**PSYCHOACTIVE SUBSTANCES**

**APPEALS COMMITTEE**

**PSA 2014/001**

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

**BETWEEN** **COSMIC CORNER LIMITED**

Appellants

**AND PSYCHOACTIVE SUBSTANCES REGULATORY AUTHORITY**

Respondent

**DECISION OF THE APPEALS COMMITTEE ON APPEAL**

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**Introduction**

1. On 1 April 2014, the Appeals Committee heard this appeal at a hearing in Wellington in which the appellant was represented by Ms Shelley Eden and the Regulatory Authority, the respondent, was represented by Ms Anita Miller.
2. The appeal related to a discretionary condition that had been imposed on a licence issued to the appellant permitting it to sell psychoactive products in accordance with the Psychoactive Substances Act 2013 (“the Act”). While the licence permitted the appellant to sell psychoactive products, the discretionary condition prohibited the appellant from selling food, confectionery, soft drinks, or household goods from the same premises in conjunction with psychoactive products. This discretionary condition conflicted with the appellant’s business model and as a consequence the appellant appealed to this Committee.
3. At the conclusion of the hearing, and after a brief adjournment, we indicated that we would grant the appeal by removing the discretionary condition from the licence but at the same time substituting another condition that would make the appellant’s premises an R18 venue. This was met with little opposition from the appellant who had already operated the store, voluntarily, on an R18 basis prior to the appeal.
4. We invited counsel to confer and draft a condition which would reflect our decision, which we received on 6 April 2014.
5. However, within this period the Psychoactive Substances Amendment Act 2014 was past under urgency and is now law. As is described below the net effect of the amendments is to ban the sale of psychoactive substances and products under interim licences and all interim licences that were issued have been revoked.
6. Therefore although we granted the appeal the amendments to the Act now make that outcome nugatory. For these reasons we make no further decision as to the licence of the appellant, but we set out our reasons for our initial indication at the appeal hearing.

**Background**

1. It is important to canvass both the legislative and factual background to this appeal, and in particular the recent amending legislation that has been passed.
2. The Act came into force on 18 July 2013. The purpose as set out in Section 3 was to regulate the availability of psychoactive substances in New Zealand “to protect the health of, and minimise harm to, individuals who use psychoactive substances”.
3. The term “psychoactive substance” is defined broadly in s9 as “a substance, mixture, preparation, article, device or thing that is capable of inducing a psychoactive effect (by any means) in an individual who uses the psychoactive substance”.
4. In turn, a “psychoactive effect” means an effect of the substance on an individual’s mind.
5. A “psychoactive product” is a finished product packaged and ready for retail sale that either is a psychoactive substance or contains one or more psychoactive substances.
6. The Act was introduced to bring regulation to a pre-existing industry that manufactured, distributed, and sold a variety of substances that were commonly known as “legal highs”. The notion that they were “legal” is something of a misnomer. Many of the substances were not classified as controlled drugs under the Schedule to the Misuse of Drugs Act 1975, but nor were the substances that were intended for consumption by people regulated in any way. The substances appeared to occupy a space between prohibition and explicit regulation. There were no controls as to the manner in which the substances were composed, packaged, marketed, sold, and eventually consumed. This was of concern to the public and Parliament responded with the Act.
7. The substantive architecture of the Act established the Regulatory Authority which is taxed with the responsibility of determining whether psychoactive substances and psychoactive products could be imported, manufactured, distributed or sold in New Zealand and who should hold licences that would permit them to conduct these activities.
8. At the core of the Regulatory Authority’s function was the need to reflect the principles set out in s4 which govern the manner in which psychoactive substances and products should be assessed.
9. Psychoactive products should pose no more than a low risk of harm to individuals who use it and those products that manifest no more than a low risk of harm should be approved. Conversely a psychoactive product that poses more than a low risk of harm to individuals should be prohibited.
10. A psychoactive substance or product that has not been approved, should be prohibited on a precautionary basis until it has been assessed. Assessments should be made on the basis of advice of an Expert Advisory committee and evidence including the results of preclinical and clinical trials.
11. Subpart 3, in addition to establishing the Regulatory Authority, also established the Psychoactive Substances Expert Advisory Committee.
12. Part 2 of the Act prescribes the regime by which people could apply for licences to import, manufacture, research, or sell psychoactive substances and products by retail or by wholesale. The provisions in Part 2 are the key mechanics of the Act by which applicants can seek approval for products and licences to sell those products. It is in this Part, Subpart 3, that this Appeal Committee is established.
13. Part 3 of the Act imposes a variety of controls on approved products including age restrictions and restrictions on where approved products could be sold. There are requirements concerning marketing of the products, in addition to offence provisions for when the Act is breached. The Subpart also provides a mechanism by which territorial authorities can establish policies about the location of stores selling approved psychoactive products within its territorial boundaries.
14. In Subpart 6 of Part 3, the Act provides for regulations to be created covering many aspects the trade in psychoactive substances and products. Included in the regulation making powers, is the ability to make regulations determining those substances that should or should not be psychoactive substances that are approved for the purpose of the Act. This in turn references back to the core architecture establishing the Regulatory Authority, the Expert Advisory Committee and the need for evidence of low risk of harm before psychoactive substances and productscould be approved.
15. We have been informed by counsel for the Regulatory Authority that the Ministry of Health responsible for administering this Act has expended considerable time to the exercise of preparing Regulations which will support the function of the Act and achieve its purposes. The preparation of those regulations is necessarily complicated and involved due to complex issues arising from the need to provide reliable frameworks in which the products can be assessed. Although it had been hoped that the regulations would come into force by now, that has not occurred.
16. The gap between the Act coming into force and the creation of Regulations was anticipated by Parliament which ultimately resolved that this essentially non-regulated market need regulation immediately.
17. Although psychoactive substances and psychoactive products cannot be assessed in the manner the legislation intends without the Regulations, Parliament nevertheless sought to bring the manufacture, distribution and sale of psychoactive substances and products within an interim regulatory environment.
18. As a consequence, Schedule 1 to the Act created an interim regime by which people could apply for interim approvals for products and correspondingly could apply for interim licences to sell those products pending the creation of the Regulations.
19. Under Schedule 1, Subpart 3 of the Act could be utilised by applicants to apply for interim approvals of psychoactive products and interim licences. Those applications had to be made within 28 days of the Act coming into force. The schedule only applied to psychoactive substances or products that were lawfully being imported, manufactured, researched, or sold throughout the period of three months immediately before the commencement of the Act.
20. Because the Regulations would introduce permanent mechanisms and standards for assessing psychoactive substances, all interim approvals or interim licences extended only to the point when the Regulations came into force. At that point the licence was deemed to be cancelled unless the licence holder made a “full application” to carry on the activity to which the interim licence related. This application would then be assessed in terms of the Act and Regulations rather than on an interim basis.
21. This is significant. Interim approvals have been assessed on what data is available, which is limited. “Full Applications” will no doubt need to be advanced on the basis of pre-clinical and clinical trials.
22. We have been informed that there was a deluge of applications by persons previously engaged in the unregulated market for psychoactive substances and products to achieve interim approval for products and interim licences to continue to sell those products. The Regulatory Authority had to manage many applications based on what information was available to it about the psychoactive products and the applicants who intended to sell them.
23. We understand that approximately 42 psychoactive substances/products were approved and many have not been approved (some of which have been the subject of appeals to this Committee). Equally a number of interim retail licences were issued and again, some declined, (again some being the subject of appeals to this Committee).
24. It is therefore in this interim regime that the present appeal has been brought and must be considered by us.
25. Since hearing the appeal on 1 April 2014, the Associate Minister of Health communicated an intention by the Government to effectively reverse the interim regime as it related to the approval of psychoactive substances and product.
26. This was, it was reported, as a result of a growing concern about the availability of psychoactive substances and products and the negative impacts of those products on the health of New Zealanders.
27. As a consequence Parliament has now passed under urgency amending legislation effectively banning all psychoactive substances and products until the Regulations anticipated by Part 3, Subpart 6 of the Act have been established. This has been achieved by revoking interim product approvals and interim licences, and recalling the products that have been sold to date.
28. This will remain until psychoactive substances and products can be properly assessed in the context of a framework which will reliably demonstrate whether those products pose a risk to the health of individuals in New Zealand.
29. It is also clear that despite the outcome of any appeal, no interim licence can now be issued until full applications can be made under the permanent framework anticipated by the Act.
30. However we consider it important that we do provide reasons, notwithstanding the most recent developments of this legislation, because eventually the appellant may wish to make a full application for a permanent licence. Our reasons may assist both the appellant but also the Regulatory Authority in any future application under the Regulations made by it.

**The Appeal**

1. The background to the appeal has been comprehensively and helpfully summarised in both the notices of appeal provided by Ms Eden on behalf of the appellants and also in submissions. There was no dispute about that background.
2. In August 2013, the appellant made applications for retail licences for a number of retail venues pursuant to Part 7 of the First Schedule to the Act.
3. The venue subject to this appeal is at 97-99 Cuba Mall, Wellington. This is one of a number of premises operated by the appellant between Wellington and Christchurch. The Cuba Mall store traded as the “Amsterdam Coffee Shop”.
4. On 13 August 2013, the Regulatory Authority indicated that it intended to grant the licence but place a discretionary condition on this and all other retail licences which was aimed to specifically prohibit the retailer from selling food of any type, confectionery, soft drinks, and other household goods.
5. The basis for the Regulatory Authority’s decision to impose the discretionary condition was grounded in s52 of the Act to which we will return.
6. There was a dialogue between the appellant and the Regulatory Authority in which the appellant endeavoured to persuade the Regulatory Authority to refrain from imposing the discretionary condition. However, in its final decision of 14 November 2013, the Regulatory Authority indicated that the licence would contain the discretionary condition concerning the sale of food etc.
7. When a discretionary condition has been imposed pursuant to s18 of the Act, under ss(2) the licence holder may ask the Authority for reasons, which was done by the appellant on 18 December 2013. Due to the Christmas period the letter was provided on 13 February 2014.
8. The appellant had originally filed a notice of appeal dated 8 January 2014 in order to meet the 60 day time limit for the filing of appeals set out in s45(3) of the Act, however the appellant did not have the benefit of the Regulatory Authority’s reasons at that time. For these reasons we gave leave to the appellant to file and serve an amended notice of appeal once it had received the decision in addition to other relevant material from the Regulatory Authority. The amended notice of appeal was filed on 17 March 2014 and we commend the appellant’s counsel for the comprehensive and thorough way in which that notice has been prepared.
9. We directed and received substantive submissions prior to the hearing on 1 April 2014 and we were greatly assisted by the submissions of counsel during that hearing.
10. We now turn to the substantive issue, the arguments raised by the appellants and the Regulatory Authority, our analysis, and conclusions.

**Issue**

1. The point of the appeal is a relatively discrete one. The appellant satisfied the criteria to be a licence holder under s16 of the Act but under s18 of the Act the Regulatory Authority had a discretion to impose conditions on the licence that it thought fit. Although couched in broad terms, there was no dispute that the bounds of the discretion to impose discretionary conditions were the Act itself, and in particular the need to achieve compliance with the purposes and principles of the Act and its other provisions.
2. The provision in question that generated the discretionary condition is s52 which states:

A person must not sell an approved product from any of the following:

1. A shop commonly thought of as a dairy;
2. A shop commonly thought of as a convenience store;
3. A grocery store or a supermarket;
4. Any business where the principal business carried on is – [petrol stations];
5. Any premises where alcohol is sold or supplied under a licence issued under the Sale and Supply of Alcohol Act 2012;
6. Any premises that are not a fixed permanent structure (for example, a tent or marque);
7. Any vehicle or other conveyance (for example a mobile street cart);
8. Any other place or premises specified in descriptions or described in the Regulations.
9. In addition to intending to selling psychoactive products, the appellant also sold coffee from its café confined within its premises and café food, a variety of soft drinks (but not alcohol) in addition to what it described as novelty food such as Twinkies and other specialist sweets imported from overseas. The appellant also sold clothing apparel and other items associated with the nightclubbing milieu.
10. It was the sale of food, confectionery, and soft drinks that caused anxiety to the Regulatory Authority because in its view this would have brought the appellant within the prohibitions contained in s52 set out above. In particular it would permit the sale of psychoactive products from a venue “commonly thought of as a convenience store”.
11. The condition eventually imposed on this licence, and we understand on all licences, became known as the “standard discretionary condition” and provides as follows:

**Table 1 interim licence to retail psychoactive products**

* You must not sell food, confectionery, soft drinks, or household goods from the premises in which you are licensed to sell psychoactive products, except:
* in store specialising in adult themes and where entry is restricted to persons aged 18 years and over, sale of novelty food products, cosmetics, and household goods consistent with the adult them, is permitted.
* in stores specialising in tobacco or other smoking products and where entry is restricted to persons aged 18 years and over, sale of novelty food products or household goods consistent with that theme, is permitted.
* in speciality stores where entry is not restricted by age, sale of novelty of good products and specialist household goods is permitted. (In this context, a specialty store is a store that sells goods not generally as household goods and includes religious images and figures, incense, crystals, etc.)

1. In essence, the appellant contends that the Regulatory Authority must apply s52 to the specific circumstance of the Cuba Mall store. It submitted that rather than being a “convenience store” the premises represented something more akin to a psychedelic department store which sold a range of products targeted to a particular subculture. Like other department stores, such as Kirkaldie & Stains or Smith & Caugheys it had a café but, as counsel pointed out, s52 did not preclude cafés from selling psychoactive products.
2. Counsel for the Regulatory Authority contended that the Authority had correctly applied s52 in constructing the discretionary condition which was designed to meet the prohibitions in that provision. In essence because the appellant sold confectionery items, and other items of food, it characterised the venue as a place that would be commonly thought of as a convenience store and a venue prohibited from selling psychoactive products. Accordingly, the discretionary condition was necessary in order to ensure that the venue did not become one of the prohibited venues set out in s52.
3. In terms of how we approach the appeal, the Regulatory Authority submitted that this was an appeal from the exercise of a discretion and as a consequence, the principles concerning appeals by way of rehearing set out in *Austin Nicholls & Co Inc v Stitching Lodestar* [[1]](#footnote-2)werenot directlyapplicable. In *Austin Nicholls & Co Inc v Stitching Lodestar*, the Supreme Court confirmed, as a general proposition, that in an appeal by way of rehearing the appellant decision maker was required to come to its own decision on the issue under appeal. If the appellate Court’s opinion differed from the conclusion of their tribunal subject to the appeal, then the decision under appeal was wrong in the only sense that mattered and the Appeal Committee would afford a remedy.
4. However in *GS v New Zealand Psychologists Board* [[2]](#footnote-3), the Court maintained that when appeals concerned the exercise of a discretion the decision should not be overturned unless it could be demonstrated that the original decision maker: made an error of principle; considered irrelevant matters; failed to consider relevant matters; or was quite plainly wrong.
5. Therefore the Appeals Committee must be satisfied that the Regulatory Authority erred in law or was so plainly wrong so as to justify our intervention. It was submitted that we could not grant the appeal simply because our view differed on the factual assessments made by the Regulatory Committee in this case.
6. The appellant did not dispute that this was the appropriate approach. Therefore in framing the issue we adopt this approach: in order to grant the appeal we need to be satisfied that the Regulatory Authority erred in law or principle, considered irrelevant matters, or was just plainly wrong in imposing the discretionary condition in order to satisfy the needs of s52 of the Act.

**Submissions**

1. The appellant provided a body of material including photographs and an affidavit filed by Mark Campbell Carswell, the director of the appellant company.
2. No issue was taken with the provision of this evidence and indeed the Regulatory Authority also filed some evidence in response to a second affidavit filed by the appellants, (concerning the consumption of food in conjunction with psychoactive products).
3. In summary, that material supported the submissions made on behalf of the appellant in relation to the inception of the Cuba Mall store and its essential character.
4. The Cuba Mall store was opened in 2011 and was described by the appellant as a “destination venue”. It was developed as a retail venue which would comprise a coffee bar selling food and non-alcoholic beverages in addition to a range of other products targeted to a primarily youth market. Those other products included clothing, novelty items such as juggling kits and hacky sacks, sunglasses in addition to tobacco accessories such as pipes and lighters (presumably to support the consumption of psychoactive products).
5. The appellant also sold US candy products such as Twinkies and unusual M&M flavours, Tootsie Rolls, and Jolly Rancher lollypops. The venue sold tickets to local music events and on Friday and Saturday evenings, DJs played in the store to add to the ambience and enjoyment of its customers.
6. The photographs, and a store plan provided to us by counsel during the hearing, showed a venue with a particular design aesthetic utilising neon lights, a coffee kiosk placed towards the front of the store and various display racks.
7. Significantly, the appellants voluntarily developed an R18 policy which it imposed on the Cuba Mall store in its effort to ensure its products were marketed responsibly and in strict compliance with the prohibitions on sales of psychoactive products to persons under 18 contained in the Act. In fact the appellant indicated that once the Act came into force, all of its stores that previously sold psychoactive products were made R18.
8. This self-imposed step precluded anyone under the age of 18 from even entering the store. At the appellant’s cost, a security person checking for ID at the front of the store was employed to ensure compliance with this policy.
9. The appellant submitted that the Regulatory Authority erred in law in its interpretation of s52 and correspondingly the condition it created in an endeavour to reflect those prohibitions. Rather than viewing s52(1)(a) and (b) in terms of the statutory language, it was submitted that the Regulatory Authority equated the sale of any food products as tantamount to making a venue a dairy or convenience store.
10. This was inconsistent with the language of the section that prohibited venues “commonly thought of” as a dairy or convenience store. Counsel observed that there would be many shops not listed in s52 which would also sell food and confectionery or soft drink such as a café. Therefore the mere fact of sale of food, confectionery or soft drinks was not sufficient to meet the statutory language of the prohibition in s52, but the Regulatory Authority had approached the construction of this provision in this way.
11. The appellant also challenged the discretionary condition because of its generic nature and the fact it had been applied to all licence holders, citing as justification the need to ensure that those under 18 were not exposed to psychoactive products. The appellant submitted that this was inconsistent with cases such as *Old Forge Limited v Papakura District Licensing Agency* [[3]](#footnote-4)and *My Noodle Limited & Ors v Queenstown Lakes District Council & Anor* [[4]](#footnote-5)which concerned conditions imposed under earlier liquor licensing regimes.
12. In those cases, the Court cautioned against the Liquor Licensing Authority applying policies in an over rigid way without regard to specific circumstances of an individual applicant. In this case the appellant contended that the Regulatory Authority adopted an overly rigid interpretation of s52 without considering the specific circumstances of the appellant, and in particular its R18 policy.
13. In summary, the appellant submitted that the Cuba Mall store was neither a convenience store, nor supermarket as described in the Act and could not be commonly thought of as one simply because in conjunction with other products, it sold a limited and specialised range of food and confectionery.
14. In support of the Regulatory Authority’s decision it was submitted that the Authority had correctly interpreted s52 and necessarily imposed a condition on this and other licences in order to ensure compliance with s52. The Authority was right to interpret s18 to enable it to impose discretionary conditions in a manner that gave effect to s52. Therefore the imposition of the condition was manifestly reasonable and not capable of disturbance on appeal.
15. Counsel noted that the notion of “convenience store” was not expressly defined in the Act but the Authority was entitled to interpret the concept broadly in order to achieve the objectives of the Act. In particular preventing the sale of psychoactive products to persons under the age of 18 and otherwise protect the health of and minimise harm to individuals who use those products.
16. It was suggested that the appellant’s self-imposed R18 policy did not change the characterisation of the Cuba Mall store because despite that policy, food would be sold from it and it was the sale of these items that was sufficient to bring the premises into something which could be commonly regarded as a convenience store.
17. Counsel cautioned against allowing a “flood gate” of other venues applying for interim licences simply by developing an R18 policy or describing themselves as something other than a “convenience store”. Accordingly there was no basis to conclude that the Regulatory Authority had erred in law in its interpretation s52 nor misapplied this provision to the circumstances of the appellant.

**Analysis and Decision**

1. Section 52 is notable for those premises prohibited from selling psychoactive products, but also those premises which have been excluded from that list. While the appellant’s Cuba Mall store, dairies, and convenience stores all sell food, confectionery, and soft drinks we conclude that this is not the test to be applied under s52 to determine whether a venue is prohibited.
2. There are a host of other venues which are not prohibited by s52 which also sell the same line of products as those that would be common to the appellant’s Cuba Mall store, dairies, and convenience stores.
3. As counsel for the appellant agreed, cafés sell food, confectionery, and soft drinks. Subject to the prohibition on a licensed premises selling psychoactive products there is nothing in s52 that would prevent a café from selling psychoactive products. Indeed that must have been part of the appellant’s rationale for creating the Amsterdam Coffee Shop within the confines of the Cuba Mall store.
4. Therefore we consider that the Regulatory Authority erred in law when it equated the sale by the appellant of food, confectionery, and soft drinks as being tantamount to a prohibited premise. Equally this lead to the Regulatory Authority ignoring relevant factors in the assessment.
5. The prohibited premises are those “commonly thought of” as a dairy or convenience store. This must necessarily involve some objective perception which was no doubt intended to ensure that venues could not attempt to superficially alter their appearance to sell psychoactive products. For example, the corner dairy or Four Square could not alter its signage to exclude itself from the list of prohibited venues when it fact continued to trade in the range of products that people would commonly associate with a dairy or convenience store. In this sense, we do not agree that there is a “flood gates” risk with respect to those types of shops which are readily recognisable as prohibited venues.
6. Rather the test of a prohibited venue, and particularly something commonly thought of as a dairy or convenience store, requires the Regulatory Authority to contemplate all the circumstances of a particular venue to determine whether that venue would be “commonly thought of” in that way. The statutory tests requires an assessment of all of the relevant factors which will vary from place to place but will include, although not be limited to the following:

* the location of the venue;
* the hours the venue is open;
* the product lines sold by the venue and whether those product lines include household convenience items such as food, confectionery, and soft drinks but also extend to cleaning products, personal hygiene products, convenience food such as tins, breads, milk and other items made available for “convenience” to people who may be reluctant to make a greater journey to a supermarket;
* whether the items are specialist items;
* the sale of other items consistent or inconsistent with the perception of the venue being a dairy or convenience store such as specialty clothing and footwear and other lifestyle ranges; and importantly
* whether there is any age restriction on entering the store.

1. The Authority appears to have approached s52 on the basis that if food, confectionery, and soft drinks are sold from a venue, that venue will be commonly thought of as a convenience store but as we have demonstrated above, a more nuanced enquiry is required by the Act. In limiting its assessment to the food aspects of the appellant’s business, the Regulatory Authority failed to consider and give proper weight to other aspects of its business going to the “commonly thought of” part of the test.
2. Considering all the relevant factors we agree with the appellant’s assessment that the venue is a psychedelic department store containing a café, and directed at a particular subculture. That coupled with its R18 policy could not bring it within the statutory exclusion because a reasonable and objective observer of this venue could not conclude that it was the same or similar to a dairy or convenience store in the true sense of those terms.
3. The store does not sell toilet paper, or tins of baked beans. It does not sell cleaning products, toothpaste or other personal hygiene items. While its hours may be similar to those of a dairy or convenience store that is because its market is directed towards night clubbers and people who socialise in nearby bars and cafés.
4. Importantly a dairy or convenience store does not commonly have a bouncer requiring proof of age and a policy that prohibits people under the age of 18 from entering the store. The mere fact that the Cuba Mall store, in conjunction with other aspects of its business, sells food, confectionery and soft drinks does not of itself lend this venue to a common perception that because of those items the venue is akin to a dairy or convenience store.
5. We also conclude that the Regulatory Authority was just plainly wrong in concluding that this venue qualified for exclusion under s52 when all of the venues circumstances are considered as a whole.
6. In our view, the appellant’s Cuba Mall store does not come close to something that could be thought of as a diary or convenience store. There will be other cases where the line is more finely drawn. Each case will have to be assessed on its own merits. We caution that by merely adopting an R18 policy, altering signage, or in some other way superficially endeavouring to alter the function of the venue, a venue could avoid the prohibition in s52.
7. Ultimately the decisive and critical factor to us was the appellant’s R18 policy which puts the matter beyond doubt. A dairy or convenience store may sell products such as cigarettes, or alcohol, that cannot be sold to people under the age of 18. But a dairy or convenience store is always open to young people to buy other products. The appellant’s Cuba Mall store is off bounds to anyone under the age of 18 and as a consequence is different in character from dairies and convenience stores and perceptively so.
8. For all these reasons we intended to grant the appeal. However because of the emphasis that we have placed on the characterisation of the venue as R18 only by the appellant, we considered that the present condition would have to have been substituted with a condition that required the venue to have and maintain an R18 policy at all times, and that this be an enforceable condition of the licence. This would meet any concern about the sale of confectionery, food, and the operation of the café and would ensure that the venue will remain squarely outside of s52.
9. Further because the appellant’s store limits the sale of food, confectionery and soft drinks to its café and specialised food products, we would also substitute a discretionary condition to limit the sale of food, confectionery and soft drinks to achieve the same purpose.
10. We invited counsel for the appellant and respondent to confer and provide us with draft wording which we received on 6 May 2014 in a memorandum dated 5 May 2014.
11. With respect to the food and beverages condition, we accept that that is appropriate and would have ordered the imposition of the substituted discretionary condition accordingly (see below).
12. However we do not consider that the R18 condition was explicit enough to ensure that the venue maintained its R18 characterisation.
13. In order for an R18 discretionary condition to work, there must be an underlying policy that demonstrates how that licence condition will be complied with. In light of the material provided by the appellant in support of its appeal, we anticipate that a policy already exists and if not, one could readily be prepared to demonstrate the manner in which the appellant has voluntarily complied with an R18 condition, and intends to do so in the future.
14. We consider that the creation and maintenance of that policy should form part of the licence condition so that the Regulatory Authority has a mechanism by which to measure the appellant’s R18 policy performance.

**Result**

1. For the foregoing reasons but for the amendments to the Act we would have granted the appeal, and we would have quashed the standard discretionary condition on the appellant’s licence.
2. We would have substituted the following condition which would have to appear in a licence to be reissued by the regulatory authority to the appellant:

***R18***

* *You must develop and maintain an R18 policy for entry to the licensed premises.*
* *That policy must be provided to the Regulatory Authority before you exercise the privileges of this licence. That policy forms part of the conditions to this licence.*
* *You must at all times adhere to the R18 policy in a manner in which it is to be implemented in accordance with the policy.*

***Food******and beverages***

*You may sell:*

* *Specialty confectionery products imported by you, including Twinkies, unusual M&M flavours, Tootsie Rolls and Jolly Rancher lollypops; and*
* *In the Amsterdam Coffee Shop portion of the premises you may sell hot and cold drinks, including tea, coffee, smoothies, fruit drinks and energy drinks, and food items including cakes and biscuits, savoury food items, and ice-cream.*

1. In light of recent legislature amendment, this outcome is moot for the appellant at the present time. However in the future the outcome of this appeal may assist the appellant, and the Regulatory Authority, should the appellant pursue its interest in the sale of psychoactive products from the Cuba Mall store.

Fletcher Pilditch

Chair – Psychoactive Substances Appeals Committee

Dated this 20th day of May 2014

1. [2007] NZSC 103. [↑](#footnote-ref-2)
2. [2010] NZAR 417 (HC). [↑](#footnote-ref-3)
3. HC 115/95, 20 February 1996. [↑](#footnote-ref-4)
4. HC Christchurch, CIV 2007-485-2559. [↑](#footnote-ref-5)