

I TE KŌTI MANA NUI

BETWEEN

WOOLWORTHS NEW  
ZEALAND LIMITED

Appellant

AND

FOODSTUFFS NORTH  
ISLAND LIMITED

AUCKLAND COUNCIL

MEDICAL OFFICER OF  
HEALTH

ALCOHOL REGULATORY  
AND LICENSING  
AUTHORITY

Respondents

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OUTLINE OF ORAL ARGUMENT FOR  
WOOLWORTHS NEW ZEALAND LIMITED

12 SEPTEMBER 2022

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## **Outline of oral argument**

### **1. Issues for determination**

- (a) What is the test that ARLA is required to apply on an appeal under s81 of the Sale and Supply of Alcohol Act 2021 (Act)?
- (b) Did ARLA apply the correct test?
- (c) If not, what, if any, relief should be ordered?

### **2. Procedural background**

- (a) Joint Chronology [9] onwards, current status of the PLAP

### **3. Outline of Act**

- (a) Purpose, s3, object, s4
- (b) Default national maximum trading hours, s43, s45
- (c) Restrictions on supermarkets, s58, s112
- (d) Local Alcohol Policies, s75-80
- (e) Right of appeal to ARLA s81-86
- (f) ARLA, s169-205

### **4. Auckland PLAP**

- (a) Temporary Freeze: 3.2, 4.1.2-4.1.6
- (b) Rebuttable presumption: 3.3, 4.1.2-4.1.6
- (c) Maximum trading hours: 3.4, 4.3.1, 5.3

### **5. Test to determine whether element of a PLAP is “unreasonable in the light of the object of the Act”**

- (a) Court of Appeal judgment: [39]-[41] (rejection of proportionality principles from bylaws cases); [53], [62], [108]-[109] (“real and appreciable possibility” of minimising harm)
- (b) Woolworths says test is objective unreasonableness, having regard to the object of the Act. This requires ARLA to consider:
  - (i) Both limbs of the object of the Act in s4
  - (ii) Lawfulness (note s94)

- (iii) Partiality/unfairness/bad faith
  - (iv) Proportionality, including impacts on consumers, licence holders and the public generally
- (c) This interpretation is supported by/consistent with:
- (i) Ordinary use and meaning of “unreasonable”
  - (ii) Object of the Act in s4 (subs [55]-[59]): see Court of Appeal judgment at [16], [20], compare *Medical Officer of Health v Lion Liquor Retail Ltd* at [45], [50]-[53]
  - (iii) Purpose of the Act in s 3 (subs [49]-[54])
  - (iv) Fact LAP may be more *or less* restrictive than default trading hours: s 45
  - (v) Requirements on Councils when developing PLAPs under s 78 of Act and the Local Government Act 2002 (subs [69]-[70])
  - (vi) Appeal process under the Act (subs [60]): compare *Shotover Gorge Jet Boats* at p439-440
  - (vii) Case law under previous Act: *Meads Brothers Ltd v Rotorua District Licensing Agency* at [23] and [53]
  - (viii) Prior decisions by ARLA: *Hospitality New Zealand v Tasman District Council* at [39]-[41], [50]-[51], [55]; *B&M Entertainment v Wellington City Council* at [16], [19]-[20]
  - (ix) Antecedent public freedom to sell, buy and consume alcohol (subs [63]-[64])
  - (x) Proportionality in bylaws cases: *JB International v Auckland City Council* at [74]-[75], application at [99]-[102]
  - (xi) Correct interpretation of *My Noodle v Queenstown Lakes District Council* at [72]-[74]

6. **Did ARLA apply the correct test?**

- (a) ARLA correctly described test at [30]-[36] (other than incorrectly referring to onus of proof on the appellant) but fell into error by describing precautionary principle in terms suggesting it provides a different test: at [43], [113].
- (b) Decision on temporary freeze and rebuttable presumption at [122]

(c) Decision on closing hour restriction at [146]

7. **Was the error material to ARLA's decision/should relief be ordered?**

(a) There was evidence before ARLA on which it could reasonably have found that elements 1 and 2 were unreasonable in light of the object of the Act (e.g. because they were unlikely to reduce harm and would have disproportionate effects on consumers and supermarkets), e.g.:

(i) Evidence of an *inverse* relationship between presence of supermarkets and alcohol related harm: Hampson exhibits relating to the City Centre (306.1214 at 306.1228)

(ii) Presumption against new off-licences applies to *all* neighbourhood centres across entire Auckland region, not just high-risk locations: Hampson at 6.7 (201-0066 at 201.0105)

(iii) The Auckland region as a whole has lower alcohol related harm than the rest of New Zealand: Fairgray at 2.78-2.79 and figure 2.1 (204.0638 at 204.0658); HPA Attitudes and Behaviour towards Alcohol Survey (301.0172 at 301.0181-2)

(b) ARLA either ignored this evidence or dismissed it on the basis that there was a sufficient evidential basis to support the elements. However, this is not sufficient. ARLA was required to also consider whether the elements were reasonable/proportionate, having regard to this evidence. It failed to do so, and it cannot be assumed that this failure was immaterial to the outcome.

(c) ARLA should be required to reconsider its decision on elements 1 and 2 on basis of appeal test as clarified by this Court.