



Administrative Decisions Tribunal  
New South Wales

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**CITATION:** **Dwyer v Department of Services, Technology and Administration and Kmart Australia Limited NSWADT 312 [2010] NSWADT 312**

**DIVISION:** General Division

**PARTIES:** APPLICANT  
Shop Distributive and Allied Employees Association (First Applicant)  
Gerard Dwyer (Second Applicant)

RESPONDENT  
Department of Services, Technology and Administration (First Respondent)  
Kmart Australia Limited (Second Respondent)

**FILE NUMBER:** 103310

**HEARING DATES:** 17 December 2010 17

**EX TEMPORE DECISION DATE:** December 2010  
**BEFORE:** Montgomery S - Judicial Member

**CATCHWORDS:** Shop Trading Act – approval for Boxing Day trading - exceptional circumstances – public interest

**LEGISLATION CITED**  
Administrative Decisions Tribunal Act 1997  
Shop Trading Act 2008 Retail Trading Act 2008

**CASES CITED:** Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell (2009) 185 IR 458; [2009] NSWCA 198  
Kellogg Brown & Root Pty Ltd & Ors v Esso Australia Ltd PR955357 139 IR 34  
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355  
Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290

**REPRESENTATION:** APPLICANT  
I Latham (First and Second Applicants)

RESPONDENT  
M Nagy (First Respondent)

M Seck (Second Respondent)

**ORDERS:**

1. The decision is set aside
2. The decision is made that the application is refused

**Reasons for Decision**

1 The Shop Distributive and Allied Employees Association (“the SDA”) seeks the review of a decision by a delegate of the Director-General, Department of Services, Technology and Administration (“the First Respondent”) to allow Kmart Orange to trade on Boxing Day 2010.

2 Kmart is a discount department store chain. It operates about 171 stores nationally and sells a broad range of general merchandise including toys, electronics, clothing, homewares, automotive products, audio-visual products and pre-packaged food. It operates a store at the corner of Byng and Anson Streets, Orange, New South Wales, trading as Kmart Orange.

3 On 21 October 2010, the Second Respondent applied for an exemption under section 10 of the *Shop Trading Act* 2008 (“the former Act”). It made an application for retail trading on Easter Sunday and Boxing Day for a period of 3 years in respect of its Orange Store.

4 The delegate’s decision was dated 30 November 2010. Between the time of the application for exemption and the delegate’s decision, the former Act was substantially amended and renamed as the *Retail Trading Act* 2008 (“the Act”). The amendments commenced on 29 November 2010.

5 Mr Gerard Dwyer sought to be joined as a party to the proceedings. Mr Dwyer is the National President of the SDA and the Secretary-Treasurer of the New South Wales Branch of the SDA. The SDA is an association of employees taken to be registered as an organisation under the Commonwealth *Fair Work (Registered Organisations) Act* 2009.

6 The Respondents have opposed the Application.

7 The matter came before me for hearing on 17 December 2010. I joined Mr Dwyer as a party to the proceedings. Following the hearing, I set aside the decision to grant the exemption that Kmart had sought and in its place determined that the application for an exemption should be refused.

8 The First Respondent has sought more detailed reasons and these are now provided. **The**

**Legislative Scheme**

9 The Act and the former Act recognise Boxing Day (among others) as a day of special community significance by section 4(1)(e), which requires shops to be kept closed 'at all times on Boxing Day'. That prohibition is subject to any exemption granted under Part 3 of the relevant Act: section 4(2).

10 Part 3 of each Act concerns 'Exemptions' and provides for certain classes of exemptions to the prohibitions in section 4(1), including (for example) shops operating the particular types of businesses listed in Schedule I (section 7) and in respect of small shops (section 8).

11 Section 10(1) confers a discretion on the Director-General to grant an exemption from the requirement that a shop be kept closed, subject to the requirements of section 10(2) which provides:

(2) The Director-General must not grant an exemption for a shop unless the Director-General is satisfied that it is in the exceptional circumstances of the case in the public interest to do so, having regard to the following matters:

- (a) the nature of the shop and the kinds of goods sold by the shop,
- (b) the need for the shop to be kept open on the day or days concerned,
- (c) the likely effect of the proposed exemption on the local economy, tourism and small businesses and other businesses in the area,
- (d) the likely effect of the proposed exemption on employees of, or persons working in, the shop.

12 The right to seek review of a determination of the Director-General is pursuant to section 12. Section 12 was substantially amended with the amendments commencing 29 November 2010. Prior to 29 November 2010 section 12 provided:

### **12 Reviews by Administrative Decisions Tribunal**

(1) Any person who has applied for an exemption and is aggrieved by any of the following decisions may apply to the Administrative Decisions Tribunal for a review of the decision:

- (a) a determination of the Director-General to refuse to grant or to amend or revoke an exemption,
- (b) a determination of the Director-General as to the conditions subject to which, or the period for which, an exemption is granted.

(2) Any other person who considers himself or herself to have a sufficient interest in an application for an exemption under this Division may apply to the Administrative Decisions Tribunal for a review of any such decision.

(3) The Administrative Decisions Tribunal is not required to review a decision on the application of a person (other than the person who applied for the exemption) if it is not satisfied that the person has a sufficient interest in the application for exemption.

13 From 29 November 2010 section 12 provided:

### **12 Reviews by Administrative Decisions Tribunal**

(1) Any person who has applied for an exemption and is aggrieved by any of the following decisions may apply to the Administrative Decisions Tribunal for a review of the decision:

- (a) a determination of the Director-General to refuse to grant or to

amend or revoke an exemption,

(b) a determination of the Director-General as to the conditions subject to which, or the period for which, an exemption is granted.

(2) Any other person who considers himself or herself to have a sufficient interest in an application for an exemption under this Division may apply to the Administrative Decisions Tribunal for a review of any such decision.

(3) The Administrative Decisions Tribunal is not required to review a decision on the application of a person referred to in subsection (2) if it is not satisfied that the person has a sufficient interest in the application for exemption.

(4) A representative of an industrial organisation of which persons employed or engaged in shops are entitled or eligible to become members may apply to the Administrative Decisions Tribunal for a review of any of the following decisions:

(a) a determination of the Director-General to grant or to amend an exemption,

(b) a determination of the Director-General as to the conditions subject to which, or the period for which, an exemption is granted.

(5) In this section:

industrial organisation means:

(a) an industrial organisation of employees within the meaning of the Industrial Relations Act 1996, or

(b) an association of employees registered as an organisation under the Fair Work (Registered Organisations) Act 2009 of the Commonwealth.

14 The Second Respondent submits that the applicable legislation in this matter is that which was in place at the time the application for the exemptions was made i.e. 21 October 2010. It contends that at that time the former Act would not permit the Applicant standing to commence these proceedings.

15 Under section 12(2) of the former Act as in force on 21 October 2010 a person who considers he or she has a "sufficient interest" in an application for an exemption may apply to the Tribunal for a review of "any such decision". In the Second Respondent's submission, even if the Applicant could establish that it had "sufficient interest", the expression "any such decision" refers to the class of decisions set out in section 12(1). That is (a) a determination of the Director-General to refuse to grant or to amend or revoke an exemption; or (b) a determination of the Director-General as to the conditions subject to which, or the period for which, an exemption is granted. It does not include the Director-General's decision to grant an exemption under section 10(1).

16 I do not accept that submission. While I agree that Kmart was entitled to have its application for exemption determined under the legislation that was in place at the time of the application, in my view the provisions of section 12 do not come into play until after the Director-General

has made a determination. The applicable legislation for the purposes of an application for review by the Tribunal is that which was in force at the date of the reviewable decision. In this matter the relevant date was 30 November 2010. On that day, section 12(4) of the Act had commenced and in my view, the rights included in section 12(4) of the Act by the 29 November 2010 amendments are applicable to this matter.

17 Section 12(4) confers rights which did not exist before the assent of the provisions. It is not in dispute that Mr Dwyer satisfies the provisions of section 12(4). It follows, in my view, that Mr Dwyer is eligible to bring these proceedings and should be joined as a party.

### **Nature of proceedings**

18 The application before the Tribunal is an application for review of a reviewable decision. Pursuant to section 63(1) of the *Administrative Decisions Tribunal Act 1997* the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including factual material and the written or unwritten law. The Tribunal may exercise all of the functions and powers of the original decision-maker: section 63(2).

19 The 'correct and preferable decision' is to be determined having regard to the statutory test enumerated in section 10 of the Act and the material that is before the Tribunal, rather than being confined to that material which was before the original decision maker.

### **Section 10 of the Act**

20 Section 10(1) confers a discretion on the Director-General to grant an exemption from the requirement that a shop be kept closed. Section 10(2) provides that an exemption must not be granted unless the Director-General is satisfied that it is 'in the exceptional circumstances of the case in the public interest to do so'.

21 In my view, section 10(2) provides for a two stage process. I think the two stages require me to determine (a) whether there are exceptional circumstances and (b) whether it is in the public interest that an exemption apply. In forming that view regard must be had to the four factors that are listed in paragraphs (a) – (d) of section 10(2).

### **Exceptional circumstances**

22 The Tribunal must be satisfied that "it is in the exceptional circumstances of the case in the public interest" to grant the exemption. There should be a general presumption against trading on the restricted days. The phrase "exceptional circumstances" is a reference to the specific circumstances of the case.

23 Regard must be had to the scope and purpose of the Act in assessing whether circumstances are 'exceptional' for the purposes of section 10(2): *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 -382.

24 The Macquarie dictionary defines 'exceptional' as:

“1. forming an exception or unusual instance; unusual; extraordinary.

25 In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 the New South Wales Court of Appeal considered the phrase 'Exceptional circumstances', in the context of rule 31.18(4) of the *Uniform Civil Procedure Rules 2005*. Campbell JA (with whom Tobias JA and Handley AJA agreed) said:

66 Another question of construction concerned “exceptional circumstances” in rule 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]-[69], I gave consideration to the expression “exceptional circumstances” in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of rule 31.18(4).

(a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).

(b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913).

(c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912-913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

26 In my view, the phrase 'exceptional circumstances', in the context of section 10 of the Act, sets a high bar requiring more than 'special' circumstance.

27 In the present matter, it is submitted that the holding of the 65th Annual Jazz Convention at Orange (“the Jazz Convention”) from 26 to 31 December 2010 and associated issues, constitute 'exceptional circumstances' for the purposes of section 10 of the Act. The associated issues include:

(a) the unusual and significant influx of visitors that is expected to visit Orange for the Jazz Convention;

(b) the fact that many visitors will be staying in self contained accommodation or camping, and hence are likely to be catering for themselves;

(c) the fact that the success or failure of the Jazz Convention as a tourist attraction and in terms of its orderly conduct may be affected by the access of visitors to goods such as those required for camping. Kmart Orange sells a broad range of general merchandise to meet these

needs and there are no other equivalent department stores or shops selling a range of general and specialised merchandise on Boxing Day 2010.

Orange City Council has been actively promoting Orange as a tourist destination and its reputation may be adversely affected if it cannot adequately meet the demands of tourists.

28 In my view, the fact that a number of visitors will be expected to visit Orange for the Jazz Convention between Boxing Day and 31 December 2010 is unusual or special.

29 However, Boxing Day is the first day of the Jazz Convention and is merely the registration day. It would be unusual for visitors, who come to the Jazz Convention with the expectation that they will be self-contained, to turn up on the first day and not be prepared.

30 While I am satisfied that the circumstances are 'special', on the evidence before me I do not consider that they are 'exceptional'.

### **The 'public interest'**

31 In the circumstances it is not necessary that I consider whether granting the exemption is in the public interest. However, for completeness I will deal with it briefly.

32 The 'public interest' refers to the interest of the general public, not that of individuals employees or employers. The notion of 'public interest' refers to matters that might affect the public as a whole. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. Although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them. The ascertainment of the public interest may involve balancing countervailing public interests: *Kellogg Brown & Root Pty Ltd & Ors v Esso Australia Ltd* PR955357 139 IR 34 per Commissioner Whelan at paragraphs [23] – [26].

33 The statutory requirement that a decision maker have regard to listed matters requires that each is given weight as a fundamental element in making the determination. In *Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell* (2009) 185 IR 458; [2009] NSWCA 198 at [73] the Court of Appeal (per Spigelman CJ) stated:

"A statutory requirement to "have regard to" a specific matter, requires the Court to give the matter weight as a fundamental element in the decision-making process. (R v Hunt; Ex parte Sean Investments Pty Ltd (1979) 180 CLR 322 at 329; R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 at 333, 337-338; Zhang v Canterbury City Council [2001] NSWCA 167; (2001) 51 NSWLR 589 at [71]-[73]). An equivalent formulation is that the matter so identified must be the focal point of the decision-making process. (See *Evans v Marmont* (1997) 42 NSWLR 70 at 79-80; Zhang supra at [73].)"

34 In my view, the nature of the goods sold by Kmart suggests that, if the exemption is granted, the goods would be provided for a very small subset of those attending the Jazz Convention. In the circumstances I do not think that there is a need for the shop to be kept open. The likely effect on small businesses and other businesses in the area is minimal because they are not trading in the same products as Kmart. Similarly, I do not think that the likely effect of the proposed exemption on the local economy and tourism is significant. The evidence before me

suggest that if the exemption were granted there would be both benefits and disadvantages for employees of, or persons working in, the shop. I don't think that the effect on those individuals is conclusive.

35 The decision I have now reached is that these are not exceptional circumstances. However, even if the circumstances are exceptional, on balance I do not consider that granting the exemption is in the public interest.

36 It follows, in my view, that the exemption sought should not be granted.

## Orders

1. The decision is set aside
2. The decision is made that the application is refused

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