**PSYCHOACTIVE SUBSTANCES**

**APPEALS COMMITTEE**

**PSA 2014/005**

**IN THE MATTER OF** An appeal against the Psychoactive Substances Regulatory Authority’s decision

**BETWEEN** **ELP RETAIL LIMITED, KEVIN JOHN MILES, NIGOR TRADING LIMITED, KINNARI MIHAR PATEL, SMOKOS DISCOUNT TOBACCO SPECIALIST LIMITED PARTNERSHIP, KEVIN PAUL STEPHENS, VIDEO EXPO LIMITED and WENG & LI COMPANY LIMITED**

Appellants

**AND PSYCHOACTIVE SUBSTANCES REGULATORY AUTHORITY**

Respondent

**DECISION OF THE APPEALS COMMITTEE IN RELATION TO APPLICATIONS FOR INTERIM RELIEF**

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**Background**

1. All of the appellants operate retail premises from which approved psychoactive products[[1]](#footnote-2) have been sold. Their premises are located in either Hamilton or Hastings.
2. The Psychoactive Substances Act 2013 (“the Act”) came into force on 18 July 2013 and is intended to regulate the availability of psychoactive substances and products in New Zealand in order to protect the health of, and minimise harm to, individuals who use psychoactive products.[[2]](#footnote-3) The Act was created bring regulation to a pre-existing market engaged in the importation, distribution, and sale of psychoactive substances and products.
3. The Act establishes the Psychoactive Substantives Regulatory Authority (“the Authority”) which is required to determine whether, among other things, people who apply for licences to sell psychoactive products by retail should be granted.[[3]](#footnote-4) Part 2, subpart 1 of the Act creates the statutory mechanism for retail licence applications, and the grounds on which a licence may be granted by the Authority.
4. Section 17 of the Act details compulsory conditions that the Authority must impose on a licence issued under subpart 1 of Part 2.
5. Section 18 of the Act provides the Authority with a discretion to “impose any other conditions on the licence in addition to a relevant condition specified in s17 that the Authority thinks fit”. Section 18 is a mechanism by which the Authority may achieve overall compliance with the Act and its purposes set out in s3.
6. The Act also provides for the creation of Regulations that will provide guidance on how licences and other approvals under the Act will be considered.[[4]](#footnote-5) The Regulations are not in force at the present time.
7. As a consequence, Schedule 1 to the Act was introduced to provide transitional provisions that has enabled people in this market to apply for interim licences pending the Regulations coming into force. During the period in which this decision has been prepared the Appeals Committee has become aware of steps that may be taken to repeal this interim regime by legislation. This legislation will, if passed, effectively ban the sale of psychoactive products until full applications can be made in accordance with the yet to be created Regulations.
8. While noting these recent developments we record that we can only apply the law that exists at this time and this decision proceeds on this basis.
9. When a licence is issued on an interim basis, it is deemed to be cancelled within 28 days of the Regulations coming into force unless the holder makes a “full application” under the Act for a licence to carry out the activity to which the interim licence relates.[[5]](#footnote-6) In that case the interim licence will continue until the date on which the full application is determined.
10. The full licence application will then be considered by reference to the Regulations.
11. Each of the appellants applied for and were granted interim licences under the regime described above. Each of the appellants exercised the privileges of this licence from the premises described below:

* *ELP Retail Limited*, 370 Anglesea Street, Hamilton. This appellant sells adult novelties and gifts, associated products and psychoactive products.
* *Kevin John Miles*, 236 Heretaunga Street East, Hastings. This appellant’s business is called “Adult Selections” and is an adult store selling a variety of products from lingerie, adult aids, and psychoactive products.
* *Nigor Trading Limited*, 104 Karamu Road, Hastings. The appellant operates an adult store selling novelties and gifts and psychoactive products.
* *Kinnari Mihar Patel*, 371 Grey Street, Hamilton East, Hamilton. This appellant sells tobacco products and psychoactive products.
* *Smokos Discount Tobacco Specialist Limited Partnership*, 789 Te Rapa Road, Hamilton. This appellant is a specialist retailer of tobacco products and sells psychoactive products.
* *Kevin Paul Stephens*, 851 Victoria Street, Hamilton. This appellant operates a business called “Adult World” and specialises in adult novelties, gifts and sells psychoactive products.
* *Video Expo Limited*, 641 Victoria Street, Hamilton. It is unclear if and what other products this retail outlet sells, but we assume it may be videos or DVDs. The retail outlet sells psychoactive products.
* *Weng & Li Company Limited*, 220 Victoria Street, Hamilton. This appellant sells tobacco products as well as psychoactive products.

1. When the retail licences were issued to the appellants, it contained the following discretionary condition:

The sale of approved products is subject to any policy adopted by a local territorial authority.

1. The reference in the condition to a “policy” pertains to what the Act describes as “Local Approved Product Polices” (“LAPP”) prescribed by ss66 to 69 of the Act. These polices may be created and adopted by territorial authorities, as long as the authority complies with the special consultative procedure in s83 of the Local Government Act 2002.[[6]](#footnote-7)
2. An LAPP may include policies on the location of premises from which psychoactive products may be sold by reference to: areas within a district; proximity to other premises that sell products; and the proximity of other premises or facilities including kindergartens, early childhood centres, places of worship etc.[[7]](#footnote-8)
3. At the time that the appellants applied for their licences, there were no LAPPs in place in the districts from which the appellants intended to sell psychoactive products. This is likely to reflect the relatively strict interim timetable that was created by Schedule 1. Under clause 7, an applicant was required to apply for an interim licence within 28 days of the commencement of the Act. We perceive that there was a deluge of applications for interim licences following the Act coming into force on 17 July 2013.
4. Conversely, under s69, the territorial authority that intended to create an LAPP, had to do so in accordance with the special consultative procedure. That consultative procedure must have necessarily delayed the creation of LAPPs beyond the 28 days in which the licence applications had to be made under Schedule 1, and then considered by the Authority.
5. The approval date of the Hamilton City Council LAPP is 27 February 2014. The date on which the Hastings District Council LAPP was adopted was 6 December 2013.
6. As a consequence of those two LAPPs being adopted by the respective territorial authorities, the discretionary condition imposed on the licences of the appellants required them to cease trading in approved psychoactive products. To continue to trade would have been in breach of that condition and correspondingly an offence under s28 of the Act.
7. Following the adoption of the LAPPs, the Authority reviewed licences that had been issued for retailers operating within the districts under the jurisdictions of the territorial authorities that adopted the LAPPs. With respect to the eight appellants, the Authority formed the view that the continued sale of psychoactive products from those retail outlets would constitute a breach of the LAPPs, and consequently a breach of the condition on their licences.
8. On that basis, the Authority wrote to the appellants outlining its concerns and suspended those licences for a period of 21 days pursuant to s22(1)(c) of the Act.
9. The Authority had intended to review the suspension of the appellants’ licences within that three week period with a view to determining whether or not the licences should be cancelled under the same provision. As a consequence of the appellants pursuing appeals before this Committee, the Authority has taken no further steps in relation to those licences.
10. The appellants filed notices of appeal and applications for interim relief to this Committee, pursuant to Part 2, subpart 3 of the Act between 19 March 2014 and 21 March 2014.
11. Through counsel, the appellants requested that the applications for interim relief be contemplated as a matter of urgency. Accordingly we heard the applications for interim relief in a hearing at Wellington on 1 April 2014. The substantive appeal has been adjourned to 7 May 2014.
12. After hearing submissions on the applications for interim relief, we issued a results decision. We granted the application in part by ordering that the suspension of the licences imposed by the Authority pursuant to s22 of the Act be stayed pending our consideration of the substantive appeal. However, we refused to provide relief with respect to the discretionary condition imposed on the licences pursuant to s18. We now detail our reasons.

**Applicable law**

1. The ability of the Appeals Committee to offer some form of interim relief pending an appeal is framed in s45(4) which states:

A decision of the Authority against which an appeal is lodged continues in force unless the Appeals Committee orders otherwise.

1. Although this appears to confer a wide discretion on the Appeals Committee to “order otherwise”, that discretion is premised on a presumption that any decision of the Authority “remains in force”. We interpret this to mean that the decision under appeal remains valid unless there are good reasons to the contrary.
2. Additionally, the discretion must be exercised in accordance with the purpose and principles of the Act set out in ss3 and 4. Our discretion must be exercised with an eye to protecting the health of and minimising harm to individuals who use psychoactive substances.
3. Without reaching any definitive conclusions, we considered the boundaries of the discretion in s45(4) in *Parfitt v Psychoactive Substances Regulatory Authority*.[[8]](#footnote-9) In that that case, the appellant had been declined an interim licence to sell psychoactive products by retail and sought interim relief which, in effect, would have required this Committee to grant the interim licence. We expressed reservations about whether s45(4) permitted us to do so and, in any event, declined the application on the merits.
4. We held that when read as a whole, subsection (4) allowed the Appeals Committee to “order” that the decision of the Authority is not “in force” in respect to the subject matter of an appeal. We did, however, acknowledged that examples of orders that could be made under s45(4) included the imposition of a discretionary position or the suspension of a licence.[[9]](#footnote-10)
5. In this case we accept that the two decisions under appeal: The decision to impose a discretionary condition; and the decision to suspend; are “decisions” that would be amenable to the relief prescribed in s45(4). The question is whether that discretion should be exercised in favour of the appellants in the present circumstances.
6. In this regard we were assisted by the submissions of the appellants who draw parallels between this provision and s147(a)(ii) of the Sale of Liquor Act 1989 which bore some similarities. Counsel drew our attention to *Catz Niteclub (1991) Limited v Police*[[10]](#footnote-11) in which Justice Hansen held that a Court was unlikely to grant a stay until satisfied that:

* There was substantive merit in the appeal; and
* The consequences of the appeal are such that it would be completely unjust not to allow the relief.

1. His Honour observed that when there was a bona fide appeal, Parliament could not have intended to put an appellant out of business and render any success on the appeal nugatory.
2. Counsel also referred us to the *JM Enterprises Timaru Limited v McCrostie*[[11]](#footnote-12), which in turn referred to *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Limited*.[[12]](#footnote-13) The net effect of those cases was that the Court was required to make a preliminary assessment of the merits of the appeal, in addition to the impacts of the decision subject to the appeal on the appellants. The Court would have particular regard to the appeal being rendered nugatory if interim relief is not granted.
3. These cases also recognised the Court’s function in assessing: the impact of interim relief on third parties; the novelty and importance of the question involved; the public interest in the proceedings; and the overall balance of convenience.
4. It is noteworthy that while weight is to be attached to the commercial interests of the appellants, the considerations of the Court contemplating interim relief are much broader and must ultimately rest with the overall interests of justice in the particular case. We consider this important in the context of an Act directed at protecting public health.
5. It should be noted that in these, and other cases cited by the appellants, it appears that the licensing decision under appeal or review prevented those appellants from trading in any way. In the present case, the appellants have cited hardship with respect to the loss of trade in psychoactive products, but on the basis of the evidence before us, the sale of psychoactive products is not the appellant’s sole source of income. They also sell other products not affected by the Act, for example adult novelty items and tobacco goods.
6. In addition to the comprehensive survey of the principles provided by the appellant, we would also observe the cautions expressed in *Hossain v New Zealand Transport Agency*[[13]](#footnote-14)which concerned a decision to disqualify a taxi driver from holding a taxi endorsement on his licence for four years. The application for interim relief was made in conjunction with substantive judicial review proceedings.
7. His Honour Venning J held that the Court had a wide discretion to consider all the circumstances of the case in deciding whether to grant interim relief, “including the apparent strengths or weaknesses of the claim and all repercussions, public or private of granting interim relief[[14]](#footnote-15)”.
8. His Honour noted the caution expressed by the Court of Appeal in *Director of Civil Aviation v Air National Corporate Limited*[[15]](#footnote-16); that interim relief granted too readily would incentivise the applicants to launch judicial review proceedings simply to access the High Court Section 8 jurisdiction.
9. Ultimately, we must assess a series of considerations including but not limited to the position the appellants find themselves in, being unable to trade in psychoactive products, as a result of the introduction of the LAPPs in Hamilton and Hastings. However, we must also consider the public interest and the overall intent and purpose of the Act.

**Appellants’ submissions**

1. When the appellants received their interim licences to sell approved psychoactive products by retail, all of those licences contained the same condition set out in para 11 above.
2. We note that none of the appellants sought to appeal the decision to impose the discretionary condition, at the time the licence was issued. In this regard, this ground of the appeal has been brought outside of the 60 day period, from the date of the decision, in which appeals are to be lodged, unless the Appeals Committee allows a further period of time.[[16]](#footnote-17) No issue has been taken with this appeal being brought out of time by the Authority and accordingly we grant leave and will hear the substantive grounds of the appeal if they are pursued by the appellants.[[17]](#footnote-18)
3. Having received licences containing the discretionary condition, the appellants continued trading in psychoactive products. It is also apparent that the appellants were aware, or became aware, of active steps taken by the relevant territorial authority to create LAPPs. In some instances, the appellants have made submissions to the relevant territorial authority on the content of the LAPP.
4. The appellants recognise that the decision to impose the discretionary condition, and the subsequent decision to suspend the licences are all grounded in the recognition given by the Authority to the creation of LAPPs under the Act.
5. The appellants submit that although statutory power has been given to territorial authorities to create LAPPs, the statutory status of the LAPPs is unclear. Importantly, the appellants say, the Act does not bind the Authority to enforce an LAPP in its decision making powers. There is no provision in the Act which requires compliance with an LAPP, nor is compliance with an LAPP one of the mandatory conditions that must be imposed under s17. There is no crime for breaching an LAPP.
6. Therefore, the appellants submit, the imposition of the condition by the Authority elevated the status of the LAPP to a legal requirement which was not prescribed by the primary legislation from which the LAPPs are derived. This was both an error of law, and a self-imposed fetter on the Authority’s condition making discretion in s18.
7. Additionally, the appellants submit that the condition as framed by the Authority is defective due to its ambiguity. The condition merely states that the licensee must comply with “any policy” without specificity. In oral submissions, counsel for the appellant recognised that due to the timing of the issuance of the licences, and the subsequent creation of the LAPPs, the Authority could do little more than describe eventual LAPPs in this way. But nevertheless this created an intolerable burden on the appellants to comply with a condition that, in effect, did not exist, and could change over time. This made the discretionary condition unenforceable.
8. Counsel records that the territorial authorities have indicated that permitted zones in their LAPPs will change over time. This is not apparent from the LAPPs although we note that each is subject to a review following a period of time. It was submitted that this manifested a “moving feast” so as to make compliance with the discretionary condition impossible.
9. In summary, it was submitted that the respondent pre-emptively treated the LAPPs as a mandatory and binding condition on any licence it issued without knowing the content of the LAPPs and the specific impacts of those policies on individual applicants. As such, the respondent fettered their discretion and failed to consider the specifics and merits of each case.
10. Rather than being a mandatory condition, the appellants submit that the Act gives territorial authorities the ability to consult and produce policies relating to the location of retail premises where psychoactive products will be sold. However this merely creates a relevant consideration for the Authority in assessing the merits of an individual application. The appellants submit that even in the face of a conflict with a LAPP zone condition, it remained within the Authority’s discretion to issue a licence to an applicant if it determined that it was appropriate to do so.
11. Finally, it was suggested that the decisions have, in effect, permitted the territorial authorities concerned to use a central Government agency to ban products which the central Government have regulated, but also permitted. On this basis, it is said that the decisions are manifestly wrong.
12. The appellants acknowledge that the appeals involve important questions of law and submits that this weighs in favour of the discretionary interim remedies sought. It is said on behalf of the appellants that they have appealed in good faith. Their delay in appealing the discretionary conditions arose because at the time their licences were granted, no LAPPs existed. There was no need for an appeal. It is also contended that the appellants are suffering hardship due to their inability to continue to trade in psychoactive products.
13. With respect to third parties, the appellants have identified their customers and their inability to obtain approved psychoactive products from, presumably, their local retail outlet.
14. Ultimately, the appellant submit that the balance of convenience lies with interim relief being granted in the manner sought.

**Respondent’s submissions**

1. The Authority broadly agreed with the legal test to be applied and the various competing considerations that must be balanced by the Appeals Committee in assessing whether interim relief should be granted.
2. However, the Authority outlined the position it was in when contemplating the interim regime for granting retail licences and its obligation to ensure that licences issued by it complied with the Act.
3. It was submitted that it was entirely reasonable for the Authority to impose a condition which gave due recognition to any LAPPs that were adopted by territorial authorities, given the express statutory recognition of the creation and adoption of those polices in ss66-69 of the Act.
4. It was acknowledged that there is no explicit provision in the Act giving LAPPs the force of law, a contravention of which amounts to an offence. However, Parliament clearly intended territorial authorities to assume a responsibility for determining zones in which retail outlets could sell psychoactive products. If the Authority had not pre-emptively reflected LAPPs in the discretionary conditions that it imposed, then this would render the LAPPs nugatory when clearly they were meant to have statutory recognition.
5. Due to the circumstances created by the interim regime, it was both reasonable and necessary for the discretionary condition to refer to “any policy” and, in any event, the appellants were fully aware of the implications of that condition on their licences as the territorial authorities in question moved to consult and then create the LAPPs that were ultimately adopted.
6. It was for these reasons that the conditions were imposed, and the same reasons led to the Authority suspending the licences when the LAPPs were introduced. Those licences could not be exercised from the retail premises without breaching the LAPP, and correspondingly a condition on the licence.
7. It was submitted that the Appeals Committee should give due weight to both the discretionary condition and LAPPs reflecting as they do the policies of the elected territorial authority which was in the best position to assess restricted zones. The balance of convenience did not favour the granting of interim relief.

**Discussion**

1. When an appellate Tribunal contemplates an application for interim relief pending a substantive appeal, that Tribunal is placed in the position of having to assess the merits of the appeal on a preliminary basis, in addition to considering a range of factors. The merits must be assessed in this way before we have had the benefit of full argument on the subject.
2. Therefore in this decision we are bound to reach some preliminary views on the matters that have been raised in careful and thoughtful submissions by the appellants and the respondent, but we must emphasise that our views are preliminary only. Our collective minds are open to all submissions when the substantive appeal is heard.
3. In assessing the merits of the appeal, we have paid careful regard to all that has been submitted by the appellants. The appellants are, in all likelihood, correct when they submit that no particular status has been afforded to the creation and adoption of LAPPs in the Act. Compliance with LAPPs are not mandatory conditions imposed by s17. Nor is a breach of an LAPP an offence under the Act.
4. However, we cannot agree with the submission that the LAPPs have “no status” as the appellants appear to contend. We are not prepared to impute to Parliament an intent to establish a code by which territorial authorities can exercise a degree of oversight over the placement of retail outlets for psychoactive products, only to have that intent ignored by the Authority, or indeed by us.
5. We agree that the question of the status of the LAPPs must be explored further in the appeal, but they exist for a reason, and to give meaning to Parliament’s intent that statutory purpose must be reflected in decisions made by the Authority when issuing licences, and indeed by us.
6. Therefore, the appellants will have a hurdle to overcome to persuade us that the imposition of the discretionary condition was wrong because there is no legal status afforded to the LAPPs.
7. That is not to say this ground of the appeal is frivolous. Indeed we agree that it raises an important question of law that requires careful and thorough consideration. But fundamentally, the Authority was taxed in exercising its discretion under s18 with achieving the Act’s purposes and principles, and overall objectives. This included the LAPPs.
8. In this regard, we have some sympathy for the Authority contemplating interim licence applications submitted within 28 days of the Act coming into force. The Authority then, no doubt, would have exercised due diligence in considering those licences and if appropriate, issuing licences with conditions designed to achieve the objectives of the Act. However some of those objectives, including the LAPPs, would not have been realised until well after the initial round of interim licence applications.
9. If it is accepted on a preliminary basis that ss66-69 manifests an intent by Parliament to give territorial authorities “some say” in the operation of retail outlets within its territorial boundaries, the Authority cannot be criticised for attempting to give effect to that intent by the creation of the discretionary condition. But due to the timing, the framing of that condition was necessarily pre-emptive. The issuing of interim licences was always going to occur before territorial authorities could achieve consultation compliance required by the Act. This presented something of a “chicken and egg” situation for the Authority.
10. It is then unsurprising that the condition itself was couched in necessarily broad language, requiring compliance with “any policy”. At the time the licences were issued, no specific policies existed. While the appellants take issue with the broad nature of the condition, they would have equally taken issue if the Authority had delayed considering the applications until such time as territorial authorities had satisfied the consultation requirements necessary to create LAPPs.
11. It is arguable whether this represented the Authority fettering its discretion under s18 in an arbitrary way, or whether it was a necessary consequence of giving effect to Parliament’s intent within the limited period of the interim regime.
12. Therefore, on our initial assessment of the merits, we are not persuaded that the appeal has such high chances of success that to decline interim relief would create an injustice to the appellants.
13. Furthermore, and importantly, we are cognisant of the remedies available to the Appeals Committee which could include quashing the discretionary condition[[18]](#footnote-19), but can also include referring the matter back to the Authority for reconsideration.[[19]](#footnote-20)
14. If the complaint is that the Authority failed to properly consider the individual circumstances of an appellant’s licence as against the content of the now adopted LAPPs, there is a mechanism available that would permit that to occur. Reference of the decision to impose the discretionary condition back to the Authority would not necessarily result in that condition being quashed in the interim.
15. If referred back, it is conceivable that after due consideration of an appellant’s licence application in the specific context of the LAPPs in Hamilton or Hastings, the Authority would nevertheless impose a condition requiring compliance with the LAPPs. Given Parliament’s clear intent to involve territorial authorities in the regulation of the sale of psychoactive products an LAPP is likely to be given considerable weight, even if, as the appellants contend, they are not binding on the Authority.
16. Therefore even if we accept the submissions concerning the present condition, it is by no means certain that this would result in their being no condition imposed on the licence.
17. The considerations established in the cases cited to us include the public interest, and the interests of third parties. While the appellants represented the interests of their customers as third parties, we must also take into account the wider communities in Hamilton and Hastings represented by the territorial authorities who have taken steps of creating the LAPPs.
18. A number of submissions have been made to us about the scope of the LAPPs. It has been suggested that the LAPPs have been designed by these territorial authorities to effectively ban the retail distribution of approved products within the geographical limits of those Cities. We are in no position to assess those claims. We cannot sit as a Court of review in relation to the LAPPs, although we understand proceedings under the Judicature Amendment Act 1973 have been filed in the High Court at Hamilton in relation to the Hamilton LAPP.
19. What we can pay regard to is the fact that the territorial authorities have exercised their ability under the Act to create LAPPs in the interest of their local communities. The appellants may take umbrage with the scope of those policies but we consider we must give some deference to the elected territorial authority’s oversight of their local communities.
20. We must accept that the creation and adoption of the LAPPs occurred in compliance with the requirements of the Act, and the Local Government Act 2002. Unless successfully challenged in the High Court, we assume that these communities were properly consulted and the views of all interested parties taken into account before those policies were refined and eventually adopted.
21. We must make some acknowledgment that the territorial authorities are in a position better than us to determine where psychoactive product outlets should be located.
22. We accept the submission of the Authority that to provide interim relief in these circumstances would render nugatory the efforts by the territorial authorities to create LAPPs in the interests of their local communities. It would effectively permit all of the appellants to continue trading in psychoactive products in areas, and in places, where the territorial authorities had deemed those areas as being unsuitable.
23. For example, it is open to a territorial authority to create a policy in relation to where approved products may be sold by reference to kindergartens, early childhood centres and places of worship.[[20]](#footnote-21) The evidence before us does not indicate whether any of the appellants would be selling psychoactive products in close proximity to such institutions or whether this would fall foul of either of the LAPPs. But we would reluctant to grant interim relief that would permit this to occur, contrary to the interests of the territorial authority that created the policy and implicitly the interests of the community for whose benefit the policy was created.
24. In giving weight to this public interest consideration, we also recognise that the communities and territorial authorities in question are not parties to this appeal, and did not appear or were represented in the interim relief applications. They have not been able to respond to the suggestions made by the appellants about the policies.
25. We have been conscious of the impact on the appellants of being unable to trade in psychoactive products as a result of the decision of the respondent to suspend the licences, a subject to which we return below. We note, however, that all of the appellants trade in other goods not regulated by the Act and therefore their businesses are not entirely dependent on the sale of psychoactive products. We do not underestimate the economic impact of transitioning from selling these products, then not selling these products, but equally we must record that when the appellants obtained their licences, they were on notice that LAPPs could impact on their ability to trade.
26. Whether the appellants paid careful and due regard to these conditions is not clear, but from the outset of the licences being issued, it was always intended that the licences would become subject to any policy created by a territorial authority. The appellants had the opportunity to assess the risk to their business that an LAPP could create and modify their business practice accordingly. Equally, they could have appealed the imposition of the discretionary condition at the time that the licence was issued if the existence of that condition posed unacceptable business risk. This would have clarified to the licensee their rights and obligations under the licence so that they could alter their business model if required.
27. For these reasons overall we are not satisfied that we should exercise our discretion to stay both the imposition of the discretionary condition and the suspension so as to permit the appellants to continue trading in approved products in conflict with the LAPPs in Hamilton and Hastings.
28. While we will give careful consideration to the substance of the appeal, which will be heard shortly, we do not consider that interim relief in the meantime is justified.
29. We do consider that the decision to suspend the appellants’ licences should be stayed on an interim basis.
30. This decision was made by the Authority when it became apparent that LAPPs had been adopted in Hamilton and Hastings and that the appellants continued trade in psychoactive products under their licences would conflict with those LAPPs, and consequently the discretionary condition.
31. Under s22 of the Act, the Authority may suspend a licence if the Authority is satisfied that the licence holder has breached any conditions of the licence. There must be a breach of a condition before the Authority can take this step. We do not read s22 as creating a pre-emptive discretion to suspend a licence when the Authority believes that a condition may be breached at some future point in time.
32. This distinction may have been important in the present case because it was not clear on the material provided to us, whether the appellants had continued trading in approved products following the adoption of the LAPPs. During oral argument, counsel for the appellants and respondent advised that following the adoption of the LAPPs in Hamilton and Hastings, there was something of a hiatus when the appellants were unsure whether their retail premises infringed the zoning requirements of the LAPPs. It is understood that in these circumstances they continued to sell psychoactive products during this time.
33. Once the Authority had gathered sufficient information to determine that the appellants were trading in a manner that conflicted with the contents of the LAPP, the suspension decisions were made.
34. On this basis, it appears to us that the Authority had jurisdiction under s22 to suspend the licences because the appellants had sold approved products in breach of the condition. The appellants’ counsel appeared to accept that this was so, submitting that there was a period when the appellants had difficulty defining their obligations under the condition and LAPPs and therefore any breach of the condition was unintentional.
35. Giving the benefit of the doubt to the appellants, we accept that there was a period when it may have been unclear to them that continued trade would breach the discretionary condition of their licence by virtue of infringing the LAPP. We are, however, bound to observe that it is the responsibility of a licence holder to know and understand the conditions of their licence which, in this context, would include knowing and understanding the terms of the LAPP once that policy was adopted. Licensees have a legal obligation to comply with the conditions of their licence. It is not the responsibility of the Authority in every case to extract compliance by suspending licences.
36. In any event, although the suspension decision was made in good faith, and with jurisdiction, we do not consider that the suspension is necessary.
37. The condition requires the appellants to comply with “any policy” which we consider is a direct reference to the LAPPs created by the territorial authorities in Hamilton and Hastings. If the appellants’ shops are in places which are not approved locations, then to continue to trade in psychoactive products would conflict with those policies. By virtue of the condition, the sale of those products “is subject” to the LAPPs. Therefore it is not permissible under the condition to trade in a manner which is contrary to the LAPP.
38. While the decision to suspend licences was taken to ensure compliance with the Act, the condition itself and the requirement that licensees comply with those conditions, is itself sufficient to achieve that purpose. For these reasons the suspension was unnecessary and does not need to continue at this time.
39. This may present as a hollow outcome to the appellants because they are still bound by the condition which requires compliance with the LAPPs. However in reaching our conclusion on the suspension decision, we have recognised that with respect to the Hamilton appellants, there is currently review proceedings before the High Court challenging the LAPPs in that City. We are not aware of whether a similar challenge has been made to the LAPP in Hastings although it must be recognised that any outcome that was favourable to the appellants in Hamilton could prompt similar proceedings in Hastings.
40. By staying the suspension decision, we are able to give recognition to any future outcome in the High Court proceedings in Hamilton. If the applicants in those cases were successful in obtaining relief from the High Court, for example by the High Court quashing the LAPP, then those appellants operating in the Hamilton area would be able to resume selling approved products in accordance with the conditions of their licence. There would be no valid LAPP in place and correspondingly no infringement of their LAPP condition. This would put the appellants back to the position they were in prior to the adoption of the LAPPs.
41. We are not aware of whether interim relief could be obtained by the applicants in the judicial review proceedings, or whether that has been sought. But equally a decision by the High Court staying the LAPP on an interim basis would have the same effect.
42. Finally, we are also cognisant that certain consequences follow the suspension of a licence. For example the Authority must, within a reasonable period of time, consider whether to cancel the licence. We record that the Authority has responsibly indicated it would not move to cancel licences pending the outcome of this appeal but nor do we consider that the appellant should be vulnerable to cancellation in the circumstances.
43. For these reasons, we therefore stay the decision to suspend the licences until the substantive appeal has been heard.

**Outcome**

1. For the foregoing reasons, we decline the application to order that the decision imposing the discretionary condition be stayed pending the appeal.
2. We order that the decision to suspend the appellants’ licences be stayed pending the appeal.

Dated: 30 April 2014

**FLETCHER PILDITCH**

Chairman

Psychoactive Substances Appeals Committee

1. Defined in s4 as a finished retail product containing a psychoactive substance. [↑](#footnote-ref-2)
2. Section 3. [↑](#footnote-ref-3)
3. Section 13(1)(e). [↑](#footnote-ref-4)
4. Sections 99-101. [↑](#footnote-ref-5)
5. Schedule 1, clause 9(1). [↑](#footnote-ref-6)
6. Section 69(1) [↑](#footnote-ref-7)
7. Section 68 [↑](#footnote-ref-8)
8. PSA 2013/002, 20 December 2013. [↑](#footnote-ref-9)
9. Paras [53] and [54]. [↑](#footnote-ref-10)
10. [1996] 3 NZLR 581. [↑](#footnote-ref-11)
11. HC Timaru, CIV 2007-476-581, 5 December 2007. [↑](#footnote-ref-12)
12. (1999) 13 PRNZ 48. [↑](#footnote-ref-13)
13. HC Auckland, CIV 2011-404-004986, 14 September 2011, Venning J. [↑](#footnote-ref-14)
14. Para [15]. [↑](#footnote-ref-15)
15. [2011] NZCA 3. [↑](#footnote-ref-16)
16. Section 45(3). [↑](#footnote-ref-17)
17. The appellants have recently sought an adjournment of the appeal due to the imminent prospect of legislation banning products until full applications can be made. We have addressed this issue in a separate minute (4). [↑](#footnote-ref-18)
18. Section 45(6). [↑](#footnote-ref-19)
19. Section 46. [↑](#footnote-ref-20)
20. Section 68(c). [↑](#footnote-ref-21)