

**LICENSING COURT OF SOUTH AUSTRALIA**

**BWS CUMBERLAND PARK**

**JURISDICTION:** Referral of an application by the Commissioner

**CASE NO/S:** 42 of 2022

**HEARING DATE:** 24 August 2022

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

**DELIVERED ON:** 31 August 2022

**CATCHWORDS:**

*Referral of an application for a packaged liquor sales licence in respect of proposed premises at the Cumberland Park Shopping Centre, a district shopping centre – The application was previously refused by the Commissioner because he formed the opinion that the layout of the proposed premises and proximity to a supermarket were such that the licensed premises would not be devoted entirely to the business conducted under the licence and be physically separate from premises used for other commercial purposes – The renewed application has attended to this issue – The application is a designated application such that it cannot be granted unless the Court is satisfied that it is in the community’s interests to do so – In this case it is appropriate to use the suggested two kilometre radius identified in the guidelines as identifying the relevant locality – The application involves the creation of a small, attractive, convenience style bottle shop, adjacent to a very popular supermarket – It will be in a substantial district centre in an relatively affluent locality that has nearly 40,000 residents – The locality has relatively few take away liquor facilities within it – Many of the local community can be expected to take advantage of the proposed premises and will find it to be very convenient – It will be operated by an experienced and reputable licensee – No undue negative matters have been identified – **Held** that the Court is satisfied that it is in the community interest to grant the application – Consideration of the requirements of s 57 concerning 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 – **Held** that none of these are of concern in this case – General*

*discretion considered – **Held** that it is in the public interest to grant the application – Liquor Licensing Act 1997.*

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

*Hove Sip N Save [2021] SALC 7*

*Liquorland McLaren Vale [2022] SALC 53*

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

**REPRESENTATION:**

Counsel:

Applicant: Mr B Doyle QC with Mr R D'Aloia & Mr P Connelly

Solicitors:

Applicant: Clelands Lawyers

- 1 Endeavour Group Ltd (Endeavour) has applied for a packaged liquor sales licence in respect of proposed premises at the Cumberland Park Shopping Centre (the Centre).
- 2 A previous application in connection with the proposed premises was dealt with by the Liquor and Gambling Commissioner. The Commissioner, for reasons published on 11 December 2020, refused the application. He did so, because he formed the opinion that the layout of the proposed premises relative to their proximity to an adjacent supermarket, offended s 38(3) of the *Liquor Licensing Act 1997*. That provision provides that ‘it is a condition of a packaged liquor sales licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.’ But for this, it appears that the Commissioner would have granted the application.
- 3 Endeavour has since made changes to the layout of the proposed premises, and in light of them, renews its application. It would appear that the Commissioner felt compromised in dealing with it because of his earlier dealings with the matter. Accordingly, he resolved to refer the application to the Court pursuant to s 80 of the Act.
- 4 An application for this type of licence is defined in the Act as a ‘designated application’.<sup>1</sup> Pursuant to s 53A(1) of the Act, a ‘licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.’ In deciding that question, the authority must have regard to: -
  - 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;<sup>2</sup> and
  - the cultural, recreational, employment or tourism impacts;<sup>3</sup> and
  - the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises;<sup>4</sup> and
  - any other prescribed matter;<sup>5</sup> and
  - must apply the community impact assessment guidelines.<sup>6</sup>

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<sup>1</sup> Section 4 of the Act provides that various types of licences are designated licences including a packaged liquor sales licence. Section 53A (4) provides that a designated application includes an application for the grant of a designated licence.

<sup>2</sup> Section 53A(2)(a)(i).

<sup>3</sup> Section 53A(2)(a)(ii).

<sup>4</sup> Section 53A(2)(a)(iii).

<sup>5</sup> Section 53A(2)(a)(iv).

<sup>6</sup> Section 53A(2)(b).

- 5 The community impact assessment guidelines (the guidelines) stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has consulted with the relevant key stakeholders and interest groups in the community. The guidelines provide that ‘applicants are required to show, as part of their application, that they have engaged with members of the community and any relevant stakeholders.’ They provided that ‘[e]vidence of this may include petitions, survey results and/or letters of support.’
- 6 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that if relevant is expected to address matters such as: ‘the applicants products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest. Applicants are also required to provide, where applicable: a map and report regarding the locality generated through the Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of site/building.’
- 7 The applicant also needs to satisfy the Court that the pre-requisites of s 57 of the Act have been met. Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.
- 8 Finally, the Court must be satisfied that it is in the public interest to grant the application and the Court has a wide discretion to refuse it even if the other stipulated criteria have been met.<sup>7</sup>

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<sup>7</sup> Section 53(1) grants a licensing authority an unqualified discretion to grant or refuse an application under the Act. Section 53(1a) requires the authority to refuse an application if it is satisfied that to grant it would be contrary to the public interest.

## Locality

- 9 The guidelines identify the locality as referring ‘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.’ They provide that as part of the accompanying submission an applicant is ‘required to identify the geographic area from which they expect to draw customers.’ They suggest as a guide that the locality of licensed premises in the Adelaide Metropolitan Area is the area within a two-kilometre radius of the site of the relevant premises. As was observed in *Liquorland (Australia) Pty Ltd (Park Holme)*:

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.<sup>8</sup>

- 10 As mentioned earlier, the proposed premises will be in the Centre, which is zoned a District Centre. It is situated on the south-western corner of Cross Road and Goodwood Road. Cumberland Park is about five kilometres south of the Adelaide CBD. It is within the City of Mitcham council area (the Mitcham Council).
- 11 The Centre is quite large by Adelaide standards. It occupies the whole of the area on the block bordered by Goodwood Road to the east, Cross Road to the north, Eaton Street to the west, and Little Street to the south. It is over forty years old. It is anchored by a Big W store and a Woolworths supermarket. In addition to these retail outlets, there are a number of small specialist shops and businesses
- 12 The Centre is well serviced by public transport infrastructure, being the Belair train line, the Glenelg tram line, and high frequency bus routes. It can be conveniently accessed by car and is supported by over five hundred car parks. It can also be conveniently accessed by pedestrians.
- 13 The supermarket is located in the south-western corner of the Centre. The Big W store is immediately adjacent to it, to the north. The dimensions of the Big W store and the supermarket are substantial. Unsurprisingly, given its size, and ease of access, the supermarket has the largest turnover of any Woolworths supermarket in metropolitan Adelaide.

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<sup>8</sup> [2020] SALC 37 at [20].

- 14 The proposed premises is to be located adjacent to the front of the supermarket, facing east, just north of the Little Street boundary, and would occupy some 200 m<sup>2</sup>. It will be a typical liquor store co-located with a full line supermarket. It will trade under the 'BWS' badge. Like other stores trading under this badge, it will provide a local convenience offering. It will be an attractive, well stocked store, which will carry over 1,800 lines.
- 15 Unlike the earlier proposal, which permitted access from within a common area near the entrance to the supermarket, the revised proposal will only permit entry from the eastern side of the proposed premises. Accordingly, there is no issue about the condition imposed by s 38(c) of the Act.
- 16 Endeavour engaged Mr Graham Burns, a planning consultant, to assist it in undertaking its community impact assessment. The findings made in his report accord with the accumulated knowledge of this Court to the effect that the locality consists of low density detached dwellings within a suburban setting, interspersed with shopping centres and precincts, which, other than those within the Centre, are located on the periphery of the locality. As such, he considered that the primary catchment of the proposed premises was likely to be slightly smaller than the suggested two-kilometre radius. He identified that within the locality there are just under forty thousand residents.
- 17 I accept this evidence and find that this is the relevant locality.
- 18 The suburbs under consideration in this case are relatively typical of more affluent suburbs in metropolitan Adelaide. They include part or all of the suburbs of Cumberland Park, Millswood, Clarence Park, Kings Park, Hyde Park, Westbourne Park, Melrose Park, Black Forest, Glandore, Edwardstown, Kingswood, Daw Park and Colonel Light Gardens.
- 19 The socio-economic profile of the relevant community is higher than across metropolitan Adelaide and the crime rate is lower. There are no drug or alcohol rehabilitation facilities or any dry zones in the locality. There is no reason to infer that there is a significant cohort of 'at risk' groups within the relevant community.
- 20 There are two schools very nearby. Westbourne Park Primary School is just opposite, on the eastern side of Goodwood Road. Cabra College abuts Eaton Street, to the west. I shall return to these later.
- 21 There are three bottle shops trading under packaged liquor sales licences within or just outside of the locality. They comprise of the Goodwood Cellars, about two kilometres to the north of the proposed store on the eastern side of Goodwood Road, and two BWS stores, one of which is about a kilometre to the south on the western side of Goodwood Road, and the other, about two kilometres to the west, on the southern side of

Cross Road, just west of the intersection between South Road and Cross Road.

- 22 There also are several hotels in the general vicinity, being the Castle Tavern, which is within the Castle Plaza Shopping Centre, South Road, Edwardstown, The Maid of Auckland, South Road, Edwardstown, the Avoca, South Road, Edwardstown, the Torrens Arms, Belair Road, Mitcham, and the Hyde Park Tavern, King William Road, Hyde Park. All but the Hyde Park offer very serviceable take away liquor facilities. But none of these are sufficiently proximate to the proposed premises to be of concern.

### **The community interest test**

- 23 Having identified and discussed the relevant locality, I now turn to consider whether the grant of this application is in the relevant community interest.
- 24 Endeavour sent letters to a range of stakeholders inviting comment upon its application. The recipients included the Mitcham Council, South Australia Police, various Government Departments, local schools and childcare centres, and local medical centres.
- 25 It would appear that the only expression of concern came from the Department of Health, which sought information about Endeavour's proposed policies and procedures to address harm minimisation and preventing the sale of liquor to minors, and which expressed the Government's general commitment to reducing alcohol related harm. Endeavour responded by detailing its policies and procedures around harm minimisation.
- 26 A survey of 100 person undertaken by Endeavour revealed that 90% were in favour of the proposed premises. Whilst not much can be made of such surveys, the results confirm what might be expected in a case such as this, and that is, that many of the vast number of people who shop at the centre, would welcome the opportunity to use the proposed store.
- 27 For the reasons explained in *Hove Sip N Save*,<sup>9</sup> the Court will always be concerned when a proposed liquor store will be in the vicinity of schools at which teenagers attend. This cohort has an unfortunate propensity to be afflicted by alcohol related harm.
- 28 Endeavour is an established proprietor of licenced premises. It has extensive policies and procedures in place to address harm minimisation and to prevent the sale of liquor to minors. This allays any concerns that I might otherwise have had concerning the proximity of nearby schools,

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<sup>9</sup> [2021] SALC 7 at [107].

especially Cabra College, which I am permitted to know has a large cohort of teenagers.

29 In *Liquorland McLaren Vale*<sup>10</sup> I noted the Commissioner's concern based on submissions that he had received from Royal Australasian College of Surgeons (RACS), and Australia's National Research Organisation for Women's Safety (ANROWS) about the impact of the Covid-19 pandemic.

30 As I noted in that judgment:

RACS concluded by reflecting upon the effects of the Covid-19 pandemic, noting that it was associated with an increased incidence of domestic violence. It stated that about half of the reported cases of interpersonal violence, domestic violence and sexual assault, are related to excessive alcohol consumption and that there appears to be a direct relationship between increased alcohol consumption in 2020 and an increase in domestic violence in the same period. It cautioned that in this period of increased stress, pressure and uncertainty, allowing further saturation of outlet density would be to send the wrong message and would set a dangerous precedent for future applications.<sup>11</sup>

31 I also noted that ANROWS submitted:

... that a study in May 2020 conducted by the Australian Institute of Criminology, that examined the impacts of the Covid-19 pandemic on domestic violence, reported an increase in alcohol consumption in the three months from February 2020. It also asserted that another study 'highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families.'<sup>12</sup>

32 I expressed the view that the Commissioner was entitled to be concerned by these submissions, but added that the submissions might be dated in light of the speed with which things have changed over the course of the pandemic.

33 In response to this, Endeavour placed before the Court an affidavit from its Business Development Manager, Mr James Scott-Mackenzie. Mr Scott-Mackenzie's affidavit annexed details of research from academics from the Ehrenberg Bass Institute for Marketing Science at the University of South Australia that surveyed findings related to wine and alcohol consumption in Australia during the pandemic, a survey conducted by Roy Morgan, and statistics collected by the Australian Bureau of Statistics.

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<sup>10</sup> [2022] SALC 53.

<sup>11</sup> Ibid at [57].

<sup>12</sup> Ibid at [61].

- 34 The effect of these was that whilst a small proportion of the population has increased their consumption of alcohol during the pandemic, some have reduced their consumption, and that overall, drinking patterns seem to be returning to their pre-pandemic levels, and that the prior trend of diminishing alcohol consumption is re-emerging.
- 35 It must be accepted that this research was not exhaustive and there might have been a degree of selectivity in what was placed before the Court. But what is of significance is Mr Scott-Mackenzie's evidence regarding his analysis of Endeavour's trade figures relating to the sale of take away liquor. It reveals that after an initial spike, which was probably related to the inability to access on premises facilities, and I suspect, might also have been influenced by a similar hording mentality that led to a rush on a variety of grocery products, sales have now stabilised to a level consistent with what it was experiencing before the pandemic.
- 36 I now turn to conduct the evaluative exercise that the Act requires.
- 37 On the positive side, the Centre is extremely popular, and it can be taken as a given that many members of the relevant community will take advantage of the proposed premises. The Centre is of a size that might be expected to have within its offerings a bottle shop. The grant of this application will add to the attractiveness of what is already a significant retail hub that has been a prominent feature of the locality for over forty years.
- 38 Endeavour can be expected to operate a well-run bottle shop. Its staff can be expected to be alert to the need not to serve minors or intoxicated persons.
- 39 The grant of this application will result in some extra employment opportunities.
- 40 Of course, it must be recognised the grant of this application may have some negative consequences. As I observed in *Liquorland Park Holme*:

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.<sup>13</sup>

- 41 But this is not a locality that is 'awash' with take away liquor facilities. To the contrary, the only facility that has given me any cause for concern is the BWS store on the same side of Goodwood Road, a kilometre to the south of the proposed premises. I expect some who use the Centre will be

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<sup>13</sup> Ibid at [44].

combining their liquor purchases by using that store as part of the same shopping excursion. Whilst this might be convenient to those who reside south of the Centre, the same would not be true for those who live in the east, west and north of the Centre. For them, to use that store, a special trip up Goodwood Road would be required. Although Goodwood Road is not as formidable as some other roads in the area, such as South Road, this journey would involve a fair degree of inconvenience. As Kourakis CJ observed in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*: ‘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.’<sup>14</sup>

- 42 In *Hove Sip N Save* I made the point that: ‘Whilst each case must be evaluated on its own facts, it is natural and appropriate to make comparisons with previously decided cases.’<sup>15</sup>
- 43 The situation in this case is in marked contrast to the situation in *Hove Sip N Save*, in that a significant proportion of the relevant community in this case cannot conveniently purchase liquor in combination with their supermarket shopping.
- 44 Given the social profile of the relevant community and the limited number of take away liquor facilities in the immediate vicinity, I think it is unlikely that the grant of this application will result in a worrying level of increased harm due to the excessive or inappropriate consumption of liquor, either to the relevant community as a whole, or to any group within that community.
- 45 In my opinion, it will not cause any adverse cultural, recreational or tourism impacts.
- 46 I think it is unlikely to have an adverse social impact or impact on the amenity of the locality of the proposed premises. To the contrary, it is likely to add to the popularity of the Centre and its viability.
- 47 Through the letters sent to the various entities, Endeavour has consulted with the relevant key stakeholders and interest groups in the community.
- 48 There are no issues regarding Endeavour’s products and services or its relevant knowledge, experience and competency in relation to the service of liquor.
- 49 There are no issues regarding the plans for the proposed premises.

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<sup>14</sup> [2018] SASFC 31 at [13].

<sup>15</sup> *Ibid* at [117].

50 Having made the evaluative judgment that the Act requires, I am satisfied that it is in the community interest to grant this application.

### **Other issues**

51 I now turn to other matters that need to be considered.

52 There are some places of worship in the locality. It can be inferred that many of the parishioners of the places of worship would frequent the Centre and though the required advertisement of this application would have been aware of it. None have expressed any concern about the application.

53 None of the other matters raised by s 57 of the Act are of concern here.

54 I find that the premises will be suitable. I find that there is negligible potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity or that they will prejudice the safety or welfare of children attending nearby kindergartens and schools. I find that the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.

### **The Court's discretion**

55 I now turn to the final matter that I must consider, that is, whether it is in the public interest to grant the application.

56 Had there been compelling evidence that there was, and remains, a substantial increase in alcohol consumption as a result of the pandemic a licensing authority would have been entitled to take the view that now is not the right time to be increasing the opportunities for members of the public to purchase liquor from an additional take away liquor outlet.

57 On this issue, Mr Scott-Mackenzie's evidence concerning his analysis of Endeavour's trading patterns is very telling. I am permitted to know that Endeavour is one of, if not, the largest, retail liquor seller in Australia. If there had been a sustained increase in alcohol consumption in this State as a result of the pandemic, it would have shown up on its trading figures. The fact that it has not, allays the concerns expressed by RACS and ANROWS about the potential impact of the pandemic upon alcohol related harm.

58 In summary, this is a modest application to create an attractive convenience type bottle shop to be co-located with one of the busiest supermarkets in the State in a large shopping centre that might be expected to include within its retail offerings a bottle shop. It is in a relatively affluent part of metropolitan Adelaide that has a low density of take away liquor facilities in the immediate vicinity of the proposed store. It will be

operated by an experienced and reputable operator. It will result in some modest employment opportunities. Apart from a general expression of concern by the Department of Health, it met with no opposition from any other stakeholders, including the police and the Mitcham Council. Concerns previously expressed by the Commissioner about the impact of the pandemic on alcohol consumption, on the evidence available to this Court, have been allayed.

- 59 In light of all of this, I cannot discern any grounds that would warrant finding that it is not in the public interest to grant this application. To the contrary, I make a specific finding that it is in the public interest to grant it.

### **Conclusion**

- 60 This application is in the community interest and the public interest, and it is therefore granted. Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court's consideration.