

First Choice Liquor [2015] SALC 1

LICENSING COURT OF SOUTH AUSTRALIA

FIRST CHOICE LIQUOR

v

WOOLWORTHS LTD, KYLEDON PTY LTD & RORT PTY LTD,
CENTRAL PROPERTIES PTY LTD, HURLEY HOTELS PTY LTD,
ARKABA INVESTMENTS PTY LTD, P&J HURLEY PTY LTD,
HURLEY/SYMONS PTY LTD AND TONSLEY HOTEL FREEHOLD PTY
LTD

JURISDICTION: Application for a Retail Liquor Merchant's Licence

FILE NO: 3996 of 2014

HEARING DATE: 9, 20, 21, 22 and 23 October, 17 November and
12 December 2014

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 5 March 2015

*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 the Court in the exercise of its discretion should refuse to grant the licence - Ss 53, 57, 58 and 59 Liquor Licensing Act 1997*

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

Liquorland (Australia) Pty Ltd v Woolies Liquor Stores and Anor [2014]
SASCFC 87

Woolworths Liquor BWS Arndale [2014] SALC 14

Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd and Others
(1998) 73 SASR 6

Woolworths Ltd v Drake Coosit Pty Ltd [2010] SASC 13; (2010) 106 SASR
146

BWS - Mount Gambier [2013] SALC 82

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

Woolworths Limited v Mawson Lakes Hotel [2013] SALC 23

REPRESENTATION:

Counsel:

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|-------------|---------------------------------|
| Applicant: | Mr M Roder SC with Mr R Harley |
| Respondent: | Mr S Walsh QC with Mr R D'Aloia |
| Respondent: | Mr B Doyle with Mr A Battiston |

Solicitors:

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| Applicant: | Hunt and Hunt Lawyers |
| Respondent: | Clelands Lawyers |
| Respondent: | DMAW Lawyers |

- 1 The applicant, Liquorland (Australia) Pty Ltd, proposes to establish a First Choice Liquor store at the premises of 1133-1137 South Road, St Marys. The site is on the south western corner of South Road and Pinn Street. At the moment the site comprises of an empty retail shop and surrounding car park. Significant modifications will have to be made to it to accommodate the proposed bottle shop. Accordingly, the applicant seeks a certificate under s 59 of the *Liquor Licensing Act 1997* for the proposed premises.¹
- 2 To succeed in this application the applicant needs to satisfy the Court that the pre-requisites of ss 57 and 58 of the Act have been met and that in the exercise of the Court's discretion the licence should be granted.
- 3 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.
- 4 None of these matters are at issue in this case.
- 5 What is in dispute is whether the pre-requisites provided by s 58(2) have been met and whether in the Court's discretion the licence should be granted.
- 6 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.”
- 7 The application has drawn objections from Woolworths Ltd and from the licensees of five hotels in the general vicinity, the Avoca Hotel,² the Castle Tavern,³ the Maid of Auckland,⁴ the Marion Hotel⁵ and the Tonsley Hotel.⁶

¹ The effect of the granting of a certificate is that, subject to the premises being constructed in accordance with approved plans, a retail liquor merchant's licence will be granted in respect of the premises.

² Licensee: Kyledon Pty Ltd & Rort Pty Ltd

³ Under lessor: Central Properties Pty Ltd

⁴ Licensee: Hurley Hotels Pty Ltd

⁵ Lessor: Arkaba Investments Pty Ltd; Licensee: P&J Hurley Pty Ltd and Hurley/Symons Pty Ltd

⁶ Lessor: Tonsley Hotel Freehold Pty Ltd; Licensee: P&J Hurley Pty Ltd

- 8 It is settled law that in determining whether the test postulated by s 58(2) has been met licensed premises within and outside the boundaries of the relevant locality have to be considered.⁷
- 9 There was some disagreement amongst the experts as to how the locality should be defined in this case.
- 10 Before discussing their evidence it is appropriate to make some observations about the roads and suburbs that might be relevant.
- 11 South Road is a primary arterial road, linking the Northern and Southern Expressways, thereby proving continuous road linkage between the southern metropolitan suburbs of Seaford and Aldinga through to the northern suburbs of Salisbury and beyond. It is a very busy road.
- 12 Immediately to the north of the proposed premises is the intersection of South Road and Daws Road. At that intersection South Road carries of the order of 46,000 vehicles per day. Daws Road runs from east to west connecting Goodwood Road to Marion Road at which point Daws Road becomes Oaklands Road. Immediately to the north of Daws Road are the suburbs of Park Holme, Ascot Park, Edwardstown, Melrose Park, Clarence Gardens and Daw Park. Immediately to the south are the suburbs of Warradale, Oaklands Park, Marion, Mitchell Park, Clovelly Park, Pasadena and St Marys.
- 13 Marion Road is about one and a half kilometres west of South Road. It is also a very busy road. Adjacent to the south western corner of the intersection of Marion Road and Daws Road is a small suburban shopping centre anchored by a Coles Supermarket and known as the Park Holme Shopping Centre.
- 14 Further west again is Morphett Road. It connects Anzac Highway to the north to the southern suburbs of Seacombe Gardens and O'Halloran Hill. Just north of the intersection of Morphett Road and Anzac Highway is the suburb of Camden Park.
- 15 About 1.8 kilometres to the south of the proposed premises South Road intersects with Ayliffes Road and Shepherds Hill Road and turns about 45 degrees to the west. Further south it intersects Sturt Road. Further south again it provides access to the Southern Expressway and just beyond that junction it intersects with Marion Road which at that point it becomes Flagstaff Road. That road enables access to the southern suburbs of Flagstaff Hill, Coromandel Valley and Aberfoyle Park.

⁷ *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* [2000] SASC 116; (2000) 76 SASR 290 at 299

- 16 About three kilometres west of the intersection of South Road and Sturt Road is the Marion Shopping Centre, Adelaide's largest suburban shopping complex.
- 17 About a kilometre east of the intersection of South Road and Ayliffes Road, Ayliffes Road becomes Fiveash Drive and it turns about 45 degrees to the north. About two kilometres to the north east, it becomes Goodwood Road, at which point it again turns about 45 degrees and runs parallel with South Road. To the east of Goodwood Road is the Adelaide to Belair railway line and the suburbs of Colonel Light Gardens, Panorama, Lynton and further east, Belair. South of Belair are the suburbs of Glenalta, Eden Hills, Blackwood, Coromandel Valley and Craighburn Farm.
- 18 About two kilometres north of the proposed premises is Cross Road, which is perpendicular to and intersects South Road, connecting the Adelaide Hills with Anzac Highway.
- 19 In this general vicinity there is a railway line that runs almost diagonally from the intersection of Cross Road and South Road to the intersection of Daws Road and Marion Road. As with the Belair line passage across the railway line is limited to specified crossing points such that movement across the line is compromised.
- 20 In *Liquorland (Australia) Pty Ltd v Woolies Liquor Stores and Anor*, Parker J, with whom Kourakis CJ and Sulan J agreed, said in connection with the concept of locality:

“Section 61(2) requires the locality to be identified rather than the local community. *Nepeor* makes clear that the test for determining locality is, in the words of King CJ, identification of the area from which demand for liquor might, at least in part, be met by the licensed premises. Von Doussa J adopted the term ‘catchment area’ to describe the same concept.”⁸ (footnotes omitted)
- 21 Although that observation was made in connection with an application for the removal of a retail liquor merchant's licence under s 61(2) of the Act it is apposite in respect of the notion of locality in connection with an application for a new licence.
- 22 The applicant relied upon the expert opinion evidence of Mr Sean Stephens, an economist who, amongst other things, specializes in identifying the assessment of economic impacts associated with proposed retail developments. In that context he gave expert opinion evidence about the likely trade area for the proposed premises.

⁸ [2014] SASFC 87 at para 62.

- 23 He noted that the proposed premises are to be located on a prominent site on a major arterial road; that it was accessible via South Road; and that it would be highly accessible to both local residents and those living in more distant suburbs for which South Road and Daws Road are important transport links.
- 24 He concluded that the primary catchment area was generally skewed in a north-south direction extending north towards Cross Road, south beyond Sturt Road and west into the suburbs of Ascot Park, Mitchell Park and Park Holme.
- 25 He opined that the secondary catchment area extended to Cross Road to the north, as far south as Flagstaff Hill and Coromandel Valley, and as far east to the Belair railway line.
- 26 He noted that those living in the primary catchment area had a mean annual income that was 8% below the Greater Adelaide median.
- 27 The applicant also relied upon the expert opinion evidence of Mr Jeffrey Smith, planning consultant. He thought that the locality extended to Cross Road in the north, Morphett Road to the west, into the southern suburbs of Seacombe Gardens and Flagstaff Hill and across to the eastern suburbs of Blackwood and Coromandel Valley.
- 28 Through Mr Smith a summary of statistical records was tendered. It demonstrated that in all of the suburbs in the immediate vicinity of the proposed premises there was, in 2011, a reduced rate of motor vehicle ownership relative to the Adelaide average of 90.4% and that in some of the suburbs the differential was quite high. In Melrose Park 16.2% of dwellings did not have a motor vehicle. For Edwardstown the figure was 19.3%. For Ascot Park the figure was 15.5% and for Mitchell Park it was 18.0%.
- 29 Woolworths relied upon the expert opinion evidence of Mr Graham Burns, planning consultant. He thought that the locality of the proposed premises was defined by Cross Road to the north, Marion Road to the west, the Hills Face Zone boundary to the south and south east and the Adelaide/Belair railway line about two or so kilometres to the east.
- 30 In light of the evidence of residents, which I shall refer to in more detail, I expect that people living in the southern suburbs of Flagstaff Hill Aberfoyle Park and the eastern suburbs Blackwood and Coromandel Valley would regard travelling five kilometres or more as routine. If this licence were granted I expect that the proposed premises would attract patronage from people living in those suburbs, people living as far west as Morphett Road, as far east as a little east of Goodwood Road and as far north as Cross Road. Notwithstanding the cautionary admonition given by Parker J in *Liquorland (Australia) Pty Ltd v Woolies Liquor*

Stores and Anor, “against the fixing of overly precise boundaries for a locality”,⁹ I think it is appropriate in this case to set these as the notional boundaries of the relevant locality.

Licensed premises in and about the locality

- 31 At the commencement of the hearing, the Court, in consultation with the parties, drove around the general locality and inspected various premises and sites. The Court’s notes of this were distributed to the parties’ advisors and their comments were noted.
- 32 The observations that I am about to make are either uncontroversial or reflect the observations of the Court.
- 33 The licensed premises offering takeaway facilities in and about the locality are as follows.
- 34 *Fassina Camden Park* - This is on the southern side of Anzac Highway, just east of the intersection of Anzac Highway and Morphett Road. It is a modern, well stocked store offering a very good range of liquor.
- 35 *Maid of Auckland Hotel* - This is on the western side of South Road about two or so kilometres north of the proposed premises in Clarence Gardens. It has an average sized hotel car park surrounding it. The hotel is easily accessed from South Road. It has a takeaway facility trading under the Sip N Save badge. The facility comprises of a typical drive through and an adjacent walk-in bottle shop. The bottle shop is not clearly visible from South Road. The walk-in is accessed through the drive through. The bottle shop appeared to be of fair quality with an adequate range of liquor.
- 36 *Avoca Hotel* - This is on the eastern side of South Road, just opposite the Maid of Auckland. It is a reasonably large hotel offering a full range of facilities. It has a large car park to the rear that is easily accessed from South Road. It has a drive through that connects to a walk-in area, both trading under the Thirsty Camel badge. The walk-in area is also accessed by a door leading into the car park. The door to the bottle shop from the car park is often closed. The walk-in bottle shop is of better than average quality offering a broad range of liquor in an attractive, well laid out facility.
- 37 *BWS Cumberland Park* - This facility is about three and a half kilometres north east of the proposed premises on the western side of Goodwood Road. Although not inspected it can be assumed to be a typical BWS store that could be described as a convenience store offering a range of about 1750 lines.

⁹ [2014] SASFC 87 at para 70.

- 38 *BWS Ascot Park* - This facility is on the eastern side of Marion Road, just north of the intersection of Marion Road and Daws Road. This was inspected and it is a typical BWS store.
- 39 *BWS Edwardstown* - This facility is on the southern side of Cross Road about three kilometres north west of the proposed premises. Although not inspected it can be assumed to be a typical BWS store.
- 40 *Castle Tavern* - This facility is south of the Maid of Auckland in the south west corner of the Castle Plaza Shopping Centre on the western side of South Road in Edwardstown, about one and a half kilometres north of the proposed premises. It trades under the Cellarbrations badge. The facility comprises of a typical drive through and an adjacent walk-in bottle shop. The walk-in is accessed through the drive through. The walk-in bottle shop is quite small and the range of liquor seemed relatively limited.
- 41 *Dan Murphys Pasadena Green* - This facility is located in the Pasadena Green Shopping Centre on the corner of Fiveash Drive and Day Drive, Pasadena, about half way between Daws Road and Ayliffes Road and about a kilometre east of the proposed premises. By road the distance is of the order of two kilometres. It is a typical Dan Murphy's store of almost warehouse proportions. It contains an excellent range of liquor. The store is accessed through a travelator connected to an underground car park and a small car park outside the east of the store.
- 42 *Tonsley Hotel* - This hotel is about a kilometre south of the proposed premises on the western side of South Road in Clovelly Park. It has a takeaway facility trading under the Sip N Save badge. The facility comprises of a typical drive through and an adjacent walk-in bottle shop. The walk-in is accessed through the drive through. The walk-in bottle shop is of a reasonable size and standard.
- 43 *Marion Hotel* - This hotel is about a kilometre south of the intersection of Daws Road and Marion Road on the eastern side of Marion Road in Mitchell Park. It is a reasonably large hotel offering a full range of facilities. It has a takeaway facility trading under the Sip N Save badge. The facility comprises of a typical drive through and an adjacent walk-in bottle shop. The walk-in is accessed through the drive through. The walk-in bottle shop is of a reasonable size and standard, albeit small and at times cluttered by boxes.
- 44 *Warradale Hotel* - This hotel is situated on Diagonal Road just north of the Marion Shopping Centre in Warradale. Although not inspected I am permitted to know that it has a takeaway liquor facility operating as a drive through and trading under the Thirsty Camel badge.

- 45 *Dan Murphys Westfield Marion* - This facility is located in the south west of the Marion Shopping Centre, just off Morphett Road at Oaklands Park. It has a dedicated car park in the area to the east of the store and it can be accessed by the general shopping centre car park. Although not inspected it can be assumed to be a typical Dan Murphy's store.
- 46 *BWS Marion* - This facility is located just outside a Woolworths store within the western section of the Marion Shopping Centre. Although not inspected it can be assumed to be a typical BWS store.
- 47 *Flagstaff Hotel* - This hotel is about four or so kilometres south of the proposed premises on the eastern side of South Road in Darlington. Although not inspected I am permitted to know that it has a takeaway facility trading under the Thirsty Camel badge and that it comprises of a typical drive through.
- 48 *Cellarbrations Flagstaff Hill* - This is a stand-alone bottle shop situated within the Flagstaff Hill Shopping Centre just south of the southern side of Blacks Road, being the continuation of Flagstaff Hill Road. Although not inspected it can be assumed to be a convenience type store having a range generally comparable to a BWS store, although probably slighter better.
- 49 *Aberfoyle Hub Tavern* - This hotel is situated in Aberfoyle Park, about eight or so kilometres south of the proposed premises. It has a takeaway facility trading under the BWS badge. As I noted in *Woolworths Liquor BWS Arndale* am permitted to know that the BWS bottle shops that are attached to hotels are generally of a good standard.¹⁰
- 50 *Duck Inn* - This hotel is situated in Coromandel Valley about seven or so kilometres south east of the proposed premises. It has a small bottle shop trading under the Booze Brothers badge.
- 51 *Cellarbrations Blackwood* - This is a stand-alone bottle shop situated on Main Road at Blackwood. Although not inspected it can be assumed to be a convenience type store having a range comparable to a BWS store although probably slighter better.
- 52 The objectors contend that there are other facilities that I should have regard to.
- 53 They identify the Torrens Arm Hotel on Belair Road, Mitcham, the Edinburgh Hotel on High Street, Mitcham, the Belair Cellars on Russell Street, Belair and the Belair Hotel on Main Road, Blackwood.

¹⁰ [2014] SALC 14 at para 139

- 54 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.

The evidence of residents

- 55 I heard evidence from a number of residents who live in and about the locality.

Claire Hunt

- 56 Ms Hunt lives in Bellevue Heights. She has done so for a little over a year. She is relatively new to the area. She lives with her husband. They both work. She works in the city. Her husband is a self-employed tradesperson who works all over Adelaide.
- 57 She goes to work by driving to a point near the Mitsubishi site on South Road, and then catches a bus to the city. She sometimes parks at the tram stop at Morphettville if she has appointments after work in the beachside suburbs.
- 58 She does their food shopping at Blackwood. She said that it was a five to ten minute drive.
- 59 She occasionally goes to the Marion Shopping Centre.
- 60 She said that the closest liquor store to where she shops is a Cellarbrations store on Main Road at Blackwood. She finds it a bit expensive. She also mentioned a Thirsty Camel at Belair Hotel that was also on Main Road.
- 61 She does not use those facilities. She finds the parking inadequate. She said that the traffic on Main Road is very busy. She also complained about the prices.
- 62 She said that she and her husband spend \$200 to \$250 a month on alcohol.
- 63 For now they frequently purchase liquor from the Tonsley Hotel. She expressed some reservations about that facility. She said that it was not very inviting, the range was not extensive, and that parking can be an issue on a busy night.
- 64 She said that they buy liquor from the Dan Murphy's at Marion when they are in that area. She complained that it was frustrating to get there with all the traffic lights and that parking was hard if it was busy. She said that it would take fifteen to twenty minutes to get to the Dan Murphys at Marion.

- 65 She said that it would take between ten to fifteen minutes to get to the Dan Murphys at Pasadena but she did not like going there because of the traffic and because the car park there is difficult to manoeuvre in.
- 66 She supports the within application because she thinks that there needs to be a bottle shop on the proposed site. She said that the South Road access would be convenient for her and that the facility would offer more choice and better pricing.
- 67 She said that she was aware of but did not use the takeaway facilities attached to hotels further north along South Road.

Cindy Tucker

- 68 Ms Tucker lives in Mitchell Park. She has lived there for about eleven years. She lives alone. She purchases liquor about once a month. She drives a car.
- 69 She does her general household shopping at the Coles Supermarket in the Park Holme Shopping Centre. She shops there about once a week.
- 70 For now she buys liquor at from the BWS store on Marion Road, Ascot Park. She does not find it to be a convenient journey. She spoke of a time when it did not stock the product she was looking for. She complained of the traffic conditions and the amount of time it takes to get there from her place. She described the traffic conditions on Marion Road as “bedlam”. She said that the journey involved traversing six sets of traffic lights each way. She said that on one occasion she was delayed at the traffic lights at the intersection of Alawoona Drive and Marion Road for fifteen minutes. She was challenged about that evidence in cross examination.
- 71 She has purchased liquor from the Tonsley Hotel and the Marion Hotel. She is not especially comfortable using drive through facilities attached to hotels.
- 72 She would find it very convenient to use the proposed premises. She could use back streets to get there. She thought that the journey would take half the time it takes her to go to the BWS at Ascot Park.

Keith Harrison

- 73 Mr Harrison lives in Railway Terrace, Edwardstown with his wife. He works in the city.
- 74 He and his wife do grocery shopping twice a week, once for a major shop and a top up through the week. They generally do this at the Coles

supermarket at Castle Plaza. He said that he knew of the Cellarbrations facility at Castle Plaza but he did not use it. It did not appeal to him.

75 He and his wife purchase about \$200 worth of liquor a month.

76 For now he uses the BWS at Edwardstown. It is less than a kilometre from his home. He finds the store a bit small. He finds it annoying that it will not attempt to match cheaper prices elsewhere. He said that it was a bit expensive.

77 In his work he has used the First Choice store on Unley Road at Malvern. He likes that facility. He would like the opportunity to use a like facility at the proposed site. He thinks that he should have easy access to a large facility offering competitive prices. He said that there was nothing to attract him to Pasadena and the Dan Murphys there.

Andy Phay

78 Mr Phay lives on the southern side of Daws Road in Clovelly Park. He lives with his parents and siblings.

79 He and his parents drink alcohol. They purchase about \$300 worth of liquor a month. He generally does the purchasing.

80 He lives about two or so kilometres east of the BWS at Ascot Park. He said that the trip there would involve a right hand turn into Marion Road and a U turn on Marion Road. He said that the return journey would involve a U turn on Daws Road. He does not use that facility. He said that he does not like drive throughs.

81 For now he purchases the family's liquor from Dan Murphys at the Marion Shopping Centre. He does so because of the larger range. He said that it is a ten to fifteen minute drive. He goes there about once a fortnight.

82 If this application succeeds he will use the proposed store instead of going to Dan Murphys at Marion. It would be within walking distance of where he lives.

Robert Gardner

83 Mr Gardner lives in Flagstaff Hill with his wife. He has done so for about ten years. He is semi-retired. He and his wife drink alcohol. They purchase about \$2,000 worth of wine and about \$1,500 worth of beer a year.

84 Mr Gardner prefers to buy in bulk. He buys beer by the carton and buys a carton or two every three weeks. He buys wine by the month.

- 85 For now his first preference is the First Choice store on Unley Road, Malvern. He sometimes goes to the Edinburgh Hotel to have a look in their bottle shop. He sometimes uses the local Cellarbrations store if he needs certain items of alcohol at short notice. He finds the range there to be a bit limited.
- 86 He said that it takes about half an hour or more to drive to the First Choice store on Unley Road. He said it takes him about twenty minutes to drive to the Edinburgh Hotel.
- 87 He does not use the Dan Murphys at Marion or Pasadena. They are not in his line of travel. He said the he would not find them to be particularly convenient to use.
- 88 He said that he travels past the proposed site about three times a week. He said that a First Choice store on South Road at St Mary's "solves his problems". He said that it is on the right side of the road for his homeward journey. He would not have to worry about traffic, making right hand turns or crossing traffic at peak hour. He said that it would be highly desirable.

Bridget Celia Haniford

- 89 Ms Haniford lives in Daws Road, Ascot Park. She lives on her own. She is a carer for her daughter. Her house in distance terms is quite close to the BWS store at Ascot Park. She has lived there for about four years. She has a motor vehicle.
- 90 She buys liquor for herself and for her family, especially in connection with family dinners. She would spend about \$200 a month on alcohol. She purchases alcohol about once a week.
- 91 She does her general grocery shopping at the Coles supermarket in the Park Holme Shopping Centre. She buys alcohol from the BWS store at Ascot Park. She said that it is very awkward to get to. She said: "I could walk there in an eighth of the time but I can't carry the stuff back. It's hilarious." She said that if she only wanted one bottle of wine she would walk because it was much easier than driving. When cross examined about that she said that even if she only carried a single bottle of wine she might fall over with it.
- 92 She also spoke of the BWS store being relatively expensive when compared to stores like Dan Murphys. She said that because of her financial circumstances the price difference was significant.
- 93 She said that she regularly travels in the vicinity of the proposed premises. That is where her doctor, her preferred chemist, her preferred

hairdresser and her favourite garden place and hardware store are located.

- 94 She finds driving there very easy and much easier than driving to the BWS store at Ascot Park.
- 95 Although she visits the Marion Hotel she does not use the takeaway facility. She feels uncomfortable using drive throughs.
- 96 She has used the Dan Murphy's at Marion. She described it in terms of price as excellent. She said, however, that it was difficult to get to. She said that she does not cope well with crowded places and a lot of people and gets stressed out. She also stated that it was "a bit of a drive" and she described the parking outside Dan Murphys as "really horrendous". She said that in terms of time it took about fifteen to twenty minutes to travel there.
- 97 She said that as things presently stand there is nowhere where she can conveniently purchase liquor. She said that she had not been to the Dan Murphys at Pasadena.

Christine Rose Jones

- 98 Ms Jones lives in Mitchell Park. She runs a small business. She lives with her partner, but he works away every second fortnight in Moomba.
- 99 She buys a bottle of red wine once every week or so. She said she usually spends about \$30 to \$40. She said her partner buys beers and pre-mixed drinks. She said that they collectively spend \$150 to \$200 a month on alcohol.
- 100 She said that she does her general grocery shopping at the Park Holme Shopping Centre.
- 101 She finds accessing and driving along Marion Road to be very difficult and only uses the Park Holme Shopping Centre because she has no other option.
- 102 She said that she does not use the BWS at Ascot Park. She used to use it on a regular basis. She described it as being hard to get to.
- 103 She stopped using the store because she found that it was too expensive, especially compared to the Dan Murphys at Marion. She said that for now that is where she purchases most of her liquor. The drive to Marion takes her about fifteen minutes.
- 104 She said that she had used the bottle shop attached to the Marion Hotel. She said that in terms of location it is very convenient. She complained

about the small range of wine, her distaste for drive throughs, the small size of the bottle shop and the absence of well trained staff.

105 She said that for her the location of the proposed premises was very convenient and driving there would be quick and easy.

Leonie Meredith Gade Deverson

106 Ms Gade Deverson lives with her husband in Flagstaff Hill. She works in the city. Her husband is freelance and works all over the city.

107 They both drink alcohol.

108 For now they purchase liquor from a number of places. Her husband on occasions purchases liquor from the Duck Inn at Coromandel Valley. On other occasions they buy their liquor when passing by takeaway liquor facilities while travelling to visit friends, family and the like.

109 She said that she goes to the Marion Shopping Centre often but not for grocery shopping. She has been to Dan Murphys there a couple of times. She finds the car parking there a challenge.

110 She supports this application because it would be convenient to access a store such as that proposed on her way home from work.

Kane Sturzbecher

111 Mr Sturzbecher lives with his partner in Flagstaff Hill.

112 He is a telecommunications technician based in Melrose Park, a little north of Daws Road and east of South Road. He gets to work by driving down Flagstaff Road onto South Road, turning right onto Daws Road, and then the first left to where his workshop is located.

113 He also uses South Road to travel to family who live in the northern suburbs.

114 In his view South Road is always clogged. He said that it takes him between fifteen to twenty minutes to get to work.

115 He and his partner drink alcohol. They normally drink wine with their dinner. He also drinks beer and spirits.

116 On average they spend \$250 to \$300 a month on alcohol.

117 They sometime purchase liquor from the Cellarbrations store at Aberfoyle Park. Their preference is to purchase liquor from a large format liquor store. He finds that such stores offer lower prices and a

wider range of beers and spirits and wines. He enjoys shopping in such stores.

118 For now if they are shopping at the Marion Shopping Centre they occasionally purchase liquor from the Dan Murphys there. His partner uses the First Choice store on Unley Road. She works nearby.

119 He supports the within application as he would like to be able to access a larger format liquor store on South Road. He said that the Dan Murphys at Marion is too far away.

120 He agreed that he is currently able to get all of the liquor that he needs.

Other witnesses

Sophie Kee Mei Wong

121 Ms Wong is the state manager for Coles Liquor, South Australia and Northern Territory. She has held that position for twelve months. She has tertiary qualifications in commerce, marketing and business administration.

122 She is responsible for approximately 300 employees across South Australia and Northern Territory. She oversees operational compliance, adherence to legal and regulatory commitments and developing personnel.

123 She is responsible for the 36 liquor outlets that Coles operate in South Australia.

124 She described the three styles of liquor stores that trade under the Coles' brand, First Choice Liquor which is large format, Vintage Cellars which is a boutique smaller format offering, and Liquorland which is its convenience offering.

125 She said that there had been a rapid expansion of large format liquor retailing across Australia since 2005. She mentioned a figure of up to 550% and suggested that this indicated that there is a need and a demand from the Australian community for large format liquor.

126 She said that the average basket size in a First Choice is approximately \$55. She said that some of the transactions are quite large and comprise of many bulk orders, party orders and corporate sales.

127 She thought that the proposed premises were ideally positioned. She spoke of the benefit as a retailer of being positioned on the drive home side of the road.

- 128 She spoke of the Coles' national loyalty program known as Flybys. She said that people can join the program at any store free of charge and for their purchases receive points. Customers can shop at a Coles supermarket, a First Choice liquor store, a Liquorland store and a Coles Express, earn their points, and then once they get to a certain threshold, they are able to redeem the points. She suggested that that, in itself, is a compelling reason and provides a very good incentive for people to seek out First Choice liquor because of their ability to use a Flybys card.
- 129 She said that she had visited Dan Murphy's stores. She agreed that they stock an excellent range and were very competitive on price.
- 130 She gave evidence of her inspection of some of the identified relevant facilities in and about the locality. She offered adverse comments on the level of service and made price comparisons. She said that when she went to the BWS at Ascot Park no one smiled at her.

Aaron John Fogg

- 131 Mr Fogg is the current store manager of Dan Murphys at Noarlunga. He lives in Flagstaff Hill. He has done so for about a year.
- 132 He has worked for Woolworths for about ten years.
- 133 A couple of months before moving to Noarlunga he worked at Dan Murphys at Pasadena for about two years. Prior to that he worked for six months at the BWS store at Ascot Park and prior to that at the Dan Murphys at Marion.
- 134 As such he felt qualified to speak of the general concept of the trade areas of those stores.
- 135 He said that he was able to identify catchment areas from speaking to customers, dealing with their online orders and making deliveries.
- 136 He said that most of the trade at Dan Murphys at Pasadena was the Pasadena/St Mary's/Panorama area. He said that the store also attracted customers from Clovelly Park, Mitchell Park, Daw Park, Melrose Park, Edwardstown and Ascot Park.
- 137 He said that the BWS bottle shop at Ascot Park attracted customers from the Ascot Park area, Edwardstown, Park Holme, Marion, Oaklands Park, Mitchell Park and Clovelly Park. He said that in his time at the Ascot Park store he did not observe any particular difficulty in people gaining access to the store. He said that he did not receive a complaint in the time that he was there. He said that he did not have any trouble accessing the store by car.

Anthony Charles Leybourne Smith

- 138 Mr Anthony Smith is the business manager for liquor licensing for Woolworths Ltd. He has been involved in the industry for about 34 years.
- 139 He said that Woolworths trade under two liquor brands, Dan Murphys and the BWS brand. They trade either as standalone bottle shops or are attached to a hotel.
- 140 He said that there were twelve Dan Murphys stores in South Australia.
- 141 He said that Woolworths' preference was to have the Dan Murphy brand associated with or close to shopping centres.
- 142 He was asked to make a comparison between First Choice stores and Dan Murphys stores.
- 143 He said that First Choice stores are generally slightly smaller and carry just over 3000 lines in comparison to Dan Murphy's 4000 lines.
- 144 He said that Woolworths' policy in connection with Dan Murphys stores was to not be beaten on price.
- 145 He described the difference between destination stores such as First Choice and Dan Murphys and other facilities. He said that they had a much a wider radius of custom. He said that some people specifically make the choice to go there to satisfy their needs and were willing to travel over larger distances to do so. In contrast the convenience offer was just that, typically in a small freestanding neighbourhood shopping centre or a large shopping centre whereby the store is accessed because of the convenience of having the liquor offer there whilst patrons attend to do other things. He said that Dan Murphys and First Choice stores can do both.
- 146 In his view destination shoppers usually make their purchases on weekends such that supposed advantage of the proposed premises for such shoppers was not made out as it would be just as convenient for them to use the Dan Murphys at Pasadena.
- 147 He spoke of his attendance at the First Choice store at Malvern and of the lack of attention that he there received.
- 148 He said that the training of staff in Woolworths liquor stores was important to them as they want to be the leaders in the industry. He accepted that on occasions some staff might let customers down. He said that it was something they wish to avoid as customer complaints are the last thing they want.

Brian Hurley

- 149 Mr Hurley is a director of the Hurley Hotels Pty Ltd (The Hurley Group). The Hurley Group owns many hotels including the Maid of Auckland Hotel. Mr Hurley stated that the primary users of the hotel's takeaway facility were locals, being persons residing in Edwardstown and Plympton as far west as the Morphettville Racecourse. He spoke of the availability of car parking and a browse lane. He said that the hotel has the capacity to feature smaller wineries unable to get shelf space in larger facilities. He spoke of the price competitiveness of the Sip'n Save range. He stated that the hotel offers experienced management and a home delivery service.

Anthony Stewart

- 150 Mr Stewart is part of a company that owns the Cellarbrations store at Flagstaff Hill. He spoke of its quality customer service. He stated that its primary catchment area was local and that many of its customers combine their grocery shopping (at the Flagstaff Hill Shopping Centre) with their liquor purchases. He spoke of the store's regular sponsorship with the local community centre.

Douglas Kemp

- 151 Mr Kemp is the manager of the Cellarbrations store at Blackwood. He spoke of the extensive connections that the proprietors of the store have with the local community. He also described the personal relationship that he enjoys with customers and of the fact that it is a well performing store.

Nick Limberis

- 152 Mr Limberis is the manager of the Marion Hotel. The Marion Hotel is owned by the Hurley Group. He spoke of the bottle department's focus on providing customer service. He described a busy and attentive business and a level of flexibility not available with larger bottle shops.

Linden Goldsworthy

- 153 Mr Goldsworthy is the proprietor of the Avoca Hotel. He also has interests in the Kentish Arms Hotel, the Goodwood Park Hotel, and the Goodwood Cellars.
- 154 He spoke of the success of the Avoca Hotel and its bottle shop. He said that the bottle shop promotes smaller wholesalers and smaller wineries and gives exposure to products that probably are not available in the larger stores.

Mr Sam McInnes

- 155 Mr McInnes is the General Manager of the Hurley Hotel Group. He gave evidence as to its operations.
- 156 He spoke of a significant warehouse at the rear of the Tonsley Hotel that was constructed in June 2014 and as a result of the Group's enhanced capacity to be competitive on price.
- 157 He spoke of the success of the bottle shops at the Tonsley and Marion Hotels, of their commitment to providing knowledgeable staff and good service to their customers.
- 158 The applicant tendered a schedule of distances.
- 159 It reveals that for Ms Tucker the BWS at Ascot Park is about 2.4 kilometres away, Dan Murphys Marion, 3.4 kilometres, Dan Murphys Pasadena, just less than 4 kilometres, and the proposed premises just over 3 kilometres.
- 160 It reveals that for Ms Jones the BWS at Ascot Park is about 1.7 kilometres away, Dan Murphys Marion, just over 4 kilometres, Dan Murphys Pasadena, 3.4 kilometres, and the proposed premises 2.5 kilometres.
- 161 It reveals that for Mr Phay the BWS at Ascot Park is about 1.9 kilometres away, Dan Murphys Marion, 5.8 kilometres, Dan Murphys Pasadena, 2.6 kilometres, and the proposed premises less than a kilometre.
- 162 I also received into evidence stock lists and price lists concerning the proposed store and the various takeaway liquor facilities in and about the locality.

The parties' submissions

- 163 Mr Roder SC, counsel for the applicant, submitted that the application should succeed on either one of two bases.
- 164 The first was based on the adequacy of available facilities to those living in the anticipated primary catchment area of the proposed premises, particularly Clovelly Park, Mitchell Park, Daw Park and St Marys.
- 165 The second was based on the anticipated secondary catchment area to the south.
- 166 In respect of the first he submitted that the evidence established that those living in Clovelly Park and Mitchell Park are required to travel further and for longer than is usual in the metropolitan area; they are

required to drive on congested roads to access facilities capable of providing an acceptable range and price; the demographics of the area indicates a lack of mobility; and that they should have access to facilities other than those provided through a drive through bottle shop.

- 167 He submitted that in evaluating “public demand”, the word “public” can mean a significant sector of the public, which in turn means no more than “a material” sector of the public.
- 168 He said that a significant section of the disadvantaged living in the primary catchment area will have their situation improved by access to the proposed premises. He said that there mere fact that they were putting up with the existing facilities was not to the point.
- 169 As to his second plank he submitted that for people living in southern suburbs the range and prices offered by facilities in those areas are inadequate. He said that the Avoca Hotel was not relevant as it does not compare with the range and price characteristics sought. He said that it has all of the disadvantages and drawbacks of a bottle store that is accessible via a busy drive through area.
- 170 As to the Dan Murphys at Pasadena, he said that it is not conveniently meeting that demand as it involves turning across a busy road and the route is not one that would be a convenient one for many living in that area. He said that South Road is the main road for travel between north and south and having a facility of the type proposed on that road would present a far more convenient alternative.
- 171 Mr Walsh QC, counsel for Woolworths, submitted that those living in and about the locality are already well serviced in terms of access to takeaway liquor facilities. He said that those living on the eastern side of the locality might be expected to use the Pasadena Shopping Centre. Within that centre is a Dan Murphys store. He said that it is an excellent bottle shop only two or so kilometres from the proposed premises.
- 172 He submitted that those living in the northern sector, many might be expected to combine their liquor purchasing with their shopping at the Castle Plaza Shopping Centre, using the Cellarbrations store there or the Avoca Hotel or the Maid of Auckland Hotel nearby. He said that they also have access to the BWS stores at Ascot Park, Cumberland Park and Edwardstown as well as the Fassina store at Camden Park.
- 173 He submitted that those living on the southern and western sides of the locality might be expected to shop the Pasadena Shopping Centre, the Marion Shopping Centre or the Park Holme Shopping Centre. As just mentioned, at Pasadena is a Dan Murphys. There is also one at Marion as well as a BWS store within the centre. At Park Holme there is the BWS

at Ascot Park, just three hundred metres to the north. These residents also have available the Tonsley Hotel and the Marion Hotel.

- 174 He submitted that whilst it might be expected that for some living in the immediate vicinity of the proposed premises those premises would present a far more convenient means of accessing takeaway liquor than the existing facilities that was not enough for the application to succeed.
- 175 He submitted that the case based upon the peculiar demographics of those living in Mitchell Park and Clovelly Park and the smaller than usual motor vehicle ownership had not been made out. He said that we do not know within those suburbs where the persons without vehicle live; whether they live close to bus routes; whether they are contentedly purchasing their liquor from existing facilities; or whether they would use the proposed facility. He noted that all of the residents who gave evidence own a motor vehicle. He therefore contended that this aspect of the applicant's case was based on speculation.
- 176 Finally he submitted that in the exercise of the Court's discretion the application should be refused because to grant it would have a deleterious effect on many of the local stores in places such as Blackwood and Flagstaff Hill as well as the local hotels.
- 177 Mr Doyle, counsel for the hotel objectors, similarly contended that the threshold had not been met. He submitted that the evidence of the residents did not establish the existence of any discontent and that overall the evidence did not establish that a significant number of people were not being adequately catered for by the existing facilities.
- 178 He submitted that in the exercise of the Court's discretion the application should be refused because to grant it would result in a proliferation of large format liquor stores in a relatively small area which over time would undermine the viability of the local facilities thereby resulting in a loss of diversity, loss of the benefits that those enterprises offer to their local communities and the loss of the responsiveness that those facilities can offer to the local demand.
- 179 Mr Roder submitted that this was not a case that called for the exercise of the discretion adverse to the applicant. He said that this is not an area where there are a lot of retail liquor merchant licences. He said that there is nothing unusual about the placing of two large format liquor stores a couple of kilometres apart. He made reference to the proximity of the Dan Murphy stores at Norwood, Payneham and Marden and the proximity of the Dan Murphys and First Choice stores at Golden Grove. He said that there was no evidence that the bar trade of any particular hotel is going to decline or the services that they are going to offer the public are going to decline if this application were to succeed.

Analysis

180 I have made findings as to the relevant locality earlier in these reasons.

181 I now move to the other evidence.

182 Ms Hurst's evidence seemed entirely plausible and I accept it. So too the evidence of Mr Harrison, Mr Phay, Mr Gardner, Ms Jones, Ms Gade-Deverson and Mr Sturzbecher. I accept their evidence.

183 I did not form such a favourable view of the evidence of Ms Tucker and Ms Haniford.

184 Ms Tucker left me with the firm impression that she was exaggerating the time and inconvenience involved in her accessing the Park Holme Shopping Centre and the BWS at Ascot Park and of her difficulty with Marion Road. Her evidence that on an occasion she was delayed at the traffic lights at the intersection of Alawoona Drive and Marion Road for fifteen minutes does not ring true.

185 Ms Haniford similarly left me with the firm impression that she was exaggerating the time and inconvenience involved in her accessing the BWS at Ascot Park. Given her proximity to that store her evidence of the contrast between walking and driving there does not ring true.

186 I do not accept their evidence.

187 I thought that all of the other witnesses who gave evidence either orally or through affidavit were doing their best to help me. I did not get the sense that for them there were any credit issues of any moment. Their evidence and the observations of the Court enable the findings made herein about the various retail liquor facilities discussed earlier in these reasons.

188 I did not find the evidence of price comparisons of much utility. I am permitted to know that all takeaway liquor facilities operating under the various badges have specials from time to time and depending upon what is on special, a particular brand of liquor might be cheaper in one facility compared to another at a particular time. The only matter of note is that both Dan Murphys and First Choice stores endeavour to beat advertised lower prices.

189 I did not find the evidence of service within particular facilities to be of much utility either. I am permitted to know that in any such facility the level of service might vary from time to time, as will the competence and friendliness of staff. Moreover, the perception of matters such as quality of service, competence and friendliness are very subjective. Some patrons might regard being left alone to wander about a store without

interruption to be highly desirable and reflecting the discretion of the service staff. Others might equate it with poor service.

- 190 My impression is that all of the facilities that I identified as relevant offer a reasonable level of service. Woolworths is an experienced operator of takeaway liquor facilities with a focus on customer service. That seems to be a core value of the hotels trading within the Hurley Group. My impression is that it is a value that is also shared by Mr Goldsworthy, the proprietor of the Avoca Hotel, as well as the proprietors of the Cellarbrations stores at Blackwood and Flagstaff Hill. It doubtless is a core value of Coles Liquor.
- 191 Ultimately I did not get the sense of any significant areas of disagreement on the relevant facts. The real issues are what to make of those facts and how the relevant legal principles are to be applied.
- 192 I now deal with the applicant's contention that the application should succeed by reference to the anticipated primary catchment area.
- 193 In determining this issue I remind myself of what Doyle CJ said in *Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd and Others* where he spoke of the need for the Court to focus on things like the accessibility of the existing premises in terms of distance; the forms of transport available; the time taken to get to existing premises and the like; the availability at the existing premises of the range of liquor demanded by the public; the standard of the existing premises and of the service provided there; and the existing shopping patterns and habits of the public to the extent that they bear on the accessibility of the existing premises. Importantly he said that: "The court is required to determine not just what the public in the relevant locality want." He then went on to say:

"... mere inconvenience in getting liquor from an existing outlet is not enough to justify the grant of a new licence. Nor is a mere preference to shop at a particular place, or a preference for 'one-stop shopping' enough to establish that existing premises do not adequately cater for the public demand. The fact that the public wish to purchase liquor at a proposed new outlet, or would prefer to be able to purchase their liquor at that outlet, does not of itself establish that existing premises do not adequately cater for the public demand. The court is required to assess that wish or preference by reference to contemporary standards to determine whether, if the demand for liquor is to be met at existing premises, it can be said that those premises do adequately cater for the public demand."¹¹ (emphasis mine)

¹¹ (1998) 73 SASR 6 at 10

- 194 For most of the people residing in Mitchell Park and Clovelly Park the round trip to the BWS at Ascot Park is less than five kilometres. To reach the store these residents will have to travel along Marion Road and some will have to travel along South Road and Daws Road. Whilst those roads can be very busy and can at times be challenging for this section of the public traveling along those roads is part of their day to day living. Moreover, the time required for travel is not great.
- 195 For some living in Mitchell Park, especially those near Marion Road, the Marion Hotel is very close. That same is true of some of those living in Clovelly Park and distance between them and the Tonsley Hotel.
- 196 I find that this section of the public has access to a range of takeaway liquor facilities that are of reasonable quality; that provides a reasonable range of liquor; and a reasonable level of service. For them, it cannot be said that the existing premises do not adequately cater for their demand.
- 197 I accept that the evidence indicates that in these suburbs there are a relatively high number of persons who do not own a motor vehicle. But there is much force in the submissions put by Mr Walsh about this and the speculative nature of where this leads.
- 198 It is also notable that the evidence indicates that at least some of the needs witnesses became aware of this case through a letter drop. I agree with the submission that it is of some significance that all of those who gave evidence own a motor vehicle. If those living within the relevant locality, who do not own a vehicle, were particularly inconvenienced in having to use the existing facilities, it is a little surprising that no such person came forward to give evidence to that effect.
- 199 It is also significant that the proposed premises are not within or near a shopping centre. It would follow that if this licence were granted persons using the facility would need to shop for their regular grocery shopping elsewhere.
- 200 In and about the immediate vicinity people could be expected to shop at the Pasadena Shopping Centre, the Marion Shopping Centre, the Park Holme Shopping Centre or the Castle Plaza Shopping Centre. All but the Park Holme Shopping Centre has a bottle shop. In the case of the Marion Shopping Centre it has two. As for Park Holme, there is a BWS store 300 metres up the road.
- 201 Members of the public using any one of these shopping centres could easily combine their liquor shopping with their grocery shopping. I expect that many do so and that for those who do not, and who choose to purchase their liquor separately, the vast majority are doing so contentedly at existing premises.

- 202 In my view the net effect of the evidence of the needs witnesses living in the primary catchment area can be put no higher than that they would find it very convenient to have the option of purchasing their liquor from the proposed premises.
- 203 However, as was explained in *Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd* that is not the test.
- 204 In my view the evidence falls short of establishing that those who reside in the anticipated primary catchment area of the proposed premises are not adequately catered for by existing premises for their demand for liquor.
- 205 I now turn to the alternate argument based upon the anticipated secondary catchment area.
- 206 In metropolitan Adelaide there has always been a range of retail takeaway liquor facilities. Within that range have been large facilities offering a large range of products. But, until relatively recent times, probably coinciding with the grant of the retail liquor merchants licence that led to the establishment of a Quaffers store at Unley Road, Malvern, which has since become a First Choice store, the concept of a series of brand name large format destination stores offering a vast array of liquor products at very competitive possible prices did not exist.
- 207 Over the last ten years or so that has changed. There are now in metropolitan Adelaide four First Choice Stores, situated at Malvern, Collinswood, Hindmarsh and Golden Grove and ten Dan Murphys Stores, situated at St Peters, Norwood, Glenunga, Marden, Welland, Pasadena, Highbury, Marion, Noarlunga and Golden Grove.
- 208 Although based on a slightly different model the Fassina Group also offer some large retail facilities. For some time it has had a large store at Somerton Park, offering a large range of liquor. It now has large stores in Walkerville and Camden Park.
- 209 In *Woolworths Ltd v Drase Coosit Pty Ltd* Kourakis J (as he then was) made the following observation:

“However, **the identification of public demand, which is not adequately catered for, is a question of fact; it must be decided both on the evidence presented in a particular case and by the Licensing Court’s assessment of contemporary community standards. The concept is not a static one.** On most applications for a retail liquor licence the existence of some unmet demand is unlikely to be seriously disputed; an applicant is unlikely to risk the investment of a substantial amount of capital if there were not a significant demand. The more difficult question will usually be where the balance should be struck between allowing the public

demand to be more adequately catered for and the maintenance of community standards concerning the responsible promotion and sale of liquor. **Recent Australian social history shows that facilities which one day are thought to be no more than matters of convenience quickly become, or at least are soon thought to be, necessities.**”
(emphasis mine)¹²

- 210 By reference to contemporary community standards in my view members of the public now expect to have available to them reasonable access to a large format destination store offering a vast array of liquor products at the competitive prices as part of the range of takeaway facilities servicing their needs for takeaway liquor. Depending upon what facilities are available in and about a particular locality it is reasonably arguable that if the public in and about that locality does not have reasonable access to such a store, the test postulated by s 58(2) of the Act may have been met.
- 211 I am in no doubt that for the majority of residents living in the locality their need to access a large format destination store is contently being met by the Fassina store at Camden Park, the Dan Murphys at Marion and the Dan Murphys at Pasadena.
- 212 I accept that for those living in the southern parts of Flagstaff Hill and those living in Aberfoyle Park and the eastern suburbs Blackwood and Coromandel Valley, most of whom might be expected when requiring access to a large format destination store to be using the Dan Murphys at Westfield Marion or the Dan Murphys at Pasadena, the distances involved in accessing those stores are bordering on the unreasonable. My difficulty, however, with the applicant's case is that I struggle to see how the proposed store, when viewed as a destination store, would, in terms of reasonableness, be any better. The fact that it is on South Road, as opposed to say the Dan Murphys at Pasadena on the extension of Goodwood Road, seems to me to be of no real consequence. The distances and time taken to travel are almost the same.
- 213 The proposed premises may be more convenient to those living in those suburbs when driving home via South Road. But in a very real sense those persons would be using the proposed premises as a convenience store rather than a destination store. In satisfying that need they could just as easily use the well-stocked and convenient bottle shop and drive through at the Avoca Hotel, which is also on the left hand side of the South Road. They could also use the takeaway facilities nearer to where they live. It is not as if the residents of Flagstaff Hill, Aberfoyle Park and the eastern suburbs Blackwood and Coromandel Valley have no access to takeaway liquor facilities close to their homes. The Cellarbrations store at Flagstaff Hill, the Aberfoyle Hub Tavern, with its takeaway

¹² *Woolworths Ltd v Drake Coosit Pty Ltd* [2010] SASC 13 at para 55; (2010) 106 SASR 146 at 158.

facility trading under the BWS badge, the Duck Inn in Coromandel Valley, with its small bottle shop trading under the Booze Brothers badge and the Cellarbrations store at Blackwood, are more than capable of servicing the convenience needs of that section of the public.

214 In my view the evidence falls short of establishing that those who reside in the anticipated secondary catchment area of the proposed premises are not adequately catered for by existing premises for their demand for liquor or that the grant of this licence is necessary to satisfy that demand.

215 Even if the test had been met, I would exercise the Court's very wide discretion under s 53 of the Act¹³ to refuse the application. Mr Roder's submissions about the proximity of large format liquor stores in other parts of Adelaide overlooks the fact that in each case the store came into existence as a result of a removal or modification to an existing facility and, so far as I can tell, none of the stores that he mentioned were the subject of a contested hearing in this Court.

216 Even without direct evidence the Court is entitled to be concerned about the impact of granting a new licence for the creation of a large format liquor store because of the potential for it to adversely affect other enterprises in the locality, especially when such a store already exists only two kilometres away by road from the proposed premises. I am permitted to know that a consequence of the creation of a large format liquor store is that takeaway facilities attached to hotels struggle.¹⁴ I am permitted to know that some members of the public find large format stores "somewhat daunting and would prefer to make their liquor purchase in a smaller environment."¹⁵ I am permitted to know that "many people ... find it very convenient to make their takeaway liquor purchases from a drive through facility attached to a hotel."¹⁶

217 I appreciate that s 53(1) expressly provides that the Court must not, in exercising its discretion, take into account the economic effect on other licensees in the locality affected by the application. But that does not mean that it must ignore the potential for the grant of a retail liquor merchant's licence that is intended for a large format store to result in the public ultimately having less choice not more. Given the existence of a large format store in relatively close proximity to the proposed premises, in this case there is a very real risk that over time the grant of this licence might result in the closure of some of the takeaway facilities attached to some of the hotels in the locality. As such, in my view, the Court should

¹³ *Woolworths Ltd v Drake Coosit Pty Ltd* [2010] SASC 13 at para 30; (2010) 106 SASR 146 at 154-5.

¹⁴ *BWS – Mount Gambier* [2013] SALC 82 at para 59.

¹⁵ *Woolworths Limited v Smithfield Hotel Pty Ltd* [2012] SALC 57 at para 98.

¹⁶ *Woolworths Limited v Mawson Lakes Hotel* [2013] SALC 23 at para 95.

take a cautious approach and exercise its discretion to refuse the application.

218 The applicant has failed to satisfy the requirements of s 58(2) of the Act. Even if it had satisfied those requirements I would, in the exercise of the Court's discretion, have refused the application.

219 The application is dismissed.