

**RETAIL TRADING ACT 2008 DECISION  
REASON FOR DECISION - AMENDED**

1. I, Natalia Reed, am an officer holding a delegation from the Secretary under the *Retail Trading Act 2008* (Act) to exercise the functions prescribed in that Act.
2. On 21<sup>st</sup> January 2025, The trustee for DJ Scully Discretionary Trust and The trustee for Scully Family Discretionary Trust and The Trustee for Vogel Family Discretionary Trust trading as Batehaven Supermarket (Applicant) made an application under section 10 of the Act as occupier of a shop at 1 Corrigan Crescent, Batehaven, NSW 2536 (Shop), for the Shop to be exempt from the requirement to be kept closed on Good Friday (18<sup>th</sup> April) Easter Sunday (20<sup>th</sup> April), and Anzac Day (25<sup>th</sup> April) for the year 2025 (Application).
3. It should be noted that the Application was submitted for Good Friday, Easter Sunday and Anzac Day 2025, however this decision relates to Anzac Day 2025 only. This is because there is an existing exemption allowing the Applicant to trade on Good Friday and Easter Sunday under Section 89B of the Shops and Industries Act 1962, due to their location in the Eurobodalla Shire local government area. This existing exemption is still valid under Schedule 2, clause 2 of the Retail Trading Act 2008.
4. I have considered the Application and public comments which were received.
5. On this day I have decided to refuse the application as I am not satisfied that, as required by section 10(2) of the Act, 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 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.
6. In making this decision I have taken into account the principles enunciated in a decision of the Administrative Decisions Tribunal (*Shop Distributive and Allied Employees Association v Director General of Services Technology and Administration and K-Mart Australia Limited* [2010] NSW ADT

312) that the test under section 10 is a two-step process, there being a need for both exceptional circumstances and for the granting of the exemption to be in the public interest.

7. The Application was placed on public exhibition for a period of no less than 14 days from 22<sup>nd</sup> January 2025 and public comment was sought. One public submission was received; from the Shop, Distributive & Allied Employees' Association, New South Wales (SDA NSW).
8. I have now considered the circumstances raised by the Shop, as well as the submission from SDA NSW.
9. The Applicant submitted the following as a claim for exceptional circumstances:
  - (a) The Shop is an essential service in a high-traffic tourist area.
  - (b) The Shop operates within walking distance of three holiday parks and there are many holiday homes and apartments within the area.
  - (c) Due to demand for supermarket products during peak tourist periods, not being allowed to trade on restricted trading days could negatively impact the Batemans Bay tourism industry.
  - (d) Eighty percent of staff are under 18, and want to work on these days for additional penalty rates
10. Whilst I acknowledge the circumstances raised by the shop, I do not consider these qualify as exceptional circumstances in accordance with section 10(2) of the Act for the following reasons:
  - (a) No evidence was provided by the applicant in support of the claim that the shop is an essential service in a high tourist area. There were also no public submissions supporting this claim.
  - (b) Notwithstanding the absence of evidence, the location of the supermarket in proximity to tourist parks and holiday homes is not a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon.
  - (c) Regarding the demand for products sold by the Shop in peak tourist periods, this is also not a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon, as would be required when considering exceptional circumstances for the purpose of this Act.
  - (d) The claims made with regards to negative impacts on Batemans Bay tourist industry as a whole are not supported with evidence, nor were they supported by public submissions. Due to the statewide application of the Act, there will be many tourist areas with similar restrictions in trading.
  - (e) The application notes that 80% of staff would like to work on a restricted trading day however there were no submissions from employees of the shop supporting granting of an exemption to secure penalty rates, despite the notice being published both on the Fair Trading website and instore to provide the opportunity for staff to support or oppose this application.
  - (f) Having regard to the rationale of the Act, there should be a general presumption against trading on restricted trading days and there appears to be no exceptional circumstance in place to warrant the granting of an exemption.

11. The Applicant submitted the following reasons as to why they believed granting an exemption would be in the public interest:
- (a) The supermarket provides food and food products to both locals and tourists during busy times.
  - (b) Granting the exemption would positively affect local accommodation and hospitality businesses, as more people are likely to holiday in an area where supermarket facilities are open.
  - (c) Approximately 12 staff will be working on the restricted trading days, mostly casuals, as full-time and part-time staff are paid to have the day off.
  - (d) Casual staff working on these days will receive 225% of the normal rate of pay as per the General Retail Industry Award 2020.
12. I do not consider the reasons provided by the Applicant sufficiently demonstrate that granting the Shop an exemption is in the public interest in accordance with section 10(2) of the Act for the following reasons:
- (a) The application relates to individual days, with unrestricted trading available under the Act on both the day immediately before, and the day immediately after each restricted trading day. This does not appear to constitute a significant restriction of access for the public to food or food products sold in the Shop.
  - (b) There is no evidence provided in the application that there would be higher numbers of tourists in the area if supermarket facilities were to remain open, to support the argument that granting an exemption would be in the public interest, or that there would be a positive impact to other businesses in the area if an exemption were to be granted.
  - (c) There were also no submissions received from other businesses in the area supporting this application for exemption; that there would be increased traffic to their businesses.
  - (d) The application notes granting an exemption would provide increased rates of pay to approximately 12 staff, however there were no submissions from employees of the Shop supporting granting of an exemption.
  - (e) By contrast, the SDA submission refers to the social welfare of employees, their families and society, and notes the granting of an exemption would be out of step with community expectation, put pressure on retail employees and their families and impact the ability of many employees to commemorate Anzac Day with their community.
  - (f) Notwithstanding the absence of submissions from direct employees of the Shop, 'public interest' refers to the interest of the general public, not that of individuals, employees, or employers.
  - (g) The notion of 'public interest' refers to matters that might affect the public as a whole, which does not appear to be the case in this instance.

Natalia Reed  
Manager, Grade 11/12  
**NSW Fair Trading**  
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