IN THE MATTER of the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of an application by **WANAKA FOODMARKET LIMITED** pursuant to S.99 of the Act for an off-licence in respect of premises situated at 20 Dunmore Street, Wanaka known as "New World Wanaka"

BEFORE THE QUEENSTOWN LAKES DISTRICT LICENSING COMMITTEE

Chairman: Mr E W Unwin
Members: Ms M W Rose
Mr J M Mann

HEARING at WANAKA on 25th August 2015
Final submissions received 16th February 2016.

APPEARANCES

Mr M B Couling – for the applicant
Ms J J Mitchell – Queenstown Lakes Licensing Inspector – to assist
Sergeant L K Stevens – N Z Police – to assist
Dr D W Bell – Medical Officer of Health – in opposition

RESERVED DECISION OF THE COMMITTEE

Introduction

[1] This decision involves an application by Wanaka Foodmarket Limited (hereafter called the company) for an off-licence in respect of premises situated at 20 Dunmore Street, in Wanaka and trading as "New World Wanaka". The business trades as a supermarket and has been operating from the present site with an off-licence for at least 20 years. The application results from an, 'in-house family' sale of the existing business to a company owned and operated by Dean Alan Bartley and Natashia Louise Bartley.

[2] The application for the off-licence was filed with the Queenstown Lakes District Council on 6th May 2014, and it was accompanied by a plan showing the proposed single area as required by ss. 112 to 114 of the Act. The company has been trading with temporary authorities ever since.

[3] The application was opposed by the Medical Officer of Health in the light of the Act's requirement for a single alcohol area. In her report the Inspector

expressed reservations about whether the proposed single area plan was compliant with the Act. The Inspector's report and the Medical Officer's matters in opposition represented the only outstanding issues preventing the application being granted. The primary reason for the delay in disposing of the application has been to see whether the law on the interpretation of the new legislation has become settled.

[4] In the event, the Christchurch District Licensing Committee (DLC) issued two decisions involving separate supermarkets in June and July 2014. In both cases the DLC prescribed its own view of what constituted an acceptable single alcohol area. The two supermarkets appealed to the Alcohol Regulatory and Licensing Authority (ARLA) and the appeals were heard in December 2014. In January 2014, ARLA issued its decision. See *J & C Vaudrey Limited and another v Christchurch District Licensing Inspector and others* [2015] NZARLA PH 64-65,

[5] The "Vaudrey" decision as it has become known was appealed to the High Court and was heard at the end of June 2015 with further submissions being filed in mid-July. The comprehensive decision of Mr Justice Gendall was issued in November 2015. The Committee was aware of the pending decision when it heard the evidence and received submissions at the public hearing in August 2015.

[6] At the hearing, the Committee decided that it would wait until the High Court decision was delivered, and then either hear again from the parties before making its final decision, or receive written submissions. The parties agreed to provide submissions and the last of these was received in February 2016. In effect the High Court decision in "Vaudrey" made little difference to the outcome. The Committee had made a preliminary decision after the hearing in August 2015, and reached the conclusion that the application for a licence would have to be rejected. After reading the submissions and studying the judgment, the Committee is of the same opinion, although it is now able to suggest the type of layout that in its view would be acceptable.

[7] We understand that leave to appeal to the Court of Appeal has been filed. Should the application be granted, it may well be that the various "Vaudrey" issues will be finally determined by the Court of Appeal this year.

[8] Although all decisions have been helpful, it cannot be said that the defining of a single area has become an uncomplicated or even an automatic process. One of the difficulties is that supermarkets appear to have subtle differences of opinion on how and where their merchandise should be displayed.

[9] By a process of consensus, the present application was not set down for hearing. However, Mr Couling acting for the company wrote to the Committee on 11th May 2015. He submitted that his client was prejudiced by the delay, and the steady stream of Temporary Authorities, and invited either the Medical Officer of Health to withdraw his opposition, or the Committee to grant the application 'on the papers'.

[10] After due consideration, the Medical Officer declined the request. Pursuant to s.202 of the Act, the Committee decided that the application should be argued at a public hearing on 25th August 2015. Mr Couling then applied for an

adjournment on the grounds that decisions of higher authorities were pending, but in a Chairperson's minute dated 6th July 2015, the request was refused. The minute noted that the base licence was due to expire in less than a year's time.

The Application.

[11] Mr Bartley was the sole witness as to fact. He has twelve years' experience in the supermarket industry and has held a manager's certificate since 2004. He became the store manager in 2005. He was required to complete certain management development courses, so that he could be approved by Foodstuffs South Island Limited (Foodstuffs), and therefore become eligible to own and operate either a 'New World' or a 'Pak'nSave' store.

[12] Following the granting of an approval, Mr Bartley was given the opportunity to complete a two year apprenticeship to run "New World Wanaka" virtually on his own. Once this process had been completed in early 2014, Mr Bartley and his wife became entitled to operate "New World Wanaka". The company operates the business under a franchise agreement with Foodstuffs. The latter company owns the premises

[13] When the application was filed, the company submitted a layout plan showing the proposed single alcohol area. This plan was substantially the same as the plan submitted in evidence, except that the company proposed an extra end of aisle display on the Western end of aisle 10. This plan is appended to this decision as Appendix "A".

[14] The plan effectively maintains the company's main display layout as it has existed for many years. There is a wine alcove at the South Eastern end of the building. In addition wines and beer are displayed on the inner sides of aisles 10 and 11. The beer that is displayed on the inner side of aisle 10 is contained in chillers. Mr Bartley accepted that this configuration has always been the case within the supermarket's interior layout. Although Mr Couling objected to the use of the words 'status quo', this is effectively what was proposed.

[15] Both Mr Bartley and Mr Couling argued that other significant changes had been made. Previously, alcohol had been scattered throughout the store, mostly as end-of-aisle displays, and on some occasions, pallets of beer had been located in the produce department. We take the view that the requirement to remove such 'separate' displays is clear and concise, and leaves no room for argument. The company had a legal duty to remove such displays and has done so. In other words any changes that have been made should not be a cause for self-congratulation, but rather an acknowledgement of the company's acceptance of its legal obligations.

[16] The real issue is what has remained. The proposal effectively draws together the two areas that had hitherto been the main displays of alcohol for the shopping public. The wine alcove and the two aisles. They are shown in deep shading. One of the issues about the proposal is that aisle 12 runs from the delicatessen in the South Western corner to the wine alcove in the South Eastern corner. This aisle contains dairy and chilled products on one side and toilet paper and paper towels on the other. Mr Bartley readily acknowledged

that a person, who carried out a full systematic shop by going down every aisle, would then, if taking the most direct route to the checkouts, have to pass through the proposed single alcohol area. He described in paragraph 50 of his brief as *"in reality customers are only walking between two small end of aisle displays."*

[17] Mr Bartley stated that the plan came into existence after he had had a number of discussions with Foodstuffs' management. He said that he considered that the proposal met the requirements of the single alcohol area conditions contained in the Act.

[18] Mr Bartley also proposed that the 'main body' of the store should be the whole of the store from the end of the aisles closest to the checkout counters. This was shown in lighter shading. Thus Mr Bartley argued that the proposed single alcohol area would be contained within the main body of the premises.

[19] There is one area (of the proposed main body) that needs to be highlighted, and that is the small diagonal strip that runs from the Eastern end of aisle 10 to include a stand of batteries which abuts a checkout counter.

[20] Mr Bartley spent some time discussing an alternative design that had been suggested by Dr Bell. He argued that the alternative single alcohol area was no better than his proposal and if anything, would only increase the potential for shoppers to be exposed to alcohol displays. Mr Bartley also produced four other single alcohol plans of other supermarkets that had been approved, and which he claimed did not differ in any material way from what he had proposed.

[21] In her report the Inspector had made these comments:

> "*When my colleague Jodi Yelland discussed the layout and the single area with the applicant Miss Yelland suggested that a reconfiguration was necessary such as removing the corner display at the end of aisle 12 or swapping aisle 11 and 12 around would solve the issue. The applicant advised that this would be too expensive and would result in insufficient shelf space for both the chilled goods and alcohol.*
>
> *In a subsequent phone call to me on June 25th 2014 Mr Dean Bartley advised that they were prepared to change the layout of the supermarket and intended to discuss the matter with Foodstuffs South Island Limited. He advised that the chillers located at the end wall that contained the dairy products were due for replacement and that they needed to be ordered from the United States of America and could take a few months to arrive.*
>
> *He advised that Foodstuffs South Island Limited would draw up a plan. I suggested to him both over the phone and in a subsequent email that once the plan had been drafted that the agencies could then review this and provide their feedback as to whether they felt the floor plan was compliant with the single area prior to ordering the chillers. I was under the impression that Mr Bartley was agreeable to this proposal.*

On Friday 4th July 2014 Mr Dean Bartley sent an email to me advising "after careful consideration I would like to leave our designated area for liquor as is" and requested the inspector's report once it was available and also the likely date for a hearing"

Mr Bartley was referred to the content of the report and accepted its accuracy.

Submissions from the Medical Officer of Health.

[22] Dr D W Bell has been the designated Medical Officer of Health for the Otago and Southland health districts since 1998. He argued that the single area concept was introduced into the Act to limit the exposure of shoppers to alcohol products alcohol promotions and alcohol advertising. (S.112(1)).

[23] Dr Bell focused on s. 114 (1) of the Act. He argued that the Committee had to describe an alcohol area that shoppers did not have to pass through on their way from the main body of the store to any point of sale, and that in describing that area the Committee must have regard to the purpose of the section to limit exposure of shoppers to alcohol. He submitted that any shopper in aisle 12 would in taking the most direct route to the checkout have to pass through the alcohol area and having done so does not re-enter the main body of the store. Not only that, but his view was that shoppers would be surrounded by alcohol on their way to the checkout.

[24] Dr Bell disputed the company's proposed description of the main body of the store and in particular the small area adjacent to the checkout that contains just the one small product stand of batteries as well as an end of the aisle alcohol display. In support he referred to the original "Vaudrey" decision (see para [4] above), and in particular the discussion about the meaning of "the main body of the premises" in paragraph [33].

[25] In summary Dr Bell argued that the Committee should not be diverted by his initial suggestion about a possible solution to the issue. He submitted that this was simply an attempt to create an opportunity for the parties to engage in further discussion that had not taken place. He suggested it was not the Committee's function to design the proposed single area or engage in discussion about the respective merits of competing schemes. In quoting from para [34] of the Vaudrey decision he argued that "*If the DLC considers that the location of the proposed Single Alcohol Area is contrary to s.113 (5) then it must refuse the application"*.

[26] In summary his reasoning for the current proposal's lack of compliance was that the majority of supermarket customers must walk through the alcohol area to the checkouts, and in doing so, are unable to pass back into the main body of the store before the checkouts.

The Licensing Inspector's Submissions.

[27] Ms J. J. Mitchell considered that the Committee had little choice but to decline the application. She argued that there was a significant difference between shoppers who could bypass a proposed single area, and those who would have to go through it. She submitted that the proposed single area was in a prohibited place in terms of s.113(5) (b) (ii) of the Act in that the most direct

route between the aisle 12 and the checkouts was through the proposed single alcohol area.

[28] Ms Mitchell also contended that the company had accepted in evidence that aisle 10 could be a possibility for a single alcohol area, and had therefore failed to establish that it had taken all reasonably practical steps to explore such a possibility.

[29] Finally she argued that the battery stand could not be considered as a part of the main body of the supermarket because it was located in the same 'aspect' as other confectionary. She noted that the confectionary displays in front of the checkouts had not been included in the plan showing the main body of the premises, and the battery stand should be treated in the same way.

The Applicant's Submissions.

[30] Mr Couling submitted that there were two issues for determination.

(a) Whether the proposed single alcohol area is a single area or is in two areas (because it contains a through fare between aisle 11 and the wine alcove).

(b) Whether the proposed single alcohol area breaches section 113(5) (b) of the Act. Specifically, is the proposed single alcohol area in any area of the premises through which the most direct pedestrian route **between** the main body of the premises and any general point of sale passes.

[31] He argued that the submissions from both the Medical Officer of Health and the Licensing Inspector were flawed. In support he quoted from the decision in Vaudrey (paragraph 32) as follows:

> "***It is section 113(5) that has created most of the debate. It provides that the DLC can only describe an alcohol area if it is a single area. Further, that area may not contain all or any part of the most direct pedestrian route between an entrance and the main body of the premises; nor may it be on the most direct pedestrian route between the main body of the premises and any general point of sale. The suggestion that the area may not be anywhere between an entrance (or general point of sale) and a part of the main body of the premises is incorrect; that definition imports words into the section that are not there ("a part"). This submission, if adopted, could have the effect of prohibiting a single alcohol area completely which, clearly, is not the intent of the section."***

[32] Thus the area in issue is the area between the main body of the premises and any general point of sale. By describing the main body of the premises in the way that it has, (whether including the battery display or not), the company is able to show that there is no part of the prohibited area that is contained in the single alcohol area. As Mr Couling pointed out the single alcohol area is contained within the main body of the premises. Consequently, there can be no possibility that section 113(5) can be breached, because the proposed single alcohol areas is not **between** the main body and the checkouts and is not between the entrance to the store and the main body.

[33] Mr Couling was well aware that his argument depended on the Committee 'forming an opinion' under s.113 (5) of the Act that (a) the proposed area is a single area, and (b) that if so, the single area is so configured that it does not contain any area through which will pass the most direct pedestrian route between the main body of the premises and any general point of sale.

[34] He therefore contended that the Committee cannot apply a different definition of 'main body' to suit any one argument. “The main body is the main body” he stated (at paragraph 64 of his submissions), “and ought to be applied in accordance with what New World Wanaka has proposed”.

[35] Mr Couling accepted that the Committee was required to describe the alcohol area but only if in its opinion it was a single area. He argued that the fact that there was a thoroughfare between the wine alcove and aisles 11 and 12 was irrelevant because geographically it was one area and it was also one area in both a technical and substance sense.

[36] On the other hand he accepted that even the examples of other single areas that had been produced by Mr Bartley had different shapes and sizes. He referred in particular to a single alcohol area shown for “Bishopdale New World” which is one of the supermarkets involved in the “Vaudrey” proceedings. The single alcohol area was one long aisle which had a thoroughfare going through the centre. In that case the Committee had formed an opinion that what was proposed was a single area and there had been no issue raised by ARLA on appeal.

[37] Mr Couling also referred to a plan for “South City New World” which he claimed was “really no different” to what is proposed by New World Wanaka “albeit that the geometric shape is different”. He argued that when forming its opinion the Committee would be assisted by the purpose of ss. 112, 113, and 114 of the Act as set out in s.112(1), to limit (as far as is practicable) exposure of shoppers to displays of alcohol.

[38] Mr Couling submissions included a summary of the Act's legislative history. This was provided in case we had any doubt about his interpretation of the Act. He concluded with the contention that the company's proposed single alcohol area complied in all respects in substance rather than mere technicality, and that the proposed area could be described accurately and realistically as a single area.

The Impact of the High Court decision on the Application.

[39] We acknowledge with thanks the submissions of the Inspector, Medical Officer of Health and Mr Couling for the company. They were asked to comment on the impact of the High Court “Vaudrey” decision on the application.

[40] Mr Couling advised that the company did not accept the High Court's findings in “Vaudrey”. Nor did he appear to accept this Committee's ability to impose a single area condition inconsistent with that proposed by the company, although he did accept that the High Court had “opened the gates” on our ability to do so, and that the Medical Officer of Health was quite right to submit that we should now do so.

[41] Mr Couling's major concern was the expiry of the base licence on 25th August 2016. He proposed a scheme under which we would grant the licence and impose a single area condition, the implementation of which would be delayed for 12 months (as if the application was a renewal under s.115 of the Act). This would ensure that nothing changed until after the Court of Appeal had ruled, thereby saving the costs of any changes that had to be undertaken, but might subsequently be reversed by the Court of Appeal's decision.

[42] Mr Couling spent some time countering arguments made by the Inspector and the Medical Officer of Health that the company's proposal did not comply with s.113(5) of the Act. As will be seen, we accept that technically the proposed single area complies with the section but not with section's purpose.

[43] Mr Couling referred to paragraph [116] of the High Court decision wherein it is stated; ***"The prime concern is to ensure that any decision is founded on sufficient evidence".*** He then explained that the only evidence had come from Mr Bartley. We note that Mr Bartley produced the plan, and the plan was supplemented by the members taking a view and the view was more than compelling.

[44] The submissions from the Inspector and the Medical Officer of Health assisted our understanding that the original ARLA decision had interpreted ss. 112 to 115 of the Act in three significant ways.

[45] First, it had downplayed the impact of s.112 (1). See para [26].

> ***"In itself the section does no more than explain the purpose of the following sections. It is not an operative provision"***

Secondly it stated that no conditions other than those in ss. 112,113 or 114 could be imposed. See para [27]. Thirdly it advised that the DLC could only accept or refuse the proposed single alcohol area that was included in the application. Thus the Committee's only task was to accept what was being proposed or reject the application. See para [34].

[46] The High Court decision at para [123] had this to say:

> ***"In my view the process in the Authority has misfired because it proceeded from what I have determined was a fundamental misapprehension of the Act, it follows that its decision is now in jeopardy in the sense that it is entirely flawed."***

[47] The reality is that High Court decision provides excellent guidance in how to deal with these types of applications. The Judge has helpfully outlined our role, and provided useful interpretation advice as follows;

<u>Para [14] (d)</u>

> ***"In the case of an application for an off-licence which is also a supermarket or grocery store, MUST impose a single area condition if it grants a licence. This entails an evaluative exercise requiring the relevant body to;***

i. *be satisfied that the proposed area is a single area;*
ii. *be satisfied that the proposed area complies with s.113(5)(b);*
iii. *consider whether the proposed plan limits, as far as is reasonably practical, the exposure of shoppers to displays and promotions and advertisements for alcohol;*

In undertaking this evaluative exercise, it is the role of the District Licensing Committee or the Authority concerned (not of the applicant) to describe the single alcohol area. Thus, the relevant body is not limited to simply accepting or rejecting the plan put forward by the applicant. Rather, the relevant body must describe an area which it considers complies with the above criteria after hearing evidence and submissions from all relevant parties."

Para [16] (a) (v)

There will be cases where the matter(s) to which the decision maker is required to have regard, are so fundamental or critical that they assume an elevated mantle – s.112(1) is an example of an elevated consideration.

Para [16] (c)

The standard of "so far as is reasonably practical" specified in the Act comprises the following considerations:

i. *the requirement is not absolute;*
ii. *the physical possibility or feasibility of a task or course of action is not synonymous with reasonable practicality;*
iii. *ascertaining what is reasonably practical entails a balancing exercise between the benefit sought to be secured and the sacrifices that would be occasioned by securing that benefit (such as cost, time, difficulty, inconvenience);*
iv. *the assessment is to proceed on the basis of information known at the time the decision is made; and*
v. *the meaning of 'reasonably practical' is not static – it will respond to the context in which it is used.*

Para [31]

"The scheme of the Act, as it relates to the licensing or re-licensing of off-licence premises, can be summarised as follows:

(a) The general purpose of the Act is, for the benefit of the community as a whole, to implement a new system of control over the sale and supply of alcohol. The characteristics of this new scheme are to be that it is reasonable, and its administration is to assist in achieving the object of the Act."

Para [56] (a)

> ***"The role of the relevant body upon receipt of an application for licensing or re-licensing is an evaluative one, requiring the decision maker to make a merits-based determination on the application."***

Para [58]

> ***"Nevertheless, on the issue as to the role of that body in relation to single area conditions, I have reached the clear view that this role is to describe an area which the authority considers best accords with the purpose and object of the Act the purpose more specifically stated in s.112 (1), together with the requirements as mandated in s.113 (5)."***

Para [59] (c)

> ***"The relevant body is required to "have regard to s.112 (1) when, inter alia, "describing an alcohol area". The requirement to "have regard to" is inherently active and not merely mechanical."***

Para [59] (h)

> ***"The result I have reached is that the relevant body is able to assert a reasonable level of control over the single area condition. Its role is not limited to a "rubber stamping" one, but nor can it impose absolute limits.***

Para [80]

> ***The requirement "to limit" simply bears its ordinary meaning which is to restrict or restrain.***

Para [105]

> ***"Indeed, the MOH made the submission, in reliance on the conclusions reached in an academic article, that there is evidence suggesting restrictions on the use of aisle-ends for the sale of alcohol is a "promising option to encourage healthier in-store purchases, without affecting availability or cost of products". In this light it may well be that the condition is justifiable under s.117. Indeed on the face of the record, there is little to suggest it would not be."***

The Committee's Decision and Reasons.

[48] We deal first with the legal issues raised by Mr Couling in his final submissions. Mr Couling was concerned that the base licence is due to expire on 25th August 2016, and no further temporary authorities can be issued. We see no problem. All the company has to do is arrange for an application to renew the base

licence to be filed before 25th August 2016. S.122 (3) of the Act applies. Temporary authorities will continue if necessary. We also note that pursuant to s.152 (2) of the Act, the decision we are about to make will have no effect during the period allowed for an appeal or while the appeal is pending.

[49] While the principles have been distilled above, it seems to us that most cases will have to be decided on their individual merits. Given the size and range of supermarkets, and the number of permutations available to licensees, there is likely to be a range of opinions from the various Committees.

[50] The first consideration is the law and the way this has been interpreted by the authorities and particularly the High Court. The relevant sections to be applied are:

S.112 (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.***

S113 (1):

> ***The licensing authority or licensing committee concerned must have regard to section 112(1) -***
>
> ***(a) when describing an alcohol area; and***
>
> ***(b) when taking any other action under this section; and***
>
> ***(c) when forming any opinion for the purposes of this section.***

S.113 (5):

> ***The authority or committee must describe an alcohol area within the premises only if, in its opinion, -***
>
> ***(a) it is a single area; and***
>
> ***(b) the premises are (or will be) so configured and arranged that the area does not contain any part (or all of) -***
>
> ***(i) any area of the premises through which the most direct pedestrian route between any entrance to the premises and the main body of the premises passes; or***
>
> ***(ii) any area of the premises through which the most direct pedestrian route between the main body of the premises and any general point of sale passes.***

[51] It is mandatory for us to have regard to the purpose of the section (s.112(1)) limiting exposure to the display of alcohol so far as is reasonably practical when we are forming an opinion about such matters as whether there are two areas or one, and what constitutes the main body of the supermarket. As explained by the High Court this is an elevated consideration.

[52] The second consideration is the evidence and the submissions. We thank the parties for their respective contributions. We accept Mr Couling's point that on a strict or even technical interpretation of s.113(5)(b)(ii), the company's plan complies, because the proposed single area does not contain any part of any area between the company's interpretation of the main body and the general point of sale. However, as will be seen that is not the end of the matter.

[53] Although Mr Bartley was the only witness, his evidence was disappointing. He had difficulty in accepting that there was any difference between 'bypassing' a single alcohol area and 'going through' one. His explanation as to why any area other than the proposed area was reasonably impractical was unconvincing. We never really discovered why the chillers which were said to be due for replacement in June 2014 were now anticipated to last for another five years.

[54] These points or issues could be said to be relatively minor. The main issue for us was that it was clear that Mr Bartley had either on his own volition, or under direction, decided that the status quo should be maintained if possible. In our view he had not carried out a serious or considered review of the premises, to see whether there were other places where a single alcohol area might be placed. Which leads us to the third consideration which was the Committee's view of the proposed single alcohol area.

[55] This is a large and busy supermarket. Of all the potential single alcohol areas in the premises, (and there are many), the one in question has easily the greatest exposure to the display of alcohol. It was a revelation. We were at the time of the view, aware that shoppers who needed dairy items or chilled products or toilet paper or paper towels, were then more than likely not to retrace their steps, but to continue straight through to the check outs. If they had no interest in purchasing alcohol, these shoppers are then required to "run the alcohol gauntlet".

[56] Dr Bell was quite right. In heading for the checkouts, the shoppers are 'surrounded' by alcohol. And what is more the alcohol is up to head high and the gap is quite narrow. It is difficult to imagine how alcohol could be displayed in this supermarket to be more confrontational. Effectively there will be times when the alcohol is on three sides of the shopper. Mr Bartley described the process as "walking between two small ends of aisle displays". (Paragraph [50]). We beg to differ.

[57] The law requires that we must describe an alcohol area only if in our opinion it is a single area. In forming our opinion, we must have regard to the purpose of the section to limit (as far as reasonably practical) the exposure of shoppers to the display of alcohol. Mr Couling stated (paragraph 75) that "the fact there is a thoroughfare between the main alcohol aisles is irrelevant. Geographically it is one area. It is also one area both in a technical and substance sense". We don't think so. This is not just any thoroughfare. This is the only sensible thoroughfare for shoppers who have completed a full shop or purchased diary items and toilet paper in aisle 12.

[58] It may well be possible to join two areas that include a thoroughfare, but not one like this, where the public is in practical terms intentionally forced to be exposed to displays of alcohol. Nor is it geographically one area. The public

do not see the lines. They are imaginary. The public will see two areas that are quite different in physical shape and design. The other single areas quoted by Mr Couling have in our respectful view nothing in common with this proposal.

[59] Nor is this one area in either a technical or substance sense. The two areas in question are conveniently close together so that shoppers do not have to walk too far to compare prices and quality and so on, but we have to form an opinion whether this proposal constitutes a single area. In forming that opinion we must have regard to the purpose of the section to limit (as far as is reasonably practical) the exposure of shoppers to alcohol displays. We are unanimously of the opinion that the company's proposed plan is not a single area and we cannot therefore describe an alcohol area.

[60] In his final submissions, Mr Couling produced a plan of the layout plan for Wakatipu Frankton New World. Alcohol is spread over two separate aisles (10 and 11). He argued that this plan was not materially different to the Wanaka New World plan. Once again we cannot agree. There is a significant difference between aisles that are next door to each other and an aisle and an alcove which have nothing physical in common. There was also a plan of the 'Garden New World' in Dunedin that had been approved by the Medical Officer of Health. Mr Couling suggested that customers taking the most direct route to a check out 'could' go through the single alcohol area. They could, but if they did not want to they had an easy second choice, unlike the current situation.

[61] Having made such a decision that is effectively the end of the matter. However to assist the parties we also considered the second issue. Whether, any part of the proposed single area infringed on the area between the direct pedestrian route and the main body of the premises. The Act requires that we must describe an alcohol area only if in our opinion that area does not contain any part of the most direct pedestrian route between the main body of the premises and any general point of sale. In forming our opinion we must have regard to the purpose of the section to limit (as far as reasonably practical) the exposure of shoppers to the display of alcohol.

[62] The "Vaudrey" decision made by ARLA is helpful in assisting us to determine where the main body of the premises is. In that case it was stated at paragraph [33]:

> ***"What can be gleaned from this definition is that the main body of the premises does not necessarily mean the whole of the retail or shopping area where product is displayed. Often this will be the case (except for small displays adjacent points of sale). However, for example, if taking a direct pedestrian route from the entrance to the Single Alcohol Area involved passing a small retail area containing non-alcoholic product, the main body of the premises could mean the balance of the shopping or retail area excluding that small shopping or retail area situated between the Single Alcohol Area and the entrance. It is a matter of degree and involves the sort of judgment that a DLC must exercise when forming an opinion in terms of s.113 (5) and having regard to the purpose as expressed in s. 112(1). Regard to the purpose of the***

section will assist a DLC in forming an opinion not only as to whether it is a Single Alcohol Area that is being described but also whether that Single Alcohol Area is in one of the places prohibited by s.113(5)(b) of the Act."

[63] For the reasons we have stated above, we have formed a conservative view of the main body of the premises. Clearly the small area that includes the battery display will be excluded. However that is not the end of the matter. The issue is whether a thoroughfare between the end of aisle 12 (or part of it) as well as the thoroughfare in front of the checkouts should also be included in the main body of the premises. The main body does not necessarily mean the whole of the retail or shopping area. In this particular case, the inclusion of a part of the thoroughfare will subject shoppers to exposure to alcohol displays which is at the high end of the exposure scale. We believe that this was done without serious consideration of how the new provisions of the Act could be achieved in a reasonably practical way.

[64] Most supermarkets that we have individually experienced appear to have entered into the spirit of the new provisions of the Act in a thoughtful and reasonable way, and may have suffered some reduction in demand for all we know. By agreeing to the company's plan of the 'main body' we not only create an unfair advantage for the applicant company, we promote the very thing that Parliament has legislated against. We would be perpetuating a marketing scenario that existed prior to the passing of the new Act, thus rendering the new single area provisions nugatory. This we decline to do.

[65] We believe that the main body of these premises should not include that part of the thoroughfare between the Eastern end of aisle 12 as well as the thoroughfare between the checkout counters and the other aisles. Consequently it is our opinion that we cannot describe an alcohol area because the proposed area contains a part of a direct pedestrian route between the main body of the premises and any general point of sale, as well as the fact that the proposed area is not one area.

[66] We find ourselves unable to impose on the new licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol (S.112(2) of the Act. If the company decides to accept this ruling and review its plan, it has options. The final decision will depend on whether the company plans to utilise the alcove for the display and promotion of alcohol. If it does so, then it will have to shift the other alcohol displays to the southern wall as proposed by the Medical Officer of Health. There will be no end of aisle displays because there is no end of aisles in such a plan.

[67] If the company decides not to use the alcove, then it can utilise one or more aisles for its display and promotion of alcohol. In such a case there will be no end of aisle displays. As submitted by the Medical Officer of Health, such displays are used to maximise exposure and often promote discounts to encourage sales. The purpose of the relevant sections is to restrict or restrain exposure. The purpose of an end of aisle display is an additional marketing tool because of exposure. However, there would be no difficulty in arguing the point on renewal in twelve months' time.

[68] As will be seen we have delayed the implementation of this decision, in case the company might want to accept that a change is necessary. In which case, we are confident that all parties would work towards a resolution of the matter so that a grant of an off-licence could be made. The company will make its own decision on this matter. For our part we note that there have been many missed opportunities for the company to review its position.

[69] In concluding this decision, we note Justice Gendall's comments in paragraph [31] that the general purpose of the Act is for the benefit of the community as a whole to implement a new system of control over the sale and supply of alcohol. We think the people of Wanaka deserve better.

[70] For the reasons we have stated we cannot describe a single alcohol area, and since we cannot comply with s.112 (2) of the Act, the application for an off-licence is therefore declined. This decision will take effect 20 working days from its date.

DATED at Queenstown this 4th day of March 2016

Mr E W Unwin
Commissioner

APPENDIX "A"

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NEW WORLD WANAKA