

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

1. I, Janet Bailey, 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 25 March 2025, Merlot Pty Ltd trading as Manly Bottler (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 216-218 Pittwater Road, Manly NSW 2095 (**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 28 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 as the submissions from the SDA and the SDA NSW.

8. The Applicant submitted the following as a claim for exceptional circumstances:
- (a) The Shop provides essential services catering to tourism and visitors in the local area, maintaining public convenience and serving the local community, as has been done respectfully on past Anzac Days.
  - (b) The Shop was classed as an essential service by the Government during the 2020 COVID pandemic and remains an essential service.
  - (c) The Shop plays a vital role in the community due to its beachside location catering to locals and tourists.
  - (d) There is strong demand for the Shop's services on restricted trading days and Anzac Day is a peak trading day.
  - (e) If the exemption is not granted, there would be an impact on the local community and a significant financial loss for the Shop.
  - (f) The Shop supports local employment and providing the opportunity to earn income during this peak period is needed during the current cost of living crisis.
  - (g) The Anzacs fought to preserve the freedom to choose and to operate an essential service without interference from Government.
  - (h) The Applicant notes the significance of restricted trading days and is committed to operating in a manner that respects the spirit of these regulations. If the exemption was granted, the Applicant will ensure compliance with all relevant employment laws, fair public holiday compensation and appropriate staffing levels.
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 tourist locations and beachside areas and servicing locals and tourists 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 is 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) No evidence was provided to support the claim that there would be a significant financial loss for the Shop. There were also no public submissions supporting this claim.
  - (e) With regards to 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 retail operations across NSW.
  - (f) 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.
  - (g) 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

- (h) 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 is a retail liquor store selling alcohol, soft drink, cigarettes, chocolates, chips, ice cream and ice.
- (b) If the Shop was not exempt from the retail trading restriction, there would be significant financial harm and job losses for individuals who rely on peak trading days for income.
- (c) It is unfair that pubs and clubs are permitted to trade while takeaway liquor is not.
- (d) The majority of the public will benefit from the exemption as the store services locals and tourists.
- (e) The decision should consider workers' rights and social traditions including the norm since 1916.
- (f) Current economic and consumer needs align with the broader public interest.
- (g) If the exemption is granted, other businesses in the area will benefit such as restaurants allowing BYO alcohol as the public will be able to better afford eating out if they can BYO alcohol.
- (h) If the exemption was granted, more foot traffic would be generated in the area which benefits other retail and service outlets.
- (i) The Shop is located in a tourist area. Tourists would be unfamiliar with local traditions and regulations and may be caught off guard if they were unable to obtain needed items.
- (j) The staff of the Shop depend on public holiday pay rates to bolster their income particularly currently when it is hard to make ends meet.
- (k) If the exemption is granted, the Shop will have three staff members rostered and paid under the Retail Award Wage.

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 the days immediately before and after Anzac Day. This does not indicate a significant restriction of access to products sold by the Shop for the local community or tourists, nor is there detail provided to support the claim of significant financial harm 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 it is claimed that trading on Anzac Day has been a social tradition since 1916 and that this aligns with current economic and consumer needs, 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.
- (d) While the Application cites an increase in foot traffic for other retail and service outlets including restaurants allowing BYO alcohol, 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 benefits or increased foot traffic.
- (e) The claims made regarding confusion for tourists would be offset by the media coverage surrounding the increase in trading restrictions and the statewide application of the Act.
  - (f) The Application notes granting an exemption would bolster the income of the three rostered employees during current times when it is hard to make ends meet. 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.
  - (g) 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.
  - (h) 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.

Janet Bailey  
Director  
**NSW Fair Trading**  
15 April 2025