IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-409-000098
[2015] NZHC 2749

BETWEEN	CHRISTCHURCH MEDICAL OFFICER OF HEALTH Appellant
AND	J & G VAUDREY LIMITED First Respondent
	BOND MARKETS LIMITED Second Respondent
	FOODSTUFFS NORTH ISLAND LIMITED First Interested Party
	GENERAL DISTRIBUTORS LIMITED Second Interested Party
	CHRISTCHURCH CITY COUNCIL (LICENSING INSPECTORS) Third Interested Party

Hearing:	29-30 June 2015
Further Submissions:	7 July 2015 and 10 July 2015
Appearances:	C P Browne and R J Sussock for Christchurch Medical Officer of Health I Thain for J & G Vaudrey Limited M Couling for Bond Markets Limited B Zagni for Foodstuffs North Island Limited A Braggins for General Distributors Limited H McKenzie for Christchurch City Council (Licensing Inspectors)
Judgment:	06 November 2015

JUDGMENT OF GENDALL J

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PART I: OVERVIEW, DECISION APPEALED, ISSUES AND SUMMARY OF FINDINGS

Overview

[1] Following the passing of the Sale and Supply of Alcohol Act 2012 (the Act), applications for, or renewals of, alcohol licences fall to be determined in accordance with the provisions of the Act. Importantly, for present purposes, alcohol sales in a supermarket or grocery store are now circumscribed as to location. All licence applications and licence renewals for supermarkets and grocery stores must be subject to a single-area condition which limits the display and promotion of alcohol to a certain area or areas within the premises (up to a maximum of three sub-areas). This new compulsory condition for all supermarket and grocery store licences was introduced for the stated purpose set out in s 112(1) of the Act:

> …to limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol.

[2] Both the first respondent, J & G Vaudrey Limited (Vaudrey), and the second respondent, Bond Markets Limited (Bond), applied to the Christchurch District Licensing Committee (CDLC) for alcohol off-licenses for their respective supermarkets, South City New World (South City) and Bishopdale New World (Bishopdale). Vaudrey, as the owner and operator of South City, and Bond, as the owner and operator of Bishopdale, operate their supermarkets under franchise agreements with Foodstuffs South Island Limited (Foodstuffs).

[3] The Vaudrey application was unopposed at the time of determination. The CDLC therefore proceeded to determine that application on the papers. However, in granting the application, it excluded from the application a wine display cabinet at one end of the wine display shelves, because it was considered to be in contravention of the purpose of such an area, as described in s 112(1) of the Act.

[4] The Bond application was opposed. Following a hearing, at which several different options were discussed, the CDLC released its decision, imposing a single-

area alcohol condition that was said to be a compromise between the proposal Bond had advanced and the concerns raised by the other submitters.

[5] Both parties appealed to the Alcohol Regulatory and Licensing Authority (the Authority) against the respective decisions insofar as they related to the description of the single alcohol area.[1] The appeals were allowed. The appellant, the Christchurch Medical Officer of Health (the MOH), now appeals against the decisions of the Authority.

[6] For the reasons that follow I have formed the view that the appeal must be allowed. The issues in contest here are outlined below at [12]. I summarise my findings at [13]. Part II of this judgment contains the framework against which this appeal must be determined. Part III outlines the detailed reasons underpinning the summary, with Part IV setting out the overall outcome, orders and addressing the issue of costs.

The Authority allows the appeals

[7] The Authority allowed both appeals from the CLDC. It says it would have done so on the basis of natural justice alone.[2] The Authority was of the view that the CDLC breached the requirements of natural justice by making a decision which was not founded in evidence. The Authority found that, in coming up with its own proposal, the CDLC necessarily departed from all submitted proposals and this was wrong.[3]

[8] This was not dispositive of the case, however. The Authority formed the view that its only powers under s 158 of the Act were to confirm, modify, or reverse the decision under appeal.[4] It considered the only appropriate course was to modify the decision, which required an examination of the legislation bearing upon single alcohol areas.[5] The contest between the parties was set out by the Authority in this way:

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1 *J & G Vaudrey Ltd v Christchurch District Licensing Inspector* [2015] NZARLA PH64–65.
2 At [9]–[13].
3 At [13].
4 At [14].
5 At [15].

> [22] The supermarkets have argued that the effect of the sections is that provided the proposed Single Alcohol Area constitutes a single area and is not situated on the most direct pedestrian route between either the entrance of the premises or its general point of sale (on the one hand) and the main body of the premises (on the other hand), the alcohol area may be located anywhere in the premises and no conditions pertaining to its location or displays, promotions or advertisements may be imposed.
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> [23] The reporting agencies say that a DLC may impose such conditions as to the location, displays and promotions in a Single Alcohol Area as will enable compliance with the purpose of the sections, viz the limitation of the exposure of shoppers to displays, promotions and advertisements of alcohol (s 112(1)) and as will achieve the purpose of the Act (s 3) and its object (s 4). The Police have submitted "*the main body of the premises*" can mean any part of the main body of the premises.

[9] In resolving this interpretative deadlock, the Authority systematically addressed the issues under various heads:

(a) *Section 112*: section 112 of the Act (described in part at [1] above) explains the rationale underpinning ss 112–114 by seeking to limit alcohol exposure, by reducing exposure to displays, promotions and advertisements relating to alcohol, but only so far as is reasonable practicable. The only conditions which may be imposed under s 112 relate to the location of the single alcohol area and its composition. According to the Authority, there is nothing in ss 112–114 authorising the imposition of conditions not specifically mentioned in those sections. The discussion is concluded as follows:

> … If the interpretation of the reporting agencies [the Police, a District Licensing Inspector and the Medical Officer of Health] is correct, then, for example, instead of containing the specific prohibitions as to the location of Single Alcohol Areas in s 113(5) of the Act, the section would simply have prevented the location of Single Alcohol Areas in any place that contravened s 112(1) of the Act.

(b) *Section 113*: though s 113(1) requires regard to be had to s 112(1) of the Act, "it does not go so far as to authorise conditions outside the specific provisions of the sections". The section goes on to explain how a single alcohol area is to be described (it may be divided into two or three sub-areas and the perimeter may not pass through the proposed location of any display units).

(c) *Section 113(5)*: this subsection is said to have created "most of the debate". It provides that a District Licensing Committee or the Authority may only describe a single alcohol area if it is a single area. Further, the area may not contain all or part of the most direct pedestrian route between the entry and the main body of the premises, nor may it be on the most direct pedestrian route between the main body of the premises and any general point of sale. However, the main body of the premises cannot, necessarily, mean the entirety of the premises. What constitutes the main body is a matter of degree and involves the sort of judgment that a District Licensing Committee or the Authority must exercise when performing its functions. The corollary of this is that the role of the District Licensing Committee or the Authority is not necessarily a rubber stamping exercise. Nevertheless, the effect of s 113(5) is that a single alcohol area can be anywhere in the premises except in the prohibited areas.

This conclusion was reached upon an interpretation of the text of s 113 and its purpose, but also for the following reasons:

(i) the role of the CDLC is to decide the application before it. Namely, to accept or reject it. No conditions can be imposed which would make it an altogether different application;

(ii) if an application does not comply with s 113(5) the CDLC is unable to grant the application;

(iii) the limit on exposing shoppers to alcohol displays and promotions in s 112(1) only extends to "reasonably practicable" measures, which is far from absolute; and

(iv) only the applicant's plan is that which may or may not be described by the CDLC.

[10] Having set out its interpretation of the general scheme of the Act, the Authority interpolated several further matters. First, it turned to the role of s 107 of the Act, which enables the refusal of an application even if there are no objections and the application is unopposed. The Authority considered this jurisdiction needs to be deployed "very cautiously", with the CDLC being obliged to consider an application on the evidence before it. Usually where an application is not objected to and unopposed, the application will be determined on the papers.

[11] In terms of Vaudrey's defined appeal, the Authority concluded that the CDLC had no jurisdiction to delete the display unit from the single alcohol area, not being a condition that is able to be imposed pursuant to ss 112–114 of the Act. It concluded there was no evidential basis to impose the condition. As to Bond's defined appeal, the Authority found the CDLC erred in law when describing the single alcohol area as an area other than that which the applicant had submitted. The Authority concluded by allowing both appeals.

Issues for resolution on appeal

[12] The issues here, as best as I can tell, require me to resolve the following:

(a) The nature of a District Licensing Committee's role upon receipt of a licence application or licence renewal. In considering this question I will consider:

(i) the obligations incumbent on the District Licensing Committee upon receipt of an application. In particular:

(A) whether the District Licensing Committee is required, in accordance with s 112(1), to only approve a single alcohol area that limits so far as reasonably practicable the exposure of shoppers to display, promotion and advertising of alcohol; or

(B) whether the role of the District Licensing Committee is limited to ensuring that an application for a licence

complies with the requirements of s 113(5).

(ii) whether a District Licensing Committee is able to impose conditions, additional to the description of the single alcohol area, which relate to the manner of display, promotion or advertising of alcohol within the single alcohol area, in order to achieve the purpose as described in s 112(1).

(iii) the role of the District Licensing Committee when it considers a plan proposed by the applicant does not comply with the requirements of the Act. In particular:

(A) is its function binary in the sense it is limited to accepting or rejecting the plan proposed by the applicant; or

(B) is it able to consider the plan submitted, together with alternative plans and submissions by other parties, and recommend an alternative plan which achieves the purpose as stated in s 112(1);

(b) The relevance and application of the requirements of natural justice when a District Licensing Committee is considering an application. In particular:

(i) whether it is precluded from reaching a conclusion, or forming a view, which represents a synthesis or compromise between submissions made as to the most appropriate plan; and

(ii) depending on the answer to the first sub-issue, whether an established breach of natural justice inevitably leads to a successful appeal, or whether it simply requires a merits-based assessment of the competing positions.

Summary of findings

[13] In this section I summarise and draw together the findings made regarding the various issues addressed in this judgment. These have led me clearly to the conclusion that the appeal must be allowed. The relief stemming from this finding is that the decision of the Authority is to be quashed and remitted back to it for reconsideration in light of this judgment.

[14] In particular I have found:

(a) The role of the District Licensing Committee and the Authority (the relevant body) upon receipt of an application for licensing or re-licensing is an evaluative one, requiring the decision maker to make a merits-based determination of the application.

(b) In considering an application, the relevant body is fundamentally required to assess whether a licence ought to issue. In so doing, it must:

(i) consider any objections made by persons who have a greater interest in the application than the public generally;

(ii) consider any opposition filed by the constable in charge of the Police station nearest to where the application is filed, a District Licensing Inspector, and the Medical Officer of Health;

(iii) have regard to the criteria stipulated in s 105 of the Act (for present purposes including the design and layout of the premises); and

(iv) finally cross-check whether the application is capable of meeting the object of the Act.

(c) For the purpose of an off-licence application, the relevant body *must* impose the conditions specified in s 116(2) of the Act.

(d) In the case of an application for an off-licence which is also a supermarket or grocery store, the relevant body *must* impose a single area condition if it grants a licence. This entails an evaluative exercise requiring the relevant body to:

(i) be satisfied that the proposed area is a single area;

(ii) be satisfied that the proposed area complies with s 113(5)(b);

(iii) consider whether the proposed plan limits, so far as is reasonably practicable, the exposure of shoppers to displays and promotions of alcohol and advertisements for alcohol;

In undertaking this evaluative exercise, it is the role of the District Licensing Committee or the Authority concerned (not of the applicant) to describe the single alcohol area. Thus, the relevant body is not limited to simply accepting or rejecting the plan put forward by the applicant. Rather, the relevant body must describe an area which it considers complies with the above criteria after hearing evidence and submissions from all relevant parties.

(e) There is no ability under ss 112–114 of the Act to impose general conditions (but that power is to be found in s 117).

(f) The relevant body may impose any or all of the conditions stipulated in s 116(1).

(g) The relevant body has a discretion to impose any further conditions which are reasonable and that are "not inconsistent" with the Act. In deciding whether to impose such conditions, the relevant considerations are these:

(i) the relevant body must have identified a risk which it seeks to abate, or a benefit which it seeks to secure;

(ii) that risk or benefit must be consistent with the purpose and object of the Act, and not inconsistent with the Act in its entirety;

(iii) the relevant body must direct itself as to all relevant circumstances;

(iv) it must then weigh the risk to be abated, or benefit to be secured, against the relevant circumstances as identified;

(v) the condition must be a proportionate response;

(vi) an absolute prohibition would not ordinarily be reasonable, nor a condition which secured a benefit or abated a disbenefit only marginally; equally, a condition may not be absurd, ridiculous, patently unjustifiable, extreme or excessive; and

(vii) ultimately whether a condition is reasonable will depend on an objective assessment of whether there is a rational and proportionate connection, between the identified risk or benefit, when weighed against all relevant considerations.

(h) The ability to refuse an application under s 107 is not a departure from the statutory regime – it is explicitly part of that regime. In each case the relevant body must come to a merits-based decision on the application as benchmarked against the factors in s 105. Equally, a public hearing is not a fundamental pre-requisite to the deployment of the power to refuse contained in s 107.

[15] In addition, it is my finding that the principles of natural justice which have application to hearings before a relevant body are these:

(a) the applicant (and any objectors or opposing parties) must be afforded an opportunity to be heard;

(b) it is through being furnished with the ability to present a case, and produce evidence, that the primary requirements of natural justice are fulfilled;

(c) there is no general obligation upon a decision maker to either disclose what they are minded to decide, or produce a draft copy of the decision, prior to actually deciding;

(d) the three most important points are that the decision made:

(i) has a proper evidential foundation;

(ii) is only made in reliance upon the evidence legitimately before the relevant body; and

(iii) where the relevant body wishes to take into account further and fresh evidence, it reverts to the applicant to ensure he or she has an opportunity to comment;

(e) where an applicant (or other party) is dissatisfied with a decision, the most appropriate avenue of recourse is via statutory appeal rights;

(f) there is a narrow basis upon which it may be necessary to provide an applicant a further opportunity to be heard, namely where the course proposed to be adopted by the relevant body does not have an appropriate evidential foundation. The applicant must be able to apprise itself of all relevant matters, and the consequences of the proposed decision – it is anticipated this will not be common.

[16] Beyond these primary findings, I have also reached the following conclusions:

(a) The requirement in the Act to "have regard to" comprises the following considerations:

(i) "have regard to" bears its ordinary meaning;

(ii) the decision maker must actively and thoughtfully consider the relevant matters;

(iii) to do so requires the decision maker to correctly understand the matters to which he or she is having regard;

(iv) the weight to be given to such matters is generally within the discretion of the decision maker; and

(v) there will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle – s 112(1) is an example of an elevated consideration.

(b) The term "limit" in the Act has its ordinary dictionary meaning, and is not capable of being interpreted as including a limitation so extensive that nothing remains.

(c) The standard of "so far as is reasonably practicable" specified in the Act comprises the following considerations:

(i) the requirement is not absolute;

(ii) the physical possibility or feasibility of a task or course of action is not synonymous with reasonable practicability;

(iii) ascertaining what is reasonably practicable entails a balancing exercise between the benefit sought to be secured and the sacrifices that would be occasioned by securing that benefit (such as cost, time, difficulty, inconvenience);

(iv) the assessment is to proceed on the basis of information known at the time the decision is made; and

(v) the meaning of "reasonably practicable" is not static – it will respond to the context in which it is used.

PART II: THE FRAMEWORK FOR DETERMINATION

Appeal jurisdiction

[17] This is an appeal pursuant to s 162 of the Act. It is limited to points of law alone. This Court will not interfere with a decision unless it can be shown that the decision maker erred in law, accounted for irrelevant matters, failed to account for relevant matters, or was plainly wrong.[6] Factual challenges, whether raised squarely or obliquely, will not be entertained on appeals of this kind, save to the extent they are capable of establishing that the decision appealed is plainly wrong. This is necessarily a very high threshold.

[18] Somewhat of a side-issue has arisen as to this Court's powers (and also those of the Authority) when determining an appeal. Section 161(7) states:[7]

> On hearing the appeal, the High Court may confirm, modify, or reverse the decision appealed against, and the decision of the court is final and binding on all parties.

[19] There has been some debate as to whether these appeal powers permit an interpretation which includes an ability to remit the matter back for determination. The Authority was of the clear view that there was no such power. There is authority evincing a contrary view in relation to s 138(11) of the Sale of Liquor Act 1989, which is materially identical to the above provision.

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6 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19]–[28]; *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]–[58].

7 The relevant provision applying to appeals to the Authority, which is identical for all intents and purposes, is contained in s 158. This provides: "On hearing an appeal, the licensing authority may confirm, modify, or reverse the decision under appeal".

[20] Blanchard J left the question undecided in *Chef and Brewer Bar and Café Ltd v Police*.[8] In *Cats Nightclub (1991) Ltd v Police*, Panckhurst J doubted whether s 138(11) conferred jurisdiction upon an appellate Court to direct a rehearing, praying in aid the judgment of Blanchard J in *Chef and Brewer Bar and Café Ltd v Police*.[9] But in *Triveni Puri Ltd v Commissioner of Police*, Kós J commented that "[a]lthough there is no express power in s 138(11) to remit proceedings back to the Authority, I am satisfied that such power exists as a matter of necessary implication in the provision".[10]

[21] Most on point is the judgment of the Court of Appeal in *Director-General of Social Welfare v W*.[11] In that case the interpretation of s 12M(7) of the Social Security Act 1964 was in contest, which terms were materially the same as those in the present case. The Court of Appeal relevantly commented:[12]

> In our view the term "reverse" appearing in s 12M(7) includes "revoke". One of the meanings of "reverse" noted in the Concise Oxford Dictionary is "revoke or annul". More particularly, given the Authority's status, by virtue of s 121(1) as a "judicial authority", we observe that in a legal context of appellate or reviewing powers, "reverse" has the included meaning. Jowitt's Dictionary of English Law (2nd ed, 1977), vol 2 defines "reverse" as "to undo, repeal or make void. A judgment is said to be reversed when it is set aside by a court of appeal." Black's Law Dictionary (7th ed, 1999) defines "reversal" as "1. An appellate court's overturning of a lower court's decision." The Dictionary of Canadian Law (1991) defines "reverse" as "to make void, repeal or undo. A judgment is reversed when a court of appeal sets it aside."
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> … there may well be situations where a decision should not stand but should be reheard in the light of directions …
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> In our opinion the Authority may confirm a decision under appeal, or modify it, or reverse it by turning it round, or reverse it in the sense of revoking it either with or without a direction for rehearing. But it must do one of those things. It cannot simply dismiss without passing on the correctness or otherwise wholly or in part of the decision appealed against.

[22] I would therefore dispose of this issue by holding that inherent in the concept of reversal is the ability to revoke or nullify a decision under appeal. A natural

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8 *Chef and Brewer Bar and Café Ltd v Police* [1995] NZAR 158 (HC) at 167.
9 *Cats Nightclub (1991) Ltd v Police* [1997] NZAR 83 (HC) at 89.
10 *Triveni Puri Ltd v Commissioner of Police* [2012] NZHC 2913, [2013] NZAR 88 at [38].
11 *Director-General of Social Welfare v W* [2005] NZAR 258 (CA).
12 At [19]-[22]. I note that s 12M(8) of the Social Security Act 1964 did provide for an ability to rehear, but my reading of the case is such that this does not derogate from the conclusion I have reached in light of the Court of Appeal's general process of reasoning.

corollary of this is that there is the power to refer back for rehearing should the appellate body consider that necessary (it will also ordinarily have power to hear further evidence on appeal). This conclusion, in my view, applies as much to appeals to the Authority as it does to appeals to this Court.

[23] Had I not disposed of this matter on the above ground, there are two further possible bases upon which power to remit might arise. The first is by residual application of part 20 of the High Court Rules.[13] The second is the inherent jurisdiction of this Court. Though I need not discuss the matter in any detail, it seems to me that the ability to remit a decision back for a rehearing or reconsideration is a fundamental component of an appellate Court's role in fulfilling itself as an appellate Court.

[24] I therefore conclude the ability to "confirm, modify, or reverse" a decision appealed against outlined in s 161(7) of the Act includes the power to nullify the decision altogether, which then triggers the ability to refer the matter back to the Court under appeal for reconsideration. Had I not reached this conclusion on this basis, I would have nonetheless reached the same view on the basis of the inherent powers of the Court on appeal (as Kós J concluded in *Triveni Puri Ltd v Commissioner of Police*) or perhaps on the basis of the High Court Rules to the extent they remain applicable.

The role of a DLC in relation to the single area condition when licensing or relicensing

Statutory interpretation

[25] This appeal involves as a central issue the construction and application of ss 112 to 115 and 117 of the Act. Necessarily this engages basic principles of statutory interpretation which are articulated in s 5 of the Interpretation Act 1999. A statute must be interpreted in accordance with the text and in light of its purpose. Both text and purpose serve as a check and balance on the other. An overly grammatical or semantic approach to the text will undoubtedly yield where to

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[13] See for example *Chee v Stareast Investment Ltd* HC Auckland CIV-2009-404-5255, 1 April 2010 at [139]–[146].

interpret in that way would be anathema to the purpose of the Act. Conversely, the purpose will be constrained by text.[14] These two cardinal principles have been described as the 'twin pillars' of statutory interpretation.[15]

[26] What has emerged as somewhat of a locus classicus as to the proper approach to statutory interpretation is the judgment of Tipping J in *Commerce Commission v Fonterra Co-operative Group Ltd*:[16]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[27] There are of course limits to the judicial role when interpreting statutes; Judges are not legislators. As Doogue J stated in *Hunia v Parole Board at Wellington*:[17]

> … it is not for this Court to guess at what purpose the Legislature intended and rewrite the provision. It is for the Legislature to make clear what it intended. It is simply not clear from the section as it stands. Arguments can be made … in both directions. Of first importance, however, is that for this Court to give the section the meaning that the Crown argues for would require this Court to give no effect to the clear wording of the section and to write into the section a reference to another section when the Legislature has chosen to make no reference to that other section. It may well be … that the Legislature may have had an unstated intention … That may or may not be the case. It is not for this Court to impose its view on what should be the provisions of the section in place of what the Legislature has said in the section.

[28] The present case, in my view, is one where arguments cut both ways. It is not for this Court to re-write legislation recently passed. It is rather to look at text, purpose, and other permissible aids in interpretation to ultimately ascertain the intention of Parliament, and thereby the effect of the relevant sections.

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14 *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791 at [32].
15 *Commissioner of Inland Revenue v Challenge Corp Ltd* [1986] 2 NZLR 513 (CA) at 549.
16 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (citations omitted).
17 *Hunia v Parole Board at Wellington* (2001) 18 CRNZ 543 (HC) at 551–552.

[29] Of final relevance in this case is the extent to which extrinsic material may be relied upon when interpreting a statute. There is a long history of using such materials, the purpose of which was aimed at taking account of the mischief against which a statute was enacted as a palisade.[18] Today it is common ground that such material can assist, but there is a need to proceed with due caution. Resort should only be had when plain words and purpose are not dispositive of the issue or, in other words, where there remains some ambiguity which may be diminished by those materials.[19]

[30] In order to engage in this exercise of statutory interpretation, it is now necessary to set out the relevant provisions, and in doing so to consider the scheme of the Act. I will then turn to consider what may be further permissible aids to interpretation here.

Scheme of the Act

[31] The scheme of the Act, as it relates to the licensing or re-licensing of off-license premises, can be summarised as follows:

(a) The general purpose of the Act is, for the benefit of the community as a whole, to implement a new system of control over the sale and supply of alcohol.[20] The characteristics of this new scheme are to be that it is reasonable, and its administration is to assist in achieving the object of the Act.[21]

(b) The object of the Act is intended to ensure alcohol is sold, supplied and consumed safely and responsibly, and to minimise the harm caused by the inappropriate or excessive consumption of alcohol.[22]

(c) The holder of an off-licence may sell alcohol for consumption at a location away from the premises where the alcohol is sold.[23] Off-

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18 *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349 (HL) at 397.

19 *Milton v Director of Public Prosecutions* [2007] EWHC 532 (Admin), [2008] 1 WLR 2481.

20 Sale and Supply of Alcohol Act 2012, s 3(1).

21 Section 3(2).

22 Section 4(1).

licence premises may sell alcohol daily between the hours of 7 am and 11 pm (as a default position).[24]

(d) The holder of a licence must comply with every condition subject to which the licence has been issued or renewed.[25]

(e) An application for a licence must be filed with the relevant District Licensing Committee, in the manner and form prescribed by the Act and regulations, together with the prescribed fee.[26] Within 10 working days of filing the application, a notice of the application must be displayed in a conspicuous place on or adjacent to the site to which the application relates'. Within 20 working days of filing the application, the applicant must give public notice of the application.[27]

(f) Upon receiving an application for a licence, the secretary of the licensing committee must send a copy of the application together with all associated documents to (a) the constable in charge of the police station nearest the premises (or the secretary's office in the case of a conveyance); (b) an inspector;[28] and (c) the Medical Officer of Health in whose District the premises are situated or in whose District the applicant's principal place of business is situated in the case of a conveyance.[29] All three parties must inquire into the application, with the inspector being required to file a report on the application, while

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23 Section 17.

24 Section 43(1)(b).

25 Section 63.

26 Sections 99 and 100; Sale and Supply of Alcohol Regulations 2013.

27 Section 101. "public notice" is defined by s 5 to mean, for the purposes of the Act, "a notice published as required for the purposes of the provision (or of several provisions including it) by regulations made under this Act".

28 "inspector" is defined by s 5 to mean an inspector appointed pursuant to s 197(1) of the Act.

29 Section 103. "Medical Officer of Health" is defined by s 5 to have the meaning given by s 2(1) of the Health Act 1956, which is defined as meaning:

> … the medical officer of health appointed under this Act for a health district, and includes any deputy medical officer of health; and, for the purposes of Part 4, includes any medical practitioner acting under the direction of the medical officer of health

The Medical Officer of Health is able to delegate his or her functions under s 151 of the Act. "district" is defined by s 5 to have the meaning, in relation to a territorial authority, given by s 5(1) of the Local Electoral Act 2001, which itself defines "district" as "the district of a local authority; and includes a region".

the other two must only file a report if they are opposed to it (it is to be assumed they consent if no report is filed within 15 working days after they have received the application).[30]

(g) Persons are able to object to the grant of a licence if they have a greater interest in the application than the public generally; the objection must be in writing and filed within 15 working days after the required public notice is published.[31] The grounds of objection are limited to the criteria for granting a licence in s 105.

(h) In the case of each objection (by persons generally entitled to object) and opposition (by the relevant constable, inspector, and MOH), the applicant is to be given a copy.[32]

(i) In the ordinary course, a District Licensing Committee will determine an application for a licence, but with leave of the chairperson, a committee may refer an application to the Authority (together with the complete file).[33] Whichever body (the relevant body) determines the application, the matters to which they are to have regard are specified in s 105 of the Act.[34]

(j) The body considering the application is able to reject the application:[35]

(i) even where there is no objection (by persons entitled to object) or opposition (by one or more of the three relevant bodies), having regard to the s 105 criteria; or

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30 Section 103(2)–(4).
31 Section 102.
32 Sections 102(5) and 103(5).
33 Section 104. "authority" simpliciter is not defined by s 5 of the Act. "licensing authority" is, however, defined to mean "the Alcohol Regulatory and Licensing Authority continued in existence by section 169(1) which provides:

> This section continues in existence an authority to be called the Alcohol Regulatory and Licensing Authority.

34 When considering the criterion listed at s 105(1)(h), further guidance is provided by s 106.
35 Sections 107–109. "local alcohol policy" is defined by s 5 to mean a policy in force under s 90 of the Act.

(ii) where the application is contrary to any local alcohol policy (or may set conditions where there is a local alcohol policy and issue of the licence without conditions would be contrary to the policy).

(k) There are specific provisions relating to the grant of licences for supermarkets and grocery stores.[36] They are relevantly:

(i) only certain types of alcohol (beer, mead, wine, or a food flavouring not suitable to be consumed undiluted) may be sold in a supermarket, none of which may exceed 15 per cent alcohol by volume when measured at 20 degrees Celsius.[37]

(ii) when granting a licence or renewal in relation to a supermarket, the relevant body must impose a condition describing one area within the premises as a permitted area for the display and promotion of alcohol (single-area condition).[38]

(iii) a single-area condition may either be one single area, or divided up into a maximum of three areas.[39] If more than one area, the perimeter of each must be described separately, and the relevant body must designate one sub-area as the core area, one as the secondary area, and (if there are three areas) one as the overflow area.[40] Such an area, or areas as the case may be,

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[36] Sections 112–115. "supermarket" is not defined, though s 32(1)(e) requires that all supermarkets have a floor area of at least 1,000 square metres. "grocery store" has the meaning given to it by s 33, which provides:

> **grocery store** means a shop that–
> (a) has the characteristics normally associated with shops of the kind commonly thought of as grocery shops; and
> (b) comprises premises where–
> (i) a range of food products and other household items is sold; but
> (ii) the principal business carried on is or will be the sale of food products.

[37] Section 58.

[38] Section 112(1). "single-area condition" is defined by s 5 to mean "a condition under s 112(2)".

[39] Section 113(3).

[40] Section 113(3)(a) and (b).

must be described by a plan showing the configuration and arrangement of the areas, and their perimeter.[41]

(iv) the effect of a single-area condition is threefold:[42]

(A) no alcohol may be displayed, promoted or advertised outside of the area(s);[43]

(B) the premises cannot be reconfigured (intentionally or otherwise) so as to contravene s 113(5)(b);[44] and

(C) no display, promotion, or advertisement of a non-alcohol product may be:

(1) in the case of a core area/single area, at any place within the area;[45]

(2) in the case of a secondary area, where there are only two areas, at any place within the area, unless it occurs at a time when alcohol is not being displayed, promoted or advertised;[46]

(3) in the case of a secondary area, where there are three areas, at any place within the area, unless it occurs at a time when alcohol is not being displayed, promoted or advertised in either the secondary area or the alcohol area;[47]

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41 Section 113(2).
42 Section 114(5) provides that neither a sign giving directions to the alcohol area, nor various print materials containing a promotion of, or advertisement for, alcohol is a promotion for the purposes of s 114.
43 Section 114(1)(a).
44 Section 114(1)(b), which effectively mirrors s 113(5)(b).
45 Section 114(2), (3)(a) and (4)(a).
46 Section 114(3)(b).
47 Section 114(4)(b).

(4) in the case of an overflow area, at any place within the area, unless it occurs at a time when alcohol is not being displayed, promoted or advertised in the overflow area.[48]

(v) the body considering an application "must describe an alcohol area within the premises only if, in its opinion", it is a single area and the premises will not be configured so that (in effect) the area, or areas, do not contain any or all of (i) any area of the premises directly between the entrance and the main body of the premises; or (ii) any area of the premises directly between the main body of the premises and the general point of sale.[49]

(vi) the purpose of the provisions I have described above at [31](k) is "to limit (so far as reasonably practicable) the exposure of shoppers in supermarkets and grocery stores to displays and promotions of alcohol, and advertisements for alcohol".[50] Relevantly, in describing an alcohol area, the relevant body is mandated to "have regard" to this purpose.[51]

(vii) there are certain transitional provisions relating to single-area conditions for certain licence renewals.[52] They are not engaged here.

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48 Section 114(4)(c).

49 Section 113(5). "general point of sale" is defined, for the purposes of s 113 and 114, to mean anything that is:

(a) a checkout, till, or cashbox where goods other than alcohol (or alcohol and goods other than alcohol) may be bought; or

(b) a device by which goods other than alcohol (or alcohol and goods other than alcohol) may be paid for without the involvement of any person other than the buyer.

50 Section 112(2).

51 Section 113(1).

52 Section 115.

(l) Beyond the single-area condition I have described above, certain further specific conditions may or must be imposed in relation to the issue of off-licences.[53] They are not engaged here.

(m) The relevant body is also vested with a general discretion to "issue any licence subject to reasonable conditions not inconsistent with this Act", the generality of which is not limited by anything else in the Act.[54]

(n) Any conditions are able to apply differently to different parts of the premises, and/or differently to the same part of the premises at different times and/or on different days.[55] There is an ability to apply to vary or cancel any conditions attaching to a licence.[56]

[32] The process I have described above relates to applications for licences. There is a discrete process for processing renewals which, in large part, mirrors that described. Relevantly, however, where an application for a renewal is both unopposed and has no objections, the relevant body is vested with jurisdiction to determine the application on the papers.[57] However, there is a general ability to either consider a matter on the papers or to convene a public hearing to consider the application where an application is not objected to (the section is silent as to opposition).[58] Where an objection is filed within time, a public hearing must be convened, subject to limited exceptions.[59]

External materials

[33] The Act has its genesis in a report of the Law Commission.[60] The Commission was convened to consider the issue of alcohol reform as a result of concerns that had progressively arisen over New Zealanders' approach to the

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53 Section 116.
54 Section 117.
55 Section 118.
56 Section 120.
57 Section 134.
58 Section 202.
59 Section 202(3).
60 Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, April 2010).

consumption of alcohol, and attitudes towards alcohol generally. In the summary to the report, the Law Commission stated that "[a]lcohol is a legalised drug with the potential to cause serious harm".[61] It continued:

> 4 New Zealanders have been too tolerant of the risks associated with drinking to excess. Unbridled commercialisation of alcohol as a commodity in the last 20 years has made the problem worse. New Zealanders now spend an estimated $85 million a week on alcohol.

[34] The specific harms stemming from alcohol include the commission of criminal offences, the health issues associated with alcohol, the "catalogue of harms visited upon third parties", the general harm to society (education, workplace productivity, friendships etc), and the public nuisance aspect of excessive alcohol consumption.[62] These harms are now reflected in the Act's purpose and objects.

[35] In considering these issues, the Commission confronted the role of supermarkets and the way in which alcohol is sold in them.[63] This concern was introduced by the following prefatory remarks:

> 8.79 Concerns about the way in which alcohol is sold in supermarkets can be addressed by applying a mandatory condition on supermarkets regarding the placement of alcohol within the store.

[36] The concern seems to have been the prominence with which alcohol was displayed in supermarkets, particularly near the entrance, checkouts, ends of aisles and commonly purchased goods.[64] Supermarkets are of particular concern because of their ability to increase availability (large stores) and decrease price (substantial bargaining power and low profit margins).[65] It was noted that the prominence of alcohol in supermarkets had also been a concern under the previous regime in the Sale of Liquor Act 1989.[66]

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61 At [2].

62 At [10]. Harm is specifically addressed at 69–95. See too the issues paper, Law Commission *Alcohol in Our Lives: An Issues Paper on the Reform of New Zealand's Liquor Laws* (NZLC IP15, 2009).

63 At [8.79]–[8.98].

64 At [8.81].

65 At [8.82]–[8.83].

66 At [8.89], citing *Bernard v O'Shaughnessy (Newtown New World)* LLA PH006/2010, 13 January 2010.

[37] The Law Commission proposed the following in relation to supermarkets:[67]

> 8.95 We accept that a single-area restriction would constitute an interference in the way that supermarkets operate. Yet the proposed new Act would represent a paradigm shift in the way that alcohol is sold in New Zealand. It is appropriate that supermarkets share some of the responsibility for addressing alcohol-related harm because of the large share of the alcohol market in their control.
>
> 8.96 The challenges relating to fluctuating alcohol stocks are not insurmountable. A single-area restriction could still allow for greater or lesser amounts of shelf or floor space to be used for alcohol so long as it remained in a single area. Product placement restrictions in supermarkets are not unprecedented given the existing restrictions on cigarette placement. We recognise there will be a cost to retailers in setting up their alcohol areas in accordance with the proposed Act's requirements. However, this is likely to be a one-off cost in most instances.
>
> 8.97 Supermarkets have in the past expressed a willingness to adapt store layouts to reduce the risk of alcohol-related harm. In its submissions to the Select Committee on the Sale of Liquor Bill in 1988, Progressive Enterprises acknowledged it was possible to create separate areas in its supermarkets in order to restrict the access of minors to alcohol.
>
> 8.98 *We propose a "single-area restriction", similar to the requirements of the Victorian legislation. This would seems to be a sufficient control on the placement of alcohol within a supermarket. To impose a greater degree of separation, similar to that in New South Wales, would appear to impose too great a cost on retailers at this stage. The law would restrict the display of all alcohol products to one area. Conceivably this could be more than one aisle if the supermarket required this. However, there should be no displays of alcohol products at the supermarket's entrance or at checkouts, as these positions seem to be areas of particular vulnerability for supermarket patrons.*

[38] The position occupied by the Law Commission was such that it prompted a response in the form of a cabinet paper from the Government.[68] While the majority of the recommendations were recommended to be adopted by the cabinet paper, at least by number, many of the more controversial (and concomitantly substantial) recommendations for reform received what might be seen as a more tepid response.

[39] One such area related to the Commission's proposals concerning the single-area restriction:

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[67] Citations omitted and emphasis added.

[68] Office of the Minister of Justice "Alcohol Law Reform: Cabinet Paper" (5 August 2010).

> 117. The Commission recommends that supermarkets should be required to display alcohol in only one area on the premises to limit the impact of product placement on price and availability [LC recs. 20 and 26]. Submissions to the Commission showed significant public concern about the visibility and commercialisation of alcohol throughout supermarkets, particularly in respect of children and people with alcohol disorders.
>
> …
>
> 120. In relation to the proposal for a single area display restriction in supermarkets, I acknowledge that such a restriction could assist in reducing the exposure of young people and those recovering from alcohol dependency issues to alcohol promotions. Submissions to the Commission showed significant public concern about the visibility and commercialisation of alcohol throughout supermarkets. On the other hand, such a restriction could unduly impede the right of supermarkets to manage their own business and creates a risk that the alcohol display area is placed in a prominent position, such as the front of the supermarket. On balance, I do not recommend introducing a single area display restriction for supermarkets (recommendation 42).

[40] Nonetheless, from all this, the first conception of what has become the Act, in the form of the Alcohol Reform Bill, was born.[69] As originally conceived it contained no single-area restriction in relation to supermarkets. The first reading of the Bill therefore contains no relevant guidance.[70] Though it does contain some comments stemming from frustration at the lack of meaningful initiatives recommended by the Law Commission being implemented. The Hon Lianne Dalziel referred to:[71]

> …four elements that would have been in this bill, had the Government been truly willing to deal with the real issues, instead of the shame we have seen of sideswiping and sidelining issues…

[41] One of the elements referred to is the commercialisation of alcohol, which the Hon Lianne Dalziel stated is manifested:[72]

> …by the fact that alcohol is usually the first thing we see when we enter a supermarket these days. We do not have to wait to get to the alcohol aisles, because the supermarket has specials right at the front door, ready to greet us and to remind us that this is the place where dirt-cheap alcohol gets poured into the community.

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69 Alcohol Reform Bill 2010 (236–1).
70 (11 November 2010) 668 NZPD 15251.
71 At 15254.
72 At 14255.

[42] The Ministry of Justice then prepared a departmental report.[73] Though there was not at this stage a clause included addressing the issue of the single-area restriction in supermarkets, it was the subject of submission. It is dealt with briefly in these terms:

> Submissions – single display area
>
> 83. 133 submitters commented on the Law Commission's recommendation to require alcohol in supermarkets to be confined to a single display area. Of these, almost all supported the proposal. The majority of these submitters were either individuals or NGOs and community groups.
>
> Comment
>
> 84. We will report to the Committee on whether the sale of alcohol by supermarkets should be further controlled, such as through a single display area requirement, in Part 2 of the departmental report.

[43] In addition to these brief comments, the report does also make some relevant comments about the ability to impose conditions generally. I replicate this section below:

> **Clause 107 – Other discretionary conditions**
>
> 515. Clause 107 permits the licensing decision-maker to place any other condition on a licence provided that condition is reasonable and not inconsistent with the Bill.
>
> Submissions
>
> 516. 35 submitters commented on this clause, with 60% of them opposed to it. Industry submitters, who were largely opposed to the clause, commented that:
>
> 516.1. conditions under this clause could be placed without giving the licensee a reasonable opportunity to be heard on the issue;
>
> 516.2. such conditions would not be subject to appeal;
>
> 516.3. the clause would create undesirable discrepancies between licensing practices in different areas; or
>
> 516.4. the clause gives too much power to licensing decision-makers.
>
> Comments

[73] Social Policy and Justice Group *Departmental Report for the Justice and Electoral Committee: Part One* (Ministry of Justice, May 2011).

517. We acknowledge that conditions placed on a licence under this clause may involve expense and inconvenience for the licensee. The ability to place any reasonable condition on a licence recognises, however, that different communities have different needs, and will therefore require different licensing conditions to meet those needs to reduce the risk of alcohol-related harm.

518. We note that conditions placed under this clause would be placed following a public hearing, at which the licensee has the right to appear, give evidence and examine witnesses. A licensing decision can be appealed if the licensee wishes to contest the conditions placed on the licence.

519. Overall, we consider that this clause provides an important ability for licensing decision-makers to tailor conditions to meet the precise needs to individual licences and communities. We therefore recommend no change to clause 107.

[44] This was then followed by a further cabinet paper which addressed the issue of single-area conditions.[74] In that paper it was observed:

Supermarkets and grocery store eligibility and display requirements

Current policy

17. In August 2010 Cabinet accepted the Law Commission's position to make no changes to the eligibility of supermarkets and grocery stores to sell alcohol. The Law Commission proposed a single area display restriction for supermarkets and grocery stores. Cabinet did not support this recommendation due to concerns that the display could be located in a prominent area of the store, undermining the intention to reduce the visibility of alcohol.

Submissions

18. Overall 6,538 submitters (form and substantive) commented on supermarkets selling alcohol, with most (98.5% form, 84% substantive) opposing supermarket sale.

19. In their oral submissions, Foodstuffs (NZ) Ltd and Progressive Enterprises Ltd indicated that they would not be opposed to a single area display restriction. Progressive Enterprises Ltd is already restricting alcohol displays to one area in some of their new stores.

Response

20. In light of the strong submissions in this area and supermarkets' views, Cabinet may want to consider whether to impose a single area display restriction for supermarkets and grocery stores, involving:

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[74] Office of the Minister of Justice "Alcohol Reform Bill – Policy Amendments for Inclusion in the Departmental Report" (30 June 2011).

- A requirement that alcohol be displayed in only one area of the store (although alcohol could continue to be sold through regular check-outs);

- Legislative control on where a single display area can be located to ensure it is not in a prominent area, which could include an access-way to other products; and

- A requirement that alcohol advertising and promotions only be displayed in that same single area.

21. A single area display restriction was favoured by some submitters and is in place in some overseas jurisdictions (e.g. New South Wales, Scotland).

22. Such a restriction may go some way towards addressing submitter concerns about alcohol sales in supermarkets. Reducing the overall availability and accessibility of alcohol lessens the supply and consumption of alcohol and consequent harm. There is also increasing evidence of an association between exposure to alcohol and alcohol-related harm, with the greatest effect on youth.

[45] This discussion led to a question to cabinet involving single area restriction, and associated restrictions on the advertising and promotion of alcohol to that area.[75]

[46] A further Ministry of Justice Departmental Report followed the cabinet paper.[76] It addressed the issues which had remained live from the first Department Report, including the single alcohol area issue. As has become something of a theme, I replicate the relevant aspects of that report:

10. Supermarkets are eligible under clause 35 to sell alcohol under an off-licence. They are restricted by clause 59 to only selling beer, mead, or wine not exceeding 15% alcohol by volume (abv). This means that they are not permitted to sell spirits or spirit-based beverages, or fortified wines such as sherry and port if they are stronger than 15% abv.

Submissions

11. As noted in part 1 of the departmental report, 133 submitters commented on the Law Commission's recommendation to require alcohol in supermarkets to be confined to a single display area, with the majority supportive of such a restriction. Submitters considered that a single display area would reduce the prominence and visibility of alcohol within supermarkets, particularly for children and young people.

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75 At [103].

76 Social Policy and Justice Group *Departmental Report for the Justice and Electoral Committee: Part Two* (Ministry of Justice, July 2011)

Comment

12. A single area display restriction would go some way to addressing submitters' concern about the normalising effect of alcohol sales in supermarkets, by treating alcohol differently from other household items and reducing its visibility. It is likely to reduce the frequency that children and young people are exposed to alcohol in supermarkets, and is therefore consistent with other provisions of the Bill. It may also limit the opportunity for price discounts that are negotiated on the basis of the display products in key positions (e.g. aisle ends, entrances and checkouts).

13. Given the strong submitter support for further restrictions on supermarket sales of alcohol and the potential for changes in this area to shift the profile of alcohol, we recommend the Bill be amended to require supermarkets to display alcohol in a single area of the premises only, which may not be in a prominent area. This condition will avoid the risk that the display area is located in a highly visible place, such as at the entrance of the store or at the checkout, which would undermine the effect of the restriction.

14. This restriction would have some initial impact on store layouts, with possible associated compliance costs, but the ongoing costs are likely to be low. During oral submissions, Progressive Enterprises Ltd and Foodstuffs (NZ) Ltd indicated that they would not be opposed to a single area restriction. Progressive Enterprises Ltd noted that they are already restricting alcohol displays to one area in some of their new stores.

15. For consistency, we also recommend this restriction to apply to grocery stores. Other restrictions that apply to supermarkets, such as the limitation on what they can sell, also apply to grocery stores. Application of the single area display restriction to grocery stores would also eliminate the risk that grocery stores could move to make the display of alcohol more prominent. We note that what constitutes a prominent area within grocery stores is likely to differ from that in supermarkets, given the different size and layout of the respective premises.

16. To support the intended effect of the restriction to reduce the visibility of alcohol within supermarkets and grocery stores, we also recommend that in-store alcohol advertising and promotions may only be displayed within the single display area. This will mitigate the risk that large advertisements and promotions are used as a substitute for product displays.

17. We do not recommend requiring total physical separation or separate checkouts for alcohol sales. This would impose a much higher cost on supermarkets and grocery stores and create practical difficulties for shoppers, without any significant gains in terms of reducing access to alcohol and alcohol-related harm.

Recommendations

We recommend the Bill be amended to require supermarkets and grocery stores to display alcohol in only one area of the store that is not a prominent area. We also recommend that the Bill provide that alcohol advertising and promotions within supermarkets and grocery stores may only be displayed within the single display area.

[47] It was from all this that the origins of the single area restriction can be traced. Thus, the Alcohol Reform Bill 2010 (236–2), as reported from the Justice and Electoral Committee, contained a new clause 105A. The explanatory note discussed this in these terms:

> **Regulation of stores**
>
> We recommend inserting new clause 105A which would require supermarkets and grocery stores to display alcohol in only one area of the store. This clause also stipulates that the alcohol display area must not be in a prominent area of the store, and would restrict alcohol advertising and promotions to that designated area.

[48] The clause as introduced read as follows:

> **105A Compulsory conditions relating to display and promotion of alcohol in supermarkets and grocery stores**
>
> (1) The licensing authority or licensing committee concerned must ensure that every off-license it issues or renews for premises that are a supermarket or a grocery store is subject to a condition describing one part of the premises as a permitted area for the display and promotion of alcohol.
>
> (2) The part can be described verbally, or by means of some sort of plan.
>
> (3) The authority or committee must described only a part that, in its opinion,–
>
> (a) is a single area; and
>
> (b) does not include all or any part of a thoroughfare.
>
> (4) The condition takes effect as a condition that the licensee–
>
> (a) must ensure that no display, advertisement, or promotion of alcohol occurs on the premises at any place outside the part described; and
>
> (b) must not arrange or reconfigure the premises in such a way that any part of the part described becomes a thoroughfare or part of a thoroughfare.
>
> (5) For the purposes of this section, a part of any premises is a thoroughfare if the premises are so configured or arranged that most customers are likely to find it impossible, difficult, or convenient to undertake a normal shopping trip on the premises (or impossible,

difficult, or inconvenient to buy lottery tickets on the premises) without going through the part.

[49] There then arose the question of whether the Bill might be amended by way of Supplementary Order Paper. The Hon Judith Collins introduced a further cabinet paper querying this issue.[77] The raison d'être was explained in the cabinet paper as follows:

> 10. I seek cabinet approval for the attached SOP to be introduced and considered at the Committee of the Whole House stage. The SOP contains minor and technical amendments to the Bill as well as the following additional policy changes, which I consider necessary after further consideration and consultation undertaken over the last seven months.

[50] Relevantly, for present purposes, the paper stated:

> *Single area restriction for supermarkets and grocery stores*
>
> 50. In July 2011 Cabinet agreed to include in the Bill a requirement that alcohol for sale in supermarkets and grocery stores should be displayed in a single, 'non-prominent' area [CAB Min (11) 25/2]. This was in response to calls from the public for tighter restrictions on the sale of alcohol from these stores due to concerns that this normalises alcohol as an everyday grocery item.
>
> 51. Consultation was undertaken with the supermarket operators (Foodstuffs New Zealand Ltd and Progressive Enterprises Ltd) and the New Zealand Retailers Association after they expressed concern that the way this policy is reflected in the Bill could have unintended and undesirable consequences. For example, by requiring whole aisles of supermarkets to be dedicated to alcohol.
>
> 52. As a result of these discussions, the SOP amends the single area provisions by:
>
> a) clearly stating that the purpose of the single area restriction is to limit the exposure of shoppers so far as is reasonably practicable; and
>
> b) requiring that each supermarket and grocery store have a single alcohol area that contains only alcohol displays and promotions, and that this area cannot be:
>
> - at the entrance of a store, or
> - at a check-out.

[77] Office of the Minister of Justice "Alcohol Reform Bill – Paper One: Approval for Amendments to the Bill and Introduction of Supplementary Order Paper" (25 July 2012)

> 53. The SOP also makes other technical changes to improve the workability of the single area provisions, such as enabling the single area to be extended or reduced to allow for fluctuations in the demand for alcohol.

[51] The Supplementary Order Paper which ultimately gave effect to those recommended changes contains the working of what is now the Act.[78] The explanatory note to the SOP stated the general effect of the changes.[79]

[52] From all these materials and the extensive consultative process involved, the Act, including the single area condition, originated.

PART III: RESOLVING THE INTERPRETATIVE DEADLOCK

Substantive obligations of the relevant body (the DLC and the Authority)

The general role of the relevant body upon receipt of an application

[53] Having set out the scheme of the Act, it is now appropriate to draw together the relevant threads to depict the role of the DLC and the Authority in determining applications for licensing or re-licensing, as the case may be.

[54] It seems beyond challenge, in my view, that the role of the relevant body upon receipt of an application for licensing or re-licensing, is an evaluative one.[80] There are several bases for this general position:

(a) the fact that persons are able to object, and the Police, the Licensing Inspector and the Medical Officer of Health, are able to oppose an application, indicates that the role of the relevant bodies, the District Licensing Committee and the Authority, is to consider an application and make a merits-based determination;

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78 Supplementary Order Paper 2012 (132) Alcohol Reform Bill (236–2).

79 At 31–32 (explanatory note).

80 This too was the position under the Sale of Liquor Act 1989: *Otara-Papatoetoe Local Board v Joban Enterprises Ltd* [2012] NZHC 1406, [2012] NZAR 717 at [31].

(b) section 105 of the Act expressly contemplates an evaluative assessment being undertaken, as benchmarked against the criteria listed in s 105, which includes the design and layout of the premises, of which the single area is a necessary component; and

(c) related to [54](b) above, is the fact that the relevant body is able to reject an application, even where not objected to and unopposed, on the basis that granting the application would be inappropriate having regard to the factors listed at s 105.

[55] Thus, when the relevant body receives an application, they must consider it against s 105 in deciding "whether to issue a licence". There is no presumptive position, and certainly no foregone conclusion. I think the reality of the position is that if the object of the Act cannot be achieved by the application, then it cannot succeed.[81]

[56] So, in my view, the position can be summarised as follows:

(a) The role of the relevant body upon receipt of an application for licensing or re-licensing is an evaluative one, requiring the decision maker to make a merits-based determination on the application.

(b) In considering an application, the relevant body is fundamentally required to assess whether a licence ought to issue. In so doing, it must:

(i) consider any objections made by persons who have a greater interest in the application than the public generally;

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[81] *Re Penoy Spirits Ltd* [2014] NZALRA PH697, citing *Otara-Papatoetoe Local Board v Joban Enterprises Ltd* [2012] NZHC 1406, [2012] NZAR 717. In *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315, Heath J stated at [20]:

> It seems to me that the test may be articulated as follows: is the Authority satisfied, having considered all relevant factors set out in s 105(1)(b)–(k) of the 2012 Act, that grant of an off-licence is consistent with the object of that Act? That is the approach I take to the appeal.

(ii) consider any opposition filed by the constable in charge of the Police station nearest to where the application is filed, a Licensing Inspector, and the Medical Officer of Health;

(iii) have regard to the criteria stipulated in s 105 of the Act (for present purposes including the design and layout of the premises); and

(c) The relevant body must finally cross-check whether the application is capable of meeting the object of the Act.

(d) It must impose the conditions required by s 116(2) and in the case of a supermarket or grocery store, the single area condition (which I discuss in more detail below).

(e) It may impose further conditions in accordance with ss 116(1) and 117 (which I discuss in more detail below).

[57] But the central issue in this particular appeal is not the role of the relevant body simpliciter, but rather its functions in describing a single area condition. It is to this issue I now turn.

Powers of the relevant body in relation to a single area condition

[58] As noted above, I have concluded that the role of the relevant authority upon receipt of an application is an evaluative one. Nevertheless, on the issue as to the role of that body in relation to single area conditions, I have reached the clear view that this role is to describe an area which the authority considers best accords with the purpose and object of the Act, the purpose more specifically stated in s 112(1), together with the requirements as mandated in s 113(5).

[59] The relevant body must therefore engage in an evaluative exercise when describing the area. It must follow that it is not the applicant who is to have the final say in describing the area. The corollary of this is that the relevant body is not

limited to accepting or rejecting the plan put forward by the applicant. There are several reasons for this conclusion:

(a) first, there is nothing on the face of s 113 to indicate that the role of the relevant authority is limited to accepting or rejecting a plan put forward by the applicant;

(b) secondly, the obligation of the relevant body (not the obligation of the applicant) is to describe a plan *only if* it is a single area (which may contain up to three sub-areas) and does not contravene s 113(5)(b);

(c) thirdly, it seems to me that s 113(1) makes clear that the role of the relevant body is active rather than limited to approval or rejection of an applicant's plan. The relevant body is required to "have regard to s 112(1)" when, inter alia, "describing an alcohol area". The requirement to "have regard to" is inherently active and not merely mechanical;

(d) fourthly, it would be futile to include a requirement in s 113(1) to "have regard to" s 112(1) when, on the Authority's interpretation, that would really add nothing to the requirements of the section. Courts do not lightly interpret express words in legislation (or entire sub-sections of an Act) as being meaningless;[82]

(e) fifthly, there would be further irrelevance if it was Parliament's intent that compliance with s 113(5) simultaneously secured compliance

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[82] The starting point in this case is that the sections are to be accorded a "fair, large, and liberal construction": *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC) at 706; *Stewart Investments Ltd v Invercargill City Corp* [1976] 2 NZLR 362 (CA) at 370. Apposite here are the comments of Cooke P in *Ashburton Acclimatisation Soc v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78 (CA) at 88:

> With all respect to the contrary arguments, to treat s 2 as a surplusage or irrelevant or mere window-dressing would be, in my opinion, as cynical and unacceptable a mode of statutory interpretation as that which was rejected in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The duty of the Court must be to attach significance to and obtain help from this prominent and unusual feature of the Parliamentary enactment.

See too RI Carter (ed) *Burrows and Carter Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2015) at 329.

with s 113(1) (and s 112(1) by definition). Section 113(1) must be something *more* than a mere façade or, as Cooke P has said, more than "mere window-dressing";

(f) sixthly, relevant considerations under ss 105(1)(a) and (e) of the Act are "the object of this Act" and "the design and layout of any proposed premises". By itself this imports considerations of whether the license ought to be granted having regard to these factors, and therefore a requirement for a merits-based determination. There are strong parallels between these two factors and s 112 itself;

(g) seventhly, I consider the extensive legislative history effectively neutral on this point – it does not advance matters beyond the plain words; and

(h) finally, this conclusion is, in my view, entirely consistent with the purpose and object of the Act. In particular, I note the purpose expressly states that the new regime implemented by the Act is intended to be reasonable, which dovetails into the requisite reasonability mandated by s 112(1). The entire Act thus largely endorses the proposition that any restriction must be proportionate. The result I have reached is that the relevant body is able to assert a reasonable level of control over the single area condition. Its role is not limited to a "rubber stamping" one, but nor can it impose absolute limits.

[60] This does leave extant the issue of the ability to impose conditions beyond the single area condition in reliance upon ss 112–114. In my view it is wrong to attempt to rely on these sections to impose general conditions. As a matter of logic ss 112–114 are limited to the imposition of a condition of one kind, the single area condition, and that alone. Those sections cannot be prayed in aid for the general ability to impose conditions. Nor, in my judgment, do they need to be. I discuss below s 117 of the Act which is an entirely new provision conferring a broad

discretion upon the relevant body to impose general conditions, provided they are reasonable and not inconsistent with the Act.

[61] I would therefore summarise the role of the relevant body in relation to the single area condition in these terms:

(a) In the case of an application for an off-licence which is also a supermarket or grocery store, the relevant body must impose a single area condition if it grants a licence. This entails an evaluative exercise requiring the relevant body to:

(i) be satisfied that the proposed area is a single area;

(ii) be satisfied that the proposed area complies with s 113(5)(b);

(iii) consider whether the proposed area plan limits, so far as is reasonably practicable, the exposure of shoppers to displays, promotions and advertisements of alcohol;

In undertaking this evaluative exercise, it is the role of the District Licensing Committee and the Authority (not of the applicant) to describe the single alcohol area. Thus, the relevant body is not limited to simply accepting or rejecting the plan put forward by the applicant. Rather, the relevant body must describe an area which it considers complies with the above criteria, after hearing evidence and submissions from all relevant parties.

(b) There is no ability under ss 112–114 of the Act to impose general conditions (but that power is to be found in s 117).

[62] It follows that I disagree with the Authority on this aspect.

[63] I do note, however, that the position could differ between a first application involving a single area condition and subsequent renewal applications. Once compliance with the Act has been secured in the first instance, a renewal would

ordinarily be expected to be granted as a matter of course, absent material changes in circumstance. This is consistent with the intent of the Law Commission that compliance "is likely to be a one-off cost in most instances".[83]

[64] This conclusion, however, only takes the position so far. What does need to be considered is how this translates into the practical role of the relevant body upon receiving an application for a new licence or a renewal. This requires a more detailed analysis of the criteria listed above.

Application issues related to Building Act and Resource Management Act certificates

[65] Before engaging in that more detailed analysis, it is necessary to review the issues raised particularly by the second interested party, General Distributors Limited (GDL). GDL operates over 100 licensed supermarkets around New Zealand. Its specific concerns relate to the obligations of an applicant for a licence under the Building Act 2004 (BA) and the Resource Management Act 1991 (RMA). On this GDL refers to s 100 of the Act, which provides:

> **100 Form of application**
>
> An application for a licence—
>
> (a) must be made in the name of the person or club who will hold it if the application is granted; and
>
> (b) must be made in the prescribed form and manner; and
>
> (c) must contain the prescribed particulars; and
>
> (d) if it relates to any premises, must be accompanied by a statement by the applicant that—
>
> (i) the owner of the building in which the premises are situated provides and maintains an evacuation scheme as required by section 21B of the Fire Service Act 1975; or
>
> (ii) because of the building's current use, its owner is not required to provide and maintain such a scheme; or
>
> (iii) because of the nature of the building, its owner is exempt from the requirement to provide and maintain such a scheme; and
>
> (e) must be accompanied by the prescribed fee; and

[83] Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, April 2010) at [8.96].

> (f) except in the case of an application relating to a conveyance, must be accompanied by a certificate by the territorial authority that the proposed use of the premises meets requirements of the Resource Management Act 1991 and of the building code.

[66] GDL focuses particularly upon the requirements of s 100(f), maintaining that there is a substantial amount of work required to obtain the two certificates referred to in that sub section.

[67] Under the RMA, a primary concern advanced by GDL here, as I understand it, relates to the placement of external machinery relevant to the sale and supply of alcohol, such as external refrigeration and air conditioning. Issues here concern the requirement to submit site plans for the supermarket/store for the purpose of obtaining a resource consent. To the extent that external refrigeration is required to be located on a plan, that would also inform the internal layout of the store. Thus, it is submitted that any change in layout required by the District Licensing Committee would potentially alter this complex process. GDL put the position in these terms:

> 4.10 The upshot is that the resource consent process starts to determine the design of the licensed premises, both externally – its size, orientation, location on site, where the front entrance is – and to some extent the internal makeup of the building.

[68] GDL then confronted the issues that arise under the BA. In order to obtain a "certificate by the territorial authority that the proposed use of the premises meets requirements of the … building code", two steps are required. First, the applicant must obtain confirmation that the building plans comply with the Building Code, which is obtained by way of a building consent.[84] And second and interestingly here, until a code compliance has been issued after the building has been constructed, the territorial authority will not be in a position to issue a certificate under s 100(f) of the Act.

[69] Thus, it is suggested the technical strictures of the Act might require building completion (or extension as the case may be) before an application is able to be made. This approach, it is said, is impractical. The approach adopted in practice, as

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[84] Building Act 2004, s 49(1). I note the Building Code is defined by the Building Act 2004 to mean the regulations made under s 400 of the Building Act 2004. Presently, these are the Building Regulations 1992.

I understand it however, is to accept an application accompanied with a building consent, but to refrain from issuing an alcohol licence until the territorial authority has issued a code compliance certificate. GDL explained the implications of this in these terms:

> 5.6 The upshot of this approach is that in order to obtain the necessary certification under s 100(f) an applicant for a premises in a new or extended building must obtain resource consent before making an application for an off-licence. For completeness, the Act does provide provision for waivers to be granted. The inability to obtain a waiver is discussed below at section 6.

[70] In terms of waiver, the key point made by GDL is that on the face of the Act there is no jurisdiction under s 208 to waive non-compliance with s 100 where that non-compliance is wilful. While there is some authority to suggest the DLC may be willing to accept an application in the absence of either a building consent or resource consent, GDL makes the following point:[85]

> 6.6 While that might tend to suggest that an off-licence application can be made in advance of a resource consent application and a building consent application, it is important to bear in mind it is up to the DLC to grant a waiver and:
>
> (a) It can be argued that a conscious decision to apply for a licence prior to obtaining the relevant certificates is wilful and does not allow a waiver to be granted (this is a particular concern for GDL as this issue places it in an invidious position of having to go to significant design and expense without knowing whether its design is acceptable).
>
> (b) Caselaw under the Sale of Liquor Act 1989 may no longer be good law, given the greater range of relevant considerations under the Act (and therefore the extent and quality of information needed to make a decision on an application).
>
> (c) With the increasing formality with which applications are treated a waiver application may not even make it to the DLC, if the administrative staff refuse to accept the application for lodgement.
>
> (d) The reporting agencies may object to such a waiver being granted.

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[85] *Application by Hardy* [1994] NZAR 523 (LLA); *Re Te Poi Country Club* LLA 838/95, 28 April 1995.

[71] Whilst I am cognisant of these concerns, in my view, no argument raised by GDL in relation to these practical matters bears substantially upon the interpretation of the Act itself. They are all practical matters which, more than anything, go to the requirement of reasonableness which pervades the entirety of the Act.

[72] In the event, the concerns raised by GDL, as I see it are largely able to be answered in the following way:

(a) First, these issues are only given full vent in relation to new supermarkets. Existing supermarkets (which are the substantial majority) will not encounter the same difficulties. As the Law Commission stated, there will likely be one off costs for new applications. The reality is that this is the price to be paid for reducing alcohol-related harm under the new regime.

(b) Secondly, as I have mentioned, these are quite obviously practical issues which will bear upon the issue of reasonableness of conditions, and of the relevant body altering the proposed layout.

(c) Thirdly, these practical issues cannot overbear the prime task of interpreting the legislation. I have reached the view that the position is clear from the face of the Act.

(d) Fourthly, the requirement for an applicant to comply with the RMA and BA is expressly included in the Act. Parliament must be taken to have been cognisant of the issues identified by GDL in its submissions.

[73] In any event, all of these issues substantially fall away if the supermarkets accept, as they now seem to be imploring this court to do, that a practical approach to applications must be taken. It would be sensible for an applicant to informally liaise with the reporting agencies and perhaps also staff of the relevant District Licensing Committee to obtain some input before completing building proposals and

formally making an application. The RMA and BA processes need not be entirely disjunctive from the process mandated by the Act.

What is meant by "have regard to"?

[74] When the relevant body receives an application, in terms of s 105 of the Act, it is to have regard to "the object of this Act" and "the design and layout of any proposed premises". Further, in considering and describing a single alcohol area, it "must have regard to" s 112(1), which states that its purpose is to "limit (so far as is reasonably practicable) the exposure of shoppers in supermarkets … to displays and promotions of alcohol, and advertisements for alcohol". To fully understand the role, it must be considered what is meant by the words "have regard to".

[75] It is trite to say that having regard to something does not put the position as high as giving effect to it, which is synonymous with a directive to "implement".[86] Care must be taken not to elevate a requirement to "have regard to" to the standard of giving effect to.[87] The standard "have regard to" has been described as a "jurisdictional prerequisite" to the exercise of a discretion, and involves an "active intellectual process" in which relevant factors are afforded the decision maker's genuine consideration.[88]

[76] In Canada it has been held that while the decision maker is not bound to follow something in relation to which it is required to have regard, it must consider that matter carefully in relation to the circumstances at hand, the objectives and statements as a whole, and what they seek to protect.[89] In New Zealand it has been

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86 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77], citing *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 at [51].

87 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308 (HC) at 314, after referring to *R v CD* [1976] 1 NZLR 436 (SC) at 437; *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551 per Cooke P and 566 per McMullin J; *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612; *Donnithorne v Christchurch City Council* [1994] NZRMA 67 (PT) at 103.

88 *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145, (2010) 274 ALR 438 at [57], citing *Tickner v Chapman* (1995) 57 FCR 451 ; *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17, (2001) 205 CLR 507 at [105].

89 *Re Ottawa-Carleton (Regional Municipality) Official Plan Amendment 8* (1991) 26 OMBR 132 (Ont) at 181. See too *Bruckmayer v Renfrew (County) Land Division Committee* (1982) 14 OMBR 492 (Ont) at 493.

held there is not "any magic" in the words and that they require the decision maker to give genuine attention and thought to the required matters.[90]

[77] This necessarily requires the decision maker to correctly understand the matters to which he or she is directed to have regard.[91] However, in having regard, the weight to be given to statutory criteria will generally be a matter for the decision maker.[92] Though in some cases it is apparent that there may be one or more factors which are "critical or fundamental" to the making of a decision.[93] However, the requirement to have regard to a set of factors does not preclude having regard to other relevant matters, such as the purpose and object of an Act.[94]

[78] From this discursive analysis, in my view the principles relating to the requirement to "have regard to" can be summarised as these:

(a) the phrase "have regard to" bears its ordinary meaning;

(b) the decision maker must actively and thoughtfully consider the relevant matters;

(c) to do so requires the decision maker to correctly understand the matters to which he or she is having regard;

(d) the weight to be given to such matters is generally within the discretion of the decision maker;

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90 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612–613.

91 See for example *Auckland Regional Council v Arrigato Investments Ltd* [2001] NZRMA 158 (HC) at [28].

92 *Staunton Investments Ltd v Chief Executive Ministry of Fisheries* [2004] NZAR 68 (HC) at [18], citing, inter alia, *Ishak v Thowfeek* [1968] 1 WLR 1718 (PC); *Whangarei District Council v Northland Regional Council* [1996] NZRMA 445 (HC) at 468, citing, inter alia, *De Falco v Crawley Borough Council* [1980] QB 460 (CA) at 476.

93 *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145, (2010) 274 ALR 438 at [58] and [60], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; *R v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 338; *R v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.

94 *Walker v Police* HC Wellington AP87/01, 31 May 2001 at [29].

(e) there will be cases where the matter(s) to which the decision maker is required to have regard are so fundamental or critical that they assume an elevated mantle.

[79] To my mind it is apparent that the requirement "to have regard to" further supports the notion that, in considering a single area condition, the role of the relevant body is evaluative and requires an assessment. It is not a black and white matter. Further, in the present case, the mandatory requirement in s 113(1) to have regard to the purpose in s 112(1) is fundamental to the making of a decision under s 113 – it is, of course, the only matter to which the decision maker is expressly directed to have regard. While this does not preclude the relevant body having regard to other matters, the inclusion of a specific reference only to s 112(1) as a matter to which the relevant body must have regard, in my view, elevates it to a critical consideration.

What is meant by "limit"?

[80] The requirement "to limit" simply bears its ordinary meaning which is to restrict or restrain.[95] Resort to the ordinary dictionary definition here is appropriate.[96] It is not aimed at a total proscription, although the High Court of Australia observed in one case, in a constitutional context, that it is possible to limit until nothing remains.[97]

[81] In my view however, the present case is not a situation in which it is possible to construe the Act as approbating a limit amounting to a total prohibition on exposure. To limit must be seen therefore as to circumscribe, to restrict, or to reduce. Within that concept, at least ordinarily, is some area within the metes and bounds of the delimitation which is permissible, some residual content that may remain. In short, the requirement to limit, in my judgment, does not mandate prohibition.

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95 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014) at 1069.

96 See *R v B(S)* (1983) 1 CCC (3d) 73 (BC SC) at 80; *Mid-West By-Products Co v Manitoba (Clean Environment Commission)* [1979] 6 WWR 46 (Manitoba QB); *Nye v Insurance Co of British Columbia* 2012 BCSC 1053, (2012) 12 CCLI (5th) 34 at [47].

97 *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161 at 170–171.

What is meant by "so far as reasonably practicable"?

[82] The standard created by the words "so far as reasonably practicable", as I see the position, is not an absolute. Rather, it requires all reasonable steps to be taken or, to put it another way, to do that which would not be unreasonable in the circumstances.[98] It is therefore immediately apparent that the test depends on the context of the legislation creating the obligation and that it is primarily factually oriented.[99]

[83] Inherent in the concept of "reasonably practicable" is the notion of proportionality; the benefit to be obtained must be weighed against the sacrifices obtained in securing the benefit.[100] Such a weighing exercise is able to engage various issues, including expenditure, time involved, difficulty and inconvenience, as balanced against the desired objective.[101] In *Edwards v National Coal Board*, Asquith LJ stated:[102]

> 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them — the risk being insignificant in relation to the sacrifice — the defendants discharge the onus on them.

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98 *Braham v J Lyons & Co Ltd* [1962] 1 WLR 1048 (CA), citing *Edwards v National Coal Board* [1949] 1 KB 704 (HL) (see the cases cited therein).

99 *New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry* [2013] NZCA 65 at [66] (this decision related to the phrase "as soon as reasonably practicable").

100 *McCarthy v Coldair* [1951] 2 TLR 1226 (CA); *West Bromwich Building Society v Townsend* [1983] ICR 257 (HC); *R v M* [1996] 2 NZLR 659 (CA) at 662:

> Whether it is "not reasonably practicable to obtain [the] evidence" of the witness turns on the nature of the case, the nature and significance of the evidence the witness could give, what measures were taken and could have been taken to obtain the evidence, and the time, effort and cost involved.

See too *Union Steam Ship Company of New Zealand Ltd v Wenlock* [1959] NZLR 173 (SC and CA); *Tawhiwhirangi v Attorney-General* [1998] 1 ERNZ 571 (EC) at 578–579.

101 *Jordan v Norfolk County Council* [1994] 1 ELR 1353 (Ch); *Council of the Shire of Wyong v Shirt* [1980] HCA 12, (1980) 146 CLR 40.

102 *Edwards v National Coal Board* [1949] 1 KB 704 (HL) at 712.

[84] In *Akehurst v Inspector of Quarries: T and T Quarries Ltd v Inspector of Quarries*, Richmond J made the following observations in relation to s 16(1) of the Quarries Act 1944:[103]

> … in their ordinary meaning the introductory words [, "so far as may be reasonably practicable"] demand observance in every quarry of all the rules, whether mandatory or prohibitive in form, except in so far as in an individual case and in the particular circumstances prevailing it may not be reasonably practicable to observe the requirements of some particular rule.

[85] Importantly, the mere physical possibility of a task does not render that reasonably practicable.[104] The principles were summarised by Gaudron J in *Silvak v Lurgi (Australia) Pty Ltd*:[105]

> [53] The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:
>
> - the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
>
> - what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
>
> - to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk

[86] It must finally be remembered that the interpretation of what "reasonably practicable" means is entirely flexible, depending on the context in which the phrase is used. In *Porter v Bandridge Ltd*, Ormrod LJ remarked:[106]

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103 *Akehurst v Inspector of Quarries: T and T Quarries Ltd v Inspector of Quarries* [1964] NZLR 621 (SC) at 623, citing *Marshall v Gotham Co Ltd* [1954] AC 360 (HL).

104 *West Bromwich Building Society v Townsend* [1983] ICR 257 (HC) at 266; *Marshall v Gotham Co Ltd* [1954] AC 360 (HL) at 372–373.

105 *Silvak v Lurgi (Australia) Pty Ltd* [2001] HCA 6, (2001) 205 CLR 304 at [53], citing, inter alia, *Ryan v Central Norseman Gold Corp (No Liability)* (1964) 111 CLR 327 at 331, 332; *Coltness Iron Co Ltd v Sharp* [1938] AC 90 (HL); *Edwards v National Coal Board* [1949] 1 KB 704 (CA); *McCarthy v Coldair Ltd* [1951] 2 TLR 1226 (CA); *Marshall v Gotham Co Ltd* [1954] AC 360 (HL); *Austin Rover Group Ltd v HM Inspector of Factories* [1990] 1 AC 619 (HL); *R v Behlen-Wickes Co* (1980) 4 Man R (2d) 119 (Manitoba CA); *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 (HC); *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330 (HC).

106 *Porter v Bandridge Ltd* [1978] ICR 943 (CA) at 951–952.

> The phrase is one which Parliamentary draftsmen find useful, in various contexts, to express the intention of Parliament that the provision which it qualifies is not to be applied with the inflexibility of a mechanical or automatic process, but with due regard to the constraints to which human beings are subject. These, of course, vary according both to circumstances and to subject matter. In consequence, the meaning given to the words 'reasonably practicable' varies with the context in which it is used. At one end of the spectrum are the cases relating to the statutory duties placed upon employers to take steps to protect their employees. There the phrase is strictly interpreted.

[87] For convenience I distil the principles gleaned from the authorities to a summary of the prescription that is "so far as reasonably practicable":

(a) the requirement is not absolute;

(b) the physical possibility or feasibility of a task or course of action is not synonymous with reasonable practicability;

(c) ascertaining what is reasonably practicable entails a balancing exercise between the benefit sought to be secured and the sacrifices that would be occasioned by securing that benefit (such as cost, time, difficulty, inconvenience);

(d) the assessment is to proceed on the basis of information known at the time the decision is made; and

(e) the meaning of "reasonably practicable" is not static; it will respond to the context in which it is used.

[88] It follows that the obligation incumbent on the relevant body in relation to the single area condition is to ensure that the condition limits the exposure of shoppers to alcohol. That requirement is neither absolute nor de minimis. The relevant body is called upon to exercise its judgment as to whether, in each case, the limitation is condign. It is within the framework I have described that its judgment is to be brought to bear. This requires a factual assessment of all relevant circumstances, including the size and layout of the supermarket. It must then ensure the objective

sought to be secured is proportionate and reasonable when weighed against the sacrifices to be made in securing it.

The ability to refuse an application which is unopposed and not objected to

[89] The Authority in its decision commented:[107]

> [38] Section 107 of the Act permits a DLC, after considering the statutory criteria, to refuse a licence application where there are not objections and the application is not opposed. The DLC purported to do this in respect of the South City application although it did not actually refuse the application but merely imposed gratuitously a condition that altered the plan accompanying the application. Section 107 needs to be treated very cautiously by DLCs. It is not an invitation to depart from the statutory role of decision applications. A DLC, like any other judicial body can only decide an application on the evidence before it (see *Erebus* supra). It is not entitled to provide its own evidence or use its own personal opinions to justify the use of s 107. Usually, where an application is not objected to and not opposed the application will be determined on the papers in accordance with s 202 of the Act. However, for example, if a DLC is concerned that some matter relevant to the statutory criteria may have been overlooked, it may convene a public hearing. It would only be after a public hearing that a s 107 decision could be justified.

[90] I respectfully disagree with the views of the Authority on this point. The fundamental role of the relevant body considering an application is to engage in a merits-based consideration of the application having regard to all relevant matters. This obligation does not disappear nor is it diminished, simply because there is no objection to an application and it is unopposed.

[91] If the relevant body is satisfied after receiving an application that is neither opposed nor objected to, that a licence should not issue, then the licence may be declined. Before that decision to decline is made, the applicant would have had the opportunity to put their case. Should that fail to meet the requisite threshold as a matter of fact, it is difficult to see how a breach of natural justice would have been occasioned. It is, in reality, no different from a formal proof hearing.

[92] Equally, given that s 107 is part of the Act, I struggle to see how resort to it would amount to a departure from the statutory scheme. It has been included in the Act intentionally by Parliament as a power in the armoury of the relevant body. I

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[107] *J & G Vaudrey Ltd v Christchurch District Licensing Inspector* [2015] NZARLA PH64–65.

also do not think that a public hearing is a necessary pre-requisite to the deployment of s 107.

What is the breadth of the power to impose further discretionary conditions?

[93] Another aspect of the decisions under appeal which remains for consideration is the ability to impose further conditions under s 117 of the Act. Under this provision, any conditions imposed must be both reasonable and not inconsistent with the Act.

[94] It is clear that under the Sale of Liquor Act 1989, the relevant body had the ability to impose conditions not proposed by an applicant.[108] Under the 1989 Act there were different provisions for the imposition of discretionary conditions in relation to both on-licenses and off-licenses. I set out the relevant provisions below:[109]

> **14 Conditions of on-licences**
>
> …
>
> (5) On granting an application for an on-licence, the Licensing Authority or District Licensing Agency, as the case may be, may impose conditions relating to the following matters:
>
> (a) the days on which and the hours during which liquor may be sold:
>
> (b) the provision of food for consumption on the premises or conveyance:
>
> (c) the sale and supply of low-alcohol beverages:
>
> (d) the provision of assistance with or information about alternative forms of transport from the licensed premises:
>
> (e) any other matter aimed at promoting the responsible consumption of liquor:
>
> (f) the steps to be taken by the licensee to ensure that the provisions of this Act relating to the sale of liquor to prohibited persons are observed:
>
> (g) the designation of the whole or any part or parts of the premises or conveyance as a restricted area or supervised area:

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[108] See *Sheepys Ltd v Manukau District Licensing Authority* [2002] NZAR 603 (HC); *Sprig and Fern Milton Street Ltd v Monck-Mason* [2009] NZAR 735 (HC).

[109] Broader powers existed under the Sale of Liquor Act 1962, such as the ability to impose conditions not inconsistent with the Act in s 111.

(h) the persons or types of persons to whom liquor may be sold or supplied.

…

37 Conditions of off-licences

…

(4) On granting an application for an off-licence, the Licensing Authority or District Licensing Agency, as the case may be, may impose conditions relating to the following matters:

(a) the days on which and the hours during which liquor may be sold or delivered:

(b) the designation of the whole or any part or parts of the premises as a restricted area or a supervised area:

(c) the steps to be taken by the licensee to ensure that the provisions of this Act relating to the sale of liquor to prohibited persons are observed.

(d) the persons or types of persons to whom liquor may be sold or supplied.

[95] The ability to impose conditions under the predecessor Act was similar to the ability to impose limited conditions, in relation to off-licences, that is now found in s 116(1) of the Act. There was no comparable provision to what is now s 117. This has, to an extent, opened the gates on the ability to impose conditions, which is unqualified save for the requirement that they must be reasonable and not inconsistent with the Act.

[96] The breadth of the new ability to impose general conditions is consistent with the intent of the Law Commission:[110]

> 9.6 The range of conditions that may be imposed in respect of a licence under the 1989 Sale of Liquor Act is much narrower than under the 1962 Act. Unlike the 1962 Act, the current Sale of Liquor Act does not contain provisions empowering the licensing body to impose such conditions not inconsistent with the Act as the licensing body thinks fit. Although licence conditions may be imposed relating to "any other matter aimed at promoting the responsible consumption of liquor", discussions with police and liquor licensing inspectors indicate that, generally, a narrow range of conditions is sought by the reporting agencies.

[97] The Law Commission's subsequent discussion is both expressly and impliedly directed towards the benefits to be obtained from conferring broader

[110] Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, April 2010).

powers upon the relevant body in relation to the ability to impose conditions. This discussion perhaps reached its high point when the Law Commission commented:

> 9.22 We also consider the licensing decision-makers should be able to impose any reasonable condition on all licences designed to minimise harm. This would enable the licensing decision-makers to tailor conditions to the particular risks posed by a particular licence. The Alcohol Regulatory Authority, which is the tribunal we recommend in chapter 10 to replace the current LLA, should issue guidelines on the types of conditions that are suitable to address particular risks. This would ensure consistency across the country. Although all public law decision-makers are required to act reasonably, as a reminder and an additional safeguard, there should be a specific legislative requirement for conditions to be reasonable.

[98] This broad discretionary power has survived unmolested since its introduction through its passage to Royal Assent. Despite some submissions querying the wide-ranging powers, and potential consequences, there is little need to question the originating rational of the provision, nor that it undoubtedly adds breadth to the panoply of conditions otherwise available to be imposed by the relevant body.

[99] It is therefore somewhat surprising that the Authority applied, it seems without question, the principles applicable to conditions under the 1989 Act.[111] This is particularly so given there was already some dissatisfaction with the limited ability under the 1989 Act to impose conditions, even where considered to be sensible. In *Liquor Licensing Authority: Application by Wynne,* the issue was succinctly put:[112]

> There is no similar provision [(to s 118(4) of the Sale of Liquor Act 1962)] in the 1989 Act giving the Authority a discretion as to conditions that may be imposed on the grant of an on-licence for premises or a conveyance. The conditions that we may impose are detailed in s 14. Accordingly whilst we would otherwise concur with the conditions suggested in this instance by the District Council Inspector we have reluctantly concluded that the Act does not authorise us to impose any general conditions not specified in the new legislation.

[100] All of this however begs the question of what conditions may be imposed under the Act. The first requirement is that the condition not be inconsistent with the

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111 See for example *Meads Brothers Ltd v Rotorua District Licensing Agency* [2002] NZAR 308 (CA); *Christchurch District Licensing Agency v Karara Holdings* [2003] NZAR 752 (CA); *PP and G Basra Ltd v Rangitoto College Board of Trustees* [2010] NZAR 372 (HC).

112 *Liquor Licensing Authority: Application by Wynne* [1990] NZAR 287 (DC) at 288.

Act. This requires the relevant body to step back and consider the purpose and scheme of the Act, together with the more specific provisions, to ensure there is no inconsistency. This is not a particularly stringent first gateway through which a condition must pass.[113] In each case this requires a factual assessment.

[101] The greater difficulty lies with the requirement that any condition must be reasonable. As I have discussed above, the requirement of reasonability invokes concepts of proportionality. There must be a sufficient connection between the condition the relevant body wishes to impose and the risk it seeks to guard against.[114] It follows as a matter of logic that the condition must be no more restrictive than is necessary to militate against the identified evil. It need hardly be said that a condition which is absurd, ridiculous, patently unjustifiable, extreme or excessive, will not be reasonable.[115] Conversely, however, a condition will not be unreasonable simply because it does not meet such an extreme threshold.

[102] In *Re a Solicitor*, the standard of reasonableness was described in the following terms:[116]

> The word "reasonable" has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know.

[103] In each case, what is required is an assessment of the entire factual matrix to ascertain whether the imposition of the condition is proportionate, and therefore reasonable.[117] As a matter of necessity, this requires the relevant body to direct itself to all those circumstances which are relevant in coming to a decision as to whether the condition would be reasonable.[118] Ultimately the concept of reasonableness is a moving one and will impart different meanings in differing contexts; there is

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113 See *Sale of Alcohol* (online looseleaf ed, Thomson Reuters) at [SA117.02].

114 *Jackson v Joyceville Penitentiary* (1990) 55 CCC (3d) 50 (FCC) at 80.

115 *University Hospital v Service Employees International Union Local 333 UH* (1986) 26 DLR (4th) 248 (Sask CA) at 250; *Australian Doctors' Fund Ltd v Commonwealth of Australia* (1994) 126 ALR 273 (FCA) at 281.

116 *Re a Solicitor* [1945] KB 368 (CA)

117 *National & Provincial Building Society v Lloyd* [1996] 1 All ER 630 (CA) at 637–638 (what amounts to a "reasonable period" would be a question for the Court in the individual case); *Austin Rover Group v HM Inspector of Factories* [1988] Crim LR 752 (QB); *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 117.

118 *Opera House Investment Pty Ltd v Devon Buildings Pty Ltd* (1936) 55 CLR 110 at 116.

fundamentally a need to be able to justify the decision as being rational.[119] The test is an objective one.[120]

[104] I consider the principles can be stated as follows:

(a) the relevant body must have identified a risk which it seeks to abate, or a benefit which it seeks to secure;

(b) that risk or benefit must be consistent with the purpose and object of the Act, and not inconsistent with the Act in its entirety. In this respect the comments of the authors of *Sale of Alcohol* are usefully repeated:[121]

> Any conditions considered under this provision must be reasonable, and, in the view of the authors, must relate to, and be consistent with, Parliament's intentions in the legislation as set out in ss 3 and 4 – the purpose and object of the Act;

(c) the relevant body must direct itself as to all relevant circumstances;

(d) it must then weigh the risk to be abated, or benefit to be secured, against the relevant circumstances as identified;

(e) the condition must be a proportionate response. As was said in *Johnsonville Club Inc v Wellington District Licensing Agency*:[122]

> … a condition which in its totality bears marginal relevance to that total risk, must be said to be illogical and therefore as a matter of law unreasonable.

(f) an absolute prohibition would not *ordinarily* be reasonable, nor a condition which secured a benefit or abated a disbenefit only marginally; equally, a condition may not be absurd, ridiculous, patently unjustifiable, extreme or excessive; and

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119 *British Columbia Telephone Co v Telecommunication Workers' Union* (1978) 17 LAC (2d) 211 at 216; *Vantreight v Saanich (District)* [1950] 2 WWR 1253 (BC SC) at 1255; *Hick v Raymond & Reid* [1893] AC 22 (HL); *Charnock v Liverpool Corp* [1968] 1 WLR 1498 (CA).

120 *CUPE Local 3501 v Boys' Home* [1992] OLRB Rep 409 at 416.

121 *Sale of Alcohol* (online looseleaf ed, Thomson Reuters) at [SA117.02].

122 *Johnsonville Club Inc v Wellington District Licensing Agency* [1999] NZAR 360 (HC) at 366.

(g) ultimately whether a condition is reasonable will depend on an objective assessment of whether there is a rational and proportionate connection, between the identified risk or benefit, when weighed against all relevant considerations.

[105] Because in this case the Authority seemed to consider the condition deleting the single display cabinet as part and parcel of ss 112 and 113, rather than 117, it is now impossible to ascertain whether it applied the correct legal test. My tentative view, however, is that it did not, if only for the fact the authorities relating to conditions under the predecessor regime were applied unquestioningly. On this basis I cannot be satisfied that it was correct to delete the condition. Indeed, the MOH made the submission, in reliance on the conclusions reached in an academic article, that there is evidence suggesting restrictions on the use of aisle-ends for the sale of alcohol is "a promising option to encourage healthier in-store purchases, without affecting availability or cost of products".[123] In this light it may well be that the condition is justifiable under s 117. Indeed, on the face of the record, there is little to suggest it would not be.

Natural justice

[106] The impact of the conclusions I have reached begin to clarify the role of natural justice in applications to the relevant body. An adequate point of commencement is the judgment of Lord Mustill in *R v Secretary of State for the Home Department, ex p Doody*:[124]

> Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

[107] It seems to me the Authority's position was that not only ought the applicant be afforded an opportunity to present his or her case in the form of evidence and

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123 Referring to Ryota Nakamura and others "Sales Impact of Displaying Alcoholic and Non-Alcoholic Beverages in end-of-aisle Locations: An Observational Study" (2014) 108 *Social Science & Medicine* 68.

124 *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 (HL) at 560D–560G.

submission, but also that the applicant is provided with an opportunity to comment on the decision reached before it is released, and to potentially alter that decision as a result of the further opportunity. While the very essence of natural justice is its ambulatory nature, responding to meet needs as they arise, this to me seems a proposition that cannot stand.[125] As Fisher J has averred:[126]

> There is no rule of natural justice of general application requiring "that a decision maker must disclose that which he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he makes a final decision.

[108] Similar comments are found in McGechan J's judgment in *Prasad v Chief Executive of the Department of Labour*:[127]

> There is no requirement for an Authority to submit conclusions to an appellant on some preliminary basis for comment or correction, as if some preliminary draft.

[109] Though there are undoubtedly situations where advance notice of adverse findings will be required, Andrews J has suggested that "it will only be in exceptional circumstances that notice of adverse findings will be required in criminal or civil proceedings".[128] Save for the caveat I describe below, this is not, in my view, such an exceptional case.

[110] This is not a situation similar to *R v The Chancellor, Masters and Scholars of the University of Cambridge* (*Dr Bentley's Case*), where the Master of Trinity College faced allegations concerning his behaviour as Regius Professor of Divinity.[129] Dr Bentley refused to appear before the Vice-Chancellor's Court to meet these allegations. His degrees were duly stripped from him. In the King's Bench, Dr Bentley secured a writ of mandamus restoring his degrees on the basis he had been denied a fair hearing. Nor does this situation invoke similar considerations to those prevailing in *Re Erebus Royal Commission*, which was fundamentally concerned

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125 For the protean nature of natural justice refer generally *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 132; *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 357; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 (Full HC) at 613.

126 *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC) at 464.

127 *Prasad v Chief Executive of the Department of Labour*[2000] NZAR 11 (HC) at 29.

128 *Goston v Designer Space & Storage* HC Auckland CIV-2007-404-103, 2 April 2007 at [34].

129 *R v The Chancellor, Masters and Scholars of the University of Cambridge* [*Dr Bentley's Case*] (1723) 1 Strange 557, 93 ER 698 (KB).

with an adverse credibility finding and an absolute failure to afford the party an opportunity to meet the adverse findings.[130]

[111] While far from determinative, the strictures of natural justice in this context were considered by the Ministry of Justice in one of the departmental reports in the conception stages of the Act.[131] In that report it was commented:

> 518. We note that conditions place under this clause would be placed following a public hearing, at which the licensee has the right to appear, give evidence and examine witnesses. A licensing decision can be appealed if the licensee wishes to contest the conditions placed on the licence.

[112] The presumptive position is that applications for licences proceed by way of a public hearing (this is certainly the case where objections are lodged).[132] At that hearing the applicant is entitled to present its case and put its best evidence and submissions in support.[133] Equally, certain persons are entitled to object and the three reporting agencies are able to oppose. Each also has an opportunity to present evidence and make submissions. It is by this process that primarily the requirements of natural justice are fulfilled.

[113] Indeed, there was authority under the Sale of Liquor Act 1989 to the effect that it was acceptable to impose conditions different to those proposed by the applicant.[134] What is important is that the decision is only made in reliance on material put before the relevant body. To have regard to any further material would require the relevant body to afford the parties an opportunity to engage with, and comment on, that material.[135] Care must also be taken of taking judicial notice. But

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130 *Re Erebus Royal Commission* [1983] NZLR 662 (PC).

131 Social Policy and Justice Group *Departmental Report for the Justice and Electoral Committee: Part One* (Ministry of Justice, May 2011).

132 Of course, all affected parties, including the applicant, must have fair and proper notice of the time and date of hearing: *Waitemata County v Local Government Commission* [1964] NZLR 689 (SC) at 698–699; *Coles v Miller* CA25/01, 8 November 2001 at [43].

133 This satisfies the requirement that a person be provided a fair opportunity to be heard: *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 720; *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 270; *Waitemata Health v Attorney-General* [2001] NZFLR 1122 (CA) at [115].

134 *Sprig and Fern Milton Street Ltd v Monck-Mason* [2009] NZAR 735 (HC); *Sheepys Ltd v Manukau District Licensing Authority* [2002] NZAR 603 (HC).

135 *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd* [2003] NZAR 752 (CA) at [46], citing *Meads Brothers Ltd v Rotorua Licensing Agency* [2002] NZAR 308 (CA).

so long as this is done it seems to me that most decisions will have an appropriate evidential foundation.

[114] It therefore follows that I do not consider there to be a breach of natural justice in describing an alcohol area which is not that proposed by the applicant (whether it be a synthesis or compromise of other proposals or submission is irrelevant). The opportunity to be heard and respond has been furnished. Dissatisfaction with outcome is then best ventilated through the appeal process.

[115] The only equivocation I have is the ability of the reporting agencies to establish that an approach they recommend is reasonably practicable, as I have described that requirement. This is because relevant factors in that assessment may often be unique to the applicant. These generally would include matters, amongst others, such as cost, time, difficulty and inconvenience. The applicability and weight to be attached to such factors will often therefore substantially depend on the individual applicant.

[116] Where the relevant body seeks to depart from *one* of the plans put forward by an applicant, an objector or an opposing party, and the relevant body is of the view it has insufficient evidence to form a comprehensive view, fairness may demand that it actively seek that further information.[136] The prime concern is to ensure that any decision is founded on sufficient evidence. The fact that the approved plan or condition is not that advanced by the applicant does not automatically call into question the integrity of the evidential foundation, nor fundamental precepts of natural justice.

[117] By way of example, where three parties put forward three alternative plans, it may well be that there is sufficient evidence to come to a compromise decision. It may also be that there is not. Where the latter is the case, the Authority, in my view, should seek that further information and afford the party an opportunity to shore up the factual lacunae in their case, lest it risk transgressing the mandate of natural justice.[137]

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136 *Bhuyian v Minister of Immigration* HC Wellington AP321/01, 2 May 2002 at [31].
137 See *Lal v Removal Review Authority* HC Wellington AP95/92, 10 March 1994 at 21–24.

[118] When describing a single alcohol area, the relevant body must be poised to make a thorough assessment of the evidence. This may require it to require the applicant to produce further evidence, which in practice amounts to a further opportunity to respond. This is part and parcel of the process, however. And it will not always be required to give full vent to principles of natural justice. As Fisher J stated in *Khalon v Attorney-General*:[138]

> [A] party should normally be given an opportunity to respond to an allegation which, with adequate notice, might be effectively refuted. The converse will generally be true if the risk of an adverse finding was always foreseeable, particularly if the challenge to the finding relates to the way in which the tribunal had exercised a value judgment rather than the completeness of the material which had been placed before the tribunal. The key elements are surprise and potential prejudice.

[119] The concerns I have raised are not insurmountable and do not generally detract from the position I have reached. The position as to natural justice can be summarised in these terms:

(a) the applicant (and any objectors or opposing parties) must be afforded an opportunity to be heard;

(b) it is through being furnished with the ability to present a case, and produce evidence, that the primary requirements of natural justice are fulfilled;

(c) there is no general obligation upon a decision maker to either disclose what they are minded to decide, or produce a draft copy of the decision, prior to actually deciding;

(d) the three most important points are that the decision made:

  (i) has a proper evidential foundation;

  (ii) is only made in reliance upon the evidence legitimately before the relevant body; and

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138 *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC) at 466.

(iii) where the relevant body wishes to take into account further and fresh evidence, it reverts to the applicant to ensure he or she has an opportunity to comment;

(e) where an applicant (or other party) is dissatisfied with a decision, the most appropriate avenue of recourse is via statutory appeal rights;

(f) the narrow basis upon which it may be necessary to provide an applicant a further basis to heard, namely where the course proposed to be adopted by the relevant body does not have an appropriate evidential foundation, enabling it to apprise itself of all relevant matters, and the consequences of the proposed decision – it is anticipated this will be the case less often than not.

[120] While I need not decide the issue in this case, my preliminary view is that I am not altogether convinced there was any transgression of the principles of natural justice before the CLDC. But, as will be seen below, this will be a matter for the Authority.

[121] This raises the final question of what an appellate Court is to do where it considers there has been a breach of natural justice. As I have concluded, the ALRA will now be able to refer the matter back for reconsideration in light of any finding there has been a breach of natural justice. But, equally, an appeal to the ALRA is by way of rehearing. While I do not reach any conclusion on the point, it seems to me that there is no absolute requirement that an appeal be allowed simply because there has been an error below; the ALRA is to engage in a fresh consideration of the matters and only then would it be in a position to consider whether the appeal must be allowed or otherwise.

Conclusion

[122] The interpretative exercise was undertaken by beginning to draw the threads of the Act and other relevant sources together. I have done so under various heads. The final task, however, is to draw the findings under these disparate heads together

to present an overall picture of the position I have reached. This is done at [13]–[14] above and I do not replicate it again here.

PART IV: OUTCOME, ORDERS AND COSTS

Outcome

[123] In my view the process in the Authority has misfired. Because it proceeded from what I have determined was a fundamental misapprehension of the Act, it follows that its decision is now in jeopardy in the sense that it is entirely flawed. The practical result of this is that I am not in a position to fulfil a proper appellate role in reaching a view and determining the issues before me.

[124] The only prudent course in the circumstances is therefore to quash the decision in its entirety and refer it back to the Authority for reconsideration in light of this judgment. It will be up to the Authority whether it also wishes the CDLC to reconsider the matter given the conclusion I have reached about its ability to remit for reconsideration.

Orders

[125] The appeal is allowed. The decision of the Alcohol Regulatory and Licensing Authority ([2015] NZALRA PH 64–65) is quashed. The appeals from the Christchurch District Licensing Committee decisions are to be reconsidered in light of the present judgment.

Costs

[126] My tentative view is that the appellant, the MOH, as the largely successful party here, is entitled to costs. In light of the nature of this case and the outcome reached, however, I propose to reserve costs in the hope that the parties are able to resolve these issues between themselves. If this hope proves baseless, the parties are to file memoranda sequentially (not exceeding five pages). I will then determine costs on the papers, absent any party indicating they wish to be heard on the issue.

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Gendall J

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