

RETAIL TRADING ACT 2008 ORDER

REASONS 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 03 February 2025, Zonndain Pty Ltd, trading as Foodworks Broulee (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 7/40 Train Street, Broulee, NSW 2537 (**Shop**), for the Shop to be exempt from the requirement to be kept closed on Good Friday, Easter Sunday and Anzac Day for the years 2025-2027 (**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 25 February 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 a vital local resource for residents in Broulee and surrounding areas, many of whom are dependent on the store for essential grocery items. This includes individuals who may have limited mobility, elderly customers, or people living in remote areas with limited access to other retail options.
 - (b) As a regionally based shop there are challenges in maintaining consistent stock levels due to distance from major distribution centres and increased cost of transportation. Allowing trading on a restricted trading day will ensure residents access to necessary goods without disruption and alleviate potential scarcity in periods of increased demand.
 - (c) Operation on the restricted trading day would not undermine the spirit of the Retail Trading Act and would be fair and responsible to local community, employees and other small businesses, with measures implemented to manage any potential disruption to surrounding businesses.

The Applicant also submitted claims relating to public benefit to vulnerable community members and local economic benefit, however I have considered these under point 11 relating to public interest.

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) A customer base including individuals who may have limited mobility, elderly customers, or people living in remote areas is not a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon.
 - (b) No evidence was provided by the Applicant in support of the claim that these customers are wholly dependent on the store for essential grocery items, or that there is limited access to other retail options. There were also no public submissions supporting this claim, despite the notice being published both on the Fair Trading website and instore to raise awareness with customers.
 - (c) 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 2025. It is not clear how a single day closure would result in significant disruption of access

to necessary goods for residents, or that there would be an increased demand resulting in scarcity of necessary goods. No public submissions supported this claim.

- (d) Notwithstanding the Applicants assertion that they would ensure trading on Anzac Day would be fair and responsible, with management of potential disruption to surrounding businesses, there is no detail provided in the Application as to how operation on a restricted trading day would not undermine the spirit of the Act. By contrast, the SDA submission refers to Anzac Day as a day of important cultural and historical significance and notes the restriction of trading on this day is in keeping with community sentiment on the solemn nature of Anzac Day.
- (e) 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 Shop is a supermarket, selling fast moving consumer goods; groceries.
- (b) Exemption would allow the community and surrounding suburbs to have access to essential grocery needs in a time of restricted retail access, particularly relating to Broulee's large elderly population, tourist influx and relative isolation from other retailers.
- (c) In the current economic and social climate, ensuring access to essential supplies on a restricted trading day provides significant public benefit and support for vulnerable members of the community.
- (d) The Shop is the only grocery store in an isolated tourist village.
- (e) Granting of an exemption would help attract and retain tourists, boosting the local economy and retaining the tourist population.
- (f) Granting an exemption would likely reduce the need for customers to travel to more distant locations, supporting the economic stability of the area.
- (g) Granting of an exemption would provide more opportunities for staff, support local employment in an area where opportunities can be limited, and provide 5-10 team members (many of whom are aged under 18) a financial incentive based on loadings in the Award, within a collaborative environment.

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 one single day, with unrestricted trading available under the Act on both the day immediately before, and the day immediately after Anzac Day 2025. This does not indicate a significant restriction of access to essential grocery needs for the general public, even having regard to the circumstances raised by the Applicant - a time of restricted retail access, large elderly or vulnerable population, tourist influx and relative isolation from other retailers.

- (b) The claims made regarding the Shop's location as the only grocery store in an isolated tourist village are not supported with evidence, nor were they supported by public submissions.
- (c) The claims made regarding increased attractiveness of the region for tourists or increased retention of tourists in 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.
- (d) Similarly, the requirement for customers to travel to more distant locations to avoid restricted trading will also be lessened by the statewide application of the Act.
- (e) The Application notes granting an exemption would support local employment, and provide a financial incentive to 5-10 employees, 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) 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.
- (h) Similarly, while the Application cites support for economic stability in the area should the exemption be granted, 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
14/3/25