

**LICENSING COURT OF SOUTH AUSTRALIA**

**BWS SEAFORD MEADOWS**

**JURISDICTION:** Application for Review of or an Appeal from the Commissioner's Decision

**FILE NO:** 00023 of 2022

**HEARING DATE:** 19 December 2022, 22 February 2023

**JUDGMENT OF:** His Honour Judge Burnett

**DELIVERED ON:** 10 July 2023

**CATCHWORDS:**

*Application for review of the Commissioner's decision to refuse an application for a packaged liquor sales licence in respect of proposed premises in the Seaford Meadows Shopping Centre – The Commissioner found that the approval would increase the licence density significantly beyond the state average density and further the proposed offering would offer no point of difference given the current offerings in the locality and the BWS store at Seaford Central Shopping Centre – The Commissioner further found that granting the application would not be consistent with the responsible development of the liquor license industry and would be a further step towards proliferation and would provide an undesirable precedent that would support the wholesale alignment of package liquor and shopping centres – The locality has two take away liquor facilities and one general and hotel liquor licence – One of the packaged liquor facilities was a BWS store at Seaford Central Shopping Centre and the other a stand-alone facility – **Held** on a review under the Liquor Licensing Act, the Court can receive new evidence without being confined to the fresh evidence rules – the Court received evidence correcting an error by the applicant's expert in its Community Impact Report (CIR) and also further evidence relating to the transfer of licences in the locality that have occurred after the Commissioner's decision – **Held** members of the community will take advantage of the proposed proceedings and would benefit from one-stop shopping and the proposed premises would likely add to the popularity and viability of the shopping centre – the applicant was an experienced and reputable operator with comprehensive harm minimisation policies and the risk of harm posed by the application was relatively low – **Held** The CIR report wrongly stated the number of residents in the locality and was adopted and used by the Commissioner to make findings as to the density of packaged liquor stores*

*in the locality and licences in the locality – **Held** The Commissioner’s conclusions that there was a proliferation of liquor licences no longer hold once the revised figures as to the population of the locality were used – since the hearing before the Commissioner, the applicant has transferred the packaged liquor sales licence at Seaford Central Meadows Shopping Centre such it can no longer be said that there is no point of difference between the two premises – **Held** there was no evidence that supported a finding that the alignment of liquor stores with supermarkets would lead to an increase in alcohol consumption or an increase in harm and therefore there was no basis for finding that the granting of the application would create an undesirable precedent – **Held** the application for a review is allowed and the decision of the Commissioner refusing the application is quashed.*

*Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd (1976) 135 CLR 616*

*Coal and Allied Operations Pty Ltd v AIRC [2000] HCA 47; (2000) 203 CLR 194*

*R v Fitzgerald & Fleming [2023] SASCA 34*

*Wigg v Architects Board (SA) (1984) 36 SASR 111*

*Harradine v District Court of South Australia [2012] SASC 96*

*Phantom Precision Engineering Pty Ltd v Luscombe [2021] SASC 59*

*CDJ v VAJ [1998] HCA 76; (1998) 197 CLR 172*

*Hove Sip n Save [2021] SALC 7*

*Liquorland McLaren Vale (No 2) [2022] SALC 53*

*Liquorland (Australia) Pty Ltd (Park Holme) [2020] SALC 37*

*Kordister Pty Ltd v Director of Liquor Licensing & Anor [2012] VSCA 325*

*BWS Cumberland Park [2022] SALC 70*

*BWS Woodcroft [2022] SALC 108*

*Liquorland (Australia) v Woolworths Ltd and Ors [2018] SASCF 31*

*Woolworths Ltd v Drase Coosit Pty Ltd & Ors [2022] SASC 13; (2010)106 SASR 146*

*BWS Para Hills [2022] SALC 73*

*Police Association of South Australia [2022] SALC 72*

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

*Cellarbrations Mannum [2021] SALC 42*

*BWS Seaford [2015] SALC 19*

## **REPRESENTATION:**

Counsel for the Applicant: Mr T Besanko with him Mr R D’Aloia and Mr P Connelly

Solicitors for the Applicant: Cleland Lawyers

## Introduction

- 1 This is a review of a decision made by the Liquor and Gambling Commissioner (the Commissioner) refusing an application made by the applicant, the Endeavour Group Limited (Endeavour), for a packaged liquor sales licence at premises at the Seaford Meadows Shopping Centre.
- 2 Endeavour trades under the brand BWS.
- 3 The review is made pursuant to s 22 of the *Liquor Licensing Act 1997* (SA) (the Act). Pursuant to s 22(8), the Court on the review may:
  - (a) affirm, vary or quash the decision subject to review;
  - (b) make any decision that should, in the opinion of the Court, have been made in the first instance;
  - (c) refer a matter back to the Commissioner for rehearing or reconsideration;
  - (d) make any incidental or ancillary order.
- 4 In its application for a review, Endeavour referred to what it submitted were a number of errors made by the Commissioner in reaching his decision. Given that the review is a rehearing and that further evidence was tendered on the review (which corrected an error made by Endeavour’s expert in the hearing before the Commissioner and also dealt with circumstances that have arisen since the Commissioner’s decision), the exercise that the Court must undertake in this review is not so much as to determine whether the Commissioner has erred (on the material before him) but to consider the matter in light of the new evidence insofar as that new evidence is admitted on the review.

## Nature of the review conducted by this Court

- 5 Pursuant to s 22(7) of the Act, the review conducted by the Court is by way of a rehearing. How a “rehearing” is conducted and the procedure adopted will depend on the nature of the particular review or appeal and the legislation which gives the right of a review or an appeal. In *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd*,<sup>1</sup> Jacobs J held that in an appeal by way of rehearing, the decision should be given on the facts and law as they existed at the date of the rehearing.<sup>2</sup> In the ordinary course, if no further evidence is admitted on the appeal, the appellate powers are construed as

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<sup>1</sup> (1976) 135 CLR 616.

<sup>2</sup> *Ibid* at 628.

requiring the identification of error in the court or tribunal below, before the court will allow the appeal.<sup>3</sup>

- 6 That of course leaves open the extent to which further evidence may be received on a review or appeal by way of rehearing. On that topic, Jacobs J held:

How far fresh evidence will be received, in the absence of statutory provision and subject to considerations of fairness, reasonableness and justice, depends upon the procedure of the court to which the appeal lies. The procedure may be found in its rules or, if there are no rules governing the matter, or no established practice, then by direction of the court on the procedure to be followed... In the absence of statutory provision or of rules governing the procedure of established practice, the adoption of one or another of the courses open, a rehearing *de novo* or a rehearing on the material before the person or body from whom the appeal is brought with the reception of further evidence, involves the exercise of a judicial discretion applying principles of fairness and reasonableness. The procedure adopted will depend largely on the nature of the appeal - whether it is from the exercise of an administrative discretion, or from a decision of an administrative tribunal on a question of fact, or the decision of a judicial tribunal on such a question. It will also depend upon the questions in issue in the appeal. Moreover, it may be fair to allow a respondent in the tribunal at first instance to produce further evidence but it may not always be fair to allow the moving party to reframe the case which he made before the tribunal at first instance, a principal of fairness which recalls the old Chancery rules which I have explored.

- 7 The Court of Appeal recently considered the nature of an appeal in *R v Fitzgerald & Fleming*.<sup>4</sup> The Court referred to the four different kinds of appeal which may be created by a legislature including first, an appeal *stricto sensu* (where the question is whether the judgment complained of was correct on the material before the trial Court), secondly, an appeal by way of rehearing on the evidence before the Appeal Court, thirdly, an appeal by way of rehearing on the evidence before the trial court supplemented by such further evidence admitted by the appellate court and fourthly, an appeal *de novo* where the Appeal Court hears the matter afresh. The Court cited with approval the following passage from Cox J said in *Wigg v Architects Board (SA)*:<sup>5</sup>

The use of the word “rehearing” will not be decisive, because that is a word to which different meanings have been given. It will be a matter of discerning Parliament's intention from an examination of the legislation as a whole. ... It is not to be supposed, of course, that a statutory appeal procedure will always fit easily into one or other of the three categories discussed above. It is open to a legislature to create any kind of appeal it

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<sup>3</sup> *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47; (2000) 203 CLR 194 at [14].

<sup>4</sup> [2023] SASCA 34.

<sup>5</sup> (1984) 36 SASR 111 at 113.

pleases, including a hybrid that exhibits features of more than one of the classic categories.

- 8 Blue J in *Harradine v District Court of South Australia*<sup>6</sup> considered the nature of a review which was to take place in the context of a minor civil review. His Honour noted that on the review (and the initial hearing), the Court was to act in equity, good conscience and the substantial merits of the case without regard to technicalities, that the court was not bound by the rules of evidence, a party was not generally represented and the Court could not remit the matter back to the Magistrates Court for further hearing.<sup>7</sup> Blue J concluded that because it was a review and not an appeal and because the Court may inform itself as it thinks fits and must act according to the substantial merits of the case, the Court could rehear evidence without being confined to the fresh evidence rules which apply to the appeals by way of rehearing.<sup>8</sup> In *Phantom Precision Engineering Pty Ltd v Luscombe*,<sup>9</sup> Lovell J, relying on the decision of the High Court in *CDJ v VAJ*<sup>10</sup> held that the common law principles do not govern the exercise of the discretion to admit new evidence on the statutory appeal that was the subject of the proceedings, but the common law rules were critical factors to be taken into account in the exercise of the court's discretion.
- 9 There are a number of matters which lead me to the conclusion in the present case that the Court can receive new evidence on this review without being confined to the common law fresh evidence rules. First, the Act provides for a review, not an appeal. This suggests a less formal process. Secondly, s 23 of the Act requires the Court to act without undue formality. Thirdly, s 23 also states that the Court is not bound by the rules of evidence and may inform itself on any matter as it thinks fit. Fourthly, under s 18 of the Act, the Commissioner hears the matters according to the same rules. Fifthly, it is clear from ss 20(1) and 22(1) of the Act that the Commissioner may determine a case without a hearing. Sixthly, under s 53A, a licensing authority may only grant a designated application if it is satisfied that the application is in the community interest. Section 53(1a) requires the application to be refused if it is contrary to the public interest. These provisions require the licensing authority (in this case, the Court) to consider matters that go beyond the interests of the parties and consider the wider interests of the community and the public. The Court therefore must consider any available material that might be relevant to the public interest or community interest, suggesting a restrictive approach to the receipt of fresh evidence is not to be preferred.

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<sup>6</sup> [2012] SASC 96.

<sup>7</sup> *Ibid* at [52].

<sup>8</sup> *Ibid* at [53].

<sup>9</sup> [2021] SASC 59 at [32]-[33].

<sup>10</sup> [1998] HCA 76; (1998) 197 CLR 172.

- 10 That was the approach taken by Judge Gilchrist in *Hove Sip n Save*.<sup>11</sup> Judge Gilchrist concluded:<sup>12</sup>

That is not to say that an applicant or an objector should treat the proceedings before the Commissioner as no more than a rehearsal or dummy run. The parties should endeavour to place all relevant evidence before the Commissioner. But if on review, there is cogent evidence that was not placed before the Commissioner, which might have a significant influence on the outcome of the application, I think that in an appropriate case, the Court has a discretion to receive the evidence, even though on common law principles the evidence would not have been admitted.

- 11 If further evidence is admitted on the review and is substantially different to that before the Commissioner, the Court must consider for itself what decision should be made.<sup>13</sup>

### **New evidence on the review**

- 12 In the present case, the new evidence that was presented on the review consisted of the following:

- (1) Two further reports from the applicant's expert, MasterPlan, which provided the Community Impact Report (the CIR), correcting an error in that report. In the CIR, MasterPlan at table 2, paragraph [9.7] stated that 3,851 people lived in the Seaford Meadows locality. This figure was then used by MasterPlan, and was adopted by the Commissioner, to compare the ratio of packaged liquor outlets per 100,000 people with the ratio across the State. In fact that number of 3,851 was the wrong number and was too low. It included only persons who lived in the suburb of Seaford Meadows. A further report dated 14 December 2022 corrected this figure but then wrongly used all persons who lived in any of the suburbs that comprised the locality comprised in the two kilometre radius from the proposed premises when only some of those persons should have been included. The correct figure (as included in the MasterPlan report dated 10 January 2023) was 11,416. The error led in the CIR to the ratio of licences in the locality per 100,000 people to be far higher than the true ratio. Using the correct population in the Seaford Meadows locality of 11,416 resulted in a far lower ratio than had been previously calculated;
- (2) Endeavour had owned and operated a BWS store at Seaford Central Shopping Centre. This was a store which was within the Seaford Meadows locality. However, because Endeavour had purchased a nearby hotel, the Beach Hotel, which was just outside the locality, the Australian Competition and Consumer Commission (the ACCC) ruled

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<sup>11</sup> [2021] SALC 7.

<sup>12</sup> *Ibid* at [83].

<sup>13</sup> *Ibid* at [79].

that Endeavour must divest itself of that BWS store at Seaford Central Shopping Centre. Settlement on the transfer of that licence occurred on 30 June 2022;

- (3) The two objectors to the application, the Australian Hotels Association (SA) and the Beach Seaford IPG Management (SA) Pty Ltd, have both withdrawn their opposition to the application and did not want to be heard on the review;
- (4) Some updated crime statistics figures which have only recently become available, some updated maps and photographs and some further population figures based on the 2021 Census. None of this material, except for the further census figures, is of particular significance.

13 The correction of the error in the CIR is significant. There are cogent reasons why the new material should be admitted. It cannot be in the community interest or in the public interest that this Court proceed on a false premise. The error in the CIR was relied upon by the Commissioner in reaching his conclusion and in fact formed a critical part of his reasoning. The Commissioner made the following findings:

- (1) (page 6) MasterPlan provided analysis of the licence density of the Seaford Meadows locality compared to South Australian averages per 100,000 persons (Table 2, 9.7, CIR) which showed that rate of general and hotel licences plus Packaged Liquor Sales Licence outlets for SA of 1001 which equals a rate of 59.7 outlets per 100,000 people for SA as a whole, compared to 77.9 outlets for the Seaford Meadows locality;
- (2) (page 7) MasterPlan submits that the total density of licensed outlets within the Stare is approximately 23 per cent lower than the Seaford Meadows locality;
- (3) (page 7) At present there is approximately one packaged liquor outlet for every 1283 residents in the locality (calculated from Table 2, 9.7 CIR). In the event this application is granted the rate of General and Hotel licences per Packaged Liquor Sales Licence outlets for Seaford Meadows will increase from 77.9 outlets per 100,000 people to rate of 103.87 outlets per 100,000 people (which equates to approximately one outlet for every 963 people in the locality) and which would be significantly higher than the State average of 59.7 outlets per 100,00 people (which equates to approximately one outlet for every 1,675 people);
- (4) (page 27) It is clear from the CIR that the licence density for the locality is higher than the State average and that in the event the application is granted will be yet higher still. This is of some relevance to my consideration of whether the grant of the application is in the community interest (and in the public interest);
- (5) (page 28) Whilst I accept the Applicant's submission that the Act and Guidelines are silent in respect of licence density, the higher than average

licence density in the locality does not assist their application, and to my mind is a factor that weighs against the granting of the application.

- 14 The second matter, namely the evidence that Endeavour has transferred the licence at the BWS store at Seaford Central Shopping Centre, is a new matter and is therefore something that would be admitted into evidence on the review in the normal course. The Commissioner took into account the fact that there would be two BWS stores at shopping centres in near proximity to each other. The Commissioner held:

(page 28) In respect of this application I have some concerns that approval will increase the licence density to a level significantly beyond the State average density and additionally in this instance the proposed offering will prove no point of difference given the current offerings in the locality and in particular the existing BWS at the Seaford Shopping Centre.

- 15 The third matter, namely the withdrawal of the objectors, has relevance in my view to the ultimate orders that the Court might make in the matter including whether the Court determines the matter or whether it should remit the matter to the Commissioner for further hearing. In circumstances where new evidence is permitted on the review that materially affected the determination of the review, the Court might ordinarily consider that this is a matter in favour of remitting the matter so that objectors could have the opportunity to challenge and rebut that evidence. That consideration is not of significance in the present proceedings where there are now no objectors.
- 16 The fourth matter was the receipt of some updated population figures and maps. As counsel for Endeavour submitted, a substantial period of time had elapsed since MasterPlan had prepared the CIR and the original application had been lodged. The further material was obviously not available at that time.
- 17 Taking all of these matters into account, the further evidence should be admitted. It is cogent evidence (to use the test applied by Judge Gilchrist in *Hove Sip n Save*)<sup>14</sup> which either could not be obtained at the time of the hearing before the Commissioner or was necessary to correct a false premise upon which the Commissioner's decision was in part based. Further, given the withdrawal by the objectors of their opposition to the application there could be no prejudice arising from the receipt of the evidence.

### **Background to the application**

- 18 The Commissioner has set out in his reasons the background to the application which I adopt. I will set out the essential facts relating to the premises from which it is proposed that packaged liquor sales will be made.

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<sup>14</sup> [2021] SLAC 7 at [83].



- 19 Endeavour, trading under the brand BWS, have sought a packaged liquor sales licence at premises at the Seaford Meadows Shopping Centre. Endeavour is part of the Woolworths group of companies. There is an existing Woolworths supermarket at the Seaford Meadows Shopping Centre, along with specialty shops, Service SA offices, a medical clinic and an early learning centre. There are twelve speciality shops in total. The Woolworths supermarket averages about 9,321 customer transactions per week. The Centre contains 328 car parks. The proposed packaged liquor sales premises is located almost entirely within the footprint of the existing Woolworths supermarket. The cost of construction is estimated to be in the order of \$400,000-\$500,000. I agree with and adopt the determination of the Commissioner that the application (as amended) does not contravene s 38(3) and (4) of the Act in that the premises are physically separate from premises used for other commercial purposes and are separated by a permanent barrier that is not transparent and is of height of at least 2.5 metres.
- 20 The proposed premises will sell approximately 1800 lines of liquor. Nothing has been raised that would suggest that there are any concerns regarding the standard of the building for the purposes of s 57(1)(a) of the Act or the effect on the amenity of the neighbourhood for the purposes of s 57(1)(b). Endeavour operates many BWS stores across the country and it can be readily accepted that its buildings and operations are of a high standard. The Commissioner did not make any specific finding on the matters set out in s 57(1) but given the evidence contained in the CIR about the premises and the operation of the proposed premises, and the general experience and reputation of Endeavour, I am satisfied of the matters set out in s 57(1)(a) and (b) of the Act.
- 21 Development plan consent has been given to the proposed development. However, building rules consent is still required. Therefore, if the review is allowed, the Court will grant a certificate of approval pursuant to s 59(1) of the Act.
- 22 The general area where the premises are located is likely to experience significant population growth. There was evidence from MasterPlan that the population of Seaford Meadows had grown by about 15.8% since 2016. The updated report from MasterPlan further stated that the 2021 census figures indicated that there was an increase of person in the locality (being the two kilometre radius from the proposed premises) to 12,738. Further, there are two residential estates immediately to the north of the Seaford Meadows Shopping Centre which are still undergoing construction and would account for population growth of about an additional 1687 persons.
- 23 Within the locality of a two kilometre radius from the proposed premises, there are two packaged liquor sales licence outlets and one general and hotel liquor licence. They are:

- (1) A packaged liquor sales licence outlet at Cliff Avenue, Port Noarlunga which is a stand-alone Sip'n Save store. This outlet does not offer one stop shopping convenience. It is not co-located with a supermarket or other stores.
  - (2) A packaged liquor sales licence outlet at Seaford Central Shopping Centre. That outlet is in a large shopping centre complex that includes a Woolworths supermarket, a Big W discount department store and a Drakes supermarket. It is about 2.1 km away by road from Seaford Meadows Shopping Centre. Since the hearing before the Commissioner, Endeavour has acquired the Beach Hotel. In approving that acquisition, the ACCC imposed a condition that Endeavour divest itself of the BWS store in the Seaford Central Shopping Centre. Endeavour entered into an agreement to transfer that licence to a third party. Completion of that transaction took place on 30 June 2023. Those premises no longer operate as a BWS store, but instead operate as a Sip n Save.
  - (3) The Old Noarlunga Hotel which is a historic building that functions as a traditional local hotel. It does not have a bottle shop and offers a small range of beer and wine for purchase over the counter.
- 24 Just outside the locality fixed by a two kilometre radius from the proposed outlet lies the Beach Hotel which has recently been acquired by Endeavour. It has a freestanding packaged liquor sales licence outlet which previously operated under the Cellarbrations band but will presumably now operate under the BWS brand. The Beach Hotel and the liquor sales outlet is approximately 2.3 kilometres south of the proposed outlet. The evidence from MasterPlan, which appeared to have been accepted by the Commissioner, was the Hotel and its outlet was only 400 metres from the BWS outlet at the Seaford Central Shopping Centre and therefore had no effect on the proposed premises at Seaford Meadows Shopping Centre.
- 25 Endeavour submitted that the Old Noarlunga Hotel should be excluded from density calculations because it did not contain a dedicated take away facility and was at the outer edge of the locality. I do not consider that it is appropriate to exclude that hotel from the density calculations, observing that the density calculations are only a guide when considering issues such as proliferation. The operational details of each outlet in the locality are not examined in the broad brush density calculations.

### **The Statutory Framework**

- 26 Section 3 of the Act sets out the objects of the Act. It provides:

- (1) The object of this Act is to regulate and control the promotion, sale, supply and consumption of liquor
  - (a) to ensure that the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor; and
  - (b) to ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly, consistent with the principle of responsible service and consumption of liquor; and
  - (c) to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public; and
  - (d) to facilitate the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry, in a manner consistent with the other objects of this Act.
- (1a) For the purposes of subsection (1)(a), harm caused by the excessive or inappropriate consumption of liquor includes -
  - (a) the risk of harm to children, vulnerable people and communities (whether to a community as a whole or a group within a community); and
  - (b) the adverse economic, social and cultural effects on communities (whether on a community as a whole or a group within a community); and
  - (c) the adverse effects on a person's health; and
  - (d) alcohol abuse or misuse; and
  - (e) domestic violence or anti-social behaviour, including causing personal injury and property damage.
- (2) Subject to this Act, in deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1).

27 Pursuant to s 4(d) of the Act the packaged liquor sales licence is a designated licence and under s 53A(4) an application for the grant of designated licence is a designated application. Sections 53 and 53A deal with the granting of such a licence. Those sections provide:

[s 53]

- (1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).
- (1aa) ...

- (1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.
- (1b) The licensing authority must refuse to grant an application for a licence, or for the removal of a licence, if the licensing authority is satisfied that to grant the application would be inconsistent with the objects of the Act.

(2)-(6)...

[s 53A]

- (1) The licensing authority may only grant a designated application if the licensing authority is satisfied that granting the designated application is in the community interest.
- (2) Without limiting subsection (1), in determining whether or not a designated application is in the community interest, the licensing authority -
  - (a) must have regard to -
    - (i) the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
    - (ii) the cultural, recreational, employment or tourism impacts; and
    - (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
    - (iv) any other prescribed matter; and
  - (b) must apply the community impact assessment guidelines;

(3)-(4)...

28 Pursuant to s 53B of the Act, the community impact assessment guidelines are published in the government gazette. The guidelines state that the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the community interest. The guidelines also provide assistance in how to determine the locality of the area in which the proposed licence will operate. Schedule 2 states that the term locality refers to the area surrounding the licensed premises/proposed licensed premises and is the area most likely to be affected by the granting of the application. As a guide only, the guidelines state the locality of the premises in the Adelaide Metropolitan Area is the area within the two kilometre radius of the premises. The guidelines set out a list of the suburbs which are considered to be part of the Adelaide Metropolitan Area. Seaford Meadows is listed as such a suburb.

## Determination

- 29 Pursuant to s 53(1) of the Act, the Court has an unqualified discretion to grant or refuse an application on any ground or for any reason. However, there are several constraints expressed in the Act as to how that discretion is to be exercised. First, s 53(1) expressly precludes the licensing authority (in this case, the Commissioner, but on review, the Court) from taking into account the economic effect on other licensees in the locality. Secondly, the licensing authority, pursuant to s 53A(1), may only grant a designated application if it is satisfied that the designated application is in the community interest, having regard to the matters set out in s 52A(2). Thirdly, pursuant to s 53(1a), the application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest. Fourthly, pursuant to s 3(2) in deciding the application, the licensing authority must have regard to the objects set out in s 3(1).
- 30 The approach to be taken by the Court on this review, given the admission of the new, cogent evidence, is therefore to consider whether in the exercise of its discretion the application should be granted or refused, observing it can only be granted if the Court is satisfied that it is in the community interest. As a matter of statutory construction, the Court could refuse the granting of a licence in the exercise of its discretion even if it formed the view that granting the application was in the community interest. In practical terms, it is unlikely this would occur. In exercising its discretion whether to grant or refuse the application, the Court will have regard to the objects set out in the Act. In *Liquorland McLaren Vale (No 2)*,<sup>15</sup> Judge Gilchrist held that the Act completed that the harm minimisation objects set out in s 3(1) have primacy over the other objects and therefore rejected a submission that all objects of the Act must be treated equally.<sup>16</sup> In coming to this conclusion, Judge Gilchrist referred to the *Liquor Licensing (Liquor Review) Amendment Act 2017* and observed that more comprehensive provisions had been included in relation to objects of harm minimisation and that the object of encouragement of a competitive market had been removed. Further, the construction of s 3(1) requires the object of regulating and controlling the promotion, sale, supply or consumption of liquor must be to ensure the objects set out in sub-sections (a)-(d) which contain the harm minimisation provisions are satisfied. The object in subsection (d) which does not concern harm minimisation expressly states that the facilitation of the stated objects must be in a manner that is consistent with other objects of the Act.
- 31 Having undertaken the enquiry into the community interest, the Court must then consider whether it is satisfied that the application is contrary to the public interest, in which case the application would be refused. The Court

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<sup>15</sup> [2022] SALC 53.

<sup>16</sup> *Ibid* at [133].

must be persuaded that the negative has been established-that is the application is contrary to the public interest. It does not have to be satisfied of the positive-that is that the application was in the public interest. Again, in practical terms, the distinction may be of little practical difference.

- 32 It is well settled that determining whether the application is in the community interest and whether the application should be granted in the exercise of the licensing authority's discretion (which in this case is the Court) involves the Court conducting an evaluative exercise that weighs the positives and negatives of the granting of the new licence for the purchase of, in this case take away liquor, in the relevant locality.<sup>17</sup> The Court must consider the matters set out in s 53A in conducting that evaluative exercise. Judge Gilchrist held in *Liquorland McLaren Vale (No 2)*:<sup>18</sup>

In the end, a licensing authority must 'balance each the objects and arrive at an appropriate synthesis in the particular circumstances of the case by way of a discretionary judgment',<sup>19</sup> recognising that harm minimisation is of prime importance.

- 33 Before embarking on the evaluative exercise of analysing the positive and negatives of whether the licence should be granted, the Court first must identify the locality of the proposed premises. As I have stated, the Community Impact Assessment Guidelines provide that as a guide only, the locality in the case of licensed premises in the Adelaide Metropolitan Area (as are the proposed premises), is a two kilometre radius from the relevant premises. Judge Gilchrist in *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>20</sup>, held:

I think it follows that the 'locality' is now focussed upon the local community and is much more focussed on primary trade catchment areas, as opposed to the secondary catchment areas. The accumulated experience of this Court is that in most parts of metropolitan Adelaide, leaving aside large discount liquor stores, a two kilometre radius from existing or proposed take away liquor facilities is a fair estimate of where the vast majority of the patrons of those facilities will reside.

- 34 In the present case, the Commissioner referred to the Community Impact Assessment Guidelines and the two kilometre radius referred to therein but observed that the expert evidence provided by MasterPlan in the CIR stated that while the two kilometre radius was appropriate to adopt, the locality would not extend the complete two kilometres to the south but would end at

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<sup>17</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [27]. *Hove Sip n Save* [2021] SALC 7 at [116].

<sup>18</sup> [2022] SALC 53 at [145].

<sup>19</sup> *Kordister Pty Ltd v Director of Liquor Licensing & Anor* [2012] VSCA 325 at [17].

<sup>20</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [20]. Approved in *Hove Sip n Save* [2021] SALC 7 at [101], *BWS Cumberland Park* [2022] SALC 70 at [9]-[14] and *BWS Woodcroft* [2022] SALC 108 at [78]

Seaford Road. This would have the consequence that Seaford Central Shopping Centre would not fall within the locality, it being south of Seaford Road. However, MasterPlan proceeded throughout the CIR and its two subsequent reports on the basis that the locality was a radius of two kilometres from the proposed premises. All of the subsequent calculations by MasterPlan in the CIR were made on the basis of the two kilometre radius. The BWS store in Seaford Central was included in their calculations, although if the more restricted locality was adopted, it would not be included. The Commissioner therefore also proceeded on the basis of the two kilometre locality. In this review, Endeavour also proceeded on the same basis and submitted liquor licence density calculations based on the two kilometre locality. In these circumstances, I consider it is appropriate to proceed on that basis.

- 35 Turning first to the advantages of the proposed premises, many members of the community will take advantage of the proposed premises. The Commissioner made a finding to that effect. The proposed premises will add to the attractiveness of the Seaford Meadows Shopping Centre.<sup>21</sup> As was held in *BWS Cumberland Park*,<sup>22</sup> the proposed premises are likely to add to the popularity and viability of the shopping centre. Kourakis CJ (although dissenting in the result) held in *Liquorland (Australia) v Woolworths Ltd and Ors*<sup>23</sup> that:

Members of the South Australian public are entitled to a measure of convenience in balancing their busy lives and if they are less mobile in negotiating urban congestion and other obstacles.

- 36 Further, members of the community will benefit from one stop shopping. In *Woolworths Ltd v Drase Coosit Pty Ltd & Ors*,<sup>24</sup> Kourakis J (as he then was) held:

it is a notorious fact that in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people and that this social fact is reflected in the development of district and regional shopping centres.<sup>25</sup>

- 37 In the present case, the evidence established that 9321 persons use the Woolworths supermarket at Seaford Meadows on a weekly basis. As the Court held in *BWS Woodcroft*,<sup>26</sup> the establishment of the premises will relieve many of a trip that they would otherwise have to take to purchase liquor. The Commissioner again made a finding to this effect.

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<sup>21</sup> *BWS Cumberland Park* [2022] SALC 70 at [37].

<sup>22</sup> [2022] SALC 70 at [46].

<sup>23</sup> [2018] SASCFC 31 at [13].

<sup>24</sup> [2010] SASC 13; (2010) 106 SASR 146 at [55].

<sup>25</sup> Approved in *Liquorland McLaren Vale (No 2)* [2022] SALC 53 at [93].

<sup>26</sup> [2022] SALC 108 at [83].

- 38 The evidence establishes that Endeavour is an experienced and reputable operator of packaged liquor sales outlets. It has many stores throughout Australia and its premises are of a high standard and operate to high and well established and comprehensive operating standards.<sup>27</sup> The proposed premises provide the public with a large number of lines of alcohol to choose from (some 1800 lines in total). Endeavour has comprehensive policies that address any risk to vulnerable person who might use the proposed outlet. Again, these were all matters accepted by the Commissioner. The Commissioner held that on the material before him he was satisfied that the risk of harm posed by the proposed application was relatively harm.
- 39 A survey conducted by Endeavour indicates widespread support for the proposed premises. I do not place a great deal of weight on that survey given its limitations, which were properly acknowledged by Endeavour. The community consultation supported the proposed premises. This included support from the local Council. The Police and other government departments did not object to the application. In *BWS Woodcroft*,<sup>28</sup> Council support and the absence of objection by the police were found to be relevant considerations.
- 40 There will be some economic benefits if the application is granted in that the cost of the building work of the premises will be in the region of \$400,000-\$500,000 and there will be some additional employment.<sup>29</sup> The building costs are not a matter on which I place much weight given that it is not clear who will benefit from the building of the premises. The additional employment is of minor weight.
- 41 I will now turn to the disadvantages of the proposed premises. I will address the harm that might be caused by the proposed outlet due to excessive or inappropriate consumption of alcohol. Having regard to the CIR, I am satisfied that the proposed premises will not have any detrimental effect on cultural, recreational, employment or tourism in the locality nor any social impact on the amenity of the locality.
- 42 The Court has recognised that even without direct evidence, it could proceed from the premise that a new takeaway liquor facility would have some negative consequences. In *Liquorland (Australia) Pty Ltd (Park Holme)*,<sup>30</sup> Judge Gilchrist said:
- .. common experience informs us that for many in the community, alcohol is a problem. Excessive consumption of alcohol carries with it serious health risks. It can fuel domestic violence. It can shatter relationships and cause families to become dysfunctional. It can cause social problems and

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<sup>27</sup> Ibid at [38].

<sup>28</sup> [2022] SALC 108 at [104].

<sup>29</sup> Ibid at [85].

<sup>30</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [43]. Approved in *Hove Sip n Save* [2021] SALC 7 at [104] and in *BWS Woodcroft* [2022] SALC 108 at [87].



result in violent and anti-social behaviour. It can cause financial problems and result in people making risky and poor decisions.

It can be assumed that some of the relevant community will be afflicted by these issues. It can be assumed that some will be alcohol dependent and that some of these will be attempting to abstain from drinking or reduce their consumption. The addition of another take away liquor facility will increase the opportunities for such persons to obtain alcohol. Passing an attractive liquor outlet when walking in and out of a supermarket increases the risk for those for whom alcohol is a problem, to succumb to the temptation to buy it.

- 43 There are a number of disadvantages if the licence is granted which could be described as generic disadvantages. That is, there are disadvantages that would apply to all applications for packaged sales liquor licences regardless of their location, the number of other outlets in the locality or the conditions under which a particular outlet might operate. That is not to say that the matters are not of any relevance, but the weight to be attached to them must be determined in that context.
- 44 There were before the Commissioner three generic submissions as to harm. The first was from Professor Livingstone who is an associate professor at the National Drug Research Institute. Professor Livingstone's evidence was considered by the Court in *BWS Para Hills*<sup>31</sup> where the Court summarised the submission to the effect that the research indicated a correlation between the density of packaged liquor outlets, heavy drinking and alcohol problems and domestic violence, general violence and alcohol specific disease. Professor Livingstone referred to research and studies that backed up his conclusions.
- 45 There was also a submission from Dr Crozier and Mr Peter Bautz on behalf of the Royal College of Surgeons. They cited research that indicated that an estimated one in eight hospitalisations related to alcohol misuse and that there was a positive relationship between alcohol outlets and increased rates of violence. They also pointed to research that indicated that regulating the physical availability of alcohol through outlet density restrictions was one of the most effective ways to reduce its negative impacts. The submission also referred to the link between alcohol and domestic violence and sexual assault.
- 46 There was a submission from Ms Raman on behalf of the Australia's National Research Organisation for Women's Safety. That submission referred to the link between alcohol and domestic violence and the link between alcohol and increased harm in families.
- 47 The evidence contained in these submissions was not contradicted by other evidence and I accept them, at the level of generality at which they were

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<sup>31</sup> [2022] SALC 73 at [39]-[40].

expressed, for the purposes of these proceedings. I accept the submission of Endeavour that the submissions do not specifically deal with the issues raised in respect of the proposed premises or the locality of the premises. The submissions do not address the evidence adduced by Endeavour in support of the application.

48 I consider that the submissions provide support for the opinion expressed by Judge Gilchrist in *Liquorland (Australia) Pty Ltd (Park Holme)* (referred to above) that even without evidence the Court could be satisfied that alcohol abuse has serious health risks and can lead to increased domestic violence, social problems and violent and anti-social behaviour generally.

49 It can also be accepted that a further outlet will increase the usage of alcohol or lead to some increased use of alcohol. That as recognised by Judge Gilchrist in *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>32</sup> when he held:

The addition of another take away liquor facility will increase the opportunities for such persons to obtain alcohol. Passing an attractive liquor outlet when walking in and out of a supermarket increases the risk for those for whom alcohol is a problem, to succumb to the temptation to buy it.

50 However, a finding that there is a generalised risk of increased harm is of some weight only. I adopt the comments of Judge Gilchrist in *BWS Para Hills*:<sup>33</sup>

Every application for a new licence, carries a risk of additional alcohol related harm.<sup>34</sup> The Commissioner was therefore right to be concerned about the potential for alcohol related harm, should the application succeed. But as I observed in *Police Association of South Australia*, harm minimisation is just that. It is not harm eradication.<sup>35</sup> Thus the question is not whether there is any risk. The question is whether there is an unacceptable risk. In light of the Commissioner's finding that this was a low-risk application, respectfully he should have found that the risk here was acceptable.

51 It is important to note that the object of the Act is to regulate and control (not ban) the promotion, sale, supply and consumption of alcohol in a way that minimises the harm caused by excessive or inappropriate use of alcohol. The object of the Act is harm minimisation not harm eradication.<sup>36</sup> A further object is to regulate the sale, supply and consumption of alcohol to ensure as far as practicable that the sale and supply of liquor is consistent with the

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<sup>32</sup> [2020] SALC 37 at [44] and quoted in *BWS Cumberland Park* [2022] SALC 70 at [40].

<sup>33</sup> [2022] SALC 73 at [76].

<sup>34</sup> *Liquorland McLaren Vale (No 2)* [2022] SALC 53 at [141].

<sup>35</sup> [2022] SALC 72 at [112].

<sup>36</sup> *Hove Sip n Save* [2021] SALC 7 at [105].

expectations and aspirations of the public. There is no suggestion that the expectations and aspirations of the public are to ban the use of alcohol.

52 There is no evidence in these proceedings that the proposed premises would have an adverse impact on the amenity of the area. There is no evidence that there are persons of particular vulnerability who would be affected by the proposed outlet. The evidence from the MasterPlan in the CIR addressed the vulnerable groups that were within the locality. The Commissioner came to the same conclusion when he held that he was satisfied that the harm that might be caused to the community whether as a whole or to an individual group within the community due to the excessive or inappropriate consumption of liquor if the application was granted was on the evidence relatively low.

53 The Commissioner relied on two matters that were specific to this locality and the application of Endeavour. These matters were critical to the exercise of his discretion to refuse the application. These matters were:

- (1) Approval would increase the licence density to a level significantly above the State average density and additionally in this instance the proposed offering will provide no point of difference given the existing BWS at Seaford Central Shopping Centre;
- (2) Approval of the application would be contrary to the community interest and public interest by setting an undesirable precedent that would likely result in the wholesale alignment of packaged liquor stores and shopping centres.

54 As to the first issue, the Court has held, in relation to the needs test, that it is not in the public interest for there to be a proliferation of bottle shops selling essentially the same range of liquor within short compass of another.<sup>37</sup> Judge Gilchrist in *Hove Sip n Save*<sup>38</sup> held that proliferation of bottle shops remained an issue under the community interest and public interest tests. His Honour quoted from the following passage from King CJ in *Lovell v New World Supermarket Pty Ltd*:<sup>39</sup>

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

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<sup>37</sup> *Hove Sip n Save* [2021] SALC 7 at [135].

<sup>38</sup> *Ibid* at [136]. See also *BWS Para Hills* [2022] SALC 73 at [56].

<sup>39</sup> (1990) 53 SASR 53 at 55-56.

standards in the service of liquor which are necessary in the public interest. It is, however, a matter of degree.

- 55 The Commissioner relied on the CIR and the following table from that report to find that the granting of the application would lead to a proliferation of outlets in the locality.

Geographical area	Population (2016 census)	General and hotel licence outlets	Packages liquor sales licence outlets (exc direct sales)	Total
SA	1,676,653	793	208	1001
Rate per 100,000 people		47.30	12.41	59.70
Seaford Meadow locality	3851	1	2	3
Rate per 100,000 people		25.97	51.9	77.90

- 56 The Commissioner used these figures to conclude that at present that there is one packaged liquor outlet for every 1283 residents in the locality (if the application were granted) and if the application were granted the rate of general and hotel licences plus packaged liquor sale outlets for the locality would increase from 77.9 outlets per 100,000 people to a rate of 103.87 outlets per 100,000 people which equates to approximately one outlet for every 963 people in the locality which would be significantly higher than the State average of 59.7 outlets per 100,000 people which equates to approximately one outlet for every 1675 people.
- 57 As I have said, MasterPlan used the wrong figures in the CIR and these figures were adopted by the Commissioner. The correct figures are set out in the following table (as per the MasterPlan report dated 10 January 2023):

Geographical area	Population (2016 census)	General and hotel licence outlets	Packages liquor sales licence outlets (exc direct sales)	Total
SA	1,676,653	793	208	1001
Rate per 100,000 people		47.30	12.41	59.70
Seaford Meadow locality	11,416	1	2	3
Rate per 100,000 people		8.76	17.52	26.28

- 58 Therefore, on the revised figures there would be, if the application were granted, one packaged liquor store per every 3,805 persons in the locality (instead of the 1283 persons found by the Commissioner). If the application were granted the rate of general and hotel licences plus packaged liquor sale outlets for the locality would increase from 26.28 (instead of the 77.9 outlets per 100,000 people used by the Commissioner) to a rate of 35.04 outlets per 100,000 people (instead of the 103.87 found by the Commissioner) which equates to approximately one outlet for every 2854 people in the locality and which would be significantly lower than the State average of 59.7 outlets per 100,000 people which equates to approximately one outlet for every 1675 people.
- 59 In short, the Commissioner’s conclusions as to there being proliferation of liquor licences no longer hold once the revised figures as to the population of the locality are used. If both the general licence and hotel licence licences and the packaged sale licences are taken into account, the proportion of such licences even if the application is granted, would be below the State average. If only packaged sales liquor outlets are taken into account and the application is granted, the proportion of such licences would be higher than the State average but by nowhere near the amount calculated by the Commissioner.
- 60 The density calculations are further ameliorated by the growth in the population of the locality, reflected in the 2021 census figures (which puts

the number of persons in the locality at an estimated 12,773), and the development in the locality that is taking place and will continue to take place.

- 61 It is important to observe that there is no mathematical formula for determining whether granting an application could be said to lead to a proliferation of packaged liquor outlets.<sup>40</sup> In the present case, the above analysis suggests that there is no such proliferation.
- 62 The evidence also suggests, as the Commissioner accepted, that the BWS Seaford would be well run and compliant with the obligations imposed by the Act (a factor considered important by King CJ in *Lovell*<sup>41</sup> in considering the impact of proliferation).
- 63 The Commissioner found, when analysing the licence density that the proposed offering will not provide a point of difference given the current offering in the locality and in particular the existing BWS at Seaford Central Shopping Centre. Following the hearing before the Commissioner, Endeavour acquired the Beach Hotel and was required by the ACCC to divest itself of the BWS store at Seaford Central Shopping Centre. There will no longer be a BWS outlet at Seaford Central Shopping Centre. It is not a case where the proposed outlet at Seaford Meadows will be in close proximity to another BWS packaged liquor sales outlet.
- 64 For all of these reasons, I do not consider that the granting of a packaged liquor sales licence at the Seaford Meadows Shopping Centre could be said to lead to a proliferation of such liquor outlets. I therefore place little weight on this factor.
- 65 The Commissioner also held that the granting of the application would set an undesirable precedent likely to result in the wholesale alignment of packaged liquor stores and shopping centres. The Commissioner stated that Parliament had not chosen to go down this path. In coming to this conclusion, the Commissioner relied on the decision of *Hove Sip n Save*<sup>42</sup> where Judge Gilchrist held:

The legislature has made a clear policy decision not to go down the path that other jurisdictions have taken in connection with allowing the wholesale alignment of take away liquor facilities with supermarkets. In conformity with this, and the views previously expressed by this Court and the Supreme Court that it is not in the public interest for there to be an over-supply of retail liquor outlets, if it had come to it, I would have concluded that it would not be in the public interest to grant this application because it would set an undesirable precedent.

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<sup>40</sup> *BWS Para Hills* [2022] SALC 73 at [57].

<sup>41</sup> (1990) 53 SASR 53.

<sup>42</sup> [2021] SALC 7 at [139].

66 In my view, this statement was not intended to convey that the alignment of takeaway liquor facilities with supermarkets was by itself undesirable and that the granting of a licence in such a situation would create an undesirable precedent. Each application must be assessed on its merits. The granting of a licence for premises in connection with a supermarket does not mean that all future applications of a similar nature would be approved. Licence density considerations would remain relevant. Parliament has given no indication in the Act that the alignment of takeaway liquor facilities with supermarkets was by itself undesirable. Judge Gilchrist made it clear in *Hove Sip n Save* that he was not finding that the alignment was by itself undesirable. He held:<sup>43</sup>

I note that the Commissioner did not find it necessary to deal with the submission that it is not desirable to align take away liquor facilities with supermarkets because this encourages the purchase of liquor as part of the purchase of staples. I think he was right not to consider it. If this argument was to be seriously pursued it needed evidence to back it up. I say that because despite an increasing trend in recent years of an increasing number of take away liquor facilities being aligned with supermarkets, the evidence that this Court has received in recent years is that overall the consumption of alcohol is diminishing. In other words, in the absence of evidence, it cannot be assumed that aligning take away liquor facilities with supermarkets will necessarily lead to an increase in alcohol consumption, or an increase in the harm associated with its consumption.

67 There is no evidence in the present case which would support any finding that the alignment of liquor stores with supermarkets would lead to an increase in alcohol consumption or an increase in harm. That was the decision reached by Judge Gilchrist in *Liquorland McLaren Vale (No 2)*<sup>44</sup> where he held that it was not open to the Commissioner to find without specific evidence that the co-location of a packaged liquor store with a supermarket would lead to increased harm.

68 It follows that in my view, it cannot be said that the granting of this application would create an undesirable precedent. Each case must be determined on its merits. In the absence of specific evidence, it cannot be said that the alignment of such premises with a supermarket would lead to increase alcohol consumption or increased harm.

69 The comparison that has been undertaken in my view shows that the positives in favour of granting the licence outweighs the negatives. Specifically, (1) many members of the community will take advantage of the proposed premises; (2) it will add to the attractiveness of the Seaford Meadows Shopping Centre; (3) members of the community will benefit from one stop shopping and (4) Endeavour is a recognised as an experienced and well-regarded operator with comprehensive and appropriate operating standards

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<sup>43</sup> Ibid at [10].

<sup>44</sup> [2022] SALC 53 at [153] and [175].

and guidelines. The disadvantages in granting the application do not relate specifically to this application but to all applications, namely that alcohol abuse has serious health risks and can lead to increased domestic violence, social problems and violent and anti-social behaviour generally. While there are the disadvantages in granting the application that I have set out, these disadvantages do not provide sufficient reason for me to conclude that the granting of the licence is not in the community interest in circumstances where the applicant, in this case Endeavour, has taken all appropriate risk minimisation measures. I find that the granting of the application is in the community interest.

- 70 I now proceed to consider whether I am satisfied that the application is not in the public interest. In most cases, it would be unusual for the Court to find that the application was not in the public interest even though it was in the community interest. In some cases, the public interest may be wider. For example, a finding that an application created an undesirable precedent, more likely leads to a finding that the application was not in the public interest rather than a finding that it was not in the community interest. In *Liquorland (Australia) Pty Ltd (Park Holme)*,<sup>45</sup> Judge Gilchrist held:

There is obviously a strong correlation between the community interest and the public interest. I think that in most cases if there was a conclusion that it was in the community interest to grant an application there would also be a finding that it was in the public interest to do so. There will be occasions when the two interests will not coincide. Sometimes it might be thought necessary in the public interest, to refuse an application to protect the integrity of the liquor licensing regime. Sometimes it might be in the interests of the local community to grant the application, but it might be thought that the interests of the wider community who live outside of the relevant locality might be so adversely affected by the grant of the application that it should be refused. Neither are relevant here. I can accept that there might be other reasons why it would be appropriate to refuse an application in the exercise of the Court's discretion notwithstanding that the community interest test has been met. But in the context of this case, none readily spring to mind.

- 71 In *Cellarbrations Mannum*,<sup>46</sup> Judge Gilchrist held that the application would be refused in the public interest if it led to an undue proliferation of like licensed facilities or set an undesirable precedent. Given my findings regarding proliferation and the alignment of liquor stores and supermarkets, there is no basis and no evidence that would justify a finding that it is not in the public interest to grant this application. I find that the granting of the application is in the public interest.

- 72 I note that an earlier application for a retail liquor merchant's licence at the Seaford Meadows Shopping Centre was made by Woolworths Ltd, the parent

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<sup>45</sup> [2020] SALC 37 at [59].

<sup>46</sup> [2021] SALC 42 at [126].



company of Endeavour. That application was refused. The decision refusing the application was made before the enactment of the *Liquor Licensing (Liquor Review) Amendment Act 2017* (the Amendment Act). The Amendment Act removed the needs test as the criteria by which applications were to be determined and replaced it with the community interest and public interest tests. The decision made in *BWS Seaford*<sup>47</sup> was based on matters that are no longer relevant since the Act was amended or are no longer relevant because of changed circumstances. Specifically, the Court in *BWS Seaford* found:<sup>48</sup>

- (1) The existing premises in or about the locality including the BWS premises at Seaford Central Shopping Centre, the takeaway facility at the Beach Hotel, the Cellarbrations store at Moana Heights and the Dan Murphy's at Colonnades adequately catered for the public demand;
- (2) It was contrary to the to the balance of the industry to have two BWS stores at such short distances from each other.
- (3) The creation of another takeaway facility in the locality carries with it the risk that competitive market for liquor might be compromised as it would but place a strain on the viability of the takeaway facilities at the Beach Hotel and the Cliff Avenue Liquor Store.

73 These conclusions do not apply to the application by Endeavour which has been lodged after the Amendment Act. In concluding in *BWS Seaford* that existing premises meet the public demand, the Court was addressing the needs test. As Judge Gilchrist held in *Hove Sip n Save*,<sup>49</sup> the abolition of the needs test has removed a significant barrier in connection with applications for licences to sell take away liquor (although upped the ante for an applicant to satisfy the licensing authority of its awareness of the vulnerabilities of potential customers). In both *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>50</sup> and *BWS Woodcroft*,<sup>51</sup> the Court approved applications which had previously been rejected under the needs test.

74 Secondly, because the Court in *BWS Seaford* was addressing the needs test, it went beyond the locality of two kilometres used under the Community Impact Assessment Guidelines. The needs test addressed the relevant trade area which is larger than the local community that is identified under the community interest test.<sup>52</sup> The Beach Hotel, the Cellarbrations store at

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<sup>47</sup> [2015] SALC 19 at [86].

<sup>48</sup> Ibid at [86]-[89] and [93]-[94].

<sup>49</sup> [2021] SALC 7 at [103].

<sup>50</sup> [2020] SALC 37.

<sup>51</sup> [2022] SALC 108.

<sup>52</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [17].

Moana Heights and the Dan Murphy's at Colonnades are all beyond the two kilometre radius.

75 Thirdly, circumstances have changed in that there will no longer be two BWS stores in close proximity to each other.

76 Fourthly, the object of the Act to encourage a competitive market was removed by the Amendment Act. Therefore, although a competitive market may have some relevance to the expectations of the public, it is no longer a specified objective and is therefore less important than was previously the case.<sup>53</sup>

77 Fifthly, the Beach Hotel is now owned by BWS.

### **Conclusion**

78 For the reasons that I have expressed, I grant the application for review and quash the decision of the Commissioner. I find the application of Endeavour for a packaged liquor sales licence is in the community interest and in the public interest. Endeavour has obtained planning development consent but not yet obtained building rules consent as construction has yet to commence. However, it is appropriate that I grant a certificate of approval pursuant to s 59 of the Act for a packaged liquor sales licence for the proposed premises. I will hear Endeavour further on this point and the orders that should be made.

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<sup>53</sup> *Liquorland McLaren Vale (No 2)* [2022] SALC 53 at [130].