IN THE SUPREME COURT OF NEW ZEALAND SC 139/2021

I TE KŌTI MANA NUI

	BETWEEN	WOOLWORTHS NEW ZEALAND LIMITED
		Apellant
	AND	FOODSTUFFS NORTH ISLAND LIMITED
		AUCKLAND COUNCIL
		MEDICAL OFFICER OF HEALTH
		ALCOHOL REGULATORY AND LICENSING AUTHORITY
		Respondents

APPEAL SUBMISSIONS OF WOOLWORTHS NEW ZEALAND LIMITED

6 JULY 2022

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May it please the Court

Introduction[1]

1. The issue in this appeal is whether the Court of Appeal (**CoA**) erred in its interpretation of the test to be applied by the Alcohol Regulatory and Licensing Authority (**ARLA**) under ss 81 and 83 of the Sale and Supply of Alcohol Act 2012 (the **Act**) on an appeal from a provisional local alcohol policy (**PLAP**).[2]

2. The CoA held that an appeal from an element of a PLAP will only succeed if there is no "real and appreciable possibility" that the element in issue will minimise alcohol-related harm.[3] The CoA further held that a PLAP need not be evidence-based[4] and there is no need to consider whether any restriction imposed by an element is proportionate to its likely benefits.[5]

3. The CoA's decision is inconsistent with the purpose of the Act, which is to create a system of control over the sale and supply of alcohol that is reasonable and helps to achieve the object of the Act.[6] Further, the CoA's decision effectively renders the appeal right under s 81(1) nugatory, as it makes the right of appeal from a PLAP more restricted than the right of judicial review.

4. The CoA's decision is therefore in error. As a consequence, its orders reinstating ARLA's decision on two elements of the PLAP, namely, the 9pm closing hour for all off-licences and the temporary freeze and rebuttable presumption against issuing new off-licences in certain areas, should be reversed. ARLA would then be required to reconsider those elements on the basis of the appeal test as clarified by this Court, alongside those elements of the PLAP that remained set aside irrespective of the CoA's decision: namely, local impacts reports and the elements set aside by the High Court on Redwood's review, which was not appealed.

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1 Pursuant to clause 7 of the Supreme Court Submissions Practice Note, Counsel certifies that these submissions are suitable for publication in that they do not contain any information that is supressed.

2 Set out at [3] of the application for leave to appeal **[[05.0003]]**.

3 *Auckland Council v Woolworths New Zealand Ltd* [2021] NZCA 484 at [53] **[[101.0043]]**, [62] **[[101.0047]]** and [109] **[[101.0066]]** [**CoA Decision**].

4 CoA Decision at [32] **[[101.0036]]**.

5 CoA Decision at [39]-[41] **[[101.0039]]**.

6 Act, s 3.

5. Woolworths accepts that the error does not affect the CoA's decision that the discretionary conditions element of the PLAP is not ultra vires.

Statutory Background

Origins of the Act

6. Before the Act came into force, the sale and supply of alcohol in New Zealand was regulated by the Sale of Liquor Act 1989 (**1989 Act**), which had significantly liberalised the law relating to the sale of alcohol. The genesis of the current Act was the 2010 Law Commission report *Alcohol in Our Lives: Curbing the Harm*,[7] (**Report**), which recommended a new statutory regime with a greater emphasis on harm reduction. The Report led to the introduction of the Alcohol Reform Bill 2010 (**Bill**), which was refined over the next two years before the Act received Royal Assent on 18 December 2012.[8]

7. The Act has an increased focus on curbing the harm caused by excessive or inappropriate alcohol consumption and includes a number of new elements, such as making formal provision for local alcohol policies. However, it also retains elements of the previous regime under the 1989 Act, including the object of establishing "a reasonable system of control" over the sale and supply of alcohol,[9] reflected in s 3 of the Act.[10] As the Law Commission observed in the Report:[11]

> The use of the term "reasonable system" to describe the regime being established by the legislation is an important phrase from the object of the 1989 Act, which should be continued in the new Act… We recognise it is essential that, in addition to providing a focus on the key alcohol-related

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7 Law Commission *"Alcohol in Our Lives: Curbing the Harm: A report on the review of the regulatory framework for the sale and supply of liquor"* Report 114, April 2010 (**Report**).

8 The provisions of the Act enabling territorial authorities to have a LAP and to prepare and consult on a draft LAP (ss 75-79) came into force on 19 December 2012: s 2(4). The remainder of the provisions enabling the further development of a draft LAP into a PLAP and the adoption of a final LAP (ss 80-97) came into force on 19 December 2013: s 2(2).

9 1989 Act, s 4.

10 The object provision drafted by the Commission contained a reference to a "reasonable system of control": Report at [5.44]. Parliament chose not to enact the object provision as drafted by the Commission. Instead, the reference to a "system of control" that is "reasonable" is found in s 3, the purpose provision. It is also worth noting that s 4 does not include the list of the "broad spectrum of alcohol-related harms" proposed by the Commission (referred to in the passage quoted in the CoA Decision at [11] **[[101.0028]]** without acknowledgment that this list did not survive the parliamentary process).

11 Report at [5.41].

harms that the Act aims to prevent, the object of the Act should include the establishment of a reasonable system for the sale, supply and consumption of alcohol.

Object and purpose of the Act

8. The purpose of the Act is set out in s 3. Subsection (1) provides that the purpose of the 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.

9. Subsection (2) provides that the characteristics of the new system of control are that "it is reasonable" and "its administration helps to achieve the object of this Act".

10. The purpose of the Act is thus directly linked to its object, which is set out in s 4 and has two prongs:

> (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.

11. Subsection (2) defines "the harm caused by the excessive or inappropriate consumption of alcohol" referred to in subs (1)(b) as including:

> (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 or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

12. The two separate elements set out in s 4(1) recognise and distinguish between the legitimate sale, supply and consumption of alcohol and the minimisation of harm caused by its excessive or inappropriate consumption. Section 4 recognises that:

(a) the sale, supply and consumption of alcohol is to be undertaken safely and responsibly, but is not intended to be minimised per se;

(b) only "harm" (as elaborated in subs (2)) caused by "excessive or inappropriate" consumption of alcohol is of concern; and

(c) such harm can only be "minimised" (not eliminated).

13. The purpose and object provisions of the Act may be compared with the object of the 1989 Act, which was "to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, so far as that can be achieved by legislative means".[12]

14. While this object focused on reduction of "liquor abuse" rather than the concept of "minimisation of harm" that applies under the Act, the underlying concept of reasonableness remains unchanged under the Act, as already noted above. Accordingly, the Court of Appeal's observations in *Meads Brothers Ltd v Rotorua District Licensing Agency* remain applicable:[13]

> The stated object envisages that the licensing system should be reasonable. This indicates the intention that the controls that are imposed under it should be neither excessive nor oppressive. The object also reflects a legislative perception that controls provided by the licensing system have the capacity to contribute to the reduction of abuse of alcohol in the community but that there are limits to that limited capacity.

and

> It is to be remembered that the statutory object is to establish a reasonable system of control. This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing may become unreasonable in its pursuit of the aim of reducing liquor abuse.

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12 Section 4(1).

13 *Meads Brothers Ltd v Rotorua District Licensing Agency* [2001] NZCA 386, [2002] NZAR 308 at [23] and [53].

Summary of the provisions of the Act in relation to LAPs

15. The Act sets out default national standards for controls on the sale and supply of alcohol including, for example, default maximum national trading hours.[14] It empowers each territorial authority (**TA**) to depart from one or more of the default national standards by adopting a local alcohol policy relating to the sale, supply or consumption of alcohol within its district. If a TA chooses to adopt such a policy it must first prepare a draft local alcohol policy (**draft LAP**), having regard to the criteria in s 78(2) of the Act. These criteria include such matters as "the objectives and policies of its district plan" and "the nature and severity of the alcohol-related problems arising in the district". The TA must consult the Police, District Licensing inspectors and the Medical Officer of Health, who in turn must make reasonable efforts to provide information requested by the TA.[15] Once it has prepared a draft LAP, the TA must engage with the community through the special consultative procedure specified in the Local Government Act 2002 (**LGA**), while having regard to the criteria in s 78(2). Once it has completed the consultative procedure, the TA may notify its policy as a provisional local alcohol policy (**PLAP**).

16. The production of a PLAP triggers a right for any person who made a submission during the special consultative procedure, as well as the Medical Officer of Health and the Police, to appeal against any element of the PLAP to ARLA.[16] The only grounds of appeal against an element of a PLAP is that it is unreasonable in light of the object of the Act.[17] ARLA must dismiss an appeal against an element of a PLAP if it "is not satisfied that the element is unreasonable in the light of the object of this Act".[18]

17. If ARLA allows an appeal against an element (being satisfied that the element is unreasonable in the light of the object of the Act) it must ask the TA to reconsider that element.[19] The TA then has the following options:[20]

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14 Section 43.
15 Section 78(4).
16 Section 81.
17 Section 81(4).
18 Section 83(1)(a)
19 Section 83(2)(b).
20 Section 84(1).

(a) resubmit the policy to ARLA with the element deleted;

(b) resubmit the policy to ARLA with the element replaced with a new or amended element;

(c) appeal to the High Court against the ARLA's decision; or

(d) abandon the PLAP.

18. An appellant has no right of appeal against the decision of ARLA.[21]

Auckland PLAP

19. In developing the draft PLAP, the Council placed a significant amount of emphasis on the "availability theory", which is a theory that reducing the availability of alcohol reduces total consumption of alcohol, and in turn, reduces alcohol-related harm.[22] Availability can be considered in a number of ways, for example temporally (trading hours) and spatially (density of premises). This approach resulted in a draft PLAP that proposed significant restrictions on both on[23] and off-licences.[24]

20. Auckland Council publicly notified the draft LAP on 16 June 2014 and called for written submissions.[25] The written submission period ran until 16 July 2014 and 2688 written submissions were received.[26]

21. In May 2014, the Council's Hearings Committee established the Hearings Panel to hear oral submissions on the draft LAP, deliberate and make recommendations to the Council. Hearings were held over eight days between August and November 2014. The Panel heard from 108 submitters. Submitters had five minutes to present in support of their submission (followed by any questions from the Panel).[27] The Act does not require a TA to create a record

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21 Section 83(4).
22 PLAP Explanatory Document at [76] **[[103.0531]]**.
23 Evidence of Hansen for Auckland Council at [3.10]. 9am to 3am in the CBD, Ponsonby and Newton and 9am to 1am outside of those areas **[[202.0356]]**.
24 9am to 9pm. Turner, table 11 at [24.7] **[[203.0482]]**.
25 Appendix 26 to the Evidence of Belinda Hansen -August 2014, Hearings Panel, Agenda report **[[305.0876]]**.
26 Appendix 26 to the Evidence of Belinda Hansen -August 2014, Hearings Panel, Agenda report **[[305.0877]]**.
27 Evidence of Hansen for Auckland Council at [3.15.4]. **[[202.0362]]**.

of the evidence and arguments made in the consultation process, and the Council did not do so in this case.[28]

22. Following the submissions process, the Council significantly reduced the impact of the PLAP on on-licences, retaining the default hours in the City Centre and only restricting on-licences hours outside the City Centre by one hour (affecting less than 100 premises in total across the region), but left the restrictions on off-licences largely unchanged from the draft PLAP.[29]

23. As a consequence of these changes, the approach of the PLAP represented a notable deviation from the strongest evidence[30] regarding the availability theory and resulted in appeals from the Police and the Medical Officer of Health.

24. The Council subsequently produced the Auckland PLAP pursuant to s 79 of the Act in May 2015.

ARLA appeal

25. Woolworths was one of eight parties that appealed to ARLA against elements of the Auckland PLAP.[31] PLAPs are particularly significant for supermarkets such as Woolworths because the Act does not envisage applications for off-licences being made in advance of resource consent and/or building consent.[32] Supermarkets cannot seek a licence until after they have already spent millions of dollars buying and developing property,[33] so there is a disconnect between the timing of decisions about whether to buy land and how to design a supermarket and licensing decisions. In addition, restrictions on when alcohol can be sold often affect supermarket customers because of the early opening and late closing times of supermarkets. It should also be noted that supermarket off-licences are not the same as general off-licences and are subject to specific

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28 The Council did include brief summaries of oral submissions in a document entitled "Deliberations Paper: Hearings Panel Recommendations for the Auckland Council Provisional Local Alcohol Policy" (March 2015) **[[305.0919]]** but this is far from a full record of submissions.

29 Evidence of Turner for Auckland Council, table 19 at [33.7]–[33.8] **[[203.0527]]**.

30 Evidence of Dr Kelly for Woolworths, section 2 **[[204.0697]]**.

31 At the time Woolworths was named Progressive Enterprises Limited. The other appellants were Redwood Corp Ltd, New Zealand Police, Foodstuffs, Super Liquor Holdings Ltd, the Medical Officer of Health, Salutation Hotels Ltd and Takapuna Residents Group.

32 Act, ss 100 and 208.

33 Woolworths' submission on the draft LAP **[[103.0343]]**.

restrictions under the Act. In particular, unlike other off-licences, supermarkets are restricted to selling beer, wine and mead and are not permitted to sell spirits or "RTDs".[34] Alcohol must also be kept in a single area of the store.[35]

26. In its appeal to ARLA Woolworths challenged a number of elements of the PLAP, including:

(a) The proposed region-wide maximum off-licence trading hours of 9am to 9pm (rather than the default national maximum of 7am to 11pm[36]) (**element 1**);[37]

(b) The proposed temporary freeze on the granting of new off-licences in certain identified areas (namely, the City Centre and the Priority Overlay area, which comprises 23 local centres) for a period of two years after the PLAP comes into force, followed by an ongoing rebuttable presumption against any new off-licences in the City Centre and Priority Overlay areas as well as in certain defined Neighbourhood Centres (**element 2**);[38]

(c) The requirement for the provision of a Local Impacts Report (**LIR**) and for the LIR to be taken account by District Licensing Committees (**DLCs**) and ARLA when making certain decisions under the Act (**element 3**);[39] and

(d) The requirement to impose of certain licence conditions when issuing or renewing off-licences (relating to prohibited persons, maintaining a register of alcohol-related incidents, CCTV, lighting, single sales and afternoon closing near educational facilities) "unless there is good reason not to do so" (**element 4**).[40]

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34 Act, s 58.
35 Act, s112.
36 Act, s 43.
37 PLAP cl 4.3.1 **[[103.0483]]**.
38 PLAP cls 3.2.1 **[[103.0480]]**, 4.2.1(a), 4.1.5, 4.1.6(a) and 4.1.7.
39 PLAP cls 3.1.1 **[[103.0479]]**, 4.1.1, 4.2.1-4.2.3 and 5.1.1.
40 PLAP cls 4.2 **[[103.0483]]** and 4.5.

27. Only elements 1 and 2 are affected by this appeal (as discussed further at [81] to [84] below). Woolworths' primary grounds of appeal before ARLA in relation to elements 1 and 2 were that:

(a) The effect of elements 1 and 2 was to impose more onerous restrictions on off-licences than on on-licences, despite evidence showing that the association between hours and alcohol related harm is consistent between on-licences and off-licences (reflected in the Council's own PLAP Explanatory Document[41]). Under the PLAP, only 4% of on-licences would have to reduce their hours,[42] while over 80% of off-licences would have to reduce their hours.[43] The temporary freeze and the rebuttable presumption against issuing new licences would not apply at all to on-licences.

(b) The PLAP failed to exempt supermarkets/grocery stores from the temporary freeze and rebuttable presumption against issuing new licences, despite evidence showing that there was no relationship or a negative relationship between supermarkets/grocery stores and alcohol related harm in key areas such as the CBD (in other words, the presence of and concentration of supermarkets/grocery stores in an area was negatively correlated with the incidence of alcohol related harm).[44]

28. More generally, Woolworths took issue with the simplistic assumption that *any* restriction in the availability of alcohol will further the object of the Act. One of the most famous national interventions restricting alcohol availability (6pm closing) is recognised to have failed to decrease and/or to have increased alcohol related harm.[45]

29. In its decision, ARLA drew on its previous decisions[46] in stating that the phrase "unreasonable in light of the object of the Act" in s 81(4) invokes the

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41 PLAP Explanatory Document at [76] **[[103.0543]]**.
42 Evidence of Turner for Auckland Council at table 19 and [33.7] **[[203.0526]].**
43 Evidence of Turner for Auckland Council at [24.4] **[[203.0481]]**.
44 Evidence of Hampson for Woolworths, Annexure 2 **[[307.1234]]**; Huckle, Annexure A **[[306.1158]]**.
45 Report at [9.52].
46 *Hospitality New Zealand Inc v Tasman District Council* [2014] NZ ARLA 846, [2015] NZAR 156 at [43]; *B & M Entertainment Ltd v Wellington City Council* [2015] NZ ARLA 21-28 at [16].

"reasonable person test" albeit "qualified by the words 'in light of the object of the Act"'.[47] As such, it held that "the test is "what an informed, objective bystander (that is, the Authority) considers unreasonable having regard to the object of the Act". [48]

30. In reference to the object of the Act, ARLA stated that the Act "seeks to strike a balance that minimises excessive and inappropriate consumption without unduly impinging on safe and responsible consumption".[49] It also stated that proportionality principles "help to give effect to the test in s 81(4)" because "they go to determining 'reasonableness' as qualified by the Act".[50] This approach was consistent with ARLA's approach in previous PLAP appeals.[51]

31. ARLA upheld Woolworth's appeal in relation to trading hours element of the PLAP (element 1) in so far as it related to the 9am opening time for off-licences, finding there was either a lack of evidence to substantiate the benefit of a 9am opening time or that the evidence was circumstantial at best, and ordered the Council to reconsider that element. However, ARLA dismissed Woolworths' appeal in relation to the introduction of a 9pm closing time for all off-licences (i.e. the closing hour aspect of element 1), finding that, while the evidence of reduction in harm from reducing the trading hours of off-licences was sparse, the Council was "entitled to test the possibility" that the closing hour restriction would meet the object of the Act.[52]

32. ARLA dismissed Woolworths' appeal against the temporary freeze and rebuttable presumption element (element 2). Woolworths had argued that element 2 was unreasonable in light of the object of the Act because it applied only to off-licences when on-licences were equal, if not greater, contributors to alcohol-related harm and because supermarkets and grocery stores were not associated with an increase in alcohol-related harm, thereby making the element

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47 *Redwood Corp Ltd v Auckland City Council* [2017] NZARLA PH 247–254 (**ARLA Decision**) at [30] **[[103.0445]]**.
48 At [30]–[42] **[[103.0445]]**.
49 At [37] **[[103.0446]]**.
50 At [35] **[[103.0445]]**.
51 Object of the Act: *Foodstuffs South Island v Dunedin City Council* (2016] NZARLA 212-26 at [53]; proportionality principles: *B & M Entertainment Ltd v Wellington City Council* [2015] NZARLA 21-28 at [16] and [19].
52 At [146] **[[103.0463]]**.

a disproportionate response to the harm the Council was seeking to address, and that the rebuttable presumption was ultra vires. ARLA was not persuaded that element 2 would have a disproportionate effect and found that the rebuttable presumption was not ultra vires.

33. ARLA dismissed Woolworths' appeal against the LIR element (element 3) and the discretionary conditions element (element 4), finding that the elements were not ultra vires and therefore were not unreasonable in the light of the object of the Act.

Woolworths' Judicial Review

34. Woolworths sought judicial review of ARLA's decision. Woolworths did *not* take issue with ARLA's description of the test under s 81(4) as "what an informed, objective bystander (that is, ARLA) considers unreasonable having regard to the object of the Act".[53] However, Woolworths challenged ARLA's reformulation of the test when it came to apply it to specific elements of the PLAP. For example, with regard to the closing hours element, ARLA stated that "if the Council considers the closing hour restriction for off-licences has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality."[54] Woolworths alleged that this aspect of ARLA's decision, among others, was in error. Woolworths' grounds for review are set out in the High Court decision at [23] to [28].[55]

35. Woolworths' judicial review was heard together with a review by Foodstuffs North Island Ltd (**Foodstuffs**). A third review of ARLA's decision by Redwood Corporation Ltd (**Redwood**) was part-heard with Woolworths' and Foodstuff's reviews. Duffy J delivered a separate judgment for the Redwood review because it raised issues specific to holders of on-licences.[56]

36. In the High Court, although it was not a pleaded ground of review, nor an argument advanced by any of the parties, Duffy J held that ARLA had erred in

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53 At [30] **[[103.0445]]**.
54 At [146] **[[103.0463]]**.
55 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293 [**HC Decision**]. **[[102.0264]]**
56 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971 at [4] [**Redwood Decision**].

finding that s 81(4) invokes the "reasonable person test". Her Honour held that the correct test was instead one of *Wednesbury* unreasonableness: "whether the inclusion of the impugned element in a PLAP can be said to be something that no reasonable territorial authority acting in light of the object of the [Act] would have done".[57] Despite setting the appeal test at this high level, Duffy J upheld Woolworths' application and set aside ARLA's decision to dismiss Woolworths' appeal against all four of the elements of the PLAP that were subject to its appeal and remitted those parts of its decision back to ARLA for reconsideration. In a separate decision, Duffy J upheld Redwood's judicial review and set aside ARLA's decision dismissing Redwood's appeal from certain other elements of the PLAP.[58]

37. The Council appealed against the High Court's decision to uphold Woolworths' and Foodstuffs' review in respect of ARLA's decision on three elements of the PLAP (namely, those described above at [26] as elements 1, 2 and 4). The Council did not appeal the High Court's decision that the element of the PLAP requiring LIRs (element 3) was ultra vires, nor did it appeal the High Court's decision on the Redwood application. Woolworths cross-appealed against the High Court's interpretation of the appeal standard in s 81(4). The CoA allowed the Council's appeal and dismissed Woolworths' cross-appeal, with the effect that ARLA's decision on elements 1, 2 and 4 was reinstated. ARLA's decision on the element 3 (LIRs) remains set aside pursuant to the High Court's decision, along with the elements affected by the Redwood decision.

Court of Appeal decision

38. In the CoA, it was common ground between Auckland Council, Woolworths and Foodstuffs that Duffy J had erred in holding that the appeal standard was one of *Wednesbury* unreasonableness and that ARLA's description of the appeal test as "what an informed, objective bystander (that is, [ARLA]) considers unreasonable having regard to the object of the Act" was largely correct.[59] However, the CoA rejected the parties' submissions that ARLA had correctly

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57 HC Decision, above n 55, at [56]-[61] **[[102.0281]]**.
58 Redwood Decision, above n 56.
59 Auckland Council's submissions as Cross Respondent dated 5 February 2021 at [9]–[59] and in particular [11], [38] and [44].

formulated the legal test to be applied on an appeal under s 81(4) (despite, as Woolworths says, falling into error in subsequent parts of its decision).

39. Dealing first with the Act's object, the CoA rejected the view of ARLA and the High Court that the two prongs of s 4(1) require balancing, saying: "The Act does not envisage that there will be conflict between the two subsections, or a need to balance one against the other. They are directed toward the same end. The Act permits the sale, supply and consumption of alcohol, provided all of those things are done safely and responsibly and provided the harm caused by excessive or inappropriate consumption is minimised."[60]

40. The CoA acknowledged that s 3 of the Act (the purpose provision) expressly states that the purpose of the Act is to put in place a new system of control over the sale and supply of alcohol with the characteristics that "it is reasonable" and "its administration helps to achieve the object of this Act".[61] However, it went on to state that "the concept of a 'reasonable' system of control under the 2012 Act is not the same as it was under the 1989 Act"[62] for the following reasons:

    (a) "Section 3 of the 2012 Act refers to a system of control that is reasonable, but it is to be a "new system of control"; it is not carried over from the system established under the 1989 Act";[63]

    (b) "the new system of control is not only to be reasonable but also to help achieve the object of the Act, which differs very significantly from that of the 1989 Act. In contrast to the 1989 Act, the reasonable system of control is not the Act's end in itself";[64] and

    (c) "the content of a reasonable system of control should be gleaned from the legislation itself and the legislative history, including the Law

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60 CoA Decision at [16] **[[101.0030]]**.
61 At [18] **[[101.0031]]**.
62 At [41] **[[101.0040]]**.
63 At [19] **[[101.0031]]**.
64 At [20] **[[101.0032]]**.

Commission's report which, as we have explained, the legislation sought to implement in significant measure".[65]

41. Having regard to its interpretation of ss 3 and 4, the CoA held that if there is a "real and appreciable possibility" that an element of a PLAP will minimise alcohol-related harm, ARLA must dismiss the appeal.[66] This "real possibility" need not be evidence-based because PLAPs are "the product of a process designed to discover and implement a community preference".[67]

42. There was no question, the CoA held, of "balanc[ing] a 'freedom' to sell alcohol against a community freedom to take reasonable steps to protect people from harm" because "there is no antecedent right or freedom to sell or supply alcohol; the right to do so is conferred under the Act and on its terms".[68] It followed, then, that ARLA had erred to the extent it held that "the proportionality principles used in bylaw cases" apply under the Act:[69] given there is no antecedent right to sell alcohol, the questions of "whether or not public or private rights are unnecessarily or unjustly invaded" and whether or not the PLAP "unnecessarily abridges or interferes with a public right without producing for local inhabitants a benefit that is 'real and not merely fanciful'" are both irrelevant.[70]

43. Hence, despite finding that Duffy J had erred in holding that the standard of appeal under s 81(4) is *Wednesbury* unreasonableness, the CoA itself adopted a standard that is potentially even more exacting than *Wednesbury*. On the CoA's interpretation of s 81(4), ARLA must dismiss an appeal so long as there is a "real and appreciable possibility" that an element of a PLAP will minimise alcohol-related harm. Other considerations – such as the freedom of responsible adults to buy and consume alcohol safely and the economic impact on existing licence holders – are simply irrelevant to determining whether an element of a PLAP is "unreasonable in the light of the object of this Act".

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65 At [21] **[[101.0032]]**.
66 At [53] **[[101.0043]]**.
67 At [32] **[[101.0036]]**.
68 At [22] **[[101.0032]]**.
69 At [39] **[[101.0039]]**.
70 At [41] **[[101.0040]]**.

Likewise, there is no need for any evidential basis for the possibility of minimising alcohol-related harm.

44. Put another way, on the CoA's approach, an appeal can only succeed if there is *no real possibility* that the element will minimise alcohol-related harm. This is the case even if the element is extremely restrictive, the possibility it will minimise harm is low and is unsupported by evidence, the degree of minimisation of harm hoped for is small and there is no plan for assessing whether the policy was successful.

45. Woolworths says this is the clear effect of the CoA's judgment, having regard to [53] and [109] in particular, but also when the judgment is read as a whole.

46. The "real and appreciable possibility" standard is a theme found throughout the CoA's decision:

(a) In the CoA's commentary on what burden of proof is required, it says a prospective benefit may be taken into account where there is a real and appreciable possibility that the element will deliver it.[71]

(b) In its discussion regarding whether the precautionary principle forms part of the test on appeal the CoA held that it is not necessary for ARLA to apply the equivalent of the precautionary principle, because the appellate standard does not require that ARLA be sure of an outcome, just that "there is a real and appreciable possibility" that the element will achieve that outcome.[72]

(c) In its analysis of the reasons given by ARLA, the CoA held it was not necessary for ARLA to reach a final view about the relationship between trading hours and harm; the real and appreciable possibility of success was sufficient.[73]

47. The CoA's conclusions in these respects also need to be read alongside its conclusions about the test on appeal:

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71 At [53] **[[101.0043]]**.
72 At [62] **[[101.0047]]**.
73 At [109] **[[101.0066]]**.

(a) The appellant bears a persuasive burden of showing that an element included in a PLAP by a TA is unreasonable in light of the Act's object.[74]

(b) LAPs are the product of a process designed to discover and implement a community preference; they need not be evidence-based.[75] It is not necessary to prove that tangible harm reduction is more likely than not to result from a given policy element.[76]

(c) A substantial degree of deference to the preferences of the TA applies; only if an element is unreasonable in light of the Act's object may ARLA intervene, and community preferences have a substantial role to play in deciding what is reasonable.[77] Indeed, ARLA must defer to them.[78]

(d) Under the Act there is no antecedent right to sell alcohol that must be balanced against a given control on supply. It is inherent in a licensing regime, and to be expected given the object of the Act, that controls may have an adverse economic impact on licensees.[79] Section 4 does not speak of balancing competing rights or freedoms, though it undoubtedly recognises that alcohol may be consumed lawfully and safely, and that alcohol-related harm cannot be eliminated.[80]

(e) What is not appropriately transferred from the bylaws context to alcohol regulation under the 2012 Act are the propositions that (a) the reasonableness of a bylaw depends in part on "whether or not public or private rights are unnecessarily or unjustly invaded" and (b) any bylaw must be unreasonable if it unnecessarily abridges or interferes with a public right without producing for local inhabitants a benefit that is "real and not merely fanciful".[81]

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74 At [52] **[[101.0043]]**.
75 At [32] **[[101.0036]]**.
76 At [41] **[[101.0040]]**.
77 At [36] **[[101.0038]]**.
78 At [40] **[[101.0039]]**.
79 At [41] **[[101.0040]]**.
80 At [22] **[[101.0032]]**.
81 At [41] **[[101.0040]]**.

48. The cumulative effect of this approach is to constrain ARLA's consideration to simply whether there is a real and appreciable possibility that the element will minimise alcohol-related harm. According to the CoA's decision there are no relevant rights or freedoms which might be impinged by a LAP element and in any event the effect on any rights or freedoms would be irrelevant. As the persuasive burden lies with the appellant, the test becomes one of persuading ARLA that there is no real and appreciable possibility of harm reduction and even then ARLA's assessment must be manifestly coloured by deference to the views of the TA. Later at paragraphs [73] to [80], we show how the CoA's decision will constrain ARLA's decision-making.

CoA's Decision is inconsistent with statutory purpose

49. It is well-established that legislation must be interpreted in light of its purpose.[82] The purpose set out in s 3(2)(a) of establishing a system that is reasonable provides an overarching principle which must be followed in the interpretation of the Act, including in relation to local alcohol policies and the standard of appeal under s 81(4).

50. In interpreting the s 81(4) appeal standard, the CoA failed to appreciate the significance of the Act's purpose provision, which provides that the characteristics of the Act's new system of control are that it is *both* "reasonable" (s 3(2)(a)) *and* that "its administration *helps* to achieve the object of this Act" (s 3(2)(b)) (emphasis added). That is, it is not enough that the system of control contributes to reducing alcohol-related harm – it must also be "reasonable". To interpret "reasonable" as just another way of saying "consistent with the object of the Act" would render s 3(2)(a) redundant. It must be assumed that Parliament did not intend to enact a redundant provision.[83] Section 3(2)(a) must, therefore, involve a wider conception of what is reasonable.

51. There is no significant textual difference between the 1989 Act's "reasonable system of control" and the Act's "new system of control… that is reasonable".

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82 Legislation Act 2019, s 10; *Commerce Commission v Fonterra* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

83 It would contravene the maxim that one should "assume that a drafter has used words carefully, and has meant every word to have significance": Burrows and Carter *Statute Law in New Zealand* (LexisNexis, 5th ed, 2015) at ch 10(d)(iv).

As explained above at [14], the object provision of the 1989 Act was interpreted by the CoA in *Meads* as meaning that "at a certain point, at the extreme end of the scale, the administration of the licensing may become unreasonable in its pursuit of the aim of reducing liquor abuse". In other words, a "reasonable" system of control is one that does not unduly interfere with the safe and responsible consumption, sale and supply of alcohol. Therefore, contrary to the CoA's suggestion,[84] the principles set out in *Meads* remain applicable under the Act.

52. The CoA's attempt to minimise the importance of s 3(2)(a) by reference to the Law Commission's decision not to retain the object of the 1989 Act appears to overlook the Law Commission's comments cited at [7] above on retaining the reference to a reasonable system.[85] They also ignore the widespread usage of the term 'reasonable' within the Act.[86]

53. Indeed, the parliamentary history of the Act supports the significance Woolworths places on s 3's reference to a "reasonable" system of control. When the Bill was introduced, the Minister of Justice stated that the Bill "targets harm without penalising responsible drinkers".[87] At the third reading of the Bill, the Minister stated that it was designed to "strike a sensible balance and deal with the considerable harm that alcohol causes without unfairly affecting responsible drinkers".[88]

54. Interpreting "unreasonable in the light of the object of this Act" to require evaluation only of whether there is a "real and appreciable possibility" that an element of a PLAP will minimise alcohol-related harm is inconsistent with the purpose of the Act. Rather, s 3(2)(a) supports giving "unreasonable" in s 81(4) its ordinary meaning as requiring a broad assessment of the reasonableness of a provision. On this approach, if an element of a PLAP is extremely restrictive

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84 CoA Decision at [41] **[[101.0040]]**.

85 It is abundantly clear from the Report that the Commission's concern with the object of the 1989 Act had nothing to do with the fact that it referred to the establishment of a "reasonable system" of control – indeed, as noted in n 10 above, the new object provision drafted by the Commission retained this very term. Rather, the Commission's criticism of the 1989 object was that it did not refer to the "broad spectrum of alcohol-related harms": Report at [5.42].

86 See for example ss, 3, 51, 53, 59, 69, 78, 115, 117, 136, 147, 183, 195, 199, 214, 239, 241 and 245.

87 (11 November 2020) 668 NZPD 15251 (First Reading, Hon Simon Power).

88 (11 December 2012) 686 NZPD 7348 (Third Reading, Hon Judith Collins).

with regard to the safe and responsible consumption, sale and supply of alcohol; the possibility it will minimise alcohol-related harm is low; and the degree of minimisation hoped for is small, that element will be "unreasonable in the light of the object of this Act".

Object of the Act

55. In the High Court and CoA, Woolworths' arguments on the meaning of the appeal test were focused on the meaning of "unreasonable". However, as explained above at [39], the CoA rejected the conclusion of both ARLA and the High Court that the two prongs of the Act's object, in s 4(1), require balancing. Instead, the CoA interpreted the two prongs as, together, meaning that "[t]he Act permits the sale, supply and consumption of alcohol, provided all of those things are done safely and responsibly and provided the harm caused by excessive or inappropriate consumption is minimised." The CoA found that, in this context, "minimised" means "reduced to the smallest amount, extent or degree".[89]

56. Woolworths accepts that the two prongs of s 4(1) are not in conflict and therefore that ARLA is not required to "balance" the two prongs of s 4(1) in applying the appeal test. However, Woolworths does not accept that the CoA interpreted s 4(1) correctly. With respect, the CoA went too far when it said that the sale, supply and consumption of alcohol is only permissible if alcohol-related harm is "reduced to the smallest amount, extent or degree"..

57. Persons who are selling, supplying or consuming alcohol safely and responsibly are undertaking an activity that is aligned with s 4(1)(a) and do not generate harm caused by the excessive or inappropriate consumption of alcohol. They are undertaking an activity which is enabled by the Act. It is incorrect to ignore the interests of persons who are undertaking activities in accordance with the object of the Act and to focus only on persons who are acting contrary to it.

58. It is therefore not the case that the object of the Act is to permit the sale and supply of alcohol *only if* alcohol-related harm is "reduced to the smallest

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89 CoA Decision at [67], quoting with approval the decision of Clark J in *Medical Officer of Health (Wellington Region) v Lion Liquor* [2018] NZHC 1123; [2018] NZAR 882 at [45] **[[101.0050]]**.

amount, extent or degree". Rather the object of the Act is to permit the safe and responsible sale and supply of alcohol *and* to ensure that alcohol-related harm is kept to a minimum, as far as that is reasonably possible. The effect of the CoA's interpretation is to subordinate para (a) of s 4(1) to para (b).

59. As ARLA noted in relation to the Dunedin PLAP,[90] the Act seeks to strike a balance that minimises excessive and inappropriate consumption without unduly impinging on safe and responsible consumption. Where the law fails to achieve that balance, increased alcohol-related harm can result, as noted with 6pm closing (see above at [28]). It is also notable that LAPs are only one mechanism in the Act by which this purpose and the object are achieved. Other mechanisms in the Act, such as the specific provisions relating to the display and promotion of alcohol, for example, are intended to deal with aspects of New Zealand's drinking culture.

Nature of the appeal process

60. In adopting its interpretation of s 81(4), the CoA disregarded features of the appeal process which indicate that Parliament intended ARLA to undertake an independent inquiry into the reasonableness of an element of a PLAP rather than simply defer to the TA unless the element could not possibly reduce alcohol-related harm:

    (a) ARLA has the powers of a Commission of Inquiry and is a specialist appellate body with expert members.[91]

    (b) Parties to an appeal have the right to call evidence before ARLA.[92]

    (c) There is no hearing prior to the issue of a PLAP, only a consultation process, and there is no provision for transmission to ARLA of any record created in the consultation process.

61. Further, the Act does not exclude the right to seek judicial review of a TA's adoption of a PLAP.[93] An element of a PLAP that had no "real and appreciable

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90 *Foodstuffs South Island Limited v Dunedin City Council* [2017] NZARLA 21 at [53].
91 Act, Part 2, subpart 6 and s 201.
92 Act, s 205.
93 See, e.g., *Hospitality New Zealand, Canterbury Branch v Christchurch City Council* [2017] NZHC 1360.

possibility" of minimising alcohol-related harm would plainly be susceptible to review on the basis of inconsistency with the purpose of the Act. If s 81(4) is read as granting an appeal right more limited than the right of judicial review, it renders the right to an appeal nugatory.

62. The CoA dismissed Woolworths' submissions on these points by stating: "A distinction must be drawn between appellate process and the standard of appellate review, which is provided for in s 81; the element stands unless ARLA is satisfied that it is unreasonable in light of the object of the Act."[94] However, that is no answer to the point that the appellate process gives an insight into how Parliament intended the standard of review to be interpreted and applied – if it was as narrow as the CoA has determined, it is difficult to understand why such an extensive appeal process would be provided, or, indeed, why Parliament provided any right of appeal at all, given the alternative of review.

Right or freedom to sell or supply alcohol

63. In support of its conclusion that ARLA is not to take account of any negative impacts on alcohol suppliers in determining whether an element of a PLAP is unreasonable, the CoA stated that "there is no antecedent right or freedom to sell or supply alcohol; the right to do so is conferred under the Act and on its terms".[95]

64. To state that the freedom to sell or supply alcohol would not exist without the Act is inconsistent with constitutional principle. In New Zealand's legal system, 'everything which is not forbidden is allowed'.[96] Hence, in the absence of legislative regulation, there is indeed an "antecedent" freedom to sell or supply alcohol. On the CoA's own reasoning, then, in determining whether an element of a PLAP is "unreasonable in the light of the object of this Act" under s 81(4) ARLA should consider the impact of the element on the "antecedent" freedoms to sell, supply and consume alcohol.

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94 CoA Decision at [55] **[[101.0044]]**.
95 At [22] **[[101.0032]]**.
96 See, e.g., *Entick v Carrington* [1765] EWHC KB J98.

Comparison with the bylaw cases

65. The CoA concluded that the proportionality principles used in bylaw cases do not apply under the Act because the context is not the same.

66. In support of this analysis, the CoA referred to the 'antecedent' argument addressed above at [63]. But even if there were no 'antecedent' right to sell or purchase alcohol, the comparison would be inapt. While some bylaws relate to controlling activities which would otherwise be personal freedoms within public land, such as driving of cattle along or across the streets in the borough as was the case in *McCarthy v Madden*,[97] others do not. Section 146(1)(b) of the LGA enables territorial authorities to make bylaws to the purpose of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing the use of, the land, structures, or infrastructure associated with matters such as water races, wastewater drainage, cemeteries and reserves. Clause 7(1) of the Auckland Council Water Supply and Wastewater Network Bylaw[98] provides that "Except as authorised by Watercare, no person may damage, stop, obstruct or otherwise interfere with the water supply network or the wastewater network." There is no antecedent right for any person to damage or interfere with Auckland's wastewater network, yet the same proportionality principles used in all bylaw cases would apply to review of cl 7(1)

67. Respectfully, the reasons why the test on appeal has a degree of analogy with the bylaw cases arises from a multitude of factors not addressed by the Court of Appeal.

68. Bylaws that have significant impacts and LAPs have the same statutory starting point:

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97 *McCarthy v Madden* (1914) 33 NZLR 1251 (CA).

98 Available at <https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/bylaws/Documents/watersupplywastewaterbylaw2015.pdf>.

(a) Bylaws which concern matters of significant interest to or significant impact on the public, must be consulted on through the special consultative procedure specified in the LGA;[99]

(b) PLAPs can only be created after the TA has used the special consultative procedure.

69. Bylaws and LAPs are subject to largely the same decision-making framework:[100]

(a) The policy assessment process is set out in ss 76 - 81 of the LGA. There are a number of other aspects of the LGA which also influence decisions (such as the purpose and principles of local government).

(b) The LGA provides a decision-making framework that can be adjusted to reflect the significance of the decision being made. In determining the significance of a decision that it is proposing to make, a council must consider:[101]

(i) all relevant matters;

(ii) the principles set out in section 14 of the LGA;

(iii) the extent of the local authority's resources; and

(iv) the extent to which the nature of a decision (or the circumstances in which a decision is taken) allow the local authority opportunity to consider a range of options or the views of other persons.

(c) The approach for policy development under the LGA is essentially to:

(i) set an objective that is to be achieved;[102]

(ii) identify options to achieve those objectives;[103]

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99 LGA, s156.
100 Subject to s 86 of the LGA, which is not material.
101 LGA, s 79(2).
102 Section 77(1)(a) LGA.
103 Section 77(1)(a) LGA.

(iii) assess those options in terms of the advantages and disadvantages:[104]

(d) Overlaid on top of that decision-making methodology is:

(i) the purpose of local government;[105] and

(ii) the principles of local government.[106]

70. As a result, while the elements of a PLAP may reflect certain desires of the TA, Parliament intended that PLAPs be developed through a systematic evidence-based framework; if not – no decision made by a TA would have to be evidence-based because s76 of the LGA applies to *every* decision made by a local authority[107], though local authorities have flexibility about how to achieve compliance with that section – in proportion to the significance of the matter they are deciding.[108]

71. The assessment of 'proportionality' within the bylaw cases is linked to the "unreasonable" ground of the statutory test,[109] and the term "unreasonable" is directly part of the appeal test under s 81 (in addition to reasonableness sitting within the framework of the purpose and object of the Act). Thus proportionality is clearly within the purview of s 81 in the same way as it is for the bylaw cases where the test is:[110]

> If any bylaw contains any provisions which are invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

72. Thus, like bylaws, the reasonableness of an element of a provisional LAP can only be ascertained in relation to the surrounding facts, including the nature

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104 Section 77(1)(b) LGA.
105 Section 10 of the LGA.
106 Section 14 of the LGA
107 "Local Authority" means a regional council or territorial authority (s 5 of the LGA).
108 Section 79 of the Local Government Act 2002.
109 *JB International v Auckland City Council* [2006] NZRMA 401 (HC) at [74].
110 Section 17 of the Bylaws Act 1910.

and condition of the locality in which it is to take effect, the issue which it is designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded. Therefore an element of a LAP will be unreasonable in light of the object of the Act where another formulation of the element would more efficiently or effectively achieve the object of the Act.

Implications of the COA's decision for future appeals

73. The CoA held, in substance, that an appeal from an element of a PLAP will only succeed if there is no "real and appreciable possibility" that the element in issue will minimise alcohol-related harm, with no evidence being required to substantiate this possibility.

74. As explained above at [43], this standard is potentially even more exacting than *Wednesbury*. Therefore, the CoA's decision effectively renders the appeal right under s 81(1) nugatory, as it makes the right of appeal from a PLAP more restricted than the right of judicial review. There would be no reason for anyone to bring an appeal, given that it will almost always be simpler and cheaper to bring judicial review proceedings than to bring an appeal.

75. On the standard set out by the CoA, where the *only* relevant consideration is whether there is a real and appreciable possibility that an element will reduce alcohol-related harm, it is difficult to see how an appeal against an element of a PLAP could ever succeed.

76. On the test as formulated by the CoA, factors such as whether the element unduly inconveniences the public or arbitrarily distinguishes between licence holders are irrelevant.

77. Therefore, a PLAP could permissibly restrict the opening hours of off-licences in one part of Auckland to two hours per day, while at the same time allowing off-licences in an adjacent part of Auckland to operate for the default statutory hours. As long as there is a "real and appreciable possibility" that the two-hour operating period will reduce alcohol-related harm (with no evidence required to show this) the measure will survive challenge, despite its arbitrariness and the inconvenience it creates.

78. Likewise, the partial and unequal treatment of different kinds of off-licences, as occurred in relation to the Dunedin PLAP would not be a relevant consideration.[111]

79. On the test as formulated by the CoA a PLAP does not need to be evidence-based and deference needs to be paid to the Council. Therefore it would not matter that there was no evidence that a restriction on sales was not linked to a reduction in alcohol related harm; an element could be justified on the basis of a wider goal to minimise alcohol related harm by reinforcing "the concept that alcohol is not an ordinary grocery item".[112]

80. Woolworths' and Foodstuffs' successful challenge to the 9am morning restriction before ARLA provides a good illustration of how substantially the CoA's test differs from that applied by ARLA. ARLA upheld the challenge to the 9am morning restriction on the basis that it was not satisfied that there was a sufficient evidential basis to a support the restriction[113] and the effect of the restriction would be disproportionate given the number of households affected.[114] On the CoA's test, both of these factors would be irrelevant.

Implications for the Auckland PLAP if appeal successful

81. Woolworths' appeal is limited to the issue of whether the CoA erred in its interpretation of the appeal test. It does not appeal from other aspects of the CoA decision. This raises the question of the effect of the error on the CoA's decision and whether some parts of the decision can survive if the appeal is upheld, or whether it must be set aside in its entirety.

82. The effect of the error as to the appeal test is clearest in relation to the CoA's decision on element 1, trading hours: see CoA Decision at [109] **[[101.0066]]** which specifically states that it was sufficient that there was a real and appreciable possibility that an earlier closing time would reduce alcohol-related harm and endorses ARLA's conclusion that "if the Council considers the closing hour restriction for off-licences has the possibility of meeting the object

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111 *Foodstuffs South Island Limited v Dunedin City Council* [2017] NZARLA 21 (2 February 2017) at [82]–[90].
112 At [62]–[63].
113 ARLA Decision, above n 47, at [153] **[[103.0464]]**.
114 At [156] **[[103.0464]]**.

of the Act, then the Council is entitled to test whether that possibility is a reality".[115] This paragraph makes plain that the CoA's decision on this element was based on its view of the test on appeal. Further, if the CoA's interpretation of the test is in error, so too was ARLA's, at least as it described it in its decision on element 1.

83. The impact of the error is less obvious in relation to the CoA's decision on element 2, the temporary freeze and rebuttable presumption as the CoA's decision on this element was not expressly linked to the test on appeal.[116] However, it can be inferred that ARLA erred in its application of the appeal test in relation to this element as well. Whether an element of a PLAP is unreasonable in light of the object of the Act requires consideration of whether the element is a proportionate response to an identified problem. That in turn requires an evidence-based assessment of the causal link between the proposed element and some aspect of alcohol-related harm. However, in relation to element 2, ARLA appears to have relied on the precautionary principle to suggest that the mere possibility of harm reduction is sufficient, and that there is no need to assess whether the restriction imposed is proportionate to the anticipated reduction in harm.[117] This is inconsistent with the statutory test.[118]

84. Woolworths accepts that the error does not impact on the CoA's reasoning in relation to element 4: discretionary considerations. The ground of review in relation to this element was that the element was ultra vires.[119] The CoA's findings on this issue are distinct from its views on the test on appeal and are not challenged by Woolworths.

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115 At [146], quoted at [80] of the CoA Decision **[[101.0054]]**.

116 This is because Duffy J concluded that ARLA had failed to provide sufficient reasons for its decision on element 2 and therefore it was impossible to assess whether element 2 was unreasonable in light of the object of the Act. The CoA found that ARLA had provided sufficient reasons and reinstated ARLA's finding that element 2 is not unreasonable in light of the object of the Act.

117 At [112] **[[103.0457]]** ARLA referred to the Council's submission that "restricting the issue of new off-licences in the Priority Overlay areas is likely to minimise alcohol-related harm given the correlation between off-licence density and alcohol-related harm", and, at [113], "the Council submits that given this, there is sufficient evidential basis to invoke the precautionary principle in relation to new off-licences in the City Centre, Priority Overlay areas and Neighbourhood Centres."

118 This error is encompassed by ground 1 [6] **[[102.0243]]** and ground 4 [9(1)(c)] **[[102.0250]]** of Woolworths' ASOC.

119 Woolworths' ASOC at [8.3] **[[102.0249]]**.

85. Therefore, the result of the CoA's decision being set aside would be that elements 1 and 2 of the PLAP which were set aside by the High Court but reinstated by the CoA would remain set aside: namely, the 9pm closing hour for all off-licences and the temporary freeze and rebuttable presumption against issuing new off-licences in certain areas.

86. ARLA would then be required to reconsider those elements on the basis of the appeal test as clarified by this Court, alongside those elements of the PLAP set aside by the High Court on Redwood's review, which was not appealed.

87. Woolworths anticipates that the Council and MoH will submit that this appeal is an attempt by Woolworths and Foodstuffs to thwart community attempts to reduce alcohol-related harm and further delay implementation of the PLAP. Woolworths does not accept that criticism. It fully supports efforts to minimise alcohol-related harm but says those efforts must be reasonable, in accordance with the Act.

88. In respect of the original appeal to ARLA, 8 parties appealed the PLAP, including the Police, the Medical Officer of Health, Alcohol Healthwatch and the Takapuna Residents Group. It would be unfair to single out Woolworths and Foodstuffs.

89. It acknowledges that the judicial reviews by Woolworths, Foodstuffs and Redwood and subsequent appeals, first by the Council, and now by Woolworths and Foodstuffs, have led to further delay in implementation of the PLAP. However, Woolworths and Foodstuffs were successful at first instance, including on the issue of local impacts reports being ultra vires. The Council has not appealed that finding. In these circumstances, the supermarkets cannot be accused of running unmeritorious arguments.

90. As matters stand, the PLAP cannot be implemented without certain elements being reconsidered by the Council and/or ARLA, irrespective of this appeal. This appeal being granted will therefore not add materially to the delay in implementing the PLAP as further steps are required in any event.

91. As recorded in the CoA decision, Woolworths accepts that it would be open to ARLA to make a fresh decision on the papers, if it chooses to do so.[120]

92. The interpretation of the Act's purpose will affect how *all* of the Act's provisions are interpreted in future, because legislation must be interpreted in light of its purpose.[121] The interpretation of the Act's object is directly relevant to other decision-making under the Act, such as licensing decisions.[122]

93. Clear guidance from this Court on the purpose and object of the Act and the test which ARLA is required to apply to PLAP appeals will aid future decision-making in the interests of all parties.

Dated 6 July 2022

JS Cooper QC/ A W Braggins

Counsel for Woolworths New Zealand

120 CoA Decision at [86] **[[101.0057]]**.
121 Legislation Act 2019, s 10.
122 Section 105 of the Act requires a licensing authority or licensing committee to have regard to the object of the Act when deciding whether to issue a licence.

List of authorities

Legislation

1 Bylaws Act 1910

2 Legislation Act 2019

3 Local Government Act 2002

4 Sale and Supply of Alcohol Act 2012

5 Sale of Liquor Act 1989

Cases

6 *Auckland Council v Woolworths New Zealand Ltd* [2021] NZCA 484. [101.0024]

7 *B & M Entertainment Ltd v Wellington City Council* [2015] NZARLA PH 21-28.

8 *Commerce Commission v Fonterra* [2007] NZSC 36, [2007] 3 NZLR 767.

9 *Entick v Carrington* [1765] 2 Wils KB 275; 95 ER 807.

10 *Foodstuffs South Island Ltd v Dunedin City Council* [2016] NZARLA PH 21-26.

11 *Hospitality New Zealand, Canterbury Branch v Christchurch City Council* [2017] NZHC 1360.

12 *Hospitality New Zealand Inc v Tasman District Council* [2014] NZARLA PH 846, [2015] NZAR 156.

13 *JB International v Auckland City Council* [2006] NZRMA 401.

14 *Meads Brothers Ltd v Rotorua District Licensing Agency* [2001] NZCA 386, [2002] NZAR 308.

15 *McCarthy v Madden* (1914) 33 NZLR 1251 (CA).

16 *Redwood Corp Ltd v Auckland City Council* [2017] NZARLA PH 247–254.[103.0437]

17 *Trans-Tasman Resource Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; [2021] 1 NZLR 801.

18 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293. [102.0264]

19 *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971.

Legislative Materials

20 Alcohol Reform Bill 2010

21 Hansard debate – Alcohol Reform Bill, First Reading (11 November 2010) 688 NZPD 15251.

22 Hansard debate – Sale and Supply of Alcohol Bill, Third Reading (11 December 2012) 686 NZPD 7348.

23 Law Commission *Alcohol in our Lives: Curbing the Harm: A report on the review of the regulatory framework for the sale and supply of liquor* (NZLC R114, 2010).

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24 Burrows and Carter Statute Law in New Zealand (LexisNexis, 5th ed, 2015).

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25 Auckland Council Water Supply and Wastewater Network Bylaw 2015.