequence of the operation of the *Holidays Act 1983* and the Order, non-exempt stores cannot trade for three consecutive days;
- (b) the application relates to one day only and is not an application for a variation of trading hours generally; and
- (c) the same circumstances will not occur again until 2022.

[218] ***Public, consumers' and business interests:*** 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 December 2016. 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.

[219] 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 could be met over the Christmas period without the need for non-exempt stores to trade on 27 December 2016. Although there would be some business advantage for larger grocery stores to be able to trade on 27 December 2016, it is not necessary for them to do so to satisfy consumer needs.

[220] The market impact of any price difference for grocery items at exempt and non-exempt stores, and the range of products where prices match, might not be as significant on 27 December 2016 as it is usually. The evidence suggests that most people stock up on food before Christmas, and most customers (including tourists) would not be doing major shopping on the day after Boxing Day.

[221] I accept that a three day closure could adversely affect at least some non-exempt stores that trade in fresh food and produce. However, sufficient planning could limit their loss. Some customers might be disadvantaged by delays in the provision of such items as fresh meat on the first day of trading after the holidays, but their needs could be met at another store.

[222] The evidence of the impact on levels of trade at exempt stores if the application is successful was equivocal. Although experience suggests that the volume of business at smaller supermarkets would drop if non-exempt stores were trading, the statistical evidence from Mr Smith demonstrates that is not always the case. Mr Mahoney gave evidence that some customers prefer to shop at his store even when Woolworths is open. Such evidence indicates that the MGA's submission summarised at [133] overstates the case for exempt stores.

- [223] On the other hand, it would be incorrect to characterise the MGA's case, or the evidence of witnesses called by the MGA, as being that the success of the application would result in the closure of one or more exempt stores. Rather, the evidence was to the effect that allowing non-exempt stores to trade on 27 December 2016 would be one more step towards the increase in market share of the major stores, with a consequent reduction in the viability of smaller competitors. Mr Mahoney epitomised that view when he agreed that the application is not for unrestricted trading hours but expressed the opinion that, if the trend continues, the independent stores will have reduced trading hours and "less chance." As a result, "the majors will take over and soon there will be no independents. ... So I think it's quite significant that one day could lead to many days."
- [224] Furthermore, although it is arguable that other stores might take the opportunity to trade if shopping centres with large anchor tenants were open on 27 December 2016, there was little evidence to demonstrate any desire by such stores to do so. Such evidence as there was suggested that although some smaller businesses in shopping centres would take the opportunity to trade on 27 December 2016, many would not, even if the non-exempt anchor tenant was trading. Their decision not to trade on that day might be for reasons unrelated to whether the non-exempt store will be trading then (e.g. penalty rates, low projected profits, preference for a longer holiday).
- [225] 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. I accept that the department stores rely on revenue from post-Christmas sales and that the statistics in relation to transactions in non-exempt stores on 28 December 2015 demonstrate that there is a significant consumer response to being able to shop immediately after Boxing Day, whatever the purpose (or purposes) of that shopping might be.
- [226] There is insufficient evidence to determine whether the purchases made and money spent on 27 December 2016 would be in addition to what would be spent subsequently. What is clear, however, is that customers will make purchases on that day and that non-exempt stores consider it is in their business interest to trade then.
- [227] I accept that in 2016 customers generally expect that, consistently with normal trading patterns, stores would be trading immediately after the actual Christmas Day and Boxing Day. The statistical evidence of trading activities on 28 December 2015 clearly demonstrates that customers have an interest in, and utilise, the additional opening hours for general shopping and to access post-Christmas sales, redeem gift cards and exchange some Christmas gifts. In other words, although their grocery needs might be met at exempt stores on 27 December 2016, customers have expressed a desire to be able to shop at non-exempt stores for a wide range of products on the day after Boxing Day.
- [228] **Impact on employment:** 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 employment opportunities for some existing full-time and part-time employees and some casual employees to work additional hours at the relevant rates.
- [229] I am also satisfied that such employment would be voluntary and that no one who declined the offer of employment on 27 December 2016 would be prejudiced in their employment as a consequence.

[230] When assessing the potential net effect on employment of the application succeeding, it is relevant to note that there is a limit on the number of people stores such as IGA can employ at any one time. The significance of that emerges from:

- (a) the evidence of Ms Lee that the Goondiwindi FoodWorks supermarket would have a maximum of 20 staff (but may have fewer if Coles is open), which compares with 31 Coles staff working a total of 212 hours on 28 December 2015;
- (b) the evidence of Mr Mahoney that he might halve his staff numbers from 16 staff on the floor (eight people on two shifts) if Woolworths were allowed to trade, which compares with the 23 people employed by Woolworths working a total of 163 hours on 28 December 2015;
- (c) the evidence of Mr Faust that his store would have employed about 15 to 18 people on Boxing Day in 2015, compared with 30 who worked at Woolworths on that day.

That evidence indicates that any reduction in employment at an exempt store on 27 December 2015 would be more than offset by the increased employment at a non-exempt store in the same towns.

[231] **Conclusion:** Having considered the relevant evidence and submissions, I am satisfied, on balance, that the application should succeed and that the Order should be amended to allow non-exempt stores in the region covered by the application to trade on Tuesday, 27 December 2016 between the hours of 8.00 am and 5.00 pm.

[232] In light of those conclusions, it is not necessary for me to consider the alternative order suggested by the MGA.

Orders

[233] As a consequence of the findings and my conclusion:

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 Tuesday 27 December 2016 except where clause 3.2 provides for a wider spread of allowable trading hours:

Tuesday, 27 December 2016

<u>Opening Time</u>	<u>Closing Time</u>
8.00 a.m.	5.00 p.m."

2. The operative date for the amendment is 7 October 2016.

[234] Order accordingly.