

[2014] NZARLA PH 176, 177, 178,  
179 and 180

**IN THE MATTER**

of the Sale of Liquor Act 1989

**AND**

**IN THE MATTER**

of applications by **KILLER  
PRAWN LIMITED** pursuant to  
ss.18 and 41 of the Act for  
renewal of on and off-licences in  
respect of premises situated at 26-  
28 Bank Street, Whangarei,  
known as “Killer Prawn”

**AND**

**IN THE MATTER**

of an application by **WHANGAREI  
FOOD WAREHOUSE LIMITED**  
pursuant to s.41 of the Act for  
renewal of an off-licence in  
respect of premises situated at  
Walton Street, Whangarei, known  
as “PAKnsAVE”

**AND**

**IN THE MATTER**

of applications by **BAY TAVERN  
LIMITED** pursuant to ss.18 and 41  
of the Act for renewal of on and  
off-licences in respect of premises  
situated at 1034 Whangarei  
Heads Road, Parua Bay,  
Whangarei, known as “Parua Bay  
Tavern”

**BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY**

Chairman: District Court Judge J D Hole

Member: Ms J D Moorhead

**HEARING** at WHANGAREI on 21 January 2014

**APPEARANCES**

Mr A Dormer and Mr J C Dorsan – for District Licensing Inspector

Mr A J Higgins – for Killer Prawn Limited and for Bay Tavern Limited

Mr I J Thain and Ms C D Stacey – for Whangarei Food Warehouse Limited

## **RESERVED DECISION OF THE AUTHORITY**

### ***Introduction***

[1] The on and off-licences issued to Killer Prawn Limited in respect of its premises at 26-28 Bank Street, Whangarei were due to expire on 12 October 2013. The applications for their renewal are dated 8 October 2013. Pursuant to s.407 of the Sale and Supply of Alcohol Act 2012, each application must be considered under the Sale of Liquor Act 1989 except that the criteria set out in s.131 of the Sale and Supply of Alcohol Act 2012 apply. When considering conditions, the provisions of s.132 of the Sale and Supply of Alcohol Act 2012 apply. The relevant portion of s.132 reads:

**When renewing a licence of any kind, the licensing authority or the licensing committee concerned –**

- (a) may impose any condition subject to which it may issue a licence of that kind; and**
- (b) must impose any condition subject to which it must issue a licence of that kind; and**
- (c) may, whether consequentially or not, vary or cancel any conditions applying to the licence before its renewal (whether they are conditions subject to which the licence was issued or conditions imposed on some earlier renewal).**

[2] Section 132(1)(a) of the Sale and Supply of Alcohol Act 2012 seems to refer to s.117(1) which states that the Authority may issue a licence “*subject to any reasonable conditions not inconsistent with this Act.*” However, s.117 was not in force at the date of the application; so presumably s.132(1)(a) refers to the more restrictive ss.14 and 37 of the Sale of Liquor Act 1989.

[3] The off-licence issued to Whangarei Food Warehouse Limited (“PAK’nSAVE”) was due to expire on 20 May 2013. An application for its renewal was made on 11 April 2013. The applicant has elected to proceed in terms of s.407 of the Act which means that the object, purpose, and criteria in the Sale and Supply of Alcohol Act 2012 apply. Further, on this basis, if the Authority agrees a three year renewed licence can be issued.

[4] The on and off-licences issued to Bay Tavern Limited in respect of the premises known as “Parua Bay Tavern” were due to expire on 7 June 2012. The renewal applications were made on 17 May 2012. Accordingly, the renewal provisions (including criteria) of the Sale of Liquor Act 1989 apply.

[5] The applications dealt with in this decision comprise a few of many renewal applications filed with the Whangarei District Licensing Agency. This is referred to in more detail in paragraphs [14] and [15] of this decision. It is anticipated that most (if not all) of these applications will be resolved as a result of this decision. Thus, this is a test case.

### ***Reporting Agencies***

[6] In each case the renewal applications have been opposed by the Inspector. The sole reason for the Inspector's opposition is that the conditions applicable to each licence do not comply with the Whangarei District Council's Alcohol Policy 2010.

[7] None of the applications were opposed by the Police or the Medical Officer of Health or Fire authorities. There are no objections. In each case each application meets the relevant criteria except the conditions attaching to each licence no longer comply with the Council's policy.

### ***Council's Policy***

[8] In August 2010 the Whangarei District Council adopted an alcohol policy. This followed the special consultative procedure of the Local Government Act 2002. The process began in April 2009. In the course of those procedures the control of licensing hours and the use of a one-way door system were seen as mechanisms that could assist in the reduction of liquor abuse and supply control techniques.

[9] The Council concluded that:

- [a] A reduction in trading hours would reduce alcohol consumption and intoxication in licensed premises and in respect of alcohol purchased from off-licensed premises.
- [b] The use of a one-way door system would decrease disorder and crime by minimising the opportunity for patrons of on-licences to interact with other persons on the streets in the central business district of Whangarei. It would enable the orderly dispersal of patrons leaving the premises in the early hours of the morning.
- [c] The foregoing steps would contribute to a change in drinking patterns and would minimise alcohol related harm.
- [d] As a result there would be a reduction in alcohol related crime which would enhance the wellbeing and safety of the community.

### ***Policy's Status***

[10] Under the Sale of Liquor Act 1989, a policy such as that adopted by the Whangarei District Council does not have specific statutory recognition. Nevertheless, this Authority has recognised that territorial authorities' alcohol policies have proved a helpful source of information as to the requirements of communities in respect of liquor licensing matters. The Authority has never recognised that the policies are mandatory in their application. Nevertheless, where appropriate the Authority has adopted the terms of these types of policies or at least recognised the principles inherent in them: see, for example, *HL and WJ Walker v New Zealand Police* 31 May 2001, High Court AP 87/10.

[11] The high point in the recognition of such policies is the Court of Appeal decision in *My Noodle Limited v Queenstown-Lakes District Council* CA 340/2009; [2009] NZCA 564. The first issue raised in that appeal was whether a report provided under s.20 of the Sale of Liquor Act 1989 could rely on a local authority's liquor licensing policy as the sole reason for opposition to a renewal. This issue was answered in the affirmative. The second issue raised was whether, in making a decision under s.23 of the Sale of Liquor Act 1989, the Authority was entitled to alter the condition of a

licence by reference to a Council's policy notwithstanding the absence of any specific problems associated with the operation of the relevant premises. Again, this issue was answered in the affirmative. Finally, the Court of Appeal dealt with the issue as to whether the Authority might have abdicated or restricted its statutory decision-making role and discretion under s.23 of the old Act by applying the trading hours contained in the policy in respect of all the renewal applications before it. This issue was answered in the negative.

[12] Effectively, the result of the Court of Appeal decision in *My Noodle* and earlier cases is that where a territorial authority has an alcohol policy which has been formulated after appropriate local consultation, this Authority should be wary about granting applications that do not conform with that policy. Nevertheless, this Authority is entitled to consider how the policies were formulated and must be careful to avoid injustice in the way a policy may be implemented.

[13] This approach is different from that which will apply to local alcohol policies created under the Sale and Supply of Alcohol Act 2012. These local alcohol policies (LAPs) are a legislative recognition of such policies as the Whangarei District Council's alcohol policy of 2010. However, the process of creating an LAP contains more safeguards than the process applicable to the formulation of policies such as the Whangarei District Council's alcohol policy of 2010. This is because of the appeal provisions contained in s.81 of the Sale and Supply of Alcohol Act 2012. This means that before an LAP can be adopted there is the opportunity for this Authority to test the contents of a provisional LAP against the criterion of reasonableness in the light of the object of the Act: s.83(1)(a) of the Act.

### ***Practice of Whangarei District Licensing Agency***

[14] Where applications are opposed (as here), ss. 21(2) and 44(2) of the Sale of Liquor Act 1989 require a District Licensing Agency to forward the file to this Authority for determination of the application.

[15] After the adoption of the alcohol policy of 2010, a number of applications for renewals of licences were granted upon the basis that conditions were inserted that complied with the policy. However, in a number of cases (including the three cases before the Authority) the applicants refused to agree to conditions which would comply with the policy. Accordingly, the applications were opposed by the Inspector and should have been referred to this Authority in accordance with ss.21 and 44 of the Sale of Liquor Act 1989. This was not done, and the opposed applications were "*parked*" in the hope that when the applicant appreciated that other renewals were being granted in accordance with the policy, the objecting applicants would ultimately conform. The District Licensing Agency's practice in this regard:

- [a] Failed to comply with ss.21 and 44 of the Sale of Liquor Act 1989 and was therefore illegal;
- [b] Created a situation where the compliant licensees may have become disadvantaged because not all licensees agreed to the new conditions. The "*playing field*" was no longer level;
- [c] Permitted the applicants to continue to trade under their existing conditions without the opposition being tested. Thus they achieved benefits which did not accrue to the compliant licensees.

- [d] Means that if these applications are granted upon conditions conforming with the Council's policy, then these applicants may become disadvantaged because there will still be outstanding applications where applicants will continue to trade without being subject to the Council's policy. This will continue until all outstanding applications have been dealt with. Again, an unfair situation could result which needs to be considered by this Authority in the context of these applications. This arises as a result of the requirement that the Authority must act reasonably: see s.4 of the Sale of Liquor Act 1989, s.3 of the Sale and Supply of Alcohol Act 2012, *Meads Brothers Limited v Rotorua district Licensing Agency* [2002] NZAR 308 and other authorities.

### **Council's Policy**

[16] Like most documents of its type, the Whangarei District Council's alcohol policy 2010 is lengthy, wordy, complicated and possibly confusing and ambiguous.

[17] Clause 12 of the policy relates to licensing hours. It reads in part:

#### ***"Existing Licensed Premises (policy to apply as from 31 December 2012)***

*This policy seeks to bring about a uniform reduction in operating hours for existing licensed premises across the district at the conclusion of a sunset period on the 31<sup>st</sup> December 2012. The sunset period will allow existing businesses to plan for and adapt to new trading hours. In that interim period up until the 31<sup>st</sup> December 2012, the specific policy statements of clauses 12.1 (on-licences), 13.1 (off-licences), 14.1 (club licences) and 15.6 (special licences) of the policy adopted on the 6<sup>th</sup> of March 2002 shall continue to apply in relation to operating hours. The Agency wishes to work with the hospitality industry to bring about a transition to the new policy hours and encourages applicants for new on, off, and club licences relating to existing licensed premises during the interim sunset period to voluntarily work with the new hours with the exception that later hours for the Whangarei CBD area will not be subject to a one way door system".*

[18] The Council says that what it was trying to achieve in this clause was that it could start to implement the new trading hours contained in the policy when licences became due for renewal before the implementation date in the policy; upon the basis that by the implementation date (31 December 2012) all licences would contain the operating hours that conformed with the policy. Depending upon the outcome of opposed applications before this Authority, it is possible that if ss.21 and 44 had been complied with, the Council's object might have been achieved. However, by "parking" the opposed applications, it was impossible for that object to be achieved.

[19] The Council's contention that in these cases it could impose conditions that conformed with the policy on renewed licences is not correct. First, the clause states that the policy was to apply as from 31 December 2012. Second, it says that during the interim period to 31 December 2012, the specific policy statements of a policy adopted on 6 March 2006 continue to apply in relation to operating hours. The Authority was not apprised of the contents of the 2006 policy statement but can assume that the existing licences conformed with that policy and that clause 12 in the 2012 policy document was intended to alter that policy. Third, the last sentence refers to licensees voluntarily applying the new hours during the sunset period: and the overall tenor of the clause seems to indicate voluntary compliance during the

sunset period rather than the compulsory alteration of conditions upon renewal of a licence.

[20] The reasoning out in paragraph [19] only affects the “Parua Bay Tavern” applications. They are the only ones referred to in this decision where the renewal applications pre-date the coming in to force of the alcohol policy.

### ***Killer Prawn Applications***

[21] The on-licence issued to Killer Prawn Limited permits trading from 7.00 am to 3.00 am daily except for the sacrosanct days. The policy would require Killer Prawn Limited to have trading hours from 8.00 am to 3.00 am with a one-way door operating from 1.00 am. The exception pertaining to the sacrosanct days remains. The applicant did not object to opening at 8.00 am rather than 7.00 am: however it was opposed to the implementation of a one-way door from 1.00 am.

[22] The off-licence issued to Killer Prawn Limited provided that from Monday to Friday its trading hours could be from 7.00 am to 3.00 am; on Saturdays from 7.00 am to 12.00 midnight; and on Sundays from 9.00 am to 10.00 pm: except for the sacrosanct days. The policy would require the off-licence to be altered so that trading could occur from Mondays to Sundays from 9.00 am to 10.00 pm with the same exceptions. The applicant was not opposed to this proposal.

[23] Essentially then, the opposition raised by Killer Prawn Limited related to the proposed one-way door condition in the on-licence. In support of the proposed condition, the Inspector argued that both international and national research indicates that alcohol induced crime levels are reduced if patrons from on-licensed premises are able to leave the premises in an orderly fashion. It is argued that the implementation of a one-way door can achieve this. Further, it was argued, especially by the Police, that the implementation of a one-way door from 1.00 am would prevent persons leaving other on-licensed premises which closed at 1.00 am from migrating (often in an inebriated fashion) from outlying districts to such premises as “Killer Prawn”.

[24] “Killer Prawn’s opposition to the proposed condition was expressed graphically by Mr Sinclair who has operated that company for approximately 17 years. The on-licensed premises are not problem premises. The implementation of a one-way door would require additional staff and would be unpopular with patrons. It would be detrimental of tourism. It is unnecessary. However, Mr Sinclair appreciated that if all or most of the on-licensed premises in the central business district were required to have a one-way door and his premises were exempt, then he would have no choice but to implement a one-way door system to prevent migration from other premises. Like the Council witnesses, he recognised that it was essential that his business operate in an environment which treated all on-licensed premises in the central business district in the same way. Philip Sentch is the president of the Northland branch of Hospitality New Zealand and operates on-licensed premises in the central business district. He conceded that on occasions when his premises become too crowded he voluntarily adopts a one-way door system. Nevertheless, in principle, he was opposed to having such a policy forced upon on-licensees.

[25] The Authority appreciates that there are varying opinions internationally as to the efficacy of a one-way door policy. Nevertheless, there is evidence that one-way doors can reduce alcohol fuelled incidents. The idea was commended by the Law Commission report NZLCR 114 *Alcohol In Our Lives: Curbing the Harm* 9.54-9.62.

More importantly, Parliament has recognised that it is a tool that is available to the authorities by permitting one-way door restrictions to be imposed as a condition to an on-licence: see s.111 Sale and Supply of Alcohol Act 2012. This section does not apply to this application: see s.407 Sale and Supply of Alcohol Act 2012. Nevertheless it expresses a principle which is presently gaining traction. It cannot be ignored.

[26] When considering this issue, the Authority has regard to clause 12.1.3 of the policy which in terms of *My Noodle* is an expression of the Council's concerns and its way of ameliorating them. While not binding on the Authority, it has considerable persuasive force. It is supported by argument which the Council accepts. Providing such a condition is reasonably implemented, the various opposition arguments are insufficient to constitute undue oppression or burden notwithstanding their adverse economic impact: see *Meads* (supra) at paragraph [56]. Further, in terms of the second issue raised in *My Noodle* (paragraph [11] of this decision), the condition can be imposed. Finally, it is authorised by ss.23(1)(b) and s.14(5)(e) of the Act: see also *Opal In the City* [2013] NZARLA 603-605.

[27] Killer Prawn Limited was nervous that a one-way door condition might be applied to its premises when other on-licensed premises in the Whangarei central business district might not be subject to such a condition. This concern was recognised by the Authority and this decision will endeavour to address it.

[28] At the hearing it was suggested that the length of the proposed one-way door condition (two hours) could be lessened if licensees were prepared to provide transport for patrons leaving the premises. This would have the effect of removing patrons from the vicinity of premises at the end of their night's entertainment. Mr Sinclair for Killer Prawn Limited showed some interest in the proposition, as did Inspector Phillips for the Police. Upon further consideration they doubted that on-licensees affected by such a condition would be able to provide this sort of transport. Since the hearing, the Authority has been advised that negotiations between the Council and taxi companies aimed at improving transport arrangements at this vulnerable time are occurring.

[29] The Authority is satisfied that overall the evidence supports a one-way condition. Thus it is prepared to grant the application for the renewal of the on-licence upon the basis that the new trading hours will be 8.00 am to 3.00 am daily with a one-way door from 1.00 am provided that the one-way door condition will not take effect until six weeks after the District Licensing Committee has advised in writing that that all outstanding renewal applications in respect of CBD on-licensed premises presently filed have been resolved with similar one way door conditions. The exception as to the sacrosanct days remains.

[30] The renewal application affecting the off-licence is granted for three years from 12 October 2013 upon condition that the trading hours are amended to 9.00 am to 10.00 pm daily except for the sacrosanct days.

### **PAK'nSAVE**

[31] The existing off-licence issued in respect of "PAK'nSAVE" has trading hours from 7.00 am to 12.00 midnight, except that on Sundays they are 7.00 am to 10.00 pm. The policy provides for hours for all off-licences from 9.00 am to 10.00 pm daily.

“PAK’nSAVE” does not object to closing at 10.00 pm as it usually closes its premises at 9.00 pm except that on Saturdays and Sundays it closes them at 8.00pm. However, it is opposed to the change to the opening time from 8.00 am to 9.00 am. In support of its opposition to the District Licensing Agency’s proposal it was argued:

- [a] If the premises are unable to start selling and supplying alcohol at 8.00 am revenue will be lost;
- [b] Customers will be inconvenienced;
- [c] A mismatch will occur between the usual trading hours applicable to the rest of the supermarket and its alcohol department which would be stressful for both customers and staff;
- [d] It is unrealistic to expect the usual trading hours for “PAK’nSAVE” to provide for opening at 9.00 am; and staff do not have the training or experience to deal with the mismatch in hours.

[32] The commercial aspects of this argument contravene the dicta in *Meads* (supra). Nevertheless, the Authority recognises that the condition should not be unreasonable.

[33] In this latter regard, the evidence supporting the proposed condition indicates that initially it was proposed that the policy should provide that off-licensed premises could open at 8.00 am. This was changed late in the process when a submission was received from Whanau Ora under the auspices of the Whangarei District Health Board. Concern was expressed that children on their way to school would see adults leaving off-licensed premises with alcohol. This would cause the children to think that alcohol was just the same as any other sort of product and treat it accordingly.

[34] The applicant’s undisputed evidence is that school children do not frequent (without parents or guardians) or pass by the premises between 8.00 am and 9.00 am. Thus the reason for the policy does not apply to these premises.

[35] The evidence indicated that, when considering the proposal for a later opening time, no consideration was given to the differences between supermarkets and other off-licensed premises. Alcohol purchased in supermarkets consists of only beer and wine and is usually purchased in conjunction with other products. This is not the case where alcohol is purchased from off-licensed bottle stores.

[36] The Police were concerned at the amount of alcohol fuelled domestic disorder occurring in Whangarei and how access to alcohol in the early morning can add to such disorder. There was no specific evidence that the position would be accentuated if the supermarkets were allowed to continue to supply alcohol from 8.00 am onwards instead of being required to remain closed for that purpose between 8.00 am and 9.00 am. The applicant’s evidence was that only [ ] percent of total sales revenue between 8.00 am and 9.00 am comes from alcohol sales. A further concern of the Police was that there be an alcohol free period for as long as practicable after closing in the Central Business District at 3.00 am. As on-licensed premises can open at 8.00 am under the Policy, the alcohol free period expires then. There is no need for supermarkets to remain closed until 9.00 am.



[37] The Authority concludes that when preparing its policy the Council failed to recognise the differences between supermarkets and other off-licensed premises. It failed to note the absence of children from “PAK’nSAVE” and possibly other supermarkets between 8.00 am and 9.00 am. The Police support for the Council position was unconvincing. Accordingly, there are no compelling reasons justifying a condition that the premises open at 9.00 am rather than 8.00 am. Whilst such a condition would not be particularly burdensome or oppressive, in the circumstances of this case such a change in opening times would be unreasonable and cannot be justified.

[38] The application for the renewal of the off-licence issued to “PAK’nSAVE” is granted for three years from 20 May 2013 upon the basis that the condition applicable to its licence will be altered so that it will be able to sell alcohol from 8.00 am to 10.00 pm daily.

### ***Parua Bay Tavern***

[39] These premises are adjacent a residential area. Accordingly clause 12.1.1 of the policy was deemed to apply. The existing hours contained in both licences are 9.00 am to 1.00 am daily. The Inspector submitted that the hours contained in the policy should prevail, namely in respect of the on-licence: Sunday to Thursday 8.00 am to 11.00 pm, Friday to Saturday 8.00 am to 1.00 am. In respect of the off-licence, the hours should accord with clause 12.2 of the policy: namely 9.00 am to 10.00 pm. Apparently the applicant is not opposed to the proposed hours for the off-licence. However, the applicant is opposed the Inspector’s suggested hours for the on-licence: hence the Inspector’s opposition to both applications.

[40] The policy does provide that an extension in hours for on-licensed premises in appropriate circumstances can be applied for. This would permit trading in respect of premises such as the applicant’s from Sunday to Thursday up to 1.00 am if *“the agency is satisfied that the licensee will be able to adequately manage and control any potential adverse effects on residential areas”*. In terms of the policy the Agency must have regard to a noise management plan, a comprehensive host responsibility plan, manager training, and event management plan.

[41] The argument for the applicant was that it frequently needs to trade later than 11.00 pm Sunday to Thursday. It is a gastro pub. It attracts diners who frequently remain after 11.00 pm Sunday to Thursday. Further, it attracts community organisations who use the premises and who often would wish members to remain after 11.00 pm Sunday to Thursday. There was no suggestion that the premises are badly managed or that any adverse effects would occur if the existing hours were to prevail. In these circumstances the proposal by the Council is regarded as being unreasonable and unnecessary.

[42] In principle, the Authority agrees. However, the argument put forward by the applicant can be satisfied by the applicant applying to the agency for an extension in hours as referred to in paragraph [40] of this decision. At the hearing, Mrs Owles who appeared as a witness for the applicant agreed that the premises almost certainly would qualify for such an extension.

[43] The Authority doubts that clause 12 of the policy applied when the renewal applications were made: see paragraph [19]. If the Authority is wrong, apparently the applicant would qualify for an extension as referred to in paragraph [40]. Rather than require the applicant to have to make such an application, it is reasonable to effectively grant that application now and renew the on and off-licences now upon their existing conditions. They are renewed accordingly for three years from 7 June 2012.

**DATED** at WELLINGTON this 3<sup>rd</sup> day of April 2014

A E Cannell  
Deputy Secretary

Killer Prawn-reserved.doc(aw)