**IN THE SUPREME COURT OF NEW ZEALAND**
**I TE KŌTI MANA NUI**

**SC 139/2021**

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| **UNDER THE** | Judicial Review Procedure Act 2016 |
| **IN THE MATTER** | appeals from a decision of the Court of Appeal |
| **BETWEEN** | **WOOLWORTHS NEW ZEALAND LIMITED** |
| | **Appellant** |
| **AND** | **AUCKLAND COUNCIL** |
| | **First Respondent** |
| **AND** | **ALCOHOL REGULATORY AND LICENSING AUTHORITY** |
| | **Second Respondent** |
| **AND** | **FOODSTUFFS NORTH ISLAND LIMITED** |
| | **Third Respondent** |

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# SUBMISSIONS ON BEHALF OF FIRST RESPONDENT

**27 JULY 2022**

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## 1. INTRODUCTION AND SUMMARY OF ARGUMENT

1.1 In granting leave to appeal in general terms, this Court indicated that it was primarily interested in whether the Court of Appeal (**CA**) judgment[1] proceeded on the basis that an appeal will only succeed if there is not a "real and appreciable possibility" that the element of the provisional local alcohol policy (**PLAP**) challenged will minimise alcohol-related harm (**ARH**) (so that proportionality considerations are not material); and, if so, whether this is correct.

1.2 These submissions address those questions. However, contrary to Woolworths' submissions at paragraph 1, whether the CA erred in its interpretation of the s 81 test is *not* "the issue in this appeal". The key issue is whether the Alcohol Regulatory and Licensing Authority (**ARLA**) erred in any of the respects alleged by Woolworths in its statement of claim. The Council submits it did not.

**Discussion of "real and appreciable possibility" related to issue of proof**

1.3 The CA did *not* proceed on the basis that an appeal under s 81 of the Sale and Supply of Alcohol Act 2012 (**Act** or **SSAA**) will only succeed if there is not a "real and appreciable possibility" that the element will minimise ARH. *Had it done so*, the Council accepts this would have been an error.

1.4 ARLA used this expression when discussing the issue of *proof*, and the argument that an element of a PLAP may be unreasonable in the absence of proof that it *will* reduce ARH. Both Woolworths and Foodstuffs had alleged that in the decision which is under review, ARLA erred by relying on the precautionary principle when faced with uncertainty as to whether an element would be effective in reducing ARH.[2]

1.5 There is nothing to suggest the CA considered whether there is a "real and appreciable possibility" that an element will reduce ARH to be the *sole* determinant of whether a s81 appeal can succeed.

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1 *Auckland Council v Woolworths New Zealand Limited* [2021] NZCA 484 (**CA Judgment**) **[[**101.0024**]]**.
2 Foodstuffs' statement of claim at [36.2] **[[**101.0120**]]**; Woolworths' amended statement of claim at [6.1] **[[**102.0243**]]**, [6.3] **[[**102.0244**]]**.

**CA did not treat proportionality as immaterial**

1.6 The CA rightly recognised the different context in which the bylaw cases cited by ARLA were decided, and the important statutory context in which the term "unreasonable" is used in ss 81 and 83 of the Act. The two principles from the bylaw cases the CA identified as inapplicable were both principles referring to public or private *rights*.[3] The CA did not go so far as to say proportionality considerations (whether taken from bylaw cases or elsewhere) are not material when assessing unreasonableness under ss 81 and 83. *Had it done so*, the Council accepts this would have been an error: but it did not.

**ARLA considered proportionality in assessing elements 1 and 2**

1.7 ARLA expressly considered proportionality as part of its analysis of whether clause 4.3.1 relating to off-licence trading hours (**element 1**),[4] and the Temporary Freeze on and Rebuttable Presumption against granting new off-licences (**element 2**),[5] were unreasonable. The CA reinstated ARLA's decision on elements 1 and 2,[6] after the High Court had set them aside.[7] This suggests that the CA was not troubled by ARLA's proportionality analysis in relation to elements 1 and 2, and did *not* proceed on the basis that proportionality was immaterial.

1.8 Further, if this Court finds that proportionality considerations are material when assessing unreasonableness under s 81, and that the CA erred by treating proportionality as *not* material, this Court can correct the CA's errors. This is a rehearing in which the Court hears the merits of the claim afresh, and decides what weight to give to the CA's decision.[8] ARLA's decision was not in error for failing to consider proportionality. There is no reason for this Court to overturn the CA's orders reinstating ARLA's decisions in respect of elements 1 and 2.

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3 CA Judgment at [41] **[[**101.0040**]]**.

4 See [143] of *Redwood Corporation Limited v Auckland City Council* [2017] NZARLA PH 247-254 (**ARLA's Decision**) **[[**103.0462**]]** discussing the number of off-licence premises affected by the proposed 9pm closing hour; and [156] **[[**103.0464**]]** considering the number of households that may be affected by the proposed 9am opening hour and the finding that this restriction would have a disproportionate effect on supermarkets and their customers.

5 See paragraph [118] of ARLA's decision **[[**103.0458**]]** where it stated it was not persuaded that the "freeze or rebuttable presumption is disproportionate in effect".

6 CA Judgment at [126(b) and (c)] **[[**101.0072**]]**.

7 *Woolworths New Zealand Limited v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293 (**HC Judgment**) at at [213] **[[**102.0329**]]**.

8 Section 78 of the Senior Courts Act 2016. The appellate court has the responsibility of considering the merits of the case afresh: *K v B* [2010] NZSC 112 at [31].

**Woolworths' grounds for review of ARLA's decision are not made out**

1.9 Although pleaded as "errors of law", Woolworths' grounds of review are in large part challenges to the exercise by ARLA of its judgment as to whether elements of the PLAP were unreasonable or not.

1.10 ARLA's decisions on the two PLAP elements relevant to this appeal, elements 1 and 2,[9] were not vitiated by any error of law. In particular:

(a) ARLA was correct in its approach to the precautionary principle. It did not apply the principle itself, but rightly recognised that a *territorial authority* may adopt a precautionary approach when preparing a PLAP, so long as the resulting element is not unreasonable in light of the object of the Act. The CA was correct to dismiss the challenge to ARLA's decision based on the precautionary principle;[10]

(b) ARLA was also correct in holding that in a PLAP appeal, the appellant has an onus of proof (or more accurately, an onus of *persuasion*) that a contested element is unreasonable in light of the object of the Act. The CA's discussion of this point[11] is respectfully adopted;

(c) ARLA gave sufficient reasons for its decisions that elements 1 and 2 were not unreasonable in light of the object of the Act, including that it was not unreasonable to treat all off-licences the same. Those reasons appear in the decision itself, together with the evidence it relied on. The CA's conclusion that ARLA's decision contained adequate reasons is correct.[12]

## 2. STATUTORY SCHEME

2.1 As the CA explained when setting out the statutory history at the start of its judgment,[13] the Act is a deliberate departure from the more liberal regulatory regime in the Sale of Liquor Act 1989 (**SOLA**). The

9 Woolworths' submissions at paragraph [84] accept the CA's findings in respect of element 4 (discretionary conditions): i.e. that this element was not ultra vires.
10 CA Judgment at [60] **[[**101.0046**]]** to [65] **[[**101.0048**]]**.
11 CA Judgment at [52] **[[**101.0043**]]** to [54] **[[**101.0044**]]**.
12 CA Judgment at [111] **[[**101.0067**]]** – conclusion that the reasons for ARLA's decision on element 1 were adequate; and [118] – conclusion that the reasons for ARLA's decision on element 2 were adequate.
13 CA Judgment at [9] **[[**101.0027**]]** to [22] **[[**101.0032**]]**.

particular features of the SSAA which illustrate this overall policy change, and are of most relevance to these proceedings are:

(a) The object of the Act, which states that ARH "should be minimised". The High Court in *Medical Officer of Health (Wellington Region) v Lion Liquor Retail* has stated that the "aim of minimisation requires alcohol-related harm to be reduced to the smallest amount, extent or degree".[14] That is consistent with dictionary definitions;[15]

(b) Local alcohol policies (**LAPs**) as an expression of local democratic decision-making and community preference in relation to licensing. As the CA noted, an LAP "is a means by which communities can implement, through participatory processes, some of their own policies on alcohol related matters in their districts".[16]

**Object and purpose of the Act**

2.2 Turning first to the object of the Act in s 4:

> (1) The object of this Act is that—
>
> (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
>
> (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.
>
> (2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—
>
> (a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
>
> (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

2.3 The harm described in subsection (2) matches the definition of "alcohol-related harm" in s 5. As the CA noted, this is a very broad concept of harm, extending beyond the immediate consequences of misuse of alcohol to wider societal and community impacts.[17]

2.4 The first limb of the object in s 4(1) refers to sale, supply and consumption being safe and responsible; the second to the

14 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882 at [45].
15 *Shorter Oxford English Dictionary* (2007 6th ed, Oxford University Press, New York) defines "minimize" as "reduce to the smallest possible amount, extent, or degree". *Collins English Dictionary* (2018 13th ed, HarperCollins, Glasgow) defines "minimise" as "to reduce to or estimate at the least possible degree or amount".
16 CA Judgment at [32] **[[**101.0036**]]**.
17 CA Judgment at [17] **[[**101.0030**]]**.

minimisation of ARH. Section 4 proceeds on an assumption that there may be sale, supply and consumption of alcohol, and the Act provides for a licensing regime like its predecessor the SOLA. However, the sale, supply and consumption of alcohol should be undertaken safely and responsibly. There is no express recognition in the statutory object (or the purpose in s3, discussed below) of any "right" to sell, supply or consume alcohol.

2.5 In its submissions,[18] Woolworths says that s4 draws a distinction between the "legitimate" sale, supply and consumption of alcohol on the one hand, and excessive or inappropriate consumption on the other. This is incorrect: both limbs of the object are aligned. While s 4(1)(a) does not refer to ARH, it refers to sale etc being undertaken *safely and responsibly*. There is no express or implied recognition of "legitimate" sale or supply or alcohol, which is somehow beyond the Act's focus on harm minimisation.

2.6 Woolworths further suggests that "[p]ersons 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".[19] With respect, this is also incorrect. Alcohol may be *sold and supplied* safely and responsibly – there is no relevant evidence that the supermarket appellants do otherwise – but thereafter *consumed* unsafely and irresponsibly, in a manner that generates ARH (which includes not only crime and disorderly behaviour but also illness and injury).[20] It is legitimate for a LAP to seek to minimise ARH by limiting night-time off-licence trading hours, when risky drinking is more likely to occur (element 1); or by limiting further off-licences in areas experiencing high levels of ARH (element 2).

2.7 As noted by the CA in its decision,[21] ARLA accepted evidence about the linkages between off-licence alcohol sales and ARH, including that purchases of off-licence alcohol after 10pm are likely to be made by heavier drinkers; that violent and disorderly offending including in

18 Woolworths' submissions at [12].
19 Woolworths' submissions at [57].
20 See section 4(2) and the identical definition of ARH in s5(1).
21 CA Judgment at [78] **[[**101.0053**]]**.

the home correlates with off-licence opening hours; and that up to 80% of alcohol sold in Auckland is sold from off-licences. The CA was correct to find that, consistent with the object of the Act and as Clark J found in *Lion Liquor Retail*:[22]

> . . . restrictions on supply by a given off-licensee may be justified although the licensee conducts its business lawfully, provided there is reason to think the premises contribute to excessive or inappropriate consumption.[23] That may happen, for example, where premises are located in an area in which alcohol-related harm is common; the premises contribute to harm merely by making alcohol accessible to those who go on to abuse it.

2.8 It is accepted that those seeking to consume or sell alcohol do have relevant interests, to be taken into account in the consideration of an appeal under s 81 within the concept of "unreasonableness": however, those interests do not feature as part of the statutory object in s 4.

2.9 Despite now accepting that "the two prongs of s 4(1) are not in conflict" and do not need to be balanced by ARLA when applying the appeal test,[24] Woolworths still argue that "the Act seeks to strike a balance that minimises excessive or inappropriate consumption without unduly impinging on safe and responsible consumption".[25] With respect, this formulation is incorrect. It departs significantly from the Act's object in s 4, and is inconsistent with Woolworths' acceptance of there being no balance to be struck within s 4.

2.10 The object of the Act is linked to the purpose stated in s 3:

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

2.11 The reference to the SSAA establishing a "new system of control" emphasises the shift from the previous SOLA regime. Further, the purpose of the reform of the law embodied in the Act is to help to achieve the object of the Act set out in s 4 i.e. with its focus on the

22 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882 at [45].
23 CA Judgment at [68] **[[**101.0051**]]** referring to *Lion Liquor Retail Ltd* at [67]-[70].
24 Woolworths' submissions at [55]-[56]
25 Woolworths' submissions at [59].

sale, supply and consumption of alcohol occurring safely and responsibly, and ARH being minimised.

2.12 Section 3(2) states that the characteristics of the new system of control are that it is reasonable and that its administration helps to achieve the object of the Act. The object of the SOLA in s 4 also referred to establishing "a reasonable system of control": the appellants contend that this means that the underlying concept of reasonableness in the SOLA remains unchanged, and applicable under the SSAA.[26]

2.13 It is correct, as far as it goes, that the "systems of control" under both Acts are to be reasonable.[27] However, because the SSSA aims to *minimise ARH* (rather than simply contribute to a reduction in liquor abuse), something which was reasonable under the SOLA system of control may no longer be reasonable under the SSAA. As the CA held, decisions under the SOLA should be applied with caution to the SSAA regime.[28] The passage from *Meads Brothers* quoted by Woolworths' does not support its submission that "the underlying concept or reasonableness remains unchanged under the Act"[29]. On the contrary, the discussion of reasonableness in that case very much reflects the modest object of the SOLA.

2.14 The CA, in its discussion of s 3, considered that "the content of a reasonable system of control should be gleaned from the legislation itself and the legislative history".[30] The Council respectfully agrees: an assessment of reasonableness (or unreasonableness, which is the relevant concept in s 81) cannot occur in a statutory vacuum.

**Local alcohol policies**

2.15 The second relevant feature new to the SSAA is the provision for local policy preferences to be reflected in the licensing process. This is primarily through LAPs. When speaking on the Alcohol Reform Bill, the Minister of Justice said:[31]

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26 Woolworths' submissions at [14]; Foodstuffs' submissions at [56].
27 In fact, the SSAA states that the system of control which it establishes *is* reasonable i.e. it is not aspirational but a statement of fact. In contrast, the object in the SOLA was aspirational.
28 CA Judgment at [41] **[[**101.0040**]]**.
29 Woolworths' submissions at [14]; *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA) at [23] and [53].
30 CA Judgment at [21] **[[**101.0032**]]**.
31 Hansard 11 December 2012, 686 NZPD 7349. The Select Committee report on the Alcohol Reform Bill described LAPs as enabling local authorities to "make provision for their communities": Alcohol Reform Bill (236-2) (Commentary) at 6.

> Another important measure to give local communities a greater say is the option for communities to adopt a local alcohol policy. Under these policies, communities will be able to restrict or extend the maximum trading hours. They will also be able to limit the location of licensed premises near certain facilities, such as schools, and specify whether further licences should be issued in a defined area…It is very important that we allow communities to decide what is best for them, especially given the aim of increasing community input and control over licensing.

2.16 A LAP is a local government policy document. It is one of a number of such policy documents provided for in legislation designed to give local communities a say in how certain regulated products or services are provided in their districts.[32] All are adopted following a public consultation process involving the right to make written and oral submissions via the special consultative procedure [33]

2.17 LAPs may also reflect political preferences. Councillors must give effect to the purpose of local government in their district,[34] which includes enabling democratic local decision-making and action by, and on behalf of, their communities.[35]

2.18 It follows that the content of a LAP need not be evidence based, as the CA held.[36] A LAP does not have to be justified by reference to any particular criteria or considerations. However, an element in a LAP that is objectively unreasonable will be vulnerable on appeal, as the CA acknowledged.[37]

**Process for preparing a local alcohol policy (LAP)**

2.19 Section 77 of the Act sets out the permitted contents of a LAP. Most relevant for present purposes a LAP may include policies relating to:

> (d) whether further licences (or licences of a particular kind or kinds) should be issued for premises in the district concerned, or any stated part of the district:
> (e) maximum trading hours:

2.20 Preparing a LAP starts with the territorial authority producing a draft local alcohol policy (**DLAP**) under s 78. In doing so, it must have regard to a range of matters set out in s 78(2). If the territorial authority wants to have a LAP, it must consult on the DLAP, using the special consultative procedure: s 79(1). This process produces the PLAP. In

32 Other examples include the class 4 venue policy under s101 of the Gambling Act 2003, and alcohol control bylaws under s147 of the Local Government Act 2002 (**LGA**).
33 LGA, ss 83, 83AA, 86 and 87.
34 LGA, s 11.
35 LGA, s 10(1)(a).
36 CA Judgment at [32] **[[**101.0036**]]**.
37 CA Judgment at [32] **[[**101.0036**]]**.

producing the PLAP under s 79, the territorial authority must also have regard to the s 78(2) matters: see s 79(2).

2.21 If, having produced the PLAP, the territorial authority still wants to have a LAP, it publicly notifies the PLAP: s 80(1). Submitters on the DLAP may appeal to ARLA against elements of the PLAP: s 81(1). The only appeal ground is that an element of the PLAP is unreasonable in light of the object of the Act set out in s 4.

2.22 ARLA then determines the appeals: s 83(1) and (2). The sole issue for ARLA (assuming the appellant has made a submission on the DLAP) is whether the element under appeal is unreasonable in light of the object of the Act. ARLA must dismiss an appeal against an element if it *is not satisfied* that the element is unreasonable in light of the object of the Act: s 83(1). ARLA must ask the territorial authority "to reconsider an element" of the PLAP if it *is* so satisfied: s 83(2).

2.23 An appellant has no right of appeal against ARLA's decision under s 83, although judicial review is unaffected: ss 83(4) and (5). Only the territorial authority has a right of appeal to the High Court: s 84(1)(c).

2.24 If ARLA asks the territorial authority to reconsider an element of a PLAP, the territorial authority must exercise one of 4 options available to it under s 84(1). If the territorial authority resubmits the PLAP with the element amended or replaced, that is deemed to be an appeal against that element (see s 86) and ss 81 to 85 apply. If ARLA decides the new/replacement elements are not unreasonable in light of the object of the Act, the PLAP is adopted and becomes the LAP: s 87(3).

2.25 From these provisions relating to the procedure for preparing a LAP, two conclusions of particular relevance may be drawn:

(a) First, there is not a "level playing field" for appellants and the territorial authority in relation to appeals. An appeal only succeeds if ARLA is satisfied that an element is unreasonable in light of the object of the Act, and only the Council has a right of appeal to the High Court;

(b) Second, ARLA's role is to act as a safeguard, by deciding whether an appealed element is unreasonable in light of the

object of the Act. Put another way, its role is to check that a challenged element formulated by a territorial authority has not strayed beyond reasonable limits, in light of the object of the Act. If it finds that it has, it must ask the territorial authority to reconsider that element. ARLA does not itself determine the content of the PLAP.

## 3. ELEMENTS OF THE AUCKLAND PLAP CHALLENGED BY THE SUPERMARKETS IN THESE PROCEEDINGS

3.1 The Auckland PLAP, as Parliament intended,[38] is an expression of local preferences as to the regulation of alcohol in their communities. As the Council noted when beginning development of the PLAP:[39]

> In recent years, public concern has been increasing over the perceived growth in alcohol-related harm and the significant social and economic costs this is incurring… The [PLAP] will therefore, be a key mechanism for ensuring that the community does have input into licensing decisions in the future. This will help to alleviate concerns about the current inability for the public to influence their local licensing environments.

3.2 The PLAP reflects not only the Council's research into ARH,[40] but Aucklanders' democratic preferences, expressed through the 2,693 public submissions on the DLAP[41] (including 108 submitters who were heard by the Council's DLAP Hearing Committee)[42]. Submitters supported specific elements that sought to minimise ARH.[43]

3.3 The Council's LAP Research Report[44] identified that "there is a wide range of alcohol-related issues in Auckland".[45] The DLAP's policies, directed at both on-licences and off-licences, sought to ensure that the sale, supply and consumption of alcohol in Auckland was undertaken safely and responsibly, and minimise the harm caused by excessive and inappropriate consumption of alcohol.[46]

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38 Alcohol Reform Bill (236-2) (Commentary) at 6.
39 Hansen Appendix 2 *Regional Development and Operations Committee Agenda Item 11* (24 May 2012) **[[**302.0427**]]**.
40 Turner Appendix N: *Alcohol-Related Harms Research* (6 December 2011) **[[**302.0269**]]**; Hansen Appendix 12 *Technical Report 2013/021: Literature Review of Mechanisms to Regulate the Supply of Alcohol for the Development of Auckland Council's Local Alcohol Policy* (September 2013) **[[**104.0644**]]**.
41 *Explanatory Document for the Provisional Auckland Council Local Alcohol Policy* (May 2015) at [11] **[[**103.0534**]]**.
42 Hansen Appendix 28 *Regional Strategy and Policy Committee Agenda Item 9* (13 May 2015) at [27] **[[**306.0988**]]**.
43 *Explanatory Document for the Provisional Auckland Council Local Alcohol Policy* (May 2015): in respect of maximum trading hours see [83], [90]-[94] **[[**103.0544**]]**; and in respect of the temporary freeze/rebuttable presumption see [58] **[[**103.0541**]]**, [65], [69] and [72] **[[**103.0542**]]**. Hansen Appendix 28 *Regional Strategy and Policy Committee Agenda Item 9* (13 May 2015): in respect of maximum trading hours see [127]-[133] **[[**306.1001**]]**; and in respect of the temporary freeze/rebuttable presumption see [105]-[111] **[[**306.0998**]]**.
44 Hansen Appendix 4 *Regional Development and Operations Committee minutes* (24 May 2012) **[[**302.0433**]]**.
45 Hansen Appendix 3 *Auckland PLAP Research Report* at 75 **[[**104.0624**]]**.
46 Hansen Appendix 23 *Statement of Proposal Draft Local Alcohol Policy* (2014) at Part A section 4.2 **[[**305.0771**]]**.

3.4 Clause 4.3.1 of the PLAP (element 1) provided that the maximum off-licence trading hours for the Auckland region were 9am to 9pm, Monday to Sunday.[47] The purpose of the closing hour restriction was to target "high risk" purchases.[48]

3.5 The supermarkets appealed against clause 4.3.1. ARLA considered the *opening hour* aspect of the clause to be unreasonable in light of the object of the Act.[49] However, on the *closing hour* aspect of element 1 it concluded:

> [146] Notwithstanding that evidence of reduction in harm from specific reductions in trading hours of off-licences is sparse, there is evidence to establish a relationship between off-licence trading hours and alcohol consumption and harm. Given the level of alcohol-related harm in Auckland, the Authority does not consider that it has been established that the closing hour restriction is unreasonable in light of the object of the Act. Given this evidential basis for the closing hour restriction, 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.

3.6 Woolworths' and Foodstuffs' challenges to ARLA's decision on element 1 focused initially on ARLA's alleged use of the precautionary principle. However, during the course of the hearing, the High Court granted Woolworths' application to amend its statement of claim to include new paragraphs 6.1(e) and (f) alleging unreasonableness due to lack of differentiation between supermarkets and other off-licences.[50] In the High Court's substantive decision, ARLA's failure to differentiate between supermarkets and other off-licences, and to give reasons why not, was the main basis upon which the challenge to ARLA's decision on element 1 was upheld.

3.7 The High Court also held that ARLA made an error of law in referring to the burden and standard of proof in civil cases as applicable to appeals before it.[51] This was despite no such an error of law having been alleged by Woolworths or Foodstuffs.

3.8 The temporary freeze and rebuttable presumption (element 2) are provided for in clauses 3.2.1, 4.1.4, 4.1.5, 4.1.6 and 4.1.7 of the PLAP. The effect of these clauses is that:[52]

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47 Provisional Auckland Council Local Alcohol Policy (May 2015) cl 4.3.1 **[[**103.0483**]]**.
48 Affidavit of Nadine Hopkins sworn 15 June 2018 at [41] **[[**201.0013**]]**.
49 ARLA decision at [157] **[[**103.0465**]]**.
50 Woolworths' amended statement of claim at [6.1] **[[**102.0244**]]**; *Woolworths New Zealand Limited v Alcohol Regulatory and Licensing Authority* [2020] NZHC 270 **[[**102.0256**]]**.
51 HC Judgment at [64] to [66] **[[**102.0283**]]** and [117] **[[**102.0301**]]**.
52 Affidavit of Nadine Hopkins at [48] **[[**201.0019**]]** to [60] **[[**201.0022**]]**.

(a) there is a freeze on the issue of new off-licences in the City Centre and areas identified in the PLAP as Priority Overlay areas for two years; and

(b) there is a rebuttable presumption against the issue of new off-licences in Neighbourhood Centres and, following the expiry of the temporary freeze, in the Priority Overlay areas.

3.9 Priority Overlay areas were identified as being at greater risk of ARH than the Auckland average, and where there is evidence of ARH occurring.[53]

3.10 Before ARLA, Woolworths and Foodstuffs unsuccessfully challenged these elements on various grounds, including that they were ultra vires s 77(1)(d) of the SSAA, and that ARLA relied on the precautionary principle in dismissing the appeal against these elements. They argued that the rebuttable presumption was ultra vires as it purported to direct the District Licensing Committee (the **DLC** or **Authority**) as to how it should exercise its discretion to issue a licence in the relevant areas and as to the threshold that should be applied and was therefore contrary to s 105 of the SSAA.

3.11 ARLA disagreed, holding that the rebuttable presumption did *not* purport to direct the Authority as to how it should exercise its discretion: "a licence may still be issued depending on the weight given to the local alcohol policy relative to the other matters in s 105".[55] It also held that the rebuttable presumption was intra vires, and within the scope of s 77(1)(d) of the SSAA.[56]

3.12 Before the High Court, Woolworths challenged ARLA's conclusion on the vires issue, and as noted above, was also given leave to argue that ARLA had erred in law by failing to give reasons why it was not unreasonable to treat supermarkets and grocery stores in the same way as other off-licences[54]. The High Court found that ARLA had failed to provide reasons, and set aside its decision on element 2 on that basis.[57]

53 Affidavit of Nadine Hopkins at [51] **[[**201.0020**]]**.
54 Foodstuffs' statement of claim at [30] **[[**101.0116**]]** and [33] **[[**101.0119**]]**; Woolworths' amended statement of claim at [6.1] **[[**102.0243**]]** to [6.4] **[[**102.0245**]]**.
55 ARLA's Decision at [116] **[[**103.0458**]]**.
56 ARLA's Decision at [115] **[[**103.0458**]]**.
57 HC Judgment at [213] **[[**102.0329**]]**.

It did not find that ARLA erred in concluding that element 1 was not unreasonable, nor find that element 1 was ultra vires.[58]

3.13 The CA reinstated ARLA's decision on elements 1 and 2,[59] after the High Court had set them aside.[60]

## 4. DID THE CA CONSIDER AN APPEAL WOULD ONLY SUCCEED IF THERE WAS NO "REAL AND APPRECIABLE POSSIBILITY" THE CHALLENGED ELEMENT WOULD REDUCE ARH?[61]

4.1 Both appellants submit that the CA considered that an appeal against an element of a PLAP will only succeed if there is not a "real and appreciable" possibility that the element will reduce ARH.[62] This is incorrect.

4.2 With respect, the appellants wrongly conflate:

(a) what the Court said when discussing the issue of proof, and addressing the argument that an element may be unreasonable in the absence of proof that it will reduce ARH;

(b) the test on appeal under ss 81 and 83.

4.3 The CA first referred to "a real and appreciable possibility" that an element may reduce ARH in a section headed *Onus and proof in appeals to ARLA under s81*. It stated:[63]

> Ultimately ARLA must be satisfied that a given element of a policy is unreasonable. Sometimes that may call for proof of facts on the balance of probabilities. An appeal may raise a question of past or present fact that is capable of proof to that standard. But an appeal may also raise factual propositions that are not capable of proof on the balance of probabilities. As ARLA plainly recognised, evidence of alcohol-related harm may not be directly traceable to a given licensee or class of licensee, but that does not preclude intervention if it may reduce the harm. ARLA may also be required to evaluate what will happen with and without a given policy element. Such an inquiry involves predictions about what might happen in future in two states of regulation, one current and the other hypothetical. Neither outcome is likely to be capable of proof on the balance of probabilities. It would be an error — because the object of the Act could not be achieved — to insist on proof that, for example, restrictions on trading hours will reduce alcohol- related harm. Rather, ARLA must make a decision on the information and evidence available to it, incorporating the likelihood that a given element will reduce alcohol-related harm. **A prospective benefit may be taken into account if there is a real and appreciable possibility that the element will deliver it**. (emphasis added)

58 HC Judgment at [154] and [155] **[[**102.0313**]]**.
59 CA Judgment at [126(b) and (c)] **[[**101.0072**]]**.
60 HC Judgment at [213] **[[**102.0329**]]**.
61 Paragraph 3(a) of Woolworths' application for leave to appeal **[[**05.0003**]]**.
62 For example, Woolworths' submissions at [2], Foodstuffs' submissions at [2].
63 CA Judgment at [53] **[[**101.0043**]]**.

4.4 Immediately before this paragraph, the CA considered the High Court's finding that ARLA had erred by referring to an appellant having the onus of satisfying ARLA that an appealed element was unreasonable in light of the object of the Act.[64] The CA (with respect correctly) characterised the onus on an appellant under s 81 as a "persuasive burden", rather than a legal burden.[65]

4.5 Paragraph [53] must be read in that context. It starts with a reference to the requirement under s 83 for ARLA to be *satisfied* that an element is unreasonable in light of the object of the Act, if an appeal is to succeed. It acknowledges that only sometimes will that call for proof of facts on the balance of probabilities. In particular, it acknowledges that evaluation of policy elements may involve predictions that are incapable of proof on the balance of probabilities – e.g. it cannot be proved a restriction on trading hours *will* reduce alcohol related harm.

4.6 Woolworths submits that in paragraph [53] of its decision, "*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] With respect, paragraph [53] clearly does *not* say this: it says that a "prospective benefit may be **taken into account** if there is real and appreciable possibility that the element will deliver it" (emphasis added). There will be other matters that can also be taken into account: most obviously, an appellant's evidence as to the burden the element may impose. It is submitted the CA's comments cannot reasonably be interpreted as a statement that the possibility an element may reduce ARH is the **only** relevant matter when assessing unreasonableness.

4.7 Paragraph [54] in the CA decision reinforces that this part of the decision concerned whether ARLA had (incorrectly) considered an appellant to be under a "burden of proof", with the standard of proof being the balance of probabilities. The CA notes that "ARLA itself recognised that causes of alcohol-related harm cannot be proved on the balance of probabilities; it sufficed that there was evidence of "a

64 CA Judgment at [50] to [52] **[[**101.0043**]]**.
65 CA Judgment at [52] **[[**101.0043**]]**.
66 Woolworths' submissions at [41].

relationship" between off-licence trading hours and consumption and harm".[67]

4.8 The CA found that ARLA "did not rest its decision on a burden of proof". It noted ARLA's conclusion[68] that "it had not been established that the closing hours restriction was unreasonable in light of the object of the Act": a conclusion that is consistent with the appellants not having satisfied the *persuasive* burden that ss 81 and 83 impose.

4.9 With respect, there can be no suggestion that in paragraph 53 the CA was attempting to address the wider question of what "unreasonable in light of the object of the Act" means, or purporting to substitute that test with the sole test of whether there is a real and appreciable possibility of reducing ARH.

4.10 The CA next referred to "a real and appreciable possibility" that an element may reduce ARH in a section headed *The precautionary principle*. From paragraph 56 onwards the CA discussed ARLA's invocation of the precautionary approach set out in *My Noodle Ltd v Queenstown-Lakes District Council*[69], and the High Court's finding that ARLA had erred when applying it because it considered the principle allowed it not to interrogate the evidence relating to the element but could simply defer to the Council.[70] The CA disagreed, and found ARLA did not fail to evaluate the evidence for itself.[71]

4.11 At paragraph 61 of its decision the CA noted that at issue in *My Noodle* was whether ARLA needed to be sure that a blanket reduction in trading hours through stricter licence conditions would reduce alcohol abuse. The Court then stated:

> [61] . . . The Court held that ARLA need not be sure; it could impose conditions and assess later whether they had the desired effect. It was in this context that the Court held that ARLA might apply the equivalent of the precautionary principle.
>
> [62] We have reached the same conclusion by a more direct route under the 2012 Act, holding that the appellate standard does not require that ARLA be sure a given element will reduce alcohol-related harm. **It suffices that there is a real and appreciable possibility that the element will do so.** As Mr McNamara submitted for the Council, this is consistent with the Act's requirement that an element be "reasonable" in light of the Act's object. This approach can be

67 CA Judgment at [54] **[[**101.0044**]]**.
68 ARLA's Decision at [146] **[[**103.0463**]]**.
69 *My Noodle Ltd v Queenstown-Lakes District Council* [2010] NZAR 152.
70 CA Judgment at [58] **[[**101.0045**]]**.
71 CA Judgment at [59] **[[**101.0046**]]**.

> described as "precautionary", in that it admits remedial measures to reduce harm although their effects are uncertain. (emphasis added)

4.12 Again, there can be can be no suggestion that in these two paragraphs the CA was attempting to address the wider question of what "unreasonable in light of the object of the Act" means, or purporting to set out all matters that might be relevant to an assessment of unreasonableness. It was addressing the argument made by the supermarkets that ARLA had erred by relying on the precautionary principle, this being a ground of review in respect of ARLA's decisions in respect of both elements 1 and 2; and the High Court judge's finding that ARLA must have applied the precautionary principle, but that it was impossible to say how because of the inadequacy of its reasons.[72]

4.13 In response to Woolworths' allegation that ARLA could not apply the precautionary principle in determining an appeal (and that it was inappropriate to rely on *My Noodle*), the CA endorsed a precautionary approach, albeit by what it described as a "more direct" route. This was that the appellate standard (in ss 81 and 83) did not require that ARLA[73] be sure a given element would reduce ARH: it suffices that there is a real and appreciable possibility that the element may do so.[74] In doing so, the Court was not purporting to establish an appeal test which would apply to every s 81 appeal. Further, the CA had already correctly identified, at paragraph 52, that an appellant bears persuasive burden of showing that an element is unreasonable in light of the object of the Act: so it cannot be suggested that the CA failed to appreciate the appeal test.

4.14 The final paragraph in which the CA referred to "a real and appreciable possibility" that an element would reduce ARH was under the heading *Element 1: trading hours*.

4.15 The High Court had found that ARLA has erred in relation to element 1 due to a failure to give reasons.[75] The CA identified, from paragraphs 105 to 107, evidence before ARLA "that was sufficient to

72 CA Judgment at [58] **[[**101.0045**]]**.
73 And by necessary implication, the Council when preparing the PLAP.
74 CA Judgment at [62] **[[**101.0047**]]**.
75 HC Judgment at [97] **[[**102.0293**]]**, [107]-[108] **[[**102.0297**]]** and [112] **[[**102.0299**]]**.

justify the restriction on closing hours".[76] It then referred, at paragraph 108, to the argument for the supermarkets that "there is a weak correlation between off-licence hours and alcohol-related offending", and said that the argument:[77]

> [108] . . . rested on the false premise that the Council must prove harm associated with supermarkets as a class of licensee before it can justify restrictions on off-licence hours in any given area. The evidence that ARLA cited sufficiently established a correlation between the serious alcohol-related harm experienced in Auckland and off-licence trading hours, such that restricting the latter might reasonably reduce the former.
>
> [109] It is true, as Ms Cooper submitted, that ARLA did not expressly engage with the witnesses for the supermarkets and explain why their evidence was rejected. But we accept Mr McNamara's submission that when its decision is read as a whole ARLA relied on the evidence led in support of the Policy for its conclusions that "there is evidence to establish a relationship between off-licence trading hours and alcohol consumption and harm". It was not necessary that ARLA reach a final view about the relationship between trading hours and harm. It sufficed as we have explained that there was **a real and appreciable possibility that an earlier closing time would reduce alcohol-related harm**. And that in essence, is what ARLA decided in the passage quoted at [80] above, in which it referred to the evidence it had mentioned and concluded that there was an evidential basis for the closing hours restriction. (emphasis added)

4.16 The CA's reference to "a real and appreciable possibility that an earlier closing time would reduce alcohol-related harm" was therefore a direct response to the supermarkets' argument that element 1 would be unreasonable unless the Council could *prove*:

(a) That ARH was associated with supermarkets as a class of licensee; and

(b) Restrictions on off-licence hours in any given area *would* reduce that ARH.

4.17 In summary, there was no error as alleged by Woolworths (or for that matter Foodstuffs), because the CA was not purporting to reframe or place a gloss on the s 81 test on appeal when referring to a real and appreciable possibility of an element reducing ARH

**Wider discussion of unreasonableness in the CA judgment**

4.18 Elsewhere in the judgment the CA recognised that if an element is ultra vires then it is unreasonable.[78] What amounts to unreasonableness in other circumstances will need to be determined in those particular

76 CA Judgment at [105] **[[**101.0064**]]**.
77 CA Judgment at [108] **[[**101.0066**]]**.
78 CA Judgment at [127] **[[**101.0072**]]**.

circumstances. The CA also made further statements about the appeal test in s 81, none of which is now in issue between the parties:

(a) ARLA's task is evaluative – that is, it must decide for itself whether a given element is unreasonable in light of the object of the Act.[79] It found that the High Court's approach of deciding whether the inclusion of the element was something that no reasonable territorial authority would have done (the *Wednesbury* standard) was wrong;

(b) An element is not unreasonable merely because ARLA may take a different view of the merits. Deference must be paid to the preferences of the community.[80] ARLA's role is to determine whether an element is objectively, rather than subjectively, unreasonable.[81]

4.19 Because it was unnecessary in this case, the CA did not set out in any expansive way what may amount to unreasonableness in different circumstances. This is unsurprising: neither Woolworths nor Foodstuffs allege that ARLA erred in its interpretation of the s 81 test. The closest their pleadings come to such an allegation is that ARLA incorrectly applied the precautionary principle.

**The right of appeal is not rendered nugatory**

4.20 Woolworths' submission that the CA's approach renders the right of appeal nugatory[82] is based on a misunderstanding of its discussion of a "real and appreciable" possibility that an element will deliver a prospective benefit in terms of reducing ARH. Properly understood, the CA's discussion of these matters simply clarifies what level of certainty (as opposed to proof) there needs to be in order for a prospective benefit of an element to be "*taken into account*" (the words used by the CA) in the overall assessment of unreasonableness. It does not purport to substitute the test of whether an element is unreasonable in light of the object of the Act with the test of whether

79 CA Judgment [35] **[[**101.0037**]]**.
80 CA Judgment at [40] **[[**101.0039**]]**.
81 CA Judgment at [32] **[[**101.0036**]]**.
82 See for example Woolworths' submissions at [3], [61 and [62].

there is a real and appreciable possibility that an element will reduce ARH.

4.21 The appellant still has a meaningful appeal right in these circumstances. An appellant may have greater difficulty satisfying ARLA that an element is unreasonable in light of the object of the Act, where ARLA finds the element has a "real and appreciable" possibility of reducing ARH. But an appellant is still able to present evidence regarding the burden the element imposes on licence holders and consumers, and argue that this burden outweighs the benefits of the element (its potential to reduce ARH). Further, an appellant can still argue the element is unreasonable on other grounds: for example, ultra vires, or being partial or unequal in its application to licence holders, as discussed below.

## 5. DID THE CA CONSIDER "PROPORTIONALITY PRINCIPLES" FROM BYLAW CASES TO BE INAPPLICABLE, OR THAT PROPORTIONALITY *PER SE* IS NOT MATERIAL? [83]

5.1 The CA stated that ARLA erred to the extent that it held that "proportionality principles" used in bylaw cases apply under the SSAA, because the "context is not the same".[84] That is obviously correct as a matter of strict logic. But it is submitted this should not be taken as a wider statement that proportionality *per se* is not relevant to an assessment of whether an element is unreasonable in light of the object of the Act.

5.2 The particular "proportionality principles" from the bylaw cases which the CA considered should not be applied were identified in paragraph 41. These are:

(a) that the reasonableness of a bylaw depends on whether or not public or private *rights* are unnecessarily or unjustly invaded;

(b) that a bylaw must be unreasonable if it unnecessarily abridges or interferes with a public *right* without producing for local residents a benefit that is real and not merely fanciful.

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83 Paragraph 3(a)(ii) Woolworths' application for leave to appeal **[[**05.0003**]]**.

84 CA Judgment at [39] **[[**101.0039**]]**. It may be noted that the CA at paragraph [40] approved one aspect of the approach to reasonableness in the bylaw cases - that a bylaw is not unreasonable merely because it does not contain qualifications which may commend themselves to the minds of judges - as applicable on a s 81 appeal.

5.3 The reason for these two principles not being applicable is due to their reference to "rights", as the next sentence in paragraph 41 makes clear:

> As explained above, **under the 2012** Act there is no antecedent right to sell alcohol that must be balanced against a control on supply. (emphasis added)

5.4 With respect, and contrary to Woolworths' submission,[85] this statement is correct: the Act does not recognise or confer a general right to sell alcohol (in the CA's language, an "antecedent right") which is then limited by the terms of a licence.[86] On the contrary, it is the *licence itself*, granted under the Act, that confers the right to sell alcohol. For example, s 17 of the Act states that on the premises an off-licence is held for, the licensee can sell alcohol for consumption somewhere else. Section 233(1) states that a person who does not hold a licence and sells, displays or keeps for sale any alcohol commits an offence.

5.5 Later in paragraph 41, the CA noted that:

> It is inherent in a licensing regime, and to be expected given the object of the 2012 Act, that controls may have an adverse economic impact on licensees.

5.6 This statement appropriately recognises that because the test under s 81 is whether an element is "unreasonable *in light of the object of the Act*", the assessment of unreasonableness cannot be the same as if it were being undertaken in a bylaw case where the assessment is of unreasonableness alone, without reference to any statutory object.

5.7 Therefore, despite referring (perhaps inaptly) in paragraph 39 to the "proportionality principles" (this being the term ARLA had itself used in paragraph 39 of the judgment under review), the CA in paragraph 41 singled out the two principles that are inapplicable when assessing an element for unreasonableness under s81, and why.[87] There is no reason why the following three principles listed by ARLA in paragraph 39 as indicia of unreasonableness should not apply, as they do not refer to any "right" being affected:

> (a) The proposed measures constitute a disproportionate or excessive response to the perceived problems;
>
> (b) The proposed measures are partial or unequal in their operation between licence holders;

85 Woolworths' submissions at [64].
86 CA Judgment at [22] **[[**101.0032**]]**.
87 CA Judgment at [39] **[[**101.0039**]]** and [41] **[[**101.0040**]]**.

(c) An element of a PLAP is manifestly unjust or discloses bad faith.

5.8 None of these principles is criticised in the CA's judgment.[88] The last of the four principles listed in paragraph 39 of ARLA's decision – an element will be unreasonable if it is "an oppressive or gratuitous interference with the rights of those affected – should be regarded as inapplicable on the CA's reasoning set out in paragraph 41, because it relates to rights being affected.[89]

5.9 There are some obvious parallels between bylaws and LAPs. Both are prepared by democratically elected councils following a public consultation procedure. A LAP may, like a bylaw, have regulatory effect. Although there is no right of appeal as such against a bylaw, as with a LAP, the council's discretion in terms of the policy content of a bylaw must be exercised within reasonable bounds, as determined by reference to the authorising statute. It is submitted that proportionality principles (minus those that refer to interference with rights) are useful for the purposes of applying the "unreasonable" test in the SSAA.

5.10 Proportionality is also a well-established framework for assessing unreasonableness in administrative law.[90] It is submitted that the CA judgment still leaves open the possibility of an element being unreasonable because it is a disproportionate or excessive response to the perceived problem, notwithstanding that there is a real and appreciable possibility that the element will reduce ARH. The benefit of the element (reduction in ARH) may be outweighed by the burden imposed on licence holders and consumers.

5.11 An example might be a severe reduction in on- or off-licence trading hours, say to from midday to 6pm. This might have a real and appreciable possibility of reducing ARH (by limiting the availability of alcohol in a temporal sense), but still be regarded as disproportionate due to its very significant impact on affected licence holders and purchasers of alcohol, and therefore unreasonable. The restrictions on trading hours under the Auckland PLAP are of course

88 ARLA's Decision at [39] **[[**103.0446**]]**.
89 ARLA's Decision at [39] **[[**103.0446**]]**; CA Judgment at [41] **[[**101.0040**]]**.
90 Phillip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [24.6.2(2)] citing *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC) at 635-636.

much more limited, and specifically aimed at reducing risky drinking behaviours.[91]

5.12 Contrary to the appellant's submissions,[92] the CA judgment does not reduce every s 81 appeal to the sole question of whether there is a real and appreciable possibility that the challenged element will reduce alcohol-related harm. Other possible grounds of unreasonableness which may raise issues of proportionality can still be established, depending on the circumstances. Indeed the claim that an element was unreasonable because of alleged unequal treatment (between supermarkets and other off-licences) was considered by the Court. This claim failed, both because it was only necessary to demonstrate a real and appreciable possibility of reducing alcohol-related harm; but also on the facts:[93]

> We accept [the Council's] submission that the Judge again focused on the perceived absence of reasons for failing to discriminate among off-licence types. We have already held that the Policy need not do that, in circumstances where the evidence sufficiently justified the inference that there is a relationship between off-licence density and alcohol-related harm in these areas. The evidence applied generally to off-licences.

**ARLA considered proportionality as part of unreasonableness**

5.13 ARLA expressly considered proportionality as part of its analysis of whether clause 4.3.1 of the PLAP (element 1) was unreasonable:[94]

(a) At paragraph 127 it recorded the supermarkets' submissions that element 1 "would constitute a disproportionate and or excessive response to the perceived problems and that they are a gratuitous interference with the rights of people affected", and the Council's response to that argument;

(b) At paragraphs 134 to 142 it noted evidence from health authorities, academics and the Council regarding the "problem" to be addressed (broadly, the nature and extent of ARH in Auckland) and the link to sale and consumption of off-licence alcohol;

91 Refer to paragraph 3.3 above.
92 Woolworths' submissions at [48].
93 CA Judgment at [118] **[[**101.0069**]]**.
94 ARLA's Decision at [127] **[[**103.0460**]]**, [134]-[142] **[[**103.0461**]]**, [143], [144] **[[**103.0462**]]**, [150] and [156] **[[**103.0464**]]**.

(c) At paragraph 143 ARLA discussed the number of off-licence premises affected by the proposed 9pm closing hour;

(d) At paragraph 144 ARLA identified that "at-risk groups are the ones most likely to be affected by the 9pm closing hour as purchasing off-licence alcohol is likely to be a cheaper source of alcohol than from on-licences" (indicating that ARLA considered the closing hour to be suitably targeted);

(e) At paragraph 150 ARLA recorded the supermarkets' submission that "the opening hours restriction is a disproportionate response to the problem sought to be addressed"; and

(f) At paragraph 156 ARLA concluded that considering the number of households that may be affected by the proposed 9am opening hour this restriction would have a disproportionate effect on supermarkets and their customers.

5.14 ARLA also expressly considered proportionality as part of its analysis of whether element 2 was unreasonable:[95]

(a) At paragraph 106 ARLA recorded the supermarkets' submission that "the temporary freeze is a disproportionate response to the harm sought to be addressed";

(b) At paragraphs 114 to 116 ARLA considered the impact of the freeze and presumption, finding that at best they would provide guidance to licensing authorities on the Council's preferred outcome and do not *prevent* further off-licences;

(c) At paragraph 118 ARLA stated it was not persuaded that the "freeze or rebuttable presumption is disproportionate in effect".

5.15 The CA reinstated ARLA's decision on elements 1 and 2,[96] after the High Court had set them aside.[97] This suggests it was not troubled by

95 ARLA's Decision at [106] **[[**103.0456**]]**, [114]-[116] and [118] **[[**103.0458**]]**.
96 CA Judgment at [126(b) and (c)] **[[**101.0072**]]**.
97 HC Judgment at [213] **[[**102.0329**]]**.

ARLA's proportionality analysis in relation to elements 1 and 2, and did *not* proceed on the basis that proportionality was immaterial.

## 6. LAP NEED NOT BE EVIDENCE-BASED[98]

6.1 Woolworths' submissions that the CA held that a PLAP need not be evidence based, with respect, overlook the important proposition in the immediately following sentence of the CA's judgment:[99] that if an objectively unreasonable preference finds its way into a proposed LAP, the remedy lies in an appeal to ARLA.

6.2 On appeal, any lack of "evidence" in support of an element *may* contribute to an appellant being able to show the element is unreasonable in light of the object of the Act: in which case the appeal against that element succeeds under s 83.[100] It may be easier for the appellant to meet the persuasive burden upon it. But there is no requirement *per se* for a PLAP to be evidence-based. The Council respectfully agrees with the CA's analysis.

6.3 If a PLAP is *not* appealed, it is adopted after public notification as provided for in s 87 of the Act. In this event, any "lack of evidence" to support the PLAP will be immaterial, because the PLAP is not "tested" before ARLA.

## 7. CA DID NOT FAIL TO HAVE ADEQUATE REGARD TO THE PURPOSE OF THE ACT[101]

7.1 The Council submits that the CA's discussion of s 3 of the Act was correct.[102] Woolworths submits that in interpreting the s 81(4) appeal standard the CA "failed to appreciate the significance of the Act's purpose provision".[103] The Council respectfully disagrees: the s 81 test requires an assessment of unreasonableness in light of "the object of the Act", rather than the purpose of the Act. The CA's decision properly reflects that.

98 Paragraph 3(b) of Woolworths' application for leave to appeal **[[**05.0003**]]**.
99 CA Judgment at [32] **[[**101.0036**]]**.
100 Provided also that the appellant has made a submission on the draft LAP: s83(2)(a).
101 Paragraph 3(a)(ii) Woolworths' application for leave to appeal **[[**05.0003**]]**.
102 CA Judgment at [19] to [21] **[[**101.0031**]]**.
103 Woolworths' submissions at [50].

7.2 The Council also disagrees with Woolworths' submissions that what amounts to a "reasonable system of control" is unchanged as between the SOLA and the SSAA. As the CA found, "the content of a reasonable system of control should be gleaned from the legislation itself and the legislative history".[104] None of this is to deny that under s 10 of the Legislation Act 2019, an Act must be interpreted in light of its purpose. However, that reference to "purpose" in s 10 must, in the present case, be taken as encompassing *both* ss 3 and 4 of the Act, not s 3 alone.

7.3 In any event, properly understood the CA decision does not rule out consideration of the impact of an element on licence holders, which Woolworths submits (and the Council agrees) is relevant to the question of unreasonableness. The argument that the CA erred in its failure to have adequate regard to s 3 rests on a misunderstanding of the CA's discussion of a "real and appreciable possibility" of reducing ARH.

7.4 More fundamentally, any error on the part of the CA in its consideration of s 3 does not taint ARLA's decision.

## 8. WOOLWORTHS' REVIEW GROUNDS ARE NOT MADE OUT

### ARLA's discussion of the precautionary principle

8.1 Both Woolworths and Foodstuffs alleged that ARLA erred by relying on the precautionary principle when faced with uncertainty as to whether an element would be effective in reducing ARH.[105]

8.2 Both the High Court and the CA concluded that the use of a precautionary approach when preparing a PLAP is available i.e. does not for that reason render an element unreasonable, albeit that the CA couched the concept in the language of a "real and appreciable possibility". The Council submits that both courts were correct to find that a precautionary approach could be used when preparing a PLAP, and that it was quite proper for ARLA to consider that the Council was entitled to take a precautionary approach.

104 CA Judgment at [21] **[[**101.0032**]]**.
105 Foodstuffs' statement of claim at [36.2] **[[**101.0120**]]**; Woolworths' amended statement of claim at [6.1] **[[**102.0243**]]** and [6.3] **[[**102.0244**]]**.

8.3 ARLA expressly referred to the "precautionary principle" or a "precautionary approach" in three passages: at paragraphs 40 to 43, 113 and 131.[106] It also *alluded* to the precautionary principle in paragraph 146, when setting out its conclusions in relation to element 1:[107]

> Given this evidential basis for the closing hour restriction, 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.

8.4 It is inherent in the object of the Act that there may be uncertainty as to whether, or to what extent, a possible measure will minimise ARH. To conclude that an element is unreasonable because its effect is not certain would be to undermine the statutory object.

8.5 Recognition of the availability of a precautionary approach in the formulation of a LAP, when there is a sufficient evidential foundation for it,[108] first occurred under the SOLA in *My Noodle.*[109] The issue that led to the Court of Appeal's statement of the precautionary principle in that case was whether a council could adopt a policy regarding trading hours that would be applied as a blanket provision in liquor licences, notwithstanding a lack of certainty as to whether it would help reduce liquor abuse.[110]

8.6 While the CA did not rely on *My Noodle*, the issue in that case is highly analogous to the question facing a local authority when developing a LAP under the Act. The Act's object, in particular its emphasis on minimising alcohol-related harm, applies equally to an alcohol policy as to an alcohol licensing decision, and involves responding to risk rather than (necessarily) certainty.[111] A precautionary approach can be appropriate in such circumstances, and irrespective of the CA's approach, the approach ARLA took was open to it.

8.7 In the present case, the effectiveness of the proposed 9pm closing time as a means of reducing ARH (which would necessarily carry through into off-licence conditions) had been called into question by

106 ARLA's Decision at [40]-[43] **[[**103.0446**]]**, [113] **[[**103.0457**]]**, and [131] **[[**103.0460**]]**.
107 ARLA's Decision at [146] **[[**103.0463**]]**.
108 Besides ARLA's Decision, see also *Hospitality New Zealand Incorporated v Tasman District Council* [2014] NZARLA PH 846, *B & M Entertainment Limited v Wellington City Council* [2015] NZARLA PH21-PH28 at [18] and [80], *Foodstuffs North Island Limited v Thames-Coromandel District Council* [2015] NZARLA PH 129-131 at [21] and [24],and *Foodstuffs South Island Limited v Dunedin City Council* [2016] NZARLA PH21-26 at [24]-[26].
109 *My Noodle Ltd v Queenstown-Lakes District Council* [2010] NZAR 152.
110 *My Noodle Ltd* at [68].
111 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882.

Foodstuffs and Woolworths on their appeals to ARLA, which is why ARLA referred to *My Noodle* and the precautionary approach.

8.8 While *My Noodle* was decided under the SOLA, the High Court has continued to regard the precautionary principle as relevant to licensing decisions under the SSAA. In *Lion Liquor Retail* Clark J found, citing *My Noodle*, that the Authority "is not required to be sure that particular conditions will reduce liquor abuse".[112] Her Honour then stated:[113]

> . . . the Act does not countenance the continuation of high levels of alcohol-related harm. The Act requires minimisation of the alcohol-related harm. It is not necessary to establish, as the Authority required, that the proposed operation "would be likely to lead to" alcohol related harm. The task of the DLC was to respond to the risk and it did so.

8.9 It is important not to overstate the implications of this recognition of a precautionary approach. The approach may be used where there is sufficient evidence (but which falls short of establishing certainty) that a measure will assist to achieve the object of the Act. A council is entitled to impose the measure to test whether its expected effect will be achieved in reality. But the precautionary principle is not a substitute for, or a gloss on, the correct legal test set out in ss 81 and 83 of the Act; and neither ARLA nor the CA treated it as such (noting the slight differences between ARLA and the CA's approaches).

8.10 The CA was also correct to dismiss Woolworths' submission that if a precautionary approach is to be used "ARLA must adopt a specific hypothesis and incorporate specific provision for testing the hypothesis by measuring harm and the effects of the policy elements". As the CA said, the submission misunderstands *My Noodle* in which the Court employed the precautionary principle by analogy; while the SSAA has an in-built requirement for LAPs to be reviewed every 6 years, which makes further provision for "testing the hypothesis" unnecessary.

**Burden and standard of proof**

8.11 In its decision, ARLA said that there was an onus on an appellant to persuade it (ARLA) that a contested element was unreasonable in light of the object of the Act i.e. the appellant had the burden of proof (or at

112 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882 at [46(f)].
113 *Lion Liquor Retail Ltd* at [68].

least of persuasion).[114] The High Court disagreed, holding that ARLA's role under s 83 was "an evaluative task that does not lend itself to questions of proof".[115] In reaching this conclusion, the Court quoted at length and relied on *Re Venus NZ Limited*,[116] a licensing case engaging ss 104 to 106 of the SSAA, saying that the reasoning was "equally applicable" to a s 83 appeal.

8.12 With respect, the statutory tasks of deciding a licence application under s 104, and determining an appeal against an element in a PLAP under s 83, are very different. The former is a true evaluative task, involving receipt and consideration of the application, any objections and reports from authorities. There is no single test or threshold that an applicant must meet to obtain a licence. By contrast, an appeal under s 83 is an adversarial process, under which the appellant succeeds if ARLA is satisfied that its appeal ground is made out.

8.13 The Council respectfully agrees with the CA's analysis[117] of ARLA's decision on this point. In particular it agrees that ARLA did not mean to hold that an appeal under s 81 must be proven on the balance of probabilities (as opposed to an appellant having a persuasive burden); and that ARLA did not rest its decision on a burden of proof.

**Failure to give reasons**

8.14 Because this ground of review, while pleaded only by Woolworths, is argued only in Foodstuffs' submissions, we address this matter in our submissions in SC 140/2021.

## 9. RELIEF

9.1 In summary, it is submitted that the CA:

(a) Did *not* proceed on the basis an appeal under s 81 will only succeed if there is not a "real and appreciable possibility" that the element will minimise ARH;

(b) Did *not* consider proportionality considerations to be immaterial: rather it regarded as inapplicable two identified

114 ARLA's Decision at [31] **[[**103.0445**]]**.
115 HC Judgment at [66] **[[**102.0285**]]**.
116 *Re Venus NZ Limited* [2015] NZAR 1315.
117 CA Judgment at [50] **[[**101.0043**]]**.

principles from the bylaw cases that refer to the impact of a proposed measure on "rights".

9.2 However, if this Court disagrees with these submissions, and finds that the CA erroneously proceeded on a different basis, there is no need for this Court to revisit the orders made by the CA, because ARLA itself did not make these errors in the judgment under review. There can be no suggestion that *ARLA* considered an appeal under s 81 will only succeed if there is not a "real and appreciable possibility" that the challenged element would reduce ARH.[118] Further, ARLA's conclusions that elements 1 and 2 were not unreasonable in light of the object of the Act *were* informed by considerations of proportionality.

9.3 Equally, if this Court finds that the CA proceeded on the basis outlined in paragraph 9.1(a) and (b) above and was correct to do so, it can simply leave in place the CA's orders. Either way, ARLA's decision should stand.

9.4 Two final factors relevant to the granting of relief, should this Court find that the CA or more relevantly ARLA has erred, are the impact on third parties including the general public of Auckland; and that none of the errors alleged are those of Auckland Council. Despite that, through these proceedings the supermarkets have preserved the status quo under which national default trading hours continue notwithstanding community preference for their reduction. The Council has been unable to implement a PLAP which ARLA largely upheld in July 2017, after considering appeals from all sides. As the CA noted, "this litigation has dragged on long enough".[119]

9.5 These submissions are certified as suitable for publication under clause 7 of the Supreme Court Practice Note 2021.

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27 July 2022

118 It instead considered a council could adopt a precautionary approach when preparing a PLAP, following settled authority (*My Noodle*).
119 CA Judgment at [86] **[[**101.0057**]]**.

## LIST OF AUTHORITIES

### Cases

- *B & M Entertainment Limited v Wellington City Council* [2015] NZARLA PH21-PH28.
- *Foodstuffs South Island Limited v Dunedin City Council* [2016] NZARLA PH21-26.
- *Foodstuffs North Island Limited v Thames-Coromandel District Council* [2015] NZARLA PH 129-131.
- *Hospitality New Zealand Incorporated v Tasman District Council* [2014] NZARLA PH 846.
- *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC).
- *K v B* [2010] NZSC 112.
- *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA).
- *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA).
- *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882.
- *My Noodle Ltd v Queenstown-Lakes District Council* 2010 [NZAR] 152 (CA).
- *R v Awatere* [1982] 1 NZLR 644 (CA).
- *Re Venus NZ Limited* [2015] NZAR 1315.

### Legislation

- Local Government Act 2002, ss 10, 11, 83, 83AA, 86 and 87.
- Sale and Supply of Alcohol Act 2012.
- Sale of Liquor Act 1989.
- Senior Courts Act 2016, s78.

### Other

- Alcohol Reform Bill (236-2) (Commentary).
- *Collins English Dictionary* (2018 13th ed, HarperCollins, Glasgow).
- Hansard 11 December 2012, 686 NZPD 7349.
- Phillip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [24.6.2(2)]
- *Shorter Oxford English Dictionary* (2007 6th ed, Oxford University Press, New York).