

SC 139/2021 and SC 140/2021 – First Respondent’s Outline of Oral Argument

1. Introduction (subs in SC 139/2021 (SUB139), 1.2- 1.10)

- 1.1 CA did **not** proceed on basis raised in SC’s leave judgment at [1].
- 1.2 But if SC finds that CA (erroneously) did proceed on this basis, ARLA did not, so no need to overturn CA’s findings reinstating ARLA’s decision.
- 1.3 Woolworths (WW) and Foodstuffs (FS) review grounds are not made out.

2. Statutory framework: object and purpose of SSAA, LAPs

- 2.1 SSAA deliberately departs from more liberal SOLA regime, which had failed to reduce ARH. New, more ambitious object and LAPs are central to “new system of control” referred to in s3: SUB139 2.1; CA at [9] - [22].
- 2.2 Object of SSAA in s4(1) has two limbs:
 - Para (a): consumption may be unsafe/irresponsible even though prior sale and supply wasn’t: SUB139, 2.5, 2.6; *Lion* at [67]; CA at [68].
 - Para (b): harm caused by excessive or inappropriate consumption of alcohol should be “minimised”: *Lion* at [45]. Concept of ARH in ss 4 and 5 includes community and societal impacts: SUB139, 2.3.
- 2.3 Two limbs of s4 are aligned and do not require “balancing”: CA at [16]. Section 4 assumes sale and supply of alcohol, but no prior “right” to sell: CA at [22]. *Licences* confer this right: SUB139, 2.4, 5.4; SSAA ss17, 233.
- 2.4 Section 3 purpose: references to “new” system of control and “reform” emphasise break with past: SUB139, 2.10-2.14; CA at [19]-[21]. *Meads* reasonableness discussion at [23], [53] reflects SOLA’s modest object.
- 2.5 LAPs allow local preferences to be reflected in licensing process: SSAA ss 43-45, 75-97, 105, 108-110. PLAP is a *policy* document adopted after public consultation. Elements may reflect community preferences and local democratic decision-making: need not be “evidence-based” provided they are not unreasonable: SUB139, 2.15-2.18, 6.1-6.3; CA at [32].
- 2.6 SSAA specifies LAP’s subject matter (s77) and matters to consider (s78). Otherwise, broad discretion: SUB139, 2.19 - 2.25, SSAA ss 75 - 79.
- 2.7 ARLA ensures element not unreasonable, but no more: SUB139, 2.25.

3. Auckland PLAP and the challenged elements

- 3.1 DLAP and PLAP based on research into alcohol-related issues in Auckland and public input (2,693 submissions): SUB139, 3.1-3.3.

- 3.2 Rationale for elements 1 and 2: Explanatory Document at [54-69](#), [75-95](#).
- 3.3 Element 1 (trading hours): ARLA found evidence to support Council’s precautionary approach. HC endorsed approach in principle but said ARLA gave insufficient reasons for not differentiating between off-licences. CA disagreed and at [\[126\(b\)\]](#) reinstated ARLA’s decision.
- 3.4 Element 2 (freeze and rebuttable presumption): ARLA held element not ultra vires. HC made no finding on vires but held ARLA failed to give reasons or not differentiating between off-licences and set aside its decision. CA disagreed and at [\[126\(c\)\]](#) reinstated ARLA’s decision.

4. **Appeal test - “unreasonable in light of the object of the Act”**

Real and appreciable possibility element will minimise ARH

- 4.1 Both appellants contend CA held that under s83 appeal will only succeed if there is not a real and appreciable possibility that the element will reduce ARH: WW subs at [2](#), FS subs at [2](#); SUB139, [4.1](#).
- 4.2 CA did **not** hold this. CA’s discussion at [\[53\]](#), [\[62\]](#) and [\[109\]](#) concerned issues of **proof** and **certainty**, and addressed WW and FS arguments that an element is unreasonable absent proof it will reduce ARH, and that ARLA erred by relying on precautionary principle: SUB139, [4.2 – 4.17](#).
- 4.3 CA at [\[53\]](#) refers to prospective benefit being “taken into account”: SUB139, [4.6](#). Does not mean possibility an element may reduce ARH is the **only** relevant matter. Section 81 appeal right not rendered nugatory under CA’s approach (cf. WW subs at [61](#)): SUB139 [4.20 – 4.21](#).
- 4.4 Nor was CA “rewriting” s81 appeal ground or s83 test: SUB139, [4.17](#) cf. FS subs at [37](#). CA discussed s83 elsewhere e.g. at [\[35\]](#), [\[36\]](#) and [\[40\]](#): but not attempting to define unreasonableness: SUB139, [4.18-4.19](#).

Relevance of “proportionality principles” from bylaw cases

- 4.5 CA identified two “proportionality principles” that refer to *rights* as not applicable, because “context is not the same” and under SSAA there is “no antecedent right to sell alcohol”: CA at [\[39\]-\[41\]](#), SUB139, [5.1-5.6](#).
- 4.6 But CA (correctly) did not rule out proportionality *per se* as potentially relevant to s83 unreasonableness eg where an element is an excessive response to a perceived problem. Proportionality allows consideration of impacts on licence-holders and consumers, even though no prior “right” to sell or consume alcohol: SUB139, [5.7](#).

4.7 CA did not criticise other indicia of unreasonableness from bylaw cases – eg if bylaw is partial or unequal in its operation; is imposed without reasonable justification; or is manifestly unjust: SUB139, 5.7-5.8.

4.8 In any event, ARLA **did** consider whether elements 1 and 2 were proportionate, without criticism from CA: SUB139, 5.13-5.15.

5. Woolworths’ grounds of review/appeal

5.1 Precautionary principle (element 1): uncertainty as to whether a policy intervention (element) *will* minimise ARH is inevitable: SUB139, 8.4.

5.2 Faced with uncertainty, Council entitled to take into account element’s potential to minimise ARH. Sufficient evidence for ARLA to uphold Council’s precautionary approach to closing hours: CA at [105]-[109]. Open to ARLA to follow *My Noodle* (which foreshadowed LAPs), as other courts have done since passing of SSAA: SUB139, 8.5-8.10.

5.3 ARLA correctly recognised *persuasive* burden in s81: SUB139, 8.11-8.13.

6. Foodstuffs’ additional grounds of review/appeal

6.1 Failure to give reasons (elements 1 and 2) not within FS’ statement of claim, and may not be introduced now: SUB 140, 3.5 to 3.6. Anyway ARLA **did** give reasons, which were sufficient to show why it made its decisions: SUB140, 4.6-4.16; *Lewis* at [81]; CA at [111] and [118].

6.2 Element 2: not ultra vires as within scope of s77(1)(d); does not direct DLC’s exercise of discretion under s105: SUB140, 5.1 to 5.3.

6.3 Element 1: no mandatory considerations when deciding appeal under s83 cf. developing DLAP/PLAP under ss 78(2) and 79(2): SUB 140, 6.1-6.7.

6.4 National default hours in s43 not a “baseline”: SUB140, 7.1; CA at [25].

6.5 No requirement to assess proportionality across region. FS argument inconsistent with appellant’s persuasive burden (s83): SUB140, 7.4-7.6.

7. Relief

7.1 ARLA’s decisions should stand even if CA erred, because ARLA did not. It correctly applied s83 test and considered proportionality: SUB139, 9.2.

7.2 Further relevant matters include delay and impact on third parties: Auckland still without LAP 5 years after ARLA’s decision: SUB139, 9.4.

7.3 Deletion of LIR element does not give rise to fresh appeal: SUB 140, 8.5-8.10; CA at [123].