

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2021] NZACC 41

ACR 24/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	BUILDING CONNEXION LIMITED Respondent

Hearing: 23 September 2020

Appearances: C Hlavac for the Appellant
G Pearson and A Isherwood for the Respondent

Judgment: 1 March 2021

**RESERVED JUDGMENT OF JUDGE AA SINCLAIR
[Levies: s 170 of the Accident Compensation Act 2001]**

[1] This is an appeal by the Accident Compensation Corporation (“the Corporation”) from a review decision dated 13 January 2020 setting aside the Corporation’s decision of 21 February 2019 classifying the business activity of Building Connexion Limited (“BCL”), for levy purposes as classification unit (“CU”) 45310 – *Timber Wholesaling*, and determining that the correct CU should be 52330 - *Hardware and Building Supplies Retail*.

BACKGROUND¹

[2] BCL is a member of the independent Timber Merchants Co-Cooperative (ITM) which sells timber, hardware and building supplies to both businesses and to the general public.

[3] BCL operates four ITM stores at Takaka, Motueka, Nelson and Havelock. These stores are situated in commercial, industrial and urban residential areas. ITM Takaha is located in a small lane in the centre of the town accessed from the main street. ITM Motueka is on King Edward St, approximately 200 metres from the main street in Motueka. ITM Nelson is located approximately 300 metres from the World of Wearable Arts Museum and Mitre 10 Mega and is on one of the main roads accessing the airport. Finally, ITM Havelock is located next to the marina in the centre of the town and less than 200 metres from the main road.

[4] The stores are predominantly directed towards the building trade and supply a product range including tools, timber, building materials, hardware, plumbing (showers etc) and a small range of garden products.

[5] The stores all have showrooms where smaller building and hardware items are displayed for sale. Dried timber products are kept under cover in a warehouse while other timber products are kept in the yard. All items are displayed in racking for retail display with a retail ticket price. All areas are open to the public and customers are able to walk through the timber yard, warehouse and showroom to select the items they need.

[6] The yard and warehouse areas make up over half of the premises at each site with less than 20% being dedicated to storage. BCL's staff are involved in handling the timber, including unloading bulk loads of timber purchased from timber suppliers using forklifts and machinery.

[7] BCL breaks down bulk packs of timber purchased from suppliers into smaller amounts for sale to its customers. Builders do not normally buy in bulk. Instead,

¹ The hearing proceeded on the basis of an agreed statement of facts which is summarised in this section.

they use the ITM sites as their yards and come in and buy what they require from the open packs of timber. They then charge their clients for the materials upon receipt of an invoice from BCL.

[8] Some goods are delivered direct to customers from BCL's suppliers. In these cases, BCL still retails the goods and invoices the customer. However, most goods are sold through the BCL stores.

[9] BCL's opening hours are 7.30am to 5.00pm, Monday to Friday and 8.00am to 12pm on Saturday.

[10] Goods are promoted in stores by in-store demonstrations (e.g. Makita tools). BCL's advertising involves ITM national advertising, newspaper advertising and magazine advertising, radio, facebook and sponsoring regional and national events.

[11] BCL's website advertises products ranging from timber, building supplies and hardware. Advertising is targeted at both trade, DIY and rural customers. BCL's webpage contains links to separate pages for "Trade" and "DIY". The Trade page includes a link to ITM's magazine "Building Business" which is directed towards trade customers in the building industry.

[12] For the 2017/18 tax year:

- (a) Approximately \$36.4M (excluding GST) or 84.2% of BCL's sales (by dollar value) were to customers holding trade accounts. This included a majority of trade customers but also some unquantified portion of "DIY" customers. BCL cannot determine with any specificity who pays the trade accounts. Payment can be made by the trade customer, homeowner/end user or someone else.
- (b) Approximately 60-70% of BCL's sales are to "trade customers", of which a large proportion are builders. This is an approximation only as BCL does not keep any records regarding its customer base.

- (c) Approximately \$13.2M or 30.5% of total sales were of timber products. A large portion of these sales in terms of volume, were to builders.

[13] Sales and invoice figures across the four stores for the quarterly period from January 2019 to March 2019 show an average invoice amount of \$307.63.

[14] Up until 2019, all BCL's business activities were assigned to CU 45390 – *Hardware Goods Wholesaling (not elsewhere classified)*. On 21 February 2019, the Corporation wrote to BCL advising that, having considered BCL's business activity, it had changed its levy classification to 45310 – *Timber wholesaling*.

[15] On 10 July 2019 the Corporation issued a levy invoice to BCL for the 2018/19 year based on this new classification. An application for review of this decision was subsequently filed by BCL.

[16] In a review decision dated 13 January 2020, the reviewer determined that the correct classification for BCL's business activities at its four sites should be CU 52330 - *Hardware and building supplies retailing* and directed that the Corporation's levy classification be amended accordingly.

RELEVANT STATUTORY PROVISIONS

[17] The accident compensation scheme is funded by a number of accounts, provided for in Part 6 of the Accident Compensation Act 2001 ("the Act"). The Work Account is used to finance entitlements provided under the Act to employees, private domestic workers and self-employed persons for work-related personal injuries² and its funds are mainly derived from levies collected from each of those groups.³

[18] With regard to employers, levies are set by classifying an employer in a classification unit corresponding to an industry or risk class that most accurately describes their activity. Section 170 of the Act states:

² Section 167(1)(a).

170 Classification of industries or risks

- (1) For the purpose of setting levies payable under sections 168,168B and 211, the Corporation must classify an employer and a self-employed person in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act.
- (2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.
- (3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the employer meets the threshold (if any) specified in regulations and if –
 - (a) the employer so requests; and
 - (b) the employer is engaged in 2 or more distinct and independent activities; and
 - (c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and
 - (d) accounting records are maintained by the employer to the satisfaction of the Corporation that-
 - (i) demonstrate the separate management and operation of each activity, and
 - (ii) allocate to each activity the earnings of employees engaged solely in that activity.
- (4) Regulations made under this Act must prescribe a Work Account levy for each industry or risk class defined under subsection (1).
...
- (5) The Corporation must decide which industry or risk class is appropriate in relation to any employer or self-employed person by whom a levy is payable, and section 239 applies if the classes defined by the regulations do not specifically cover a particular activity.

³ Section 168,168B and 211.

[19] Section 6 of the Act defines “activity” as:

activity, for the purposes of Part 6,-

- (a) means a business, industry, profession, trade, undertaking of an employer, a self-employed person, or a private domestic worker; and
- (b) includes ancillary or subservient functions relating to the activity, such as administration, management, marketing and distribution, technical support, maintenance, and product development.

.....

[20] The relevant regulations for the purposes of s 170 are the Accident Compensation (Work Account Levies) Regulations (“the Regulations”). These are updated biennially. The schedule to the Regulations sets out a list of Classification Units which provide a general description of a particular business activity, a CU number, and the applicable levy rate for that CU.

[21] Section 170 expressly recognises that an employer may be engaged in more than one activity, corresponding with more than one industry or risk class. Under s 170 (3), if an employer is engaged in two or more distinct and independent activities, each of which provides services or products to external customers in such a way that each activity could, without adaption, continue on its own without the other activities, and separate accounting records are maintained, then the Corporation must (on request by the employer) allocate multiple classification units for those different activities.

[22] Section 170(2) provides that where an employer engages in more than one activity, and those activities are not sufficiently separate to meet the requirements set out in s 170(3) then the Corporation must classify all of the employer’s employees in the classification unit for whichever of those activities attracts the highest levy rate under the Regulations.

[23] The fact that there is more than one CU which could possibly describe an aspect of an employer’s activity does not necessarily mean that part of the activity should be classified separately.⁴ Previous levy regulations have made it clear that

⁴ *Adis International Ltd v ARCIC* [1999] NZACC 138.

functions which are ancillary or subservient to an activity shall comprise part of that activity and shall not form a separate activity.⁵ The levy rates for each CU are risk weighted on the basis that functions which are ancillary or subservient to the activity comprising that CU do not form a separate activity and are treated as part of that activity.⁶

ANZSIC

[24] The classifications that appear in the Regulations are substantially derived from the Australian and New Zealand Standard Industrial Classification 2006 (“ANZSIC”), a joint development between Statistics New Zealand and its Australian counterpart, the Australian Bureau of Statistics, which was created in 1993 and amended in 2006.

[25] ANZSIC contains a hierarchical classification system with four levels, comprising 19 Divisions, which are then in turn broken down into Subdivisions, Groups and Classes. Under each Class, there is a general description of the class, a list of primary activities which fall within that class, and a list of exclusions/references. The classification units which appear in the Regulations correlate with a Class within ANZSIC, in most cases using identical wording.

[26] ANZSIC has been recognised by the High Court as providing assistance in the interpretation of the Regulations. In *On the Go (New Zealand) Ltd v Accident Compensation Corporation*⁷, Simon France J held that it was “beyond dispute” that the Regulations uplift the classification units from the ANZSIC document and while, at the end of the day, it is the wording of the Regulations that prevails, ANZSIC is an obvious interpretation aid.⁸

⁵ See Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1996, s 2 definition of activity”.

⁶ For example: *The Auckland Co-Operative Taxi Society Ltd v ARCIC* [1999] NZACC 271. *ACC v Peninsula Distribution Limited* [2012] NZACC 257; and *Salter Cartage Limited v ARCIC* [1999] NZACC 99

⁷ *On the Go (New Zealand) Ltd v Accident Compensation Corporation* HC Wellington CIV 2011-485-736 16 September 2011.

⁸ At [20] and [21].

[27] The courts have looked to the expanded commentary (descriptions, primary activities and exclusions/references) contained under a particular class in ANZSIC to provide guidance in determining the scope of the correlating CU within the Regulations. In *The Auckland Co-Operative Taxi Society Ltd v ARCIC*⁹ Judge Beattie observed there is a distinction between the underlying purpose of ANZSIC – which is to provide a basis for the standardised collection, analysis and dissemination of economic data on an industry basis for Australia and New Zealand¹⁰ and the Regulations. ANZSIC may be used as a guide to assist in determining the correct classification but the overriding statutory provisions must apply.

[28] Notably, there is a difference between the approach to classification of a business unit under ANZSIC and under the Act where an employer is engaged in more than one business activity. While the Act provides mechanisms in ss 170(2) and (3) for assessing the appropriate CU in such cases, ANZSIC requires that where business units are engaged in activities that belong to two or more industry categories (“multi activity units”), it is necessary to adopt methods for classifying each unit according to its predominant activity.

TIMBER, HARDWARE AND BUILDING SUPPLIES CLASSIFICATIONS

[29] The relevant classification units contained in the Regulations which apply in relation to the timber, hardware and building supplies industry, draw a distinction between retail trade and wholesale trade. An identical distinction appears in ANZSIC.

[30] In relation to retail trade, there is a singular CU 52330 *Hardware and Building Supplies Retailing* which includes timber retailing and plumbing supplies retailing. The applicable levy rate is 86 cents.¹¹

[31] However, there are three separate CUs in relation to wholesale trade:

- 45310 – Timber wholesaling (\$1.91)
- 45391 – Plumbing goods wholesaling (\$0.52)
- 45390 – Hardware goods wholesaling (not elsewhere classified) (\$0.69)

⁹ Above n 6 at page 10.

¹⁰ ANZSIC at 1.5.

¹¹ Under the Accident Compensation (Work Account Levies) Regulations 2019.

It is evident from these rates that timber wholesaling is considered a significantly greater risk activity than other forms of hardware and building supplies wholesaling, and of hardware and building supplies retailing (which includes timber retailing).

[32] The expanded description/commentary contained in ANZSIC in relation to each of these CUs provides:

4231 – Hardware and Building Supplies Retailing

This class consists of units mainly engaged in retailing hardware or building supplies.

Primary activities

- Carpenters' tool retailing
- Cement retailing
- Ceramic floor tile retailing
- Garden tool retailing
- Hardware retailing
- Lacquer retailing
- Lawnmower retailing
- Lock retailing
- Mineral turpentine retailing
- Nail retailing
- Paint retailing
- Plumbers' fittings retailing
- Plumbers' tools retailing
- Timber retailing
- Tool retailing
- Wallpaper retailing
- Woodworking tool retailing

Exclusions/References

Units mainly engaged in:

- wholesaling builders' hardware or supplies (except plumbing supplies) are included in class 3339 Other Hardware Goods Wholesaling; and
- wholesaling timber are included in class 3331 Timber Wholesaling

3331 – Timber Wholesaling

This class consists of units mainly engaged in wholesaling timber (except firewood)

Primary activities

- Plywood wholesaling
- Timber dealing, wholesaling (except firewood)
- Veneer, wood, wholesaling

Exclusions/References

Units mainly engaged in firewood wholesaling included in class 3739 Other Goods Wholesaling n.e.c.

3332 – Plumbing Goods Wholesaling

This class consists of units mainly engaged in wholesaling plumbing goods
...

3339 – Other Hardware Goods Wholesaling

This class consists of units mainly engaged in wholesaling other hardware goods (except timber or plumbing goods), including construction or building materials.

[33] The preambles to Division F (Wholesale Trade) and to Division G (Retail Trade) in ANZSIC provide guidance as to the business units to be included in each of these Divisions. Relevantly, the preambles state:

Division F: Wholesale Trade

The Wholesale Trade Division includes units mainly engaged in the purchase and onselling ... of goods, without significant transformation, to businesses. Units are classified to the Wholesale Trade Division in the first instance if they buy goods and then on sell them (including on a commission basis) to businesses.

Wholesalers' premises are usually a warehouse or office with little or no display of their goods, large storage facilities, and are not generally located or designed to attract a high proportion of walk-in customers. Wholesaling is often characterised by high value and/or bulk volume transactions, and customers are generally reached through trade-specific contacts.
...

A unit which sells to both businesses and the general public will be classified to the Wholesale Trade Division if it operates from premises such as warehouses or offices with little or no display of goods, has large storage facilities, and is not generally located or designed to attract a high proportion of walk-in customers.

Division G: Retail Trade

The Retail Trade Division includes units mainly engaged in the purchase and on selling ... of goods, without significant transformation, to the general public. Units are classified to the Retail Trade Division in the first instance if they buy goods and then onsell them (including on a commission basis) to the general public.

Retail units generally operate from premises located and designed to attract a high volume of walk-in customers, have an extensive display of goods, and/or use mass media advertising designed to attract customers. The display and advertising of goods may be physical or electronic.

Physical display and advertising includes shops, printed catalogues, billboards and print advertisements. Electronic display and advertising includes catalogues, internet websites, television and radio advertisements and infomercials. While non-store retailers, by definition, do not possess the physical characteristics of traditional retail units with a physical shop-front location, these units share the requisite function of the purchasing and onselling of goods to the general public, and are therefore included in this Division.

A unit which sells to both businesses and the general public will be classified to the Retail Trade Division if it operates from shop-front premises, arranges and displays stock to attract a high proportion of walk-in customers and utilises mass media advertising to attract customers.

ISSUES

[34] The issues for determination in this appeal can be summarised as follows:

- (a) For the purposes of s 170(1) of the Act, what is the industry or risk class which most accurately describes the BCL's business activity?
- (b) Is BCL engaged in two or more business activities for the purposes of s 170(2) of the Act?

ISSUE 1: INDUSTRY OR RISK CLASS MOST ACCURATELY DESCRIBING BCL'S BUSINESS ACTIVITY?

[35] Before discussing BCL's business activities, it is necessary to consider what is meant by "wholesale" and "retail" in this context and importantly, to determine the relevance of the guidelines contained in the preambles to Division F and Division G in deciding upon the appropriate categorisation of BCL's business activities.

Definition of "wholesale" and "retail"/Application of ANZSIC Guidelines?

Corporation's Submissions

[36] The Corporation says that in determining what is meant by "wholesale" and "retail", it has adopted the definitions provided by ANZSIC. These definitions are those set out in the first part of the preambles contained in Division F and Division G, namely:

Division F:

Units are classified to the Wholesale Trade Division in the first instance if they buy goods and then onsell them (including on a commission basis” to businesses.

Division G:

Units are classified to the Retail Trade Division in the first instance if they buy goods and then onsell them (including on a commission basis) to the general public.

[37] The Corporation submits that because of the way in which ANZSIC and the Regulations deliberately structure particular activities; the obvious interrelationship between those activities; and the way in which they have been applied by the Corporation in assessing an appropriate risk category and corresponding levy, it would be inappropriate to try and formulate some other definition as to what is meant by the terms “wholesale” and “retail” without that having a significant effect on the levy scheme.

[38] The Corporation says that the preambles go on to contain additional guidance by providing for example, descriptions of the activities and types of premises which are generally identified with business units that operate as either a wholesaler or a retailer (“the additional factors”). However, some caution needs to be taken in applying these factors as ANZSIC is directed towards identifying only one category or class to each business unit according to its “predominant activity” and these factors are intended to provide assistance in making that determination. This is not a requirement under the Act for levy classification purposes.

[39] The Corporation further submits that where an employer is involved in both wholesale and retail trading activities involving the same products, these additional factors can only be relevant to the assessment under s 170 to determine whether those are each separately identifiable business activities (in which case s 170(2) will apply), or whether one of those activities is merely “ancillary or subservient” to the employer’s main business activity (and therefore is to be treated as part of that main activity under s 170(1)).¹²

¹² Section 170(3) is not applicable on the facts in this case.

BCL's Submissions

[40] BCL agrees with the Corporation that the definitions of “wholesale” and “retail” contained in the preambles are appropriate for determining the classification of BCL’s activities but says that it is necessary to read the preambles in their entirety. BCL disagrees with the Corporation’s submission that the additional factors are intended to provide guidance in determining a business unit’s “predominant activity” where that unit sells to both businesses and the general public and submits that the methods for determining a unit’s “predominant activity” are contained in Chapter 4 of ANZSIC.

Discussion

[41] I accept that it is appropriate to adopt the definitions contained in the preambles to Division F and Division G for the purposes of determining the correct classification of a particular business unit under s 170 of the Act. However, I do not agree with the Corporation’s submission that the words in the first paragraph of each preamble can be read as providing the complete definition of “wholesale trade” and “retail trade”.

[42] In particular, I do not agree with the Corporation’s submission that the additional factors are included in order to assist in determining the “predominant activity” of the business unit for the purposes of ANZSIC. While there are some items relating to the treatment of particular activities covered in other chapters¹³, the general classification principles and methods are detailed in chapter 4 of ANZSIC and specifically include the methods for classifying business units to their predominant activity.¹⁴ Notably, where a business unit undertakes multiple activities, the activity with the highest value added is the predominant activity. Where it is difficult to determine predominance based on value-added, a proxy for value-added (listed in the chapter) is used.¹⁵

¹³ For example, in chapter 5 which are not relevant to the activities under consideration.

¹⁴ ANZSIC at [4.4].

¹⁵ ANZSIC at [4/5] and [4.6].

[43] It follows that I also do not agree with the Corporation's further submission that as the Act does not require it to determine a predominant activity for levy classification purposes where a business unit is involved in both wholesale and retail trading activities involving the same products, the additional factors can only be relevant to the assessment under s 170 to determine whether those activities are each separately identifiable business activities or whether one is merely ancillary or subservient to the main business activity.

[44] The additional factors principally focus on a business unit's premises including its location, layout and the physical display of goods. They also include the use of advertising, and whether high value and/or bulk volume transactions are undertaken. In my view, these factors further define/clarify the broad definitions set out in the first paragraph of each preamble and are clearly intended to be taken into consideration in assessing whether a business is engaged in "wholesale trade" (Division F) or "retail trade" (Division G) for the purposes of establishing its correct classification.

Nature of BCL's Trading Activities?

Corporation's Submissions

[45] The Corporation contends that BCL's business activities support the conclusion that wholesale sales (including timber wholesaling) is a separately identifiable business activity. In particular, the Corporation says:

- (a) Each of BCL's four stores has a large storage warehouse and timber yard. While each store has a showroom where hardware and other smaller building products are displayed, these are not comparable with the size, layout and prominence that might be expected from a business which predominantly focuses on sales to the general public;
- (b) BCL's advertising is geared towards businesses as is evident from the web page which has a clear trade and building focus;

- (c) BCL's opening hours are 7.30am to 5.00pm Monday to Friday and 8.00 to 12pm on Saturday. These hours are more focused on trade/business customers than the general public;
- (d) BCL's stores are located within commercial/industrial areas with little parking for members of the public and are not designed to attract a high proportion of walk-in customers; They are primarily geared to bulk purchase/trade customers with little parking for the general public but a significant staging area for heavy trucks and palletised transport of goods.
- (e) Approximately \$13.2 million or 30.5% of total sales in the 2017/18 year involved timber products (excluding frames and trusses). A large portion of these sales in terms of volume were to builders.

BCL's submissions

[46] BCL submits that applying the factors identified in the preambles for Division F and Division G, BCL satisfies the definition of a retailer. It does not accept the Corporation's assertions and in summary, says:

- (a) BCL's stores all operate in locations chosen for the high volume of customers they attract.
- (b) BCL operates from shop front premises and arranges and displays stock as a retailer.
- (c) BCL's advertising involves the utilisation of mass media and includes ITM national advertising, newspaper advertising and magazine advertising, radio, facebook and sponsoring regional and national events.
- (d) BCL's sales figures show that the average invoice amount for the 3-month period from January 2019 to March 2019 was \$307.63.

- (e) The sales figures are an approximation only and not an accurate representation of the character of the customer. Moreover, the nature of the customer does not determine whether a business is a wholesaler or retailer.

Discussion

Relevance /Applicability of Sales Figures?

[47] The Corporation places considerable weight on BCL's sales figures and submits that the provision of this information is necessary to determine the correct classification for levy purposes.

[48] In the present case, the evidence was that for the 2017/18 tax year, \$36.4 million (excluding GST) or 84.2% of BCL's sales by dollar value were to customers holding trade accounts. \$13.2 million or 30.5% of total sales were of timber products of which a large portion in terms of volume were to builders. These figures were approximate only.

[49] BCL does not collect the information necessary to provide the analysis of sales figures sought by the Corporation. It is not sufficient to simply produce a breakdown of sales to particular customer groups. The evidence was that trade accounts can be opened by trade customers and also by "DIY" customers. While a trade account might be held in the name of a trade customer, this does not determine whether a sale has been made at wholesale or retail. BCL does not have knowledge of its customers' trading arrangements¹⁶ and a particular invoice could be paid by the builder, homeowner/end user or another party. BCL's customers are entitled to their privacy and BCL cannot be expected to enquire whether a sale has been made at wholesale or retail and/or to collect this information for future provision to the Corporation.

[50] Furthermore, and importantly, I agree with BCL that the nature of the customer does not determine whether a business is a wholesaler or retailer. It is the

¹⁶ For example, whether a customer is operating under a labour only contract.

activities of the business unit which are under consideration not those of its customers. The ANZSIC definitions of wholesale trade and retail trade focus on the business unit's premises, display of goods, use of advertising and the value and volume of transactions. The factors identified are clear and can be readily applied. Significantly, they do not focus on the commercial attributes of the customer and do not require an analysis of the sales figures of the business unit (even if such information was available) to determine whether sales are made at wholesale or retail.

Application of Preamble Factors?

[51] The Corporation contends that each of BCL's four stores has a large storage warehouse and timber yard and that its showrooms are not comparable with the size, layout and prominence that might be expected from a business predominantly focused on sales to the general public. I am satisfied on the evidence that this is not an accurate description.

[52] To a large extent, the products for sale determine the space and presentation. In the present case, smaller items are displayed in a showroom. Timber and other bulky items required to be kept dry are displayed in a covered warehouse area while other such items are kept in an outside timber yard. Notably, there is only a minimal storage area at any of the BCL sites. The stock is arranged and displayed in retail racks with retail prices clearly marked. Importantly, there is no restriction on entry and members of the public can access all areas (showroom, warehouse and yard) to choose the products they require.

[53] The Corporation further contends that the BCL stores are in commercial/industrial locations and are not designed to attract members of the general public. I do not agree. The sites detailed in the evidence are in locations chosen to attract a broad customer base.

[54] The Corporation puts weight on the fact that the stores are not open on Saturday afternoons and Sundays. Notably, opening hours is not a factor identified in the preambles. Evidence was given at review that BCL's customer base

predominantly does not work on weekends. On this basis, the customers on a Saturday morning are likely to be members of the public. BCL's product ranges do not include household/gardening supplies making it less attractive to be open for the balance of the weekend.

[55] The utilisation of mass media advertising to attract customers is a factor supporting a classification under the Retail Trade Division. It is evident that BCL undertakes extensive marketing and advertising at both national and local levels. In addition, BCL's web page contains links to separate pages for both trade and DIY.

[56] Wholesaling is characterised by high value and/or bulk volume transactions. In the three-month period identified, BCL's average sale was only \$307. Furthermore, rather than making bulk volume transactions, BCL breaks down packs of timber for onsale to its customers in smaller lots.

Conclusion

[57] Having considered the application of these additional factors in the present case, I am satisfied that BCL's four stores come within Division G (Retail Trade) of ANZSIC. It follows that the classification which I find most accurately describes BCL's operation at each of its stores is CU 52330 – *hardware and building supplies retailing*.

ISSUE 2: TWO OR MORE ACTIVITIES FOR PURPOSE OF S 170(2)?

[58] The Corporation says that as well as being engaged in timber wholesaling, BCL is also engaged in the wholesale selling of hardware and other building products and the retail selling of hardware and building supplies to the general public. The Corporation submits that whether the retail selling of hardware and building supplies to the general public is found to be ancillary or subservient to BCL's main business activity or a separately identifiable business activity, BCL is engaged in at least two or more of the following activities:

- CU 52330 *hardware and building supplies retailing*.
- CU 45390 *hardware goods wholesaling*.

- CU 45310 *timber wholesaling*.

Accordingly, applying s 170(2), the Corporation contends it is required to assign to BCL the classification CU 43510- *Timber Wholesaling*, being the classification unit that attracts the highest levy under the Regulations.

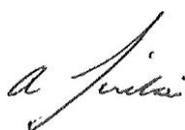
[59] I agree with BCL's submission that there is no factual foundation to support a finding of separate activities. Each store operates as an integrated business. All product lines are available to all customers; all parts of the premises at each store are open to all customers, and the points of sale service all customers.

[60] For the reasons discussed above, I am satisfied on the evidence before the Court, that the correct classification for BCL in respect of its four stores at Takaha, Motueka, Nelson and Havelock is CU 52330 *Hardware and Building Supplies Retail*.

DECISION

[61] The Reviewer's decision is upheld and the appeal by the Corporation is dismissed accordingly.

[62] Costs are awarded to BCL on a category 2B basis. I would expect the parties to be able to agree costs. However, if no agreement can be reached, BCL's submissions are to be filed and served within 21 days of the date of this judgment. The Corporation's submissions in opposition are to be filed and served within 14 days from the date of service of BCL'S submissions and any submissions in reply are to be filed and served within a further 7 days. In each case, the submissions are to be no more than 5 pages in length.



AA Sinclair
District Court Judge

Solicitors: Young Hunter, Christchurch for the Appellant.
Solicitors: Isherwood Le Gros Law Limited, Nelson for the Respondent.