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

SC 139/2021
[2022] NZSC Trans 21

BETWEEN **WOOLWORTHS NEW ZEALAND LIMITED**
Appellant

AND **AUCKLAND COUNCIL**
Respondent

ALCOHOL REGULATORY AND LICENSING AUTHORITY
Second Respondent

FOODSTUFFS NORTH ISLAND LIMITED
Third Respondent

MEDICAL OFFICER OF HEALTH
Interested Party

SC 140/2021

BETWEEN **FOODSTUFFS NORTH ISLAND LIMITED**
Appellant

AUCKLAND COUNCIL
First Respondent

WOOLWORTHS NEW ZEALAND LIMITED
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ALCOHOL REGULATORY AND LICENSING AUTHORITY
Third Respondent

MEDICAL OFFICER OF HEALTH
Interested Party

Hearing:	13-14 September 2022
Court:	O'Regan J Ellen France J Williams J William Young J Cooper J
Counsel:	J S Cooper KC, A W Braggins and B D Huntley for Woolworths New Zealand Limited P M S McNamara, T R Fischer and C J Ryan for Auckland Council No appearance by or for Alcohol Regulatory and Licensing Authority I J Thain and I E Scorgie for Foodstuffs North Island Limited D R La Hood and S B McCusker for the Interested Party

CIVIL APPEAL

O'REGAN J:

Counsel and others present in the Court, before we begin the hearing of the case, we are just going to pause to acknowledge the death of our Queen and to express our condolences to her family, including the new king, Charles III. The 70-year reign has seen now seven chief justices in New Zealand and also the creation of our two highest courts, the permanent Court of Appeal in 1957 and this Court in 2003, so it has been a time of great development in the New Zealand legal scene.

I am going to ask Justice Williams to say a karakia. Justice Cooper will then give the English translation of the karakia, and then after that we will have a period of silence in memory of the Queen. Thank you, Justice Williams.

KARAKIA TĪMATANGA

COOPER J:

Almighty God who sees all things and knows all things, day has become night and the country grieves for her Majesty Queen Elizabeth II, Queen of New Zealand and defender of the faith has fallen. As you are the giver of life and the one who takes it away, we offer her, our most noble kuia, into your care, that you may give her rest, for we know that although she has departed this suffering world yet she will live on forever through you. Lord, the royal family has donned the cloak of grief so we pray that you will comfort them, and we pray also that you may lighten all our heavy hearts. Lord God, his Majesty King Charles III has ascended his mother's sacred throne. May you remain at his side to guide and protect him now and in the future through Jesus Christ, our saviour. Amen.

O'REGAN J:

Thank you. Now, Mr Registrar, if you could call the case please.

MS COOPER KC:

Tēnā E Te Kōti, ko Cooper tōku ingoa. E tu ana mātou ko Braggins, ko Huntly, mō Woolworths New Zealand. Your Honours, Cooper, Braggins and Huntley for Woolworths.

MR THAIN:

E ngā Kaiwhakawā, tēnā koutou. Ko Thain tōku ingoa. Kei kōnei māua ko Scorgie. Mō te kaitono Foodstuffs Te Ika-a-Māui. May it please the Court, Thain and Scorgie for the appellant, Foodstuffs North Island Limited.

MR McNAMARA:

May it please the Court, counsel's name is McNamara. I appear with Mr Fischer and Mr Ryan for the first respondent in both appeals, Auckland Council.

MR LA HOOD:

Tēnā koutou, e ngā Kaiwhakawā, ko La Hood māua ko McCusker. May it please the Court, La Hood and McCusker for the Medical Officer of Health.

O'REGAN J:

Tēnā kōrua. Right, I assume you will be going first, Ms Cooper?

MS COOPER KC:

Yes, as your Honour pleases.

O'REGAN J:

Thank you. Have counsel have any discussions about time allocations?

MS COOPER KC:

We have, your Honour. We anticipate essentially that Foodstuffs and Woolworths submissions will be finished by the end of the day and then that will leave the rest of the hearing available for the respondent's submissions, the Medical Officer of Health's intervention and replies.

O'REGAN J:

All right. Well we'll take that as an outer limit –

MS COOPER KC:

Yes, your Honour, appreciate that.

O'REGAN J:

– and hope that you can do a little bit better than that, but that's fine, thank you.

MS COOPER KC:

Well of course, your Honour, and I am in the Court's hands. So I don't anticipate that we will need all the time available but we will see how we go. Apologies, your Honour, I just need to reanimate my device. So, do your Honour's have the outline of oral argument for Woolworths?

O'REGAN J:

We do, thank you.

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MS COOPER KC:

Excellent, your Honour. So perhaps just to explain what I intend to cover. As you will see, I will start with a brief introduction to the issues. I will talk briefly about the procedural background, although it's fairly well-summarised in the chronology so I don't think I need to spend time on that, but it may be useful just to summarise the current status of the policy because that is a little complex. Then I was intending to take a little bit of time, not too much time, but I did want to just take your Honours to some of the key provisions of the Act, noting of course that this is the first time that this particular Act has been before this Court. Then I will introduce the relevant parts of the Auckland policy, and then the bulk of my submissions will be directed to, of course, the question of what the correct test is.

It's a slightly unusual appeal perhaps in the sense that Woolworths' appeal is premised on an interpretation of the Court of Appeal's judgment, which is rejected by the respondents. Also rejected by the Medical Officer of Health as the intervener. However – well, I'll take your Honours through the Court of Appeal's judgment and explain why in my submission it does fall into the error

that Woolworths alleges, but in any event even if that were not the case there is still a problem for this Court to address, which is that there is still disagreement on what the correct test is, because the counsel and the Medical Officer take different views of what the correct tests should be and indeed of what they think the Court of Appeal said. So on any analysis there is a need for this Court to resolve and clarify that issue.

So that, as I say, will be the main focus of the submissions but then of course it will then be necessary to consider the question of ARLA's decision and the extent to which ARLA was in error in the test that it applied. Then the final question goes really to the issue of materiality and relief. So if ARLA was in error then was the error material to its decision and should relief be ordered? This, of course, being a judicial review. For that purpose I will then hand over to Mr Braggins to very briefly talk about some of the evidence, because although I'm not anticipating there's a need for this Court to grapple with – there was obviously extensive evidence before ARLA, and I certainly don't suggest that the Court, for a minute, should attempt to deal with that evidence, but I think it is important to give you a flavour of some of the evidence that Woolworths relied on, really, to support the submission that your Honours can't be confident that ARLA would have reached the same decision had it applied the correct test.

So I'm anticipating that my learned friends for the respondents and the Medical Officer of Health will urge upon you that the evidence of alcohol-related harm in Auckland was so compelling that on any analysis and any test the policy would have been found to be reasonable, and in my submission there is contrary evidence and there were reasonable grounds in which ARLA could have reached a different decision. So that is why we say the ultimate outcome should be that ARLA is given the opportunity or indeed required to readdress its decision in light of the correct test, as clarified by this Court.

So that is an overview of house I plan to address this. I'm obviously in the Court's hands as to what in particular you want to spend time on, but I will endeavour to work through that outline as efficiently as I can.

So starting then with what are the issues for determination. Well the immediate question of course is did the Court of Appeal get the test wrong? But inherent in that question and in the issues this Court needs to decide are the three questions I've set out in the outline: "What is the test that ARLA is required to apply on appeal under section 81 under the Sale and Supply of Alcohol Act 2012?" I have hyperlinked there for your Honours the section itself, which I'm sure you're already familiar with, but the relevant test is in section 84(4) [*sic*] and that is: "The only ground on which an element of the provisional policy can be appealed against is that it is unreasonable in light of the object of this Act." So that is the test, and the question is what did it mean? As I say, disagreement about what the Court of Appeal said it was, but everyone agrees that what Woolworths says the Court of Appeal said would not be the correct test.

Just to give your Honours a quick overview of the competing analyses, so on Woolworths' reading, the Court of Appeal said that an appeal would not succeed provided the element under appeal has a real and appreciable possibility of minimising alcohol-related harm, and I will take your Honours through the various relevant provisions of the Court of Appeal's judgment to say why we say that that is in fact the overall effect of its judgment. The Council says that what the Court of Appeal actually said was that the test is whether there is first a real and appreciable possibility of minimising alcohol-related harm, but then an additional consideration of proportionality including consideration of the impacts on licence holders and consumers, but it is not the same analysis of proportionality as under the bylaw cases, because of course the Court of Appeal said that those bylaw cases were not applicable in this context due to the different context, and the fact that there is no right essentially to consume alcohol or sell alcohol that needs to be balanced against the Act subjective of minimising alcohol-related harm.

Now we say that the Court of Appeal has misread the bylaws cases and has drawn an invalid distinction, but in any event the Council's analysis, we say, runs into trouble because it's attempting to square the Court's distinction of the bylaws cases, but at the same time allow room for some proportionality analysis

and we say that the analysis really doesn't work. It sort of, it falls apart, it's very difficult to find any support in the Court of Appeal's judgment for the type of proportionality analysis that the Council is endeavouring to bring back in, although, of course, we do agree that there is a proportionality analysis. So we agree with the Council to that extent, but we disagree with the analysis that gets them to that outcome. Then the Medical Officer of Health's submission again is that the test is not merely whether there is a real and appreciable possibility of minimising alcohol-related harm, but there is also an extreme position where there could be such a possibility but nevertheless an element would be unreasonable if it's capricious or grossly disproportionate. However, the Medical Officer of Health does say that impacts on licence holders are irrelevant. So we say that these attempts, Council and the Medical Officer of Health, are really attempts to soften or made more workable the very blunt test that the Court of Appeal proposed, but they are still not satisfactory. They're not coherent and there is no textual basis for them in the Act. So what Woolworths says the test is, is simply whether in the view of ARLA an element is objectively unreasonable, having regard to the object of the Act. So we say you don't need to go further than what the Act itself says to divine what the test is intended to mean, and we say, whether an element if objectively unreasonable brings into account all the types of issues, all the types of considerations that courts have found relevant in very similar types of analyses, of which the bylaws cases are but one example.

So we say, as summarised briefly in section 5(b) of the submissions, we say it does incorporate proportionality. It incorporates consideration of the anticipated effects of an element both positive and negative on all persons affected, which includes licence holders, it includes consumers, it includes the general public and then those effects must be weighed, we say, with regard to both limbs of the object, and this is another key point of difference between what Woolworths says and what the Council and the Medical Officer of Health say.

So we say that the object does have two limbs, and I'll go to that in a moment, and that both of these need to be weighed in assessing whether an element is

unreasonable in light of the object of the Act. So we say that the first limb that consumption of alcohol should be undertaken safely and responsibly, should not be subordinated to the second limb.

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Minimisation of alcohol-related harm is not the sole object of the Act to be pursued at any cost, it is to be pursued insofar as it is possible to do so alongside the safe and responsible sale, supply and consumption of alcohol. We say that this reflects a judgment by Parliament that it is possible to safely and responsibly sell, supply and consume alcohol and that this should continue to be permitted.

Now, we say the Court of Appeal got it wrong and we also say ARLA got it wrong and we say it's not possible to know what ARLA's decision would have been if it had applied the correct test, and therefore it ought to be required to reconsider the relevant parts of its decision.

Now just to deal very quickly at the outset with a suggestion that has been attributed to Woolworths that we're saying that ARLA should be able to substitute its views for the Council's. That is absolutely not our submission. The Act does not allow that. So the test on appeal that ARLA needs to apply is ARLA needs to decide for itself whether an element is unreasonable in light of the object of the Act. If it is satisfied that it is unreasonable, ARLA cannot rewrite the policy. It can't propose an alternative policy. All it can do is send the policy back to the Council to be reconsidered and either withdrawn or amended. So we are absolutely not saying that ARLA's view steps in and supplants the Council's.

Now just turning then briefly to the procedural background. This is, as I say, detailed quite fully in the chronology so I don't think I need to spend time on it. Perhaps just to note that of course every PLAP is proceeded by a consultation process undertaken by Council, so Council produces a draft policy. There's then a consultation period where submissions can be made and in this case the submission period was one month. Many, many submissions were

made, including by the supermarkets. There were then oral hearings at which submitters were able to give oral submissions of five minutes to a panel, which took place over a number of days. There was no record made of the submissions hearings. The Council produced a, sort of, executive summary of the key points, and then following that process the Council produced and publicly notified the policy.

O'REGAN J:
Are you saying there's anything wrong with it?

MS COOPER KC:
No, no, I'm not suggesting there's anything wrong with the process, your Honour.

O'REGAN J:
Right.

MS COOPER KC:
I'm merely saying it's – well, I'm merely just illustrating the background.

WILLIAM YOUNG J:
You're saying it's a limited process.

MS COOPER KC:
That's right, your Honour. It's not – this is an unusual form of appeal in the sense that it's not an appeal from a judicial decision, it's an appeal from an essentially administrative decision, which is taken after a consultation process.

WILLIAMS J:
Well, it's not quite an administrative decision, is it? The reason that this truncated process is not complained about is because this is a political process as well.

MS COOPER KC:

Yes, your Honour. Yes, your Honour, I accept that, that's right. So the nature of the process I think – the nature of the appeal to some extent has to reflect the nature of the process and the decision that follows from that process. So the Act of course –

ELLEN FRANCE J:

Sorry, do you accept then, Ms Cooper, that there's a community aspect to what's going on?

MS COOPER KC:

Yes, your Honour.

ELLEN FRANCE J:

And how does that play out when one's looking then at what's reasonable or unreasonable?

MS COOPER KC:

Well, your Honour, there certainly is a community aspect and clearly as intended – the Act intends that there can be community input and variation between different parts of the country according to community preference in what the specific local alcohol policies are to be. That is clear. However, the Act also intended there to be a check on those policies, which was provided by giving a right of appeal to the Alcohol Regulatory and Licencing Authority, which is a national authority and an expert body, so the members are a combination of District Court judges and appointed lay members and it's explicit in the, I'm not going to spend time on the background and the Parliamentary materials, Mr Thain I know is going to do that your Honour, but when he does that you'll see in some of that background it was clearly intended that the appeal was intended to act as a check and provide some degree of continuity and consistency between local policies. So although community preference is certainly an element that goes into a policy, it can't make an unreasonable policy reasonable is my point, and the simple fact that something is community preferenced doesn't, it may affect others appreciation of the policy, and it may feed into an overall analysis of unreasonableness but it's not,

but I'll say, and I'll come to in a moment your Honour, it's not a basis for total deference to the Council's policy. ARLA has to form its own view on whether it's reasonable.

WILLIAMS J:

In theory it probably could make an otherwise unreasonable policy reasonable, at the margins at least, because it adds an element. Not fundamentally, I'm sure you're right about that, but at the margins it probably could, couldn't it?

MS COOPER KC:

At the margins I think that's probably right, your Honour. I think probably the reason that the appeal test is left in fairly broad terms is because it's very difficult to say in advance in the abstract where precisely the boundaries lie between what is reasonable, a reasonable exercise in community preference, and where it tips over into being unreasonable, and if the community preference was that, well, I hesitate to come up with examples because you know it's, not very helpful perhaps to come up with straw men, but if the community preference was that licences should only be given to alcohol shops that were owned by people who voted a certain way, that would clearly be unreasonable, despite being a community preference. That's not a terribly good example but…

COOPER J:

It would be unworkable as well.

MS COOPER KC:

Yes it would. It's not a good example your Honour. So there has to be – the other issue, of course, is that community preference is notoriously difficult to identify and define. So in this case there were thousands of submissions and it's not in the, I don't think there's a great deal of evidence about it in this case, but in the *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 564, [2010] NZAR 152 case, for example, the previous case which involved a local alcohol policy before they were, had a statutory basis, in Queenstown, the community preference as expressed through the submission process was for longer opening hours, because there was support for a vibrant nightlife, and

that may well be reasonable, I'm not suggesting that ARLA should define unreasonable, but the point is that community preferences are very variable and different parts of the community have very different preferences.

WILLIAMS J:

Well you've got the preferences of the submitters, but these people are also, these deciders are also political representatives.

MS COOPER KC:

That's also true your Honour, yes, and I accept that, yes. So one would assume that they are in a position to express an indirect community preference.

WILLIAMS J:

Well they're certainly the communities preference.

MS COOPER KC:

Yes your Honour.

WILLIAMS J:

Their decisions day-to-day may not be.

MS COOPER KC:

The voting minority part of the communities preference.

COOPER J:

At the local council level is it a committee that decides these matters, or is it the full council?

MS COOPER KC:

I'm not sure your Honour. I might have to…

COOPER J:

Because the community of Auckland Council sort of extends from Waiuku to Wellsford, doesn't it.

MS COOPER KC:

Yes, yes.

COOPER J:

It's quite an interesting community.

MS COOPER KC:

Well, and that's another very interesting aspect of this your Honour. I'll have to come back to you and confirm. I believe it's the full council, but we'll confirm that, who actually finalises the policy. What is perhaps quite unusual, or unique even, about the Auckland policy, is that it covers an absolute huge area, and includes a large rural area, as well as an urban area. So you've got everything from Waiheke to sort of the northern reaches of the Auckland region, south Auckland, central Auckland, very, very different needs and one imagines community preferences in different parts of Auckland, and that is one of the aspects that troubled the supermarkets about this policy was that it introduced sort of essentially universal rules across the entire area. So I'll come – it's certainly in relation to hours. The situation is a little bit more complex in relation to the temporary freeze and rebuttable presumption on new off-licences, so I'll come to that shortly.

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Perhaps also to note, the draft policy was changed quite significantly following the consultation because the original draft did impose shorter on-licence opening hours than the default hours under the Act, and then following consultation those hours were reinstated, essentially, to the default hours, whereas the shorter hours for on-licences were retained.

So then the Council produced and publicly notified its provisional policy following the hearings and then a number of appeals were filed, in fact eight appeals, with ARLA. So there were the appeals by Woolworths and Foodstuffs, the two supermarkets, but there were also appeals by Medical Officer of Health, the police and the Takapuna Residents Group, among others, who argued that

the policy should be stricter essentially and particularly in relation to on-licences.

So all those appeals were then heard together before ARLA. There was extensive expert evidence and factual evidence before ARLA and the hearing took place in, it's a little hard to tell from the dates in the chronology, but certainly over a number of weeks, which resulted then in the decision which dealt with all of the appeals together which is the decision under review. ARLA did hold a number of elements of the policy were unreasonable, in particular the opening hours for off-licences. So the provisional policy proposed reduced opening hours for off-licences of 9 am to 9 pm as opposed to the default hours of 7 am to 11 pm under the Act, and ARLA accepted that the morning hours provision was unreasonable because of an absence essentially of any real evidence that that had any connection with alcohol-related harm and the inconvenience it would cause to supermarket shoppers who wished to do their shopping in the morning, and so that element was held unreasonable, along with some other elements of the Act which were ultra vires and some elements which Council accepted could be better drafted. So those went back to Council to reconsider and in the meantime three parties filed judicial review proceedings, that being Redwood which owns a brothel just outside the city centre who had concerns about the on-licence provisions and then, of course, Woolworths and Foodstuffs filed the reviews which your Honours are concerned with. Redwood's judicial review, of course, was upheld by her Honour, Justice Duffy, and that has not been appealed. So various elements – well, so Redwood's entire appeal in fact needs to be reconsidered by ARLA and at the same time ARLA also needs to reconsider the resubmitted element of the PLAP following the parts that it referred back from its original decision.

So in terms then of the current status of the provisional policy, irrespective of the outcome of this appeal, ARLA will still need to reconsider its decision in relation to the local impacts reports element of the policy, so that is the element of the policy that Justice Duffy found to be ultra vires and that aspect of her decision was not appealed. It will also –

WILLIAMS J:

Were they ultra vires per se or ultra vires in the form directed in the PLAP? I'd call it a PLAP. Shall I call it a P-LAP?

MS COOPER KC:

I tend to call it a P-LAP, your Honour, but PLAP could – I'm…

WILLIAMS J:

Just P-LAP gets a little close to P lab and we have to deal with those too, so…

MS COOPER KC:

Fair enough, your Honour. If your Honour wishes to call it a PLAP, of course, I defer entirely to your Honour.

WILLIAMS J:

You're very kind, Ms Cooper.

MS COOPER KC:

Yes, there are a lot of acronyms, unfortunately, in this case, but I suppose there are in most cases. So I'm not sure if I can entirely answer your Honour's question. I think the point is it was held to be inconsistent with the Act. It wasn't that it was ultra vires because it had some improper purpose, it was just simply held to be note within the scope of what the Act –

WILLIAMS J:

You couldn't require the local inspector to provide such a report.

MS COOPER KC:

That's right your Honour, and one of the issues there was that local inspectors are statutorily required to be independent and so – I think, I'm afraid I'm reaching back now to recall the precise grounds because of course they're not really an issue today, but essentially section 77 of the Act sets out very specifically the things which are a P-LAP, or a PLAP, is able to cover. None of those things really covers a local impacts report requirement and then at the

same time it was also held to sort of potentially infringe on the statutory independence of the officers because they were essentially being directed as to what their reports need to cover. So in any event the Act does require, the officers have an obligation to provide reports in any event. So arguably –

O'REGAN J:
That's just been now taken out of it, hasn't it?

MS COOPER KC:
I don't know that it has your Honour, but I presume that that is the inevitable effect of the decision.

O'REGAN J:
So isn't that the end of the game then?

MS COOPER KC:
Yes.

O'REGAN J:
isn't it just a matter of form for the Authority to say: "Yes, that's fine. You've done what we asked you to do."

MS COOPER KC:
Correct your Honour. Yes, there's no longer any – no, that's right. It may simply be a matter of form, but I guess the form requires it to be back before the Authority at some point. I'm not suggesting there's any greater sort of issue than that.

Yes, then secondly the Authority has before it an amended version of the hours element, because that was amended following an earlier decision. An amended, a submission of an amended PLAP is treated as a new appeal and Woolworths and Foodstuffs have made further appeals on the closing hour element of that. So that also remains to be determined.

O'REGAN J:

Really?

MS COOPER KC:

Yes your Honour.

O'REGAN J:

That's a res judicata isn't it? It's a done deal?

MS COOPER KC:

Well, your Honour, that point has actually been litigated and the High Court held it was not res judicata. So as matters currently stand those appeals remain outstanding.

O'REGAN J:

This is becoming untenable, isn't it. How long can this process go on for?

MS COOPER KC:

Well, your Honour, I can't answer that question. All I can say is that the appeals at the moment are there. The High Court has permitted them to proceed.

WILLIAM YOUNG J:

Have we got that judgment?

MS COOPER KC:

I assume so your Honour. Yes, it was not an appeal by Woolworths, it was an appeal by Foodstuffs.

O'REGAN J:

This does seem to be a game of cat and mouse, which is just not acceptable, is it?

MS COOPER KC:

Well, your Honour, Woolworths – I think it comes back to what – I mean I think the – perhaps the outstanding appeals are a distraction. I think the key thing,

and obviously what is before your Honours today, is what is the test that ARLA is required to apply, and clarity on that issue will help all of the parties in bringing this to a satisfactory conclusion.

WILLIAM YOUNG J:

Just pause there. Is the decision you referred to in relation to Foodstuffs, is that in the bundle of materials?

MS COOPER KC:

I believe so your Honour. I'll just need to check where that is. Tab 39 your Honour I believe. Those appeals are currently stayed your Honour.

O'REGAN J:

Anyway, we're getting distracted. Let's get back to what we do have to decide. 1040

MS COOPER KC:

Thank you, your Honour. So coming then to the Act. So first of all, the first place to start really is the purpose, so if we could just go to section 3. It's worth noting here that this purpose provision refers to being "for the benefit of the community as a whole", and it's "to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2)", and then secondly, "to reform the law more generally…to help to achieve the object of this Act." So achievement of object of the Act and the system of control are dealt with in separate subsections, and then subsection (2): "The characteristics of the new system…are that", first, "'it is reasonable'", and secondly, "'its administration helps to achieve the object of this Act".

Now I say it's worth noting that the concept of being reasonable and the concept of helping to achieve the object of the Act are there dealt with separately. In my submission, the only logical way to interpret those is that in that provision "reasonable" means something independent of simply achieving the object of the Act. So, "reasonable" is an independent standard that the purpose of the

Act is seeking to achieve. In my submission, that informs how we interpret the use of "unreasonable" when we come to section 81.

O'REGAN J:

Well, except that section 81 puts them together, doesn't it?

MS COOPER KC:

Well yes and no, your Honour. It depends how you read section 81, of course. So that's the purpose which, of course, needs to be borne in mind when interpreting the rest of the Act, and then the object is the following section, section 4. There we see, of course, as I have already mentioned, the object has two limbs. The first, that: "The sale, supply and consumption of alcohol should be undertaken safely and responsibly", clearly envisages continued lawful sale, supply and consumption of alcohol. So this is not an Act directed at prohibition, obviously. Then the second part of the object is that: "The harm caused by the excessive or inappropriate consumption of alcohol should be minimised." So, then "the harm" is described more fully in subsection (2).

Now, the points to note there are that it is the harm caused by the excessive or inappropriate consumption of alcohol that is to be minimised, so it is not alcohol harm or alcohol use, per se, that is to be minimised, and secondly it is to "be 'minimised' (not eliminated)", which of course reflects the Act that permits the continued sale, supply and consumption of alcohol.

ELLEN FRANCE J:

On the other hand, the definition of harm both in terms of section 4(2) and in section 5(1) is very wide, would you agree?

MS COOPER KC:

Yes, your Honour, I do accept that, and it is clear that that was an important part of the new Act in terms of the difference to the old Act, yes. I do accept that. But nevertheless, it is linked back to excessive or inappropriate consumption and not merely consumption per se.

WILLIAMS J:

Well that's hardly surprising, is it, given the ubiquity of alcohol in the community.

MS COOPER KC:

No, that's right, your Honour, it does –

WILLIAMS J:

The statute is not going to say "this is a law to end the consumption of alcohol".

MS COOPER KC:

No. That's exactly right, your Honour, but that's precisely why I say it shouldn't be read as a statute to end the consumption of alcohol.

WILLIAMS J:

Well no one's reading it that way.

MS COOPER KC:

Well, in my submission –

WILLIAMS J:

Restricting opening hours isn't the ending the consumption of alcohol.

MS COOPER KC:

No, no, that's right your Honour, but I think – no, and I certainly don't suggest that, and I'm not suggesting that – I think it's merely the need to take care in how we frame the appeal test to ensure it's not leading us to an extreme outcome. In my submission, if you were to adopt the submission – the submitted interpretation of the Medical Officer of Health, for example, that would be steering you too far towards a sort of prohibition style approach, potentially, that didn't take into account –

WILLIAMS J:

Sale is allowed for 14 hours a day. It's hardly prohibition.

MS COOPER KC:

No, no, your Honour, I'm not suggesting that the policy does not. I am absolutely not suggesting that.

WILLIAMS J:

So you don't say this is an extreme policy, or these are extreme policies?

MS COOPER KC:

I submit that there is a regional basis on which the Authority could have found these policies were unreasonable.

WILLIAMS J:

Yes, but that's a different question.

MS COOPER KC:

Yes.

WILLIAMS J:

Are they extreme?

MS COOPER KC:

I suppose another way of putting it, your Honour, is do I believe that the only decision that ARLA could reasonably have taken was that these policies were unreasonable? No, I don't submit that, your Honour.

WILLIAMS J:

Well, of course not, but that's not the way this statute is structured. Reasonable minds can differ. They get the job, not us. That's not – how does that help?

MS COOPER KC:

Well, I think perhaps it would be – I think I'd rather come back to that question perhaps when we look at the terms of the policies themselves. I mean certainly you can envisage a more extreme policy and you can envisage a less extreme policy, and so –

WILLIAMS J:

My question is really are these policies the sorts of policies this legislation as structured, and described by you, was designed to prevent?

MS COOPER KC:

Not per se but it was designed to ensure that these kinds of policies were subjected to checks.

WILLIAMS J:

A very long process.

MS COOPER KC:

Well, they're subjected to checks to ensure that they don't operate unreasonably.

WILLIAMS J:

Yes, quite, but what's striking about this legislation is how limited those checks are, how carefully constrained they are.

MS COOPER KC:

Yes, well, I agree with that, your Honour.

WILLIAMS J:

So we've got to take that as a starting point. Parliament did not intend deep interference in local political decisions about this most difficult of social issues.

MS COOPER KC:

That's right, your Honour. It also didn't intend sort of perhaps large-scale intrusion into the rights of consumers or licence holders unless there was a clear benefit that outweighed the inconvenience. So there needs to be balancing to determine whether the measures are reasonable or not and that can't be assessed, my point is that can't be assessed solely by whether or not the measures are going to reduce alcohol-related harm. Other factors need to be weighed in the balance.

WILLIAMS J:

So you say there's just a simple balancing process here? The goods, the bads, and then the decision gets made and ARLA can re-make it, or send it back to be re-made on the basis of its assessment of the balance. Is it really a process as simple as that you say?

MS COOPER KC:

Well, effectively, your Honour, yes, and I think part of what gets weighed in the balance is the local preference and the fact that the Council may have made a choice and it may have been informed by public submissions. That goes into the balancing process. But against that the rights and interests of people in Waiheke who may be very inconvenienced by a policy that applies to them where they don't have the same types of issues that another location in Auckland might have, that needs to be taken into account, and I simply give Waiheke as an example, your Honour.

WILLIAMS J:

Sure.

MS COOPER KC:

There was no appeal by people from Waiheke. But my point is if we remove ourselves for the moment from, you know – perhaps it's a distraction. I mean, ultimately this is about Woolworths' appeal. I accept that. But the test needs to work generally, not just for Woolworths. So the fact that, you know, the – certainly the Court of Appeal had a view that Woolworths' position was not particularly meritorious. That's as may be. I don't accept that. But the point is the appeal test can't be determined based on whether this particular appeal seems to be well-founded or not. It has to work for all appeals and –

WILLIAMS J:

Well, it's a good road test though, isn't it?

MS COOPER KC:

Well, yes, up to a point, your Honour, because many of these appeals were by, well, the police, or the Medical Officer of Health, or the Takapuna Residents Association. So –

WILLIAMS J:

I get the impression the argument you're running, which is this general pluses and minuses balancing with the check being ARLA gets to reconsider that and send it back, is designed to defang "reasonable" as a constraint on, shall we say, audit of the decisions.

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MS COOPER KC:

I'm sorry, your Honour, I don't quite follow.

WILLIAMS J:

Well, "reasonable" is a word that was adopted plainly to constrain the level of intervention in the decisions being made locally, otherwise they wouldn't have bothered to use that word. They'd have just said ARLA can redecide if it wishes and send it back, or they would have adopted the Environment Court approach where you just appeal de novo. They didn't do that. Clearly, that's a respect for local decision-making, local politics, local needs.

MS COOPER KC:

Yes, your Honour.

WILLIAMS J:

So you would have thought that a review process in that context would not be a plus and minuses and balance at the appeal level because "reasonable" doesn't suggest that. It suggests that there's a narrower margin of intervention prerogative intentionally. How narrow is, of course, a matter for debate, but it doesn't sound to me like a word that says you can weigh it all up again.

MS COOPER KC:

Well, against that, your Honour, I mean, look, I accept it's a high threshold because, of course, ARLA has to be satisfied that it's unreasonable. So it's not starting from a level scale, if I can put it that way.

WILLIAMS J:

No.

MS COOPER KC:

There is a persuasive onus on the appellants to prove that it's actively unreasonable and certainly just the mere fact that there might be an alternative way of doing it that might be equally available is not going to be adequate. It needs to be satisfied that it is actually unreasonable and if it's not satisfied then the appeal fails. So I don't – against that context, I don't – I'm not sure that I agree with your Honour that "unreasonable" – I mean, is your Honour suggesting that "unreasonable" is used in almost a *Wednesbury* sense?

WILLIAMS J:

Well, no, that's problematic too, but it indicates that the margin for intervention is narrowed, probably significantly. So not just "we've got a better idea" but "this decision is over the top". This decision is a decision that's being made without logic or evidence, say.

MS COOPER KC:

Well, yes, I agree with your Honour but I think that the grounds on which something can be unreasonable are broader and that's where I think that's the bylaws cases are helpful because they do broaden out the categories into broader categories than simply being sort of over the top, as it were, and I'm hoping to come to some of those cases, your Honour, because I think they are informative because they do deal with similar types of tensions. So, for example, the cases under the Prostitution Reform Act 2003, and maybe it's useful just to jump to one of those now.

I was going to take your Honours to the decision of Justice Heath in *JB International v Auckland City Council* [2006] NZRMA 401. So perhaps if we just go to that quickly at 74. So this was a decision where following the reform of the prostitution laws Auckland Council introduced a bylaw prohibiting brothels from operating in residential areas, and there was a challenge made to that on the basis that it effectively precluded small suburban brothels and was unreasonable. So it was a judicial review but also, of course, the Court determined it largely on grounds of the Bylaws Act and section 17. Justice Heath talked about proportionality in the context of that assessment, and so I've put there, paragraph 74 of the Act, where he talks about how the topic of proportionality can be considered in the context of what is "unreasonable", that being one of the grounds for invalidity under section 17 of the Bylaws Act, and he talks then about what proportionality means. He refers to that decision by Lord Clyde, and whether the legislative objective is sufficiently important to justify limiting a fundamental right, the measures are rationally connected to it, and the means are no more than is necessary, which I think is the sort of concept your Honour was talking about, and then he goes on to talk about the purpose of the Act. Sorry, your Honours, I'm just trying to find the relevant paragraph. I think perhaps it's best then if we skip to paragraphs 99 to 100. That's where Justice Heath applies those principles to this particular bylaw, and he talks about the fact that: "A bylaw that effectively forbids the operation of small owner-operated brothels is ultra vires", but "can also be characterised as unreasonable…because contrary to Parliament's clear intentions, all brothels are excluded from virtually all areas".

So he was undertaking a weighing of the objective trying to be achieved as against the impacts on brothel owners, and so –

WILLIAMS J:

But it was the absolute prohibition, or the effect of absolute prohibition that –

MS COOPER KC:

Yes, I take your Honour's point.

WILLIAMS J:

I mean, he's basically saying this is over the top, and hard to argue that that's wrong. But over the top is clearly covered by the word "reasonable", so it shouldn't be that difficult to apply. You're talking about something much closer to the balance point than over the top.

MS COOPER KC:

Well, yes –

WILLIAMS J:

You have to bear in mind that this is the sale and supply of a socially acceptable poison. I don't mean that in a sense other than the technical sense.

MS COOPER KC:

Yes, your Honour, but it is –

WILLIAMS J:

That's the problem, you see. That's why there are these constraints.

MS COOPER KC:

But it is a poison that is socially acceptable and that Parliament has decided to continue to allow to be sold and supplied and consumed.

WILLIAMS J:

Of course, of course.

MS COOPER KC:

So – but yes, I take your point.

WILLIAMS J:

But that's why there are – it seems to me, that's why there are these tight constraints, or at least potentially tight constraints if communities decide so.

MS COOPER KC:

Perhaps the other aspect, your Honour, before I move on with my submissions, but the other point I would emphasise as well is that ARLA is a specialist body that deals day-in day-out with alcohol licensing issues, and so it is very familiar with the issues, with the impacts, and so it is a little bit different to, I suppose, a bylaws review decision where the Court is coming to the issue with no particular specialist expertise in a particular topic before it. So ARLA is in a different position in that regard, and so in my submission that is an important aspect when we try to understand what Parliament intended when it gave this appeal right.

COOPER J:

One of the characteristics of bodies whose decisions are described as those of an expert body are that the appellate body generally has the power to substitute its own decision. It's not the case here, is it?

MS COOPER KC:

No, that is true, your Honour. I accept that. Other than, potentially, with regard to whether the issue is – whether it's reasonable or not. So it can substitute its own decision in terms of what the policy should be but I do say that it is up to ARLA to decide for itself what is reasonable or unreasonableness and it can't assume that because Council has implicitly seen a measure as reasonable that it is so.

COOPER J:

No, but the more you weight the concept of "unreasonable" in section 81(4), the more you are trenching on the discretion of the Council as to what in the interests of its community the policy should be.

MS COOPER KC:

Yes, but that's inevitable. Your Honour, I don't see a great – that is right but equally I don't see the point in an appeal right if all it's doing is essentially providing sort of a logic check because that would have been provided by review. It's very hard to understand why Parliament – I mean, sorry, this is dealt

with in – so this really goes to the appeal process which is dealt with at paragraph 60 of our submissions.

COOPER J:

Well, yes, you can come to it then. I was just…

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MS COOPER KC:

No, I'm happy to deal with it now, your Honour. So really the point is the appeal process is – I mean it's not a sort of on-the-papers review for logic or some kind of very gross error. It is a full hearing with evidence before a specialist body. So parties have, you know, ARLA has the powers of a Commission of Inquiry, it's a specialist body. Parties have the right – this is all at paragraph 60 of our submissions – parties have the right to call evidence, and because there's no hearing before the issue of the provisional policy, only the consultation process, and there's no transmission to ARLA of any record, ARLA really does have to start sort of – it doesn't start afresh but it does have a whole lot of information before it potentially which was not before the Council. So it is reaching a decision based on information, a sort of a fresh look, as it were, which makes, I think, has to inform the nature of the decision that it's making. It's difficult to build too much deference into the process when it is carrying out such an extensive hearing process.

O'REGAN J:

But I mean the purpose of having an appeal process instead of relying on judicial review is just the body that undertakes it, isn't it? It's just giving – instead of putting that in the High Court, the generalist High Court, it's putting it in an expert body that can probably deal with it more efficiently.

MS COOPER KC:

Well, that's an interesting suggestion, your Honour. If Parliament had intended that, I'm not sure, it would seem an odd way to express it, and then why have the right to call evidence?

O'REGAN J:

The use of the term "unreasonable" is redolent of judicial review, isn't it?

MS COOPER KC:

Well, yes, your Honour, but it's also a term that's commonly used, of course, throughout many, many statutes in many, many contexts. It's such a ubiquitous term, I don't think – it's difficult really to draw much inference that Parliament intended it to be a review type analysis just from the use of the word "unreasonable", I would suggest.

WILLIAM YOUNG J:

Are the provisions as to process before the ARLA applicable to all its functions or are they particular rules relating to PLAP appeals?

MS COOPER KC:

Some are general and some are particular, your Honour. So perhaps I should go to those now. So if we go back to the Act, so the right of appeal to ARLA is at section 81 to 86. We'll just go to those briefly just to make sure we haven't missed anything. So the right of appeal we've talked about. If we scroll down a little bit, 82 just notes that appeals have to be dealt with in public hearing, and then 83 deals with what ARLA can do with an appeal. It must dismiss it it's not satisfied the element is unreasonable or if the appellant did not make submissions, and it must ask the territorial authority to reconsider if it is satisfied that the element is unreasonable. The appellant has no further right of appeal but the Council does, and then, of course, there's an express provision that it does not limit or affect the Judicial Review Procedure Act.

So to come back to his Honour, Justice O'Regan's, point, I think if it was designed to replace judicial review it would be odd to have that saving provision in there.

If we just go down to the next section, that just deals with the actions a territorial authority can take if asked to reconsider. So it can resubmit the policy with the

element deleted, it can replace it or amend it, or it can appeal, or it can abandon the policy. Then hen 86 –

O'REGAN J:
When it says "abandon", that's the whole policy, not just the bit of it?

MS COOPER KC:
I assume so, your Honour. Then 86 deals with the effect of resubmission of the policy, that it acts as a new policy.

Then if we go to the more general – the provisions about the appeal process itself start at section 169. So this is the section dealing with the Authority. So we have the Authority's functions in section 170 which include dealing with matters referred to it by committees, so all sorts of applications, and then appeals, and then appeals against draft local alcohol policies, and applications for licences and certificates, and any other functions conferred by the Act.

Then if we continue on down through the next couple of sections, so just deal with the powers of the licensing authority. It can give directions. It can refer matters for investigation. So these are all its general powers.

If we keep going down, just to note at 179, the membership must comprise up to three District Court Judges and any number of other members, and then if we continue on down you'll see that the Chair is required to be a District Court Judge, and similarly a deputy chair.

Then if we keep scrolling through these, we come to the provisions dealing with evidence at section 205. Actually, 204. Sorry, no, 204 deals with proceedings other than appeals, and then 205 deals specifically with appeals under section 81 and provides who may appear, so the appellant and anyone authorised by a territorial authority, and also inspectors, the police, the Medical Officer of Health, anyone who made a submission, and also refers to their ability to call evidence.

So as I say, your Honour, in general, they're the general powers of the Authority but there are specific provisions relating to appeals, these type of appeals.

So then just to perhaps finish off on the Act, I did want to go back and just refer to the provisions on the national default maximum trading hours. So they're at paragraph 43. So that simply sets out the default trading hours. So that simply sets out the default trading hours, so 8 am to 4 am for on-licences and 7 am to 11 pm for off-licences.

Then if we go to section 45, this explains what the position is if there is a local alcohol policy. So if there's a local alcohol policy in force that states maximum trading hours, then those hours take precedence over the statutory hours and it's not conditional on the hours being less than the statutory hours. So it appears to be envisaged that the hours could in some circumstances be longer.

Then I do just also now want to just take your Honour briefly just to the provisions dealing specifically with supermarkets. So first of all section 58. So supermarkets in general have obviously off-licences, not on-licences, as they sell alcohol that's not to be consumed on the premises, and they are subject to some specific additional restrictions. So section 58 provides a supermarket or a grocery store is not able to sell spirits, so it's only able to sell alcohol of less than 15% ethanol by volume, and it's limited to beer, mead and wine and food flavouring for cooking. So that is, in my submission, a material distinction between supermarkets and grocery stores and other types of off-licences such as bottle stores.

Then further to note at section 112 of the Act, supermarkets are also subject to single area requirements. So the off-licence for a supermarket must specify a particular area of the store in which alcohol is able to be promoted and sold. So again, another distinction between supermarkets and other types of off-licences.

Then if we go to the sections dealing with local alcohol policies, they start at section 75. So just to note there obviously it's not mandatory to have a policy;

it's an option. The policy can provide differently for different parts of the district. So it's not – conceivably Auckland could deal separately with different parts of its region. It doesn't have to have the same rules applying throughout, but it may do. It can apply different rules to different types of premises, and so there's a degree of flexibility there.

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Then if we scroll down, section 77 deals with the things that a local alcohol policy is able to deal with, and as I have said, that was one of the reasons why the local impact supports were held to be ultra vires because the things – it's quite specific, so it's location of licence premises, essentially, whether further licences should be issued, and as part of the district or part of the district maximum trading hours, and the issue of licence is subject to conditions and one-way door restrictions, and then subsection (3) provides a policy must not include policies on any matter not relating to licensing.

Then the following sections really deal with the process, so I don't think we need to deal with section 78. Oh, no, sorry, we actually do need to deal with section 78 because it sets out the things that the Council must have regard to when producing a policy, and so I think it's worth noting that the Council is not able to solely have regard to the object of the Act when it's producing a policy. It has to also have regard to other things, including the objectives and policies of its district plan, and so that's worth mentioning because one of the arguments that Woolworths made before ARLA was that the temporary freeze and rebuttable presumption against issuing new off-licences within the city centre and the priority overlay ran contrary to the objectives of the unitary plan which anticipated greater intensification and increase in population in those areas, and for various reasons, Woolworths argued that the temporary freeze and rebuttable presumption would make developing new supermarkets, which would be needed to serve these communities, more difficult, and the reason for that is because you effectively can't apply for a licence until you have building consent because the process require a certificate from the Council saying that the application, the use of the premises will comply with the Building Code and the Resource Management Act. So Woolworths –

WILLIAMS J:

To get a licence?

MS COOPER KC:

To get a licence. So Woolworths' point is that because it can't apply in advance for a licence for a supermarket, it has to buy land and undertake, start the development process for a new supermarket many years in advance of when it can apply for a licence, and it has to invest a very large amount of money for that process without having, without knowing whether it can obtain a licence or not. Now granted there would always be I suppose a degree of uncertainty but the temporary freeze and rebuttable presumption obviously greatly increases the risk.

WILLIAM YOUNG J:

But it's probably meant to, isn't it?

MS COOPER KC:

Well it is meant to. Well that's' right your Honour. So to that extent Woolworths' argument was that, well, this is a great barrier to developing new supermarkets and growing parts of the city.

WILLIAM YOUNG J:

ARLA dealt with this a bit in its decision, didn't they –

MS COOPER KC:

They did.

WILLIAM YOUNG J:

– by saying, well, you could probably be reasonably confident in advance knowing whether or not you would get an off-licence.

MS COOPER KC:

That is what ARLA held your Honour, yes, and I'm not –

WILLIAM YOUNG J:

So what do you say about that?

MS COOPER KC:

Well I think that's, I think Woolworths would disagree with that, your Honour, because the whole point of the temporary freeze and rebuttable presumption –

WILLIAM YOUNG J:

Sorry, what I'm, there's an aspect to your case that was actually dealt with on the proportionality way by the Authority.

MS COOPER KC:

It was, I accept that your Honour, yes. I can't suggest that they didn't engage with that issue. They found against Woolworths on it. But I suppose, though, it does – that certainly goes to the issue of whether ARLA was wrong, but in my submission in relation to the, if we come back to the Court of Appeal, what the Court of Appeal said the test was, the fact that there was potentially this chilling effect, although ARLA didn't accept it, but arguably if there had been this chilling effect on new development that was desirable under the district plan, on the Court of Appeal's test that wouldn't be a relevant consideration, whereas in my submission that was a relevant consideration that ARLA was entitled to take into account.

WILLIAM YOUNG J:

The Court of Appeal didn't deal with this argument specifically, did it?

MS COOPER KC:

No, not with this particular argument, no your Honour.

WILLIAM YOUNG J:

And is that because it had been rejected by ARLA?

MS COOPER KC:

Well I think it just didn't engage with this issue your Honour. I think it was really focused more on the issue around what the appeal threshold was, and less with

its application. Perhaps that will be easier when I come to the Court of Appeal's decision.

WILLIAMS J:

Doesn't rebuttable presumption, once you've got past the freeze, doesn't rebuttable presumption just mean it should be hard to get a licence, you're going to have to justify it, even precisely the terms that you talked about, that there are now 50% more people in this area, and the current provision, both as to alcohol and groceries, isn't sufficient.

MS COOPER KC:

Well, yes your Honour.

WILLIAMS J:

What's wrong with that?

MS COOPER KC:

Well, you know an alternative way – I mean the question is whether the additional burden and uncertainty it places on the development of supermarkets is necessary or – well, is unreasonable because, for example, the policy could carve out licences for supermarkets for example. So it –

WILLIAMS J:

Sorry? But it doesn't?

MS COOPER KC:

It doesn't no.

WILLIAMS J:

What's the point in that argument?

MS COOPER KC:

Well the point is that is it reasonable to have a blanket, this type of blanket presumption. I mean perhaps the freeze, I agree with you, is easier to make the case on in the sense that, you know, why should there be a blanket freeze

for all types of off-licences when, and Mr Braggins will take you to the evidence. The evidence is that the effects of supermarkets as opposed to the effects of off-licence on the amenity and harm in local area are quite different. So, you know, it's maybe an example of the *JB International* type situation where the measure simply goes to far. So it may just be that its' overreach because it attempts to cast its net too broadly to cover all off-licences as if they are the same, when they are not, and when there are real potential detriments which impact not just on supermarkets but on supermarkets customers and the communities in which supermarkets might be deterred from putting new supermarkets.

WILLIAMS J:

What's your standard there, given that obviously ARLA and the Council disagree with you on that, what's the standard for subsequent intervention?

MS COOPER KC:

I'm sorry your Honour?

WILLIAMS J:

How do you identify – what's overreach and what's not?

MS COOPER KC:

Well that's the assessment that ARLA needs to make, is my point, and so I say it's not as far as capricious or grossly unreasonable, it's unreasonable, what is unreasonable, and I know what is unreasonable is a bit like saying how long is a piece of string, but it's an assessment that ARLA has to make based on the facts before it.

WILLIAMS J:

Got any hints at all?

MS COOPER KC:

Well I think, well ARLA used the objective reasonable bystander test. I think that seems to me the reasonable test. An informed objective reasonable

bystander, although in this case an objective bystander with some expertise, as ARLA has, so, you know, all of these assessments rely on a – re a matter of judgment ultimately and I don't believe it is possible to prescribe precise parameters.

O'REGAN J:

We probably need to get you back onto your outline.

MS COOPER KC:

Yes, I'm a bit worried about time your Honour, sorry. So I think those were the only sections of the Act I wanted to take you to. I think it is wroth just looking briefly at the P-LAP, or the PLAP. So the temporary freeze is dealt with at paragraph 3.2. So the policy, the way that PLAP is structured is it sets out some broad policy tools and then it applies them. So in section 3.2 it's setting out the policy tool of the temporary freezes, which applies to certain specified areas. So those areas are then specified at paragraphs 4.1 to 4.6. So if we go to 4.1.2. So the three areas where the temporary freeze and the rebuttable presumption apply are neighbourhood centres, the city centre, and the priority overlay. Now neighbourhood centres are defined earlier in the PLAP as essentially any area with neighbourhood centre zoning.

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So Mr Braggins can show you on the map later, but they're spread all over the Auckland region and the Council's policy there is that there should be a presumption against the issuing of new licences in all of those areas, so throughout the whole Auckland region.

Then the "city centre" is a defined part of the city, as you would imagine, and the Council's policy there is that there's a temporary freeze for two years on all new off-licences and then a presumption against issuing new off-licences after that, and then we have the priority overlay area which again the priority overlay locations are identified in the PLAP itself. So you can see where they are. They're a fairly long list of local centres where the Council had identified a

higher risk of harm, and the temporary freeze applies there, followed by the rebuttable presumption.

Then the maximum trading hours are deal with at section 3.4 and so that's essentially saying that the policy is that the trading hours in the policy should be applied to all licences, and then at 4.3.1 sets out the hours themselves. So maximum trading hours for the Auckland region as a whole 9 am to 9 pm Monday to Sunday, which, of course, is quite a significant reduction from the 7 am to 11 pm default. Then also just to note that there are not maximum trading hours for on-licences. Those remain as the default.

So that's just to give you a sense of the PLAP.

WILLIAMS J:
So are the overlays town centres, are they, generally?

MS COOPER KC:
Yes. Yes, they are, your Honour.

WILLIAMS J:
But particularly selected town centres?

MS COOPER KC:
For the priority overlay they are selected town centre. For the neighbourhood centres it is simply all –

WILLIAMS J:
It's everyone, yes.

MS COOPER KC:
Everywhere, all neighbourhood centres.

WILLIAMS J:

So they wanted to keep it out of local neighbourhoods and restrict certain town centre areas?

MS COOPER KC:

Correct. That's correct, your Honour.

WILLIAMS J:

Mostly south of the bridge, by the look of them, except for Wellsford.

MS COOPER KC:

Yes, I'd need to look at the list, your Honour, but yes, they're predominantly in south…

So now then I think we should talk about the Court of Appeal's judgment. So if we go to that and if we perhaps start at paragraph 39.

Actually, perhaps if we just start – the Court of Appeal sort of addresses the appeal test from paragraph 33 onwards and it deals with various issues and discusses Duffy's decision.

Now at the end of paragraph 35 the Court of Appeal notes it's "common ground before us" that it was an error for Justice Duffy to adopt the *Wednesbury* approach, "for ARLA's task under s 83 is evaluative. We agree. It must decide for itself whether a given element is unreasonable in light of the Act's object. ARLA correctly took that approach in this case." So I totally agree, other than that I disagree with its assessment of whether ARLA took the correct approach, I agree obviously with the Court of Appeal's finding that ARLA has to decide for itself whether an element is unreasonable. But it then goes on to –

ELLEN FRANCE J:

I wasn't quite sure why that meant it wasn't necessarily *Wednesbury* unreasonableness. I'm not suggesting it is but I didn't quite understand the

logic of that. I mean you might have to evaluate it yourself but the standard might be *Wednesbury*.

MS COOPER KC:

Yes, I take the point your Honour is making. I think what they're saying is it's not enough for ARLA to think to say that Council could reasonably have thought it was reasonable or not unreasonable.

ELLEN FRANCE J:

Which is a slightly different point, isn't it, but…

MS COOPER KC:

Yes, I think – that is what I take them to be saying and I think that must be right. So ARLA can't simply say: "Well, we think a council could reasonably have reached the view that this was a reasonable policy." ARLA has to actually decide for itself that it's not unreasonable.

Then it talks a bit about deference and community preference in section 36, and then it goes on to talk about the standard of review and bylaws cases, and if we skip down to section 39, so they talk about needs. In fact, perhaps before skip down, sorry, at 39, so just where they deal at the top of the page there, they quote the provision from *Meads Brothers Ltd v Rotorua District Licensing Agency* [2001] NZCA 386, [2002] NZAR 308 where the Court of Appeal said in regard to previous Act: "It is to be remembered that the statutory object is to establish a **reasonable** system of control. This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing may become unreasonable in its pursuit of the aim of reducing liquor abuse."

Now perhaps I have been unable to satisfy his Honour, Justice Williams, as to where that line should be drawn but I don't think that can be – in my submission for Woolworths, that can't be argued with, that statement. That must clearly be correct, that at some point something becomes unreasonable. Then –

WILLIAM YOUNG J:

Did they actually reject what was said in *Mead*?

MS COOPER KC:

Well, your Honour, this is not entirely clear but at paragraph 39, at the end of this quote, which comes from the ARLA's decision in the *Tasman* case, they say: "We accept Mr La Hood's submission, for the Medical Officer of Health, that ARLA erred to the extent it held that 'the proportionality principles used in bylaw cases' apply under the 2012 Act. The context is not the same." Now *Meads* is not a bylaws case, it's a licensing case, but that does appear to be a rejection of the passage that's just been quoted from the *Tasman* case. Then if we go into –

WILLIAM YOUNG J:

Sorry, just pause there. The bit that's perhaps slightly more interesting to me is the bit that's cited at the end of para 45 of the quote. It will be an indicator that a particular element of a provision "is unreasonable if those wishing to purchase or consume alcohol in a safe and responsible manner find that the element is a disproportionate response to possible alcohol-related harm". Now they don't seem to reject that, do they?

MS COOPER KC:

Well, I think they do, your Honour, and so – I mean I have to admit that it's not an easy decision to interpret but I think they do and I'll take you through why I think they do. So first of all we've talked about 39. They say the context is different, and then in 40 they make the point that an element isn't unreasonable merely because ARLA might take a different view, and I think that must be right, subject, of course, to ARLA not being satisfied it's unreasonable.

Then at 41 they say: "What is not appropriately transferred from the bylaws context to alcohol regulation under the 2012 Act are the propositions that the reasonableness depends in part on 'whether or not public or private rights are unnecessarily or unjustly invaded' and any bylaw must be unreasonable if it unnecessarily abridges or interferes with a public right without producing a

benefit," and then they go on to say: "There is no antecedent right to sell alcohol that must be balanced against a given control on supply." So that does seem to me to be saying that, contrary to that statement in paragraph 45 from *Tasman*, that encroaching on the interests of those wanting to purchase or consume alcohol is not something that needs to be balanced against the reasonableness of the measure. That does seem to me to be what they're saying.

WILLIAMS J:

Aren't they just rejecting the idea that that can be framed as a right with all the baggage that brings to the discussion?

MS COOPER KC:

Well, it's an odd way to put it though, your Honour, because the bylaws cases aren't simply concerned with things that are framed as rights in the sort of narrow sense of the word. They're not concerned simply with rights under the Bill of Rights Act. So there is no right to operate a brothel –

COOPER J:

They generally though, where there's litigation about a bylaw, it has been because, whether or not it's in the Bill of Rights Act or not, some right or behaviour that people commonly carry out has been purportedly restricted, such as the right to pass along the road.

MS COOPER KC:

Absolutely, your Honour, but they're more – I would say they've never been narrowly defined as – essentially, the bylaws cases, in my submission, recognise the need to weigh up freedoms, you know, is perhaps a better way of putting it. So there's a general expectation that people are free to do whatever they like unless there's a rule saying they can't, and something is – there's got to be some rational reason for encroaching on those freedoms, and in my submission that's really what the bylaws cases are saying, and so I find it, you know, when they talk about "whether or not public or private rights are unnecessarily or unjustly invaded", they are not talking about rights in a narrow

sense. They are talking about public freedoms, you know, the ability to operate a brothel from your home, the ability to buy alcohol at 10 pm. I think it's –

O'REGAN J:

I'll interrupt you because I think we've got to the tea break. How are you getting on timewise?

MS COOPER KC:

Your Honour, I will review the position over the break but I do have a bit more to get through.

O'REGAN J:

All right, we'll adjourn now, thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.46 AM

O'REGAN J:

Ms Cooper.

MS COOPER KC:

Thank you, your Honours. So, we were at paragraph 41 of the Court of Appeal's decision.

O'REGAN J:

Just before you start, how are you going time-wise?

MS COOPER KC:

Well, your Honour, I'm still hoping to be finished by lunch.

O'REGAN J:

Okay.

MS COOPER KC:

We've already covered quite a lot.

O'REGAN J:

That leaves enough time for Mr Thain?

MS COOPER KC:

Yes, your Honour.

O'REGAN J:

Yes, okay. That's fine.

MS COOPER KC:

Yes, so paragraph 41, your Honour, where the Court of Appeal is expressing the view that the proportionality principles can't be transferred from the bylaws cases to this context because there isn't an antecedent right to sell alcohol.

Now, and I take the point that if the Court of Appeal had simply been saying there's no antecedent right in the sense of a more narrow conception or a strong conception of rights, that's clearly true, but they do appear to be saying something more than that insofar as that the bylaws cases don't stand simply for the need to balance rights, per se. They stand for the need to balance freedoms against encroachment, and that does seem to be on my reading what the Court of Appeal is explicitly saying should not occur under this Act in paragraph 41, and I think it's difficult to read it another way, to be honest, particularly where they say under the Act, there's no antecedent right, "it is inherent in a licensing regime, and to be expected…that controls may have an adverse economic impact on licensees." Well, obviously, that's true, but in my submission, that's true of all bylaws, not that this is a bylaw, but the analogy with bylaws still holds, and so – it doesn't mean though that those economic impacts shouldn't be relevant.

So that's section 41, and then if we go to section 53 of the judgment, so at the paragraphs we've just been looking at, the Court of Appeal's talking about proportionality principles. At paragraph 53, the Court is dealing with the burden

of proof. So, ARLA did refer in its decision to there being a burden of proof on the appellants to prove the appeal on the balance of probabilities. Justice Duffy held that there was no such burden, and so at paragraph 52, the Court of Appeal's addressing that point and saying it's not in dispute, the Judge was correct, there's no burden, rather there's a persuasive burden.

Then the key point – no issue was taken with that, your Honour – the point then as the discussion goes on, at paragraph 53: "Ultimately ARLA must be satisfied that a given element of a policy is unreasonable." It talks about different ways that might be proved. Then at the very end of the paragraph, the Court says: "A prospective benefit may be taken into account if there is a real and appreciable possibility that the element will deliver it."

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Now I accept, and my learned friends make the point, that there it seems reasonably clear the Court of Appeal is simply talking about burdens of proof and not the appeal test as a whole, and I accept that your Honour. But if we go on, if we, the reason why we say that this effectively becomes the appeal test is because where it sits in the context of the decision as a whole. So if you go on to paragraph 62 of the Court of Appeal's decision. So this follows a discussion about the proportionality – sorry, the precautionary principle. So your Honours will recall in the *My Noodle* case the Court of Appeal and the decision of Justice Glazebrook said that the Authority wasn't required to be sure that particular conditions would reduce alcohol abuse, but it was entitled to apply the equivalent of a precautionary principle, and in the *My Noodle* case the issue there was the Authority's decision on whether to impose reduced licence hour conditions on new off-licence renewals, and the issue was whether the Authority needed to have proof that those reduced hours would reduce harm, and the Court said no, it's entitled to test a hypothesis that reducing hours would reduce harm, which it intended to do and keep under review, and so that has then been applied in further cases as essentially the precautionary principle, and was referred to and applied by ARLA.

So and Woolworths challenged ARLA's reliance on the precautionary principle. So that is what the Court of Appeal is addressing in this parts of its decision and at 62 they say: "We have reached the same conclusion by a more direct route under the 2012 Act, holding that the appellate standard does not require that ARLA be sure a given element will reduce alcohol-related harm. It suffices that there is a real and appreciable possibility that… will do so."

Again there it's ambiguous as to whether, again, the Court of Appeal is simply talking about a standard of proof, or whether it's talking about the test.

WILLIAM YOUNG J:
Well it's pretty clear in 62 it's standard of proof, isn't it?

MS COOPER KC:
Well, possibly your Honour.

WILLIAM YOUNG J:
Just pause there. Do you dispute it, to say it's wrong as to the standard of proof?

MS COOPER KC:
No your Honour, I do not.

WILLIAM YOUNG J:
Right.

MS COOPER KC:
No. If we go, then, to paragraphs 108 and 109, this follows a discussion of some of the evidence and the evidence regarding the correlation between off-licence hours and alcohol-related harm. So at 108 it talks about supermarkets contesting the inferences to be drawn from the evidence, and the Court says: "The argument rested on the false premise that the Council must prove harm associated with supermarkets… before it can justify restrictions… The evidence that ARLA cited sufficiently established a

correlation… such that restricting the latter might reasonably reduce the former. Ultimately, that was sufficient to justify the policy's supply restrictions."

Now in my submission this is an indication that there's a missing piece of the analysis. So the Court of Appeal has dealt with it in proof and said it's not necessary to prove that a measure is going to reduce harm. It's enough for there to be a connection or an evidential basis and to make it reasonable, to think that it might. But in my submission it then needed to consider whether having regard to that evidence the element, or part of the appeal test would require ARLA to then consider whether the element was unreasonable in light of the object of the Act on the basis of that evidence. S what the Court of Appeal appears to be doing here in paragraph 108, it talks about the fact there's a correlation and says "ultimately that is sufficient to justify the policy's supply restrictions".

Now that begs the question, it may or may not be, but the simple fact that there's a correlation in my submission is not enough on its own.

WILLIAMS J:

Doesn't that just get you to the point of then asking the countervailing impacts, asking yourself about the countervailing impacts?

MS COOPER KC:

Correct your Honour.

WILLIAMS J:

And then we get to 7 am to 9 pm. I mean is there really an argument that that's unreasonable in this context, given that the restriction itself is justified on its own terms? Can it really be argued that, notwithstanding that, the freedoms to purchase are being unreasonably infringed?

MS COOPER KC:

Well, your Honour, I say yes, it can be argued, and certainly the appeal test should, at the very least, permit it to be argued. So it can't be sufficient to say

once it's been shown that there's a correlation, or a potential correlation, between the measure proposed and the possibility of reducing harm, that that in itself is sufficient to make the measure reasonable in light of the object of the Act?

WILLIAM YOUNG J:

I suppose on your opponent's argument that's subject, well, it's sufficient to justify the restriction on closing hours absent something to the contrary, but we don't know whether that's implicit and, if so, what that something is.

MS COOPER KC:

Exactly so, your Honour. So my learned friends for the Council say, well, you know, the Court of Appeal wasn't saying this was the whole test. Well, there is nowhere in this Act where they suggest that there is another element to this test. So they've rejected the proportionality principles.

WILLIAM YOUNG J:

Some of the proportionality principles.

MS COOPER KC:

Well, but it's not at all clear what's left.

WILLIAM YOUNG J:

I agree. At best it's by implication.

MS COOPER KC:

So yes, so at best it may be implied that there's still some part of the analysis yet to do but what that is is unclear, and I do say it's telling that my learned friends for the Council say: "Oh, well, you bring back in proportionality," which doesn't seem to me to sit easily with section 41, or my learned friend for the Medical Officer of Health says: "Well, you don't bring in proportionality," but there is a check if something becomes sort of capricious or – I forget the exact – grossly, grossly unreasonable. Well, where does the "grossly" come from? So coming back to what does "unreasonable" mean, Parliament has used a

general term and I could make up a standard but I would simply be making it up and adding “grossly” equally is simply making up an additional word which is not in the Act and there’s no basis for it.

WILLIAM YOUNG J:

Well, can I perhaps put it another way? If the restrictions that are implemented leave in place a system for the supply of alcohol that remains reasonable, then that’s not a problem, is it?

MS COOPER KC:

No. It begs the question of what is reasonable, of course, your Honour, yes.

WILLIAM YOUNG J:

Okay, and then looking at what’s reasonable, the default position isn’t a starting point from which deviation requires justification, or do you say it is?

MS COOPER KC:

I think that argument has been rejected, your Honour, and I’m not about to attempt to revive it. So I –

WILLIAMS J:

I thought you did make that argument, that the default position was the default position; any deviation from it required justification.

MS COOPER KC:

That was an argument at an earlier level, your Honour, but I’m not going to try and advance that proposition too.

WILLIAM YOUNG J:

Okay, so what then is there to balance? Assume we’ve got restrictions that have a tendency to reduce alcohol harm. With restrictions in place, there’s still a system that looks pretty reasonable. People can buy and consume alcohol pretty much when they want to. What is there to balance against the tendency to reduce harm?

MS COOPER KC:

Well, your Honour, I think – and this is where Mr Braggins, if I leave him any time, will briefly cover this – but essentially there is the supermarkets, people enjoy the convenience. I don't mean to give evidence from the Bar, but I'm – so I think it's relatively uncontroversial to say there's a convenience factor in being able to go to the supermarket early or late and it's convenient for many people who work – shift-work workers, for example, work unusual hours. People do shop at seven in the morning or at 10 o'clock at night, and so for those people who wish to do their grocery shopping at those times and who like to buy wine or beer as part of their supermarket shopping, there is an inconvenience from the restricted hours, and so that inconvenience, in my submission – and there's an inconvenience to the stores because if they're open longer hours than the licensing hours they need to close off part of the store, so they need to have measures to deal with it.

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So those are entitled to be considered and weighed against the measure, and so what I would suggest is in some circumstances, if the inconvenience is relatively mild, assessed to be relatively mild, there might not need to be a huge amount of evidence or a huge expectation of impact –

WILLIAM YOUNG J:

Sorry, I just want to take note of this. So the best arguments against are the reasonable requirements of people doing shift work, yes, and what's the other one?

MS COOPER KC:

Well that's for the hours. There's also, I suppose, another argument that Woolworths made before ARLA, was the overall reasonableness of the policy as a whole, and the, took objection to the fact that there were these restrictions on off-licence but effectively no restrictions on on-licences, is the other point, and also I suppose there's a –

O'REGAN J:

Putting restrictions on on-licences wouldn't help the supermarkets, would it?

MS COOPER KC:

No, it's just –

O'REGAN J:

So why would that change the decision?

MS COOPER KC:

I suppose it's just an overall – is the policy coherent overall argument your Honour.

WILLIAM YOUNG J:

Third is the inconvenience of supermarkets of having to shut off a section of their shop.

MS COOPER KC:

Shut the section of the shop, correct your Honour.

O'REGAN J:

It's not that big a deal is it? You just put a rope across saying "don't go in".

MS COOPER KC:

Well, I'm not saying it's – but your Honour I suppose the point is, it's not nothing, and you say you may – I may consider that this, it doesn't outweigh the positive sides, but –

WILLIAM YOUNG J:

Was that in the arguments that were before the ARLA and before the Court of Appeal?

MS COOPER KC:

Yes, I'm struggling to remember how much we got into the evidence in the Court of Appeal your Honour, to some extent.

COOPER J:

Why does all that have to be the subject of evidence though? If you're an ordinary member of the – if you're a councillor and you've got this statute telling you your policy has to be reasonable, is that something you have to go to a guru about?

MS COOPER KC:

No, your Honour, I'm not suggesting that. I'm not suggesting that the Council requires evidence about it. What I'm saying, your Honour, is there's an appeal right that Woolworths and others are entitled to exercise, and they're entitled to put evidence before ARLA, and evidence of the inconvenience to their customers is, in my submission, relevant evidence that ARLA can take into account. I'm not saying, you know, that it would necessarily – in every case that it would outweigh the countervailing interests, but my point is you can't disregard it and on the Court of Appeal's decision it's not clear where that type of evidence would sit in the assessment that ARLA is required to make.

WILLIAM YOUNG J:

Well on the proposition I've put to you it would fit in to a general consideration whether the system that remains with the policy in place is reasonable.

MS COOPER KC:

Yes, your Honour I still feel, I agree and that is one way of looking at it, although I think the appeal test is whether the element is unreasonable rather than whether the system as a whole is unreasonable. But how it fits within the overall system is clearly a relevant part of that analysis.

WILLIAM YOUNG J:

Is the element one that makes the whole system unreasonable?

MS COOPER KC:

Well I think the element –

WILLIAM YOUNG J:

It would be quite a hard test.

MS COOPER KC:

– could be unreasonable as a stand-alone.

WILLIAM YOUNG J:

But as detracting unacceptable from a reasonable system.

MS COOPER KC:

Yes I think probably both, they probably both lead to the same answer. So my point is that there's an "and" and something else missing in the Court of Appeal's decision.

WILLIAMS J:

Can you tell me how – was the inconvenience to shoppers and the constraints on the supermarkets, as opposed to harm, a focus of Woolworths' evidence?

MS COOPER KC:

Yes it was your Honour.

WILLIAMS J:

Can you tell me where that was?

MS COOPER KC:

Well actually I may, if your Honour doesn't mind, I'll leave that to Mr Braggins –

WILLIAMS J:

Oh, Mr Braggins knows that? Good.

MS COOPER KC:

– because Mr Braggins if much more familiar with the evidence than I am.

WILLIAMS J:

Right.

MS COOPER KC:

So I think he'll be able to assist you more efficiently.

O'REGAN J:

I think we're probably done now the Court of Appeal.

MS COOPER KC:

Yes, we are your Honour.

O'REGAN J:

Because the real issue for us is what's the right test rather than what the Court of Appeal said it was.

MS COOPER KC:

Correct. That's right your Honour. So moving on then. So we're now at 5(b) of my outline. So Woolworths, as I've already said, says the test is simply objective unreasonableness, having regard to the object of the Act.

WILLIAM YOUNG J:

Do you say there's one object or two objects?

MS COOPER KC:

There's one object with two limbs your Honour. So what I say, I mean, there's scope for enormous argument about this, but I do say that ultimately the two limbs combine to create one object, but you can't pursue one to the exclusion of the other. Because if you simply pursue the minimisation of harm, that would lead you down a very different policy path than if you were also pursuing a system for the sale and supply of alcohol.

So to take an extreme example, again, you could have a system whereby all sales of alcohol were limited to one hour a day from a single outlet. That might minimise harm, but it wouldn't be consistent with continuing to permit the safe and responsible sale, supply, and consumption of alcohol, or a system that was

reasonable, in my submission. So, at some point, minimisation of harm must yield to the other aspect of the object.

So, I don't know if – I think we've talked quite a bit about the object. Lawfulness, obviously, I think that's uncontroversial that the policy must be lawful, and section 94 of the Act specifically requires it to be consistent with the Act and the law generally. Partiality, unfairness and bad faith, again, those are simply taken from the bylaws cases and again would sort of really go to lawfulness in a broad sense. Then proportionality, which we've been discussing, and I do say that this interpretation is consistent with just the ordinary use and meaning of unreasonable, whereas I'd say attempting to import a concept of capricious or grossly unreasonable, such as my learned friend the Medical Officer of Health does, is importing a gloss into the words of the Act. Parliament did not use those terms.

O'REGAN J:
It didn't use "proportional" either.

MS COOPER KC:
No, but – no, I take that point, your Honour. But I suppose it's what does – what did Parliament – what is ordinarily understood by "unreasonable", and I think proportionality is a well-understood and well-used aspect of reasonableness.

So, just in terms of the object of the Act, your Honour, the Court of Appeal did say in its judgment at 16 that there is only one – essentially, there is no requirement to balance the two aspects of the purpose and they refer to *Medical Officer of Health v Lion Liquor Retail Ltd* [2018] NZAR 882.

I won't take your Honours to that given time, but I did just want to point out something that I think is easily missed about the *Medical Officer of Health v Lion Liquor Retail* case. So, Justice Clark's decision is often quoted there at paragraph 45 where she talks about the need to promote the twin objects of the Act, and then she also does express the view at paragraphs 50 to 53, actually maybe if you could bring up 50 to 53 briefly, she expresses the view that

financial impacts on licence holders are irrelevant, but she's talking there about a renewal of a licence and her finding that the financial impacts on licence holders are irrelevant is not based on her interpretation of section 4. It's based on section 131(2) of the Act, which she deals with earlier in the judgment, which expressly provides that the financial impact on other licence holders is not a relevant consideration when renewing a licence. So she's really not saying that financial impacts on licence holders are generally irrelevant to the object of the Act. So I just simply wanted –

WILLIAM YOUNG J:

Why would it be irrelevant for the purposes that she's dealing with, but relevant for closing hour restrictions?

MS COOPER KC:

Well because it's really, I think she's actually misread section 131(2) in the way she deals with it. Section 131(2) is there to ensure that licensing committees don't essentially ration licences in order to give monopolies to existing licence holders. So it's there to say you can't say well we're not going to give you a licence because that will affect the person across the road we've already given a licence to. That's all it's there for. So it's certainly not saying that under the Act as a whole the financial interests of licence holders are irrelevant.

So I think that's probably all I really needed to say about the *Medical Officer of Health v Lion* but I did think, given the Court of Appeal refers to her comments on the object, it was important just to note that.

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I've already referred to the purpose of the Act in section 3 and the reference to "reasonable" as a stand-alone aspect of the purpose, alongside meeting the object.

We have already talked about the fact the LAP may be more or less restrictive than in the default hours. I talked about the requirements on councils.

Perhaps also just to note – this is dealt with in our submissions so I won't spend time on it – but just also the general provisions of the Local Government Act relating to Council decision-making also apply. I think perhaps the point there is it would be very strange – I may have said this already, so apologies if I'm repeating myself – but I think it would be somewhat strange if the types of considerations that the Council can take into account in developing its PLAP are not able to be taken account of by ARLA in deciding whether the PLAP is unreasonable or not. So again, that's why I say things like the impacts, consistency with the Unitary Plan or impacts more widely on the community, must presumably be things that ARLA can have regard to.

Already talked about the appeal process under the Act. We've dealt with *Meads* briefly as part of the Court of Appeal decision. I don't think I need to go, your Honour, to the prior decisions, but other than to note that in my submission ARLA actually has set out a pretty sensible approach to its decision-making in those two cases referred to there, so *Hospitality New Zealand Incorporated v Tasman District Council* [2014] NZARLA PH 846 and *B & M Entertainment Ltd v Wellington City Council* [2015] NZARLA PH 21-28, and the *Tasman* decision is the one that is referred to that we saw in that quote, that passage quoted in the Court of Appeal's decision, which does refer to proportionality and the bylaws cases, and presumably that's because ARLA has found that sort of approach quite useful in helping its analysis and its decision-making.

I've already talked about proportionality in bylaws cases, so I don't think I need to talk more about that. Obviously, after the *JB International* case there was the *Conley v Hamilton City Council* [2008] 1 NZLR 789 (CA) case which reached a different view but nevertheless had referred to the proportionality principles.

Then just the last point on this part of my submissions, your Honour, perhaps is just to talk a little about *My Noodle* because *My Noodle* was quite a focus of the hearings in the cases below. So if we could just go to paragraph 72 of that decision. So as I've mentioned, the *My Noodle* case pre-dated the current Act, and it was an appeal from a decision of the Queenstown District Council's

Licensing Authority about renewing some on-licences. The Council had adopted a local alcohol policy before there was provision for them in the Act which suggested reduced trading hours. So the Authority had referred to that policy and relied on that policy in imposing restricted trading hour conditions on the licences it was renewing that were the subject of this appeal. Delivering the decision of the Court, Justice Glazebrook confirmed that the Authority was entitled to have regard to the Council's policy and the real issue before the Court was whether the Authority was restricted to only considering issues specific to the particular licensee whose application it was considering or whether it could consider broader policy objectives.

So at paragraph 72 the Court finds the Authority was not restricted to consideration of individual licensees or individual premises, and then it goes on to say: "If the Authority considered that reduced trading hours would help reduce liquor abuse then, logically, any restriction on trading hours must be a blanket provision that applies to all liquor outlets (subject to the consideration of special individual circumstances)." I would obviously qualify that and say, well, it's not necessarily the case for different types of outlets but, in any event, and then she said: "In our view, the Authority is not required to be sure that particular conditions," so we're talking about particular licence, particular conditions, so this is an individual decision, "will reduce liquor abuse. It is entitled to apply the equivalent of the precautionary principle in environmental law." If there is a possibility of meeting the statutory objective, it's entitled to test it. "In this case, it clearly intended to test its hypothesis and keep the matter under review."

Now I'll come to in a minute the ARLA's decision and how it relied on this, but I think it's just important to note, your Honour, that the Court was dealing with a different context and again it really was dealing with this point about burden of proof and the evidence required. So it certainly doesn't suggest that having regard to the policy or the objective is the end of the analysis or the inquiry, and it doesn't provide, in my submission, doesn't really support what ARLA says at paragraph 43 of its decision, and perhaps if we just go to ARLA's decision now that might be useful to compare what they say.

So if we go to paragraph 40 of ARLA's decision, so this is ARLA's decision in this case now talking about the precautionary principle and they talk about how "in *Tasman*, we said that the precautionary principle applies to the development of a local alcohol policy". They refer to that passage from *My Noodle*, and then they go on to say that the Council was entitled to trial a local control. Then at 43 they say: "In short, provided there is an evidential basis for the adoption to of the precautionary principle, if the Council considers its local alcohol policy has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality." Now in my submission that is quite a leap from what the Court of Appeal said in *My Noodle* insofar as we've gone from being able to take into account a policy notwithstanding that it's not capable of proof and being able to essentially act on it to try and validate a hypothesis to the existence of a possibility of meeting the object of the Act giving rise to an entitlement to test it, and again I would say ARLA here is falling into the same error as the Court of Appeal because what is missing from there is that it – what it should say is ARLA – the Council is entitled to test whether that possibility is a reality provided it is in all the circumstances reasonable or rather not unreasonable to do so.

WILLIAM YOUNG J:

But it's already said that though, hadn't it, at para 32?

MS COOPER KC:

Well, it did say that at para 32. Well, it talks about the proportionality principles at paragraph 32. But in my submission what ARLA appears to have done is it's set out, broadly correctly, I would say, the approach it needs to take and then it separately deals with the precautionary principle, and it appears to then treat the precautionary principle on its own as a standalone alternative test.

ELLEN FRANCE J:

Well, in the previous paragraph, in paragraph 42, where it's talking about what was said in the *Dunedin* case, they say in those circumstances the Authority will be slow to dismiss that policy.

MS COOPER KC:

Yes.

ELLEN FRANCE J:

And isn't that all that they're saying here, that if you can establish that there is some, there is the evidential basis, then in that circumstance they'll be slow to dismiss that approach? It's not saying they won't consider anything else, is it?

MS COOPER KC:

Well, your Honour, I think the use of the word "entitled" is really the issue. It does suggest that they're treating it as a binary point. I mean I agree with you that in *Dunedin*, and they do cite that, saying the Authority will be slow to dismiss that policy, but what they say in 43 does appear to be different. I mean it's a little confused. I think the…

O'REGAN J:

Are you saying that 43 says if there's an evidential basis for adoption of the precautionary principle it's axiomatically reasonable?

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MS COOPER KC:

Yes, your Honour.

WILLIAM YOUNG J:

Is that consistent with the way – the rest of ARLA's decision though, because they do go into the evidence?

MS COOPER KC:

It's very inconsistent, your Honour. They do in some places but then in other places they don't, and so I certainly accept that in some places they clearly do engage with proportionality but then in other places they appear to essentially say, well, but we don't need to because of this. So if we go –

WILLIAM YOUNG J:

Where do they – give us an example of where they say proportionality is irrelevant.

MS COOPER KC:

I don't think they explicitly say that, but if we go to perhaps 113 – no, sorry, that's probably not – 122. Perhaps 146 would be the – so at 146 they're dealing with the trading hours, specifically the evening trading hour, and they talked about the evidence and then at 146 they say: "Notwithstanding that evidence of reduction in harm from specific reductions in trading hours of off-licences is sparse, there is evidence to establish a relationship," and then the final sentence: "Given this evidential basis –

WILLIAM YOUNG J:

You've missed out one.

MS COOPER KC:

Well, I have, yes, sorry, your Honour. Yes, so –

WILLIAM YOUNG J:

Which is slightly ambiguous but it not be entirely helpful from your point of view.

MS COOPER KC:

No. Well, I think the difficulty is again, your Honour, is the use of the word "entitled" I think is very problematic because it's difficult –

WILLIAM YOUNG J:

All right. If you treat the sentence you missed out as saying that there's nothing that has been raised to show that the restriction is unreasonable, therefore the Council is entitled to test whether that possibility is a reality, and that's the language that seems to have been taken from *My Noodle*.

MS COOPER KC:

Well, I accept it could be interpreted that way, your Honour. I think my concern would be that the reference to the Council being entitled would be quite wrong if by that they do mean: "We defer to the Council because they've established this possibility and we don't need to consider unreasonableness," and it is not clear – I mean in some places they do clearly engage with that but in others they don't and so that – in my submission, it's not sufficiently clear that they did apply the correct test to be confident that the decision is correct, and at that point –

WILLIAM YOUNG J:

Look at para 150 when they deal with opening hours.

MS COOPER KC:

Yes, well, opening hours, they clearly do engage with it. I concede that, your Honour, and that's why I say my concern is that they do correctly interpret and apply the test in some parts of the decision. The concern is, and this was Woolworths' submission, it has been Woolworths' principal argument in the High Court as well, the concern is that they have mistakenly adopted the precautionary principle as almost an alternative mode of analysis that gets to the answer without the need to engage in the type of sort of engagement with countervailing issues that is required, and I accept they do do that in relation to the morning hour restriction and they do refer to it in many parts of their decision, but it's the reference to the Council being entitled to test which, as I say, is, at the very least, ambiguous and does give rise to the concern that the test has not been correctly applies, and then, of course, the Court of Appeal would say, well, they didn't need to go further than that because all they needed to find was that there was some evidence. They didn't need to refer to the precautionary principle. They simply needed to find that there was some evidence of a causal connection that could reduce harm and that was enough.

WILLIAM YOUNG J:

But they didn't apply that approach. They could have applied that approach to the opening hours because obviously there was some evidence that it would

reduce harm, but then when they get to 157: “In the absence of stronger evidence to support,” I think, “an opening hour restriction, the Authority considers that, on balance, the opening hour restriction is unreasonable in light of the object of the Act,” and that’s based on the inconvenience to shoppers largely.

MS COOPER KC:

Yes, that’s correct, your Honour.

WILLIAM YOUNG J:

Why would they take different approaches to different parts of the decision?

1225

MS COOPER KC:

Well, your Honour, I’m not sure I can answer that. I mean, I take your Honour’s point, and it’s clearly – I can’t say that ARLA got it consistently wrong, but nor can I say they got it consistently right.

But I’m not sure I can take it a lot further than that, your Honour, but perhaps I think it might assist now if I hand over to Mr Braggins, and he can certainly assist you much more ably in terms of the evidence and the specific factors that ARLA did consider.

O’REGAN J:

That’s fine. Thank you Ms Cooper.

MR BRAGGINS:

Thank you. Now, Justice Williams, you had some questions earlier about the impact on supermarkets to do with resource consents and building consents and the timing, and I just wanted to briefly speak to that if I may?

WILLIAMS J:

I followed what was being said unless you an additional point to make?

MR BRAGGINS:

Well, perhaps the most recent example was the Herne Bay Countdown that had to open without a liquor licence because of the time it took to get that liquor licence hearing, and by that stage, the supermarket was up and in fact trading. So while you were right in terms of your question, well, can't you say, well, either these are the – this is the rationale for having a supermarket, we've got growth, we need people, we need to feed these people, but by the time you get to the liquor licence hearing, the supermarket's already open, so the opposition says, well, we've got the supermarket, we've got the bread and the milk and the food, all we don't want is the alcohol. So, there is no balanced assessment when you get to the liquor licence hearing because by that stage, you're too far through that process, and that was part of the case.

WILLIAMS J:

The opposition brings evidence to suggest that the liquor needs of the community are already met in our supermarkets, you mean?

MR BRAGGINS:

So every time you apply for a liquor licence, you take that risk. The issue with the – at the ARLA hearing, the concern was, what does a "rebuttable presumption" mean and where, you know, how does that kick in? I suppose the Supreme Court's decision in *King Salmon*, you know, "avoid means avoid" or "rebuttable presumption" means just that, and there was a concern before we knew how it would work, and before we had the ARLA decision, about how it would actually play out that actually a rebuttable presumption would be an almost insurmountable hurdle.

WILLIAM YOUNG J:

But that's not what ARLA said, is it?

MR BRAGGINS:

No, and all I'm saying for that, that was the case before ARLA –

WILLIAM YOUNG J:

Yes.

MR BRAGGINS:

– ARLA has said, no, you've got a better than even chance, and so there's that –

WILLIAM YOUNG J:

So has this issue dropped away now?

MR BRAGGINS:

Yes. I was just trying to deal with that particular concern. So, starting down with, again, perhaps just a very high-level picture of Auckland. So in terms of Auckland Council itself, the alcohol-related harm in Auckland had been trending down over a period of five to seven years, and the reference for that is 201.0074 in Ms Hampson's evidence.

WILLIAM YOUNG J:

That's up to 2015, is it?

MR BRAGGINS:

Well, that was the best available information at the time. The second –

WILLIAM YOUNG J:

So, where's this evidence? I'm sorry.

MR BRAGGINS:

So 201.0074. So the document itself is 201.0066. That is the evidence from Ms Hampson.

WILLIAM YOUNG J:

Yes. So where's the guts of her evidence? What paragraph?

MR BRAGGINS:

So it's – the graph is above paragraph 2.4.

ELLEN FRANCE J:

Is it this graph?

MR BRAGGINS:

You'll see the graph there.

O'REGAN J:

It's on the screen now.

MR BRAGGINS:

It's now on the screen.

ELLEN FRANCE J:

That one there. Yes.

WILLIAM YOUNG J:

Yes, okay.

WILLIAMS J:

What's the red line there?

1230

MR BRAGGINS:

There was an issue with the police data, so this is the tracked changes version of her evidence that was filed because there was a misdescription of the data.

WILLIAMS J:

Oh so that's, ignore that graph?

MR BRAGGINS:

So that was, ignore the one with the red line. I apologise, there were a few changes that was filed but it was done on that basis so that everyone could see how the data had changed. But you'll see the, from 2008 through to 2015 harm was reducing, although there was a slight blip back in 2015. But overall it was

still less than 2006, and that's not taking into account population growth over that time, because these are raw numbers. Secondly –

ELLEN FRANCE J:

That's just one aspect of harm, isn't it?

MR BRAGGINS:

Absolutely. So this is just some high level context because what I suspect you're going to hear is that Auckland is a terrible place to live, there's alcohol-related harm everywhere, I'm just trying to put this in a, some very brief context. The second –

WILLIAMS J:

Well you have got 37,973 incidents a year. That's not a few.

MR BRAGGINS:

No, but what I do want to do is take you to when and where that occurs because I do think that that's important.

WILLIAMS J:

Right.

MR BRAGGINS:

So if we then – while we're in that same document, and this answers the question, if we go to page 201.0089? So that's graph 9. This is above section 4 of Ms Hampson's evidence. What you'll see there, and this is probably no surprise to anyone, is that the Saturday, the Friday and Saturday peaks are substantial, but they also provide quite a contrary distinction to the rest of the week. So the LAP hours kicked in every day of the week. Part of Woolworths case is that when you were looking at reasonableness and proportionality, there is a difference between that evaluation on a Friday and a Saturday night, to the rest of the week. In the same way that geographically there is a difference between the central city and Auckland, in its large size, Warkworth. The distance between Warkworth and the Auckland CBD is sort of the same as

from Courtenay Place to Paraparaumu. So just to give you a sense of that difference, and one of the aspects we were presenting to ARLA was if the focus is on the elevated harm on a Friday and Saturday night in the central city, how then is it reasonable to restrict sales at 9.30 pm on a Tuesday night in Warkworth, because there is such a great distinction in terms of time and geography.

WILLIAMS J:

Well it seems to suggest that there's at least 50 hospital admissions across Auckland every night, and then on a Friday and a Saturday it gets really bad. Does that really make your case?

MR BRAGGINS:

The issues, and I need to clarify whether this is a cumulative total across multiple weeks, or an average. The hospital data was slightly complicated because there wasn't a clear clarity of population in terms of the number of hospitals and who would end up at those hospitals.

O'REGAN J:

So was your case that there should have been restrictions on certain nights in certain places?

MR BRAGGINS:

It was part of the case, yes.

O'REGAN J:

Including supermarkets or not?

MR BRAGGINS:

Yes, so the, I suppose the principle was that the precautionary principle, to the extent that it applied, and reasonableness should apply to the places – or most significantly in the places and the times when harm occurs the most, and equally it should apply the least when, in the places and the times that it applies the least.

O'REGAN J:

But there's nothing the Act that says you have to discriminate, does it? I mean the Act just gives a local authority the power to make a policy for its area. It allows it to discriminate but it doesn't have to, and the Act itself sets a default position for the whole country.

MR BRAGGINS:

Yes, but maybe if we go back to the ARLA decision about the reason that ARLA was talking about this 9 pm decision, so if we go to paragraph 133 of the ARLA decision, it says there: "The Council says that restricting the sale of off-licence alcohol after 9.00 pm is aimed at preventing opportunities for late-night 'top-up' alcohol purchases and excessive 'pre-loading' and 'side-loading' and corresponding high levels of intoxication." So that was the context in which we were having a discussion with ARLA about what was reasonable and what was not reasonable, and the dominant evidence was that pre-loading and side-loading was a Friday/Saturday function, you know, activity associated with people going out into town, particularly in the central city.

WILLIAM YOUNG J:

Is that the evidence that the people referred to in 134 gave?

MR BRAGGINS:

Jenny Connor was more around the, I suppose, the broader studies about alcohol-related harm. I think it was probably Ms turner for Auckland Council that talked more about pre-loading and side-loading and those particular attributes.

WILLIAM YOUNG J:

So what did they say about the suggestion that closing hours restrictions on Mondays, Tuesdays, Wednesdays, Thursdays and Sundays were not required, not warranted?

MR BRAGGINS:

So to an extent they talked about a different form of harm which was alcohol-related harm in dwellings, but that is not what, the central description of what ARLA talked about. But even in the dwellings there is a marked difference between a Friday/Saturday night and Monday, Tuesday, Wednesday.

WILLIAM YOUNG J:

133 suggests ARLA was simply talking about alcohol harm irrespective of whether it's evidenced by hospital admission or not.

MR BRAGGINS:

So I took you to hospital admissions as an example of the evidence and the trends but there was equally the same trends evidence from the police data, not – I think the hospital and the police data was –

WILLIAM YOUNG J:

Well, it's very – I mean the graph you've got up on the screen, or you had up on the screen, was very plausible.

O'REGAN J:

Is there a requirement that you have to reduce it from a higher base? Can't you reduce it from a low base as well?

MR BRAGGINS:

I suppose that comes back to the question of reasonableness and also effectiveness. You know, how effective, if you're attacking that low base, how effective is that going to be in terms of alcohol-related harm? So there was a lot of evidence about, well, what's going to happen to the 19-year-old who is typically out on a Friday night and they're doing pre-loading? There was a lot of evidence about the planned activity of pre-loading. Most pre-loading, according to the evidence, occurred prior to 9 pm but some – and it would be some would occur after. So the thought was that, well, if we stop at 9 pm we will stop that opportunistic purchasing of pre-loading or side-loading. I'm assuming – do you know what "side-loading" is? I'm happy to….

So “pre-loading” is when you go out and buy alcohol, planning to drink it before you go into town. “Side-loading” is when you’ve started drinking and – “side-loading” is when you have stored alcohol maybe in your car and then you pop in and out of the bar, and then there's “topping up” which is when you’ve started drinking and you’re buying more.

So the thinking was, well, if we stop at 9 pm that’s going to stop people, and then the question was, well, what happens on week 2? The 19-year-old will learn that they’ve missed out because they didn’t get to the off-licence by 9 pm. They’ll change their behaviour, and so then – and I think that was accepted by most parties that that was, you know, a logical function of what would happen and then there would be a question of, well, who do you then catch? Do you catch the people that have been disorganised in terms of their planned drinking?

1240

So it’s because it’s dynamic it’s a bit difficult to know exactly what will happen in terms of the people and the harm because they do have that opportunity to plan ahead, and there’s nothing much more cunning than a 19-year-old so that was the concern about what – that was trying to understand what would actually be the effect and who the policy would effect because understandably there was a lot of logic around trying to capture that Friday/Saturday night harm, but it also impacts people at 9.01 on a Tuesday night, and that’s when you’re at the checkout, you know, you have to get out of your car, to the supermarket, do your shopping, and if you hit that 9.01 then you’re going to be inconvenienced. Now that is perhaps not significant in the context of a Friday night, but you’re impacting someone on a Tuesday to try and achieve an outcome on a Friday, and that was part of the evidence that was presented to ARLA, about well what is going to be the effect of this policy, and two, who is it impacting and how do those things relate, and why is the restriction on Tuesday reasonable to achieve a Friday problem or why is a restriction in Warkworth reasonable to achieve an Auckland CBD problem, because you can't get from the CBD to Warkworth in,

sort of, well maybe an hour, if you're at Waiheke or further, it takes a long time to get to those places. So there's a –

O'REGAN J:

So are you saying it's unreasonable to set a policy for the whole area? It's just per se unreasonable?

MR BRAGGINS:

No, what we're saying is the, ARLA when they came to their decision, simply said, and Ms Cooper took you to that, the Council has established a relationship property and they're entitled to do so and that's sufficient, and what we're saying is they didn't actually go in and look at the reasonableness and the proportionality, and what we do say is that there's a different proportionality assessment on a Friday and Saturday night compared to a Tuesday night, for example, and it doesn't seem that ARLA ever did that.

ELLEN FRANCE J:

Isn't that downplaying the fact that in an area like this, as the evidence of someone like Ms Hopkins showed, you get a whole range of factors you're trying to, they're taking into account, aren't they. It's not just – it's also what happens in the home, price considerations, a whole range of different factors have come into play.

MR BRAGGINS:

So there are a range of factors, I accept that. I suppose we started out with what is the intent, what is the outcome that is being sought, and to what extent is that reasonable, and I think we were quite strong in the context of if you're talking about pre-loading and side-loading, then restrictions on Tuesday nights are not targeted at that, and are not really related to that particular issue.

WILLIAMS J:

That's just to frame it in a restricted way. It's not just pre-loading/side-loading that's causing alcohol-related harm. Even on your analysis.

MR BRAGGINS:

I'm not sure I…

O'REGAN J:

Wasn't there evidence that people buying late at night tend to be problem drinkers and that this would help restrict them.

MR BRAGGINS:

So there was a general New Zealand study that related to that 10 pm question, and that is referred to, but the, again coming back to what ARLA's description of the essence and purpose of the case, that's not what, I suppose I go back to that pre-loading issue, Auckland as a whole doesn't drink as often as the nation and has better drinking habits. Now that is, I accept, not enough to convince the Court, but that was also part of the overall fabric of the case, is that Auckland is not the worst, and in fact it actually performs a lot better –

O'REGAN J:

Yes, but so what. Auckland Council decided to put on some restrictions, which the law said it was allowed to do.

MR BRAGGINS:

The Council is allowed to propose its LAP. Our evidence was relating to what is the outcome –

O'REGAN J:

but whether it's better or worse than Dunedin is neither here nor there is it?

MR BRAGGINS:

No, I accept that. The other particular set of documents I'd like to take you to are the attachments to Ms Hampson's evidence. So that's document 306.1214 and the particular graph is 306.1228.

WILLIAMS J:

1-2?

MR BRAGGINS:

1228. So these are some, so this –

ELLEN FRANCE J:

I find it quite hard to read, Mr Braggins, so I don't know whether it's possible to zoom in a little bit.

MR BRAGGINS:

Absolutely. Perhaps if I may, I might – if we just go to the starting point of this study and I can just briefly talk to it because it was, again, a central part of Woolworths' evidence. So, the Health Promotion Agency commissioned a report to look at alcohol-related harm trends and what happened in terms of different kinds of alcohol-related harm when new licences were established, and that formed part of a particular study but Ms Hampson obtained the data from that and the analysis from that and re-mapped it.

So in essence, the purple colour shows a negative relationship, so (unclear 12:46:06) more licences, I suppose, associated with less alcohol-related harm. I'm not saying it's causative, all I'm saying is that the indication is there are different driving factors. Grey is that there was a statistically insignificant relationship and then the colours from light blue through to red showed a stronger relationship. So, in the central city for drug and alcohol offences, there was a negative relationship between supermarkets and drug and alcohol offences.

WILLIAM YOUNG J:

So is this referable to trading hours or off-licences?

MR BRAGGINS:

This is primarily related to the priority overlay areas because it's a, I suppose, an area-based analysis, but we say that it also has some – you know, it's informative in terms of hours as well, because if you have a licence, that licence is trading. If you scroll down –

WILLIAM YOUNG J:

So, what's the explanation for that? What's the logical explanation?

MR BRAGGINS:

Well, the logical explanation's that supermarkets have a different driving factor for establishing in the CBD than alcohol-related harm, so you don't –

WILLIAM YOUNG J:

But is this all off-licences?

MR BRAGGINS:

So, on the left-hand side, so in the legend, on the left-hand corner, it says "Supermarkets/Grocery Density".

WILLIAM YOUNG J:

Right.

MR BRAGGINS:

Then on the right-hand side, we have "Other Off-Licence Density Drug/Alcohol Offences" and if you scroll down a little bit. A little bit further, yes. Here we have "Bar & Club Licence Density" and then on the right-hand side we have "Other On-Licence Density". So perhaps – what we see is, perhaps unsurprisingly, you have a stronger relationship with bars and clubs and a no relevant relationship in terms of supermarkets.

WILLIAM YOUNG J:

And what was the Council response?

MR BRAGGINS:

So the Council response related to, I think primarily a later study that was generic across the country. So this is the only study that looked at Auckland and mapped out what was happening in Auckland. There was a later study that averages, I suppose, the country in terms of statistics, and it wraps up supermarkets and grocery stores as well and comes up with some generic

numbers, but it doesn't tell you the difference, for example, between the CBD, south Auckland, and Warkworth, and we see that this was very strong evidence because it was the only Auckland-centric study.

If you scroll down to the next page, please, just by way of example. So it looked at –

COOPER J:
Can I just – what trading hours for the supermarkets was assumed in those studies?

MR BRAGGINS:
That was a function of the existing whatever it was, so in the Auckland CBD, at that particular time, I'm pretty sure that there were supermarkets that were trading 24 hours at that time.

COOPER J:
And selling alcohol throughout that period?

MR BRAGGINS:
And selling alcohol 24 hours. Because until shortly before the Act, there were some supermarkets, I think around 2010, supermarkets started to pull back from the 24-hour licence trading more to the seven to 11-type standard.

So certainly, the supermarkets that were trading in the central city were trading for longer than the default hours in the Act. Well, sorry, they're certainly trading longer than 7 am to 9 pm because the ones in the city at least traded until 10. But probably not –

1250

WILLIAMS J:
So explain to me the correlation point, the correlation that these pictures seem to suggest the correlation is with, say, clubs, not supermarkets.

MR BRAGGINS:

So there were two points. Firstly, in terms of restricting the – the relationship between one extra supermarket causing additional alcohol-related harm in the central city was opposed by Woolworths on this basis. Then the second aspect, if you just scroll back up again, was that Auckland Council, at least initially, proposed conditions in the central city because the central city was meant to be a vibrant night-life, entertainment precinct and Woolworths said, well, if you've decided that the central city had a real problem with alcohol-related harm and you've decided that it's not appropriate to grant additional licences and you've decided to restrict off-licences, okay, we understand that, but how can you not also restrict on-licences, given this kind of information, that has a much stronger link of on-licence and on-licence harm?

WILLIAMS J:

Why does it have a much stronger link? That's what I'm trying to understand.

MR BRAGGINS:

Well, on the red –

WILLIAMS J:

I can see its colours. They're very pretty. But I want to know what, because I haven't read Dr, is she, Hampson's evidence, can you just tell me how she assessed this correlation?

MR BRAGGINS:

So the correlation was created by the Health Promotion Agency's report and she's just mapping it based on their numbers.

WILLIAMS J:

So then tell me about the report.

MR BRAGGINS:

So the report mapped alcohol-related harm incidents over time and also looked at the number of licences that have been granted or surrendered over time and then did some complicated mathematical formula about that relationship.

WILLIAMS J:

So it didn't tell us about how much liquor the licences in the red areas, off-licences, supermarkets, were selling in the red areas?

MR BRAGGINS:

No.

WILLIAMS J:

Didn't tell you about volume going through the checkout? Just told you about the number of supermarkets in the area?

MR BRAGGINS:

Correct.

WILLIAMS J:

So what does it tell you?

MR BRAGGINS:

Well, if…

WILLIAMS J:

If you've got two supermarkets opening 24 hours a day and they're selling as much liquor as the night clubs, then these colours mean nothing.

MR BRAGGINS:

If you are looking at an additional supermarket, if you have two supermarkets –

WILLIAMS J:

Yes, I get that, but without an assessment of volume, an assessment of throughput via off-licences in the CBD, it really doesn't tell you very much,

particularly if it was lucrative enough to keep the supermarket open 24 hours a day. I'm pretty sure they were not selling potatoes and vegetables at 3 am in the morning, except for perhaps the shift workers.

MR BRAGGINS:

Well, I said the supermarket pulled back from that 24-hour alcohol trading before the Act even came into force, but if you have two supermarkets and you add in a third, that doesn't mean that they sell more alcohol.

WILLIAMS J:

You're not getting my point.

MR BRAGGINS:

I'm sorry –

WILLIAMS J:

These colours don't tell me about the correlation between alcohol supplied by supermarkets and problems because they only tell you about the number of supermarkets, not the amount of alcohol supplied.

MR BRAGGINS:

I suppose that's true in terms of, I suppose, the nature of the assessment, but I'm not sure that I understand the logic of saying providing another supermarket, because this is about controlling another supermarket or another off-licence, whether adding another supermarket would actually increase the total amount of alcohol sold.

WILLIAMS J:

Well, that's true but that's a different point. You're suggesting that supermarkets aren't the problem and that evidence doesn't suggest that at all, at least not given the lack of granularity of the information.

MR BRAGGINS:

Okay, but I suppose I would say that that was a matter for ARLA too to weigh up and to consider.

WILLIAMS J:

Sure, absolutely. What struck me was the Inspector's evidence where he said most off-licence bottle stores, not supermarkets, would prefer to close earlier but they can't because the competition closes late.

MR BRAGGINS:

And again –

WILLIAMS J:

Because they get all sorts of problems later on in the evening for the very reasons you're talking about.

MR BRAGGINS:

So if we look at bottle stores, I think the evidence was that they do change, that they change their hours during the week, so, you know, on a Tuesday/Wednesday they might close at shorter and then longer on the Friday/Saturday. But I'm not sure. I mean if you look at the total number of off-licences in the CBD because maybe there's only a few supermarkets but there are a lot of bottle stores as well, that whether adding an extra supermarket would actually change the availability of alcohol within the CBD.

WILLIAMS J:

It may mean the other bottle stores have to stay open because they've got to compete.

MR BRAGGINS:

Well, I suppose if we're talking about hours then that comes back to the Friday/Saturday versus the rest of the week when there are less issues, and I suppose part of what we are saying is that there is a difference between – the city centre is its own ecosystem perhaps, and so to take the findings or the

concerns about the central city ecosystem and apply that across the whole region for such a large region was not, in part, was not reasonable, and then, like I've said, I'm kind of repeating myself in terms of the hours.

O'REGAN J:

We're getting near lunchtime so if you want to move onto another area do it now.

MR BRAGGINS:

Yes. If we go now to – so this is to talk to the neighbourhood centres, so this is section 201.0006. That's Roman (vi). 201.0085. Sorry, can you go up a page? Sorry, 201.0105. So this particular –

WILLIAM YOUNG J:

201, sorry, point?

MR BRAGGINS:

201.0105.

WILLIAMS J:

Same document though?

MR BRAGGINS:

That is in document 201.0066. That's Ms Hampson's evidence. So that's paragraph 6.7 of Ms Hampson's evidence.

So the other aspect in terms of the – well, the freeze and the rebuttable presumption relates to the neighbourhood centres. So neighbourhood centres are spread across Auckland and they weren't chosen because of any particular socioeconomic or alcohol-harm related issues. They were just chosen as a widespread range of zones. It's actually quite difficult to see on that but the – so at 6.7 Ms Hampson says: "The spatial patterns of social deprivation across Auckland show that Neighbourhood Centres occur across a full range of socio-economic communities from those broadly characterised as low

deprivation through to those broadly characterised as high deprivation," and if you can scroll down a little bit further to 6.8. So I'm just trying to find the reference. There's a number of – it's around…
1300

MR BRAGGINS:
I will need to check this. I think it was around 400 hectares of land across Auckland was within the neighbourhood centres zone. So that was a zone that was chosen not because of a relationship to alcohol-related harm, not because of a relationship to social deprivation, and included a reasonably substantial amount of land available for business purposes.

WILLIAM YOUNG J:
So is this the point that they were making that this is – the off-licences in these areas are readily accessible to people who live in the neighbourhood?

MR BRAGGINS:
Yes.

WILLIAM YOUNG J:
So is that the driving idea?

MR BRAGGINS:
That was the theme, was to restrict alcohol access, I suppose, in the suburbs irrespective of how much harm that particular suburb suffered.

WILLIAM YOUNG J:
So is that they're reasonable accessible by foot, I guess, is that what the point is?

MR BRAGGINS:
Yes. Foot or – I mean foot or driving. They're reasonably well spread out through the, I suppose, Auckland region as a whole.

WILLIAM YOUNG J:

Yes, so why were they chosen? Why did the – why was the Council's rationale for choosing them?

MR BRAGGINS:

Well, I think the rationale was to restrict the availability of alcohol to communities. As a way, I suppose –

WILLIAM YOUNG J:

What, so the reason – well accessible to a surrounding residential area?

MR BRAGGINS:

To a surrounding residential area.

O'REGAN J:

All right. Are you –

MR BRAGGINS:

Yes, I think we're pretty much done, and then we'll hand over to Mr Thain.

O'REGAN J:

You need to wrap up after lunch?

MS COOPER KC:

I don't have anything further, your Honour.

MR BRAGGINS:

I might just check a couple of facts. I won't be more than a couple of minutes.

O'REGAN J:

That's fine. You're happy with that, Mr Thain?

MR THAIN:

Yes, thank you, your Honour.

O'REGAN J:

All right, we'll take the adjournment now.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.17 PM

O'REGAN J:
It's probably better if you come up to the podium.

MR BRAGGINS:
Thank you, your Honour. That was just a selection of the evidence that Woolworths presented but that's, I think, enough for the presentation of the case. I'll hand over to my friend Mr Thain.

O'REGAN J:
Thanks very much. Mr Thain?

MR THAIN:
Your Honours, Ms Scorgie and I have been joined at the counsel's table over here by Mr Fitzpatrick-Cockram who is simply here just to control the screens.

O'REGAN J:
Great, thank you.

MR THAIN:
The issues in the case have really narrowed considerably from where they started, and I am certainly grateful, and I imagine your Honours will be grateful as well, to counsel for the Council in narrowing things.

What the case is not about is also pretty clear. It's not about whether there is alcohol-related harm in Auckland, and nor is it about whether that should be minimised. Foodstuffs certainly doesn't argue that there's no alcohol-related harm or that steps should not be taken to minimise that alcohol-related harm. But the essence of the beast is that the Parliament decided in its wisdom that we would have this legal drug and Parliament saw that there were benefits to

society from having that drug available for people. So when Parliament talked of minimising alcohol-related harm, they were of course, talking about it in that context, the objective being to minimise harm given that we will have this legal drug available for people to buy and to use.

The case is also, of course, not about what law the 2012 Parliament should have made in response to the information in the Law Commission's report. When my friend Mr La Hood for the Medical Officer of Health addresses you, he will no doubt talk about the evidence of extensive alcohol-related harm and troubles that the Law Commission reported, but what to do about all of that was, of course, a matter for the 2012 Parliament. Not a matter for any of us. It was an inherently political decision, of course.

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The case is also not about what the law in relation to alcohol should be now in 2022. Again, my friend for the Medical Officer of Health in his written submission talks a little bit about that. He talks about this current proposal. There's a private member's Bill. I think the Honourable Member Chloe Swarbrick's Bill was pulled from the ballot which would, if it were to be passed, remove the very appeal right that we're discussing in this courtroom. Whether or not that comes to pass is, of course, not a matter for us or any of us here. It's again a matter for Parliament, this time the current Parliament.

This case is also not about what policies should be in Auckland Council's local alcohol policy or indeed whether Auckland Council should have a local alcohol policy at all. Those are matters for Auckland Council.

The case is not even about whether the particular elements that we've been discussing in Council's provisional local alcohol policy, the PLAP that was at issue back in the appeal to ARLA, this case is not about whether those elements are in fact unreasonable in the light of the object of the Act because that's a matter then and still now for ARLA, not for this Court.

The case ultimately is simply now about what is the right test that ARLA is to apply when faced with an appeal against an element to a PLAP, and that's important for other PLAPs that other councils may put forward in the future but it's also important in this specific case because whatever happens in this hearing Auckland Council must reconsider at least some elements of its PLAP and then Auckland Council must decide whether to resubmit an amended PLAP. If it does resubmit then ARLA will inevitably, no matter what we do in this courtroom, have to re-apply the appeal test to that resubmitted PLAP, and that's why it's important to get that test clearly articulated from this Court.

With respect to the Court below, well, both Courts below, the test was perhaps not as clearly articulated as it could have been and indeed I suspect that's largely the reason we're all here, and all parties share a common interest in having that test clear so that ARLA can apply it with a degree of predictability and certainty. All parties share that.

So what the case then, you might say, should be about is what this Court said in its grant of leave. You told us that you were most interested in the question of whether the Court of Appeal had proceeded on the basis that an appeal against an element could only succeed if the element had no real or appreciable possibility of reducing alcohol-related harm and then you said, well, and if so, if that was the basis upon which the Court of Appeal proceeded, was that correct? Even that has largely been resolved, it seems, between the approaches the parties are taking. Obviously, of course, the final decision on all of that remains with you, but no one, none of the parties, the two appellants and the respondent and nor even the Medical Officer of Health, suggests that the Court of Appeal would have been correct if it had proceeded on that basis. So then it becomes a little academic as to whether it did proceed on that basis. Everybody's ad idem that it should not have.

So what remains really in issue, the real issues to be resolved fall into, it seems to me, just a few aspects. There is the correct interpretation of the test but there are only some limited points really there in debate because the words are what they are in the statute. There are two specific issues. Firstly, this concept of

what are the boundaries of the concept of unreasonableness in the light of the object of the Act. My friend for the Medical Officer of Health raises the suggestion that something would only be unreasonable in the light of the object of the Act if it were capricious or grossly disproportionate. So, there's a question for the Court as to whether he's right in that, or whether the two appellants are right that it's a lesser range. Reasonable doesn't – or unreasonable does not require capriciousness or gross disproportionality. Even Auckland Council agrees with the appellants, I think, on that.

Then the second issue in relation to the interpretation of the test is this question of proportionality and only a sub-question in that, which is whether those two principles of proportionality drawn from bylaw cases, the ones that the Court of Appeal said were not apt, whether they do or don't apply under this appeal test, because the rest of the principles of proportionality, the others that ARLA set out when it set out the appeal test, even Auckland Council accepts that they are relevant, they are part of this test. So, there's just a debate about whether these extra two from the bylaws cases come into play.

So that's the interpretation of the test. There's really only those two points. Then, there's an issue around the application of the test, which is just as much as this, really. Do factors such as the convenience of shoppers, and I could put it as the convenience of, or the interests of, those who safely and responsibly purchase and consume alcohol, is their convenience and their other interests, are they relevant factors when looking at this appeal test, or are they irrelevant, as my friend for the Medical Officer of Health suggests, in the same category as the business interests of those who sell alcohol and supply it, and he uses the term "profits", "private profits". So, there's a question as to whether business interests of sellers and suppliers have a part to play in the consideration under this appeal test, and the appellants both say yes, and as I understood my friend for Auckland Council's written submissions, he would agree with that.

Now, there's going to be debate in any given specific case about how much weight should be given to these matters, but that's always the case.

The question for this Court is whether, as a matter of principle, those sort of factors are relevant or not. Related to that is the question of whether the factors under section 78, the factors that are listed in section 78 of the Act, are relevant matters when ARLA applies the appeal test.

That's related to the point about convenience and profits, because those section 78 matters go beyond, they go wider than alcohol-related harm. They include, for instance, the objectives of the territorial authority's district plan, which obviously go into things such as having a vibrant city or attracting growth from outside the district. So there's a question as to whether those factors are relevant matters that ARLA at least can, and I would say should, have regard to when considering an appeal.

Then, there's a question in terms of applying this test of variation, a variation across the district. This is this point about – that is mostly starkly lit in Auckland as compared to probably any other territorial authority's district throughout New Zealand. The question being simply, how does that fit into the puzzle? It's the simple point about a blanket policy and the fact that Auckland is large and very diverse with a number of separated communities, including separated geographically by things like water and distance. How does that fit into the puzzle? Where does it come? Should it be ignored or not?

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Then, the last of the issues for the Court is just some specifics to this case about how to dispose of it. There's not an issue for this Court, really, about whether or not – when I say "really", there isn't at all, an issue for this Court about whether to remit ARLA's decision on hours, on the maximum hours element back to ARLA. It doesn't so much matter, because ARLA allowed the Woolworths and Foodstuffs' appeal against the whole of the maximum trading hours element. So, ARLA has already asked Auckland Council to reconsider the whole of that element. So, one way or another, Auckland Council has to reconsider the whole of that element, and then if it chooses to resubmit an amended PLAP with an amended –

WILLIAM YOUNG J:

Why did you appeal, then? Why did you appeal in relation to the closing hours? Do you want two horses running in this race?

MR THAIN:

No, so, firstly, appeal. The appeal in relation to the hours was to ARLA, of course, and that was successful.

WILLIAM YOUNG J:

Yes, and you – oh, I see. So why are you challenging –

MR THAIN:

Why judicially review?

WILLIAM YOUNG J:

Yes.

MR THAIN:

The answer to that question is twofold. Firstly, at the time that the application for the judicial review was lodged, Justice Fitzgerald had not resolved the issue of whether the resubmitted PLAP would be the subject of fresh consideration by ARLA. That was subsequently resolved. But in any event –

WILLIAM YOUNG J:

But you are still challenging the Court of Appeal decision on this issue, are you not?

MR THAIN:

Yes, but really only because the test, as I saw it, and as I understand that Woolworths saw it too, the test that the Court of Appeal had articulated, and therefore the test which ARLA would apply on the resubmission, was incorrect. That's really the reason for the appeal to this Court. Because –

WILLIAM YOUNG J:

It doesn't look that great.

MR THAIN:

Well, I suspect that your Honour means –

WILLIAM YOUNG J:

To me, to me. That's my view.

MR THAIN:

Yes, and I suspect that what your Honour's meaning is, it doesn't look great because you're suggesting that the supermarkets are looking –

WILLIAM YOUNG J:

That you're gaming the system.

MR THAIN:

Well, we'll come to that, because there is no – well, I can deal with that right now. There's really no gaming of the system. Parliament set a process by which, certainly, it allowed local authorities to have local alcohol policies, but Parliament set very clear and quite tight boundaries on that. It didn't give open slather to a territorial authority. Firstly, it's –

WILLIAM YOUNG J:

No, of course, it didn't. What concerns me is that you are having two bites of the same cherry.

MR THAIN:

Well, with respect, we're not.

WILLIAM YOUNG J:

You're saying it's a cherry that's seven years older?

MR THAIN:

Well, yes, and I'll take your Honour to Justice Fitzgerald's decision and –

WILLIAM YOUNG J:

I've had a look at it.

MR THAIN:

Yes, and so she dealt with that exact issue. She said that the supermarkets can't start again. They are only entitled, if they choose to, because of course they may not pursue that appeal, but they would only start off where ARLA finished. ARLA would control its process, limit any evidence to change, and doesn't need to go back and restart with arguments and so on that had been heard before.

In the practicalities of the way this has gone with the Auckland PLAP, there's some real substance to that as it turns out, because there has been a lot of water under the bridge, and there's been a lot of changes in Auckland in the time between then and now, and to the extent that that alters the level of alcohol-related harm or otherwise, well, why wouldn't ARLA be expected to look at that? Otherwise, there's a risk that it would rubberstamp a new LAP now having not looked at it through the lens of 2022, the post-COVID world et cetera.

WILLIAM YOUNG J:

All of this is premised on closing hours of 9 am to 9 am is one element, not two.

MR THAIN:

Yes, which was a finding that ARLA made, and which was not appealed by Auckland Council, and so therefore not an issue again for this Court.

WILLIAMS J:

You could just keep going round and round and round that loop and never get out.

MR THAIN:

No, with respect you can't keep on going around and round that loop.

WILLIAMS J:

Tell me how?

MR THAIN:

Well the obvious simple way is if ARLA rejects an appeal against an element, that's the end of the loop. So if the Council's –

O'REGAN J:

Unless you judicially review, and then appeal the judicial review, and then appeal the Court of Appeal decision, which you do have form on, don't you?

MR THAIN:

Well on the judicial review – so there are obviously two things at play there. In terms of the process that Parliament –

WILLIAMS J:

What we do know is – sorry, before you go onto that, what we do now is the games rules on the second go to ARLA will be different to the first go to ARLA.

MR THAIN:

Yes.

WILLIAMS J:

So the case will never be the same. You can just keep going round and round and the case will keep changing because the facts will keep changing.

MR THAIN:

The rules won't change however.

WILLIAMS J:

Well, if you're arguing about the rules, and basing your arguments about the rules on the facts, and the facts constantly change, that sounds pretty Kafkaesque to me.

MR THAIN:

Well, with respect it's exactly however what the Parliament was planning. The only thing –

WILLIAMS J:

Well that suits you, doesn't it.

MR THAIN:

The only thing Parliament didn't except was that the time that has run would run, and recall too that this isn't, all this time is not due to the supermarkets. The supermarkets were only two appellants out of many others. Then there was delays in this whole system with Auckland Council because of changes to its plans that delayed things, and recall that the supermarkets succeeded in the High Court on the judicial review. So while it has happened this way, it isn't because the system has been gamed. Once this Court sets the rules, sets the appeal test, then under the Act's provisions a resubmitted PLAP will be tested by ARLA against that test. If any appellant loses they have no further right of appeal. Their chances of judicially reviewing successfully will be greatly reduced because this Court will have made clear what is expected of ARLA, and so the circumstances that have led to the current situation, which was where, this was really a test case in a sense, those won't apply again. We'll have done the test case. This is really part of the reason why we're all here and why I said before that everyone shares a common interest that the rules, the test, is clearly articulated now. That is important.

WILLIAMS J:

Yes, I completely get that, and thoroughly understand it, given that this is the first time up, but we don't want this system to become a repeat of the service station wars, or the supermarket wars.

MR THAIN:

Yes, so firstly – well, there are a few things to say about that. One is imagine a situation in which the Parliament had not provided for resubmitted PLAPs to go back in front of ARLA. Imagine a situation where the legislation said that if the first round of appeal succeeds, and the Council is asked to reconsider its PLAP, it can then do what it likes without a further check by ARLA. That would obviously not work. So there had to be a second check by ARLA. Then there was this exact concern that your Honours are raising with me now, raised back at the time when all of this was being put together. There was the concern this

could go round and round, and one way that the Parliament, or *the way* that the Parliament considered it could deal with that, is to give ARLA the power to deal with a resubmitted PLAP on the papers, without needing to have another hearing, and in most situations that is actually how it has gone in other parts of New Zealand because it all happens in a short space of time. An amendment is made, it's resubmitted, there's no new evidence to be called, there's nothing new to be done, the amendment solves the problem, and the LAP comes into force. There has to be that second round of checking because otherwise talking of gaming a system, a council who loses at first instance, would then have free rein to go even more unreasonable with their policy second time around because there's no further appeal. Well, that couldn't be right.

1440

WILLIAMS J:

That's why the English invented judicial review.

MR THAIN:

Well, yes, and again, we're not here – well, I hope we're not here to say there ought not to be judicial review of ARLA's decision, because again, that's something for up the road. If Parliament wishes to amend the law in that way in this Act, they are free to do so. They could have not provided for a right of appeal. They could've excluded the right of judicial review, but they did not.

The next point, just to mention quickly on that –

WILLIAMS J:

Well…

COOPER J:

I don't think we'd want that. Well, speaking for myself, anyway.

MR THAIN:

Well, certainly, I'm grateful to your Honour for that, but certainly, Foodstuffs would not want that.

The second point, just to mention at that stage, lest it be misunderstood, is that there's a, perhaps a conception out there that the system is broken and that councils can't get these LAPs into force. That would be a misconception.

WILLIAM YOUNG J:
Are any in force?

MR THAIN:
Yes. Many.

WILLIAM YOUNG J:
How many?

MR THAIN:
67% of the territorial authorities in New Zealand have an LAP in force.

WILLIAM YOUNG J:
Is that right?

MR THAIN:
And, your Honour would ask the next question, so yes, what's the success rate? How many more wanted one? Because remember, not every council needs to have one and many have chosen not to even start one. There are really only a handful, only four or five, which have started the process, and then for one reason or another, not got to the end of it, including Auckland Council. So, the bulk of territorial authorities that have chosen to have a local alcohol policy have got one.

WILLIAM YOUNG J:
That is in force?

MR THAIN:
In force, and some of them have gone through the review process. The Act provides for a six-yearly review, and some of them have got past that stage now

and been reviewed into force. So it would be wrong to say that the whole system is broken, but in any event, again, that's not an issue, really, for this Court. That again is an issue for Parliament if they wish to change the system.

COOPER J:

Who are the four who haven't got to the end of it?

MR THAIN:

Auckland. I think, Wellington I've put in that category. Wellington was probably the first or second, I think, off the cab rank with a PLAP. It was appealed largely by the police, and the police appeal was successful, and Wellington hasn't progressed any further. They haven't tried further. Christchurch, theirs was appealed by Hospitality New Zealand's appeal, I think, was successful, and then there was a judicial review in relation to the resubmitted PLAP, an argument that they had failed to follow the proper process on amending their PLAP, and they haven't tried further. I think Hamilton started the process but then just stopped it, which, I mean, I don't know why they stopped it but it might've been that they were simply waiting to see the outcome from Auckland. I think there might be Far North, as well, Far North. Far North started the process, was appealed by a resident, and then I don't think progressed beyond there. There were other appeals as well, including by the supermarkets, but it was the resident's appeal that caused the problem.

So, those being the issues, interpretation of this test, then just the application of it, and then just those, the specific issues. I said no issue on resubmission of the hours element because in practice, it's a moot point. It's going to go back one way or another anyway if the Council chooses to resubmit it.

So there is, though, a little issue around what to do with the question of whether to resubmit back to ARLA its decision in relation to the temporary freeze and rebuttable presumption element, and I'll come to that. It's a – from Foodstuffs' perspective it's not a major issue, but it has some importance. So, on all of those issues, the few submissions that I wish to make, relate to these matters really. What it is that Foodstuffs says is the appropriate test. There's some

legislative history material which perhaps assists the Court in interpreting the test. There are also some aspects of the scheme of the Act overall and other provisions in the Act which hopefully, again, assist the interpretation exercise, interpreting what's meant by "unreasonable in the light of the object of the Act". There's this question of whether there are any antecedent rights that would be impinged by the elements of this PLAP, and therefore that question of whether those two principles from the bylaw cases should apply. There's the relevance of the diversity of communities within Auckland, and I'll deal with that, but very quickly.

Then there's just this issue around the temporary freeze and rebuttable presumption. The only submission I wish to make about that will be trying to see if I can explain the interconnection between that element and elements of the original PLAP which are already going to have to be reconsidered by ARLA or the Council, being the local impacts reports elements, which the High Court held to be ultra vires and the Court of Appeal didn't have to address that issue. It wasn't appealed. Also the definition of the "city centre" which, yes, and your Honour Justice Young frowns because no one has talked much about that. There's an interplay there between that and this case because *Redwood Corp Ltd v Auckland City Council* [2017] NZARLA PH 247-254, the brothel operator, appealed against the definition of the "city centre" in the PLAP. It's appeal was rejected by ARLA. Redwood applied for a judicial review of that decision to the High Court and the High Court granted that judicial review so that the question of the "city centre" definition is now to be referred back to ARLA because the High Court's decision on that has not been appealed Council. The "city centre" definition is used within the temporary freeze and rebuttable presumption elements. So although Redwood's interest in the "city centre" definition was different to the temporary freeze and rebuttable presumption, it's the same definition used in two places, so that's the interconnection, and I'll briefly, when I get to the end of these submissions, just explain that a little better to your Honours so that you're aware of that. The reason I will go into those matters is not because they are hugely substantive, but they do relate to what's appropriate relief and although you'll

probably snigger to hear me say it, Foodstuffs is not coming to this Court trying to create fresh procedural troubles, it's the opposite.

So just very briefly, a couple of specific points from the discussion your Honours had with my friend Ms Cooper. Firstly, in relation to that last point I was talking about, the interplay, your Honour Justice O'Regan talked about the local impacts reports when you were discussing the case with Ms Cooper, and I think your Honour indicated that perhaps we can forget all about the LIRs because they're going back anyway. Interestingly, and just because it's important for the procedure of all of this, all that's happened with the LIRs is that the High Court has sent the decision on them back to ARLA. Now it seems inevitable what ARLA will have to do because the High Court said that the LIRs are ultra vires and the Court of Appeal agreed that anything that's ultra vires must be unreasonable in the light of the object of the Act. So ARLA is inevitably going to ask Council to do something about that, but at this stage procedurally it's only sitting at that middle stage with ARLA.

WILLIAMS J:

I could have been sent back with a direction to deduct it.

MR THAIN:

Yes and effectively I think that's what it amounts to. ARLA has no real, if ARLA is going to apply the law as stated by the High Court, and the Court of Appeal agreed, then ARLA will have to ask Council to reconsider the LIR elements, and Council really will have – well, it'll have its own choice. It could attempt what your Honour Justice Williams asked a little question about earlier today. Perhaps there's a way of changing those to make them not ultra vires. Maybe that's something for Council to think about, but Council may well just delete them, and I think that's my understanding is that's what Council would intend to do, I think.

1450

WILLIAMS J:

You'd think so, wouldn't you, after all this?

MR THAIN:

I would have thought so. I wouldn't have thought Council would wish to give the supermarkets any leverage to have another crack at anything, and I've already mentioned just again that point about the whole of hours element. The supermarkets succeeded on that. So that's already back at the Council stage.

There was a brief discussion earlier with my friend, Ms Cooper, about where does community preference sit in all of this and I agree with her that – and I think probably with your Honours – that community preference is obviously a relevant factor for ARLA when it is considering any one of these appeals, but it only goes that far because the Parliament didn't say that community preference was enough. It could have; it didn't. It still said whatever the community preference is that gets reflected in the Council's policy, that is still subject to this appeal test.

In the case of Auckland, Auckland especially, there was actually evidence of quite a lot of differences of view amongst the different local boards across Auckland as to what they might like for any particular element.

COOPER J:

Did they have any formal role in the process, the local board?

MR THAIN:

I think the only role in practice was that they were consulted.

COOPER J:

Voluntarily?

MR THAIN:

I think that's right. I've got – just very quickly, I could take your Honour into the case on appeal, at item 50 in the case on appeal which is an appendix to one of the briefs of evidence that was filed before ARLA, and at page in there –

COOPER J:

Item 50 doesn't do it for me, I'm afraid.

WILLIAMS J:

Does on the left, so it's –

COOPER J:

Is it on the left, is it?

MR THAIN:

Well, hopefully it will appear magically on the screen.

WILLIAMS J:

303.058.

COOPER J:

I see. Okay.

MR THAIN:

So this is just very briefly because it's just to give you an idea of what was going on. This is the minutes of a meeting back in September 2013 when Auckland Council was busy thinking about putting together a PLAP, going through the process, and on page 303.0587 you will see there a report back of this Regional Development and Operations Committee of local board views. So they canvassed the local boards and on one point that's sort of relevant to our case, over on page 303.0588, you will see the result of the canvassing of the local board's views about maximum trading hours, mixed views about keeping the national default hours, and then number 2: "Fixed trading hours across the region" – either more permissive or more restrictive: "Generally not supported – most boards prefer hours varied by location," and then number 3 there: "Varied hours" – by location, by kind of licence, type of premises: "Strong support from local boards." So at that stage, at least, local boards were supporting the concept of doing things special for their own local communities.

WILLIAMS J:

It seems to be only for on-licences though.

MR THAIN:

Well, it might have been.

WILLIAMS J:

The off-licences though seem to support 9 am or 10 am to 9 pm across the entire region.

MR THAIN:

No, what you've got there is that is the committee's view of what to do.

WILLIAMS J:

I see. What, the "generally not supported" in 2 is the committee or the board?

MR THAIN:

In 2 that's the boards. "Most boards prefer hours varied by location," and then varied hours in 3: "Strong support from the local boards," and then: "Preferred option – hours dependent on licence kind," that was the – you'll recall, your Honour, that what I'm not doing is trying to tell you that ARLA was right or wrong in its ultimate view. I'm simply trying to show that community preferences differ on things.

WILLIAMS J:

I think that was local boards. It was local boards that said nine to nine thanks across the whole region.

MR THAIN:

Well, maybe, but – well, I don't think we have long enough for me to take you through the chain and you'll see that ultimately, actually, where it got to was a suggestion of 9 am to 10 pm, and then at the last minute, in a council meeting, some councillors changed it to 9 pm. This was a long process, and what obviously we're not to do in this Court, is to determine whether or not the actual

element was or wasn't reasonable, or unreasonable in light of the object of the Act. That's a matter for ARLA, anytime I delve into this and this just shows the risk of me doing so, is –

COOPER J:

This is a report, though, isn't it? It's not a council resolution.

MR THAIN:

Absolutely. That's exactly the point.

COOPER J:

Yes.

MR THAIN:

All I was trying to show was that it was illustrative of the fact that there weren't necessarily the same views across different parts of Auckland on everything. Just a part of the political issues, I guess, that Auckland Council, at the top of the whole structure up there, has to wrangle.

So, I said I would touch on the legislative history because I hoped that some of that would be helpful for the Court in interpreting the appeal test, but before I go there, the context of that is what Foodstuffs says is a correct statement of the appeal test, and as I've said, Foodstuffs says that the way ARLA set it out, which is not necessarily the way ARLA applied it, but the way ARLA set it out in its decision is actually right.

WILLIAM YOUNG J:

So where is this in your submissions?

MR THAIN:

Well, I've paraphrased this in my submissions, your Honour. I have –

WILLIAM YOUNG J:

I was just going to mark it up, sorry, what you say the test is.

MR THAIN:

It's in my written submission starting from, in the summary of argument really, starting from paragraph 3. The way I've summarised it is –

WILLIAM YOUNG J:

Okay, yes.

ELLEN FRANCE J:

Where's the best place to see that in terms of the Authority's decision?

MR THAIN:

Yes, in the ARLA decision. So, that starts at paragraph 30 in ARLA's decision. That's on page 103.0445.

WILLIAM YOUNG J:

So it's paragraph 30?

MR THAIN:

Starts at paragraph 30. ARLA talked about the "reasonable person" test, "qualified by the words 'in the light of the object of the Act'".

Then at 32: "It is likely that the policies in a PLAP will be unreasonable in the light of the object of the Act if", and then there are the four proportionality principles that ARLA stated. The first three of those, "disproportionate or excessive response to the perceived problems"; "partial or unequal in their operation between licence holders"; "manifestly unjust or discloses bad faith". Those first three, my friend for the Council agrees that those are relevant aspects of the test.

It's the fourth one: "(d) an element is an oppressive or gratuitous inference with the rights of those affected." That's where the appellants part company from the respondent, and that's where the Court of Appeal parted company because the Court of Appeal said well, there are no antecedent rights. But Foodstuffs

says that that is an appropriate element or part of the test because there are antecedent rights.

WILLIAM YOUNG J:

Well, the rights to trade under the default hours.

MR THAIN:

There are two ways of looking at this. Firstly, there's the way that Ms Cooper explained it when she was on her feet, what's meant by the word "rights" there includes freedoms. Secondly, there's the point that I will come to, that there are in fact precise antecedent rights grants under existing licences. Then they talked in 33 about the ultra vires point, and I don't think anyone disagrees on any of that.

1500

WILLIAMS J:

Shouldn't (b) be "irrationally or unlawfully partial or unequal", because clearly they can be partial or unequal?

MR THAIN:

Yes, I think that's right, and it does say here it's "likely that the policies will be unreasonable in the light of the object of the Act if", so none of these are said to be conclusive on their own. And I think your Honour is right that as between licence holders you've got to write a little bit more to that, maybe "as between licence holders of the same type".

WILLIAMS J:

Well, even "as between licence holders of the same type", one in one suburb and one in another, that's exactly what you're arguing for.

MR THAIN:

Well, maybe so. Exactly.

WILLIAMS J:

You want inequality because you say enforced equality is inappropriate.

MR THAIN:

Yes, so maybe I should be more precise: licence holders with the same characteristics…

WILLIAMS J:

In the same circumstance.

MR THAIN:

In the same circumstances, that's a better way to put it. Type is a –

WILLIAMS J:

So irrational or unlawful discrimination is what you're talking about?

MR THAIN:

Yes, yes. And again, I don't think that that one, there's much debate about that one.

WILLIAMS J:

Don't think that's a hard one, no.

MR THAIN:

The debate is around, (a) "proposed measures constitute a disproportionate or excessive response" because my friend for the Medical Officer of Health would say it has to be "grossly disproportionate" or "capricious", he would say. But as between the appellants and Auckland Council we all agree on (a), and (d), the debate is also around (d), because the Court of Appeal said that there are no antecedent rights, so the Court of Appeal said that – well, the effect of the Court of Appeal's decision would be that (d) does not apply and –

WILLIAMS J:

Aren't (a) and (d) the same?

MR THAIN:

Well, that is the essence of the submission for Foodstuffs and, as I understood it, also for Woolworths.

WILLIAMS J:

Then does it matter?

MR THAIN:

Well, that's a question that I asked myself the other day, your Honour, and I –

WILLIAMS J:

How did you answer yourself?

MR THAIN:

I concluded that –

COOPER J:

If it's not hearsay.

MR THAIN:

– in most circumstances I could not think of why it would matter, but – and that's why my submissions on that point about rights will be relatively brief, but they're an important part of understanding the scheme of the Act, which I think there is a critical point to that which I think will help the Court.

Ultimately where you get to with this is similar to what your Honour Justice Young talked about before, I think you at one stage said maybe if a policy is inconsistent with a reasonable system of control then it would be unreasonable, even in the light of the object of the Act. I agree with that, and you saw before in the Court of Appeal's decision they have cited from ARLA in the *Tasman* case where ARLA said: "The question really is if a responsible purchaser or consumer or seller of alcohol would find the restriction a disproportionate response, then it might be unreasonable in the light of the object of the Act, and that's really what Foodstuffs says is the correct test.

WILLIAMS J:

Hard to know what that last bit means.

MR THAIN:

Well, maybe I should take you directly to the Court of Appeal decision just so that I'm not misquoting that .

WILLIAM YOUNG J:

It's the earlier pages that…

MR THAIN:

Sorry, your Honour?

WILLIAM YOUNG J:

I think, sorry, isn't it the page before paragraph 41?

MR THAIN:

Yes, that's what I think it is too.

WILLIAM YOUNG J:

Yes.

MR THAIN:

Yes, it's that paragraph 47 from *Tasman*, which is quoted in paragraph 38 of the Court of Appeal's decision.

WILLIAM YOUNG J:

I suppose all that troubles me about that is that it leaves the decision-maker, the notional decision-maker, as a potential purchaser whereas really the decision-maker is ARLA.

MR THAIN:

Yes. So ARLA is having to stand in the shoes of the objective party and I think it puts itself in the position of both a consumer and also it should do it in the position of a seller.

WILLIAMS J:

I wonder whether that's – what we're really talking about here is sensitivity to current community expectations and values without reference to any cog in the system because we all understand that alcohol is an acceptable drug properly and carefully handled and so whoever is the decider, the Council or ARLA, must be aware of that. I don't think they should be either a supplier, a seller or a consumer. They should simply be clever enough to know what the community values and expectations are with respect to the consumption of alcohol, and they'll be different in different places perhaps.

MR THAIN:

Yes, I think that is a fair way to put it and that, of course, is the same concept of reasonableness that falls in whenever "reasonableness" is looked at. The –

WILLIAMS J:

Correct, but I don't like that man on the bus.

MR THAIN:

I was going to say I don't like the man on the, or person, on the Clapham omnibus either.

WILLIAMS J:

Well, he was a reasonable man, unfortunately.

MR THAIN:

Yes, that's right, other than to say that that person's view would change over time and that person's view would be different if they were on the Clapham omnibus as opposed to the Edinburgh omnibus or something else.

WILLIAM YOUNG J:

But why just ARLA? Why isn't it just if ARLA is of the view that it is inconsistent with a reasonable system for this control of alcohol which includes safe and responsible behaviour in a context where harm is minimised?

MR THAIN:

Yes, that would do it. Where harm is minimised in the context of "we are going to have some harm because we are going to have alcohol".

WILLIAM YOUNG J:

Yes, but it's not harm eliminated, I agree.

MR THAIN:

That's right, and even the minimisation of it is you can only minimise it so far given we are going to do those things. We are going to have alcohol, so it's a minimum in that context rather than pursuing minimising alcohol-related harm as the sole goal. If we were pursuing that as the sole goal we might come to all sorts of different outcomes. We might have – we might ban alcohol completely. We might change the age limit. We might do all sorts of things. But this is you have to minimise it in the context of what is allowed, the fact that we will have alcohol, we can sell it to people over 18, et cetera, et cetera. So it doesn't mean minimise at all costs. It's minimise in the context we're in.

But that's a good way to put it, and this is why this case, it's a shame really where it's got to because on the face of the words in the Act it's not a particularly complex test. It just says what it means. Unreasonable in the light of the object of the Act. There ought not to have been any real magic around it and what I would say is it doesn't mean capricious or grossly disproportionate. If it had meant that, the Parliament could have said that. It must means what it says, as your Honour, Justice Young, described.

So what Foodstuffs' position is simply is that ARLA stated this test, right, and, as your Honour pointed out before, when ARLA came to consider all of these various appeals in some cases it seems that it applied that test. For instance, when it looked at the morning hour aspect of the maximum trading hours element, it certainly weighed in the balance convenience of shoppers as I say it was required to. It's just not apparent that it did the same exercise in relation to the evening hour aspect.

WILLIAM YOUNG J:

But why should we attribute it to ARLA and a rational approach to its decision-making function? Why would it take a proportionality approach in relation to half of the element but not the other half of the element?

1510

MR THAIN:

It seems to be there's only – well, I guess the answer to that might be in the question, why should we attribute an irrational approach? One answer is that it was irrational, maybe.

WILLIAM YOUNG J:

But, no, that's just going around it. That's not really answering the question. I mean, they say they were applying the proportionality approach. They then apply proportionality approach to half the issue. Why would we assume they didn't in relation to the other half of the issue?

MR THAIN:

Well, the – firstly, as I said before, I think the question really is moot, because it's gone back. That issue – the element goes back to Council anyway, but the High Court's view on that was simply that because of the way ARLA described its reasons for the evening hour aspect, the Court could not be sure.

WILLIAM YOUNG J:

Why do they have to be sure?

MR THAIN:

Only because on –

WILLIAM YOUNG J:

Wouldn't it want to be, as it were, sure that they were wrong before concluding they were wrong? I'm not sure what…

MR THAIN:

Well, on judicial review, the usual approach is to – because the reviewing court can't itself make the decision, the decision's not for the reviewing court, the reviewing court ought not to make assumptions.

WILLIAM YOUNG J:

All right, 146, there is a sentence, and this is a key paragraph. It does look as though they have considered whether it is unreasonable, notwithstanding having a tendency to reduce alcohol harm.

MR THAIN:

In 146?

WILLIAM YOUNG J:

Yes.

MR THAIN:

Well, that's the question that your Honour discussed with my friend Ms Cooper.

WILLIAM YOUNG J:

Yes.

MR THAIN:

On the face of 146, on the face of that you can't tell, or at least, they don't say that they weighed anything in the balance. They just simply say there's a level of alcohol-related harm so Council is obliged or entitled to test the possibility that its element will reduce that. So, it is necessarily inferring from other paragraphs that what ARLA meant was there's not sufficient countervailing considerations. Now, they may have meant that, but they didn't say it, and that's the reason why the High Court said it needed to go back to ARLA so that ARLA could confirm.

WILLIAM YOUNG J:

But the only countervailing consideration is it's a bit of a hassle for the supermarkets to fence off the area and what about people who've got shift work? That's all there is, isn't it?

MR THAIN:

Well, it's not only shift workers, of course, because there are customers who choose to shop at different times for all sorts of reasons, family commitments, they want peace and quiet in the supermarket, et cetera, it just suits them because they're looking after children at other times of the day. There are all sorts of reasons, and in a city of over one and a half million people, there is every single reason, and there are people who value the ability to shop at those times. So those are the considerations.

WILLIAMS J:

Was there evidence about that?

MR THAIN:

Yes, there was evidence of people shopping outside of hours.

WILLIAMS J:

Whose evidence was that?

MR THAIN:

Well, the Council itself put forward some evidence, I think, it was certainly evidence of –

WILLIAMS J:

Is that the economist?

MR THAIN:

And there was no – well, yes, there were – there was evidence from the Council as to the opening hours that stores kept, and then there was evidence of shoppers and what number of shoppers go in the morning and so on from the economist, I think, and remembering, too, that ARLA not being, not sitting as a

court but sitting with the powers of a Commission of Inquiry, is entitled to draw on a little bit of its own knowledge. That, indeed, is part of the value it brings to the process because it sits on licensing issues all the time, and ARLA's practice is not to require strictly every single thing as the subject of precise evidence. It doesn't have to do that. Under its Act, it doesn't have to, and it doesn't.

WILLIAMS J:

Right. Because it does seem to me to be that the pitch from the supermarkets was more about the fallacy of harm than it was about the inconvenience to shoppers, and so you could understand why that, in that context, might've been why ARLA articulated its reasons in the way it did.

MR THAIN:

Well, perhaps, the focus of the argument was on both sides of the balance. The likelihood that the element would, in fact, reduce alcohol-related harm, and the likelihood of the extent to which it might reduce alcohol-related harm, is to be balanced against the imposition on responsible sellers, suppliers and consumers. If there's a very, very high likelihood of reducing alcohol-related harm by a significant amount, then it seems to me it would take a much greater impact, negative impact on responsible people in order to satisfy the appeal test. Whereas if the chance of the element in fact reducing alcohol-related harm, or to any significant degree, was low, then that might be outweighed more easily. So both sides of that equation were the subject of debate in the hearing and that, with respect, that must be appropriate when any reasonableness assessment is done.

Is it reasonable to require health workers in aged care facilities to still wear masks? Well part of whether or not you think that's reasonable will depend on the chances that that will help to save lives et cetera. If the chances of it doing any good were very low, it might be much less likely to be said to be a reasonable response, and so that's why both sides of the equation were considered, and that's all Foodstuffs says this test is about. As I said, nothing unusual, it's the normal reasonableness assessment that we all do every day,

often without turning our mind to quite while we're doing it, but we always weigh up the chances and the possible effects against the costs.

O'REGAN J:

We probably need to move on I think Mr Thain. You've got a way to go yet.

MR THAIN:

Thank you your Honour. So the start of the legislative history materials is the Law Commission's report of course. My friend for – well perhaps for both the Council and for the Medical Officer of Health may wish to take your Honours to this to emphasise the graphic descriptions of alcohol-related harm back in 2009/2010 when the report was being put together, but as I said before this Court is not about what the Parliament of the day should have done in response to it, that was a matter for the Parliament. So all of that really just sets a context. There was clearly sufficient concern to lead Parliament to amend the law and Foodstuffs doesn't shy away from the fact that the 2012 Act changed the law.

The starting point in terms of going through this just on things that matter for the interpretation exercise, in the foreword, this is page 1 in the foreword, you'll see that the Law Commission said: "The principle under which we have approached this review is that New Zealanders live in a free and democratic society… subject only to such limitation in their freedom as can be justified as a society… liberty to behave as they choose as long as their actions respect the rights of others…" and that's the way that the report sought to go. So that's the basic principle.

Then there are terms of reference a few pages over, page Roman vi. These are the terms of reference that the government of the day gave to the Law Commission. In that list of dot points there are two that are useful, perhaps, for interpreting, the fifth of them: "To ensure that unnecessary and disproportionate compliance costs are not imposed by the licensing system." So an aspect of reasonableness.

Then about another eight or nine dot points down there's one that says: "The need to ensure the appropriate balance between harm and consumer benefit." So that's this point I've been talking about, that rightly or wrongly, whether today's eyes like this or not, back then the government of the day saw consumer benefit coming from alcohol just as much, or at least they also saw harm coming from alcohol, and the terms of reference given were to seek the balance of that.

1520

The Law Commission recognised that too, over on page 7 in the report under the heading "The harm. Part 1: The case for reducing alcohol-related harm." At paragraph 12, after talking about the harms, the Law Commission said: "Balanced against these harms must be the pleasure many people derive from the consumption of alcohol. Those who drink in a low-risk manner will be little affected by our proposals," and the focus is on "excessive consumption" of alcohol.

Over onto page 120 of the Law Commission's report, this is where the Law Commission talked about the object of the 1989 Act, the predecessor legislation, and then also what they were proposing for the object of the new Act. I take your Honours here because the Court of Appeal made much of the change to the object provision from the 1989 Act to the new Act and talked about the 1989 Act's modest object and this one being much more extensive, et cetera. I've set out in my written submissions really the analysis here. With respect, the Court of Appeal has perhaps over-egged the pudding. What the Law Commission was talking about was the need for an object section in the new Act which provided greater detail, and that's what they say specifically. They say in the 1989 Act you had an object that was talking in a general way and we want in the new Act an object that gives greater precision and therefore the Act will have a better chance of achieving its purpose and will ensure that the central principles underpinning the scheme are clear.

In 5.40, the Law Commission recognised the fact that legislation alone can't solve all alcohol-related problems and they said they didn't consider it

necessary "to articulate in the object provision that the legislation is only intended to achieve that which is possible to achieve through legislation." But they didn't say that that wasn't still the case. They just said no need to say it.

Then at 5.41, this is important, the Law Commission's view was that: "The use of the term 'reasonable system'," because that had been in the 1989 Act's object provision, "to describe the regime being established is an important phrase which should be continued in the object of the new Act." Later on they went on to say: "We recognise it is essential that, in addition to providing a focus on the key alcohol-related harms that the Act aims to prevent, the object of the Act should include the establishment of a reasonable system for the sale, supply and consumption of alcohol."

Then at 5.44 you'll see what object the Law Commission recommended. So when the Law Commission was talking about all of this, this is what they put forward, and it's not the same as the object provision in the Act, the government didn't pick this up, and it was one section, not split into a purpose and object section as we actually have in the Act. But there it was, right up front: "The object of this Act is to establish a reasonable system for the sale, supply and consumption of alcohol for the benefit of the community … and in particular to:" and you'll see that this proposed object was broader than the one that we actually have in the Act because it wasn't expressly limited down to only excessive and inappropriate consumption harms.

ELLEN FRANCE J:

Sorry, just explain that again?

MR THAIN:

The actual object in the Act defines alcohol-related harms, those harms which should be minimised, as being only things which are the result of excessive or inappropriate consumption, and that's expressly done in the Act. It wasn't expressly done in that way here in what the Law Commission was recommending, not a –

ELLEN FRANCE J:

Yes, it's just not immediately apparent to me what's missing in terms of – because inappropriate consumption, given the nature of the harm that is described, would seem to encompass most of those things.

MR THAIN:

Well, maybe, but this was a broader proposal. For instance, look at (d), "protect and improve public health generally". Well, that doesn't feature in the current object in such a broad way. "Delay the onset of young people drinking alcohol", again doesn't feature in the object in the Act in such a broad way, that's all. The only reason I take you here is because when you re-read the Court of Appeal decision you'll see that they put a lot of emphasis on the Law Commission's recommendation that a new object was required. But the new object that the Law Commission recommended is not the one that ultimately turned up in the Act.

ELLEN FRANCE J:

No, but the new object is, on its face appears to be broader than it was under the previous Act.

MR THAIN:

Oh, yes. Under the 1989 Act the object was "reasonable system with the aim of contributing towards the product of liquor abuse", it didn't go on to say "for the purpose of reducing alcohol-related harm". Whereas the current object focuses on that harm part, it doesn't just stop with the words at the "the abuse", it says "the harm", that's the biggest difference.

The Law Commission also talked about local alcohol policies, and the second on that starts at page 144. In paragraph 7.40 they talked about the *My Noodle* decision and so the sort of informal local alcohol policies that had happened around the country, and then at 7.41 there was a reference to the recommendation that every territorial authority be "required to adopt a local alcohol policy". 7.42 talks about the argument for whether they be mandatory or not, and ultimately the Law Commission recommended they should be

mandatory. What we know is the Act said they're not mandatory, a territorial authority can choose.

7.44, the recommendation there was that local alcohol policies "should be given a clear legal status" and be required to be "consistent with the object of the new alcohol legislation". You'll see at the second dot point there they were required or the recommendation was they be required to take into account not only demographic but also socio-economic make-up of the local population. That didn't make its way into the Act and that was the subject of some debate and ultimately not included, the socio-economic part.

WILLIAMS J:
Some debate – sorry, at what level? At the legislature?

MR THAIN:
Yes.

WILLIAMS J:
In the legislative process, I see.

MR THAIN:
Yes, there was, and ultimately it was thought – the Select Committee, from memory, reported back saying: "We don't want socio-economic in that," but demography stayed, well, "demographics" it should have been but it says "demography".

At 7.45 you'll see what the local alcohol policies may also include, and here's, at the second dot point there, "local restrictions on the national maximum hours prescribed in the statute for the opening and closing of licensed premises". So the Law Commission's recommendation was that a local alcohol policy could only further restrict the hours. Ultimately Parliament in its wisdom allows for local alcohol policies to either further restrict or to extend hours from the default hours. And that next dot point talked about a "rebuttable presumption" against new off-licences or on-licences in an area.

At 7.49 this issue, where this goes is relevant when I come to talk about antecedent rights. 7.49, third line down there: "A policy should not be absolute, however. Licensing decision-makers should consider applications on a case-by-case basis and decide whether the particular circumstances justify a departure from the policy. And the next paragraph, 7.50, at the end of that you'll see "ensure a degree of flexibility to allow legitimate exceptions to a local alcohol policy in appropriate cases". So the Law Commission was imagining these policies would be subject to adjustment or exceptions for specific licences if the circumstances warranted that. And, as I'll come to, that is largely still the case under the new law but not the case in respect of two types of policy.

1530

Then the last bit on this part of the Law Commission report dealing with local alcohol policies is 7.52 which dealt specifically with the recommendation for there to be an appeal right: "Once a policy has been consulted on and agreed …, the statute should allow those who submitted on the proposed policy to appeal aspects of it to the Authority before it is formally adopted. This would be similar to the manner in which district plans are dealt with by the Environment Court pursuant to clause 14 of the First Schedule … This would ensure a degree of national consistency and quality control in local alcohol policies."

So at least the Law Commission was thinking there needed to be some control on what a territorial authority did from the point of view of quality control, whatever that meant precisely, but also to ensure there was a degree of national consistency, you couldn't have one town wholly out of step with others perhaps, and the reference to an appeal against district plan. Your Honour, Justice Williams, referred to that appeal right earlier today. So the Law Commission was thinking this might be exactly what we're dealing with.

While we're here, very last things is just hours for off-licences. The recommendation made by the Law Commission is referred to on page 187 of the report at paragraph 9.40. They proposed for off-licences that the national default hours would be 9 am to 10 pm, and at 9.45 you can see evidence of the

balancing exercise that I say ARLA is to do on an appeal against an hours element in a PLAP. 9.45: "We acknowledge this will affect the business of off-licence premises that currently trade after 10 pm or before 9 am." But we don't think there's many grocery stores who do that. So there's the exercise of this balancing that I've been talking about that the Law Commission itself was doing when it was thinking about the national default hours that it would recommend.

Just for interest while we're here, 9.46, just so that it doesn't come as a surprise if someone else raises it or your Honours see it, second line there: "The response from retailers … has been mixed. Foodstuffs is willing to accept opening hours of 8 am to 10 pm …" That was Foodstuffs' position at the time.

WILLIAMS J:

This is Foodstuffs North Island, or Te Ika-a-Māui as you so beautifully put it in your –

MR THAIN:

Te Ika-a-Māui. I think at the time, your Honour, that this was actually a submission made by Foodstuffs Aotearoa which is the parent body that does some advocacy for the two of them, both for Foodstuffs Te Ika-a-Māui and also Foodstuffs Te Wai Pounamu, and –

WILLIAMS J:

Well, what happened?

MR THAIN:

What happened? Well, the –

WILLIAMS J:

Changed your mind?

MR THAIN:

Well, Auckland Council's PLAP proposed 9 am to 9 pm, not 8 am to 10 pm, and, as I've said, there are many LAPs in force around New Zealand and a number of them have hours 10 pm as a closing.

Next in the chain is a document that I suspect I might be told you don't want me to take you to and that's a Cabinet paper setting out the government's response to the Law Commission report. The Cabinet paper is referred to, or was referred to, by the Court of Appeal but I'm conscious that your Honours, Justice O'Regan and Justice France, I think, were in the *SkyCity* decision which suggests that I'm not to be encouraged to take you to Cabinet papers.

O'REGAN J:

You probably haven't got a lot of time anyway, I think.

MR THAIN:

Exactly, so I'll –

O'REGAN J:

The main thing really is what did the statute do, isn't it?

MR THAIN:

I think that's right. One thing that we do have a part of that is part of the legislative process is the explanatory note to the Bill. The whole explanatory note to the Bill is missing from the bundle, but a portion of it is quoted in the *Lion Liquor* case, which is in the bundle. But there's no point in taking you there, I can just tell you what it says. The policy objectives of the Bill when it finally became a Bill and was put forward, the policy objectives of the Bill stated in the explanatory statement included "reduce excessive drinking by young people and adults", "reduce the harm", but then it also said "support safe and responsible sales supplying consumption of alcohol", it didn't say "tolerate" or something like that, it was "support safe and responsible sale", and that is consistent with my friend Ms Cooper's submissions about the two limbs of the object that we now see in the Act. Another of the policy objectives stated in the

explanatory note to the Bill was to "improve community input" into local alcohol licensing decisions, and that was done, that's not really about the local alcohol policies, it was about the way in which the community can be involved in specific licensing decisions, which has been improved through the new Act.

Then there's the first reading, so Hansard from the first reading, and that's in your bundle. The real point there is simply that when the Honourable Simon Power at the time the Minister of Justice introduced the Bill he said expressly in the second paragraph there, you'll see it down towards the bottom, talked about "excessive" drinking et cetera, and then said: "But we must achieve a balance. Addressing harm must be weighed against the positive benefits associated with responsible drinking. The Government's approach is therefore a considered, integrated and balanced package that targets harm without penalising responsible drinkers," so that's the theme.

There is a departmental report for the select committee that comes next, and again I imagine that your Honours would not be keen to see that, but it's in the bundle if – it's there, and refers to some of these things.

And then there's the third reading of the Bill where that same approach of balancing what the Parliament of the day saw as the positive effects of alcohol versus the negative effects, it comes through again in the first paragraph towards the tail end, the Honourable Judith Collins, who at that stage was Minister of Justice, said the same thing: there's a lot of harm, most New Zealanders enjoyed drinking alcohol in a responsible manner, and she noted that some people said that this Bill did not go far enough but she said however the provisions of the Bill "strike a sensible balance and deal with the considerable harm that alcohol causes without unfairly affecting responsible drinkers".

So I say that the theme from that in terms of interpreting this is consistent with the principles for applying the appeal test that ARLA set out back in *Tasman* and again in this decision. It was about, the reason for an appeal test, it said, unreasonable in the light of the object of the Act, was to make sure the object

of the Act helped to drive the decision, but it was also to preserve a reasonable system of control which was designed to support safe and responsible sale and supply and to achieve this balance between what Parliament saw as positive benefits of alcohol versus the harm it causes, comes from excessive and inappropriate, a tightrope to walk, where no two New Zealanders will agree on exactly where to put that line. We'll all disagree on the right balance, but Parliament struck a balance and said "that's what we're trying to do".

Your Honour Justice O'Regan said, or I think it was, you said I should get into the Act itself, because of course that is the closer context to show this playing out. In the Act there are a number of provisions that show this balance. So just as a few examples, the default maximum trading hours themselves are the classic example: we're still going to have this access to alcohol but we're going to put some limits on it. That's the first sign of the balance.

1540

Then you've got things like section 241 in the Act, which – under section 241 allows alcohol to be supplied to minors, people under 18, so you can supply alcohol to minors but only if you're a parent or guardian or you believe on reasonable grounds that you have the consent of the parent or guardian, and you supply in a responsible manner. So, there's the balance again. We're going to let children have alcohol, but we're going to put some rules around it to sort of manage it. This is this tightrope balancing of – there's benefits apparently in children being supplied with alcohol, but we need to sort of manage it to make sure we don't get harm or minimise the harm that'll come from that.

Another example that – while we're right there, and I won't take you through too many of these examples, they're all through the Act, but a good set of examples sits in section 237. Section 237 sets out a raft of things which amount to offences under the heading "Irresponsible promotion of alcohol". Look at subsection (1)(b). It's an offence to promote a deep discount on your alcohol, to lead people to believe you're discounting an alcohol product by more than 25%, but only if you do that outside your store. You can promote a deep

discount, you can say 90% off, as long as you do it in your store. There's another example of, we're going to allow businesses to do sales on alcohol, but we're going to put some rules around it to sort of manage it to try and control the harm.

Then, there's the same, in section 237, you'll see the same thing even with promoting free alcohol. Again, you can do that, but only in limited circumstances. Prizes, same thing. Encouragement to drink, same. You can encourage to drink but just not to excess.

Of perhaps more direct relevance in illustrating the way this Act always applies, all the way through, it does this exercise of allowing to the point where Parliament said it was reasonable.

In relation to supermarkets, my friend Ms Cooper talked to you about section 58. We're going to allow alcohol in supermarkets, and at the time of the debate that led to the 2012 Act, there was a lot of debate that said we should take alcohol out of supermarkets again. It had only come in in 1990, and some people said the experiment had failed, and we should remove it. That was a political decision. We'll leave alcohol in supermarkets, but we're going to limit it under section 58 to beer, wine, and honey mead, and we're going to impose a single area condition so that as from this Act, when this Act started to bite on supermarkets and grocery stores, they have to have all their alcohol in one place, whereas you might recall, back prior to 2012, you would walk into a supermarket, there might be alcohol at the front door, alcohol at the checkout, and alcohol on every aisle end. All that went. It's all in one place. But it's still in the supermarket, the supermarket where children can go, so the Parliament thought that was okay, but we're going to put some limits on it.

The single area condition provisions start at section 112 in the Act, and that's worth a quick look, because section 112 has its own purpose section. Section 112(1), the purpose of this section and other sections which set out these single area conditions "is to limit (so far as is reasonably practicable) the exposure of shoppers" to alcohol displays, et cetera. So, there's another

example of the Parliament saying, well, you've got to limit the exposure, but only as far as reasonably practicable.

Section 117 is another example, and perhaps this is the broader of the examples. Section 117 was a new thing in the new Act and seen as being quite a dramatic change from the old 1989 Act. Under the '89 Act, there was no express, general discretionary power to impose conditions on a licence. Section 117 changed that. But even then, when the Parliament put in this, they still said that any such conditions needed to be not consistent with the Act. That's not particularly special. But then they said they had to be "reasonable conditions". You can't impose anything you like: you've got to impose only reasonable conditions.

Incidentally, in the Law Commission report this was recommended and the Law Commission talked about – it said: "We probably don't need to say 'reasonable' because public decision-makers should be reasonable anyway but let's emphasise it."

Those provisions that I've just taken your Honours to, the section 112 "so far as is reasonably practicable" and the section 117 " reasonable conditions", were discussed by his Honour, Justice Gendall, in the *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749; [2016] 2 NZLR 382 case. That's in tab 36 in your authorities bundles. So this was a case related to a single area condition for a couple of supermarkets in Christchurch and also a section 117 discretionary condition imposed on one of those two licences. It went through ARLA and then on appeal to the High Court. There was an issue around description of the single alcohol area. That went on to the Court of Appeal, doesn't matter for present purposes, but his Honour, Justice Gendall's, decisions on what's meant by "reasonably practicable" and what's meant by a "reasonable condition" was not appealed and so that remains the law, and it's instructive to this concept of reasonableness.

At paragraph 71 in his Honour's decision you'll see there, third line down, his Honour reflected submissions similar to the ones I've just made about

sections, the concept of practicality and so on. He said they "go to the requirement of reasonableness which pervades the entirety of the Act."

Then at paragraph 82 his Honour dealt with this concept of what's "reasonably practicable". At paragraph 83, inherent in that concept "is the notion of proportionality; the benefit to be obtained must be weighed against the sacrifices obtained in security the benefit. Such a weighing exercise is able to engage various issues, including expenditure, time involved, difficulty and inconvenience, as balanced against the desired objective." That's the same concept of "reasonableness" that Foodstuffs urges the Court to adopt for the appeal test against an element of a PLAP.

At paragraph 93 of the decision, this is where his Honour dealt with the discretionary conditions, reasonable discretionary conditions, and at paragraph 101 you will see, from 101 onwards, you will see the analysis which again brought in those same proportionality considerations that his Honour had talked about. He said it follows as a matter of logic that a condition to be reasonable must be no more restrictive than is necessary to militate against the identified evil. There must be a sufficient connection between the condition that is to be imposed and the risk it seeks to guard against, and it invokes concepts of proportionality. He's set out the principles there at paragraph 104.

That decision and those principles in relation to this concept of "reasonableness" can be distinguished from the way the High Court looked at things in the *Capital Liquor Ltd v The New Zealand Police* [2019] NZHC 1846 case. *Capital Liquor* is a decision of her Honour, Justice Clark. *Capital Liquor* was about a specific licence application and it was granted but with a condition that restricted the trading hours, I think only on a weekend night, and there was a debate about whether or not that was a reasonable condition.

1550

At paragraph 74 of the decision you'll see the reason why I'm bringing you here is Justice Clark talked about, she said a condition may not "be capricious or grossly disproportionate". Well, I don't disagree with that. A condition can't be

capricious or grossly disproportionate, but that's not where there edges are. A condition can't be unreasonable. Her Honour got to this conclusion from a view that you'll see at paragraph 79 that she says reasonableness is "separated from administration" in the new object of the Act, it's in the purpose section actually, and Ms Cooper took you through that, reasonableness and administration in separate parts of that purpose provision. Her Honour said "that strongly suggests a deliberate step.. to narrow, if not close, the potential that existed under the 1989 Act… commercial interests to be considered… The focus of licensing decisions is now directed solely to attaining the objects of the Act."

Then that's where she got to capricious or grossly disproportionate. So I say that her analysis is not directly relevant for the current case, because it's a different picture, and I don't accept that she's right. But in any –

WILLIAM YOUNG J:
You say economic interests are material?

MR THAIN:
Economic interests can be taken into account on whether a condition is reasonable or otherwise, yes, and as Justice Gendall said, for instance, for reasonable single area condition that might require moving of shelves or whatever, the cost that that might take is a factor to be weighed up, and that's an economic interests. But what I say is that even if her Honour Justice Clark's reasoning was right, it doesn't apply to the appeal test against an element of a PLAP because in the appeal test unreasonableness is not separated from the object of the Act, they're in the same sentence. So this reasoning –

WILLIAM YOUNG J:
Sorry, what do you mean by that?

MR THAIN:
Well she has –

WILLIAM YOUNG J:
Oh you mean unreasonable in light of the objects of the Act?

MR THAIN:
Yes.

WILLIAM YOUNG J:
Yes, sure.

MR THAIN:
Yes, it's all in one, they're connected, whereas her Honour has said well, because in the purpose, reasonable and administration have been separated out onto two separate lines, that somehow changes things, which as I say I don't accept that it's right, but it wouldn't apply in our situation anyway. So the Vaudrey and Bond approach to reasonableness is the right one.

That takes me to the, I said I would take about antecedent rights, why those two principles from the bylaws cases, the two principles of proportionality that the Court of Appeal said were not applicable, why they are, in fact, applicable, at least in respect of a default maximum hours issue. The Court of Appeal seems to have not appreciated that a maximum hours element in a local alcohol policy is different to all other types of element in a policy except for one-way doors. The difference is that with something like a temporary freeze or rebuttable presumption or any of those other things, they are merely things to which the District Licensing Committee is required to have regard. It can, the district Licensing Committee can override the local alcohol policy in appropriate circumstances. That's the flexibility that you'll recall the Law Commission talked about, and you'll see that, I won't take the time of taking you there, but you'll see that flexibility in respect of all other elements of a local alcohol policy sitting in section 105, section 108 in relation to new licence applications, and section 131 and 133 in relation to renewals. The District Licensing Committee is only to "have regard". In other words give genuine attention and thought to the elements of the local alcohol policy, but that is different with maximum

hours, and one-way door policies. One-way door is in the same category but doesn't matter for our present case.

WILLIAM YOUNG J:

What's the section that deals with one-way doors, sorry?

MR THAIN:

The section that deals with one-way doors is section 50. Section 50 is the section that makes one-way door policies different to all the others except for hours.

WILLIAM YOUNG J:

Right, okay, I understand, yes.

MR THAIN:

Section 50 is the one that says if you hold an on-licence, because one-way doors only relate to on-licences, then you have to comply with every one-way door restriction in any relevant local alcohol policy regardless of the condition of your own licence. So if a one-way door policy is –

WILLIAM YOUNG J:

Yes, I understand.

MR THAIN:

And that's the same – I hope your Honours have understood that's the same deal with hours.

WILLIAM YOUNG J:

That's the same with trading hours.

MR THAIN:

So when hours are imposed through a LAP they bite immediately and affect people's antecedent rights, rights that traders have under their licences, which licences were granted under this Act, and those maximum hours impact them immediately, or once the LAP is brought into force. It's brought into force with

a three-month warning for hours and one-way doors policies for that exact reason, so that traders can get used to it and get prepared for it before it happens. That's what means that – I adopt my friend Ms Cooper's submissions that really we have antecedent rights across the board here because freedoms are rights in the relevant sense. But even if the Court was not with us on that, then in at least the hours it is clear that there are antecedent rights which are immediately impacted, just as any other rights granted expressly under a statute, are impinged, which is the basis for those two principles from the bylaw cases. So in at least the case of the element about hours there are antecedent rights which are to be balanced. The Court of Appeal didn't seem to understand that, and you'll see in the Court of Appeal decision, you'll that at their paragraphs 65 and 72. The Court of Appeal seemed to consider that the only way that the hours would come into effect would be by way of a licensing decision, you'll see that in 65, LAP "is ultimately given effect through the grant or renewal of licences".

WILLIAM YOUNG J:

Sorry, what paragraph are you looking at?

MR THAIN:

Paragraph 65 in the Court of Appeal's decision.

ELLEN FRANCE J:

Well, that's correct isn't it, that it will ultimately be given effect through…

MR THAIN:

Well, you see, that's the point. With every other type of element in a local alcohol policy it will only ever bite when a party goes along to apply for a licence or for their renewal, and that's the basis on which, I imagine, the Court of Appeal said: "So there's no antecedent rights, because you have no right to get your application granted, you have no right to a renewal, you are always subject to having to roll your dice and see what you got." So no antecedent rights, they said, for that. But for hours, you might have just renewed your or just obtained your licence under the Act, which give you hours that go through to 11 pm, and

then if this LAP element comes into force you will lose your rights. No question of going, waiting till you renew your licence, it happens immediately.

WILLIAMS J:

Well, it would have to, wouldn't it, because otherwise the system would be first up, best dressed.

MR THAIN:

Yes, absolutely, it would have to. So I'm not arguing that it's crazy or silly, it was smart from the Parliament's point of view.

WILLIAMS J:

So maybe we just read that as the licence being more in the nature of a privilege?

ELLEN FRANCE J:

That's what…

MR THAIN:

Well, except obtaining a licence may be a privilege but a licence under this Act gives one a right to sell alcohol provided you comply with the terms of your licence. So that is a legal right that you've been given –

WILLIAMS J:

Yes, but it's a statutorily defeasible right.

MR THAIN:

Sure.

WILLIAMS J:

It was never any better than that, at least not since 2012.

MR THAIN:

Yes. But that of course is always, or generally, the case with the types of rights that the bylaw cases deal with.

WILLIAMS J:

I see.

MR THAIN:

And so all I'm saying is there's no material distinction here in terms of whether there are rights, everyone has such rights.

WILLIAMS J:

Can you tell me about the bylaw case and the statutorily vested right that got defeased? Is there an equivalent of this that you can tell me about in the bylaw cases?

1600

MR THAIN:

Well, the –

WILLIAM YOUNG J:

Say, for instance, a bylaw governs licensing of something, and a new bylaw makes it a bit more difficult to get a licence. Are they –

COOPER J:

Trading in streets.

MR THAIN:

Yes. Now, that shows the point though, I think. If it makes it a little more difficult to get a licence, then the Court of Appeal analysis has some logic to it. We say it's still not applicable because you still have the freedoms and their rights, but this is not that. This is a – with the hours –

WILLIAMS J:

Yes, I understand your point.

WILLIAM YOUNG J:

Okay, all right. Changes what a licensee can do?

MR THAIN:

Yes.

WILLIAM YOUNG J:

Are there bylaw cases like that or you don't know?

MR THAIN:

I'm not familiar of any exactly like that, no, but that – but I guess – no, I'm not. For instance, the brothel cases, the Prostitution Reform Act allowed for brothels and then the bylaw restricted that. This is a little step beyond that. The Act allows for licences, and then under the Act, someone has granted a licence, and then along comes the LAP element and restricts that. I don't see any principled distinction between those two matters, and therefore I don't see any valid basis upon which to argue that there are no relevant antecedent rights, and therefore those principles shouldn't – the bylaw cases should not apply at least to maximum trading hours and one-way doors.

ELLEN FRANCE J:

Although the fact that there is the ability to do a local alcohol policy must potentially undercut it? Unless you're saying you can't change the hours?

MR THAIN:

No. Clearly, Parliament said there can be local alcohol policies, and those local alcohol policies can provide for more restrictive hours, and that this how they will apply. But the Parliament also said that those elements are subject to this right of appeal, and the right of appeal is whether or not the element is unreasonable in the light of the object of the Act, so when assessing whether or not it is unreasonable, the principles of proportionality from the bylaw cases ought to apply because the situation is the same. There is, in fact, an antecedent right that is being affected, and that, as I said, that's conceptually distinct from all the other types of element. So, for instance, the temporary freeze element is conceptually distinct, because that only matters to someone when they come along to apply for a new licence when they haven't got one before. They have – it can be said –

O'REGAN J:

I think we've got the point.

MR THAIN:

Yes.

WILLIAM YOUNG J:

Can I just ask you one question about this? Under the object of the Act, can it be said that there is a right, in a real sense, to supply alcohol other than in a way that is safe and responsible with the harm caused by excess or inappropriate consumption of alcohol minimised? Does that object qualify the right that you're talking about?

MR THAIN:

Does the object qualify the right?

WILLIAM YOUNG J:

Right, yes. That it's always subject to being defeated if the harm isn't being appropriately minimised?

MR THAIN:

Once someone's granted a licence –

WILLIAM YOUNG J:

Well, you say the object doesn't control it, I guess.

MR THAIN:

The object is a matter to which the District Licensing Committee must have regard when it decides on whether or not to grant a licence, so it can't grant a licence unless it is satisfied that doing so is consistent with the object, or at least it has to give serious attention and thought to that matter, because it must have regard to it.

Having done so, it imposes conditions. There are sections in the Act that requires it to impose certain conditions, including one that says you must set hours, and then there's that discretionary conditions provision as well. It says you can do anything else you like, any other conditions provided they're not inconsistent with the Act, and they are reasonable.

Then, the licensee, then, has to comply with those conditions. Otherwise, it's an offence, and also, the licensee must comply, or it must not breach, any of the other provisions such as sale to minors or irresponsible promotion.

WILLIAM YOUNG J:

Look it's a very long answer to the question. I was simply suggesting that the right to trade under certain trading hours is one that by the – given the context of the Act and the object is really defeasible. That's just the proposition, which I guess viewed at the level of generality is right, isn't it?

MR THAIN:

Yes.

O'REGAN J:

All right. Well, I think we should adjourn now. Have you finished what you want to say, Mr Thain?

MR THAIN:

The only point that I wanted to still address, your Honours, well, there's about one sentence I'd like to say to wrap up that piece and then I just want, if I could in the morning, come back to just deal with that interconnection between the LARs and the city centre which won't take very long at all.

O'REGAN J:

Mr McNamara, is that going to leave you enough time?

MR McNAMARA:

Yes, your Honour. I had hoped to have a clear run at it tomorrow.

O'REGAN J:

Let's make it 10 minutes, Mr Thain.

MR THAIN:

That would be fine.

O'REGAN J:

If necessary we'll abbreviate the lunch break.

MR THAIN:

I'm obliged to your Honours, thank you, and to my friend. Could I just, to wrap up that bit, just the one sentence so I don't have to try and do it in the morning? The one sentence then that flows from that is your Honours are interested in this question of whether the national default hours are something from which there must be reason for departure. Foodstuffs' position is simply that where those national default hours represent antecedent rights that licensees have, and many Auckland licensees have exactly those rights under their licence, then a departure from that must not be unreasonable. That's it.

O'REGAN J:

All right, we'll adjourn now.

COURT ADJOURNS: 4.06 PM

COURT RESUMES ON WEDNESDAY 14 SEPTEMBER 2022 AT 10.03 AM

O'REGAN J:

Mr Thain, your 10 minutes starts now

MR THAIN:

Mōrena your Honours.

WILLIAMS J:

Mōrena.

MR THAIN:

The provisions which apply in LAP's maximum hours to override pre-existing express licence rights are sections 45 and 46 of the Act, and the offence provision is section 259(1)(a). The fact that maximum hours elements override pre-existing rights is recognised in section 89 of the Act. That section provides that such an element must be treated as secondary legislation under section 161A(2) of the Local Government Act 2002. That section says it applies to significant rules from local governments that have significant legislative effect, like bylaws. Section 89 of the Sale and Supply of Alcohol Act also says that a maximum hours element must be treated – well, it is applied to subpart 2 of Part 5 of the Legislation Act, and therefore is subject to disallowance by Parliament.

WILLIAM YOUNG J:

Sorry, what section was that I'm sorry?

MR THAIN:

That is section 89 of the Sale and Supply of Alcohol Act, that does both those two things, which, as I say, recognises the distinctive nature of a maximum hours element, and a one-way door element, by comparison with all other types of elements in local alcohol policies.

A maximum hours element will not be unreasonable simply because it applies as a blanket policy across a whole region. However, if the element would be disproportionate in some parts of the region, that would be a matter to be considered by ARLA, and may make the element, as a whole, unreasonable. That principle was, in fact, recognised by Council itself in the explanatory note to the PLAP, which is in the case on appeal at tab 27, paragraphs 16, 75 and 84 of that explanatory note recognises that basic principle. Because of its work, Council's work dealing with the section 78 matters, Council itself provided substantial evidence of the variation across the different parts of Auckland including variation in alcohol-related harm and other matters. Foodstuffs, therefore, didn't need to present its own evidence on those matters, there was plenty from the Council. No such consideration about whether a blanket policy is unreasonable applies to the national default hours, however, of course because those hours are not subject to the appeal test in the Act for a PLAP. In relation to whether the decision –

COOPER J:

So you're saying Parliament has potentially enacted something that may be unreasonable in practice?

MR THAIN:

Well what I'm saying is that the default hours are what Parliament has decided will apply in the absence of an LAP.

COOPER J:

Reasonable or not?

MR THAIN:

It doesn't matter for us because that's what Parliament decided was its view of a reasonable set of default hours. The appeal test for a PLAP element never gets applied to that. It's a matter for Parliament. If a LAP specifies something different, either more restrictive or less restrictive hours, that's the only time that the appeal test is called on to be applied.

WILLIAMS J:

Well that just means, doesn't it, that they've made a decision and in the absence of – and the default means they haven't made a decision, so what's there to appeal?

MR THAIN:

Exactly right. If an LAP were to propose the default hours, it's a meaningless, there's no point in doing that, and you couldn't appeal it because to take the element out and you've still got the default hours and, of course, it's important to remember that for every individual licence. The District Licensing Committee can impose more restrictive hours if the circumstances of that particular licence make that appropriate.

In relation to whether ARLA's decision on the temporary freeze and rebuttable presumption elements should be remitted back to ARLA, in one aspect the temporary freeze and rebuttable presumption element of the PLAP is based on the assumption that there would be local imports reports. That's clause 3.3.3 of the PLAP, which deals with how one would go about rebutting the presumption. For its decision on temporary freeze and rebuttable presumption ARLA proceeded expressly on the assumption that there would be local impacts reports, because ARLA considered they were permissible. That's in ARLA 's decision at paragraphs 114 and 117. ARLA considered that local impacts reports might provide more information than would otherwise be available to a District Licensing Committee. That's in ARLA's decision at paragraph 93. Consistently the High Court held that local impacts reports, if there were to be such, would interfere with the Act's section 197(4) requirement for licensing inspectors to prepare reports independently. That's in the High Court decision at paragraph 188. So it was considered that local impacts reports, both by ARLA and the High Court, might change the information available for deciding on whether or not to rebut this presumption.

WILLIAMS J:

Can you just give me the section again?

MR THAIN:

The clause in the PLAP?

WILLIAMS J:

No, no, in the legislation that the Judge referred to?

MR THAIN:

It is section 197, subsection (4). That's the one that says the inspectors must be independent.

WILLIAMS J:

Thank you.

MR THAIN:

So both the PLAP itself and ARLA's decision in relation to these elements, was on the assumption there would be LIRs but we now know there will, in fact, not be any LIRs. The High Court held there were ultra vires and the Court of Appeal confirmed that something that's ultra vires will always be unreasonable in the light of the object of the Act. The High Court remitted the decision on local impacts reports back to ARLA, but it will be inevitable that ARLA will have to ask Council to reconsider them, and given that they are ultra vires, if there's to be any change, it'll be something substantially different, or they'll be deleted entirely.

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In other aspects, the temporary freeze and rebuttable presumption elements is based on a defined city centre area of Auckland. That's in PLAP clauses 3.2.1, 3.3.1, and 4.1.4. That defines an area in which first the temporary freeze and then after that the rebuttable presumption would apply, one of the areas in which that would apply.

Redwood's appeal was, in part, against the definition of that city centre area, and that has been remitted back to ARLA for reconsideration. You'll find that in the High Court's decision on Redwood's judicial review application, in the

High Court's decision at paragraphs 122, 124, 128, and 11. That decision is in the Authority's bundle rather than the case on appeal. It's at tab 51. So when ARLA asks Council to reconsider an element, and it will inevitably do so in relation to the LIRs, and it has already done so in relation to the maximum hours element, and it may do so in relation to the city centre definition which affects the temporary freeze and rebuttable presumption, when ARLA does that, Council's options are as per section 84 of the Act. It can delete elements or it can resubmit with amended elements that – the element that it has been asked to reconsider, not other elements. As is clear from section 86(1) of the Act, a deletion, a cross-out of some words within an element, is an amendment of that element, and that would then, as Parliament said, be dealt with when it's resubmitted, as if it were an appeal.

WILLIAM YOUNG J:

Sorry, 86?

MR THAIN:

86(1). You'll see there that if a council is asked to reconsider an element, and it deletes the element in its entirety, that deletion is not dealt with as if it were a fresh appeal, because the element's gone, but any amended element is dealt with as a appeal. So if one were to cross out a few words within an element, that is dealt with as an amendment to the element, because of course, it might change the meaning of the element. ARLA then checks it again, but no – well, the concern of continual appeals was considered, and that's section 86(2), I think, that allows for ARLA to deal with such appeals on resubmitted amendments on the papers if it sees fit.

You'll see that I mentioned briefly yesterday in the select committee's report on the bill, which is in the Authority's bundle at tab 59 on page 7, you'll see that the select committee considered this issue of continual appeals and its decision, or at least, ultimately Parliament's decision to resolve the way in which they did that was clause 85(2) and (3) of the bill, which turned into section 86(2) and (3) of the Act, which is ARLA's ability to deal with these resubmissions without another public hearing if it considers that that is appropriate.

So, ultimately, whether a lack of LIRs affects the temporary freeze and rebuttable presumption element, whether the city centre definition insofar as that might change affects the temporary freeze and rebuttable presumption, and whether any amendments of any elements, including by crossing out a word within an element, are appropriately dealt with on the papers, those are all matters or should all be matters for ARLA, not for a Court on judicial review. They're ARLA decisions. What the Court, of course, should be concerned with is simply to ensure that the correct process is applied in accordance with the statute of the process that Parliament set out.

ELLEN FRANCE J:

So are you saying, Mr Thain, that the Court of Appeal went too far in paragraphs 122 and 123?

MR THAIN:

Your Honour, just for speed –

ELLEN FRANCE J:

They're the two that refer to local impact reports and essentially disagree with the submission you're currently making.

MR THAIN:

The Court of Appeal went too far when it said that the Council is entitled to amend its PLAP without applying the statutory process. The statutory process requires that Council can only amend an element when it's been asked to reconsider by ARLA and then whatever amendment it does, unless it's complete deletion of a whole element, that amendment gets looked at by ARLA again. That is the statutory process. Whether we like it or not now is a matter for the current Parliament if they wish to reform the law. That's the process and a court on judicial review, of course, should be keen to make sure that that correct process is applied and the concerns of continual appeals ought not to worry us because the Parliament considered it, decided how to deal with it, and they gave ARLA the power to deal with simple resubmissions without a hearing.

O'REGAN J:

I think we've got the point, but have you finished now because we really do have to give Mr McNamara a fair go.

MR THAIN:

Yes. The only thing I want to say is just to correct something I said yesterday. I misread my own handwriting yesterday when I said that 67% of councils already had LAPs in force. The correct number was 61%. There are 67 councils, 41 of them have LAPs in force.

Thank you, your Honours.

O'REGAN J:

Thank you. Mr McNamara.

MR McNAMARA:

It might just take a couple of moments to set up here, if I may.

Thank you, your Honours. I trust you have received the oral outline filed on Monday.

O'REGAN J:

We have, yes.

MR McNAMARA:

I'll be largely using that document which is hyperlinked, so that's where I'll get to the few authorities that I intend to delve into and some parts of the case on appeal.

So the Council's primary submission is that the grounds of review set out in the statements of claim for Woolworths and Foodstuffs are not made out and that accordingly these appeals must fail. Now we all have interest, this being the Supreme Court, in clarifying what the test on appeal is under section 81 and that will no doubt be a benefit for Auckland Council on the appeals in relation

to resubmitted elements that are still to be heard and New Zealand more generally. However, the clarification of the test through any uncertainty created by aspects of the Court of Appeal's judgment does not mean the appeals succeed.

In granting leave, this Court said its primary interest was whether the Court of Appeal proceeded on the basis that an appeal under section 81 can only succeed if there is not a real and appreciable possibility of the element in the PLAP minimising alcohol-related harm such that proportionality considerations were not material.

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It's submitted that the Court of Appeal did not proceed on that basis, and that's based on a close reading of the three paragraphs in which that phrase "real and appreciable possibility" was used. However, even if this Court were to find that the Court did proceed on that basis, there would be no reason to overturn ARLA's – sorry, the Court of Appeal's orders reinstating ARLA's decisions.

So with that summary, unless there are any questions already, I'd like to return to some aspects of the statutory framework because fundamentally, as the Court of Appeal found, this is an exercise in statutory interpretation, given that we are dealing with a statutory policy and, of course, a statutory appeal ground as opposed to a general appeal. So if we start perhaps with what we departed from, and that is the Sale of Liquor Act regime and the object of that Act, which was in section 4, and on the hyperlink here we've got section 4 as set out in the *Meads Brothers* decision. You can see there the object that has been described since the passage of the 2012 Act as being, in retrospect, a very modest object. It refers to a reasonable system of control, an element that my learned friends emphasise continues, I'll address that shortly, over the sale and supply of liquor to the public, and this is where we start to see the modesty of the objective, with the aim of contributing, and you'll recall we use the word "minimising" now under the current Act, to a reduction of liquor abuse, whereas we now have a wider term of "alcohol-related harm" so far as that can be achieved by legislative means, and the Court of Appeal in *Meads*, and the passage immediately after

the quote of section 4, emphasised how limited the object was, and I'm referring to the second sentence, the object "reflects a legislative perception that controls provided by the licensing system have the capacity to contribute to the reduction of abuse of alcohol in the community but that there are limits to that limited capacity."

Then if we scroll down to see 24 in full the contrast is drawn between the Sale of Liquor Act and its predecessors and the observation is made: "The notion that if the availability of licences to sell and supply liquor is restricted the abuse of liquor will be diminished has been at the heart of licensing systems in New Zealand since 1881."

Then they refer to that being reflected in the requirement for hotel and taverns to show that they are necessary and desirable and then say this barrier and others like it were dismissed by the 1989 Act. So in some senses if we take a longer historical lens we see a return to a legislative regime whereby the restriction on licensing is provided for so as to reduce the abuse of liquor, but now articulated in a broader sense through the concept of minimising alcohol-related harm.

Now the aspects of the 2012 Act that most significantly emphasised in this change, in my submission, are three. First, the new purpose and object provisions in sections 3 and 4, which I'll discuss shortly. Secondly, the new regime around local alcohol policies, and thirdly, the provision for national default trading hours, and I'll cover each of those in turn.

But if we start with section 4, the Court is now very familiar with it. So, we see there the two limbs, the first focusing on the sale and supply and consumption, but a requirement that that be undertaken safely and responsibly, and then the element related to the minimisation of harm. Now, it's respectfully submitted that the Court of Appeal got it right when they said that those two limbs are aligned and don't need to be balanced. This is where the Council departs from my friends who appear for the supermarkets who continue to suggest, at least at times, that there is a tension within section 4 and between the two limbs, and

this is most clear from the written submissions for Woolworths, where they suggest that section 4 draws a distinction between the legitimate sale, supply, and consumption on the one hand, that's in paragraph (a), and excessive or inappropriate consumption on the other, that being in (b).

O'REGAN J:
What paragraph of the Woolworths submission are you referring to?

MR MCNAMARA:
That's in paragraph 12 of the written submissions, Sir.

WILLIAM YOUNG J:
Is there any explanation – I mean, the object and purpose provisions proposed by the Commission was split up.

MR MCNAMARA:
Yes.

WILLIAM YOUNG J:
So, that's not very helpful. Is there any explanation in the legislative history for section 4 in its current – in its form? The use of the singular object for instance?

MR MCNAMARA:
I don't think I can assist you there, Sir. I mean, clearly, there was an aspect of continuity in carrying over the reference to a reasonable system. Now, there was a reasonable system of control referred to in section 4 of this 1989 Act.

WILLIAM YOUNG J:
That's in section 3?

MR MCNAMARA:
That's right, and now we have that, but I think what we see in breaking up what we might call a "purpose" provision into separate purposes and objects, so two provisions rather than one as we had in the 1989 Act is, I guess, the opportunity to articulate far more clearly what alcohol-related harm is, and that concept is

substantially greater than mere liquor abuse, which was of course the focus of the 1989 Act. Because we see in section 4 the incorporation of alcohol-related harm, which is of course separately defined in section 5, and yet it's been used in the object provision as well.

Beyond that, Sir, I can't assist, and I actually don't, in my written submissions, place any real reliance on the Law Commission report. I know we can draw from that. It's clear in the context. I have preferred to keep it pretty confined to the immediate parliamentary materials, and so I only refer to Hansard in one place, but I'm grateful to my friends for the wider context.

So, again, the Woolworths submission, and this is at paragraph 57 of its submission, captures a further distinction that tends to be made in these types of cases, and that is that "persons who are selling, supplying, or consuming alcohol safely and responsibly are undertaking an activity that is aligned with section 4(1)(a) and do not generate harm caused by the excessive or inappropriate consumption of alcohol" within 4(1)(b).

With respect, that submission is also incorrect. Alcohol may be sold and supplied responsibly, and indeed, there's no evidence before this Court that the supermarkets do otherwise. This is not a case in which a licensee's conduct is in question in any way, but thereafter, the alcohol sold and supplied responsibly is consumed irresponsibly and generates alcohol-related harm. So, of course, this is the issue that we see in the Wellington context all the time from off-licence purchase on the fringes of the CBD, Courtenay Place. If we –

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WILLIAMS J:

We can agree, can't we, that the Act is about consumer abuse and harm, in the end?

MR MCNAMARA:

Yes, well, if we talk about minimising harm, it's at the consumption level obviously.

WILLIAMS J:

So is safe and responsible. Safety and responsibility relates to harm and in the end the purveyors and suppliers are contributors to the ultimate point in the Act, which is the state of alcohol-related harm through unsafe and irresponsible consumption.

MR MCNAMARA:

Yes, Sir, but I would emphasise that "safe and responsible" also applies to sale and supply, for example, through –

WILLIAMS J:

Of course, but in the end that's about not providing for safe and responsible drinking.

MR MCNAMARA:

Indeed, yes.

ELLEN FRANCE J:

Mr McNamara, just in terms of the relationship between sections 3 and 4, given that the characteristics of the new system are that it's reasonable, would you agree one could say that the Act contemplates the reasonable sale, et cetera, of alcohol, or do you see what's contemplated as being covered, essentially, by 4?

MR MCNAMARA:

I think it does contemplate the reasonable sale of alcohol. Now where my friends and I differ is that is whether the object and purpose of the Act contemplate a right to sell alcohol.

ELLEN FRANCE J:

Right.

MR MCNAMARA:

But it clearly contemplates that alcohol will be sold and supplied. It requires that that occur safely and responsibly. It, of course, creates a licensing regime which allows for that sale and supply. So it inevitably contemplates it. But given that, given the evidence of harm documented by the Law Commission and accepted by Parliament when enacting this legislation, how can that harm be minimised, given what we might call the failed experiment of the 1989 Act.

So I would like to pick up on a point my learned friends have suggested relating to the concept of reasonableness because, obviously, the word "reasonable" is used in section 3, and in my –

WILLIAM YOUNG J:

And its sort of antonym "unreasonable" is used in section 4.

MR MCNAMARA:

Yes, it is, and, of course, when we get to the appeal test we have unreasonableness again but with the further qualification that it's in light of the object of the Act, that's right.

WILLIAM YOUNG J:

Sorry, I meant in section 81.

MR MCNAMARA:

But it's submitted, and my friend on behalf of Woolworths relies on the *Meads Brothers* decision of the Court of Appeal as indicating that the concept of "reasonableness" that was established under that regime continues under the 2012 regime because of the use of that term "reasonable" in section 3.

Now in my submission that is not correct because "reasonableness" cannot be assessed in a statutory vacuum. If we return to the *Meads Brothers* decision which we were just looking at, at paragraph 23, we can see that the discussion of "reasonableness" there – I'll give my friend a moment to return to that case – was – straight after the quote: "The stated object envisages that the licensing

submission *[sic]* should be reasonable. This indicates the intention that the controls that are imposed under it should be neither excessive nor oppressive." That discussion is so firmly rooted in the very limited object of that Act that the Court of Appeal was right to say that it must be treated with caution when the object of the Sale and Supply of Alcohol Act 2012 is so much more ambitious.

WILLIAMS J:

Are you really suggesting that the controls under the new Act can be excessive or oppressive?

MR MCNAMARA:

No, Sir, and in my submissions about unreasonableness in the context of section 81, which you'll recall do allow for a consideration of proportionality, if an element were excessive or oppressive that would be an indicator of unreasonableness.

WILLIAMS J:

So your point is really that excessive or oppressive in the context of the new purpose is what's important?

MR MCNAMARA:

In the context of the new purpose and objects, Sir, yes.

WILLIAMS J:

And objects, sorry, yes.

MR MCNAMARA:

Yes, it is, Sir.

WILLIAMS J:

Okay. Was anything harder than that?

MR MCNAMARA:

No.

WILLIAMS J:

Good.

MR MCNAMARA:

So progressing through the oral outline – and I'm at 2.3 – and I've largely answered this question but I will return to it, and that's that sections 3 and 4 anticipate the sale of alcohol but they do not confer a right to sell alcohol. And so if we look at where the Court of Appeal first dealt with this concept of antecedent right, it's at paragraph 22 of its decision, and here the Court was commenting on the approach taken by her Honour Justice Duffy in the High Court where she said the Act balanced a "freedom" to sell alcohol "against a community freedom to take reasonable steps to protect people from harm". But then the Court of Appeal says: "But there is no antecedent right or freedom to sell or supply alcohol; the right to do so is conferred under the Act and on its terms," and in my submission that's correct, and we see that through provisions at the start of the Act which deal with the effect of licences. So the first and most, well, the most relevant of those provisions, is section 17 which states what the effect of an off-licence is: "On the premises an off-licence is held for, the licensee can sell alcohol for consumption somewhere else."

Then if we go – and there are equivalent provisions about the effect of an on-licence or a club licence – and then is we go further into section 233, and we're now in the office provision part of the Act: "A person who does not hold a licence and sells or displays or keeps for sale any alcohol commits an offence." And so this is really what the Court of Appeal was saying when it referred to "antecedent rights", it's licences under the Act that confer the right to sell, whether we're talking about an on-licence or an off-licence.

WILLIAMS J:

What do you say to Mr Thain's argument about LAP or PLAP changes in maximum hours, the effect of a PLAP on vested licensee rights?

MR MCNAMARA:

A PLAP…

WILLIAMS J:

Or a LAP, a final whatever it's called, a final document.

MR MCNAMARA:

Indeed. A trading hour restriction may result in a reduction in licence hours that were previously enjoyed by a licence holder. I actually have an authority on that point since it came over, like, if it assists, and I'm not sure if the Court appreciates being handed something up.

So there are two authorities here. One is the decision of the High Court in *Buzz & Bear Limited v Woodroffe* [1996] NZAR 404 McGechan J, and the second is a more recent decision under the Sale and Supply of Alcohol Act of Justice Churchman and *Lower Hutt Liquormart v Shady Lady Lighting Limited* [2018] NZHC 3100, and these cases are really just brought to the Court's attention to emphasise that a licence is not something that the licence holder can have a legitimate expectation will remain in the same form for all time. So we see that in the *Buzz & Bear* decision at page 410 and here there was really a discussion about whether conditions should change, and this is in the middle of paragraph 410.

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WILLIAMS J:

Page 410?

MR MCNAMARA:

410, yes, under the italicised heading "Decision" and his Honour, Justice McGechan says: "Times change. Communities and environments change. Social habits and levels of tolerance change. Obviously it would have been seen by the legislature to be wise to keep conditions imposed under review in light of potential social change. The Licensee's submissions would have licence conditions frozen in some time warp while the world marches on;" and not even in the arcane world of liquor licensing is a likely legislative intention. Then finally, at the end of that paragraph: "Any licensee takes a licence under the risk that conditions may change, and a report may

recommend licence adjustment. There is no asset protected for all time whatever may happen outside."

COOPER J:

Forgive me, I should know the answer to this, but is a licence issued for a specific period as a rule?

MR MCNAMARA:

Yes. My friends will be more familiar with that, but yes.

COOPER J:

And is there a standard period for renewal or how many…

UNIDENTIFIED MALE SPEAKER: (10:41:40)

One year first time and then three years.

COOPER J:

One year initially and then three-year renewal?

MR MCNAMARA:

Yes, I believe so.

COOPER J:

So at which consideration would be given to whether there'd been any relevant changes and what was happening in surrounding area, presumably, and also the conduct of the licensee.

MR MCNAMARA:

Yes, and the local alcohol policy is a consideration on renewals as well as on first instance licence applications under section 105. The second case, the *Shady Lady, Lower Hutt Liquormart v Shady Lady* case –

WILLIAMS J:

These cases have great names.

MR MCNAMARA:

Don't they?

WILLIAMS J:

All of these liquor licensing cases have great names.

MR MCNAMARA:

So if I take you to paragraph 60 here, this is a case about onus of proof amongst other things, including about suitability to hold a licence, but it's long been the case that holding a licence, whether it's an on- or off-licence, has been characterised as a privilege, not a right, and we see that in this passage at paragraph 60 which is a quote from the decision of Justice Dobson in *Casino Bar*, and he says there: "Suitability is a relatively broad concept and, in the context of an assessment of an application under s 13, it relates to the suitability of an applicant to be granted the privilege of an on-licence to dispense liquor."

So I mention section 105 which it's probably worth just quickly going to because this is the general provision setting out criteria for the granting of licences, and we can see there that the second of those criteria is the suitability of the applicant, and so this really just goes to the point that holding a licence is a privilege, not a right, and suitability is one matter that needs to be taken into account by the licensing authority.

WILLIAMS J:

Perhaps you might say that one of the differences between this, for example, and planning legislation is that there's no saving provision per existing rights if the rules change mid-game.

MR MCNAMARA:

Indeed, and I mean even if we were under the Sale of Liquor Act, which was the regime under which the *Buzz* case was decided, this point about licences being of short duration and conditions changing, I mean it's mandatory now that there be a condition about trading hours, that expectation cannot be that those

terms will remain the same, and so in my submission my learned friend, Mr Thain's suggestion that existing licence holders have rights which are being interfered with somewhat overstates the position. It does not – they have interest, and again, the Council submission is that interest can be taken into account as part of the proportionality assessment, so I'm not trying to say that there's only one side of the ledger that needs to be considered, which is the effectiveness of an element to reduce alcohol-related harm. I will return to the point which I think your Honour Justice Young raised yesterday about economic interests and when they become relevant, unless you'd like me to address that now? I'll return to it when it comes up.

COOPER J:

Presumably, if an existing licence was being responsibly exercised and there were no compelling reasons to take it away, arising from what might be happening in the neighbourhood, the licensee could expect to get a renewal.

MR MCNAMARA:

Indeed.

COOPER J:

And may have made considerable investments on that basis.

MR MCNAMARA:

Yes. I will now pick up on local alcohol policy.

WILLIAMS J:

Just before that, so following on from Justice Cooper, do you accept, then, that the reasonableness is informed by economic impact?

MR MCNAMARA:

Only at the extreme end, and I'll go back to *Meads* on that, but I perhaps should elaborate on my somewhat laconic answer to Justice Cooper.

Because if we stand back and consider what the elements at issues are in this case, their freeze on new licences which, per se, has no impact on existing licences, because it's only new licences that are impacted, and there's a –

O'REGAN J:

It could be a positive impact, in fact.

MR MCNAMARA:

Well, indeed, it could be a positive impact. Then, there's a proposed reduction in trading hours by two hours from the current status quo, which allows for 11 o'clock closing, and I'll return to the Council's evidence about the number of licence holders who would be affected by that proposed reduction in trading hours, and the number of stores that were closing at 10 pm as opposed to 11 pm, but to give you a taste of it, the evidence that the Council presented was that only 12% of supermarkets operated by the two appellants in this case were trading until 11 pm.

WILLIAMS J:

In Auckland?

MR MCNAMARA:

In Auckland. Some 50% have their closing hour at 10 pm, so would be affected essentially by a one-hour reduction. Only 12% would be affected – would lose two hours of trading – of sale of liquor under the Council's proposal.

WILLIAMS J:

I guess the same point applies in the context of the evidence put forward by Mr Braggins in relation of Dr Hampson, Ms Hampson –

MR MCNAMARA:

Ms Natalie Hampson, yes.

WILLIAMS J:

Yes, well that tells you the number of outlets, didn't tell you what the throughput is.

MR MCNAMARA:

No, and the throughput was not provided by the supermarkets in evidence.

WILLIAMS J:

So if those 12% count for 50% of the liquor sales, that's a different picture.

MR MCNAMARA:

Yes, Sir, and it was open to the supermarkets to provide evidence about throughput, about the economic impact of curtailing sales from 9 pm to 11 pm, and that was not provided.

WILLIAMS J:

So there was no evidence about economic impact?

MR MCNAMARA:

Not quantified, Sir, no, there was not. There was impact at a general level about the percentage of supermarket sales that took place in the hours between 10 and 11. Actually, I have some specific submissions on this point –
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WILLIAMS J:

Nothing direct on how much it would hurt the operators?

MR MCNAMARA:

Correct, that's correct, Sir. Again, I do intend to address this point later on, but if you'd like to deal with it now we can.

WILLIAMS J:

No, you do it in the order you want it.

MR MCNAMARA:

Okay, so just continuing with the scheme of the act, section 43 and 45, through 45, are important. My friend, Mr Thain, is correct, this is one of two types of element that applies directly, the other being the one-way door provision which is the subject of section 50 but not relevant to this case. So you see there in 43(1)(b) the default hours for off-licence is seven to 11. 44, the permitted trading hours for premises without a relevant local alcohol policy, so this is why they are default. The hours are default because they apply in the absence of a policy, and that is where the Court of Appeal, and indeed myself, departs from her Honour Justice Duffy. And then 45 is the provision that Auckland Council seeks to be relevant, permitted trading hours for premises with a local alcohol policy. So once this local alcohol policy is in force and assuming the trading hour provision survives, the maximum trading hours for the premises are those stated in the local alcohol policy unless the licence has been issued subject to an even more restrictive provision.

So the distinction here is that, unlike other elements, the trading hour element applies directly, and so if we contrast this with section 105 that we looked at briefly earlier you see in section 105 that in deciding whether to issue a licence the licensing authority must consider 11 listed matters, the third listed matter is a relevant local alcohol policy, and it is for the Authority to decide or the committee to decide what weight it gives the local alcohol policy and, of course, this is ultimately what substantially influence ARLA's finding that the freeze and presumption element was not unreasonable in light of the object of the Act. Because whilst Auckland Council as a matter of policy hoped that there would be a freeze on the issue of new off-licences in the city centre and priority overlay areas, it accepted as a matter of law that it wasn't a directly applicable provision like the trading hours provision, and that ARLA – sorry, that the licensing authority – would decide ultimately what weight to give that strong policy statement and that ultimately a new off-licence could be issued within that two-year period if the licensing committee chose to do so, notwithstanding the Council's policy position stated in its plan, or by that stage operatively.

Now my friend, Mr Thain, submitted yesterday that the Court of Appeal failed to appreciate the distinction between trading hour provisions which applied

directly through section 45, which I took you to, and other elements of an LAP. He took you to section 65 of the Court of Appeal's judgment, which is a general discussion of how an LAP is implemented. In my submission there's no basis for concluding that the Court of Appeal failed to appreciate the difference between a trading hour element, which applies directly, and other elements.

WILLIAM YOUNG J:

I have a funny feeling that I thought they had expressly acknowledged the difference, but I might –

MR MCNAMARA:

Yes, I'm not sure if it was express but the invitation to conclude that ARLA failed to appreciate – that the Court of Appeal failed to appreciate that difference based on paragraph 65, and that's just, in my submission, not tenable.

So, I'd like to just go back to the remaining provisions about the LAPs in Subpart 2 of Part 2 of the Act. So, we start there with section 75. All these provisions are permissive. A territorial authority may have a policy in relation to the sale and supply of alcohol. It may apply to only part of its district, or district parts of its district, or apply differently premises for which different kinds of licences are held.

If we go through to section 76, a council may choose to adopt a single policy or combine with another territorial authority.

The content requirements there are set out in section 77, and that's the most prescriptive part of the Act. These are the only matters that may be included within a local alcohol policy, and that point is re-affirmed in subsection (3): "A local alcohol policy must not include policies on any matter not relating to licensing."

But the content of a control within any of those subject areas is not restricted. It's only restricted by the right of appeal. So if we go to section 81, we see that

right of appeal, with the sole appeal ground being, in section 81(4), that the element is "unreasonable in light of the object of the Act".

Then, the only other substantive constraint upon what an element may say is provided in section 94 if we scroll down, which states that: "A local alcohol policy must be consistent with this Act and the general law," and that's subject to section 3 which authorises a local alcohol policy to be more restrictive than the district plan. So, I'm in a classic example of inconsistency where the general law might be something a provision that was inconsistent with the New Zealand Bill of Rights Act.

But I don't think there's any suggestion here that this PLAP was inconsistent with the general law or another statute. We see here a broad power to, within the defined area set out in section 77, make elements that reflect community preference in relation to licensing matters with a check for unreasonableness being the right of appeal to ARLA.

WILLIAMS J:
What about section 78?

MR MCNAMARA:
Yes. Section 78, if we go back to that, is a provision that sets out mandatory relevant considerations for the territorial authority when producing a draft local alcohol policy and ensures what I would call a sound information base. So, it is a requirement to have regard to those matters listed there, and that goes to the point about the quality of local alcohol policies that was the subject of the Law Commission, but also a degree of consistency across the country by having these mandatory considerations that each local authority that chooses to develop a PLAP will have had regard to when developing it.

Now, my learned friend for Foodstuffs suggests that these requirements that are on a local authority, a territorial authority when producing a policy, and they apply, also, if we scroll down to section 79, at the stage of producing the

provisional policy, which is the iteration after the draft policy that goes out for consultation.

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My friend suggests that these are also mandatory relevant consideration for ARLA when considering an appeal against a specific element under section 81. Now in my submission that's not tenable, they're stated as being mandatory relevant considerations for the territorial authority. If they are mandatory considerations they must be implied mandatory considerations, we're in the CREEDNZ space, if I can put it that way, and it must be Parliament's intent, not that it's simply desirable on occasion for a decision-maker to look at these considerations but that they are mandatory, and even in my learned friend's submission, the written submission for Foodstuffs, there's a concession that some of those considerations will be more relevant than others, which begs the question how can they be mandatory if only some of them are, depending on the nature of the appeal, and I like to describe the process of a PLAP's development as a little like a funnel, whereby by the time we get an appeal all we have at issue are certain elements that are challenged on particular grounds, whether it's by the police or by a licence holder group or a community group, and that is the focus of ARLA's enquiry at that point, whether it's unreasonable on the evidence and submission advanced by the appellant.

COOPER J:

Do you say then that ARLA is just looking at individual elements? Doesn't it have to do so in the context of all the elements of the plan?

MR MCNAMARA:

What is appealed, and the ground of the right of appeal, relates to an element.

COOPER J:

Yes.

MR MCNAMARA:

I don't say that ARLA would for example avoid consideration of how an element fits within the wider scheme of the plan.

COOPER J:

Well, it doesn't have to be concerned about what is the consequence if this element is taken out from the scheme as a whole, the plan as a whole.

MR MCNAMARA:

It does.

COOPER J:

I can't see how you can consider an individual element without placing it in terms of the whole policy.

MR MCNAMARA:

No, and I'm not suggesting that, Sir. All I'm saying is that the way the appeal ground is, the appeal right is confirmed, is you have to appeal elements, you can't appeal the PLAP as a whole, unless you choose to appeal every element.

COOPER J:

The question is though that is reached is whether the element is unreasonable in the light of the object of the Act, and surely that must depend upon an overview of the way the element plays its part in the whole scheme?

MR MCNAMARA:

Indeed. And so if we think about the provisions that are at issue here, the off-licence trading hour provision, the appeals against the PLAP were all heard together over a four-week period by ARLA. So in addition to the appeals against off-licences we have the appeals against on-licence trading hours in which the appellants against those provisions were largely that the police and health authorities, who sought more restrictive closing hours, than were provided for in the local alcohol policy. So if you've read that part of the policy, there's provision for 4 pm closing, essentially the default hour provision, of off-licences in the city centre. And whilst there was generalised evidence about

the link between availability and harm in relation to both on- and off-licences, that was not taken forward as the basis for reducing on-licence trading in the CBD, because of what is referred to as the "closing time spike", if you've read that part of the decision of ARLA, which is the phenomenon of everybody leaving the same time, and that's what would happen if you had that earlier mandatory closing time of 3 pm. Now that was contested by the police. Ultimately, that appeal was unsuccessful and the trading hour for on-licences was only reduced to 3 pm.

Now to your Honour's question, Sir, a lot of the harm that was allegedly attributed to on-licences was, in fact, on the evidence, found to be associated with off-licence alcohol through the practices of pre-loading and side-loading that were the particular focus of the trading hour element because it was risky purchasing after 9 pm. That was the primary target of the restriction to 9 pm in clause 4.3.1.

So that's an example, Sir, of, I guess, looking at the pattern of alcohol-related harm but considering one element by reference to what you're doing elsewhere in policy.

COOPER J:

So is this proposition correct, that in determining whether an element is unreasonable under section 83(2) the Authority must consider the element in the context of the policy as a whole?

MR MCNAMARA:

Yes, I don't object to that, Sir, at all.

COOPER J:

Well, that's good, because I would have thought that you would want to say that, Mr McNamara.

MR MCNAMARA:

No. So that's all I have – no, I've just one further point. There were observations from the Court yesterday that the scheme of this part of the Act was that a narrow margin of intervention had been conferred through various indicators. One was the use of the term "unreasonable" in the test in section 81. I respectfully agree with that but would add that the test is, of course, and "unreasonable in light of the object of the Act". I know the focus yesterday was around the parameters of "unreasonableness" but I think it must always be remembered that Parliament chose not to make that test unreasonable simpliciter, for example, as that term appears in section 17 of the Bylaws Act and that the reference to "in light of the object of the Act" essentially makes the test harder to meet for somebody is opposing a provision that seeks to reduce alcohol-related harm.

Secondly, in relation to the narrow margin for intervention, if we return to section 83(2) for a moment, we see what ARLA – sorry, I say "ARLA" and it's referred to as the licensing authority – but ARLA must do when it is satisfied that the element is unreasonable in light of the object of the Act. It must ask the territorial authority concerned to reconsider the element, and I respectfully agree with the point made that this is unusual in that we have a specialist decision-maker who in other contexts, like a licence under section 105, will determine the contents of the decision, will actually make the decision. Here all that decision-maker does is make a finding of unreasonableness or not and once it does that, or does find unreasonableness, it sends it back to the local authority, and it's not like an Environment Court appeal whereby it essentially on a de novo basis can completely revisit the decision made at first instance by the local authority.

ELLEN FRANCE J:

And do you see that as a recognition of community preference?

MR MCNAMARA:

I do and I think that's possibly a good time to go to what Parliament said on that very point. So if we go to – this is the speech by her Honour, Judith Collins, who at the time was the –

COOPER J:

Well, not quite.

WILLIAMS J:

Don't think she got that job.

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COOPER J:

Not quite.

MR MCNAMARA:

Sorry. The honourable Judith Collins, I'm sorry. If we just scroll down that page a little. Just a bit more, sorry. This is another important measure. This is the most pertinent discussion about the attempts to increase the level of community involvement. "Under these policies" – she's referring to local alcohol policies – "communities will be able to restrict or extend maximum trading hours," so the direct application that we've just been talking to. She possibly somewhat overstates the effect of a local alcohol policy here because it's mediated by section 105, but she says they will "be able to limit the location of licenced premises near certain facilities, such as schools, and specify whether further licences should be issued." Certainly, they're able to issue policies on those matters. Then the statement concludes: "It is very important that we allow communities to decide what is best for them, especially given the aim of increasing community input and control over licensing."

If we actually just scroll up a little bit, back to the previous page, we see part of the problem to be addressed. The first part of that paragraph talks about the situation now: "Right now, we can buy alcohol in supermarkets, bottle stores, clubs…sometimes 24 hours a day. This is despite clear evidence showing a

link between alcohol availability and harm." So what's been somewhat pejoratively described as the "availability" theory in the submissions of my friends was accepted by Parliament as, you know, a founding premise for departing from a regime which allowed for 24-hour licensing and introducing national default hours.

But then on the community input point, we see that covered in the second paragraph: "Communities have been telling us that they are concerned about the proliferation of stores selling alcohol in their areas. At present, it is very difficult to successfully object to a licence application…This can be frustrating and disheartening for communities concerned about alcohol-related harm in their areas." So, in some senses, local alcohol policies were a way in which communities could have input without that burden being put on individuals.

Now, probably all I wish to say about the scheme of the Act itself, so I'm now at section 3 –

COOPER J:
Can I just ask one brief question?

MR MCNAMARA:
Yes, Sir.

COOPER J:
Section 3 is a statement of purpose and section 4, the object. In the machinery provisions of the Act, the continual reference is to the object of the Act. Does section 3 have an ongoing role?

MR MCNAMARA:
No, Sir, and I think that is important. There was a choice, and you could, in contrasting section 3 and section 4, say that section 3 is more of a machinery provision, and section 4 is more of a high-level policy provision, or a statement of what is trying to be achieved.

WILLIAM YOUNG J:

Well, what does section 3 do?

MR MCNAMARA:

Well, it almost explains what the legislation is doing without necessarily defining the outcomes, so it's putting in place a new system of control and it's reforming, but it's putting it – I'm focusing on (b) here, reforming the law so that its effect and administration will achieve the object of the Act, so what we – the results that we're trying to achieve at a societal level are set out in section 4.

COOPER J:

But section 3 is the one that uses the word "reasonable". So you would think that it would live on and affect everything.

MR MCNAMARA:

Yes, one might think that, and yet a choice has been made, Sir, that in the appeal test it's unreasonable in light of the object of the Act. So the touchstone is the object, not the purpose.

WILLIAMS J:

But, I mean, really? The fact that it's unreasonable is clearly the flip side of the reasonable purpose provision, because section 3 takes the trouble to describe the system that has been created. It's a reasonable system that achieves the things set out in section 4 which is, it seems to me, precisely why the only appeal ground is it's unreasonable.

COOPER J:

So the sections sort of hold hands on an ongoing basis, don't they?

MR MCNAMARA:

I think I would…

O'REGAN J:

Well, section 81 doesn't refer to section 3 though.

MR MCNAMARA:

No, and I would beware, Sir, of watering down.

WILLIAMS J:

Why does that water it down?

MR MCNAMARA:

Because the test has been stated as unreasonable in light of the object of the Act. Now if we take that as a single proposition, if we then say that there's to be read into section 81 a requirement only that the system or the local alcohol policy be reasonable, we risk losing the focus on the harm minimisation objective.

WILLIAMS J:

Only? Why only?

MR MCNAMARA:

Sir, I'm not sure I follow.

WILLIAMS J:

Well, you say that the, what you just said was if the test, I think you said was "need only be reasonable", is that what you were saying?

MR MCNAMARA:

No, I…

WILLIAMS J:

Then it loses its minimisation bite.

MR MCNAMARA:

No, I was saying that Parliament must be presumed to have chosen in section 81 what the – when it was decided to formulate the test, would it be unreasonable, would it be unreasonable in light of another provision?

COOPER J:

But if – Parliament wanted a system of control which would have two principle characteristics. One of them was that it would be reasonable. It can't…

O'REGAN J:

But that's the statutory control, not the LAP control.

COOPER J:

But the LAP, I would have thought, was a crucial part of the system of control.

MR MCNAMARA:

Yes, and I think it's implicit in, if we stand back it's implicit. But part of the reasonable system of control is that we will have LAPs that don't have unreasonable elements in it, if I can put it that way.

COOPER J:

Well, yes…

WILLIAMS J:

Yes.

COOPER J:

Okay, well, that's the point isn't it?

MR MCNAMARA:

And that's why we have this check, right?

COOPER J:

Yes.

MR MCNAMARA:

But equally we also have to be realistic that not every LAP goes to our line on appeal. And so when we think about how the Court of Appeal characterised this, they said that the LAP is an expression of community preference and on that basis it doesn't need to be evidence-based. Now if it's not evidence-based and it's not appealed, it just survives.

WILLIAMS J:

Well, but that's true across the entire system of law, isn't it?

MR MCNAMARA:

Indeed.

WILLIAMS J:

I mean, where does that get you? ARLA is clearly the police of reasonableness as well as minimisation, et cetera.

MR MCNAMARA:

Well, it does. But, Sir, I go back to my point about the lack of prescription within Part 2 about what an element must be. It can't be inconsistent with the Act and it must be consistent with the general law. It must –

WILLIAMS J:

So there's no reasonableness requirement in the LAP provisions?

MR MCNAMARA:

No, no, there is not. It is only ARLA that acts as a safety next in the event that there's an appeal. Now again, I don't think – I mean, all functions carried out under the Act should be having, all those exercising functions under the Act should be having regard to the purpose and objects. So I'm certainly not suggesting some permission for local authorities to make LAPs that are somehow incompatible with section 3 and the purpose of having a reasonable system of control, I'm simply saying that we run a danger when we read into section 81 a reasonableness requirement when what was expressed was unreasonable in light of the object of the Act, and that is sufficient to address the concerns that have been raised by my friends and, as I say, I don't stand here saying that proportionality is not a relevant consideration.

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COOPER J:

Do you accept that if a council is going to have one of these policies, that will be a vital mechanism by which the sale of alcohol is controlled under this Act?

MR MCNAMARA:

Yes, I do.

COOPER J:

Well, then I would have thought it would have to be reasonable.

MR MCNAMARA:

Yes, and, of course, to that point, Sir, if it's unreasonable we know that the right of judicial review is preserved.

WILLIAM YOUNG J:

Is being reasonable the same as being not unreasonable?

MR MCNAMARA:

I think the only point there, Sir, is that, as you'll know, and you'll be familiar with the *Lovelock* decision which…

COOPER J:

Is it about rates?

MR MCNAMARA:

Yes, but it was Justice Thomas who gave quite a detailed explanation of the different types of reasonableness and the difference between Bylaws Act unreasonableness and *Wednesbury* unreasonableness. Now Bylaws Act unreasonableness, this is the term in section 17, has developed its own set of principles which are referred to somewhat inaptly as the proportionality principles in ARLA's decision in this case and in the Court of Appeal's decision, and those, I describe them in my written submissions as indicia of unreasonableness, now those are quite different from the approach to unreasonableness in an administrative law sense, and so it is possible that

Parliament, when using "unreasonableness" as the basis for the appeal ground rather than conferring a general right of appeal without an appeal ground stated in a particular way, it is possible that Parliament was expecting some kind of similar approach to the approach to Bylaws Act unreasonableness. But we don't know. Certainly, that's how the Authority proceeded from the *Tasman* decision onwards.

COOPER J:

I accept that "reasonableness" and "unreasonableness", they've shades of meaning and they mean different things in different contexts. What I just find a bit puzzling is that you want to read the concept out of the local policy. You say, well, it doesn't have to be because, for various reasons, doesn't have to be reasonable. But anyway, we've thrashed this out.

O'REGAN J:

It doesn't matter, does it? We're only dealing with one that has been subject to an appeal to ARLA.

COOPER J:

Well, I think it matters in terms of what the statute – how it's to be construed, that's all.

MR MCNAMARA:

Sir, I think I should clarify our position on this. I say it should be reasonable but it doesn't become – I mean it's entitled to the presumption of validity like any other document and it doesn't become invalid or an element – it doesn't become invalid absent being set aside on judicial review or a particular element being found unreasonable in light of the object of the Act in the event of an appeal under section 81.

WILLIAMS J:

You're walking yourself to the edge of analytical anxiety without any cause.

MR MCNAMARA:

I'll move on.

WILLIAMS J:

But it does underscore this point, doesn't it, that the battle ground here is what "reasonable" means?

O'REGAN J:

Well, no, I don't think it is. It's unreasonable in light of the object of the Act.

MR MCNAMARA:

Well, yes, it is and that's in many –

WILLIAMS J:

That's the point. What is "reasonable" or "unreasonable" in light of the object of the Act?

MR MCNAMARA:

And in many ways that's appropriate because this is the country's highest court. However, it's not the basis upon which the statements of claim were filed and they are not the appeal grounds, and so that's why I return to my earlier point, that the closest – and I can perhaps touch on this now because I've probably got time in the few minutes we have before 11.30. The closest we get, we don't have in either statement of claim, and I invite you to turn to those, if we turn first to the Foodstuffs statement of claim.

O'REGAN J:

Just tell us first what they don't – what are you saying they –

MR MCNAMARA:

Well, what they don't do is say that there was an error in the application of section 81 or section 83. If we think about, the Foodstuffs claim is divided up into three causes of action. The first cause of action is a review of the LIR decision which is the local impact element which is not before this Court.

The second cause of action is review of the freeze and presumption decision. This is at paragraph 32. If we go to paragraph 33, it's alleged that that was erroneous for two reasons. One, because it relied on and incorporated the LIR elements, and that goes to the question of severability, which I'll address later on this morning, and simply that it's no problem to delete a reference to local impact reports from that element. But it's also alleged that the freeze and presumption are otherwise ultra vires presumably outside section 77(1)(b) as a policy on the location of premises. That argument was rejected by the Court of Appeal.

The third cause of action is the one that comes closest to an allegation, that there was an error in relation to the test, and this is on the hours point, and at 36.1, it's alleged that ARLA erred by considering that Council was entitled to impose the policy to "'test…[a] possibility'". You'll recall this is paragraph 146 of ARLA's decision which is the concluding paragraph in relation to the closing hour aspect of the clause. Wrongly considered the precautionary principle. Again, 36.3, "failed to apply the relevant legal test in accordance with the law as it did not consider" distinct or different communities.

Now, I'm not sure how that's a failure to apply the correct legal test. I think from an analysis of the decision, it's clear that ARLA did apply the correct legal test. Whether it failed to consider communities or not is a different question, or whether it was under a legal obligation to do so is a different question.

WILLIAMS J:
So, is your point the reasonableness or unreasonableness standard was never put in issue?

MR MCNAMARA:
Correct.

WILLIAMS J:

Do you get the impression from submissions from both counsel from the appellants that they're arguing that reasonableness includes a more merits-based review than you would have?

MR MCNAMARA:

Yes, and –

WILLIAMS J:

Isn't that implicit in these grounds?

MR MCNAMARA:

Well, we're arguing reasonableness here because of essentially the approach that the Court of Appeal took and that the question mark that was raised, I think, and this Court was, with respect, right to ask, what was meant through those references to real and appreciable possibility, and in my submissions, I deal with that. They're a response to issues of proof and certainty, precautionary principle, and the like.

Yet, what we don't see here is an allegation, or sorry, a pleading that ARLA did in its approach to the unreasonableness test, and that's important, and if we do the similar scrutiny of Woolworths' statement of claim, the most relevant part of the statement of claim is at section 6, that the error of law is characterised in the heading as "failure to correctly interpret and apply sections 3, 4 and sub-part 2" without greater specificity, but in (a) through to (f) of 6.1, the first four grounds all relate to the precautionary principle, and then (e) and (e) [*sic*] were the new grounds that were added through the granting of leave during the High Court hearing by her Honour Justice Duffy, so the failure to address the inclusion of supermarkets and groceries in the same manner as others, whether that was unreasonable, and then failure to provide reasons.

1130

Then, just so that you can see, the second error of law relates to LIRs. Third error of law, section 8 relates to discretionary conditions, so that's no longer at issue, and then the fourth error of law relates to the rebuttable

presumption, and the submission there is that it was ultra vires section 77, and if we go over, also at odds with sections 105 and 106.

So, we can see here that this hasn't been a case in which the grounds of review at first instance were that ARLA erred in its application of the section 81 test. The closest we get is that it's substituted the precautionary principle for that test.

WILLIAM YOUNG J:

But there's also a complaint, isn't there, that section 3 wasn't taken into account?

MR MCNAMARA:

Yes. Yes, there is, but it's not particularised in any way. You see the particulars there in 6.1, and it's not at all clear what the error was in relation to section 3. I'm at half past 11, Sir, is this a suitable time to break?

O'REGAN J:

How are you going time-wise?

MR MCNAMARA:

Pretty well, I think. I'm in your hands. I had anticipated going slightly after lunch, but…

O'REGAN J:

Will that leave you enough time, Mr La Hood?

MR LA HOOD:

We had agreed a reasonably short period of time for me given I'm only an intervener, so I'll take what I can get.

O'REGAN J:

All right, we'll take the adjournment now.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.48 AM

O'REGAN J:

Go ahead, Mr McNamara.

MR MCNAMARA:

Thank you, your Honour. I was at section 3 of the road map, so I'll now just discuss, briefly, the PLAPs preparation and content. The PLAP reflects not only the Council's research into alcohol-related harm, but also Aucklanders' democratic preferences expressed through almost 2,700 public submissions and 108 submissions in person who appeared before the DLAP hearing committee, and ultimately, the decision of, in answer to Justice Cooper's question yesterday, a committee of the whole council, it was the full council, differently constituted, which adopted the PLAP on the 13th of May 2015.

The Council, in accordance with the guidance that had been issued by ARLA in its earlier decisions on PLAP appeals, issued an explanatory document summarising its rationale for the PLAP elements, and if we could turn to that and the discussion of the two elements that are at issue here, so the freeze and presumption first and then the off-licence trading hour.

WILLIAM YOUNG J:

So, what document? What number? Is it just 103.0437?

MR MCNAMARA:

0531, Sir.

WILLIAM YOUNG J:

Sorry, the whole number?

MR MCNAMARA:

I'm at page 103.0531.

WILLIAM YOUNG J:

Okay, thank you.

MR MCNAMARA:

Now, this is the part of the – it goes through the PLAP element by element, but this is the explanation of the freeze and presumption element which is one of the two that's still live. You'll see when I take you through this briefly that there are two types of explanation. For each element, there's the evidence or the research that sits behind the element, and then there's a summation of the local preference, if I can put it that way.

So, first, we see that the freeze and where it's meant to apply to city centre and the priority overlay, and then the rebuttable presumption which applies in neighbourhood centres. So, 57: "…the council aims to address high levels of alcohol-related harm whilst also recognising that there may be limited circumstances where a new off-licence is acceptable."

"Many submitters raised concerns about the proliferation of off-licences," so that democratic element, then the research base: "Australian research shows that an additional off-licence can be a significant predictor of area-level violent crime and violence on residential premises…is more likely to result in an increase in assaults at licenced premises than an additional on-licence. Accordingly, the council considers that restricting…is likely to limit the incidence of alcohol-related harm."

Then if we scroll down, discussion of the priority overlay and the city centre as areas with higher levels of alcohol-related harm, I don't need to dwell on that, except at 65. This is the point that I discussed with Justice Cooper: "Submitters from the on-licence industry also considered the consumption of cheap and readily available…alcohol or 'pre-loading' to be a major contributor to problems experienced at their establishments." So, it's that the picture is a little bit more complex than you might think when you think about alcohol-related harm occurring in the city centre outside a licensed bar or night club.

The neighbourhood centres, I just want to talk about this because my friend Mr Braggins yesterday talked about neighbourhood centres being located throughout the city, that the neighbourhood centre zone, if I can describe it as, it's for your local bank of shops, so it might have your bakery and your Four Square or if you're a Foodstuffs customer or, you know, your laundromat. But you can see that the rationale is twofold. I'm at paragraph 68 here: "…supported by evidence that the presence of alcohol retailers within walking distance, particularly…predominantly residential areas, increases the availability of alcohol to populations who are less mobile and are generally more at risk of alcohol-related harm, for example, minors or people living in areas of high deprivation."

So, obviously, there are minors and people who are more at risk of alcohol-related harm by virtue of alcohol dependency or anything else in high and low deprivation areas. It's not just about deprivation such that it should've been limited to the priority overlay which, you can see, if you want to go back to it, was formulated by reference to deprivation but also other indicators of greater vulnerability to alcohol-related harm.

Then, as I mentioned before, this community preference theme: "Submitters were particularly supportive of the rebuttable presumption in its application to Neighbourhood Centres."

If we then turn to the off-licence trading hour discussion, now, this starts at 75. At 75, there's a general discussion of the rationale for trading hours, and you can see there the reference to the mandatory section 78 considerations that had regard to. At 77 we have a general statement applicable across both on and off-licence types. "Trading hour reductions, both overseas and in Auckland, have corresponded with significant reductions in alcohol-related harm, providing empirical evidence in support."

Then in relation to off-licences specifically, the purpose, or what the Council was trying to do. For the morning it was trying to limit young persons' exposure to alcohol. Then in the evening to legal age users at time when prior

consumption of alcohol is more likely to be influencing purchasing choices, and there is strong evidence of alcohol-related harm occurring, that is late in the evening. Then this closing time is discussed. Paragraph 81, you'll recognise the conclusion there because it was, we've talked about this yesterday, it was cited in the discussion of ARLA by ARLA of the element, a recent study shows that those purchasing an off-licence after 10 pm are twice as likely to drink heavily than those purchasing before.

This is an important point. "Evidence indicates that variations in off-licence hours is likely to lead to purchasers travelling to get take-away alcohol, so regionally consistent hours are more effective at limiting alcohol-related harm." It's interesting because if you recall the *Buzz & Beer* – sorry, the *My Noodle* case that we were looking at yesterday, my learned friend Ms Cooper took us to the passage that was at 72 to 74 of that decision where the Court of Appeal in that case said that the policy in that case to reduce trading hours to 21 hours a day, logically had to be a blanket policy otherwise people would just move to the establishment that was open. So this is the nature of off-licence alcohol that can be purchased in one place and consumed somewhere else. You can't obviously move an on-licence but you can buy your off-licence alcohol in the suburbs for example and consume it in the CBD.

If we go across the page into 82 and 83. So again this community preference point. "The council's decision to restrict hours was also informed by feedback from submitters, who generally considered that off-licence hours that are more restrictive… are an improvement and will help to address 'pre-loading', 'side-loading', and violence in the home, and that they will have little impact on organised shoppers."

Now this is the point about purchase shifting, and obviously an organised shopper who had done their alcohol purchasing at 10 pm, and finds that the store is closed, can do their alcohol purchasing from the supermarket at another time, whereas the spontaneous purchaser, if I can call it that, does not have that choice.

83: “Submitters strongly supported all types of off-licences having the same maximum hours.” So by “all off-licences we are talking about supermarkets, grocery and bottle stores. “A 9 pm close for off-licences received more support from submitters than any other… including the Draft LAP proposal of 10 pm…”

Then there was a rejection of the submission for an even later opening time than nine. So as I said the two strands coming through here are what I might call the evidential foundation, or the research that suggested to the Council that the elements may have some effectiveness in reducing alcohol-related harm, and what I might call the democratic strand, which is what communities were saying.

WILLIAM YOUNG J:

What does the statute say about community preference?

MR MCNAMARA:

It doesn’t say anything explicit about community preference Sir. What it does, though, is require a local alcohol policy to go through the special consultative procedure through the DLAP going out for submission, and then at the end of that process, if the Council decides it wasn’t to continue, the DLAP becomes the PLAP. So it –

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WILLIAM YOUNG J:

So you say that the consultative process that’s provided for in the statute read in light of the legislative history indicates that community preference is a factor?

MR MCNAMARA:

Yes, it does, but also the very limited role that ARLA has, which is that if it finds the element to be unreasonable, it sends it back to the local authority to make the decision. You know, ARLA does not decide the PLAP at all except where an element falls foul of the test in section 81 and 83, and that is important. Again, the contrast with the Environment Court is striking.

So, if we now just quickly go to the PLAP itself, just to see where those two elements appear, so if we start at 3.1 – oh, sorry, 3.2.1. So, this is the effect of the freeze. Where the freeze applies, now that's in the priority overlay and the city centre. The Council's policy position, so it's no more than a policy position, is that "the DLC and ARLA should refuse to issue any new off-licences for the first 24 months".

Then if we go over the page, this is the rebuttable presumption. This is, sorry, 3.3.1 and 2: "The Presumption is that applications…should be refused in" the three clauses, so that's referencing the city centre, priority overlay, and neighbourhood centres. "This Presumption may be rebutted by the applicant." Now, how do we decide whether the presumption is rebutted? 3.3.3: "In deciding whether the Presumption is rebutted…DLC and ARLA should have regard to: (a) the Local Impacts Report and (b) information provided, and representations made, by the applicant."

Now I'm going to pause on that, because my friend Mr Thain submits that because the local impacts report was found by her Honour Justice Duffy to be ultra vires and the Council has not appealed that element, the Council's intention is to delete all references to local impact reports because they're ultra vires, and ultra vires –

WILLIAM YOUNG J:
Just put a red line through it.

MR MCNAMARA:
– necessarily means that they are unreasonable in light of the object of the Act. I think that's clear. So, the Council intends to put a line through it, and so clause 3.3.3 will read on the re-submitted PLAP: "The DLC and ARLA should have regard to", run straight to (b), "information provided, and representations made, by the applicant".

Now, my friend says that's an amendment, so clause 3.3.3, it gives rise to a fresh appeal right, and we should all have arguments now about whether

clause 3.3.3 is unreasonable in light of the object of the Act given the deletion of the LIR element.

In my submission, you can see that applying normal principles of severability in the *Alexander* case and the like, that clause functions perfectly well without a reference –

WILLIAM YOUNG J:
What, because of 3.3.4?

MR MCNAMARA:
Yes, I mean 3.3.4 assists –

WILLIAM YOUNG J:
So, I mean, obviously "the DLC and ARLA should have regard to information provided, and representations made, by the applicant." Is there anything else they should have regard to?

MR MCNAMARA:
Well, as 3.3.4 says, there is this reporting obligation on the Medical Officer of Health and the police on licence applications, and so that's explanatory, but LIRs, and I know we haven't focused on those, but they were designed to increase the quality of information before the committee and provide a level of consistency to decision-making by having a, you know, a lot of that relevant background data, presence of other licences, socio-economic status of the catchment, et cetera, et cetera. But that was found to be unreasonable and it was not appealed and –

WILLIAM YOUNG J:
But it was found to be ultra vires was it?

MR MCNAMARA:
Yes, ultra vires and, yes, sorry, it was found to be ultra vires.

O'REGAN J:

And therefore unreasonable.

MR MCNAMARA:

And therefore unreasonable, but that was a finding made in the High Court. Now again my learned friend makes the point well only the, only ARLA can direct that a local authority reconsider an element. That's the effect of section 86.

WILLIAM YOUNG J:

Well you say that it's been held to be ultra vires then the local authority just acts on that.

MR MCNAMARA:

That's right.

WILLIAM YOUNG J:

And if it's severable it's great, if it's not severable then the whole thing falls over.

MR MCNAMARA:

That's right, and if this has to go back to ARLA, which in my submission it doesn't, but if it has to then it should be dealt with on the papers and what we're dealing with is the deletion of an element but it's not, in my submission, tenable to say that there's a fresh appeal on clause 3.3.3, because the element is being amended.

COOPER J:

One of the reasons it's workable, as you say, is because if there were an application the statutory provisions would apply as to the assessment of an application, wouldn't they?

MR MCNAMARA:

Indeed, and look the most important –

COOPER J:

So 3(b) left on its own you might say can function perfectly well because all, they just apply the statutory criteria.

MR MCNAMARA:

Indeed and –

WILLIAMS J:

And the statutory participation process.

COOPER J:

Yes.

MR MCNAMARA:

Yes.

WILLIAMS J:

Because there's a wider objection right than just, you know, there's a wider participation right than just the applicant.

MR MCNAMARA:

Yes but –

COOPER J:

So this would be section 105 would it?

MR MCNAMARA:

It would be Sir, and one of the most important things is that if we have a supermarket applicant for a licence, for example, they will seek to rebut the presumption by saying, well here are the other good things that we do. We provide groceries and we provide convenience. We don't just sell alcohol. So it's not like another applicant for an off-licence who is only providing alcohol to this community, we are providing alcohol with this licence, but we're also providing consumer goods and this is a benefit to the community. So that may be – and we have, you know, we're a responsible operator and we have these processes in place and everything else. So if you recall the relevant part of

ARLA's judgment, Progressive's, as it was then, principal witness accepted that there was a more than 50% chance of the presumption being rebutted for supermarkets on account of the way they run their operations.

So that was a point I was intending to cover at the very end in relation to relief. The way that the Court of Appeal addressed that point was, and this is at paragraph 123 of its decision, if we just go to that very quickly, was that it's really a question of judgement where – and a question of fact, judgement of degree as to where an element starts and stops, and so when you're deleting the LIR element you can delete a clause that sets out the element but you can also delete the cross-reference to it in clause 3.3.3, and you know with respect I think it is somewhat opportunistic to suggest that there should be a fresh appeal given the concern about continual cycles of appeals, and this of course in the context of an existing appeal on the resubmitted trading hour clause in circumstances where the resubmitted clause, and if we go back to the local alcohol policy which I was taking you through, this is clause 4.3.1, so this is the policy as it stood when the PLAP was under appeal.

Now in light of the High Court's – sorry, in light of the ARLA decision that the morning restriction of 9 am was unreasonable in light of the object of the Act. the Council promptly amended the clause so that the opening hour was 7 am, which you'll recall is the default opening hour in section 43.
1210

It retained 9 pm because of ARLA's finding that the closing hour was not unreasonable in light of the object of the Act. However, it was bound by ARLA's finding that that the clause – that the element as a whole was unreasonable on account of the morning 9 am element and that the morning and evening elements could not be severed from one another.

WILLIAMS J:
What was the point in doing that? I'm curious about how "element" is defined.

MR MCNAMARA:

Yes, and it's not defined. Sir, I think there's a logic in having, if we're defining a trading period or trading hours, there's obviously a clear logic in defining the start and the end of it. In hindsight, had there been two clauses, one of which said the default opening hour is 9 am, the default closing hour is 9 pm, maybe ARLA would have found them to be severable, and we wouldn't have been in this problem. However –

WILLIAM YOUNG J:

It could've found it severable anyway, frankly.

MR MCNAMARA:

Sorry?

WILLIAM YOUNG J:

I thought it would've been perfectly open to ARLA to say there are two elements in the closing hours, one a 9 am start, and the other a 9 pm close.

MR MCNAMARA:

Indeed. Because the Council was largely successful before ARLA in respect of the appeals and really wanted to move on, it didn't appeal to the High Court as it was entitled to do on that aspect of ARLA's decision. It just wanted to move on. However, the consequence is that we now have, notwithstanding the finding that the 9 pm closing hour was not unreasonable in light of the object of the Act, that matter being revisited on account of 9 pm still being in the resubmitted element that has been amended only by the opening hour being taken back from 9 am to 7 am.

COOPER J:

Is there an authority which discusses what an element is?

MR MCNAMARA:

Not that I'm –

WILLIAM YOUNG J:

Just briefly, in the Court of Appeal judgment at 122, around there, discussing that the element – the point we were just dealing with earlier.

O'REGAN J:

Just says it's a matter of judgement and agree, wasn't it? Very helpful.

MR MCNAMARA:

That's right, so it's at 123, it's a matter of judgement, and obviously that judgement went against the Council at the ARLA level because we were anticipating issues about what would be the subject of any – if we were successful on one aspect on the closing hour and not the opening, or vice versa.

So, with that, I'd like to quickly go to the ARLA decision. If we start just on this page, I dwell here for a moment because you can see that there were seven or so appellants: Redwood, who is the brothel owner who also brought judicial review proceedings, the police, the two supermarkets, Super Liquor, so a major bottle store retailer, a national chain, another hotel group which ultimately exited, and the Takapuna Residents Group. A number of interested parties there, they're called section 205 parties, but under that Act, they have the right to appear and call evidence, including industry groups, Hospitality New Zealand and notably the Health Promotion Agency and Otara Gambling and Alcohol Action Group, so significant players there to Alcohol Healthwatch.

On the next page, sorry, further there, you can see that the appeals took over a four-week period with appearances from a large number of parties.

So, just quickly, the decisions on the elements at issue, on the freeze and presumption, that part of the decision starts at 103, and the way – obviously, the decision is somewhat abbreviated in its discussion and reasoning because it had to deal with all the appeals from all sides, so the on-licence elements, the off-licence elements, those who were seeking more restrictive controls, those who were seeking less restrictive controls. Here we're dealing with the freeze and presumption and the way that the decision on each element is written follows a pattern. So it starts with, at 103, an explanation of what the element

is and what it tries to achieve, and then what follows from 104 through to 113 is setting out the competing arguments. So the arguments first for the appellants essentially a vires argument – sorry, if we just dwell further up the page there at 105. Primarily a vires argument being outside the scope of section 77(1)(d) but also concerns as to its application. Concern that, in fact, in 106 on-licences are, in fact, equal if not greater contributors to alcohol-related harm and the submission – oh. If we just go on the economic impacts, the effect on inconsistency with the unitary plan, and then if we continue scrolling down the Council's argument. It is, if we dwell at 112 and 113 for a moment, the Council's submission was that it was likely to minimise alcohol-related harm given the correlation between off-licence density and alcohol-related harm. The basis for identifying the priority overlay and the neighbourhood centres, and the Council submitting that there was a sufficient evidential basis to invoke the precautionary principle.

So I guess for your information this is the second part of the judgment in which the precautionary principle is referred to. The first you may recall was the general discussion of the precautionary principle around paragraph 40 when the Court was discussing the previous jurisprudence that had developed through ARLA decisions about the test and how it applied, and the ability for councils to rely on the precautionary principle. This was the second reference to a precautionary principle at paragraph 113.

Then if we go over the page the reasoning starts. So at 114 you see there why the Authority considered the element was not unreasonable, and it's because the freeze and presumption elements at best provide guidance. They do not operate automatically to prevent an off-licence being issued. That theme is taken up again at 116: "Because the local alcohol policy is but one of the matters in s 105 to which… the Authority must have regard… a licence may still be issued…"

So that clearly went to its weight and its impact and its burden on licence holders. The vires issue was dealt with quickly in 115. It was clearly felt to be within the scope of section 77(1)(d).

117, the ability to rebut the presumption based on information put forward by the applicant in the local impact report was noted, and again through 118 and 119 we see acceptance of evidence as to how the presumption would impact on the ability to service a growing Auckland with supermarkets, and the Council's evidence was cited there, but also if we go over the page, Mr Foster, who was Progressive now Woolworths primary planning witness, his acknowledgement that he would expect the presumption to be rebutted, given the type of supermarket that Progressive builds these days.

So the Authority was entitled to reach conclusions as to unreasonable, or not, based on the evidence it preferred and you can see from, if we just scroll down to the end, 122: "For these reasons, the Authority does not find that it has been established that the temporary freeze… is unreasonable in light of the object of the Act." A correct paraphrase of the test.

1220

There's on reliance on the precautionary principle, notwithstanding the Council's submission which you'll recall, I made that submission at 113, the Council said there was a basis for relying on the precautionary principle. There's no reliance on that in ARLA's reasons. It was primarily about the effect of the presumption, and that it would have limited actual weight because the DLC in ARLA could give it what weight they thought.

Now there's one other important point at 120 that I haven't yet touched on and that is the reference to the evidence of Dr Cameron from the University of Waikato. Now this is cited in the discussion of the neighbourhood, the application of the rebuttable presumption in the neighbourhood centres, but his evidence is cited for the proposition "that off-licence density is associated with higher levels of violent offences, sexual offences, and drug and alcohol offences," and it was Dr Cameron who was the primary witness opposing the evidence of Natalie Hampson that my friend Mr Braggins took you to yesterday. So if I may I'd like to take you to, just so that you can see that there was contrary evidence, which ARLA was entitled to prefer, on the relationship between

off-licence density and harm, and specifically on the relationship between supermarket density and harm, and the question of whether there was any meaningful difference between and additional supermarket, an additional other type of off-licence, in relation to alcohol-related harm.

So if we turn to Dr Cameron's evidence. So this is at 205.0968, and if we start at 2.1. Maybe just quickly, on the first page, Dr Cameron's qualifications, so he's Associate Professor of Economics at the University of Waikato. He's got an interest in public health, at 1.3 you can see his qualifications there. At 2.1 his conclusions, if we just focus on those four paragraphs: "My research overall demonstrates generally positive relationships between the number of alcohol outlets (or alcohol outlet density) and social harms. My most recent research," because there were three tranches of research discussed in this evidence "demonstrates that there is a general positive relationship between off-licence outlet and violence events."

Thirdly, and this is important: "In that most recent research, there is not a statistically significant difference between the relationships with violence (and most other measures) and the number of outlets for supermarkets and grocery stores, and for other off-licence outlets (predominantly bottle stores)."

Fourth: "There are substantial overlaps between the areas where the relationships between off-licence density and violence events are most substantial in Auckland, and the Priority Overlay Areas from the Provisional Local Alcohol Policy."

So if we go forward to 3.1. So if we just pause for a moment. This is the first tranche of research, this is research that was done in Manukau City, so only a part of what's now the supercity of greater Auckland, and at 3.6 the findings of the research is set out. "Off-licence density is related to population density." Unsurprising. Higher density is associated – hard to paraphrase that without reading – "(a higher population density is associated with higher density of off-licence outlets) and to relative deprivation (higher relative deprivation is associated with a higher density of off-licence outlets)."

"(c)…higher density of off-licence outlets had lower prices, longer operating hours and later weekend closing times. We considered that this was likely to be because of the higher degree of…competition," and: "(d) Off-licence density was significantly associated with higher levels of violent offences, sexual offences, and drug and alcohol offences."

Now, this is in Manukau City, and at this point, he's talking about off-licence. He's not, at this point, drawing distinctions between off-licence types. If we go to section 4 –

WILLIAMS J:
Would his map be the same colour as Ms Hampson's, in Manukau City?

MR MCNAMARA:
No, it wouldn't, Sir.

WILLIAMS J:
So they weren't contradictory on this point?

MR MCNAMARA:
Well, they were covering different areas for a start, so if we look at –

WILLIAMS J:
I thought Hampson did cover South Auckland.

MR MCNAMARA:
Oh, sorry, I'm recalling that –

MR MCNAMARA:
Oh, right, yes. Yes, there was evidence about off-licence density in South Auckland, too. My friend just took us to the central city maps yesterday, yes.

WILLIAMS J:

That's right. Did the experts agree or disagree about the nature of the correlation in Manukau City between off-licences and offending?

MR MCNAMARA:

I think the – it's hard to say, Sir. There wasn't caucusing of the type that we have in other fora. I think if I can speak from the Bar, the patterns are clearer in South Auckland. There's a more clear correlation between licence density in areas of lower deprivation, and the position is less clear outside South Auckland.

WILLIAMS J:

You mean higher –

MR MCNAMARA:

Sorry, South Auckland and other lower socio-economic areas. If I then just go to 5 because this is the third tranche of research, this is for the Health Promotion Agency in 2016. Now, this is national research. The research is for all of New Zealand, not confined to Manukau or Auckland, and if we just go up to 5.1 again: "We again estimated the relationships between…outlet density and social harms."

Then we go down to 5.4 – sorry, just one other thing, so what the inputs were. So, at 5.2, this is based on CARD data, so police-attended events. It's worth noting that a significant, if I can say, the significant portion of alcohol-related harm is not reported to police or it occurs in the home, doesn't necessarily make it into official statistics, but nevertheless, if we go to 5.4: "The relationship between supermarkets and grocery stores and the outcome variables are generally not statistically significantly different from the relationship between other off-licence outlets and the outcome variables. We merged both of these outlet types in the analysis."

So, I'm not asking the Court to prefer Dr Cameron's evidence to Ms Hampson's evidence. In the High Court, Dr Cameron's evidence was criticised, and in my submission, that was an impermissible straying into the merits of the case.

WILLIAM YOUNG J:

Where's the criticism in the High Court judgment?

1230

MR MCNAMARA:

Yes. So if we turn to that, it's around about 158, Sir. So, this is at 102.0314. "First, if ARLA was influenced by the suggested inferences that Auckland Council draws from Dr Cameron's evidence I would expect ARLA to refer to those inferences as part of its discussion… But it does not. ARLA simply refers to Dr Cameron's evidence in relation to Neighbourhood Centres and says it shows an association between," alcohol-related harm and that's the paragraph in, the passage at section 120 that I took you to and I'll let you just read on.

O'REGAN J:

It's not really criticising it, is it, it's just saying that it's better to see the way ARLA dealt with it rather than to go to the evidence itself?

MR MCNAMARA:

Yes. But you'll recall that ultimately the – well there's criticism later on Sir. So at the bottom of 159: "The arguments advanced by Auckland Council and the Medical Officer of Health rely on an overly superficial view of the evidence and relevant issues."

You'll recall that the error on which Foodstuffs and Woolworths succeeded in the High Court was a failure to give reasons, and so it was the, really the failure to sufficiently explain this point about the relationship between off-licence density and harm and whether there was relevant distinctions between different types of off-licences that was the cause of the problem.

WILLIAM YOUNG J:

Just pause there. Was there any evidence to the effect that there was a difference between different types of off-licence?

MR MCNAMARA:

That was put forward, yes, on behalf of Woolworths. It was not put before you yesterday that you should be making a decision as to which of these competing strands of evidence should be preferred.

WILLIAMS J:

That's a relief.

MR MCNAMARA:

That is a relief. The way it was put to you was that it cannot be assumed that ARLA would have found in the same way, given that there was evidence which would have allowed it to reach a different conclusion.

WILLIAM YOUNG J:

So did ARLA at any stage deal with whether there was a difference between off-licences?

MR MCNAMARA:

If we look at ARLA's discussion it doesn't specifically address the on versus off distinction. I think we can take it as read that it regarded the alcohol-related harm at issue as emanating from all off-licences types, and so –

WILLIAM YOUNG J:

So it doesn't distinguish between on and off-licences?

MR MCNAMARA:

Clearly, those are in different parts of the decision, because they were appealed element by element, and we have separate –

WILLIAM YOUNG J:

So is there anywhere where it says it accepts the evidence relates to all off-licences? Well I suppose that's implicit in the generality of its reasons, but does it go beyond that?

MR MCNAMARA:

Yes, so if we just go back to the ARLA decision.

COOPER J:

146 is it?

MR MCNAMARA:

That's the conclusion Sir. I was about, I'm glad you took me here Sir, because I was about to just break down how ARLA approached its decision in relation to the off-licence trading hours. So let's do this. It starts at 123 and starts with what the default is, the proposal, it was 4.3.1 at 125. Then the Foodstuffs arguments and Progressive arguments against the element at 127, and you can see there the argument that the element would "constitute a disproportionate or excessive response to perceived problems". So use of the proportionality test, or principle, if I can call it that, that's come out of the bylaws cases. The Council on the other hand says, this is the Council's response to the proportionality argument, that there is still a 12-hour trading period, which is sufficient, without having a significant economic impact on licence sales, so it doesn't amount to a disproportionate response to the perceived problem, and it's targeted at at-risk drinkers. So to the extent that a strand of proportionality is not interfering more than you need to, you know, targeting comes in at that point, and so this is suitably targeted at those less likely to be drinking responsibly.

COOPER J:

Where are you reading from?

MR MCNAMARA:

I'm at 127 Sir.

COOPER J:

And that's recording the Council's argument?

MR MCNAMARA:

That's right, that's the Council's argument. Then the arguments for Foodstuffs and Progressive are again set out through 128. So we have the geographic size argument that – this is in relation to off-licence hours that the area should not be treated as a single homogenous one. There should be differentiation as

there was for off-licence density where we had overlays. Then criticism of total consumption theory as being just a theory. 131, purchase shifting, and then the arguments for the police that it essentially should go further, and then this, I said that there were three references to the precautionary principle and this is the third one, so this is at 132, whereby it was submitted by the police that given the levels of alcohol-related harm it was appropriate for the Council to take a precautionary approach to hours.

So from 133 we then have the Court's reasons. So it starts with the Council's rationale, so the Council says restricting sales will prevent top-up purchases, excessive pre-loading and side-loading and corresponding levels of intoxication. So it starts from the public health evidence. So the evidence of Dr Connor about the relationship between trading hours and consumption and harm. The most concrete example that was cited was the 10 pm study about heavier drinkers. Then evidence from a range of health experts based in Auckland. So Dr Rainger, Dr Landman, Dr Chan, Dr Nair. Dr Rainger, this is at 136. This, in some ways, can be seen as proportionality analysis in the sense that it's looking at one side of the equation which is the problem. What is the problem and how great is it. Dr Rainger says that hospital presentations in Auckland, 15.4% of all of them were alcohol related compared to 8.3 nationally. So we can go to a different metric about alcohol-related offending in Auckland and say well maybe that's less than the national average, or its more. There are a number of different measures of alcohol-related harm.

But I go back to the object of the Act and it's reference to "minimising", which to me suggests that whether you're under or over the national average, doesn't much matter. We should be looking to minimise no matter where we sit. In any event, Dr Rainger continued as to what the most effective measures for minimising alcohol-related harm were, and he lists those in 136, and clearly some of those are available through a local alcohol policy, i.e. restricting the availability of alcohol either through hours of opening and number of retailers, whereas others, such as increasing price or increasing the purchasing age, are not.

Then we have specific evidence at 137, sorry, still there, about pre-loading and side-loading, which you'll recall the policy was particularly targeting because of its focus on the evening period.

1240

The 138, the ED evidence of Dr Nair showing that off-licences were the source of last drink at the late night hospital presentations in the majority of cases, and then 139, the evidence of Dr Clough, which was that "80% of the alcohol sold in Auckland is… from off-licence premises. That is, most alcohol consumed in Auckland is… from an unlicensed venue." The importance of that is that if you want to make a dent on alcohol-related harm, you have to recognise the contribution of off-licence alcohol to that.

There was also evidence about the importance of price. This isn't referred to in this part of the judgment, but the importance of price for at-risk groups, and this is at –

WILLIAM YOUNG J:

Just go back, sorry. Where in Natalie Hampson's evidence is there the contradiction to Dr Cameron's evidence, or Professor Cameron's evidence about – there's no difference between supermarkets and other off-licences?

MR MCNAMARA:

Yes. I'm grateful to my friend. It may be that it's most appropriately addressed after lunch or in reply.

WILLIAM YOUNG J:

Okay, thank you.

MR MCNAMARA:

The evidence of Dr Hampson is cited about when alcohol-related harm occurs. Essentially, the correlation with off-licence trading hours. That's at 141. The research showing the, at 142, recommendations to reduce hours as a means of reducing harm.

At 143, so this is where we start to get to the other side of a conventional proportionality analysis, which is the burden. So this is the impact on licence holders. So Ms Turner's evidence was that "81% close between 9.00pm and 11.00pm" but I gave you earlier the more detailed breakdown of how supermarkets, in particular, were affected because it was a small minority that had the 11 pm closing hour.

Then, to your Honour Justice Young's point about, was the evidence addressing off-licence alcohol generally, or differentiating between supermarket alcohol and other off-licence alcohol? I think you can see from this that it's not. It's just dealing with off-licence alcohol generally and no reason to consider that there was any material difference.

If we go to the ABAS data, this is referenced in 144 of ARLA's decision, this is important, and if I may, I'd like to take you to that, because it goes to the point my friend Mr Thain makes about possible variations in the level of alcohol-related harm in a city as large as Auckland.

So this is commonly called the ABAS data. It's produced by the Health Promotion Agency and it was, if we just scroll, you can see it's November 2016, so it was released very shortly before the appeals were heard in 2017. If we scroll down, we can see the key findings there. The second finding's about who drinks and who doesn't, but if we move to the concept of harmful drinking, the third bullet point: "Drinkers experienced a range of outcomes… Twenty per cent of people living in Auckland who had consumed alcohol in the last four weeks reported at least one experience that may be considered harmful" as a result of risky drinking.

Then if we continue scrolling down, we see graphs which show risky drinking in Auckland compared to nationally. So that's at figure 1.

So, percentage of those who reported consuming alcohol in the last – sorry, that's not the risky drinking one. Sorry, if we just keep on going down.

Yes, risky drinking behaviour, figure 2. So this is seven or more drinks on one occasion, and the new Auckland average is 25%, rest of New Zealand is 28%. We have some variation in Auckland. The greatest percentage of risky drinking occurs in south and south-east Auckland at 34%, significantly higher than the rest of Auckland. The lowest is 17%. But the reason that I take you to this evidence is that even in the areas of Auckland with the lowest levels of risky drinking, so the outer Auckland at 17%, the Auckland-wide average is 25%, and this evidence was relied upon by ARLA at paragraph 144 of its decision as going directly to the scale of the problem to be addressed.

Then, at the end of paragraph 144, if we just return to ARLA's decision we see, again, what I think is another important aspect of proportionality, which is the idea that it seeks to target, and that was the evidence of Dr Clough, which was that young people between the ages of 18 and 24 do most of their spending between 9 pm and 11 pm. Now, that evidence was derived from bottle stores because there was no evidence from the supermarkets as to the age profile of those purchasing from 9 pm to 11 pm. Now that is in contradistinction to evidence as to the age profile of those purchasing from 7 am to 9 am which was put into evidence by Woolworths.

So, still in relation to the off-licence decision, the suggestion that the intervention would be ineffective because of purchase-shifting. The response that, at least for some lower socio-economic groups, stockpiling was not really possible and alcohol tended to be purchased immediately.

So, it's in light of all that, that we reach the conclusion. First, at 146, echoes of Professor Connor's evidence at 134 where ARLA restates that notwithstanding that the evidence of reduction in harm from reduction in trading hours is sparse, there is evidence of a relationship between off-licence trading hours and consumption and harm. Careful not to overstate that. Then the conclusion: "Given the level of alcohol-related harm in Auckland, the Authority does not consider that it has been established that the closing hour element [*sic*] is unreasonable." There's an evidential basis. Then an allusion to the precautionary principle in light of the arguments that had been made.

Now, in my submission, that is not the Court substituting the correct legal test with the precautionary principle. It's a response to the challenge to the element which was based on the argument that there wasn't a sufficiently clear relationship between trading hours and harm for the element to be imposed. 1250

Now, again, just briefly, and it's by way of comparison, if we look at how the morning hour element was dealt with, again at 150, we see the proportionality argument being made by the supermarkets there. ARLA's conclusion start at 153, "not satisfied that there is a sufficient evidential basis to a support an opening hour restriction".

If we go to 156, interestingly, we see there evidence from Dr Fairgray of the number of households affected by the proposed morning hour restriction, between 43,000 and 55,000. Interestingly, there was no evidence from Dr Fairgray or any other witness for Progressive as to the number of households that would be affected by the closing hour restriction from 11 pm back to 9 pm. That evidence supported the conclusion at 156, that: "This inconvenience, while perhaps not large in the overall scheme of things, is a consequence of the disproportionate effect that the restriction…will have on supermarkets," so again, clear adoption of the proportionality approach, and then: "…on balance… the restriction is unreasonable."

I would just like to make one other point and it's actually in the following section which relates to maximum trading hours for on-licences because you'll recall, if we go to 167, you'll recall that my learned friend Mr Braggins suggested that the evidence of alcohol-related harm was highly weighted towards violent events occurring in the weekend. The evidence from the police recorded at paragraph 167 was that alcohol-related violence "also occurs on a Wednesday night due to Wednesday night being student night in the CBD. Notwithstanding that the City Centre accounts for only 4% of Auckland's population, the central area experiences 11% of all" violence offences.

So, there were clearly levels of alcohol-related harm occurring outside the weekend with young people involved through behaviour such as “pre-loading” and “side-loading”.

That’s as much as I want to say about ARLA’s decision, and the reason why I’ve taken you through that at length is because I think it would be wrong, and I don't know if these submissions are still being actively advanced, they certainly were in the written submissions, it would be wrong to conclude that ARLA’s reasoning was confined to a single paragraph in the case of off-licence trading hours, paragraph 146. The way ARLA wrote its decision was to cite evidence it preferred and on which it relied. Before that, it set out competing arguments including arguments as to elements being ineffective and arguments as to elements being disproportionate in their effect.

But it has never been the law that a decision-maker is required to refer to every argument or every piece of evidence, and if I need authority for that proposition, a simple authority for it comes from the *Lion* case which has already been discussed yesterday at some length at paragraph 42 where her Honour Justice Clark accepted the submission that was made in that case by counsel for Lion, sorry, I’ll just make sure that I’ve got it, Ms Arthur-Young, that “there is no obligation for a decision-maker to address every piece of evidence or argument raised.”

Now I think we’ve seen there was quite a fulsome summary of the various legal arguments that were raised. The evidence that was preferred by ARLA in relation to off-licence trading hours came from the Council and the public health experts that were called by the Medical Officer of Health and from the police, although Ms Hampson’s evidence as to when alcohol-related harm occurs was also cited. But there was not an obligation to refer to every strand of evidence of the evidence of Dr Fairgray, for example, in relation to the impact of off-licence closing hour restrictions. Clearly, where that was impactful in relation to the morning aspect of the trading hour element was referred to and, indeed, the basis for its decision.

I'm just wondering, I'm about to move to a new section, would you like to break now or shall I keep going?

O'REGAN J:

I think you should keep going. We're probably going to run out of time, aren't we, otherwise?

MR MCNAMARA:

Thank you. I haven't got onto much longer to go. I want to move to the question in the leave judgment as to what the Court meant. There are three paragraphs in which – this is at section 4 of the oral outline – there are three passages in which real and appreciable possibility of harm are discussed. There was a concession by my friend, Ms Cooper, yesterday that in the first of those at paragraph 53, that was really a discussion about proof. I'm not –

O'REGAN J:

I think your written submission on this probably cover this ground, and we have sort of moved now, I think, to the point where we need to work out what the right test is rather than what the Court of Appeal said.

MR MCNAMARA:

Yes. So I think if there's one point that I emphasise from it, it's that the words "taken into account" in paragraph 53 are really important and they allow for the real and appreciable possibility to be put into the mix as it were but they don't exclude other things, and that's the key point. There was never any suggestion that ARLA was setting the legal test in that discussion. It was simply dealing with arguments before it in relation to proof and in relation to the precautionary principle.

So look, with that, I will start on "unreasonableness" quickly before lunch. So I'm now at 4.4 of the oral outline and there I refer to the passages from the Court of Appeal's decision in which the concept of "unreasonableness" is given some attention. So the first is paragraph 35 and that is where the Court accepts the submissions of all parties that Justice Duffy was in error by using the

Wednesbury approach and, at the foot of that page, the Court says: "It was common ground before us that this was an error, for ARLA's task under section 83 is evaluative. … It just decide for itself whether a given element is unreasonable in light of the Act's object. ARLA correctly took that approach in this case," and I respectfully agree with that and I don't think any of my friends disagree. It's ARLA that has to do the assessment rather than look at the Council decision and work out whether that falls within reasonable parameters.

So the second point, second reference to the appeal standards in 36: "The appeal standard has built into it a substantial degree of deference to the preferences of the [local] authority; only if an element is unreasonable in light of the Act's object may ARLA intervene, and then only by asking the territorial authority to reconsider," and that's really the same point that I've been making earlier this morning by taking you through the scheme of the Act, so the narrow appeal ground, unreasonable in light of the object of the Act, ARLA not being the decision-maker and having to resubmit the matter back to the local authority.

And then the third reference, it's a continuation of that really, is in paragraph 40, and this is important because it comes after the statement that I'll need to return to briefly after lunch which is that it was inappropriate to be adopting the proportionality principles. It said: "It is correct, as noted above, that an element is not unreasonable merely because ARLA may take a different view of the merits… The bylaw cases stand for that proposition, holding that a bylaw cannot be condemned … 'merely because it does not contain qualifications which commend themselves to the minds of Judges'. Deference must be paid to the preferences of the community." Now again I respectfully agree with that approach because it does reflect Parliament's intent, and again I refer to the passage from Hansard that I took you to, but also the scheme of the Act whereby the local alcohol policy is for the TA to decide even after a particular element has been found to be unreasonable.

So it is a bit like the bylaw cases in that there may be a particular qualification or nuance that ARLA, as the decision-maker, would have preferred but that's

not enough. There has to be a degree of deference and that suggests perhaps a slightly higher bar for intervention than my friends would suggest because I don't believe they would see deference as influencing the standard.

O'REGAN J:

All right, well, let's take the adjournment now. How much longer do you think you'll be?

MR MCNAMARA:

I think 30 minutes which should be adequate time for my friend.

O'REGAN J:

So that gives you about an hour. Is that enough, Mr La Hood?

MR LA HOOD:

Yes, an hour would be I think ideal if that's possible.

O'REGAN J:

All right, we'll adjourn now then, thank you.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.14 PM

O'REGAN J:

Go ahead, Mr McNamara.

MR MCNAMARA:

Thank you, your Honour. If I may, I might just quickly refer to some provisions in the Act that deal with Justice Cooper's questions about the investment sunk into businesses that have a licence. So if I could just quickly refer the Court to section 131 first, this confirms that the licence criteria are the majority of those referenced in section 105. That's at subsection (1). But perhaps –

WILLIAM YOUNG J:

Sorry, what section?

MR MCNAMARA:

131 of the Act. These are the criteria on renewal of a licence as opposed to the new licence which was 105 that I took you to earlier.

Then at 133(1): "In consider whether to renew a licence," so the grant, not grant, decision, "the licensing authority … must not take into account any inconsistency between the relevant local alcohol policy and renewal of the licence." However, subsection (2) explains that it may impose conditions if there's a relevant local alcohol policy and it considers renewal would not be inconsistent with the policy.

WILLIAM YOUNG J:

So this means – well, this doesn't have any practical effect because the trading hours restrictions apply automatically and the new off-licence is one – applies to new licence applications only.

MR MCNAMARA:

Correct, but you will recall there are other elements as well, and so what this is just saying is that on the sunk investment point it's got very limited application. It's more relevant to conditions and not to the grant, not grant, and then 135 just more generally confirms the ability for licences to be renewed on different conditions and so that goes back to the *Buzz & Bear* point that, you know, you don't have a right for all time. The conditions of the licence may change over time as social circumstances and expectations change.

WILLIAMS J:

So neither the freeze obviously nor the rebuttable presumption will bite on renewals is really its –

MR MCNAMARA:

Correct.

WILLIAMS J:

If that was ever an issue, that's the one that's put to bed?

MR MCNAMARA:

Yes, and interestingly there's a definition of "new licence" just to sort of – in the PLAP – which deals with the transfer of the licence on the change of ownership on a premises. But yes, it's only dealing with new licences as opposed to renewals.

So if I could just now pick up at the oral outline, I was at 4.5 and the discussion of the proportionality principle. So this is the Court of Appeal's decision at 40 and 41, and I've just taken you to 40 at which the Court had endorsed one principle from the bylaws cases which I might call the deference principle, and if you look at footnote 45 there in paragraph 40 it's a reference to *McCarthy v Madden* (1914) 33 NZLR 1251 (CA) which is the seminal bylaw case and some of your Honours will be familiar, recall that case. It was a stock-driving bylaw in Riccarton and the public right affected was the common law right of passage in relation to roads which was impinged upon by restrictions on droving stock at particular hours of day, and so a number of principles were developed and one of them was that a bylaw would be – didn't use the language intensity that long ago – but it would be scrutinised more carefully if a public right was being affected.

Now at 41 then the Court says: "What is not appropriately transferred from the bylaws context to alcohol regulation" are two propositions, that the reasonableness "depends on 'whether or not public or private rights are unnecessarily or unjustly invaded'" or that "any bylaw must be unreasonable if it unnecessarily abridges or interferes with a public right without producing" a corresponding benefit, and the reason why they're not is in the next sentence. That is because "there is no antecedent right to sell alcohol" as it had already found earlier in the judgment and that's, of course, because it's the Act and licences under the Act that confer that right.

1420

So in my submission that analysis is correct. However, it doesn't extend to an exclusion of proportionality per se. So if we look back to, and I use the word "precautionality *[sic]* principles" in inverted commas because the principles are much wider than proportionality, but if we look at the cases, the principles from the bylaw cases that ARLA had said were relevant, those were set out in ARLA's decision at paragraph 32 of the judgment, if we can turn back to that. It's at 103.0445. The, I'm calling them "indicia of unreasonableness", are listed there: the proposed measures constitute a disproportionate or excessive response to perceived problems; are partial or unequal in their operation between licence holders; PLAP is manifestly unjust or discloses bad faith. These were first adopted in Tasman and then in Wellington PLAP appeals. The partial or unequal point was of particular importance as between bottle stores and supermarkets, and Super Liquor was a participant in the early appeals largely to establish a level playing field and submissions made on behalf of Super Liquor in those early cases were advancing that principle as being particularly relevant.

Then a fourth principle: "an element is an oppressive or gratuitous" – may be unreasonable if it's "an oppressive or gratuitous interference with the rights of those affected." Now whilst that principle wasn't singled out by the Court of Appeal on its logic, it also would not be applicable because again it refers to rights.

COOPER J:

Did Super Liquor participate in the High Court?

MR MCNAMARA:

No, and it was suggested that when the supermarkets were given – if your Honour cares to look at the leave judgment, the judgment granting leave to amend that they should be allowed to participate, because the differentiation point clearly stood to affect them, they were a participant before ARLA in the appeals, but her Honour did not consider that to be necessary.

COOPER J:

So once they were gone there was no other body of off-licence retailers represented in the proceeding?

MR MCNAMARA:

In the High Court proceedings, that's correct, Sir. Now a question has come up yesterday which is if, as we say, the impact on licence holders can be considered as part of the unreasonable test, does that include the economic impact? Now in my respectful submission the best guidance on that actually comes from *Meads Brothers*, notwithstanding that it is a Sale of Liquor Act case.

So if we turn to that decision, it's the decision of the Court of Appeal, of course, at paragraph 53. This is where the Court addresses the relevance of evidence about the impact on a licence's business, economic impact, and it says at 53: "The proposition that the economic," and I quote this because I endorse this as the correct approach in relation to unreasonableness for a LAP – "The proposition that the economic impact of particular restrictions on a liquor outlet will never be relevant to the terms of renewal … is too great a generalisation. It is to be remembered that the statutory object is to establish a reasonable system of control," and we, of course, still have that aim of the system being reasonable here through section 3. "This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing system may become unreasonable in its pursuit of the aim of reducing liquor abuse." In the written submission I give the example of the six – let's say we were to have a 6 pm closing time for off-licences proposed. In that instance there would clearly be a significant impact on off-licence holders, notwithstanding that they don't have a right for all-time to trade under their existing hours, but you're starting to get towards the extreme, if I can put it that way, that's being mentioned in that paragraph. Then at 56 there's some further elaboration of what's not extreme, or what may be considered acceptable, and this is towards the bottom of the paragraph. In an appropriate case such a situation might properly be the subject of evidence. Most restrictive licensing controls will have an economic impact on licensees which will sometimes be substantial. That is a normal instance of a system of reasonable control of liquor abuse. The general

provisions for grant and renewal of licences allow no basis for the expectation that a licensee will be able to run a particular type of business successfully.

Again, in my submission, that's a useful guide. There will be economic impacts on licensees inherent in controls that are imposed through a local alcohol policy. That's a normal incident of a system that seeks, in this case, to minimise alcohol-related harm, rather than just reduce liquor abuse. It's only at the extreme end, however, that they will outweigh a provision that, in the Court of Appeal's language, will have a real and appreciable possibility of benefit or, put more simply, may reduce alcohol-related harm.

So I had taken you to those indicia of unreasonable in 32 of the ARLA decision. Those are not criticised by the Court of Appeal. It's only those two principles that refer to rights that are criticised, and in my submission those are the only ones that should not be taken forward as useful guides.

I do want to touch on the point raised in question and answer with my learned friends yesterday about what the actual evidence of the burden on licence holders was in this case. There was limited evidence as to burden. I will start with the – I will state quite simply that there was no direct evidence from shoppers. There was no direct evidence from consumers. There was no direct evidence from shift workers. The impact on –

WILLIAM YOUNG J:
Sorry, from shoppers, shift workers…

MR MCNAMARA:
Or consumers generally.

WILLIAMS J:
Does that really matter?

MR MCNAMARA:

Well it does in the sense that some of these people were, of course, submitters on the PLAP, but they weren't necessarily appellants or parties called by the supermarkets. The supermarkets –

WILLIAMS J:

You're really suggesting the supermarkets should have corralled a few of their customers to come along and say: "Yeah, we agree with Foodstuffs and Woolworths."

MR MCNAMARA:

Well possibly consumer groups, had the impact on them been so significant, might have wanted to have a say. However, I just make that point that the inconvenience was asserted on behalf of shoppers by the supermarkets themselves.

WILLIAMS J:

But to be fair to the supermarkets, not without evidence because there was evidence of patronage at those times, people were using them obviously, and buying liquor.

MR MCNAMARA:

Yes, yes there was. There was no, however, evidence of, from supermarkets about the economic value of liquor sales after 9 pm.

WILLIAMS J:

No, well you can understand why, but they have to live with the fact that it would perhaps be inconvenient to divulge revenue flows during those periods.

MR MCNAMARA:

Yes, nor was there that however though even if the numbers had been taken out, nor was there evidence about the volume of alcohol, the number of alcohol sales after 9 pm as opposed to total sales after 9 pm i.e. sales that, you know, general sales from stores without that further differentiation as to whether they were alcohol sales or not.

WILLIAMS J:

Are you saying that an inference would be drawn from the absence of that about what it might have said?

MR MCNAMARA:

I'm saying that there was an opportunity to present evidence on burden, that was not taken for whatever reason. The Council did its best to assess the burden of its proposed trading hours.

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If we go to Ms Turner's evidence, which starts at 203.0405. This is the matter I mentioned earlier about the percentage of stores operated by the supermarkets that would be affected by the closing time. What's relevant to note when we just start at the columns, is that there's a difference often in practice between licenced hours and trading hours. So a store may get a licence that allows them to trade to 11 pm – sorry, that allows them to sell alcohol to 11 pm. It may choose to have trading hours that are shorter, i.e. close earlier. So if we bear that in mind, and then look down to see what the closing hour was for different stores. If we can just scroll up a little bit so we can just see the table. So we had 4% of stores – four stores had an 8 pm closing time, once we get to 9 pm we had eight stores, or 20% as a whole. The 10 pm closing time was the most common, so 55% of the stores had that as their closing time and only 12% of stores were trading, 13 in number, were trading right up until 11 pm, notwithstanding that a much higher percentage was licenced to that time.

So the Council did its best to assess the impact. It also, if we go down to 24.17, tried to assess the percentage of total sales that would be affected by the restricted periods, the two hours in the morning and the two hours in the evening. It stated it didn't have access to alcohol sales from the supermarkets. The only data it could access was bottle shop data. It indicated that 8% of total sales were in those four hours that stood to be affected, and 1% was actually outside the hours, so it was, in fact, illegal. But anyway. The Council did its best to assess the impact.

WILLIAMS J:

It's kind of a catch-22 for the supermarkets, isn't it, because if there wasn't much business during those hours, then it's no problem, and if there was lots of business during those hours, that's a big problem. So you lose either way.

MR MCNAMARA:

Well, yes, and so if we look at what Mr Foster, who was a planning witness for Foodstuffs said, he addressed the question of whether economic impact was relevant, and this is what he said in his rebuttal evidence. "I do not see much benefit in assessing the reasonableness of provisions restricting when alcohol is sold by reference to economic impact, for three main reasons: (a) When sales are low, the economic impact will be low as will the potential amount of ARH associated with those sales… (b) When sales are higher, the economic impact will be higher…"

So that was his evidence on behalf of Foodstuffs – sorry, of Woolworths as to the relevance of economic impact.

I'll move now just quickly to the end of section 4 of my oral outline. As I hope I've demonstrated through taking you through the ARLA decision, there was discussion of proportionality in ARLA's decision, and that discussion did not attract any criticism from the Court of Appeal in its decision so as to suggest it was concerned with a proportionality analysis being undertaken.

Moving to section 5 of the outline, this is about the grounds of appeal. The primary ground of appeal for Woolworths in respect of element 1 was the application of the precautionary principle. I will take you briefly to My Noodle, if I may, to demonstrate that the precautionary principle has been used to deal with uncertainty as to the effect an element may have. So if we go to *My Noodle*, you'll recall this was the policy that proposed the reduction in 24-hour trading in Queenstown down to 21 hours and it was submitted on behalf of the licence holders, represented by Mr Forbes QC, that the Authority had erred because – and I'm in the middle of paragraph 70 – "there was no independent assessment by the Authority of the justification for, or the merits

of, the policy or how it might contribute to meeting the object of the Act in section 4." That was the Sale of Liquor Act. It simply decided it should be accepted. "The Authority was unsure whether a blanket closing time would help meet the statutory object and this does not suffice."

So then if we go to how the Court of Appeal dealt with that over the page at 72, 3 and 4. We've had the recognition of the need for a blanket provision in 73. 73: "If the Authority considered (as it did) that reduced trading hours would help reduce liquor abuse then, logically," – sorry, that's 73. That's the blanket provision.

"In our view, the Authority is not required to be sure that particular conditions will reduce liquor abuse. It is entitled to apply the equivalent of the precautionary principle in environmental law." If there is the possibility of meeting the statutory objective, and the Authority found that there was, it is entitled to test whether that possibility is a reality.

So it's a response to uncertainty, particularly raised by an appellant, as to whether an intervention will be effective to meet the statutory object, whether that's to reduce our liquor abuse or minimise alcohol-related harm.

Similarly, we have the precautionary principle being used in cases under the Sale and Supply of Alcohol Act as well. So just briefly I'll take you to the *Lion* case concerning the Liquor King on Cambridge Terrace here in Wellington. Now this was a licensing case rather than a local alcohol authority case but again this issue of certainty and the relationship between the off-licence in that case and the alcohol-related harm was the central issue, and the Authority's assessment had been that there was no causal nexus between the renewal of the licence and the general incidence of ARH in the locality. It was that conclusion that caused the health authorities in that case to appeal and the approach taken in the High Court decision was quite different.

So if we go over the page then to 64, they cited the evidence of Dr Palmer, a well known Emergency Department specialist, who said it was not possible to

link individual alcohol-related attendances to specific off-licences. It was known that three-quarters of all alcohol consumed is sourced from an off-licence, very similar to the statistic that we had in Auckland whereby 80% by volume is off-licence alcohol. Liquor King is on the edge of the problematic Courtenay Place area. "Dr Palmer did not attempt to link specific alcohol-related harm to specific off-licences. Nor do I regard it as necessary."

Then if we go to 67, we start to see the language of the precautionary principle coming in here at the end of the paragraph. "Where there is an evidential foundation enabling a link to be drawn between a real risk of alcohol-related harm and the grant or renewal of a licence, the harm must be minimised not ignored or condoned."

The following paragraph. "The task of the DLC was to respond to the risk and it did so. It was not necessary to establish, as the Authority required, that the proposed operation 'would be likely to lead to' alcohol-related harm. To require demonstration of a link to this degree of specificity is not much different from requiring proof." So similar to the types of concerns that have arisen in these proceedings.

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Then finally, over the page at the foot of paragraph 72(e): "In all the circumstances the trading hours condition which the DLC imposed… was principled. The DLC did not have to be sure the condition would, in fact, minimise the alcohol-related harm. It was entitled to test the possibility." Then citing the *My Noodle* decision.

So again a response to uncertainty, very much as in environmental law, we have the development of the principle as a response to perhaps a lack of certainty as to the state of knowledge in a particular area, and that not being an excuse for not doing anything.

COOPER J:

What work is the word “test” doing in this phrase that recurs. I mean what happens if the test is – or is the consequence of the test there analysed or…

MR MCNAMARA:

So you mean it’s entitled to test that possibility, is that what –

COOPER J:

Well I just wonder what “testing” is about. How does that take place?

MR MCNAMARA:

Well I think that takes place, primarily Sir, through the provision for mandatory six year reviews.

COOPER J:

Okay.

MR MCNAMARA:

So it’s a requirement and it had initially been suggested that LAP should expire after six years, this was in the parliamentary stages. But now we simply have, and I think it’s section 97 from memory, a requirement for local alcohol policies to be reviewed every six years and that, in my submission, is a built in testing, as it were.

COOPER J:

Would be a counterfactual, would there, of some kind? No, or a test to carry out –

MR MCNAMARA:

Well it’s difficult, isn't it, because –

COOPER J:

Isn’t it just saying “entitled to act on the possibility”?

MR MCNAMARA:

Yes, it's entitled to act on the possibility, but I guess, fortunately I guess the provision for review suggests that it will be evaluated retrospectively before the next iteration of the local alcohol policy is introduced.

O'REGAN J:

You need to get a wriggle on.

MR MCNAMARA:

I do. So that's all I have. I think the persuasive burden point has been covered sufficiently. On Foodstuffs' additional grounds for review, I make the point that absence of reasons is not in Foodstuffs' pleadings, and so is not properly argued in this Court. It hasn't been orally, although it was in the written submissions. My main point there is that the principle from *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA) that the decision-maker must show to what it was turning its mind applies but was met. At times in the High Court judgment it appears her Honour was finding wrong reasons to have been given. The question was simply whether sufficient reasons were given and in my submission they clearly were and it would be wrong to focus solely on a single paragraph like paragraph 146 in which ARLA is rounding out its analysis and treating that as a sum total of its reasoning.

In relation to mandatory considerations, which is also part of the case for Foodstuffs, I repeat the point that those are considerations which the Act says are for the territorial authority when developing its DLAP or PLAP. It cannot be inferred that those are mandatory relevant considerations for ARLA when making a decision.

In relation to national default hours, the argument in this Court has been that it is for, I think the argument has been that it has been for ARLA to explain why it is not unreasonable for a local alcohol policy to depart from the default hours. In my submission that misapprehends what Parliament intended by setting default hours. Default is simply a recognition that they will apply in the absence of a local alcohol policy with that element in it.

The alleged obligation on ARLA to assess proportionality across the region, in my submission also stems from a misreading of the Act. The provisions in section 75 and 76 are permissive. They allow a local alcohol policy to differentiate and draw distinctions within districts. They do not require them to do so. Indeed, Parliament allows local alcohol policies to be combined across regions, districts, which suggests a very broad approach is contemplated by Parliament.

I think, with respect, her Honour in the High Court was misled a little by the concept of "local" and reconciling that with the fact that "local" simply means district or the territorial authority in area. We happen in Auckland to have the largest area by population, but a local policy can still be district-wide, and in my submission the arguments being advanced essentially seek to shift the burden, which is a persuasive burden on an appellant under section 81, because for ARLA to undertake that assessment and be satisfied that a policy is not disproportionate or unreasonable on account of its application to all parts of the district in practice requires the local authority to put that evidence before ARLA which is shifting the burden completely.

I have dealt with the specific relief point at 7.3 of my submission. That is raised by my friend for Foodstuffs. The deletion of the LIR element is deletion of an element even where that element appears in another element that still survives. So that's the rebuttable presumption element.

I would ask you to record that there is no reference to local impact reports in the freeze provisions. So the only relevant deletion is in 3.3….

WILLIAM YOUNG J:

In the rebuttal presumption provision?

MR MCNAMARA:

Yes, in the rebuttal presumption provision.

Finally, in relation to relief, I would say that of course it's the case that the impact on third parties must be taken into account. This is, it's to be remembered, judicial review of ARLA's decision, not Auckland Council's decision, and yet the result is the same. The result is that Auckland does not have an operative LAP, notwithstanding that most of the local alcohol policy was upheld on appeal. Auckland Council has moved swiftly to deal with the elements that were found to be unreasonable in light of the object of the Act, in particular the morning opening hour for off-licences. It has been prevented from making the LAP operative through the ongoing existence of appeals which have essentially been stayed through these judicial review proceedings and the loser is the public of Auckland and those whom the policy seeks to protect. So that impact is relevant, in my submission.

WILLIAMS J:

Might be something to be said for a progressive operative provision in the Act so that…

MR MCNAMARA:

Indeed, and I've long wished that the legislation said that elements of a local alcohol policy could be made operative in stages as we have with district plans which can be made operative in part, but we don't have that, unfortunately. So notwithstanding that the on-licence provisions are largely resolved, they cannot be brought into force.

Unless you have questions, those are the submissions for Auckland Council.

O'REGAN J:

Thank you, Mr McNamara. Right, Mr La Hood.

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MR LA HOOD:

May it please your Honours, you'll see from my submissions that I have a reasonable amount to say but a short space of time to say it in, so I will do my best to be efficient and in that regard I think taking you to my written

submissions would be helpful. I'll start on page 6 at paragraph 6 and try and focus on the main points. I'm very happy to be moved along or questioned as I go to make things efficient. I anticipate that I might be able to provide the most help in relation to the appeal standard. My submissions more or less mainly address that point –

O'REGAN J:
I think that is right, yes.

MR LA HOOD:
– so I'll try to focus in that regard, especially because I am here on behalf of the Medical Officer on a public health perspective basis.

So the Medical Officer of Health's position is that – and this is a statutorily prescribed narrow appeal standard governed by or directed by the object of the Act in section 4 because that's what section 81 and 83 say. That narrow appeal standard, it is submitted, accords with the scheme and the history of the legislation and it also fits in with the precautionary principle that has been adopted not only in relation to environmental law but very recently, both here and in Canada, in relation to public health, particularly in the COVID response of the governments of those countries to that public health context. I've given you some case law around that that I'll come to very briefly.

Starting then with the scheme and purpose of the Act, the submissions have picked out parts of the history from a public health perspective because you've been taken through a lot already. I've put in there paragraph 10 of the Court of Appeal's decision which summarises all of that.

Then at paragraph 9 of the submission, this is in fact the start of the explanatory note to the Bill when it was first introduced. Mr Thain referred you to part of this yesterday and said you didn't have the full copy. You do. It's in my submission. In my submission, that very first statement from Parliament, if you like, of the purpose of the Act accords entirely with the Law Commission's view of what was required and the Court of Appeal's assessment of the scheme and purpose

of the Act. It was, in my submission, clearly about bringing about change. That's the language that the Honourable Judith Collins used in the quote over the page at paragraph 10 that Mr McNamara has already taken you to where she uses that very phrase. The point of the Act was to bring about change and to curb the harm, and there can be no doubt, in my submission, reading those statements together, that the object of the Act, the purpose and object of the Act, was to reduce and minimise alcohol-related harm to a greater extent than had been done under the previous legislation to deal with the excessive hazardous drinking culture that we have across the country.

So the Court of Appeal, in my submission, took a very orthodox approach to that based on that legislative material but also based on the case law that's already built up under the Act, both in the High Court, or mainly in the High Court, but also in the *Vaudrey* case in the permanent Court of Appeal. I have given you the citations and you have those cases in the bundles. I'll come to some of them shortly.

There is just one piece of the legislative history that is missing from the submissions but not from your bundle and it goes to some of the questions that were raised earlier in the hearing about is there any commentary around section 3 and 4 and what was intended, and the answer to that, as far as I can find, is only in the Departmental Report. Now you have the Departmental Report at tab 63 of the bundle and I would like to take you to it. Mr Ryan is kindly bringing it up on the screen for me. I know my learned friends have been hesitant to refer to the Departmental Report but in my submission your Honours need not be.

For example, in a reasonably recent decision of this Court in *Trans-Tasman Resource Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; [2021] 1 NZLR 801 which you've got in the bundle at tab 15, your Honours, Justices France and Young, referred reasonably extensively to a Departmental Report in the context of the Exclusive Economic Zone Act in terms of assisting you with what the Act might mean, and that's at footnotes 81, 101, 111, 302, of that decision. So in my submission, whatever Professor Burrows might say

academically about it, in my submission this is helpful background that you can take into account.

I'm taking you only to paragraph 122 because of time but the discussion actually starts earlier than that at paragraph 112 of the Departmental Report. It might just be helpful to just briefly, if we can go back, Mr Ryan, to that, and just over the page, so you see that's where the discussion starts.

If we go to paragraph 116, I won't read that out but that talks about – that's the comment of the Departmental Report writers about the purpose and object clauses.

COOPER J:
Which department are we talking about?

MR LA HOOD:
Good question. I'll just need to double – Justice, yes, and then if we go over to paragraph 122, there is there specific discussion about the very issue that's been raised, and at 123: "To combine the two clauses would intermingle these different concepts. It could be done; but it would be likely to result in a provision whose elements were considerably more complicated than the present clauses, and whose interpretation was considerably harder to predict. Also requiring decision-makers to have regard to the purpose rather than (or as well as) the object of the Bill would not provide appropriate guidance on decision-making. We therefore recommend against any changed." In my submission that puts beyond any doubt that Parliament intended for section 83, the appeal test, to not have any regard to the overall purpose but to be focused on the object of the Act as a guide, in my language, as the governing principle on which you determine the appeal, or the unreasonableness proposition contained in the language of the appeal.

COOPER J:
What do you make of the last sentence in 122.1?

MR LA HOOD:

Well, I rely on it. It's a repeat really of what's said in 123.

COOPER J:

So we should have regard to section 3 in interpreting the Bill, the Act.

MR LA HOOD:

122.2 final sentence: "Its primary purpose," this is the object, not the –

COOPER J:

No, I was referring to 122.1.

MR LA HOOD:

.1, sorry.

COOPER J:

Yes.

MR LA HOOD:

Yes, it is something that you can have regard to when interpreting the Bill. I don't deny that. But we're talking about here in the context of what is the appeal test under section 83. But even if you were to say that the purpose section has some importance under section 83 in the sense advocated for by my learned friends, which is that it opens up unreasonableness in the light of the object of the Act to a much wider and open-ended test. In my submission the word "reasonable" in section 3 cannot have that wide-ranging effect and on its own it simply can't because –

WILLIAMS J:

Why not?

MR LA HOOD:

Because the appeal provision is clear, and for the reasons the Court of Appeal has set out very well, in my submission, and I adopt them, at paragraph 18 onwards of its decision. So I'll just take you to that – and the very same position

was reached via a slightly different route by Justice Clark in the *Capital Liquor* case, which I'll come to.

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But if we go to the Court of Appeal decision, and the Court does talk about section 3 because so much of it was the focus – it was so much the focus of the supermarkets on the appeal. Again, your Honours can read this for yourselves, but the points they make about the purpose are, that unlike the reasonable modestly purpose of the Sale of Liquor Act, both the purpose and object of this Act were much more ambitious, and that the system of control that's talked about in section 3 of the Act has, as its overall objective, to achieve the object of the Act. So it fits in with the Departmental Report writers saying it's a very general provision that isn't going to provide much guidance, but when you look at what the test is in any particular section, it's the object ultimately that's going to guide you, because even that general purpose is trying to achieve that object, and if the object is alcohol-related harm minimisation, and the promotion of safe and responsible drinking, which as Justice Clark has described in the decisions you've got of *Lion* and *Capital Liquor*, they're twin unified objects. They seek to achieve the same thing. They seek to do what Parliament intended, which is to bring about a change and deal with the excessive drinking issues that we have. Does that make sense?

ELLEN FRANCE J:

Could I just check, Mr La Hood, in terms of the version of the Bill that the report relates to, that had unreasonable as the test for the appeal right?

MR LA HOOD:

I've just check this in court today, and I stand to be corrected by your Honours or the research clerks in the court, but what I checked today, what you do have in the materials is you have the – you don't have the Bill as introduced, but you have the Bill after the select committee report, and the select committee's report on it, and I've checked both the Bill as introduced, and following the select committee report, and against the Act, and the object and purpose sections did not change.

ELLEN FRANCE J:

Yes, sorry, and the provision relating to the appeal right? That talked about unreasonable from the outset, is my query?

MR LA HOOD:

That's a good question and I just, I hadn't checked that.

ELLEN FRANCE J:

I'm asking because later in the –

MR LA HOOD:

But I'm sure Mr McCusker can check that while I'm on my feet.

ELLEN FRANCE J:

Later in the departmental report the officials talk about the right of appeal being a limited one.

MR LA HOOD:

They do, and I was about to come to that next as the other missing piece of the statutory history, that fits in with my argument about the narrow appeal –

WILLIAM YOUNG J:

Help me, the Departmental Report comes before the select committee report, does it?

MR LA HOOD:

Yes, it's advice to the select committee.

WILLIAM YOUNG J:

Yes.

MR LA HOOD:

Does it come before it…

ELLEN FRANCE J:

Yes it does.

MR LA HOOD:

I believe it does, yes. I'm not sure I have checked it, but we will check and let you know. But paragraph 428, and this is actually in my submissions in full quoted passages from it at paragraph 30 of my submissions, so I'm jumping ahead, but if we can bring up, paragraph 428 of the Departmental Report, from 428 to 430. The report deals with a submission by Woolworths to narrow or to say that the appeal standard should be narrow. It actually starts higher than that. No, sorry, 427, that's right.

ELLEN FRANCE J:

But I think also you should, for completeness, you should look at 421 I think.

MR LA HOOD:

Yes, I certainly think the whole section should be looked at. So if we start at 421. I know having prepared the submissions that it does identify Woolworths as the relevant submitter. It was then called Progressive. You'll see it talks about the appeal ground being limited. 428 is the part that I've quoted in the submissions, and it specifically talks about the risk of undermining the democratic process of the special consultative procedure and expresses concern about how well placed ARLA would be, and then at 430: "We do not propose further extending the right to appeal," and this is interesting but note that the right to seek judicial review would still be available in such a case which suggests to me that, in fact, judicial review is wider than this very narrow appeal standard which in my submission supports the Court of Appeal's view which supports my submission that this is a narrow appeal standard and "unreasonableness" must be given a narrow meaning.

COOPER J:

Could you just give me the document number of this in our case –

MR LA HOOD:

That's tab 63 of the joint bundle.

WILLIAMS J:

What would be the point in that? I mean if reasonableness if just *Wednesbury* reasonableness or unreasonableness, what's the point?

MR LA HOOD:

Well, the very –

WILLIAMS J:

Except that you get to go to ARLA instead of going to the High Court.

MR LA HOOD:

Absolutely. But the very point of it, in my submission, is that – do you mean what's the point compared to judicial review or do you mean what's the point altogether, because I think they're two different –

WILLIAMS J:

Well, what's the point altogether we don't have time for.

MR LA HOOD:

No, no. Well, if it's about what's the point as compared to judicial review, the answer would have to be you'd have to ask the legislature, but one answer to that though, in my submission, Sir, is that an appeal to ARLA does not have the same kind of procedural complexity. I know that judicial review is not as complex as other civil proceedings but the costs regime –

WILLIAM YOUNG J:

No, I'm not sure that's right when you look at what's happened to the doom loop that you, yes, the poor old city council seems to have got in, Auckland Council's got into.

MR LA HOOD:

Yes, it's certainly not right in terms of how things have played out, but I am not sure that the Department and Parliament were aware, when they left in quite broad appeal provisions in the late – in early 200s of the Act that Mr McNamara

took you to yesterday, without adopting the appeal provisions that relate to licence appeals which are earlier in the Act which are appeals with the rehearing process, that they quite realised that they were opening appeals up to the way they have been run, which feeds into the Chloe Swarbrick Bill that I've set out in my submissions, if your Honours have had a chance to see that, which feeds into why, in my submission, that Bill has come about because of the way that these appeals have ended up being extremely complicated and prolonging things. So in my submission Parliament simply didn't turn its mind to how this might all play out when they put in a narrow appeal standard with no real process guidance or very little.

ELLEN FRANCE J:

Well, you need to look at 437 and 438. They do deal with the submission that anticipates what they describe as a – what Local Government New Zealand, as it was, described as permitting a "continuous appeal".

MR LA HOOD:

Yes, I did read this some time ago now but thank you, your Honour, let's just see what it says. Sorry, I haven't – the comment does suggest, though, that that was more about the process following a successful appeal.

ELLEN FRANCE J:

Yes, yes. No, I accept that. All I'm saying is I don't think it was completely out of their minds.

MR LA HOOD:

Look, I don't think it was completely out of their mind at all because they put in provisions, as Mr McNamara took you to, I think, around 200 – I don't need to take you back to it – saying that the parties that submitted can have a right to be heard with leave and all the other things around some of the process without really thinking about is it de novo, is it an appeal by way of rehearing which different processes, and in the end you'll see that ARLA has decided it has to be de novo because there's no record from the Court below, and the Court of Appeal has dealt with that, but I'll come to that. I would like to just come back

to the submissions so I don't lose my place, but I'm happy to answer any other questions on that legislative history.

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WILLIAMS J:

I have got to say, I wonder why that leads one to the conclusion that unreasonable in 81(4) and reasonable in section 3 are not flip sides of each other.

MR LA HOOD:

Look, I think I'm saying they are.

WILLIAMS J:

Oh are you? Good, good. Keep going.

MR LA HOOD:

I think what I intended to say, and unless I'm mistaken, is that because section 3 requires that the reasonable system of control achieves the object of the Act. A reference to section 3 doesn't help my learned friends. It simply provides them with exactly the same test, more or less the same test, that we have in section –

COOPER J:

So both sections are heading in the same direction.

MR LA HOOD:

Yes.

O'REGAN J:

All roads are leading to Rome, yes.

COOPER J:

That's what I've been trying to say all day.

MR LA HOOD:

Yes, I'm agreeing. I think my learned friend Mr McNamara was resisting it because my learned friends for the supermarkets placed so much weight on section 3 to say it's different to section 4, that because it's a stand-alone reasonableness concept without reference to the object of the Act in section 3, that that somehow means the test in section 81 is open-ended. I say that's wrong for the reasons, really, that your Honour Justice Williams is saying, because section 3, and the Court of Appeal said it 2021 and preceding, because section 3 directs that, the system as to achieve the alcohol reduction and minimisation object, it's no different. It doesn't help –

WILLIAMS J:

Yes, so section 4 is a powerful statement. Section 3 is read in light of it.

MR LA HOOD:

Section 3 leads into it and feeds into it.

WILLIAMS J:

That's why the Departmental Report is interesting and all of that but I don't see that it helps us understand what is, on its face, relatively clear.

MR LA HOOD:

I agree, if what you suggest on its face is clear, is what I'm saying. Which is that the test is narrow and focused on achieving the object of the Act. It's a statutory test that is clear and doesn't lend itself to the open-ended bylaw principles that my learned friends would have you adopt, unlike section 17 of the Bylaws Act, it's not a stand-alone unreasonable.

WILLIAMS J:

That's right, that's why in the end reasonableness is the issue. How wide that fissure is, is the issue.

MR LA HOOD:

It is, but it's very important, in my submission, that it's not unreasonable on its own. It's unreasonable in light of the object of the Act.

WILLIAMS J:

Oh yes.

MR LA HOOD:

So it's governed by the object.

WILLIAMS J:

Reasonableness is always reasonableness in light of the statutory context.

MR LA HOOD:

Yes, but it doesn't always say it like that.

WILLIAMS J:

Well look at this statutory context and you can see that I'm agreeing with you, because the statutory context is a very powerful statement.

MR LA HOOD:

Exactly.

WILLIAMS J:

There we go, let's move on.

MR LA HOOD:

But coming back to the question Justice France asked yesterday of one of my learned friends, I don't necessarily agree with everyone that *Wednesbury* unreasonableness is not the test for unreasonableness in the section itself. Because really what I'm saying is another version of pay extreme deference, or to use the language that the High Court has been developing, that the legal controls of this decision, that's the decision of the Council, are loose, they're not tight, because of the nature of that decision. That is a decision with high policy content. Where the views of the local people must be given a high degree, through the Council, must be given a high degree of weight,

ELLEN FRANCE J:

That's why I'm surprised, Mr La Hood, that there's no one on your side of the table arguing for the other Woolworths, the rating Woolworths type of approach, which, to reasonableness, which is a *Wednesbury*.

MR LA HOOD:

Well I think I am. I mean I've avoided – Justice Duffy didn't pick *Wednesbury* unreasonableness out of the air. It only came up when I got to my feet and started making my submissions, and I think what my learned friends are saying, the part to which I do agree, is that to the extent Justice Duffy might have suggested it's like a judicial review, that's not right, because it's a statutory test, and so to that extent I agree with my learned friends, you don't approach this – ARLA doesn't approach it like a judicial review. It's an appeal with a statutory standard, and you deal with it that way. But when you give meaning to the word unreasonable, what I'm saying is if there is a reasonable basis, a rational basis that the measurement, or element, will reduce alcohol-related harm, then it's presumptively reasonable and will only be something extreme, or disproportionately, grossly disproportionate or extreme or capricious, using the language, I'm not making this up, of Justice Clark from *Capital Liquor* and *Lion Liquor*, *Capital Liquor* in particular, that only then will ARLA be able to intervene. That, in my submission, is a more nuanced, but effectively the same, test as you won't interfere ARLA unless it's a decision that no reasonable decision-maker could have made, but –

WILLIAM YOUNG J:

Is that any different from saying, well, we've got to be satisfied it's unreasonable. We recognise, though, that this is a legislative function that the local authority is engaging in. Our role is actually pretty limited, it's a check, if we don't like it we send it back and they deal with it, and there is room possibly there for deference. Is that much different from *Wednesbury*?

MR LA HOOD:

No, it's not much different from *Wednesbury*, but I think what is important, and my submissions elaborate on this, and I'm not sure I'm going to have time to go into it now in some detail. What, in my submission, you as the highest court

can say, and I urge you to say, is what things will not be relevant to the disproportionality, or the proportionality calculus. So –

WILLIAMS J:

It's a tough call though.

MR LA HOOD:

It is a tough call, and I agree that it's context-specific.

WILLIAMS J:

It usually gets apex courts into difficulty 20 years down the track.

MR LA HOOD:

Yes, but as I say in my submissions, there are some things that ARLA has already said when it has interpreted the statute, more or less as I am suggesting, in other words that if, there's a possibility that the measure will meet the object, then – a rational or reasonable possibility, then in the absence of something extreme we will effectively allow it or not hold it to be unreasonable, and they have said, for example, there are certain things that are simply irrelevant considerations, irrelevant to that calculus, and one of those things is whether you have a dynamic city centre. So the Act doesn't – because of the powerful –

WILLIAMS J:

Well, I don't think it said that. It said you can't make that your launching off point when you're job is to control liquor.

MR LA HOOD:

No they have said, and it's in the submissions, that they have said the dynamic city centre is not a relevant consideration.

WILLIAMS J:

Well they said it in the context of a PLAP or a DLAP or whatever.

MR LA HOOD:

Yes, that's right.

WILLIAMS J:

That made that the whole point.

MR LA HOOD:

That's the context, though, that we're dealing with, which is appeals from PLAPs.

WILLIAMS J:

Because the fact that you have to look at the operative plan indicates that at least some resource management priorities are going to inform what you come to.

MR LA HOOD:

Yes, but they're very specific about the idea that having a vibrant city centre night life on its own, so forget about the resource consent or planning issues around that, but just the fact that people want to go and party and have a good time, and maybe have a less good time if they're not open until 5 am, instead close at four. That's not – and I submit that's right, that's not a relevant consideration because proportionality in this context is guided by the purpose and object, and the starting point of the purpose of the Act, is that the Act is for the benefit of the community as a whole. It's a piece of public welfare legislation for the benefit of the community as a whole. So in my submission when you weigh up what the countervailing factors are to the presumptively reasonable measure, it cannot be things like whether I'm going to have a good time downtown, or whether I'm going to make a private profit.

WILLIAMS J:

So does that mean, say, a constraint, some hypothetical constraint, in a draft leads to off-licences coming to the Council and saying, you do this, and 30% of us go broke.'

1520

MR LA HOOD:

I was going to come to that, because I'm not saying, and my learned friends – I'm not saying that economic considerations, so things other than private profit, economic considerations are never relevant because they could well lead to outcomes that do not benefit the community as a whole, and this is why it has to be at the extreme end. So –

WILLIAMS J:

But why is profit not that?

MR LA HOOD:

Because it's not relevant to the objectives of the Act, the powerful statements.

WILLIAMS J:

Yes, that's the conclusion. Why not?

MR LA HOOD:

Well, we've already seen that it's clearly not in relation – the Act says it's not in relation to licence applications.

WILLIAMS J:

30% of off-licences come along and say: "We will lose so much profit."

MR LA HOOD:

That's different. If the ultimate outcome is loss of jobs or –

WILLIAM YOUNG J:

Disruption of a supply.

MR LA HOOD:

Disruption of the supply. So if the ultimate outcome of the private profit is something that affects public welfare, then we are into relevant considerations. So whether or not Foodstuffs –

WILLIAMS J:

So liquor store owners are not public.

MR LA HOOD:

No, whether or not –

WILLIAMS J:

But their staff are?

MR LA HOOD:

– Foodstuffs make a profit of 50 million instead of 100 million a year is not relevant, in my submission, to the calculus –

WILLIAMS J:

Well, it might be if staff get shed as a result.

MR LA HOOD:

Only if.

WILLIAMS J:

But that's – you know, you can't distinguish between those things.

MR LA HOOD:

Well, you can because that's the – sorry, Sir.

WILLIAMS J:

It's – you're slicing things too thinly.

MR LA HOOD:

Well, no, you can because that's the obligation on the parties that want to establish that the element is unreasonable. They need to persuade ARLA that this otherwise reasonable-looking provision, a 9 pm closing time, a one hour earlier closing time, is somehow going to have such impact on their profit that people in the community are going to be harmed, not just that they're not going

to make some money, that people in the community are going to be harmed more than just being inconvenienced.

WILLIAMS J:

Yes, yes.

MR LA HOOD:

So if people start losing their jobs –

WILLIAMS J:

Right, but what I'm doing in this discussion is trying to find the edge.

MR LA HOOD:

Well, in my submission –

WILLIAMS J:

You say profit is irrelevant but economic impact can be relevant provided the angels and not the devils get hurt.

MR LA HOOD:

No –

WILLIAM YOUNG J:

Well, you're saying really it's systemic, isn't it, that the economic –

MR LA HOOD:

Provided there's a public consequence.

WILLIAM YOUNG J:

– if the economic consequences have system effects that disrupt the system.

MR LA HOOD:

Yes, on the public as a whole, yes, that has some systemic effect on the public's welfare because –

WILLIAMS J:

I think the economists would tell you there's no difference.

MR LA HOOD:

Well, we did hear from a lot of economists, so this wasn't thrashed out in that way. But there must be a difference.

WILLIAMS J:

Well, it seems to me the test is reasonableness, excessiveness, oppressiveness. That's the test. So if the effect of something based on relatively limited evidence is going to be considerable, even to commercial parties, you're going to look closer, even on a reasonableness test.

MR LA HOOD:

Well, that may be so. I say it's not because of the, as your Honour has said, the powerful policy statements and the public welfare aim of this Act. I say no and if a party wants to come to ARLA and say it's unreasonable, it has to show a public welfare reason for it being unreasonable and that may be economic because the economic consequences will affect the system to the extent that the public welfare is damaged, but there may be room, your Honour, and this is for a gross disproportionality element to pure profit. I say there's not. But that could be something that's allowed, and I talk later in the submissions about the concept of gross disproportionality, and that is recognised in the law.

My learned friends say, Mr Thain in particular said yesterday, well, if the Act had meant "unreasonable" to mean "gross disproportionality" it would have said so. The answer to that, of course, it also doesn't say "partial" or "unequal" or "manifestly unjust". The things that he advocates for is the meaning of "unreasonable". That's not how statutes work. It's for you, as the Courts, to interpret and apply the principles and work them out and, in my submission, there's far more reason on the statutory purpose to read in the narrow proposition from Justice Clark's decision in *Capital Liquor* that this is the extreme ends of the margin only where proportionality will be relevant.

WILLIAMS J:

Yes, I'm trying to work out what "extreme" means.

MR LA HOOD:

Yes, and in my submission it means "grossly disproportionate". So perhaps if I just take you there now in the submissions. So if your Honours were to go to…

O'REGAN J:

I think you should probably then wrap this up, not the whole submission, just this point, because you are going to run out of time.

MR LA HOOD:

I am going to run out of time and I've kind of jumped all over the place, but I'm grateful for the intervention from the Court because it helps me to address the issues.

So page 20. So recently in the Health and Safety at Work Act 2015 there's recognition of the concept of gross disproportionality in the context of practicable steps under that legislation. I know your Honours will be familiar with it to an extent.

So there is at paragraph (e) of the definition of the meaning of "reasonably practicable" the concept used in terms of the cost of having to take a measure, and if the measure is going to protect health and safety it's only if it's only going to become grossly disproportionate to the benefit that you wouldn't take it.

So I haven't taken you to Justice Clark's decision about this and I don't think I'll have time but can I just refer you to it? It's in my submissions. But her Honour, at paragraph 74 through to 84 of *Capital Liquor* which is at tab 35 of your bundle, uses the term "capricious or grossly disproportionate" to measure against a control that is going to reduce alcohol-related harm as being the test. She doesn't explain expressly where she's got that term from but she hasn't plucked it out of thin air. She has referred to the *Meads* decision which is, of course, the decision that Mr McNamara's taken you to which is at tab 28 of your

bundle at paragraph 53, I won't take you to it again, where the Court of Appeal, even under the old Act with its much more modest object, the Court said it's only at the extreme ends of the margins that economic impacts are relevant. Her Honour does an analysis that says, well, given the new object and purpose, and it's an analysis very similar to the Court of Appeal's at paragraph 18 onwards about the purpose, given that, there's now no room to take into account economic interests unless – this is clear enough by implication – unless they're capricious or grossly disproportionate. So that hasn't been plucked out of thin air because Justice Clark drew from *Meads* to get to it, and then the reason I give you these other references to "grossly disproportionate" is because in the Court of Appeal Justice Goddard questioned whether such a concept exists, and I filed a memorandum after the hearing referring to these very points, which it clearly does exist, both in the Health and Safety at Work Act, it's been a longstanding concept under the Proceeds of Crime Act when private interests, that is the interests of criminals, might be affected to the extent that it's so grossly disproportionate that you might step back from imposing what you would otherwise impose.

I have also set out there what the Canadian Courts have done in a slightly different context under their Bill of Rights, but that's slightly less on point, in my submission.

WILLIAMS J:

But even on that analysis private impact will be relevant just at the extreme end.

MR LA HOOD:

Yes, and so that's why I've said to your Honour that that could be a point that you reach. I submit that you don't and shouldn't reach that point because –

WILLIAMS J:

That's what I'm trying to work out, why you say that.

MR LA HOOD:

Because my test allows for economic impact but only –

WILLIAMS J:

As long as it's systemic.

MR LA HOOD:

Only if it affects public welfare which I draw on from the powerful statements of purpose that you refer to –

WILLIAMS J:

Right, yes, I've got that.

MR LA HOOD:

– including the start of section 3 which talks about the benefit of the community as a whole. But whatever test you reach, what's being put forward here, in my submission, falls short by a wide margin on whatever test that you choose to reach because shopper inconvenience to buy after 9 pm, in what world, in my submission, could that be a reason not to try and see whether the extreme alcohol-related harm in Auckland, and I use the word "extreme" because although there's argument about this, whether it's worse than some of the country and better than some on certain measures. My learned friends are attempting to rewrite history. No one contested, in the four weeks before ARLA, the extreme level of alcohol-related harm in Auckland.

1530

I've set out the Law Commission's initial issues paper, the start of my submissions, paragraph 6 onwards, what they said about their direct observations of downtown Auckland. We had evidence from police officers and ED experts and doctors that talked directly about the disturbing levels of alcohol-related harm in Auckland. In my submission, something has to be done about it, and the Council was entitled to say, provided there was a rational basis for it, let's see if 9 am closing across the city, across the district, might have some effect, given we have – and this is referred to at paragraph 31 of the Court of Appeal decision and again at paragraph 106 – given that we have evidence that those purchasing alcohol after 9 and 10 pm are going to be people that are abusing alcohol. That's all they needed. In my submission, given the narrow

focus of the test, the persuasive burden required and the object of the Act, once the Council had that, some rational basis, that was all that they needed unless there was going to be some very serious, whether it's extreme or grossly disproportionate or whatever term you want to put on it, something extremely serious to counteract it. Nothing's been put forward. No suggestion that Foodstuffs and Woolworths will have to lay off staff. A fanciful, in my submission, suggestion that they won't open new supermarkets which was put to bed under cross-examination by Mr Smith and Mr McNamara at the hearing. Fanciful. Of course they're going to open supermarkets.

The idea that ARLA was required to go through all the countervailing evidence about how much this will impact upon reducing alcohol-related harm is just unreal in my submission.

If we go to the precautionary principle, and I submit that the Court of Appeal was right to say that this is built into the test because the way that I've articulated it necessarily so narrowly that it incorporates it, but whether it's part of the test or not, in my submission it's clearly applicable. Whether it's bult into the test or a principle to be applied under the test, it's clearly applicable.

To go to page 13 of the submissions, I just there give you the more recent case law in the public health context, around COVID. I won't take you to the highlighted passages but over the page at paragraph 24 my submission is that the principle can be easily and appropriately adjusted and applied under the Act. So acting on the best available information to protect the health of New Zealanders in this context in relation to alcohol-related harm, despite the uncertainty of outcome, if there's a real and appreciable possibility that the measure will have the desired effect then it's appropriate to try it. It will never be possible to have clear evidence that a measure will work without conducting a human experiment.

So do the supermarkets seriously suggest that before you can try to reduce alcohol-related harm you must try and measure and wait and see if it works before you – or see if a measure has been implemented somewhere else

because you can't do it yourself without a PLAP, wait for someone else to do it somewhere else which may not be transferable, and if it doesn't work for them then don't do it and if it does work for them do it? That would, in my submission, be a very unsound way of conducting your public health policy. Are you meant to wait until the harm gets so bad that you've got no choice to try something? It's just not clear what the supermarkets say should be done.

So if I can just go back slightly, I know I'm running out of time, and just work out what else I need to take you to. If we go back to page 10 of my submissions, I think I've taken you to all of this. My learned friend, Mr McNamara, has referred you to the *Lion Liquor* principles. Just one note here in relation to *Lion Liquor*. Mr Thain suggested that Justice Clark had reached the conclusion that commercial interests aren't relevant under the new Act without reference to the Act's object in *Lion Liquor*. I'll let you look for yourself but that's not correct. Tab 45, paragraph 50, there's a reference to the object of the Act feeds into her conclusion, but, more importantly, she clearly looks at the object when she reaches the same conclusion in *Capital Liquor* at 74 onwards which I've taken you to and draws on the *Meads* decision which was under the old Act. So that submission just isn't correct.

Over the page on 12 I've given you the references to the Court of Appeal decision at 18 and 21 and to *Capital Liquor* at 74 that are relevant to those paragraphs. I've taken you, on page 13, to the precautionary principle. I've taken you now to this concept of "grossly disproportionate".

So paragraph 28 of my submissions captures my argument. I won't read it out in full, but in my submission the Court of Appeal correctly interpreted the section 81 and 83 tests as narrow, requiring deference to the Council's policy-making role, allowing policies aimed at minimisation of alcohol-related harm despite uncertainty of effect, and rejecting wholesale application or adoption of the proportionality principles in bylaw cases.

29, Justice Williams, I take you to the dynamic central city irrelevant consideration part of the *Wellington* decision.

Departmental Report is at 30. I won't take you to that.

What I do at 16 is demonstrate, I hope, that even in the bylaw cases the unreasonable test in section 17 depends on statutory context. So in *Conley*, for example, Justice Hammond concluded that a great deal of deference was required to be paid to the Council's decisions around brothel policy, given the nature of those decisions and the high policy content and the like. So even under the bylaw cases "unreasonableness" depends entirely on statutory context, and you can't simply adopt general principles into a clear statutory test.

That, I think, covers most of the rest of what I wanted to say. I don't know if I need to address the point about a licence being a privilege, not a right. I don't think I do. In my submission, Mr McNamara's submission is exactly right, and what I do address is the idea of being able to consume alcohol as if freedom or right and it's exactly the same as smoking, in my submission, which this Court has held is nothing more than a freedom, a lifestyle choice, and that's important because again it's relevant to the degree to which you place weight on that and the proportionality calculus. If it's a lifestyle choice, it's to be given, in my submission, no or very little weight, a far cry from the ideas of Bill of Rights rights or even public rights like accessing a highway that we talk about in the bylaw context.

Finally, and just so you're aware of it, at paragraph 51, finally on this point, at paragraph 51, in case it's suggested it hasn't been in oral submissions, that supermarkets are not the place where people buy preloading alcohol as Justice Duffy wrongly inferred. There's actually evidence to the contrary and that's in the footnote at paragraph 80 that the drink of choice in those studies for preloading and sideloading is, for males, beer, and a very high percentage of females preload on wine. So just not correct.

1540

That leaves just one perhaps final point which starts at page 24 of my submissions, paragraph 59, and I'm not sure if your Honours have had a

chance to grapple with this and it may be, well, in my submission, you shouldn't even need to get to this point because your Honours should adopt either Mr McNamara's approach or mine which don't differ significantly, but if not, in my submission, even if you were to find this was an evaluative decision then in this context it requires a more nuanced consideration of what that means than simply saying it was an *Austin, Nichols & Co Inc v Stitching Lodestar* [2008] 2 NZLR 141 (SC) appeal to ARLA which meant ARLA could substitute its view which seems to be what my learned friends ultimately want. I don't have time to take you through this because –

O'REGAN J:

I think your submissions are pretty clear on it though.

MR LA HOOD:

Yes, I don't know if I need to elaborate any further on it but effectively my submission is that I'm sure this wasn't the intention of the Court in *Austin, Nichols* but has become this binary approach in New Zealand where the nuance that the Courts in England bring to evaluative decisions seems to have been lost, and in my submission context is –

WILLIAM YOUNG J:

I don't know that we're going to review *Austin, Nichols*.

MR LA HOOD:

I'm not asking your Honours to go as far as reviewing *Austin, Nichols*.

WILLIAMS J:

Read like that in the submissions.

MR LA HOOD:

Well, I'm asking you to consider whether it's been interpreted so strictly that all nuance has been lost from it.

WILLIAMS J:

So review it slightly.

MR LA HOOD:

Well, in my submission, the binary approach is just not working but – and it lacks the nuance that you have in England. But anyway, look, it's probably an academic point or I hope it will be an academic point in the case because I hope that you accept my submissions that precede it.

So that's a very whirlwind tour of my submissions, I'm sorry. I've probably missed something but I'm running out of time. So do your Honours have any further questions for me?

O'REGAN J:

No, that's fine, thank you very much.

MR LA HOOD:

The only other thing is I think Mr McCusker was going to check. So he's just confirming that the test in 81 and 83 didn't change throughout the Act's history.

O'REGAN J:

All right, in reply, Ms Cooper.

MS COOPER KC:

A few brief points, your Honour, so just a couple of things. So first of all my learned friend, Mr La Hood, talked about, well, urged upon your Honours to close the categories of matters that would be relevant for proportionality assessment and I would urge upon you equally strongly not to do that. As his Honour, Justice Williams, pointed out, that would be fraught with difficulty for the path ahead. It's for ARLA to determine in any given case what matters may be relevant and in some instances that may include private profit, in other instances it may not. It really is all circumstantial and it's a fruitless task to attempt to prescribe in advance what may and may not be.

For the purposes of this appeal, I should clarify, because perhaps I wasn't sufficiently clear about this in my submissions, but the impact on Woolworths' profit was not something that Woolworths relied upon in its appeal before ARLA. The focus of ARLA's appeal in relation to hours was really more on shopper convenience and that evidence, just to give your Honours the reference, is in the evidence of Dr Fairgray which is at page 203.0608 of the bundle. That's where Dr Fairgray's evidence commenced.

WILLIAMS J:
Can we have the number again, please?

MS COOPER KC:
203.0608. So there's several briefs from Dr –

WILLIAM YOUNG J:
Sorry, 202 or 203?

MS COOPER KC:
203, your Honour.

WILLIAM YOUNG J:
Dr Fairgray?
1545

MS COOPER KC:
Dr Fairgray, that's right, and the relevant evidence begins at page 0623 within that document, and specifically from paragraph 3.24 to 3.30, and that talks about the number of transactions during the affected period of the evening and the proportion of trading hours affected, and, as I say, it's really the shopper issue and that has a flow-on effect for Woolworths, in particular its staff and stores, because they have to deal with frustrated customers if they're unable to access the alcohol part of the store, but Woolworths did not seek to argue its own financial loss of profit was an issue that should be taken into consideration by ARLA. There was a separate issue that obviously Woolworths did rely on in

relation to the temporary freeze and rebuttal presumption of the difficulty in opening stores, but again that also has a flow-on effect to public interest and public benefit in terms of the utility of having more supermarkets, so not purely a private financial matter. But nevertheless, as I say, your Honour, you shouldn't foreclose the possibility that in some instances impact on profit may very well be relevant.

So that was the first point, your Honour, and then there was a question your Honours put to my learned friend, Mr McNamara, about how the evidence of Dr Cameron about the relationship between stores and harm related to the evidence of Ms Hampson. So there's a slightly – important thing to be aware of there is there are in fact three reports by Dr Cameron. So Dr Cameron's evidence deals with all three. The second report he talks about was the research he did for the Health Promotion Authority, or Agency, rather, in 2012 to 2013. That's the HPA data that Ms Hampson used for the maps that Mr Braggins took you to. So that is in fact exactly the same report and the same data, and Mr Cameron talks about the relationship between supermarket and grocery store density as a result of that data in his brief. So his brief of evidence is at page 205.0968, and he deals specifically with this issue on page –

WILLIAMS J:
09 05?

MS COOPER KC:
205.0968, and he deals with this point at 205.0974. 0974 is the page and on that page there's a subparagraph (h) where he specifically says that, on the basis of that data, for much of Auckland, the relationship between supermarket and grocery store density and violence is negative or not significant. The exceptions include Māngere and Otahuhu. So in effect the data is saying the same thing to him as it said to Ms Hampson and that's recorded in his brief of evidence. He then did some further research in 2016 which he goes on to deal with later in his evidence and at page 205.0977 at paragraph 5.4, and I think my learned friend took you to that paragraph of his evidence which said that there was not a statistically significant difference between supermarkets

and grocery stores and other off-licences and both types were merged in the analysis. So the difficulty there is, of course, because they're merged it's difficult to see what the fine detail might be, and Dr Fairgray responds to that in his rebuttal evidence and Dr Fairgray's rebuttal evidence is at document page number 204.0638 is the start of his evidence, and if I could refer your Honours to the section, section 3, which begins at 204.0662 and especially paragraphs 3.1 –

WILLIAM YOUNG J:
Sorry, you'll have to give me the page number again.

MS COOPER KC:
The relevant section begins at 0662, 204.0662.

WILLIAM YOUNG J:
Yes, okay.

COOPER J:
What was the first number? 204.0368?

MS COOPER KC:
No, 638.

COOPER J:
638? I was going to say, a long brief.

MS COOPER KC:
I do apologise for all these…

COOPER J:
No, no, it'll be my fault.

MS COOPER KC:
So in particular I draw your Honours' attention to paragraphs 3.14 to 3.20 where he discusses what can and can't be deduced from Dr Cameron's third report.

WILLIAMS J:

It's the 2016 research.

MS COOPER KC:

The 2016 research, that's correct, your Honour.

WILLIAMS J:

And does he say Cameron is right or wrong?

MS COOPER KC:

Well, he says it really doesn't tell you very much.

WILLIAMS J:

Okay, good, thanks.

MS COOPER KC:

That's essentially what he tells you. Then I think the only further reference to give your Honours is also some discussion about pre-loading and side-loading and the patterns of expenditure for the 18 to 24 age group. So Dr Fairgray in his rebuttal evidence analyses some credit card data about what type of transactions the 18- to 24-year-olds are carrying out and when and what that tells you about whether there might be pre-loading or side-loading, so comparing the same credit card being used in an off-licence and in an on-licence, and he finds very weak support for the anecdotal evidence that side-loading and pre-loading is prevalent. So that evidence is in his rebuttal evidence at 204.0638 which is the number I've already given you for his rebuttal but specifically at page 0676.

WILLIAMS J:

So the side-loading and pre-loading are not significant issues for teenagers, is that the point?

MS COOPER KC:

No, he's not saying that, your Honour. He's just saying that if you look at credit card data, it doesn't provide much corroboration of the anecdotal evidence is the only point he's making, so I put that in the mix.

Then the very last point, your Honours, I wanted to make was just the point about deference which has been discussed, and really just to make the point that there is a great deal of structural deference in the legislation because, of course, as we, I think we all agree, that the appeal ground is a narrow one however it's interpreted and, of course, the rights that flow from an appeal in terms of what ARLA can do are limited. So ARLA can only refer a measure back to the Council: it can't rewrite the policy.

I think the other very important factor which I would urge upon your Honours is the fact that ARLA is an expert body. It is devoted entirely to alcohol licensing issues. So it's not the same as a judicial review to a court, and I think that Parliament gave ARLA the ability to carry out these appeals advisedly and we should not denude that of meaning or overly restrict ARLA in its ability to consider these issues which are important issues and do have significant impacts.

I think that was all I wanted to say, thank you, your Honours.

O'REGAN J:

Do you want to say anything about costs?

MS COOPER KC:

Of the appeal? Well, your Honour, I appreciate that there's a degree of frustration with the way this process has played out. What I would like to say is that it would be unfair to place all of the blame for the length of time this process has taken at the feet of –

O'REGAN J:

No, I'm just really asking – it's not a loaded question. It's just… Methinks you protest too much.

WILLIAM YOUNG J:

I don't think it's costs against Council that he had in mind.

ELLEN FRANCE J:

It's just costs, should costs follow the event in the usual way or is there some other…

MS COOPER KC:

No, I think costs should follow the event in the usual way, your Honour.

O'REGAN J:

All right, thank you, Ms Cooper.

MS COOPER KC:

Thank you.

O'REGAN J:

Anything in reply, Mr Thain?

MR THAIN:

Thank you, your Honour. With respect, my friend, Mr La Hood, has perhaps in some cases fallen into the trap of assuming that this case is about what Parliament in 2012 should have enacted in response to the Law Commission Report rather than what it, in fact, chose to do. For instance, that's squarely made clear by the fact that even the Law Commission did not recommend a 9 pm closing hour. It recommended a 10 pm closing hour and yet the Council's policy pushes for nine, and even after that the government of the day and then the Parliament did not accept even the 10 pm recommendation made by the Law Commission. Instead it enacted an 11 pm default hour.

O'REGAN J:

I think we're just getting lost in detail there. Let's just deal with things that help us decide what the test is.

MR THAIN:

Yes, and that's exactly right, your Honour. The key is, what is the test, which starts at the purpose and object. For this exercise you start at the Law Commission's suggestion, and his Honour Justice Young I think referred to this. At the very beginning of what became ultimately the purpose and object provisions, the Law Commission had recommended a single object provision that contained both a purpose and an object all in the one provision. That's in the Law Commission Report at paragraphs 5.41 and 5.45, and that contained the reasonableness requirement, which the Law Commission itself said was essential to the team. Then my friend Mr La Hood has taken you to the Departmental Report, but not to all of the relevant parts of it. If any of it is to be read there are a few other parts that would need to be seen.

WILLIAMS J:

I thought you might say that.

O'REGAN J:

I think given the time you just need to give us the references.

MR THAIN:

Yes, I will do that. You've seen 122 which is the one that just sets out the absolutely standard Legislation Act section 10 approach. When interpreting the appeal ground you, of course, interpret that in light of the Act's purpose. The purpose is expressly stated in this Act, which is that the system of control is to be reasonable, or at least that's one of its characteristics. That's how it works, there's no more magic to it than that, and I think your Honour Justice Cooper and your Honour Justice Williams talked about this, purpose and object go hand to hand in that way. They walk hand in hand like that. The appeal test is interpreted in light of that purpose.

The other parts of the Departmental Report that your Honours should look at are in particular paragraph 421, which deals specifically with the appeal ground, and said: "The nature of alcohol law, with its sizeable impacts on public health, community safety and the economic viability of businesses requires the additional safeguard that the right to appeal provides." So economic viability of businesses was specifically referred to there.

Clause 366, talking about setting up local alcohol policies. It said: "The Government's view is that local communities are best placed to assess the role that alcohol outlets should play in their community. It is, however, necessary – "

WILLIAMS J:
Give me the paragraph again please?

MR THAIN:
This is 366 your Honour. "It is, however, necessary to strike an appropriate balance between allowing community control and national consistency and the associated effects on the operating requirements for businesses." That was what was said and they said: "We consider… licence criteria… would have a disproportionate impact."

O'REGAN J:
I just don't think this is helping us get to the test. Just tell us what the paragraphs are, and we'll read them, but we actually are interpreting the Act, not the Departmental Report.

MR THAIN:
Yes your Honour. This is in response to my friend Mr La Hood –

O'REGAN J:
I know that, but it's now two minutes to four and we're finishing at four, so if you've got a better point, use your time to finish it.

MR THAIN:

Well the other two, or three clauses in the Departmental Report that your Honours should read in order to have the full picture of that document are clause 115, clause 116 and clause 9, all of which refer specifically to what was meant by the concept of reasonableness, and they talk about it looking at reducing harm without unduly impacting on responsible drinkers or imposing disproportionate regulatory costs. That's the concept. That's exactly the same concept as you saw in the two Hansard extracts that we went through the other day.

COOPER J:

Can I just ask you those numbers again. Was it 115?

MR THAIN:

It was 115, 116.

COOPER J:

116, okay.

MR THAIN:

Yes, and then clause 9 is the overall statement of the intention behind the Act.

COOPER J:

Thank you.

MR THAIN:

The appeal right. My friend talked about what happened to that appeal right. It started with from the Law Commission's recommendation, and as I said the other day, the Law Commission recommended that the appeal right would be like the RMA appeal right against district plans. That, as my friend said, that did not get carried through, and it turned into the appeal right that we see today.

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If your Honours are to look at the Department Report, you should not do that in isolation of the Cabinet Paper which shows exactly what the Government's response to the Law Commission was. There are only –

WILLIAM YOUNG J:

But that's before the parliamentary process starts, though, isn't it?

MR THAIN:

Yes, but it shows why the first version of the Bill says what it says, which is the same wording for the appeal test that's remained all the way through to the end. There are only four parts of that Cabinet paper which your Honours should look at. They are paragraph 9, which talks about balancing interests; 83, 131 and 133. 131 and 133 specifically relate to what the appeal test was intended to achieve.

The only other point, given the limited time for my reply, the only other point I think that's worth mentioning is just this issue of the suggestion that it's Foodstuffs that's asking somehow for permission to have a further right of appeal against whatever PLAP is resubmitted by Council. That's not asking Foodstuffs asking for any such permission. The Act simply says that is what will occur and my submission was merely to make sure that the Court was aware that that's what the statute sets out will happen. That's simply what section 86 requires and so that is what will happen.

Your Honour Justice Cooper talked about the need for a holistic view, for ARLA when it considers an amended element in a resubmitted PLAP to have regard to how that sits within the whole of the policy, and perhaps that is the reason why Parliament in its wisdom, or otherwise, did not allow for progressive introduction of policies, because of this holistic requirement, that it all needs to fit together in a cohesive fashion, and perhaps that also relates to this issue of the hours element. If you divorced opening hours from closing hours, you can't tell whether one of them is unreasonable without regard to the overall period of trading that's permitted. In other words you'd have to have regard to the other end of the opening and closing. Perhaps that the reason and that's certainly

something that ARLA will look at but it'll decide it on the papers insofar as it considers that's all it needs to do.

O'REGAN J:
Do you have any comment on costs?

MR THAIN:
I think my friend Ms Cooper is right, that this doesn't qualify, in fact, as a test case for the purposes of costs, although of course it will have that effect for all of those parties who are interested in local alcohol policies.

Perhaps I should say that because that feeds into this issue of what can your Honours make of *Lion* and *Capital*, the cases that deal with specific licence applications. There is a fundamental distinction. When dealing with a LAP, and particular with an hours element of a LAP, that of course applies to everybody in the area to which its imposed, regardless of whether those individual licensees are in a risky area close to Courtenay Place or something like that. In the appeal test for a LAP element the concept of unreasonableness, and therefore the flip side reasonable, is expressly stated in there, and perhaps for that good reason, because parties who are not near risky areas, or not themselves conducting business in a risky fashion, will be affected by those elements. By contrast when dealing with a specific licence application the provision that provides for hours restrictions, for an hours condition in a specific application, section 116, it does not expressly restate the reasonableness obligation in that provision. Instead, of course, the individual licence will be dealt with on its own merits, in its own situation, and whatever comes of that won't be imposed on other licensees who may be in different circumstances. That's a fundamental reason why *Lion* and *Capital* don't really help your Honours with the current case. Even if they are right on their own, they're not relevant to a LAP. Thank you your Honours.

O'REGAN J:
Thank you. Can I just ask you Mr McNamara, do you agree that costs just should apply in the normal way? You do? Thank you. Sorry Mr…

MR LA HOOD:

You will have noticed perhaps that there's been agreement that the Medical Officer can never seek costs or have costs awarded.

O'REGAN J:

Yes, no, I was aware of that, thank you. Thank you counsel for your submissions. We'll reserve our decision and release them in due course, and we'll know adjourn.

COURT ADJOURNS: 4.05 PM