

**Decision No.**

**IN THE MATTER**

of the Sale and Supply of Alcohol Act 2012

**AND**

**IN THE MATTER**

of an application by **GENERAL DISTRIBUTORS LIMITED** for renewal of an OFF License pursuant to s.127 of the Act in respect of premises situated at **2 East Street, Ashburton** and known as "**Countdown Ashburton South**".

**BEFORE THE ASHBURTON DISTRICT LICENSING COMMITTEE:**

Chairman: A J Lawn  
Members: Mrs R Kilworth  
Mrs S Griffin

**HEARING** at ASHBURTON on 31 August 2018

**APPEARANCES**

Mr M Doesburg – for applicant  
Dr A Humphrey – Medical Officer of Health – In opposition  
Mrs H Faass – Ashburton District Council Alcohol Licensing Inspector – To assist  
Sergeant G Sutherland – NZ Police – To assist

**RESERVED DECISION OF THE COMMITTEE:**

***Introduction***

[1] This is an application by **General Distributors Limited (GDL)** for the renewal of an off-licence in respect to premises situated at 2 East Street, Ashburton. The premises trades as a supermarket. The application to renew is dated 17 April 2018.

***Reporting Agencies***

[2] When the renewal was lodged, and reports pursuant to s.129 of the Act were sought, the Medical Officer of Health opposed the application on the grounds that the external outward facing shelves, as well as the stacks of beer and wine barrel promotion do not "*limit (so far as is reasonably practicable) the exposure*

*of shoppers in supermarkets and grocery stores to displays and promotions of alcohol* [s112 (1) SaSoAA 2012].

[3] The Alcohol Licensing Inspector and Police did not oppose the application. There were no public objections.

### **Background**

[4] Countdown Ashburton South is a new store which was built in 2016 and first licensed in July 2017. There was no opposition to the granting of the new licence.

[5] The Single Alcohol Area (SAA) is located in a purpose-built alcove at the rear of the premises. There are four end of aisle displays of alcohol within the SAA and there is a wine barrel, with wine on it, adjacent to one of the end of aisle displays. The wine barrel is on wheels and is used primarily for wine tastings. The applicant has undertaken to remove the wine barrel and only use it when tastings are taking place. The barrel will be moved to the rear of the store when it is not being used for tastings.

[6] All parties agree that the only 'live issue' are the end of aisle displays of alcohol at the front of the SAA.

[7] The Committee conducted a site visit and has considered all the evidence, and submissions, placed before us by the parties.

### **Evidence and submissions**

[8] The applicant produced its evidence by calling Mr Paul Radich. Mr Radich gave evidence that he has been employed by Woolworths (General Distributors parent company) for almost two years and previous to that he was a Senior Advisor in the Auckland Council's Alcohol Licensing Department for approximately six years and before that was an Alcohol Licensing Inspector for approximately nine years. In summary he has over 16 years' experience in the regulation of the sale of alcohol.

[9] Mr Radich summarised the application and the response of both the Police and the Alcohol Licensing Inspector that they had no opposition to the renewal of the license on the terms which are currently applicable to the license. He quoted the report of the Inspector where she stated that;

*"in my opinion, it is a good example of a planned single area which limits the exposure of shoppers to alcohol".*

[10] Mr Radich further stated that Countdown Ashburton South is a relatively new store, built in 2016/2017 and the store was designed to include a purpose-built single alcohol area in accordance with what GDL considers best practice in terms of meeting the requirements of the Act.

[11] He went on to describe the area and the measures which GDL has undertaken to define the area and which make it clear to shoppers that the alcohol area is a separate area.

[12] In summary Mr Radich believed that the way the SAA is configured it limits the exposure of shoppers to displays, promotions and advertisements of alcohol (so far as is reasonably practicable):

- i. The alcove is located at the rear limiting the exposure of shoppers to displays
- ii. The SAA is contained in a purpose-built alcove with walls on three sides providing only one access point and sightline into the SAA
- iii. All displays are recessed within the perimeter of the SAA further restricting views of the area. The alcohol displays are set back from both the butchery and milk cases so that they cannot be seen until a customer stands in front of them.
- iv. The SAA is small in size compared to the store's retail footprint.
- v. Shoppers can traverse the entire store without entering the SAA.
- vi. The shelving at the end of aisles in the SAA are 'dense end' style racking which wholly encapsulate the product and only enables product to be displayed on and selected from one face of the shelving.

Floor stacking is used sparingly to display a few excess units of product. Where stacking is used it is tidy, discreet and blends in with the façade of the SAA.

[13] Mr Radich also stated that this style of SAA has been confirmed by licensing bodies across the country and that Medical Officers of Health in other regions have described this type of layout as an example of exactly what the Act intended.

[14] It was the view of the applicant that the SAA complies with the requirements of the Act and it would be unreasonable to impose an 'end-of-aisle' condition on the license as

- i. Customers will see alcohol when they walk past the SAA even if there are end-of-aisle displays.
- ii. Requiring GDL to remove the end-of-aisle displays will have no benefit in furthering the object of the Act.
- iii. Only one year ago GDL went to the cost of designing and establishing the SAA and if now required to remove the 'end-of-aisle' displays GDL will be put to further cost to remove the shelving and rearranging the products within the SAA.

- [15] GDL filed comprehensive submissions in support of its position and reiterated the evidence above as well as addressing the evidence and submissions of the Medical Officer of Health.
- [16] The applicant's submissions address the Medical Officer of Health's request that the Committee impose a condition on the renewal of the license that the end-of-aisle be used only for non-alcoholic beer and wine or display a blank wall.
- [17] The applicant opposes those conditions on the grounds that they are neither justified nor reasonable and that the evidence before the Committee does not demonstrate that a benefit would result from the prohibition of end-of-aisle displays at Countdown Ashburton South and that such a condition would have a cost. The applicant asserts that a condition without a benefit that comes at a cost is unreasonable.
- [18] It is the submission of the applicant that the Medical Officer of Health has adopted a 'policy position' in regards to end-of-aisle displays which the applicant asserts is inconsistent with the ruling of the High Court in *Medical Officer of Health (for the Manawatu Health District) v G & B Hasler Ltd* [2018] NZHC 1208, at [71].
- [19] The applicant also submits that the evidence adduced by the Medical Officer of Health, at the hearing, does not justify the removal of the end-of aisle displays as there was no evidence linking sales from end-of-aisles (as opposed to other displays) to such risks as non-communicable diseases (such as cancers).
- [20] Further in the submission of the applicant it states that there would be costs associated with removing the end-of-aisle displays, including as a result of inefficient use of retail space and the cost to physically change the alcohol area.
- [21] In regards to photographs presented by Dr Humphrey showing other Countdown stores in Canterbury where end-of-aisle displays had been removed by the licensee those SAA are different in layout and are not contained within an alcove. Some of the photographs showed SAA's which were located immediately to the left or right of the entrance and Mr Radich explained that with that type of layout GDL agrees to remove end-of-aisle displays of alcohol.
- [22] The applicant also raised in its submission the issue of fairness in respect to another supermarket off license which was recently granted a renewal where no opposition was raised by the Medical Officer of Health. It was accepted by a witness for the Medical Officer of Health, and confirmed by the Alcohol Licensing Inspector, that the premise's SAA included outward facing end-of-aisle displays and pallets of beer stacked in the centre of the rear aisle in the SAA. The fairness considerations are relevant to the broader context that the Committee must assess when determining whether a condition prohibiting end-of-aisle displays is reasonable at Countdown Ashburton South.
- [23] In summary the applicant seeks the renewal of the license on such terms and conditions that are attached to the current license.

- [24] The Alcohol Licensing Inspector, Mrs Helene Faass, gave evidence and confirmed her report. She confirmed under questioning that it was her opinion that the Countdown Ashburton South SAA was a good example of a planned single alcohol area which limits the exposure of shoppers to alcohol. The Inspector recommends the granting of the licence renewal, with the appropriate conditions.
- [25] Mrs Susan Newton, who is an Alcohol Regulatory Officer with delegations under s.151 of the Act to make enquiries into license applications on behalf of the Medical Officer of Health, was called to produce a photograph taken inside Countdown Ashburton South which showed a wine barrel displaying bottles of wine as well as a poster above the barrel which was advertising 'wine of the month'.
- [26] Dr Alistair Humphreys is a Medical Officer of Health for Canterbury. He is qualified to hold this role and also holds a Master of Public Health degree and a Master of Health Law. In the sphere of his role as a Medical Officer of Health we regard Dr Humphrey as an expert in Public Health.
- [27] Dr Humphrey gave evidence and confirmed his Brief of Evidence. He also filed a comprehensive submission subsequent to the hearing.
- [28] In his evidence Dr Humphrey confirmed that as Medical Officer of Health he did not oppose the application by GDL for a new supermarket off-license for Countdown Ashburton South in 2016. He stated that the reason for not opposing the license was due to the fact that the premise was still being built and that the SAA was in plan form only.
- [29] Dr Humphrey stated that he believed that the plan met the requirements of s.113 but what he could not evaluate at the time was the level of exposure of shoppers to displays and promotions of alcohol, and advertisements for alcohol. Once Dr Humphrey learned that the supermarket was open an inspection was arranged and conducted by the previous Alcohol Regulatory Officer for the Medical Officer of Health. The photographs supplied to Dr Humphreys by that officer caused Dr Humphrey to have concerns regarding the level of exposure of shoppers to alcohol displays, advertisements and product.
- [30] A further report was sent by Dr Humphrey to the DLC outlining Dr Humphrey's opposition. Dr Humphrey conceded that this report was outside the statutory 15 day reporting period and therefore not a valid opposition report. The Committee takes this matter no further as it was not raised with it at the time and no request was made for the DLC to rehear the matter.
- [31] Dr Humphrey summarised the evidence of Mr Radich and argued that Mr Radich stated that seven stores had "very similar layouts" which had been approved recently but that Mr Radich did not produce any photographic evidence to "elucidate" what "very similar" meant.
- [32] Dr Humphrey pointed to that fact that he had produced photographs which showed four Countdown stores where end-of-aisles of their SAA had either been blanked out or non-alcoholic products placed there and that Mr Radich

had suggested that the layout of those stores were very different to Countdown Ashburton South but did not say why the removal of alcohol from the end-of-aisles at these four Countdown stores was manifestly practicable in those four stores but not practicable in the current application.

- [33] In summarising the evidence of Mrs Newton Dr Humphrey pointed to her evidence that she would have had to walk past some 200 bottles of wine on the end-of-aisles in order to get to the milk fridge and that the SAA was visible from three aisles.
- [34] Dr Humphrey stated that it was his opinion that the outward facing shelves of the SAA, stacks of beer and wine barrel promotion cause unnecessary exposure of shoppers to displays, and promotions of alcohol, and therefore a condition under s.117 of the Act should be used to remove the displays and promotions of alcohol in this instance.
- [35] In evidence Dr Humphrey stated that the bulk of alcohol related deaths in New Zealand and overseas is caused by non-communicable diseases such as cancer and stroke and that this is not caused by intoxication but rather the insidious increase of alcohol consumption caused by, for example increased exposure of shoppers to discounted alcohol in supermarkets.
- [36] Dr Humphrey referred us to a scientific paper as evidence, the Nakamura paper, which was not disclosed to the applicant or the Committee before the hearing and was only entered by the consent of the applicant. Other evidence was excluded as it was not disclosed and there was no reasonable remedy apart from an adjournment, which we decided was not appropriate.
- [37] The 'Nakamura paper' presented by Dr Humphrey stated that end-of-aisle displays substantially increased sales volumes of six beverage categories studied, including alcohol. The effect on alcohol sales was between 23.2% and 46.1%, this included spirits which had the highest increase. The paper did however acknowledge its limitations in that it was the first study to attempt to isolate the impact on alcohol purchasing of the in-store physical environment, specifically end-of-aisle displays, the effects of substitution is not taken into account, differences in other factors such as media advertising and other marketing campaigns, and the fact that there may be limits to the generalizability of the findings. We take the findings on face value but balance this with the stated limitations as expressed by the authors.
- [38] In his submission Dr Humphrey reiterated his evidence and stated;
- i. The application as filed should be refused because the proposed single area is unsuitable and does not meet the statutory standard for acceptability;
  - ii. Only with appropriate changes to the proposed single area should the application be granted;
  - iii. Only with additional conditions under s.117 should the application be granted.

[39] Dr Humphrey submits that:

- (a) The proposed area is not consistent with the statutory purpose of limiting so far as reasonably practical the exposure of shoppers in supermarkets to displays and promotion of, and advertisements for, alcohol.

[40] In his submission the Medical Officer of Health draws substance for his opposition to the proposed SAA (which in effect is the current SAA) primarily from the High Court decision of *Christchurch Medical Officer of Health v J & C Vaudrey Ltd* [2015] NZHC 2749 and secondly from the recent High Court decision of *Medical Officer of Health (for the Manawatu Health District) v G & B Hasler Ltd* [2018] NZHC 1208.

[41] Further in his submission Dr Humphrey discussed the ability of the Licensing Body to impose conditions under s.117 which could affect the arrangement or display within the SAA and invites the Committee to use its discretion and either refuse the application or impose a condition under s.117 and exclude the end-of-aisle displays as well as the barrel with wine on it within the SAA.

[42] Though seeking the above relief the Medical Officer of Health commends the applicant for recessing the SAA.

[43] As stated previously the NZ Police did not oppose the application for renewal and though appearing at the hearing did not adduce evidence, call witnesses or file a submission. The Alcohol Licensing Inspector did not file a submission.

### ***Committee's Decision and Reasons***

[44] We considered all evidence and submissions and weighed it in light of the sections of the Act with which we must have regard to in section 131 of the Act.

[45] As stated earlier in this decision, the only matter that was at issue was the matter of the Single Alcohol area. Although this is the central issue we have considered it does not diminish our responsibility to have regard to all matters as set out in s.131. We have considered all other matters and are satisfied that the application meets these criteria.

[46] When a committee has an application such as this before it there are certain mandatory conditions which must be applied to the licence. Section 112 of the Act applies. This states that;

*(1) The purpose of this section and sections 113 and 114 is to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol.*

*(2) The licensing authority or licensing committee concerned must ensure that, when it issues or renews an off-licence for premises that are a supermarket or grocery store, it imposes on the licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol.*

*(3) On the renewal of an off-licence for premises that are a supermarket or grocery store, any single-area condition imposed when the licence was issued (or was last renewed) expires.*  
*(4) Subsection (3) is subject to section 115(4).*

[47] This in effect brings the application under sections 113 and 114 of the Act.

[48] These sections detail the compulsory conditions relating to display, promotion and advertising of alcohol in a single area in supermarkets and grocery stores.

[49] Any area designated as a single area must promote both the object of the Act and the purpose, or intention, of the condition as set out at section 112(1), *“to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol”*.

[50] The position of the SAA within the store is not an issue which was raised in opposition but the applicant was commended by the Medical Officer of Health for placing the SAA in an alcove.

[51] The High Court decision of *Hasler*, quoted by both the applicant and the Medical Officer of Health, provides us with some guidance in regards to the matters to which we must have regard.

[52] At paragraphs [44] and [45] Clark J stated;

*[44] ...*

*(e) Manifestly, the layout of shelving and alcohol within the alcohol area, has no bearing on the decision to position the alcohol area. Sections 112-114 are concerned not with the arrangement of shelving or displays within the area but limiting the exposure of shoppers to displays of alcohol that is achieved (principally) by ensuring its perimeter is not in an impermissible section of the store. It is for this reason that the bare perimeter of the alcohol area is to be shown on the plan accompanying the licence application. Details of the configuration and arrangement such as those required for the premises are inapplicable to the space within the alcohol area.*

*[45] ..... The perimeter of the alcohol area is described as required by s 113(2)(b). As can be seen, some shelving is indicated but, in my view, the plan would have been acceptable without the indicative layout. There is no requirement in the Act or Regulations for that detail.*

[53] At [61] Clark J further states;

*[61] The Authority correctly understood the legal effect of a single-area condition. The Authority’s understanding and interpretation is consistent with the legislative materials which the Court of Appeal found helpful and relevant to an analysis of these provisions. At all stages, including enactment of the single-area provisions, the intention has been to locate the alcohol area at a physical distance from shoppers. There has been no*

*intention to control the configuration or arrangement within that area. Nor do the statutory provisions themselves contemplate that degree of interference. It follows that a single-area condition, of itself, does not prohibit changes to the way in which alcohol is displayed, promoted and advertised within the alcohol area.*

[54] In regards to the imposition of a condition under s 117 of the Act to restrict the arrangement or configurations within the alcohol area Clark J stated at [69] and [71];

[69] *Following the discussion of s 117 in Vaudrey the following characteristics of the power to impose a condition under s 117 are uncontentious:*

*(a) Section 117 confers a broad power to impose conditions.*

*(b) The versatility of the power is amplified by s 118 which envisages different conditions applying to different parts of the premises.*

*(c) In view of the breadth of the power in s 117 it may be open to a licensing body to impose conditions under s 117 relating to matters such as displays within a single alcohol area if that would advance the object of the Act as set out in s 4.*

*(d) Conditions may not be imposed under s 117 that have the effect of altering the single-area condition imposed under s 112(2).*

[71] *Notwithstanding the scope of the power conferred by s 117, I would regard as impermissible the imposition of aisle-end conditions as a matter of course. Conditions imposed under s 117 must relate to a particular application and the issue of a particular licence. It may very well be that, from time to time, the licensing body considers it is necessary to impose conditions, including a condition restricting aisle-end displays in the alcohol area, but the licensing body should be satisfied the condition is reasonable in the circumstances. It would not be reasonable to take the view that aisle-end displays of alcohol, of themselves, offend the purpose of the Act and for the licensing bodies to exercise what is effectively their judicial power for a legislative purpose namely to legislate aisle-end displays out of existence by way of imposition of conditions. The statutory purpose of limiting, so far as reasonably practicable, the exposure of shoppers to displays and promotions of alcohol is achieved by the enactment of ss 112 to 114.*

[55] When we weighed the expert evidence of the Medical Officer of Health we found that there was no direct link to this application that would persuade us that we should refuse the application on the grounds that it did not comply with the statutory criteria or use our discretion and apply an end-of-aisle condition under s 117.

[56] The evidence relating to the Nakamura research was informative but in our opinion not direct enough, in regards to this particular application.

[57] In the decision of Clark J at paragraphs [75] and [76] she makes it clear that the burden of upholding the object of the Act does not fully fall on ss 112 to 114;

[75] *The legislation does not place upon ss 112 to 114 the full burden for regulating the sale and supply of alcohol in order to achieve the object of the Act. These provisions do not call for an interpretation, or application, that exaggerates their intended purpose and effect. The Act's regulation of the sale and supply of alcohol is effected through many other provisions which, for example: restrict the kinds of alcoholic products that can be sold in supermarkets and grocery shops; regulate trading hours; confer powers to impose discretionary and compulsory conditions relating to off-licences, for example prescribing the people or kinds of people to whom alcohol may be sold or supplied; and create offences of irresponsible promotion of alcohol, or sale or supply of alcohol to minors, and so on.*

[76] *providing a licensee's display and promotion of alcohol is consistent with the purpose of the single-area provisions—to limit so far as is reasonably practicable, the exposure of shoppers to alcohol—there is unlikely to be any reasonable basis for the imposition of conditions to further restrict the exposure. That, however, is a matter for the opinion of the licensing body. The expert opinions of the reporting agencies will be valuable to the licensing body but ultimately it is a matter for the decision-maker to consider whether and to what extent the proposed single-area limits, so far as is reasonable practicable, shoppers' exposure to alcohol displays, promotions and advertisements.*

[58] We believe that the evidence placed before us, when weighed in the light of the statutory criteria, confirms that the way in which this applicant has situated the SAA, in an alcove at the rear of the premise, and displayed the alcohol within it, including the 'dense end' shelving, does limit, as far as is reasonably practicable, shoppers exposure to alcohol displays, promotions and advertisements and therefore complies with the requirements of the Act.

[59] We note that the applicant has made a solemn undertaking in regards to the use of the 'wine barrel' and that it will only be used for wine tastings and will be stored off the retail floor when not used for this purpose. We take note of the Medical Officers submission in regards to undertakings but are satisfied as to this applicant's commitment in this matter.

[60] When we stand back and evaluate the application we are satisfied as to the matters to which we must have regard as set out at s's.131 and 132 of the Act, as well as the sections regarding the SAA. A renewal of three years is granted.

[61] We refer any party who wishes to appeal this decision, or part of this decision, to s 155 of the Act.

The applicant must comply with all conditions specified on the licence.

The licence will be subject to the following conditions:-

### **Conditions**

#### **Compulsory conditions**

**The following conditions are compulsory:**

(a) No alcohol is to be sold or delivered on Good Friday, Easter Sunday, Christmas Day or before 1pm on Anzac Day.

(b) Alcohol may only be sold or delivered on the following days and during the following hours:

- Monday to Sunday 7.00 am to 9.30 pm

(c) Water must be freely available to customers, while alcohol is being supplied free as a sample on the premises.

(d) Single Area Condition: Alcohol Area for display and promotion of alcohol

- Only the area described and delineated on the plan approved by the District Licensing Committee is the permitted area for the display and promotion of alcohol within the premises as required under section 112.

#### Discretionary conditions

The following are discretionary conditions:

(a) the following steps must be taken to ensure that the provisions of the Act relating to the sale of alcohol to prohibited persons are observed:

- Display of appropriate signs adjacent to every point of sale detailing the statutory restrictions on the supply of alcohol to minors and the complete prohibition on sales to intoxicated persons

(b) the following steps must be taken to ensure that the provisions of the Act relating to the management of the premises concerned are observed:

- Alcohol must only be sold and supplied on the premises in accordance with the premises plan submitted with the application.

#### Conditions applying to all remote sales for the sale and supply of alcohol.

(a) The following information must be displayed on the internet site in a prominent place, in any catalogue used by the licence holder and on any receipt issued for any alcohol sold via the internet site:

(b) The licence holders name, the licence number and the date on which the licence expires.

(c) A legible image of the licence, or clearly identified link to such an image must be displayed in a prominent place on the internet site.

(d) The following steps must be taken to verify that people are over the purchase age:

- 1) In the case of an order made using an internet site the prospective buyer must declare by ticking an on screen box, that he or she is 18 years of age (and where the prospective receiver is involved, that the prospective receiver is also 18 years of age or over)-
  - (i) Once when the prospective buyer first enters the internet site; and
  - (ii) Again, immediately before the sale of any alcohol is completed.

#### Other restrictions and requirements to be noted on the licence

The following restrictions and requirements are to be noted on the licence:

Section 56 – Display of signs

Section 57 – Display of licences

Section 58 – Restrictions on kinds of alcohol sold in supermarkets and grocery shops, and premises directly accessible from supermarket or grocery shop

Section 59 - Requirements relating to remote sales by holders of off-licences

Section 214 – Manager to be on duty at all times and responsible for compliance

Section 215 – Circumstances where section 214 does not apply (for remote sales)

A copy of the licence setting out the conditions to which it is subject is attached to this decision.

**THE LICENSED PREMISES**

The premises are identified on the plan provided with the application for a licence.

**DATED** at ASHBURTON this 5<sup>th</sup> day of October 2018.

A handwritten signature in black ink, appearing to be 'S. J. ...', written over a horizontal line.

Chairman

**Ashburton District Licensing Committee**