

Woolworths Liquor BWS Arndale [2014] SALC 14

LICENSING COURT OF SOUTH AUSTRALIA

WOOLWORTHS LIQUOR – BWS ARNDALE

JURISDICTION: Application for Retail Liquor Merchant's Licence

FILE NO: 3792 of 2013

HEARING DATE: 20, 21, 24, 25 and 26 March 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 16 April 2014

*Application for a retail liquor merchant's licence - Whether the licensed premises that already exist in the vicinity of the proposed facility are adequately catering for the public demand for takeaway liquor - Whether in the exercise of the Court's discretion the application should be refused - **Held** that the applicant has not satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - Held that had the position been otherwise it would not be necessary in the Court's discretion to refuse to grant the licence - Ss, 53, 57 and 58 Liquor Licensing Act 1997*

Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern [2000] SASC 116; (2000) 76 SASR 290

Waiata Pty Ltd v Lane (1985) 39 SASR 290

Woolworths Limited v Smithfield Hotel Pty Ltd [2012] SALC 57

BWS Mt Gambier [2013] SALC 82

Liquorland v Duke Unley [2004] SASC 113

Harding Hotels v Jatadd Pty Ltd [2001] SASC 439; (2001) 81 SASR 222

Lovell v New World Supermarket Pty Ltd (1990) 53 SASR 53

Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd [2002] SASC 17; (2002) 81 SASR 337

REPRESENTATION:

Counsel:

Applicant: Mr S Walsh QC and Mr D'Aloia

Respondent: Mr J Firth and Mr B Allen

Solicitors:

Applicant: Clelands

Respondent: Wallmans

- 1 This is an application for the grant of a retail liquor merchant's licence.
- 2 The applicant, Woolworths Ltd, is a very large supermarket chain that operates stores across Australia. It seeks the licence in respect of premises in the Arndale Kilkenny Shopping Centre, immediately adjacent to a supermarket that it operates in the centre. The licence if granted will trade as a BWS liquor store.
- 3 The application has drawn objections from Fassina Investments Pty Ltd, Minbalup Pty Ltd, Scott Cove Pty Ltd and Daly Waters Pty Ltd. Fassina Investments and Minbalup are part of the Fassina Group. Fassina is the owner and operator of a retail take away liquor facility at Addison Road, Pennington. It is the owner and intended operator of a retail take away liquor facility, the licence of which is currently under suspension, in respect of premises on Hanson Road, Mansfield Park. Scot Cove and Daly Waters are the joint licensees of the Regency Tavern on Days Road, Ferryden Park. The Regency Tavern operates under a hotel licence. Within it is a small bottle shop trading under the Thirsty Camel badge.

Background

- 4 Arndale is a very large regional shopping centre occupying some 44,000 square metres. It is situated on the intersection of Torrens Road which runs from south-east to north-west and Hanson Road which runs from north to south. It is surrounded by a large car park offering something like 2,300 car parks. At the eastern edge of the centre's car park Torrens Road connects with Regency Road which runs from east to west. In that eastern area of the car park is a bus exchange. The exchange offers regular services to Port Adelaide, Mansfield Park, Wingfield, Semaphore, West Lakes, Flinders University, Glen Osmond and the city.
- 5 Within the main part of the complex are two large supermarkets, Coles and Woolworths, a very large Big W, a Harris Scarfe's store, numerous ATMs, three bank outlets, medical service outlets and a post office and something like a hundred specialty shops offering a large range of goods and services. These including electrical appliances, pharmaceutical goods, fresh food, clothes, fashion accessory and jewellery items, footwear, mobile phones, newspapers and magazines, hair and beauty products and eat in and takeaway food and beverages. Within the centre but outside of the main area is a Greater Union Cinemas complex.
- 6 The centre has an estimated patronage of over six million visitors a year. It is plainly one of the busiest shopping centres in Adelaide.
- 7 For many years it had within it a retail take away liquor facility. Towards the end of its life within the centre it was owned and operated by Fassina.

- 8 A few years ago Fassina removed the licence to premises within the external car park of the centre. That licence was then placed under suspension in anticipation that it would be used to trade from nearby premises. Earlier this year the licence was sold by Fassina to the Coles Group and it was removed by them to the nearby St Clair Shopping Centre, where it trades under the Liquorland badge, adjacent to a Coles Supermarket.
- 9 Woolworths contend that the centre has been compromised by the absence of a retail take away liquor facility. It accepts, however, that that in itself would not justify the grant of a licence. The test is that postulated by ss 57 and 58(2) of the *Liquor Licensing Act 1997*. Even if they are satisfied the Court may decline to grant the licence in the exercise of its discretion.¹
- 10 It is intended that the proposed premises will occupy part of the floor space that is currently being used by Woolworths as its supermarket. Woolworths intend to convert an area in the south east corner of the store into a bottle shop that will be laid out such that people can enter and leave the store without having to go into the supermarket. Patrons will be able to access the store either directly from the car park to the south west or from a mall within the centre. It will be new and modern. It will occupy 197 square metres of which 30 square metres will be a walk in cool room.² In terms of size and range I expect it will be a fair average quality store. It will carry about 1600 lines.³
- 11 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. None of these matters are at issue in this case.
- 12 Section 58(2) requires an applicant for this type of licence to satisfy the Court that “the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.” Although the sub-section talks of “in the locality” the authorities make it clear that retail liquor take way facilities adjacent to the locality also have to be considered.⁴

¹ Section 53 of the Act

² Tr 165

³ Tr 220

⁴ *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* [2000] SASC 116; (2000) 76 SASR 290 at 299

The locality

13 The starting point in a case such as this is the identification of the relevant locality.

14 That issue was addressed by this Court nearly thirty years ago when successive attempts to persuade this Court to grant a retail liquor merchant's licence at the centre failed, only to ultimately succeed by a majority judgment on appeal to the Full Supreme Court.⁵ The Court found that the locality to be a circle with a radius of two to three kilometres with Arndale at its centre. On appeal the majority worked on a radius of two and a half kilometres. Johnston J, with whom Matheson J agreed, described it thus:

“...the locality runs on its axes from roughly Grand Junction Road in the north to a kilometre south of the Port/Kilkenny Road intersection in the south; and from about Cheltenham cemetery on the west to within .6 km of Churchill Road on the east.”⁶

15 I am not sure that the locality identified by Johnston J reflected a considered decision by him. It was the mid-point of the two figures put forward the judge of this Court and Johnston J qualified his specification of 2.5 km by saying in effect that nothing turned on it.

16 In light of that and the passage of near on thirty years since this issue was addressed by this Court, suggests to me that it is appropriate to revisit the issue.

17 In *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* Doyle CJ made some helpful observations about the nature of that task. He said:

“The identification of a locality is usually a necessarily imprecise process. A particular boundary must be identified in most cases, but the identification of that boundary does no more than identify in a general way the locality from which the relevant public demand arises....

...It should not be overlooked that s 58(2), after the reference to whether existing facilities adequately cater for public demand, goes on to provide that the licence will not be granted unless the court also concludes that “the licence is necessary to satisfy that demand”. Consideration of the ability of the facilities in the locality to cater for the demand in the locality is not the end of the matter. The grant of the licence must be necessary to satisfy the demand. Section 58(2) is not concerned solely with the ability of premises in a locality to meet the public demand in that locality. It requires a wider consideration of the means by which that demand is or can

⁵ *Waiata Pty Ltd v Lane* (1985) 39 SASR 290

⁶ *Waiata Pty Ltd v Lane* (1985) 39 SASR 290 at 304

be satisfied. It is also relevant to bear in mind that in most cases, although not all cases, however the locality is identified there will be shopping facilities and licensed premises not far from the extremities of the locality which will in fact be playing a part in meeting the demands of people within the locality. It will also often be the case that, however the locality is identified, for a fair number of people in the locality, shopping facilities and licensed premises not far outside the locality will actually be closer and more convenient than the applicant's premises. When an application is made for a licence, the focus is naturally upon the applicant's proposed premises. There is a natural tendency to draw the locality around and by reference to those premises. This should not lead the court to ignore the relevance of shopping facilities and licensed premises outside the locality."⁷ (footnote omitted)

- 18 In addressing the issue of locality Woolworths relied upon the expert opinion evidence of Mr Graham Burns, a planning consultant. The objectors relied upon the expert evidence of Mr Jeff Smith, who is also a planning consultant.
- 19 Both planners thought that the relevant locality was bounded by Port Road to the south and by South Road to the east. If axes are notionally drawn into the middle of the centre Port Road is about two kilometres south of Arndale and South Road is two kilometres to the east. The distances are obviously greater the further one moves away from the notional axes.
- 20 Mr Smith set the northern boundary along Grand Junction Road, a major arterial road that runs from east to west about three kilometres north of Arndale. Mr Burns thought that the northern boundary ought to be an imaginary line about one kilometre south of Grand Junction Road. About two kilometres west of Arndale is Addison Road, which becomes Cheltenham Parade as it crosses Torrens Road. Mr Burns thought that that should be the western boundary. Mr Smith thought that the western boundary should be a little further west.
- 21 Not a lot turns on it but I see it a little differently. Port Road is a very wide road and it is an obvious marker. So too is Grand Junction Road. I would set them as the southern and northern boundaries. I think the area west of Addison Road/Cheltenham Parade is a bit distant from Arndale. I would set Addison Road/Cheltenham Parade as the western boundary. As to the eastern boundary it needs to be noted that South Road morphs into two roads about a kilometre south of the intersection with Grand Junction Road. In a straight line it becomes Days Road. To the east it remains as South Road, eventually running parallel to Days Road, several hundred metres away. Days Road ends at Torrens Road. Several

⁷ *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* [2000] SASC 116 at para 34; (2000) 76 SASR 290

hundred metres to the west of that junction Rosetta Street joins Torrens Road to Port Road. Several hundred metres to the east South Road bisects Port Road. I think the areas east of Days Road and Rosetta Street are a bit distant from Arndale. I would set Days Road and Rosetta Street as the eastern boundary of the locality.

- 22 The practical effect of my assessment of the relevant locality is to exclude from consideration some of the licensed premises that the objectors identified as relevant. I shall return to them shortly.

Relevant licensed premises in and around the locality

- 23 In discussing the retail take away liquor facilities that are in or on the boundaries of or just outside of the locality as I have found it to be, I will work my way through the north, west, south and east quadrants of my notional axes.
- 24 A few hundred metres north of Arndale on Hanson Road, Woodville North, is the Finsbury Hotel. It is a modern well presented facility. It has a drive-through bottle shop that trades under the BWS badge. It has a browsing area of about 60 square metres. It has a cool room but public access is not permitted. The drive-through has two lanes, one of which permits vehicles to stop. It has a large car park. It has about 1300 lines of various types of liquor.⁸
- 25 About a kilometre north of Arndale, on the corner of Hanson Road and Chapman Road, Mansfield Park, is the Fassina retail liquor store, the licence of which is under suspension that I spoke of earlier. There are plans to develop this into a modern, well stocked store. I will come back to those plans when I discuss Mr Fassina's evidence.
- 26 About a kilometre or so north again, just east of the corner of Grand Junction Road and Hanson Road, Mansfield Park, is the Mansfield Hotel. It operates a retail take away liquor outlet trading under the Sip N Save badge. The bottle shop occupies about 50 square metres.⁹
- 27 In the north western corner is the Grand Junction Tavern, near the corner of Grand Junction Road and Addison Road in Pennington. It operates a Liquorland express as a retail take away liquor outlet. The browse section occupies about 70 square metres.¹⁰
- 28 On the west side of Addison Road, just north of the corner of that road and Torrens Road, Pennington, is the other Fassina retail liquor store that I referred to earlier. In its present form it is a fair average quality store. It

⁸ Tr 157

⁹ Tr 160

¹⁰ Tr 160

carries about 1400 lines within a trading area of about 200 square metres.¹¹ Plans are afoot for it to be improved.

- 29 A bit less than a kilometre to the south of the corner of Cheltenham Parade and Torrens Road, within the St Clair development, is the Liquorland store that I referred to earlier. It is new and modern. It occupies about 190 square metres.¹² In terms of size and range it is a fair average quality store.
- 30 On the southern side of Port Road, just north of the junction of Port Road and Woodville Road, Woodville South, roughly parallel to and midway between Kilkenny Road and Cheltenham Parade, is the Woodville Hotel. It conducts a retail take away liquor outlet trading under the Thirsty Camel badge.
- 31 About two kilometres south of the intersection of Port Road and Cheltenham Parade is a BWS store on Findon Road, Findon. It is a typical BWS store occupying about 190 square metres.¹³
- 32 On the southern side of Port Road, just south of the junction of Port Road and Kilkenny Road, Beverley, almost due south of Arndale, is the Halfway Hotel. It is a modern well-presented facility. It has a drive-through bottle shop that trades under the BWS badge. The browse section occupies about 80 square metres.¹⁴
- 33 Further east along Port Road, on the southern side at Welland, is a Dan Murphy's store. I have elsewhere described such stores as almost warehouses, stocking a very wide range of local and imported liquor, that encourage bulk purchases by offering discounts and which conduct transactions through checkouts.¹⁵
- 34 On South Road, Ridleyton, adjacent to the intersection of South Road and Hawker Street, a few hundred metres east of Rosetta Street and about two kilometres south of the intersection of Days Road and Regency Road is a BWS store. It is a typical BWS store carrying about 1400 lines.¹⁶ It occupies about 200 square metres.¹⁷
- 35 Several hundred metres south east of Arndale, on the southern side of Torrens Road in West Croydon, is the Challa Gardens Hotel. It has a drive-through bottle shop that trades under the Sip N Save Cellars badge, a slightly up market version of Sip N Save. The drive-through has two

¹¹ Tr 224

¹² Tr 224

¹³ Tr 223

¹⁴ Tr 160

¹⁵ *Woolworths Limited v Smithfield Hotel Pty Ltd* [2012] SALC 57 at para 32

¹⁶ Tr 221

¹⁷ Tr 223

lanes, one of which permits vehicles to stop. It has a large car park. It has a small browse section offering a fairly limited range of wine and spirits. The area is about 50 square metre carrying about 1000 lines.¹⁸ It has a large cool room that is presently off limits to customers because of some theft issues. It is planned that public access will be allowed once some further security measures are put in place.

- 36 On the east side of Days Road in Regency Park, almost due east of the proposed Fassina store at Mansfield Park is the Regency Tavern. As I indicated earlier it has a small bottle shop trading under the Thirsty Camel badge. The tavern is a modern well-presented facility. The bottle shop is within the hotel. It is essentially manned by bar staff. It is adjacent to a gaming room. It is adequate and far more pleasant than some of the rudimentary bottle shops that are attached to some hotels. But it is very small, occupying about 30 square metres.¹⁹
- 37 The objectors contend that there are other facilities that I should have regard to.
- 38 They identify the Rosewater Tavern which is situated few hundred metres west of the junction of Grand Junction Road and Addison Road, Rosewater.
- 39 They identify the Reepham Hotel on Churchill Road, Prospect, about a kilometre east of the intersection of Regency Road and South Road. It conducts a retail take away liquor outlet trading under the Thirsty Camel badge.
- 40 They identify the Findon Hotel on Grange Road, Findon. It has a bottle shop that trades under the BWS badge. It has a large browsing area of about 340 square metres and carries a large range.²⁰
- 41 They identify the Hope Inn Hotel on Port Road, Hindmarsh, just east of the intersection of Port Road and South Road. It conducts a retail take away liquor outlet trading under the First Choice badge. It is a take away facility not unlike Dan Murphy's.
- 42 They identify a yet to be built Liquorland store within a new development on Churchill Road at Islington. It is about two kilometres north of the BWS store on South Road, Ridleyton.
- 43 Given my assessment of the relevant locality, in my view all of these are generally a bit too remote from the relevant locality to be of much significance.

¹⁸ Tr 158

¹⁹ Tr 159

²⁰ Tr 223

The evidence

44 I now turn to consider the evidence.

Mr Burns

45 In addition to his evidence of the issue of locality Mr Burns gave evidence on a range of topics. To put matters into perspective he made comparisons with other shopping centres. He said that in terms of retail area Arndale is more than twice the size of the Burnside Village and is around three quarters of the size of Westfield West Lakes, both of which have take away liquor facilities.

46 He referred to the Charles Sturt Council Development Plan and of its policy that the area where Arndale is situated “will accommodate...a range of retail facilities, offices, consulting rooms, and cultural, community, public administration, entertainment, educational, religious and residential facilities to serve the community and visitors within the surrounding district.”²¹

47 His evidence was that a shopping centre of this size and within that planning classification would be expected to have within it a take away liquor facility.

48 Mr Burns analysed statistics collected from the 2011 Census. They reveal that the area around Arndale contains a higher proportion of young professionals (29.97% compared to 24.44%) and a lower income level (5.74% earning \$1,600 per week or more compared to 10.26% and 56.73% earning less than \$600 per week compared to 49.64%) than the Greater Adelaide area. He said that the area is less mobile in the sense that it has a lower vehicle ownership compared to the metropolitan area as a whole. He said that in statistical terms the difference would be regarded as significant.

49 He explained that Housing Trust development was a feature of a number of suburbs in the locality being The Parks, Ferryden Park, Mansfield Park and Woodville Park. He said that the people living in these houses are generally of a lower income level. He said that many might be single mums or disadvantaged people. He said that there are quite a few migrant communities in those areas as well.

50 He qualified this and explained that a lot of that housing stock has reached the end of its economic life and that redevelopment is occurring throughout all of those suburbs consistently and generally steadily. He said that a consequence of that redevelopment is an improvement in the socio-economic status of the community.

²¹ Ex A10

Mr Smith

- 51 As I mentioned earlier Mr Smith took a slightly different view of the relevant locality to Mr Burns. He did not take issue with many of the other observations made by Mr Smith. He did, however, have a very definite view about Arndale and its car park. He said:

“Arndale is a little bit complicated because of its - the way that it’s developed. It was developed as a 1960s centre. So the car parks are a little bit piecemeal, given the way that the shopping centre has developed. They’ve constructed a sort of large car park undercroft and above-ground car park at the northern end, but the smaller car parks around the perimeter of the centre have been consumed by additions to the shops, so that’s made the centre a little bit bitty in the way that you’ve got to get into certain car parks. Some car parks have got difficult routes to get into. For instance, you can’t turn right off of Torrens Road to get into the shopping centre car park, you can only turn left now, and that’s a function of a whole range of things: roadworks that are undertaken as a consequence of ingress, traffic volumes, and so on. There’s certainly been some - a lot of development to the east of the shopping centre, with the development of the bus interchange and the clearing of industrial land through there. There’s a lot of open space now, open car parking on that side of the centre, but less car parking on the western side.”²²

- 52 I now turn to discuss the so called “needs witnesses”.

Diane Grierson

- 53 Mrs Grierson lives in West Croydon. She has lived at her current address for 28 years. She lives about one and a half kilometres from Arndale. In the past she has shopped at both Arndale and Welland, but following the refurbishment at Arndale she now shops predominantly there. She finds the car parking easy. For now she buys liquor at Dan Murphy’s at Welland. She would find it very convenient to buy liquor at Arndale, as it would save her the trip to Dan Murphy’s. She would prefer to buy her liquor from a bottle shop in preference to a hotel. She said that she did not have any trouble getting the type of liquor she wanted locally. She said that the Dan Murphy’s was a couple of minutes down the road. When she was invited to consider some of the facilities in and about the locality she said:

“I mean, we’re spoilt for choices, you know, but a lot of those places, if you’re driving past you’ll call in, but predominantly I’ll go to the shop that’s handiest to me.”²³

²² Tr 206

²³ Tr 32

Roman Bileki

- 54 Mr Bileki is retired. He lives in Woodville not far from the Woodville Railway Station. He visits Arndale four or five times a week. He thinks the centre should have a bottle shop. He used to use the shop in the centre when it was there. He described the parking at Arndale as fantastic. For now he buys liquor from Dan Murphy's at Welland about once a week. His son-in-law works part-time in a liquor store and at times he brings liquor home for him. He was very disappointed that the previous bottle shop at Arndale closed. He said it would be convenient to him if it re-opened. When asked if he had any trouble getting the liquor he wanted he said no.

Sinisa Rakocevic

- 55 Mr Rakocevic is a taxi driver. He lives in Woodville North, about five hundred metres from the proposed Fassina store at Mansfield Park. He regularly visits Arndale. He used to use the bottle shop there. He explained why he supports this application as follows:

“Because that means I have to go and make extra trips when I need to - if I need shopping, then it goes into the back seat in the car, you go other places. I wouldn't go too far away, I mean, on the way Finsbury is there, so I will stop at Finsbury but Finsbury doesn't have that much, sort of - you know, you have to stop there for a short period of time and then you have to know what you need, so if you want to browse, sort of thing, it's a bit hard.”²⁴

- 56 He said that when he buys liquor he is normally in a car. For now he uses the BWS attached to the Finsbury Hotel. He occasionally uses Dan Murphy's at Welland. He said that the proposed Fassina store at Mansfield Park was only two minutes drive from his home. It would be convenient for him if the centre had a bottle shop.

Leanne Robinson

- 57 Ms Robinson is a payroll officer. She lives in Croydon. She does most of her shopping at Arndale. She goes there often. For now she buys liquor for herself and her husband at the BWS store on the corner of South Road and Hawker Street, Ridleyton. It is not far from where she lives. It is essentially just on the other side of South Road, which she has to cross when she is going there from her home. She would prefer not to do that. She supports this application because it would be convenient for her to buy her groceries and her liquor purchases at the same time.

²⁴ Tr 53

Patrick Cummins

- 58 Mr Cummins lives in Days Road, Croydon Park. He lives alone. He works on Old Port Road, Royal Park. He starts work at 6.30am in the morning and can finish anytime from 3.00 until 5.00pm in the evening. He owns a car. He regularly shops at Arndale. He goes there on average three times a week.
- 59 For now he finds the easiest place to service his take away liquor needs is the Challa Gardens Hotel. He said that he did not find the Challa Gardens Hotel that convenient. He often goes there on his way home from work when he is travelling east along Torrens Road. He said it is not permissible to turn into the hotel from the northern side of Torrens road. He said that you have to turn right and do a U-turn on Torrens Road in front of an adjacent street to the hotel. He said that on leaving the hotel he had to drive to the back of the car park to get to an adjacent street, so that he could turn right and proceed east down Torrens Road. He found this to be time consuming and frustrating.
- 60 If he wants something a bit special he might go to the Dan Murphy's at Welland. He said it has a wider selection. It would be his preference not to do that. He would prefer to buy take away liquor from a bottle shop at Arndale. He explained why:

“Simply because I lead a busy lifestyle, and I like to do my grocery shopping and my liquor shopping all in one go on the same day, and my life is fairly well planned, and I like to have the rest of my time free to do what I need to do. Like, I have work commitments. I also have outside of work commitments, you know, so I like to get it all done in one bang...”²⁵

Rebecca Clark

- 61 Ms Clark lives at Mansfield Park. She has done so for about three years. Before that she lived in Ferryden Park for the best part of twenty years. She lives with her four children aged 15, 14, 8 and 7. She works at the Challa Gardens Primary School, just east of Arndale. She works part time. She also studies full time. She plainly has a busy life. She does not have a driver's licence. She gets about by using public transport, walking and catching taxis. She catches the bus to work.
- 62 She regularly shops at Arndale. It has everything she needs, except a bottle shop. She services her take away liquor needs by using the drive through at the Finsbury Hotel. She finds it frustrating because having purchased liquor she has to go back to Arndale to then go home. She also has issues with a drive through. She said:

²⁵ Tr 88

“Anyone with children who doesn’t drive finds it very difficult. It’s horrible for, like - and I’ve got friends with babies in prams, and it’s very inconvenient and unsafe for them to go to places like the Finsbury Hotel when it’s a drive-through and there are cars everywhere. It’s just - and it’s kind of tacky, walking your kids through a drive-through.”²⁶

63 Having said that she later agreed that when she goes to the Finsbury, she goes by taxi and leaves her children in the taxi when she buys liquor, and then the taxi drops her and her children home.

64 She strongly supports this application. She said:

“I like the idea of having a one-stop place where I can just go, do everything I need to do and then catch my bus home. I don’t have to worry about going extra places and running around and dragging my kids, like, down a main road past some pretty obscene scenery, and then take them walking through a driveway, so - yes.”²⁷

65 Although Ms Clark does not live far from the proposed Fassina store at Mansfield Park she said that she would not use it. She said that that area had an issue with street prostitution and she would avoid it.

66 I move now to discuss the other witnesses that were called.

Lara Byrne.

67 Ms Byrne is the marketing manager for Arndale. Her job requires her to drive sales and traffic for the shopping centre. She does this by conducting campaigns and promotions, giveaways, competitions and the like to attract patrons to the centre.

68 She said that she is also required to have a comprehensive understanding of the trade area, the demographics and the like. She said:

“...the primary trade area is predominantly a low to middle income background, blue collar sort of workers. There is certainly a presence of young families and predominantly, you know, the 35 to 45 year olds are shopping at the centre, female, but yes, certainly that low to middle blue collar predominant.”²⁸

69 She discussed how people access the centre. Obviously many come by car. But she said many come by other means. She said:

“...we see a strong visitation by foot, so people walking to the centre. We are certainly located in a position that allows people to quite easily walk to the centre and obviously with the bus

²⁶ Tr 108

²⁷ Tr 110

²⁸ Tr 121

interchange located at the centre we are certainly at the heart of, you know, public transport certainly for our primary trade area who are often walking to the bus interchange and then able to walk home as well if they are travelling to other places around Adelaide.”²⁹

- 70 She said that the centre has two busy taxi ranks and that people visit the centre by means of a taxi.
- 71 She said that the primary catchment area was within two to three kilometres of the centre. She said that within that area there are approximately 30,000 residents.
- 72 She said that following a recent refurbishment the centre had enjoyed an increase in trade culminating in the 6.1 million visitations per year that I spoke of earlier. She said that Thursday, Friday and Saturday are the busiest trading days for the centre.
- 73 She said that it was incredibly important in terms of the centre’s tenancy mix for it to have a take away liquor facility. She said that she had had a number of queries from customers for a bottle shop to return to the centre. She said that for a centre the size of Arndale not to have a bottle shop was inconsistent with what else was happening within the market in Adelaide.

Matthew Holland

- 74 Mr Holland is the senior regional property manager for Woolworths. His role involves the management of relationships between landlords and Woolworths’ businesses including its supermarkets, liquor stores and petrol stores. He is also responsible for the expansion of Woolworths’ network stores through new stores, refurbishments and new leases.
- 75 He spoke of the refurbishment at Arndale. He said Woolworths has a certain requirement of size to include all of its specific offers such as a deli, a bakery, a large fresh fruit and vegetable department, and a butcher as well as enough area in the store to have enough groceries to include the full offer. He said that before the refurbishment the then Woolworths store could not deliver that. He said that Woolworths worked with the landlord to expand the store by over a thousand square metres to ensure that it we could get all of those offers into the store. He said that it had resulted in a dramatic improvement in sales, of the order of 34% increase on last year’s corresponding period of trade.

²⁹ Tr 122

- 76 He said that in undertaking his role he had made an assessment of the general demographics of the area in the vicinity of Arndale. He described it as a “Wholly multicultural, low to mid socioeconomic group”.³⁰
- 77 He said that Woolworths’ primary catchment included residents from Woodville North, Mansfield Park, Woodville Gardens, Ferryden Park, Croydon Park, Kilkenny, Woodville Park and West Croydon.
- 78 He said that the positioning of the proposed store meant that it would service not only Woolworths’ customers but others as well. He said that there are a number of areas where customers could park to easily get to the proposed store. He explained that nearby was a basement car park that was connected to the centre by a travelator and that there are parking areas east and south of the store.
- 79 He was in no doubt that the proposed store would be viable. He said:
- “Firstly, there are no centres like this in Adelaide that don’t have a liquor offer. Furthermore, the performance of our supermarket and the Big W and our market knowledge of what the Coles supermarket is trading at shows that there is significant opportunity for a successful bottle shop to operate.”³¹

Anthony Smith

- 80 Mr Anthony Smith is Woolworths’ business manager for liquor licensing. He has been involved in the liquor industry for about 34 years.
- 81 Mr Anthony Smith identified two factors that indicated a need for the proposed facility. He said:
- “The first is obviously the centre itself, and the centre, having seen it, say, 10 years ago and seen it as of today, it’s vastly different; it’s obviously much improved; it’s enlarged; it’s modern; the parking - no shortage of parking, so yes, it seems to be screaming out for a bottle shop; that would be probably the first one, and then number two would be that that centre, for many years, did have a bottle shop that traded, I think, for over 20 years and there is no longer that facility there.”³²
- 82 He said that at present the Woolworths’ supermarket at Arndale enjoys about 23,000 customer transactions per week.
- 83 When asked to comment on the suggestion that the proposed store might not be viable he said:

³⁰ Tr 135

³¹ Tr 142-3

³² Tr 152

“You wouldn’t think so. On the surface you wouldn’t think so. It clearly appears to be - I suppose we’re looking at it now. It’s very much a popular shopping centre but going back when the licence was trading - I think under the Liquorland banner - there was a Woolworths, there was a Coles, there was a Big W and, you know, a substantial amount of specialty shops there. I can’t answer as to why it wouldn’t have been viable.”³³

- 84 Mr Anthony Smith was asked to comment on why Coles sold the Liquorland store at the centre. It led to the following exchange:

“Have you, or to your knowledge, anyone in Woolworths ever spoken to Coles as to why they left the Liquorland store in Arndale, sold it?---No, we don’t. For whatever reason Coles - it would have to be six, seven, eight years ago now, nationwide, they decided to offload a large quantity of, we will call it I suppose, I’d assume poor performing liquor stores which Kilkenny must have been one of them and they were picked up in different states of Australia. They sold off I think it was as I said about 60 stores. So that would have been part of that overall sale.”³⁴

Tristan Langham

- 85 Mr Langham is the manager of the Regency Tavern on Days Road, Regency Park. He said that the bottle shop within the Tavern trades on Monday to Saturday, from 8 am to 12 midnight and on Sunday from 11 am until 9 pm.

- 86 He gave a breakdown of the sales at the bottle shop as follows:

“The main sales in ours, and I think in most of our group, is packaged beer, and that contributes to about 50 per cent of our sales. The rest of it is broken down relatively evenly. RTDs is 15 per cent; bottled wine is 15 per cent; spirits is 15 per cent, and about 5 per cent in soft drink; sundries; chips, nuts, et cetera.”³⁵

- 87 He said that the majority of its customers were from the western side of Days Road. The Tavern is adjacent to a golf course. He said that a lot of people want to take a six-pack or so to the golf course. He said that other customers included local businesses hosting a Friday lunch might buy liquor. He said that most of the staff, will grab a six-pack on the way home. He said that some people using the Tavern’s bistro might want to grab something on the way home as well.

³³ Tr 167

³⁴ Tr 235

³⁵ Tr 242

- 88 He said that the Tavern offers a delivery service for take away customers. He said it uses a courier service that delivers within two to three hours.
- 89 He said that the predominant source of income for the Tavern was from poker machines. He said that the bottle shop is responsible for about 10% of the overall trade.

William Kieboom

- 90 Mr Kieboom is the group manage for the Good Earth Hotel Group which amongst others owns the Challa Gardens Hotel.
- 91 He said that the hotel offers a full range of services. It has a sports bar with TAB, lottery facilities, a lounge and function area, a large dining room, a function room, a gaming room, 17 accommodation rooms and a bottle department.
- 92 He said that the bottle department opens at 9.00am every day and closes at 10.00pm on Monday and Tuesday, 10.30pm on Wednesday, 11.00pm on Thursday, Friday and Saturday and 9.00pm on Sunday.
- 93 He was asked where the hotel's customers come from. He said:

“Generally it is all local area, you know, in terms of functions and so forth, we might get people outside of the local area. Gaming can be classed sometimes as a bit of a transient customer base, so people do move around the area or also, sometimes due to their privacy issues, gamble outside of their immediate locality. Accommodation comes from mainly outside of the metro area with the TAFE facilities down the road a lot of our students or a lot of our patrons in the accommodation area are students and they avail themselves if they come from regional centres like Murray Bridge, Port Pirie, Port Augusta and so forth.”³⁶

- 94 He described the local area as being within a five-kilometre radius.
- 95 He said that the bottle shop sales are prominently beer, being 50%, with 20% RDTs and 15% wine.
- 96 When asked to profile its customers he said that even though the demographics in the area are changing, he would class them as predominantly working class.
- 97 He said that the trade was a mix of men and women and that some use the drive-in whereas others will park their car and browse in the bottle

³⁶ Tr 250

shop. He said that most people that come through the hotel know what they want.

Mr Ross Fassina

- 98 Mr Fassina is the managing director of the Fassina Group. He has been involved in the liquor industry for nearly 40 years.
- 99 He spoke of a planned major refurbishment of the Mansfield Park store and of the expectation that it will be ready for trade by the end of October this year. Mr Fassina said that the renovations that he is currently carrying out will result in the store looking very much in appearance and size and storage like the recently renovated Fassina store just off Anzac Highway, Camden Park. Mr Anthony Smith described the Camden Park store as “very nice”.³⁷ The refurbished store at Mansfield Park promises to be of very good quality.
- 100 He explained how he acquired the former Liquorland licence within Arndale and of the removal of the licence from the centre to an adjacent area. He spoke of the issues that he had with the licence. He said:

“We couldn’t make things work in the shopping centre, your Honour. No matter what we did we couldn’t build it up enough to warrant basically the rental, and we had - the area, in our analysis, warranted - as we all, I think, realise - beer sales was a big factor in what happens to the liquor market in that area, and because of the limited room that we had at the store we couldn’t micro-market that store in itself under our banner to market some cheaper ranges of beer, because frankly, we didn’t have the room, and couldn’t have it cold enough, quick enough, to satisfy the customers. So we’d generally have a lot of disgruntled customers which we didn’t want to do, so it was a fairly large problem of getting the beer out to the said cars by the customers and that was often the complaint. What we found was a lot of the customers we had - and when I say ‘a lot’, I can’t tell you percentages - just talking with the customers and getting a feel - was that they’d do their liquor shopping in two locations. Generally they would get, if they wanted to, a bottle of beer, a bottle of spirit, or what-have-you, at our store, but then they’d, travelling back - if they had a car, of course - they would call into a pub and just get a slab in the boot which is a lot easier for them, than actually having to negotiate a trolley, and we couldn’t see a solution to that because we tried to negotiate - not negotiate; we tried to work out how we could actually get the beer out to the cars because that was the main problem that we saw in the business, and what happened was we tried to put it in the trolley for customers but the majority of the senior customers had problems in actually lifting it back out; the female customers also

³⁷ Tr 228

had troubles in actually digging deep and lifting a slab out, so that was problematic. Then most of the customers, like, it rested on top of their trolley, which again was problematic because you eventually have to steer and hold. The parents with children had a problem because they have to look after their children and hang on to their children, plus hang on to the slab of beer. So no matter what we did we couldn't really come to a resolution of the beer problem, and that was a large part of the market. So we decided, look - we had just three meetings with the centre management at that time, presented them our figures, showed them the situation we were in; again there was talk about refurbishment, relocation, better access to foot traffic, car parking, all the above, but it never transpired. So at the end of the day we were just losing money on the site and we just had to decide to leave and relocate."³⁸

101 Mr Fassina said that when the store was within the centre about 60% of its trade was beer.

102 He was asked:

“Did you find operating a liquor store inside the centre and out on Regency Road to be a viable operation?”

103 He said:

“No, that's why we closed both down otherwise it would still be running, yes.”³⁹

104 He explained why he thought it did not work. He said:

“...there are two components to liquor business as we see it. One is supplying the alcohol for the local area which is important of course, but the second factor, and it is quite a major factor, is passing traffic and passing traffic has a lot to do with how the business evolves, hence our Camden project. There is - when we rebuilt Camden and the business exploded there wasn't the locals that exploded the business because we still had the same locals coming to the business because it is very convenient for them. But the actual passing traffic along Anzac Highway saw it as a destination coming home because of the ease of accessibility so the problem with the Regency Road site was it was on the opposite side of the coming home traffic because most business in a liquor store occurs between 4.00 and 7.00 which is coming home actually and because of the traffic build-up unless there is an easy path of getting in and out, you do struggle to run it as a business but the passing traffic is an important component of the said business of a liquor store in that regard.”⁴⁰

³⁸ Tr 275

³⁹ Tr 284

⁴⁰ Tr 284

- 105 Mr Fassina was much less enthusiastic about the car parking at Arndale compared to some of the other witnesses. He said:

“When we were there the dynamics of the centre was such that that car park that is next to Woollies was the very first car park that gets filled up, virtually from the first hour it opens, within half an hour it opens that’s chock-a-block. Then people after that chose to park at the Hanson Road side car park where they have the underground facilities and above ground car park there which was a secondary fill of the shopping centre. Then of course if that was all full then you’d have the rear, I think where the bus terminal is. You could have that filled up as a third option unless you’re coming off from the other side of the centre heading south rather than north. Then you’d be parking on the back end. What I call the ‘back end’ of the Arndale shopping centre where the bus terminal is.”⁴¹

- 106 He said that when he was trading there he frequently received complaints about car parking. He reported customers saying as follows:

“Always full. Cars running everywhere. It’s dangerous. Lots of cars belting around. Shopping trolleys. You have to watch out where you’re going. The distance from - you know, carrying any articles from the - when purchasing liquor to the cars.”⁴²

- 107 Mr Fassina said that the Fassina Group offered to sell the licence to Woolworths, Coles and the proprietors of the centre. He said that no offers were received. He said that eventually, when Coles realised that it needed a licence for the bottle shop it had planned for St Clair, it purchased the licence, subject to its removal to St Clair being approved. That approval was forthcoming.

- 108 Mr Fassina said that following the closure of the Kilkenny store the sales at his Pennington store increased by 35% and that those sales had essentially remained despite the opening of the Liquorland at St Clair.

- 109 Plainly an overriding reason why Mr Fassina is objecting to the grant of this licence is his desire to protect the commercial interests of the Fassina Group. But he went further. He said:

“I think the area has more than well and truly catered for the particular need of the area. I’ve known the area for a while and I think the witnesses I saw haven’t swayed me to believe otherwise. I mean, sure it’s more convenient having a liquor store on every corner but, you know, that’s not the Act.”⁴³

⁴¹ Tr 291

⁴² Tr 292

⁴³ Tr 294

The Applicant's case

- 110 Woolworths submitted that the effect of the removal of the previous retail liquor merchant's licence is that for those in the south and east of the locality do not have access to a bottle shop. It submitted that the areas of Woodville Gardens, Croydon Park, Kilkenny, and Woodville Park have been significantly disadvantaged.
- 111 It identified a number of categories of person who do not have their needs met. They being: persons without cars, people who use public transport, those who walk, those who have limited access to cars and those who are time poor.
- 112 It argued that it was not reasonable to expect people in the areas identified to travel across Port Road to access the Dan Murphy's store at Welland. It argued that I could infer that some of these people can be assumed to not wish to purchase their liquor from a hotel. It submitted that the needs witnesses and in particular Mrs Grierson, Ms Clark and Mr Cummins were representative of that group, and that they are using hotels reluctantly. It submitted that these people were of a sufficient number to satisfy the test that existing licensed premises do not adequately cater for the relevant public demand for liquor for consumption off licensed premises.
- 113 Mr Walsh QC submitted that the addition of a new bottle shop would enhance competition and would result in three proximate bottle shops being operated by different operators, Woolworths, Coles and the Fassina Group resulting in an excellent competitive environment.

Analysis

- 114 I commence with a general observation. I thought that all of the witnesses who gave oral evidence were doing their best to help me. I did not get the sense that there were any credit issues of any moment. I thought that the needs witnesses were credible and by and large I accept what they say.
- 115 There was some mixed evidence about the Arndale car park. I do not think anything turns on it. I have no reason to doubt Mr Fassina's observation that when he ran a store within the centre the car park next to Woolworths was one of the first car parks to fill. It accords with common sense that the car parking areas closest to the main entry points will fill first. That said, I expect that for most of the time parking in the centre's car park is pretty easy and parks are plentiful. It might be a bit different at peak times. There might be some issues around Easter and Christmas but by and large it provides good access to the centre.

- 116 The centre is plainly a significant structure in the locality. It is a focal point where members of the public congregate and shop. It might be expected to house a bottle shop, but as indicated that is not the test.
- 117 The evidence suggests, and I so find, that the bottle shop that previously operated within Arndale was not, at least in more recent years, exceptionally busy. That suggests that many of the patrons who were then using the centre were servicing their take away liquor needs from other facilities.
- 118 Mr Walsh would have it that this might be attributable to the way Mr Fassina ran the business. He said “the very existence of numerous bottle shops in shopping centres and the applications to move into shopping centres, and the continuing existence of them speaks eloquently against any proposition that we should treat any suggestion of lack of viability as other than being purely to Mr Fassina and his style of trade.”⁴⁴
- 119 I have some difficulty with that submission.
- 120 I am permitted to know that most of the applications for new retail liquor merchant’s licences and removals of existing licences into shopping centres are generally made by either Coles or Woolworths. It cannot be assumed that those entities in making those applications are solely motivated by the financial viability of the liquor store. As Mr Anthony Smith said in this case, as he has said in other cases, if it could, Woolworths would have a liquor store in every supermarket that it operates.⁴⁵ It can be safely assumed that the supermarkets that Coles and Woolworths operate benefit, in terms of their sales, by having a retail take away liquor outlet nearby.
- 121 Second, I thought that Mr Fassina’s evidence about there being a significant desire by those visiting Arndale to buy cartons of beer rang true. It sits with the socio economic profile of those using the centre. I also accept his evidence of the difficulties that customers encountered in moving cartons of beer in a trolley and of getting them out of a trolley.
- 122 I accept that there have been improvements to the centre and the proposed location of the proposed bottle shop will be much better located in terms of access to the car park than the store that was previously in the centre.
- 123 However, for the reasons given by Mr Fassina, which evidence I accept, I expect that even if this application was granted, many using the centre will continue to service their take away liquor needs from other facilities.

⁴⁴ Tr 361

⁴⁵ Tr 232

Many patrons will continue to want to purchase beer and they will continue to want to purchase it in cartons. Many are likely to find it more convenient, as they no doubt do now, to make that purchase via a car through a facility that provides easy access to vehicles.

- 124 I did not get any sense of any serious complaints about the range of liquor available within the locality or that the range of retail liquor outlets was inadequate. I thought that Mrs Grierson’s observation about being “spoilt for choice” was telling. It confirmed my tentative assessment that this locality is very well serviced in terms of access to bottle shops and hotels.
- 125 In my view, when, as I must⁴⁶ weigh their evidence with the objective features of the locality, all that the so called needs witnesses establish is that it would be very convenient for them to have the opportunity to purchase liquor whilst visiting Arndale and that some are disappointed at no longer having that option.
- 126 Whilst it might be said, as it was noted in *BWS - Mount Gambier*, that the “growing appreciation of the relevance of the community’s desire for one stop shopping as a relevant consideration that Cox J alluded nearly a quarter of a century ago in *Lovell v New World Supermarket* is “marching forwards”⁴⁷ it is not the sole test. As the Supreme Court has said on a number of occasions “one stop shopping does not, standing alone, constitute a sufficient ground for the grant of a licence.”⁴⁸
- 127 It is sufficient to refer to the remarks of King CJ in *Lovell v New World Supermarket Pty Ltd*:

“The desire for one-stop shopping is widespread in the community. The inability of customers to obtain their liquor supplies where they do the rest of their shopping may be irritating but it does not of itself mean that their demand for liquor cannot be met by existing facilities. It may be that the demand can be met, although perhaps at the price of some inconvenience to the customer. Inconvenience in gaining access to the required liquor is undoubtedly relevant to the determination of the question whether the public demand for liquor in the locality cannot be met by the existing facilities but it is not of itself decisive. If, for example, there existed an accessible first grade bottle shop at a distance of, say, 200 or 300 m 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

⁴⁶ *Harding Hotels v Jatadd Pty Ltd* [2001] SASC 439; (2001) 81 SASR 222 at 227 per Doyle CJ

⁴⁷ [2013] SALC 82 at para 71

⁴⁸ *Liquorland v Duke Unley* [2004] SASC 113 at para 71

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. I repeat what I said in *New World Supermarkets Pty Ltd & L H & B J Martin Pty Ltd v Liquor Licensing Commissioner and Jattadd Pty Ltd*:

‘The section is satisfied if the public demand for liquor in the locality cannot be met without unreasonable difficulty and inconvenience. Distance and conditions of traffic play an important part in such a decision as is shown by *Nepeor Pty Ltd v Liquor Licensing Commission*. Entrenched shopping habits and aversions arising out of these and other considerations, if reasonable, are not to be disregarded.’⁴⁹

(footnotes omitted)

- 128 It is to be expected that those living in the locality and those visiting Arndale will include people who are elderly and disabled and people who do not drive. But as Debelle J observed *Liquorland v Duke Unley* that fact “does not, standing alone, prove the second requirement that the licensed premises that already exist in the locality do not adequately cater for that demand and that the grant of the licence is necessary to satisfy that demand.”⁵⁰
- 129 As in that case, here it is clear that that need is being met by existing facilities. There are thirteen take away facilities in and about the locality that could be expected to meet the take away liquor needs of those living in the locality or visiting the centre. It can be safely assumed that a number of these facilities offer a delivery service. I accept that some members of the public do not like or want the delivery of alcohol to their home but it does not follow that the fact that delivery services are available is irrelevant.
- 130 There are six stand-alone bottle shops, a Dan Murphy’s, two BWS stores, two Fassina stores and a Liquorland.
- 131 The Dan Murphy’s store on Port Road provides as good a range of liquor as any liquor store in Adelaide. It is true that Port Road is a wide and at times busy road. But it is not that hard to cross. Crossing it is certainly nowhere near as challenging as crossing Main North Road near Blake’s Crossing, with its vast volume of traffic in an 80 kph zone that troubled me in *Woolworths Limited v Smithfield Hotel Pty Ltd*.⁵¹

⁴⁹ (1990) 53 SASR 53 at 55-56

⁵⁰ [2004] SASC 113 at para 43

⁵¹ [2012] SALC 57

- 132 The same is true for South Road at Ridleyton and the necessity to cross that road to access the BWS there. While at times crossing South Road at Ridleyton can at times be irritating it is not a major challenge.
- 133 It is notable that the size of and the range of liquor available at the BWS stores at Ridleyton and on Findon Road, Findon, are comparable to that which is proposed.
- 134 The Fassina store at Pennington is, as I said earlier, a fair average quality bottle shop. So too is the Liquorland store in St Clair. It is an attractive modern store.
- 135 The refurbished Fassina store at Mansfield Park, when completed, will not be all that far behind the Dan Murphy's. It promises to be a modern facility offering a good range of liquor.
- 136 In summary, the six stand-alone bottle shops are all of fair average quality or better.
- 137 I appreciate that the other facilities, spread as they are in and about the locality, are all attached to hotels. I appreciate the observation made in a number of cases that a not insignificant proportion of the public do not wish to buy their take away liquor from a hotel. But that statement needs to be qualified. The take away facilities offered by hotels vary enormously. Some are unattractive and very rudimentary. Others, such as the Dan Murphy's attached to the Federal Hotel, Mount Gambier, that was inspected by this Court in *BWS – Mount Gambier*,⁵² are almost indistinguishable from a first rate, large stand-alone bottle shop.
- 138 In this case the take away facilities attached to the Challa Gardens Hotel, the Finsbury Hotel and the Regency Tavern, being the three hotels that were inspected, were attractive and reasonably adequate. They were much more appealing facilities in terms of appearance than many, which are often no more than a thoroughfare designed for speedy transactions and not much else. An example of that type of facility is the drive in bottle department attached to the Smithfield Hotel that this Court inspected in *Woolworths Limited v Smithfield Hotel Pty Ltd*.⁵³
- 139 I am permitted to know that the BWS bottle shops that are attached to hotels are generally of a good standard. The evidence of Mr Anthony Smith about the store attached to the Halfway Hotel bears that out. Although the Court did not inspect that hotel it is reasonable to assume that the take away facility that it offers is also attractive and reasonably adequate. Thus, at least four of the take away facilities in and about the locality that are part of a hotel are of a good standard and not as

⁵² [2013] SALC 82

⁵³ [2012] SALC 57

uninviting as many of the hotel take away facilities that are generally on offer. The evidence of the needs witnesses and their willingness to use the take away facilities in and about the locality that are part of a hotel bears that out.

140 I accept that even so, there will still be some members of the relevant public who do not wish to purchase take away liquor from a hotel. However, given the ability of that proportion of the relevant public to access the six bottle shops just described or to use a delivery service, in my view it cannot be said that their take away liquor needs cannot be met without unreasonable difficulty and inconvenience.

141 For all of these reasons, in my view the test postulated by s 58(2) of the Act has not been met.

142 Whilst that is sufficient to dispose of this application, given that I received submissions I propose to consider whether, if I concluded otherwise, I would, in the exercise of the Court's discretion under s 53, have refused the application.

143 The objectors contend that in conformity with what the Supreme Court said in *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd* Woolworths should be denied this licence because the need for a new facility is of their making.

144 In that case Doyle CJ, with whom Martin and Besanko JJ agreed, said:

“The Tavern previously provided facilities that adequately catered for the public demand in the locality for liquor for consumption off licensed premises. The public demand is now not adequately catered for. It is not adequately catered for because the applicants decided in their own financial interests to provide gaming machines in a way that meant they no longer had space for a bottle shop. It can be said that the applicants have chosen not to use their hotel licence to cater for the public demand in the locality. One would expect the Court to be hesitant to grant a retail liquor merchant's licence to an applicant who holds a licence that could be used to meet the relevant demand, but does not because the applicant chose not to so use its existing licence. To grant a licence in such a case is to condone a choice not to make full use of a licence, and to decline to meet an existing demand.”⁵⁴

145 And then later:

“I consider that what has occurred here is contrary to the scheme of the Act. It is contrary to the scheme of regulating the grant of hotel licences and retail liquor merchant's licence by reference to a

⁵⁴ [2002] SASC 17 at para 34; (2002) 81 SASR 337

proved need and a demand not adequately catered for. It is contrary to that scheme in that the applicants could meet the local demand, but have made a commercial decision not to do so. There is a demand not adequately catered for only because of that decision. What has happened is contrary to the notion that Marinelli's Tavern should provide for the public the facilities a hotel is intended to provide, if there is a demand for them, as there is. I emphasise that I do not reflect in any way on the bona fides of the applicants. They made what is, no doubt, a sensible commercial decision from their point of view. But the consequences have adverse implications for the administration of the Act.⁵⁵

- 146 The objectors contend that Woolworths had the opportunity to buy an existing licence to remove to the centre, but declined to make an offer. They say that even so it could address the so called need for a bottle shop itself. They submit that it could apply to remove either the BWS store at Croydon or the BWS store at Findon, but it has chosen not to. They contend that to the extent that this application is necessary because of any perceived inadequacies of the BWS facility at the Finsbury Hotel, Woolworths could seek to remodel and increase that facility and resolve that issue.
- 147 I reject these submissions. As Mr Walsh submitted, what Doyle CJ was alluding to in *Lindsey Cove* was the need to protect the integrity of the licensing regime. The Court would not allow a person to artificially create a demand for a particular licence, by changing the operation of an existing licence that was meeting that demand, and to then rely upon that fact to secure a second licence. By analogy, if it the applicant here was Coles or Fassina, it would be arguable that if need were established, it could be said that the need was created by Coles' decision to remove or Fassina's decision to sell the existing licence and that in conformity with *Lindsey Cove* the Court should exercise its discretion and refuse the application. That would leave open the possibility as was alluded to in *Lindsey Cove* of some other entity applying for the licence.
- 148 That is not the situation here. In this case had Woolworths established the need for a new licence it would not have been a need that it had created. It might have been a need that it was able to remedy, but it was entitled to balance that with a consideration of its own commercial interests and the interests of the patrons of those other facilities who would be affected by the measures taken to remove or alter those facilities to meet that need.
- 149 If it came to it, I would not, in the exercise of the Court's discretion under s 53, have refused the application.

⁵⁵ [2002] SASC 17 at para 46; (2002) 81 SASR 337