[2014] NZARLA PH 846

IN THE MATTER	of the Sale and Supply of Alcohol Act 2012
AND	
IN THE MATTER	of an appeal pursuant to s.81 of the Act in respect of the provisional local alcohol policy of the Tasman District Council
BETWEEN	**HOSPITALITY NEW ZEALAND INCORPORATED**
	Appellant
AND	**TASMAN DISTRICT COUNCIL**
	Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairman: District Court Judge J D Hole
Members: Ms J D Moorhead
Mr D E Major

HEARING at NELSON from 28 July to 30 July 2014

APPEARANCES

Mr J D Young − for the appellant
Mr J C I Ironside and Miss A A Woodhouse − for the respondent

INTERESTED PERSONS PURSUANT TO S.205 (2) OF THE ACT

Dr M S R Palmer QC and Mr A W Braggins - for Progressive Enterprises Limited
Mr M B Couling − for Foodstuffs South Island Limited
Mr T G H Smith − for NZ Police
Mr P J Egden − for Medical Officer of Health
Mr P McNamara − for Super Liquor Holdings Limited

RESERVED DECISION OF THE AUTHORITY

Introduction

[1] This is the first decision by the Authority arising out of appeals pursuant to s.81 of the Act against elements of provisional local alcohol policies (PLAPs).

[2] The appealed element of the PLAP of the Tasman District Council (the respondent) is that portion of Clause 2.2.1 of the policy reading:

"**Hours for on-licences**

The following maximum trading hours apply to all on-licensed premises in the Tasman District territorial area (other than hotel in-bedroom mini-bar sales):

Monday to Sunday 8.00 am until 2.00 am the following day."

[3] Section 205 of the Act permits the appellant and witnesses for the territorial authority not only to appear and be heard but also to call, examine and cross examine witnesses in an appeal under s.81. Pursuant to subsection (2) of that section, with the leave of the Chairperson of the Authority, the following persons may appear and be heard, whether personally or by counsel, and call evidence:

> **(a) any Inspector;**
>
> **(b) any Constable;**
>
> **(c) any Medical Officer of Health;**
>
> **(d) any other party who made a submission as part of the special consultative draft local alcohol policy.**

[4] Those persons appearing by counsel and recorded above were granted leave in terms of s.205 of the Act to appear and be heard and call evidence (if appropriate). Only the Police and Medical Officer of Health elected to call evidence pursuant to s.205(2) of the Act.

[5] All parties accepted that the appeal should be heard *de novo*. With a minor reservation by one party which is not material to this appeal, it was accepted that the appellant bears the burden of proof and the standard of proof is on the balance of probabilities.

Scheme of Act in respect of provisional local alcohol policies

[6] Sections 75 to 97 of the Act provide for the preparation of a local alcohol policy (LAP). LAPs are new creatures not previously provided for in former Acts pertaining to the sale of alcohol. Notwithstanding this, however, some territorial authorities did produce alcohol policies and their relevance to decision making was confirmed by the Court of Appeal in *My Noodle Limited v Queenstown Lakes District Council*, [2010] NZARLA 152 (CA).

[7] There is no obligation for a territorial authority to have a LAP. However where a territorial authority wishes to have such a policy, it must be produced, adopted and brought into force in accordance with the Act – s.75(3).

[8] Section 77 of the Act provides a list of those policies that may be included in a LAP. No other matters may be included. The section reads:

> **77 Contents of policies**
>
> **(1) A local alcohol policy may include policies on any or all of the following matters relating to licensing (and no others):**
>
> **(a) location of licensed premises by reference to broad areas:**
>
> **(b) location of licensed premises by reference to proximity to premises of a particular kind or kinds:**

> **(c) location of licensed premises by reference to proximity to facilities of a particular kind or kinds:**
>
> **(d) whether further licences (or licences of a particular kind or kinds) should be issued for premises in the district concerned, or any stated part of the district:**
>
> **(e) maximum trading hours**:
>
> **(f) the issue of licences, or licences of a particular kind or kinds, subject to discretionary conditions:**
>
> **(g) one-way door restrictions. …**

[9] To reinforce the exclusitivity of the list, s.77(3) states:

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

[10] Section 78 requires that those local territorial authorities that wish to produce a LAP must first produce a draft LAP. Section 78(2) of the Act provides:

> **(2) When producing a draft policy, a territorial authority must have regard to—**
>
> **(a) the objectives and policies of its district plan; and**
>
> **(b) the number of licences of each kind held for premises in its district, and the location and opening hours of each of the premises; and**
>
> **(c) any areas in which bylaws prohibiting alcohol in public places are in force; and**
>
> **(d) the demography of the district's residents; and**
>
> **(e) the demography of people who visit the district as tourists or holidaymakers; and**
>
> **(f) the overall health indicators of the district's residents; and**
>
> **(g) the nature and severity of the alcohol-related problems arising in the district.**

When preparing a draft LAP, the territorial authority must consult with the Police, Inspectors and the Medical Officer of Health (s.78(4)).

[11] If the territorial authority wishes to continue with the LAP process, then s.79 of the Act requires that it produce a PLAP (provisional local alcohol policy). It must use the special consultative procedure to consult on the draft LAP. In this regard the territorial authority must have regard to the matters stated in s.78(2) of the Act.

[12] "The special consultative procedure" means the special consultative procedure set out in s.5(1) of the Local Government Act 2002. That section refers to the procedure set out in ss.82-89 of the Local Government Act 2002. It includes the giving of public notice of the draft LAP and the provision of the opportunity for persons to make and present submissions.

[13] Having considered all the views expressed during the special consultative procedure and the matters set out in s.78 of the Act, the territorial authority then

produces a PLAP. Public notice is given of the PLAP and the rights of appeal against it, together with the ground on which an appeal may be made.

[14] Section 81 of the Act states that only the Police, Medical Officer of Health, and any person or agency who made a submission on the draft LAP may appeal against any element of the resulting PLAP. There is no general right of appeal. Appeals are heard by this Authority. The only ground on which an element of the provisional policy can be appealed against is that *"it is unreasonable in the light of the object of this Act"* – s.81(4) of the Act.

[15] Appeals are dealt with in public.

[16] Section 83 provides *inter alia*:

> **(1) The licensing authority must dismiss an appeal against an element of a provisional local alcohol policy if it—**
>
> > **(a) is not satisfied that the element is unreasonable in the light of the object of this Act; or**
> >
> > **(b) is satisfied that the appellant did not make submissions as part of the special consultative procedure on the draft local alcohol policy concerned.**
>
> **(2) The licensing authority must ask the territorial authority concerned to reconsider an element of a draft local alcohol policy appealed against if it is satisfied that—**
>
> > **(a) the appellant made submissions as part of the special consultative procedure on the draft local alcohol policy concerned; and**
> >
> > **(b) the element is unreasonable in the light of the object of this Act.**

[17] Section 83(4) of the Act specifies that an appellant has no right of appeal to the High Court against a decision of the Authority. However, s.83(5) of the Act preserves the option of judicial review under the Judicature Amendment Act 1972. Section 84(1)(c) permits the territorial authority to appeal to the High Court against a decision of the Authority.

[18] Section 84 applies where the Authority has asked a territorial authority to reconsider an element of a PLAP. In this situation, the territorial authority must either:

(i) resubmit the policy to the Authority with the offending element deleted; or

(ii) resubmit the policy to the Authority with a new or amended element; or

(iii) appeal to the High Court against the decision of the Authority; or

(iv) it can abandon the PLAP.

[19] In summary, there is no obligation for a territorial authority to prepare a LAP. However, if it chooses to do so, it must comply with the procedure set out in ss.75-97 of the Sale and Supply of Alcohol Act 2012. The Act provides for a single restricted right of appeal for the appellant, Police, Medical Officer of Health and submitters. This recognises that LAPs are prepared by democratically elected councillors following a public consultation process. The policies can include a high policy element. In these circumstances a general right of appeal to a Court would deflect from the democratic process involved.

[20] On an appeal, the Authority is required to compare the challenged PLAP element against the object of the Act and determine whether the challenged element is an unreasonable response in the circumstances.

Unreasonable in the light of the object of this Act

[21] The legislative history of the Act shows an intention to provide limited appeal rights. No guidance can be found from this history to explain what *"unreasonable in the light of the object of this Act"* means.

[22] Section 5(1) of the Interpretation Act 1999 states:

> **(i) The meaning of an enactment must be ascertained from its text and in the light of its purpose.**

[23] The purpose of the Sale and Supply of Alcohol Act 2012 is set out in s.3. It reads:

> **3 Purpose**
>
> **(1) The purpose of Parts 1 to 3 and the schedules of this Act is, for the benefit of the community as a whole,—**
>
> **(a) to put in place a new system of control over the sale and supply of alcohol, with the characteristics stated in subsection (2); and**
>
> **(b) to reform more generally the law relating to the sale, supply, and consumption of alcohol so that its effect and administration help to achieve the object of this Act.**
>
> **(2) The characteristics of the new system are that—**
>
> **(a) it is reasonable; and**
>
> **(b) its administration helps to achieve the object of this Act.**

[24] One characteristic of the new system of control provided by the Act is that it be reasonable. The second characteristic is that the Act's administration must help to achieve the object of the Act. The ground of appeal set out in s.81(4) of the Act seems to mirror the statutory purpose.

[25] The object of the Act is set out in s.4 which states:

> **4 Object**
>
> **(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. …"**

[26] Section 4 then prescribes what is meant by "the harm caused by the excessive or inappropriate consumption of alcohol". For the purposes of this decision there is no necessity to set out subsection (2) at length.

[27] This object is more challenging than that in the former Sale oLiquor Act 1989. In particular there is the requirement that alcohol-related harm be minimised; viz.

"Reduced to the smallest amount, extent or degree." (See, e.g. *Penoy Spirits Ltd* [2014] NZARLA PH 697 which approved this definition found in the New Shorter Oxford English Dictionary).

[28] Whilst the submissions advanced on behalf of all persons revealed some divergence of opinion as to the meaning of the expression all submissions accepted that "unreasonable" has its ordinary, everyday meaning. The standard is what an informed objective bystander (the Authority) would consider unreasonable having regard to the object of the Act. Further, it is undesirable to attempt to "define" the expression in any greater detail. Doing so would risk undermining the flexibility inherent in the concept of unreasonableness.

[29] Whilst the demarcation lines between the various submissions are, inevitably, somewhat blurred, it is possible to discern three distinct positions advanced.

[30] The respondent, Medical Officer of Health and the Police argued that the concept of reasonableness must be limited to establishing a nexus between the object of the Act and the decision reached. Provided the decision establishes that the object was considered (either expressly or implicitly) the decision must be reasonable in the light of the object of the Act. Indeed, it was suggested that there is a presumption that a PLAP is reasonable until proved otherwise.

[31] At the other end of the spectrum is the argument presented on behalf of Progressive Enterprises Limited and Foodstuffs South Island Limited. They argued that the concept of "reasonableness" is much broader than that suggested in the previous paragraph. In particular, procedural irregularities in the creation of a PLAP can amount to unreasonableness in the light of the object of the Act. For example, the absence of any local evidential foundation for a decision would breach s.78(2) of the Act and this could result in unreasonableness. It was argued that notwithstanding the preservation of the judicial review remedy (s.83(5)), the Authority is entitled to look at procedural matters and if it is satisfied that procedural irregularities occurred then it follows that a PLAP must be unreasonable. Whilst it was not argued, s.167 of the Act (no judicial review until appeal rights exercised and determined) may assist this proposition.

[32] Midway between the two extremes, is the argument advanced by the appellant and on behalf of Super Liquor Holdings Limited. They argued that the concept of unreasonableness can be deduced from a consideration of what was considered unreasonable under the Sale of Liquor Act 1989, how the concept is treated in the by-law context and the common law. In particular, they argued for the adoption of the proportionality argument to the effect that the provision of a PLAP could be unreasonable if it amounts to an excessive or unrealistic response to the alleged risk of alcohol-related harm and if it impacts unreasonably on public or private rights.

[33] For the purposes of this decision, the Authority refers only to those matters raised in the submissions which have relevance to this appeal. For example, some of the submissions made on behalf of Progressive Enterprises Limited and Foodstuffs South Island Limited are irrelevant because no procedural irregularity in the creation of the PLAP has been suggested. Likewise there is no attempt to define the status of "default national hours".

Appellant's argument

[34] In its submissions, the appellant concludes:

> *"That in order to be satisfied that an element of a [provisional local alcohol policy] is unreasonable or not, the Authority must adopt a proportionality approach to assessing unreasonableness.*
>
> *The approaches advanced by counsel for the Police, Council and the Medical Officer of Health imply that there should be no countervailing factors to minimising harm when considering the object of the Act. However, the system under the Act must be reasonable. Further, the debates that gave rise to the new Act acknowledge the need for weighing benefits and costs, and avoiding penalising responsible drinkers."*

[35] The problem with the argument of the appellant is that it mostly ignores the second part of the test. The appeal ground invokes both the concept of "unreasonableness" and the concept of the object of the Act. The appellant has concentrated on the concept of unreasonableness but has not linked that with the object of the Act. Further, the concept of "unreasonableness" is wider than that adopted in the by-law situation. This is because when a by-law is enacted it is presumed to be reasonable. This is not the case with a PLAP: the reasonableness testing (by appeal) is part of the procedure of preparing the LAP. There is an anticipation that the PLAP will have to survive the test as to whether or not it is unreasonable in the light of the object of the Act. In short, the process of creating a by-law and that of creating a LAP are different, and different treatment is required to determine their reasonableness or otherwise.

[36] The appellant's approach has the effect of requiring the territorial authority to justify its PLAP. This is evident from the final submissions made on behalf of the appellant and Foodstuffs South Island Limited. This is not the correct approach. As all counsel agreed, the onus is on the appellant to satisfy the Authority that the appealed element is unreasonable in the light of the object of the Act. The very wording of the ground of appeal places that onus on the appellant. Should an appellant fail to discharge its onus on the balance of probabilities then there would be no need for a territorial authority respondent to do anything.

Respondent's argument

[37] The respondent submitted that to succeed:

> *"The appellant must show that Clause 2.2.1 is not consistent with the object of the Act to the extent that it amounts to an unreasonable exercise of the Council's powers and cannot be allowed to stand.*
>
> *This is a high threshold – a minor or arguable inconsistency in the context of the policy as a whole would not suffice."*

Further, the respondent submitted that a LAP:

> *"Is an administrative tool that may be produced to help achieve the object of the Act and is presumed to be reasonable. This statutory presumption, contained in s.3(2) of the Act, has implications for the nature of the Authority's enquiry into this appeal."*

[38] At Clause 12 of the synopsis to the respondent's submissions, it is submitted that:

> *"The appellant must satisfy the Authority that the element appealed against cannot be said to be directed at or capable of contributing to, these policy objectives. … If the Authority reaches that point, then it is likely that the appellant will have satisfied the Authority that the element appealed against would not be consistent with the object of the Act, and would be an unreasonable exercise of a local authority's powers."*

[39] The Medical Officer of Health thought that to engage in a proportionality analysis would involve the Authority considering matters unrelated to the object of the Act.

[40] The Authority considers that the argument made on behalf of the respondent and its supporters is inherently flawed. The suggestion that there is a presumption in s.3(2) of the Act that the PLAP is reasonable cannot be correct. First, a PLAP is but part of an ongoing process. The appeal process itself provides an opportunity to test the reasonableness or unreasonableness of a PLAP. Thus the legislation itself recognises that a PLAP can be unreasonable. Second, the "new system" referred to in s.3(2) of the Act does not refer to a PLAP because it does not become part of "the new system of control" until adoption. It is the "system of control" that has the characteristic of being reasonable; not a concept (a PLAP) that has not become part of that "system of control".

[41] If the submission of the respondent (supported by the Medical Officer of Health and the Police) is taken to its logical conclusion, then provided a PLAP has been prepared taking into account the object of the Act it is deemed to be reasonable. In this situation, there is no need to consider the reasonableness or unreasonableness of the policy because of the suggested presumption. In short, if the submission were correct then the statutory ground would read "is not satisfied that the element is in accordance with the object of the Act" (or something similar). The concept of "unreasonableness" is part of the test and cannot be ignored. Indeed there would be no need for an appeal process.

Authority's approach

[42] Determining if a PLAP is unreasonable in the light of the Act's object is not an intuitive exercise. It may be assumed that the legislature when including the concept of unreasonableness expected a principled approach to the interpretation of the ground in s.81(4) of the Act. The concept has been judicially considered in various situations and the case law can be used to reach an interpretation that fits the purpose and object of the Act; and which is practical and easily understood. The Authority does not reject either the respondent's approach or that of the appellant absolutely. Aspects of both submissions have validity. However, when considering the issues raised by this appeal, the Authority prefers (in general) the argument put forward on behalf of Super Liquor Holdings Limited.

[43] Where the Authority differs slightly (in emphasis rather than principle) from the argument put forward by Super Liquor Holdings Limited is that, whilst it accepts that each part of the test requires separate consideration, ultimately those two considerations merge in the ultimate test. The test is not whether the element of the PLAP is reasonable or unreasonable; nor is it whether or not the PLAP conforms with the object of the Act. The test combines the two concepts and is whether or not the

element of the PLAP is unreasonable in the light of the object of the Act. As Super Liquor Holdings Limited acknowledged when applying s.5 of the Interpretation Act 1999, the concept of "unreasonableness" in this context is qualified or governed by the object of the Act.

[44] It was suggested that when considering "unreasonableness" consideration should be given as to how the concept was considered under the Sale of Liquor Act 1989. The Authority agrees. In particular, the comments of the Court of Appeal in *Meads Brothers Limited v Rotorua District Licensing Agency*, [2002] NZARLA 308 (CA) at [53] are pertinent:

> *"It is to be remembered that the statutory object is to establish a **reasonable** system of control. This envisages that at a certain point, at the extreme end of the scale, the administration of the licensing may become unreasonable in its pursuit of the aim of reducing liquor abuse."*

[45] The comment made in *Meads Brothers Limited* was reiterated in *Christchurch District Licensing Agency v Karara Holdings Limited*, [2003] NZAR 752 (CA) at [26]. This the Authority confirmed in *New Zealand Police v Absolute Caterers Limited*, [2013] NZARLA 946 at paragraph [12]. Thus, it will be an indicator that a particular element of a PLAP is unreasonable if those wishing to purchase or consume alcohol in a safe and responsible manner find that the element is a disproportionate response to possible alcohol-related harm.

[46] The same principle can be deduced from the by-law cases. As was stated in the leading case of *McCarthy v Madden*, [1914] 33NZLR 1251 (SC):

> *"The reasonableness or unreasonableness of a by-law can be ascertained only by relation to the surrounding facts including the nature and condition of the locality in which it is to take effect, the evil, danger, or inconvenience which it is designed or professes to be designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded."*

[47] An important aspect of reasonableness discussed in the by-law cases is proportionality. In essence, proportionality involves the assessment of the interference with a public right, against the benefits sought to be achieved by the provision.

[48] Notwithstanding the comments made earlier in this decision at paragraph [35], there are parallels between the creation of by-laws and LAPs. Democratically elected Councils follow a public consultation procedure in each case. Although there is no right of appeal in respect of by-laws such as that provided by s.81 of the Act, nevertheless, by-laws must be reasonable and can be judicially reviewed if they are not. The concept of "reasonableness" applies to both by-laws and LAPs. The comments of Asher J in *Carter Holt Harvey Limited v North Shore City Council*, [2006] 2NZLR 787 (HC) as approved in *Harrison v Auckland City Council*, [2008] DLR 619, [2008] NZAR 527, are useful:

> *"The test of unreasonableness as expressed in McCarthy v Madden is more a matter of judgement, considering the proportionality of any interference with a public right against the benefit to inhabitants of the area."*

> *"[This] is a mixed question of fact and law … A by-law is not unreasonable just because a Judge thinks that it is so. The consideration of the reasonableness of the by-laws can only take place in the context of the legislative background."*

[49] Assistance can also be gleaned from the common law. The "reasonable person" test (as mentioned, for example, in *Blyth v Birmingham Waterworks*, [1856] 11EX 781 at [784]) has provided a standard measure against which actions or inactions can be assessed without consideration of the idiosyncrasies of the particular person whose actions are in question. Whilst it is difficult to set a specific test or benchmark for when a specific provision in a PLAP is "unreasonable" the reasonableness or otherwise of such a provision can be assessed by the Authority from the perspective of an informed objective bystander.

[50] However, "reasonableness" is not the only aspect of the test. It is governed or qualified by the words *"in the light of the object of the Act".* Interestingly, s.81(4) uses the words *"in the light of"* to link the concept of unreasonableness with the object of the Act. Section 5 Interpretation Act 1999 (supra at paragraph [22]) uses the same expression to link the text of a statute being interpreted with the statute's purpose. In *Commerce Commission v Fonterra Co-operative group Ltd* [2007] 3 NZLR 767 at para [22] the Supreme Court held that the expression made text and purpose the key drivers of statutory interpretation and that text should always be cross-checked against purpose. In this case, then, unreasonableness must always be cross-checked against the object of the Act if the dual requirements of s.81(4) are to be met.

[51] It follows that where an element of a PLAP can demonstrably (through evidence presented to the Authority) be linked to the object of minimising alcohol-related harm, the Authority will be slow to find that element to be unreasonable. The invasion of public or private rights would need to be significant to outweigh the benefit of such an element in terms of minimising alcohol-related harm. However, if an element of a PLAP cannot be shown to attempt to minimise alcohol-related harm, then the Authority will be more likely to find the element unreasonable for the purposes of ss.81 and 83 of the Act.

[52] As is the case in any appeal, there is a burden on the appellant to prove its case. If the appellant fails to do this, then in an appeal brought under s.81 of the Act there is no necessity for the territorial authority to do anything: it does not have to justify the element appealed against. If, in its PLAP, the territorial authority is able to provide reasons for each element of the policy, then it is those reasons that will be scrutinised in any appeal. If the reasoning of the territorial authority shows that the territorial authority has carefully weighed concerns of submitters as to the effects of the policies upon them and the general community, against the minimisation of alcohol-related harm in the locality, then it is unlikely that the Authority will determine that the PLAP is unreasonable in the light of the object of the Act.

[53] A LAP is just that. It is not a national policy and evidence of national characteristics will seldom be of value except to provide a background for evidence of local issues. It is a local policy prepared by local people who know and understand the local problems in their locality. The criteria in s.78(2) reinforce this view.

[54] The territorial authority does not need to be sure that a particular element of its PLAP will minimise alcohol-related harm. This can be deduced from the judgment of the Court of Appeal in *My Noodle Ltd v Queenstown-Lakes District Council* [2009]

NZCA 564; (2010 NZAR 152 at paragraph [74]). A precautionary approach can be used to see if it will achieve the statutory object

[55] Thus, when preparing its PLAP, the territorial authority needs to consider what it must incorporate in it to attempt to minimise alcohol-related harm in its locality. Also, it must determine if the proposed measures constitute a disproportionate or excessive response to the perceived problems. If its proposed measures are partial or unequal in their operation between licence holders, then it is possible that the measures will be unreasonable. Obviously, if an element of a PLAP is manifestly unjust or discloses bad faith or is an oppressive or gratuitous interference with the rights of those affected then it is likely that the measure will be unreasonable in the light of the object of the Act. Accordingly, whilst the object of the Act is the paramount consideration in determining whether or not an element of a PLAP is unreasonable, it is not the only consideration that needs to be taken into account. The other matters referred to in this paragraph are important although the degree of emphasis placed on any one of them will depend upon the facts of the individual case.

[56] The playing field is not an even one. It is weighted against an appellant in favour of the territorial authority. This is not because of any presumption that a PLAP is reasonable in the light of the object of the Act. Rather, it arises from the onus on an appellant, if it is to succeed, to satisfy the Authority on what is a negative proposition. That is more difficult than establishing a positive one. Further, the proportionality approach is weighted against an appellant because the PLAP does not have to achieve the statutory object: rather it must constitute an attempt to do so and can employ the precautionary principle described in *My Noodle* (supra) at paragraph [74].

This appeal

[57] The appellant has contended in this case that the respondent has failed to show that the proposed hours in the PLAP will minimise alcohol-related harm. The onus was not on the respondent. Nevertheless it did call evidence as to how its PLAP is intended to comply with the statutory object.

[58] More importantly, the appellant says that the effects of the element of the PLAP appealed against are unreasonable on licensees and those persons patronising the on-licensed premises in the locality. It argued that the remedy in the PLAP is disproportionate to the perceived risk. It assessed the alcohol-related harm in the locality as relatively insignificant. It considered that the maximum closing hours that apply to on-licensed premises in the locality did not create alcohol-related harm: indeed, the element of the PLAP could be harmful in some situations.

[59] The appellant called evidence from three on-licensees. One of those has licensed premises in Collingwood. The next has licensed premises in Murchison and the third has licensed premises in Richmond. In each case, the evidence was that the premises are well conducted and on occasion each of the premises closes at 3.00 am. Thus, the PLAP would reduce opening hours in each case by one hour.

[60] Various concerns were expressed. If the hours were reduced by one hour then, instead of going home, it is possible that patrons on leaving the licensed premises would go elsewhere and party with consequential alcohol-related harm. Difficulties would be experienced by a licensee transporting patrons to their homes if the opening hours were reduced by one hour. In the case of Richmond there is a

possibility that patrons would no longer patronise the Richmond on-licensed premises in favour of travelling approximately 10 kilometres to Nelson premises with more favourable hours. Migratory problems could occur if Nelson premises had hours which are more extensive than those premises in Tasman. Shorter hours mean less profit.

[61] All of the concerns expressed by the witnesses for the appellant are valid. However, the evidence from the respondent shows that for most of the time, even though many on-licensed premises in the area are required presently to close at 3.00 am, most do not use those hours. It is seldom that any of the on-licensed premises remain open until 3.00 am. However, during the summer holiday period in some cases opening hours are used to their full extent and it is at this time that the element of the PLAP will impact to some extent on both on-licensees and patrons.

[62] The evidence for the respondent and its supporters indicates that in Motueka the proposed hours have applied to on-licensed premises for some years. Motueka experienced considerable alcohol-related harm problems in the late 1990s. As a result of a "gentleman's agreement" between the Police and the Motueka licensees, on-licensed premises in the Motueka area closed at 2.00 am. Consequently, there was a proved reduction in alcohol-related harm in that area. Whilst presently Motueka seems relatively calm, if the PLAP permitted more extensive hours than at present voluntarily apply in Motueka, it is inevitable that pressure would be brought to overturn the voluntary accord. In those circumstances it is likely that alcohol-related harm would increase. It would be unwise for places other than Motueka to have longer hours as this could create migratory problems with associated alcohol-related harm. This does not occur at present; but this is because for most of the year most on-licensed premises do not remain open beyond 2.00 am.

[63] The second contention of the respondent and those supporting it is that the Tasman District Council encompasses a large rural area and inevitably difficulties can be experienced in ensuring that the provisions of the Act are observed. The longer on-licensed premises can remain open in the more distant portions of the locality, the more difficult enforcement becomes. Resources both of the Inspectorate and the Police are limited. Enforcement of the alcohol laws is an integral part of achieving the Act's object.

[64] Data provided for the Medical Officer of Health shows the locality is not free from alcohol-related harm. The difficulty with this evidence was that the data was not restricted to Tasman but included Nelson.

[65] A rather unsophisticated poll of residents supported the PLAP element. Not much weight can be placed on this; although it was another tool that caused the respondent and its officers to focus on the Act's object.

[66] *Meads Brothers Limited* (supra) was decided under the Sale of Liquor Act 1989. It is equally relevant to the application of the Sale and Supply of Alcohol Act 2012 as the principles discussed by the Court of Appeal have not been the subject of statutory change. The case involved the renewal of an on-licence and the restriction of its permitted hours for the sale and supply of alcohol. There was evidence of noise and drunk and disorderly behaviour. Whilst the on-licence was renewed, the permitted hours of sale and supply of liquor were restricted. The Court of Appeal recognised the statutory object of the Act which was to establish a reasonable system of control with the aim of reducing liquor abuse. It recognised that whilst evidence of any impact on the viability of a business by the imposition of more

restricted hours could be relevant, the economic disadvantage to be sustained by the appellant was not so extreme as to outweigh conformity with the object of the Act.

[67] If one applies the principle in *Meads Brothers Limited*, and adopts the proportionality argument expressed in the by-law cases to the facts of this appeal, and if one looks at the situation as an informed, objective bystander, then the appellant's concerns referred to in the evidence do not outweigh conformity with the object of the Act. The evidence supporting the element appealed against is compelling. There has been alcohol-related harm in Tasman in the past. It is inconceivable that there is no such harm now although the evidence is sparse. That the proposed new hours have worked in Motueka is strong evidence that they will also work throughout the rest of the Tasman area. The far-flung nature of the locality and difficulties in resourcing enforcement are also relevant. The economic and other disadvantages likely to be sustained by those very few on-licensees affected by the proposed change pale into insignificance on the facts of this case. Patrons will be affected, but again their interests are not so substantially disadvantaged as to outweigh the importance of the object of the Act being achieved. The PLAP's element is not unreasonable per se. It is not unreasonable when considered in the light of the Act's object.

[68] The Authority gave consideration to the specific case of the on-licensees in Richmond. The reasoning set out above applies to them as well. The adjacent Nelson City Council has not yet prepared a LAP. Thus any suggestion that the PLAP as it affects Richmond should conform with Nelson on-licensed hours cannot be sustained. Nobody knows what the Nelson hours will be.

Reasons for territorial authorities' decisions

[69] In this decision it has been suggested that when preparing a PLAP reasons for each element of it are contained in the policy document itself. This was not the case with the respondent's PLAP. However, if the reasons (they need not be lengthy) are contained in the policy document then this transparency may have the effect of reducing criticism of the policy. It also enables an appellant to present its case first as the appellant will understand the rationale behind the PLAP. With an appellant bearing the onus, recognition of that burden is preserved if an appellant proceeds first at the hearing. That did not occur in this case. It has created difficulties for the appellant.

[70] It is important that LAPs set out the rules clearly and concisely. If the rules are interspersed with the reasons for each element of the policy then the document will become virtually unintelligible. Accordingly, the Authority suggests that the reasons for each element be contained in a separate part of the policy document.

[71] The Authority appreciates that the creation of PLAPs is a democratic process. Not all councillors of any territorial authority will agree on the reasons for any particular element of the policy. Nevertheless, when preparing the documentation for consideration by councillors in respect of PLAPs, it must be possible for Council officers to suggest appropriate reasons. These can be adopted by the councillors if they agree with them. They can always add to them or decline to adopt them. This technique should assist territorial authorities when preparing their PLAPs.

Conclusion

[72] The appellant has not satisfied the Authority that the appealed element of the respondent's PLAP is unreasonable in the light of the object of the Act. In these circumstances pursuant to s.83(1) of the Act, the appeal is dismissed.

DATED at WELLINGTON this 7th day of November 2014

A E Cannell
Deputy Secretary

Hospitality NZ Inc.doc(jeh)