

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 07 February 2025, DK Supermarket Weston Pty Ltd, trading as Foodworks Weston (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 96 Cessnock Road, Weston, NSW 2326 (**Shop**), for the Shop to be exempt from the requirement to be kept closed on Anzac Day for the year 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 16 February 2025, and public comment was sought. One public submission was received; from the Shop, Distributive & Allied Employees' Association, New South Wales (SDA NSW).

7. I have now considered the circumstances raised by the Shop, as well as the submission from SDA NSW.
8. The Applicant submitted the following as a claim for exceptional circumstances:
 - (a) The Shop opened 7 months ago and is the only supermarket in the suburb.
 - (b) 15% of the Weston population is over 65.
 - (c) Local customers are asking if the Shop will remain open on public holidays.
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 length of time since the Shop opening and its position as the only supermarket within a suburb are not circumstances that can be considered out of the ordinary course, or unusual, or special, or uncommon.
 - (b) Similarly, a high population over the age of 65 in a suburb may be considered a regular, routine or normally encountered circumstance across many areas in NSW.
 - (c) No evidence was provided by the Applicant in support of the claim that customers requested the Shop open on public holidays. 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.
 - (d) Notwithstanding the absence of evidence, customer requests of this nature may be considered a regular, routine or normally encountered circumstance.
 - (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.
10. The Applicant submitted the following reasons as to why they believed granting an exemption would be in the public interest:
 - (a) The Shop sells all grocery needs - milk, bread, fruit, vegetables, hot food, sandwiches, meat, medicines, health and beauty and car goods.
 - (b) The Shop is the only supermarket in the suburb and the suburb population is above 65.
 - (c) Local customers are asking for the Shop to open for a few hours on all public holidays.
 - (d) The Shop is a small family owned business in its first year of trade and granting an exemption would help maintain a healthy relationship with locals.
 - (e) Granting of an exemption will help tourism as the Shop is close to vineyards in the Hunter Valley.
 - (f) All staff members will be granted a day off and family members will work in the Shop on Anzac Day.
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 appear to constitute a significant restriction of access to goods sold by the Applicant for the public, even having regard to the circumstances raised by the Applicant – the Shop being the only supermarket in the suburb and the suburb population being above 65.

- (b) No evidence was provided by the Applicant in support of the claim that customers are requesting that the Shop open on public holidays. 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) There is no evidence provided in the Application that granting an exemption would improve tourism in the area to support the argument that granting an exemption would be in the public interest, or that tourism would be improved for Hunter Valley vineyards due to their proximity to the Shop.
- (d) The Application notes all staff members will be granted a day off and family members will work in the Shop on Anzac Day, in support of the argument for public interest. By contrast the SDA submission cites a growing public perception that public holidays are seen as invaluable days to share with family and friends away from work and that granting the exemption would be against the public interest.
- (e) While the Application cites maintenance of a healthy relationship with locals should the exemption be granted, 'public interest' refers to the interest of the general public, not that of individuals, employees or employers.
- (f) 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
19/3/25