

IN THE MATTER

of the Sale and Supply of
Alcohol Act 2012

AND

IN THE MATTER

of an application by **TRICORP
HOLDINGS LIMITED** pursuant to
Ss.32, 33 and 99 of the Act for an
off-licence in respect of premises
situated at 14 Camp Street,
Queenstown, known as “Church
Street Night ‘n’ Day”

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin
Members: Mr L A Cocks
Mr J M Mann

HEARING at QUEENSTOWN on 12 September 2017

APPEARANCES

Mr M R Walker – for the applicant
Ms S H Swinney – Queenstown Lakes Licensing Inspector – to assist
Sergeant T Haggart – N Z Police – to assist
Ms L Grace – representing Medical Officer of Health – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction

- [1] This decision involves an application by Tricorp Holdings Limited (hereafter called the company) for an off-licence in respect of premises situated at 14 Camp Street, in Queenstown and trading as “Church Street Night ‘n’ Day”. The business has been operating at its present site with an off-licence since 2008. The application results from the sale of the existing business to a company owned by Mr Alan Robert Garrick and an associated trust. Mr Garrick is the company’s sole director. He has been involved with this type of retail business for 25 years. The sale took place on or about the 1 April 2017 and the company has been trading with temporary authorities since that time.
- [2] The business is a 24 hour seven days a week operation although the hours for the off-licence are from 7.00am to 11.00pm. The shop is conveniently situated in the Centre of town and adjacent to a taxi rank. Public notification was made in Mr Garrick’s name rather than his company. We are satisfied that the error was not willful and a waiver is granted under s.208 of the Act.

- [3] There was no public opposition to the application and the Police offered no objection although pointing out that the company had failed a Controlled Purchase Operation while operating under temporary authority. In her report, the Inspector noted that the proposed single area was in contrast to the comments made in our “New World” decision (*Wanaka Foodmarket Limited* 0002/16). Mr M R Walker was instructed just prior to the hearing and he was instrumental in advising the company to adopt the suggestions made by the Inspector. This new plan now creates a conforming single area.
- [4] In her report on the application, the Medical Officer of Health’s delegated officer (Ms L Grace) raised matters in opposition. She noted that only one month’s sales figures had been produced. She requested 12 months figures (to include the period of time when the previous owner was trading), although she acknowledged that the figures were just one aspect to which the committee must have regard, when forming an opinion on whether the premises were a grocery store or a convenience store.
- [5] This is the sole issue to be determined. Pursuant to s.32(1)(f) of the Act an off-licence may be issued only for premises that (in the opinion of the licensing committee concerned) are a grocery store. The requirement to form an opinion is reinforced in the new Act by s.36(c) of the Act which additionally requires that the licensing committee concerned must not issue an off-licence for any premises if (in its opinion) they are a shop of the kind commonly thought of as a convenience store.
- [6] This is not the first time that the legitimacy of the licence has come under discussion. In its decision ***Church Street Night ‘n Day*** [2010] NZLLA 1357 the Liquor Licensing Authority considered whether the business was a grocery store under the Sale of Liquor Act 1989. At the time the business was trading to 11.30pm. The Authority stated that on balance it concluded that there was evidence that indicated that the store was a grocery store.

A Short Review of the Licensing of Groceries and Convenience Stores.

- [7] The above decision was made under the old Act. The wording of the new Act is quite prescriptive and provides definitions that did not exist before. Because this is a “greenfield” application, we believe it is important briefly to review the history of the licensing of grocery stores. It is clear that in passing the new Act, Parliament determined that there would no longer be any doubt about its intentions.
- [8] The Sale of Liquor Act 1989 was regarded as a liberalising enactment. Under s.36 of that Act, an off-licence could be granted to any grocery store where the Authority was satisfied that the principal business of the store was the sale of main order household foodstuffs.
- [9] In the absence of any definition of a grocery or main order household foodstuffs or the principal business, the Liquor Licensing Authority attempted to set out its expectations. In *Douglas-Oliver Corporation* LLA 6/1990 the Authority stated:

"We regard the latter (main order household requirements) as being easily recognisable by most New Zealanders. They are the items the

majority of New Zealand families purchase once a week from either a supermarket or a grocery."

[10] In *Jay and H Company Limited* LLA 155/2001 the Authority stated:

"In determining the „principal business“ of any store we endeavour to apply a broad common sense approach. Consideration includes-

(1) The turnover percentages produced in accordance with Regulation 8 (2) (j).

(2) The number and range of the items available. The greater the number and depth of foodstuff items available, the more likely the premise is to be a grocery store in terms of s.36 (1) (d) (ii).

(3) The size of the premises. Larger premises are less likely to be categorised as a dairy.

(4) The layout of the premises. The presence of trolleys in multiple rows of goods assist categorisation as a grocery store.

(5) A view of the premises. The evidential weight given by the Authority to a view is usually considerable.

[11] Other decisions show that in 2000 and 2001, the Authority had not just agreed to re-define „main order household foodstuffs“ but it is apparent that it had also been persuaded to broaden the definition of a grocery. In 2000 it began to issue „on the papers“ grocery style off-licences to “Star Mart” premises. In the decision of *Caltex New Zealand Limited and another* LLA PH 1082-1083/2000 the following comments were made:

*"In the 10 years since the passage of the present Act, the parameters have changed. **In our view the ‘convenience store’ should be added to supermarkets, groceries and superettes as premises from which wine and beer can be sold, with only the traditional small corner dairy being excluded.***

We do not want to impose a restrictive definition of what is and what is not a dairy by reference to the size of premises in terms of square metres. Nevertheless, it is probably relevant to mention that in a recent decision “Patamahoe Superette” 1081/2000 we accepted premises of between 288 and 302 square metres as being larger than a dairy; with the present two applications we have a Star Mart of 156 square metres and a Seven to Eleven of 190 square metres.” (The emphasis above is ours).

[12] In *Caltex New Zealand Limited* LLA PH 167/2001 the Authority had this to say:

"As “convenience stores” have proliferated, shopping patterns have changed; not surprisingly so too has the range of goods offered in

particular stores. Rather than buying “once a week”, a market for more frequent “convenience” or “impulse” purchases has been met.”

- [13] None of these decisions had the force of statute law, but their combined force created a turning point in the off-licence industry. Over the next few years, the number of off-licence’s that were granted to convenience stores was dramatic. The Authority finally decided to reverse the trend. In ***The Woodward Group Limited*** [2008] NZLLA 1415 it was faced with an application for a grocery style off-licence for a small convenience store based at the Wellington airport. Not only were the premises under 40 square meters, but over 40% of the total sales was coffee. The Authority made its “line in the sand” decision in these terms:

[48] In this case the meaning of the words in s.36(1)(d)(ii) are crystal clear. We can only grant an off-licence under that section to a grocery. That is the very first element that must be established to our satisfaction. The Act does not say “grocery or convenience store”. Once an applicant has established the bona fides of the type of premises it must then show that the grocery’s principal business is the sale of main order household foodstuffs.....

[51] In summary, therefore, and after careful consideration, we consider that the Authority’s earlier decisions to issue off-licences to convenience stores were contrary to the correct interpretation of the Act and should no longer be regarded as good law. The current application illustrates the point that the Authority’s relaxed interpretation of a grocery store in 2001, has led to unrealistic expectations that inappropriate businesses could qualify for a grocery-style off-licence.

[52] This “line in the sand” decision means that no new off-licences will be issued where the business is plainly a convenience store and not a grocery (as in this case). It is time to return to a principled approach based on what is stated in the relevant section, and not on what commentators might think was intended by Parliament.

[54] In the present case, the premises were described by counsel as an “unremarkable and modest convenience store”. The business advertises itself as the “Cargo Convenience Store”. Traditionally grocers have stocked dried and preserved goods. A perception of a grocery is to see shelves of tinned food, flour, sugar, packaged foods, soups, breakfast cereals, sauces, pickles, cooking oils and so on. In a modern world there is likely to be fresh meat, bread, fruit and vegetables as well as other non-food items. Nevertheless the first hurdle must be to look like and be a grocery style business.

- [14] The issue of grocery stores was discussed by the Law Commission in its stand-out report to the Parliament, called “Alcohol in our Lives. Curbing the Harm,” released on 27 April 2010. This is the report on which the new Act was based. The Commission made these comments.

8.11 The LLA recognised the significance of this convergence between store types in the early 2000s when it ruled convenience stores could be treated as grocery stores for the purpose of section 36(1)(d)(ii).³⁷¹ However, in recent times the LLA has pulled back from this position and now regards convenience stores as being ineligible for a liquor licence under section 36(1)(d)(ii), using a stricter interpretation of the law.³⁷²

The LLA's recent decision on the licence renewal of a Night 'n' Day store in Christchurch reiterated the ineligibility of convenience stores when it found that in order to award an off-licence to a grocery store it must be satisfied shoppers go to the store primarily to purchase their main order household food requirements rather than for impulse food purchases.³⁷³ (The decision was subsequently reversed by the High Court although the principles were approved)

8.12 The LLA stated that its "relaxed interpretation of a grocery store in 2001, has led to unrealistic expectations that inappropriate businesses could qualify for a grocery-style off-licence".³⁷⁴ The LLA has acknowledged there has been a proliferation in the number of off-licences granted to convenience stores that in reality were "nothing more than ambitious dairies", and the reduction in the number of this type of off-licence might well encourage the reduction of liquor abuse.

- [15] Against that background Parliament passed s.33 of the Sale and Supply of Alcohol Act 2012 with major differences to the previous Act. In the first instance the Licensing Committee is required "to form an opinion" as to whether the premises are a grocery store. A grocery store is defined. It has to have the characteristics normally associated with shops of the kind thought of as grocery shops and the principal business must be the sale of food products.
- [16] Parliament took the trouble to define food products, snack foods, and ready-to-eat prepared food. It required the Committee to have regard to the size, layout and appearance of the premises as well as a statement from the applicant of annual sales divided into specific categories and certified by a chartered accountant as well as the number, range and kinds of items on sale on the premises. In forming an opinion, the Committee can have regard to any matter it thinks relevant. And finally, the Committee can determine that the premises do not have the characteristics normally associated with a grocery because of characteristics or items of sale that the premises either has or does not have.

The Application.

- [17] In terms of the Act's requirements to supply details of annual sales revenues as well as the number, range and kinds of items on sale, the company's application was inadequate. Included with the application was a one page document from Mr T Allison advising a figure for 12 months total sales (less GST and Lotto(nil)), from 1 March 2016 to 28 February 2017. Mr T Allison is the CEO of "Night 'n' Day Foodstores Limited" the franchise owner based in Dunedin. He has a Bachelor of Commerce but it is not known whether he is a chartered accountant.

[18] At the request of Counsel we made an order under s.203 (5) of the Act prohibiting publication of the details of sales on the grounds of commercial sensitivity. However, the above figure itself is of no consequence. There is no breakdown as required by the Sale and Supply of Alcohol Regulations 2013.

[19] A second letter from Mr Alan Garrick was more helpful. He showed sales revenue (exclusive of GST) from 1 February 2017 to 28 February 2017 (prior to his company taking over) as follows:

Food Products	35.81%
Alcohol	4.87%
Tobacco	30.13%
Convenience Foods	21.59%
Other sales	7.60%

[20] Mr Garrick advised in a letter dated 25 May 2017 that each sale of each product had been individually assigned to the appropriate category. 61,409 items had been allocated and had taken a full week to be assigned. He then stated that the percentage of each category had then been adopted from each category and applied to the annual sales figure. And that this had always been the company's standard practice and had been approved by the Liquor Licensing Authority. (We thought these latter comments were standard comments from the franchise holder that had been left in the letter in error.)

[21] When the notice of hearing and other documents were distributed, Mr Garrick wrote to the secretary requesting a delay. He said that Ms Denise Lane was out of the country and she is the person who processes all transactions to provide the sales mix into appropriate groupings, and that he thought it important that she be present. Ms Lane is a Director of "Night 'n' Day Foodstores Limited". He also said that in the past the sales figures had been calculated on a one or two month period and then annualised.

[22] The Committee declined the application and the secretary advised Mr Garrick that the figures needed to be for 12 months and could be submitted in writing. He was advised that if he needed further assistance he might like to seek legal opinion. Mr Garrick accepted the advice and Mr M R Walker was instructed. Mr Walker managed to persuade Mr Allison that more figures were vital and accordingly we received figures and percentages for a further five months from April to August (when the company was operating the business). The new percentages are:

Food Products	32.34% (a drop of 3.47% from the previous owner)
Alcohol	3.24% (a slight reduction)
Tobacco	30.60% (no change)
Convenience Foods	25.73% (an increase of 4.14% over previous figure)
Other sales	8.10% (a slight increase)

[23] Given that Mr Garrick stated that he had changed the operation to add more grocery lines, there was a swing of 7.51% the other way. Grocery sales went down and convenience sales went up. It is possible that this was a seasonal swing. Mr Garrick also said he wanted to make other changes to the store, but he had found it very awkward and time consuming to make physical

changes to the layout. No figures were produced showing the number, range, and kinds of items on sale. We think that such figures would be considerably important given that the shop appears to stock many more convenience items than food products. Mr Garrick pointed out that when the tobacco excise duty is removed on 15 September 2017, as a result of the recent amendment to the regulations, all other figures will rise. However, the percentage differentials should stay the same.

- [24] It was argued that the Act or regulations call for 12 months sales figures and that the Committee is therefore prevented from making a decision. There are several ways of looking at this. On the one hand given that “Night ‘n’ Day” head office is inclined to rely on attributing a month’s (or more) percentages to the total sales, such an exercise would be to the company’s advantage. On the other hand given that the company has changed the way it operates then relying on former figures would be inappropriate. And the issue of figures is but one aspect of several to which the Committee must have regard.
- [25] Mr Garrick acknowledged that he also owned a “Night ‘n’ Day” store in Arrowtown and had supplied sales figures for 12 months when applying for a renewal in 2015. He also acknowledged that the Arrowtown premises had a better range of grocery products. He stated that when he purchased “Church Street Night ‘n’ Day”, he had only looked at the gross sales figures. He confirmed that on 1 April 2017, his company had also purchased a second “Night ‘n’ Day” franchise in Queenstown although this was unlicensed.
- [26] Mr Garrick acknowledged that there were times particularly between 10.00pm and 3.00am when the majority of items that were sold would be convenience items. This was particularly so when late night revelers were waiting for taxis close by. On the other hand, he argued that he was providing a grocery service to the many people who were staying in hotels and motels. He believed that the business was a grocery.

The Licensing Inspector.

- [27] Ms S H Swinney is a Licensing Inspector and is the Team Leader for Alcohol Licensing in Queenstown Lakes. She provided information about a related issue before the Dunedin Licensing Committee when the Committee had insisted on receiving 12 months sales figures before it would rehear the application.
- [28] She argued that looking at correspondence from the “Night ‘n’ Day” operations as well as Head Office, there was a common pattern that individual items would be assigned to a category over a short period such as a month and then the percentage was applied to the yearly sales. It was argued that the Liquor Licensing Authority had approved this practice. In one letter Ms Lane had stated that to assign each item to a category over a 12 month period would take three months full time work. Ms Swinney submitted that it was a surprising that a franchised business of this nature would not have a more modern system in place.

The Medical Officer of Health.

- [29] Ms Lynette Marion Grace is delegated by the Medical Officer of Health for the Otago and Southland District to report on all licence applications for their compliance with the Act. She has carried out this role since 2009. She argued that there was insufficient information to establish eligibility for a licence. She submitted that the premises present as a convenience store and noted that there were no shopping trolleys as one might expect in a grocery. There is provision for less than six shopping baskets. She argued that there was extensive proportion of convenience style foods and the prominent displays both internal and external, all highlighted convenience foods.
- [30] Ms Grace suggested that such predominance of convenience foods was clearly at odds with the sales figures that had been produced. Her primary submission was that the business operates predominantly as a convenience store and therefore a licence was prohibited.

The Committee's Decision and Reasons.

[31] The issue before us must be determined pursuant to s. 33 of the Act. We set it out in full because of its importance.

33 Determining whether premises are a grocery store

(1) *In this section, -*

food product

(a) *does not include*

- (1) *alcohol, confectionery, ready-to-eat prepared food, or snack food; or*
- (2) *a drink (other than milk) sold in a container with a capacity of 1 litre or less; but*

(b) *includes delicatessen items that are not ready-to-eat prepared food or snack food*

grocery store *means a shop that –*

(a) *has the characteristics normally associated with shops of the kind commonly thought of as grocery shops; and*

(b) *comprises premises where -*

- (1) *a range of food products and other household items is sold; but*
- (ii) *the principal business carried on is or will be the sale of food products*

ready-to-eat prepared food –

(a) *includes food for the time being declared by regulations under this Act to be ready-to-eat prepared food; and*

(b) *does not include food for the time being declared by regulations under this Act not to be ready-to-eat prepared food*

Snack food -

(a) *includes food for the time being declared by regulations under this Act to be snack food; and*

(b) *does not include food for the time being declared by regulations under this Act not to be snack food*

(2) *In forming for the purposes of this Act an opinion on whether any premises are a grocery store, the licensing authority or a licensing committee –*

- (a) *must have regard to –*
 - (i) *the size, layout, and appearance of the premises; and*
 - (ii) *a statement of the annual sales revenues (or projected annual sales revenues) of the premises, produced in accordance with any regulations in force under this Act prescribing what information such statements must contain and how it must be set out; and*
 - (iii) *the number, range, and kinds of items on sale (or expected to be on sale) on the premises; and*
 - (b) *may have regard to any other matters it thinks relevant; and*
 - (c) *may determine that the premises do not have the characteristics normally associated with a shop of the kind commonly thought of as a grocery shop by virtue of characteristics that the premises and the items on sale there lack or will lack, characteristics that the premises and the items on sale there have or will have, or a combination of both.*
- (3) *Paragraph (a) of the definition in subsection (1) of **food products** is for the avoidance of doubt only, and does not extend the generality of the term.*

[32] The Act requires us to form an opinion on whether the premises are a grocery store. In **Re Venus NZ Ltd** [2015] NZHC 1377, [2015] NZAR 1315 Heath J stated at paragraph [57]:

“First, s.105 (1) (h) and (i) of the 2012 Act, both of which deal with “amenity and good order” considerations, requires the Authority to form an “opinion”. The need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance on probabilities that a relevant fact has been proved.”

[33] In forming an opinion we must have regard to certain matters that are set out in s.33 (2) (above). As far as size is concerned there is enough space for a grocery. The layout consists of four aisles with the main counter along a wall where a large quantity of takeaway food items is located. There is insufficient room for trolleys and there are no check outs at any event.

[34] The store’s appearance on the inside looks busy and cluttered and the majority of the items seem to be confectionery. We agree with Ms Grace that the prominent displays all highlight convenience items. There is a large self-help slushy/ice-cream type machine in the middle of one of the aisles. The appearance from the outside is definitely that of a 24 hour convenience store. The words BEER & WINE, TAKEAWAYS, BAKERY, GROCERIES, ICE CREAM, SNACKFOODS, FISH & CHIPS, and DELI are prominently displayed.

[35] In forming an opinion we must have regard to the annual sales revenues produced in accordance with the regulations. Accordingly we set out the relevant regulation.

The Sale and Supply of Alcohol Regulations 2013

12. Requirements for statements of annual sales revenue (existing businesses)

- (1) In the case of premises to which subclause (2) applies, the statement of annual sales revenue to which, by virtue of [section 33\(2\)\(a\)\(ii\)](#) of the Act, the licensing authority or a licensing committee must have

regard in determining for the purposes of the Act whether any premises are a grocery store must contain—

- (a) a statement of the gross sales revenue(excluding GST) for the 12 months ending no more than 90 days before the time at which the application for the issue or renewal of an off-licence for the application for the issue or renewal of an off-licence for the premises is made of the business being carried on the premises, after deduction of all revenue from sales of lotto, Keno, Instant Kiwi, or any other New Zealand lottery promoted by the New Zealand Lotteries Commission; and—
- (b) a statement assigning the remainder of that projected revenue to the following categories:
 - (i) the sale of food products:
 - (ii) the sale of alcohol:
 - (iii) the sale of tobacco:
 - (iv) the sale of convenience foods:
 - (v) other sources of revenue.
- (c) a statement from a chartered accountant verifying the figures given as correct according to prepared accounts

(2) This subclause applies to premises where, as at the time at which an application for the issue or renewal of an off-licence for the premises is made,—

- (a) business has been carried on for 12 months or more; and
- (b) the business being carried on has not changed materially for at least 12 months before that time.

[36] The figures show that the principal business is the sale of food products and we accept that. What we do not know is whether the items were classified in accordance with the new definitions in the Act. Furthermore, there is no statement of verification from a chartered accountant. We agree with Ms Grace that the sales figures appear to be at odds with the predominance of convenience foods and confectionery on display in the shop. In those circumstances it is unfortunate that the company has not supplied the list of stock showing the number, range and kinds of items on sale on the premises. From our observations we believe that such a list would be revealing.

[37] How much of the new Act has been adopted and understood by the “Night ‘n’ Day” franchises is unclear to us. The regulations have set out what is and what is not snack food and what is and what is not ready-to-eat food. It is not easy for Mr Garrick, because all this work is carried out by the Head Office in Dunedin. Normally, we might consider adjourning the application to enable the company to obtain stock figures and to enable an independent chartered accountant not only to verify the figures, but also to ensure that the classifications have been carried out in accordance with the regulations. But an adjournment would achieve little because we are in no doubt that this business as presently constituted is a convenience store.

[38] We have determined that the premises do not have the characteristics normally associated with a traditional grocery store. What are these characteristics? We have considered other definitions as well as the definition in the Act. In Wikipedia, a grocery is “a retail store that primarily sells food. A grocer is a bulk seller of food. Grocery stores often offer non-perishable food that is packaged in bottles, boxes and can; some also have bakeries,

butchers, delis and fresh produce.” In the Concise Oxford dictionary “a grocer is a dealer in tea, butter, flour, sugar, spices, tinned foods, and miscellaneous household stores”. And in the Merriam-Webster dictionary a grocer is “a dealer in staple foodstuffs, meat, produce, dairy products and usually household supplies.” There is a consistency about all four grocery definitions.

[39] In this case, the shop was not bulging with any of these items as it would be if it was a grocery. There was a lack of dried and preserved goods. There were some shelves with modest supplies of tinned food, sugar, packaged foods, soups, breakfast cereals and so on. There was no fresh meat and very few fruit and vegetable items. The vegetable display was limited and there were no potatoes on either day that we visited. It is hard to imagine that people would regularly shop at these premises to buy food that is not snack food or ready-to-eat food. Is this a destination for people regularly to purchase grocery items to take home in order to prepare one or more of the three meals that are normally consumed each day? We think not.

[40] The overwhelming factor in coming to our opinion is that this is a 24 hour seven days a week operation. It exists for the convenience of people who are in need of an immediate food or drink fix. Under the Sale of Liquor Act it was said that the evidential weight given to a view of the premises was usually considerable. Now that we are required to form an opinion and since we may have regard to any matters that we think are relevant, then if an application is finely balanced, a view becomes a necessity.

[41] We have not only viewed the subject premises, but also checked on the “Arrowtown Night ‘n’ Day Foodmarket” (closing at 11.00pm), the “Mediterranean Market” in Wanaka (closing at 6.30pm), the Alpine Four Square in Queenstown, (closing at 10.00pm), the Arrowtown Four Square (closing at 10.00pm) and the “Wanaka Four Square” (closing at 10.00pm). All of them (except the subject premises) pass the test. Do they have the characteristics normally associated with shops of the kind commonly thought of as grocery shops? Yes they do. The “Arrowtown Night ‘n’ Day Foodmarket” was probably the most marginal, but it was well ahead of its Queenstown counterpart.

[42] There are no groceries in our region that open past 11.00pm. The “Shotover Night ‘n’ Day” opens for 24 hours but it has no licence. The Fernhill Food Centre closes at 9.00pm. Even the unlicensed “Wanaka Night ‘n’ Day” closes at 11.00pm. The grocery store in Hawea closes at 10.00pm.

[43] For these reasons it is our unanimous opinion that the “Church Street Night ‘n’ Day” is not a grocery, and therefore a licence cannot be granted. Accordingly the application is refused. This decision will take effect three months from the date of the decision.

DATED at Queenstown this 25th day of September 2017



Mr E W Unwin
Commissioner

