IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-2760
CIV 2017-404-2538
CIV 2017-404-2785
[2020] NZHC 293

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of section 81 of the Sale and Supply of Alcohol Act 2012 ("Act") in relation to an application to review statutory decision of the Alcohol Regulatory and Licensing Authority in relation to appeals on the Auckland District Council's Provisional Local Alcohol Policy ("PLAP") under the Act
BETWEEN	WOOLWORTHS NEW ZEALAND LIMITED First Applicant

Hearing:	11-15 February 2019, 20 February 2019, 20 and 21 June 2019
Appearances:	J Cooper QC and A Braggins for First Applicant R Hooker and M Martin for Second Applicant I Thain and I Scorgie for Third Applicant No appearance for First Respondent P McNamara and T Fischer for Second Respondent D R La Hood, Medical Officer of Health V McCall for First Respondent, abides the decision of the High Court
Judgment:	27 February 2020

JUDGMENT OF DUFFY J

This judgment is delivered by me on 27 February 2020 at 2:30 pm
pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

REDWOOD CORPORATION LIMITED
Second Applicant

FOODSTUFFS NORTH ISLAND LIMITED
Third Applicant

AND

ALCOHOL REGULATORY AND LICENSING AUTHORITY
First Respondent

AUCKLAND COUNCIL
Second Respondent

THE MEDICAL OFFICER OF HEALTH
Interested Party

[1] The applicants are persons who were unsuccessful in their respective appeals to the Alcohol Regulatory Licensing Authority (ARLA) against elements of the Auckland Council's Provisional Local Alcohol Policy (PLAP). They each now bring judicial review proceedings of ARLA's decisions dismissing their appeals.

[2] The Auckland Council opposes the applications as does the Medical Officer of Health, who has been joined as an interested party in the proceedings. ARLA abides the decision of the Court.

[3] These proceedings were heard together but they were not joined. There are common features in the review proceedings brought by Woolworths New Zealand Limited (Woolworths) which was formerly known as Progressive Enterprises Limited and by Foodstuffs North Island Limited (Foodstuffs). Accordingly, I shall deal with these proceedings together. The other proceeding which is brought by Redwood Corporation Limited (Redwood) will be dealt with separately.

Background: Woolworths and Foodstuffs

The Parties

[4] Woolworths is one of New Zealand's leading supermarket operators through over 180 Countdown supermarkets across New Zealand. Woolworths is also the franchisor of the Supervalue and FreshChoice brands in New Zealand with around 70 Supervalue and FreshChoice stores that are independently operated. In total these stores provide around three million customer transactions per week. Woolworths holds off-licences for its Countdown supermarkets through a subsidiary company. Depending on their size Countdown supermarkets, Supervalue and FreshChoice stores are licensed to sell beer, wine and mead. They do not sell alcoholic drinks with a higher percentage of alcohol (spirits such as whisky and gin) or pre- mixed alcoholic drinks, which are commonly known as RTDs.

[5] Foodstuffs is a franchisor and operator of other leading supermarkets and grocery stores in the Auckland region and throughout the North Island of New Zealand

under the New World, Pak'nSave and Four Square brands.[1] Foodstuffs also franchises alcohol off-licenced wholesale entities in Auckland and elsewhere in the North Island under the Gilmours brand. Foodstuffs has an interest in Liquorland Limited, which is a franchisor of bottle shops trading in Auckland and throughout the North Island under the Liquorland brand.

[6] Auckland Council is a territorial authority, the boundaries of which span from the Rodney ward in the north to the Franklin ward in the South, and from the Tasman Sea (together with the Kaipara and Manukau harbours) in the West, to the Pacific Ocean and Hauraki Gulf in the East. Its territory includes some of the most urbanised areas in New Zealand as well as remote rural areas and off shore islands such as Great Barrier. It has a population of approximately 1.6 million and it is the most populous territorial authority in the country. The population is expected to increase by 700,000 in the next 25 years.

[7] The Medical Officer of Health has a statutory role under the Sale and Supply of Alcohol Act 2012 (SSA) which includes having a consultative role at the very early stage of the development of a local alcohol policy (LAP).[2] The SSA also gives the Medical Officer of Health standing to appeal against an element of a PLAP.[3]

The PLAP

[8] Foodstuffs and Woolworths object to four elements of the PLAP, which led to them appealing albeit unsuccessfully to ARLA.[4] These elements relate to maximum trading hours, a temporary freeze on granting off-licences and a subsequent rebuttable presumption against any new off-licences, a requirement for local impacts reports and a requirement to impose certain discretionary conditions on off-licences unless there is a good reason not to do so. These four elements are summarised in turn.

[9] First, the PLAP provides for reduced maximum trading hours during which off-licence outlets can sell their alcoholic beverages. The national default maximum

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1 I shall generally refer to Supervalue, FreshChoice and Four Square stores as grocery stores.
2 See s 78(4) of the Sale and Supply of Alcohol Act 2012.
3 See s 81(2) of the Sale and Supply of Alcohol Act 2012.
4 Section 81 of the Sale and Supply of Alcohol Act 2012 provides such right of appeal.

trading hours in the SSA are from 7am to 11pm.[5] The common closing time for off-licence premises in the Auckland region at present is 11pm.[6] The maximum permissible trading hours under the PLAP will be from 7am to 9pm Monday to Sunday, except for the specific days covered by ss 47 and 48 of the SSA.[7] For stores which close at 9pm this will not be an imposition. However, many of the Woolworths and Foodstuffs stores operate later than 9pm. Under the PLAP, outside the permitted hours those stores will be obliged to close off access to the alcoholic beverages they sell. For the Liquorland stores they will have to close at 9pm because alcoholic beverages are their primary sales.

[10] Secondly, there is a "policy tool" that there should be a temporary freeze preventing any new off-licences being issued in certain identified areas, namely the defined City Centre and Priority Overlay areas, which comprise 23 local centres, for a period of two years from the PLAP coming into force.[8] The temporary freeze is not mandatory but the language of this element discourages the granting of new off-licences during the currency of this freeze, which applies to all types of off-licences including supermarkets, grocery stores and bottle stores in the subject areas. At the end of the temporary freeze the policy provides for an ongoing rebuttable presumption against any new off-licences in the City Centre and Priority Overlay areas, which also applies to all types of off-licences.[9] The policy also provides for a rebuttal presumption against any new off-licencing centres being issued in certain defined Neighbourhood Centres.[10] Again, this applies to all off-licences.[11] These rebuttable presumptions are reinforced by cl 3.3.1 which generally provides that new off-licences in the City Centre, the Priority Overlay areas and Neighbourhood Centres should be refused.

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5 See s 43(1)(b) of the Sale and Supply of Alcohol Act 2012; s 43(2) makes s 43(1)(b) subject to ss 47 and 48 which impose restrictions on the sale and supply of alcohol on Anzac Day morning, Good Friday, Easter Sunday and Christmas Day.

6 See the Explanatory Document for the PLAP.

7 See cl 4.3.1 of the Provisional Local Alcohol Policy as amended by Auckland Council and resubmitted to ARLA on 12 October 2017.

8 See cl 4.1.4(a) and cl 4.1.6(a). The Priority Overlay areas are defined areas of: Avondale, Clendon, Glen Eden, Glen Innes, Helensville and Parakai, Henderson, Hunters Corner, Māngere, Māngere East, Manukau, Manurewa, Mt Wellington, Oranga, Ōtāhuhu, Ōtara, Panmure, Papakura, Papatoetoe, Point England, Pukekohe, Takanini, Wellsford and Te Hana, Wiri.

9 See cl 4.1.4(b) and cl 4.1.6(b).

10 The provisional alcohol policy defines the Neighbourhood Centres as being those mapped in the Proposed Auckland Unitary Plan notified as at 30 September 2013.

11 See cl 4.1.2.

[11] Thirdly, there is the requirement for local impacts reports to be prepared by the Auckland Council Alcohol Licensing Inspectorate (licensing inspectors) and for these reports to be taken into account by the District Licensing Committees (DLCs) and ARLA when making certain decisions under the SSA.

[12] Fourthly, there are the requirements, when issuing or renewing off-licences in the Auckland region, for certain licence conditions to be imposed relating to prohibited persons, maintaining a register of alcohol related incidents, CCTV, lighting, single sales and afternoon closing near educational facilities.

Statutory framework

[13] Alcohol policies are not mandatory and where they are not adopted the provisions of the SSA will regulate the sale and supply of alcohol.

[14] Section 75 of the SSA provides that any territorial authority may have a policy relating to the sale, supply, or consumption of alcohol. Such a policy may provide differently for different parts of its district. Any policy must be produced, adopted and brought into force in accordance with Part 2, Subpart 2 of the SSA.[12]

[15] Section 77, entitled "Contents of policies" provides:

> (1) A local alcohol policy may include policies on any or all of the following matters relating to licensing (and no others)
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> (a) location of licensed premises by reference to broad areas;
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> (b) location of licensed premises by reference to proximity to premises of a particular kind or kinds:
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> (c) location of licensed premises by reference to proximity to facilities of a particular kind or kinds:
>
> (d) whether further licences (or licences of a particular kind or kinds) should be issued for premises in the district concerned, or any stated part of the district:
>
> (e) maximum trading hours:
>
> (f) the issue of licences, or licences of a particular kind or kinds, subject to discretionary conditions:

[12] Sale and Supply of Alcohol Act 2012, s 75.

(g) one-way door restrictions.

(2) Paragraphs (a) to (d) of subsection (1) do not apply to special licences, or premises for which a special licence is held or has been applied for.

(3) A local alcohol policy must not include policies on any matter not relating to licensing.

[16] Sections 78, 79 and 80 set out a formal process that a territorial authority must follow if it is to adopt a LAP. The process entails the production of a draft provisional alcohol policy, public consultation using the special consultative procedure in the Local Government Act 2002 followed by public notification of the intention to adopt such policy, at which point it becomes a PLAP.

[17] Section 81 provides a right of appeal to a licensing authority against any element in a PLAP. That right is limited to persons or agencies that have made submissions as part of the special consultative procedure on a draft local alcohol policy. Such persons may within the prescribed time limit appeal against any element of the resulting PLAP.[13] The Police or a Medical Officer of Health may within the prescribed time appeal to a licensing authority against any element of the PLAP.[14] The territorial authority responsible for the PLAP is the respondent in any such appeal.[15] Persons or agencies who did not make submissions at the special consultative procedure cannot appeal.[16]

[18] Appeals before the licencing authority must be dealt with by way of public hearing.[17]

[19] The only ground of appeal against an element of a PLAP is that it is unreasonable in the light of the object of the SSA.[18] Further s 83 provides:

(1) The licensing authority must dismiss an appeal against an element of a provisional local alcohol policy if it—

(a) is not satisfied that the element is unreasonable in the light of the object of this Act; or

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13 See the Sale and Supply of Alcohol Act 2012, s 81(1).
14 See section 81(2).
15 See section 81(6).
16 See section 81(3).
17 See section 82.
18 Section 81.

(b) is satisfied that the appellant did not make submissions as part of the special consultative procedure on the draft local alcohol policy concerned.

(2) The licensing authority must ask the territorial authority concerned to reconsider an element of a provisional local alcohol policy appealed against if it is satisfied that—

(a) the appellant made submissions as part of the special consultative procedure on the draft local alcohol policy concerned; and

(b) the element is unreasonable in the light of the object of this Act.

[20] Section 4 of the SSA sets out the Act's object:[19]

> The object of this Act is that
>
> (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly, and
>
> (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.
>
> (2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes-
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> (a) any crime, damage, death, diseases, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
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> (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph.

[21] Whilst appellants have no right of appeal against a decision of ARLA,[20] judicial review is not precluded.

[22] Woolworths and Foodstuffs made submissions as part of the special consultative procedure on the Auckland Council's draft local alcohol policy; thus, they satisfied the requirements in s 83(1)(b) of the SSA. Accordingly, the sole issue for ARLA to determine was whether the subject elements were unreasonable in the light

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19 Section 4.
20 Section 83(4).

of the object of the SSA. Following the dismissal of the appeals Woolworths and Foodstuffs commenced these proceedings.

Pleadings

[23] Woolworths pleads that ARLA committed four errors of law, each of which makes ARLA's decision unreasonable in light of the object of the Act.

[24] The first error of law is alleged to arise from ARLA's application of the precautionary principle. Woolworths pleads: (a) the precautionary principle is not provided for in the SSA and, therefore, should not be read into it; (b) ARLA failed to provide reasons as to when it applied the precautionary principle; and (c) ARLA applied that principle incorrectly and in a way which meant that ARLA's testing of the elements in the PLAP could not determine their effect or whether they met the object of the Act. Woolworths says that the precautionary principle influenced ARLA's decision on elements one and two set out above, namely the restriction on trading hours and the temporary freeze on new off-licences.

[25] As part of the first error of law Woolworths also pleads that ARLA: (a) failed to expressly address whether it was unreasonable to include supermarkets and grocery stores in the PLAP in the same manner as other off-licences; and (b) ARLA failed to provide reasons for its implied conclusion that it was not unreasonable for the PLAP to treat supermarkets and grocery stores in the same manner as all other kinds of off-licences.[21]

[26] The second error of law relates to the provision of local impacts reports in the PLAP, which Woolworths contends are a type of policy that falls outside the scope of those permitted by s 77(1) of the SSA. Here, Woolworths alleges that ARLA failed to interpret and apply s 77(1) of the SSA correctly and made mistakes of fact when it determined that a local impacts report is not a policy.

[27] The third error of law relates to the imposition of discretionary conditions in the PLAP. Woolworths contends that ARLA failed to interpret and apply s 77(1)(f) of

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[21] This was done by an amendment to the pleading that was allowed during the hearing.

the SSA correctly with regard to the discretionary conditions of the PLAP. Woolworths contends that this incorrect interpretation of s 77(1)(f) creates a situation where the wording of the relevant part of the PLAP imposes a rebuttal presumption that those discretionary conditions should be imposed, which fetters the statutory discretion in s 77(1)(f) as to whether to impose a discretionary condition or not.

[28] The fourth error of law relates to the imposition of the temporary freeze on and rebuttal presumptions against the issue of new licences. Woolworths contends that they are ultra vires s 77(1) of the SSA. Woolworths also contends that ARLA: (a) failed to have regard to the level of specificity or certainty required for matters which are to be evaluated under s 105 of the SSA; (b) failed to have proper regard to the purpose of the SSA when assessing whether the rebuttable presumptions were unreasonable in light of the object of the Act; (c) misinterpreted the effect of the rebuttable presumptions; and (d) misinterpreted clauses 4.1.3, 4.1.5 and 4.1.7 of the PLAP, which are the clauses that relate to the temporary freeze and rebuttable presumptions.

[29] In its first cause of action Foodstuffs pleads a number of grounds of review. First, that ARLA made an error law in dismissing the appeal against the inclusion of local impacts reports in the PLAP. Foodstuffs contends the local impacts reports are policies which fall outside the scope of permissible policies in s 77(1) of the SSA. Accordingly, they are ultra vires.

[30] Secondly, it is improper for extraneous material that is properly outside the scope of s 77(1) of the SSA to be included in a LAP when it purports to impact on the rights, obligations and processes of applicants, agencies and decision makers in alcohol licensing matters. Accordingly, ARLA has misinterpreted s 77(1).

[31] Thirdly, s 197(4) of the SSA requires licensing inspectors to act independently in the exercise and performance of their functions, duties and powers, and requires territorial authorities to take steps to ensure that their licensing inspectors can act independently. The inspectors' functions, duties and powers, including reporting on licensing applications, are provided in ss 103(2) and 129 of the SSA. By prescribing the form and content of the inspectors' reports the PLAP is inconsistent with s 197(4)

and, therefore, ultra vires and unreasonable in light of the object of the SSA. By failing to recognise this aspect of the PLAP and so dismissing Foodstuffs' appeal ARLA has acted in error of law and unlawfully.

[32] Foodstuffs' second cause of action challenges ARLA's decision on the temporary freeze and rebuttable presumption. Foodstuffs contends ARLA's dismissal of Foodstuffs' appeal against the temporary freeze and rebuttable presumptions was made in error of law and therefore unlawfully, because the temporary freeze elements and the rebuttable presumption elements of the PLAP refer to and rely upon the local impacts reports elements of the PLAP which themselves are ultra vires. This illegality taints the temporary freeze and rebuttable presumption elements.

[33] Foodstuffs' third cause of action challenges the off-hours licensing decision. In relation to restricting closing hours of off-licences to 9.00pm Foodstuffs contends ARLA has erred in law because: (a) ARLA wrongly considered the Council was entitled under the Act and in the circumstances to impose a policy in order to "test … [the] possibility"; (b) wrongly considered that what it described as the precautionary principle would apply to make the 9.00pm closing restriction of the off-licence hours element not unreasonable in light of the object of the Act; (c) failed to apply the relevant legal test in accordance with the law, because it did not consider the test with respect to each of the distinct and/or different local communities within the greater Auckland region; and (d) took into account and wrongly gave primacy to the fact Auckland Council is a unitary territorial authority with responsibility for the greater Auckland region as a whole, which is irrelevant to the legal test when correctly applied.

[34] Foodstuffs also contends that in dismissing its appeal against this element ARLA failed to have any or proper regard to relevant considerations including: (a) the matters set out in s 78(2)(b) to (g) of the SSA; (b) the large size (both in land area and population) and wide diversity (in demography of residents and visitors, overall health indicators in the nature and severity of alcohol related problems arising) in the greater Auckland region; (c) that within the Auckland region there are a wide variety of communities that are geographically, demographically and socio-economically different and distinct, and which have different rates of off-licence premises, with

different opening hours, different overall health indicators and different rates of alcohol related problems of different natures and severities; and (d) the off-licence hours elements would impose a maximum 9.00 pm closing on all off-licence premises, on all days. Foodstuffs contends that this was done without regard to the matters set out in s 78(2) of the SSA in respect of each of the various communities in the Auckland region, including that in many of those communities the rate, nature and severity of alcohol related problems is below the national average and that the 9.00 pm restriction is not a response to local issues, and is therefore outside the scope of the limited authority given to territorial authorities by the relevant provisions of the SSA.

[35] Auckland Council denies that ARLA's decision contains any of the errors alleged by Woolworths and Foodstuffs. The denials largely overlap. Regarding the claims that ARLA read the precautionary principle into the SSA or that it applied the precautionary principle, Auckland Council denies this and further pleads that ARLA correctly found that the challenged elements of the PLAP were not unreasonable in light of the object of the Act.

[36] Regarding the alleged errors of law relating to the local impacts reports Auckland Council contends these reports are not policies, and therefore their inclusion in the PLAP is not precluded by s 77(1) of the SSA. ARLA was correct to find the local impacts reports were simply information requirements and further, if ARLA was wrong and the local impacts reports are policies, then they fall within the scope of s 77(1) of the SSA.

[37] Further, that the local impacts reports are not inconsistent with the requirements of s 197(4) of the SSA, or ultra vires, or unreasonable in light of the object of the Act, that ARLA correctly found that the local impacts reports would not dictate the way licensing inspectors interpreted or commented on information in a local impacts report or made recommendations to DLC's. Auckland Council denies the allegations relating to the PLAP's closing hour restrictions for off-licences.

[38] Regarding the alleged errors of law relating to the discretionary conditions in the PLAP, Auckland Council contends ARLA was correct to find the discretionary

conditions contained in the PLAP do not offend against s 77(1)(f) of the SSA, nor do they fetter the discretion of ARLA or the DLC.

[39] Regarding the error of law relating to the temporary freeze and the rebuttable presumptions, Auckland Council contends that those policies in the PLAP are intra vires s 77(1) of the SSA, that ARLA properly considered s 105 of the SSA when assessing whether the rebuttable presumptions were ultra vires s 77 or unreasonable in light of the object of the Act. Further, that ARLA properly considered the purpose of the SSA, did not misinterpret the effect of the rebuttable presumptions and therefore did not misinterpret the relevant clauses of the PLAP.

ARLA's decision

General

[40] ARLA commenced its decision with some general comments on the relevant statutory framework[22] and the relevant legal principles.[23] Then ARLA outlined the legal test to be applied on appeal. Relying on its earlier decisions, ARLA adopted the test of what an informed objective bystander considers unreasonable having regard to the object of the SSA. ARLA considered the test had two parts however, "ultimately those two considerations merge in the ultimate test… the test combines the two concepts ".[24]

[41] Secondly, ARLA applied a series of legal principles also drawn from its earlier decisions, in which it had found as follows. The applicant carries the burden of proof, the standard of which is on the balance of probabilities.[25] The proportionality principles used in by-law cases are applicable to an appeal against a PLAP.[26] Regarding these principles, ARLA stated that the policies in a PLAP will be unreasonable in light of the object of the Act if the proposed measures are: (a) a

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22 *Redwood Corporation Ltd v Auckland City Council* [2017] NZARLA PH 247 – 254. See [10] to [22]. [ARLA's Decision]

23 See [30] to [43]. ARLA also addressed the application of the principles of Te Tiriti o Waitangi and the requirement for the Auckland Council to provide reasons in support of the PLAP. Those matters formed no part of this proceeding.

24 See [30].

25 See [31].

26 See [32].

disproportionate or excessive response to the perceived problems; (b) partial or unequal in their operation between licence holders; (c) an element of the PLAP is manifestly unjust or discloses bad faith; or (d) an element is an oppressive or gratuitous interference with the rights of those affected. If an element of a PLAP is found to be ultra vires it will be viewed as unreasonable.[27] What might be the best policy response to an issue is for the territorial authority alone to determine.[28]

[42] Thirdly, ARLA outlined its understanding of the objective of the SSA.[29] In ARLA's view the SSA seeks to minimise excessive and inappropriate consumption of alcohol without unduly impinging on safe and responsible consumption. ARLA agreed with submissions from the Police, the Medical Officer of Health and Alcohol Watch, that the SSA provides no right to consume or sell alcohol. Rather, for people who choose to consume alcohol the object of the SSA is to ensure that the sale, supply and consumption is done safely and responsibly, and the harm caused by excessive or inappropriate consumption is minimised. Thus, there is no requirement for a PLAP to protect a public right to consume alcohol or to not unduly impinge on alcohol consumption.[30]

[43] Fourthly, ARLA acknowledged that the precautionary principle was applicable to a PLAP.[31] This principle was first applied in the licensing area in *My Noodle Ltd v Queenstown-Lakes District Council*[32] where in the context of a challenge to the conditions imposed on a particular licence under the previous legislation, Glazebrook J said:[33]

> 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 a possibility of meeting the statutory objective (as the Authority found there was in this case), then it is entitled to test whether that possibility is a reality. In this case, it clearly intended to test its hypothesis and keep the matter under review.

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27 See [33].
28 See [36].
29 See [38] to [39].
30 See [39].
31 See [40] to [43].
32 *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 564, [2010] NZAR 152.
33 At [74].

[44] ARLA then referred to other decisions where it had applied a precautionary approach, providing there was an evidential basis to support it. Here ARLA referred to a statement it had made in an earlier decision:[34]

> Consistent with the policy nature of a PLAP, a respondent is entitled to trial a local control where it considers that control will respond to a local problem. Where it can be shown that a proposed control may have a positive effect locally, the Authority will be slow to dismiss that policy.

[45] This led to ARLA stating:[35]

> In short, provided there is an evidential basis for the adoption 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.

Discussion – General

[46] The general statements by ARLA on the statutory framework and relevant legal principles are matters of general application that affect its decisions on each element of the PLAP. Accordingly, where relevant these are addressed now.

The test on appeal to ARLA

[47] The sole ground of appeal is that an element is unreasonable in light of the object of the SSA.[36] There is no magic in this phrase. I consider it does no more than invoke the well settled rule of administrative law for assessing the exercise of administrative powers that was first given clear expression in *Padfield v Minister of Agriculture*.[37]

[48] In *Padfield* Lord Reid rejected the Minister's arguments that his statutory power gave him an unfettered discretion:[38]

> It is implicit in the argument for the Minister that there are only two possible interpretations of this provision – either he must refer every complaint or he

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34 See [42] of ARLA's Decision.
35 At [43].
36 See s 81(4) of the Sale and Supply of Alcohol Act 2012.
37 *Padfield v Minister of Agriculture* [1968] AC 997 (HL) at 351; see also Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) at 1064 "it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."
38 *Padfield,* above at 1030.

> has an unfettered discretion to refuse to refer in any case. I do not think that is right. *Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court.* In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court. (emphasis added)

[49] Lord Reid also rejected the Minister's argument that a decision for which no reasons are given cannot be reviewed, and in so doing his Lordship reinforced the earlier finding that statutory powers must be expressed to promote the policy and objects of the Act to which they relate:[39]

> … I do not agree that a decision cannot be questioned if no reasons are given. *If it is a Minister's duty not to act so as to frustrate the policy and objects of the Act*, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act.
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> (emphasis added)

[50] These passages from Lord Reid's speech were expressly approved by the Court of Appeal in *Fiordland Venison Ltd* when it recognised that ministerial decisions can still be questioned even when no reasons are given;[40] in which case the Court is left with inferentially determining the reasonableness of a Minster's decision and whether it promotes the policy and objects of the Act.[41]

Purpose and object of the SSA

[51] Section 3 sets out the purpose of the Act relevant to Parts 1 to 3, stating that it is for the benefit of the community as a whole to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in s 3(2); and to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act. The stated

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39 Above at 1032-1033.
40 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 350.
41 Above at 346.

characteristics of the new system are that (a) it is reasonable; and (b) its administration helps to achieve the object of this Act.[42]

[52] Section 4 of the SSA sets out the object of the Act, which is that:

> (a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and
>
> (b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.

[53] Section 4(2) defines the harm caused by excessive or inappropriate consumption of alcohol to include:

> (a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and
>
> (b) any harm to society generally or the community, directly or indirectly caused, or directly or indirectly contributed to, by any crime, damage, death, disease, disorderly behaviour, illness, or injury of a kind described in paragraph (a).

[54] Accordingly, the SSA strikes a balance between allowing safe and responsible consumption of alcohol and minimising the harm caused by excessive or inappropriate consumption. In this way, the SSA recognises a freedom to sell, supply or consume alcohol, in a reasonably safe and responsible way, while at the same time recognising a community freedom to take reasonable steps to protect its members from the harms caused by excessive or inappropriate consumption of alcohol, all of which are a cost and burden to the community as well as harmful to the individual consumer. This view is consistent with the view ARLA expressed on the SSA's purpose and object.

[55] The provisions for the sale, supply and consumption of alcohol must indicate Parliament's view on what will generally achieve the SSA's purpose and object, because otherwise they would not be in their present form. They are a general default standard from which there should be reason for departure. The presence of Part 2 Subpart 2 of the SSA, however, with provisions for LAPs, indicates that Parliament also recognises the SSA's general provisions may require tailoring to meet specific

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[42] See Sale and Supply of Alcohol Act 2012, s 3(2).

features of individual communities, if the purpose and object of the SSA are to be met. Accordingly, the elements of a PLAP need to be formulated with these matters in mind. ARLA did not approach its assessment of the elements under appeal in this way.

Unreasonableness in terms of the appeal test

[56] The SSA's regulation of the sale, supply and consumption of alcohol is not something that engages rights. Accordingly, I see no place for what is known as the "hard look" doctrine when considering the "unreasonableness" aspect of the appeal test in s 81(4). Moreover, a decision by a democratically elected territorial authority on the elements of a PLAP is analogous with local authority rating cases or other such decisions by local government. Such cases involve matters of policy on which views may differ. In these circumstances "unreasonableness" is generally understood to mean what has come to be known as "*Wednesbury* unreasonableness".[43]

[57] A formulation of *Wednesbury* unreasonableness, which I consider to be helpful and therefore of use here, (because it expressly encapsulates the requirement for the decision-maker to pay heed to the context in which he or she operates), is that given by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*:[44]

> … it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

[58] Taken together the statements from *Padfield v Minister of Agriculture* and *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* meld into a single principle: namely, that no reasonable decision-maker would act in a way that would frustrate the policy and objects of the Act under which he or she was exercising authority. This principle mirrors the language of s 81(4) of the SSA. Accordingly, I consider that in enacting s 81(4) of the SSA Parliament has done

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43 See P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed. Thomson Reuters, Wellington, 2014) at 998. This view of *Wednesbury* unreasonableness necessarily first strips out the other forms of unreasonableness that Lord Greene MR identified in decision: namely, pursuing an improper purpose; failing to address relevant considerations or taking into account irrelevant considerations. These are now generally seen to be part of illegality rather than unreasonableness. See discussion in *Constitutional and Administrative Law in New Zealand* 4th ed. at 1000.

44 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064 per Lord Diplock.

no more than apply settled law in relation to ministerial decisions to the decision-making of ARLA, despite its role being more akin to a quasi-judicial body.[45]

[59] Further, it follows implicitly from s 81(4) that, in addition to meeting the express requirements of Part 2 Subpart 2 of the SSA, a LAP should only contain elements that are not unreasonable in light of the object of the SSA, because otherwise elements that do not conform to this requirement will be set aside, if taken on appeal.

[60] I do not consider that ARLA correctly formulated the test for appeal when it stated:

> The reasonable person test applies qualified by the words "in the light of the object of the Act." The test is what an informed, objective bystander (that is the Authority) considers unreasonable having regard to the object of the Act.

[61] There is a difference between conduct which no reasonable territorial authority acting in light of the object of the SSA would adopt (being the measure on appeal of whether an element is unreasonable or not) and the test as formulated by ARLA, which appears more analogous to a test taken from the law of torts when foreseeability is in issue.[46] This is because when it comes to the formulation of policy by those exercising public law powers there is often no binary choice between what is reasonable and what is not. Often there may be more than one possible choice of policy upon which reasonable people may hold differing opinions as to which is to be preferred. In such circumstances it would be open to the territorial authority concerned to make its choice. That is the very essence of administrative discretion. Accordingly, it is not for ARLA on appeal to substitute what it (acting like an informed objective bystander) thinks is unreasonable. Rather, the assessment by ARLA should be tested by reference to whether the inclusion of the impugned element in a PLAP can be said to be something that no reasonable territorial authority acting in light of the object of the

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[45] I note that in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 345, the Court of Appeal described Minister's function in that case as being "analogous to a judicial one, which makes the reasoning in that decision even more applicable to the present case.

[46] See [30] of ARLA's Decision where it outlines the test as being what an informed objective bystander would consider to be unreasonable. This is comparable to the foreseeability test in torts; see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 and *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, [2012] 1 NZLR 36.

SSA would have done. In this respect ARLA may have set the bar for appeal lower than it should have done.

[62] ARLA treated grounds of appeal alleging illegality as being within the test in s 83(1) because illegality, if present, must always evidence unreasonableness. None of the parties challenged this approach and I agree with it because it reflects well established legal principle.[47]

[63] In judicial review the Court's role is to ensure the decision-maker has acted in accordance with the law. Here such scrutiny goes beyond assessing whether ARLA has correctly applied the legal test for appeal and extends to the orthodox judicial review considerations relevant to the decision-making process, which can be conveniently referred to as illegality, unreasonableness and procedural fairness. In exercising this supervisory function questions of law are for the Court to determine without deference to the maker of the impugned decision.

Burden of proof

[64] I consider ARLA misdirected itself in law when it referred to the burden and standard of proof that is applied in civil cases being applicable to appeals before it. Burden of proof and standard of proof are evidential principles to be applied when there is a need to make factual determinations on evidence in the context of a lis inter partes. In *Re Venus NZ Limited* Heath J was critical of the application of such principles to decisions by ARLA on applications for the grant of a new off-licence:[48]

> [52] With respect, the conclusion that there is an onus on an applicant to satisfy the Authority that the issue of a proposed off-licence is unlikely to reduce the amenity and good order of the locality to more than a minor extent is not justified by the extract from Kós J's judgment in *Utikere v IS Dhillon & Sons Ltd,* on which the Authority relied. As I read that extract, the Judge is emphasising the need for the Authority to consider cogent evidence when forming its opinion about the likelihood or otherwise of a reduction in the amenity and good order of the locality.
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> [53] There is a fine line between the proposition that the proliferation of licensed premises will necessarily result in an increase in the supply of liquor to the public in absolute terms, and the injunction that the Authority not take into account "any prejudicial effect that the issue of the licence on the business

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47 See *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [50] and [174].
48 *Re Venus NZ Limited* [2015] NZHC 1377, [2015] NZAR 1315.

conducted pursuant to any other licence". The difficulty arises out of the clash between the public policy goals inherent in competition among businesses (on the one hand) and the regulation of the sale, supply and consumption of alcohol (on the other). It seems to me that question whether amenity and good order will not be materially reduced is one on which a judgment must be formed by the Authority, on the facts of a specific case, as opposed to something that an applicant is required to prove on a balance of probabilities. The difficulties inherent in proving a negative support that view.

…

[56] Section 106(1)(h) of the 2012 Act requires the Authority to form an opinion that "the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence". That is one factor to be taken into account in determining whether a licence should be granted. To the extent that *Re Hari Om* held that there was an onus on an applicant to demonstrate that there would be no material reduction to the good order and amenity of the location, I consider that it was wrongly decided. In my view, no such onus exists.

(Footnotes omitted)

[65] And later:

[57] First, s 105(1)(h) and (i) of the 2012 Act, both of which deal with "amenity and good order" considerations, requires the Authority to form an "opinion". The need for a judicial body to form an independent opinion is conceptually different from a decision that is based on whether or not an applicant has established on a balance of probabilities that a relevant fact has been proved.

[58] Second, the existence of an onus on some aspects of the s 106(1) criteria is inconsistent with the nature of the evaluative task contemplated by s 106 of the 2012 Act, to determine whether the amenity and good order criterion has been met. Section 106(1) refers to factors to which the Authority "must have regard".

[59] Third, s 105(1) of the 2012 Act contemplates the same type of evaluative exercise as is undertaken under s 106(1). The factors listed in s 105(1) are taken into account by the Authority in determining whether the application succeeds.

[60] There is an underlying assumption (which I take from the way in which criteria are expressed) that the Authority will exercise an inquisitorial role in determining the appropriateness of the grant of a particular licence having regard to all relevant factors. Although the 2012 Act does not express the powers of the Authority in that way, the breadth of its functions, (which go beyond judicial determinations) suggests that the application of rules involving onus of proof may not be appropriate. For example, powers of investigation are explicitly conferred by s 174, albeit ones that are delegated to one of its members or some other qualified person.

[61] In my view, the Authority erred in requiring Venus to establish that the amenity and good order criterion had been established. It was obliged to

> inquire into that consideration and to form its own opinion on the basis of the evidence adduced.

[66] Whilst these statements were made by Heath J in an appeal to this Court following ARLA's refusal to grant an off-licence application (something which engages ss 105 and 106 of the SSA), I consider the reasoning to be equally applicable to appeals to ARLA against a PLAP. The short point is that in both instances ARLA is asked to form an opinion on whether certain statutory criteria are satisfied or not, which is an evaluative task that does not lend itself to questions of proof.

Precautionary principle

[67] As part of its general comment ARLA referred to the precautionary principle and the fact it had been applied by the Court of Appeal in *My Noodle Ltd v Queenstown-Lakes District Council* and by ARLA in earlier decisions. In *My Noodle Ltd* the Court of Appeal stated:[49]

> 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 a possibility of meeting the statutory objective (as the Authority found there was in this case), then it is entitled to test whether that possibility is a reality. In this case, it clearly intended to test its hypothesis and keep the matter under review…

[68] In the present case ARLA found that:[50]

> …provided there is an evidential basis for the adoption 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.

This is as much as ARLA says about the precautionary principle in relation to the elements under appeal.

[69] I have some concerns about how ARLA has expressed itself here because the language it has used suggests that provided Auckland Council thinks its PLAP will possibly meet the object of the SSA it is free to pursue such policy. This seems to me to misapply the reasoning in *My Noodle Ltd*. That reasoning was directed to the

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49 At [74].
50 See ARLA's Decision at [43].

conditions that may be placed on a licence. Here, there is the broader question, as posed by ARLA, of whether the PLAP meets the object of the SSA. This question overlaps with the appeal test of whether an element of a PLAP is unreasonable in light of the object of the SSA. By posing the issue as it has done here, ARLA seems to be saying that it can simply accept what Auckland Council thinks its PLAP will possibly achieve, without interrogation by ARLA. That to me is not a correct application of the precautionary principle. When applied properly it should reveal a circumstance where on the strength of the available evidence, when viewed from a precautionary approach, ARLA can be satisfied that an element under appeal is not unreasonable in light of the object of the SSA.

[70] Woolworths argues that the precautionary principle has no lawful application in an appeal against a PLAP. That seems to me to be too narrow an approach and I am reluctant to find the principle could never apply. There is nothing in the SSA that would exclude its application. The principle developed in environmental law and its effect is that a lack of certainty about the threat of harm is no justification for not acting to reduce the harm.[51] I see no reason in principle why a precautionary approach could not be taken in the formulation of a PLAP.

[71] For reasons given later in the judgment, I consider the question of whether ARLA applied the precautionary principle, and if it did whether it did so properly, is something that cannot be properly addressed on review by this Court because ARLA has provided no reasons that would permit me to see how and why ARLA applied the precautionary principle in relation to a particular element under appeal.

[72] Auckland Council maintains the precautionary principle was not applied. The difficulty with this submission is that were this the case, it would be difficult to see why ARLA even mentioned the precautionary principle. I consider the precautionary principle must have featured in some way in ARLA's thinking, but the paucity of reasons given by ARLA do not enable a reader to get a clear view on when or how the principle was applied.

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[51] The principle was described in *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 564 at [74] but was initially founded in the *Rio Declaration on Environment and Development* A/Conf/151/26 (1992), and was subsequently incorporated into various pieces of legislation, including for example, the Fisheries Act 1996, s 10.

[73] The Court, parties and indeed any reader of ARLA's decision need to see when and how the precautionary principle was applied before any assessment can be made on whether its use was unlawful or not. In short, context matters. Much will turn on the available evidential basis in a given case and just how much uncertainty there was. It is not possible to apply evidential principles like the precautionary principle in a vacuum.

[74] I now turn to ARLA's decision on each of the impugned elements. I consider it is helpful to address each element and the outcome separately.

Element one: Restriction on statutory trading hours for off-licences

ARLA's decision

[75] ARLA gave general broad-ranging reasons for rejecting the appellants' arguments against the reduced closing hours. The topic is covered between [123] to [146] of the decision. The first three paragraphs are introductory. From [126] to [145] ARLA summarised the submissions it heard from various parties, and on occasion at the same time ARLA passed comment on them.[52] Then at [146] it provides its conclusion:

> 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 between off-licence trading hours and alcohol consumption and harm. Given the level of alcohol-related harm in Auckland, the Authority does not consider that it has been established that the closing hour restriction is unreasonable in light of the object of the Act. Given this evidential basis for the closing hour restriction, if the Council considers the closing hour restriction for off-licences has the possibility of meeting the object of the Act, then the Council is entitled to test whether that possibility is a reality.

[76] The conclusion states that there is some evidence to establish a linkage between off-licence trading hours and alcohol-related harm, without expressly identifying this evidence. Accordingly, ARLA's reasons for: (a) not differentiating between types of off-licences; and (b) why it considered there was evidence to support a linkage between the closing hours of all manner of off-licences and alcohol-related harm can only be known by inference.

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[52] See [138]; [141]; [144]; [145].

[77] ARLA's summary of the submissions it heard from the various parties as well as its specific references to parts of the evidence called by those parties may provide some insight into what its reasons may have been for the conclusion on off-licence trading hours. Accordingly, this material will also be assessed because it may enable me to infer reasons for ARLA's decision.

[78] Auckland Council explained the restriction on the sale of off-licence alcohol after 9pm as something aimed at "preventing opportunities for late-night top-up alcohol purchases, and excessive pre-loading (consuming alcohol away from an on-licence supplier before a night out) and side-loading (consuming alcohol outside an on-licence outlet while enjoying a night out there) and corresponding high levels of intoxication." It submitted that reducing the closing hours from 11pm to 9pm would reduce the opportunities for off-licence sales, which were more likely to lead to harmful drinking.

[79] Auckland Council said the restricted closing hours were aimed at 'at risk' drinkers for example, younger drinkers rather than those who drink safely and responsibly. It submitted that a 12-hour trading period, (here it was referring to the PLAP's original reduced hours of 9am to 9pm,)[53] allowed for the safe and responsible supply of alcohol, without having any significant economic impact on off-licence sales. Accordingly, this element was not a disproportionate response to the problem of alcohol-related harm across Auckland.

[80] Ms Turner, for Auckland Council, gave evidence that research both overseas and in Auckland strongly supported the correlation between the temporal availability of alcohol and the incidence of alcohol-related harm, with the research recommending that decreasing supply hours was a means to reduce alcohol-related harm. The Council had referred to the "811 public facing off-licence (i.e. retail bottle stores and supermarkets in Auckland)" and said the most common closing time was 11pm (52 per cent), although 81 per cent of those close between 9pm and 11pm". The Council was of the view 65 per cent of off-licences would likely be impacted by the closing hour

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[53] Woolworths and Foodstuffs successfully appealed against the proposal to reduce opening hours from 7am to 9am.

restriction in the PLAP such that, in the Council's view, the PLAP would represent a real reduction in alcohol-related harm once implemented.

[81] Ms Turner's evidence was that region-wide violent and disorderly offending steadily rose: [54]

> From 7am and between 7am and 8am offending doubles climbing to a peak of 12 midday before peaking at around 12 midday, 4pm and 7pm. At, or around, 12 midnight there is a sharp drop-off in violent and disorderly offending.

[82] Ms Turner opined that this pattern of reported violence and disorderly offending for Auckland correlated with the current off-licence operating hours of 7am to 11pm, and she referred to evidence in 2016 that 86 per cent of offenders nationally had their last drink somewhere other than in licensed premises.[55]

[83] Ms Turner gave evidence from a survey undertaken by the Health Promotion Agency that of those people who presented in the Auckland City Emergency Department, 28 per cent lived in the most deprived areas (which are included in the Priority Overlay Areas). She said the most 'at risk' groups were the ones who are most likely to be affected by the 9pm closing hour as purchasing off-licence alcohol is likely to be a cheaper source of alcohol than from on-licences.[56]

[84] There was evidence supporting the PLAP from Alcohol Health Watch and medical practitioners including specialists in preventive social medicine. They acknowledged that evidence of reduction in harm from specific reductions in off-licence trading hours was sparse. However, they referred to overseas studies supporting the relationship between off-licence trading hours and alcohol consumption and harm. Their submissions included reference to New Zealand population survey data which showed that purchases from off-licences in New Zealand after 10pm were approximately twice as likely to be made by heavier drinkers, and that closing off-licences earlier could be expected to particularly reduce access to alcohol for heavy drinkers who suffer and cause the most alcohol-related harm.

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54 See [140].
55 See [140].
56 See [144].

[85] ARLA also heard from Dr Rainger, an independent health consultant and designated Medical Officer of Health, as well as from a number of senior hospital emergency department doctors and residents of Takapuna regarding alcohol-related harm experienced in their community. In Auckland, in 2016, 15.4 per cent of all presentations at hospitals were alcohol-related in comparison to 8.3 per cent nationally. In 2013, 19.3 per cent of presentations to hospitals in Auckland were alcohol-related compared to 18 per cent nationally. Dr Rainger gave evidence that restricting the availability of alcohol was widely recognised as one of the best policies for addressing unacceptable levels of alcohol-related harm. Reducing the availability of alcohol was presented as one of the top three policy options in terms of cost effectiveness to implement and reduce harm from alcohol.

[86] Medical experts from the Waitematā District Health Board gave evidence regarding the adverse effects of the consumption of a large quantity of alcohol in a short period of time. Dr Nair, an Auckland Hospital Emergency Department doctor, acknowledged there was little data to show a link between alcohol related presentations at hospital emergency departments and the source of the supply of the alcohol concerned. However, he did refer to a report from Auckland Hospital which showed that alcohol-related presentations around 1am on Saturday and Sunday mornings indicated that off-licences were the source of the "last drink" in the majority of cases.[57] Dr Clough, a senior economist at the New Zealand Institute of Economic Research gave evidence that up to 80 per cent of alcohol was sold from off-licence premises.[58]

[87] Woolworths and Foodstuffs argued the proposed maximum off-licence trading hours were unreasonable in light of the object of the Act because they would constitute a disproportionate or excessive response to perceived problems, and they were an oppressive or gratuitous interference with the rights of people affected.

[88] Woolworths and Foodstuffs contended that due to the geographic size of Auckland, the diversity of individuals in communities within Auckland, and the large variation in alcohol-related harm between different parts of the regions, Auckland

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57 See [138] of ARLA's Decision.
58 See [139].

could not reasonably be treated as if it were a single homogenous area for the purposes of the PLAP. Moreover, because the PLAP proposes the same maximum off-licence trading hours for all parts of the regions and to all communities, those hours cannot be said to be a response to local issues. That maximum off-licencing trading hours in the PLAP were described as a:

> … blunt blanket policy which would apply regardless of any local issues as to alcohol-related harm, but in addition would impose in all communities in the region the most substantial off-licence trading hours restriction of anywhere in New Zealand.

[89] ARLA heard evidence from Woolworths' expert witness Natalie Hampson the Associate Director at Market Economics Limited which showed there is a rise in both dwelling and non-dwelling related violent and disorderly offending in the late evening. She had said there was a rise in dwelling offences after midnight which then started to drop after 1am. Non-dwelling offences started to rise earlier after 10pm and peaked at 12 midnight before starting to drop off again.

[90] Foodstuffs submitted there was no evidence to justify the restricted closing hours applying to those parts of the region where alcohol-related harm was relatively low, particularly when the aggregate of alcohol-related harm in Auckland was considered as a whole as being no worse than the rest of New Zealand generally. Foodstuffs also submitted that the restricted closing hours are premised on an availability or total consumption theory rather than anything specific or local to Auckland and its residents. Foodstuffs contended that instead of seeking to address issues that arose in Auckland, the restricted closing hours were an attempt by the Council to impose what the Council considered to be better default hours than those specified by Parliament in the SSA. In addition, Foodstuffs contended that because consumers are able to shift the time in which they purchase off-licence alcohol, off-licence trading hours restrictions will not control consumption except perhaps for those who are unable to purchase their alcohol at other times or who fail to plan ahead.

[91] There are comments that ARLA expressed while summarising the parties' submissions and evidence. These comments also throw light on and can be read as forming part of ARLA's conclusion on the reduced closing hours for off-licences. They are set out below.

[92] ARLA found that the evidence of Woolworths' expert witness Ms Hampson, showed an overall pattern of violent and disorderly offences between the hours of 7.00 am and 12 midnight, which correlated with off-licence trading hours.[59]

[93] Regarding medical evidence of alcohol presentations at around 1am at hospital emergency departments on Saturday and Sunday mornings, ARLA acknowledged this evidence did not show where alcohol was purchased before the last drink, and with on-licences still open at around 1am those presentations could not be categorically linked to off-licences.[60] Nonetheless, ARLA considered this evidence showed that off-licence premises are a contributor to late night/early morning weekend alcohol-related presentations.[61] ARLA also considered that evidence from Dr Clough, that 80 per cent of alcohol is sold from off-licence premises, suggested that most of the alcohol consumed in Auckland is consumed in an unlicensed venue.[62]

[94] ARLA referred to Ms Turner's evidence that 25 per cent of Aucklanders had reported risky drinking behaviour in the "last four weeks" and that those most likely to be engaging in risky drinking were younger people aged 15 to 24, those in south/south-east Auckland and Māori and Pacific populations.[63] ARLA found Ms Turner's evidence to be consistent with the evidence of Dr Clough who said that young people between the ages of 18 to 24 years currently do most of their alcohol spending between 9pm and 11pm and therefore the 9pm restriction was most likely to target young persons who engage in pre-loading behaviour.[64]

[95] ARLA then referred to evidence it heard that preloading was a well-planned activity, which would suggest that off-licence trading hour restrictions would not control consumption, except perhaps for those who were unable to purchase their alcohol at other times or who failed to plan.[65] However, ARLA then referred to submissions which countered this view. These came mainly from a Police Officer stationed at Counties Manukau District Headquarters who gave evidence that

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59 See [141].
60 See [138].
61 See [138].
62 See [139].
63 See [144].
64 See [144].
65 See [145].

preplanning was not a feature of lower socio-economic groups where the relationship between the purchase of alcohol and consumption was more immediate and the opportunities for stock-piling alcohol were limited. His view was that alcohol is not consumed when it is not available to be purchased.[66]

Outcome – Element one: Restriction on closing hours

[96] None of the submissions or evidence in support of reduced closing hours, to which ARLA refers, differentiates between supermarket and grocery store off-licences on the one hand and bottle store off-licences on the other. The alcoholic beverages that each group sells differ. The types of problems identified in the evidence of those supporting the PLAP are not problems one would usually associate with off-licence sales from supermarkets and grocery stores throughout the Auckland region. Why those outlets and their customers should be subject to reduced closing hours is not clear from this evidence. Nor is it clear from the available evidence why the closing hours of all bottle stores in the Auckland region should be reduced to 9pm, when Parliament considers that in general 11pm closing hours will meet the object of the SSA. The idea the examples given of alcohol-related harm can be associated with all bottle stores wherever located in the Auckland region is not self-evident.

[97] ARLA's dismissal of the appeals against the off-licence closing hours restriction must mean ARLA found it was not unreasonable in light of the object of the SSA for the same closing hours restriction to apply to all off-licences in the Auckland region. But, ARLA gives no reasons for this outcome. This is in circumstances where reasons for the outcome are not self-evident, nor can they be inferred from the evidence and submissions ARLA mentions in its decision. ARLA uses the language of "proof" in its conclusion; stating that it "does not consider that it has been established that the closing hour restriction is unreasonable…".[67] ARLA also uses language which suggests it was influenced by the precautionary principle. For the reasons set out below I consider these to be errors of law by ARLA, which led to it wrongly dismissing the appeals of Woolworths and Foodstuffs.

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66 See [145].
67 See [146].

Failure to provide reasons

[98] There is no express requirement in the SSA for ARLA to provide reasons for its decisions on appeals under s 81, and it remains the case that the common law does not invariably require the provisions of reasons.[68] Nonetheless, the circumstances where a decision bereft of reasons will withstand judicial review scrutiny have become fewer over time. The common law has now reached the stage where it is commonly accepted that persons exercising a judicial or quasi-judicial function should give reasons for their decisions, and that failure to do so can result in this Court granting relief on judicial review.[69] This development gained impetus in *Lewis v Wilson & Horton Ltd*[70] and has subsequently been accelerated in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*.[71]

[99] Here the appeal provisions vest ARLA with what is plainly a judicial or quasi-judicial role. The public nature of the hearings before ARLA, the standing requirements before an appeal can be pursued before ARLA, the nominating of the territorial authority as the respondent in any appeal, and the type of impacts ARLA's decision will have are all consistent with a judicial or quasi-judicial role.

[100] *Belgiorno-Nettis* involved an express statutory duty to provide reasons, whereas here there is no such duty. Nonetheless, the discussion in the judgment on the general importance of reasons to the maintenance of the rule of law and the common law's growing requirements for reasons are relevant here.

[101] In *Belgiorno-Nettis* the Court of Appeal reiterate the purposes and benefits of a common law requirement for judicial and quasi-judicial decision-makers to give reasons for their decisions.[72] These purposes and benefits stem from the principle of open justice, which necessitates the ability to see and understand the court process, which in turn helps to maintain public confidence in the court system. Reasons help

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68 See *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [75].

69 See *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] NZRMA 535.

70 *See Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

71 See *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175; see also *Waikanae Christian Holiday Park Inc v New Zealand Historic Places Trust Maori Heritage Council* [2015] NZCA 23; [2015] NZAR 302, where a growing trend towards a presumptive duty to give reasons was recognised.

72 At [47].

in this way because they inform the parties why they won or lost, and they help everyone to understand the efficacy of participating in judicial process. When they are absent the rule of law is not seen to be working. Secondly, without reasons it is not possible to know whether there has been an error or misunderstanding made by the decision maker or even arbitrary conduct, all of which adversely impacts on the exercise of rights of appeal or judicial review, where applicable. Finally, the provision of reasons provides a discipline, which requires the decision-maker to formally marshal reasons.

[102] As in the present case, the rights of appeal in *Belgiorno-Nettis* were limited and judicial review was expressly recognised in the subject legislation, all of which confirmed a requirement for reasons:[73]

> [58] In practical terms, these limited appeal rights mean that the merits of a submission will be considered only once. It might be thought that this in some way indicates that reasons are less important, as factual determinations cannot be challenged save in limited circumstances so the reasons for the factual determinations do not need to be stated. It is true that this aspect of the need for reasons may apply with less force, but it is more than counteracted by the even greater need for justice to be seen to be done by the public, with the reasons for the unchallengeable decisions being apparent. Otherwise the reasons could be entirely arbitrary and no-one would know or be able to challenge recommendations or the decision by judicial review, a remedy expressly recognised as still applicable under the Transitional Provisions Act. In our view, the very limited rights of appeal weigh in favour of the giving of discernible reasons, rather than against it. An unsuccessful submitter should be able to understand why the submission has failed. A submitter who cannot understand why a submission has been rejected, and who has no right of appeal against the decision is more likely to be left nursing a sense of uncertainty and unfairness.

[103] The Court of Appeal also found that simply grouping submissions by topics and then generally addressing them with no more than general conclusory findings, which do not explain why a particular submission was not accepted, will not be enough to discharge the requirement for reasons:[74]

> [65] We accept the Judge's observation that it would be sufficient for the Panel to group submissions by reference to "matters" if particular features arising from submissions were stated and submissions on those topics grouped, and reasons on each topic given. Accepting this, there is still a duty to give reasons for accepting or rejecting submissions on a topic even if those submissions are grouped, and the reasons be of a summary nature. If the Judge

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73 See *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] NZRMA 535 at [58].

74 At [65], [77] and [98].

> is indicating otherwise, we respectfully disagree with him. While grouped and summarised reasons could be sufficient in the context of the particular process, some articulation of the Panel's thinking was required. A reader should understand why a decision such as the zoning and height levels for a significant block of land has been made. This can be in short form, and depending on the circumstances a few paragraphs or even a few sentences may be enough. But the "why" should be stated.
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> [77] We do not see these general statements as providing any sort of a reason for the acceptance or rejection of a specific submission or group of submissions when they are competing. It is no more than a statement of principle or approach. We are unable to agree with the submission that this was a reason for the rejection of Mr Belgiorno-Nettis' submission. The competing evidential positions on the Promenade and Lake Road Blocks are not mentioned at all. There is not sufficient material to be able to say why the Panel made its recommendations concerning those Blocks. It is not self-evident.
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> …
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> [98] Possibly if the Council submission was accepted in preference to other submissions, a short statement to this effect, relating it back to the Overview, could have been enough. However, as it was, particularly in relation to these areas, where no particular submission is reflected in the end result, reasons have to be inferred and in the circumstances they are not sufficiently discernible to be capable of analysis and criticism. …

[104] Like the decision-maker under review in *Belgiorno-Nettis,* here ARLA divided its decision into general comment and topic headings on the specific elements on appeal. Under each topic heading ARLA grouped its summaries of the evidence and submissions it received from the parties. ARLA's rejection of Woolworths and Foodstuffs appeal against the closing hours restriction is given in one paragraph that does no more than refer to: (a) evidence linking reduction in alcohol related harm to specific reductions in trading hours being sparse; and (b) there being some evidence of a relationship between off-licence trading hours and the consumption of alcohol and alcohol related harm. Nothing else is said about the latter evidence. The criticisms this approach attracted from the Court of Appeal in *Belgiorno-Nettis* are applicable here as well.

[105] For the closing hours restrictions, ARLA was faced with competing submissions from Auckland Council and the Police and medical persons on the one hand and Woolworths and Foodstuffs on the other. The evidence and submissions ARLA received from Woolworths and Foodstuffs portrayed the widespread application of the reduced closing hours as being disproportionate, excessive and

without evidential foundation, as well as being overly general and therefore contrary to the SSA's requirements for the elements of a PLAP to provide a response to local issues where required. The dismissal of their appeals must mean ARLA rejected their evidence and submissions, and instead found the blanket reduction on reduced closing hours was not unreasonable in light of the object of the SSA. However, no reasons for those findings are given. Like the Court of Appeal in *Belgiorno-Nettis*, I consider that Woolworths and Foodstuffs are entitled to know why their cases on appeal were rejected, as is any reader of ARLA's decision.

[106] Faced with no more than conclusory reasoning the Court can only look to the evidence and submissions that ARLA has chosen to include in its decision and in this way attempt to infer what ARLA's reasons may have been for deciding as it did. From the account ARLA provides in its summaries of the parties' submissions it is clear the evidence that purported to link alcohol related criminal offending with off-licence trading hours was either non-existent or at best weak.

[107] First, ARLA referred to evidence that it considered showed a pattern of violent and disorderly behaviour offences between 7.00am and 12 midnight and off-licence trading hours, which currently end at 11pm. This is as far as the evidence went. There was no consideration of other factors that may contribute to this pattern of offending, such as: (a) the extent to which on-licence trading hours play a part; (b) whether it is a certain type of off-licence supplier rather than all off-licence suppliers; and (c) whether this pattern of offending happens throughout the entire Auckland region or only in certain parts of the region. But without such consideration the correlation that ARLA purports to draw between off-licence trading hours and alcohol related offending to support a blanket reduction in off-licence closing hours throughout the entire Auckland region appears to be no more than an expression of the post hoc ergo propter hoc fallacy.[75] There is nothing inferentially available here to explain why ARLA dismissed Woolworths and Foodstuffs appeal.

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[75] See *Collins English Dictionary* (13th ed. Glasgow, 2018) at post hoc, "the fallacy of assuming that temporal succession is evidence of causal relation [from Latin, short for *Post hoc ergo propter hoc* after this therefore on account of this". In *Erebus Royal Commission*, *Re Air New Zealand Ltd Mahon* [1983] NZLR 662 (PC) at 681 the Privy Council recognised that a court on judicial review was entitled to reject a decision-maker's findings of fact where they were "based upon an evident logical fallacy."

[108] Secondly, ARLA referred to evidence from medical experts regarding alcohol presentations at hospitals around 1 am. ARLA accepted this evidence did not identify where alcohol was purchased and therefore the influence of on-licence supply could not be discounted. ARLA also referred to other evidence that showed 80 per cent of alcohol purchases were made from off-licence suppliers. This gave ARLA the confidence to find that off-licence supply was a contributor to the late-night/early morning presentations at hospital emergency departments. Again, the extent of the contribution from off-licence suppliers, to what extent any such contribution by them could be attributed to all off-licence suppliers, rather than a particular type of supplier, in all districts, rather than some districts, was not touched on. Again, the failure to address those factors leaves ARLA's reasoning open to the inference it has fallen victim to the post hoc ergo propter hoc fallacy. Again, there is nothing inferentially available here to explain why ARLA dismissed Woolworths and Foodstuffs appeal.

[109] Thirdly, ARLA took evidence from Ms Turner that 25 per cent of Aucklanders had reported risky drinking behaviour "in the last four weeks", that those most likely to engage in consumption in this way were young people between 15 and 24 years old, those living in south/south east Auckland and Māori and Pacific populations, and combined this evidence with evidence from Dr Clough that most young people between 18 and 24 years do their alcohol spending between 9pm and 11pm. ARLA does not say how the combined effect of this evidence would indicate the need for a blanket restriction on off-licence closing hours throughout the entire Auckland region, nor is it inferentially apparent.

[110] Fourthly, ARLA had heard evidence that pre-loading was a well-planned activity and heard submissions to the effect that this suggested the restriction of off-licence closing hours would not control alcohol consumption, except for those who failed to plan. ARLA expressly referred to and relied on a contrary submission from a Police Officer from the Counties Manukau district who said that pre-planning was not a feature of lower socio-economic groups, where the relationship between alcohol and consumption is "more immediate" and opportunities for stockpiling are more limited. For those persons alcohol is not consumed when it is not available. However, this evidence does not address whether such persons seek their supplies from all off-licences or whether they are drawn to those off-licence suppliers that supply alcoholic

beverages with a higher alcohol content than beer, wine and mead, and only to those off-licences near to where they live or frequent. Logic would suggest such persons prefer beverages with higher levels of alcohol for quick effect and are likely to purchase them from suppliers close to where they live and frequent. Again, ARLA does not say why it thought this evidence supported a blanket restriction on off-licence closing hours throughout the entire Auckland region, nor is it inferentially apparent.

[111] Moreover, ARLA's finding on the use of the temporary freeze and rebuttable presumptions includes reference to evidence and submissions from Auckland Council that the areas of high deprivation contain populations that are "generally less mobile".[76] This was said in support of the Priority Overlay areas and Neighbourhood Centres being subject to the temporary freeze and rebuttable presumptions. However, the logic of this evidence and submission would suggest that the general lack of mobility associated with areas of high deprivation, (which are also associated with excessive alcohol consumption and alcohol related harm), would also mean such persons were less likely to travel outside their localities. In which case it is hard to see why restricting closing hours to reduce alcohol related harm is something that needs to be done across the entire Auckland region. In this respect the evidence and submissions before ARLA tell against a region-wide reduction in closing hours.

[112] Such evidence as there is of a link between reduced trading hours of off-licences, alcohol consumption and alcohol-related harm does not distinguish between the different types of off-licence suppliers. Supermarkets and grocery stores are restricted to selling beverages with a lower alcohol content. Supermarkets and grocery stores are not self-evidently associated with displays of excessive alcohol consumption or alcohol related harm, nor are those features generally associated with their customers. The evidence of excessive alcohol consumption and alcohol related harm to which ARLA does refer is associated with deprivation and other features of lower socio-economic conditions, which suggests those problems are localised to areas of deprivation. Indeed, ARLA was faced with evidence from Auckland Council that suggested reduced closing hours in areas of deprivation were unlikely to lead to persons in those areas travelling outside their localities to purchase alcohol from off-

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[76] See [112].

licences, if that were legally possible. ARLA identifies no evidence that would show excessive alcohol consumption and alcohol related harm are a widespread occurrence across the entire Auckland region. ARLA also identifies no evidence to show a blanket region-wide reduction of closing hours is needed to mitigate the effects of excessive alcohol consumption and the alcohol related harm that it causes.

[113] The SSA recognises the freedom to consume alcohol in a reasonably safe and responsible way.[77] Parliament considers 11pm closing hours for off-licences to be consistent with the purpose and object of the SSA, otherwise those hours would not have been adopted as default hours. As Foodstuffs submitted, Auckland Council's replacement of the default hours with the reduced hours in the PLAP appears to be an attempt to re-write the SSA by substituting an earlier closing time for the statutory time, without proper regard being paid to the individual characteristics of the various local communities within Auckland and their respective needs.

[114] In the absence of a reasoned decision which sets out why ARLA found it is not unreasonable for there to be a blanket reduction of the statutory default hours for off-licences across the entire region, (of what is the most populous and growing territorial authority in New Zealand), it is hard to understand why such reduction would be imposed. Hence the importance for ARLA to explain in a reasoned way why it found this element of the PLAP could survive appeal. The answer is not self-evident, nor is it capable of inference from ARLA's decision.

[115] I acknowledge that in *My Noodle Ltd v Queenstown-Lakes District Council* the Court of Appeal referred to the view that reduced trading hours would help reduce alcohol abuse and stated:[78]

> …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).
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> (emphasis added)

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77 See [54] herein.

78 *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 564; [2010] NZAR 152 at [73].

However, this was said in the context of an appeal against a refusal to renew a 24 hour liquor licence under the Sale of Liquor Act because the Queenstown-Lakes District Council was concerned about alcohol abuse and alcohol related harm in Queenstown and wanted to reduce its effect by reducing the closing hours of all bars and taverns in Queenstown. Obviously, the size of the locality affected, and the character of the suppliers affected meant that a reduction in trading hours would be undermined if it were not applied to all. Although I note that even then the Court of Appeal recognised there may be room for exceptions. However, those circumstances are not comparable with the circumstances prevailing here, given the size of the Auckland region and the variety of off-licence suppliers. What followed logically from the circumstances in *My Noodle Ltd* does not do so here.

[116] Accordingly, I am satisfied that here the absence of reasons constitutes an error of law that goes to the heart of ARLA's decision on this element of the PLAP. Woolworths has established its first ground of review.

Burden of proof error

[117] After traversing the evidence set out in its decision ARLA then stated that "given the level of alcohol related harm in Auckland" ARLA did not "consider that it has been *established* that the closing hour restriction is unreasonable in light of the object" of the SSA. This language suggests that faced with what was at best sparse evidence to link alcohol related harm with off-licence closing hours ARLA erroneously fell back on its misunderstanding of the applicability of the burden of proof, and so it approached the issue on appeal on the basis that it was for Woolworths and Foodstuffs to prove that it was unreasonable in light of the object of the SSA to restrict the closing hours. This is another error of law.

Failure to pay proper regard to s 78 factors

[118] Foodstuffs pleaded additional errors of law that arise from ARLA allegedly not following the correct decision-making process. The argument is that s 78 of the SSA mandates the considerations relevant to forming a decision under s 77 to adopt a LAP. The lack of reasons means there is nothing to show how ARLA assessed the s 78 considerations relevant to Foodstuffs' appeal. However, Foodstuffs argues by

implication that had ARLA properly paid regard to the s 78 considerations when considering Foodstuffs' arguments ARLA could never have found against Foodstuffs.

[119] The difficulty the Court faces in assessing whether proper regard was paid to the s 78 factors is the lack of reasons to support ARLA's decision, which means whether the relevant statutory processes were properly addressed and how they might have influenced ARLA's decision are not apparent. This problem illustrates why reasons are so important. The Court could take the outcome of Foodstuffs' appeal and attempt to fill in the gaps by inferentially reasoning backwards to see whether proper regard to the s 78 considerations would preclude the blanket reduced closing hours being found to be not unreasonable in light of the object of the SSA. However, Woolworths' success in establishing ARLA has erred in law by failing to provide reasons means it is unnecessary to take this step. The lack of reasons means this element will have to be referred back to ARLA, and the better approach is to await ARLA's response to this judgment.

Erroneous application of the precautionary principle

[120] Woolworths and Foodstuffs also pleaded that ARLA's decision on the closing hours reductions was an error of law through wrongful application of the precautionary principle or in the alternative a failure to apply the principle properly.[79] Again, the absence of reasons means it is difficult to see how the precautionary principle may have influenced ARLA, if the principle was applied.

The respondents' arguments

[121] In summary, Auckland Council argues that ARLA has made no error of law in finding the reduced closing hours are not unreasonable in light of the object of the SSA. Auckland Council also argues that there is no suggestion that ARLA applied the precautionary principle in a manner that overrode the appropriate legal test. Rather, the outcome is the result of ARLA finding that Foodstuffs had not established that a region-wide reduction is unreasonable. Auckland Council contends that whilst s 75(2)

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[79] Woolworths and Foodstuffs argue the principle was unlawfully and wrongly applied. Auckland Council argues it was not applied but that the Council and ARLA are free to have regard to it should they choose to do so.

enables a territorial authority to adopt a LAP that treats different parts of a region differently, it is not obliged to do so and may instead adopt a more comprehensive approach. Therefore, there is no error in ARLA's finding that the region-wide reduction in closing hours is not unreasonable. I reject these submissions for the reasons given at [96] to [116] herein. Moreover, I consider the localised focus expressed in s 75(2), which permits different treatment for different districts within a region, is at odds with the idea the standard default provisions on trading hours can be comprehensively replaced for an entire region.

[122] The Medical Officer of Health submits that the precautionary principle is applicable to ARLA's decision and that ARLA correctly held that the reduced closing hours were reasonable, because the precautionary principle only requires there to be a relationship between off-licence trading hours and alcohol consumption and harm but does not require evidence of this relationship to be powerful or direct. The Medical Officer contends there was an extensive range of evidence showing significant alcohol related harm in the Auckland region that was adduced before ARLA in order to establish the necessary link.

[123] I do not accept the Medical Officer's view of the quality of the evidence relevant to linking alcohol-related harm with off-licence trading hours. Such evidence as there was is sparse and it fails to distinguish between the different types of off-licence suppliers. His submission that, because the safe and responsible consumption of alcohol is one of the objects of the SSA, any element of a PLAP addressing irresponsible consumption of alcohol cannot be unreasonable in light of the object of the SSA is: (a) based on his erroneous view of the quality of the relevant evidence; and (b) the submission begs the question as to whether such harm is linked with all off-licence suppliers throughout the Auckland region. Accordingly, I reject his submissions.

Element two - Temporary freeze on new off-licences followed by rebuttable presumption against issuing new off-licences

ARLA Decision

[124] The PLAP divides parts of the Auckland region into the City Centre, Priority Overlay areas and Neighbourhood Centres. For those areas the PLAP provides a "policy tool" in the form of a temporary two-year freeze on the issue of any new off-licences in the City Centre and the Priority Overlay areas, followed by a rebuttable presumption against the issue of new off-licences in those designated areas. Whilst not subject to a temporary freeze the issue of off-licences in Neighbourhood Centres is subject to the same rebuttable presumption.

[125] The appeals ARLA heard against the temporary freezes and the rebuttable presumptions challenged: (a) the definitions and extent of the City Centre and Priority Overlay areas; and (b) the substantial question as to whether such comprehensive restrictions were warranted. Accordingly, ARLA's considerations of this topic appear twice in its decision. Both occasions must be examined when seeking to identify the reasons for ARLA upholding the imposition of the temporary freezes and the rebuttable presumptions against new off-licences.

The definitions and bounds of the subject areas

[126] Regarding the challenge to the definitions and bounds of the City Centre and Priority Overlay areas, ARLA rejected the appellants' arguments that Auckland Council has defined the City Centre arbitrarily by adoption of Auckland Unitary Plan boundaries, finding instead that Auckland Council had first referenced the definition to evidence relevant to alcohol related harms[80] and then referenced this to the definition of City Centre in Auckland.[81] As to the Priority Overlay areas ARLA found that Auckland Council had followed a robust process of analysis in determining the bounds of these. ARLA was satisfied that Auckland Council had used criteria that helped to identify where alcohol-related harm may be greater in some areas relative to

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80 There was evidence from Auckland Council which identified these as the high number of licences in the area, (particularly late-trading premises), the area's demography (it being populated by a high concentration of young people) and data showing alcohol related harm was heightened in the City Centre.

81 See [83].

others and considered there was nothing before it that challenged those criteria.[82] ARLA concluded:[83]

> The Authority does not consider that the Priority Overlay areas have an unequal and disproportionate policy impact on supermarkets and grocery stores compared to other types of off-licences. This is discussed below in relation to the impact of the freeze and rebuttable presumption elements of the PLAP.

[127] ARLA also concluded that it was not unreasonable for the PLAP to impose restrictions on new off-licences in the City Centre and Priority Overlay areas when it did not impose the same restrictions on new on-licences, despite their acknowledged contribution to alcohol-related harm:[84]

> Given the nature of off-licences, it has not been shown that these restrictions are unreasonable in light of the objects of the Act because they are different from those which apply to on-licences.

[128] The general reasons ARLA gives in these conclusions need to be read in light of the submissions and evidence to which ARLA expressly refers.

[129] Regarding the arguments against the definition of the City Centre, Woolworths submitted that rather than apply the risk-based approach that was taken to defining the "Priority Overlay" areas with the "City Centre", Auckland Council simply adopted the definition provided in the Auckland Unitary Plan, which views the "City Centre" as an entertainment hub.[85]

[130] Regarding the arguments against the definition of the Priority Overlay areas, Woolworths submitted that those areas had been defined by using a set of proxy measures for alcohol-related harm supplemented by information from local Boards for the improper purpose of restricting off-licences.[86] Further, those areas were not defined for the purpose of addressing potential alcohol-related harm in 'at risk' communities, as they should have been. Woolworths further submitted that given the growth strategy in the Auckland Unitary Plan, the definition of the Priority Overlay

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82 See [80].
83 See [82].
84 See [84].
85 See [66].
86 See [67].

areas would result in an unequal and disproportionate policy effect on supermarkets and grocery stores compared to other types of off-licences (for example, bottle stores).[87]

[131] Woolworths also contended that many of the Priority Overlay areas have a lower than average rate of alcohol-related harm than the Auckland average, which Woolworths says is lower than the New Zealand average.[88] Woolworths further contended that, aside from South Auckland, the Priority Overlay areas did not show any correlation between supermarkets and alcohol-related harm. Moreover, it was illogical for the PLAP to impose restrictions on new off-licences in the City Centre and Priority Overlay areas, but not to place the same or similar restrictions on new on-licences given the impact of on-licences on alcohol-related harm.[89] This led Woolworths to submit that it was unreasonable in light of the object of the Act to restrict off-licences by reference to defined areas without consideration of alcohol-related harm in those areas, particularly when they had seen only limited growth in off-licences in recent times.[90]

[132] Auckland Council refuted Woolworths' arguments. Ms Turner gave evidence that when determining the Priority Overlay areas the Council had regard to demographic information, the nature and severity of alcohol-related harm, the health of residents and the nature and number of existing licences in Auckland.[91] She said that Auckland Council had analysed both alcohol-related offending and 'at risk' population groups. The 'at risk' groups were identified by reference to research from various sources including Auckland's health authorities and Police crime statistics. This information revealed the linkage between alcohol-related harm, deprivation and certain ethnic populations. This information also informed Auckland Council that different types of interventions were warranted to address the different levels of alcohol-related harm being experienced in Auckland and that the most deprived areas also closely matched with the areas experiencing the most alcohol-related crime. The information also closely aligned with hazardous drinking statistics. Accordingly,

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87 See [67].
88 See [68].
89 See [69].
90 See [70].
91 See [74].

Auckland Council had defined the Priority Overlay areas having regard to the proportion of residents aged 15 to 24 years, the proportion of Māori and Pacific peoples, the proportion of peoples living in high deprivation areas, and the number of alcohol-related incidents drawn from Police data per 1,000 residents.[92]

[133] The Police, the Medical Officer of Health (supported by the Takapuna Residents' group) seemingly confined their arguments on the definition of the Priority Overlay areas to a complaint that Pt Chevalier and Takapuna were not included.[93] It was left to Auckland Council to defend the definitions adopted in the PLAP.

The temporary freeze and rebuttable presumptions as policy tools

[134] Regarding the use of the temporary freeze and rebuttable presumptions as a policy tool ARLA concluded:[94]

> … the Authority does not find it has been established that the temporary freeze or rebuttable presumption is unreasonable in light of the object of the Act.

[135] Here, ARLA gave a series of reasons set out at paragraphs [114] to [121] of its decision. These are also best considered in light of the evidence and submissions to which ARLA referred.

[136] Foodstuffs and Woolworths submitted that the temporary freeze and rebuttable presumption were ultra vires s 77(1) of the SSA because they were not a policy on whether further off-licences should be issued in stated parts of Auckland.[95] Further, even if not ultra vires, the temporary freeze was confusing because it was intended to operate as a policy and would not be mandatorily imposed, and the rebuttable presumptions were vague, because there was nothing to show how they would operate.[96] Whilst the PLAP specified that certain sources of information should be considered when determining whether the presumptions are rebutted,[97] it says nothing about the circumstances or matters that would rebut the presumptions, which makes

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92 See [75] and [76].
93 ARLA dismissed this aspect of their appeals and the matter has not been pursued further.
94 See [122].
95 See [105].
96 See above.
97 See cl 3.3.

their operation subjective and uncertain. It leaves it unclear as to whether they are to be applied strictly or flexibly, and how much weight they are to be given by the decision-makers.[98]

[137] Woolworths and Foodstuffs also submitted that these elements of the PLAP are unreasonable in light of the object of the SSA because they only apply to off-licences, when on-licences are at least equal if not greater contributors to alcohol-related harm. Further, these elements are inconsistent with the evidence that supermarkets and grocery stores are not associated with an increase in alcohol-related harm in the Central Business District, whereas other types of licences are shown to increase harm. Accordingly, these elements were a disproportionate response to the harm sought to be addressed.[99]

[138] Woolworths and Foodstuffs argued that the effect of the temporary freeze and rebuttable presumptions on supermarkets would be inconsistent with Auckland Council's aspirations for the Unitary Plan, how that plan proposes to deal with anticipated growth in Auckland, and the need for additional supermarkets and grocery stores in the Central Business District. There were also likely to be unintended consequences for other parts of Auckland, notably because the temporary freeze will constrain the ability of areas to be developed in response to changing demographics and city planning. Where demand exists for supermarkets in Priority Overlay areas developers would be driven to develop on the edge of the area to avoid the temporary freeze and rebuttable presumption. Woolworths and Foodstuffs submitted that such outcomes would be at odds with the Auckland Unitary Plan and the Independent Hearing Panel's finding that the zone provisions in the plan needed to be amended to provide land to cater for more supermarkets and grocery stores.[100] Accordingly, the PLAP failed to recognise the role of supermarkets in improving the economic wellbeing and social amenity of communities at a localised level and their importance to the development of a more efficient city.[101]

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98 See [105].
99 See [106].
100 See [107].
101 See [108].

[139] Woolworths and Foodstuffs also argued that the benefits of the temporary freeze and rebuttable presumptions would only be marginal because a restriction on new supermarkets and grocery stores would have only a very limited impact on the actual accessibility of alcohol, given that most Priority Overlay areas already contained a supermarket or grocery store.[102] Further, these elements are not sufficiently connected to the risk of alcohol-related harm in some of the Priority Overlay areas as in some cases the rates of alcohol-related harm are lower than both the Auckland average and the national average.[103]

[140] On the other hand, Auckland Council submitted that restricting the issue of new off-licences in the Priority Overlay areas was likely to minimise alcohol-related harm given the correlation between off-licences, density and alcohol-related harm. The Priority Overlay areas had been identified on the basis of relevant risk factors. The presence of off-licences in Neighbourhood Centres particularly in residential centres was said to increase the availability of alcohol to 'at risk' populations. These populations were generally less mobile due to those areas being areas of high deprivation.[104] The Council submitted that there was sufficient evidence to invoke the precautionary principle in relation to new off-licences in the City Centre, Priority Overlay areas and Neighbourhood Centres.[105]

[141] ARLA considered that the policy tools of the temporary freeze and the rebuttable presumptions at best provided guidance to the DLC and to ARLA on Auckland Council's preferred outcome. Thus, the temporary freeze and rebuttable presumption elements would not operate automatically to prevent the issue of off-licences in all cases. An off-licence may still be issued where the information contained in the local impacts report or otherwise satisfies the DLC or ARLA that a licence should be granted.[106]

[142] ARLA rejected the arguments that the rebuttable presumptions were ultra vires s 77(1) of the SSA.[107] It found the rebuttable presumptions were a policy tool that

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102 See [109].
103 See above.
104 See [112].
105 See [113].
106 See [114].
107 See [115].

were relevant to whether further licences should be issued for stated parts of Auckland. In ARLA's view the rebuttable presumptions fell within the types of policies permitted by s 77(1)(d) of the SSA, and they provided some guidance to the DLC and ARLA on Auckland Council's preferred treatment for and outcome of certain licensing applications.[108]

[143] ARLA noted that the parties acknowledged the temporary freeze and rebuttable presumptions do not act as a prohibition on the issue of licences. This was because the LAP is but one of the matters in s 105 of the SSA to which decision-makers on individual licence applications (being the DLC or ARLA) must have regard when deciding whether to issue a licence. Accordingly, a licence may still be issued during the currency of the temporary freeze and rebuttable presumptions. Whether it is issued would depend on the weight given to the LAP relative to the other matters in s 105. The rebuttable presumptions were also described as something to be considered on a case-by-case basis, having regard to the information in the local impacts report and the information put forward by an applicant.[109]

[144] In ARLA's view the circumstances of each licensing application will vary and the rebuttable presumptions will simply require that in certain cases the information required to persuade the DLC to grant an off-licence will be greater than what might otherwise be the case. The effect will be that the rebuttable presumptions may require the applicant to provide more information to the DLC to satisfy it that the criteria in s 105 have been met. ARLA saw this as a feature that would in time lift the quality of licensing applications.[110]

[145] ARLA was not persuaded there would be unintended consequences for Auckland as a result of the PLAP, or that the temporary freeze or rebuttable presumptions were disproportionate in effect. It accepted there would be development measures arising from the applications of the Auckland Unitary Plan as regards supermarkets in residential areas, which may see some supermarkets developed outside Priority Overlay areas. But ARLA considered this impact was overstated. It

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108 See above.
109 See [116].
110 See [117].

also found the temporary freeze and rebuttable presumptions were not intended to operate in metropolitan centres. Nor would those elements apply to town centres, or local centres, unless those centres were in the Priority Overlay areas. In this regard ARLA referred to a submission from the Council's resource consents department:[111]

> Supermarkets are already well established in the city centre and Priority Overlay. The Priority Overlay affects a relatively small proportion of centres. The neighbourhood centre zone anticipates small scale supermarkets where land size allows. New off-licences for supermarkets are not precluded in the city centre or Priority Overlay (after the temporary freeze) or in Neighbourhood Centres, there is simply a higher threshold for granting because the presumption against granting must be rebutted. For these reasons I consider that [Woolworths' expert witness] overstates his concerns that the PLAP will drastically change the zone opportunity for supermarket and grocery store growth.

[146] ARLA also referred to the fact Woolworths' expert witness had acknowledged under cross-examination that with the type of supermarkets Woolworths built, it should have more than a 50 per chance of rebutting the presumption.[112]

[147] ARLA did not accept that the rebuttable presumption was insufficiently connected to the risk of alcohol-related harm in respect of Neighbourhood Centres. Here it referred to the evidence of Dr Cameron from the University of Waikato for Auckland Council, that off-licence density is associated with higher levels of violent offences, sexual offences and drug and alcohol offences. And under cross-examination in response to questions about whether there was a risk assessment of different Neighbourhood Centres Ms Turner, for the Council, had said:[113]

> The risk is about the type of centre and the way that makes alcohol more accessible than it would if the store located in a larger centre that wasn't so residential in nature. So that's the risk analysis that was undertaken.

[148] Finally, ARLA concluded that the rebuttable presumptions were not ambiguous or vague. The decision-makers on an individual licence application were required to consider the local impacts report, the relevant rebuttable presumption and any other information an applicant presented.[114]

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111 See [118].
112 See [119].
113 See [120].
114 See [121].

Outcome – Element two: temporary freeze and rebuttable presumptions

[149] Woolworths' grounds of review allege that:

(a) ARLA failed to expressly address whether it was unreasonable to include supermarkets and grocery stores in the PLAP in the same manner as other off-licences; and

(b) that ARLA failed to provide reasons for its implied conclusion that it was not unreasonable to treat all off-licences in the same manner; this applies to the temporary freeze and rebuttal presumption element of the PLAP, as well as to the reduced closing hours for off-licences.

Failure to provide reasons

[150] Nowhere in its decision does ARLA address whether it was unreasonable to treat supermarkets and grocery stores in the same manner as other off-licences in relation to the temporary freeze and the rebuttable presumptions. Further, there is nothing in that part of ARLA's decision in terms of its summaries of the evidence and submissions it heard or its comments thereon that would enable a reader to infer why it was that ARLA considered it was not unreasonable in light of the object of the SSA for all off-licences to be treated in this manner. For the same reasons as are given for finding that ARLA's decision on the reduced closing hours element constitutes an error of law through the failure to provide reasons I make that finding here as well.

[151] Moreover, the temporary freeze and the rebuttable presumption suggest to me that it may be more difficult for Woolworths and Foodstuffs (or any other supermarket/grocery store wanting to sell beer, wine or mead) to open new stores in the City Centre, the Priority Overlay areas or Neighbourhood Centres, given those suppliers will necessarily have to overcome the obstacles that the temporary freeze and rebuttable presumptions will present. The need to address this obstacle will be an additional cost and in close decisions may be a determining factor against such new developments.

Temporary freeze and rebuttable presumption: ultra vires

[152] Woolworths also contends that the temporary freeze and rebuttable presumptions are ultra vires s 77(1) of the SSA. However, s 77(1)(a) permits a LAP to include a policy on the location of licensed premises by reference to broad areas, which is what the City Centre, Priority Overlay areas and Neighbourhood Centres do. Section 77(1)(d) permits policies on whether further licences (or licences of a particular kind or kinds) should be issued for premises in the district concerned or any stated part of the district, which is what the temporary freeze and rebuttable presumptions are for.

[153] In principle, therefore, a policy that designates specific areas within the Auckland region for licensing purposes and seeks to restrict the issue of further licences for premises in those areas would not be ultra vires s 77(1). However, before such a policy could form part of the PLAP the relevant considerations set out in s 78 would need to be considered, which would include the different types of off-licences and the different impacts they might have on the relevant factors set out in s 78.

[154] By upholding the PLAP's comprehensive application of the temporary freeze and rebuttable presumptions to all off-licences in the City Centre, Priority Overlay areas and Neighbourhood Centres ARLA has found this element of the PLAP is not unreasonable in light of the object of the Act. However, ARLA gives no reasons for this finding. For the Court to assess the lawfulness of the decision-making process that led to the inclusion of this element, whether it complied with the requirements of ss 77 and 78 and whether ARLA properly considered this aspect of the appeal the Court needs to know ARLA's reasons for its decision. How and why the decision was reached needs to be seen. Whether due regard was paid to the relevant factors in s 78 and whether the discretionary authority in s 77(1)(a) and (d) were properly exercised cannot be properly assessed when no reasons have been given. In short, the absence of reasons to explain ARLA's decision on this element, including the failure to explain why Woolworths' arguments were rejected prevent any proper analysis by this Court of the ultra vires ground of review.

[155] The absence of reasons also means the Court cannot assess the ground of review that ARLA was wrong to conclude the comprehensive application of the temporary freeze and rebuttal presumption elements to all off-licences is not unreasonable in light of the object of the SSA.

[156] Here, the absence of reasons constitutes an error of law that leads to relief. Whilst it may be open to the Court to conclude that there is nothing either expressly or inferentially to show that ARLA's decision on the second element is intra vires, in which case it must follow that the element is ultra vires, I consider the better approach is to find the decision to be unlawful because of the lack of reasons to support it.

The respondents' arguments

[157] Auckland Council contended that the temporary freeze and rebuttable presumption were not ultra vires as they comprised a policy that goes to whether further licences should be issued in certain stated parts of Auckland, which brought them within s 77(1) of the SSA. The Council also submitted that the evidence of Dr Cameron, before ARLA, suggested there was no basis for different treatment of supermarkets and other off-licences, and thus ARLA was entitled not to find elements of the PLAP unreasonable on account of their failure to differentiate between different off-licence locations. The Medical Officer of Health made minimal submissions on this point, opting to support the submissions made by the Council, but he also noted that if an element could be linked to the minimisation of alcohol related harm, because this was an objective of the SSA, the element would not be unreasonable in light of the object of the Act. Regarding the temporary freeze and the rebuttable presumption sufficient evidence was placed before ARLA to establish the necessary link that rendered the policy reasonable.

[158] I reject the opposing submissions. 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 of Dr Cameron's evidence. But it does not. ARLA simply refers to Dr Cameron's evidence in relation to Neighbourhood Centres and says it shows an association between off-licence density and higher levels of violence, sexual offences and drug

and alcohol offences. This outline of Dr Cameron's evidence is not enough to support the inference ARLA either understood or accepted that the features Dr Cameron identified are something that is common to all types of off-licences. Secondly, Auckland Council took me to aspects of Dr Cameron's evidence and invited me to infer from those that his evidence showed there was no basis for differentiation between different types of off-licences when it came to their association with alcohol-related harm. However, unlike ARLA I have not had the benefit of seeing and hearing all of Dr Cameron's evidence. So, I am not well-placed to assess his evidence or to draw the inferences that Auckland Council wants me to draw. Accordingly, I propose to approach Dr Cameron's evidence from the perspective of how it was outlined in ARLA's decision.

[159] More importantly, it is not apparent from ARLA's decision whether evidence that it understood as showing linkage between off-licences and alcohol-related harm was evidence that generally referred to off-licences, without the researchers taking account of any distinction between the different types of off-licences; or whether they had taken this factor into account and then found that much the same level of alcohol-related harm could be linked to all types of off-licences. The former circumstance may well render the same treatment for all off-licences unreasonable in light of the object of the SSA, whereas the latter may not. Even if the level of alcohol-related harm were found to be the same for all types of off-licences, the next question is whether that would be the case for all areas within the region, or whether it would differ according to the local characteristics of the various areas. Until a view is formed on these questions, it is not possible to say whether an approach that may limit the number of all new off-licences in all parts of the Auckland region is not unreasonable in light of the object of the SSA. The arguments advanced by Auckland Council and the Medical Officer of Health rely on a an overly superficial view of the evidence and relevant issues.

Element three - Local impacts reports: are they ultra vires and/or unreasonable?

ARLA's decision

[160] Clause 4.1 of the PLAP refers to the Council's general policies on issuing off-licences in the Auckland region. The clause provides that amongst other things, the

DLC and ARLA should have regard to the local impacts report prepared under cl 3.1.3 of the PLAP. Clause 5.1 of the PLAP makes similar provision in relation to the Council's general policies on issuing on-licences in the Auckland region.

[161] Clause 3.1 of the PLAP generally provides for local impacts reports. The purpose of the local impacts report is to provide the DLC and ARLA with information relevant to their decision-making under the SSA. Auckland Council intended that the local impacts report be a consideration for decisions on whether to issue a licence, whether to impose discretionary conditions, and if so what those conditions should be, as well as the conditions to be imposed on the renewal of licences, and whether to issue the licence with the full extent of the maximum hours.

[162] For all applications where the LAP directs the DLC and ARLA to consider a local impacts report, the licensing inspectors are directed to prepare a local impacts report in accordance with cl 3.1.4. This clause outlines the matters relevant to the local impacts report, which are to be addressed to the extent such information is available. They are: the number of existing licensed premises in the reporting area, their locations relevant to the proposed site, the kinds and mix of licences, the type of premises, the trading hours, their risk profiles and whether any sensitive sites exist within the reporting area and their proximity to the proposed site. Sensitive sites are identified as being early childhood centres and childcare facilities, education facilities, addiction treatment facilities and marae. For on-licence applications the available transport options should be identified. Other matters relevant to this information gathering are the other types of land uses within the reporting area, the nature and severity of alcohol related harm in the reporting area including the incidents of alcohol-related crime, anti-social behaviour, alcohol-related health issues and any other information relevant to s 4(2) of the SSA. Also relevant is the kind of licence that is sought, the type of premises, the patron capacity, the proposed hours of operation, the likely risk profile under the Sale and Supply of Alcohol (Fees) Regulations 2013 and the steps the applicant would take to manage the premises to minimise alcohol-related harm.[115]

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[115] See cl 3.1.4 of the Provisional Local Alcohol Policy.

[163] The PLAP also provides that where a hearing is required in respect of an application, and the DLC or ARLA is directed to have regard to a local impacts report, Auckland Council is to provide the applicant with a copy of the local impacts report in advance of the hearing to allow the applicant time to respond.[116]

[164] Woolworths and Foodstuffs submitted there is uncertainty about the production, application and utility of the local impacts report. In any event, they are ultra vires s 77 of the Act.[117]

[165] Woolworths argued that a local impacts report without context could prove problematic. It gave the example where Police were required to provide crime data in respect of an application, but then chose not to oppose the application and argued that the decision-maker may still be encouraged to decline the application on the basis of the crime statistics, despite there being no advice from the Police about what these statistics mean and despite the fact that the Police may themselves not share the concerns.[118]

[166] Foodstuffs submitted that this element of the PLAP requires inspectors to prepare local impacts reports and directs that the DLC and ARLA should have regard to local impacts reports when neither element is a permitted policy under s 77(1) of the SSA, because neither comes within any of the matters listed in s 77(1). Foodstuffs submitted in the alternative that this element constitutes a policy on (a) the information inspectors are to provide to the DLC and ARLA; and (b) the information to which the DLC and ARLA must have regard.[119]

[167] Foodstuffs further submitted that the PLAP makes it mandatory for the licensing inspector to prepare the report, when the inspector is required by s 197(4) of the SSA to act independently in the performance of his or her functions, which is another reason why the local impacts report are ultra vires s 77 of the SSA.[120]

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116 See cl 3.1.5 of the Provisional Local Alcohol Policy.
117 See [88].
118 See [98].
119 See [89].
120 See [89].

[168] Foodstuffs also submitted that because the temporary freeze and rebuttable presumption are linked to the elements of the local impacts report, therefore, if the element of the PLAP requiring the preparation of a local impacts report was found to be ultra vires those inter-related elements must also be reconsidered by ARLA.[121]

[169] Auckland Council submitted that while s 77(1) of the SSA does not expressly refer to "mechanisms" such as local impacts report, nor does s 77(1) preclude them. Section 77(1) states that a LAP may include policies on any or all of the matters listed relating to licensing and no others. The Council submitted that the words 'policies on' indicates that it was intended that territorial authorities have a degree of latitude when formulating local alcohol policies and that local impacts reports are intended to provide information that will assist the DLC or ARLA to decide on the matters in s 77(1)(a) and (d).[122]

[170] For Auckland Council, Ms Turner gave evidence that the idea for local impacts reports came out of the community concerns around schools and such issues not being considered in licensing decisions. This was a matter also raised by the Takapuna Residents group which advised ARLA that the information in the local impacts report was needed to protect communities from alcohol related harm and would enable appropriate conditions to be imposed on licences.[123]

[171] ARLA found the local impacts reports are not ultra vires s 77(1) of the SSA, because they merely provide relevant information rather than policy. ARLA considered that the special reporting process provided by the local impacts reports simply works to inform the DLC and ARLA's decisions about the location and density of new licences. ARLA considered there was nothing preventing this information from being put before the DLC or ARLA, and the information can already be provided by any of the reporting agencies under s 103 of the SSA. ARLA acknowledged that the contents of a local impacts report will include what can be found in a licensing inspector's report, but nevertheless the information in the local impacts report will be provided "faster and more consistent[ly]".[124] Accordingly, the local impacts reports

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121 See [88].
122 See [90].
123 See above.
124 See [91] and [92].

would not guide the DLC or ARLA in the way that a policy does, rather these reports merely require that in certain types of applications (determined by reference to risk and the designated locations provided in the PLAP) more information than might otherwise be put before a decision-maker is to be considered.[125]

[172] ARLA considered the local impacts reports would facilitate consistent reporting and decision-making across the Auckland region. To this extent the local impacts reports were said by ARLA to be akin to an internal information standard that specifies best practice. Whilst a LAP may not be the ideal place to state such a requirement or standard, given it is not a policy, its presence in the LAP is not precluded by s 77(1). ARLA observed that if local impacts reports were not included in the PLAP, they could still be given effect to by reporting agencies.[126]

[173] ARLA found that some of the information the licensing inspectors were required to produce depends on that information first being provided to them by another agency for example, crime data from the Police. If certain information from other reporting agencies was not available then it need not be included. Clause 3.1.4 only requires the local impacts reports to address matters set out to the extent the information is available.[127]

[174] ARLA also did not consider the independence of the licensing inspector was compromised by the mandatory nature of the local impacts report. In this regard it found the Council was not seeking to dictate the way the inspector may interpret, comment on or make a recommendation to the DLC based on the information in the report. Nor did the local impacts report fetter the ability of the Police, Medical Officer of Health, or inspector to provide a s 103 report. The Police and Medical Officer of Health's discretion under s 103 of the Act to oppose an application was not impacted by the inspector providing a local impacts report. In this regard ARLA found:[128]

> Section 103 reports are not constrained by the fact that certain information is to be put before the [DLC] or [ARLA]. To the extent that local impacts reports will be "*more consistent*" than s 103 reports, accords with the function of the

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125 See [93].
126 See [94].
127 See [95].
128 See [96].

> [licensing inspectors] to foster consistency in the enforcement of the Act (s 197(6)).[129]

[175] ARLA found that an applicant would not be prejudiced by the fulsome information contained in a local impacts report being before the DLC. The applicant would be given a copy of that information when seeking to satisfy the DLC of the criteria in s 105 of the Act.[130]

[176] ARLA rejected Woolworth's submission that the provisions of a local impacts report without more from the source of the information could be problematic. ARLA found that regardless of any lack of opposition to an application it is the decision-maker who must be satisfied that the criteria in the Act are met. An applicant should not be able to shelter behind the fact that reporting agencies may not have put fulsome information before the DLC or ARLA in respect of a licensing application.[131] ARLA also referred to its experience of licensing applications, and how it could be very difficult for communities to have input into licensing decisions which affect them when there is no opposition from reporting agencies. When there is no opposition the absence of information that might otherwise have been available to a decision-maker presents a real and difficult challenge for objectors who wish to mount an objection. Local impacts reports will go some way to ensuring all information relevant to a licensing application is before the DLC and the Authority.[132]

[177] ARLA found it was not unreasonable for the PLAP to require the DLC or ARLA to have regard to the information in the relevant local impacts report. Relying on *J and C Vaudrey Ltd v Canterbury Medical Officer of Health*[133] ARLA found that the requirement to have regard to a matter only imports an obligation to give genuine attention and thought to the stipulated matter.[134]

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129 See [96].
130 See [97].
131 See [99].
132 See [100].
133 *J and C Vaudrey Ltd v Canterbury Medical Officer of Health* [2016] NZCA 539, [2017] 2 NZLR 334 at [41].
134 See [101] of ARLA's Decision.

Outcome – Characterisation of local impacts reports

[178] The starting point is how local impacts reports are characterised. Either they are a policy in themselves or they are a tool to achieve a policy.

[179] ARLA found the local impacts reports were not policies, rather they supplied relevant information that would better enable a DLC or ARLA to decide whether to allow a licensing application. Therefore, they were not precluded by s 77(1).

[180] The purpose of including the requirement for local impacts reports in the PLAP may have been driven by the recognition by ARLA and Auckland Council that community groups often had difficulty obtaining information on the impact of proposed new licences in their locality, particularly when other parties, such as the licensing inspectors, Police or the Medical Officer of Health, were not opposed to a particular application.[135] Thus, the provision for local impacts reports in the PLAP may reflect a policy on the part of Auckland Council to improve the quality of information for consideration before granting or refusing a licensing application. ARLA was alert to this because it comments on how the local impacts reports are likely to lead to more consistent and better information.[136]

[181] The SSA imposes its own information gathering requirements relevant to licensing applications. Section 103(1) of the SSA requires the licensing inspector, Police and Medical Officer of Health to be served with copies of any licensing applications. Section 103(2) requires the inspector to inquire into and file a report on the application with the DLC. Section 103(3) requires the Police and Medical Officer of Health to make inquires and file any written material if they decide to oppose an application. Should the Police or Medical Officer of Health decide not to oppose an application the only information likely to be readily available to community members wanting to oppose an application would be the inspector's report. Such community members may also have access to other publicly available information, but that is something they would need to seek out for themselves.

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135 See [100].
136 See [94].

[182] Whilst the inclusion of local impacts reports in the PLAP may ensure communities are better able to participate in the licence application process, their presence in the PLAP goes further than this. The local impacts reports element of the PLAP stipulates a series of matters that the licensing inspectors are to report on, to the extent the information is available. Those matters are more specific than those provided for in s 103 or elsewhere in the SSA. The PLAP also requires that the DLC and ARLA (who are the decision-makers on licensing applications) pay regard to the local impacts report when deciding whether to grant a licensing application or not.[137] In this way the content of the local impacts reports expands the matters to be brought to the decision-makers' attention and elevates them to be a relevant consideration to which the DLC and ARLA must pay regard. All of which is additional to the procedural requirements which the SSA imposes on the inspectors and the decision-makers on licensing applications.[138]

[183] It is difficult to say whether local impacts reports constitute a policy to improve community access to information relevant to licensing applications and to require the decision-makers to consider such information before making their decisions; or whether local impacts reports are merely the tool by which such a policy, albeit unstated, is to be achieved. The demarcation between the two is finely balanced. Either way I am satisfied that for the reasons set out below the inclusion of these reports in the PLAP is ultra vires s 77(1) of the SSA.

Local impacts reports: ultra vires

[184] Section s 77(1) expressly prohibits policies that extend beyond those provided for in s 77(1). A policy to enhance the quality of information required to be considered by DLCs and ARLA, and to ensure community groups have access to said information and can use it for their submissions, is not one of the permitted policies set out in s 77(1).

[185] Insofar as local impacts reports are merely tools to achieve such a policy their inclusion in the PLAP is also contrary to s 77(1). Auckland Council argues that s 77(1)

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137 See cls 3.1.2, 3.1.3, 3.3.3 and 4.1.1.
138 See ss 197 and 100-119 of the Sale and Supply of Alcohol Act 2012.

permits matters additional to policies to be included in the PLAP. I reject that argument because it runs counter to the role the SSA gives to PLAPS. They are the basis on which a LAP is formed. In s 77(1) Parliament has expressly stated that only policies that meet the requirements of s 77(1) are to be included in a LAP. The section's silence on whether matters other than policies can also be included in a LAP cannot be read to permit their inclusion. With ss 76 and 77 Parliament has decided to allow territorial authorities to develop within prescribed limitations policies on the sale and supply of alcohol. That is as far as the authority in those provisions goes.

[186] Moreover, s 105(c) of the SSA directs that DLCs and ARLA must have regard to LAPs when making decisions on licensing applications. And s 108 provides that a licensing application may be refused if it is contrary to the relevant LAP. When s 105 and s 108 are viewed together with the expressed boundaries in s 77(1), the purpose and scope of those boundaries is then clear. With s 77(1) Parliament has set out the limits of what can be included in a LAP. Such limits are needed because without them once something is included in a LAP then by operation of s 105 it becomes a relevant mandatory consideration for decisions on licensing applications, and under s 108 any such application may be refused if contrary to the LAP. It follows that if a LAP could include non-policy features, like local impacts reports, as well as the matters outlined in s 77(1) those features would not just be part of the LAP, by operation of s 105 and s 108, they would attain a significant and influential role in the decision on whether to grant an application or not. Parliament cannot have intended this outcome, otherwise it would have made express provision for it in the SSA.

[187] Accordingly, I am satisfied that inclusion of material additional to the policies permitted by s 77(1) of the SSA in the PLAP is contrary to law.

[188] I also consider that for a LAP to require licensing inspectors to prepare specific reports covering specific matters (which is what the local impacts reports do) is something that conflicts with the inspectors' statutory roles. Parliament has provided them with a statutory role. For a territorial authority then to require the inspectors to provide information which the territorial authority considers should be available when considering licensing applications means the inspectors are preparing reports at the direction of the territorial authority. This in principle creates the potential for conflict

of interest. If Auckland Council wants community groups to have assistance through the provision of licensing related information there seems to me to be no reason why Auckland Council could not separately acquire this information and make it available to such persons.[139]

[189] Accordingly, I find that ARLA erred in failing to find that the inclusion of local impacts reports into the PLAP was ultra vires s 77 of the SSA.

The respondents' arguments

[190] Auckland Council submits that local impacts reports were not policies and therefore their inclusion in the PLAP was not precluded by s 77 of the SSA. It follows from this that the inclusion of local impacts reports in the PLAP would not be ultra vires, and thus not unreasonable in light of the object of the Act. Auckland Council also submits that, in the case local impacts reports were policies, they fall within s 77 of the SSA. Auckland Council also contends that s 77 does not prohibit policies that are highly prescriptive or directive, and that accordingly the local impacts reports are not ultra vires on that basis. Lastly, Auckland Council contends that requiring local impacts reports to be produced by inspectors is not inconsistent with s 197 of the SSA and does not impact on the licensing inspector's independence. The Medical Officer of Health supported the submissions made by the Auckland Council.

[191] The submissions of the Auckland Council and the Medical Officer of Health are rejected for reasons discussed at length at [178]–[189] herein.

Element four - Policies on discretionary conditions to be applied to off-licences

ARLA's decision

[192] Clause 4.4 of the PLAP provides policies on discretionary conditions to be applied to off-licences.

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139 The Local Government Official Information and Meetings Act 1987 would permit persons to request and access information Auckland Council acquired that was relevant to licensing applications.

[193] The Council's policy position in the PLAP is that when issuing or renewing off-licences in the Auckland region the DLC and ARLA should include the following conditions, unless there is good reason not to do so: (a) the licensee is required to take specified steps to ensure no intoxicated persons are allowed to enter or remain on the premises and to ensure that signs are prominently displayed detailing the statutory restrictions on the sale of alcohol to minors and intoxicated persons adjacent to every point of sale; and (b) there is to be a register of alcohol-related incidents. Material alcohol-related incidents are defined in the PLAP. [140]

[194] Foodstuffs and Woolworths submitted that a condition requiring a licensee to maintain a register of alcohol-related incidents is unreasonable as a PLAP sets out a framework where the condition applies by default, or there is a presumption that such a condition will be imposed.[141] They submitted that s 77(1)(f) of the SSA relates to the issue of licences subject to discretionary conditions. Accordingly, the condition requiring a register of alcohol-related incidents was said to be ultra vires.[142]

[195] ARLA did not agree.[143] Rather, it accepted the Council's submission that these elements indicated the Council's preferred position in respect of their imposition and it did not mean they would necessarily be imposed. The words "unless there is good reason not to" in cl 4.4.1 were found to mean that the DLC and the Authority retained the ability not to impose these conditions, thus the conditions are still discretionary. Accordingly, ARLA found there was nothing in the PLAP which fettered what the DLC or Authority may consider to be a good reason not to impose the condition.

Outcome – Element four: Discretionary conditions

[196] Section 77(1)(f) of the SSA permits a policy on the issue of licences, or licences of a particular kind or kinds, subject to discretionary conditions. Before proceeding further, it is helpful to consider what a policy is and the purpose of having a policy. A policy is generally understood to be a set of ideas or principles that are used as a basis for making decisions. A policy on the issue of licences subject to discretionary

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140 Cl 4.4 of the Provisional Local Alcohol Policy.
141 See [200].
142 See [201].
143 See [202].

conditions might be thought to provide a basis for identifying the types of discretionary conditions that might be imposed on licences and the circumstances in which certain types of licences with certain types of conditions might be granted.

[197] This view of a "policy" in terms of s 77(1)(f) is to be contrasted with Part 2, Subpart 3 of the SSA, which sets out the licensing process and gives a DLC and ARLA the power to impose various conditions on various licences. Sections 110 to 116 and ss 118 to 119 provide a series of specific powers relating to the imposition of conditions on licences, some of which must be exercised, and others are discretionary. In addition to those provisions, s117 provides that a DLC or ARLA may issue any licence subject to any reasonable conditions not inconsistent with the SSA. And s 109 permits a DLC or ARLA to issue a licence subject to conditions, when to do otherwise would be inconsistent with the LAP.

[198] Clause 4.4 of the PLAP purports to set out policies on discretionary conditions to be applied to off-licences. Under cl 4.4.1 the DLC and ARLA are required to impose certain stipulated conditions, unless there is good reason not to do so. ARLA considered this was permissible because there was the possibility of finding good reason not to apply those conditions.

Discretionary conditions: ultra vires

[199] Woolworths argues that cl 4.4 is ultra vires because it requires the imposition of the stipulated conditions, unless there is good reason not to impose such conditions. Thus, this element of the PLAP not only provides for such conditions, but prescribes when they are to be imposed. Woolworths argues that the latter aspect is a fetter on the discretions given to the DLC and ARLA under Subpart 3 of the SSA. Woolworths also argues that cl 4.4 is ultra vires because there is a difference between the "description condition to be imposed" and how an assessment should be made to determine whether to impose such a condition. Woolworths argues that it is the latter that falls within the scope of s 77(1)(f) whereas the former does not.

[200] In principle, a policy that identifies when discretionary conditions may be imposed on a licence and the type of such conditions is one that would fall within s 77(1)(f). Accordingly, the type of conditions set out in cl 4.4.4 and 4.4.5 would fall

within the above. However, the addition of the direction to the DLC and ARLA that such conditions should be imposed unless there is good reason not to do so goes beyond the bounds of policy and enters the realm of directing the decision-maker as to how the policy is to be applied in particular cases. Accordingly, it falls outside the scope of s 77(1)(f), and is therefore ultra vires. It also has the effect of fettering the discretions given to the DLC and ARLA in Subpart 3. There is a difference between requiring a decision-maker to impose a condition unless there is good reason no to do so, and leaving the question open for the decision-maker to determine. The former presumes the condition will be imposed if the proviso is absent whereas the latter leaves the imposition of discretionary conditions to the persons to whom Parliament has given such powers.

[201] Other questions arise regarding the conditions provided for in cl 4.4.3. Like those provided in cl 4.4.4 and 4.4.5 the conditions in cl 4.4.3 are to be imposed unless there is good reason not to do so, which means they suffer from the same flaws as the others. But they also have additional characteristics that make them objectionable.

[202] The stipulated "discretionary" conditions in cl 4.4.3 replicate mandatory obligations that ss 56 and 252 of the SSA impose on licensees and the managers of licensed premises. It is difficult then to see how there could ever be good reason not to impose these "discretionary" conditions, when they reflect mandatory requirements set out in ss 56 and 252. On the other hand, there is the alternative argument that they need never be imposed because there is no good reason to replicate the effects of ss 56 and 252 by imposing their requirements as conditions on licences. Seen either way the discretionary conditions in cl 4.4.3 leave no room for the proper and purposeful exercise of discretion.

The respondents' arguments

[203] Auckland Council contended that the elements implementing licence conditions unless there were good reasons not to, did not fetter the discretion of ARLA or the DLC as those bodies retained the ability to utilise their discretion to ensure the conditions were applied in a reasonable manner. Auckland Council also submitted that the element was not ultra vires as it still fell within the ambit of possible policies

under s 77 of the SSA. Auckland Council did acknowledge that this element was directive in nature, but contended that this did not render it ultra vires as the ultimate discretion to impose conditions remained with the decision-maker. Again, the Medical Officer of Health did not make substantive submissions on this point, instead opting to support the submissions of the Auckland Council.

[204] The submissions of the Auckland Council and the Medical Officer of Health are rejected for reasons discussed at [196]–[202] herein.

Summary of outcome

[205] In relation to the first element on review, concerning the region-wide reduction in trading hours, ARLA made an error of law by failing to provide reasons either explicitly or inferentially for its conclusion that the reduction in trading hours was not unreasonable in light of the object of the SSA.

[206] Similarly, in regard to the second element, namely the temporary freeze and rebuttable presumptions, ARLA again erred in law by failing to provide reasons for its determination that the freeze and rebuttable presumption were not unreasonable in light of the objects of the SSA.

[207] With respect to the third element concerning the local impacts reports, ARLA made an error of law by failing to find the provisions relating to local impacts reports were ultra vires s 77 of the SSA, and therefore unreasonable in light of the objects of the Act.

[208] Lastly, in regard to the fourth element pertaining to discretionary conditions, ARLA again made an error of law by failing to find that the provisions relating to the requirement to impose certain discretionary conditions unless there were good reasons not to, were ultra vires s 77 of the SSA, and therefore unreasonable in light of the objects of the Act.

Relief

[209] Under the Judicial Review Procedure Act 2016 this Court is given wide powers to grant the relief it considers to be appropriate.

[210] ARLA has erred in law in its decisions dismissing the appeals of Woolworths and Foodstuffs against four elements of the PLAP.

Reduced closing hours, temporary freeze and rebuttable presumptions

[211] A finding that reasons are required can on occasion result in a decision-maker being directed to provide reasons for its decision. But with ARLA's decisions on the appeals against reduced closing hours and the temporary freeze and rebuttable presumptions there are other errors of law as well.

[212] Whilst the outcomes of those decisions are not necessarily excluded by the SSA, it is difficult to see how: (a) the comprehensive substitution of the SSA's provisions with the restrictions imposed by the reduced closing hours; and (b) the comprehensive application of the temporary freeze and rebuttable presumptions could ever satisfy the SSA's requirements for a PLAP. However, this is a matter that should be left to ARLA to determine. The discipline which the requirement to provide reasons imposes on a decision-maker should ensure that when ARLA comes to determine the appeals against those elements again they receive proper consideration.

[213] Accordingly, I am satisfied the appropriate course is to set the decisions on those two elements aside and remit those matters back to ARLA for it to determine again in accordance with the reasoning and findings expressed herein.

Local impacts reports and discretionary conditions

[214] Regarding ARLA's decisions on the local impacts reports and discretionary conditions elements of the PLAP, the outcome here is complicated by the fact appeal decisions are being reviewed, rather than the decision of the initial decision-maker. I have concluded that those elements are ultra vires the SSA, which means the PLAP cannot lawfully contain those elements. Ordinarily such findings would result in declarations of invalidity. If the invalid parts of a decision form part of a wider decision, they can be severed from the remainder. Whereas here, had ARLA allowed the appeals against those elements, the provisions of ss 83 and 84 of the SSA would take effect. Those provisions provide a statutory process for dealing with elements of a PLAP after an appeal against them is successful.

[215] I consider it would be wrong for relief granted by this Court to pre-empt the statutory process. For this reason, I will not make the declarations of invalidity that Woolworths and Foodstuffs seek. Instead, I propose to set aside ARLA's decisions on the local impacts reports and discretionary conditions elements and refer the appeals against those elements back to ARLA for it to determine again in accordance with the reasoning and findings expressed herein.

Result

[216] Woolworths and Foodstuffs are entitled to relief under s 16 of the Judicial Review Procedure Act. Pursuant to that section the subject decisions on which they seek review are set aside.

[217] Pursuant to s 17 of the Judicial Review Procedure Act the subject decisions are remitted back to ARLA for reconsideration and determination in their entirety. In doing so ARLA is to act in accordance with the reasoning and findings of fact and law set out in this judgment.

[218] The parties have leave to file memoranda on costs.

Duffy J