

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA37/2016
[2016] NZCA 539**

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

Hearing:	18 October 2016
Court:	Harrison, Miller and Brown JJ
Counsel:	D J Goddard QC and I J Thain for Appellants C P Browne and R J Sussock for Respondent A W Braggins and H E Philip for First Interested Party M N Zarifah for Second Interested Party
Judgment:	16 November 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal against the order of Gendall J allowing the appeal, quashing the decision of the ARLA and referring both applications back to the ARLA, is dismissed.

B The questions of law are answered as follows:

Question 1: Does the direction in s 113(1) merely give guidance (echoing s 112(1)) on the implementation of the s 113(5) requirements or does it impose a discrete obligation?

Section 113(1) directs the decision-maker to give genuine attention and thought to the purpose stated in s 112(1) in describing the perimeter of the single area. The decision-maker must take into account the purpose of limiting so far as reasonably practicable the extent of shoppers' exposure to alcohol displays, promotions and advertisements in describing the alcohol area.

Question 2: Can the DLC/ARLA describe a single area materially different from that sought by the applicant?

- (i) the decision-maker cannot describe a single area different from that proposed by the applicant if the application is granted on the papers under s 202(1);
- (ii) the decision-maker can describe a single area which is a sub-area of the area proposed by the applicant provided that the applicant has a proper opportunity to be heard at a hearing with reference to the reduced area;
- (iii) the decision-maker cannot unilaterally describe a single area which is in a different location from that proposed by the applicant unless the applicant is properly consulted and agrees to that different single area; and
- (iv) the decision-maker must decline the application if, having undertaken the evaluative exercise described by Gendall J at [61(a)(i)–(iii)], the applicant's proposed single area is not acceptable to the decision-maker.

Question 3: Can conditions be imposed under s 117 that have the effect of altering the single area imposed under s 112, or restricting the configuration or arrangement of that area?

Save for the imposition of an interim condition under s 115(5), conditions may not be imposed under s 117 that have the effect of altering the single area imposed under s 112(2).

Question 4: Is the ARLA or the High Court able to refer a matter on appeal back to the decision-maker below?

Yes.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

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Question 4: Is the ARLA or the High Court able to refer a matter on appeal back to the decision-maker below?
Outcome

[71]
[78]

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Off-licences for premises that are supermarkets or grocery stores are required by s 112(2) of the Sale and Supply of Alcohol Act 2012 (the Act) to contain a condition describing a single area within the premises for the display and promotion of alcohol (a single-area condition). Applications for such off-licences must include a floor plan of the premises showing the proposed single alcohol area for the display and promotion of alcohol.¹ The questions of law on this appeal focus on the powers of a district licensing committee (DLC) or the Alcohol Regulatory and Licensing Authority (ARLA) to impose single-area conditions varying an applicant's proposed alcohol area when issuing or renewing an off-licence.

Background

[2] In 2014 the Christchurch District Licensing Committee (CDLC) considered applications for new off-licences by the first appellant, J & C Vaudrey Ltd (Vaudrey), for the South City New World supermarket (the Vaudrey application) and the second appellant, Bond Markets Ltd (Bond), for the Bishopdale New World supermarket (the Bond application). Each application contained the requisite floor plan and proposed permitted alcohol area.

The CDLC decisions

[3] The Vaudrey application, which was neither objected to² nor the subject of any reports in opposition,³ included within the proposed single alcohol area a display cabinet containing wine facing onto a thoroughfare which led to the checkouts and the exit of the premises. In granting the application for the off-licence on the papers,

¹ Sale and Supply of Alcohol Regulations 2013, sch, form 4.

² Sale and Supply of Alcohol Act 2012, s 102.

³ Section 103.

the CDLC varied the proposed single alcohol area by deleting provision for the display cabinet, stating:⁴

In my view that display if it remained would be in breach of the purpose of the single area as explained in s 112(1). I do not believe that requiring the removal of this display would be unreasonable. I have therefore decided that the single area available for the display and promotion of alcohol must exclude this display, and I have approved a new plan showing the single area which excludes this part of the display.

[4] The Bond application was the subject of a public hearing. Although no objections were lodged to Bond's application, there were reports in opposition from the Christchurch City Council Licensing Inspector, the police and the Canterbury Medical Officer of Health (the Medical Officer) in relation to the single alcohol area proposed by Bond. Two different areas were suggested, one by the Licensing Inspector, the other by the Medical Officer with the police in support.

[5] The licence granted by the CDLC rejected all three proposed areas. Instead it imposed a condition permitting an area substantially smaller than and partially outside the perimeter area proposed by Bond. The CDLC said:⁵

Given the space constraints in this supermarket the Committee considers that a reasonable approach would be to balance the size of the supermarket to the size of the [single alcohol area], particularly if it allows in the Committee's view compliance with the Act.

The ARLA appeals

[6] The appeals against these decisions were heard together by the ARLA.⁶ The reporting agencies⁷ did not resist the contention that each decision had contravened the rules of natural justice with the consequence that both appeals were allowed.⁸ However, because the ARLA considered that it did not have the power to remit the matters back to the CDLC it proceeded to consider the licence applications itself.

⁴ Decision No 60C [2014] 1164 at [8].

⁵ Decision No 60B [2014] 1565 at [85].

⁶ *J & C Vaudrey Ltd v Christchurch District Licensing Inspector* [2015] NZALRA PH 64-65 [ARLA decision].

⁷ The Christchurch District Licensing Inspector, the Canterbury Medical Officer of Health and the police.

⁸ ARLA Decision, above n 6, at [12]–[13]. In relation to the Vaudrey application, the applicant was not given an opportunity to comment on the deletion of the display cabinet. In relation to the Bond application, the applicant was not given an opportunity to comment on the decision to relocate the single alcohol area to a place of the CDLC's choosing.

[7] The ARLA considered that the CDLC's role was confined to granting an off-licence solely by reference to the single alcohol area proposed in the application.⁹ It could not propose to modify the area on its own initiative. Consequently, the ARLA reasoned that the application must be rejected if the single alcohol area proposed by the applicant was not acceptable to the CDLC. The ARLA considered that the CDLC's modifications to each application were unreasonable and accordingly granted the licences with single-area conditions in the terms proposed in each of the Vaudrey and Bond applications.¹⁰

The High Court judgment

[8] On appeal by the Medical Officer under s 162 of the Act, Gendall J quashed the ARLA decision and directed it to reconsider the appeals from the CDLC decisions.¹¹

[9] The Judge disagreed with the ARLA's conclusions about its role; rather, Gendall J saw the role of the relevant decision-making body (a DLC or the ARLA) as an evaluative one, requiring a merits-based determination of the application.¹² Therefore, when imposing a single-area condition, the DLC or ARLA was required to describe a single alcohol area that complies with the mandatory requirements set out in s 113(5) of the Act and that takes into account the requirement to limit, so far as reasonably practicable, exposure of shoppers to displays and advertisements of alcohol.¹³ The DLC or ARLA was accordingly not limited to simply accepting or rejecting the plan as put forward by the applicant. The DLC or ARLA then has the ability to impose any further conditions that are not inconsistent with the Act.

[10] Gendall J agreed that, in accordance with natural justice, parties must be given the opportunity to be heard on an application. However, he did not necessarily consider there had been a transgression before the CDLC; it is through being

⁹ At [34].

¹⁰ At [41]–[42].

¹¹ *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] 2 NZLR 382 [High Court judgment]. Note that the parties' names are erroneously recorded in the intituling of the High Court judgment and this has carried over to the reported version.

¹² At [56].

¹³ At [61].

furnished with the ability to present a case and produce evidence that the primary requirements of natural justice are fulfilled.¹⁴

[11] The Judge therefore concluded that the ARLA proceeded from a fundamental misapprehension of the Act and it followed that the entire decision was flawed.¹⁵ Accordingly, the only prudent course was to quash the decision and refer it back to the ARLA for reconsideration in light of the High Court judgment.

Issues for determination

[12] After hearing from the parties, Gendall J issued a subsequent decision settling four questions of law for determination on appeal.¹⁶ Vaudrey then applied to this Court unsuccessfully for special leave to appeal on additional questions of law. After a number of telephone conferences with the Court, the parties agreed the form of four questions of law for determination. However, noting that concessions had been made in the written submissions of both sides, the Medical Officer proffered a revised list of issues but in relation to which the appellants declined to engage.

[13] Against that background, and reflecting Mr Goddard QC's acknowledgment that the compromise formulation of the questions was not felicitously expressed, we consider that the issues for resolution by this Court arising from the appeals are:

- (a) Does the direction in s 113(1) merely give guidance (echoing s 112(1)) on the implementation of the s 113(5) requirements or does it impose a discrete obligation?
- (b) Can the DLC/ARLA describe a single area materially different from that sought by the applicant?
- (c) Can conditions be imposed under s 117 that have the effect of altering the single area imposed under s 112, or restricting the configuration or arrangement of that area?

¹⁴ At [119]–[120].

¹⁵ At [123].

¹⁶ *Canterbury Medical Officer of Health v J & G Vaudrey Ltd* [2016] NZHC 73.

- (d) Is the ARLA or the High Court able to refer a matter on appeal back to the decision-maker below?

Statutory framework

Legislative history

[14] Provision was first made for the grant of off-licences for supermarkets and grocery stores in the Sale of Liquor Act 1989, with the first such application by a supermarket being made in 1990.¹⁷ The Sale of Liquor Act did not provide any specific rules regarding the location of alcohol displays within supermarkets. Initially supermarkets were restricted to selling wine but access was obtained to the retail beer market in 1999.¹⁸

[15] While the grounds of objection to the grant of an off-licence were restricted to the matters listed in s 35(1) of the Sale of Liquor Act, a series of decisions recognised that the Liquor Licensing Authority (the ARLA's predecessor) was not limited to the s 35(1) criteria in considering the grant of a licence and that it was necessary to have regard to the statutory objective. For example, in *Walker v Police* Fisher J held that road safety was a relevant consideration given the objective in s 4 of the Sale of Liquor Act of reducing liquor abuse.¹⁹ In *My Noodle Ltd v Queenstown-Lakes District Council* this Court held that it was open to the Liquor Licensing Authority to consider a new local authority policy that sought to reduce liquor abuse by reducing trading hours.²⁰

[16] In 2010 the Law Commission released its report *Alcohol in our Lives: Curbing the Harm* which recommended that new legislation entitled the Alcohol Harm Reduction Act be enacted.²¹ The report observed:

8.81 Currently, alcohol is displayed prominently throughout supermarkets. It is often positioned near the entrance, the checkouts, beside commonly purchased household goods, or in other areas

¹⁷ *Application by Douglas-Oliver Corporation* [1990] NZAR 411 (LLA).

¹⁸ Sale of Liquor Amendment Act 1999, s 30.

¹⁹ *Walker v Police* HC Wellington AP87/01, 31 May 2001.

²⁰ *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 564, [2010] NZAR 152. Similarly see *PP and G Basra Ltd v Rangitoto College Board of Trustees* [2010] NZAR 372 (HC); and *Wells Instrument & Electrical Ltd v Shree Sai Holdings Ltd* [2011] NZAR 655 (HC).

²¹ Law Commission *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010).

through which shoppers must walk. Commonly, displays of alcohol are found on aisle ends.

The Law Commission noted that the placement strategy of supermarkets ensured that alcohol was highly visible which increased the likelihood of casual impulse purchases of alcohol.²²

[17] While accepting that a single-area condition would constitute an interference in the way that supermarkets operated, the Law Commission considered that the proposed new statute would represent a paradigm shift in the way alcohol was sold in New Zealand and that the cost to retailers in setting up alcohol areas would likely be a one-off in most instances.²³ The report stated:

8.98 We propose a “single-area restriction”, similar to the requirements of the Victoria legislation. This would seem 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.

[18] Notwithstanding the Law Commission’s recommendation, the Alcohol Reform Bill 2010, in its original form, did not contain a single-area condition in relation to supermarkets.²⁴ However, apparently in response to public submissions, the Alcohol Reform Bill as reported from the Justice and Electoral Committee contained a new cl 105A, explained in the following way:²⁵

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.

[19] Clause 105A, as reported from the Committee, read as follows:

²² At [8.87].

²³ At [8.95]–[8.96].

²⁴ Alcohol Reform Bill 2010 (236-1).

²⁵ Alcohol Reform Bill 2010 (236-2) (select committee report).

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-licence 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 describe 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 inconvenient 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.

[20] Clause 105A did not contain a statement of, or reference to, statutory purpose. As Mr Browne for the Medical Officer observed, sub-cl (3) required an evaluative judgment not only in relation to a single area but also concerning the locational restriction related to a “thoroughfare”, a constraint which he suggested some stores might have struggled to comply with.

[21] The constraint on the location of the single area was further addressed in a supplementary order paper (SOP),²⁶ the subject of which a Cabinet paper explained:

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

²⁶ Supplementary Order Paper 2012 (132) Alcohol Reform Bill (236-2) (select committee report).

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.
- 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.

Purpose and object of the Act

[22] The modest object of the Sale of Liquor Act was to establish a reasonable system of control over the sale and supply of liquor to the public with the aim of contributing to the reduction of liquor abuse, so far as that could be achieved by legislative means.²⁷

[23] The new Sale and Supply of Alcohol Act signals a new community-oriented approach incorporating both purpose and object provisions. A key purpose of the Act is to put in place, for the benefit of the community as a whole, a new system of control over the sale and supply of alcohol.²⁸ The characteristics of the new system are that it is reasonable and its administration helps to achieve the object of the Act.²⁹

²⁷ Sale of Liquor Act 1989, s 4.

²⁸ Sale and Supply of Alcohol Act, s 3(1)(a).

²⁹ Section 3(2).

[24] Section 4(1) provides that the object of the Act is that:

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

[25] Unlike s 35 of the Sale of Liquor Act, the list of criteria which must now be considered in applications for off-licences includes as the first criterion the object of the Act.³⁰

Supermarkets and grocery stores

[26] Part 2 of the Act, which provides for the sale and supply of alcohol generally, recognises four kinds of licence: on-licences, off-licences, club licences and special licences. Section 32(1), which specifies the kinds of premises for which off-licences may be issued, relevantly provides:

32 Kinds of premises for which off-licences may be issued

(1) An off-licence may be issued only—

...

- (e) for premises that (in the opinion of the licensing authority or licensing committee concerned) are a supermarket with a floor area of at least 1 000 m² (including any separate departments set aside for such foodstuffs as fresh meat, fresh fruit and vegetables, and delicatessen items); or
- (f) for premises that (in the opinion of the licensing authority or licensing committee concerned) are a grocery store.

[27] Section 33 both defines a grocery store and lists matters for a DLC to consider in forming an opinion on whether any premises are a grocery store. There is no equivalent provision relating to supermarkets. Section 58 places restrictions on the kinds of alcohol which may be sold in supermarkets and grocery stores.

[28] Subpart 3 of pt 2 concerns the licensing process for off-licences. An application for a licence must be filed with the relevant DLC and conform with the several requirements set out in s 100, including that it be made in the prescribed

³⁰ Section 105.

form and manner.³¹ The prescribed form of application for an off-licence, form 4 in the sch to the Sale and Supply of Alcohol Regulations 2013, specifies a number of attachments which must be filed alongside the application, including:

... Floor plan showing any proposed permitted area for the display and promotion of alcohol, and any proposed sub-areas.

[29] In addition to the object of the Act, in deciding whether to issue a licence, the DLC must have regard to a range of matters including the design and layout of any proposed premises.³²

Single-area conditions

[30] The “permitted area” to be shown on the floor plan of the premises is the applicant’s proposal for the alcohol area³³ that is to be imposed by way of the single-area condition under s 112. Section 112 provides:

112 Compulsory conditions relating to display and promotion of alcohol in single area in supermarkets and grocery stores

- (1) The purpose of this section and sections 113 and 114 is 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) The licensing authority or licensing committee concerned must ensure that, when it issues or renews an off-licence for premises that are a supermarket or grocery store, it imposes on the licence a condition describing one area within the premises as a permitted area for the display and promotion of alcohol.
- (3) On the renewal of an off-licence for premises that are a supermarket or grocery store, any single-area condition imposed when the licence was issued (or was last renewed) expires.
- (4) Subsection (3) is subject to section 115(4).

[31] The mode of description of an alcohol area is specified in s 113:

³¹ Section 99.

³² Section 105.

³³ Defined in s 5(1) of the Sale and Supply of Alcohol Act to mean, in relation to a single-area condition, the area described in the condition.

113 Describing alcohol areas

- (1) The licensing authority or licensing committee concerned must have regard to section 112(1)—
 - (a) when describing an alcohol area; and
 - (b) when taking any other action under this section; and
 - (c) when forming any opinion for the purposes of this section.
- (2) An alcohol area must be described by means of a plan of the footprint of the premises concerned (or, in the case of premises on more than one level, a plan of the footprint of the level on which the area is or is to be located) showing—
 - (a) the proposed configuration and arrangement (or, in the case of the renewal of a licence, the existing or any proposed new configuration and arrangement) of the premises or level; and
 - (b) the perimeter of the area.
- (3) The area may be so described that it is divided into 2 or 3 sub-areas; and in that case,—
 - (a) the perimeter of each sub-area must be separately described; and
 - (b) the licensing authority or licensing committee concerned must designate one sub-area as the core area and one sub-area as the secondary area, and (if the area is divided into 3 sub-areas) must designate one sub-area as the overflow area.
- (4) The perimeter of the area or any sub-area may pass through the proposed locations (or, in the case of the renewal of a licence, any existing or proposed new locations) of any display units.
- (5) The authority or committee must describe an alcohol area within the premises only if, in its opinion,—
 - (a) it is a single area; and
 - (b) the premises are (or will be) so configured and arranged that the area does not contain any part of (or all of)—
 - (i) any area of the premises through which the most direct pedestrian route between any entrance to the premises and the main body of the premises passes; or
 - (ii) any area of the premises through which the most direct pedestrian route between the main body of the premises and any general point of sale passes.

- (6) For the purposes of this section and section 114, **general point of sale** means 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.

[32] The implications of a single-area condition are elaborated in s 114:

114 Effect of single-area conditions

- (1) Every single-area condition takes effect as a condition that the licensee of the premises concerned must ensure that—
- (a) no display or promotion of, or advertisement for, alcohol occurs on the premises at any place outside the alcohol area; and
 - (b) the premises are not reconfigured or rearranged in a way whose effect (whether intentional or not) is that the alcohol area contains—
 - (i) any area of the premises through which the most direct pedestrian route between any entrance to the premises and the main body of the premises passes; or
 - (ii) any area of the premises through which the most direct pedestrian route between the main body of the premises and any general point of sale passes.
- (2) If the alcohol area has not been so described that it is divided into 2 or 3 sub-areas, a single-area condition also takes effect as a condition that the licensee of the premises concerned must ensure that no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the alcohol area.
- (3) If the alcohol area has been so described that it is divided into 2 sub-areas, a single-area condition also takes effect as a condition that the licensee of the premises concerned must ensure that—
- (a) no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the sub-area designated as the core sub-area; and
 - (b) no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the sub-area designated as the secondary sub-area unless it occurs at a time when no display or promotion of, or advertisement for, alcohol is occurring inside that sub-area.

- (4) If the alcohol area has been so described that it is divided into 3 sub-areas, a single-area condition also takes effect as a condition that the licensee of the premises concerned must ensure that—
 - (a) no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the sub-area designated as the core sub-area; and
 - (b) no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the sub-area designated as the secondary sub-area unless it occurs at a time when—
 - (i) no display or promotion of, or advertisement for, alcohol is occurring inside that sub-area; and
 - (ii) no display or promotion of, or advertisement for, alcohol is occurring inside the sub-area designated as the overflow sub-area; and
 - (c) no display or promotion of, or advertisement for, a product that is not alcohol occurs on the premises at any place inside the sub-area designated as the overflow sub-area unless it occurs at a time when no display or promotion of, or advertisement for, alcohol is occurring inside that sub-area.
- (5) For the purposes of this section,—
 - (a) neither of the following is a promotion of alcohol:
 - (i) a sign (consistent with other general signage in the supermarket or grocery store concerned) giving directions to, or describing the location of, an area where alcohol is available for purchase;
 - (ii) a newspaper, magazine, or catalogue containing a promotion of or advertisement for alcohol; and
 - (b) **described** means described under section 113; and
 - (c) **designated** means designated under section 113(3)(b).

Question 1: Does the direction in s 113(1) merely give guidance (echoing s 112(1)) on the implementation of the s 113(5) requirements or does it impose a discrete obligation?

[33] It is common ground that s 112(1) is not in itself an operative provision but sets out the specific purpose of the three single-area provisions, namely ss 112–114. By contrast, the dual requirements in s 113(5) are prerequisites to the function of describing an alcohol area. The point of contention arises from the direction in s 113(1) that the decision-maker “must have regard to section 112(1)” when

describing an alcohol area. Does that impose a discrete obligation on the decision-maker?

[34] Gendall J considered that it does. He said:³⁴

[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;

...

The fundamental difference between the parties concerns the subsistence of that third step.

Submissions

[35] The Medical Officer supports Gendall J's interpretation, contending that what is described as the s 113(5) prohibitions constitute a strict minimum requirement (a "regulatory floor") and that, in addition, the decision-maker must also evaluate whether the proposed area to be described limits alcohol exposure in the manner stated in s 112(1). Although the Medical Officer's written submissions went so far as to say that the decision-maker must be "satisfied" on those three elements, Mr Browne acknowledged in argument that the obligation imposed by s 113(1) was no more extensive than as stated by Gendall J.

[36] The appellants construed the direction in s 113(1) as intended simply to ensure that the single area is described in a way that gives effect to both the letter

³⁴ High Court judgment, above n 11.

and the spirit of s 113(5). They submitted that the purpose provision “gives guidance” to persons seeking to implement the requirements in s 113(5) but does not impose further requirements over and above those found in s 113(5). They concluded:

Thus the DLC should stand back and ask whether the proposed single area complies with the letter and spirit of s 113(5). It should ask whether the single area that is proposed will achieve the outcome that a shopper can do their shopping with limited exposure to alcohol (specifically, is the alcohol limited to one place in the store, and is that place not in either of the two places that every shopper is effectively required to pass through — the entrance and the checkouts). If the answer is “yes”, then that single area should be approved: the DLC has had regard to the s 112(1) purpose provision, and it is satisfied. It is irrelevant that the single area could be reduced further, and it is irrelevant that further reductions might be reasonably practicable.

Hence on the appellants’ construction, honouring the s 113(1) directive would be subsumed in the course of forming the two opinions on the s 113(5) prerequisites.

Discussion

[37] We do not accept that the appellants’ characterisation of the function of the specific s 113(1) direction adequately reflects the legislative intention. The presence in s 112(1) of the statement of purpose of the three sections would be sufficient of itself to provide “guidance” on the discharge of the obligations conferred by ss 112–114.

[38] While there will inevitably be repetition or surplusage in some instances of legislative drafting,³⁵ we do not consider that the presence of s 113(1) can be explained on that basis. Its location at the commencement of s 113, its mandatory wording and the particularisation of the conduct which is the subject of the obligation all tell strongly against the proposition that it is not an “operative” provision to adopt the parlance of the argument. In our view it would not be an acceptable mode of statutory interpretation to treat it in effect as surplusage.³⁶

³⁵ *Wilson & Horton Ltd v Commissioner of Inland Revenue* [1996] 1 NZLR 26 (CA) at 33.

³⁶ *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78 (CA) at 88.

[39] Consequently we consider that the inclusion of the mandatory obligation in s 113(1) was not a mere reiteration of that statement of purpose dedicated to the s 113 functions but rather signalled the necessity to take a specific step. We reject the interpretation advanced by the appellants which would effectively eliminate the need for the decision-maker to observe s 113(1) in any explicit manner.

[40] In our view, the correct construction of s 113 is that in performing the function in s 113(2) of describing the single area, the decision-maker is subject to the dual directives set out in s 113(1) and (5). Section 113(5) prescribes two prerequisites about which the decision-maker must form an opinion before the single area may be described.

[41] The obligation imposed by s 113(1), while mandatory, is not as absolute in nature as the s 113(5) prerequisites. The requirement to “have regard to” a matter imports only an obligation to give genuine attention and thought to the stipulated matter. In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:³⁷

He is directed by s 107G(7) to “have regard” to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is ‘have regard to’ not ‘give effect to’. They may in the end be rejected, or accepted only in part. They are not however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.

Indeed the phrase imposes a somewhat less onerous obligation than the stronger formula “have particular regard to”.³⁸

[42] Similarly, in the context of s 113(1), it would not be sufficient for the DLC to reach a conclusion on the perimeter of the single area simply because it formed the opinions required under s 113(5)(a) and (b) unless the DLC also specifically had regard to the purpose stipulated in s 112(1).

³⁷ *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. See also *R v Police Complaints Board, ex parte Madden* [1983] 1 WLR 447 (QB) at 465–467 where a number of English decisions are discussed.

³⁸ *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, (2015) 19 ELRNZ 163 at [64].

[43] In our view, Gendall J's description of s 112(1) as a matter which s 113(1) directed the decision-maker to "consider" accurately captured the nature of the obligation imposed by s 113(1).³⁹ The specific purpose in s 112(1) is a matter to which the decision-maker has to give genuine attention and thought when undertaking any of the steps described in s 113(1)(a)–(c).

[44] Although not required to "give effect to" that specific purpose, when forming the s 113(5) opinions and in undertaking the s 113(2) description it is a matter for the decision-maker to consider whether and to what extent the proposed single area limits, so far as reasonably practicable, shoppers' exposure to alcohol displays, promotions and advertisements. If, having regard to the s 112(1) purpose, the decision-maker considers that the proposed single area is incompatible with that purpose, the decision-maker is entitled, but not obliged, to take that into account in the decision to approve, decline or propose an amendment to the description of the single area proposed in the application.

[45] Consequently the answer to question 1 is that s 113(1) directs the decision-maker to give genuine attention and thought to the purpose stated in s 112(1) in describing the single alcohol area. The decision-maker must take into account the purpose of limiting so far as reasonably practicable the extent of shoppers' exposure to alcohol displays, promotions and advertisements in describing the alcohol area.

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[46] In the case of the Vaudrey application, the direction in s 113(1) of the Act provided a sound statutory basis for the CDLC's concern about the presence of the wine display cabinet at one end of the wine display shelves. However, as we explain in the context of question 2, the CDLC was not justified in proceeding as it did in modifying the application on the papers.

[47] Mr Goddard contended that it was in effect unreasonable to preclude the corner end of the wine display shelving from being used for alcohol display, making

³⁹ Set out at [34] above.

the point that the consequence would be that that particular area would lack utility as it could not be used to display a product which is not alcohol. We do not consider that would be the consequence having regard to s 113(4) which enables the perimeter of a single area to pass through the proposed location of a display unit. Products which are not alcohol may be displayed outside but adjacent to the single area, subject to any other conditions which may be imposed.

Question 2: Can the DLC/ARLA describe a single area materially different from that sought by the applicant?

Submissions

[48] Both the appellants and the Medical Officer endorsed the finding of Gendall J that the decision-maker is not limited to simply accepting or rejecting the plan for the single area advanced by the applicant.⁴⁰ However, they parted company on the extent of the change which the decision-maker may impose by way of a single-area condition.

[49] The line of demarcation can usefully be shown by reference to the appellants' suggested answer to the question in the compromise formulation:

The DLC or ALRA can impose a condition that describes a single alcohol area different from that which was sought by the applicant, subject to compliance with the requirements of natural justice, and the requirements in the Act in relation to hearings. However the description of that area is confined to describing its perimeter on the plans of the premises provided by the applicant, and does not extend to requiring changes to the configuration or arrangement of the premises as shown on those plans.

The Medical Officer concurred with the first proposition but demurred on the second.

[50] The appellants emphasised the importance of distinguishing between the perimeter of the single area and the configuration and arrangement of the premises, pointing to the distinction drawn in s 113(2). They suggested that Gendall J had run the two together thereby causing confusion. It was the appellants' proposition that the decision-maker has no power to require a reconfiguration or rearrangement of the

⁴⁰ High Court judgment, above n 11, at [59].

store; rather, the role is limited to describing the single alcohol area by drawing the approved perimeter on the plans as submitted, with the configuration/arrangement of the store to be taken as “a given”.

[51] The appellants’ view of the delimiting nature of the plan of the footprint of the premises was demonstrated by their submission:

Thus it is not open to submitters to contend for a change in the configuration and arrangement of the premises, or for the decision-maker to impose such a change as part of a single-area condition. Rather, taking those matters as a given, submitters can contend for a different single alcohol area to be described on those plans, and the decision-maker can reach its own view on what that single alcohol area should be.

Hence the decision-maker’s capacity to describe the single area would be confined to the proposed perimeter area or some subset of it.

[52] That interpretation was said to be supported by s 114(1) of the Act, which makes it clear that the store owner is free to reconfigure or rearrange the premises provided only that, in doing so, it does not have the effect of the single alcohol area breaching the location requirements in s 113(5)(b)(i) and (ii).

Discussion

[53] We agree that the effect of s 114(1) is that, once an off-licence is granted, the applicant may alter the configuration and arrangement of the premises provided the outcome is not as prohibited by s 114(1)(b). However we do not consider that such post-grant flexibility supports an interpretation that the decision-maker’s consideration of the perimeter of the single area is confined to the applicant’s proposed perimeter or a subset of it.

[54] We accept that the decision-maker cannot unilaterally describe a single area which is beyond the perimeter of the area proposed by the applicant. Were it otherwise, the decision-maker could in effect redesign the layout of the store. However the decision-maker is not fettered by the plan and single area perimeter proposed by the applicant. The applicant does not have the ability in effect to dictate where in the store the single area location will be.

[55] If the decision-maker does not accept the single area proposed by the applicant or a sub-area within that perimeter, it has two options. One is to decline the application. The other is to indicate to the applicant that it would be minded to grant the application if a revised plan was submitted incorporating a single area acceptable to the decision-maker at another location within the store.

[56] Gendall J appeared to consider that there was a third option whereby the decision-maker could grant an off-licence imposing a new single area at a location within the store different from that proposed by the applicant, without the applicant's agreement to that course. The Judge noted that it was not the applicant who was to have the final say in describing the area, the corollary being that the decision-maker was not limited to accepting or rejecting the plan put forward by the applicant.⁴¹ Gendall J said:⁴²

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.

[57] While we agree with the view that the applicant does not have the final say in that it cannot dictate the location of the single area within its store, we do not consider that there is such a third option. As stated in the context of question 1, it is the role of the decision-maker, having undertaken the evaluative exercise described by Gendall J at [61(a)(i)–(iii)] of the High Court judgment, to grant applications in which the proposed single area is acceptable to the decision-maker. However the decision-maker does not have the power to impose a single-area condition specifying a new single alcohol area that falls outside the proposed perimeter when that course is opposed by the applicant. Hence if the applicant's proposed single area is not acceptable to the decision-maker but the decision-maker's preferred alternative single area is not acceptable to the applicant, the decision-maker is obliged to decline the application.

⁴¹ High Court judgment, above n 11, at [59].
⁴² At [61].

[58] We consider that question 2 is appropriately answered in the following manner:

- (a) the decision-maker cannot describe a single area different from that proposed by the applicant if the application is granted on the papers under s 202(1). This is in accordance both with the wording of s 202(1) and the requirements of natural justice;
- (b) the decision-maker can describe a single area which is a sub-area of the area proposed by the applicant provided that the applicant has a proper opportunity to be heard at a hearing with reference to the reduced area;
- (c) the decision-maker cannot unilaterally describe a single area which is in a different location from that proposed by the applicant unless the applicant is properly consulted and agrees to that different single area; and
- (d) the decision-maker must decline the application if, having undertaken the evaluative exercise described by Gendall J at [61(a)(i)–(iii)], the applicant’s proposed single area is not acceptable to the decision-maker.

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[59] Reverting to the Vaudrey application, it was not open to the CDLC to purport to grant the application on the papers but impose a single area condition which altered the single area proposed in the application. If the CDLC did not accept the application in its terms, it should not have proceeded on the papers under s 202(1) but instead directed that a hearing be convened.

[60] After a hearing at which Vaudrey was afforded a proper opportunity to be heard on the CDLC’s proposed reduction in the single area by the removal of the wine display cabinet at one end of the wine display shelves, the CDLC would have had jurisdiction to describe a reduced perimeter making that alteration.

[61] However, a decision-maker would not have jurisdiction to impose a single-area condition specifying a different location within the store for the single alcohol area unless the applicant agreed to that course. Hence, in respect of the Bond application, if Bond had been afforded the opportunity at the hearing to be heard on the CDLC's proposed single area⁴³ and had objected to it, then the CDLC would have been obliged to decline that application.

Question 3: Can conditions be imposed under s 117 that have the effect of altering the single area imposed under s 112, or restricting the configuration or arrangement of that area?

[62] Section 117 provides:

117 Other discretionary conditions

- (1) The licensing authority or licensing committee concerned may issue any licence subject to any reasonable conditions not inconsistent with this Act.
- (2) The generality of subsection (1) is not limited or affected by any other provision of this Act.

There was no comparable provision in the Sale of Liquor Act.

[63] Section 117 came to prominence in the Vaudrey application when the ARLA, considering that a condition relating to the deletion of the display unit could not be imposed under ss 112–114, appeared to suggest that the power to impose such a condition could be found in s 117.⁴⁴ However, because in the ARLA's view there was no evidential basis for the condition in any event, an order was made modifying the decision with the consequence that the display unit was restored.⁴⁵

[64] Gendall J viewed s 117 as conferring the power to impose conditions, a power which was unqualified save for the requirement that the conditions must be reasonable and not inconsistent with the Act.⁴⁶ The Judge considered that the

⁴³ Described at [5] above.

⁴⁴ ARLA Decision, above n 6, at [39].

⁴⁵ At [41].

⁴⁶ High Court judgment, above n 11, at [95].

condition deleting the single display cabinet might have been justifiable under s 117, adding that, on the face of the record, there was little to suggest there would not be.⁴⁷

Submissions

[65] The appellants and the Medical Officer were in accord that the structure of the Act precluded a s 117 condition altering the single area as described under ss 112(2) and 113(2). We agree with that view. Sections 112–114, in effect, constitute a code relating to the areas in which alcohol can be sold in a supermarket. A condition relating to the location of the single alcohol area should not then be imposed under s 117.

[66] Mr Browne contended that it would not be inconsistent with the Act for conditions to be imposed under s 117 that affect the arrangement or display either within the single area or adjacent to it. He suggested that such conditions might include limits on such things as the height of alcohol displays (so as to reduce their visibility from other areas) and preventing the removal of shelving in the surrounding areas intended to limit shoppers' exposure to alcohol.

[67] Mr Goddard acknowledged that it may be open to a DLC to impose conditions under s 117 relating to matters such as displays within a single alcohol area if that would advance the object of the Act as set out in s 4. However, he submitted that that issue need not be determined on this appeal as neither the CDLC nor the ARLA imposed any condition under s 117.

Discussion

[68] In view of Mr Goddard's submission and the limited argument which we heard on the issue we confine ourselves to the following observations. First, the new power to impose conditions in s 117 is broad. While such a condition must be reasonable and not inconsistent with the Act, the generality of the power is not limited or affected by any other provision in the Act.⁴⁸ Indeed s 115, which provides for delays in the application of single area conditions for certain licence renewals,

⁴⁷ At [105].

⁴⁸ Sale and Supply of Alcohol Act, s 117(2).

enables conditions to be made in the interim under s 117. The versatility of the power is amplified by s 118, another new provision, which enables different conditions to apply to different parts of the premises.

[69] Secondly, in view of the breadth of the power, we consider that Mr Goddard's acknowledgment was appropriately made. However, any more detailed analysis of the ambit of the s 117 power should await a case where the exercise of the power has been entertained.

[70] Accordingly the answer to question 3 is that, save for the imposition of an interim condition under s 115(5), conditions may not be imposed under s 117 that have the effect of altering the single-area condition imposed under s 112(2).

Question 4: Is the ARLA or the High Court able to refer a matter on appeal back to the decision-maker below?

[71] This issue arises because of the apparently circumscribed powers of the ARLA and the High Court on hearing appeals. Section 158 of the Act states:

On hearing an appeal, the licensing authority may confirm, modify, or reverse the decision under appeal.

An equivalent provision is found in s 161(7) in relation to general appeals to the High Court, and this applies to appeals on questions of law by way of s 162(2).

[72] The ARLA concluded that its powers on appeal were confined to those specified in s 158. Hence, it considered that it did not have the power to remit the appeals back to the CDLC.⁴⁹ This prompted Gendall J to consider the powers of the ARLA and the High Court under ss 158 and 161(7) respectively.

[73] Doubts have previously been expressed about the power to refer a matter back in a number of decisions concerning the equivalent provision under s 138(11) of the Sale of Liquor Act.⁵⁰ More recently, a contrary view was taken in *Triveni Puri Ltd v Commissioner of Police* where, noting that there was no express power in

⁴⁹ ARLA Decision, above n 6, at [14].

⁵⁰ See *Cats Niteclub (1991) Ltd v Police* [1997] NZAR 83 (HC); *K & J Fraser Ltd v Major* [2002] NZAR 466 (HC); and *Tē Puke Wholesale Liquor Ltd v McGlone* [2012] NZAR 113 (HC).

s 138(11) to remit proceedings back to the Authority, Kós J was nevertheless satisfied that such a power existed as a matter of necessary implication.⁵¹

[74] Gendall J focussed on the judgment of this Court in *Director-General of Social Welfare v W* where, in discussing the term “reverse” in a materially equivalent phrase, the Court stated:⁵²

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.

Gendall J concluded that inherent in the concept of reversal is the ability to revoke or modify a decision under appeal, with the natural corollary being that the appellate body will have the power to refer back for rehearing if it considers it necessary to do so.⁵³

[75] Although not with any enthusiasm, Mr Browne submitted that neither the ARLA nor the High Court has the power to refer matters back but that ss 158 and 161(7) require final decisions to be made and to that end the statute confers the procedural powers necessary to do so.

[76] The appellants abided the decision of the Court on this issue although Mr Goddard observed that there was good practical sense in the High Court having the ability to refer matters back to ARLA.

[77] We agree with the interpretation in *Director-General of Social Welfare v W* that “reverse” includes the revocation or annulment of a decision, adopted by Gendall J and in accordance with the view expressed in *Triveni*.⁵⁴ In our view, both ARLA and the High Court have the power under ss 158 and 161(7) respectively to refer appeals back to the original decision-maker in appropriate cases. Accordingly, the answer to question 4 is in the affirmative.

⁵¹ *Triveni Puri Limited v Commissioner of Police* [2012] NZHC 2913, [2013] NZAR 88 at [38].

⁵² *Director-General of Social Welfare v W* [2005] NZAR 258 (CA) at [22].

⁵³ High Court judgment, above n 11, at [22].

⁵⁴ We note that *Director-General of Social Welfare v W*, above n 52, was dealing with s 12M of the Social Security Act 1964 which, along with the ability to “confirm, modify or reverse” a decision, also gives an explicit power to remit the matter back to the chief executive for reconsideration. However, we do not consider that this affects the Court’s interpretation of “reverse” as including the ability to revoke a decision and direct a rehearing.

Outcome

[78] The appeal against the order of Gendall J allowing the appeal, quashing the decision of the ARLA and referring both appeals back to the ARLA, is dismissed.

[79] The questions of law are answered as follows:

- (a) **Question 1: Does the direction in s 113(1) merely give guidance (echoing s 112(1)) on the implementation of the s 113(5) requirements or does it impose a discrete obligation?**

Section 113(1) directs the decision-maker to give genuine attention and thought to the purpose stated in s 112(1) in describing the perimeter of the single area. The decision-maker must take into account the purpose of limiting so far as reasonably practicable the extent of shoppers' exposure to alcohol displays, promotions and advertisements in describing the alcohol area.

- (b) **Question 2: Can the DLC/ARLA describe a single area materially different from that sought by the applicant?**

- (i) the decision-maker cannot describe a single area different from that proposed by the applicant if the application is granted on the papers under s 202(1);
- (ii) the decision-maker can describe a single area which is a sub-area of the area proposed by the applicant provided that the applicant has a proper opportunity to be heard at a hearing with reference to the reduced area;
- (iii) the decision-maker cannot unilaterally describe a single area which is in a different location from that proposed by the applicant unless the applicant is properly consulted and agrees to that different single area; and
- (iv) the decision-maker must decline the application if, having undertaken the evaluative exercise described by Gendall J at

[61(a)(i)–(iii)], the applicant’s proposed single area is not acceptable to the decision-maker.

- (c) **Question 3: Can conditions be imposed under s 117 that have the effect of altering the single area imposed under s 112, or restricting the configuration or arrangement of that area?**

Save for the imposition of an interim condition under s 115(5), conditions may not be imposed under s 117 that have the effect of altering the single area imposed under s 112(2).

- (d) **Question 4: Is the ARLA or the High Court able to refer a matter on appeal back to the decision-maker below?**

Yes.

[80] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

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