In the Supreme Court of New Zealand
I Te Kōti Mana Nui
SC 140/2021

In the matter of	an application under the Judicial Review Procedure Act 2016 in respect of decisions made under section 83 of the Sale and Supply of Alcohol Act 2012 and on appeal from a decision of the Court of Appeal
Between	**Foodstuffs North Island Limited**
	Appellant
And	**Auckland Council**
	First Respondent
And	**Woolworths New Zealand Limited**
	Second Respondent
And	**Alcohol Regulatory and Licensing Authority**
	Third Respondent

Submissions on behalf of Foodstuffs North Island Limited

Date: 6 July 2022

Counsel certify that these submissions are suitable for publication under clause 7 of the Supreme Court Submissions Practice Note 2021

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Introduction

1 The appellant, Foodstuffs North Island Limited (**Foodstuffs**)[1], has been granted leave to appeal against a Court of Appeal decision (**CoA Decision**)[2], on judicial review of parts of a decision by the Alcohol Regulatory and Licensing Authority (**ARLA**)[3]. ARLA's decision (**ARLA Decision**)[4] was on appeals against elements of a provisional local alcohol policy (**PLAP**) proposed by the first respondent, Auckland Council (**Council**). The Sale and Supply of Alcohol Act 2012 (**Act**) governs the development of a PLAP and provides for appeals against elements of it.

Summary of argument

2 The Court of Appeal 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 alcohol-related harm. That interpretation is incorrect. It is inconsistent with the text of the appeal ground in the light of the Act's express purpose and its context.

3 On the correct interpretation of the appeal ground, that the relevant element is 'unreasonable in the light of the object of the Act', ARLA must make its determination in the light of, or having regard to, both limbs of the object of the Act. But, although considered in that context, what must be determined is still whether the element is unreasonable. The correct enquiry is therefore whether the element is consistent with a reasonable system of control over the sale, supply and consumption of alcohol, which system is intended to help achieve the twin limbs of the object of the Act. This requires a consideration of more than simply whether there is a possibility of the element reducing alcohol-related

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[1] Foodstuffs is the franchisor of the PAK'nSAVE, New World, Four Square and Fresh Collective supermarkets and grocery stores in Auckland. Many of those stores have off-licences issued under the Sale and Supply of Alcohol Act 2012.
[2] *Auckland Council v Woolworths New Zealand Ltd* [2021] NZCA 484. [[COA 101.0024]].
[3] The body established by section 85(1) of the, now repealed, Sale of Liquor Act 1989 and continued in existence by section 169 of the Sale and Supply of Alcohol Act 2012.
[4] *Redwood Corporation Limited v Auckland Council* [2017] NZARLA 247. [[COA 103.0437]].

harm. The other impacts of the element must be considered. An assessment must be made of whether the element would be proportionate. This will involve consideration of a range of matters including those which are mandatory considerations for the development of a PLAP.

4 Proceeding on the incorrect, overly narrow single focus, interpretation of the appeal ground led the Court of Appeal to the view that ARLA had given adequate reasons for its relevant decisions. However, in fact ARLA did not sufficiently state why it had rejected arguments based on proportionality.

5 Consequently, the appeal should be allowed. ARLA's relevant decisions should be remitted back to it for reconsideration in accordance with the correct interpretation of the appeal ground and with a direction that ARLA provide sufficient reasons for its decisions after that reconsideration.

Narrative of facts

6 Section 75 of the Act gives territorial authorities the power, but does not oblige them, to have an LAP and section 77(1) of the Act limits the matters on which there may be policies in an LAP to only any or all of seven specified matters relating to alcohol licensing.[5] The *effect* of any policy in an LAP is determined by the Act.[6]

7 In May 2012, Council first decided to develop a local alcohol policy (**LAP**).[7] Wishing to have an LAP, Council was required to first produce a draft local alcohol policy (**DLAP**). Section 78 of the Act specifies the

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[5] That list of matters is closed. However, while the Act expressly limits the *maximum* scope of a LAP, there is no *minimum* scope requirement. LAPs are also not required to apply, or apply consistently, across the whole of the relevant territorial authority's district, or to apply consistently across premises for which different types of licence are required. See section 75(2) of the Act.
[6] See section 45 in relation to maximum trading hours, sections 50 & 111 in relation to one-way door restrictions, sections 105, 108, 142 & 145 in relation to the issue of licences, sections 131 & 133 in relation to the renewal of licences and sections 109, 120, 133 and 146 in relation to the imposition of conditions on licences.
[7] Affidavit of Nadine Hopkins dated 15 June 2018 at [7]. [[COA 201.0001]].

matters to which Council was required to have regard when producing its DLAP. These include the location and opening hours of each licensed premises in the district, the demography of the district's residents, tourists and holiday-makers, and the nature and severity of the alcohol-related problems arising in the district.

8 The Council produced a DLAP and notified it for public consultation[8] in June 2014. Foodstuffs[9] made submissions on the DLAP as part of the required special consultative procedure. Council then produced and publicly notified its PLAP in May 2015.[10] Foodstuffs, along with a number of other parties including Woolworths,[11] filed appeals to ARLA against various elements of the PLAP, pursuant to section 81(1) of the Act.

9 There is only one permitted ground of any appeal against an element of a PLAP: that the element challenged is 'unreasonable in the light of the object of [the] Act' (**Appeal Ground**).[12] The twin limbed object[13] is that 'the sale, supply, and consumption of alcohol should be undertaken safely and responsibly', and that 'the harm caused by the excessive or inappropriate consumption of alcohol should be minimised'.

10 ARLA heard all of the appeals together in early 2017 and issued the ARLA Decision on 19 July 2017. ARLA has only a binary choice in determining an appeal against an element of a provisional local alcohol policy. It must either, if satisfied that the element *is* unreasonable in the light of the object of the Act, ask the territorial authority to reconsider

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[8] Pursuant to section 79 of the Act, utilising the special consultative procedure set out in section 83 of the Local Government Act 2002.
[9] Amongst others, such as Woolworths New Zealand Limited, previously named Progressive Enterprises Limited (**Woolworths**), and Redwood Corporation Limited (**Redwood**).
[10] Pursuant to section 80 of the Act.
[11] Also including Redwood, the Medical Officer of Health, the New Zealand Police, Super Liquor Holdings Limited, Glengarry Hancocks Limited and the Takapuna Residents Group, each having made submissions on the DLAP as part of the special consultative procedure. In addition to the parties who filed appeals, a number of other parties representing parts of the community appeared and were heard pursuant to section 205 of the Act (both in support of and in opposition to elements of the PLAP).
[12] Section 81(4) of the Act.
[13] Stated in section 4 of the Act.

that element, or if *not* satisfied that the element is unreasonable in the light of the object of the Act, dismiss the appeal.

11 In respect of many of the elements of the PLAP, ARLA dismissed the appeals.[14] However, ARLA allowed appeals in respect of several elements of the PLAP,[15] including the element prescribing maximum alcohol trading hours for off-licensed premises at clause 4.3.1 of the PLAP (**Off-licence Hours Element**). As required by section 83(2) of the Act, ARLA asked Council to reconsider those elements which it held to be unreasonable.

12 Section 84(1) of the Act gave the Council the option, on its reconsideration, of resubmitting an amended PLAP to ARLA, with each element found to have been unreasonable either deleted or replaced with a new or amended element.[16] On October 2017, Council resubmitted to ARLA an amended PLAP (**Resubmitted PLAP**) with element 4.3.1 replaced with an amended element[17] and the other elements which had been found to be unreasonable simply deleted.

13 Pursuant to section 86(1) of the Act, ARLA must deal with Council's Resubmitted PLAP as if it were an appeal against every new or amended element (i.e. the amended element setting maximum alcohol trading hours for all off-licensed premises). In addition, on 10 November 2017, Foodstuffs[18] filed a specific appeal against that amended element. That

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14 In particular, ARLA dismissed the appeals against all but two of nine 'local impacts reports' elements. Those elements state policies that Licensing Inspectors are to prepare 'local impacts reports' containing specified information and that ARLA or the DLC is to have regard to these reports when making certain licensing decisions. ARLA also dismissed appeals against elements relating to a 'temporary freeze' on the issue of new off-licences in specified parts of the Auckland region and a 'presumption' against the issue of new off-licences in specified areas.
15 Listed in paragraph [203] of the ARLA Decision. [[COA 103.0472]].
16 Council's other options were to appeal to the High Court or abandon its PLAP.
17 The amended clause 4.3.1 specified maximum off-licence trading hours of 7am to 9pm, Monday to Sunday, across the whole of Auckland and represented a change in the opening hour aspect of the specified trading hours from 9am to 7am.
18 And Woolworths.

appeal remains on foot, but has been stayed by ARLA pending the outcome of these judicial review proceedings.[19]

14 Because of section 83(4) of the Act, there was no ability for any appellant before ARLA to appeal ARLA's decisions where it dismissed appeals against elements of the PLAP. However, section 83(5) confirmed that section 83(4) did not limit or affect the Judicial Review Procedure Act 2016 and in November 2017 Foodstuffs filed its statement of claim (as did Woolworths) in the High Court seeking judicial review of aspects of ARLA's Decision.[20]

15 The High Court issued its decision granting Foodstuffs' and Woolworths' applications for judicial review on 27 February 2020 (**HC Decision**).[21] The High Court set aside, and remitted back to ARLA for reconsideration, its decisions in relation to the 9pm closing time aspect of the Off-licence Hours Element,[22] the elements of the PLAP providing for a temporary freeze and rebuttable presumption against the issue of new off-licences in specified areas (**Freeze and Presumption Elements**),[23] the elements of the PLAP requiring local impacts reports to be prepared and considered on applications for the issue of licences (**LIR Elements**),[24] and elements of the PLAP purporting to be policies on the issue of licences subject to discretionary conditions

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19 We note that the outcome of these proceedings may not directly alter the fact that ARLA must still hear and determine that appeal. But, the principles of law enunciated by this Court will assist ARLA in its consideration of whether the amended element 4.3.1 of the Resubmitted PLAP is unreasonable in the light of the object of the Act.

20 Another appellant before ARLA, Redwood, had also filed a statement of claim seeking judicial review of ARLA's Decision in October 2017. [[COA 101.0110]] & [[102.0228]].

21 *Woolworths New Zealand Limited v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293. [[COA 102.0264]].

22 Clause 4.3.1 of the PLAP. [[COA 103.0483]]. ARLA determined that element 4.3.1 as a whole was unreasonable in the light of the object of the Act and referred that element back to Council for reconsideration, but stated that this was only because of the morning hour aspect of that element. See the ARLA Decision at [158]–[160]. [[COA 103.0465]].

23 Clauses 3.2.1, 3.3.1, 3.3.2, 3.3.3, 4.1.2, 4.1.4, 4.1.5, 4.1.6 and 4.1.7 of the PLAP. [[COA 103.0480–103.0482]].

24 Clauses 3.1.1–3.1.5, 3.3.3, 4.1.1, 4.2.1–4.2.3 and 5.1.1 of the PLAP. [[COA 103.0479-103.0483]] & [[103.0487]]. The High Court finding that these elements were ultra vires the Act and therefore unreasonable in the light of the object of the Act. This aspect of the HC Decision was not appealed.

(**Discretionary Conditions Elements**).[25] The High Court held, amongst other things, that ARLA had erred in law by failing to give adequate reasons for its decisions and by improperly imposing a burden of proof to the civil standard on the appellants before it.[26]

16 In March 2020, Council appealed against parts of the HC Decision.[27] In April 2020, Woolworths filed a cross-appeal in respect of the HC Decision and both Woolworths and Foodstuffs filed memoranda advising that they supported the HC Decision on other grounds.[28]

17 The Court of Appeal issued the CoA Decision on 24 September 2021 granting Council's appeal and dismissing Woolworths' cross-appeal.

18 On the basis of the CoA Decision and those parts of the HC Decision which were not appealed, the position is that:

18.1 the ARLA Decision in relation to the Freeze and Presumption Elements and the Discretionary Conditions Elements stands.[29]

18.2 the ARLA Decision in respect of the Off-licence Hours Element stands. ARLA required Council to reconsider that element in its entirety, although ARLA noted that the request was made only on the basis of the 9*am* aspect of the element.

18.3 the HC Decision in relation to the LIR Elements stands. ARLA is required to reconsider the appeals against those

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25 Clause 4.4 of the PLAP. [[COA 103.0484]]. The High Court also granted Redwood's application for judicial review of the ARLA Decision and set aside and remitted back to ARLA for reconsideration its decisions on the definition of the 'City Centre' in the PLAP and the element setting on-licence closing hours in and outside that City Centre (clauses 2.1.1(a) and 5.3 of the PLAP). [[COA 103.0478 & 103.0488]]. See *Redwood Corporation Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971 at [15]–[18], [121]–[123], [126] and [128] (**Redwood Judgment**). That decision has not been appealed.

26 HC Decision at [97], [114] and [150]. [[COA 102.0293, 102.0300]] & [102.0312]].

27 As noted above, Council did not appeal the High Court's decision in relation to the LIR Elements. ARLA will be required to reconsider those elements irrespective of the outcome in this Court.

28 Pursuant to rule 33 of the Court of Appeal (Civil) Rules 2005.

29 Other than in connection with the Redwood Judgment.

elements in light of the High Court's finding that they are ultra vires the Act.[30] The Court of Appeal confirmed that the Appeal Ground will be made out where an element is ultra vires.[31]

18.4 in respect of each element that Council has been asked by ARLA to reconsider, the statutory process set out in sections 84 to 86 of the Act remains to be followed. In particular, where Council resubmits its PLAP with any new or amended element(s) that resubmission is required by section 86(1) to be dealt with as if it were an appeal against the new or amended element(s).

19 This Court has granted Foodstuffs' and Woolworths' leave to appeal against the CoA Decision in general terms.[32] However, this Court has advised that it is primarily interested in whether:[33]

> The Court of Appeal's judgment 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 policy challenged will minimise alcohol-related harm (so that proportionality considerations are not material) and, if so, whether this is correct.

The approach taken by the Court of Appeal

20 The primary issue before the Court of Appeal[34] was whether the High Court had erred in finding that ARLA had not given sufficient reasons for its decisions. At the core of that issue was consideration of the scope and meaning of the Appeal Ground. The High Court was unable to

[30] HC Decision at [189] and [214]. [[COA 102.0324]] & [[102.0329]].
[31] CoA Decision at [127]. [[COA 101.0073]].
[32] On the grounds set out in their respective applications for leave.
[33] *Woolworths New Zealand Limited v Auckland Council* [2022] NZSC 46 at [1]. [[COA.05.0016]].
[34] It was common ground before the Court of Appeal that ARLA was obliged to give reasons for its decisions. Counsel also note that the Court of Appeal agreed with the High Court that there is no burden of proof in an appeal to ARLA under section 81 (see CoA Decision at [52] [[COA 101.0043]]). However, the Court of Appeal disagreed that ARLA had 'meant to hold…that an appeal under s81 must be "proved" on the balance of probabilities' and therefore disagreed with the High Court that there had been any reviewable error (see CoA Decision at [54] [[COA 101.0044]]).

ascertain sufficient reasons in the ARLA Decision to establish that ARLA had properly understood and applied the Appeal Ground. The High Court therefore referred the relevant matters back to ARLA for reconsideration in light of the High Court's interpretation of the Appeal Ground and with a direction that reasons should be stated.[35]

21 In the ARLA Decision, ARLA stated that, by analogy with bylaw cases, proportionality principles apply. On that basis, it is likely that policies in a PLAP would be unreasonable in the light of the object of the Act if:[36]

> (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;
> (c) an element of the PLAP is manifestly unjust or discloses bad faith; or
> (d) an element is an oppressive or gratuitous [interference] with the rights of those affected.

22 The Court of Appeal, although accepting that ARLA's task is evaluative and that ARLA must decide for itself whether a given element is objectively unreasonable in the light of the object of the Act,[37] determined that ARLA had erred in holding[38] that the proportionality principles apply.[39]

23 The Court of Appeal said the proportionality principles used in bylaw cases do not apply to the Appeal Ground under the Act because 'the context is not the same'.[40] Specifically, the Court of Appeal took the

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[35] Those findings differed from the test set out by ARLA in the ARLA Decision at [30]–[32]. [[COA 103.0445]].
[36] ARLA Decision at [32]. See CoA Decision at [37]. [[COA 101.0038]]. See also *JB International Ltd v Auckland City Council* [2006] NZRMA 401 at [73]–[75].
[37] CoA Decision at [32] and [35]. [[COA 101.0036-0037]]. It was common ground that the High Court's incorporation of the concept of Wednesbury unreasonableness into the section 81 appeal test, or to view ARLA's jurisdiction through an administrative law lens, was incorrect.
[38] See [32] of the ARLA Decision. [[COA 103.0445]].
[39] CoA Decision at [39]. [[COA 101.0039]]. This was despite the appellant, the respondent, and the cross-appellant in the Court of Appeal all accepting that those proportionality principles did apply. Counsel note that ARLA did not participate in the hearing and advised that it would abide the decision of the Court of Appeal. The Medical Officer of Health appeared as an interested party and not as a respondent or appellant.
[40] CoA Decision at [39]. [[COA 101.0039]].

view that under the Act there is 'no antecedent right to sell alcohol that must be balanced against a given control on supply' and the concept of a 'reasonable' system of control, described in the purpose of the Act,[41] was 'not the same as it was under the 1989 Act'.[42]

24 The Court of Appeal considered that the content of the 'reasonable system of control' under the Act should be 'gleaned from the legislative history, including the Law Commission's report[43], which preceded the Alcohol Reform Bill,[44] and that the Law Commission had recommended not to retain the object of the 1989 Act,[45] incorporating instead, in the object of the Act, a definition of alcohol-related harm that was a 'significant departure' from the 1989 Act.[46]

25 Those factors, the Court of Appeal said, were not given sufficient weight by the High Court and led to the erroneous conclusion that the Act:[47]

> …strikes a balance between allowing safe and responsible consumption of alcohol and minimising the harm cause by excessive or inappropriate consumption…[and] recognises a freedom to sell, supply or consume alcohol, in a reasonably safe and responsible way, while at the same time recognising a community freedom to take reasonable steps to protect its members from the harms caused by excess or inappropriate consumption of alcohol, all of which are a cost and burden to the community as well as harmful to the individual consumer.

26 In addition, the Court of Appeal rejected the High Court's finding that the default provisions contained in the Act, which apply in the absence of a LAP, evidence Parliament's view on what will generally, subject to local needs, achieve the purpose and object of the Act.[48] Therefore, rather than requiring reason for a departure from the default provisions

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41 Section 3 of the Act.
42 Section 4 of the Sale of Liquor Act 1989 (**1989 Act**): CoA Decision at [41]. [[COA 101.0040]].
43 Law Commission *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010) (**Law Commission Report**): CoA Decision at [21]. [[COA 101.0032]].
44 Introduced on 8 November 2010 and implementing the Government's response to the Law Commission Report.
45 CoA Decision at [19]. [[COA 101.0031]].
46 CoA Decision at [17]. [[COA 101.0030]].
47 HC Decision at [54], [[COA 102.0280]], cited in the CoA Decision at [22]. [[COA 101.0032]].
48 CoA Decision at [23]–[25]. [[COA 101.0032-0033]].

of the Act[49] or 'tailoring to meet specific features of individual communities',[50] the Court of Appeal considered that an element of a PLAP is presumptively *not* unreasonable by virtu simply of the fact that it is proposed by the territorial authority (which the Court of Appeal considered was implementing a community preference).[51] The Court of Appeal stated that a policy in a LAP therefore 'need not be evidence-based'.[52]

27 As a result, the Court of Appeal considered that the sale, supply, and consumption of alcohol did not engage any rights or freedoms,[53] and that there were no relevant rights or freedoms to be weighed against any further restrictions imposed, or amendments made, by an LAP to the default system set out in the Act. Instead, said the Court of Appeal, a LAP 'need be no more than a local preference about a licensing matter'.[54]

28 On the Court of Appeal's view, the Appeal Ground did not require the chance of the element in fact reducing harm, and the likely degree of any reduction, to be weighed against the costs or impacts of the element on responsible sellers, suppliers and consumers. Rather, 'it sufficed that there was evidence of "a relationship" between [the element] and consumption and harm.[55] It was for that reason the Court of Appeal concluded that ARLA did not rest its decision on the inappropriate application of a burden of proof on the appellants before ARLA.[56] And that ultimately, in respect of the 9pm closing aspect of the Off-licence Hours Element, no reasons other than that 'there was a real and appreciable possibility that an earlier closing time would reduce alcohol-related harm' were required.[57]

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[49] As the High Court considered was necessary: HC Decision at [55]. [[COA 102.0280]].
[50] As the High Court considered may be necessary, if the purpose and object of the Act are to be met: HC Decision at [55]. [[COA 102.0280]].
[51] CoA Decisions at [32], [36] and [55]. [[COA 101.0036]], [[101.0038]] & [[101.0044]].
[52] CoA Decision at [32] and [40]. [[COA 101.0036]] & [[101.0039]].
[53] CoA Decision at [22] and [41]. [[COA 101.0032]] & [[101.0040]].
[54] CoA Decision at [110]. [[COA 101.0066]].
[55] CoA Decision at [54]. [[COA 101.0044]].
[56] CoA Decision at [54] [[COA 101.0044]].
[57] CoA Decision at [109] and [111]. [[COA 101.0066-0067]]. See also at [41]. [[COA 101.0040]].

29 In coming to that conclusion, the Court of Appeal rejected the submission that the matters a territorial authority is expressly required by the Act to consider when formulating each element of a PLAP (and the preceding DLAP)[58] are relevant considerations for ARLA in considering whether the Appeal Ground is made out in respect of any particular element of a PLAP.[59]

30 The Court of Appeal therefore mischaracterised the High Court's conclusions in respect of sufficiency of reasons as a rejection of certain evidence before ARLA linking off-licence trading hours with alcohol-related harm.[60] In fact, the High Court was simply recognising that ARLA's reference to evidence showed only that it had considered general alcohol-related harm in Auckland. ARLA's statements of evidence did not go further to show that ARLA had *weighed* any other considerations in concluding that the 9pm aspect of the Off-licence Hours Element was not unreasonable in the light of the object of the Act. ARLA's references to evidence also did not show that it had grappled with Foodstuffs' and Woolworths' arguments that the Off-licence Hours Element was a disproportionate response to perceived problems, for example because it failed to differentiate between different types of off-licensed premises and applied indiscriminately to stores and customers throughout the entirety of the Auckland region despite variations between different parts of that region.[61]

31 Of course, on judicial review, the Court is not to itself determine whether the appeal ground is made out. The task undertaken by the

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58 See section 78 of the Act and [29] of the CoA Decision. [[COA 101.0034]].
59 The Court of Appeal appeared to consider that the section 78 matters were matters only for the Council and not ARLA. See CoA Decision at [31] and [110]. [[COA 101.0035]] & [[101.0066]].
60 CoA Decision at [100]–[104]. [[COA 101.0064]].
61 See the HC Decision at [96]–[97]. [[COA 102.0293]]. As explained by this Court in *Trans-Tasman Resource Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801; NZSC 127 at [157] & [161], where there are a number of factors to be taken into account, the decision-maker needs to explain, albeit briefly, the way in which the balance has been struck, having set out the evidence for the findings of fact on which that balance depends. What is required is for the decision-maker to indicate an understanding of the nature and extent of the relevant interests said to apply, and why those interests were outweighed by other factors, or sufficiently accommodated in other ways.

High Court was instead to determine whether the ARLA Decision made apparent that ARLA had in fact applied the correct test by examining its reasons for rejecting appellants' arguments. With respect, the High Court was correct that those reasons were not self-evident from ARLA's reference to evidence and submissions. Of course, the fact that an argument was rejected does not itself provide a reason *why* it was rejected. Nor is it enough to say that there was in fact evidence sufficient to support a decision on some assumed analysis. And in the absence of reasons, it is not self-evident that ARLA applied the Appeal Ground correctly. As the Court of Appeal said in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*:[62]

> Inferences drawn from the result because there is no other way to discern why the result has been reached can be wrong, and tantamount to guess work. That is why the authorities we have mentioned have placed so much importance on the giving of reasons.

32 As noted above, the Court of Appeal expressly rejected the approach taken in the High Court, asserted that policies in a LAP need not be evidence-based, and found that ARLA was wrong to state that the Appeal Ground required a proportionality assessment. In addition, and as a result, the Court of Appeal considered that ARLA's reference to evidence of alcohol-related harm and a correlation with existing off-licence trading hours was a sufficient statement of reasons without the need for any discussion of weighing the effects of the proposed new restriction on responsible sellers, suppliers and consumers. Consequently, the Court of Appeal must be taken to have found that ARLA had in fact stated the correct test when it said, in respect of the Off-licence Hours Element, that 'if the Council considers that the 9pm aspect has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality'.[63]

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[62] [2019] NZCA 175 at [59].
[63] ARLA Decision at [146] [[COA 103.0463]], CoA Decision at [80], [94], [109] and [111]. [[COA 101.0054, 101.0060]] & [[101.0066-0067]].

33 The Court of Appeal itself adopted the analysis that the Appeal Ground does not include any proportionality assessment and does not require ARLA to weigh the possible impact of an element on reducing alcohol-related harm against any negative costs or impacts on any members of the community. In particular, in paragraphs 53, 62 and 109 of the CoA Decision, the only consideration referred to is whether there was a 'real and appreciable possibility' that an element might reduce alcohol-related harm.

34 Therefore, the answer to the first question posed by this Court when granting leave is that the CoA Decision *did* proceed on the basis that an appeal to ARLA will only succeed if there is not a 'real and appreciable possibility' that the element of the PLAP challenged will minimise (or at least reduce) alcohol-related harm (so that proportionality considerations are not material).

The correct approach to the Appeal Ground

35 Determining the correct meaning of the Appeal Ground is obviously a matter of statutory interpretation. Section 10(1) of the Legislation Act 2019 applies. The meaning of the Appeal Ground 'must be ascertained from its text and in the light of its purpose and its context'.

36 The approach adopted by the Court of Appeal is at odds with the text of the Appeal Ground in sections 81(4) and 83 of the Act, in light of the purpose and context.

37 In particular, the Court of Appeal's approach effectively re-writes the Appeal Ground from 'the element is unreasonable in the light of the object of the Act' to 'there is no real and appreciable possibility that the element will reduce alcohol-related harm'. These words could have been, but were not, used by Parliament. The Court of Appeal's approach would remove the concept of 'unreasonable' by giving it a singular narrow definition as if the words in the Act were 'unreasonable

in that the element has no real and appreciable possibility of reducing alcohol-related harm'. Again, these words were not used by Parliament.

38 The Court of Appeal's proposed interpretation of the Appeal Ground is also inconsistent with the express purpose stated in the Act. Contrary to the Court of Appeal's view, the Act's purpose is not a singular focus on minimising or reducing alcohol-related harm. The purpose includes to establish a new system of control over the sale and supply of alcohol. A PLAP (and subsequent LAP) is part of that system of control. The purpose states that the system is to be reasonable. Therefore elements of a PLAP are to be reasonable and consistently, the Appeal Ground requires a proper assessment of whether an element is unreasonable, rather than a consideration of only whether the element has a possibility of reducing alcohol-related harm.

39 The Court of Appeal's approach is also inconsistent with the context of the Act as shown by the legislative history material.

40 The Court of Appeal placed much weight on the fact that the object of the Act is not the same as the object of the predecessor legislation, the 1989 Act. However, although the Act created a new and different system of control over the sale, supply and consumption of alcohol, it is that new system which the Act's purpose expressly says is to be reasonable. And, of course, the exercise for the Court is to interpret the actual words of the Act, not to apply what the Court considers Parliament might or ought to have enacted to address concerns of alcohol-related harm.

41 On a correct interpretation of the Appeal Ground, ARLA must make its determination in the light of, or having regard to, both limbs of the object of the Act. But, although considered in that context, what must be determined is still whether the element is unreasonable. In other words, the enquiry is whether the element is consistent with a reasonable system of control over the sale, supply and consumption of alcohol,

which system is intended to help achieve the twin limbs of the object of the Act.

42 On that basis, an appeal will not succeed *only* if there is not a real and appreciable possibility that an element will reduce alcohol-related harm. An appeal may succeed if, for example, there is a countervailing possibility that the element will actually increase alcohol-related harm (through some unintended consequence). Or, an appeal may succeed if the possibility of negative effects of the element on responsible sellers, suppliers and consumers of alcohol is disproportionate having regard to the existing level or nature of alcohol-related harm or the possibility of the element reducing that alcohol-related harm (considering both the chance that there will be a reduction and the expected extent and nature of any such reduction).

43 Sections 3 and 4 of the Act set out the purpose and object of the Act.

44 The Appeal Ground expressly refers to the object of the Act. The question of whether an element of a PLAP is unreasonable is to be determined in the light of that object. Both the Appeal Ground itself and the object of the Act are to be interpreted in the light of the purpose of the Act.

45 The Court of Appeal began with considering the object of the Act, because 'an appeal against an element of a proposed local alcohol policy must be decided by reference to it'.[64] The Court placed much weight on the fact that the legislature had chosen 'as the Law Commission had recommended' not to retain the object of the 1989 Act.[65] The Court quoted the Law Commission's rejection of submissions arguing that the object of the 1989 Act should be retained.[66]

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[64] CoA Decision at [15]. [[COA 101.0030]].
[65] CoA Decision at [19]. [[COA 101.0031]].
[66] CoA Decision at [11]. [[COA 101.0029]].

46 However, the passage quoted from the Law Commission should be read with the understanding that Parliament chose not to adopt the object section recommended by the Law Commission. Therefore, while the object of the Act is not the same as the object was in the 1989 Act, nor is the object in the Act the one recommended by the Law Commission.

47 The 1989 Act did not have a purpose provision, but set out its object in section 4:

> (1) The object of this Act is 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.
>
> (2) The Licensing Authority, every District Licensing Agency, and any court hearing any appeal against any decision of the Licensing Authority, shall exercise its jurisdiction, powers, and discretions under this Act in the manner that is most likely to promote the object of this Act.

48 The object was to establish a system of control that was to be reasonable. The aim of the system was to contribute to the reduction of liquor abuse. Contrary to the suggestion in paragraph 20 of the CoA Decision, the establishment of a reasonable system of control was not the 1989 Act's 'end in itself'. As was reinforced by section 4(2), contributing to the reduction of liquor abuse was the 'end' objective.

49 The Law Commission recommended that the object section of the new legislation 'should set out the purposes of the legislation *in greater detail* than the 1989 Act.'[67] The Law Commission's view was that '[s]etting out the object *with greater precision* will give the statute a better prospect of achieving its purpose and will also ensure the central principles underpinning the scheme are clear.'[68]

50 As to the qualification in the object of the 1989 Act ('so far as that can be achieved by legislative means'), the Law Commission said:[69]

[67] Law Commission Report at [5.38] (emphasis added).
[68] Law Commission Report at [5.39] (emphasis added).
[69] Law Commission Report at [5.40] (emphasis added).

> We do not doubt that a legislative licensing regime can only go so far. The legislation will speak for itself in terms of the measures it puts in place. We do not consider it *necessary* to articulate in the object provision that the legislation is only intended to achieve that which is possible to achieve through legislation.

51 Contrary to the impression that might be obtained from the CoA Decision, the Law Commission did not recommend any change from the objective for the system of control in respect of alcohol to be 'reasonable'. In fact, the Law Commission said:[70]

> 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 object of the new Act … We recognise it is *essential* that, in addition to providing a focus on the key alcohol-related 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.

52 The Law Commission also noted a submission from the alcohol industry in support of including recognition that the system of control is for the benefit of the community. The Commission said 'we agree this is a helpful way of describing the purpose of the licensing regime, and have included this in our proposed object'.[71]

53 Therefore, it is clear that the Law Commission's recommendation for change was not that the system of control should no longer be reasonable, or that reasonable should somehow have a new meaning under the new legislation. Instead, the Commission's recommended change was for there to be a new focus with the Act's aims related directly to the reduction of alcohol-related harms, rather than simply liquor abuse. The Commission said:

> We consider it to be essential that the object of the new Act sets out aims that relate directly to the broad spectrum of alcohol-related harms. We are convinced that the current state of alcohol-related harms means a new

[70] Law Commission Report at [5.41] (emphasis added).
[71] Law Commission Report at [5.41].

> approach is warranted. The object of the new Act should signal this. The legislation needs to take a wider focus than that of simply contributing to the reduction of liquor abuse. Preventing liquor abuse is clearly important, but there are wider effects of alcohol use and misuse that should be emphasised, such as crime, disorder, public health, accidents, the amenity of public places and the resource use of our public services. The problems related to alcohol in New Zealand are at a point where a more proactive approach to addressing harms is needed.

54 On that basis, the Law Commission recommended that the object of the new legislation be:

> The object of this Act is to establish a reasonable system for the sale, supply and consumption of alcohol for the benefit of the community as a whole, and in particular to:
>
> (a) Encourage responsible attitudes to the promotion, sale, supply and consumption of alcohol;
>
> (b) Contribute to the minimisation of crime, disorder and other social harms;
>
> (c) Delay the onset of young people drinking alcohol;
>
> (d) Protect and improve public health;
>
> (e) Promote public safety and reduce public nuisance; and
>
> (f) Reduce the impact of the harmful use of alcohol on the Police and public health resources.

55 That object was however not adopted in the Act. As noted, the Act contains both purpose and object provisions. The Law Commission's recommended purpose of establishing a reasonable system of control was adopted. However, in contrast to the Law Commission's recommendation, the second limb of the object in the Act was limited to only that harm which is caused by the 'excessive or inappropriate' consumption of alcohol, i.e. as the 1989 Act had referred to liquor 'abuse', not the consumption of alcohol per se.

56 The listing of types of harm caused by excessive or inappropriate consumption and the focus on those harms is certainly a change from the object provision in the 1989 Act. However, that change does not detract from the purpose of establishing a system of control that is reasonable. That remains an express purpose of the Act. Therefore, contrary to the

suggestion in paragraph 20 of the CoA Decision, the difference between the object of the 1989 Act and the purpose and object of the current Act is not very significant to the exercise of statutory interpretation required in the present case.

57 The Act has of course established a 'new' system of control. It of course has different features to the system of control under the 1989 Act. One of the new features is the ability for territorial authorities to have local alcohol policies. However, such policies will be part of the system, which Parliament intended to be reasonable.

58 The objective of a reasonable system of control was not some narrow or single focus on reducing alcohol-related harm. The concept of reasonableness was the usual one, incorporating the principles of proportionality and cost/benefit assessment.

59 This is first reflected in the Government's terms of reference to the Law Commission, which expressly required the Law Commission to deal with 'the need to ensure the appropriate balance between harm and consumer benefit' and to 'ensure that unnecessary and disproportionate compliance costs are not imposed by the licensing system.'[72]

60 That approach is further reflected in the fact that the Government and then Parliament did not accept key aspects of the Law Commission's recommendations. Of particular relevance for the present case:

60.1 The Law Commission recommended that the new legislation provide for LAPs (which were not provided for under the 1989 Act). However, the Government rejected the Commission's recommendation that it be *mandatory* for each territorial authority to adopt a LAP.

[72] Law Commission Report at vi.

60.2 Also, the Government did not adopt the Commission's recommendation that LAPs could alter maximum trading hours only by *reducing* them from the 'default' hours that would otherwise apply under the Act. The Government and then Parliament provided the ability for an LAP to *extend* maximum permitted alcohol trading hours.

60.3 The Law Commission recommended that the default maximum trading hours for off-licences should be 9am to 10pm (reduced from 24-hour trading permitted under the 1989 Act). However, the Government rejected that recommendation, instead adopting default hours of 7am to 11pm.

61 It can also be noted that where the Law Commission recommended the new legislation be called the Alcohol Harm Reduction Act, the actual name adopted was merely the Sale and Supply of Alcohol Act.

62 The rejection of the Commission's recommendation that LAPs be mandatory is significant. Because no part of New Zealand is required to have an LAP, Parliament must be taken to have considered that the purpose and object of the Act could be achieved by the provisions of the Act itself, without any further restrictions. In relation to maximum off-licence trading hours, Parliament must be taken to have considered that the purpose and object of the Act could be achieved by those hours being 7am to 11pm throughout New Zealand. This is unsurprising, since the Act provides that any off-licence can be issued subject to conditions prescribing more restrictive maximum trading hours.[73]

63 It is also particularly significant that the Act allows for a LAP to provide for maximum off-licence trading hours *more extensive* than the default hours.[74] Parliament must be taken to have considered that the purpose

[73] Section 116(2) of the Act. Licensing decision-makers make these decisions on the basis of local considerations and the particular characteristics and circumstances of the licensee and the community in which it sits.
[74] Section 45 of the Act.

and object of the Act may be able to be achieved even with maximum trading hours greater than the default hours specified in the Act. The Court of Appeal's interpretation of the Appeal Ground is inconsistent with the ability for an LAP to provide for more extensive maximum trading hours.

64 The Government's response to the Law Commission Report was set out in the Cabinet Paper dated 5 August 2010, which the Court of Appeal referred to.[75] Of particular relevance to the current case:[76]

64.1 After noting the Law Commission's recommendation that LAPs include 'local *restrictions* on the national hours prescribed in statute for the opening and closing of premises', the then Minister of Justice proposed however that LAPs could contain 'local restrictions on *or extensions* to the national maximum trading hours'.[77]

64.2 After noting the Law Commission's recommendation that all territorial authorities be required to adopt an LAP, the Minister proposed however that LAPs be voluntary 'recognising that some communities may not desire further restrictions or extensions over and above the legislation ... where an LAP is not adopted, the national framework would apply.' The Minister took the view that Communities should not have to incur the cost of producing an LAP if they did not wish to.[78]

64.3 After noting the Law Commission's recommendation for maximum national trading hours of 9am to 10pm (intended to reduce opportunities for excessive consumption and alcohol-related harm), the Minister proposed *more extensive* hours of 7am to 11pm. He said 'in considering maximum trading

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75 CoA Decision at [13]. [[COA 101.0029]].
76 Office of the Minister of Justice, Cabinet Paper *Alcohol Law Reform*, 5 August 2010.
77 At [79] and [80] (emphasis added).
78 At [68] and [71].

hours, it is important to balance the aim of reducing alcohol-related harm with the impacts on licensees on responsible drinkers'. In relation to the proposed opening hour, the Minister said 9am would achieve 'little reduction in exposure to alcohol, while early morning shoppers would be inconvenienced.' And in relation to the Law Commission's 10pm proposed closing hour, the Minister said 'a later closing hour of 11pm for off-licences would also accommodate late-night shoppers'.[79]

65 Consistently, in the Cabinet Paper, in addition to recognising the extent and impact of alcohol-related harm, the Minister also stated that 'alcohol is often used safely and enjoyed by people as a part of social interaction and relaxation. In this way, alcohol provides benefits to individuals and society. Its manufacture, sale and export also provide economic benefits to New Zealand.'[80] The Minister's express aim for the alcohol legislation reform was to minimise the regulatory impact on New Zealand's economic performance overall and 'target those who drink excessively, with little impact on low or moderate drinkers'.[81] The Minister said 'I want to reduce harm especially crime and victimisation caused by heavy episodic drinking. I do not, however, want to unduly inconvenience low and moderate drinkers.'[82]

66 Each of the proposals by the Minister referred to above were carried through to the Alcohol Reform Bill and then the Act. The Bill was discussed in a Departmental Report that stated the view that the purpose and object clauses 'reflect the balance between the different interests at play (eg,: health, social, economic), but with a specific focus on harm from excessive or inappropriate consumption.'[83]

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[79] At [126], [131] and [133].
[80] At [46].
[81] At [58].
[82] At [9].
[83] Alcohol Reform Bill Departmental Report for the Justice and Electoral Committee: Part One (Social Policy and Justice Group, 2011) at [116] (**Departmental Report**). In relation to LAPs

67 These materials are all consistent with the interpretation of the Appeal Ground as set out in paragraphs 41 and 42 above (i.e. a consideration that, while in the light of the object of the Act, requires a proportionality assessment having regard to matters wider than simply whether the proposed element has a real or appreciable possibility of reducing alcohol-related harm).

68 Also consistent, are the speeches when the Bill was introduced to the House for its first and third readings. When he introduced the Bill, the then Minister of Justice, Hon. Simon Power, said:[84]

> … we must achieve a balance. Addressing harm must be weighed against the positive benefits associated with responsible drinking. The Government's approach is, therefore, a considered, integrated and balanced package that targets harm without penalising responsible drinkers.

69 When introducing the Bill (along with two related amendment Bills) for third reading the Hon. Judith Collins, who was then the Minister of Justice, said:[85]

> Some people, including members of this House feel that the Bills do not go far enough. However, they strike a sensible balance and deal with the considerable harm that alcohol causes, without unfairly affecting responsible drinkers.

70 Again consistent, specifically in relation to the Appeal Ground, the Cabinet Paper said:[86]

> LAPs would need to be consistent with the primary legislation. *This means that any restriction included in an LAP would need to be a reasonable control and not unduly restrict the sale and supply of alcohol. For example, the creation of dry areas could be deemed to be an unreasonable control.* Once an LAP has been consulted on and agreed by the local authority, the Commission proposes an appeal right to the national licensing tribunal for

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specifically, see [366], which stated it is 'necessary to strike an appropriate balance between allowing community control and national consistency and the associated effects on the operating requirements for businesses'.

84 (11 November 2010) 668 NZPD 15251.

85 (11 December 2012) 686 NZPD 7348.

86 At [83], see also the Law Commission Report at [7.52], (emphasis added).

those who submitted on the LAP. An appeal process would ensure a degree of national consistency and quality control in LAPs.

71 The interpretation of the Appeal Ground for which Foodstuffs contends is also consistent with the overall scheme of the Act, particularly as it applies to individual licensing decisions. When deciding whether to issue or renew a licence, the decision-maker is required to have regard to the object of the Act.[87] However, this does not detract from the overarching requirement for the licensing system to be reasonable. His Honour Gendall J recognised in *Christchurch Medical Officer of Health v Vaudrey*[88], that the concept of reasonableness 'pervades the entirety of the Act'. His Honour held that determining whether a restriction on a licensee, a licence condition[89], is reasonable (or unreasonable) requires a proportionality assessment. This involves weighing the likely benefits to be obtained, in terms of helping to achieve the object of the Act, against the costs or 'sacrifices' to be incurred.[90]

72 The Court of Appeal considered that there was no basis for a proportionality assessment, because said the Court, there 'is no antecedent right or freedom to sell or supply alcohol'[91] and 'there is no antecedent right to sell alcohol that must be balanced against a given control on supply'.[92] In fact, prior to the Off-licence Hours Element coming into force, off-licensees have existing legal rights to sell and supply alcohol and people are free and legally entitled to purchase.[93] Those rights are antecedent to and would be reduced by the element. If brought into force, the element would override existing licence rights. The restrictions in the element would not only affect subsequently granted licences.[94]

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87 Sections 105(1)(a) & 131(1)(a) of the Act.
88 [2015] NZHC 2749; [2016] 2 NZLR 382.
89 Pursuant to section 117 of the Act.
90 See in particular at [101], [103] & [83]. This aspect of Gendall J's judgment was not the subject of the subsequent appeal to this Court.
91 COA Decision at [22]. [[COA 101.0032]].
92 COA Decision at [41]. [[COA 101.0040]].
93 Provided they are 18 years or older and not intoxicated at the time.
94 Sections 45 and 90 of the Act.

73 The Court of Appeal also criticised the High Court's view that the default maximum off-licence trading hours in the Act are a general standard 'from which there should be reason for departure'.[95] The Court of Appeal said that the Act establishes no presumption in favour of the default hours and that there is nothing requiring 'that a local authority justify departure from those hours'.[96]

74 It is not at issue whether *Council* needs to justify its proposal to depart from the default hours. The question is simply whether the proposed departure would be 'unreasonable in the light of the object of the Act'. The default hours define existing rights of licensees (where their licence conditions do not impose more restrictive hours). Therefore, the default hours are the baseline against which the effect of the proposed element must be assessed. Even if the Court of Appeal's overly narrow interpretation of the Appeal Ground were correct, assessing whether the element had a real and appreciable possibility of 'reducing' alcohol-related harm, requires comparison with the status quo, i.e. the default hours. A departure from the default hours will be struck down on appeal if it is *unreasonable* in the light of the object of the Act. Therefore, with respect, the High Court was right to say that there should be reason for a departure. By definition, a restriction without reason is unreasonable.

75 Because a correct consideration of whether the Appeal Ground is made out in respect of an element will involve a proportionality assessment, ARLA should consider such of the matters set out in section 78(2) as are raised by the appeal. Those matters are mandatory considerations to be taken into account when a DLAP and then a PLAP is produced by a territorial authority. They are therefore matters which the Act identifies as relevant, because they inform the scope and effect of any element in a PLAP.

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[95] CoA Decision at [25]. [[COA 101.0033]].
[96] CoA Decision at [25]. [[COA 101.0033]].

76 The Court of Appeal said that it would be wrong to cite section 78 as the source of an obligation on ARLA to give reasons for the Off-licence Hours Element failing to discriminate by area and population type. With respect, Foodstuffs does not make that argument. Foodstuffs' position is that ARLA failed to give adequate reasons for rejecting, and therefore may have failed to have proper regard to, the argument Foodstuffs made that the Off-licence Hours Element was unreasonable because it would be disproportionate in some parts of the Auckland region. The source of the obligation on ARLA to give reasons is not section 78, but the requirements of open justice, discipline on decision-makers, and the need for the Court to exercise its supervisory jurisdiction to assess a decision's lawfulness.

77 The Court of Appeal apparently considered that ARLA did not need to give reasons for rejecting Foodstuffs' argument based on the variation between different parts of the region.[97] The Court of Appeal relied on the fact that although section 75(2) allows for a LAP to provide differently for different parts of a district, it does not *require* that, and the Court's view that in some circumstances there *may* be good reason not to differentiate.[98] However, with respect, Foodstuffs' argument was not that an element will necessarily be unreasonable if it is to apply in a blanket fashion across a whole district. But, the proportionality assessment that ought to have been undertaken by ARLA required *consideration* of the effects of the proposed element across the region, including whether it would be disproportionate in any particular part of that region. It would then be a matter for ARLA to determine whether the element was unreasonable as a result, having regard to the fact that

[97] These variations and the prospect that they would require different approaches in the PLAP were expressly recognised by the Council itself in its explanatory document to the PLAP. See for example at [16] and [75]. [[COA 103.0535]] & [[COA 103.0543]]. See also the Departmental Report at [353], where it was noted that Council considered it particularly important for Auckland that LAPs could apply in different ways to different areas and that the term 'local' was confusing in the Auckland context. The Council's own evidence established great diversity in demographics and alcohol-related harm throughout Auckland (see Rebecca Turner's brief at Table 8, within her paragraph 6.5, [[COA 203.0429-0430]]).
[98] CoA Decision at [31] and [110]. [[COA 101.0035]] & [[COA 101.0066]].

an LAP is *able* to be tailored to meet different needs of different areas within Council's district.[99]

78 On the basis set out, the answer to the second question posed by this Court when granting leave is that it was not correct for the Court of Appeal to proceed on *its* view of the Appeal Ground.

Relief sought

79 For the reasons set out above, the Court should allow Foodstuffs' appeal and reinstate the HC Decision remitting the Off-licence Hours Element and the Freeze and Presumption Elements back to ARLA for reconsideration.[100] That reconsideration should be undertaken by application of the Appeal Ground as set out in paragraphs 41 and 42 above and ARLA should be directed to provide sufficient reasons for its decisions after that reconsideration.

80 In relation to ARLA's reconsideration it can be noted that the Court of Appeal rejected Foodstuffs' submission that the correct statutory process is that a decision to amend a PLAP can be made by a territorial authority only *after* ARLA has referred an element back to the territorial authority for its consideration.[101]

81 The issue is of significance as a matter of principle. In the present case the High Court found that the LIR Elements were ultra vires the Act. This was not appealed. ARLA will therefore be required to refer those elements back to Council for reconsideration.[102] However, the LIR Elements are referred to *within* the Freeze and Presumption Elements[103]

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[99] As was stated by the Minister of Justice in the Cabinet Paper at [84].
[100] Pursuant to the HC Decision ARLA must also reconsider the LIR Elements.
[101] Pursuant to section 84(1) of the Act. See the CoA Decision at [123]. [[COA 101.0071]].
[102] CoA Decision at [120] and [127]. [[COA 101.0070]] & [[101.0072]].
[103] See clause 3.3.3 of the PLAP. [[COA 103.0481]].

and, in addition, were expressly relied on by ARLA in dismissing the appeals against those elements.[104]

82 Council submitted, following the HC Decision, that its intention was to simply delete the reference to the LIR Elements from the Freeze and Presumption Elements, specifically clause 3.3.3(a) of the PLAP.[105] However, under the Act, the decision whether to amend or entirely delete an element of a PLAP can only be made by a territorial authority *after* ARLA has directed that territorial authority to reconsider that element.[106] This may have important implications depending on the particular facts of any given case.

83 ARLA does not (and nor does the Court of Appeal on judicial review) have the power to amend or redraft any element of a PLAP. While a territorial authority can amend its PLAP, it can only do that *after* being asked to reconsider by ARLA and an amended PLAP can only be brought into force after resubmission to ARLA. Such a resubmission must be dealt with as if it were a fresh appeal against every new or amended element.[107]

84 In the present case, the resubmission of the Freeze and Presumption Elements with the reference to the LIR Elements deleted would be an amendment to those elements and therefore required to be dealt with as a fresh appeal. While ARLA would be able on that fresh appeal to take into account its previous decisions (in particular the reasons why it found the relevant element was unreasonable in the light of the object of the Act), a court on judicial review is not able to determine the outcome of that fresh appeal. It is properly a matter for ARLA.

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[104] CoA Decision at [122], [[COA 101.0071]] and ARLA Decision at [114], [117]and [121]. [[COA 103.0458–0459]].
[105] The deletion of an element being an option available to it if it resubmits the PLAP to ARLA pursuant to section 84(1)(a) of the Act.
[106] Section 84(1) of the Act.
[107] Section 86(1) of the Act.

85 Therefore, as a matter of principle, the correct approach is for the Freeze and Presumption Elements to be referred back to ARLA, at which time ARLA will decide whether to refer them back to Council for reconsideration. If that happened and Council was then to resubmit the elements with the reference to the LIR Elements deleted, it would be a matter for ARLA to determine whether the amended elements are unreasonable.[108]

Date: 6 July 2022

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I J Thain / I E Scorgie
Solicitor / Counsel for Foodstuffs North Island Limited

[108] That decision could even be made on the papers, in private, pursuant to section 86(2) of the Act.

List of Authorities

Legislation

1 Legislation Act 2019

2 Local Governments Act

3 Sale and Supply of Alcohol Act 2012

4 Sale of Liquor Act 1989

Cases

5 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175; [2019] NZRMA 535

6 *Christchurch Medical Officer of Health v Vaudrey* [2015] NZHC 2749; [2016] 2 NZLR 382

7 *Foodstuffs North Island Limited v Auckland Council* [2019] NZHC 1697

8 *JB International Ltd v Auckland City Council* [2006] NZRMA 401

9 *Hospitality New Zealand v Christchurch City Council* [2017] NZHC 1360.

10 *Redwood Corporation Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971

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

Legislative materials

12 Alcohol Reform Bill

13 Alcohol Reform Bill: Departmental Report for the Justice and Electoral Committee: Part One (Social Policy and Justice Group, 2011)

14 Hansard (11 November 2010) 688 NZPD 15251, Hon Simon Power

15 Hansard (11 December 2012) 686 NZPD 7348, Hon Judith Collins

16 Law Commission *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010)

17 Office of the Minister of Justice, *Cabinet Paper: Alcohol Law Reform*, 5 August 2010