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

SC139/2021 and SC140/121

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	An application for leave to appeal under section 73 of the Senior Courts Act 2016 and the Supreme Court Rules 2004
BETWEEN	**WOOLWORTHS NEW ZEALAND LIMITED** Appellant
	FOODSTUFFS NEW ZELAND LIMITED Appellant
AND	**AUCKLAND COUNCIL** First Respondent
	ALCOHOL REGULATORY AND LICENSING AUTHORITY Second respondent
	THE MEDICAL OFFICER OF HEALTH Interested Party

SUBMISSIONS FOR THE MEDICAL OFFICER OF HEALTH IN OPPOSITION TO APPEALS

Dated: 10 August 2022

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CONTENTS

MAY IT PLEASE THE COURT:

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Auckland Medical Officer of Health (the **MOH**) has been granted leave to file submissions and be heard as interested party in respect of appeals by Woolworths New Zealand Limited (**Woolworths**) in SC 139/2021 and Foodstuffs North Island Limited (**Foodstuffs**) in SC 140/2021 (collectively the **Supermarkets**).

2. The MOH supports the Auckland Council's (the **Council**) position and endorses its submissions in opposition to both appeals.

3. As the Supermarkets' positions are aligned, these submissions will address both appeals together. As leave had been granted in general terms, these submissions will address the general merits of the appeals while recognising that the Court is primarily interested in whether the Court of Appeal proceeded on the basis that an appeal will only succeed if there is not a "real and appreciable possibility" that an element of the provisional alcohol policy (**PLAP**) will minimise alcohol-related harm (**ARH**) and, if so, whether this is correct.[1]

4. In summary, the MOH submits:

   Court of Appeal did not improperly substitute the statutory test with "real and appreciable possibility"

   4.1 For the reasons set out in the Council's submissions, the Court of Appeal did not hold that an appeal under s 81/83 of Sale and Supply of Alcohol Act 2012 (**SSAA** or the **Act**) will *only* succeed if there is no "real and appreciable possibility" that an element will reduce ARH. As the Council's submissions demonstrate, at no point did the Court of Appeal suggest that this phrase was the sole test to be applied on appeal. The phrase was used in rejecting the Supermarkets' contention that the Alcohol Regulation and Licensing Authority's (**ARLA**) decision was wrong due to insufficient *evidence* that the elements would reduce ARH. The Court of Appeal held that, given the legislative history and the Act's object of ARH minimisation, *proof* that an element *will* reduce ARH is not required.[2]

   4.2 As the Court of Appeal considered the evidence clearly established there was a rational basis for concluding (a "real and appreciable possibility") that the elements will reduce ARH,[3] it did not need to further articulate the appeal test in

[1] Supreme Court leave decision: *Woolworths NZ Ltd v Auckland Council* [2022] NZSC 46 at [1].
[2] *Auckland Council v Woolworth NZ Ltd & Others* [2021] NZCA 484 at [53].
[3] At [53] and [62].

the context of this case. It rightly criticised the wholesale importation of the proportionality principles from bylaw cases given the different statutory context.[4] Moreover, in the absence of any evidence of effects beyond mere shopper inconvenience and (speculative) reduction in private profit, the elements were incapable of being disproportionate whatever test is applied.

Court of Appeal's decision consistent with legislative background and case law

4.3 The Court of Appeal's interpretation of the SSAA's object and purpose was consistent with its legislative history and authority that has developed since its enactment:

(a) It is clear that Parliament intended that the SSAA would address the country's high levels of ARH and its excessive drinking culture. As the country's largest metropolitan area, addressing these issues in Auckland is logically necessary to achieve this outcome. The evidence before ARLA of the wide-spread and serious ARH across the Auckland region confirms the urgent need for this to occur.[5]

(b) In enacting the SSAA Parliament recognised the "clear evidence" of a link between availability of alcohol and harm, and considered the SSAA's "key measures" included restriction on access to alcohol.[6]

(c) Parliament's expectation was that local alcohol policies (**LAP**) would be used by territorial authorities to address high levels of alcohol-related harm in their region.[7]

(d) The Court of Appeal's interpretation of the SSAA's object and purpose was an orthodox reflection of this legislative history and of the case law that has developed since the Act's inception (with the exception of Duffy J's decision in this case).[8]

(e) Notably, the recently introduced Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill proposes the abolition of appeals of local alcohol policies (and to implement recommendations of a Ministerial

[4] At [39]-[41].
[5] At [77] – [80], [105]-[111], [118].
[6] At [14].
[7] At [14].
[8] *Medical Office of Health v Lion Liquor Retail* [2018] NZAR 882; *Capital Liquor Ltd v The New Zealand Police* [2019] NZHC 1846; *J & C Vaudrey Limited v Canterbury Medical Officer of Health* [2017] 2 NZLR 334 (CA); *Christchurch MOH v Vaudrey & Bond* [2015] NZHC 2749; *Lower Hutt Liquormarket Ltd v Shady Lady Lighting Ltd* [2018] NZHC 3100; *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2016] NZAR 287.

Forum on alcohol advertising and sponsorship). The Explanatory Note states the abolishment of appeals is required to meet concerns about the ability of local authorities to develop LAPs to "enhance community wellbeing", and that "large companies have used their appeal rights in the Act to largely block the development of local alcohol polices" [9].

4.4 The following propositions flow logically from the above:

(a) It would have been extraordinary if Auckland Council's local alcohol policy did not seek to limit the availability of, and access to, alcohol.

(b) The elements of the policy in issue in this case, restrictions on off-licence trading hours and on the opening of new off-licence premises, will clearly limit the availability of, and access to, alcohol.

(c) These elements are therefore logically not "unreasonable in light of the object of the Act",[10] in the absence of compelling evidence to the contrary. There was in fact extensive evidence that this logical starting point was correct, i.e. evidence that there is a rational basis to conclude that the elements could reduce ARH ("a real and appreciable possibility" that they will reduce ARH).[11] As it is undisputed that the Supermarkets carried the burden of establishing that the elements are unreasonable in light of the Act's object,[12] it was for them to persuade ARLA to reach a conclusion contrary to this logical starting point. It is submitted that the Supermarkets' cases fell well-short of meeting this persuasive burden.

(d) It was necessary for the Court of Appeal to interpret the s 81/83 test of "*unreasonable* in light of the object of the Act" in its full context. The Supermarkets in effect seek adoption of a universal interpretation of the word "unreasonable" devoid of statutory context and contrary to the remaining words of the s 81/83 test: "in light of the object of the Act". The ARH minimisation object of the Act *governs* the interpretation of the word unreasonable. The Court of Appeal therefore correctly interpreted the s 81/83 test as narrow, requiring deference to the Council's policy-making role, allowing policies aimed at minimisation of ARH despite

[9] Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill, Members' Bill (Chloe Swarbrick, Green), introduced 30 June 2022, Parliament 53, Bill no. 147-1. The Bill is awaiting its first reading.
[10] Sections 81 and 83 SSAA.
[11] Above n 5.
[12] Above n 2 at [52].

uncertainty about their effect, and rejecting wholesale application of proportionality principles applicable in a different statutory context.

Court of Appeal did not reject proportionality per se

4.5 The MOH endorses the Council's submission that the Court of Appeal did not hold that proportionality was *immaterial*. As noted above, its rejection of the proportionality principles from the bylaw cases was not a rejection of proportionality per se – it was simply not called upon to go further in the absence of any evidence of any disproportionate effect. It is submitted that the Court was right to be cautious about further articulating a proportionality test in the absence of a need to do so, as context is everything when it comes to making such an assessment.

4.6 However, if the Court feels it necessary to go further, the MOH repeats its submissions before the lower Courts regarding proportionality. The starting point is the requirement to take a precautionary approach to measures aimed at improving public health and welfare. If there is a rational basis to conclude an element could reduce ARH (i.e. "a real and appreciable possibility" it will do so), it will not be "unreasonable in light of the object of the Act" unless its consequences are "capricious or grossly disproportionate".[13]

4.7 Moreover, not every burden caused by an element will be given equal weight in the proportionality calculus. The Court of Appeal was plainly correct to state that there is no *right* to sell or consume alcohol.[14] Like smoking, it is a freedom, or lifestyle choice and no more.[15] Where an element will interfere with actual *rights* (as opposed to lifestyle choices, like smoking or drinking, or private interests such as profit), it may require more certainty of effect. However, the interference in this case, namely minor shopper inconvenience and speculative impact on private profit, was incapable of rendering the elements unreasonable.

ARLA gave sufficient reasons for its decision

4.8 In respect of ARLA's reasons for its decisions, the MOH endorses the Council's submissions.[16] The Supermarkets' submissions rest on a fundamentally incorrect

[13] *Capital Liquor Ltd v The New Zealand Police* [2019] NZHC 1846 at [74]-[82].

[14] Above n 2 at [22] and [41].

[15] *B v Waitemata District Health Board* [2017] 1 NZLR 823 (SC); *B v Waitemata District Health Board* [2016] NZCA 184; [2016] 3 NZLR 569.

[16] Council's submissions in 140/2021, section 4.

interpretation of the narrow appeal standard in s 81/83. The appeal standard properly understood required ARLA to dismiss the appeal unless it was *persuaded* that an element was not reasonably capable of meeting the object of the Act, or that its effects would be grossly disproportionate. ARLA's reasons were more than sufficient in this context. It was not required to address every piece of evidence or argument raised.[17]

Court of Appeal was correct to find that the Supermarkets' argument conflated the appeal process with the appeal standard

4.9 The Court of Appeal was right to reject the submission that a s 81/83 appeal should be classified as a "de novo" appeal in which there is no presumption that the local authority's decision is correct. The Court of Appeal correctly held that "a distinction must be drawn between the appellate process and the standard of appellate review contained in s 81".[18] Section 81/83 contains a simple, narrow appeal standard that the Court of Appeal was correct to hold has "built into it a substantial degree of deference to the preferences of the territorial authority".[19]

Appeal could not succeed even if the section 81/83 test is more expansive

4.10 Even if the Supermarkets could establish that the appeal standard in s 81/83 is more expansive than the Court of Appeal found (which is denied), this would not mean their appeals could have succeeded. The Council's decision about the content of a local alcohol policy is the very type of decision to which ARLA should accord a high degree of deference to and be very reluctant to interfere with, no matter what the correct test is under s 81/83. There is nothing in the evidence before ARLA, or its evaluation of that evidence, that could justify interference in this case.

COURT OF APPEAL DID NOT IMPROPERLY SUBSTITUTE STATUTORY TEST WITH "REAL AND APPRECIABLE POSSIBILITY"

5. The MOH has nothing further to add to the summary of its position at paragraphs 4.1 – 4.2 above, in light of the Council's extensive submissions on the point.[20] However, the

[17] *Medical Office of Health v Lion Liquor Retail* [2018] NZAR 882 at [42].
[18] Above n 2 at [55].
[19] At [36].
[20] Council's submission in 139/2021, section 4.

below submissions on other aspects of the case reinforce the correctness of the Court of Appeal's approach.

COURT OF APPEAL'S DECISION CONSISTENT WITH LEGISLATIVE BACKGROUND AND CASE LAW

The legislative background

6. As the judgment under appeal and the other parties have set out the legislative background in detail, the following submissions emphasise certain matters from a public health perspective.

7. As the Court of Appeal noted, the "2012 Act marked the end of an experiment in the regulation of alcohol supply in New Zealand" brought about by the Sale of Liquor Act 1989 (**SOLA**) and "the Law Commission found in 2010 that the experiment had not been a success".[21]

8. The background to enactment of the SSAA included extensive recommendations by the Law Commission to address the country's high levels of ARH and change the country's unhealthy drinking culture. The Court of Appeal summarised the position as follows:[22]

> [10] The Law Commission found in 2010 that the experiment had not been a success. The 1989 Act had not reduced alcohol-related harm and was insufficiently ambitious about doing so. The problem had worsened, partly through proliferation of outlets. The Commission emphasised that levels of alcohol-related harm in the community were high, both for those who consume alcohol and those who are affected directly or indirectly by others' consumption. The problem is not confined to binge drinking, drinking to intoxication and offending while under the influence. Alcohol misuse affects children from conception, it reduces workplace productivity and safety, and it increases the risk of death from alcohol-related causes for the many New Zealanders who consume more than two drinks a day. Its effects are disproportionately felt by Māori and those in lower socioeconomic groups. [Footnotes omitted]

9. The "General policy statement" at the start of the Explanatory Note to the Bill also reflected this position:[23]

> The Alcohol Reform Bill implements the Government's decisions on the reform of alcohol legislation. These decisions were made in response to the Law Commission's 2010 report, *Alcohol in Our Lives: Curbing the Harm*. **Excessive drinking** and intoxication is contributing to New Zealand's crime rate, injury rate and road crash statistics and is affecting the nation's overall level of health. **Excessive drinking** also impacts on absenteeism and workplace productivity and contributes to family violence and child abuse. Alcohol is estimated to contribute to 1 000 deaths a year in New Zealand, and is implicated in 30 percent of all police recorded offences, 34 percent of recorded family violence, and 50 percent of all homicides. It is estimated that during weekends, up to 70 percent of injury-based emergency department presentations are alcohol related. ACC estimates that nearly 25 percent of all claims are alcohol-related. The direct costs to the taxpayer of

[21] At [9] and [10].

[22] At [10].

[23] Alcohol Reform Bill (explanatory note) (236-1, 2010) at 1-2; see also Alcohol Reform Bill: Departmental Report for the Justice and Electoral Committee: Part One (Social Policy and Justice Group, 2011) at [16]-[18].

> alcohol-related harm in New Zealand have been estimated to be as high as $1,200 million per annum.
>
> Regulation alone will not turn New Zealand's **excessive drinking culture** around and the Bill will therefore be supported by robust public education and treatment interventions. Legislative settings can, however, support a safe and responsible drinking culture through controls on the availability of alcohol, requirements for safe and responsible licensed premises, and the management of alcohol in public.
>
> In this context, the policy objectives of the Bill are to:
>
> - Reduce excessive drinking by young people and adults;
> - Reduce the harm caused by alcohol use, including crime, disorder, public nuisance and negative public health outcomes;
> - Support safe and responsible sale, supply and consumption of alcohol;
> - Improve community input into local alcohol licensing decisions;
> - Improve the operation of the alcohol licensing system.
>
> [Emphasis added.]

10. As the Court of Appeal noted, this intention was also reflected in the statements of the Hon Judith Collins (by then the Minister responsible for the Bill as Minister of Justice) in speaking at the Bill's third reading:[24]

> These bills[25] provide a strong legislative framework for reducing alcohol related harm. It is the first time in more than two decades that Parliament has acted to restrict, rather than relax, our drinking laws. Most New Zealanders enjoy alcohol in a responsible manner; however, the harm resulting from excessive drinking strains our country's health and law enforcement resources, and causes people and communities a lot of grief and stress. **These bills contain a wide range of measure that will help to bring a change in our drinking culture. They provide many parts of society, from central to local government, communities and parents, with tools to make that happen …**
>
> … I would like to take this opportunity to outline some of the bills' **key measures that will help reduce problem drinking in our country. Let us look at access to alcohol. Right now we can buy alcohol in supermarkets, bottle stores, clubs, bars, and corner stores, sometimes 24 hours a day. This is despite clear evidence showing a link between alcohol availability and harm, such as crime and health problems. The Sale and Supply of Alcohol Bill, which I will now refer to as "the bill", introduces national maximum trading hours of 7am to 11 pm for bottle stores, supermarkets, and grocery stores, and 8 am to 4 am for restaurants, bars and clubs …** [Emphasis added]

11. As the Court of Appeal further noted, these statements "spoke of the "clear evidence" linking availability of alcohol and harm and stated that the Bill's "key measures" included restrictions on access to alcohol".[26] The Court then set out the following statement of the Minister regarding local alcohol policies:[27]

> Another important measure to give local communities a greater say is the option for communities to adopt a local alcohol policy. Under these policies, communities will be

[24] Above n 2 at [14]; Hansard record of speech of the Minister of Justice, Hon Judith Collins, moving the Third Reading of the Bill, 11 December 2012.

[25] The Bills were the Sale and Supply of Alcohol Bill, and the Summary Offences (Alcohol Reform) Amendment Bill.

[26] Above n 2 at [14] (with typographical error of an extra "that" corrected).

[27] Above n 2 at [14].

> able to restrict or extend maximum trading hours. They will also be able to limit the location of licensed premises near certain facilities, such as schools, and specify whether further licences should be issued in a defined area. There have been calls to make local alcohol policies mandatory; however, there are important reasons why policies should be optional. Firstly, there is significant cost associated with the development of a local alcohol policy. Some territorial authorities—particularly the smaller ones—may not want to fund the development of a policy. Secondly, some communities may consider that a local alcohol policy is unnecessary for their area, and that the national maximum trading hours, a new criteria in the bill, adequately address their needs. It is very important that we allow communities to decide what it is best for them, especially given the aim of increasing community input and control over licensing.

12. The particular alcohol-related problems faced by New Zealand cities, and Auckland as its largest city, were also recorded by the Law Commission. Its 2009 Issues Paper noted that, in the seven months prior to drafting the paper, "the Law Commission accompanied police and liquor licencing inspectors in late night and early morning shifts in 17 different towns and cities around the country" and that "[t]he case studies which appear in this chapter are the Law Commission's accounts'." [28] The Commission said:

> Before the mayors and tourist bodies leap to the defence of their cities, this chapter [entitled "Alcohol, Crime & Antisocial behaviour"] is not about moderate, sociable drinking: it is not about the vibrant and diverse bar and restaurant sector which has sprung up in towns and cities all over the country, contributing employment and significant rates revenue to local bodies.
>
> It is about the contribution alcohol is making to crime, antisocial behaviour and victimisation in our country.
>
> It is about the fact that on 21,263 separate occasions in the year 2007/08, our police officers became nursemaids and taxi drivers, picking up from the streets and taking to safety people who were so intoxicated they were judge to be a risk to themselves or others.

13. Tellingly, the Commission's first case study was downtown Auckland. It was prepared to express its views in blunt terms:[29]

> [The Police] base in downtown Auckland stares down the throat of Fort Street, a narrow alley with pretensions as an upmarket night club zone. From 1 or 2 am most Saturday and Sunday mornings a sea of people in various states of intoxication funnel down Queen Street into this "hot zone"...
>
> The testosterone levels are palpable as people spill out into the alleyway jostling for ringside position. A wrong look, a real or imagined insult, it takes very little to earn an unprovoked punch at this hour in the morning in Auckland's CBD.

14. The Commission then noted that many of the downtown Auckland Police, who had also policed cities like London and Birmingham, offered unflattering comparisons when asked to describe their experiences in policing Auckland's CBD in the early hours. The Commission then offers this quote:[30]

> I have been lucky enough to visit cities all over the world and no other city I have been to is as violent as High Street and Fort Street at 4 am over the weekend. The aggression and

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[28] *Alcohol in our Lives: An Issues Paper on the Reform of New Zealand's Liquor Laws* (NZLC IP 15, July 2009) at p 51.
[29] At p 52.
[30] Above n 28.

> abuse from intoxicated people has to be seen to be believed. Girls are sitting in the gutter smashed out of their brains with their underwear on show and their friends nowhere to be seen. Nobody looks after each other and the police are left to pick up the pieces.

15. The Commission continued:[31]

> Mute evidence to back this ugly assessment is captured each night on a bank of TV screens streaming continuous footage from dozens of strategically positioned CCTV cameras around the city. If 24-hour licensing is supposed to be an essential ingredient in making Auckland a competitive "world class" city, you have to wonder what competition it is hoping to win.
>
> The consequences of Auckland's continuing ARH, in particular the social costs which are not internalised by those who profit from it, are dealt with by the frontline Police and health professionals who gave evidence before ARLA.

16. The above comments are not just relevant to on-licence outlets. There was extensive evidence in this case about the impact of purchasing and consuming off-licence alcohol prior to, and during the course of, a night out (called pre-loading and side-loading).[32] As Sir Geoffrey Palmer has said in the concluding comments to chapter 24 (*Reforming Alcohol Law: Too Much Liquor in Our Lives*) of his memoir: "When there is ample evidence of harm, and there are means available to ameliorate it and they are not taken, it is a matter for public concern".[33]

17. While the link between Auckland's high levels of alcohol-related harm and off-licence trading was in dispute in this case, there was extensive undisputed evidence that Auckland has high levels of such harm across the region (unsurprisingly, given the Law Commission's findings referred to above).[34]

18. Finally, the Explanatory Note to the recently introduced Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill is of note.[35] The Bill abolishes appeals of local alcohol policies (and implements recommendations of a Ministerial Forum on alcohol advertising and sponsorship). The Explanatory Note to the Bill explains the reasons for abolishing LAP appeals as follows:

> The objective of the Sale and Supply of Alcohol Act 2012 (**the Act**) includes that "the harm caused by the excessive or inappropriate consumption of alcohol should be minimised". Unfortunately a number of aspects of the Act do not meet this harm minimisation or public health approach and this Bill does two things to fix this.
>
> Part 1 of the Bill abolishes appeals on local alcohol policies in order to provide proper local control over alcohol regulation. Territorial authorities can try to develop local alcohol policies to enhance community wellbeing. However, this part of the Act has failed because large companies have used their appeal rights in the Act to largely block the development of local alcohol policies. And those that have been adopted have only rarely

[31] Above n 28.
[32] Above n 2 at [78].
[33] *Reform: A Memoir*, Victoria University Press, 2013; chapter 24 *Reforming Alcohol Law: Too Much Liquor in Our Lives* at p 641.
[34] Above n 2 at [77] – [80], [105]-[111], [118].
[35] Sale and Supply of Alcohol (Harm Minimisation) Amendment Bill, Members' Bill (Chloe Swarbrick, Green Party), introduced 30 June 2022, Parliament 53, Bill no. 147-1. The Bill is awaiting its first reading.

included regulations over the location and density of stores selling alcohol. This means that communities have not been able to develop public health approaches to the provision of alcohol in their areas.

The Health Promotion Agency, a Crown agent, recommends that the appeal process should be abolished because the appeals process is "expensive and time-consuming", for community members it is "unfamiliar, stressful and intimidating", and the Act already requires territorial authorities to go through a special consultative process before adopting a local alcohol policy.

Relevant principles

19. The approach of the Supermarkets throughout this case has been to deny the wide policy-making power vested in territorial authorities to formulate LAPs. Their approach would severely curtail territorial authorities' ability to minimise ARH and promote safe and responsible drinking; and seriously undermine Parliament's intention to address New Zealand's excessive drinking culture through the Act. It is submitted that as the Supermarkets have a significant commercial interest in an interpretation of the Act that subordinates the minimisation of ARH to other considerations, their arguments should be approached with caution.[36]

20. The Court of Appeal's decision was consistent with case law that has developed since the Act's inception (apart from Duffy J's decision).[37] Many of the issues in this case were addressed by Clark J in *Medical Office of Health v Lion Liquor Retail* ("*Lion Liquor*") where it was held:[38]

    20.1 The Act was intended to restrict rather than relax drinking laws based on clear evidence showing a link between the availability of alcohol and ARH. National maximum trading hours were reduced in the Act, with off-licence trading hours significantly shorter than on-licence hours.[39] Restriction on trading hours was one

[36] For comment on parties with vested interests making arguments in their own favour in this context, see, for example, Sir Geoffrey Palmer, a proponent of the liberalisations of liquor law in the late 1980s, in *Reform: A Memoir*, Victoria University Press, 2013 – in particular chapter 24 entitled *Reforming Alcohol Law: Too Much Liquor in Our Lives* where he said, at 622-623, that "A combination of factors has caused political timidity in this field, and the public interest is not being well served by the law that was passed by Parliament in 2012. Legislators should take seriously what the empirical social science tells us about what is occurring in society with alcohol. Many of the decisions taken by Parliament either ignore the evidence or are contrary to it. In my judgment the reason for this laxity lies in the heavyweight lobbying influence of the liquor industry, an influence exerted behind closed doors. Alcohol in New Zealand is a multi-billion dollar industry and the wine sector alone was estimated to have contributed $1.5 billion to the gross domestic product of New Zealand in 2008. No doubt this has much to do with the tenderness with which the industry has been treated". See also 636 for Sir Geoffrey's views on the liquor and hospitality industry.

[37] *J & C Vaudrey Limited v Canterbury Medical Officer of Health* [2017] 2 NZLR 334 (CA) at [22] – [25]; *Christchurch MOH* v *Vaudrey & Bond* [2015] NZHC 2749; *Lower Hutt Liquormarket Ltd v Shady Lady Lighting Ltd* [2018] NZHC 3100 at [6]-[9]; *Birthcare* above n 8 at [115]; *Nekita Enterprises Ltd v Christchurch City Council Alcohol Licensing Inspector* [2021] NZHC 2598 at [69]; *E R Bellas Ltd v Kairikari 2021 Charitable Trust Inc* [2020] NZHC 2517 at [16] – [17].

[38] *Medical Office of Health v Lion Liquor Retail* [2018] NZAR 882 at [72]. Although in the slightly different context of the imposition of an hours' restriction on an application for renewal of an off-licence, the general principles apply with even greater force to the formulation of LAPs given their high policy content and the narrow appeal test in ss 81/83.

[39] At [72].

of the policy levers recognised in the Law Commission work that led to the Act as being available to reduce ARH, especially in relation to off-licences.[40]

20.2 A direct link between ARH in an area where an off-licence trades and sale of alcohol from that off-licence is not required for a trading hours' restriction to be reasonable, as a precautionary approach can be applied to test whether the condition would in fact address ARH.[41] It is sufficient if the off-licence is "implicated" in the high level of ARH.[42]

20.3 "The statutory provisions must be applied in a way that promotes the twin statutory objects which are that the sale, supply and consumption of alcohol should be undertaken safely and responsibly and that alcohol-related harm should be minimised. The aim of minimisation requires alcohol-related harm to be reduced to the smallest amount, extent or degree". [43]

20.4 ARLA wrongly assumed the Act required a balance to be struck between allowing the safe and responsible sale, supply and consumption of alcohol, and minimisation of ARH. A licensee's concern at a potential loss of customers and market share is not a relevant consideration. The Legislature's expectation that ARH will be minimised "does not yield to a licensee's commercial or equitable interests".[44]

20.5 The Act "does not countenance the continuation of high levels alcohol-related harm. The Act requires minimisation of the alcohol-related harm. It is not necessary to establish, as the Authority required, that the proposed operation "would be likely to lead to" alcohol related harm. The task of the DLC was to respond to the risk and it did so."[45]

20.6 In giving reasons, a decision-maker is not required to address every piece of evidence or argument raised.[46]

21. Duffy J in the High Court made no reference to these principles from *Lion Liquor* despite receiving extensive submissions about them from the MOH. Nor (despite being referred to it upon its release post-hearing) did the High Court address the subsequent decision of Clark J in *Capital Liquor Ltd v The New Zealand Police,*[47] where it was held: [48]

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[40] At [72].
[41] At [72].
[42] At [70].
[43] At [45].
[44] At [49]-[51].
[45] At [68].
[46] At [42].
[47] *Capital Liquor Ltd v The New Zealand Police* [2019] NZHC 1846.
[48] At [74]-[82].

21.1 The purpose section of the Act (s 3) contains a "powerful statement of the legislative purpose and puts public health front and centre". As long as measures put in place to minimise ARH are not "capricious or grossly disproportionate" they do not need to be the *most* proportionate means of achieving the Act's purpose.

21.2 Parliament's decision, in the purpose section of the Act, to separate the reasonableness of the system of control from the requirement for the system's administration to help achieve the object of the Act "strongly suggests a deliberate step by the legislature to narrow, if not close, the potential that existed to require, even if only rarely, commercial interests to be considered in licencing decisions."

22. The Court of Appeal adopted most of these principles,[49] and held that Duffy J's failure to have regard to them led to misinterpretation of the object and purpose of the Act and the purpose of national default hours; and to misinterpretation and incorrect application of the appeal test in ss 81/83 of the Act.[50] The Court of Appeal accepted that:

22.1 The twin objects of the Act are not in conflict and do not require a "balance to be struck", but rather seek the same result of improving public health outcomes.[51]

22.2 The national maximum default hours are not presumptively reasonable and a local authority is not required to justify departure from them.[52]

22.3 It is sufficient for a "prospective benefit to be taken into account if there is a real and appreciable possibility that the element will deliver it".[53]

22.4 As there was ample evidence to support to the finding there was a "real and appreciable possibility" that the elements will reduce ARH,[54] there was no basis to interfere with ARLA's conclusion that the Supermarkets had not met the burden persuading it that the elements were "unreasonable in light of the object of the Act."

22.5 The Court of Appeal accepted that a precautionary approach is appropriate and applied it in interpreting the appeal standard in s 81/83. Thus, its "real and appreciable possibility" test for assessing a prospective benefit incorporates a

[49] Above n 2 at [35]-[41], [53], [56]-[68]
[50] Above n 2 at [22], [35]-[41].
[51] Above n 2 at [16].
[52] At [25].
[53] At [53].
[54] At [77] – [80], [105]-[111], [118].

precautionary approach because it "admits remedial measures to reduce harm although their effects are uncertain".[55]

23. In relation to the last point, there has been recent application of the precautionary principle to meet public health objectives in judicial review proceedings involving challenges to Covid-19 measures. Cooke J has explained the application of the principle in that context as follows:[56]

> *The precautionary principle*
>
> [94] Even a modest vaccination protection on a modest number of personnel needs to be considered in the context of the potential effects of a pandemic. In *Four Aviation Security Service Employees v Minister of COVID-19 Response* I referred to what can be described as the precautionary principle as being of real significance. I indicated that in the case of the Aviation Security workers who were at a key location where COVID-19 might first enter New Zealand, which at that stage had managed to eliminate COVID, this principle should operate. This principle has been explained in other COVID-19 related cases, particularly in Canada. In *Spencer v Attorney-General of Canada* the Federal Court of Ontario addressed this concept in relation to restricting entry into Canada. Pentney J said:
>
> > **… The precautionary principle is a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad, and it gives effect to the precautionary principle in a manner that reflects the Government of Canada's overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate it given the current state of knowledge of the virus.**
> >
> > **Viewed in light of the precautionary principle, the fact that the Order may not provide perfect protection is not particularly significant. The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection**. This, in turn, would have a significant – perhaps deadly – effect on the wider Canadian public, based on the experience thus far.
>
> [95] I agree with that approach. It is consistent with the one I applied in *Four Aviation Service Employees*. But the position is different here as this Order is not sought to be promulgated and justified on a public health need to suppress the spread of the virus. Rather it is imposed for the purpose of ensuring continuity of, and confidence in, essential services. **One of the main justifications for the precautionary approach is the health risk to the wider public. That is not suggested as relevant here. But I accept that there may be an analogous concept — if there was evidence of a threat to the continuity of Police and NZDF services then there is room for giving the Crown the benefit of the doubt in imposing measures to address that risk. It is plain that such services are of vital importance, and that they can be needed during the pandemic. In the last few months the effects of the tsunami in Tonga, and the occupation of the grounds of Parliament and the surrounding areas by protesters demonstrates the need to ensure such services are readily available.**
>
> [96] But the burden still is on the Crown to demonstrate that the limitation on the applicants' rights is reasonable and demonstrably justified in light of the precautionary principle (or the version of it described above). Ultimately this case may be thought to

[55] At [62].

[56] *Yardley v Minister for Workplace relations and safety* [2022] NZHC 291 [25 February 2022]; for a recent discussion of the precautionary approach in the context of environmental law see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at [107].

> come down to a contest between the fundamental rights of the applicants and this version of the precautionary principle.
>
> [Emphasis added and footnotes omitted.]

24. These statements of principle can be applied with appropriate adjustment to the context of this case. Although imposing public health measures in a pandemic involves different considerations, the evidence of the extent the ARH and its impact on the community justifies an approach of "acting on the best available information" to protect the health of New Zealanders despite uncertainty of outcome. And provided the evidence shows the measures are a "rational response" to a "real and imminent threat to public health", they will be reasonable unless their interference with fundamental rights is unjustified (discussed further below).

COURT OF APPEAL DID NOT REJECT PROPORTIONALITY PER SE

Court of Appeal did not hold that proportionality was immaterial and was not required to expressly undertake a full proportionality assessment

25. For the reasons summarised at paragraphs 4.5 – 4.7 above, the MOH endorses the Council's submissions that the Court of Appeal did not hold that proportionality was *immaterial*. However, the MOH emphasises that the Court of Appeal did not need to elaborate on what proportionately might encompass due to the lack of evidence of any effects sufficient to establish disproportionality. The inconvenience caused to shoppers by having to purchase off-licence alcohol one hour earlier, or the (speculative) impact on the Supermarkets' private profits, was incapable of establishing disproportionality. The Supermarkets simply did not adduce evidence capable of persuading ARLA that the elements were disproportionate.

26. However, in case the Court considers it appropriate to assess what proportionality should encompass under s 81/83, the MOH will address the point.

The content of the proportionality assessment

27. The MOH relies on Clark J's formulation in *Capital Liquor*, namely that a measure that has the reasonable possibility of meeting the object of the Act will only be unreasonable if it is "capricious or grossly disproportionate".[57]

[57] *Capital Liquor Ltd v The New Zealand Police* [2019] NZHC 1846 at [74]-[82].

28. It was necessary for the Court of Appeal to interpret and apply "*unreasonable* in light of the object of the Act" in its full context. The Supermarkets in effect seek adoption of a universal interpretation of the word "unreasonable" devoid of statutory context and contrary to the remaining words of the s 81/83 test: "in light of the object of the Act". The ARH minimisation object of the Act *governs* the interpretation of the word unreasonable. The Court of Appeal therefore correctly interpreted the s 81/83 test as narrow, requiring deference to the Council's policy-making role, allowing policies aimed at minimisation of ARH despite uncertainty about their effect, and rejecting wholesale application of proportionality principles applicable in a different statutory context.

29. The considerations relevant to the assessment of unreasonableness are limited by the object of the Act. By way of example of an irrelevant consideration, in the *Wellington* PLAP decision ARLA found that preserving the "dynamic central city" was not a relevant consideration.[58]

30. There is support for this position in the Departmental Report that evaluated the submissions on the Bill and provided advice to the Select Committee. In reply to a submission opposing the narrow appeal ground it was said: "While ARLA is well placed to assess the reasonableness of the defined licencing matters in light of the object of the Act, a broader consideration of the merits of an LAP would fall outside its expertise. It would also risk undermining the democratic process of the special consultative procedure".[59] In response to a submission from Woolworths (then named Progressives) that an appeal right should exist if the LAP breaches the clause stating that LAPs be consistent with the Act and general law, the report said "We do not propose further extending the right to appeal but note that the right to seek judicial review would still be available in such a case. To the extent an issue arises with the application of an LAP in a licensing application, these issues could be raised in the licensing process".[60]

31. This position is also supported by Clark J's decision in *Capital Liquor* where, as noted above, it was held that the separation, in the Act's purpose, of the reasonableness of the system of control from the characteristic that "its administration helps to achieve the object of this Act" means that "the focus of licensing decisions is now directed solely at attaining the objects of the Act".[61] This reasoning applies with equal or greater force to LAP decisions (given their broad policy content). This aligns with the Court of Appeal's following conclusions on the Act's purpose:

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[58] *B & M Entertainment Ltd v Wellington City Council* [2015] NZARLA at [67]-[68].

[59] *Alcohol Reform Bill: Departmental Report for the Justice and Electoral Committee: Part One* (Social Policy and Justice Group, 2011) at [428].

[60] At [430].

[61] Above n 55 at [79].

> [20] Second, the new system of control is not only to be reasonable but also to help achieve the object of the Act, which differs very significantly from that of the 1989 Act. In contrast to the 1989 Act, the reasonable system of control is not the Act's end in itself.
>
> [21] Third, the content of a reasonable system of control should be gleaned from the legislation itself and the legislative history, including the Law Commission's report which, as we have explained, the legislation sought to implement in significant measure. We observe that it is a premise of the 2012 Act that licensing policy can reduce alcohol-related harm; that was the lesson the legislature took from the 1989 Act, under which increased outlet density and longer trading hours contributed to increased harm. We have referred at [12] above to what the Commission identified as characteristics of a reasonable system of control. We observe too that it is a feature of the 2012 Act that the system of control should facilitate local preferences about alcohol supply.
>
> [Footnotes omitted.]

32. The bylaw cases themselves demonstrate that the word "unreasonable" must be interpreted in its full statutory context. In *Conley v Hamilton City Council* the Court noted that the starting point was s 17 of the Bylaws Act, which provides:[62]

> **17. Part of bylaw only may be deemed invalid** – If any bylaw contains any provisions which are invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or **unreasonable**, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.
>
> [Emphasis added.]

33. The Court expanded on the meaning of "unreasonableness" in s 17:[63]

> • fourthly, a bylaw will be regarded as unreasonable if it leads to manifest arbitrariness, injustice, or partiality. A well-known example of the application of this fourth principle is *Montreal v Arcade Amusements Inc* [1985] 1 SCR 368, holding invalid a bylaw prohibiting minors from entering amusement halls or using amusement machines. The Supreme Court of Canada said that it was upholding "the rule of administrative law that the power to make [bylaws] does not include a power to enact discriminatory provisions" (p 403) and that this is a "principle of fundamental freedom" (p 413).

34. The Court then reviewed the various meanings that could be adopted for unreasonable in s 17 under a discussion headed "reasonableness and proportionality", which included the following:

> [52] The general issue is: what is the standard of unreasonableness, or degree of intensity of review, where the term "unreasonable" is (as here) contained in a statute? In *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1977] AC 1014 the Secretary of State had the power to issue directions to the local education authority "if . . . satisfied" that the local education authority "had acted or [was] proposing to act unreasonably" (s 68 of the Education Act 1944 (UK)). Despite the seemingly subjective formulation, the House of Lords read the term "unreasonably" as expressing the *Wednesbury* formulation (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA)). That is, the Secretary of State could issue directions only where the local education authority was acting so unreasonably that no reasonable authority would so act.
>
> [53] "Proportionality" is a recognised general principle of law much employed in Europe, and now in England by British courts, in respect of directly effective community laws (see, for example*, Stoke-On-Trent City Council v B and Q plc* [1991] Ch 48). Those who opposed its applicability in English law did so largely on a view that it may lower the threshold of

[62] *Conley v Hamilton City Council* [2008] 1 NZLR 789.

[63] At [45].

judicial intervention and involve the courts in considering the merits and facts of administrative decisions (see, for example, Lord Lowry's arguments against proportionality in *R, ex p Brind v Secretary of State for the Home Department* [1991] 1 AC 696 at pp 766 – 767).

[54] The practical advantage of the doctrine is that it is a respectable tool for assessing two categories of cases, namely where something is challenged as being unreasonably oppressive or where there is a distinctly or manifestly improper balancing of relevant considerations.

[55] Commonly three tests are employed where the proportionality doctrine is resorted to:

- a "balancing test", which requires a balancing of the ends which an official decision attempts to achieve against the means employed to achieve them;
- a "necessity test", which requires that where a particular objective can be achieved by more than one of the available means, the least harmful of these means should be adopted to achieve that objective; and
- a "suitability test", which requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.

(See De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th ed, 1995), para [13.073].)

[56] Even when "proportionality" is resorted to there is still a difficult question of the intensity of review to be employed. In a case of delegated authority to an elected local authority, Hammond J suggested in *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 NZLR 30 at p 35 that some caution is required "in assessing Council's homework": "That in turn would offend the three imperatives recently conveniently encapsulated by Lord Irvine of Lairg QC in 'Judges and Decision-makers: the Theory and Practice of Wednesbury Review' [1996] PL 59. His Lordship identified such as being the democratic imperative; (that is, the deciders derive authority from an electoral mandate, to which they are accountable); secondly a constitutional imperative, (that government, not Courts decides fundamental policy); and thirdly, an imperative that Courts in many, if not most areas, lack the relevant expertise to make such assessments."

[57] See also the decision of this Court in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, and particularly the judgment of Richardson J at pp 545 – 547.

[58] Whether "proportionality" adds much in a case such as the present may be open to argument. For instance, the very reason something may be thought to be "unreasonable" is precisely that it is disproportionate, but it is at least an aid to clearer analysis.

35. In dismissing the appeal (challenging a bylaw providing that brothels could only be operated in specified zones and not located within 100m of specified sites), the Court concluded:

[74] The third point is that this equivocal evidential foundation is hardly a satisfactory basis for the subsequent claim of "discrimination" as between different kinds of prostitutes. Just how things have operated as a result of this bylaw is, on the evidence in Court on this application, distinctly problematic. It is difficult to apply public law labels such as unreasonable or disproportionate to what little evidence there is. There are all sorts of tests – some quite sophisticated – which could be applied, but only to actual evidence. As noted in cases under the Bill of Rights, cases involving arguments of unreasonableness or disproportionality cannot be run in the abstract; there must be an evidential foundation.

[75] The fourth point is that, even if this were a close-run case, in our view where as here the choices being made are distinctly ones of social policy (considered, we note, in the absence of any real Bill of Rights concerns), a court should be very slow to intervene, or adopt a high intensity of review. A large margin of appreciation should apply. Parliament entrusted the location of brothels to local authorities, which are elected bodies, and Parliament has itself decided to maintain a measure of ongoing review of prostitution.

36. As *Conley* illustrates, even when a statute uses the word "unreasonable" without further elaboration, its correct interpretation will be highly context specific. The statutory context, the underlying social policy, the entrusting of that policy to local authorities, and Bill of Rights concerns will all be relevant considerations. Taking those matters into account, the Court in *Conley* considered a "large margin of appreciation" should be given to the local authority. The Court did not simply apply a set of abstract principles devoid of context. This supports the Court of Appeal's approach in this case, and that was reinforced by the plain words of s 81/83, which direct that the unreasonableness assessment is governed by object of the Act.

37. ARLA expressed the view in this case (and other cases) that general proportionality principles used in bylaw cases apply.[64] However, as demonstrated by *Conley*, the bylaw cases do not blindly apply a set of principles devoid of context. Moreover, the wholesale importation of general bylaw principles puts an improper gloss on the statutory language. It is submitted that the Court of Appeal was correct to hold that such principles should not be imported into the SSAA context. As noted above, Parliament deliberately decided to keep the appeal provision narrow. Indeed, the Supreme Court has often expressed concerns that a "gloss" should only be placed on statutory language where it is necessary to make a statute work – which is not the case here.[65]

38. Although, as the Court of Appeal accepted, adoption of the bylaw principles did not lead ARLA into error in this case, their adoption has encouraged arguments in support of a seemingly open-ended proportionality assessment. It has provided fertile ground for the Supermarkets to argue that PLAP elements are unreasonable by reference to all manner of irrelevant considerations (a prime example being shopper inconvenience).

39. Accordingly, the MOH's position remains that the bylaw proportionality principles should not be imported into s 81/83. The Supermarkets have urged that these principles be adopted in full and effectively seek to relegate the object of the Act to something ARLA must only "have regard to" but no more. To adopt such an approach when the statutory provision contains only *one* matter that ARLA must test unreasonableness against, is to ignore the context in which the phrase "in light of" has been used. Section 81/83 requires a simple, narrow inquiry and no gloss is required.

40. It is submitted that ARLA was correct in its *Tasman* decision when it said that "proportionality involves the assessment of the interference with a *public right*, against

[64] Above n 2 at [38].

[65] See, for example, *Poynter v Commerce Commission* [2010] 3 NZLR 300 at [45], *Steele v Serepisos* [2006] NZSC 67 at [22] and, and on the topic of "correcting" legislation*, Air New Zealand Ltd v McAlister* [2010] 1 NZLR 153 at [56] and [95]-[96].

the benefit sought to be achieved by the provision" and that it will only be at "certain points at the *extreme* ends of the scale" that action taken to reduce ARH may become "unreasonable" [italics added].[66] Clearly, not every freedom members of the public enjoy will constitute a public (or private) right. [67]

41. There are many things members of the public can do that are lifestyle choices, which do not qualify as rights. This is illustrated by the Supreme Court and Court of Appeal's decisions on the smoking ban imposed by Waitemata District Health Board in respect of its inpatient mental health facilities.[68] It was argued that the inability to smoke was a breach of the patients' rights, as persons detained, not to be subject to disproportionately severe or inhumane treatment under in ss 9 and 23 of the NZ Bill of Rights Act 1990 (**BORA**). In dismissing the appeal, the Supreme Court agreed with the Court of Appeal that "there is no existing right to smoke".[69] The Court of Appeal endorsed the statement of principle from the Canadian Supreme Court that "smoking is not a 'basic choice going to the core of what it means to enjoy individual dignity and independence' it is rather a matter of life-style choice".[70]

42. It is submitted that there is no basis to distinguish between smoking tobacco and consuming alcohol in terms of whether they engage a public (or private) right. They are both lifestyle choices and nothing more. This means that the extent to which an element may impinge on the general ability of the public to buy or consume alcohol is an irrelevant consideration to determining whether the element is unreasonable in light of the object of the Act. It does not constitute a public or private right that the element must be assessed against.

43. It is therefore submitted that if there is evidence that provides a rational basis for concluding that an element will assist with minimising ARH (or using the Court of Appeal formulation "a real and appreciable possibility" it will reduce ARH), it will not be unreasonable in light of the object of the Act unless it is "capricious or grossly disproportionate".[71] Given the wording of s 81/83, what is relevant to that proportionately assessment is *governed* by the Act's twin (unified) objects of ARH minimisation and promotion of safe and responsible drinking. Some consequences

[66] *Hospitality New Zealand Incorporated v Tasman District Council* [2014] NZARLA PH 846 at [43]-[51].

[67] For a recent discussion of "public rights" in the context of the tort of public nuisance see *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 at [60]; see also the bylaw case of *Harrison v Auckland City Council* [2008] DCR 619 at [52] where Stevens J provides some guidance on what a public right might be in that context – in that case it was a right recognised by statute to exercise a dog: Dog Control Act 1996 s 10(4)(d).

[68] *B v Waitemata District Health Board* [2017] 1 NZLR 823 (SC); *B v Waitemata District Health Board* [2016] NZCA 184 [2016] 3 NZLR 569.

[69] At [136].

[70] At [79].

[71] *Capital Liquor* above n 13.

caused by implementing an element will be irrelevant to the proportionality calculus, others might be highly relevant (e.g. impingement on fundamental rights) and others will fall between the two. As always, context is everything.

44. Examples of irrelevant considerations include shopper inconvenience (which appears to have been Duffy J's focus), private profit,[72] and maintaining a dynamic city centre.[73] In this case, as there is no consequence of implementing the elements beyond irrelevant considerations such as shopper inconvenience and private profit (and even if these are *relevant* considerations they are so minor as to be trivial), the Court of Appeal did not need to go further than it did to dismiss the appeal. However, if the Court considers the Court of Appeal should have taken the extra step of expressly undertaking a proportionality assessment, this can now be corrected on appeal.

The concept of gross disproportionality

45. The concept of "gross disproportionality" adopted by Clark J in *Capital Liquor*, and in a slightly different form by ARLA in the *Tasman* decision,[74] is recognised in other areas of the law with public or rights protection goals.

46. There has been Parliamentary recognition of the concept of "gross" disproportionality in assessing "reasonable" practicability in the context of public welfare legislation in s 22 of the Health and Safety at Work Act 2015. The section provides:[75]

> **22 Meaning of reasonably practicable**
>
> In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
> (a) the likelihood of the hazard or the risk concerned occurring; and
> (b) the degree of harm that might result from the hazard or risk; and
> (c) what the person concerned knows, or ought reasonably to know, about—
> (i) the hazard or risk; and
> (ii) ways of eliminating or minimising the risk; and
> (d) the availability and suitability of ways to eliminate or minimise the risk; and

[72] As the Court of Appeal noted at [41] "It is inherent in a licensing regime, and expected given the object of the 2012 Act, that controls may have an adverse economic impact on licensees".

[73] *Tasman* above n 66.

[74] Above submissions at paragraph 40.

[75] Prior to recognition in statute, the concept was long recognised at common law in the health and safety context: see *Waimea Sawmills Ltd v WorkSafe* NZ [2016] NZHC 915 where Collins J noted:

> [35] The concept of what is "reasonably practicable" was explained by Asquith LJ in *Edwards v National Coal Board* [footnote: [1949] 1 KB 704 at 712], and quoted with approval by Hansen J in *Buchanans Foundry Ltd v Department of Labour* [footnote: [1996] 3 NZLR 112 (HC)], in the following way:
>
> > Reasonably practicable is a narrower term than physically possible and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale, and the sacrifice involved and the measures necessary for adverting the risk (whether in money, time or trouble), is placed in the other; and that if it can be shown that there is a **gross disproportion** between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. [Emphasis added and typographical errors corrected.]

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, **including whether the cost is grossly disproportionate to the risk**. [Emphasis added in this paragraph.]

47. Judicial interpretation of the "undue hardship" test for relief applications under the Criminal Proceeds (Recovery) Act 2009 (and its predecessor) also relies on the concept of "gross" disproportionality. The Court of Appeal has held:[76]

> Those who establish drug houses and commit serious offences in or from them can normally expect to lose them unless there is gross or severe disproportion between the gravity of offending and the value of the property sought to be forfeited coupled with the other punishment inflicted on the offender. We have obtained some guidance on this question from the decision of the Court of Appeals for the Ninth Circuit in *United States v Washer* 817 F 2d 1409 (1987) in which it was held that only those forfeitures that in light of all the circumstances are grossly disproportionate to the offence committed are prohibited by the Eighth Amendment's ban on cruel and unusual punishment.

48. The concept of "gross disproportionality" is also recognised by the Canadian Supreme Court in assessing the protection afforded by s 7 of the Canadian Charter of Rights and Freedoms, which provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". When assessing whether a law might contravene s 7, the Court considers whether the law is "arbitrary, overbroad, or grossly disproportionate". In *Canada (Attorney General) v Bedford* the Court explained:[77]

> [120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.
>
> [121] Gross disproportionality under s. 7 of the Charter does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:
>
> > In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]
>
> [122] Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.
>
> [123] All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object,

[76] *Lyall v Solicitor-General* [1997] 2 NZLR 641 at 646-647; see also *Solicitor-General v De Bruin* (2004) 20 CRNZ 933 para 22(b) p 938 and *The Commissioner of Police v Nelson* HC AK CIV-2010-404-989 [30 July 2010] at [73]-[75].

[77] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

> or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

49. These examples support Clark J and ARLA's view (which is also implicit in the Court of Appeal's reasoning) that given the public welfare imperative of the Act's object and purpose, it will only be grossly disproportionate or extreme consequences that will render unreasonable an element capable of reducing ARH. As submitted above, the Supermarkets' cases fell well short of establishing any such consequences.

ARLA GAVE SUFFICIENT REASONS FOR ITS DECISIONS

50. In respect of ARLA's reasons for upholding element 1, the MOH endorses the Council's submissions.[78] As noted above, the Supermarkets' submissions rest on fundamentally incorrect interpretation of the narrow appeal standard in s 81/83. The appeal standard properly understood required ARLA to dismiss the appeal against an element unless it was persuaded that the element was not reasonably capable of meeting the object of the Act, or that its effects would be grossly disproportionate.

51. In respect of ARLA's reasons for upholding element 2, the MOH again endorses the Council's submissions (and the Court of Appeal's findings at [118]-[119]),[79] including that the High Court wrongly focused on a perceived failure to differentiate between types of off-licences and made incorrect assumptions that supermarkets cause less harm. In relation to the Court of Appeal's conclusions at [119] that "it cannot be assumed that those who are pre-loading are consuming beverages with a higher content than wine or beer", it should be noted that there was in fact evidence before ARLA to contradict the High Court's erroneous assumption on this point.[80]

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[78] Council's submissions in 140/2021 at paragraphs 4.1 - 4.12.

[79] At paragraphs 4.13 - 4.16

[80] The evidence included:

- T McCreanor et al (2015) *'Drink a 12 box before you go': pre-loading among young people in Aotearoa New Zealand, New Zealand,* New Zealand Journal of Social Sciences Online 2016 (**COA 312.2396**)*,* where the authors state "For men, the preferred beverage for pre-loading was beer. Women were less explicit about quantity but spoke in terms of bottles of wine or six-packs of premixed drinks" (page 41 COA).
- UMR Research (2013) *Pre-loading of alcohol and associated harm in Palmerston North* (**COA 310.1875**), which states that most alcohol for pre-loading was purchased from "a liquor store (79%) or supermarket (35%)" and that "the preferred alcohol was beer or cider (45%), spirits (45%) and RTDS (41%). The type of alcohol was driven by price (62%), what they felt like drinking that night (27%), and taste (24%)" (page 6 of study, **COA 310.1880**); wine was the alcohol of choice for 22% overall and 36% for females (page 59, **COA 310.1933**), and "most claimed to start pre-loading between 6:00pm and 9:00pm (71%) followed by 15% after 9:00pm and 9% before 6:00pm" (page 6, **COA 310.1880**).

COURT OF APPEAL WAS CORRECT TO FIND THAT THE SUPERMARKETS' ARGUMENTS CONFLATED THE APPEAL PROCESS WITH THE APPEAL STANDARD

52. It is submitted that the Court of Appeal was correct to hold that ARLA's task is "evaluative" in the sense that it "must decide for itself whether a given element is unreasonable in light of the Act's object", and that "ARLA correctly took that approach in this case".[81]

53. The Court of Appeal was also correct to hold that the s 81/83 test has "built into it a substantial degree of deference to the preferences of the territorial authority".[82]

54. Moreover, the Court of Appeal was right to reject the submission that a s 81/83 appeal should be classified as a "de novo" appeal in which there is no presumption that the local authority's decision is correct (i.e. the usual appellate burden to *persuade* the appellate Court that the decision was wrong does not apply). The Court of Appeal correctly held that, although the appellate *process* required evidence to be called before ARLA as there is no ability to proceed on the record created in the special consultative process, "a distinction must be drawn between the appellate process and the standard of appellate review contained in s 81".[83]

55. The Supermarkets' arguments in the Courts below conflated the appeal *process* and the appeal *standard* to justify expansion of the narrow appeal standard in s 81/83. The argument was in effect that, if the appeal is classified as a de novo, no deference is required and the concepts of unreasonableness and proportionality are expansive and open-ended.

56. However, the Supreme Court in *Austin, Nichols & Co Ltd v Stichting Lodestar* held that in both de novo appeal and appeals by way of rehearing the appellant has on onus of establishing the decision is wrong;[84] confirming that classification of an appeal *process* as de novo does not support the Supermarkets' position in the Court of Appeal that they did not have a burden of persuasion before ARLA.

57. It is submitted that the *standard* of appellate review is determined by interpretation of the relevant statutory provisions. The concepts of appeal "de novo" and appeal "by way

[81] Above n2 at [35].
[82] At [36].
[83] At [55].
[84] *Austin, Nichols v Stichting Lodestar* [2008] 2 NZLR 141 (SC) at [4]; Although the Court of Appeal in *Chief Executive of New Zealand Customs Services v Jury* [2017] 3 NZLR 745, relegated to Supreme Court's conclusion on de novo appeals to mere obiter, it is submitted that the Court of Appeal's reasoning is wrong and the Supreme Court's view should be preferred. The Court of Appeal conflated the appellate process with the appellate standard.

of rehearing"[85] express the process by which an appeal is conducted not the standard of appellate review. A de novo appeal process means the parties are free to call any evidence they choose,[86] whereas a rehearing is conducted on the evidence before the first-instance decision-maker.[87] The Courts have considered this expression of the appeal *process* to be an *indication* of the standard of appellate review in the absence of statutory provisions setting out the standard.[88] However, the starting point is the statutory provisions, which in this case are clear and determinative of the appeal standard irrespective of the appeal process.

58. As submitted above, s 81/83 contains a simple, narrow appeal standard. If an appellant cannot "satisfy" ARLA that an element is "unreasonable in light of the object of the Act", the appeal must be dismissed.

APPEALS COULD NOT SUCCEED EVEN IF THE SECTION 81/83 TEST IS MORE EXPANSIVE

59. In any event, it is submitted that even *if* the Supermarkets could establish that the appeal test in s 81/83 is more expansive than the Court of Appeal found (which is denied), they could not have succeeded before ARLA.

60. The post-*Austin, Nichols* New Zealand jurisprudence has become narrowly focused on a distinction between full merits appeals against "evaluative" decisions and restrictive appeals against the exercise of a discretion (i.e. the *Austin, Nichols* approach versus the *May v May* approach).[89] This approach requires the Court to apply starkly different tests depending on classification of the decision under appeal: if the decision is classified as "evaluative", a full merits review is required, but if it is classified as "the exercise of a discretion" then it must be established that the decision was based on an error of law, failed to account for relevant considerations or accounted for irrelevant ones, or was plainly wrong.

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[85] The phrase "appeal by way of rehearing" originated in the Chancery courts, prior the merging of that jurisdiction with the courts administering the common law: *F Hoffmann-La Roche & Co AG v W M Bamford & Co Ltd* [1975] 2 NZLR 507 (CA) at 517–518.

[86] *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 440.

[87] The Supreme Court confirmed the term rehearing is an expression of the appeal process in *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] 2 NZLR 124 (SC), where it said, at [16], "The Supreme Court Act requires that appeals to this Court proceed by way of rehearing. Such an appeal does not contemplate a right to a new hearing of the evidence. The appellate Court is required to determine issues which had to be determined in the proceeding of the Court appealed from on the basis of the evidence appearing in the lower Court's record. This may be supplemented by adducing fresh evidence, but only within established guidelines. It would ordinarily be outside the scope of the statutory direction to proceed by way of rehearing for this Court to allow a new case to be put up by a party to the appeal on which fresh evidence had to be called. The short answer, accordingly, to the applications to add the proposed new ground of appeal and to call fresh evidence to support it, is that they would take the appellate process outside of appropriate bounds."

[88] *Taipeti v R* [2018] 3 NZLR 308 (CA) at [22]; *Chief Executive of New Zealand Customs Service v Jury* [2017] 3 NZLR 745.

[89] As discussed in cases such as *Kasem v Bashir* [2011] 2 NZLR 1 (SC) at [31]-[33] and *Taipeti v R* above.

61. In contrast, the Courts of England and Wales take a more nuanced approach to the standard of appellate review of "evaluative" decisions. In *Bawa-Garba v The General Medical Council*, the Court of Appeal of England Wales reviewed the relevant authority in some detail.[90] It is submitted that the following principles emerge from that review:

61.1 Whether an appeal is by way or "review" or "rehearing" the task is determine whether the decision is "wrong". In either case, the appeal court should accord the decision-maker the same respect.[91]

61.2 When the decision appealed against is an "evaluative" decision based on many factors, involving a mixture of fact and law, it can be described as "kind of jury question" about which reasonable people may reasonably disagree. It has been repeatedly stated in cases at the highest level that there is limited scope for an appellate court to overturn such a decision.[92]

61.3 The need for appellate caution in reversing factual evaluations applies even when there are no questions of credibility. This is because expressed findings of fact can never capture all the nuances that play an important role in the decision-maker's overall evaluation. Where the application of a legal standard involves no question of principle but simply a matter of degree, an appellate court should be very cautious about reversing the decision.[93]

61.4 Even if the appellate court might disagree if it approached the matter afresh, it does not follow that the decision-maker lacked legitimate and proper grounds for making its assessment and that the decision was "wrong". In reviewing the first instance decision-makers assessment of primary facts, even where the evidence below was entirely in writing, the proper approach will depend on the circumstances of the case and what opportunity the court has, in reality, to improve and correct the overall assessment of the evidence.[94]

61.5 This general caution applies with particular force in the case of a specialist adjudicative body, which usually has greater experience in the relevant field than the courts. An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could

[90] *Bawa-Garba v The General Medical Council* [2018] EWCA Civ 1879 at [60]—[67].
[91] At [60].
[92] At [61].
[93] At [61] - particularly the quoted passage.
[94] At [65] – [66].

properly and reasonably decide. The authorities show that the addition of the words "plainly" or "clearly" to the word "wrong" adds nothing in this context.[95]

62. Thus, in England and Wales, categorisation of a first instance decision as "evaluative", still requires the Court to accord deference to the decision-maker where that decision involves mixed questions of fact and law in respect of which reasonable minds could differ (particularly so if the decision-maker is an expert tribunal). In the absence of an error of principle, the court will be not interfere unless the decision is outside the bounds of what could reasonably have been decided. It is only then that the decision will be "wrong".

63. This can be contrasted with the development of New Zealand case law post-*Austin, Nichols*. Although it is recognised that there is a burden to satisfy the appellate court the decision is wrong, in the absence of credibility assessments or specialist tribunal expertise, substitution by the appellate court of its view of the merits is apparently required irrespective of the nature and context of the evaluative decision under appeal. This has resulted in much litigation over whether first-instance decisions should be categorised as "evaluative" or "discretionary" when there is often no clear line to be drawn.[96] It is submitted that the more nuanced approach in England and Wales should be preferred. However, even applying the New Zealand approach, the specialist expertise of the Council and its policy-making mandate should require a high degree of deference by ARLA.

64. It follows that even if the Supermarkets could establish that the appeal standard in s81/83 is more expansive and open-ended than the Court of Appeal found, this would not mean their appeals could have succeeded. A Council's decision about the content of a local alcohol policy is the very type of decision to which ARLA should pay a high degree of deference and be very reluctant to interfere with, whatever test is adopted under s 81/83. There is nothing in the evidence before ARLA, or its evaluation of that evidence, that would justify such interference in this case.

CONCLUSION

65. For the reasons summarised at the start of these submissions, it is submitted the appeals should be dismissed.

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

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[95] At [67].

[96] See for example the extended judicial debate on the standard or appellate review in relation to penalty decisions of professional disciplinary bodies: *Emmerson v Professional Conduct Committee* [2017] NZHC 2847 at [86]-[97].

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Dated 10 August 2022

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