

**LICENSING COURT OF SOUTH AUSTRALIA**

**CELLARBRATIONS WALKLEY HEIGHTS**

**JURISDICTION:** Application for a Review of a decision of the Commissioner

**CASE NO/S:** 57 of 2022

**HEARING DATE:** 23 March 2023

**JUDGMENT OF:** His Honour Judge Gilchrist

**DELIVERED ON:** 6 July 2022

**CATCHWORDS:**

*Application for review – The Liquor and Gambling Commissioner refused an application for a packaged liquor sales licence in respect of proposed premises adjacent to a Drakes Mini supermarket in Walkley Heights on the grounds that it was not in the community interest or the public interest to grant it – The Commissioner noted that the supermarket was relatively small and in a small shopping centre – He found that to grant the application would be a further step towards proliferation and would provide an undesirable precedent – On review the applicant contended that the Commissioner made factual errors and erroneously limited his focus to convenience. It submitted that whilst this was an important aspect of its application, its case was also pitched on the proposed premises providing choice, through the provision of a different type of facility to those currently on offer and trading under a different badge – The applicant submitted that it was significant that the three take away liquor facilities within the locality were at its perimeter, two were attached to hotels and the other was a larger destination store – In contrast the proposed premises was a small convenience based stand-alone bottle shop – **Held** that in the absence of any evidence of things like turnover, or the number of weekly transactions, it is not appropriate to make a finding that the shopping centre in which the proposed premises is to be situated is an especially popular shopping centre or that many within the relevant community would be using the shopping centre as part of a ‘one stop shop’ shopping expedition – **Held** that it is significant that the other shopping centre within the locality it is a very popular shopping centre and for the majority of people living in the locality this is where they would undertake their shopping for fresh food and groceries – **Held** that it can be inferred that the other shopping centre is the place where the majority of those living within*

*the locality undertake ‘one-stop shopping’ and that most of those who shop at this shopping centre, who wish as part of that shopping expedition to purchase alcohol, would do so at the nearby Settlers Hotel or the First Choice Liquor store – **Held** that the addition of another take away liquor facility in the locality is not in the community interest – **Held** that the community interest test could only be met in this case by concluding that it is sufficient that some of the relatively small number of the local community who visit the shopping centre would find it convenient to have the option of purchasing take away liquor as part of that visit and the bottle shop in the locality is large and is a few hundred metres away from the nearest supermarket – **Held** that this would create an undesirable precedent such that the application had to be refused on public interest discretionary grounds – **Held** that the Application for Review is dismissed – Liquor Licensing Act 1997.*

*Nepeor v Liquor Licensing Commissioner (1987) 46 SASR 205*  
*First Choice Liquor [2015] SALC 1*  
*BWS Woodcroft [2022] SALC 108*  
*Hove Sip n Save [2021] SALC 7*  
*Erythos Holdings Pty Ltd [2015] SALC 34*  
*Liquorland (Australia) Pty Ltd (Park Holme) [2020] SALC 37*  
*BWS Mount Barker [2023] SALC 31*  
*Liquorland McLaren Vale (No. 2) [2022] SALC 53*  
*Cellarbrations Mannum [2021] SALC 42*  
*BWS Cumberland Park [2022] SALC 70*  
*BWS Para Hills [2022] SALC 73*

## **REPRESENTATION:**

Counsel:

Applicant: Mr M Roder KC with Ms K Sheridan

Respondent: Mr G Coppola

Solicitors:

Applicant: Mellor Olsson Lawyers

Respondent: Australian Hotels Association (SA Branch)

- 1 Finliq Pty Ltd (Finliq) seek a review of a decision of the Liquor and Gambling Commissioner (the Commissioner) wherein he refused its application for a packaged liquor sales licence to trade under the Cellarbrations badge at proposed premises within the Walkley Heights Shopping Centre, Walkley Heights.
- 2 Finliq contends that the Commissioner made several errors in reaching his decision. It contends that on the evidence presented the licence should have been granted.
- 3 The application before the Commissioner was opposed by the Australian Hotels Association (AHA). The AHA contends in this Court that the Commissioner was right to refuse the application and that the application for review should be dismissed.
- 4 A packaged liquor sales licence is one of several categories of liquor licences available under the *Liquor Licensing Act 1997*. It 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.’ Thus to have succeeded in its application Finliq needed to persuade the Commissioner that the grant of the application was in the community interest.
- 5 Pursuant to s 53A(2) of the Act in determining that issue 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; and
  - 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 which relevantly 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.’
- 7 Finliq also needed to satisfy the Commissioner that the pre-requisites of s 57 of the Act have 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 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.”
- 9 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.

#### **The proceedings before the Commissioner**

- 10 Finliq’s application before the Commissioner was supported by a Community Impact Submission prepared by its solicitors, Mellor Olsson (the Submission), a Community Impact Analysis, prepared by the planning expert, Ms Caro Mader, from the planning consultancy firm URPS, (the Report), the results of an In Store Survey (the Survey) conducted at the Drakes Supermarket, which is the supermarket which anchors the Walkley Heights Shopping Centre, and which is immediately adjacent to the site of the proposed premises, and a document titled “Drakes Liquor Licensing & Compliance Guide”, as well as additional documents around matters such as planning and landlord consent relating to the proposed premises.
- 11 The guidelines, as published by the Commissioner, suggest that as a guide the locality of premises in the Adelaide Metropolitan Area is generally the area based on a two kilometre radius of the site of the relevant premises. This was the locality adopted in the Report. The nominated locality includes the suburbs of Walkley Heights, Northfield, to the south of Grand Junction Road, Pooraka, to the west of Briens Road, Ingle Farm, to the north of Wright Road, and Valley View and Para Vista, to the north-east.
- 12 Walkley Heights is situated just north of Grand Junction Road and the Yatala Labour Prison. Grand Junction Road is a major Adelaide road

traversing through many of Adelaide's northern suburbs. It runs roughly from east to west. In the vicinity of Walkley Heights is Hampstead Road, which runs roughly from south to north. As that road passes through Grand Junction Road and heads in a northerly direction, it becomes Briens Road. About two kilometres north of the intersection of Hampstead Road/Briens Road and Grand Junction Road, is Wright Road. It forms a junction with Briens Road and runs from east to west and is roughly parallel to Grand Junction Road. As Wright Road heads east from its junction with Briens Road, after about a kilometre or so, it is met with RM Williams Drive, which forms a junction with Wright Road. At that point RM Williams Drive heads generally to the south before changing direction to the east, and then changing direction again, heading north before forming another junction with Wright Road, about a kilometre from the earlier junction. The Walkley Heights Shopping Centre is to the south of Wright Road, just west of the eastern junction of Wright Road and RM Williams Drive. Reference also needs to be made to Montague Road and Walkley Road. Montague Road abuts Briens Road and is roughly parallel to Wright Road about a kilometre to the north. Walkleys Road abuts Montague Road about a kilometre east of the junction of Montague Road and Briens Road. It connects Montague Road to Grand Junction Road.

- 13 The Report stated that within the locality there were three take away liquor facilities, being the Bridgeway Hotel, the Settlers Tavern, and a First Choice Liquor Store.
- 14 The Bridgeway Hotel has a drive through and bottle shop trading under the Sip'n Save badge and is located on the western side of Briens Road, just south of the junction with Wright Road.
- 15 The Settlers Tavern has a drive through and bottle shop trading under the Thirsty Camel badge and is located on Montague Road on the eastern end of the Ingle Farm Shopping Centre. The Ingle Farm Shopping Centre is a relatively large shopping centre that appears to have over a 1,000 car parks. Amongst its offerings is a Kmart, a Coles Supermarket, an Aldi store, a food court and numerous speciality shops.
- 16 The First Choice Liquor Store is located on the corner of Montague Road and Walkleys Road, within the Ingle Farm Shopping Centre precinct a couple of hundred metres to the west of the Settlers Tavern. It can be accessed from the car park in the Ingle Farm Shopping Centre precinct as well as directly from Montague Road. The First Choice Liquor Store was not inspected but it can be inferred that it is a typical First Choice Liquor store. As a specialist court, this Court is permitted to draw upon its accumulated knowledge.<sup>1</sup> Such stores are often described as destination

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<sup>1</sup> *Nepeor v Liquor Licensing Commissioner* (1987) 46 SASR 205 at 218 per von Doussa J.

stores. This Court has previously received evidence that a First Choice Liquor Store is not quite as large as a Dan Murphy's, which are generally of warehouse proportions, sell through checkouts and carry over 4,000 lines. In contrast to this, a First Choice Liquor Store is a little smaller and typically carries over 3000 lines. Both have a wide radius of custom and patrons are willing to travel over larger distances to use them for the specific purpose of purchasing liquor in bulk. When they are situated in proximity to a shopping centre, they can also perform the same function as a typical convenience type store enabling the purchase of take away liquor as part of an overall shopping expedition.<sup>2</sup>

- 17 The Report stated that within the locality there resided 23,574 persons. The Report recorded the Socio-Economic Index for Areas (SEIFA)<sup>3</sup> stating that it ranked 51. It suggested that this ranking "indicates that the community may be more vulnerable to alcohol-related harm than many South Australian communities, but less so than most of northern metropolitan Adelaide". It noted that there were a greater proportion of Aboriginal and Torres Strait Islander people in the locality than in the greater Adelaide area. It made reference to a report issued by the Australian Institute of Health and Welfare that indicated that Indigenous Australians are more likely not to drink alcohol than non-Indigenous Australians, but those who do are more likely to drink at dangerous levels. It also noted that the locality had a higher proportion of people from culturally and linguistically diverse backgrounds and that whilst in percentage terms that cohort is more likely to abstain compared to primary English speakers, some are more vulnerable to alcohol-related harm due to a history of torture, trauma, grief and loss.
- 18 But the Report went on to observe that there had been engagement with the Department of Premier and Cabinet (Aboriginal Affairs & Reconciliation) and with the Department of Premier and Cabinet (Multicultural Affairs) and neither had provided any feedback.
- 19 After noting that aside from there being lower average incomes, a higher percentage of person 65 years or older, a marginally greater number of Aboriginal and Torres Strait Islander peoples and peoples of greater cultural diversity, the population profile was typical of other localities within Greater Adelaide and that there was a relatively low percentage of licensed premises within the locality it concluded as follows:

On the basis of analysis of the specific data cited here and community engagement findings present in this report, it is the conclusion of this Community Impact Analysis that the proposed

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<sup>2</sup> See, for example: *First Choice Liquor* [2015] SALC 1.

<sup>3</sup> This is the product of data collected by the Australian Bureau of Statistics that measures for particular areas things like unemployment rates, incomes, education levels, and access to the internet, and then ranks them by reference to other areas.

packaged liquor sales outlet is likely to have a neutral impact on the community within this Locality.<sup>4</sup>

- 20 The Submission stated that the relevant locality primarily comprised of the residents of Walkley Heights and Ingle Farm. It noted that in the immediate vicinity of the proposed store there are two retirement villages and a Childcare Centre. It noted that within the broader locality there were three primary schools, one secondary school and a number of kindergarten/early learning centres. It submitted that the current offer of packaged liquor within the locality was limited. It noted that the Walkley Heights Shopping Centre comprised of a Drakes Mini Supermarket that was open from 7.00 am to 9.00 pm seven days a week, six take away food outlets, a beauty salon and a Salvation Army outlet store. It submitted that because of the supermarket's trading hours and the number of take away food outlets it would be very convenient for those who want liquor with their food to be able to buy liquor from the proposed store. Reference was also made to the fact of the retirement villages nearby and the likelihood that some of these residents would be less likely to drive or would prefer not to drive the distance required to access other take away liquor facilities in the locality.
- 21 The Submission stated that Finliq was a subsidiary of Drakes Supermarkets. It described Drakes Supermarkets as a South Australian family-owned business that of the largest independent grocery retailer in Australia, and provided details of the group's annual turnover and staff numbers. It spoke of the group's support for local manufacturers and suppliers and its charity initiatives that included supporting the local community. It stated that Drakes Supermarkets currently operate three other Cellarbrations stores, adjacent to a Drakes Supermarket and that it has a proven history of being a responsible operator of packaged liquor outlets. It submitted that the proposed premises would add to the attractiveness of the Walkley Heights Shopping Centre and would meet an existing desire by many of combining their grocery shopping and take away food purchasing with the purchase of take away liquor. It noted a relatively low ratio of take away liquor facilities in the locality. It submitted that the take away facilities at the two hotels in the locality were drive through bottle shops which it contended had limited opportunity to browse. It submitted that a stand-alone bottle shop offers a superior range and enables browsing. It submitted that the First Choice store was a destination store with a large busy car park that was physically separated from the Ingle Farm Shopping Centre. It submitted that in contrast the proposed premises was based on convenience complimenting a well-established business that would "round out the offer in this location

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<sup>4</sup> The Report, p 23.

and be consistent with the growing modern shopping trend of one stop shopping”.<sup>5</sup>

- 22 The Survey was completed by 351 persons, 98% of whom supported the proposed premises.
- 23 The Commissioner invited submission from the Australian Competition and Consumer Commission (ACCC), Associate Professor Michael Livingston, who has conducted extensive research examining the relationships between the availability of alcohol, alcohol consumption and alcohol related harm, the Royal Australasian College of Surgeons (RACS), and Australia’s National Research Organisation for Women’s Safety (ANROWS).
- 24 ACCC advised that it did not wish to make written submissions. It made general observations about the potential over time for the grant of new licenses to particular entities to undermine the competitiveness and viability of independent liquor retailers.
- 25 The submissions advanced by Professor Livingston, RACS and ANROWS were summarised by this Court in *BWS Woodcroft*<sup>6</sup> as follows:

Professor Livingston submitted that there was a clear association between the density of liquor facilities and alcohol related harm including violence.

RACS asserted that the Covid-19 pandemic was associated with an increased incidence of domestic violence. It also asserted that there was increased alcohol consumption in 2020 and an increase in domestic violence in the same period. The inference being that the two were connected. It asserted that Covid-19 had resulted in increased stress, pressure and uncertainty. It submitted that allowing further saturation of liquor outlet density would be to send the wrong message and would set a dangerous precedent for future applications.

ANROW’s asserted that alcohol is involved in around half of all domestic and family violence and that there was a clear association indicating that alcohol increases the severity of that violence. It asserted that a study in May 2020 conducted by the Australian Institute of Criminology, that examined the impacts of the Covid-19 pandemic on domestic violence, reported an increase in alcohol consumption in the three months from February 2020. It also asserted that another study ‘highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families’.

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<sup>5</sup> The Submission, p 13.

<sup>6</sup> [2022] SALC 108.



Underpinning RACS and ANROW's submissions is the contention that the impacts of the Covid-19 pandemic included a noticeable increase in alcohol consumption.<sup>7</sup>

- 26 The AHA submitted that there were ample take away liquor facilities within the locality, each stocking more than 1,400 lines. It noted that no product range for the proposed premises was put into evidence. It noted that the Report put the proposal as no higher than having a neutral impact on the relevant community which it submitted fell short of the requirement that the application be in the community interest.

### **The Commissioner's decision**

- 27 The Commissioner found that the relevant locality was, as identified in the Report, that is, the area within two kilometres of the proposed premises. He found that many of those who shop at the Walkley Heights Shopping Centre live in the locality. He found that some of this cohort would find increased convenience from the proposed premises. However, he considered that such number would be limited because of the size of the supermarket anchoring the Walkley Heights Shopping Centre, which he found to be analogous to the supermarket that was the subject of the decision of this Court in *Hove Sip n Save*.<sup>8</sup> In that case the relevant shopping centre had 54 car parks. The supermarket that anchored that shopping centre and with which the proposed liquor store was to be co-located conducted about 6,200 transactions per week and most of its customers used the store to complete 'top up' shopping.
- 28 The Commissioner noted that various stakeholders had been consulted and none expressed their objection. He noted the Survey and reasoned that it reflected community engagement. He thought that the results of the Survey were indicative that some members of the community supported the application.
- 29 The Commissioner found that the proposed premises would not negatively impact upon any activities conducted on any community buildings and facilities within the locality.
- 30 The Commissioner found that none of the issues raised by s 57 of the Act were of any concern in this case.
- 31 The Commissioner found that the locality was not awash with take away liquor facilities.
- 32 The Commissioner noted that the locality had a SEIFA ranking of 51<sup>st</sup> out of 71 Local Government Areas across South Australia. He stated that it

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<sup>7</sup> Ibid at [34]-[37].

<sup>8</sup> [2021] SALC 7.

had a significantly higher unemployment rate, a higher proportion of Aboriginal and Torres Strait Islander people than Greater Adelaide, and lower average income levels. He stated that these were all factors which militated against the grant of the application and indicated an increased risk of harm.

- 33 The Commissioner noted the submissions advanced by Professor Livingston, RACS and ANROWS. He reasoned that they collectively suggested that in the aftermath of the COVID-19 pandemic he should proceed with extra caution having regard to the effect of increasing the accessibility and exposure of alcohol to residents in the relevant locality.
- 34 The Commissioner thought that the application would only result in marginal extra employment opportunities.
- 35 The Commissioner accepted that general convenience and the desire to one-stop shop was a factor to take into account but that did not mean that all inconvenience had to be eliminated.
- 36 The Commissioner stated that to allow this application would create an undesirable precedent because having regard to the small size of the Walkley Heights Shopping Centre to grant it could lead to the future wholesale alignment of packaged liquor sales licences with shopping centres, being a notion that Parliament declined to adopt. He stated that there were already three “PLSL” outlets in the locality, which he said were ample to meet the convenience of those residing in the locality. He made particular note of the Ingle Farm Shopping Centre and of the fact that it has a significant number of tenancies anchored by Aldi, Coles, Kmart, The Reject Shop and Best & Less, and that it contained a large, packaged liquor outlet. He stated that this shopping centre clearly provided the residents in the locality the opportunity to “one-stop-shop”.
- 37 The Commissioner found that the grant of the application was not in the community interest. He found that to grant it would be a further step towards proliferation, it would set an undesirable precedent, it would provide little overall benefit to the community, and it was therefore not consistent with the responsible development of the licensed liquor industry.

### **Submissions of review**

- 38 On review Finliq commenced by noting that the Settlers Hotel is 1.8 kilometres from the proposed premises and the First Choice liquor store is 1.7 kilometres from it. It submitted that when the drive through and bottle shop at the Bridgeway Hotel is added, it can be seen that all of the take away liquor facilities were some distance from the proposed

premises and that for a locality with a population of 23,000 the number of such facilities was small.

- 39 It submitted that it can be taken as a given that the many people who live south of the proposed premises would be greatly inconvenienced by being able to purchase take away liquor as part of their shopping expedition to the Walkley Heights Shopping Centre.
- 40 It submitted that it was instructive that the Commissioner stated that there were three “PLSL” outlets in the locality. It said that this was an error because there was only one, being the First Choice Liquor store. It submitted that this appears to be more than a mere slip of the pen and given his ultimate conclusion might indicate that he approached this case from an erroneous factual premise. It submitted that the Commissioner gave no consideration to the fact that none of the take away liquor facilities in the locality were convenience stores directly co-located with a supermarket. It noted that two of the facilities were hotels with drive throughs, and the third was a large destination store that is some distance away from the supermarkets in the Ingle Farm Shopping Centre, and that all are on the outer limits of the locality and some distance from the proposed premises.
- 41 It submitted that it was also instructive that the Commissioner stated that “the locality cannot be said to be awash, and the application should not be refused on the basis of license density concerns alone.” It said that whilst it was undoubtedly true that the locality was not awash with take away liquor facilities, the Commissioner’s statement suggests that he looked at the matter from the wrong perspective. I understood it to contend that the Commissioner seemed to regard this as a neutralising factor whereas he should have regarded it as a positive indication that it was in the relevant community’s interest to grant the application.
- 42 It submitted that the Commissioner erroneously limited his focus to convenience. It said that whilst this was an important aspect of its application, its case was also pitched on the proposed premises providing choice, through the provision of a different type of facility to those currently on offer and trading under a different badge.
- 43 It submitted that the Commissioner gave too much weight to the fact that the proposed premises was to be co-located with a small supermarket. It noted that even under the former “needs test” this Court granted applications for retail liquor licenses for premises co-located with small supermarkets. It referred to *Erythos Holdings Pty Ltd.*<sup>9</sup> That case concerned the successful application for a licence to be co-located with a small shopping facility that was not much larger than a convenience store. The applicant in that case acknowledged that the application could not be

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<sup>9</sup> [2015] SALC 34.

based on the premise that it would lead to one-stop shopping because a full range of goods and services would not be available at that shopping facility.

- 44 It submitted that the Commissioner seemed to be overly focussed on harm minimisation and that appeared to give little, if any, weight to the fact that no opposition to the application had been expressed by the local council, the police or the Health Department, all of whom had been consulted. By reference to *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>10</sup> it submitted that absent that opposition it was open to draw the inference that the relevant community was not afflicted by significant issues around alcohol. It noted that the AHA had not placed any evidence before the Commissioner that the hotels in the locality had encountered issues around problem drinking.
- 45 It noted that the Commissioner seemed to be influenced by the relatively low SEIFA index. After stating that the index is a blunt tool, it made the point that whilst the locality might not be as advantaged as some of the eastern and seaside suburbs of Adelaide, it actually had a higher ranking than its neighbouring northern council areas of Port Adelaide Enfield, Salisbury and Playford. It submitted that the locality should be seen as an ordinary Adelaide suburban area with a mix of people, including professionals and those in managerial positions. It also contended that when the data is analysed it reveals that the Commissioner erred in finding that the locality had a relatively high unemployment rate. The data indicates that the percentage of persons in the locality in full time work was 54.1% and in part-time work, 32.9%. The comparable figures for Greater Adelaide were 54.0% and 33.5% respectively.
- 46 The AHA, submitted that it was significant that the Report put it no higher than the proposed premises as having a neutral impact on the community. It submitted that this fell short of the requirement that the grant of the application is in the community's interest and on that ground alone the Commissioner's decision to refuse the application was unassailable.
- 47 Next it submitted that it was also significant that Finliq placed no evidence before the Commissioner as to the turnover of the supermarket with which the proposed premises was to be co-located. It submitted there was no evidence that enabled any sense of how many customers frequent the Walkley Heights Shopping Centre.
- 48 It submitted that this was a low-risk application to add a small well stocked bottle shop to be operated by a reputable operator where the only other take away liquor facilities on offer in the locality are on its edge, two are drive throughs attached to hotels, and the third is a destination store away

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<sup>10</sup> [2020] SALC 37 at [45].

some distance away from a nearby shopping centre. It contended that it is in the community interest to grant the application and that because of the unique circumstances of the case, no issues of creating an undesirable precedent arise such that it ought not be refused on public interest grounds.

- 49 The AHA accepted that the Commissioner may have erred in finding that the locality had a relatively high unemployment rate. But it added there were other aspects of the SEIFA data that rightly concerned the Commissioner, being a higher proportion of Aboriginal and Torres Strait Islander people than Greater Adelaide, and lower average income levels. It pointed to that statement contained in the Report that:

The Australian Department of Health (DoH) agrees that:

Aboriginal and Torres Strait Islander peoples are less likely to drink alcohol than other Australians. But those that do drink are more likely than other Australians to:

- < drink at dangerous levels – both over a lifetime and on a single occasion.
- < go to hospital for alcohol-related conditions such as liver disease.<sup>11</sup>

- 50 The AHA submitted that the locality comprised of many large houses with large off-street parking, and it was proper to infer that for many in the locality driving a motor vehicle was the norm. It submitted that the existing facilities in the locality were already adequately catering for the community, and those who do not wish to purchase take away liquor from a hotel can purchase liquor from the First Choice store, being one of the largest bottle shops on offer in this State.
- 51 It submitted that despite some minor slips, the Commissioner ‘got this right’ and the application for review should be dismissed essentially for the reasons he gave.

### **Consideration**

- 52 With respect, I think the evidence regarding population profiles should have been given very little weight. I accept that an epidemiological approach based upon the profile of sections of a particular community has the potential to inform whether that community will be at an unacceptable risk of harm by the grant of an application enabling an additional facility to sell alcohol, in the same way as it might be used to predict adverse health outcomes. But for such evidence to be genuinely helpful it needs to be based on standardised terminology, common methods of measurement

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<sup>11</sup> The Report, p 13.

and evaluation, and compatible reporting of adverse events. Without this, drawing any conclusions from such evidence amounts to little more than stereotypical conjecture. In this case the evidence regarding population profiles comprised of no more than non-specific SEIFA data and generalised statements about alcohol and Indigenous Australians and the vulnerability of some people from culturally and linguistically diverse backgrounds to alcohol-related harm. In my opinion this evidence had such little probative value that it should have been ignored.

- 53 On the state of the evidence, noting that no issues were raised by the local council, the police or the Health Department there was, with respect, no basis to evaluate this application from the premise that the members of the relevant locality were at any increased risk of alcohol related harm compared to the community at large.
- 54 More recent evidence has dispelled the notion that in the aftermath of the COVID-19 pandemic issues have arisen in connection with alcohol consumption. Thus there was no basis to approach this application with extra caution on account of these.
- 55 It must be accepted that those who shop the Walkley Heights Shopping Centre who wish to purchase alcohol would find it very convenient to do so from a nearby bottle shop. It must be accepted 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. There do not appear to be any issues regarding Finliq's suitability to conduct the business of a licensed bottle shop or around its policies and proposed procedures to deal with harm minimisation.
- 56 These are undoubtedly positives that point towards the grant of the application being in the community interest. But as was recently observed by this Court in *BWS Mount Barker* "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". The Court observed:

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. 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.<sup>12</sup> (Footnotes omitted)

- 57 As this Court also observed in *Liquorland McLaren Vale (No. 2)*, measuring “licensed premises density is much more nuanced than simply adding up the number of licensed premises and dividing the overall relevant population by that number to arrive at a ratio”.<sup>13</sup> Consideration needs to be given to the nature of the facility. The take away liquor facilities forming part of the Settlers Hotel and the Bridgeway Hotel are not small. The First Choice Liquor store in the Ingle Farm Shopping Centre is a sizable bottle shop. Thus, whilst it might be true to say that the locality is not awash with take away liquor facilities, the members of the relevant community already have access to three substantial take away liquor facilities, all trading under different badges. In light of the size and range of these take away liquor facilities and the proximity of two of them to a large shopping centre, the fact that the grant of this application would provide for a different type of facility to those currently on offer and trading under a different badge would not, without more, in my opinion be enough to establish that it is in the community interest to do so.
- 58 There are some retail facilities that because of their size and the size of adjoining car parks, even without further evidence, inferences can be drawn as to their popularity. But in this case, no such inference can be drawn. On the face of it the Drakes Mini Supermarket with which the proposed premises is to be co-located appears to be a relatively small supermarket in a relatively small shopping centre with a relatively small car park. Whilst some people living in the locality might do all of their supermarket shopping there, its size suggests that for many it is a facility used for ‘top up’ shopping. This might not be correct, but absent any evidence of things like turnover, or the number of weekly transactions, I am not prepared to make a finding that the Walkley Heights Shopping Centre is an especially popular shopping centre.
- 59 Having said that I repeat what I said in *BWS Para Hills* that none of this should be understood as meaning that an application for a packaged liquor sales licence in a smaller shopping centre is doomed to fail. But what it does mean is that whilst it can be accepted that many within the relevant community “share the values of many contemporary Australians for whom the ability to undertake ‘one-stop shopping’ is very important, I am not able to infer that many members of this community will be using the Walkley Heights Shopping Centre for that purpose.
- 60 It is also significant that in contrast to the Walkley Heights Shopping Centre, the nearby Ingle Farm Shopping Centre is relatively large. Even

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<sup>12</sup> [2023] SALC 31 at [78].

<sup>13</sup> [2022] SALC 53 at [186].

without direct evidence, the inference can be drawn that it is a very popular shopping centre and that for the majority of people living in the locality this is where they would undertake their shopping for fresh food and groceries. It can be inferred that it is the place where the majority of those living within the locality undertake ‘one-stop shopping’. It can also be inferred that most of those who shop at this shopping centre, who wish as part of that shopping expedition to purchase alcohol, would do so at the nearby Settlers Hotel or the First Choice Liquor store.

- 61 It cannot be doubted that the addition of a take away liquor facility in any locality has the potential to cause harm. Sometimes, because of the limited number or nature of the take away liquor facilities already existing within the locality, or the extra convenience and choice that the addition of a further take away liquor facility would achieve, the evaluative judgment that the community interest test entails might lead to the conclusion that this is a price worth paying. But in my opinion, this is not that case. Having regard to the number and nature of the take away liquor facilities already existing within the locality and the range and choice that they provide, and the relatively small number of people who would benefit from the extra convenience and choice that the grant of this application would achieve, in my opinion the addition of another take away liquor facility in this locality is not in the community interest.
- 62 I now turn to the issue of “public interest”. In finding that it was not in the public interest to grant this application, the Commissioner appears to have drawn parallels to the observations made by this Court in *Hove Sip n Save*.<sup>14</sup> In that case the Court observed that the community interest test could only have been met by concluding that it was sufficient that some of the relatively small number of the local community who visit the Hove Shopping Centre would find it convenient to have the option of purchasing take away liquor as part of that visit. It held that if this was enough, an undesirable precedent would be created because it would mean that any application for a packaged liquor sales licence in respect of any premises in the vicinity of a supermarket, that does not already share an alignment with a take away liquor facility, would have to be granted.
- 63 In this case I have some reservations as to whether this case is sufficiently alike *Hove Sip n Save* to draw that conclusion. But I respectfully agree with the Commissioner that in any event the application should also be refused on public interest grounds. As mentioned earlier, the applicant’s case was pitched as being more than just the convenience of having the option of purchasing take away liquor as part of a visit to the Walkley Heights Shopping Centre. It also contended that it was in the community interest to grant this application because it would provide for a different type of facility to those currently on offer in the locality and trading under

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<sup>14</sup> [2021] SALC 7.



a different badge. Given the limited added convenience that the grant of this application would have achieved, one could only have concluded that it was in the community interest to grant it by giving great significance to the notions of choice and competition. Whilst these things are important they should not come at any price. In this locality there is already substantial choice. The fact that only one of them is a large stand-alone bottle shop that is a few hundred metres away from the nearest supermarket cannot be a powerful factor tipping the balance in favour of granting an application to achieve the creation of a smaller bottle shop trading under a different badge that is closer to a supermarket. If it were otherwise, an undesirable precedent would be set.

64 The application for review is dismissed.