



EDUCATION, EMPLOYMENT AND TRAINING COMMITTEE

Members present:

Ms KE Richards MP—Chair
Mr MA Boothman MP
Mr N Dametto MP
Mr J Lister MP
Mr BL O'Rourke MP
Mr JA Sullivan MP

Staff present:

Mr R Hansen—Committee Secretary
Ms R Duncan—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE OPERATION OF THE TRADING (ALLOWABLE HOURS) ACT 1990

TRANSCRIPT OF PROCEEDINGS

MONDAY, 15 NOVEMBER 2021

Brisbane

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The committee met at 9.55 am.

JAMES, Mr Tony, Acting Deputy Director-General, Office of Industrial Relations, Department of Education

MOXHAM, Mr Rhett, Acting Director, Industrial Relations Strategic Policy, Office of Industrial Relations, Department of Education

CHAIR: Gentlemen, would you like to begin by responding to any of the points just made by the Shop, Distributive and Allied Employees' Association?

Mr James: Good morning, Chair and committee. I acknowledge the traditional owners of the land on which we meet and pay our respects to eldest past, present and emerging.

Generally I certainly do not take any issue with anything that the SDA has raised. In terms of those informal discussions, Mr Gazenbeek and I, particularly in the early stages of the new arrangements, often spoke about how those provisions might operate. I know that Mr Gazenbeek has for a long time raised concerns about section 36B. I will just mention, in relation to 36B, that it was after the Carnival of Flowers trading hours special events application was decided that Deputy President Merrell, I think, first said he did not think he had the power to make a forward order for voluntary labour, but in a following decision Commissioner McLennan said she was very happy with the protections that were offered by 36B. It has been the consistent rhetoric right the way through that the commission cannot make an order for a forward power to ensure voluntary labour but the protections offered by 36B remain. I would just point out too that 36B is a mirror of 36A, and 36A has been in since 2002. That goes to the 'in writing', that written stuff as well.

Other than that, in terms of the SDA's discussion around section 5 applications, I think there is some merit in looking at that provisions of section 5 and some merit in looking at the definitions and the meanings of a significant event and the requirements for lodging an application in terms of the evidence that should be brought forward. Certainly I think there is merit in considering strengthening the protections available to employees, particularly whether the commission has a prospective order-making power to protect voluntary workers; in other words, clarify the situation around voluntary work and extension of hours.

Mr LISTER: Gentlemen, thank you very much for coming to see us again. Regarding section 19 and its applicability in the modern age where we have online ordering and all that sort of thing for groceries and so forth, how would that apply to a non-exempt retailer in the event that they were doing a home delivery on a day on which they were not able to trade? I am talking about Woolworths, Coles and so forth.

Mr James: Section 19 has been in the act since it was reintroduced in 1990 so it actually predates the internet. The Office of Industrial Relations has never in any way really taken the act or the trading hours as being applicable to internet shopping, so that has always been our fundamental position. I might look across to my good colleague, Mr Moxham. He can handle the curly question, and if I need to I will come back.

Mr Moxham: As Tony said, the provisions predate online trading provisions so it is clear it was never the intent of section 19 to have applications for online trading platforms with respect to retail trading. When you look at the title, the provisions talk about the closure of non-exempt shops not to confer advantage. It has always been the view that the advantage is not for the non-exempt shops that are closed; it is to ensure that there is no advantage conferred on other players taking advantage of the fact that the non-exempt shops are forced to close in these periods.

Mr James: I might say one thing there. When I was back on the tools in the eighties and nineties, that provision was very prominent for us because in those days before Sunday trading we had a lot of electrical stores that used to work Monday to Saturday and then they would pop up at some of the near-permanent markets. There was a big set of permanent markets over near Garden City in the eighties. That particular provision was very much aimed at stopping those particular places

from trading in the goods that would normally be sold in non-exempt shops but they were bound to close on Sundays. I have to say that since the liberalisation of trading hours and the inclusion of Sunday trading, there has not been a lot of call for scrutiny around section 19.

Mr Moxham: The act is designed to apply to shops and within the act shops are defined as a physical place and not a virtual place. The act, in its construction, is designed for regulating retail shops—the physical location of places—and then it divides those up into non-exempt and exempt and independent shops. Section 19, in the department's view, has always been designed to ensure that there is no advantage being provided or disadvantage given to the non-exempt shops that are required to close on those days and allowing other players to come in and try to exploit that situation.

Mr SULLIVAN: I have a follow-on question. More bluntly, the legislation does allow explicitly for deliveries and those sorts of things to occur outside of tradeable hours for non-exempt shops.

Mr James: To be blunt, the legislation looks at opening and closing of retail premises. It has never really dealt with deliveries. In terms of that click and collect—

Mr SULLIVAN: To that point, it has dealt with those. There is never a suggestion that the tradeable hours are the only hours that employees are allowed to work and be paid for. There are shelf stockers, cleaners and all the other things that occur outside of opening hours. That is a legitimate trade for those sorts of companies.

Mr James: That is exactly right. We have always known that trucks arrive and stockers restock shelves. That is just part of retail. The trading hours has always been about opening the front door to the shopping public. Whilst I say it was built in the time before the internet, certainly it operated at the same time as the internet. As we have seen, the internet has expanded rapidly, particularly over the past two years with COVID. We still maintain that the trading hours legislation talks about shops and retail premises. I would go to the McKell Institute's report that gives a fairly good summary of the differences and the relationships between internet and bricks and mortar. It is not that if you were to cut delivery, or what have you, you would improve bricks and mortar. In fact, they actually dispel that. I would suggest that there have always been jobs done in retail outside of trading hours; it is just that the doors for shopping have been and are required to be closed in accordance with the trading hours for non-exempt shops.

CHAIR: It certainly gives a lot of food for thought about shopping online versus the bricks-and-mortar style shopping when you think about rescinded goods, walking out with your shopping bags or opening the back of a truck. There is a lot to think about.

Mr BOOTHMAN: My question is more around education when it comes to section 36B for employers and employees. What type of information is available and easily disseminated to those two groups?

Mr James: In answer to Mr Gazenbeek's question about how many prosecutions the department has had in terms of breaches for 36B or 36A, I would say it is none. In terms of education—and I apologise, I should have checked—I think there is a line on our website that talks about the voluntary nature of work but, to be frank, it would simply be a line. As Mr Gazenbeek said in his evidence, the notion of voluntary work was quite topical when the new provisions were put in, the section 5 applications. As I said, the requirement for voluntary work has always been there as trading hours became more liberal.

In a simple answer to your questions, the Office of Industrial Relations has not gone on any particular educational campaign around this although all of our officers would be very aware and would advise, if asked, about any trading hours matter on extended hours or on section 5 applications that work is always of a voluntary nature. Because of the fact that the shop assistant areas are now covered by the federal workplace system, we probably do not get as many questions around this as we may have had before the advent of WorkChoices in 2006. In a simple answer to your question, if asked we would provide the answer, but I would suggest that it has not been given a high priority and it has not had a lot of heat and light around it in the past few years.

Mr DAMETTO: My question relates to Mr Gazenbeek's comments earlier around removing section 5 and maybe shoring up some of the stuff in section 5 legislatively. Would you be able to give us some commentary around what that would mean in practical terms from the department and how that would work out?

Mr James: From the department's point of view, it probably would not have a lot of practical impact because, whilst we monitor and we are advised of all applications in section 5, if that was to continue, and even if it was to be tightened if further requirements were made, the impacts of that would basically be on the applicants—if they had to supply more evidence or more support for their

application, that would go to the applicant. Again, the commission would have to do further consideration if there was some consideration of what becomes a significant event. The department may be called upon to provide some opinion to the commission to assist the commission. By and large, I would not see that the department itself would have a lot to do in terms of once the legislation was amended.

I would say that, in the absence of any other mechanism in the commission, the section 5 applications have given the parties—and it is predominantly the traders—an avenue to look at trading hours in significant events. We have seen the Commonwealth Games and other significant events that have occurred. For example, the Mount Isa Mines Rodeo has given traders the opportunity to extend their hours in what the community or what the commissioner has said is a significant event. If that was totally removed and there was no other valve for that, I would imagine that I would get a lot more letters to respond to. But by and large that is government policy and that is what we do.

Mr DAMETTO: As it exists right now, section 5 has quite a function as far as the department is concerned; would I correct in saying that?

Mr James: It was government policy to put it in and it clearly has a function for applicants to apply on the basis that they feel that it is a significant event and they would gain value from trading hours. Within my department there are views about the efficacy of that particular process and the consistency of maintaining a trading hours regime generally. I do have—sympathy is not the word, but I do think there is merit in some of the work that the SDA has done in their submission, particularly around the notion of what is a significant event. As you know, the Commonwealth Games was a big feature. The Commonwealth Games is a significant event. It draws a lot of international and interstate visitors who may not be familiar with our trading hours arrangements. It also may have had events on that were outside of the trading hours arrangements and, therefore, there does appear to be a natural synergy in having a think about trading hours whilst that event was on.

The Weipa Fishing Classic is the other one that is mentioned in the act. After the last session with you, Chair, I went back and thought about the Weipa Fishing Classic. I think it may have had a little bit to do with the fact that it is a big fishing classic up there. It does attract a lot of people and they do travel from far and wide. The fishers come back into town at odd times. There may have been a view held that it may be appropriate to accommodate those particular national and international visitors to Weipa and those areas.

When you get down to the Chinchilla annual show, there is some question. Certainly by the provisions of the act the commission felt that it met the requirements. But the Chinchilla annual show getting extended trading hours? I must admit that I am not quite clear that that was the ultimate attempt there. There were some things that the SDA put in their application about the type of evidence that could be called on, the connection between the retailers and the event, what they were proposing to use and checking afterwards if they actually did use it. You might recall from a previous time when I spoke that it is very difficult to find out, other than getting the order, how it was used. I think it was in the Chinchilla regional show that a non-exempt shop in the region actually curtailed its hours rather than expanded them.

Mr O'ROURKE: Further to the question from the member for Theodore, in regards to section 36B and it being voluntary for staff to work outside of those hours, does your office do any monitoring in regards to that?

Mr James: I would suggest no. We have an inspectorate of 11 on the ground, predominantly doing long service leave complaints. If we were to receive a complaint we would certainly respond but as a proactive campaign, no, I cannot say that my inspectors visit shops afterwards and check for that. I am looking back at my inspectorate colleague who says, 'No.' There you go.

Mr O'ROURKE: Where are your 11 staff based?

Mr James: I have one in Cairns, one in Townsville, four in Bowen Hills, about the same in Mount Gravatt and one in Maroochydore. If you do the maths that should be around 11. A couple of my senior guys are in Brisbane with the Chief Inspector, Mr Schostakowski.

CHAIR: In former hearings we have talked about going back to the geography of boundaries around varying trading hours. In correspondence that we have had there has been some reference to the 2017 trading hours order, previously known as the Trading Hours—Non-Exempt Shops Trading by Retail—State. I know the order has expired, but how is it used to work in conjunction?

Mr James: It was quite fortuitous that this morning when I did my quick review in preparation I went to the Trading (Allowable Hours) Act. You will see that is referenced in the act itself in the section that deals with the trading hours. I did a big scout and went to the QIRC's website. The QIRC publishes the 2017 order. It specifically says that, basically, for the purposes of defining various areas

in the state the Trading (Allowable Hours) Act has been amended to incorporate this but for the purposes of the definition of boundaries. Then I went to the definition of boundaries. It is a 34-page order. It is actually what existed before the Mickel variations and changes streamlined them across to what we have today. There are a number of different definitions of trading hours for the various sections, such as the tourism areas of Cairns and the tourism area of Townsville.

I had a look because I had a premonition that this question about boundaries might pop up. First of all, boundaries are not built by the government. The boundaries are determined on the applications by the parties and they have existed over a number of years. The commission has made an order saying 'this trading hours arrangement will apply in this area and this area is bounded by', so you are always going to have to have a boundary if you are going to segregate parts of the state.

Interestingly, the question around 'My shop is on the left-hand side of the road and the boundary runs down only the right-hand side of the road', when I looked through it this morning I found some of the trading hours areas actually have a line in them. I looked at the Woolloongabba central business district. I know this also happens on the Gold Coast with the Pacific Highway. It gives you the big definition which reads, 'Commencing at the junction of Wellington Road and Stanley Street and then along Stanley Street to Annerley Road and along Annerley Road' et cetera, but it has a little proviso there which says, 'Provided that any premise facing onto any of the named streets are within the zone'. That is not a universal provision, but we have always taken the view that if they are on the street they are covered. I know there were some concerns raised that shopkeepers say, 'I'm on the other side of the road.' I am not quite sure how in reality that applies.

CHAIR: So that should not exist in reality given the flexibility of that proviso within the order?

Mr James: That proviso does not appear in every definition; it appears in some. It does not appear, for example, in the definition of the Cairns CBD which commences at the point where Aplin Street intersects with the Esplanade. Put it this way, if I were asked to adjudicate for one of my inspectors as to whether we would pinch a storekeeper who was on the left-hand side of Aplin Street where it intersects with the Esplanade, I would be loath to commence an action based on that. If I were asked about that and someone was five streets away, I would have no option but to say that they are not in the zone.

Mr SULLIVAN: I get the substance of what you are talking about there. In terms of the technicality of it, is that document enlivened because the QIRC still refers to it or is it enlivened by reference in the act even though it has itself ceased? Does it still exist for the purpose of the definition?

Mr James: By reference in the act.

Mr SULLIVAN: That is a clunky way of asking, but do you know what I am getting at?

Mr James: No, it is good because I took the journey through the act this morning to make sure that I could confidently answer your question if it came up. My colleague Mr Hopgood has pointed out to me that it is at division 2 subdivision 2 at section 16D(3). It states—

schedule 1AB area means an area, within the meaning of the 2017 trading hours order, mentioned in schedule 1AB.

seaside resort means a Tourist and/or Seaside Resort within the meaning of the 2017 trading hours order.

In 2017 we repealed all the trading hours orders that applied up until the new legislation because it consolidated the trading hours and then we referred back to 2017 order for the purposes of the definitions. The order states—

Section 16A of the Trading (Allowable Hours) Act 1990 defines the 2017 trading hours order means the order titled 'Trading Hours—Non-exempt Shops—Trading by Retail—State' made by the industrial commission under section 21 on 27 November 1992 as it was in effect immediately before the commencement of the Trading (Allowable Hours) Amendment Act 2017. For the purposes of defining various areas within the state, the Trading (Allowable Hours) Act 1990 has been amended to provide for definition in the 2017 hours order.

It goes through and lists from A to FF all the different areas. Does that answer your question?

Mr SULLIVAN: I think it does.

CHAIR: Thank you for appearing before us again today and particularly for the clarification on the expired order. We are very grateful. No questions have been taken on notice. I declare this public briefing closed.

The committee adjourned at 10.19 am.