

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 19/02/2025, Three Buggs Trust trading as Tweed Valley IGA (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 232 Tweed Valley Way, Murwillumbah, NSW, 2484 (**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 25/02/2025 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 Shop is one of only two supermarkets in Murwillumbah, catering to a population of approximately 12,000 residents in the town and surrounding villages.
 - (b) The Shop is a locally owned, independent, full-service supermarket with a total floor space of 1000m², including 800m² of retail space.
 - (c) The town also has a full-size Coles supermarket, while the next closest supermarkets are in Tweed Heads or Coolangatta, approximately 30km away, or a 30-40 minute drive.
 - (d) The Shop has previously traded every day of the year, and averages around 1,500 customers daily.

- (e) The Shop also services daily commercial clients such as Murwillumbah Hospital, Mountain View Retirement Lodge, Wedgetail Retreat Hospice, and Tweed Palliative Care.
- (f) The Shop also supplies local government organisations, including the SES and the Tweed region's rural fire services.
- (g) While these commercial clients receive daily orders, the store is regularly required to provide emergency catering and food requirements when required.
- (h) The Tweed Valley region is prone to exceptional flooding events corresponding with heavy rain cycles that usually occur in February, March or April.
- (i) Major roads in and out of the Tweed Valley are susceptible to closure because of heavy rain often leaving the town or Murwillumbah and surrounding villages cut off for days.
- (j) The Coles Plaza ceases trading in such events, while the Shop has remained operational due to its construction above the 1-in-100-year flood level.
- (k) During the 2022 flood, the Shop was the only grocery store open and accessible by the community for six days, servicing thousands of customers and meeting the needs of community groups where possible.
- (l) The NSW Government inquiry findings into the 2022 floods deemed the community as well as local and State Government needed to be better prepared for the need for food distribution during such a crisis.
- (m) By not allowing the Shop to trade on Anzac Day, the community would have no access to grocery provisions for 12,000 people in the region. If this was to occur during the same time as a major rain or flooding event the ramifications for the community could be devastating.
- (n) The owners and staff of the Shop recognise and respect the significance of ANZAC Day. The Shop actively supports community organisations in various ANZAC Day events leading up to and on the day itself. If it was deemed the Shop should trade for the benefit of the community but store trading hours should be adjusted to better reflect timing of services in the community on that day, the Shop would be obliging.

The Application also claimed that not granting an exemption would go against the findings made at state and local level following the 2022 floods. I have considered this in 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) The Application notes the Shop is one of only two supermarkets in Murwillumbah, catering to a population of approximately 12,000 residents in the town and surrounding villages and by not allowing the Shop to trade on Anzac Day, the community would have no access to grocery provisions in the region. No evidence was provided by the Applicant in support of the claim that these customers are wholly dependent on the Shop for essential grocery items. There were also no public submissions received from customers of the Shop to support this claim.
 - (b) Notwithstanding the absence of evidence, the location of the Shop as one of only two supermarkets in the area with a 30-40 minute driving distance to the next closest supermarkets, could reasonably be considered a regular, routine or normally encountered circumstance in many regional areas across NSW.
 - (c) The status of the Shop as a locally owned, independent supermarket with a customer base of individual consumers, commercial clients and community or government organisations is not a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon.
 - (d) As a Shop located in an area with an existing local government exemption to trade on Easter and Christmas restricted trading days, the previous history of trading every day of the year is also not considered out of the ordinary course, or unusual, or special, or uncommon.

- (e) In considering the claims related to the previous flood incidents and potential for a major flood to coincide with the single restricted trading day for the Shop, it is recognised there could be a substantial impact on the region from any emergency event, however the scenario of this occurring on the standalone restricted trading day is hypothetical. Under section 10(2) of the Act, an exemption must only be granted if it is in the exceptional circumstances of the case in the public interest to do so, having regard to the specific circumstances of the Shop, and matters to be regarded in section 10(2) relating to the restricted trading day concerned and likely effects of the proposed exemption. Granting an exemption based on hypothetical exceptional circumstances appears misaligned to these requirements.
 - (f) The Shop has indicated they have been required to provide emergency catering and support to commercial clients previously. There is no evidence of what this has involved previously, and as with claims related to potential for a major flood, this scenario is hypothetical only. Accordingly, I do not consider these constitute exceptional circumstances in relation to the single restricted trading day.
 - (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.
 - (h) As I have found that exceptional circumstances do not exist for the entirety of Anzac Day, I have not considered the adjustment of trading hours.
10. The Applicant submitted the following reasons as to why they believed granting an exemption would be in the public interest:
- (a) Tweed Valley IGA is a full-service supermarket of 1000m² in size. It retails around 20,000 individual product lines. The Shop has a fresh butcher department with butchers onsite, a fresh produce department supplied by dozens of local growers, a fully functioning fresh bakery department, a large deli that caters for homemade pre-prepared meals, fresh seafood, dairy, freezer sections, and a 2,000 SKU gluten-free department. Essential grocery and specialty grocery items make up the rest of the store.
 - (b) It was deemed a requirement of the findings into the devastating 2022 floods that the community and local government agencies should be better prepared for food distribution in times of such dramatic events. By not allowing the store to trade at all on ANZAC Day, the region of over 12,000 people would be left with no food provisions of any kind for 24 hours.
 - (c) If this were to coincide with another major rain event, as experienced in previous years around this time, the consequences to the community could be grave.
 - (d) Even without the prospect of a flood, community organisations such as the local hospital and care organisations would be left with the prospect of no food supply if they experienced an emergency.
 - (e) Local residents would also be in the same situation, forced with the prospect of driving to Queensland to secure any emergency supplies.
 - (f) If an exemption were granted, the 12,000-strong community would have at least one option for food provision on that day. It would provide some form of safety platform in case of emergency and adhere to the findings of the recent 2022 flood inquiry.
 - (g) Without the prospect of a natural disaster, allowing the store to open would benefit the thousands of tourists who visit the Tweed Valley region every weekend from Brisbane and the Gold Coast.
 - (h) With ANZAC Day falling on a Friday this year, the region is forecasting an above-average level of visitors for the long weekend. Because of its prominent location on the main thoroughfare into Murwillumbah, the Shop caters to many of these visitors.
 - (i) The store is supplied by over 200 local producers who provide products such as cheese, bread, gourmet grocery lines, and health products. The flow-on effect from visitors

sampling these products and returning for follow-up purchases via another trip to the region has been noted and recognised by the Tweed Economic and Business Forum.

- (j) Direct feedback has been provided to the forum from visitors who travel to the Tweed Valley because of the diversity, range, and quality of local produce and products grown and produced in the region.
- (k) All employees of the Shop are employed under the federal General Retail Award. As in previous years, the store has a practice of asking those staff who wish to do so to nominate for work on public holidays. In every case, the number of staff wishing to work on public holidays has exceeded the amount required by the store because of the generous pay conditions available under the Award. On a typical restricted trading day shifts are split into a morning and afternoon shift, requiring no staff to work a full day. On such days, 40 people are generally required to run the store throughout the entire 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 claims made in the Application relate to two distinct scenarios, either in the event of a natural disaster event or otherwise and have been considered as such.
- (b) In considering the claims related to the previous flood incidents and potential for a major flood to coincide with the single restricted trading day for the Shop, it is recognised there is an argument in the public interest for an exemption to be granted. Under section 10(2) of the Act, an exemption must only be granted if it is in the exceptional circumstances of the case in the public interest to do so, having regard to the specific circumstances of the Shop and the restricted trading day concerned. This is affirmed as a two-stage process requiring both elements to be satisfied in order that an exemption may be granted. As I have concluded in point 9.f that exceptional circumstances cannot be satisfied using a hypothetical scenario, the consideration of public interest cannot impact the overall satisfaction required to grant an exemption under section 10.
- (c) With regards to the Applicant's claim that the decision to refuse an exemption would go against the findings of the inquiry into the 2022 floods, existing legislation must operate independently of a government inquiry. The decision to grant or refuse an exemption must be made under the requirements of the Retail Trading Act in force at that time.
- (d) In considering the claims related to standard circumstances outside of a natural disaster event, 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 the goods sold by the Shop, even having regard to the circumstances raised by the Applicant – benefits to tourists who visit the region every weekend from Brisbane and the Gold Coast, and above average level of visitors to the region over the long weekend created by Anzac Day 2025.
- (e) There is no clear evidence provided by the Applicant to demonstrate that 12,000-strong community would have no other option for food provision on the restricted trading day, or detail provided as to why customers would be unable to reasonably obtain food supplies on adjacent trading days.
- (f) No evidence was provided by the Applicant in support of the claim that community organisations such as the local hospital and care organisations would be left with the prospect of no food supply or local residents would need to drive to Queensland to source supplies, if either experienced an emergency. 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.

- (l) It is noted in the Application that the Tweed Economic and Business Forum recognises a flow-on effect from visitors sampling the products of local producers in the Shop and returning for follow-up purchases via another trip to the region. The claims made regarding increased return visits to the Region based on the granting of an exemption are not supported with data to further the argument that granting an exemption would be in the public interest, or that the impact on other businesses in the area would be significant if an exemption were to be granted.
- (g) There were also no submissions received from other businesses in the area supporting this application for exemption; that there would be increased traffic or other benefits to their businesses.
- (h) The Application notes granting an exemption would allow up to 40 employees to benefit from generous pay conditions available under the Award if they chose to work. However, there were no submissions from employees of the Shop supporting granting of an exemption.
- (i) 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 and put pressure on retail employees and their families.
- (j) Notwithstanding the absence of employee submissions or other businesses in the area, 'public interest' refers to the interest of the general public, not that of individuals, employees, or employers.
- (k) With regards the claims of the Applicant outside of a natural disaster or major flood event, 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
7/04/2025