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

SC 140/2021

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

SUBMISSIONS ON BEHALF OF FIRST RESPONDENT

27 JULY 2022

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1. INTRODUCTION AND SUMMARY OF ARGUMENT

1.1 These submissions respond to the submissions of the appellant (**Foodstuffs**), with a primary focus on further matters not already raised in the submissions on behalf of the appellant (**Woolworths**) in SC 139/2021.

1.2 In response to Foodstuffs' summary of argument at paragraphs 2 to 5 of its submissions:

(a) For the reasons set out in the Council's submissions in SC 139/2021, it is submitted the Court of Appeal (**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 reduce alcohol-related harm (**ARH**);

(b) When referring to a real and appreciable possibility of an element reducing ARH, the Alcohol Regulatory and Licensing Authority (**ARLA)** was 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. It was not purporting to reframe or place a gloss on the s 81 test on appeal;

(c) Foodstuffs is, with respect, incorrect to suggest that the correct inquiry in an appeal under s 81 is "whether the element is consistent with a reasonable system of control over the sale, supply and consumption of alcohol, which is intended to help achieve the twin limbs of the object of the Act."[1] This interpretation departs from the text of s 81(4), which states the appeal ground to be unreasonableness in light of the *object* of the Act in s 4, rather than the *purpose* of the Act in s 3;

(d) The Council agrees with Foodstuffs that an assessment of unreasonableness under s 81 "requires a consideration of more than simply whether there is a possibility of the element reducing alcohol-related harm",[2] but says that the CA's

1 Foodstuffs' submissions at [3].
2 Foodstuffs' submissions at [3].

decision does not stand for that proposition. Considerations of proportionality *are* relevant – all the CA considered to be inapplicable were two so-called "proportionality principles" from the bylaw cases that refer to rights (because there is no antecedent right to sell alcohol under the SSAA);

(e) Contrary to Foodstuffs' submission,[3] ARLA *did* give sufficient reasons for its decision on elements 1 and 2.[4] The Council respectfully agrees with the CA's findings in this respect.[5] ARLA was not, as Foodstuffs suggests, required to "state why it had rejected arguments based on proportionality". The requirement was to provide reasons sufficient to explain its decision, not to address every argument advanced by the appellants.[6] In fact, as discussed in the Council's submissions in SC 139/2021, ARLA expressly considered proportionality as part of its analysis of whether elements 1 and 2 were unreasonable in light of the object of the Act;

(f) It is improper for Foodstuffs to argue that ARLA failed to provide sufficient reasons for its decisions, when this is not pleaded in its statement claim. Only Woolworths has pleaded a failure to provide reasons;[7]

(g) ARLA's decisions should not be "remitted back to it for reconsideration in accordance with the correct interpretation of the appeal ground"[8]. ARLA did not misinterpret or misapply the appeal ground in s 81.

3 Foodstuffs' submissions at [4].
4 For convenience, like Woolworths in its submission in SC 139/2021, we refer to clause 4.3.1 of the PLAP relating to maximum off-licence trading hours as **element 1**; and clauses 3.2.1, 4.1.4, 4.1.5, 4.1.6 and 4.1.7 relating to the temporary freeze on, and rebuttable presumption against, new off-licences as **element 2**.
5 *Auckland Council v Woolworths New Zealand Limited* [2021] NZCA 484 (**CA Judgment**) at [111] **[[**101.0067**]]** and [118] **[[**101.0069**]]**.
6 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123, [2018] NZAR 882 at [42]; *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345.
7 Woolworths' amended statement of claim at [6.1] **[[**102.0244**]]**.
8 Foodstuffs' submissions at [5].

1.3 The grounds of review in Foodstuffs' statement of claim are not made out. In particular:

(a) The Temporary Freeze and Rebuttable Presumption (element 2) are not ultra vires. There was no error of law in ARLA's decision on element 2.

(b) ARLA's decision on off-licence trading hours (element 1) was not erroneous on account its discussion of the 9pm closing hour alluding to the Council being allowed to take a precautionary approach;[9]

(c) Nor was ARLA's decision on element 1 tainted by the alleged failure to have regard to matters alleged to warrant a different approach to off-licence trading hours across the Auckland region. Key paragraphs of ARLA's decision in respect of element 1 show that it accepted that the harm to be addressed was region-wide.[10] The CA was correct to find that s78 of the Act allows, but does not require, a local alcohol policy to discriminate by area and demographic characteristics.[11]

1.4 Although pleaded as "errors of law", Foodstuffs' grounds of review are in large part challenges to the exercise by ARLA of its judgment in deciding whether the disputed elements of the Provisional LAP (**PLAP**) were unreasonable or not. It is submitted that there being no errors of law in ARLA's decision, there is no proper basis for this Court to set aside ARLA's decision.

2. CA DID NOT ATTEMPT TO REDEFINE, OR PLACE A GLOSS ON, THE TEST ON APPEAL UNDER SECTION 81

2.1 It is respectfully submitted that Foodstuffs in its submissions (like Woolworths in its submissions) wrongly conflates:

(a) what the CA 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;

9 ARLA's Decision at [146] **[[**103.0463**]]**.
10 ARLA's Decision at [144] **[[**103.0462**]]** and [145] **[[**103.0463**]]**.
11 CA Judgment at [31] **[[**101.0035**]]** and [110] **[[**101.0066**]]**.

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

2.2 At paragraph [53] of its decision, the CA said 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. The statement quoted above does not rule this out.

2.3 It is submitted that 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.

2.4 Foodstuffs' submissions therefore proceed on a mistaken footing, when they say:[12]

> 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 cost 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. [footnotes omitted]

2.5 It is clear that in the paragraph from the CA decision being referred to here – paragraph 54 – and the four preceding paragraphs, the Court was discussing the issue of proof, and in particular the inability to "prove" the relationship between trading hours and ARH.[13] Paragraph 54 is not a delineation of the factors that may be considered within the unreasonableness test in s 81, let alone a statement that s 81 requires only that there be a real and appreciable possibility that an element will reduce ARH, in which case the appeal fails.

2.6 Therefore, contrary to Foodstuffs' submission quoted in paragraph 2.4 above, the impact of an element on sellers, suppliers and consumers (whether responsible or otherwise) *can* be considered as part of an assessment of unreasonableness under s 81.

2.7 The Council relies on its submissions in SC 139/2021 as addressing the key points made by Foodstuffs in relation to the CA's discussion of a "real and appreciable possibility" that an element will reduce

12 Foodstuffs' submissions at [28].
13 CA Judgment at [54] **[[**101.0044**]]**.

ARH, and the inapplicability of two "proportionality principles" from the bylaw cases that refer to rights.

3. FOODSTUFFS' GROUNDS OF REVIEW

3.1 In Foodstuffs' statement of claim:

(a) The first cause of action relates to ARLA's decision on local impacts reports (**LIRs**);

(b) The second cause of action relates to ARLA's decision on the Temporary Freeze on, and Rebuttable Presumption against, the granting of new off licences;[14]

(c) The third cause of action relates to ARLA's decision on the off-licence trading hours element.[15]

3.2 The first cause of action is no longer relevant, as the Council accepted (did not appeal) the High Court's finding that LIRs were ultra vires.

3.3 The second cause of action[16] alleges that ARLA's decision on the Temporary Freeze and Rebuttable Presumption (element 2) was unlawful because it referred to and relied in the LIRs which were ultra vires, and also that element 2 was ultra vires and unreasonable in light of the object of the Act in its own right.

3.4 The third cause of action alleges that ARLA's decision on off-licence trading hours (element 1) was unlawful because of:

(a) ARLA's view as to the applicability of the precautionary principle;[17]

(b) Failure to apply the correct legal test due to failure to consider distinct or different communities within greater Auckland;[18]

(c) Wrongly giving primacy to the fact that the Council is a unitary authority;[19]

14 Referred to hereafter, as in the Woolworths' submissions, as element 2.
15 Referred to hereafter, as in the Woolworths' submissions, as element 1.
16 Foodstuffs' statement of claim at [33] **[[**101.0119**]]**.
17 Foodstuffs' statement of claim at [36.1] and [36.2] **[[**101.0120**]]**.
18 Foodstuffs' statement of claim at [36.3] **[[**101.0120**]]**.
19 Foodstuffs' statement of claim at [36.4] **[[**101.0120**]]**.

(d) Failure to have regard to various allegedly relevant considerations, including the size and diversity of Auckland and differences in health indicators and rates of alcohol related problems, and that the 9pm closing hour was not a response to *local* issues.[20]

3.5 Foodstuffs' statement of claim does *not* raise ARLA's failure to provide reasons for its decision as a ground of review. Only Woolworths applied for, and was granted, leave to amend its statement of claim during the High Court hearing to allege that ARLA erred by failing to provide reasons.[21] On the contrary, Foodstuffs' statement of claim at paragraph 17 states that "…ARLA's decisions were notified by way of a combined, written decision including reasons."[22]

3.6 On that basis, it is respectfully submitted that Foodstuffs' submissions in relation to ARLA's alleged failure to give reason are not properly advanced.[23] Without derogating from that submission, a substantive response to those submissions is set out in section 4 below.

4. ARLA DID NOT FAIL TO GIVE SUFFICIENT REASONS FOR ITS DECISION

The duty to give reasons

4.1 The SSAA does not expressly require ARLA to give reasons when determining appeals against the PLAP.

4.2 In *Lewis v Wilson and Horton Ltd* the Court of Appeal observed that "there is no invariable rule" in New Zealand law that Courts must give reasons for their decisions;[24] but identified reasons why the provision of reasons by Judges is desirable. More recently in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* the Court of Appeal found that:[25]

> … some articulation of the Panel's thinking was required…This can be in short form, and depending on the circumstances a few paragraphs or even a few sentences may be enough. But the "why" should be stated.

20 Foodstuffs' statement of claim at [36.5] **[[**101.0121**]]**.
21 *Woolworths New Zealand Limited v Alcohol Regulatory and Licensing Authority* [2020] NZHC 270 **[[**102.0256**]]**; Woolworths' amended statement of claim at [6.1] **[[**102.0244**]]**.
22 Foodstuffs' statement of claim at [17] **[[**101.0114**]]**.
23 *Butler v Attorney-General* [1999] NZAR 205 (CA) at 207.
24 *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA) at [75].
25 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] 3 NZLR 345 at [65].

4.3 The purpose of the common law duty to give reasons is not to enable a reviewing Court to revisit the merits of a decision. In *R v Awatere* the Court of Appeal held that it was not its role to "examine the reasons given by the District Court Judge in order to decide whether they were good reasons or whether indeed they may have been bad reasons".[26]

4.4 The CA, in the judgment under appeal,[27] adopted the following statement from *Lewis* as to the scope of the duty to give reasons:

> [81] The reasons may be abbreviated. In some cases they will be evident without express reference. What is necessary, and why it is necessary was described in relation to the Civil Service Appeal Board (a body which carried out a judicial function) by Lord Donaldson MR in *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 ALL ER 310 at p 319:
>
> > … the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful …"

4.5 The Council submits that ARLA *did* give reasons for its decisions on elements 1 and 2, and that its reasons were sufficient to meet this test. It respectfully agrees with the CA's findings in this respect at paragraphs 111 and 118.

ARLA gave sufficient reasons for its decision on element 1

4.6 ARLA's conclusion in respect of element 1 was set out at paragraph 146.[28] This paragraph alone is sufficient to "tell the parties in broad terms why the decision was reached",[29] bearing in mind the sole legal question in s 83. However, paragraph 146 should not be read in isolation, or as the totality of ARLA's reasons.

4.7 Evidence relevant to the application of the off-licence trading hours restriction to all off-licences in the Auckland region (including supermarkets) was cited and accepted by ARLA when it made its decision, and implicitly formed part of its reasons. In particular, there was evidence that:

(a) A high proportion of alcohol is sold at off-licences (80% by volume) including supermarkets (26% of spending);[30]

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26 *R v Awatere* [1982] 1 NZLR 644 (CA) at 649.
27 CA Judgement at [92] **[[**101.0059**]]**.
28 ARLA's Decision at [146] [[103.0463]]
29 *Stefan v General Medical Council* [1999] 1 WLR 1293 (PC) at 1304.
30 Turner at [25.2]-[25.6] **[[**203.0487**]]**; Clough at [4.4] **[[**204.0753**]]**.

(b) Alcohol is cheaper at off-licences than on-licences;[31]

(c) Supermarkets are approximately 18% cheaper than bottle stores for comparable drinks;[32]

(d) Price is a key driver of drinking behaviour for at-risk groups;[33]

(e) There is no basis for differentiating between supermarkets and bottle stores in terms of ARH;[34]

(f) Exempting supermarkets from earlier closing hours would undermine reductions in ARH one would otherwise expect from reducing off-licence trading hours;[35] and

(g) A regional approach to off-licence trading hours should be adopted.[36]

4.8 Ms Turner's evidence to ARLA highlighted ARH within specific parts of Auckland: e.g. those included in the Priority Overlay Areas.[37] However, it also discussed region-wide evidence of ARH e.g. the 2016 *Attitudes and Behaviours towards Alcohol Survey* (**ABAS**).[38] Foodstuffs, which emphasised regional differences in their submissions to ARLA, presented no evidence to ARLA to rebut the ABAS data, or to suggest more generally that ARH was not occurring region-wide, or was less in some parts of Auckland than others. Nor was there any evidence from Foodstuffs about how licence holders in different parts of Auckland would be differently impacted by the proposed 9pm closing time. Foodstuffs' submissions to this Court do not (and cannot) cite any evidence it gave to ARLA relating to ARH or the impact of element 1 on licence holders that should have been addressed in ARLA's decision (but was not), because Foodstuffs gave no such evidence.

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31 Turner at [22.3] **[[**203.0480**]]** and at [26.1]-[26.11] **[[**203.0499**]]**.
32 Turner at [26.4] **[[**203.0500**]]**.
33 Turner at [26.31]-[26.35] **[[**203.0505**]]**; Chan at [9]-[10] **[[**202.0279**]]**.
34 Turner at [10.14]-[10.15] **[[**203.0444**]]** and [28.1]-[28.4] **[[**203.0512**]]**; Cameron at [2.2], [2.3] **[[**205.0971**]]**, [4.4] **[[**205.0974**]]**, [5.4] **[[**205.0977**]]** and [5.6] **[[**205.0978**]]**.
35 Turner at [28.4] **[[**203.0513**]]**.
36 Hopkins at [44] and [45] **[[**201.0017**]]**; Turner at [4.31]-[4.34] **[[**203.0420**]]**.
37 Turner at [4.4] **[[**203.0413**]]** to [6.11] **[[**203.0431**]]**.
38 Turner Appendix C Health Promotion Agency *Attitudes and Behaviours towards alcohol survey 2013/14 to 2015/15* (November 2016) **[[**301.0172**]]**.

4.9 ARLA expressly referred to, and implicitly adopted, the ABAS evidence on risky drinking at paragraph 144 of its decision.[39] A careful reading of paragraphs 144 and 145 of ARLA's decision shows that ARLA accepted that the harm to be addressed **was** *region-wide*, and that at-risk groups are the ones most likely to be affected by the 9pm closing hour restriction – a key part of its proportionality analysis. ARLA's conclusion at paragraph 146 that element 1 was not unreasonable in light of the object of the Act due to its region-wide application, reflected its acceptance of Council's evidence and a lack of opposing evidence.[40]

4.10 At the start of paragraph 109 the CA acknowledged that "ARLA did not expressly engage with the witnesses for the supermarkets and explain why their evidence was rejected."[41] However, the inference to be drawn is not that ARLA failed to consider that evidence: rather, that it regarded the evidence for the Council and supporting parties as being more cogent and persuasive.

4.11 Counsel for Foodstuffs submit that ARLA's references to evidence:[42]

> . . .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.

4.12 However, with respect this submission misapprehends the nature and scope of the duty to give reasons. There is no obligation on a decision-maker to address every piece of evidence or argument raised.[43] Returning to the statement from *Lewis* adopted by the CA and quoted at paragraph 4.4 above, ARLA's reasons were sufficient to show to what it was directing its mind.

ARLA gave sufficient reasons for its decision on element 2

4.13 ARLA's key findings as to the effect of the temporary freeze and rebuttable presumption are set out at paragraphs 114 to 122. Its conclusion at paragraph 122 *expressly* relies on the reasons in

39 ARLA's Decision at [144] [[103.0462]] citing Turner Appendix C Health Promotion Agency *Attitudes and Behaviours towards alcohol survey 2013/14 to 2015/15* (November 2016) **[[**301.0172**]]**.
40 ARLA's Decision at [144]-[146] **[[**103.0462**]]**.
41 CA Judgment at [109] **[[**101.0066**]]**.
42 Foodstuffs' submissions at [30].
43 *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZHC 1123, [2018] NZAR 882 at [42].

preceding paragraphs. The reasons include a number of findings relating to matters such as how the temporary freeze and rebuttable presumption elements would operate in law and in practice, the issue of vires, evidence related to unintended consequences and impediments to development, the risk of ARH, and certainty of drafting. These matters go directly to establishing that the temporary freeze and rebuttable presumption are not unreasonable in light of the object of the Act.

4.14 The High Court's criticisms of ARLA's decision on this element focused on the perceived absence of reasons as to why ARLA failed to differentiate between different off-licence types in relation to the temporary freeze and rebuttable presumption element.[44]

4.15 It is respectfully submitted that the High Court became improperly concerned with the merits of ARLA's decision on the temporary freeze and rebuttable presumption element: see, for example, the finding at paragraph 151 that the temporary freeze and rebuttable presumption might make it more difficult for Woolworths and Foodstuffs to open new stores.[45] This finding contradicts the evidence relied on by ARLA, given by Woolworths' own planning witness, that a supermarket should have a more than 50% chance of rebutting the presumption.[46]

4.16 The Council respectfully agrees with the CA's findings at paragraph 118 as to why the High Court's approach on this question was incorrect, and why ARLA's reasons in respect of element 2 were sufficient (including because the evidence it accepted applied generally to off-licences).[47]

5. ARLA'S DECISION ON ELEMENT 2 IS NOT IN ERROR, BECAUSE THE ELEMENT IS NOT ULTRA VIRES

5.1 It is not clear from Foodstuffs' notice of application for leave to appeal whether it intends to advance its pleaded grounds of review in respect of element 2 before this Court.

44 *Woolworths New Zealand Limited v Alcohol Regulatory and Licensing Authority* [2020] NZHC 293 (**HC Judgment**) at [150] and [151] **[[**102.0312**]]**.
45 HC Judgment at [151] **[[**102.0312**]]**.
46 ARLA's Decision at [119] **[[**103.0459**]]**.
47 CA Judgment at [118] **[[**101.0069**]]**.

5.2 Assuming it both wishes and is permitted by this Court to do so, it is submitted the temporary freeze and rebuttable presumption (element 2) are not ultra vires. They are clearly policies on whether further licences should be issued for premises in the district or part of the district, within the scope of s 77(1)(d) of the Act.

5.3 Nor is there any other error in ARLA's decision on element 2. ARLA correctly found that element 2 did *not* purport to direct a licensing authority as to how it should exercise its discretion on a licence application, and that a licence may still be issued depending on the weight given to the LAP relative to the 10 other matters listed in s 105(1).[48] It was justified in concluding that it was not persuaded that the "freeze or rebuttable presumption is disproportionate in effect".[49] These were conclusions ARLA was entitled to draw from the evidence, and there was no error of law in ARLA reaching these conclusions.

6. ARLA'S DECISION ON ELEMENT 1 DID NOT FAIL TO HAVE REGARD TO RELEVANT CONSIDERATIONS

6.1 At paragraph 1.2.5 of its notice of application for leave to appeal, Foodstuffs states that the CA erred because its interpretation of the test on appeal under ss 81 and 83 "does not require consideration of the matters set out in s 78 of the Act, despite recognising that these matters are mandatory considerations for a territorial authority when formulating each element of a PLAP".[50]

6.2 Section 78(2) lists a number of matters to which a territorial authority must have regard when producing a draft LAP (**DLAP**). Section 79(2) states that when producing a PLAP, a territorial authority must also have regard to those matters.

6.3 By contrast, there is no equivalent list of matters to which ARLA "must have regard" when considering an appeal under s 81. It is submitted that there is a good reason for this. Whereas the broad list of matters in s 78(2) being mandatory relevant considerations ensures

48 ARLA's Decision at [116] **[[**103.0458**]]**.
49 ARLA's Decision at [118] **[[**103.0458**]]**.
50 Foodstuffs' application for leave to appeal at [1.2.5] **[[**05.0010**]]**.

that a PLAP starts from a solid information base, there is no equivalent reason why these matters should always be taken into account on an appeal against an element of a PLAP. An appeal may concern very specific policies relating to a one-way door restriction, or discretionary licence conditions, on which the matters listed in s 78(2) have little if any bearing. The broad role of local authority in formulating the DLAP and PLAP is quite different to ARLA's narrow role, further on in the PLAP process, of determining appeals on specific elements of the PLAP that have been challenged.

6.4 Further, under s 201 ARLA has the powers of a Commission of Inquiry to require the attendance of witnesses before it, or the production of documents. This, coupled with the rights to appear and call evidence set out in s 205 of the Act and ARLA's expertise as specialist decision-maker, are sufficient to ensure that all relevant material is before ARLA, without requiring it to consider the matters set out in s 78(2) in every case.

6.5 Foodstuffs submits that "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 s 78(2) as are raised by the appeal" (emphasis added).[51] The words emphasised are in themselves a concession that many of those matters will not always be relevant. What factors need to be considered, in order for ARLA to be satisfied that a challenged element is unreasonable in light of the object of the Act, will vary from case to case depending on the element challenged, and why the appellant alleges the element is unreasonable.

6.6 Further, just because an assessment of unreasonableness under s 81 may be informed by proportionality considerations (which all parties agree is appropriate), does not mean that all s 78 matters are always relevant to that assessment. A proportionality assessment would typically involve weighing the likely public benefit of a provision (the PLAP element) against its likely burden on those targeted by the

51 Foodstuffs' submissions at [75].

provision. The matters listed in s 78(2) may be too general to assist in any proportionality assessment.

6.7 Moreover, the basis on which an element has been challenged may not be that it is disproportionate in its effect: it may instead be a challenge based on vires, or alleged unequal application as between licence holders.[52] This underscores why it is inappropriate for these matters to be treated as mandatory relevant considerations for ARLA when considering a s 81 appeal.

7. CERTAIN FOODSTUFFS' SUBMISSIONS ARE INCONSISTENT WITH THE ACT'S PROVISIONS IN RELATION TO LAPS, AND AN APPELLANT'S PERSUASIVE BURDEN

Status of national default trading hours

7.1 Foodstuffs appears to submit that it is for the Council to justify a provision in its PLAP that sets maximum trading hours that differ from the national default maximum trading hours:[53]

> . . . the default hours are the baseline against which the effect of the proposed element must be assessed. … 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.

7.2 With respect this is incorrect. The purpose of the national **default maximum** trading hours, as the name indicates, is to ensure that there are *some* maximum trading hours in place where no LAP in force[54] – either because a council decides not to adopt one, or because it is not yet in force (as in Auckland's case). But the territorial authority is not required to start with the national default trading hours and then justify any departure from them. Rather, it has a broad discretion to come to its own conclusion, informed by the public consultation process, as to what the maximum trading hours in its district should be – so long as that is not unreasonable in light of the object of the SSAA. The Council respectfully agrees with the CA's conclusion that "ss 43-45 establish

52 See the Council's submission in the Woolworths appeal, SC 139/2021 at [4.21].
53 Foodstuffs' submissions at [74].
54 SSAA, section 44.

no presumption in favour of the default hours and nothing in them requires that a local authority justify a departure from those hours".[55]

7.3 Foodstuffs' suggestion that a territorial authority should be required to justify its "departure" from the national default maximum trading hours is also inconsistent with an appellant challenging the trading hours element having a persuasive burden under ss 81 and 83.

Ability for LAP to apply differently across different parts of the district

7.4 Foodstuffs also submits that:[56]

> 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. 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.

7.5 Section 75(2) of the Act, which authorises LAPs, is permissive rather than mandatory. Similarly, a PLAP "may" provide differently for different parts of the district, and "may" apply to only part (or 2 or more parts) of the relevant district. Further, two or more councils may adopt a joint LAP spanning two or more districts.[57] These are all policy choices for the council or councils concerned.

7.6 Again, the Foodstuffs submission seeks to shift the burden onto the Council to justify why a particular element applies across its district or region[58], or onto ARLA to assess the effect of a district/region wide provision on any given part of the district/region. However, the Act is clear that the *appellant* bears the onus of persuading ARLA that an element in unreasonable in light of the object of the Act. It is respectfully submitted that the CA correctly identified why the kind of localised proportionality assessment Foodstuffs suggests is necessary is inappropriate, and should not be required:[59]

> On the contrary, there may be good reason not to discriminate. By way of example, evidence as to alcohol-related harm may be generally applicable; put another way, there may be no reason to doubt that it affects the entire district. (In this case, by way of illustration, there was general evidence that those purchasing alcohol after 9 pm are likely to be abusing it.) Subdivision of a district into

55 CA Judgment at [25] **[[**101.0033**]]**.
56 Foodstuffs' submissions at [77].
57 SSAA, section 76.
58 Auckland Council being a unitary authority, its district and region are the same.
59 CA Judgment at [31] **[[**101.0035**]]**.

> boundaries may tend to defeat the purpose of a control on off-licences, since people may travel to buy alcohol and may consume it anywhere. Attempts to draw boundaries are prone to engender controversy, making the policy difficult and costly to develop and administer. This last point is a relevant consideration because the Act recognises that a local alcohol policy imposes burdens on a territorial authority; the legislative record suggest that is why local alcohol policies were not made compulsory and why two or more local authorities may adopt a joint policy.

8. RELIEF

No need for ARLA to reconsider elements 1 and 2, if CA has erred

8.1 Foodstuffs submits that the Court should reinstate the High Court's decision remitting elements 1 and 2 to ARLA for reconsideration, with that reconsideration to be undertaken by application of the Appeal Ground as set out in paragraphs 41 and 42 of Foodstuffs submissions.[60]

8.2 Even if the CA has erred in the manner submitted by Foodstuffs, it is not necessary or appropriate for ARLA to reconsider elements 1 and 2. ARLA clearly considered both limbs of the object of the Act in s 4, and thoroughly assessed whether elements 1 and 2 were unreasonable in light of the object of the Act, including by reference to whether they were disproportionate in their effect.

8.3 The Council refers to section 9 of its submissions in Woolworths' appeal SC 139/2021, which apply equally to Foodstuffs' appeal SC 140/2021. However, there are additional matters particularly relevant to the question of relief in this appeal. These include that should this Court find that ARLA erred in the respects alleged by Foodstuffs in its statement of claim, any such errors were trivial and do not warrant an order setting aside ARLA's decision. The Council relies on the classic statement from *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA) at 324 per Somers J:

> It does not follow that to establish some want of legality on the part of a tribunal or authority will ipso facto lead to the setting aside of its order or decision. Such a result will depend on the gravity of the error in the context and circumstances of the case.

8.4 Aside from the gravity of the error, the circumstances of this case that weigh against ARLA's decision being set aside, if this Court finds that

60 Foodstuffs' submissions at [79].

it made a reviewable error, include the weight of evidence in favour of its conclusions that element 2, and the 9pm closing hour in element 1, were not unreasonable in light of the object of the Act. They also include the prejudice to third parties (especially the public of Auckland) in requiring a further round of appeal hearings before ARLA. It is well established that when considering whether to exercise its discretion whether to quash an unlawful decision or grant another remedy, the court can take into account the effect on third parties.[61]

Deletion of LIR element does not give rise to a fresh appeal

8.5 Foodstuffs also repeats, at paragraphs 80 to 85, the submission it made to the CA, and which the CA dismissed at paragraph 123 of its decision: namely, that the Council can only amend its PLAP after ARLA has referred an element back to it for reconsideration.[62]

8.6 There has not to this point been any direction by ARLA to reconsider the LIR element. It was the High Court that found LIRs to be ultra vires. The Council has not appealed that finding, and intends to delete all references to LIRs from the PLAP, including the references to LIRs in clause 3.3.3 which relates to the rebuttable presumption.

8.7 However, paragraph 83 and 84 of Foodstuffs' submissions make it clear that it regards amendment of the temporary freeze and rebuttable presumption element (simply to remove references to the LIRs) as giving rise to a fresh appeal. Woolworths' submissions also anticipate a further hearing before ARLA on the LIR element, notwithstanding that this had been set aside due to the High Court's finding of ultra vires.[63] Further appeals by Foodstuffs (and/or Woolworths) will prevent the PLAP from being adopted (under s 87) and coming into force (under s 90). The supermarkets have already appealed against the resubmitted element 1 (relating to off-licence trading hours), after the Council amended the element to make the opening hour 7am rather than 9am, following ARLA's finding that 9am was unreasonable in light of the object of the Act.[64]

61 *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA) at [59].
62 CA Judgment at [123] **[[**101.0071**]]**.
63 Woolworths' submissions in SC 139/2021 at [4].
64 Chronology, steps 31 to 39.

8.8 Section 86(1) states that ARLA must deal with the resubmission of a PLAP under s 84(1)(b) as if it were an appeal against a new or amended element. By contrast, ARLA has no power to deal with the resubmission of PLAP under s 84(1)(a) where the element has been deleted.

8.9 With respect, the CA was correct to state at paragraph 123 of its decision that division of a PLAP into elements is a question of fact and judgment. In this case, it is submitted that the element relating to LIRs encompasses all references to LIRs that appear in the PLAP including clause 3.3.3. The Council should be able to delete all references to LIRs in light of the High Court's finding of ultra vires, without a direction from ARLA that this occur after a further appeal hearing.

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

P M S McNamara / T R Fischer
Counsel for the First Respondent
27 July 2022

LIST OF AUTHORITIES

Cases

- *Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 (CA).
- *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] 3 NZLR 345 (CA).
- *Butler v Attorney-General* [1999] NZAR 205 (CA).
- *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA).
- *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA).
- *Medical Officer of Health (Wellington Region) v Lion Liquor Retail Ltd* [2018] NZAR 882.
- *R v Awatere* [1982] 1 NZLR 644 (CA).
- *Re Venus NZ Limited* [2015] NZAR 1315.
- *Stefan v General Medical Council* [1999] 1 WLR 1293 (PC)

Legislation

- Sale and Supply of Alcohol Act 2012.