

[2017] NZARLA PH 170

**IN THE MATTER**

of the Sale and Supply of Alcohol  
Act 2012

**AND**

**IN THE MATTER**

of an appeal pursuant to s.154 of  
the Act against a decision of the  
Wellington District Licensing  
Committee in respect of a renewal  
of an off-licence for premises  
situated at 27-29 Kent Terrace,  
Wellington, known as “Liquor King  
Kent Terrace”

**BETWEEN**

**LION LIQUOR RETAIL LIMITED**

Appellant

**AND**

**DR STEPHEN PALMER**  
(Medical Officer of Health)

First Respondent

**AND**

**DAMIAN WILSON RAPIRA-  
DAVIES**  
(Police Officer of Wellington)

Second Respondent

**BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY**

Chairperson: District Court Judge K D Kelly  
Member: Ms J D Moorhead

**HEARING** at Wellington on 27 April 2017

**APPEARANCES**

Ms A A Arthur-Young and Mr M J Doesburg – for the appellant  
Mr G H Allan – for the first respondent  
Mr A Z Heyns – for the second respondent  
Mr P T G Whelan – Wellington District Licensing Inspector – to assist

**DECISION OF THE AUTHORITY**

**Introduction**

[1] On 6 October 2016, the Wellington District Licensing Committee (DLC), approved an application to renew an off-licence in respect of premises situated at 27-29 Kent Terrace, Wellington known as “Liquor King Kent Terrace”.

[2] This application was the subject of one public objection from a resident whose children attend a primary school situated near the premises. The application was also opposed by the both the Medical Officer of Health (the first respondent), and the New Zealand Police (the second respondent). As a consequence, the Licensing Inspector recommended that the application be determined at a public hearing.

[3] The DLC granted the renewal subject to two conditions which are the subject of this appeal. The first condition changes the applicant's proposed hours of trading from 8.00 am to 11.00 pm to 8.00 am to 9.00 pm on Friday and Saturday nights. The second condition requires all carry bags in which alcohol is sold to retail customers to be branded with "Liquor King" branding.

[4] The DLC heard the application over two days, namely 7 March 2016 and 12 April 2016, during which the DLC said it heard considerable evidence of negative effects on the community which it considered would fall within the amenity and good order consideration under s 131 of the Act. In addition to reviewing trading hours, during the course of its deliberations the DLC considered the imposition of a condition relating to branded bags would go some way to improving the amenity and good order of the locality. Because this was not a condition that had been discussed during the course of the hearing, a draft decision was issued by the DLC to explain the rationale for the proposed condition. Written submissions were sought in relation to the proposed condition and following consideration of those submissions, the DLC issued its final decision confirming the condition.

## **Background**

[5] The premises operate as a bottle store and are a ground level store of approximately 200m<sup>2</sup> with displays of alcohol, chillers, a beer filling station and an office. The appellant has operated the licensed premises since 2005. The appellant sought to renew its off-licence on the same conditions as the previous licence including trading hours of Monday to Sunday 8.00 am to 11.00 pm.

[6] The Inspector's report to the DLC, made pursuant to s 129 of the Act, states that appellant has operated the premises without issue except for one failed controlled purchase operation (CPO) on 17 October 2015. Notwithstanding this, the Inspector recommended to the DLC that the licence be granted for the days and hours sought on the basis that they are within the default maximum trading hours in the Act, and those hours fit the style and location of the premises. The Inspector also said that he did not consider that the amenity and good order of the locality would be likely to be increased by more than a minor extent if the licence was not renewed.

## *Objection*

[7] A resident – Mr Christie – objected to the renewal of the licence on a number of bases predominantly relating to the amenity and good order of the locality. In Mr Christie's opinion, the locality is already badly affected by existing alcohol licences, and the density of liquor stores in the locality is already too high. Mr Christie also cited problems he considered to be associated with the premises namely litter, noise, vandalism and customers drinking in public outside the store and in the vicinity of the local primary school, as well as on the school grounds.

[8] The first respondent opposed the application on four grounds. The first ground related to concerns about the manner in which the appellant has sold alcohol, and in particular, that the appellant proposed to sell single RTDs and beers and had failed a

CPO. The second ground related to the suitability of the applicant. The third ground related to the fact that the premises are located on the edge of the Courtenay Place entertainment precinct. In the first respondent's opinion, there is a high likelihood that the high risk demographic in the locality will purchase alcohol between 9.00 pm and 11.00 pm to pre-load and side-load in the CBD liquor ban area or in a public place. Finally, the first respondent advised the DLC that these issues left an outstanding concern in his mind that if the licence is renewed the sale, supply and consumption of alcohol from the appellant's premises is not likely to be undertaken safely and responsibly which could lead to an increase in alcohol-related harm (ARH).

[9] In light of this, the first respondent opposed the hours of trading sought by the applicant and recommended to the DLC that a 9.00 pm closing time be imposed as a condition of the licence.

[10] The second respondent opposed the application on the basis of amenity and good order of the locality and specifically referred to the failed CPO of 17 October 2015.

### **Grounds of Appeal**

[11] As noted, the two conditions that are the subject of this appeal are:

- (i) reduced trading hours from 8.00 am to 9.00 pm on Friday and Saturday nights (condition 1(b)); and
- (ii) a requirement that all carry bags be branded with the words "Liquor King" (condition 6).

[12] The grounds for the appeal are that:

- (i) the conditions will not achieve the object of the Act; and
- (ii) the DLC erred in finding that the conditions are reasonable and not inconsistent with the object of the Act; and
- (iii) the DLC failed to establish a causal nexus between the appellant's operations and ARH in the surrounding area that the conditions are intended to address; and
- (iv) the DLC misdirected itself and applied the wrong legal test when determining that it had reasonable grounds to impose the conditions; and
- (v) the DLC reached conclusions that were not available to it on the evidence before it; and
- (vi) the DLC failed to consider relevant aspects of the appellant's evidence.

[13] By way of relief under s 158 of the Act, the appellant seeks a modification of the decision of the DLC:

- (i) amending condition 1(b) to allow trading hours of 8.00 am to 11.00 pm on Friday and Saturday, as originally applied for; and

- (ii) deleting condition 6.

## **Law**

[14] Section 4 sets out the object of the Act as follows:

**(1) The object of this Act is that—**

**(a) the sale, supply, and consumption of alcohol should be undertaken safely and responsibly; and**

**(b) the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.**

**(2) For the purposes of subsection (1), the harm caused by the excessive or inappropriate consumption of alcohol includes—**

**(a) any crime, damage, death, disease, disorderly behaviour, illness, or injury, directly or indirectly caused, or directly or indirectly contributed to, by the excessive or inappropriate consumption of alcohol; and**

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

[15] Section 131(1) states:

**(1) In deciding whether to renew a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**

**(a) the matters set out in paragraphs (a) to (g), (j), and (k) of section 105(1):**

**(b) whether (in its opinion) the amenity and good order of the locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew the licence:**

**(c) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made by virtue of section 129:**

**(d) the manner in which the applicant has sold (or, as the case may be, sold and supplied), displayed, advertised, or promoted alcohol.**

[16] The relevant parts of s 105 provide:

**(1) In deciding whether to issue a licence, the licensing authority or the licensing committee concerned must have regard to the following matters:**

**(a) the object of this Act:**

**(b) the suitability of the applicant:**

**(c) any relevant local alcohol policy:**

**(d) the days on which and the hours during which the applicant proposes to sell alcohol:**

**(e) the design and layout of any proposed premises:**

**(f) whether the applicant is engaged in, or proposes on the premises to engage in, the sale of goods other than alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which goods:**

**(g) whether the applicant is engaged in, or proposes on the premises to engage in, the provision of services other than those directly related to the sale of alcohol, low-alcohol refreshments, non-alcoholic refreshments, and food, and if so, which services:**

...

**(j) whether the applicant has appropriate systems, staff, and training to comply with the law:**

**(k) any matters dealt with in any report from the Police, an inspector, or a Medical Officer of Health made under section 103.**

**(2) The authority or committee must not take into account any prejudicial effect that the issue of the licence may have on the business conducted pursuant to any other licence.**

[17] Section 106(2) adds:

**(2) In forming for the purposes of section 131(1)(b) an opinion on whether the amenity and good order of a locality would be likely to be increased, by more than a minor extent, by the effects of a refusal to renew a licence, the licensing authority or a licensing committee must have regard to the following matters (as they relate to the locality):**

**(a) current, and possible future, noise levels:**

**(b) current, and possible future, levels of nuisance and vandalism.**

[18] Finally, s 117 of the Act reads:

**(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.**

## **Submissions**

### *Appellant*

#### Trading Hours

[19] The appellant submits that the evidence of ARH is too general to draw any logical link, or 'causal nexus', between that ARH and the premises trading between 9.00 pm to 11.00 pm on Friday and Saturday nights. The appellant submits that the DLC sought to address ARH more generally when the causal nexus that is required to be established needs to relate the ARH to the specific condition imposed.

[20] The appellant submits further that while there is evidence of ARH within a 500 metre radius of the premises, this area encompasses approximately 130 bars and nightclubs and 12 other off-licences. The DLC wrongly dismissed the fact that if the

premises closed at 9.00 pm, customers would either purchase alcohol earlier or from another nearby store (which opens later) with the consequence that any potential or intended benefit of truncating the trading hours of these premises will be lost. The appellant submits this creates an “uneven playing field” relative to the closing time of other premises in the area. In dismissing this fact, the appellant submits that the DLC was not directing itself to the particular condition it was imposing but to more general concerns yet was coming to different decisions on hours in respect of different premises in the area.

[21] The appellant submits that the evidence does not link the trading hours condition to any ARH caused by sales from the appellant’s premises. Nor does it link the proposed condition to an expected benefit. As a consequence, restricting the trading hours on Friday and Saturday nights relative to those which applied prior to the renewal, is arbitrary and unjustified.

[22] The data, it is submitted, cannot distinguish between ARH caused by persons purchasing at specific times. That is, the evidence does not show that a 9.00 pm closing will reduce ARH, or that any particular harm relates to alcohol sold after 9.00 pm as opposed to any other time. Nor does the data link any particular calls for service or hospital admissions to the premises.

[23] Rather, the appellant submits that 9.00 pm is simply the time that the respondents have chosen to pursue across licence applications. The appellant submits that DLC appears to have made a policy decision about an appropriate closing time for off-licences in the Wellington region based on its concerns about wide-ranging ARH in the community. Such a policy, it is submitted, cannot be applied in individual licensing decisions in the absence of a local alcohol policy. The appellant submits that the imposition of an earlier closing time must be reasonable and proportionate when tested against the evidence in respect of the premises for which the renewal is sought. In this case, the appellant says there is nothing in the evidence linking the particular condition for the premises to the harm sought to be avoided.

[24] In respect of the evidence of the objector, it is also submitted that this evidence does not provide a link to the premises or to when the alcohol was sold. In fact, it is submitted by the appellant, a number of the products in the objector’s photographs are not sold by the premises.

[25] Finally, in respect of condition 1(b), the appellant submits that the DLC erred in forming the view that the reduced trading hours will prevent people who are under the influence of alcohol from purchasing more alcohol. The appellant submits that it is unreasonable for the DLC to base its findings on an assumption that the appellant will breach the Act and sell to prohibited persons. In summary, the appellant submits that evidence of general harm in the Wellington CBD is insufficient to justify a specific reduction of the premises’ trading hours.

### Branded Bags

[26] In respect of the requirement to brand bags, the appellant submits that the DLC considered there are “reasonable grounds” to impose the condition namely, to provide information to the appellant and reporting agencies on how alcohol was being consumed and to provide better information for future renewal applications.

[27] The appellant submits, however, that “reasonable grounds” is not the correct legal test. Instead, s 117 requires that discretionary conditions are “reasonable and not inconsistent” with the Act. Because the condition will not identify when alcohol was sold, to whom it was sold, when and where it was consumed, or how or by whom it was consumed, the condition will have no benefit. Finding a branded bag, it is submitted, provides no other information than that the alcohol was sold at the premises. In the appellant’s view, the DLC is attempting to use the condition to create an evidence gathering tool for future applications. As the condition will come at a cost to the appellant, however, the condition is not reasonable.

### ***Medical Officer of Health***

#### Trading Hours

[28] The first respondent submits that the evidence of the respondents was not adduced as proof of an historical nexus between the trading hours of the premises and the general incidence of ARH, or of specific incidences of ARH (aside from one incident). Instead, the evidence of the respondent is intended to show the vulnerability of the relevant community of users served by the premises.

[29] The first respondent submits that alcohol-related hospital admissions, and police call-outs, are causally connected to the consumption of alcohol. Accordingly, the data is direct evidence of excessive or inappropriate consumption of alcohol, and hence the level of risk relative to the premises which is the subject of the renewal application. As the grant of a licence requires consideration of the object of the Act, and safe and responsible drinking is a function of the vulnerability of persons who consume alcohol, the incidence of this vulnerability is directly relevant to the mischief about which the object of the Act is focused. While not a metric of ARH associated with the premises, this data is an indicator of harm which is relevant to the renewal of a licence.

[30] In essence, the first respondent submits that users in the locality of the premises are especially vulnerable to ARH either as consumers, residents or victims of alcohol-related violence. As alcohol supplied through off-licences is, in the first respondent’s view, a ‘significant contributor’ to ARH, the location and characteristics of the appellant’s premises make it a likely contributor to ARH, which increases as the night wears on and peaks on Friday and Saturday nights at around 1.00 am.

[31] Therefore, to mitigate the potential contribution that the premises will make to ARH, the DLC is entitled to set closing hours of 9.00 pm on those two nights. In doing so, it is submitted, the DLC took a considered approach to setting this time.

[32] The first respondent submits that what a DLC is required to focus on is not historical risk but the risk of prospective ARH. The first respondent submits that the most a decision-maker can do to address ARH of such breadth (including acute and non-acute ARH), is to first identify vulnerable communities and then seek to reduce the availability of alcohol where appropriate. The first respondent submits that the issue is whether a closing time of 9.00 pm on Friday and Saturday nights is appropriate in light of the statutory objectives of preventing excessive or inappropriate drinking and minimising ARH.

[33] In the first respondent’s view, setting a closing hour of 9.00 pm on Friday and Saturday nights is a rational response to established levels of ARH associated with the phenomena of pre-loading and side-loading in and around Courtenay Place in

Wellington. If ARH through late night availability of off-licence alcohol is a reasonably identified problem in the locality, then the DLC is entitled to seek to redress that harm through hours regardless of whether that reduction conforms to any particular analysis of historical data.

[34] Moreover, the first respondent submits that in the light of the risk of continued ARH, which is associated with alcohol availability through late night trading by off-licences, it would be unreasonable for a DLC not to respond to that continued ARH by reducing availability through trading hours, which is the principal means of addressing ARH under the Act.

### Branded Bags

[35] In respect of branded bags, the first respondent submits that it is conducive of the object of the Act that decision-makers understand the impact of the grant of licences upon ARH. The branding of bags will assist, for example, where a person is found to be consuming alcohol from a branded bag, or where alcohol hidden for the purpose of side-loading is found in a branded bag.

[36] It is submitted that provided that there is a sufficient connection between the condition and the risk it seeks to safeguard against, and the condition is rational (which assessment includes a requirement for the response to be proportionate), it is justifiable. It is submitted that it is not necessary that the bag be linked to particular incidents of harm, nor is it necessary for the decision-maker to look behind the efficacy of the condition.

### **Police**

[37] The second respondent, in turn, submits that the issue of a causal nexus can be something of a 'red herring' as the role of the decision-maker is to undertake an evaluative exercise. In summary, the second respondent submits that the evidence establishes that there is a problem in Courtenay Place on Friday and Saturday nights. And, as submitted by the first respondent, the premises will on balance have contributed to ARH. The premises are in an enviable position in Courtenay Place. When, and to whom it sells alcohol is a problem. The required nexus, it is submitted, is 'obvious' such that the DLC had available to it the option of 'cutting back' the appellant's trading hours.

[38] In terms of branded bags, the second respondent agrees with the first respondent that branded bags will assist in the future, including with the identification of 'problem outlets'.

### **Evidence**

[39] The evidence before the DLC is described in the DLC's decision of 6 October 2016.

[40] The first respondent adduced evidence of the age demographic in Wellington. In the area of the premises, the profile is of a greater number of younger people in their late teens and twenties than the national profile. The first respondent also referred to emergency department alcohol-related attendances noting that attendances are higher for people living in the locality of the premises than in Wellington generally.

[41] The first respondent also adduced evidence in the form of an Health Promotion Agency (HPA) "*Attitudes and Behaviour Alcohol Survey 2010-2012*" which said that the most common drinking location for adult drinkers was in their own home (52%) followed by a friend's home (18%), in contrast to younger drinkers (aged 18 to 24 years) who were more likely to have consumed alcohol outside the home (41% at a friend's house, 28 % in their own home, and 20% in a pub or bar).

[42] The first respondent also provided the DLC with heat maps which show peak emergency department attendances for both females and males. These heat maps show that attendances for younger people peak on early Sunday morning and early Saturday morning (in that decreasing order of magnitude). In Dr Palmer's view, the majority of alcohol related attendances relate to binge drinking.

[43] Mr Pupich for the first respondent also gave evidence that the Medical Officer of Health's concern related to trading after 9.00 pm as it was Mr Pupich's evidence that alcohol purchased after this time is more commonly purchased for immediate consumption and contributes to binge drinking.

[44] While one study – the Rataora study – identified that one incident of ARH involving a 19 year old female was linked to the purchase of alcohol from the appellant's premises, the hospital admission data presented by the first respondent does not identify where the alcohol behind the admissions was purchased, or the time of purchase.

[45] The evidence of the second respondent included data of Police calls for assistance to the Police communications centre between 17 February 2015 and 17 February 2016. This data included all calls involving incidents that the Police say commonly feature alcohol as a factor for one or more of the parties to the incident. A total of 1626 calls for Police assistance were made over the year for Police assistance for alcohol-related incidents within a 500 metre radius of the premises.

[46] Again, however, the second respondent's evidence does not identify from where the alcohol was purchased in relation to these incidents. Nevertheless, it is the second respondent's view that there is a heavy concentration of incidents in close proximity to the premises and most of the incidents occur at night. Of the calls for assistance between the hours of 9.00 pm and 11.00 pm during the time period of the evidence, 171 calls for assistance were within 500 metres of the premises which the second respondent said the Police believed to be largely attributed to off-licences as most of the busy on-licences do not commence the main part of their trading until later in the evening (i.e. usually after 12.00 midnight).

[47] Police evidence is that they issued 963 Alcohol Infringement Offence Notices (AIONs) between 1 January 2015 and 13 December 2015 for breaches of the alcohol ban area, of which 'many' were issued within 500 metres of the applicant's premises. It was also conservatively estimated that some 1500 warnings were issued for the same type of offending during the period.

[48] The evidence of the second respondent also spoke to the vulnerability of the neighbourhood due to the presence of such things as low income boarding houses, schools and child care centres. Further the evidence spoke to the busiest days for Police for alcohol-related crime being Friday, Saturday and Sunday with Saturday being the busiest day of the week (being also five times busier than Monday). The Police evidence also stated that the two busiest suburbs in Wellington are Te Aro and Wellington Central where the premises are located.

[49] The second respondent also gave evidence of problems associated with pre-loading and said that if the numbers of those arrested after drinking at private homes are combined with those numbers of those drinking in public places, twice the number of people who come to Police attention do so following the consumption of off-licence alcohol compared to alcohol purchased in on-licensed premises.

[50] For his part, Mr Christie, the objector to the renewal, gave evidence that included photographs of the alcohol related litter around the premises and locality. Mr Christie gave evidence of litter, noise and the personal impact of vandalism and disturbances at night from drunk people. Mr Christie gave evidence of boxes, beer and wine bottles, and cans (beer and RTDs) in the grounds of the local primary school and on the footpath between the premises and the school. Mr Christie also gave evidence that the bus stop across from the premises is a common place for people to drink. Mr Christie said that he has observed people exiting the premises and sitting at the bus stop drinking. (This last point was denied by the appellant.)

[51] Again, however, Mr Christie said that he could not say that the alcohol generally comes from the appellant's premises rather than other liquor outlets. But in Mr Christie's view, the evidence strongly implicates the premises as the trail of discarded cans and bottles, he says, is continuous from the premises to the nearby school.

### **Authority's Decision and Reasons**

[52] The issue before the Authority in this appeal regarding trading hours, is whether there is a requirement on the DLC to establish a 'causal nexus' between the premises and the trading hour condition sought to be imposed in respect of that premises. And, if there is, does the evidence establish that nexus?

[53] In respect of the condition that bags are to be branded, the issue is whether this condition is "reasonable and not inconsistent" with the Act as per the test in s 117 of the Act.

#### *Trading Hours*

[54] In *Otara-Papatoetoe Local Board v Joban Enterprises Ltd* [2012] NZHC 1406, [2012] NZAR 717, the High Court, in respect of an appeal under the 1989 Act against the granting of an off-licence, had cause to consider the issue of the required 'causal nexus' between the granting of a licence and ARH. In that case, the Authority granted an application where it considered that the evidence did not show a "causal nexus" existing between the granting of the application and liquor abuse problems.

[55] In the High Court, the appellant submitted that the Authority erred by requiring this "causal nexus" between the proposed liquor outlet and the potential for increased alcohol abuse to be proved by the Board. The appellant contended that this placed too high an evidential burden on the Board.

[56] In determining the appeal, Heath J said at [31]:

*"In light of the authorities, what approach should be taken when the Authority determines whether or not to grant an off-licence? In my view, the Authority is required to undertake an evaluative exercise which brings to bear both the factors set out in s 35(1) and any other relevant considerations relating to the statutory object. In undertaking that task, checklists should be eschewed and a*

framework for analysis developed. An appropriate framework would involve (in no particular order) consideration of:

(a) The criteria set out in s 35(1);

(b) The reports presented by the Police and the inspector. Such reports should be directed to both the s 35(1) criteria and the extent to which the grant of an application might offend against the object of the Act; and

(c) Public objections that are directed to the s 35(1) criteria.

*Having considered all of that information, the Authority must stand back and determine whether the application should be granted (whether on conditions or not) or refused. This step requires the Authority to form a view on whether there is any evidence to suggest that granting the application will contrary to s 4(1), increase the risk of alcohol abuse. While a causal nexus is required between such evidence and the relevant risk, it is unnecessary to qualify the nature of the link by reference to such words as “powerful” or “direct”. (emphasis added)*

[57] Subsequently, in *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689, Moore J said at [46 et seq]:

*“[46] The terms “nexus” or “causal nexus” appear in a number of decisions of the Authority under the 1989 Act. These were discussed by Heath J in *Otara-Papatoetoe Local Board v Johan Enterprises Limited*, a decision made under the 1989 Act.*

...

*[48] Section 131 makes it plain that the renewal of a licence is not automatic and is to be approached in much the same manner as the grant of an initial licence.*

*[49] Section 131 also requires a reflective analysis which recognises that the best evidence of suitability for the renewal of a licence will likely be the manner in which the applicant has operated its licence in the past and, more particularly, the way in which it has sold, supplied, displayed, advertised or promoted alcohol.*

*[50] There is no reason in principle why the “causal nexus” approach adopted under the 1989 Act and approved in decisions of this Court, should not continue to be relevant and applicable under the new Act. Indeed, it was not suggested in argument that a different legal test should be adopted. Under both Acts the relevant enquiry is the same; the Authority is required to have regard to the s 105 criteria (or in the case of a renewal the s 105 criteria as modified by s 131) and then step back and consider whether there is any evidence to suggest that granting the application will be contrary to the object of the Act contained in s 4(1), namely that the sale, supply and consumption of alcohol should be undertaken safely and responsibly and the harm caused by the excessive or inappropriate consumption of alcohol should be minimised.” (emphasis added)*

[58] It is evident from these decisions that the causal nexus which needs to be established is between the granting of the application for a licence (or in this case, a renewed licence), and the object of the Act contained in s 4(1). That is, a DLC needs

to consider whether there is anything to suggest that granting the application will be contrary to the safe and responsible sale, supply and consumption of alcohol or that granting the application will result in harm caused by the excessive or inappropriate consumption of alcohol such that that harm should be minimised.

[59] It is not contended by the respondents that granting the renewal of the appellant's licence per se will be contrary to the object of the Act. Nevertheless, the respondents contend that the premises, by the very fact that they are located in a vulnerable community, will likely contribute to harm caused by the excessive or inappropriate consumption of alcohol and that shortened trading hours will help minimise that risk of harm.

[60] The evidence shows that younger people are over-represented in emergency department alcohol-related attendances and police calls for service, and that attendances are higher for people living in the locality of the premises than in Wellington generally. Apart from the one incident, and the disputed evidence of Mr Christie that he observed people exiting the premises and sitting at the bus stop drinking, however, there is no evidence before the Authority that links the grant of the renewal to increased harm caused by the excessive or inappropriate consumption of alcohol of alcohol from these premises.

[61] The data before the DLC is undoubtedly evidence of excessive or inappropriate consumption of alcohol in the locality of the premises or in the Courtenay Place entertainment precinct more generally. The data does not, however, constitute evidence that excessive or inappropriate consumption of alcohol and increased ARH will result from the renewal of this particular licence. Or, put the other way, there is no 'causal' nexus between the grant of this renewal licence and general incidence of ARH in the locality established by the respondents and objector. In a licensing application such as this, it is not sufficient that there simply be a positive correlation between alcohol consumption and ARH, or that there is a positive correlation between the sale of alcohol from off-licences and ARH. Rather, in a licensing application like this, what is required is consideration of whether the proposed operation of the premises which is the subject of the application is likely to lead to harm caused by the excessive or inappropriate consumption of alcohol. In the case of a renewal, this includes consideration of how the premises have operated to date. As Moore J said in *Birthcare* (supra), s 131 requires a reflective analysis:

*"which recognises that the best evidence of suitability for the renewal of a licence will likely be the manner in which the applicant has operated its licence in the past and, more particularly, the way in which it has sold, supplied, displayed, advertised or promoted alcohol."*

[62] The Authority is under no illusion that all 130 bars and nightclubs and 13 off-licences in the locality, collectively contribute to ARH in the locality of the premises or the Courtenay Place entertainment precinct. But unlike where a local alcohol policy allows consideration of trading hours by reference to broad areas, a licensing application must be considered on its merits relative to evidence about a premises' operation or intended operation.

[63] In the context of a licensing application, an approach that first identifies vulnerable communities and then seeks to reduce the availability of alcohol cannot substitute the requirement to identify whether a reduction in availability in respect of the particular premises is appropriate in light of the statutory object. This necessarily requires a link between the premises to the risk of excessive or inappropriate

consumption at more than a generic level. If this were not the case, an evaluation of the matters set out in ss 105 and 131 would not provide the balance sought to be achieved in the Act between allowing the safe and responsible sale, supply and consumption of alcohol and the minimisation of harm caused by excessive and inappropriate consumption.

[64] The same reasoning applies when setting the mandatory condition under s 116(2)(a). In the context of a renewal application, a proposal to change trading hours on renewal relative to the premises' previous trading hours, in circumstances where there is little or no issue about the manner in which the applicant has operated its licence in the past, must be able to be explained by some evidence demonstrating abuse as a result of the granting of the renewal on those terms. This is not because there is a presumption that the hours of any licence will be the national maximum default hours set out in s 43 of the Act, but because any change in conditions should not be arbitrary.

[65] In this regard, the test is not whether setting a closing hour of 9.00 pm on Friday and Saturday nights is a rational response to established levels of ARH associated with the phenomena of pre-loading and side-loading in and around Courtenay Place in Wellington, but whether a change in the premises closing hour can be said to be a rational response to the probability of a greater degree of abuse associated with the premises resulting from the grant of the renewal.

[66] Unlike an initial license which operates for a probationary period of one year as a means of curtailing the risk of ARH associated with a premises (given the lack of evidence as to the premises' actual operation), in the case of a renewal, the operation of the premises relative to its locality is of direct relevance. Evidence of vulnerability of the community is not sufficient to alter a premises operating conditions in the absence of some link between the operation of those premises trading hours and that vulnerability. Increasing vulnerability in the locality must be a consequence of the effect of granting the renewal on the same terms. In the present application, there is no evidence that this will be a consequence of granting the renewal beyond the general proposition that alcohol from off licenses can be linked to ARH and that vulnerability in the community is the result of alcohol availability.

### *Branded Bags*

[67] Unlike trading hours, the condition relating to branded bags is imposed pursuant to s 117 of the Act.

[68] As noted by Gendall J in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749, [2016] NZLR 382 at [95], s 117 has 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. Gendall J said (footnotes removed):

*"[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 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. 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. 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. 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:*

*“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. 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. Ultimately the concept of reasonableness is a moving one and will impart different meanings in differing contexts; there is fundamentally a need to be able to justify the decision as being rational. The test is an objective one.*

[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:*

*“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:*

*“... 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*
- (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.”*

[69] The Authority is satisfied that the condition relating to the branding of bags is a proportionate regulatory response to the problem of linking ARH in a locality to particular premises. As the first respondent has identified, the branding of bags will provide a benefit in linking ARH to the premises in situations where a person is who found to be consuming alcohol from a branded bag, or where alcohol hidden for the purpose of side-loading is found in a branded bag. This will be of some value for the purposes of aiding decision-makers to understand the impact of the grant of licences upon ARH, where a DLC, or the Authority, is required to consider under s 106(1)(a)(ii), current, and possible future levels of nuisance and vandalism when forming an opinion on amenity and good order. This is likely to be especially relevant in the case of renewals. And this will also be assisted by the fact that that some other premises in the area use branded bags. In saying this, however, the Authority has some reservations about the efficacy of the condition over time as the information to be garnered from the branding of bags is only likely to be cogent in limited circumstances. Efficacy goes to reasonableness in so far as it speaks to proportionality and whether or not the condition serves only a marginal benefit.

[70] On balance, however, the Authority considers that there is a sufficient connection between the condition and the benefit it seeks to secure, namely information linking premises to ARH to assist statutory agencies administer the Act in a way that helps achieve its object. Ironically, this is the very issue that the DLC faced in this application as regards trading hours. The Authority is seized of the fact that often a DLC is often limited in its ability to address aspects of ARH due to the lack of evidence showing a link to the premises in question. The condition will go some way to addressing this in some cases. While the condition will not be a conclusive consideration in many cases, the condition is likely to contribute to the body of information before a decision-maker. In this respect, the condition is, on balance, rational. It is not absurd, ridiculous, patently unjustifiable, extreme or excessive.

[71] The Authority suggests, however, that the DLC should evaluate the impact of the condition over a period of time to ensure that its intended benefits are realised over time.

## **Conclusion**

[72] The appeal is allowed in part. Pursuant to s 158 of the Act, the decision of the DLC is modified by amending condition 1(b) to read:

*(b) Friday and Saturday, between 8.00am and 11.00pm.*

[73] Condition 6 of the renewed licence is amended to read:

*“All Carry bags in which alcohol is sold to retail customers, must be branded on at least one face of the bag with “Liquor King” branding. As a minimum, it must carry the words “Liquor King”. The branding is to be on no less than 25% of one face of the bag. This condition is to take effect on 1 August 2017.”*

**DATED** at WELLINGTON this 12th day of May 2017

District Court Judge K D Kelly  
Chairperson  
**Alcohol Regulatory and Licensing Authority**

Lion Liquor Retail (Liquor King Kent Terrace.doc(kdk))