

LICENSING COURT OF SOUTH AUSTRALIA

BWS MOUNT BARKER

JURISDICTION: Application for a Review of or an Appeal from a decision of the Commissioner

CASE NO/S: 30 of 2022

HEARING DATE: 26 and 27 October 2022;
Written submissions 31 March, 21 April 2023,
9 & 12 May 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 19 May 2023

CATCHWORDS:

*Application for review – The Commissioner for Liquor and Gambling refused an application for a packaged liquor sales licence in respect of proposed premises adjacent to a Woolworths supermarket in Mount Barker on the grounds that it was not in the community interest or the public interest to grant it – The Commissioner had recently granted a packaged liquor sales licence in respect of proposed premises in a nearby shopping centre – The evidence established that the Woolworths supermarket was not only a large full line supermarket but it was that brand’s best performing supermarket in South Australia – It was contended that because of the volume of its customers, the grant of the application would provide them with a one-stop shopping experience whereby they would be able to purchase all of their grocery and drinks needs at one convenient location and that its unique characteristics would not create an undesirable precedent – **Held** that if this application were granted, it would result in there being in the Mount Barker town centre area effectively four bottle shops, one of which can be taken to sell take away liquor on an almost industrial scale, as well as a drive through, all within less than a kilometre of each other – **Held** that in light of accepted evidence that increasing the number of packaged liquor outlets in a neighbourhood is likely to increase rates of risky drinking, rates of alcohol-related harm and negative amenity impacts in that neighbourhood, the consequences of granting this application sets alarm bells ringing such that a conservative approach is compelled – **Held** that the number of take away liquor facilities in the Mount Barker town centre area has, at least for now, reached saturation point*

*and that despite the positive aspects of the application, the evaluative exercise that the Act requires points against it being in the community interest to grant this application – **Held** that because this application could only be granted if it were accepted that the mere fact that a large, busy full line supermarket is not co-located with a bottle shop is of itself sufficient to conclude that it is in the community interest to grant the application this would set an undesirable precedent and therefore, in any event, it would have to be refused on public interest discretionary grounds – **Held** that the Application for Review is dismissed – Liquor Licensing Act 1997.*

BWS – Mt Barker [2016] SALC 33
Liquorland Mount Barker (No. 2) [2023] SALC 3
Liquorland McLaren Vale (No. 2) [2022] SALC 53
Hove Sip n Save [2021] SALC 7
Liquorland Australia Pty Ltd (Park Holme) [2020] SALC 37
BWS Woodcroft [2022] SALC 108
Liquorland McLaren Vale (No. 3) [2023] SALC 2
On The Run Pty Ltd [2022] SALC 109
Liquorland Mount Barker [2022] SALC 21
Liquorland (Australia) Pty Ltd & Ors v Lindsey Cove Pty Ltd & Anor (2002) 81 SASR 337
Nardi v Director of Liquor Licensing (Occupational & Business Regulations) [2005] VCAT 323

Counsel:

Applicant: Mr T Besanko with Mr P Connelly
Objector: Mr S Henry KC with Mr B Allen

Solicitors:

Applicant: Clelands Lawyers
Objector: Wallmans Lawyers

- 1 This an application seeking a review of a decision of the Liquor and Gambling Commissioner (the Commissioner) wherein he refused an application by the applicant, Endeavour Group Ltd, (Endeavour) for a packaged liquor sales licence to trade under the BWS badge at proposed premises adjacent to a Woolworths supermarket within the Woolworths Shopping Centre at 5 Walker Street, Mount Barker.
- 2 The application was opposed in the proceedings before the Commissioner by Chelsea Bay Pty Ltd, Takma Pty Ltd, and Hutchinson Hotel Investments Pty Ltd, the joint proprietors of the two hotels trading in the vicinity of the proposed premises, Pulpit Tavern and Grays Inn. They maintain their opposition in connection with the within review. I will refer to them collectively as the objectors.
- 3 Endeavour contends that the Commissioner made several errors in reaching his decision, and that on the evidence presented, the licence should have been granted.
- 4 The legal principles applicable to an application for a packaged liquor sales licence under the *Liquor Licensing Act 1997* are now settled and do not require extensive elaboration. Such a licence is within a special category of applications defined in the Act as a ‘designated application’. Pursuant to s 53A of the Act, a ‘licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.’ To determine that issue the relevant community has to be identified and that in turn requires identifying the relevant locality.
- 5 Once the locality, and hence the relevant community, has been identified, in deciding whether the grant of the application is in the relevant community’s interest, pursuant to s 53A(2) of the Act the licensing authority must have regard to:
 - the harm that might be caused (whether to a community as a whole or a group within the community) due to the excessive or inappropriate consumption of liquor;
 - the cultural, recreational, employment or tourism impact;
 - the social impact in, and the impact of the amenity of, the locality of the premises or proposed premises; and
 - the nature of the business conducted or to be conducted under the licence (as prescribed).
- 6 Community impact guidelines have been issued that inform this process. Amongst other things they provide that: ‘the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the

community interest and to provide relevant evidence and submissions to discharge this onus.’ They speak of the locality as referring ‘to the area surrounding the licensed premises/proposed licensed premises and is the area most likely to be affected by the granting of the application.’ They suggest as a guide that the locality of licensed premises in the Adelaide Metropolitan Area is the area within a two kilometre radius of the site of the relevant premises and outside of the Adelaide Metropolitan Area is the area within a five kilometre radius of the site of the relevant premises.

- 7 Endeavour also needed to satisfy the Commissioner that the pre-requisites of s 57 of the Act had been met. Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.
- 8 The Commissioner expressed no concern about these matters and no issue was taken with them on review.
- 9 In addition to these matters, and as with any other licence application, a licensing authority has, under s 53 of the Act, an unqualified discretion to grant or refuse an application under the Act ‘on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application)’. It must refuse to grant the licence if it is satisfied that to grant the application would be contrary to the public interest. It must also refuse to grant a licence if it ‘is satisfied that to grant the application would be inconsistent with the objects of the Act’. Section 53(2) provides that a licensing authority ‘should not grant an application as a matter of course without proper inquiry into its merits, taking into account the operation of Division 13’.
- 10 In refusing the application the Commissioner found that it was not in the community interest to grant the application. He also found that it was not in the public interest to do so.

Mount Barker – Some relevant features

- 11 Before discussing details of the application made to the Commissioner and his reasons for refusing to grant the application, it is convenient to outline various features of Mount Barker and the various take away liquor facilities in and about that township.
- 12 This Court conducted a detailed analysis of this in connection with a previous application made in respect of essentially the same proposed

premises in *BWS - Mount Barker*¹ in 2016, and much of the following is taken from that judgment. It is supplemented by observations made by this Court on a view conducted in connection with this application for review.

- 13 Mount Barker is a peri urban township about 30 kilometres south-east of Adelaide. It is connected to Adelaide by the South Eastern Freeway. Whereas it once was a typical country town with a main street, Gawler Street, that contained most of the town's retail and commercial activity, it has since changed to a large urban centre which is continuing to develop. Most of the retail and commercial development has occurred in and about the historic centre of the town, which is just off the freeway and is accessed by an exit road from the freeway, known as Adelaide Road.
- 14 The Woolworths Shopping Centre is at the edge of the town centre of Mount Barker, in the north-west corner of the city centre, about 200 metres north of Gawler Street and just under a kilometre south of the freeway. It is serviced by a car park immediately in front of the centre and a multi-story car park nearby. It is classified as a regional scale centre that is within the District of Mount Barker's regional town centre zone. In addition to the Woolworths supermarket, it contains Mount Barker Newsagency; Noodle Box; Our Place Café; Nova Hair and Beauty; Mount Barker Fresh Markets; The Octopus's Garden (Seafood); Community Living Australia; Mount Barker Chicken and Seafood; a dentist; and Café Brunelli.
- 15 About 200 metres east of the Woolworths Shopping Centre is a large shopping complex known as Mount Barker Central. It is the major retail hub of Mount Barker. It is serviced by a large car park. It is significantly larger than the Woolworths Shopping Centre. It is anchored by a large Coles supermarket and a Kmart store. It has over a dozen food outlets, a similar number of clothing and accessory shops, and various service and health care outlets. It also contains a retail liquor store following a decision made by the Commissioner to grant an application for a packaged liquor sales licence for premises trading under the Liquorland badge. This Court recently affirmed that decision.²
- 16 Bisecting Gawler Street is Hutchinson Street, which runs from north to south. It is about 100 metres east of the Woolworths Shopping Centre and about 100 metres west of Mount Barker Central. On the western side of Hutchinson Street, about 150 metres or so south-east of the Woolworths Shopping Centre, and just north of the junction of Gawler Street and Hutchinson Street is the Pulpit Cellars,³ which is part of the Pulpit Tavern. Although it trades under a general and hotel licence it is indistinguishable from a traditional bottle shop store. It is an impressive facility.

¹ [2016] SALC 33.

² *Liquorland Mount Barker (No. 2)* [2023] SALC 3.

³ This appears to also trade under the name of "Urban Cellars".

- 17 Immediately adjacent to the Pulpit Cellars is an Aldi supermarket. The Aldi Supermarket is much smaller in size than the nearby Woolworths and Coles stores. Adjacent to the Aldi Supermarket is a car park. It is a typical supermarket car park of the type that would be encountered in most moderately sized suburban supermarkets in metropolitan Adelaide.
- 18 Almost immediately opposite and just round the corner, in Gawler Street, just east of the junction of Gawler Street and Hutchinson Street is Grays Inn. It is a conventional hotel with a conventional drive through and bottle shop trading under the Thirsty Camel badge.
- 19 About 400 metres or so further south along Hutchinson Street is a Dan Murphy's liquor store. It is a typical large destination liquor store of almost warehouse proportions containing an extensive range of liquor. Diagonally across the road from the Dan Murphy's is a shopping centre, anchored by a Foodland Supermarket.
- 20 As Adelaide Road heads south from the town centre, after about a kilometre it forks into three roads, Flaxley Road, to the south-south-west, Wellington Road, to the south-south-east, and Alexandrina Road to the east. About a kilometre along Wellington Road is a shopping centre that contains a large IGA store. Adjacent to it is the Cellarbrations store that operates as a convenience store offering a range generally comparable to a BWS store in an attractive, well laid out facility. There are no other facilities within this shopping precinct.
- 21 Immediately to the north of Mount Barker is the town of Littlehampton where there is a Sip'n Save drive through and walk-in bottle shop that forms part of the Great Eastern Hotel. It is a little less than three kilometres from the proposed premises.
- 22 After judgment was reserved the objectors became aware of the fact that the Commissioner had recently granted a packaged liquor sales licence in respect of proposed premises to trade under the Cellarbrations badge within the Aston Hills Village Centre. They applied to re-open the case to bring this to the attention of the Court. Endeavour opposed this but added that if the objectors were permitted to re-open, it wished to adduce fresh evidence relating to population increases in Mount Barker contained in the 2021 Census. I will return to this later in these reasons.

The proceedings before the Commissioner

- 23 Endeavour's application before the Commissioner was supported by written submissions and a Community Impact Report, dated 7 September 2020, that included a planning report prepared by MasterPlan.
- 24 The objectors filed submissions opposing the grant of the application.

- 25 In addition to the these, the Commissioner invited submissions from the Australian Competition and Consumer Commission (ACCC), Associate Professor Michael Livingston, the Royal Australasian College of Surgeons (RACS), and Australia's National Research Organisation for Women's Safety (ANROWS).
- 26 The ACCC submissions alluded to potential competition concerns if Coles and Woolworths were able to expand further via the grant of new liquor licences in local retail markets where they already have a significant presence and that the granting of new licences to them could undermine the competitiveness and viability of independent liquor retailers. The Commissioner noted that there is no other BWS store in the locality and he did not regard competition concerns as an issue in this case.
- 27 Amongst other things, Professor Livingston expressed a concern about the density of liquor outlets and social problems associated with alcohol. He stated in his submissions that: 'Substantial international research literature links the density of liquor outlets within a neighbourhood to the rate of alcohol-related problems experienced in that neighbourhood'. In his submission Professor Livingston added that: '... there is robust and consistent local evidence that increasing the number of packaged liquor outlets in a neighbourhood is likely to increase rates of risky drinking, rates of alcohol-related harm and negative amenity impacts of alcohol in that neighbourhood' and, that whilst the impact of any one individual store might not be great, it was the cumulative effect that could be substantial.
- 28 Included in the RACS and ANROWS submissions was an expressed concern about the impact of the COVID-19 pandemic and the suggestion that it had been associated with an increase in alcohol consumption and consequential social harm.
- 29 The Commissioner did not expressly rely upon these submissions in arriving at his decision and, to the extent that they expressed concerns about the impact of the COVID-19 pandemic upon issues such as increased alcohol consumption and increased adverse health and domestic violence consequences, in light of further and more recent evidence those concerns can be put to one side.⁴
- 30 As would be expected, Endeavour's application discussed the identification of the relevant locality. Reference was made to the guidelines. Because the proposed premises are outside of the metropolitan area, the guidelines provide that a five kilometre radius of the proposed premises is the suggested locality. Endeavour accepted that this was appropriate, but also noted that given the customer drawing power of the Mount Barker Regional Town Centre Zone, one could justifiably extend

⁴ See, for example: *Liquorland Mount Barker (No. 2)* [2023] SALC 3 at [43].

the locality to a six kilometre radius to capture the nearby towns of Littlehampton, Nairne, Blakiston, and Hahndorf.

- 31 In its submissions Endeavour identified there being two facilities trading under a packaged liquor sales licence in its suggested locality, as well as five facilities trading under general and hotel licences. As it was, by the time the matter came to be determined by the Commissioner a third facility trading under a packaged liquor sales licence had been added.⁵
- 32 The material placed before the Commissioner revealed that the Woolworths Mount Barker is a full line supermarket that has been in operation for over 30 years and that it is currently the best performing Woolworths Supermarket in South Australia in terms of turnover and average basket spend.
- 33 Endeavour's application was pitched from the premise that it is an experienced operator of liquor facilities and that the proposed premises would comprise of a new, modern, safe and clean store with a comprehensive range of quality liquor and associated products and services, including an extensive range of beer, wine and spirits.
- 34 Endeavour submitted that the current absence of a packaged liquor store in the Woolworths Shopping Centre denied Woolworths' customers seeking the convenience of purchasing liquor as part of the daily or weekly shop at a large-scale shopping centre the ability to do so.
- 35 It submitted that there was a community interest benefit in enabling the purchase of household groceries and items and liquor supplies in one location, which could be realised by this proposal. It submitted that the location of the proposed premises would provide convenience shopping within an existing centre enabling the purchase of household grocery items and liquor supplies as part of a one-stop-shop experience.
- 36 Endeavour submitted that whilst the Great Eastern Hotel has a drive-through liquor sale option for customers, it was not convenient to access it from the Mount Barker Town Centre as it required travelling over the South Eastern Freeway via the highly trafficked Adelaide Road, being a main thoroughfare from Mount Barker to Adelaide.
- 37 It contended that little weight should be given to the Cellarbrations outlet given that it was approximately 1.9 kilometres by road from the proposed premises; it is co-located with an IGA supermarket that is not a full-line supermarket; and the shopping centre that it is contained within has no other specialty tenancies.

⁵ See para [15] herein.

- 38 It noted that although Pulpit Cellars was near to the Aldi supermarket, that supermarket was relatively small and was not a full-line supermarket.
- 39 It contended that there currently were no packaged liquor outlets situated adjacent to a full-line supermarket in the locality. The Commissioner noted that this contention was no longer accurate given his approval of Liquorland's application, it being co-located with a full-line Coles supermarket in Mount Barker Central.
- 40 The evidence placed before the Commissioner revealed that the locality has a relatively low crime rate and that many of its residents were in a comfortable socio-economic position. Endeavour noted despite a specific notification to the Mount Barker branch of Drug and Alcohol Services, no specific response was provided. It submitted that there was no reason to consider that the grant of the application would have adverse implications for the relevant locality.

The Commissioner's decision

- 41 The Commissioner considered that the five kilometre radius of the proposed premises suggested by the guidelines was appropriate to apply in this case.
- 42 Having thoroughly canvassed the material placed before him, he made specific reference to his decision to grant the Liquorland packaged liquor sales licence to the premises in Mount Barker Central, noting that it resulted in there now being a packaged liquor outlet co-located with a full-line supermarket.
- 43 The Commissioner acknowledged that the grant of the application would result in added convenience to those who shop at the Woolworths Shopping Centre. But he added that the locality 'already provides opportunities for one-stop shopping, ample take away liquor options, and significant convenience'.
- 44 The Commissioner noted an observation made by this Court *Hove Sip n Save*⁶ that the public interest discretion raised issues around undue proliferation of take away liquor facilities and of the undesirability of creating a precedent that could be relied upon that could lead to the wholesale alignment of take away liquor facilities and supermarkets. Collectively these matters led him to conclude that it was not in the community interest or the public interest to grant the application. He said:

[G]ranting this application would be a further step towards proliferation and would provide a precedent that would support the wholesale alignment of packaged liquor and shopping centres, which

⁶ [2021] SALC 7 at [139].

is not desirable in circumstances where the approval of this application will provide little more benefit to the community than providing even more convenience in a locality where there is already ample convenience and where customers already have one-stop-shop options.

- 45 I think a fair summary of the Commissioner's approach to this application was that now that a packaged liquor sales licence had been granted resulting in the creation of a Liquorland store co-located with a large full-line supermarket not far from the proposed premises, that the grant of a further packaged liquor sales licence was not in the community interest and to grant it would create an undesirable precedent.

Submissions on review

- 46 On review Endeavour contended that the Commissioner misconstrued the decision of this Court in *Hove Sip n Save*⁷ where it spoke of the legislature's clear policy decision not to go down the path taken in other jurisdictions of allowing the wholesale alignment of take away liquor facilities with supermarkets and its endorsement of the views previously expressed by this Court and the Supreme Court that it is not in the public interest for there to be an over-supply of retail liquor outlets. It submitted that there was a stark difference between the supermarket under consideration in that case, which was a small 'top up' store as opposed to Woolworths Mount Barker and the Woolworths Shopping Centre, the supermarket being a large full-line supermarket that is the best performing Woolworths Supermarket in South Australia.
- 47 Endeavour submitted that in light of the unique characteristics of the Woolworths Shopping Centre, the Commissioner ought to have found that a significant number of the relevant community shop there, such that a significant number of the relevant community would benefit from the added convenience that would come from a co-located bottle shop. It submitted that parallels could be drawn with the approach taken by this Court in *Liquorland (Australia) Pty Ltd (Park Holme)* where in connection with a Coles supermarket that was within the top third of all South Australian supermarkets the Court said that that many of its customers could be expected to 'share the values of many contemporary Australians for whom the ability to undertake "one-stop shopping" is very important'.⁸
- 48 Endeavour submitted that the Commissioner gave too much emphasis to the fact that he had granted a packaged liquor sales licence that enabled the creation of a Liquorland store adjacent to a Coles supermarket. It submitted that there was no reasonable basis as to why there could not be

⁷ Ibid.

⁸ [2020] SALC 37 at [37].

two full-line supermarkets co-located with bottle shops in a particular locality. It submitted that the creation of a take away liquor facility trading under the BWS badge would create a point of difference. It submitted that the Commissioner's concern about the fact of other facilities failed to accurately reflect the fact that need is no longer the relevant test.

- 49 Endeavour went further and submitted that the decision of this Court upholding the Commissioner's decision to grant the Liquorland licence reinforced its submissions that the present application is in the community interest and ought to have been granted. It made reference to this Court's observations in *Liquorland Mount Barker (No. 2)* where it said that it is 'of significance that Mount Baker is experiencing significant population growth' and this is projected to continue for many years to come, that it is a fast growing peri urban community, and that although the town of Mount Barker was 'already adequately catered for in terms of take away liquor facilities, is not awash with them'. It also referred to the Court's observation in that case that it was 'not in any way concerned that the Commissioner's grant of [the Liquorland Application] is likely to adversely impact upon drinking behaviours in Mount Barker or lead to an unacceptable risk of harm'.
- 50 Endeavour then made reference to this Court's observations in *BWS Woodcroft*⁹ about the desirability of consistency and predictability of decision making and of it being in the public interest for like cases to result in like outcomes. It submitted that the factors that led this Court to uphold the decision to grant the Liquorland licence were indistinguishable from those underpinning this application, such that in this case, like that case, the application should have been granted.
- 51 Endeavour then made the point that despite the offerings at the other shopping centres in Mount Barker, the fact is that large numbers of the local community still prefer to complete their grocery and other shopping needs at the Woolworths Shopping Centre. It submitted that in light of this, the submissions advanced by the objectors, to the effect that the proposed premises would only provide some additional convenience to a very narrow group of persons, must be rejected.
- 52 Endeavour referred to the decision of this Court in *Liquorland McLaren Vale (No 3)*.¹⁰ That case concerned an application for a packaged liquor sales licence to be co-located with a supermarket in circumstances where nearby there was another supermarket that was already co-located with a facility trading under a packaged liquor sales licence. The Court accepted that although the relevant centre was 'in name' a single shopping centre, in truth it was 'in effect two shopping centres' situated on different

⁹ [2022] SALC 108.

¹⁰ [2023] SALC 2.

levels and anchored by two different supermarkets. It found that to travel from one level to another involved a degree of inconvenience akin to travelling across a moderately busy road. Endeavour submitted that the same could be said here in respect of Woolworths' customers travelling to the other take away liquor facilities on offer in Mount Barker.

- 53 Endeavour submitted that there was no evidence the proposed premises would negatively impact on the local community; there was no evidence that there is something about a close alignment of a packaged liquor store co-located with a supermarket that creates an appreciably greater risk of harm than would be the case for an unaligned store; there was no evidence that the Mount Barker community has more than its fair share of problem drinkers; and that apart from concerns expressed by commercial competitors, there has been no other expressions of opposition to the grant of the present application. It submitted that the proposed premises can be taken to be an attractive, well stocked facility operated by an experienced and reputable licensee with proper policies and procedures around preventing sale to minors and intoxicated persons that will create some employment opportunities and that the grant of the application will be greatly appreciated by many of the patrons of the Woolworths Shopping Centre who wish to purchase liquor as part of that shopping expedition.
- 54 Finally it submitted that the size and popularity of the Woolworths Shopping Centre sets this application apart from a typical co-location case such that this Court should have no concerns about setting an undesirable precedent.
- 55 The objectors submitted that the Commissioner was right to have refused the application and they supported his reasons.
- 56 They submitted that the evidence of the grant of a packaged liquor sales licence at the Aston Hills Village Centre should be received because it was relevant evidence that demonstrated the existence of yet another take away liquor facility within the locality where there were already too many take away liquor facilities.
- 57 Endeavour submitted that this evidence when considered in context tells a different story. It placed before the Court the 2021 Census data which demonstrated that since the previous census in 2016, there had been a 21.64% population increase for the locality. It sought to contrast this with State-wide figures that demonstrated that across the whole of the State the increase over that period was 6.25%.
- 58 It submitted that the substantial population growth that the Mount Barker township has experienced in recent years was consistent with earlier evidence to the effect that the regional centre of Mount Barker is a focal point for population growth and an area of increasing residential densities.

It submitted that the latest Census data demonstrates that the grant of the application would not result in any material escalation of licence density in the locality above the State average which might warrant an adverse finding and supported its contention that the grant of this application was in the community and public interest.

Consideration

- 59 I commence with the issue of locality.
- 60 In *Liquorland Park Holme*¹¹ I observed that in the former needs test: “focussed upon the adequacy of the existing facilities in the relevant locality to cater for the public demand for liquor, the issue of locality was very much directed towards identifying the relevant trade area. ... locality was held to be a much broader than the area that might be described as the local community, and it included not just the primary trade catchment areas, but also the secondary catchment areas.”¹² I then noted that because the Act now “speaks of ‘members of the community and any relevant stakeholders’ and how they might be impacted by the grant of the application” it followed that “‘locality’ is now focussed upon the local community and is much more focussed on primary trade catchment areas, as opposed to the secondary catchment areas”¹³.
- 61 In light of this it is understandable why the Guidelines would suggest that as a starting proposition the locality of proposed premises in metropolitan Adelaide is a two kilometre radius and outside of the metropolitan area it is five kilometres, because these figures are broadly consistent with what might be expected to be the primary catchment areas. But just as “locality” itself is an imprecise concept, so too is the distinction between metropolitan and non-metropolitan. In many ways Mount Barker is like a country town that draws people from a wider community into the town to avail themselves of the services on offer there. But it also has attributes consistent with what might be expected of outer suburbia Adelaide and just like people in the suburbs if the services are available tend to shop locally, people living in the outer reaches of Mount Barker might be expected to do the same.
- 62 The Aston Hills Village Centre is on Heysen Boulevard about four or so kilometres from the town centre of Mount Barker. The Heysen Boulevard is a continuation of Alexandrina Road. As that road heads east away from Adelaide Road, it becomes Hartman Road and as it heads in a more southerly direction before heading east again it becomes Heysen Boulevard. This Court is permitted to know that Aston Hills is a major new residential development on the outskirts of Mount Barker. As

¹¹ Ibid.

¹² Ibid at [17].

¹³ Ibid [18] - [20].

such it is reasonable to infer that those residing in that development would regard the Aston Hills Village Centre as a local shopping centre in its own right as opposed to simply an additional shopping facility that forms part of the overall suite of such facilities on offer in Mount Barker. Thus, even though the Aston Hills Village Centre is within five kilometres of the proposed premises, in my opinion, for the purposes of the Act it is doubtful that it is in the same locality as the proposed premises. That is not to say that it is irrelevant, but what it does mean is that whether it is, or is not in the same locality, it is of only marginal relevance. As will emerge shortly, what is of far greater significance are the take away liquor facilities in the town centre of Mount Barker. Thus whilst I am prepared to receive this evidence as well as the evidence of increased population growth in Mount Barker it has had no real impact upon the outcome of this review.

63 I now turn to consider the submissions advanced on review.

64 This Court has previously expressed the need for consistency.¹⁴ Endeavour was therefore right to seek to draw comparisons with other cases.

65 But the situation here is quite unlike *Liquorland Park Holme*. In that case there was only one take away liquor facility close to the proposed premises, it being 500 metres away on the opposite side of Marion Road, which is one of the busiest roads in metropolitan Adelaide. All of the other take away liquor facilities in the locality were quite some distance away, as were other supermarkets in the locality that were co-located with bottle shops.

66 The situation here is also different to *Liquorland McLaren Vale (No. 3)*.¹⁵ It might be true that the degree of inconvenience in accessing the existing take away liquor facilities relative to the proposed premises is comparable, but as the Court was at pains to point out in *Liquorland McLaren Vale (No. 3)*, the factual picture must be considered as a whole. The supermarket in that case with which the proposed premises was to be co-located, was not only a large full line supermarket, but it was also, by some measure, the largest supermarket in the locality. In this case, Woolworths Mount Barker is plainly a very large full-line supermarket. But so too is the nearby Coles supermarket and it is within a much larger shopping centre.

67 Some further observations need to be made about *Liquorland McLaren Vale (No. 3)*. Whilst there were many wineries selling take away liquor as well as craft distilleries and craft beer outlets in the McLaren Vale locality, many of these might be expected to be focussed on tourist trade. The only other facilities in the locality at the time when

¹⁴ See: *On The Run Pty Ltd* [2022] SALC 109 at [38].

¹⁵ [2023] SALC 2.

the review was being considered that were selling the full range of take away liquor was one convenience style bottle shop and a hotel bottle shop and drive through.

68 In contrast to this, leaving to one side those now living in the extensive housing development that is taking place at the south-eastern edge of Mount Barker¹⁶ it must be said that the residents of Mount Barker that live closer to the Freeway are very well served by a range of take away liquor facilities on offer within the town. For now there are effectively three convenience style bottle shops,¹⁷ two drive throughs¹⁸ and a large destination store.¹⁹ These residents also have a large complement of different badges of take away liquor, being Thirsty Camel, Sip'n Save, Cellarbrations, Liquorland, Dan Murphy's and an independent. All but the Sip'n Save at the Great Eastern Hotel are close to supermarkets. Thus there is already ample opportunity for these residents who wish to combine their supermarket shopping with the purchase of take away liquor to do so from a variety of places and a variety of facilities.

69 It is also notable that in *Liquorland McLaren Vale (No. 3)*, the Court expressly stated that the case needed to 'understood as having been decided on its own facts, which are relatively unique'.²⁰ I think it can be taken from this and the Court's statement that sometimes the addition or subtraction of a fact may make all the difference, that the outcome in that case was a close thing, and had the overall factual picture been slightly different, a different result may have ensued.

70 As for this Court's observations in *Liquorland Mount Barker (No. 2)* referred to by Endeavour, they must be viewed in context. In that case, in the proceedings before the Commissioner, the objectors in opposing the application for a packaged liquor sales licence contended that if the application succeeded the economic impact upon Pulpit Cellars would be such that Pulpit Cellars would be unviable. The Commissioner was not persuaded that this was a relevant consideration. Following the grant of the application the objectors sought a review of the decision by this Court.

71 At the hearing of the review it was contended that as a matter of law the Commissioner erred in not taking into account the potential for an existing take away liquor facility in the relevant locality to become unviable if the application for a new licence succeeded. The objectors argued that the embargo contained in s 53(1aa) of the Act that prohibits a licencing authority from taking 'into account the economic effect on other licensees

¹⁶ Noting that a packaged liquor sales licence has since been granted.

¹⁷ Pulpit Cellars, Liquorland and Cellarbrations.

¹⁸ Grays Inn and the Great Eastern Hotel,

¹⁹ Dan Murphy's Mount Barker.

²⁰ Ibid at [86].

in the locality’ did not apply to the evaluation required under the community interest test.

- 72 It was resolved that this legal issue would be dealt with as a preliminary point. This Court understood that if the point were ruled adversely to the objectors there would be little, if anything further, to be argued by way of complaint about the Commissioner’s decision. The point was ruled adversely to the objectors.²¹ That being so it might have been expected that this might be the end of the matter.
- 73 As it was, many months later and without notice, the objectors advised the Court that it now wished to advance a new argument inconsistent with its initial contention. It sought to introduce new evidence that demonstrated little more than one unique take away liquor facility in Mount Barker had enjoyed a sustained period of solid sales in recent years. Presumably, it was to be argued that this apparent increased consumption of alcohol might be related to the COVID-19 pandemic, and that the Court might be persuaded that now was not the right time to be granting a new packaged liquor sales licence for a premises in Mount Barker.
- 74 The fate of late applications to change tack and introduce new evidence is determined by reference to where the interests of justice lie. Whilst there is no encyclopaedic list of matters to be considered, issues such as prejudice to the parties and the consequences of allowing or refusing the application must be considered.
- 75 In *Liquorland Mount Barker (No. 2)* the Court noted that if the application to amend and introduce new evidence was granted there would be further delay and the incurring of legal fees, and the objectors had made no offer to Liquorland to compensate it for any additional costs that it would incur if the amendment were granted. Prejudice to Liquorland had therefore been established. As for the consequences of granting or refusing the application, the Court formed the view that the new evidence was of little probative value. It then needed to consider from a community interest and public interest perspective the implications of refusing the application given that it meant the likely dismissal of the Application for Review and the consequential maintaining of the grant of the licence. The Court noted that Liquorland had been granted its licence about a year before and that it was in the public interest for matters before this Court to be dealt with expeditiously. It formed the view that this matter had been dragging on for too long and the time had come to bring the matter to a close.
- 76 This forms the context in which this Court stated that the application was ‘for a packaged liquor sales licence for a modest bottle shop in a large shopping centre in a fast-growing peri urban community, which is not

²¹ *Liquorland Mount Barker* [2022] SALC 21.

awash with take away liquor facilities’ and that there was no basis to conclude that ‘the grant of the licence to Liquorland will have serious adverse implications for the Mount Barker community or the public more generally’. These observations did not purport to be an overwhelming endorsement of the Commissioner’s finding that the grant of the application was in the community’s interest, nor did they form a precedent from which Endeavour can decisively rely upon in this case.

- 77 It must be accepted that Woolworths is the only supermarket in the town area of Mount Barker that does not have a take away liquor facility that is immediately adjacent to it. It must be accepted that it is a very well patronised store, that many members of the relevant community shop there, and many of these would welcome the opportunity to buy take away liquor from a nearby store. It also must be accepted that Endeavour enjoys a good reputation as the licensee of licensed premises and that the proposed premises would comprise of a modern, safe and clean store with a comprehensive range of quality liquor and associated products and services.
- 78 Whilst these factors point in favour of a finding that it would be in the community interest to grant this application, consistent with what this Court said in *Hove Sip n Save*,²² by reference to the judgment of Doyle CJ in *Liquorland (Australia) Pty Ltd & Ors v Lindsey Cove Pty Ltd & Anor*,²³ it is in the community interest for there to be some brake on the number of premises at which the public may purchase liquor for consumption off the premises. As a matter of common sense the greater the number of facilities promoting and selling liquor within a particular locality, the greater the risk of social harm that comes from the purchase and consumption of alcohol.²⁴ Moreover, the fact that packaged liquor sales licences are not that easy to obtain has some positive consequences. It means that they are valuable commodities. As such the holders of these licences can be expected to want to protect their asset by ensuring compliance with the Act and any conditions on the licence. It also provides some measure of protection from undue or excessive competition which in turn reduces the risk of the potential failure of an existing licensee to provide the range of facilities at existing licensed premises that should be provided in the community’s interest.²⁵
- 79 With respect, the Commissioner was right to be concerned about the number of take away facilities that would result if this application were granted. Following the grant of the Liquorland licence, if this application succeeded, it would result in there being in the Mount Barker town centre area effectively four bottle shops, one of which can be taken to sell

²² [2021] SALC 7 at [131]-[140].

²³ (2002) 81 SASR 337 at 343-4.

²⁴ See the discussion about such matters in *Liquorland Park Holme*, *ibid* at [43]-[44].

²⁵ *Liquorland McLaren Vale (No. 2)* [2022] SALC 53 at [169]-[171].

take away liquor on an almost industrial scale, as well as a drive through, all within less than a kilometre of each other. The small distance between these facilities is a significant matter. Whilst the measure of licensed premises density is much more nuanced than simply adding up the number of licensed premises,²⁶ in the case of multiple substantive take away liquor facilities in close proximity to each other, the observations by Professor Livingston about robust and consistent local evidence that increasing the number of packaged liquor outlets in a neighbourhood is likely to increase rates of risky drinking, rates of alcohol-related harm and negative amenity impacts in that neighbourhood ring true. These, together with his observation that it is not necessarily the impact of any one individual store that is the issue, it is the cumulative effect that could be substantial, which observation I also accept, sets alarm bells ringing. As was noted by this Court in *Liquorland McLaren Vale (No. 2)* by reference to the decision of the Victorian Civil and Administrative Tribunal in *Nardi v Director of Liquor Licensing (Occupational and Business Regulation)*²⁷ in the context of concerns about harm minimisation: ‘Once there are circumstances prevailing which give the decision-maker pause, or ring alarm bells, a conservative approach is compelled’.²⁸

- 80 Like the Commissioner, I think that upon the grant of the Liquorland packaged liquor sales licence, the number of take away liquor facilities in the Mount Barker town centre area has, at least for now, reached saturation point and that despite the positive aspects of the application, the evaluative exercise that the Act requires points against it being in the community interest to grant this application.
- 81 In my opinion the Commissioner was right to find that the community interest test in connection with the within application had not been met.
- 82 He was correct to find that in any event the application had to be refused on public interest grounds. This application could only be granted if it were accepted that the mere fact that a large, busy full line supermarket is not co-located with a bottle shop is of itself sufficient to conclude that it is in the community interest to grant the application. That would set an undesirable precedent. It would mean that wherever there is any busy full-line supermarket that is not co-located with a bottle shop, an application for a packaged liquor sales licence to enable that co-location to occur, would have to be granted. If that were so, it could result in a highly undesirable proliferation of take away liquor facilities within a particular locality.
- 83 Whilst I can understand that Endeavor might feel some grievance at this outcome, given that the order in which the Commissioner dealt with its

²⁶ *Liquorland McLaren Vale (No. 2)*, ibid at [186].

²⁷ [2005] VCAT 323 at [44].

²⁸ *Liquorland McLaren Vale (No. 2)*, ibid at [157].

and Liquorland's applications for packaged liquor sales licences appears to have affected the outcome of this case, the following point needs to be made. Had the Commissioner dealt with both applications at the same time, for the reasons outlined herein, only one could have succeeded. Given the relative size of Mount Barker Central as opposed to the Woolworths Shopping Centre, and the much greater number of facilities on offer there, it is highly likely that the successful application would have been the one located within Mount Barker Central.

84 The application for review is dismissed.