



Submission by

**The Shop Distributive and Allied
Employees Association (Queensland Branch)**

To

Education, Employment and
Training Committee

Review of the Trading (Allowable Hours) Act 1990

1. SDA'S PRIMARY ROLE – THE INTERESTS OF RETAIL WORKERS

The SDA represents the interests of almost 35,000 essential retail, fast food and warehouse employees across a vast range of enterprises both large and small. Our membership is an excellent representational sample of workers within the retail industry and in this submission we will refer to the views and experiences of our members based on various ways they have been communicated and sampled.

The SDA views one of its primary roles as being one to ensure our members, and other retail workers by extension, are protected from the erosion of working conditions and have the ability to maintain a reasonable work/life balance. Such interests are intrinsically entwined with any consideration regarding the regulation of trading hours as contemplated extensions are invariably within what workers view as unsociable hours (i.e. earlier starts, later finishes, working across weekends). We should never lose sight of the fact that our children or our children's children may work in the retail industry.

The SDA membership comprises 66% female and 34% male employees with 37% of our membership being aged 25 and under, and 63% over 25 years of age.

Retail workers cover a wide gamut of employees who are engaged in full-time, part-time and casual work. There is no 'stereotypical' retail worker. Many have been engaged in the industry for numerous years and work various hours and days across the entire week. A large number (if not the majority) of retail employees are engaged part-time or casually; often times this is simply because they cannot attain full-time hours, or perhaps they work to supplement household incomes and work day time hours whilst young children are in schooling. A large portion of retail employees are students – and whether they are school or university students, the amount of work and hours in which they should or can work in this sector is influenced by the legislation and regulation of trading hours.

It is acknowledged retail workers also comprise an indeterminate number of individuals who might desire or require working unsociable hours for a period of time because it happens to suit their lifestyles. Prima facie though, there are a large number of young workers, vulnerable workers, working mothers and sole parents who work in the industry. Many of who feel vulnerable and susceptible to coercive activities in order to hold down the job or maintain their casual hours and this has been exacerbated as a result of the COVID-19 pandemic. The SDA has always maintained a stance that to achieve an essential work/life balance for members and other retail workers means it must regularly oppose applications made before the QIRC by employer groups wishing to extend trading hours into unsociable

hours, permanently or for a specified period of time, on the basis those applications on nearly every occasion will negatively impact a workers personal, social or family life.

The SDA submits another key issue for retail workers is the ability to have the choice to elect to work or not work in unsociable hours. The potential effect of any review to the existing permitted hours is the ability for trading hours to be extended beyond the current regime and/or the continued ability for applications to be made for Non-Exempt Shops to trade 24/7 during the period of declared special event. As a result of this assumption, the SDA submits that workers desire an entitlement to have the 'election whether to work or not' so they do not have to simply rely on a general undertaking by a limited number of large employers that work will be voluntary. It should also be noted that certain management from large retailers give unequivocal guarantees that work during any proposed extended times will be voluntary, however members continue to provide feedback they feel pressured by their employers to work in the extended hours and when pressed in Enterprise Negotiations to include this guarantee in the respective agreement, senior management within these businesses refuse point blank to do so. This must call into account the value one can attach to the guarantees given, albeit in good faith, in a hearing in the Queensland jurisdiction where its enforcement in the federal commission is doubtful at best.

The SDA has conducted numerous surveys of its members over many years to ascertain their views on extensions to retail trading hours, permanently or for a period of a special event. Most recently we conducted a survey of our members in October 2021 with a focus on issues outlined in the terms of reference and in particular, the issue of extended trading for Non-Exempt Shops during the period of a declared special event (Section 5(1) of the Act). That survey saw responses from more than 1,370 retail workers and the results of that survey will be referred to throughout this submission as a recent and reliable representation of our member's views and professional experiences.

2. IMPACT OF THE MORATORIUM AND EFFECTIVENESS OF PERMITTED HOURS

Terms of reference: 1a, 1d, 2 and 3

The existing trading hours as permitted by the legislation secure a more efficient framework by providing an appropriate and central set of permissible hours that remain unchanged on a long-term basis by successive and frequent applications. The SDA supports this stability and requests a further moratorium period of 5 years in which hours should not be changed. The following are a list of essential considerations which support the desirability of the requested outcome:

- COVID-19 and the changing retail landscape
- The reality of consumer needs
- Employment and business growth
- Market share of small and medium sized businesses
- Vulnerable workers
- The impact of federal instruments

These considerations are discussed in more detail below.

2.1 COVID-19 and the changing retail landscape

Any revised model needs to account for actual consumer and visitor expectations, desires or requirements and not a retailer's assertion of what they believe customers might desire. Our retail landscape in Queensland has changed dramatically since 2020 as a result of the COVID-19 pandemic. The most notable change being the evolution of customer transactions from in person exchanges to a sudden need for businesses to accommodate more dominant demands by customers for the ability to shop online. In the last 18 months, most businesses have placed a significant focus on their online operations as many were unable to operate through government mandated lockdowns and other occasions where customer traffic was substantially decreased; most likely caused by widespread concern over community transmission of the virus. Customers have now adjusted and become accustomed to the prominence of online shopping as a key part of the lifestyle they enjoy. As a result of this new landscape, customers now have the ability to shop for the substantial majority of retail goods at all hours and to purchase their desired items with delivery provided at minimum to no cost.

The SDA has always believed there is no genuine need or overwhelming desire by customers to see trading hours in Queensland extended further. We are especially not convinced that desire has appeared or increased in light of the recent migration to online

shopping platforms. When surveyed, 96.18% of our members believe customers have enough choice to shop within the current trading hours and the availability of online 'click and collect'. We submit that now more than ever, permitted trading hours are effective to protect the work-life balance of retail workers and adequately support consumer needs for in-store trading due to 24/7 access online supporting the small percentage of customers who may desire to shop in unsociable hours.

It is also imperative we acknowledge that through the pandemic, retail workers have been widely recognised for their valuable contribution to our community and their commitment to providing safe access to food and other necessities. We submit this recognition should be reflected in the consideration of a major change to their employment which has the potential to substantially decrease the quality of their professional, personal and financial circumstances. We submit any permanent or temporary extensions of the existing regime are likely to have that affect as a result of express and implied requirements for retail workers to regularly work unsociable hours usually reserved for time spent with their family and participating and contributing to the community.

2.2 The reality of consumer needs

It is often suggested by larger retailers they press for extended hours, focused towards weekends, in order to support time-poor customers seeking accessible retail alternatives. With the availability of online shopping, assistance from initiatives such as 'click and collect' and some 83+ hours of available shopping time spread over 7 days a week, we are left to wonder at what point these customers would cease to be 'time-poor'. Shift workers are often cited to be in this category, but if simple logic is applied, shift workers have much more time available in which to shop than a 9-5 Monday to Friday worker, probably 40 hours more, or almost half as much again. This, of course, disregards absolutely the fact they are free to shop at independent or Exempt Shops. Whilst the SDA supports a regime with a stable set of hours, it must be qualified with a system that does not allow for constant change or radical expansion and is more attuned to social needs and requirements, and in particular the need of workers within the retail industry and the impacts it may have on their families.

2.3 Employment and business growth

All too often our organisation hears retailers say 'you need to be there for customers' without any regard to what impact 'being there' has on the human worker and their families beyond superficial considerations. One consideration most often reviewed superficially is the suggested potential of extended trading to create employment opportunities. For this reason we strongly press that any consideration of 'employment' should not simply question if

someone might gain retail work, but also examine the extent of the hours worked / gained or whether such employment is meaningful in terms of being sustainable and ongoing.

Retailers generally give statements and provide data in trading hours applications that infer by extending trading hours new employment arises. There is evidence to suggest this is not the case, and although additional hours are created where work is required, the existing workforce is spread more thinly across the new hours. For example, when canvassing members as to the hours gained and employment offered in stores with changed hours, 76.31% believe there is no discernable or large employment increases but the change leads to their shifts being spread further apart and dramatically increases their workload. The SDA is also aware of a matter where evidence was cited that extending trading hours for an additional three hours would create nine jobs, however under cross examination the witness admitted that it would result in nine workers being required in the store for an additional three hours and could not guarantee they would be additional hours for the workers.

There is certainly evidence to suggest that by having a robust retail trading hours regime, the economy will be enhanced, however it should be noted that at best the gain relating to these issues is speculative. Neither the SDA nor employers or any other body has the ability to gauge the veracity of such claims. Anecdotally, 83.14% of SDA members believe if large retailers were allowed to trade 24/7 they would introduce roster changes and coerce existing staff to work during extended hours causing stress.

2.4 Market share of small, medium sized businesses

The SDA's primary concern is for the impact of extended trading hours on the worker and their families; however, we also acknowledge permitted trading hours as being essential to ensure small (one owner) stores remain competitive in the market. Small groceries in Australia have already seen a significant decline in their market share which has dropped from 13.8% to 9.1% since March 2016.¹ Their unique ability to operate in unrestricted hours helps to prevent their market share from being completely eroded by the extension of trade hours for larger stores. The SDA believes this consideration is also of special significance due to the economic impact resulting from the COVID-19 pandemic, which disproportionately affected small businesses that now require substantial support to recover and rebuild. It is our concern that a failure to support small businesses by protecting their competitive advantage of unrestricted trading is likely to lead to a complete concentration of the market in Australia.

¹ <http://www.roymorgan.com/findings/8336-fresh-food-and-grocery-report-december-2019-202003230634>.

Medium sized retailers (e.g. IGA's) suggest that as they compete directly with Non-Exempt retailers there is merit in the restriction of trading hours so they retain some form of competitive advantage. Larger supermarkets claim that expanding trading hours does not reflect on the individually owned medium or small supermarkets and point to southern States as evidence. In those States, supermarkets are permitted to sell alcohol which can comprise in excess of 40% of their weekly take. This is not the case in Queensland and much evidence has been adduced by these smaller operators of significant, and at times terminal, loss of business when trading hours have been expanded in an area.

The SDA accepts that statutory definitions found in the Act may not necessarily reflect an accurate composite of businesses that are found within the retail landscape. For example:

- There is a significant crossover of goods amongst retailers that may not allow a particular store to be classed snugly within the current definitions.
- There are corporate and business structures that utilise non-related entities to overcome the restrictions around staffing and being an independent retail shop.

These matters may be of significance to employer or business stakeholders to the review but whatever change might be suggested, will result in an impact on retail workers. Accordingly, it is imperative that those workers retain entitlements or benefits and do not erode their ability to have a work/life balance.

The ability for workers to elect to work or not work extended hours outside the current permissible regime of hours is of paramount importance to securing a work/life balance. It is absolutely clear to the SDA that our members and retail employees more broadly do not want to work at unsociable times in the evenings, particularly on weekends and their interests must be protected.

2.5 Vulnerable workers

The existing protections relating to voluntary work, whether provided for by the Act or other industrial instruments, do not go far enough to protect vulnerable workers in a professional environment driven by employer's agendas of profitability and cost minimisation. The permitted hours as legislated currently provide an essential level of protection to retail workers who face some of the following challenges when those hours are extended even temporarily:

- Decline in mental health
- Increase to childcare costs
- Transport issues
- Customer abuse

Those permitted hours are heavily relied upon by many workers who are experiencing the impact of employer groups and our industrial framework taking a stronger stance on what roster patterns can be required from retail workers and a more narrow view of what personal or social circumstances of the worker should be reasonably accommodated.

2.5.1 Decline in mental health

It is widely recognised that a reasonable work/life balanced is essential for a person to maintain good mental health and quality of life. The significant experience of our members when surveyed is that work in unsociable hours has cost them valuable time with family and friends. 58.18% of our members report missing important events such as weddings and birthdays as a result of unsociable hours. Workers who regularly perform duties in unsociable hours sacrifice time with family, miss social events and their sacrifices are not appropriately compensated due to the current decline in the penalty rates these workers receive in those hours.

In our most recent survey of members, we received a number of responses regarding the impact of the last review of trading hours in 2017 which resulted in the extension of trading hours until 9pm on Saturday evenings. The results of the survey include that as a consequence of this change:

- 65.13% missed out on time with family
- 54.76% had to change social plans
- 55.33% missed out on important events
- 13.83% were required to change their childcare arrangements

When canvassing our members about their views of an extension to trading hours on Sundays, our members also responded with serious concerns they would miss out on the following:

- 83.48% time with family
- 65.69% important events
- 37.08% caring responsibilities
- 22.06% sporting commitments
- 16.28% giving back to my community

Our members also report experiences and significant fear of being pressured or coerced into agreeing to work all manner of hours to achieve what is represented as business and consumer needs. When surveyed, 38.28% of our members reported their mental health suffers because they work in unsociable hours.

In a report prepared by UNSW Social Policy Research Centre involving 6,469 participants, 35% of retail, fast food and warehousing workers either agreed or strongly agreed that the way they are rostered impacts their mental health.² The overall result of these considerations indicates the permitted regime safeguards retail workers from the percentage of workers suffering with poor mental health from increasing.

2.5.2 Childcare costs

SDA members make many valuable contributions to our community, not only through the work they do in stores, but through the unpaid labour they provide as parents and as carers to children and adults in their families and for others. Despite the significance of their contribution, retail workers have a genuine lack of choice when it comes to their working hours and childcare arrangements.³ Notably, 55% of workers in retail, fast food and warehousing regularly provide some form of care to another person, such as care to a child, grandchild, or to an older person, or a person with a disability or long-term health condition. Of those who identified as parents with a child under the age of 18, 25% were sole parents.⁴ This is a significant percentage of workers who are faced with the challenges of balancing their rostered hours against child care costs.

We submit this is an essential consideration in light of rising insecure employment and casualisation of our retail workforce. A number of these parents are not guaranteed a set roster or minimum number of hours in any week. The recent survey found that only two in five (40%) of participants said they worked the same shifts each week and this was higher for fathers (48%) and lower for mothers (38%).⁵ This means the greatest guarantee some of these parents are provided is a minimum shift length of 3 hours, and this can create serious complexity for navigating caring and financial responsibilities.

Many childcare centers require advanced notice from parents of a reservation for their child and the service provided is at a cost determined based on a full or sometimes half day of care. If a parent is required to place their child in care to perform one shift of three hours on a day, that shift can cause result in a financial loss for that day with the cost of childcare surpassing the earned income. With

² Cortis, N., Blaxland, M., and Charlesworth, S. (2021). *Challenges of work, family and care for Australia's retail, fast food and warehousing workers*. Sydney: UNSW Social Policy Research Centre, 70.

³ Ibid, 2.

⁴ Ibid.

⁵ Ibid, 5.

circumstances like this becoming more common, it is unfortunately not surprising financial security is a very real issue for many households now reporting a post-tax income of less than \$1,000 per week with that bracket of earnings identified with by 32% of couple parents and 80% of sole parents.⁶

Further, there is limited to no formalised childcare availability for parents to place children in care outside of Monday-Friday 6am to 6pm.

2.5.3 Transport issues

Work in unsociable hours significantly limits the ability to utilise public transport to and from work. This creates complexity and additional pressure for many workers, particularly young workers, single parents and families without access to a vehicle or only one shared mode of transport. This concern particularly extends to workers in more rural areas where access to public transport is even more limited. We submit that the existing regime safeguards retailer workers from these additional rostering pressures, petrol expenses and the risk of driving at unsociable hours while fatigued. The existing regime also prevents access to independent transport from becoming a more substantial incentive for hiring workers in an industry many vulnerable people rely upon for employment.

2.5.4 Safety and customer abuse

During the COVID-19 pandemic the general public became more aware of the type of abuse retail workers can suffer as a result of disgruntled and dangerous customers. Although footage of these experiences was predominantly captured during the various surges of panic buying, our members are often subjected to this kind of experience at work on a weekly basis. Whilst some larger retailers have responded to the growing risk these employees face, most do not consider or implement protective measures. These measures can include hiring security guards in hours where workers are more at risk or implementing policies that protect young and vulnerable workers from being required to walk to and from their cars in dimly lit parking lots unaccompanied. It is our strong position the existing regime and its permitted hours provide an essential level of protection for retail workers from the heightened risk of customer abuse and violence during unsociable hours.

⁶ Cortis, N., Blaxland, M., and Charlesworth, S. (2021). *Challenges of work, family and care for Australia's retail, fast food and warehousing workers*. Sydney: UNSW Social Policy Research Centre, 6.

2.6 Impact of federal instruments

The State government does not ultimately have authority to provide adequate compensation or protections to workers for work performed in unsociable hours. These retail workers are covered by federal instruments and awards which set their pay and conditions. We submit the State government should support the existing regime particularly in light of the declining percentage of compensation, or the penalty rates, awarded to workers during those unsociable hours. A recent report revealed over half the participants rely upon penalty rates to make a living (50%).⁷ This included 53% of permanent part-time workers and 50% of those with permanent full time hours. Once again, this is a significant percentage of retail workers who are experiencing the impact of a federal system decreasing its protection and compensation for the work they perform to supply food and necessities during unsociable hours. The permitted hours are an irreplaceable method of protecting more retailer workers from being utilised at will by their employer, without reasonable consideration of or compensation for the significant impact of these rosters on the worker and the impact on their families.

⁷ Ibid, 7.

3. SECTION 5(1)(C) APPLICATIONS

Terms of reference: 1c, 2

The SDA submits the primary outcome envisaged by any revision of the current regime would be the continuation of hours currently legislated and the elimination of any ability for persistent applications to be made requesting unnecessary extensions to those hours for a period of time. For clarity, we submit Section 5(1)(c) of the Act be removed on the basis the current regime is sufficient and the need for these applications has proven unconvincing over the period of the moratorium. As a secondary position, if Section 5(1)(c) of the Act were retained, it is our strong view significant amendments must be made to ensure the applications do not undermine the permitted hours and are therefore required to adequately establish their necessity in future matters. We would also submit as a fundamental issue the legislation must be amended to enshrine the principle of voluntary work for retail workers applying to hours beyond those available for Non-Exempt Shops to trade during the period of any declared special event.

3.1 Current regime

An application made pursuant to Section 5 (1) (c) of the Trading (Allowable Hours) Act 1990 gives the Commission a significant power, having the ability to declare a “Non-Exempt Shop” an “Exempt Shop” for the purpose of a specific significant event. Such a declaration if granted therefore extends the possible trading hours of Non-Exempt Shop and has serious impacts on retail employees.

We submit the declarations made pursuant to Section 5(1)(c) over the period of the moratorium have not been relied upon by Non-Exempt Shops to any extent which may justify their continued necessity. In the case of many, if not all, of the declared “special events” it is our strong view larger retailers did not experience anywhere near the level of benefit associated with 24/7 trading which they initially predicted. A key example of this was the Commonwealth Games in 2018. A major international event attracting significant tourism and although large retailers predicted substantial trading opportunities in the extended hours, the SDA recalls the majority of retailers in the area experiencing a decrease in customer traffic during this period. The SDA recalls numerous retailers reducing their operating hours in this period where they were given the opportunity to extend them, despite their firm initial position being that the opportunity to trade beyond the current regime was an essential requirement according to the needs of both the retailers and customers during that period.

Another example of this was the Chinchilla Show in 2021. Despite an order being granted for the period of the Chinchilla Show,⁸ Woolworths Chinchilla reduced their normal trading hours on 21/05/2021 by 7 hours; trading from 10am to 4pm.

The SDA submits the experience of our members during the period of the declared special events provide important insight to the practical effects of those declarations. Of our members that did recall their Non-Exempt employer extending trading hours during the period of a declared special event, 67.5% said that customer traffic either remained the same or decreased. If those hours were made permanently available, 79.68% of members would not want to work in the unsociable period. From their experience with these declarations, 83.14% of members believe that if large retailers were allowed to trade 24/7 they would introduce roster changes and coerce existing staff to work during the extended hours. Based on the practical reality of how these declarations are applied by Non-Exempt Shops, it is our position any suggested benefit of those declarations by retailers are minimal and do not outweigh their negative impact to their retail workers affected in store.

3.2 Insufficient and unclear checks and balances

Section 5 (3)(a) of the Act describes matters the commission must consider when making a determination whether to declare an event to be a “special event”. The industrial commission:

- (a) *Must consider -*
 - (i) *the cultural, religious or sporting significance of the event; and*
 - (ii) *the significance of the event to the economy and the tourism industry; and*
- (b) *may consider a submission made by a local government for an area in which the declaration is likely to have an impact.*

There is, in our submission a deficiency within the Act for not providing guidance or any reference to considerations on such matters as:

- (a) The necessity of non exempt shops to actually trade as exempt shops during the special event.
- (b) The impact such a declaration has on employees of shops affected by the granting of such a declaration and their immediate family.
- (c) The necessity to limit any retail hours during the special event period.
- (d) Consideration of any food and drink available at the event or any local restaurant promotions taking place during the event encouraging patrons to direct their spending

⁸ TH/2021/3.

to small, local businesses. For example, the 2020 Toowoomba Carnival of Flowers offering a #trEATS food trail containing various promotions encouraging patrons to visit participating cafes, restaurants and pubs.

(e) The correlation between the nature of the shop requesting to trade and the nature of the event.

(f) Whether previous declarations for the specific event were utilised by the affected Non-Exempt Shops to extend their hours of trade during the period of the event and any benefit derived or detriment experienced in the extended period.

(g) More specific factors that indicate the significance of the event, such as attendance numbers, size of the event, media coverage, contribution to the States international reputation etc.

To provide an example of where the lack of clarification became confusing, in some applications attendance numbers were determined to be a contributing factor to the degree of significance of the event to the local area.⁹ In other applications, that consideration was rejected¹⁰ despite the presence of this consideration in the Major Events Act 2014 (Qld) s13(4).

Another complication we faced related to the period for which the application could be requested. The SDA understood and would still press the scope of Section 5(1)(c) allows an application to be made only for the period in which the event is operating. Section 5(1)(c) refers to “a shop operating in a stated area for an event” and it is not clear how a Non-Exempt Shop could be operating for an event on dates where the event is not operating. On some occasions this interpretation was accepted¹¹ and on other occasions, declarations were made inclusive of days beyond the period of the event.¹²

An alternative model should have a more robust mechanism to examine the holistic impact of any application made pursuant to the section. A greater onus should also be placed on the applicant to, as a minimum, demonstrate the application has been requested by a Non-Exempt Shop in the area, how that Non-Exempt Shop intends to utilise the ability to trade 24/7, the genuine customer needs they intend to meet, the benefit of their trading to the event and the specific actions that Non-Exempt Shop will take to promote and protect the voluntary nature of work in any extended hours.

⁹ TH/2021/1 at [28], [33].

¹⁰ TH/2021/8 at [25].

¹¹ TH/2021/1, TH/202/4.

¹² TH/2021/5.

3.3 Improper use of Section 5(1)(c) applications

The branch secretary of the SDA participated in the 2016-2017 review of the relevant legislation as a key stakeholder. The SDA took a clear position that the intention of Section 5 of the Act was to only allow the Commission jurisdiction to approve matters for events that were deemed to be major significant events with a significant impact to the community. Events contemplated were of the following type and nature: Commonwealth games, G20, Beef Australia in Rockhampton. Those events are of significant international prominence and generate tourism and mass visitation.

The SDA also submits that recommendations by the Office of Industrial Relations Review in December 2016¹³ stated that a change to the trading hours legislation was considered in terms of assisting tourism by specifically providing Shops operating within a designated area around and during international special events (e.g. Commonwealth Games) and for local festivals to be able to be declared exempt from trading hours regulation after consideration of an application to the QIRC and that the QIRC will decide the appropriateness of area and timeframe for exemption. We submit the review recommendations were not intended to make every event significant or to make all Non-Exempt facilities in locations near an event free from trading regulations.

It is our significant concern the detriment to retail workers and their family in the way Section 5 was drafted and ultimately legislated, has led to application for events that are in our strong view not significant events. Those applications were able to be made without the inclusion of information such as the names of retailers requesting the order, the confirmation of retailer's intention to use those hours and what purpose those stores could serve in terms of patron's needs that could not be served by the event itself or nearby small retailers. On that basis we submit the significant majority of those applications were not representative of any real need or desire for extended trading in the requested period but were utilised as an opportunity to undermine the existing regime without sufficient reason to do so.

Out of the numerous applications made to the QIRC, only one application was rejected.¹⁴ This was an application by the National Retail Association (NRA) for the BrisAsia Festival to be declared a special event. The NRA initially applied for the entire month of February but later indicated a willingness to accept the 8th to the 14th of February, before reducing the dates further to three days in light of one particular event; being the Lunar Year Event on 12 February 2021. This event took place in Fortitude Valley from 6-9pm and was a 15-20 minute walk to Queens Plaza, the shopping area that formed the focus of their application. In

¹³ Recommendation 10 – Ch. 6.4 p29 A Review of Queensland's Trading (Allowable Hours) Act 1990

¹⁴ TH/2021/1.

our view, the changing and nonsensical nature of this application brought attention to the consistent improper use of Section 5. In particular, the failure of applicants to only request a declaration be made in circumstances where the operation of a Non-Exempt Shop during the extended hours would create genuine trading opportunities and support attendees needs. We submit the overwhelming approval of these applications indicate a need for a more robust system.

3.4 No protections for workers

By reason of a declaration made pursuant to Section 5(1)(c) having the potential to extend trading hours in Non Exempt Shops, the current legislation allows large retailers to require retail employees to work within a set of 'extended hours' as defined under the said Act but without the requisite protections afforded to employees of Non Exempt Shops pursuant to Section 36B(1) of the Act.

Section 36B(1) of the Act states that an employer must not require an employee to work during 'extended hours' unless the employee has freely elected to do so as evidenced in writing. It is our strong view the inclusion of Section 36B(1) in the legislation demonstrates its intention to ensure hours outside the permitted hours remain voluntary working hours for retail employees. Whilst Section 5 applications are not an application to extend the permitted trading hours in a technical sense, the reclassification of a Non-Exempt Shop to an Exempt Shop has the same practical effect. The SDA was successful for a period of time in arguing the Section 36B(1) protections be applied to declarations made by the Commission pursuant to Section 5 of the Act.¹⁵ It has since been determined by the Commission it does not have the jurisdictional ability to apply those protections to future declarations.¹⁶ On occasions where the Commission has determined Section 36B(1) protections could not be applied, attempts have still been made to stress the importance of voluntary work as a strong concern. Ultimately, this does not prevent retail workers from being placed in the situation where they can effectively be required to work the extended hours without the relevant protections originally intended by the legislation to apply to those hours.

We have heard it suggested that although Section 36B(1) protections are desirable, in their absence retail employees are protected by other instruments; such as enterprise agreements which require consultation before a roster change or a written agreement to work additional hours. The SDA submits this perspective does not adequately account for the reality of the expectations, relational pressures and repercussions retail workers face in store. For example, when surveyed 14.36% of our members report they were not advised

¹⁵ TH/2017/26 at [25]-[27].

¹⁶ TH/2020/4 at [32].

they could elect to work or not during the extended hours, 54.55% felt pressured or forced to work outside their normal span of hours and 89.74% did not agree to work those hours in writing. Our members are also increasingly expected to have significant reasons as to why they cannot accommodate a requested change to their roster and face a dominant expectation that to work in retail you must be prepared to work as required regardless of any personal impact. In many circumstances failure to do so could amount to a failure to follow a reasonable direction and put the security of their employment at risk.

3.4.1 Protection on public holidays

Due to many special events falling on and around public holidays, it is important to consider the impact of Section 5(1)(c) in circumstances where a worker will not have the option to take the day off when the Non-Exempt Shop is declared Exempt on that day. The Fair Work Act requires employees to work on public holidays and hence the SDA submits that there should be protection of benefits if a worker must work OR inbuilt in the legislation an avenue for the retail worker to elect whether to work or not. The close connection these applications have to our Queensland public holidays reinforces the necessity for any amended version of the section to enshrine the voluntary nature of work performed outside the existing regime.

4. SUMMARY OF POSITION

- The current permitted trading hours secure an efficient framework by providing an appropriate and central set of permissible hours that remain unchanged.
- The existing regime is adequate to support a variety of worker, customer and business needs.
- The SDA strongly supports a further moratorium period of five (5) years.
- The primary concern and expectation of retail workers is the ability to elect to work extended trade hours if extended by a revised model or during the period of a declared special event.
- Section 5(1)(c) should be removed to protect the permitted hours from frequent applications for alternative hours without merit.
- If Section 5 is retained it should be amended to include, as a minimum, considerations for the following:
 - The necessity of Non Exempt Shops to actually trade as Exempt Shops during the special event;
 - The impact such a declaration has on employees of shops affected by the granting of such a declaration and their immediate family;
 - The necessity to limit any retail hours during the special event period;
 - Consideration of any food and drink available at the event or the events promotion of local restaurants and businesses;
 - The correlation between the nature of the shop and the nature of the event;
 - How any previous declaration for the event was used by the affected Non-Exempt stores and the subsequent impacts;
 - Other specific features of the event such as attendance numbers, size of the event, media coverage, contribution to the States international reputation.
- If Section 5 is retained, it should be amended to include voluntary work and provide protections in line with those contained in Section 36B(1) of the Trading (Allowable Hours) Act 1990.