

**LICENSING COURT OF SOUTH AUSTRALIA**

LIQUORLAND MCLAREN VALE (No. 3)

**JURISDICTION:** Application for a Review of an appeal from a decision of the Commissioner

**CASE NO/S:** 28 of 2022

**HEARING DATE:** Written submissions dated 5, 8 and 12 December 2022

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 24 January 2023

**CATCHWORDS:**

*Application for a packaged liquor sales licence – An existing licensee that previously ran a bottle shop trading as Australian Boutique Premium Wines is not currently trading in McLaren Vale and plans to trade elsewhere – Whether the Court should take the presence or absence of that bottle shop into account in determining this application – **Held** that it must be taken into account in the sense that for now within the relevant community there is only one stand-alone bottle shop and one take away liquor facility attached to a hotel, but it is possible that a second stand-alone bottle shop in addition to the proposed store, may trade in the future – Whether in light of evidence of an increase in packaged liquor sales, and it is too early to say that the impacts upon purchasing patterns related to the COVID-19 pandemic have passed such that a cautious approach is warranted and that now is not the time to be introducing a new take away liquor facility in McLaren Vale – **Held** that the most reliable evidence is that contained in the wastewater analysis reports – **Held** that there is no reliable evidence of increased alcohol consumption or increased alcohol related violence related to the COVID-19 pandemic in McLaren Vale or in South Australia generally – Community Interest test considered – **Held** that it is in the community interest to grant the application – Public Interest test considered and in particular whether the grant of this application will create an undesirable precedent given the proximity of another bottle shop to the proposed store – **Held** that the overall factual position must be considered – **Held** that this case must be understood as having been decided on its own facts, which are relatively unique and therefore it does not create an undesirable precedent that warrants refusal on public interest grounds – Licensing Act 1997.*

*Liquorland McLaren Vale (No 2)* [2022] SALC 53  
*BWS Woodcroft* [2022] SALC 108  
*Woolworths Ltd v Fassina Investments Pty Ltd & Ors* [2015] SASCF 72  
*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336  
*Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37  
*R v Allan; ex parte Australian Mutual Provident Society* (1977) 16 SASR 237  
*Nancollas v Insurance Officer* [1985] 1 All ER 833  
*Lovell v New World Supermarket Pty Ltd* (1990) 53 SASR 53  
*BWS Para Hills* [2022] SALC 72  
*Woolworths Ltd v Fassina Investments Pty Ltd & Ors* (2015) 122 SASR 535  
*Hove Sip n Save* (2021) SALC 7

**REPRESENTATION:**

Counsel:

Applicant: Mr M Roder KC with Mr R Harley  
Respondent: Mr S Henry KC with Mr G Coppola  
Intervenor: Ms V Montandon

Solicitors:

Applicant: Jones Harley Toole  
Respondent: Australian Hotels Association  
Intervenor: Crown Solicitor's Office

- 1 These reasons should be read in conjunction with my earlier reasons.<sup>1</sup>
- 2 At the conclusion of the last hearing, I found that the Commissioner made several errors in refusing Liquorland's application for a packaged sales liquor licence in connection with a proposed store adjacent to a Coles Supermarket in the McLaren Vale Shopping Centre.
- 3 I held that in the absence of evidence the Commissioner erred in finding that the proposed store might have negative impacts upon local wineries and might adversely affect tourism.
- 4 I held that in the absence of evidence the Commissioner erred in finding 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.
- 5 Whilst I held that the Commissioner was entitled to be concerned about the proximity of the BWS store to the proposed premises, I considered that he may have given too much weight to the convenience that the proposed store would provide to the members of the local community that shop at the Coles Supermarket in considering the negative aspects of the application. I note in passing that in my earlier reasons, reference was made to evidence that the BWS store was of high-quality internal fit-out, with a typical BWS product range.
- 6 Whilst I held that the Commissioner was entitled to be concerned about evidence suggesting that the COVID-19 pandemic may have caused increased stress and that it might have caused changes in drinking behaviour that might be increasing alcohol related harm. I was concerned about the currency of that evidence.
- 7 I was also concerned about the paucity of evidence relating to the status and intentions of Australian Boutique Premium Wines Pty Ltd which previously operated a bottle shop under a packaged liquor sales licence just east of the BWS store and within a few hundred metres of the proposed store.
- 8 Having identified these errors and concerns I invited submissions as to how the matter should proceed. I noted that several options were available.
- 9 Liquorland had earlier foreshadowed that given the chance it might have pursued the application on an alternative basis, that is, a Vintage Cellars badged store, as opposed to a conventional Liquorland store. In light of this I raised the possibility that the Court might simply set aside the

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<sup>1</sup> *Liquorland McLaren Vale (No 2)* [2022] SALC 53.

Commissioner's refusal of the application such that it could start all over again. It declined that invitation.

- 10 Other alternatives were that the matter be remitted to the Commissioner or for this Court to determine the matter.
- 11 I anticipated argument on this issue but as it was, the parties, being Liquorland, the AHA, and the Commissioner, reached agreement as to how the matter would proceed. On 27 September 2022 consent orders were made to the effect that this Court would determine Liquorland's application and that each of the parties could adduce further evidence limited to current trends in alcohol consumption, and associated risk of harm in the context of the availability of packaged liquor, in light of the current social and economic conditions and the stage of the COVID-19 pandemic based on the most recent available research, as well as the status of the packaged liquor sales licence held by Australian Boutique Premium Wines.

### **Fresh evidence**

- 12 The Commissioner placed before the Court the following:
  - Supplementary submission from Professor Livingston undated but received 21 October 2022.
  - Supplementary submission from ANROWS dated 24 October 2022.
  - Supplementary submissions from the RACS dated 23 October 2022.
  - Report from the Foundation for Alcohol Research & Education (FARE) dated July 2020.
  - Report from FARE dated February 2022.
  - Report from FARE dated May 2022.
  - Information regarding the status of the licence held by Australian Boutique Premium Wines.

- 13 In his supplementary submission Professor Livingston stated:

The COVID-19 pandemic has had complex effects on alcohol consumption in Australia, with some indications of declines at the population level offset by clear and concerning increases in key measures of harm like mortality. Surveys suggest that family and domestic violence rates may have increased during the pandemic, although these increases were not detected in police data. Data remains relatively scarce since restrictions have eased, but consumption and harm rates appear to be relatively similar in 2022

as they were during the height of the pandemic. This suggests that concerns about increases in alcohol availability and related harms remain highly relevant, although the relative lack of reliable, recent data remains a key issue.

14 In its earlier submission ANROWS had noted research from the Australian Institute of Criminology that suggested signs of increased alcohol consumption directly impacting domestic and family violence in the three months after the pandemic began. In its supplementary submission it noted that since then there was little conclusive evidence found in Australia that supported this. It stated however that international research provided insight into the dynamics of COVID-19, alcohol consumption and domestic and family violence. It pointed to national evidence suggesting an increase in alcohol consumption over the course of the pandemic as well as an increase in domestic violence. It accepted that alcohol consumption varied across jurisdictions and its data was not specific to South Australia.

15 ANROWS concluded by saying:

The relationship between the COVID-19 pandemic, alcohol, and domestic and family violence is complex. Research thus far has largely been inconclusive as to whether there have been any significant impacts on domestic and family violence pertaining directly to patterns of alcohol misuse throughout the COVID-19 pandemic. Though some research does suggest that the stay-at-home policies enforced, as well as shifts in liquor licensing, resulted in more alcohol consumption in the home and an increased risk of violence, the constant changing socio-economic context of the COVID-19 pandemic makes it challenging to be conclusive. The stay-at-home policies have now ceased in Australia, and research is still being undertaken to determine any ongoing impacts of the COVID-19 pandemic. Despite this, when examining the ongoing sale and supply of alcohol, consideration should be given to both Australian and international findings that suggest takeaway alcohol may contribute to an increase in domestic and family violence, as opposed to alcohol consumed within more public settings.

16 RACS repeated its previously expressed submission that because of a known association between liquor outlet density and increased alcohol related harm, the approval of additional liquor outlets should be delayed. It submitted that a linkage between increased alcohol sales from packaged liquor outlets after the onset of the pandemic and increased domestic violence had been established. It noted that the pandemic had put a great strain upon the South Australian Health system and that the health impacts of COVID-19 were likely to continue for many years. It therefore submitted that any increase in alcohol related presentations would exacerbate an already strained public health system.

- 17 FARE is a not-for-profit organisation focussed on freeing Australians from alcohol related harm. Its research and analysis of data indicates that whilst some Australians decreased their alcohol consumption after the commencement of the pandemic, a small cohort had increased their consumption and that this increase was likely to be more common amongst already heavy drinkers. It noted that even before the pandemic the home was the most common place on which alcohol was consumed and that this increased significantly after the pandemic commenced. It expressed concern that this might ‘normalise’ alcohol consumption amongst minors and that the trend of increased consumption in the home might become a long-term trend. It stated that there was consistent evidence that the pandemic had cause increased levels of stress and that there was a link between increased levels of stress and increased alcohol consumption. Its reports included an analysis of alcohol retail turnover by State. However no statistics pertaining to South Australia were included.
- 18 The Commissioner advised the Court that Australian Boutique Premium Wines currently hold a packaged liquor sales licence, but it is no longer trading in McLaren Vale and may be trading on Hindmarsh Island. This was confirmed by Australian Boutique Premium Wines in an email to the Commissioner wherein it indicated that it was applying for a removal of the licence to Hindmarsh Island.
- 19 Liquorland placed before the Court the following:
  - Report from Associate Professor Jacobus Gerber relating to recent alcohol use in South Australia by reference to wastewater analysis.
  - Successive National Wastewater Reports prepared by the Australian Criminal Intelligence Commission in respect of the analysis of wastewater across the various States and Territories (the Wastewater Reports).
  - Extract from the Review of the South Australian Liquor Licensing Act 1997 by the Honourable TR Anderson QC (the Anderson Review).
  - Supplementary report from Ethos Urban dated 22 November 2022.
  - Extract from the Northern Territory News ‘Pubs bounce back but home drinkers dry up’ dated 24 August 2022.
  - Extracts from various Coles Group Annual Reports.
  - Coles Group First Quarter 2023 Sales Results.
  - Extracts from various Woolworths Group/Endeavour Group Annual Reports.
  - Market Release Endeavour Group Trading Update 2023.

- Winetitles Media, How wine and alcohol purchasing and consumption changed during COVID-19 isolation in Australia dated 1 July 2020.
  - Drinks Trade, Four out of five Australians consume less than two drinks a day dated 22 March 2022.
  - Roy Morgan ‘Australian alcohol consumption declines from pandemic highs of 2021, but consumption of RTDs at record high’ dated 17 August 2022.
  - Alcohol Beverages Australia, Analysis of research dated 15 December 2020.
  - Alcohol Beverages Australia, Media Statement dated 16 February 2022.
  - Letter from Alcohol Beverages Australia to the Federal Treasurer dated 23 February 2022.
  - University of South Australia ‘Locked down and liquored up?’ dated 1 July 2020.
  - Bade, Simpson, Ghetia, Nguyen, White and Gerber ‘Changes in alcohol consumption associated with social distancing and self-isolation policies triggered by COVID-19 in South Australia: a wastewater analysis study’ dated 1 October 2020.
  - Drinks Digest, How COVID has decimated pub beer sales dated 21 January 2022.
- 20 Professor Gerber was part of a research group that analysed data collected from wastewater analysis conducted by the Australian Criminal Intelligence Commission through its National Wastewater Drug Monitoring Reports. Professor Gerber stated that as a result of the COVID-19 lockdowns there was an immediate downward consumption of alcohol in South Australia which returned to normal levels when social restrictions were relaxed.
- 21 In *BWS Woodcroft*<sup>2</sup> this Court received the evidence and noted that the Wastewater reports purport to provide accurate data regarding the consumption of methylamphetamine, amphetamine, cocaine, MDMA, MDA, heroin, cannabis, oxycodone, fentanyl, nicotine, alcohol and ketamine and were certified by the University of Queensland and the University of South Australia.
- 22 In connection with the consumption of alcohol consumption, it is measured by quantifying the amount of a specific metabolite of ethanol, ethyl sulphate, in wastewater, to extrapolate the number of standard drinks per 1,000 persons.

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<sup>2</sup> [2022] SALC 108.

- 23 The Court stated of Report 16 that it ‘demonstrated that for the twelve-month period between December 2020 and December 2021, alcohol consumption had not changed substantially and that alcohol consumption in South Australia was the lowest in the country. It showed that between August 2019 to February 2022, consumption in the Adelaide metropolitan area had gone from about 1,300 standard drinks per 1000 residents per day, dropping to around 700 standard drinks per 1,000 residents in April 2020, with minor fluctuations around 1,000 standard drinks per 1,000 residents in the months that followed. The regional averages were generally lower, fluctuating between 500 to 700 standard drinks per 1,000 residents.’<sup>3</sup>
- 24 The Court stated of Report 17 which covered sampling in April and June 2022 that ‘[i]t indicated that across Australia there was a decrease in alcohol consumption over the period from December 2021 to April 2022, but an increase in South Australia. In metropolitan Adelaide this is from about 1,000 standard drinks per 1,000 residents in February 2022 to about 1,500 standard drinks per 1,000 residents in June 2022. There appears to be a trend emerging from about October 2020 of increasing alcohol consumption in metropolitan Adelaide, but the amount is below consistent measures of greater than 1,500 standard drinks per 1,000 residents measured in the period from June 2017 to February 2019. The report states that South Australia along with Western Australia have the lowest alcohol consumption in the country.’<sup>4</sup>
- 25 The extract from the Anderson Review contains details on the number of licences held as at 30 June 2005, 30 June 2014 and 31 May 2016. In respect of retail liquor merchant’s licences, being the equivalent of the now packaged liquor sales licences, there were 200 as at 30 June 2005. The number dropped to 194 in 2014. As at 31 May 2016 there were 201 of such licences.
- 26 The Anderson Review notes that the Full Court in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors*<sup>5</sup> moved away from the more restrictive application of the ‘needs’ test than had been taken in earlier decisions and placed ‘more weight on contemporary standards and expectations’. It stated that the Court seemed to be moving in a direction that Mr Anderson advocated for which ‘takes into account the expectations and aspirations of the public’.
- 27 The focus of the Ethos supplementary report was directed towards what, if any, correlation there is between increased sales of packaged liquor and overall alcohol consumption. The report noted that because of the uniqueness of the COVID-19 pandemic some caution needs to be

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<sup>3</sup> Ibid at [66].

<sup>4</sup> Ibid at [67].

<sup>5</sup> [2015] SASFC 72.

exercised in analysing shopping behaviours. It also noted that the public health response to the pandemic varied across Australia and in particular that there was generally less intervention in South Australia, relative to Victoria and New South Wales. The report noted that between 2008 and 2018 there was an average increase in dollar value of 4.9% per year but over that same period there was a reduction in the overall consumption from 10.8 litres per capita to 9.5 litres. It suggested a range of reasons, including increased popularity of low and mid-range beer, an increased popularity of wine and ciders, the growing popularity of boutique products and a switch to more expensive brands. It noted a general uplift in overall retail sales during the pandemic with less variation in South Australia, which it attributed to less public health intervention. It suggested that this likely represented a shift from consumption on premises to consumption at home because of the restricted access to places like hotels and other licensed venues. It noted that both Coles and Woolworths had a decline in packaged liquor sales in the first quarter of 2023, relative to earlier trading. It suggested that the purchase of take away liquor was ‘normalising’.

- 28 The extract from the Northern Territory News ‘Pubs bounce back but home drinkers dry up’ concerned a commentary on the trading performance of the Endeavour Group which, amongst other things, owns take away liquor facilities trading under the Dan Murphy’s and BWS badges as well as a number of hotels. It noted a sinking of the Group’s share value. It then stated:

.... Endeavour has enjoyed the best of times and worst of times through the pandemic. Dan Murphy’s and BWS stores were kept open though lockdowns, but its pubs and hotels were closed. This triggered a rocket in sales at its bottle shops as consumers bought beer, wine and spirits to consume at home but left its pubs shuttered. Now Endeavour is witnessing a return to “normal” patterns of Australians socialising to push a rebound in sales at pubs and hotels and bring turnover at bottle shops back down to historic levels.

- 29 The sales records of Coles, Woolworths and Endeavour confirm that data underpinning the observations made in the Ethos supplementary report.
- 30 The extract from Winetitles Media, ‘How wine and alcohol purchasing, and consumption changed during Covid 19 isolation in Australia’ dated 1 July 2020 contains the findings made by a survey conducted by the Ehrenberg Bass Institute at the University of South Australia. The survey was undertaken in May 2020 and related to wine consumers. It suggested:

There is not an epidemic of increased alcohol consumption, and the most likely cause of the (temporary) upward spike during lockdown was stocking up because of uncertainty of supply.

- 31 The article from Drinks Trade, dated 22 March 2022, stated that based on the national Health Survey 2020-21, during the first year of the pandemic, two thirds of drinkers drank the same, nearly one in four drank less and about one in ten drank more.
- 32 The Roy Morgan article dated 17 August 2022, was based on a consumer survey of drinking habits in the twelve-month period up to June 2022. It stated: ‘The number of Australians drinking wine, beer and spirits reached pandemic heights during 2021, but the short-term boost as people were stuck at home has now receded.’ It recorded that the only sustained increase was RTD’s being a 3.2% overall increase. In contrast to this wine consumption was down 1.7%, beer, 2.3%, and spirits, 2.8%. It suggested:

The ‘shock’ of the pandemic disrupted a longer-term trend of declining alcohol consumption amongst the Australian population which is now reasserting itself.
- 33 The effect of the December 2020 Alcohol Beverages Analysis was that the suggestion that there had been an increase in drinking following the COVID-19 outbreak was selectively misleading and that it did not factor that 80% of households reported buying less alcohol or evidence indicating a decrease in alcohol spending. It added that the sales spike evidenced at the commencement of the pandemic was attributable to stockpiling but overall consumption had decreased over the course of lockdowns.
- 34 The Alcohol Beverages Australia Media Statement dated 16 February 2022 is critical of a report issued by FARE. It contended that FARE erroneously suggested that an increase in retail sales led to a higher volume of alcohol being consumed whereas it merely established that Australians were paying more for their drinks and were drinking at home because of the closure or limits on hospitality, sport and family gatherings, pubs, clubs and restaurants.
- 35 The letter from Alcohol Beverages to the Federal Treasurer dated 23 February 2022 also complained about claims made by FARE and others. It contended that claims of increased harmful drinking were misleading. It pointed to evidence that indicated a substantial fall in the number of alcohol treatments sought in the period 2019-20 when compared to 2010-11, as well as a declining share of alcohol related Emergency Department presentations.

- 36 The University of South Australia ‘Locked down and liquored up?’ article dated 1 July 2020 is also based on the survey conducted by the Ehrenberg Bass Institute at the University of South Australia. It records a statement by Professor Larry Lockshin that:

Early data showing a spike in alcohol purchases in March, have been followed by fairly sharp declines in sales of beer and cider, spirits and wines in April, May ... which would suggest, much like groceries, people were stocking up ahead of the shutdown.

- 37 The Bade, Simpson, Ghetia, Nguyen, White and Gerber article contended that based on the wastewater analysis, alcohol consumption in South Australia decreased following the imposition of COVID-19 restrictions and suggested a decrease in social and binge drinking in pubs and clubs. It concluded by stating:

... the [wastewater] data presented in this paper contrasts recent reports in Australian media that suggested Australians were consuming more alcohol than usual since the COVID-19 outbreak, in part as a mechanism to cope with anxiety and stress resulting from a rapidly changing social and economic landscape and future uncertainties. Our data demonstrate that any increase in purchasing did not lead to an increase in consumption and instead, there was a decrease in the population level of alcohol consumption. This decrease is best explained as a decline in drinking in licensed premises and in other social gatherings. As the public health impact of alcohol is closely linked with the overall level of its consumption in the population, it is likely that the major impact of the COVID-19 epidemic may be a decline in alcohol-related problems.

- 38 The Drinks Digest article of 21 January 2022 in calling for tax breaks for beer, noted that there was a 50% reduction in beer sales in pubs and clubs in July to September 2021 compared to the corresponding months in 2020, as against an already decline of over 1,000,000 litres compared to July to September 2019.

- 39 The AHA did not introduce any further evidence.

### **The parties’ submissions**

- 40 The Commissioner did not make any further submissions. I understand his position to essentially be neutral.
- 41 Liquorland submitted the application must be approached from the premise that Australian Boutique Premium Wines is no longer trading in the McLaren Vale area. It contended that the grant of this application, in terms of outlet density is merely restoring the status quo.

- 42 Liquorland submitted that the overall effect of the evidence regarding the impact of the COVID-19 pandemic is that there has been no demonstrable increase in alcohol consumption. It contended that relevantly the focus of any data needed to be directed towards the position in South Australia and whatever national trends may have occurred there was no evidence to suggest that in this State there had been any increase in potentially harmful drinking. It noted that evidence indicated that South Australia has and continues to have substantially lower rates of alcohol consumption relative to national averages, and that the impact of COVID-19 was to reduce even further alcohol consumption. It submitted that given its low base, the return to pre COVID-19 drinking levels now the effects of the pandemic are subsiding, is not a matter of concern.
- 43 Liquorland noted that the uncontradicted evidence establishes that an increase in retail sales does not equate to an overall increase in alcohol consumption. It submitted that to argue that something can be made of an increase in retail sales nationally was therefore misplaced.
- 44 It submitted that overall the evidence supported a conclusion that it is in the interests of the relevant community to grant this application and there is no basis on public interest grounds to refuse it.
- 45 The AHA submitted that the licence held by Australian Boutique Premium Wines must be taken into account. It submitted that the suggestion that it is trading on Hindmarsh Island is hearsay. It submitted that given that the proprietors of that licence have not been heard, this Court should be very cautious in making any adverse finding and that if it were to do so it needed to apply the *Briginshaw* test.<sup>6</sup> It submitted that in any event, whatever Australian Boutique Premium Wines' present trading circumstances might be, there is nothing preventing it from recommencing trade in McLaren Vale.
- 46 The AHA submitted that the evidence clearly established an increase in packaged liquor sales, and it was too early to say that the impacts upon purchasing patterns related to the COVID-19 pandemic had passed. It submitted that the cautious approach that the Court spoke of in its earlier decision was still warranted and that now is not the time to be introducing a new take away liquor facility in McLaren Vale. It submitted that the application should be refused.

### **Consideration**

- 47 I commence by making a general observation.

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<sup>6</sup> *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, stands for the proposition that even in a civil case a court needs cogent evidence before making a finding based upon a serious allegation.

- 48 I accept the sincerity expressed by some about the already abundant access that people have to alcohol, and its potential for harm. I accept that a case could be made for limiting, rather than increasing the opportunities for people to buy alcohol, noting that such an approach has been adopted in this State in connection with the number of gaming machines available for use.<sup>7</sup>
- 49 But as I explained in my earlier reasons, in the case of alcohol, and doubtless in recognition of the fact that for the overwhelming majority of the general public, alcohol is not an issue, Parliament has chosen not to go down that path. To the contrary, its adoption of the recommendation of the Anderson Review and the abolition of the needs test means that it accepts that applications leading to the establishment of new bottle shops will from time to time be granted.
- 50 Thus an application such as this cannot be approached from the premise that there is something inherently noxious about the creation of a new bottle shop. In the face of an extended period of stagnant growth over an extended period, as evidenced by the statistics contained in the Anderson Review, Parliament's adoption of a less stringent test reflects its expectation that the number of such facilities will grow.<sup>8</sup>
- 51 Returning to this case, I do not doubt the sincerity of, and the concerns expressed by RACS, regarding the impact upon health systems by the COVID-19 pandemic and strain on such systems caused by alcohol related disease and injury. I do not doubt the sincerity of, and concerns expressed by ANROWS about adverse social implications related to the pandemic, and the potential for them to lead to increased alcohol consumption and related increased domestic violence.
- 52 I accept that for many people across the world the impact of the COVID-19 pandemic and lockdowns have been a cause of great stress. I accept that some people alleviate stress by consuming more alcohol than they otherwise would. I accept that there is a connection between alcohol consumption and violence, and in particular domestic violence.
- 53 I accept that in connection with the relevant community or the relevant public in this case, if there was cogent evidence that any of these matters were of concern, it would be open for this Court to conclude that for now, it is not in the community interest or the public interest to be granting an application that will result in take away liquor being more accessible to the relevant community or the relevant public.

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<sup>7</sup> I noted this in my earlier reasons at [142].

<sup>8</sup> I qualify this with the observation that I made in my earlier reasons where I said 'whilst ... there will be cases that will succeed under the new test that would not have succeeded under the 'needs test', it should not be assumed that it is now significantly easier to prosecute a case for the grant of a packaged liquor sales licence' at [146].

- 54 But importantly in the context of this case, the evidence also establishes that the stress that individuals might experience as a result of the pandemic, and any changes to their alcohol consumption and increased levels of violence on account of it, are not uniform and can vary from one jurisdiction to another.
- 55 For present purposes, the relevant community that I must consider is that of McLaren Vale and its residents. The relevant public that I must consider is the public of South Australia.
- 56 There may have been overall increased sales of packaged liquor following the onset of the COVID-19 pandemic. But there might be many reasons explaining increased sales that do not reflect increased consumption. I am permitted to know that some purchasing habits following the onset of the pandemic defied logic. There was, for example an almost insatiable demand for toilet paper. Yet there is no evidence that suggests that this demand was in consequence of an increased use of that product. I therefore am sceptical as to what I should make of evidence of increased sales.
- 57 In contrast to this, I find the evidence based on the wastewater data persuasive. It is objective evidence that is jurisdiction specific. It does not suffer from the subjective nature of self-reporting surveys, nor does it suffer from the speculative nature of opinions as to drinking patterns based on the data related to the records of the sale of liquor.
- 58 Having carefully considered the evidence placed before me, I am not persuaded that there is any reliable evidence of increased alcohol consumption or increased alcohol related violence related to the COVID-19 pandemic in McLaren Vale or in South Australia generally. If anything, the hard evidence points in the opposite direction in connection with the State generally, and that is, that there was a reduction in alcohol consumption and a reduction in alcohol related harm over the course of the pandemic. As such, there is no basis to refuse this application because of the impact of the COVID-19 pandemic, either by reference to the community interest test or the public interest test.
- 59 The evidence regarding Australian Boutique Premium Wines might not satisfy the stringent evidentiary requirements of the criminal law, but this Court is not bound by the rules of evidence.<sup>9</sup> I am prepared to act upon the information provided by the Commissioner in connection with this licence. Australian Boutique Premium Wines is not trading in McLaren Vale and is planning to trade elsewhere. I accept that it is conceivable that it could recommence trade in McLaren Vale. Whilst for now its intentions are not to do so, things might change. Its application to

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<sup>9</sup> Section 23 of the Act.

use the licence to trade elsewhere might fail. It might be persuaded to sell its licence to another, who has plans for McLaren Vale. I therefore cannot approach this application from the premise that this licence is irrelevant. But by the same token, I cannot ignore that fact that it has not traded in McLaren Vale for some time and has no immediate intention to do so. I must approach this application on that basis that for now, within the relevant community, there is only one stand-alone bottle shop and one take away liquor facility attached to a hotel, but it is possible that a second stand-alone bottle shop in addition to the proposed store, may trade in the future.

- 60 As was observed in *Liquorland (Australia) Pty Ltd (Park Holme)* the community interest test ‘involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new licence and hence take away facility for the purchase of take away liquor in the relevant locality’.<sup>10</sup> In undertaking this judgment there is no magic touchstone<sup>11</sup> that yields the outcome. Each case must be decided on its own facts. The factual picture must be considered as a whole and sometimes the addition or subtraction of a fact may make all the difference.<sup>12</sup>
- 61 The fact of the previous uneventful co-existence of Australian Boutique Premium Wines with the other take away facilities in McLaren Vale is of some significance. It indicates that the relevant community was not adversely affected by the fact that two bottle shops and a take away facility attached to a hotel were trading in relative proximity to each other. This suggests that the grant of this application, provided that Australian Boutique Premium Wines does not return to the locality, is unlikely to have an adverse impact beyond the impact that any conveniently located bottle shop will have on vulnerable members of the relevant community.
- 62 In connection with the community’s want for the proposed store, although the McLaren Vale Shopping Centre is in name a single shopping centre, in truth, it is in effect two shopping centres. One on a lower level, with a large adjacent car park to the west, north-west and north-east, anchored by a large full line Coles supermarket occupying some 3,800 square metres. The other is on a higher level with an adjacent car park to the south-east which is immediately adjacent to the main road of McLaren Vale, anchored by a smaller, albeit substantial Foodland supermarket, occupying some 1,700 square metres.

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<sup>10</sup> [2020] SALC 37 at [27].

<sup>11</sup> These are the wise words of Bray CJ in *R v Allan; ex parte Australian Mutual Provident Society* (1977) 16 SASR 237 at 248.

<sup>12</sup> *Nancollas v Insurance Officer* [1985] 1 All ER 833 at 840.

- 63 To travel from one level to the other requires either walking through an outdoor path that includes walking up or down stairs or a ramp or driving from one car park to the other. These are matters of degree, but the two levels do not naturally flow into one another as might be the case if they were connected by a lift or an internal stairway or ramp or an escalator or travelator as sometimes appear in other shopping centres. I would regard the inconvenience of travelling from one level to another as more akin to that experienced crossing a moderately busy road as opposed to effortlessly moving from one part of a shopping centre to another. As such, I expect that a large number of the patrons who shop at the Coles supermarket who wish to purchase alcohol as part of that shopping expedition would welcome the opportunity to use the proposed store rather than travel to another take away liquor facility. This observation is confirmed by the results of the survey that I discussed in my earlier reasons.
- 64 In the end, I am left with this:
- 65 There is no evidence that the proposed store might have negative impacts upon local wineries or that it might adversely affect tourism.
- 66 There is 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.
- 67 There is no evidence that the community has more than its fair share of problem drinkers.
- 68 There is no evidence that when there were three take away liquor facilities in McLaren Vale, that alcohol related harm was as issue for the local community.
- 69 Apart from concerns expressed by commercial competitors, there were no other expressions of opposition to the grant of the application.
- 70 On a positive note, the proposed store 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.
- 71 Some employment opportunities will be created by the grant of the application.
- 72 The McLaren Vale Shopping Centre is the only shopping centre in the town. The Coles Supermarket is a large full line supermarket and is by some measure the largest supermarket in McLaren Vale. It occupies more than twice the space of the nearby Foodland Supermarket. It is safe

to infer that many of the residents of McLaren Vale regularly shop there. It is safe to infer that many of its patrons who wish to purchase takeaway liquor as part of that shopping expedition will welcome and appreciate the opportunity of purchasing take away liquor as part of that shopping expedition without having to make a special trip to the BWS Store, the nearby hotel, or elsewhere.

- 73 For those who presently shop at Coles accessing the BWS store, even though it is only 100 or so metres away, and is technically within the same shopping centre, involves an unusual level of inconvenience.
- 74 As mentioned earlier, the BWS store in McLaren Vale is typical of such stores, which can be described as convenience based. The take away liquor facility attached to the McLaren Vale Hotel, trades under the Thirsty Camel Badge. It is a typical drive through with an adjacent walk in bottle shop. The proposed store will be convenience based. Neither the proposed store, nor the existing take away liquor facilities in McLaren Vale can be described as large facilities. None can be expected to be selling liquor on a near industrial scale that I spoke of in my earlier reasons.
- 75 There is no more than a possibility that Australian Boutique Premium Wines will resume trade in McLaren Vale at some time in the future.
- 76 There are no issues regarding the plans for the proposed premises. None of the matters raised by s 57 of the Act are of concern here. I find that the premises will be suitable. There is no evidence to suggest that they have the potential to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity or that they will prejudice the safety or welfare of children attending nearby kindergartens and schools. I find that the appropriate approvals, consents and the like, pertaining to the proposed premises have been granted.
- 77 Having made the evaluative judgment that the Act requires, I am satisfied that it is in the community interest to grant this application.
- 78 I now turn to consider whether it is in the public interest to grant this application.
- 79 If I considered that the grant of this application would create a precedent that irrespective of the number, nature and proximity of other take away liquor facilities, an application for a packaged liquor sales licence to enable the creation of a bottle shop adjacent to a large full line supermarket must succeed, I would refuse this application on public interest grounds.
- 80 Parliament has elected not to go down the path taken in other jurisdictions of permitting the wholesale alignment of bottle shops with

supermarkets and this can be taken to reflect the public's expectations in this State. The public clearly supports the alignment of bottle shops with some shopping centres that contain supermarkets. If it were otherwise, there would not be so many bottle shops aligned with supermarkets in shopping centres. But through the Parliament, the public can be taken to not aspire to an alignment of a bottle shop with every shopping centre that contains a supermarket. The public can be taken to consider that sometimes, because of the proximity of other take away liquor facilities, it would be better for a shopping centre not to have a bottle shop.

81 I also take into account the observation of King CJ in *Lovell v New World Supermarket Pty Ltd* where he said:

If, for example, there existed an accessible first grade bottle shop at a distance of, say, 200 or 300 metres from the shopping centre, it would be absurd to suggest that the demand for liquor by customers of the shopping centre could not be met simply because they would have to drive their cars a short distance from the general shopping centre in order to obtain their liquor. To attempt to provide access to a full range of liquor for everybody who is without the use of a motor car would result in a wholly undesirable proliferation of liquor outlets with consequent deterioration of the standards in the service of liquor which are necessary in the public interest. **It is, however, a matter of degree.**<sup>13</sup>

82 But as I noted in *BWS Para Hills*:

That last sentence is important, because it emphasises that there is no mathematical formula that determine these matters and in the end, each case must be decided on its own facts.<sup>14</sup>

83 At one extreme is a case such as the Arndale Shopping Centre which featured in *Woolworths Ltd v Fassina Investments Pty Ltd & Ors*.<sup>15</sup> In that case the Full Court thought that the public would think it surprising that a shopping centre of the size and importance of the Arndale Shopping Centre case did not contain, amongst its offerings, a bottle shop. It held that in light of the community's expectation, even though there were plentiful opportunities to purchase take away liquor from nearby facilities, a bottle shop in Arndale was in the words of the Act as it then was, 'needed'.

84 The other extreme is the Hove Shopping Centre which featured in *Hove Sip n Save*.<sup>16</sup> There it was held in effect that there would be no community expectation that a small suburban shopping centre would

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<sup>13</sup> (1990) 53 SASR 53 at 55-56.

<sup>14</sup> [2022] SALC 72 at [57].

<sup>15</sup> (2015) 122 SASR 535.

<sup>16</sup> (2021) SALC 7.

have its own bottle shop, especially when there were other opportunities to purchase take away liquor nearby.

- 85 In this case, the size of the supermarket adjacent to the proposed store and the size of its patronage were important factors in my determination that it was in the community interest to grant this application. But there were other matters that were also important. First, was the fact that previously the existence of two proximate bottle shops had not led to any apparent difficulties in the relevant community. Secondly, even with the grant of the within application, none of the take away facilities in McLaren Vale could be described as large. None are likely to be selling take away liquor on a near industrial scale. And by reference to other cases<sup>17</sup> and the very speculative prospect that the packaged liquor sales licence held by Australian Boutique Premium Wines will feature in this locality, the grant of this application will not result in the locality being awash with bottle shops. Finally, was my finding that the patrons of the large Coles supermarket cannot access the existing BWS bottle shop without a degree of inconvenience that I considered was atypical of that which might be expected within a suburban shopping centre.
- 86 As such, this case must be understood as having been decided on its own facts, which are relatively unique and therefore it does not create an undesirable precedent that warrants refusal on public interest grounds.

### **Conclusion**

- 87 The powers conferred on this Court on a review, include the power to make any decision that should, in the opinion of the Court, have been made in the first instance. In the exercise of this power, I grant Liquorland's Application for Review and set aside the order made by the Commissioner. In lieu of it, I find that the grant of the application is in the community interest and the public interest. Liquorland's application for a packaged liquor sales licence in respect of the proposed premises is therefore granted. Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court's consideration.

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<sup>17</sup> Some of these were considered in *BWS Para Hills* (ibid).