[2019] NZARLA 215

UNDER	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 South Waikato District Licensing Committee granting a new on-licence for premises situated at 42 Mannering Street, Tokoroa to be known as 'Kina's Sports Bar'
BETWEEN	**COLIN RONALD BRIDLE** Appellant
AND	**J & I IMPORTS LIMITED** Respondent

BEFORE THE ALCOHOL REGULATORY AND LICENSING AUTHORITY

Chairperson: District Court Judge K D Kelly
Members: Ms J D Moorhead
Ms S L G Mehrtens

HEARING at TOKOROA on 15 October 2019

APPEARANCES

Dr G Hewison – for appellant
Mr J Lang and Mr R Davies – for respondent
Ms J Smale – Licensing Inspector – to assist

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DECISION OF THE AUTHORITY

Introduction

[1] On 23 May 2019, following a public hearing on 2 May 2019, the South Waikato District Licensing Committee (DLC) granted an application for an on-licence to J & I Imports Limited for premises at 42 Mannering Street, Tokoroa to be known as 'Kina's Sports Bar'.

[2] Mr Colin Bridle, a resident of Tokoroa, was the sole objector to the grant of the application. Mr Bridle now appeals the DLC decision.

[3] The Authority notes that Mr Bridle also objected to another application which was heard by the DLC on the same day, and subsequently granted. This other application was for Nexus Wine & Café Ltd, which is located on Bridge Street in Tokoroa. Significant aspects of that DLC decision are the same, or similar, to the DLC's decision in respect of this application. This is partly because the nature of Mr Bridle's objections to both applications raise identical grounds. Mr Bridle also appealed the DLC decision in respect of Nexus Wine & Café Ltd, which the Authority heard the day before hearing this appeal. While the grounds of appeal differ in some respects, the Authority notes that three of the grounds of appeal are common to both.[1]

Summary of result

[4] The Authority is satisfied that the DLC has properly evaluated the application having regard to the criteria in s 105 of the Act. Our response to each of the grounds of appeal is:

(i) Did the DLC err by granting a generic on-licence rather than a tavern-style on-licence?

No

(ii) Did the DLC err by not deciding that premises would operate as a tavern?

No

(iii) Did the DLC err in deciding the application in the absence of a business plan or training programme being prepared and made available to it?

No

(iv) Did the DLC err on matters relating to the suitability and object of the Act?

No

[1] Refer *Bridle v Nexus Wine & Café Limited* [2019] NZARLA 214 heard on 14 October 2019 with the Authority's decision issued on 1 November 2019

(v) Did the DLC err by deciding that the menu was sufficient to meet the purposes of the Act?

No

Premises and applicant

[5] The premises to which this appeal relates is a building that previously housed Pockets 8 Ball Club Inc, which operated under a club licence. Pockets 8 Ball was placed into liquidation in the Rotorua High Court on 10 December 2018 and ceased trading on that date. The premises, and the 16-gaming machines contained within, have sat idle since then.[2]

[6] Mr John Kennely McKeany is the sole director and shareholder of J & I Imports Limited, which has a 10-year lease on the property.

[7] Mr McKeany holds a manager's certificate and is an experienced operator, having operated the 'Hound & Hog Sports Bar' in Putāruru between 2005 and 2017 without issue. Mr McKeany intends to work in Kina's Sports Bar himself and also intends to employ other managers as the business grows.[3] Mr McKeany told the DLC that he plans to employ 4-5 full time staff and intends to cater to 'blue collar workers'.

[8] Mr McKeany sought a restricted area designation for the premises as he intends to run an adults only 'true Kiwi tavern' with pool tables, big screen TVs and dart boards.[4]

[9] Following the hearing of this appeal, the Authority made a site visit to the proposed Kina's Sports Bar. Renovations of the premises have not commenced, but nevertheless the Authority was able to gain a sense of what is intended once renovations are complete.

Applicable criteria for evaluating application

[10] Section 105 of the Act sets out the criteria to which a DLC must have regard when deciding whether to issue a licence. We repeat s 105 in its entirety:

> **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**

[2] DLC decision at [2] – [4]
[3] DLC decision at [5] and [12]
[4] DLC decision at [13]

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:

(h) whether (in its opinion) the amenity and good order of the locality would be likely to be reduced, to more than a minor extent, by the effects of the issue of the licence:

(i) whether (in its opinion) the amenity and good order of the locality are already so badly affected by the effects of the issue of existing licences that—

(i) they would be unlikely to be reduced further (or would be likely to be reduced further to only a minor extent) by the effects of the issue of the licence; but

(ii) it is nevertheless desirable not to issue any further licences:

(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.

[11] Relevant to s 105(1)(a), s 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).

[12] Section 106 of the Act also provides a legislation aide when considering s 105(1)(h), but that paragraph is not in issue in this appeal.

Section 103 agency reports

Police & Medical Officer of Health

[13] According to the s 103 report of the Licensing Inspector, Ms Julie Smale, a Police report dated 8 February 2019 initially opposed the grant of the licence but this was subsequently withdrawn on 13 March 2019.[5]

[5] undated s 103 report of Licensing Inspector at 13.1

[14] The Licensing Inspector also reports that by way of a report dated 20 February 2019, the Medical Officer of Health did not oppose the application.[6]

[15] Neither the Police nor the Medical Officer of Health appeared before the Authority.

Licensing Inspector

[16] The Licensing Inspector noted in her s 103 report that Mr McKeany has had considerable experience in running licensed premises and that he had established, and operated for 12 years, the Hound & Hog Sports Bar in Putāruru.

[17] The Licensing Inspector reported further that Mr McKeany will ensure that all staff employed will be fully trained in their responsibilities under the Act with particular attention being given to the identification of minors and recognition of the signs of intoxication. The Licensing Inspector noted that Mr McKeany is a past member of Hospitality New Zealand,[7] and that he intends to continue that relationship.

[18] The Licensing Inspector also reported on the one objection received from Mr Bridle. Ms Smale said that while she believed the objector has status to object under the Act, she did not believe the objection was based on any of the s 105 criteria.[8] The Authority notes that s 102(3) provides that no objection may be made in relation to a matter other than a matter specified in s 105 of the Act. The Licensing Inspector considered that most of Mr Bridle's objections are "frivolous and border on being vexatious" and also advised that Mr Bridle has objected to other premises in the past using almost the same wording in his objections.[9]

[19] Ms Smale recommended that the DLC issue the on-licence with the days and hours requested by the applicant, and on such other conditions the DLC thinks fit.[10]

Mr Bridle's objection

[20] Like his objection to the application in respect of Nexus Wine & Café Ltd, Mr Bridle's objection to this application, dated 14 February 2019, states that he objects "under all of the criteria in section 105 of the Act". Mr Bridle's particular concerns with this application are as follows:

(a) *South Waikato Alcohol Accord*: while the applicant intends to be a member of the Accord, Mr Bridle questions why J & I Imports Ltd is not already a member of the Accord and asks for details about how J & I Imports Ltd complies with the Accord;

(b) *menu*: Mr Bridle notes that the menu provided with the application is a handwritten menu with spelling mistakes, which he says is very unusual for a tavern; Mr Bridle also says that the range of meals that will be available

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[6] undated s 103 report of Licensing Inspector at 13.2
[7] in 2011 the Hospitality Association of New Zealand (HANZ) became known as Hospitality New Zealand
[8] undated s 103 report of Licensing Inspector at 21.0 - s 102(3) states that no objection may be made in relation to a matter other than a matter specified in s 105
[9] undated s 103 report of Licensing Inspector at 21.0
[10] undated s 103 report of Licensing Inspector at 22.0

must all be microwaved and that this does not meet the requirements of the Act, especially the object of the Act;

(c) *checklist and incomplete application*: Mr Bridle says that the checklist in the application form requires a copy of the memorandum of association or other documentary evidence of J & I Imports Limited's authority to sell liquor or to hold a licence and that the application is not accompanied by either a memorandum of association or other documentary evidence; further, Mr Bridle says that while the application says that CCTV cameras will be installed at the premises, the application does not note their proposed position — as a result, Mr Bridle says that the application is incomplete and invalid under s 100 of the Act;

(d) *planning/building certificate:* Mr Bridle says that the application is not accompanied by certificates that confirm the premises meet the requirements of the Resource Management Act 1991 or the building code — therefore Mr Bridle says the application is incomplete and invalid;

(e) *Youthtown Letter:* The application is accompanied by a letter of support from Youthtown Inc[11] addressed to the DLC and dated 21 January 2019. Mr Bridle questions the value of this letter as it is addressed to the "Tokoroa District Council" which Mr Bridle says does not exist and it also misspells the proposed name of the bar as "Kinna's". Mr Bridle also says the letter does not say how the revenue from gaming machines will benefit Tokoroa directly and notes that there is no 'harm/benefit analysis' in the letter;

(f) *suitability*: in light of the recent liquidation of Pockets 8 Ball Club Inc, Mr Bridle expressed concern about the financial viability of the premises — accordingly, Mr Bridle asks for a thorough business plan confirmed by a chartered accountant to show that the business is viable and that all staffing salaries, wages and taxes will be paid;

(g) *gaming machine venue/tavern*: Mr Bridle expressed concern that the premises will be principally a gaming machine venue and not a tavern — therefore Mr Bridle asks that the applicant demonstrate through a report from a chartered accountant that the revenue and accounts of the business show it will principally be a tavern and not a gaming machine venue;

(h) *suitability – compliance with Council Class 4 Venue Policy:* Mr Bridle is concerned that the premises do not comply with the South Waikato Gambling Class 4 and Racing Board Policy as Kina's Sports Bar is not referred to in the appendix to that policy, and the policy states there shall be no new class 4 venues from the date of the adoption of the policy; and

(i) *hours:* Mr Bridle is concerned about the very long hours that the premises intends to be open.

[21] In terms of his standing to object, Mr Bridle said that he lives within 0.9 km from the venue and that: "In the past due to peoples excessive alcohol consumption our

[11] Youthtown Inc provides services to youth, grew out of the original Boystown, and involves the Police, Youth and Citizens' Club. It incorporated in 2002 and provides programmes specifically designed to engage and develop each school age group both during and outside school hours. Youthtown Inc relies on funding from Class 4 gaming venues which are aligned with Youthtown. The letter states that Youthtown would welcome the opportunity to expand its delivery into Tokoroa.

property i.e. letter box and front garden have been damaged on a number of occasions" (sic).

[22] Mr Bridle also said that he is an elder in the Elim Church in Tokoroa and people seek his assistance with alcohol and gambling issues. Accordingly, Mr Bridle says that he has a greater interest in the application than the public generally.

[23] The objection closes by saying that "we will provide both alcohol & social harm data closer to a hearing date." This data was not included in Mr Bridle's evidence before the DLC.

DLC decision

[24] The DLC considered the standing of Mr Bridle and thought that the decision to grant him standing was finely balanced. Nevertheless, the DLC granted Mr Bridle standing to object.[12]

[25] The DLC decision sets out the applicant's evidence, the evidence from the Licensing Inspector, and Mr Bridle's evidence. After hearing from Mr Bridle, the DLC noted, amongst other things, that Mr Bridle adopted what the DLC considered to be a "somewhat misguided attack on the perceived inaccuracy and illegitimacy of the application".[13]

[26] The DLC, however, also said that Mr Bridle appropriately raised the issue of the principal activity of a tavern, noting that the Act requires a tavern to be principally in the business of providing alcohol and other refreshments to the public.[14]

[27] The DLC also noted that Mr Bridle criticised the proposed menu of microwavable options and that he tried to argue that these were insufficient to meet the requirements of the Act.[15] The DLC said further that Mr Bridle outlined his concerns that the business would struggle to prevent gaming revenue from becoming the principal revenue stream from the business, which he said would be contrary to both the Sale and Supply of Alcohol Act 2012 and the Gambling Act 2003.[16]

[28] After considering the criteria in s 105 and 106 of the Act,[17] the DLC concluded that it had no difficulty in deciding that J & I Imports Ltd is a suitable entity to hold an on-licence despite the high-risk environment in which it chose to operate.[18]

[29] Relevant to this appeal, the DLC then turned its mind to the matter of designations under s 119 of the Act. The DLC said, amongst other things, that it would not be drawn into designating a gaming room as a restricted area purely in order to accommodate gaming machines and that it believed that the appropriate designation for the premises is a 'supervised' designation.[19]

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[12] DLC decision at [29] – [30]
[13] DLC decision at [35]
[14] DLC decision at [36]
[15] DLC decision at [37]
[16] DLC decision at [38]
[17] DLC decision at [44] – [70]
[18] DLC decision at [75]
[19] DLC decision at [78]

Grounds of appeal

[30] The grounds of appeal set out in the notice of appeal[20] are that:

(i) *Ground 1: 'granting a generic on-licence rather than a tavern-style on-licence'* – the DLC erred by (a) granting a 'generic' on-licence when the application was for a tavern-style or tavern 'kind' of on-licence; or (b) not granting a tavern-style or tavern 'kind' of on-licence when that was the style or kind of licence applied for; or (c) recording that it required the applicant to operate as a tavern, but then not specifically granting a tavern-style or tavern 'kind' of on-licence;

(ii) *Ground 2: 'not determining whether the premises would operate as a tavern'* – the DLC erred by not determining whether the premises would be used, or was intended to be used, in the course of business, principally for providing alcohol and other refreshments to the public; or determining whether the premises met the definition of tavern in s 5 of the Act;

(iii) *Ground 3: 'No business plan or training plan'* – the DLC erred by (a) deciding, in the absence of a business plan or training programme being prepared and made available to the DLC, that the application met the criteria in s 105(1)(j) of the Act; or (b) deciding that a business plan or training programme may be prepared before the premises opened if the licence is granted (that is, after the DLC had made its decision), and that this satisfied s 105(1)(j) of the Act;

(iv) *Ground 4: 'matters contrary to the suitability and object of the Act'* – the DLC erred by deciding that the sale, supply and consumption of alcohol would be undertaken safely and responsibly at the premises and that the applicant company and director were suitable, when (a) the applicant sought and defended a Restricted Area designation for the entire premises; or (b) Mr McKeany's response to questions about how he was going to ensure that the principal revenue stream for the business would be alcohol and other refreshments was that he would increase the sales of alcohol rather than reduce the number of gaming machines or gaming machine revenue;

(v) *Ground 5: 'a reasonable range of food is not available'*– the DLC erred by deciding that the refreshed menu provided at the hearing was sufficient to meet the purposes of the Act.

Relief sought

[31] While the Notice of Appeal is silent on the relief sought, before the Authority Dr Grant Hewison for Mr Bridle sought by way of relief under s 158 of the Act, that the decision of the DLC be reversed and the application refused.

[20] dated 6 June 2019

Approach on appeal

[32] As the Authority has recently reiterated in *Capital Liquor Ltd v NZ Police*[21] it is well settled that an appeal brought pursuant to s 154 of the Act is a rehearing.[22] As was said in *Mangere-Otahuhu Local Board v Level Eighteen Limited*,[23] the onus on the appellant before the Authority is to satisfy the Authority that the decision in the original hearing before the DLC was wrong.

[33] The Authority will be slow to draw different factual conclusions from those of a DLC as the DLC will have had the advantage of hearing the evidence at first instance.[24] *Mangere-Otahuhu Local Board v Level Eighteen Limited* reflects what the Supreme Court said in *Austin, Nichols & Co Inc v Stichting Lodestar*:[25]

> *Perhaps the most familiar general appeals are those between courts. …. Similar rights of general appeal are provided by statute in respect of the decisions of a number of tribunals. The appeal is usually conducted on the basis of the record of the court or tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged. … In either case, the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.*

[34] Similarly, the approach a DLC (and the Authority on appeal), is to take when determining whether to grant an application for a licence has been well traversed by the superior courts. This has been referred to in previous decisions of the Authority, including recently in *Shady Lady Lighting Limited v Lower Hutt Liquormart Limited.*[26] In that case too, on appeal, Churchman J confirmed that not only do notions of onus of proof have little or no relevance and application to the inquisitorial, evaluative decision-making process a decision-maker is to undertake when considering whether or not to grant an off-licence, notions of standard of proof similarly have little value.[27] What is required is that the decision-maker be reasonably satisfied of any evidence put to it, having regard to the nature and consequence of the facts in question.[28]

Ground 1 'granting a generic on-licence rather than a tavern-style on-licence'

Submissions for appellant

[35] As in the prior appeal heard by the Authority in respect of Nexus Wine & Café Ltd,[29] Mr Bridle submits that the application was for a 'tavern-style' on-licence but the DLC did not grant a tavern-style or tavern 'kind' of on-licence. Mr Bridle submits that in

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[21] *Capital Liquor Ltd v NZ Police and others* [2018] NZARLA 335 at [109] – [110]
[22] s 157
[23] *Mangere-Otahuhu Local Board v Level Eighteen Limited* [2014] NZARLA PH 627-228 at [15]
[24] *Mangere-Otahuhu Local Board v Level Eighteen Limited*, above n 23, at [17]
[25] *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [146]
[26] *Shady Lady Lighting Limited v Lower Hutt Liquormart Limited* [2018] NZARLA 198-199 at [55] – [65]
[27] *Lower Hutt Liquormart Limited v Shady Lady Lighting Limited* [2018] NZHC 3100 [28 November 2018] at [73]
[28] *Lower Hutt Liquormart Limited v Shady Lady Lighting Limited,* above n 28 at [73]
[29] above, n 1

Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust,[30] the Authority said that it is clear that a tavern on-licence is different in kind to other types of licences.

[36] The absence of a reference to 'tavern' in the licence, Dr Hewison submitted for Mr Bridle, creates a risk of confusion that on renewal the DLC will ignore the fact that the premises is intended to be a tavern rather than a gaming venue, and not apply the relevant criteria articulated by the Authority in *Kaiti Club Hotel Ltd* for determining the nature of the premises.

[37] In response to a question from the Authority, Dr Hewison submitted that the matter is both one of form and substance and that it is not sufficient that the licence includes the mandatory conditions that are required for taverns.

Submissions for respondent

[38] Mr Jesse Lang for J & I Imports Limited submits that s 13 of the Act provides that there are only four types of licences under the Act, and the appropriate type of licence was issued in this case. Further, it is submitted that conditions imposed by the DLC reflect the type of conditions that are to be imposed for taverns.

Analysis

[39] As we said in our prior decision,[31] this ground of appeal is premised on a fundamental misunderstanding of the operation of the Act.

[40] Section 13 of the Act provides that there are four kinds of licences, including on-licences. No mention is made of 'tavern-style licences'.

[41] The word 'tavern' is mentioned eight times in five sections of the Act. Two of these sections (ss 349 and 350) relate to district and suburban trusts and are not relevant to this appeal. Section 32 provides that an off-licence may be issued to the holder of an on-licence issued for a hotel or tavern, which is also not relevant in this case.

[42] Section 119, however, is applicable and provides that when issuing an on-licence for a tavern, the DLC must designate all, or part of the premises, as either supervised or restricted areas.

[43] Section 5 then defines what a tavern is, namely premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public, but not including an airport bar.

[44] The factors the Authority set out in *Kaiti Club Hotel Ltd* for helping determine the nature of a premises, cannot be read as creating a further kind of licence to those set out in s 13 of the Act. What *Kaiti Club Hotel Ltd* confirms is that as the restrictions in the Act do not equally apply to all types of on-licences, tavern on-licences are different in kind to other types of on-licences. That is, where premises operate as a tavern, further statutory restrictions apply, in particular, there is a requirement to designate the premises as set out in s 119 of the Act.[32] The factors set out in *Kaiti Club Hotel Ltd*, and previous decisions of the Authority, which were canvassed in that decision, are factors which go to help determine whether the premises in question are a tavern.[33]

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[30] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust* [2018] NZARLA 225 at [90]
[31] above, n 1
[32] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust*, above n 30 at [90]
[33] *Kaiti Club Hotel Ltd v Ka Pai Kaiti Trust*, above n 30 at [97]

[45] It is the nature of the premises that dictates what restrictions ought to apply to premises used, or intended to be used, in the course of business principally for providing alcohol and other refreshments to the public. Upon a DLC imposing the relevant condition, namely one of the things described in s 119(3) of the Act, it is then incumbent on a licensee to comply with those conditions. Failure to do so will result in enforcement action under s 280 of the Act.

[46] Moreover, a licensee seeking a renewal will again need to specify the type of premises for which the licence is sought,[34] and the DLC will have to have regard to the criteria in 131 and s 105(1), as applicable. Objectors and reporting agencies will know by virtue of the application and public notification requirements in s 127(3) the type of premises for which the renewal is sought. It will be incumbent on the DLC to again, at that point in time, if a licence is sought for a tavern, to consider whether the premises are a tavern as defined in s 5 of the Act, and if so, what s 119 designation ought to apply.

[47] That is, whether the premises are a tavern is a question of fact.

[48] Accordingly, it makes no difference whether or not the licence once issued, refers to the premises being a tavern. What matters is that the relevant conditions under the Act are properly imposed. While it would undoubtedly be helpful if a licence for a tavern says the premises are a tavern, and in the Authority's experience this is helpfully done by a number of DLCs around the country, this is not a requirement under the Act.

[49] For completeness, the Authority also notes that by virtue of this appeal no licence has yet been issued to reflect the decision of the DLC. That responsibility sits with the DLC (s 135), but in practice is usually undertaken by the secretary of the DLC. As the decision of the DLC has not yet been translated into an issued licence, it is presumptive to speculate as to whether the licence, once issued, would have contained the word 'tavern'.

[50] For the reasons stated, this ground of appeal has not been established.

Ground 2 'not determining whether the premises would operate as a tavern'

Submissions for appellant

[51] Mr Bridle submits that the DLC has recorded that to be granted a tavern-style or tavern kind of on-licence, the premises have to operate principally for providing alcohol and other refreshments. The DLC also recorded that Mr McKeany said it was his intention to run the business principally as a tavern.[35] The DLC further noted that the definition of the term 'tavern' was one of the relevant legislative provisions for it to consider,[36] and that the DLC would require Mr McKeany to operate within the parameters of the Act including the requirement to operate as a tavern.[37]

[52] Notwithstanding this, Mr Bridle submits that the DLC did not record Mr Bridle's arguments that recent case law, notably *L & H Graces Place Ltd v Abbott* (i.e. re Hi

[34] s 127 (2)(c) and (d) and Forms 3 and 7 of the Sale and Supply of Alcohol Regulations 2013
[35] DLC decision at [11]
[36] DLC decision at [40]
[37] DLC decision at [74]

Sports Bar),[38] supports the proposition that new tavern licence applications should be refused where the principal activity will be gambling. Mr Bridle submits further that J & I Imports Ltd did not prove that the premises will be used in the course of business principally for providing alcohol and other refreshments to the public.

[53] Mr Bridle submits that by not following *L & H Graces Place Ltd v Abbott,* and in particular, by not applying the factors set out therein for determining whether a premises are a tavern, the DLC erred.

[54] Before the Authority, Dr Hewison for Mr Bridle accepted that on the basis of the Authority's recent decision in *SBS NZ Limited v Young*,[39] it is not necessary for the DLC to refer to all of the factors for determining whether premises are a tavern. Dr Hewison accepted that where the factors are not relevant there is no need for the DLC to look at them but said it would have 'been good' for the DLC to state which factors it did not consider to be relevant. Dr Hewison also conceded that in the present case, the proposed revenue of the business, as well as the nature and configuration of the premises, were considered by the DLC.

[55] Dr Hewison submitted, however, that because Mr Bridle made submissions and gave evidence relating to the public perception of the premises, and about the reasons why patrons attend the premises, the DLC erred by not considering these.

Submissions for respondent

[56] Mr Lang for J & I Imports Limited submits that the DLC properly inquired into the application and determined on the basis of the evidence adduced before it that the premises were intended to be operated as a tavern and that accordingly, the decision was reasonable given the circumstances.

[57] Mr Lang says it is accepted that how a prospective licensee intends to operate premises is relevant to the DLC's consideration of the s 105 criteria, and specifically whether the respondent intends to operate the premises in the course of business principally for providing alcohol and other refreshments to the public.

[58] Mr Lang submits, however, that the Authority in *L & H Graces Place Ltd v Abbott* was not seeking to fetter the discretion of a DLC in terms of the factors it ought to consider when determining the nature of the premises, and that a DLC has a wide-ranging discretion which enables its decision-making to be effective, taking into account local conditions.

[59] Further, J & I Imports Limited submits that not all the factors set out by the Authority will be appropriate to every application where the legal test for a tavern relates to the manner in which the applicant *intends* to operate (rather than currently uses), the premises. It is submitted that while a decision-maker must give careful attention and thought to all relevant matters, it need not exhaustively detail every independent consideration.

[38] *L & H Graces Place Ltd v Abbott* [2018] NZARLA 273
[39] *SBS NZ Limited v Young* [2019] NZARLA 175 at [120]

[60] Before the Authority, Mr Lang submitted that the DLC had regard to all of the factors relevant to a new application for an on-licence and the evidence is that Mr McKeany:

(a) holds a manager's certificate;
(b) has successfully operated a tavern in Putāruru from 2005 to 2017;
(c) will be working in the business himself;
(d) will employ additional certified managers as the business grows;
(e) plans to employ 4-5 full time workers;
(f) intends to cater for blue collar workers;
(g) requested that the entire premises be designated as a Restricted Area on the advice of the Police;
(h) predicts alcohol and other refreshments would be the principal income stream; and
(i) predicts the gaming machines will contribute about 25% of the income.

[61] It is also submitted that Mr McKeany intends to obtain a class 4 gaming licence in respect of which, one requirement is that the premises must not be used mainly for operating gaming machines. That is, Mr McKeany will be required to operate the premises as a tavern. Further Mr Lang submits for J & I Imports Ltd that the DLC said:[40]

> … we confirm that the decision on whether a class 4 gaming licence can be issued and be operated at these premises is a matter for the DIA. We note that Section 67(k) of the Gambling Act 2003 clearly states that "The Secretary (of the DIA) must refuse to grant a class 4 venue licence unless the Secretary is satisfied that …the class 4 venue is not mainly for operating gaming machines.
>
> It should now be acutely obvious to Mr Bridle that the Committee will require the applicant to operate with the parameters of the Sale and Supply of Alcohol Act 2012, and that includes the requirements to operate this business as a tavern.

[62] Mr Lang submits that while Mr Bridle may disagree with the views formed by the DLC on the basis of its consideration of the relevant factors, that is appreciably different from the DLC having erred in law when making its decision.

Analysis

[63] As we said in our prior decision,[41] in *L & H Graces Place Ltd v Abbott*, this Authority said:

> [74] The nature of the premises and how it intends to operate is a relevant consideration when considering the criteria in s 105 of the Act. In *Kaiti Club Hotel Ltd* , we said that where an applicant seeks a licence for a tavern, as the appellant has done in this case, it is necessary to consider whether the premises is a tavern. If the premises do not have as their principal purpose the sale of alcohol and other refreshments, then a tavern licence may not be issued. Having said that, it is not sufficient that the premises have as their principal purpose the sale of alcohol and other refreshments. The DLC is still required to have regard to the other relevant matters in s 105(1).
>
> [75] The term "tavern" is defined in s 5 of the Act as premises used or intended to be used in the course of business principally for providing alcohol and other refreshments to the public. This is a question of fact and degree. As we noted in

[40] DLC decision at [73] – [74]
[41] above, n 1

> *Kaiti Club Hotel Ltd* the authorities to date establish that this involves consideration of a number of factors including:
>
> a) the nature and configuration for the premises;
> b) the public perception provided it is referable to the legal definition;
> c) the reasons why patrons attend the premises;
> d) the revenue from various sectors of the business;
> e) the imposition of a cover charge;
> f) the current nights of the week when the premises are open;
> g) the trading hours and days requested; the nature of the entertainment; and
> h) the nature of food and beverages offered.
>
> [76] As we said in the appellant's previous appeal [34] , consideration of these factors remains the correct approach to take when determining whether premises are a tavern.

[64] Subsequently, in *SBS NZ Limited v Young*, having regard to *L & H Graces Place Ltd v Abbott*, we said that what is important is that the nature of the proposed premises is considered. Subject to being satisfied of the other criteria in s 105 (and in that case, s 131), if the DLC is satisfied the premises are intended to be used as a tavern as the applicant has said, by reference to the factors articulated in previous decisions of the Authority, then a licence may issue. As Dr Hewison has acknowledged, however, we qualified this by saying that a DLC is not required in every case to refer to each factor.[42]

[65] We also noted that while it is the applicant who is required to specify the general nature of the business intended to be conducted pursuant to the licence, it is the DLC which is charged with determining how the premises are actually being used or will be used. If an applicant states that they intend to conduct premises in the nature of a tavern, it is for the decision-maker to assess whether the premises are in fact to be used principally for providing alcohol and other refreshments based on the evidence before it. This allows a decision maker to then impose appropriate controls, through conditions, depending on the nature of the premises, how they are managed and the risk they might pose. In doing so, the DLC is able to ensure, where an application is capable of meeting the object of the Act, that the provisions of the Act will be observed.[43]

[66] In the present case, the Authority is satisfied that the DLC was seized of the obligation on it to have regard to the nature and configuration of the premises for the purposes of imposing the appropriate conditions. Dr Hewison has said as much.

[67] Similarly, it is accepted that the DLC considered the proposed revenue for the premises. There is no cover charge proposed.

[68] In *SBS NZ Limited*[44] we said that it does not matter whether a decision-maker, when evaluating an application for a tavern licence, undertakes an assessment of whether the premises are a tavern as defined in s 5 separately, or as part of its s 105 evaluation.

[69] The criteria that Mr Bridle says were not considered after being raised by him were (i) the public perception of the premises, and (ii) the reasons why patrons attend the premises.

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[42] *SBS NZ Limited v Young*, above n 39 at [120]
[43] at [101] – [111]
[44] *SBS NZ Limited v Young*, above n 39 at [116]

[70] In his evidence before the DLC Mr Bridle said that in his view, the public of Tokoroa will perceive the premises, and attend them, for 'pokie' gambling. Mr Bridle said he based this perception not only on what he has himself seen, but also on his many years of social work experience and also his experience as the centre manager of the Salvation Army Community Ministries office in Tokoroa.

[71] Mr Bridle considers that the separate layout of the gaming room in the premises will reinforce this perception. Mr Bridle also says that the public of Tokoroa know the operations of the venue by Pockets 8 Ball Club Inc, and that they know it to be primarily a gambling/pokie venue and that is why patrons attended it when it was open. While the Pockets 8 Ball premises have since closed, Mr Bridle says nothing has changed in terms of the nature and configuration of the premises.[45]

[72] Having regard to the evidence, the Authority does not consider it right to say that nothing has changed. The evidence of Mr McKeany is that the nature and configuration of the premises are intended to be renovated and that he is intending to spend about $100,000 on:

(a) upgrading the existing kitchen, including new equipment;
(b) repainting and redecorating the interior;
(c) recladding the front and part of the sides of the premises;
(d) installing new electronics including a new jukebox, TVs, and sound system; and
(e) installing new whiteware (fridges, chiller, etc);

[73] Upon completion of renovations, the premises will have three pool tables, five dart boards, one jukebox, six televisions and one large screen (all broadcasting SKY TV), and a new sound system.[46] Furthermore, under cross-examination by Dr Hewison, Mr Keany said that he intends to move the wall around the gaming area by about a metre so that Mr McKeany has a better ability, from the bar, to see people coming in the door, and to better observe the area.[47]

[74] The Authority is satisfied that the DLC understood the nature of Mr Bridle's concern and the evidence before it. The DLC said:[48]

> The Committee conducted a site visit and noted that the gaming room occupies about 10% of the floor available to the public and does not 'dominate' the premises as alleged by Mr Bridle.
>
> There were three large pool tables present, there are dart boards along one wall and provision for large screen TVs that are all common entertainment features normally present in taverns.
>
> Mr McKeany told us he intends to extend the wall and doorway into the gaming area to provide greater visibility of patrons from the bar area.
>
> We have no issue with the design and layout of the premises.

[75] In light of the fact that the premises were being renovated and run under new management, the DLC also said it considered the evidence of Mr Bridle and what

[45] Bridle BoE at [36] – [39]
[46] McKeany BoE at [19] – [20]
[47] DLC Transcript at pages 12 - 13
[48] DLC decision at [53] – [56]

weight it should apply to it, if any. The DLC said that Mr Bridle's 'scatter gun' approach was unhelpful and damaged Mr Bridle's credibility.[49]

[76] Mr Bridle's evidence was based on his observations of when the premises were operated by Pockets 8 Ball Club Inc, and beyond that, Mr Bridle's evidence is of his observations of the Hog and Hound Sport Bar in Putāruru.[50] The Authority does not find this evidence and these observations to be germane to this application. This is an application for new premises in Tokoroa, and not Putāruru, to be operated under a different licensee to its predecessor.

[77] In light of this, the Authority is not satisfied that the public perception of the premises, and why patrons will attend the premises, is a relevant consideration in the circumstances. The premises are not yet open, and it is speculative as to why people will attend. This, of course, will likely be a relevant matter should the licensee choose to renew the licence in a years' time.

[78] Beyond that, the weight to be given to the criteria in s 105, including the design and layout of the premises (s 105(1)(e)), and whether the applicant proposes to engage in the provision of other services (s 105 (1)(g)), is a matter within the discretion of the DLC.[51] The Authority is satisfied that the DLC understood the matters it needed to consider, considered those matters, and reached a reasonable conclusion following its evaluation.

[79] Finally, in respect of Mr Bridle's contention that the DLC erred by not requiring J & I Imports Ltd to prove that the premises will be used in the course of business principally for providing alcohol and other refreshments to the public, the Authority considers no error is established. As should be well understood by now, as Gendall J said in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*,[52] the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one.[53] In this regard, as stated in *Re Venus NZ Ltd*,[54] *Auckland Medical Officer of Health v Birthcare Auckland Ltd*[55] and *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited*[56] the notion of standard of proof and onus of proof have little or no relevance and application to the inquisitorial, evaluative decision-making process when considering whether or not to grant a new licence.

[80] For the reasons stated, the Authority is not satisfied that this ground of appeal has been established.

Ground 3 'No business plan or training plan'

Submissions for appellant

[81] Mr Bridle submits that the DLC erred by deciding the application 'met' the requirements of s 105(1)(j) in the absence of a business plan or training programme

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[49] DLC decision at [72]
[50] Bridle BoE at [40] – [49]
[51] *Christchurch Medical Officer of Health v J & G Vaudrey* Ltd [2015] NZHC 2749; [2016] NZLR 382 at [16(a)(iv)]
[52] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd,* above n 51
[53] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* above n 51 at [54]
[54] *Re Venus NZ Ltd* [2015] NZHC 1377, [2015] NZAR 1315 at [60]
[55] *Auckland Medical Officer of Health v Birthcare Auckland Ltd* [2015] NZHC 2689 at [52]
[56] *Lower Hutt Liquormart Ltd v Shady Lady Lighting Limited*, above n 27 at [73]

being made available to the DLC, or in deciding that either could be prepared before the premises commenced. This ground of appeal is premised on the DLC first expressing its concern that there was no business plan or training programme available to it.[57]

[82] Mr Bridle relies on a previous decision of the Authority in *Liquor 2 Go*[58] as authority for the proposition that an applicant for an off-licence needs to prove its case on the balance of probabilities and that if the applicant fails to do so, the application is not able to be granted.

[83] Before the Authority, Dr Hewison submitted that under cross-examination Mr McKeany said he would be prepared to write down the business plan that was 'in his head' and provide it to the DLC.[59] Dr Hewison submits, in light of this, that the concern of the DLC is somehow considered magnified or elevated. It is submitted that the business plan should therefore have formed a significant factor for determining what systems would be in place and in the present case the applicant did not provide the business plan to the DLC. Without this, Dr Hewison says it was not possible for the DLC to ascertain whether the applicant has systems, staff and training to comply with the law (per s 105(1)(j)).

[84] In the alternative, Dr Hewison said that if no training plan was provided, regard could not have been had to it, and given the DLC expressed concern about the training programme not being available, it then erred in not having regard to that matter.

Submissions for respondent

[85] J & I Imports Ltd submits that the DLC correctly considered all of the statutory criteria including s 105(1)(j) of the Act. It is submitted that the evidence was that Mr McKeany intends to employ 4-5 employees, and to recruit managers as the business grows. Further, Mr McKeany has 12 years' experience operating a tavern and has indicated his intention to work in the premises himself. Given this, it is submitted that the DLC had enough information on which to consider J & I Imports Limited's systems, staff and training and that the DLC's decision is supported by the evidence.

Analysis

[86] As we have already noted, the role of the DLC or the Authority in considering the relevant factors in s 105 of the Act is an evaluative one and notions of standard of proof and onus of proof have little or no relevance to the DLC's decision-making process. The decision in *Liquor 2 Go* relied on by Mr Bridle predates those decisions of the High Court to which we have already referred, and as such, cannot still be considered to be good law on the question of whether an applicant must prove its case on the balance of probabilities. It does not. The High Court has clearly said this on multiple occasions.

[87] In terms of s 105(1)(j), there are no specific systems, or training requirements prescribed by the Act. Nor is there a requirement that an applicant for an on-licence have a documented business plan or training programme. What is required is that the DLC have regard to whether an applicant has appropriate systems, staff and training to comply with the law.

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[57] DLC decision at [66]
[58] *Liquor 2 Go* [2013] NZARLA 920 at [32]
[59] DLC Transcript at page 15

[88] The application by J & I Imports Ltd states:[60]

> Management of the Proposal
>
> John McKeany will be responsible for the overall management of the business and day to day running of the business. He holds a Managers Certificate ... Staff previously employed by the applicant party may work at this premises or experienced locals from the area.
>
> Best practice will be for between two and three certified duty managers to be employed at the premises. It is anticipated that this number will be sufficient to ensure that at all times the premises are open for the sale and supply of liquor; the requirements of the Act are adhered to.
>
> The applicant will be instructed by the Agent as to their obligations in regard to managers and will ensure that sections 231 and 214 are adhered to.
>
> The Duty Manager will take control of any situation that may lead to a breach in the provision of the Act.
>
> Evidence of age documents will be requested when deemed necessary. All appropriate signage is displayed.
>
> Staff Training
>
> The manager will ensure that all staff will be fully trained in their requirements and responsibilities under the Act. Particular attention will be paid to the identification of minors and signs of intoxication.
>
> John has always subscribed as a member of HANZ. He will continue this industry relationship at this premises. Resources from this industry leader are used as attending their annual regional and national conferences (sic). In addition to this, he will become an active member of the South Waikato Accord Group and support the organisation. Staff meetings will be held weekly. These are conducted in a manner that encourages contributions from team members and also discuss topical issues arising during the week.
>
> Further training will be given by trained professionals for NZQA unit standards 4646 and 16705 for the LCQ.

[89] The Licensing Inspector, in turn reported that the licensee will ensure that there is good signage including prohibited persons signs and the legislative requirements. Further, there will be a quality CCTV security camera system, external security lights and night vision cameras. The Licensing Inspector said that the director is committed to employing at least two more managers by the time the licence is granted and that Mr McKeany understands the importance of having enough managers on board to cover for annual leave and illness.[61] In terms of training, the Licensing Inspector said:[62]

> The applicant will ensure that all staff will be fully trained in their requirements and responsibilities under the Act with particular attention paid to the identification of minors and recognising the signs of intoxication.
>
> As a past member of the Hospitality Institute of New Zealand (HANZ) the applicant will continue the relationship.

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[60] Application prepared by Hospitality Licensing Ltd at page 2-3
[61] undated s 103 report at 12.0
[62] undated s 103 report at 12.0

> Weekly staff meetings will encourage contributions from staff and also discussing the previous week's event.

[90] The requirement in s 105 is that the DLC have regard to whether the applicant has appropriate systems, staff and training to comply with the law. The Act is not prescriptive about how it is to be satisfied of these matters. Moreover, 'to have regard' to the matters in s 105 means that the decision maker must actively and thoughtfully consider the relevant matters, which requires the decision-maker to understand the matter correctly, however, the weight to be given to s 105(1)(j) is generally within the discretion of the decision-maker.

[91] As a consequence, there is no requirement that a DLC review business plans and training programmes, if it is otherwise satisfied of the matters in s 105(1)(j). In this regard, the DLC noted that there will be several staff with manager's certificates employed to provide coverage for the proposed opening hours.[63] While the DLC said it was concerned that there was no business plan or training programmes, it was satisfied that these could be prepared before the premises open.[64] Further, the DLC recognised that:[65]

> The onus will of course be on the applicant to turn words into actions. It is often said that the first year is the 'probationary period' for licensees to prove themselves as competent operators. The ball is firmly in the hands of Mr McKeany to operate within the parameters of the all legislation that is applicable to this business. We are sure the tavern will be closely monitored by the Police and the other agencies.

[92] The Authority is satisfied that the DLC turned its mind to s 105(1)(j) and that there was evidence before it on which it could rely when making its evaluation of the application. The DLC did not find Mr Bridle's evidence to be as credible for the reasons stated. The Authority is satisfied that the position reached by the DLC was one that was open to it.

[93] The fact that the DLC expressed concern about training programmes did not preclude if from being able to make a decision on the available information before it.

[94] Finally, the Authority notes that it was Dr Hewison who asked Mr McKeany to commit his business plan to writing. The DLC did not ask for this to be done or require the business plan before making a decision. A response to a question asked by counsel for Mr Bridle cannot be construed as a requirement on the part of the DLC without more.

[95] This ground of appeal has not been established.

Ground 4 'matters contrary to the suitability and object of the Act'

Submissions for appellant

[96] Mr Bridle submits that the DLC erred in deciding that the sale, supply and consumption of alcohol would be undertaken safely and responsibly, and that J & I Imports was suitable to hold a licence, when:

[63] DLC decision at [65]
[64] DLC decision at [66]
[65] DLC decision at [81]

(a) J & I Imports Ltd sought a restricted designation for the premises; and

(b) in response to a question from the DLC, Mr McKeany said he would increase alcohol sales to ensure the premises met the definition of a tavern.

Designation

[97] In respect of the designation, Mr Bridle submits that J & I Imports Ltd sought a restricted designation on the advice of the Police, the intended nature of the premises and the appropriateness of having unaccompanied minors enter parts of the premises used principally for the sale or supply of alcohol. Notwithstanding this, however, Mr Bridle says that Mr McKeany also stated that he would not object to a supervised designation but did not offer any reasons why this would be appropriate in light of his earlier statements. The DLC then considered that the appropriate designation for the bar was as a supervised area, and that it would not be drawn into designating the gaming room as a restricted area purely to accommodate gaming machines.[66]

[98] Mr Bridle submits that as the application is for a tavern, and the DLC decided to grant the licence for the premises as a tavern, the DLC erred by not following the principles in case law, namely in designating the gaming room as a supervised area. Notably, Mr Bridle relies on *Sporting Investments Ltd*[67] as authority for the proposition that gaming rooms per se ought not be designated and that, where a room or place in which gaming machines are situated is not a bar within the confines of a tavern, a designation is inappropriate on the basis that the sale, supply or consumption of alcohol is not the principal or exclusive activity for that area.

[99] In the present case, Mr Bridle submits that the proposed gaming room is not situated in a bar within the confines of the tavern and that the gaming room is a separate room from the bar area. As such Mr Bridle submits that the DLC erred by designating the gaming room as a supervised area.

[100] That is, Mr Bridle submits that on the basis of the case law, and because the application is for a tavern, the application should have been refused as the gaming room per se should not have been designated and having an undesignated area in a tavern is contrary to s 119 and does not meet the object of the Act.

Increasing alcohol sales

[101] In relation to a question from the DLC as to how J & I Imports Ltd would respond should revenue from gambling exceed alcohol sales, it is submitted that Mr McKeany said that he would look to increase sales through such things as 'happy hours', rather than saying that he would reduce the opportunities for gambling.

[102] Mr Bridle submits that in *L & H Graces Place Ltd v Abbott* the Authority expressed concern about a prospective licensee who was focused on promoting alcohol sales to ensure that revenue from alcohol sales exceeds revenue from gaming.[68]

[66] DLC decision at [76] – [78]
[67] *Sporting Investments Ltd* [2002] NZLLA 486 (6 September 2002)
[68] *L & H Graces Place Ltd v Abbott,* above n 38, at 112

[103] It is submitted that Mr McKeany's response to the DLC goes to whether the sale, supply and consumption of alcohol would be undertaken safely and responsibly, and also to the applicant's suitability. By not taking this into account as a relevant matter, it is submitted that the DLC erred.

Submissions for respondent

[104] In respect of the designation for the premises, Mr Lang for J & I Imports submits that a restricted designation was considered appropriate because of the advice of the Police, which was made clear to the DLC and that the reason the Police recommended this was because the Police considered a restricted designation would reduce the risk of alcohol-related harm. Mr Lang submits, however, that a designation does not impact on whether the sale, supply or consumption of alcohol will be undertaken safely and responsibly or whether the applicant is suitable to hold a licence.

[105] Having regard to *Sporting Investments Ltd,* it is further submitted that the business conducted within the premises is that of a tavern, which contains gaming machines and should, therefore, be designated. In any event, it is submitted that *Sporting Investments Ltd* provides guidelines only and is not determinative.

[106] In terms of the response to the question about revenue from alcohol relative to gaming, it is submitted that Mr McKeany's response was made in the context of the question asked by the DLC, which was about how he would increase alcohol sales. In any event, it is submitted that Mr McKeany expressed strong doubt that there would be greater sales from gaming machines than from alcohol. That is, it is submitted that Mr McKeany was essentially led by the DLC to provide an answer to a question on how he would increase sales, despite his initial reluctance to accept that such an action would be necessary.

Analysis

Designation

[107] Section 119 of the Act reads:

> **(1) The licensing authority or licensing committee concerned must do one of the things described in subsection (3) when issuing an on-licence for a hotel or a tavern.**
> **(2) ....**
> **(3) The things referred to in subsections (1) and (2) are—**
>
> **(a) designate all of the premises—**
> **(i) an area to which minors must not be admitted; or**
> **(ii) an area to which minors must not be admitted unless accompanied by a parent or guardian:**
> **(b) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted:**
> **(c) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian:**
> **(d) both—**
> **(i) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted; and**
> **(ii) designate a part (or any of 2 or more parts) of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian.**

[108] It is clear on its face that s 119 provides that a part or parts of the tavern premises are to be designated as restricted or supervised.

[109] The Authority is satisfied that the DLC chose to designate all of the premises an area to which minors must not be admitted unless accompanied by a parent or guardian (per s 119(3)(c)). There is no error established in that regard.

[110] In respect of the contention that the gaming room is a separate room that is not a bar within the confines of the tavern, such that it ought not be designated, the Authority disagrees. In *Sporting Investments Ltd,*[69] the Authority was concerned with premises where a separate room had been set aside for gaming machines, which were not a mere 'sideline' to the principal business of the sports café bar, and where the machines were not in a bar. Here the gaming room cannot be described as being separate from the rest of the tavern, and this will more so be the case when the wall around the gaming room is moved (which move Mr Bridle has acknowledged). Further the evidence does not establish that the gaming room will be the primary business of the premises. The DLC itself said that the gaming room will comprise about ten per cent of the floor.[70] From the Authority's site visit, this estimate is about right, or if anything, generous.

[111] As such, the decision to designate the gaming room is not inconsistent with *Sporting Investments*, which also says that where a business is conducted within a tavern, then the area (bar) which contains machines may receive a designation.

[112] The Authority is not satisfied that the DLC erred in designating the premises as supervised as opposed to restricted. The original application as filed by J & I Imports Ltd was for a supervised designation. This was only changed on the recommendation of the Police because the Police considered that a restricted designation would reduce the risk of alcohol-related harm. The Police, in the end, did not oppose the application and did not speak to this issue before the DLC.

[113] The DLC considered that it would not be drawn into designating a gaming room as a restricted area purely to accommodate gaming machines. Instead, the DLC considered that if the licensee wished to responsibly designate the gaming room as a restricted area for the purposes of the Gambling Act 2003, that was a matter for the licensee rather than the DLC, as a DLC is charged with making designations for reasons relating to alcohol licensing.

[114] Before the Authority, in response to a question from the Authority, Dr Hewison said that he considered the DLC should have been drawn into this question. The Authority disagrees and finds no error in the reasoning of the DLC. The focus on designations for a DLC is for reasons to do with the object of the Act and not the Gambling Act 2003.

[115] On a plain reading of the Act, the DLC has designated all of the premises as an area to which minors must not be admitted unless accompanied by a parent or guardian (that is, as a supervised area). There is, therefore, no breach of the Act.

[116] Nor can a decision that rests with the DLC, especially one that has been made in accordance with s 119, be somehow sheeted home on appeal, to challenge the suitability of an applicant.

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[69] *Sporting Investments Ltd,* above n 67
[70] DLC decision at [53]

Increasing alcohol sales

[117] In terms of the response about increasing alcohol sales, the Authority agrees with Mr Lang that this must be read in context. It is clear that Mr McKeany did not consider that revenue from gaming would exceed that from the sale of alcohol and other refreshments. He said as much twice in response to questions from the DLC[71] and a further time in response to a question from Mr Davies.[72]

[118] Moreover, the DLC expressly asked Mr McKeany "You've been in this business for 20-odd years, how are you gonna turn it round or increase alcohol sales and reduce gaming? What can you do?". Mr McKeany merely responded to the question he was asked. In doing so, it is clear that Mr McKeany did not see the need to increase alcohol sales or to reduce the number of gaming machines because in his words, "I honestly can't see it running at 50%. I've run machines before and I know how they run in comparison to bars."[73] In this context, the Authority does not consider that Mr McKeany's response goes to his suitability to hold a licence.

[119] The Authority is not satisfied that this ground of appeal has been made out.

Ground 5 'a reasonable range of food is not available'

Submissions for appellant

[120] Mr Bridle submits that the menu provided at the hearing was for "Cottage Pie, Fish Pie, Beef Lasagne, Sweet & Sour Pork, Chicken Corma (sic), Roast Lamb Dinner, Ham & Pineapple Mini Pizza, and Chicken & Bacon Mini Pizza." In addition, before the DLC, Mr McKeany said he would also be offering hot chips.

[121] The menu provided also stated that all meals would be microwaved.

[122] Mr Bridle submits that offering only 'heat and eat' or microwaved meals does not accord with the requirement of s 53 of the Act as set out in the Authority's decisions in *Empire Hotel Petone Limited*[74] and *Paulin v PC Bar Limited & Clark*.[75]

[123] It is submitted that these decisions are authority for the proposition that the Act requires types of food that include fresh ingredients and not several microwaveable meals such as J & I Imports intends to offer. Mr Bridle says that what is being offered is essentially the equivalent of three types of pies. Mr Bridle submits that the DLC erred in determining that the menu, even with the inclusion of hot chips, was sufficient to meet the purposes of the Act, and more particularly s 53.

[124] Before the Authority Dr Hewison said that if one overlays the object of the Act, that is the minimisation of harm, with the requirement for food in s 53, the provision of frozen food does not meet the requirement of the Act. Dr Hewison said that instead the Act requires food to be fresh, and fresh food will better meet the object of 'the safe sale, supply and consumption of alcohol' as it is more likely to be promoted by the premises relative to frozen food.

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[71] Transcript at page 22
[72] Transcript at page 23
[73] Transcript at page 22
[74] *Empire Hotel Petone Limited* NZLLA PH 1652/2008
[75] *Paulin v PC Bar Limited & Clark* [2018] NZARLA PH 200-300

Submissions for respondent

[125] Mr Lang disputes that Mr Bridle has correctly interpreted the Authority's decision in *Empire Hotel Petone Limited* to be as restrictive as he says it is. Rather what is required, as a minimum standard, is that food is able to be microwaved and does not require temperature control.

[126] It is submitted the DLC did not err in determining that the proposed menu was sufficient.

Analysis

[127] Section 53 of the Act requires the holder of an on-licence to ensure that, at all times when the premises are open for the sale and supply of alcohol, a reasonable range of food is available for sale and consumption on the premises, in portions suitable for a single customer, at reasonable prices, and within a reasonable time of being ordered.

[128] In *Empire Hotel Petone Limited*, a decision under the 1989 Act, the then Liquor Licensing Authority had cause to consider the issue of the supply of food in an application for an on-licence. At that time, there was no equivalent of s 53. Rather, s 14(5)(b) of the Act stated that the Licensing Authority, or the District Licensing Agency, as the case may be, may impose conditions relating to the provision of food for consumption on the premises.

[129] The Authority said:[76]

> We believe that it is time to introduce minimum food standards for licensed premises (other than restaurant style licences), along the following lines:
>
> - The range of food must be readily available at all times that the premises are open.
> - Menus must be highly visible and food should be actively promoted using a variety of mediums, e.g. menus on the tables, a board, or food on display. Food should also be advertised in any outdoor areas.
> - Bar staff are expected to actively promote the range of food options.
> - A minimum of three types of food should be available. e.g. paninis, pizzas, lasagne, pies, toasted or fresh sandwiches, wedges, filled rolls, and/or salads. (This does not mean three types of pie.)
> - It is acceptable to have a menu from neighbouring premises to provide for one or two of these options, however, there must be a back up option that could be produced on site.
> - A minimum standard to be accepted on site would be a microwave or fryer and utensils, and a supply of a variety of "long life" meals that do not require temperature control, or tins of soup and rolls. There should be an area for preparation of food and utensils for service of the food.
>
> It is not possible to incorporate these standards as conditions of an on-licence because to do so would make the licence too complicated. However we anticipate that the standards will provide licensees with a set of minimum expectations. It may well be that in some limited circumstances a licensee will be able to satisfy the Agency that total compliance is not possible. As will be seen below, a licensee can provide its own menu with its application for a

[76] *Empire Hotel Petone Limited*, above n 74 at [38]-[39]

> licence or a renewal. Whether the menu is acceptable will be a matter for the monitoring agencies. As always, the ultimate test will be the reasonableness of the proposals, when looked at in the light of each individual set of circumstances.

[130] In *Marsh v Sharma and Sons (2009) Ltd*,[77] this Authority also said that it does not accept that it is sufficient for the purposes of s 53 that food is available from other premises.

[131] Nowhere in these decisions, however, does the Authority state that food must be fresh and could not be microwaveable. To the contrary, in *Empire Hotel Petone Limited* we said a minimum standard to be accepted on site would be a microwave or fryer and utensils, and a supply of a variety of "long life" meals that do not require temperature control, or tins of soup and rolls.

[132] In *Paulin v PC Bar Limited & Clark*, which was an enforcement application and not a licensing decision, we said that five heat and eat meals, along with some frozen crumbed fish found on the premises on the night in question did not suffice. There, the evidence was that there were in essence five meals on the premises. The cleaner was appointed as a temporary manager in charge of the premises and she did not know about whether there was additional food in a freezer. There, the food that was available did not constitute a reasonable range of food.

[133] *Paulin v PC Bar Limited & Clark* is not authority for the proposition that s 53 requires the food to be available to be fresh as is contended by Mr Bridle.

[134] Furthermore, the Authority is not satisfied that Mr Bridle has established that the provision of fresh food is necessary to meet the object of the Act relative to food on offer in J & I Imports Limited's menu. It was unclear whether the reason for this was because of something innate in the quality of fresh food or the time it took to prepare it. To the extent that Mr Bridle considered this was because fresh food might be better promoted, this was speculative at best. There was nothing before the Authority about how the food would be promoted and this was not evident from Mr Bridle's ground of appeal.

[135] Accordingly, this ground of appeal must also fail.

Result

[136] The Authority is satisfied that the DLC has properly evaluated the application having regard to the criteria in s 105 of the Act in the manner set out by Gendall J in *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*.[78] Having considered the evidence before the DLC, the Authority agrees with the DLC's evaluation of the application and is not satisfied that Mr Bridle has established any error on the part of the DLC.

[137] The Authority considers that this appeal is without merit.

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[77] *Marsh v Sharma and Sons (2009) Ltd* [2018] NZARLA 137

[78] *Christchurch Medical Officer of Health v J & G Vaudrey Ltd*, above n 51 at [55] – [56]

[138] The appeal is dismissed. Pursuant to s 158 of the Act, the decision of the DLC is confirmed.

[139] As requested by the respondent, the Authority leaves open the issue of costs, which is to be the matter of submissions by the parties, if any, and to be determined on the papers. The Authority directs that any application for costs be received by the Authority within 30 days from the date of this decision.

DATED at WELLINGTON this 1st day of November 2019

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