

*Liquorland* [2013] SALC 51

**LICENSING COURT OF SOUTH AUSTRALIA**

LIQUORLAND

**JURISDICTION:** Application for the Removal of a Retail Liquor Merchant's Licence

**FILE NO:** 5139 of 2012

**HEARING DATE:** 18, 19, 20 and 21 March and 29 and 30 May 2013

**JUDGMENT OF:** His Honour Judge WD Jennings

**DELIVERED ON:** 25 June 2013

**REPRESENTATION:**

Counsel:

Applicant, Liquorland:	Mr M Roder SC with Mr R Harley
Objector, Woolies Liquor Store Pty Ltd:	Mr S Walsh QC with Mr R D'Aloia
Objector, Salia Property Pty Ltd:	Mr J Firth with Mr S Salandra

Solicitors:

Applicant, Liquorland:	Hunt & Hunt
Objector, Woolies Liquor Store Pty Ltd:	Clelands Lawyers
Objector, Salia Property Pty Ltd:	Salandra Maine Lawyers

- 1 Liquorland (Australia) Pty Ltd has applied to remove a Retail Liquor Merchant's Licence from Shop 12, 320 Gorge Road Athelstone (which is in the Athelstone Shopping Centre) to 81 Newton Road Newton where it is proposed that a First Choice Liquor Store be established. Liquorland at Athelstone stopped trading on 16 September 2012.
- 2 81 Newton Road is currently a vacant allotment on the corner of Newton Road and Clairville Road on the western boundary of the suburb of Newton. It is located on the eastern side of Newton Road and to the south of but physically removed from the Centro Newton Shopping Centre.
- 3 Objectors to the application are Woolies Liquor Store Pty Ltd and Salia Property Pty Ltd, the latter being the owner of the Centro Newton Shopping Centre.
- 4 To set the scene, the suburbs or areas that were primarily the subject of the evidence included Athelstone, Newton and to a lesser extent, part of Paradise. Contained therein are a number of supermarkets and liquor outlets. They include the Athelstone Shopping Centre (which has a Woolworths Supermarket); the Centro Newton Shopping Centre which has a Foodland Supermarket, a Target store and a BWS liquor store; and the Newton Village Shopping Centre which has a Coles and Woolworths Supermarket and a BWS liquor store. The Newton Village is approximately a 2-3 minute drive from the Athelstone Shopping Centre. The Reservoir (or Rezz) Hotel has adjacent to it a stand-alone Cellarbrations bottle shop. The Cellarbrations bottle shop is approximately 1.23 kilometres from the Athelstone Shopping Centre and is approximately 2 kilometres from the site of the proposed premises at 81 Newton Road.
- 5 The two issues agitated before the Court were whether the proposed First Choice Liquor Store is in the same locality as the former Liquorland store in the Athelstone Shopping Centre; and (even if it is within that locality) whether the Court should exercise its discretion pursuant to section 53 of the Act and refuse the removal application.

### **The evidence**

- 6 I will start by dealing with the evidence of the two planners and economists. I will then deal with the evidence concerning the nature of the operations of First Choice and Dan Murphy's stores; how they relate to each other and how they differ from Cellarbrations, BWS and Liquorland stores. I will then deal with the evidence concerning the patronage by local residents of the Athelstone Shopping Centre and the former Liquorland store and the ramifications and effects of its closure.
- 7 I will then consider the question of the locality and the Court's discretion.

- 8 **Mr Jeffrey Smith**, Planning Consultant, was called by Liquorland. He considered a number of factors in determining the locality of the former Liquorland store at Athelstone. Those factors included historical developments, geographic characteristics, demographic factors and accessibility. His starting point and final position was that the locality should be defined by a 2.5km radius. In his report he said:

“To the north the 2.5km radius extends beyond the River Torrens to include the suburbs of Dernancourt, Highbury and southern portions of Hope Valley.

To the south and south west the 2.5km radius extends to include the suburban areas of Newton and parts of Rostrevor.

I have concluded that the locality described by the 2.5km radius provides only a general indication of the locality pertinent to the assessment of this matter.

Geographic factors in this case present significant limitations to the extent of the locality. The Black Hill Conservation Park and Mount Lofty Ranges present as a significant constraint to the easterly extent of the locality as does the River Torrens present as a limitation to the northerly extent of the locality.

Given the range of facilities available in the vicinity of Centro Newton Shopping and road network connecting to the Centre, I consider that it is a centre that is readily accessible to and frequented by, the residents of Athelstone. In my opinion the residents of Newton and Paradise would for a variety of reasons shop at the Athelstone Shopping Centre from time to time.

In determining the locality I had regard to the location of main roads and the capacity for these to provide a convenient delimiter to the locality.

It is my opinion the locality of Athelstone Liquorland Store can be defined by the River Torrens and Lower North East Road to the north, the easterly extent of subdivision development in the foothills, Montacute Road to the southern and Newton Road to the west.”

- 9 As to Mr Smith’s settling on a 2.5 radius in determining his locality his evidence was:

“How did you arrive on the 2.5 as opposed to say, two or 1.5?--- It’s to do with travel distance and time. As I understand, the court has previously used five to seven minutes of travel time and that equates at various speeds to be somewhere between - and that is

also a function of where you live and the traffic lights you've got to go through and so on, but it's somewhere between, I think, 60 kilometres an hour, five minutes travel time is five kilometres, which equates to about a 2.5 kilometre radius in round figures. Seven 15 minutes travel time equates to about 3.5. So to me it was a question of just sort of striking a balance, I've used 2.5 in the past and I think it was reasonable to do in these circumstances. In fact, I think it was probably a little on the conservative side given the freedom of movement generally within that locality.”<sup>1</sup>

And

“I think you explained to his Honour that that was the start of your exercise? ---Yes.

And there was a suggestion put to you that at one stage that it was the finish. Your ultimate locality is somewhat more constrained than this indicative locality, isn't it, in that it's constrained by the Hills Face zone to the east? ---Yes.

And it would be fair to say, would it not, that ultimately the locality that you have devised is on many sides, at least, less than the 2.5 kilometres? ---Yes.

In fact, when one goes to the west, it almost touches Newton Road but it doesn't completely. Is that right? ---That's right.”<sup>2</sup>

And:

“I'm now putting to you that that evidence is wrong and that when you look at the matter logically it's not likely to be Newton Road but the edge of the boundary is more likely to be up towards Stradbroke Road?---I think there's some potential if you put it that way, yes. But if I were to look at the locality for Athelstone as it's drawn here in relation to the Newton Village Shopping Centre - - - So some potential for it being up towards Stradbroke Road. You accept that? ---Yes.”<sup>3</sup>

10 **Mr Graham Burns**, an expert planner was called by Woolworths.

11 As a starting point he considered the Licensing Court decision when approving a Retail Liquor Merchant's Licence at the Athelstone Shopping Centre in 1986. He noted:

“While that decision was handed down more than 26 years ago I agree that the locality that was generally defined in that matter was reasonably well defined by natural features to the north (the River Torrens valley) and to the east and south (the Hills Face Zone and

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<sup>1</sup> tr 40

<sup>2</sup> tr 60,61

<sup>3</sup> tr 32

Black Hill Conservation Park). I would also be inclined to adopt Montacute Road as the southern boundary.

In 1986 the Court was of the opinion that the locality's western extent was 'a little to the east of the Arrow Shopping Centre near the junction of Gorge Road and Newton Road at Newton' but elsewhere in that decision Arrow Cellars was described as being 'either just within or just without the locality as I perceive it to be'.

However, circumstances in 2013 are substantially different to what they were in 1986, such that the locality's western boundary would not in my opinion extend as far west as Newton Road (even if it did extend that far in 1986, which is at best arguable)."

12 He concluded:

"the locality of the premises which until recently were situated in the Athelstone Shopping Centre would not extend any further west than a line running north south and following generally the alignment of Stradbroke Road. This area corresponds closely with the primary catchment area of the Woolworths supermarket in the Athelstone Shopping Centre, which would in turn closely correlate with the catchment of the former Liquorland bottle shop in that centre. ...

If in the alternative the locality was defined using the radius approach, it would be appropriate in all the circumstances to adopt a radius of 'two or so kilometres' as was done in 1998 in the *Saturno* matter at Newton Village. However because of the distinct physical barriers which exist to the north (the River Torrens valley) and the east and south east (the Hills Face Zone and Black Hill Conservation Park), I would still be inclined to adopt those physical barriers as the locality boundary, which means that the radius would only apply to the built up area located west and south west of Athelstone Shopping Centre. I believe a radius of two or so kilometres is appropriate, recognising that BWS at Newton Central is well located, well stocked and prominently located in that centre, and recognising also that there is now a BWS bottle shop in the Newton Village Shopping Centre which provides a one stop shopping experience which is midway between Athelstone Shopping Centre and Newton Central. If the Court was uncertain as to whether Arrow Shopping Centre (Newton Central) was just in or just out of the Athelstone locality in 1986, I am in no doubt that the locality boundary would not extend west to include this centre in 2013."

He then had this to say about Mr Jeff Smith's reasoning and conclusion:

“Mr Smith’s letter [of 5/11/12] makes a case for the proposed site at 81 Newton Road Newton being within the same locality as Liquorland’s premises at 320 Gorge Road Athelstone. Among other things Mr Smith mentions that his staff, under direction, conducted an inspection of Liquorland’s former Athelstone premises ‘within a 2.5 kilometre radius of the store’. Mr Smith adds that ‘the Newton Central Shopping Centre albeit situated on its boundary, does fall within the locality of the former retail liquor outlet at 320 Gorge Road Athelstone’. In light of the fact that the site at 81 Newton Road is slightly more than 2.5 kilometre radius from 320 Gorge Road (by my calculations it is 2.62 kilometres) and that the Court in the 1986 matter found that the licensed premises then known as Arrow Cellars was ‘a little to the east of the Arrow Shopping Centre’, it is not clear to me how Mr Smith could have reached this conclusion.

My preceding investigations include an analysis of customer shopping information obtained from Woolworths Limited relating to the catchment area of the Woolworths supermarket in the Athelstone Shopping Centre. That map shows the supermarket’s Primary Catchment area extending west to approximately Stradbroke Road and Thornton Park Reserve. Even the Secondary Catchment on that plan stops well short of Newton Road. Given that shoppers in the Athelstone supermarket (Woolworths) would have been likely to have also shopped at the adjacent Liquorland store as part of a one stop shopping experience, I believe there is a close correlation between the supermarket and bottle shop catchment areas. I therefore disagree with Mr Smith’s assertion that ‘the former Athelstone store [Liquorland] principally serviced the Athelstone and Newton suburbs, as far as Newton Road to the west’.

Mr Smith’s letter makes an alternative case for defining a locality which is centred upon the site of the proposed premises. A radius of 2.5 kilometres has been selected even though there is no justification for selecting this radius in his letter.”

- 13 The last two witnesses called in this matter were **Mr Sean Stephens**, who was called by Liquorland. He is the Managing Partner and Senior Economist at Essential Economics Pty Ltd based in Victoria. **Mr Gavin Duane** was called by Woolworths. He is an Economist and Director of Location IQ which is based in Sydney.
- 14 Their evidence was primarily directed to the issue of the relevant locality.
- 15 Both defined primary and secondary trade areas. Mr Stephens in his evidence explained the difference between the two trade areas.

“The primary trade area is typically located in proximity to the location that's being analysed and represents an area in which a higher level of market share is achieved by a retail outlet or shopping centre. A secondary trade area represents an area that is within the trading patterns generated by a retail outlet or shopping centre, typically is a little further away and involves a lower market share from that area.

Can you tell his Honour whether there's a general rule about what percentage of total sales of a store would be generated from the overall trade area that is primary and secondary?---Again, it depends upon the circumstances of the analysis, but typically 80 to 90 per cent of sales in my experience would be within the trade area served by a retail outlet or shopping centre.”<sup>4</sup>

- 16 **Mr Curtis Field** is the National Business Development Manager for the Coles Liquor Group. He has worked in the liquor industry for some 12 years. Prior to his current position he was the National Operations Manager for First Choice from 2006 to 2011. His responsibilities include the identification of new sites and the renewal of leases.
- 17 There are in excess of 85 First Choice stores Australia-wide. In South Australia there is one at the Hampstead Hotel. It occupies just under 1000 square metres overall and has a selling space of just under 800 square metres. There is another First Choice at Unley (which was previously Quaffers) and one at Hindmarsh. There are proposals to have First Choice stores at Golden Grove and West Lakes.
- 18 There are 33 Liquorland stores in South Australia.
- 19 The proposed First Choice store at Newton would have a selling space of just under 900 square metres. First Choice's main competitor is Dan Murphy's. Dan Murphy's store floor areas are slightly larger than those of the First Choice stores. There are currently ten Dan Murphy's stores in South Australia.
- 20 The proposed store at Newton will have a larger range of liquor than the First Choice at Hampstead Hotel. It will have approximately 3000-3500 stock items. There will be between 900 and 2000 wines. That is to be compared with BWS stores where he estimates there is a range of between 500-600 wines and Liquorland stores with a range of between 400-500 wines.
- 21 First Choice focuses on the premium end of wines and offers a greater range than either BWS or Liquorland. Cellarbrations stores have a range of between 350-500 wines including international wines. It has more premium

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<sup>4</sup> tr 284, 285

wines than either BWS or Liquorland. The Cellarbrations store that the Court visited during the view, that is the one adjacent to the Reservoir Hotel, had a range of wines that surprised him with an Italian collection at the “top end”. The First Choice that the Court visited on the view, ie at the Hampstead Hotel, has a stand containing international wines. That is common with all First Choice stores.

- 22 The prices at First Choices are generally cheaper than the prices at Liquorland and BWS. There are generally 5-8 staff at Liquorland stores whereas at First Choice the staff ranges between 15-20 people, all of whom are subject to special training. First Choice stores are also noted for easy access and have dedicated car parks compared with the Liquorland store at Athelstone where there was shared parking apart from 5-6 dedicated parks.
- 23 Both Dan Murphy’s and First Choice stores are generally situated on out-bound locations on busy roads. The primary buying time for First Choice stores on Mondays to Fridays is between 4 and 7pm; on Saturdays and Sundays it is earlier.
- 24 His view of the BWS store in Newton Centro was that it contained a range typical for a BWS store; that it traded well and it had car parking access. His observation of the BWS at Newton Village was that again its range of liquor was typical but that its trade was moderate.
- 25 As to the closure of the Liquorland at Athelstone and the non-renewal of the lease for that store, his evidence was that the turnover for the 12 months prior to its closure was \$1.5M per annum. The trading was flat and was slightly declining. The opening of the Cellarbrations store some 18 months ago had led to a downturn in its sales of between 7½ and 10%. Typical sales for a Liquorland store are in excess of \$2M. Hence the lease at the Athelstone Shopping Centre was not renewed. The store closed on 16 September 2012. The other concerns that led to the closure of the store was the anticipated Dan Murphy’s store at the Highbury Hotel which he said would have a similar effect on the Liquorland store’s trading as did the opening of Cellarbrations. This would be likely to further reduce the turnover at the Liquorland store. There was also a proposed increase in rental from \$97,000 to \$105,000. No business case could be made, he said, to renew the lease. It was a “loss-making store”. The non-renewal of the Liquorland lease was a decision made independent of the First Choice proposal.
- 26 There is a general desire to expand the number of First Choice stores. There is more growth in larger stores in Australia. As a rule of thumb, the primary catchment area for a First Choice store is between 3½ to 5kms. The secondary catchment area is up to 10kms.



- 27 A First Choice store would not be suitable at the Athelstone Shopping Centre as there was no room for a “large box” and insufficient car parking. Consumer trends in Australia are towards the purchase of more premium beers and wines, ie customers are trading up. Specials represent between 25-45% of First Choice sales and are an important part of their business.
- 28 He did not personally visit the Liquorland store before it closed and had not personally enquired as to how it might have improved its performance. He agreed there are a number of ways in which performance could be improved but said none were applicable here. They did not see a future in the site. When asked whether existing customers who lived at Athelstone would be disadvantaged by the closure, he said that they might be “to a degree” but that there are other stores nearby. He understood the concept of “convenience” shopping and “one-stop” shopping and acknowledged that it has its place.
- 29 He was unaware when Liquorland at Athelstone started in 1986 that it was a Vintage Cellars store. He agreed that Vintage Cellars sell premium wines. Vintage Cellars fits between First Choice and Liquorland in the hierarchy of their stores. When asked why they did not consider turning the Athelstone Liquorland into Vintage Cellars, he referred to the fit-out costs that would be involved. When asked why they had not premiumised that store, he said that was not in line with the Liquorland brand. He said in the last two to three years sales there had been quite flat.
- 30 Their preference in this case was to establish a First Choice store rather than maintain the Liquorland store. First Choice stores “made more money”. He said that they occasionally sell liquor licences but that did not occur here as their view was “to get out of the shopping centre at Athelstone”. He said they needed to provide a store where there was a demand and a store that made a profit. The Athelstone liquor store was not viable because of the operating costs, labour, occupancy costs, rent and outgoings.
- 31 **Mr Anthony Smith** who resides in New South Wales is the National Business Development Manager for Liquor Licences for Woolworths Ltd. He is responsible for applications for liquor licences in various States with the exception of Queensland and Northern Territory. He has had 33 years’ experience in the liquor industry. There are 100 liquor licences owned by Woolworths in South Australia; 89 BWS stores (some are part of hotels) and 11 Dan Murphy’s. He is familiar with the BWS stores at Newton Centro and Newton Village. He was unaware of the Liquorland store at Athelstone prior to this application but is now aware of its location. He has now been to the Athelstone Shopping Centre and has seen where the Liquorland store was. BWS stores are in shopping centres and supermarkets and are free-standing.

- 32 The three shopping centres, Athelstone, Newton Centro and Newton Village would have a catchment area of some 3½kms. All have speciality shops; all have supermarkets and all have liquor licences. It was his experience that people tend to shop near where they live. Dan Murphy's has a different catchment area of approximately 5-7kms from the site but that might be reduced because of the presence of other licensed premises. Dan Murphy's is a destination store that sells bulky goods at better prices. The Athelstone Shopping Centre is land-locked to the east. The Liquorland trade would have had a similar catchment to the Woolworths Supermarket at Athelstone. He agreed that people might shop outside of that catchment area. Whilst he said that the majority of their trade came from the immediate catchment area, that proposition was a moving target and every store is different. When told that the turnover of Liquorland at Athelstone was \$1.6M his response was that he regarded that as being profitable and he would have kept it. Reductions on outgoings can be achieved by reducing the floor space and trading at a lesser level. He said that Woolworths would be interested in acquiring the Liquorland licence particularly as there is already a Woolworths Supermarket in the Shopping Centre. He was not aware of any effort by Coles concerning the sale of that licence. He said that one-stop shopping is of growing importance; it is convenient for customers who can do all of their shopping in one trip. There is a changing pattern in the purchasing habits, with people visiting supermarkets several times a week making smaller purchases, eg for fresh food. If a bottle shop is present then people can buy liquor at the same time. The closure of the Liquorland store means that that option is now not available for people in the locality and they are thus disadvantaged. The Liquorland store had been there for some 25 years and people are now forced to go elsewhere to purchase liquor to a place which is not as convenient for them.
- 33 In cross-examination he agreed that Dan Murphy's and First Choice offer an extensive range of liquor at a lower price, with specialised staff being able to give customers advice in relation to premium wines. He agreed that that was hard to beat. He agreed that both stores had a variety of wines including rare wines; that both stores had ease of car parking and that the public like to access these stores. He agreed that First Choice was Dan Murphy's immediate competitor and that Dan Murphy's range was slightly larger than that of First Choice and that those ranges were much larger than traditional bottle shops. He agreed that the area was well served with supermarkets and liquor stores.
- 34 When cross-examined about his views about the profitability of Liquorland it was put to him that he could not judge from afar and that he had never seen the store. His response was:

“Their location, I thought, was very good in that they had the best of both worlds, they had people that could zip in through the outside

carpark into the supermarket, they also had an entry from the supermarket with big roller shutters so people that had done their shopping at the Woolworths could pull their trolley in, fill it with liquor or whatever, put liquor in there and off they'd go if they parked down at the eastern carpark, so that was a bit of a plus for them, I would have thought. Now, it's Liquorland - it's a multinational company with lots of resources. I just find it interesting that a store doing that sort of level of trade, in an area of Athelstone that is affluent, which would have had a very healthy gross profit, I would have thought, how they certainly supposedly weren't making money.”<sup>5</sup>

- 35 He posed the question why the owners did not identify where the loss was coming from and improve the range of liquor available and customer service. He confirmed that there is “definitely” still a place for smaller convenience stand-alone bottle shops in shopping centres.
- 36 I now turn to the evidence concerning the Athelstone Shopping Centre and the Woolworths Supermarket in that Shopping Centre. I will then deal with the evidence of some local residents.
- 37 The Athelstone Shopping Centre contains the following tenancies:

Medical HQ  
Australia Post  
Variety on Gorge, Discount Store  
Pets Domain, Vet  
Athelstone Take-Away  
Anytime Fitness (opening soon, former Liquorland site)  
Per Tutti Espresso and Lunch Bar  
Lady Love Nails  
Cemons Hair and Beauty  
Newsagency  
Athelstone Quality Meat  
Athelstone Bakehouse  
Chemmart Pharmacy  
Woolworths.

- 38 **Mr Scott Trezise** is the Area Manager for Woolworths Supermarkets. He has spent 19 years working for Woolworths. His evidence was that the Athelstone Woolworths Supermarket is 2,600 square metres. It has eight check-outs. It has been operating there since 1998 and was refurbished some five years ago.

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<sup>5</sup> tr 252

- 39 The area previously occupied by Liquorland is now a fitness centre. When Liquorland operated there, there was an entry/exit into the supermarket as well as in front of the Liquorland premises.
- 40 The other tenancies at Athelstone included a Post Office which was a major drawcard for the established population in the area (it enabled people to pay bills etc). The medical centre and chemist brought people to the centre. All of these facilities attracted local people and helped to define the community. People were less likely to go outside of the area. He said that the location of the petrol station was also important.
- 41 He described the centre as a one-stop shopping centre. There is a trend which is for people to move away from shopping at major shopping centres to neighbourhood shopping centres which provided the ultimate services; the more facilities in those supermarkets meant a better overall offer to customers.
- 42 He described the every-day reward system and when referred to attachment B2 to Mr Burns' planning report, said that the red area depicted thereon was the primary catchment area. Approximately 35% of their customers at Athelstone use the cards. This area comprised of people who lived closest to the supermarket and were more likely to shop there. People living in this primary catchment area represented the greatest bulk of Woolworths' trade which he rated at 70%. He said that some people will go outside of the area for their retail shopping needs, eg they may go to Target (which is situated in the Centro Newton Shopping Centre) for clothing.
- 43 As to people's shopping habits, he said that nowadays multi-trips during the week were more prominent, for example people liked to purchase fresh food more on a daily basis. When so doing, where it is available, they could purchase liquor to match the food. Athelstone has a large number of high income residents (including managers and professionals) who are busy people for whom convenience shopping is paramount.
- 44 He confirmed that the Athelstone Shopping Centre is fully tenanted whereas Newton Village is not. Newton Village has not been fully tenanted since 2008. He described the customers of the Woolworths Supermarket at Newton Village as being within a 1.5km radius.
- 45 As to the primary catchment area he said that the 34% of people from that area used their everyday rewards system card and that represented 50% of their trade.
- 46 **Mr Craig Piro** has lived at three different locations in Athelstone (designated as P1, P2 and P3 on Exhibit W4). He has lived at those various addresses in Athelstone since 1974 when he was 14 years of age. He

currently lives at 10 Whelan Close Athelstone where he has lived for 25 years. He lived at Hockley Terrace and Cooida Crescent (P2), for 13 years.

- 47 He is a financial member of the Athelstone Football Club which has some 500-600 members. His father was also a member of that Club. He has a wife and 3 children aged 22, 20 and 18, all of whom live at home.
- 48 He said that historically there used to be a number of market gardens in the area but they have been replaced by residential development.
- 49 There have over the years been a lot of development in Athelstone and changes in the Athelstone Shopping Centre. It has got bigger. He uses most of the facilities of the shopping centre including the butcher, newsagent, post office and the Woolworths Supermarket. He does the majority of shopping for the family as his wife works. His main shopping days are Saturday afternoons and Sunday and depending on their needs, he tops up shopping twice during the week.
- 50 He described the Athelstone Shopping Centre as convenient to get in and out of.
- 51 When Liquorland was there he purchased his liquor from there “many times” and often purchased liquor at the same time that he was shopping. That included impulse buys.
- 52 He sees other people at the Shopping Centre who he knows. He has done business in that area all of his life.
- 53 Since Liquorland has closed he goes to the Glynde Hotel. He does not go to the Centro Shopping Centre very often. He purchases fruit and vegetable once a week from Tony and Mark’s. He would go to the Target store once or twice a year for clothes but he does not regard that store as part of his locality.
- 54 He has been to Newton Village and purchased liquor from the BWS store. He did not go there before Liquorland closed.
- 55 He regards the prices at Cellarbrations as a little bit high and it is not on his way home. He said that Cellarbrations was not as convenient as the Liquorland store at Athelstone.
- 56 He described the Liquorland closure as a disadvantage and that its closing was a “disservice”. He would buy liquor at that store if the licence returned. That is what he wants.

- 57 He described the range of liquor at Liquorland as “a big enough range for him”. He agreed that the rewards and incentives from stores determine where he goes for his shopping.
- 58 He said it was hard to get a park at Centro; there was no Woolies store there and that it was “not in our area”. He does not purchase liquor at BWS Centro. They do shop at Target there.
- 59 When asked in cross-examination whether he would frequent the proposed First Choice on the assumption that it had a good range of liquor at cheaper prices with good parking, he said “maybe, maybe not” and that such a purchase would require a special trip as compared with the former Liquorland which did not.
- 60 He agreed that Newton Road was “very busy” and that he avoids it “like the plague”.
- 61 He said he purchases liquor now at Newton Village as there is no other alternative.
- 62 **Mr Peter Adams** lives at 286 Gorge Road in a retirement village.
- 63 Of the lay witnesses he has lived in the area a lesser time than the other witnesses. He and his wife have lived in the retirement village for 3½ years. Prior to moving to that address they lived in Windsor Gardens on the Main North East Road. They mainly shop at the Newton Village on Fridays because they have a Woolworths and a Coles. They go there on Fridays for their “big shop”. He has bought liquor there. He also shops at the Athelstone Shopping Centre, probably three or four times a week. He described the Athelstone Shopping Centre as “the closest and most convenient”. When Liquorland was there he regularly purchased his liquor requirements there. He said the Liquorland at Athelstone was very convenient.
- 64 If the liquor store were reinstated at Athelstone he would go back there to purchase liquor. As to the Liquorland store, he said “it was there one minute and gone the next” and when he asked what was going on, he was told it was closing down. There was not to his knowledge any announcement concerning the closure.
- 65 He goes to Tony’s fruit and vegetable store sometimes. He regards the Centro Newton Shopping Centre as being in his locality because of the Target store and the fruit and vegetable store.
- 66 He used to purchase liquor from Liquorland every fortnight but regarded the young staff there as quite rude. He said the store had a good range.

- 67 He agreed that a First Choice or Dan Murphy's would add something new to the area.
- 68 He does not purchase liquor from the BWS at Centro Newton.
- 69 **Mr Paul Cox** owns the newsagency in the Athelstone Shopping Centre. He lives at 10 Meadowvue Road Athelstone with his wife. They have lived there for eight years. His daughter lives on the same property in a granny flat. He purchased the newsagency about four years ago. When Liquorland was operating it had an adverse effect on his business as some people went directly from the liquor store to the supermarket. Now that it has closed it is more likely that people will go into his shop. As such the closure of Liquorland has been a benefit for him.
- 70 The overwhelming number of his customers come from Athelstone and the areas immediate adjacent to Athelstone, ie Paradise. He has friends who live in the Athelstone area and they shop at the Shopping Centre. He described the Centre as "a village". There is a strongly-held sense of community in which people support one another in all sorts of respects. He said that one local Athelstone resident died recently and some 400 people attended the funeral.
- 71 He estimated that more than 90% (perhaps as many as 97-98%) of his customers come from the Athelstone area and that this was based on his experience, knowing and by talking to people. He described his newsagency as the "gossip centre" of Athelstone, particularly in the context of his assistant who has lived in that area all of her adult life.
- 72 When Liquorland was open he used it and saw other people going in there. Most people who attend the shopping centre go to several of the businesses in it. The clientele was predominantly local. They often come in to his store with a Woolies trolley. He said those customers are people of all ages and include young ladies with families and their parents and grandparents.
- 73 His customers are loyal to him and he described them as being part of the village community. He has been to Target infrequently. His wife goes there occasionally. They go to Tony's Fruit and Veg but he did not regard that or Centro as being in his locality and it was "a nuisance having to go that far".
- 74 He has on occasions been to the BWS at Centro Newton but he said it was nice to have Liquorland at Athelstone. He purchases limited amounts of alcohol and that amounted to about half a dozen purchases a year. He said that the village atmosphere has not changed since Liquorland closed.

- 75 **Mr Jim Kelly** is a retired businessman who lives in the retirement village at 286 Gorge Road Athelstone (marked “A” on Exhibit W4). He has lived there for two years but prior to that lived at 30 Russell Road Athelstone for some 41 years. He has a wife and three children. He knows the area well and has friends in the area. He has always shopped at the Athelstone Shopping Centre and has and still supports the local shops there. He said the shopping centre has expanded on two or three occasions. He has always been loyal to it. He uses the doctors’ surgery in the Centre, the fish and chip shop, the chemist and Liquorland when it was there. The residential area of Athelstone had expanded and when he first moved there only about half of the area was occupied by residents; the other areas were market gardens. He described it as a nice area.
- 76 They shop at the Athelstone Shopping Centre on Friday nights. That was their practice when he and his wife were working and they have maintained that practice. During the week he goes to the Athelstone Shopping Centre to the doctors or chemist, the newsagency for X-Lotto and the fish and chip shop. He sees neighbours and friends there. They often go to the café in the Shopping Centre for coffee. He said that the coffee shop had a nice atmosphere and a community feel about it which he has noticed more and more since his retirement.
- 77 He also uses the Pets Domain store in the shopping centre. He did use the Liquorland and whilst he did not buy a lot of liquor it was convenient to have it there when he wanted to purchase beer or wine. Now if he wants to purchase liquor he does so at the BWS store at Dernancourt which is near a dog obedience training that he attends.
- 78 He goes to Target at Centro once a month and to Tony and Mark’s Fruit and Veg shop. He does not regard Centro as being within his local area.
- 79 He goes to Newton Village Shopping Centre occasionally as there is a good chemist shop there and it also has a Coles and a Woolworths. He does not go there often. He does not consider that shopping centre to be his “local”.
- 80 If Liquorland re-opened he said it would be convenient and he would use it. He said the Athelstone Centre was more than just a shopping centre and he knows people there. He only goes to Tony’s Fruit and Veg shop and a bakery nearby on Sundays.

### **Consideration**

#### ***Locality***

- 81 Section 61(2) of the *Liquor Licensing Act 1997* states:



“An application for the removal of a Retail Liquor Merchant’s Licence must satisfy the Licensing Authority that the licensed premises already existing in the locality to which the licence is to be removed do not adequately cater for the public demand for liquor for consumption off licensed premises and the removal of the licence is necessary to satisfy that demand.”

82 That provides a two limb test, namely that the applicant must satisfy this Court that:

- (1) the licensed premises existing in the locality of the proposed location, namely the area of the Newton Central Shopping Centre ‘do not adequately cater for the public demand ...’ and
- (2) the removal of the licence to the site is necessary to satisfy that demand.

83 In *Liquorland v Hurley’s Arkaba Hotel Pty Ltd*<sup>6</sup> the Full Court held that the requirements in s 61(2) of the Act only apply where the proposed licence is to be removed from one locality to another. The Court concluded that the language of the section with its focus on the needs of the locality to which the licence was to be removed implied that it was speaking to a removal to a new locality and were not apt to apply where the licensee sought to stay within the original locality. The needs test does not apply unless the removal is to outside of the locality.

84 In the recent case of *BWS – Beer Wine Spirits*<sup>7</sup> which was an application by Woolworths to remove a Retail Merchant’s Licence from Collinswood to Walkerville I considered what Debelle J said of the expression “locality” in *Woolies Liquor Store v Seafood Rise Tavern*<sup>8</sup>:

“Although the task of defining a boundary is frequently undertaken in applications for retail liquor merchant’s licences, the limitations inherent in a defined locality must be recognised. First, it is a somewhat artificial concept since there are obvious difficulties in defining the locality with precision. The locality in which the demand exists is not capable of precise delineation. Secondly, the purpose of defining the locality is not to fix lines on a map but rather to focus attention upon the local, as distinct from the purely general, character of the public demand with which s 58(2) is concerned: per King CJ in *Nepeor v Liquor Licensing Commissioner* at 206. This necessarily imprecise process is no more than a means to the end of identifying the relevant public demand and the relevant licensed premises.”

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<sup>6</sup> (2001) 80 SASR 59

<sup>7</sup> [2013] SALC 7

<sup>8</sup> (2000) 76 SASR 290

- 85 I also observed in that case that it follows that the Court's focus must be to determine the physical locality of the patrons, excluding passing trade that might be expected to use the existing premises and then ask the question as to whether the proposed premises are within the same locality.
- 86 Von Doussa J in *Nepeor v Liquor Licensing Commission*<sup>9</sup> said:
- “In other cases, particular physical features of the area, such as a river, or some other significant obstruction to the free movement of people, might provide the basis for including or excluding particular areas from consideration in a precise way.”
- 87 In this case the Hills Face Zone and Black Hill Conservation Park (to the east and south) and River Torrens catchment area (to the north) provide definitive barriers, such that the radius approach which was appropriate in *BWS - Beer Wine Spirits*, is less so here.
- 88 The respective primary trade areas as defined by Mr Stephens and Mr Duane were similar and were of some assistance on the question of the relevant locality. Mr Stephens' secondary trade area is bounded by Newton Road whereas Mr Duane's secondary trade area finishes further to the east. Aside from that I did not find their evidence added much to the other evidence in determining what is the relevant locality. Mr Stephens based a number of his conclusions on an extrapolation of fly-by data supplied to him from Liquorland. He used that data as being representative of all customers. That is not necessarily a sound assumption.
- 89 Aspects of their evidence whilst relevant to locality are more relevant to the consideration of the exercise of the Court's discretion and I will refer to that evidence later in these reasons.
- 90 Mr Smith, apart from the concession referred to earlier in these reasons, conceded that the Athelstone Shopping Centre was smaller and less likely to have the same catchment area as Newton Central (for which he chose a 2.5km radius in determining its locality) yet he maintained the 2.5km radius was still appropriate for the Athelstone Shopping Centre.
- 91 Mr Burns' approach in identifying the local community using the Athelstone Shopping Centre (and the catchment area of the Woolworths Supermarket) seems to me to be a more logical approach in the circumstances of this case. That approach is supported by the evidence of the local residents and in particular Mr Cox. It is also supported by the evidence of Mr Trezise. It is consistent with the approach I adopted in *BWS - Beer Wine Spirits*. I adopt Mr Burns' approach and conclusions here and

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<sup>9</sup> (1987) 46 SASR 205

find that the proposed First Choice Store is not within the locality of the Athelstone Shopping Centre.

- 92 It has not been seriously suggested that there is any actual need for the proposed First Choice store. Accordingly, having found as I do that what is involved here is not a removal of a retail liquor licence from one premises to another within the same locality, the application must be dismissed.
- 93 If I am wrong in reaching that conclusion I will deal with the Court's discretion.

### *The Court's Discretion*

- 94 Section 53 of the *Liquor Licensing Act* provides:

“(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).

(1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.”

- 95 In *Liquorland v Lindsey Cove Pty Ltd*<sup>10</sup> Doyle CJ said this about the exercise of the Court's discretion:

“27. I have already set out the statutory provision that confers a discretion on the Court. **It is well established that the discretion is a very wide one.** In support of that proposition, it suffices to refer to the reasons of King CJ in *Waiata Pty Ltd v Lane* (1985) 39 SASR 290 at 293-294. In his reasons in that case King CJ made the point that the legislative history showed that the predecessor of the present provision **had been created as a means of protecting the public interest**, when local option polls and memorials were abolished as a means of protecting the public interest in relation to the sale of liquor. He said (at 294):

‘When this is appreciated, it can be seen that at least one purpose, and without doubt the primary purpose, for which the discretion is conferred, is the protection of that general public interest, which is to be distinguished from the public need or demand for

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<sup>10</sup> [2002] SASC 17 at paras 27-31

liquor facilities, in the number, type, location and standard of liquor outlets and in the conditions under which they are to be permitted to operate. **The s 61 discretion is the means by which the Licensing Court is enabled to promote the shaping and development of an orderly and harmonious system of liquor facilities designed not only to meet the public need for liquor facilities but also to protect the wider public interest in the preservation of the community from adverse social effects.'**

He then went on to outline the basis on which the discretion is to be exercised (at 294-295):

'The language of the section enables the Court to exercise the discretion on grounds or for reasons which commend themselves to the Court and irrespective of the grounds which may be relied upon by the parties to the proceedings. These grounds or reasons include any proper principles or policies which the Court has developed for the attainment of the purposes of the Act. Such principles or policies may relate to the undue proliferation of licences or of certain types of licences. **They may relate to the promotion and maintenance of a suitable balance between the various types of liquor facility available in a locality.** The Court is authorized by s. 6b to inform itself in any manner in which it sees fit and that includes informing itself by reference to its own records and its own knowledge of liquor facilities which have been granted or promised by the Court and to the previous history of proceedings relating to particular premises. The Licensing Court must act judicially, but there is an unmistakably administrative element in its task of promoting, encouraging and maintaining a system of liquor facilities to meet the public need for liquor facilities and the wider community interests.'

Subject to some comments which I will make in a moment, I consider that what King CJ said is still appropriate, and that nothing in s 3 of the Act setting out the objects of the Act, conflicts with what he said.

28. **In short, the discretion must be exercised for a purpose consistent with the Act, and to advance or to maintain principles and policies found in the Act,** or which the Court in its experience finds appropriate or necessary in the proper application of the Act. On the other hand, the Court

must be careful not to use the discretion as a basis for imposing views about what is desirable, unless those views are firmly linked to the principles on which the Act operates or is administered.” (my emphasis)

96 The objects of the Act include:

“3 – Objects of this Act

- (1) The object of this Act is to regulate and control the sale, supply and consumption of liquor for the benefit of the community as a whole and, in particular—
  - (a) to encourage responsible attitudes towards the promotion, sale, supply, consumption and use of liquor, ...; and
  - (b) to further the interests of the liquor industry ... within the context of appropriate regulation and controls; and
  - (c) **to ensure that the liquor industry develops in a way that is consistent with the needs and aspirations of the community;** and
  - (d) **to ensure as far as practicable that the sale and supply of liquor contributes to, and does not detract from, the amenity of community life;** and
  - (e) **to encourage a competitive market for the supply of liquor.”** (my emphasis)

97 The trend towards and the importance and convenience of one stop shopping for the local community or the residents of Athelstone is clearly demonstrated by the evidence referred to earlier herein of Mr Anthony Smith (somewhat reluctantly by Mr Field) and by Mr Piro, Mr Cox, Mr Kelly and Mr Jeffrey Smith. This evidence demonstrates the convenience for local residents of shopping at the Athelstone Shopping Centre. Mr Cox’s evidence which is important is that the vast majority of his clients are from Athelstone. Those residents have for some 25 years also been able, whilst shopping there, to purchase liquor. By virtue of the closure of Liquorland those Athelstone residents have been denied that convenience, and have thus been disadvantaged. They now have to make special trips to less convenient locations to purchase their liquor. That evidence is supported by the following evidence of Mr Burns:

“The Woolworths Supermarket which anchors the [Athelstone Shopping] centre has a floor area of 2,600 square metres and the

15 speciality stores have a combined floor area of 2,372 square metres. The medical centre occupies 283 square metres. In total therefore the Athelstone Shopping Centre has a total floor area of 5,255 square metres.

Athelstone Shopping Centre is located in a Neighbourhood Centre Zone as indicated on Zone Map Cam/4 of the city of Campbelltown Development Plan. A shop (among other kinds of development) is an envisaged and complying development for this zone.

The Neighbourhood Centre Zone which applies to Athelstone Shopping Centre lies towards the eastern-most end of the Campbelltown Council area. ... Its location is such that the surrounding residential community (consisting almost entirely of the suburb of Athelstone) would be expected to rely upon this centre for its day to day and weekly shopping needs, as well as for medical, postal, fuel and other services. Indeed, my observation in this regard is confirmed by the Catchment Plan for Woolworths Supermarket in Athelstone Shopping Centre which shows a concentration of customers who are drawn almost entirely from the suburb of Athelstone. This concentration of customers is drawn from an area extending north to the River Torrens valley and east and south-east to the Hills Face Zone and Black Hill Conservation Park.

...

I have interrogated the most recent (2011) Australian Bureau of Statistics data to determine the population living in the primary catchment area of the area coloured red on the Catchment Plan. In 2011, the population of this area was 8,567 persons. Of this number, 4,704 people reside in that part of the suburb which is to the east of the Athelstone Shopping Centre. These are the residents of Athelstone who would have to drive past the shopping centre to purchase their liquor supplies at one stop shopping centres located further to the west, and would have to travel much further in the process, if a retail bottle-shop was not located in the Athelstone Shopping Centre. In fact, the residents who live at the most eastern extremity of Athelstone (King George Avenue) would be required to drive 4.4 kilometres along Gorge Road to get to Newton Centre Shopping Centre on Newton Road, or 4.1 kilometres along Gorge Road and Stradbroke Road to get to Newton Village Shopping Centre if they wanted to purchase supermarket grocery supplies at the same time as purchasing liquor.

When Liquorland was located next to Woolworths and other services and facilities in Athelstone Shopping Centre, it therefore provided the Athelstone community with a convenient one stop shopping experience. Since it is proposed to relocate the licensed premises from the heart of Athelstone to the western extremity of

Newton, this community will no longer be able to conveniently purchase beer, wine and spirits as part of their daily or weekly shopping trip to Athelstone Shopping Centre. In other words, the Athelstone Shopping Centre and the former retail bottle-shop premises of Liquorland would have conveniently serviced the Athelstone community who made purchases of liquor as part of their regular grocery shopping trip.”

- 98 That evidence is complemented by aspects of the evidence of Mr Stephens and Mr Duane. In his report Mr Stephens said:

“Unsurprisingly, the highest share of the adult population who visited the Athelstone Liquorland store is in the suburb of Athelstone. For many of these residents, the Athelstone Liquorland was the closest and most convenient location for take home liquor purchases.”

- 99 Mr Duane in his report defined two primary trade sectors as:

“The *primary east sector*, including parts of the suburb of Athelstone to the east of the centre, that is to the east of Brookside Road and Fox Avenue.”

“The *primary west sector* including parts of the suburb of Athelstone as well as the suburb of Paradise, generally bounded by Stradbroke Road to the west and Emmanuel Street/Sunset Street to the south as well as the River Torrens to the north.”

- 100 In his conclusion he said:

“Residents of the defined primary trade area for Athelstone Shopping Centre would have an expectation that there was a liquor store provided as part of that centre, which provides their closest weekly food and grocery shopping destination. This is particularly the case given the (sic) Liquorland was previously provided at the site and a liquor store has operated at Athelstone (under various banners) since 1986.

The primary trade area is of a significant size, comprising over 9,000 persons, able to support a full-line supermarket as well as a liquor store at that location. The majority of sales for a liquor store at Athelstone would come from the combined primary sectors.

...

... residents of the primary trade area of Athelstone would find Athelstone Shopping Centre the most convenient for their food and grocery and liquor needs and would visit the site on a regular basis

for a variety of purposes. They are the most important in terms of supporting a liquor store at the site.”

- 101 The former one stop shopping experience and convenience residents enjoyed at Athelstone would not be met by them having to visit other liquor outlets nor by the establishment of a First Choice store on the proposed site. Put another way, those Athelstone residents have a demand that will not be conveniently met by the other existing liquor stores nor by the establishment of the First Choice store. It is not to the point that the proposed First Choice store has a larger and attractive range of liquor and that it would attract customers from further afield.
- 102 I have no doubt that Liquorland would be substantially better off commercially in the longer term by the establishment of the First Choice store on the proposed site, rather than its selling the licence or attempting to improve the turnover at the former Liquorland at Athelstone site in the manner suggested by Mr Anthony Smith (although the latter is seemingly no longer an option as the lease has been cancelled and the area re-leased). That is not the test.
- 103 To allow this application would be to sanction a strategic decision made by the applicant to abandon licensed premises to the detriment of a section of the public to enable it to seek commercial advantages elsewhere.
- 104 Mr Roder SC would have it that this is of no moment. He said that there was no evidence of a decision that supported the proposition that the existing licence was granted essentially for the benefit of the people in the immediate vicinity of the Athelstone Shopping Centre to meet their demand for one-stop shopping. He submitted that the existing licence was simply granted to primarily serve the public within the relevant locality and that if I were to find that the proposed premises are within the same locality what is involved here is no more than a removal of a licence within the same locality that will serve the public within that locality.
- 105 He submitted that the Supreme Court decision in *Liquorland (Australia) v Hurley's Arkaba Hotel Pty Ltd* was a clear precedent that supported the removal of a smallish licensed premises within a shopping centre to a much larger and better facility, not connected with a shopping centre, but within the same locality. He said that essentially that was what was involved here.
- 106 That case involved the removal of a retail liquor merchant's licence from a shopping centre on Unley Road at Unley to other premises 600 metres away on the same road. On the face of it the case supports Mr Roder's contention. But there are some matters that require comment.
- 107 First Perry J noted at para 49:



“One would have to conclude that residents of the Unley Shopping Precinct are well served with licensed premises offering off-premises sales of packaged liquor, and further, that a number of those outlets are in close proximity to the Unley Shopping Centre as well as to the proposed premises.”

108 In other words, although the removal of the licence from the shopping centre might have been an inconvenience to some, there still remained other convenient options.

109 The second is that the case was decided a decade ago. The position taken by Perry J, namely:

“In dealing with this particular application, even without the evidence called to that end, the court could safely assume that there would be a number of local residents who shopped regularly at the Unley Shopping Centre and who might find it convenient to continue to purchase their liquor requirements at the existing liquor store.”<sup>11</sup>

has, I suggest, over the ensuing period, changed. In *Woolworths v Drase*<sup>12</sup> Kourakis J (as he then was) at para 55 made the point that:

“Recent Australian social history shows that facilities which one day are thought to be no more than matters of convenience quickly become, or at least are soon thought to be, necessities. The routines of contemporary Australian life are such that the facility of one stop shopping is of great importance to working people. The development of district and regional shopping centres reflects that social fact. Many shopping centres now include “off premises” retail liquor outlets. I accept that some of those licences may have been removed into a centre from nearby outlets, but the point of present significance is that the very existence of retail liquor outlets in shopping centres may reflect an increasing demand for liquor at such centres.”

110 In *Woolworths Limited*<sup>13</sup> at para 105 Gilchrist J made the observation:

“Another relevant consideration in determining the issue of discretion is clear evidence that has emerged from many cases of ‘the community’s wish for one-stop shopping’.”

111 In this case the evidence clearly establishes that many members of the public living in and around the Athelstone Shopping Centre and those from

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<sup>11</sup> para 109

<sup>12</sup> [2010] SASC 13

<sup>13</sup> [2013] SALC 23

further away who use the Centre have been significantly disadvantaged by being denied the capacity of meeting their take away liquor needs as part of the general food and grocery shopping. To allow the applicant to permit that to occur simply to enable it to explore a more financially rewarding enterprise in an area that already has adequate access to take away liquor, would be to set an undesirable precedent of the type alluded to by Doyle CJ in *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd*. Licensees who hold a retail liquor merchant's licence within or near a shopping centre that meets the local community's wish for one stop shopping should be discouraged from withdrawing that facility merely to take advantage of more commercially attractive opportunities elsewhere within the locality, particularly if the removal of the licence will significantly disadvantage that local community and simply offer the other community another retail facility, albeit one that might be bigger and have a greater range than that which is already on offer. That is what is involved here. In my view this amounts to a sound reason for the exercise of the discretion adversely to the applicant. I therefore dismiss the application.

- 112 For the foregoing reasons I have concluded that pursuant to s 53 it is not in the public interest that the application be granted.