

## 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 06 February 2025, NSG Trading Pty Ltd, trading as The Old Bank Centre (**Applicant**) made an application under section 10 of the Act as occupier of a shop at 19 Nabiatic Street, Nabiatic, NSW 2312 (**Shop**), for the Shop to be exempt from the requirement to be kept closed on Anzac Day for the year 2025 (**Application**).
3. It should be noted that the Application was submitted for The Old Bank Centre which incorporates Nabiatic Newsagency. This decision excludes Nabiatic Newsagency as there is an existing exemption allowing newsagencies to trade under Schedule 1 of the Act. This existing exemption is still valid for Anzac Day 2025. Rationale for consideration of the Nabiatic Newsagency separately to The Old Bank Centre is provided in point 10.
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 06 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 mixed business in a small village and a large portion of the business is already exempt, including Nabiac Newsagency, fresh fruit and vegetables and tobacconist.
  - (b) The location of the Shop halfway between Newcastle and Port Macquarie in close proximity to the Pacific Highway results in a high volume of tourist traffic stopping at the Shop. This is increased over long weekends as will be the case for Anzac Day 2025.
  - (c) The Shop is the only amenity for locals within a 30 minute drive to offer lottery products.

The Applicant also submitted claims relating to specific products sold by Nabiac Newsagency however these have not been considered given an existing exemption applies for newsagencies to trade under Schedule 1 of the Act.

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) The Shop claims that a large portion of their business is already exempt from trading restrictions on Anzac Day 2025. Under section 7 of the Act, a shop is exempted from a requirement to be kept closed if its **predominant business** is a business of a kind specified in Schedule 1.
    - i. Schedule 1 of the Act includes newsagencies, fruit and vegetable shops and tobacconists in the list of Exempt shops, however section 7 refers to the predominant business of a kind in Schedule 1 and does not exempt specific product types within a shop.
    - ii. I have reviewed the Australian Business Register and note there are 6 business names registered under ABN 18658278801 provided with the Application:
      1. Nabiac Bottle Shop
      2. Nabiac Cellars
      3. The Old Bank Centre
      4. Nabiac General Store
      5. Nabiac Liquor Supply
      6. Nabiac Newsagency

- iii. Nabiac Newsagency is registered as a separate business name under the ABN included with the Application, and reflected as a separate entity on the Shop's website. There is an existing exemption under Schedule 1 for newsagencies as an exempt shop therefore Nabiac Newsagency has been considered separately.
  - iv. While reference is made to separate business names relating to sale of liquor both under the ABN and on the Shop's website, there is no requirement to consider these separately as there is no exemption available under Schedule 1 of the Act for packaged liquor shops.
  - v. The registered business names listed under the ABN provided in the Application make no reference to individual entities for a fruit and vegetable shop or a tobacconist shop.
  - vi. If these were individual shops, they may be considered exempt however there is no exemption provided under the Act for a specific product type.
  - vii. Review of the Shop's website further supports the view that the sale of fruit, vegetables and tobacco are not considered separately from the remainder of the business selling groceries, general merchandise and liquor. The website lists the Shop's departments as:
    - 1. Australia Post
    - 2. Local Liquor
    - 3. the Lott (lottery outlet franchise)
    - 4. Nabiac Newsagency
    - 5. Friendly Grocer.
  - viii. I have considered this Application on the basis that with the exception of Nabiac Newsagency, the Shop is a mixed business. The Application also refers to the Shop as a mixed business in the Application.
  - ix. Schedule 1 does not include mixed retail businesses in the list of exempt shops, nor does it exempt specific product types, therefore I do not consider the Shop's claim that a large portion of their Shop is already exempted to be valid.
- (b) When considering exceptional circumstances, a mixed business selling groceries, fruit, vegetables and liquor is a regular, routine or normally encountered circumstance in many areas across NSW.
  - (c) The location of the Shop as the only amenity within a 30 minute drive offering a lottery outlet is not supported by evidence in the Application, nor is it a circumstance that can be considered out of the ordinary course, or unusual, or special, or uncommon in many areas across NSW.
  - (d) The claim made regarding a high volume of tourist traffic due to the location of the Shop is not supported with evidence. Notwithstanding the absence of evidence, the volume of tourist traffic and potential increase on long weekends would also be a regular, routine or normally encountered circumstance in many areas across NSW.
  - (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 an independent, family owned general store to the village including a lottery outlet and tobacconist, selling groceries, fresh fruit and vegetables, general merchandise and liquor.
  - (b) The public are generally unaware of trading restrictions for Anzac Day meaning many locals could be unable to access basic staple products. This is exacerbated by the location of the Shop and limited public transport options to nearest town.
  - (c) The Shop expects a high level of tourist traffic making a stop in the village who will rely on their services.
  - (d) Granting an exemption would provide benefit to local economy and tourism.
  - (e) Other small businesses in the area will benefit from the Shop being open as products sold by the Shop will bring both locals and tourists into the village who are more likely to visit other businesses should they choose to open.
  - (f) Employees are offered the choice to work on public holidays and have always declined previously, resulting in the 2 owners being the only ones working in the Shop.
  - (g) If an employee chooses to work, they would be paid the appropriate award rate with public holiday penalties.

The Applicant also submitted claims relating to the operation of Nabiac Newsagency however these have not been considered given an existing exemption applies for newsagencies to trade under Schedule 1 of the Act.

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 for locals to basic staple products, even having regard to the circumstances raised by the Applicant – the public being unaware of trading restrictions, the location of the shop and limited public transport options.
  - (b) There is no evidence provided in the Application that there would be increased local and tourist traffic to surrounding businesses to support the argument that granting an exemption would be in the public interest. There were also no submissions received from other businesses in the area supporting this application for exemption; that there would be increased traffic to their businesses.
  - (c) The Application notes granting an exemption provides the opportunity for staff to earn additional income in the form of penalty rates. It is also noted in the Application however that staff have chosen not to work and earn this additional income in the past. This preference for not working on a restricted trading day, despite financial incentive, is echoed in the SDA submission citing Anzac Day as a day of important cultural and historical significance and noting the restriction of trading on this day is in keeping with community sentiment on the solemn nature of Anzac Day.

- (d) In addition, 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.
- (e) Notwithstanding the absence of submissions from direct employees of the Shop, or other businesses in the area, 'public interest' refers to the interest of the general public, not that of individuals, employees, or employers.
- (f) Similarly, while the Application cites strengthening of the local economy and tourism 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.

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**NSW Fair Trading**  
19/3/25