

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

1. I, Javier Yuste, 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 March 2025, Shebeen Enterprises No 3 Pty Ltd trading as West Kempsey Cellarbrations (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 1 Kemp Street, Kempsey NSW 2440 (**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 26 March 2025 and public comment was sought. Two public submissions were received: one from the Shop, Distributive & Allied Employees' Association, New South Wales (SDA NSW), and another 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 public submissions received.
8. The Applicant submitted the following as a claim for exceptional circumstances:
 - (a) West Kempsey Cellarbrations is a standalone, independently operated bottle shop in a regional community, forming part of a group of five such stores owned by a small, family-operated business.
 - (b) The business is privately owned by two directors and is the sole source of income for the two families involved. The business does not have the financial capacity to operate pubs, unlike major competitors such as large corporate chains or hotel groups.

- (c) The Shop faces an unfair competitive disadvantage, as competitors with attached pubs can legally trade on Anzac Day while standalone bottle shops such as theirs cannot. This creates an uneven playing field, with significant market advantage accruing to larger businesses.
 - (d) The Shops employees — four to five per store — are locals who rely on public holiday penalty rates as a key part of their income. The Shop proposes that only staff who choose to work will be rostered, in line with the *Fair Work Act 2009* and *Retail Trading Act 2008* protections.
 - (e) The business contributes to the local economy and retail landscape by supporting associated suppliers, maintaining competitive pricing, and providing consumer choice. The restriction prevents consumers from accessing more affordable packaged liquor, forcing them to purchase from more expensive hotel-operated competitors.
 - (f) Public demand exists for packaged liquor on Anzac Day, particularly in regional communities where options are limited. Packaged liquor stores serve an important social function during Anzac Day gatherings, including informal commemorations and events with family and friends.
 - (g) 10% of the Shops annual revenue is earned on public holidays and Anzac Day is a significant trading day. The inability to open places financial pressure on the business and could lead to reduced competitiveness and long-term loss of market share.
 - (h) The current regulatory framework is inconsistent — while takeaway alcohol may be purchased from exempt venues under the *Liquor Act 2007*, standalone liquor stores such as theirs are restricted from trading under the *Retail Trading Act 2008*. This misalignment, in their view, further disadvantages their business and undermines the intent of the legislation.
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) The business model of a small, independent packaged liquor store operating in a regional or coastal area — even when part of a family-owned group — is not, in and of itself, unusual, rare or out of the ordinary in the context of retail trading across New South Wales. The fact that a business operates independently or without corporate affiliation does not, without more, elevate its position to the statutory threshold of being *exceptional*.
 - (b) While the business's reliance on retail trading as its primary income source is understood, this is a feature common to many small businesses across the state and does not meet the legislative threshold of *exceptional circumstances*. Similarly, the fact that the business does not own a pub or club does not render it uniquely disadvantaged in a way contemplated by the Act.
 - (c) The Shop's employees may benefit financially from working on public holidays, but no evidence was provided to indicate that staff would experience hardship if they were not rostered on Anzac Day. Importantly, no submissions were received directly from employees, and the Applicant did not provide any evidence of staff reliance on Anzac Day shifts beyond general assertions.
 - (d) The Shop is legally permitted to trade on the days immediately before and after Anzac Day. The Applicant did not provide evidence to demonstrate that closure on Anzac Day alone would substantially or materially affect the business's viability, nor did it demonstrate that customers would be left without access to goods necessary for health, safety, or wellbeing.
 - (e) While it is claimed that the business previously traded on Anzac Day after 1pm and that this met community expectations, this practice ceased following the *Retail Trading Amendment (Anzac Day Trading Hours) Act 2024*. That amendment reflected the outcome of a public consultation process and the legislative intent to preserve Anzac Day as a full day of remembrance and community reflection. Prior practice, therefore, is not sufficient to establish current exceptional need.
 - (f) The Applicant has raised regulatory inconsistency between the way the *Liquor Act 2007* and the *Retail Trading Act 2008* treat businesses which hold different types of liquor licences. The application of legislation may differ based on the individual circumstances of a business and accordingly, this is not considered exceptional for the purposes of the Act.

- (g) No evidence of community hardship, social need, or unavailability of services that would arise from closure was provided. The assertion that patrons would pay more at a nearby pub-based bottle shop is a commercial consideration, but not a sufficient basis to establish that the Shop is an essential service or uniquely necessary on Anzac Day.
 - (h) While the business contributes to the local economy and supports employment, these are considerations common to many retail operators. The general benefits of local employment, consumer choice, or competitive pricing do not, in this instance, satisfy the high threshold of exceptional circumstances envisioned by the Act.
10. The Applicant submitted the following reasons as to why they believed granting an exemption would be in the public interest:
- (a) The Shop provides local employment in a small regional community. Each store employs between four and five staff members, many of whom are casual workers who rely on the penalty rates applicable on public holidays such as Anzac Day. These opportunities to work and earn a higher hourly rate are a key financial resource for staff.
 - (b) The Shop is positioned as a locally owned business that contributes to the regional economy and supports associated suppliers and producers. The ability to trade on Anzac Day would allow the business to continue generating income, protect jobs, and stimulate other local economic activity.
 - (c) Closure on Anzac Day forces customers to turn to competitors that are legally permitted to trade under existing exemptions — specifically, liquor outlets attached to hotels and pubs — many of which are corporate-owned. This, they assert, results in reduced consumer choice, less competition, and higher prices for customers.
 - (d) The ability to trade on Anzac Day would provide service continuity to the local community and meet demand for packaged liquor that typically coincides with Anzac Day gatherings and commemorative events.
 - (e) Preventing the Shop from trading risks a loss of market share, customer base, and long-term business viability, particularly in a competitive environment where large exempt venues are advantaged by their structure.
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 matters advanced by the Applicant primarily reflect operational and commercial considerations — including competition, revenue preservation, staffing arrangements, and customer retention — which are routinely encountered by businesses. These factors, while relevant from a business standpoint, do not demonstrate a wider benefit to the community sufficient to override the policy intent of the legislation.
 - (b) The Applicant did not provide evidence that local residents would experience hardship or a meaningful reduction in access to necessary goods or services if the Shop is closed on Anzac Day.
 - (c) The Shop is permitted to trade without restriction on both the day before and the day after Anzac Day. No evidence was provided to demonstrate that customer needs could not be reasonably met on those days, or that the one-day closure would result in community disruption or dissatisfaction.
 - (d) While the Applicant submitted that staff benefit financially from public holiday shifts, no employee submissions were provided in support of the Application. There is no information before me to confirm that staff rely on this income to the extent that their wellbeing would be materially affected if the Shop is not permitted to trade.
 - (e) The public submissions received from SDA NSW and the SDA reflect broader societal expectations regarding the significance of Anzac Day. Both organisations opposed the Application and noted that Anzac Day is a National Day of Commemoration, reflection, and shared rest. Their submissions referenced the 2024 amendments to the *Retail Trading Act*

2008, which followed an extensive public consultation process and confirmed strong community support for maintaining full-day trading restrictions on Anzac Day.

- (f) The public interest must be assessed in relation to the broader community and legislative intent, rather than the preferences or competitive circumstances of individual businesses. In this case, the Applicant's submission does not demonstrate a compelling or unique public benefit that would justify departing from the established trading restriction.
- (g) The *Retail Trading Act 2008* requires that any exemption be demonstrably in the public interest, with consideration given to the broader community rather than individual business interests. The cultural, social, and commemorative significance of Anzac Day is central to the purpose of the Act, and the continued restriction on trade aligns with both legislative intent and prevailing community expectations, as reinforced by the 2024 amendments.

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17/4/25