

RETAIL TRADING ACT 2008 DECISION

REASON FOR DECISION

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 20/02/2025, Camperdown Cellars trading as Camperdown Cellars (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 45A Spofforth Street, Cremorne, NSW 2028 (**Shop**), for the Shop to be exempt from the requirement to be kept closed on Anzac Day 2025 (**Application**).
3. I have considered the Application and public comments which were received.
4. 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.
5. 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.
6. The Application was placed on public exhibition for a period of no less than 14 days from 3rd March 2025 and public comment was sought. Two public submissions were received; from the Shop, Distributive & Allied Employees' Association, New South Wales (SDA NSW) and from the NSW Branch of the Shop, Distributive & Allied Employees' Association (SDA).
7. I have now considered the circumstances raised by the Shop, as well the submissions from SDA NSW and SDA.
8. The Applicant submitted the following as a claim for exceptional circumstances:
 - (a) The business operates 8 small format liquor retail stores and believe that continued operation on the restricted trading day is important to provide essential services. The Shop was classified as an essential service by the government through Covid and remains an essential service today.
 - (b) Camperdown Cellars plays a vital role in the community providing essential supplies in city fringe locations, tourism locations near the harbour as well as beachside areas visited by locals and tourists.

- (c) Anzac Day like any other public holiday is a peak trading day and there is a strong demand for the services of the Shop on restricted trading days.
- (d) Operating the Shop supports local employment, ensuring team members can earn income during peak periods which is relied on in the cost-of-living crisis era.
- (e) The Shop asserts that freedom to choose and freedom to operate an essential service without interference from Government are elements the Anzacs fought to preserve. The Application cites an understanding of the significance of restricted trading days and notes if an exemption were granted, the Shop is committed to operating in a way that respects the spirit of these regulations, complying with all relevant employment laws and ensuring appropriate staffing levels to maintain service quality.

The Application also included claims related to impact on the local community and financial loss to the business which have been considered at point 11.

9. 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) Shops located in city fringe locations, tourist locations and beachside areas could reasonably be considered regular, routine or normally encountered circumstances in many areas across NSW.
 - (b) The classification of the Shop as an essential service through Covid is not a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon and applied to varied business types under separate Orders in force at that time, for varied reasons. The Act has not been amended to broadly consider the essential services classification applied under Orders during that time as an exceptional circumstance, and the decision to grant or refuse an exemption must be made under the requirements of the Retail Trading Act 2008 currently in force.
 - (c) While there may be a strong demand for services of the Shop on restricted trading days, this 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. No evidence was provided by the Applicant in support of the claim of strong demand from customers on these days to further support the argument for exceptional circumstances. There were also no public submissions supporting this claim.
 - (d) With regards the Shop supporting local employment and providing opportunities for increased income through award entitlements in peak periods, these are all circumstances regularly, routinely, or normally encountered and could not be considered out of the ordinary course or uncommon within the context of regional retail operations across NSW.
 - (e) The Shop notes in its application that freedom to choose and the freedom to operate an essential service without interference from Government are elements the Anzacs fought to preserve. This statement was not supported by evidence, nor was it supported by public submissions received.
 - (f) Notwithstanding the Applicant's assertion that they would ensure trading on Anzac Day would respect the spirit of the regulations relating to voluntary work arrangements and fair public holiday compensation, there is no detail provided in the Application as to how operation on a restricted trading day would not undermine the spirit of the restricted trading day as one of important cultural and historical significance. Instead, permitting trade on this day could be considered inconsistent with the wider legislative and community expectations established through public consultation and reflected in the 2024 amendments to the Retail Trading Act 2008.
 - (g) 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.
10. The Applicant submitted the following reasons as to why they believed granting an exemption would be in the public interest:

- (a) The business operates eight small format liquor retail stores.
 - (b) The majority of the public will benefit from an exemption as they are local to the small format liquor stores located across inner Sydney, and in tourist areas.
 - (c) Pubs and clubs are permitted to trade while takeaway liquor is not, so fairness must be evaluated. Allowing small businesses to trade levels the playing field with larger businesses or pubs and clubs.
 - (d) If an exemption were granted there would be a boost in sales and increased revenue for small businesses, especially in hospitality and retail. More activity in local businesses benefits suppliers, delivery services and other dependent industries.
 - (e) Tourists expect dining, shopping, and entertainment options, especially in popular destinations. Allowing small businesses to open improves their experience.
 - (f) Small businesses often showcase unique products, artisan goods, or regional specialties, enhancing the local area's appeal.
 - (g) Exemptions can stimulate the local economy, support small business survival, and enhance the tourism sector, making the area more vibrant and attractive. If an area becomes known for being open and welcoming on restricted days, it can boost its reputation as a tourism-friendly destination.
 - (h) Additional trading hours may lead to increased employment, particularly for casual or part time workers.
 - (i) Restricted trading will impact the local community, result in significant financial loss for the business and cause significant financial harm and job losses for individuals who rely on peak trading days for their income.
11. 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 one single day, with unrestricted trading available under the Act on both the day immediately before, and the day immediately after Anzac Day. This does not indicate a significant restriction of access to products sold by the Shop for the local community, nor is there detail provided to support the claim of significant financial loss for the business itself. There is no clear evidence provided by the Applicant to demonstrate why expected demand on the restricted trading day would not be transferred to adjacent trading days should the Shop remain closed.
 - (b) The Application notes that fairness between larger businesses, pubs and clubs and small businesses must be evaluated however 'public interest' refers to the interest of the general public, not that of individuals, employees or employers.
 - (c) While the Application cites a boost in sales and increased revenue for other small businesses, as well as benefits to suppliers, delivery services and other dependent industries, there were no submissions from the general public, small businesses in hospitality and retail, or other businesses in the area supporting this application for exemption; that there would be a boost in sales, increased revenue, increased activity or stimulation of the local economy.
 - (d) The claims made regarding improved experience for tourists within the region or the enhancement of the tourism sector overall within the area based on the granting of an exemption are not supported with evidence. Due to the statewide application of the Act, there will be many areas with similar restrictions in trading, therefore the ability to trade or not trade on the restricted trading day should not be a reflection on the area itself. Public submissions received from the SDA point to community sentiment supporting this restriction in trading rather than viewing it as a negative.
 - (e) The Application notes granting an exemption would support increased employment and prevent significant financial harm and job losses to individuals who rely on peak trading days for income, however there were no submissions from employees of the Shop

supporting granting of an exemption, despite the notice being published both on the Fair Trading website and instore to raise awareness with staff.

- (f) 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.
- (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
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NSW Fair Trading
01/04/25