

IN THE MATTER

of the Sale and Supply of Alcohol Act 2012 ('the Act')

AND

IN THE MATTER

of an application by **CHAKU AND CO. LIMITED** for the grant of an off-licence pursuant to s.100 of the Act in respect of premises situated at 3 Rainbow Drive Taupō trading as the "**Rainbow Point Store.**"

BEFORE THE TAUPO DISTRICT LICENSING COMMITTEE

Chairman: Murray Clearwater
Member: Judy James
Member: Graeme Cushing

HEARING at Taupo on 26 August 2024.

APPEARANCES

Mr. Jon Wiles counsel for **Chaku and Co. Limited** ("the applicant")
Mr. Nitinkumar Khandubhai Patel for the applicant

Mr. Grant Singer – Taupo Licensing Inspector ("the Inspector") – to assist.
Sergeant Greg Weston – Police Alcohol Harm Prevention Officer ("AHPO")– to assist
Ms. Dawn Meertens- for the Medical Officer of Health ("MOoH") – in opposition

Dr. Grant Hewison- counsel for the objector
Mr. Ken Baird- objector
Mrs. Marie Baird- witness for the objector

RESERVED DECISION OF THE COMMITTEE

Introduction

1. By an application dated the 19th of December 2023, **Chaku and Co. Limited** applied for the grant of an off-licence. It was duly advertised and reported on by the agencies. The applicant has been operating the business under Temporary Authority since 30 October 2023.

2. One public objection was lodged and the MOoH opposed believing that the business did not, and would not be able, to meet the definition of a grocery store for a licence to be issued pursuant to Section 32 and 33 of the Act.
3. The business had been operating with a grocery style off licence for many years under a previous ownership.
4. Of significance for this application, we note that there is a large Woolworths Supermarket with an Off Licence and an extensive alcohol offering, and a large Liquorland OFF Licence situated in the nearby Kokomea Village centre.
5. OFF Licences for these premises have been granted in the last two years.
6. The Committee was mindful of the Alcohol Regulatory Licensing Authority (ARLA) stance in **[2016] NZARLA PH 486 UDAY INVESTMENTS LIMITED**,¹ In that decision, the Authority determined that food products must be 'first in rank' in sales revenue for a grocery store style OFF Licence to be granted or renewed.
7. And they **must also meet all the other criteria** that are helpfully prescribed in Section 33 of the Act.
8. Overall, we needed to be satisfied that the business was that of a grocery store and not a Convenience Store or Dairy.
9. The applicant did seek the same kind of licence and conditions in place on the current licence. On that basis Section 102(4) and (4A) were in play and any objection could only be made on the grounds of suitability of the applicant.
10. However, we were advised a few days before the hearing that the applicant had moved and increased the size of the Single Alcohol Area and had also installed a Specialist Vape Retailer shop in the front corner of the store.
11. Mr. Wiles sagely conceded that his client's application was now not seeking the same conditions as prescribed in the previous licence and the full examination of the application, pursuant to Sections 105 and 106, was now in play.

Applicant's Evidence

12. Mr. Patel told us that he and his wife, Pratikshaben Nitinkumar Patel, both work in the store and hold current manager's certificates.
13. They had been operating the store under Temporary Authority since 6 November 2023 and he believed that the store had been licensed for 16 years under previous operators.

¹ [2016] NZARLA PH 486 UDAY INVESTMENTS LIMITED

14. Mr. Patel produced two sets of sales revenue figures. The first was said to be 'projected annual sales revenue' prepared by his accountant and the second was for one month of actual sales revenue in July 2024.
15. As we explained to him at the hearing, he was only required to provide us with estimated sales revenue that he could have prepared himself. Instead, his accountant provided a projected revenue statement suggesting that food products would amount to 55%, Convenience foods at 13.4%, alcohol at 12.5%, tobacco at 7% and Other at 12.6%. Mr. Patel conceded this estimate was not entirely accurate as it included NZ Post revenue of \$50,000 but he no longer held the NZ Post franchise.
16. He then doubled down with a "genuine statement" of the actual sales figures for the month of July 2024. This had food products at 37.43%, convenience foods at 20%, alcohol at 2.88%, tobacco and vape at 27% and Other incorrectly recorded as 42.57% (actually about 12%.) Also Excise tax had not been correctly recorded as stripped in the revenue statement.
17. These errors bring doubt to the veracity of these figures.
18. He then told us about the small vape store they have installed and that he knows there must be a dedicated staff member to conduct vape sales independently of the food store.
19. He produced "up to date information on staff training and directions to staff." The 2 page document was generic and not signed off as delivered to any member of staff. He said they has also undertaken an "intensive training programme" by Zoom and delivered by an Auckland Licensing Inspector. There was no evidence of the content of that 'training' nor was there any evidence of the training credentials of the Inspector.
20. He produced a 'Host Responsibility Policy' that was riddled with errors and spelling mistakes and designed for on-licensed premises.
21. He said he was "very familiar" with the SCAB Intoxication Assessment Tool. He was asked by the objector how many factors had to be evident in a customer before they could be deemed intoxicated. Mr. Patel said if one factor was present, he would refuse service. The Act and the Assessment Tool requires that two or more factors should be evident before a person can be deemed intoxicated.
22. He said they believed that they were a grocery store and served the local people. He said they re-introduced tobacco "late last year" and in March they set up the Vape Shop. He was asked how introducing those products contributed to benefitting the community as a whole? He said he was trying to cater for all of his customers' needs.

23. He agreed that they only had small quantities of fresh foods, and he explained that as many of them were perishable, they would go to waste if not sold. He argued that the changes he has made to the SAA were “very minor.”
24. He offered up a discretionary condition restricting single sales of alcohol if the DLC thought it would be necessary.
25. He agreed to have a draughtsman to draw an accurate plan on the shop and provide it to the parties. The new plan showed that there was 6.8 metres of alcohol shelving and fridges compared to 4.2 metres in the old SAA not the “more than doubling” that the objector alleged.

Inspector’s Evidence

26. The Inspector reported on the application and concluded that the new SAA still limited exposure as far as reasonably practicable and it appeared to be a grocery store. He said the applicant had an “acceptable knowledge of their responsibilities under the Act.”

Police Evidence

27. Sergeant Weston initially appeared wearing two hats. Pursuant to Section 204 (3) he was entitled to appear and be heard, be it in a capacity to assist the Committee, as the Police had withdrawn their initial opposition to this application.
28. He was also to be called as a witness for the Objector. However, there was nothing in his proposed evidence for the Objector that could not be introduced in his role as the Alcohol Harm Prevention Officer.
29. The parties agreed with the Committee that it would be ‘cleaner’ for him to appear as the AHPO, and his evidence was received as such.
30. He told us that the Rainbow Point Store was the subject of an aggravated robbery in February 2023 where a group of youths stormed the store with weapons and stole cigarettes, the cash register and smashed a number of windows.
31. The licensee at the time was understandably seriously traumatised and sold the business to this applicant. Prior to selling the store he withdrew tobacco and cigarettes from his product offerings.
32. In April of 2024 the Police dealt with an intoxicated person located nearby on Lake Terrace who had exposed himself to members of the public and urinated there and was found masturbating in full view of the public. There was no evidence that Rainbow Point Store had been the source of the alcohol that he had clearly consumed.

33. He said Police had attended 204 calls for service over a two year period within a 2 kilometre radius of this store.

Medical Officer of Health Evidence

34. Ms. Dawn Meertens appeared as the delegated officer for the MOoH. Her concerns were mainly around her view that the store did not meet the definition of a grocery store, and the application had several indicators of inexperience and lack of professionalism.
35. She also raised concerns about the integrity of the sales data, especially around the recording of the excise tax on tobacco products and the variety of product types. In her view the figures were inaccurate.
36. In closing Ms. Meertens referred us to a number of notable decisions of the Authority. In particular we note in **Tricorp Holdings Limited [2018] NZARLA 208 at [36]²** said “Section 33(2)(a)(i) also makes the appearance of the premises a mandatory consideration. Matters like external signage, the prominent placement of confectionery and the slushy ice-cream machine (not being food products), are all indicators of whether the premises is a grocery store.”

Objectors Evidence

37. Mr. Ken Baird told us that he is a local resident and has seen the locality change as the subdivisions and the shopping centres expand. He expressed sympathy for the applicant, and he believed that the client base of the store had changed over the last few years with the arrival of the bottle store and the supermarket.
38. He was concerned that the applicant had increased the size of the SAA and had reintroduced cigarettes and tobacco and now vapes into his product range.
39. He raised the issue of sensitive sites nearby and that there were vulnerable populations living nearby.
40. He said that up until recently the nearby Rainbow Point Motel was full of MSD Emergency Housing people. It was confirmed by the Police and MOoH that although apparently not in full use it was still on the books as emergency housing if required.
41. Overall, he believed that Rainbow Point Store was not operating as a grocery store and it did not benefit the community as a whole as prescribed in the Purpose of the Act.

² Tricorp Holdings Limited [2018] NZARLA 208 where at [36]

42. Mrs. Marie Baird told us she was Ken's wife and also held fears for the community should alcohol remain available at this store.

Relevant legislation

43. Section 3 of the Sale and Supply of Alcohol Act 2012 ("the Act") states the purpose of the Act as follows:

- (1) The purpose of Parts 1 and 3 and the schedules of this Act is, for the benefit of the community as a whole, –**
 - (a) to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and**
 - (b) to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.**

- (2) The characteristics of the new system are that–**
 - (a) It is reasonable; and**
 - (b) Its administration helps to achieve the object of this Act.**

44. Section 4 states the object of the Act as follows:

- (1) The object of this Act is that –**
 - (a) The sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and**
 - (b) The harm caused by the excessive or inappropriate consumption of alcohol should be minimised.**

- (2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes –**
 - (a) Any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and**
 - (b) Any harm to society generally or the community, directly or indirectly caused, or directly and indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).**

45. Determining whether premises are a grocery store

- (1) In this section,—**
 - food product—**
 - (a) does not include—**
 - (i) alcohol, confectionery, ready-to-eat prepared food, or snack food; or**
 - (ii) 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—
(i) 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 product is for the avoidance of doubt only and does not extend the generality of the term. (underlining our emphasis)

Section 36 of the Act says:

No off-licences for petrol stations, certain garages, dairies, convenience stores, conveyances, or shops within shops

The licensing authority or licensing committee concerned must not direct that an off-licence should be issued for any premises if (in its opinion)—

(a) the principal business carried on there is—

(i) the sale of automotive fuels; or

(ii) the repair and servicing of motor vehicles and the sale of automotive fuels; or

(b) they are a shop of the kind commonly thought of as a dairy; or

(c) they are a shop of the kind commonly thought of as a convenience store; or

(d) they are a conveyance; or

(e) they are situated (wholly or partially) within a shop; or

(f) the public can reach them directly from a shop, or directly from premises where the principal business carried on is a business of a kind described in paragraph (a).

Regulation 13 says:

Requirements for statements of annual sales revenue (new 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 **projected gross sales revenue** of the business to be carried on, on the premises for the period of 12 months after the time at which the application for the issue or renewal of an off-licence for the premises is made— **(our emphasis)***

(i) excluding GST; and

(ia) excluding excise duty and excise-equivalent duty on tobacco products; and

(ii) after deduction of all projected 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.

Further Considerations

Whether the premises is a grocery store

46. Pursuant to section 33(2) of the Act the Committee needs to be satisfied, **in its opinion**, that the business is that of a grocery store and not a dairy or convenience store.
47. The first consideration under this Section is the size, layout and appearance of the premises. Rainbow Point Store is rectangular in shape with only one main aisle and a series of chest freezers down the middle. Chilled cabinets take up most of the sides of the shop with groceries, cleaning products and hardware on the aisle racks. The currently Single Alcohol Area (SAA) is in the back right corner of the store in an L shape. As recorded elsewhere the SAA appeared to have increased in size by about 50%.
48. The objector argued that the design and layout of the revised SAA did not reduce exposure of alcohol to shoppers as far as reasonably practicable. We disagree the SAA is in the best available place.
49. There is a large sign on the front of the shop stating Rainbow Point Store but the overall appearance of the shop in our view was that of a Convenience Store.
50. The second consideration for a new licence is the provision of projected revenue

data on the likely sales under the criteria in Reg 13 i.e. (i) the sale of food products, (ii) the sale of alcohol: (iii) the sale of tobacco: (iv) the sale of convenience foods: and (v) other sources of revenue.

51. The figures initially provided as projected revenue figures were crudely derived from previous annual sales revenue but with the food products range bumped significantly up to 55%. The second set of actual sales revenue figure for the month of July contained errors and the stripping of excise tax had not been performed correctly. Overall, the figures were inaccurate and unhelpful for our determination of this application.
52. The third consideration is the number, range and kinds of items on sale. The Inspector provided a very helpful set of colour photographs of the store and its contents. Members of the Committee also visited the shop. It was clear that Mr. Patel, to his credit, was buying more stock and trying to fill the shop with a variety of food products. Notably many products were fully 'fronted' to the front edge of the shelf indicating they were either very popular and had to be regularly restocked or the stock was not moving rapidly at all. We prefer the later theory.
53. Many of the products fitted into categories other than 'food products' as defined in the Act. There were not large volumes of staple foods such as deli products, baking supplies, fresh meat and fruit and vegetables. However, there was a very large range and volume of snack foods, soft drinks and confectionery.
54. The applicant had also altered and increased the size of the SAA and reintroduced tobacco products and vapes into his product ranges.
55. Fourthly we may determine that the store does not have the characteristics that one would normally expect of a grocery store.

Other criteria to be considered.

56. The Act provides that in deciding whether to grant a licence, the licensing committee must also have regard to the matters contained in section 105 & 106 of the Act.
57. We do not see these criteria to be significant in the bigger picture. The objector tried to argue that the extensive volume of graffiti on the nearby tunnels was indicative of a reduction in the amenity and good order of the area and somehow should be linked to this store. There was no evidence adduced of drunken youth caught graffitiing the area. We place little weight on this evidence.

Section 105(1)(a) The Object of the Act

58. Section 105(1)(a) of the Act requires the licensing committee to have regard to the Object of the Act. The licensing committee must be satisfied that the granting of

the licence would help achieve the Object of the Act. We must also read Section 3 of the Act together with Section 4. We come back to these sections after reviewing the other criteria.

Section 105(1)(b) Suitability of the Applicant

59. Section 105(1)(b) provides that the applicant must be a suitable entity to hold an off-licence. We have concerns about the applicant's knowledge of his obligations under, and commitment to, the principles of the Sale and Supply of Alcohol Act.
60. The application was unprofessionally prepared and populated with inadequate documents around training, its social responsibility, and projected sales revenue figures. Mr. Patel gave evidence that he had arranged for intensive training for staff but was not able to produce any record of that training and it had apparently been conducted by an out of town licensing inspector who was not a qualified industry trainer.
61. The applicant altered the SAA layout and installed a Specialist Vape store within the footprint of the shop without taking advice or advising the agencies and in so doing breached the conditions of the underlying licence.
62. These matter raise concerns about the overall suitability of the applicant. These are not the hallmarks of a knowledgeable, competent licensee.
63. It appeared to us that it was more like a shop owner trying to prop up a struggling business.

Section 105(1)(c) Relevant Local Alcohol Policy

64. Taupō does not have a Local Alcohol Policy. There is nothing for us to consider.

Section 105(1)(d) The days and hours of operation of the licence

65. The current operating hours are Monday to Sunday 7.00am to 9.00pm. They are unremarkable and within the default national maximum trading hours for off licences.

Section 105(1)(e) The design and layout of any proposed premises

66. As described in paragraphs 46-49 above, the design and layout of the premises, in our opinion, is more akin to a convenience store than that of a grocery store.

Section 105(1)(f) Whether the applicant is engaged in or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods.

67. The shop sells a diverse range of magazines, tobacco and vape products, postage stamps, cleaning products and hardware.

Section 105(1)(g) Whether the applicant is engaged in or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low and non-alcoholic refreshments, and food, and if so, which services.

68. No other services are offered.

Section 105(h) Whether (in our opinion) the amenity and good order of the locality would be likely to be reduced to more than a minor extent by the effects of the issue of the licence.

69. We believe that this business would be a medium-risk activity and not reduce the amenity and good order of the locality by more than a minor extent.

Section 105(1)(j) Whether the applicant has appropriate systems, staff, and training to comply with the law.

70. As we said at the hearing, as a new business we required best-estimates of projected sales revenues delivered in the required format. It was not produced in the required format and the material that was provided appeared to be propped up for effect and was confused and inaccurate at best.

71. The 'training' documents, and the 'Zoom training', were undocumented, and the 'Host Responsibility Policy' was, in our view, a misguided attempt at window dressing and not fit for purpose.

Section 105(1)(k) Any matters dealt with in any report of the Police, an Inspector and the Medical Officer of Health under Section 129

72. The Police were not opposed but did assist in providing statistics that showed that the locality of the store does have some challenges.

73. The MOoH was concerned about the veracity of the sales revenue figures and the obvious errors in the reporting of tobacco sales and the stripping of excise tax.

74. It was also clear that the nearby 'empty' emergency housing motel was still active and could house vulnerable clientele again.

75. The Inspector is of the view that the business meets the criteria of a grocery store, and once a properly drawn scale plan is before the Committee could be granted an Off Licence.

76. Dr. Hewison, on behalf of the objectors, believed the applicant had failed to demonstrate the required level of suitability for a vulnerable area and the store was simply no longer a grocery store.
77. He believed the breaches of the base licence were willful and significant and the Committee should hold the applicant to account for those actions.

Reasons for the Decision

78. Overall, the business appears to us to be that of a Convenience Store. There is a very large range of single serve soft drinks, confectionery, ice-creams, ready-to-eat products, and snack foods. There is a moderate range and number of food products and grocery items, but we have serious doubts that the food products are being purchased by shoppers.
79. They have reintroduced tobacco products and a large range of vapes via a Specialist Vape Store into the product range. There is a large supermarket and a bottle store within 200 metres of the store that clearly cater for the main shopping activities of the locals.
80. The shopping patterns and demographics of the customer base appears to be that of a convenience service for the local community rather than a full range grocery store. We have no criticism at all of them wanting to provide for the needs of their customers. They are entitled to try and improve the profitability of the store, but this must not be at the expense of being unable to demonstrate that they are operating as a true grocery store.
81. The previous owners may have operated as a grocery store for many years but in recent times, and under the current ownership, in our opinion, they have shifted the focus away from operating as a grocery store.
82. As said in the **[2018] NZARLA 208 Tricorp Holdings Limited**³ decision that we referred to earlier, the Authority also made it clear that grocery stores must have more than just food products as the principal revenue source. The Authority added: “*The premises must also share the characteristics normally associated with shops commonly thought of a(s) grocery shops.*”

The Decision

83. Section 3 of the Act requires us to act reasonably with the aim of contributing to the Object of the Act in the exercise of our duties. We are also bound to comply with the procedures and provisions of this Act and to administer the Act for the benefit of the community as a whole.

³ 2018] NZARLA 208 Tricorp Holdings Limited

84. The Committee is not satisfied that the business is that of a grocery store and the Object of the Act would be met in granting this application.
85. The application for an off licence is refused.
86. The sale of alcohol must cease on or before the last day of the current Temporary Authority that being the 6th of October 2024

DATED at TAUPO this 5th day of September 2024

A handwritten signature in black ink, appearing to read 'Murray Clearwater', enclosed within a thin black rectangular border.

Murray Clearwater
Commissioner
For the Taupo District Licensing Committee

NOTE

Sections 153 to 155 of the Act relating to the right to appeal this decision are in effect.

This decision has immediate effect even if notice of appeal is lodged with ARLA.