Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

WOOLWORTHS NEW ZEALAND LTD v AUCKLAND COUNCIL AND OTHERS
(SC 139/2021)

FOODSTUFFS NORTH ISLAND LTD v AUCKLAND COUNCIL AND OTHERS
(SC 140/2021)

[2023] NZSC 45

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

The Sale and Supply of Alcohol Act 2012 (the 2012 Act) regulates the sale, supply and consumption of alcohol. Its object is the safe and responsible sale, supply and consumption of alcohol and the minimisation of alcohol-related harm. Under s 75, a territorial authority may develop a policy regarding the sale, supply or consumption of alcohol within the authority's district. Before a territorial authority can adopt such a policy, it must first produce a provisional local alcohol policy. In 2015, the Auckland Council produced its provisional local alcohol policy (the Auckland PLAP).

Woolworths New Zealand Ltd (Woolworths) and Foodstuffs North Island Ltd (Foodstuffs) operate New Zealand's two major supermarket chains. They, among others, appealed to the Alcohol Regulatory and Licensing Authority (the Licensing Authority) under s 81 of the 2012 Act. This was on the basis that several elements of the Auckland PLAP were unreasonable in the light of the object of the 2012 Act. The elements under challenge included:

(a) 9 am to 9 pm maximum trading hours for all off-licences throughout Auckland instead of the default trading hours of 7 am to 11 pm as provided for in the 2012 Act (the trading hours restriction); and

(b) restrictions on the granting of new off-licences (the new off-licence restrictions), through:

(i) a rebuttable presumption against the granting of new off-licences in certain neighbourhood areas; and

(ii) a recommended temporary freeze on the granting of new off-licences in certain other areas, subsequently followed by a rebuttable presumption against granting new off-licences in these areas.

Another challenged element provided for local impacts reports to be provided in relation to applications for off-licences and their renewal.

In its decision on the appeals, the Licensing Authority concluded that the 9 am opening time but not the 9 pm closing time was unreasonable and for this reason required the Auckland Council to reconsider the trading hours restriction. The Licensing Authority was not persuaded that the new off-licence restrictions were unreasonable. The finding in relation to the 9 am opening time has been accepted by the Auckland Council which now proposes a 7 am opening time.

Lower courts

Woolworths and Foodstuffs both sought judicial review of the Licensing Authority's decision.

The High Court found that the Licensing Authority had made an error of law by failing to provide appropriate reasons regarding the 9 pm closing time and the new off-licence restrictions. It also held the local impacts reports element was ultra vires (meaning that the Auckland Council lacked the authority to include this element in the Auckland PLAP).

On appeal (which did not extend to the local impacts reports element), the Court of Appeal reinstated the decision of the Licensing Authority in relation to the 9 pm closing time and the new off-licence restrictions.

The Supreme Court granted Woolworths and Foodstuffs leave to appeal.

Supreme Court decision

The Supreme Court has unanimously dismissed the appeals.

Role of Licensing Authority on appeal under s 81

The Court noted that while there is no legal burden of proof, there is a persuasive burden on the appellant to demonstrate that an element is unreasonable in light of the object of the 2012 Act. The Licensing Authority's decision will almost always turn on whether the system as it would be with the provisional local alcohol policy (including the challenged element) in place is unreasonable. While the Licensing Authority must consider s 4 (the object section), the reasonableness assessment is also informed by s 3 (the purpose section). The 2012 Act introduces a reasonable system of control on the sale and supply of alcohol that seeks to

achieve closely related outcomes; that alcohol is sold, supplied and consumed safely and responsibly and that harm from excessive and inappropriate drinking is minimised.

The Court agreed with the Court of Appeal that a precautionary approach is open and that a restriction may be justified on the basis of a reasonable likelihood that it will reduce alcohol-related harm. However, this likelihood does not mean that an element cannot be successfully challenged. Whether a restriction is unreasonable will likely come down to whether it is a disproportionate limit on the sale and supply of alcohol, while considering its likely impact on ensuring the safe and responsible sale, supply and consumption of alcohol as well as on minimising alcohol-related harm. The Licensing Authority will have to assess whether the restriction is likely to cause: any reduction in alcohol-related harm; and any disruption to safe and responsible drinking. An assessment of these two factors is a matter of general evaluation and impression. The Court also noted that where a system for the sale and supply of alcohol is reasonable and safe with the restriction in place, little or no likelihood of a reduction in alcohol-related harm may be required, particularly where the restriction reflects community preference.

Court of Appeal's approach

The Supreme Court concluded that the Court of Appeal did not make its decision on the basis that a real and appreciable possibility that the challenged element will minimise alcohol-related harm precludes any challenge to the reasonableness of the element. The Court of Appeal referred to a real and appreciable possibility of reducing alcohol-related harm as a factor that *may* justify a restriction. Additionally, the Court of Appeal's rejection of a proportionality assessment was limited to a rejection of the argument that a restriction had to be proportionate in relation to its impact on a supposed general freedom to sell, buy and consume alcohol.

9 pm closing time

The Supreme Court found the Licensing Authority had made no error of law in concluding that the 9 pm closing time was not unreasonable in light of the object of the 2012 Act. The Licensing Authority had extensively reviewed the evidence indicating that changing the closing hour to 9 pm was likely to reduce alcohol-related harm. The Court also rejected the argument that the trading hours restriction may have only been appropriate in certain areas of Auckland and for certain types of off-licences. As well, the Court concluded that it might be thought to be clear that a system which incorporated trading hours of 7 am to 9 pm is not unreasonable in light of the object of the 2012 Act.

The new off-licence restrictions

The Court agreed with the Court of Appeal that the ultra vires references to local impacts reports in the clauses dealing with new off-licence restrictions did not mean that these clauses had to be referred to the Auckland Council for reconsideration. More generally, the Court found that the Licensing Authority was entitled to conclude, and gave adequate reasons for concluding, that the new off-licence restrictions were justified on the basis of a likelihood of

reducing alcohol-related harm. The Licensing Authority also adequately addressed the countervailing proportionality factor of the difficulties faced by supermarkets in obtaining new off-licences.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613