

LICENSING COURT OF SOUTH AUSTRALIA

HOVE SIP N SAVE

JURISDICTION: Application for Review from a decision of the Commissioner

FILE NO: 41 of 2020

HEARING DATE: 2 December 2020

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 28 January 2021

CATCHWORDS

*Review of a decision of the Commissioner for Liquor and Gambling wherein he refused an application for the grant of a packaged liquor sales licence in respect of proposed premises at Brighton Road, Hove – Nature of a hearing on review considered – Application to adduce evidence not tendered before the Commissioner – In this case the Commissioner resolved not to conduct a hearing – Whilst that did not prevent the applicant from placing evidence before the Commissioner it suggests that its failure to do so was not as a result of a forensic choice – **Held** that the evidence is relevant and the Court should receive it – 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 – Factors relevant to this evaluation identified and they include the community impact assessment guidelines – The guidelines considered and discussed – Although the abolition of the 'needs test' has removed a significant barrier in connection with applications for licences to sell take away liquor, the effect of the legislative changes is not all the one way – The imposition of the requirement to comply with the community impact assessment guidelines has significantly upped the ante in connection with an applicant's obligation to satisfy a licensing authority of its awareness of the vulnerabilities of its potential customers and its knowledge, experience and competency in relation to the responsible service of liquor, especially to vulnerable persons – The Court has real concerns as to whether the applicant has sufficient awareness, knowledge, experience and competency in relation to the appropriate conduct of a packaged liquor sales licence – This suggests that the application should be refused – But in addition to this are many factors that support the same conclusion – The community interest test involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new licence and hence a new*

*take away facility for the purchase of take away liquor in the relevant locality – The application is in respect of proposed premises contained in a small shopping centre – **Held** that there would not be a contemporary community expectation that within the retail offerings contained within that centre there would be a take away liquor facility – **Held** that in all the circumstances the Court is not satisfied that it is in the community interest to grant the application – Whether in any event it would be in the public interest to grant the application – General discretion considered – If the circumstances in this case were sufficient to meet the community interest test in this case, it is difficult to see how a licensing authority could refuse any application made by an experienced licensee for the grant of a packaged liquor sales licence in respect of any premises in the vicinity of a supermarket that does not already share an alignment with a take away liquor facility – The legislature made a clear policy decision of not allowing the wholesale alignment of take away liquor facilities with supermarkets – In conformity with this, and the view 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 – **Held** that it would not be in the public interest to grant this application because it would set an undesirable precedent – Liquor Licensing Act 1997.*

The Airport Club [2006] SALC 11

Jackpots on Hindley [2009] SALC 35

Coal and Allied v AIRC [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585

Clark v Stingel [2007] VSCA 292

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

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

(Woolworths Ltd v IPG Management (SA) Pty Ltd & Ors) [2015] SASFC 97

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

Nuriootpa Cellars [2009] SALC 12

Jackpots on Flinders [2006] SALC 18

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

Waiata Pty Ltd v Lane (1985) 39 SASR 290

Woolworths Ltd v Drase Coosit Pty Ltd [2010] SASC 13

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458

REPRESENTATION:

Counsel:

Applicant:

Objector:

Mr B Allen

Mr G Coppola

Solicitors:

Applicant:

Objector:

Wallmans Lawyers

Australian Hotels Association (SA Branch)

- 1 This is an application seeking a review of a decision by the Commissioner for Liquor and Gambling wherein he refused an application for the grant of a packaged liquor sales licence in respect of proposed premises at 349 Brighton Road, Hove ('the proposed premises') made by Hove Retail Pty Ltd (the applicant).
- 2 By way of background an application was made by the applicant to the Commissioner on 29 January 2020 seeking the licence in connection with a proposed trading name of 'Hove Cellarbrations'. The application identified that Mr Philip Desteno and his wife, Ms Rosemary Desteno, were persons holding positions of authority within the applicant and that their son, Mr Damien Desteno, as well as Mr Matthew Farmer, were seeking approval as responsible persons. Underpinning the application was the broad assertion that the grant of the licence would benefit the local and broader community in terms of 'employment, choice and convenience'.
- 3 In respect of proceedings before the Commissioner, the Commissioner has an absolute discretion as to how the proceedings are to be conducted. Pursuant to s 81(a) of the *Liquor Licensing Act 1997* the Commissioner may determine to deal with the application by way of written submissions only without holding a hearing or the Commissioner may resolve to hold a hearing.
- 4 In this instance, the Commissioner resolved to deal with the matter by way of written submissions only. Those submissions comprised of a Community Impact Assessment form completed by the applicant and written submissions filed by the Australian Hotels Association (the AHA) opposing the grant.
- 5 An application for a packaged liquor and sales licence is a designated application for the purposes of s 53A of the Act. As such, the application may only be granted if the licensing authority is satisfied that the grant of the application is in the community interest. Pursuant to s 53A(2) of the Act in determining that issue the licensing authority must have regard to:
 - the harm that might be caused (whether to a community as a whole or a group within the community) due to the excessive or inappropriate consumption of liquor;
 - the cultural, recreational, employment or tourism impact; and
 - the social impact in, and the impact of the amenity of, the locality of the premises or proposed premises; and
 - the nature of the business conducted or to be conducted under the licence (as prescribed).

- 6 Community impact guidelines have been issued which relevantly provide that: ‘the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the community interest and to provide relevant evidence and submissions to discharge this onus.’
- 7 In accordance with s 53 of the Act, the licensing authority must also be satisfied that it is in the public interest to grant the application.

The Commissioner’s decision

- 8 The Commissioner noted that the applicant had provided little by way of statistics or general information about the facilities in the locality or vulnerable groups. He also noted that there were two existing packaged liquor outlets within two kilometres of the proposed premises as well as a drive through bottle shop attached to the Brighton Metro Hotel.
- 9 The Commissioner noted the submissions advanced by the AHA. These included the contention that the provision of a packaged liquor store immediately adjacent to a supermarket was inconsistent with the minimisation of harm because it would encourage the purchase of liquor as a staple with groceries and other perishables. The AHA also submitted that convenience does not equate to community interest, that the small size of the proposed premises meant that it was likely to have a small range, and that given the proximity of other retail liquor outlets, the grant of the licence could result in undue proliferation of the availability of packaged liquor with the resultant risk of harm. It said that it was not to the benefit of the community to encourage one stop shopping.
- 10 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.
- 11 The Commissioner refused the application because he did not consider that the applicant had adequately addressed matters such as harm minimisation, economic benefits, and the community benefit beyond shopping convenience. He thought that the argument about community convenience was diminished by the fact that there were three other premises offering take away liquor facilities within two kilometres of the

proposed premises. He was concerned that the applicant seemed to be suggesting that there were no ‘at risk’ groups within the community and that its failure to adequately identify the potential for harm and how it would manage and reduce that risk showed a lack of awareness of the impact that the licence could have on the community.

A technical challenge

- 12 Mr Coppolla, who represented the AHA, argued that there was a technical deficiency in the application because a licence can only be granted to an applicant that has been found by the licensing authority to be a fit and proper person to hold the licence. He contended that as no application for approval was made, this was fatal to the application.
- 13 This can be immediately disposed of. I think it was implicit that Mr Philip Desteno and his wife were seeking approval. But in any event, whilst it is customary to refer to an application for a licence, in a case such as this, where the proposed premises are yet to be constructed, what is actually being sought is a certificate of approval under s 59 of the Act. Under s 59(2) that certificate ‘may be granted on conditions that the licensing authority thinks fit’. In a case such as this, that would invariably involve granting the certificate conditional upon all of those in a position of authority within the applicant obtaining the appropriate approval.
- 14 This application does not fail because of a technical defect. Its outcome depends upon an assessment of the merits.

The application for review

- 15 An application for review is permitted by s 22 of the Act. It provides that the hearing before this Court is by way of a rehearing.
- 16 The applicant’s application for review simply asserts: ‘having regard to the application and the relevant provisions of the Liquor Licensing Act the application warranted approval’.
- 17 In recognition of the deficiencies in the material that was placed before the Commissioner, on review the applicant sought to tender an affidavit of one of the directors of the applicant, Mr Philip Desteno¹ and for him to give oral evidence. It also sought to tender a report from URPS dated 6 November 2020, which purported to provide a community impact analysis² and for the Court to hear oral evidence from the author of the report, Ms Caro Madder.

¹ Exhibit A2

² Exhibit A3

18 Over an objection by the AHA, I received this evidence de bene esse.³ I now set out a summary of this evidence.

Mr Philip Desteno

19 Mr Philip Desteno and his wife are the sole directors and shareholders of the applicant.⁴

20 Mr Philip Desteno has over fifty years' experience in owning and operating supermarkets, beginning as a trainee supermarket manager after leaving high school and as owner of various Foodland Supermarkets. From 2000 to 2012, Mr Philip Desteno owned and operated a supermarket in Collinswood where he sublet a portion of his shop floor to a liquor store. He has also served on the Board of Foodland for 27 years, including 20 years as Deputy Chairman, and 10 years on the National Council of IGA Retailers.⁵

21 Mr Philip Desteno has owned and operated the supermarket at Hove since 2013.⁶ His son Damien is the current manager of the store.⁷

22 Mr Philip Desteno has no experience of holding a liquor licence.⁸ He stated that he had not considered applying for a liquor licence prior to the change from the needs test to the community interest test.⁹ He said that based upon his experience as a supermarket retailer he was aware of the potential for an increase in sales that a supermarket could achieve by being connected to a retail liquor store. As a result of this, on becoming aware of the legislative change in 2019, he decided to make enquiries into obtaining a liquor license.¹⁰ This culminated in the applicant's application for a packaged liquor licence being lodged with the Commission in January 2020.¹¹

23 In his affidavit, Mr Desteno outlined the applicant's proposal for the licensed premises. He said that it intended to establish a relatively small liquor store of at a neighbourhood shopping centre in Hove.

24 Mr Desteno said that in addition to the supermarket, the shopping centre has other specialty stores such as a café, bakery, an accountancy practice,

³ Evidence taken de bene esse means that it is received on a provisional basis subject to a final ruling by the Court as to its admissibility.

⁴ Affidavit of Phillip Desteno [32].

⁵ Aff [6]-[26].

⁶ Aff [21].

⁷ Aff [22].

⁸ Aff [27].

⁹ Aff [29]-[30].

¹⁰ Aff [19], [28], [95].

¹¹ Aff [37].

a post office, a chemist and a Vietnamese takeaway.¹² He said that there are 54 car parks for the centre.¹³

- 25 Mr Desteno said that the Foodland Supermarket that anchors the shopping centre trades from 8:00am to 8:00pm Monday to Friday, 8:00am to 5:00pm on Saturday, 11:00am to 5:00pm on Sunday.¹⁴ He said that it receives about 6,200 transactions per week, with a turnover of approximately \$150,000.00 per week.¹⁵ He estimated that approximately 70 per cent of its customers come from within a one kilometre radius and are usually residing in the suburbs of Hove, North Brighton, Somerton Park and Warradale.¹⁶ He said that some older people may do their weekly shop at the store, but it is also used daily by customers to complete ‘top up’ shopping.¹⁷
- 26 Mr Desteno said that the applicant expects that the proposed liquor store will provide convenience for people who wish to complete their liquor, grocery shopping, and any other errands at the other stores at the same time.¹⁸ He said that the proposed liquor store is expected to turn over approximately \$30,000 per week. He said that he expects that the liquor store will cause an increased turnover in the supermarket¹⁹ and that the other stores in the centre will also benefit from the proposed liquor store by attracting more customers and ‘strengthening’ the centre.²⁰
- 27 Mr Desteno said that the proposed liquor store would occupy about 100 m² plus cold storage of approximately 20m² with additional dry storage available if needed.²¹ He said that the 100 m² of floor space will be excised from the current supermarket floor.²² A floorplan of the proposed store was annexed to Mr Desteno’s application.²³ He said that the proposed liquor store will be accessible by external doors from the car park with no access from the supermarket proper. He said that the liquor store would be stocked from the back of house.²⁴
- 28 Mr Desteno said that the local Council and the landlord have approved the internal fit out for the proposed store.²⁵ He said that if approval is granted

¹² Aff [87].

¹³ Aff [89].

¹⁴ Aff [73].

¹⁵ Aff [91]-[92].

¹⁶ Aff [99]; Tr 21.17-19.

¹⁷ Aff [100].

¹⁸ Aff [101]-[102].

¹⁹ Aff [95].

²⁰ Add [103]-[104].

²¹ Aff [55].

²² Aff [74]-[75].

²³ Annexure ‘PD2’.

²⁴ Aff [56].

²⁵ Aff [86].

the work will be completed urgently to enable the liquor store to begin trading as soon as possible.²⁶

- 29 Me Desteno said that the applicant initially considered trading under the Cellarbrations banner because Cellarbrations stores are supported by the Metcash group, being the same entity that he deals with in securing grocery items for the supermarket.
- 30 Mr Desteno explained that after submitting its application the applicant was advised by Metcash that it could not trade under the Cellarbrations banner. Accordingly the applicant now intends to trade as a Sip ‘n’ Save store and to trade as “Sip ‘n’ Save Cellars Hove”.²⁷ He said that pricing and advertising will be consistent with the Sip ‘n’ Save brand.²⁸ He said that operating under this banner will offer customers a point of difference compared to the other liquor retail stores in the locality.²⁹
- 31 Mr Desteno said that as part of the Sip ‘n’ Save franchise, the applicant has received operating advice including potential sales, the range, promotional programs and their requirements to operate under the badge.³⁰ He said that the applicant expects that the new store will employ one fulltime manager and around five part-time or casual employees with some extras during the busy holiday periods.³¹ He said that the applicant had received advice from Sip ‘n’ Save on how to source a properly qualified manager for the proposed store but for now none have been employed.³² He said that based upon advice received from Sip ‘n’ Save that they are able to stock some 1350 products lines. He said that these will include the Sip ‘n’ Save ‘core range’ as well as a “slight focus on South Australian wines” and in particular those from the Adelaide Hills.³³ Annexed to Mr Desteno’s affidavit was an indicative stock list which has a selection of local and imported wines, including cask wines, spirits, pre-mixed drinks, beer and cider as well as some soft-drinks and juices.³⁴
- 32 Mr Desteno provided a copy of Sip ‘n’ Save’s *Liquor Marketing Group Information Update* dated August 2020, to demonstrate to the Court the type of assistance that will be available to the applicant while trading under the banner.³⁵ The *Liquor Marketing Group Information Update* provides no information about assistance that the Liquor Marketing Group could provide in relation to creating policies surrounding the responsible sale of

²⁶ Aff [85].

²⁷ Aff [60].

²⁸ Aff [61]-[62].

²⁹ Aff [63].

³⁰ Tr 20.13-16.

³¹ Tr 21-25.

³² Aff [70].

³³ Aff [65]-[67].

³⁴ Annexure ‘PD4’.

³⁵ Aff [70].

alcohol and harm minimisation for stores under the Sip ‘n’ Save banner. The document appears to have a focus on infrastructure and strategies available to boost profits and sales. By way of support, it outlines available e-commerce and computer based sales systems, as well as marketing focuses available to ‘member’ stores. It also outlines the rebates available to member stores for selling certain products.

- 33 The core marketing focuses are target advertising through social media and e-commerce as well as more traditional means such as catalogues, radio and television.
- 34 Through its sales growth statistics, the *Liquor Marketing Group Information Update* provides some insight into the ordinary customer of a Sip ‘n’ Save store. For example, it can be gleaned that an average transaction is for 1.6 items, and that over 50 per cent of transactions are for under \$30 with transactions between \$30-\$60 sitting at approximately 34 per cent of transactions.³⁶ For the two periods included in the update, all types of products (beer, cider, spirits, ready-to-drink, cask, wine and other) saw an increase in customer spending and most saw growth in the amount of customers purchasing the products.³⁷
- 35 Mr Desteno outlined the process that the present application has taken thus far. He said that the applicant placed a petition at the supermarket checkouts that collected 300 signatures in support. He said that the full petition was not able to be produced to the Court as two pages had been lost.³⁸ The petition pages tendered had approximately 120 signatures. In cross-examination, Mr Desteno agreed that numerous people whose names appear on the petition were named multiple times and many appear to be from the same family group.³⁹ He accepted that it was possible that minors may have signed the petition and that no one was excluded from signing it.⁴⁰ It is also notable that it appears no details about the proposal were provided to customers, including that the floor area would come from a portion of the already established supermarket or that it was proposing to trade as a Sip ‘n’ Save store.⁴¹ In light of the obvious deficiencies in the petition, I have resolved to ignore it.
- 36 Mr Desteno said that the applicant displayed a notice of the application at the supermarket and no objections or negative comments were raised from persons in store.⁴² However, in cross-examination, Mr Desteno agreed that

³⁶ Annexure PD 5 p 8-9

³⁷ Annexure PD 5 p 12-13.

³⁸ Tr 21.37-22.02; Petition tendered as Exhibit A4.

³⁹ Tr 30.17-33.05.

⁴⁰ Tr 39.18-30.

⁴¹ Tr 41.01-11.

⁴² Aff [47]-[49].

no effort was made to record negative comments, refusals to sign the petition, or to gauge whether people considered it a bad idea.⁴³

- 37 Mr Desteno said that the applicant wrote to several schools and made calls to two nursing homes in the area to advise them of the application. He said that no objections were raised.⁴⁴
- 38 Mr Desteno said that the applicant's solicitors wrote to the Holdfast Bay Council, the Police Licensing Enforcement Branch, the Department for Education, Department for Human Services, Department of Health and Wellbeing, and the Department of Premier and Cabinet – Aboriginal Affairs and Reconciliation Division. He said that there was no objection received in response to these letters.⁴⁵
- 39 In response to the Commissioner's decision, Mr Desteno stated that he decided to take legal advice to assist in the review. He said that the applicant also engaged URPS for social planning advice in relation to harm minimisation, demographic and social implications and to prepare a Community Impact Analysis.⁴⁶
- 40 Mr Desteno also responded to the Commissioner's refusal by undertaking a Responsible Service of Alcohol course, which he completed on 8 October 2020.⁴⁷ Mr Desteno said that his son Damien had also undertaken this training.⁴⁸
- 41 Mr Desteno said that he is aware of the General Code of Practice under the Act, and that he has considered the Code of Practice and Consumer and Business Services Guidelines. He stated that he would be comfortable in undertaking those obligations.⁴⁹
- 42 Mr Desteno said that the applicant has experience operating in a regulated supermarket environment as it is the holder of a tobacco license and is authorised to sell lottery tickets.⁵⁰ He said that in connection with these the applicant's staff are instructed to ask for ID for anybody who is "marginal in terms of age".⁵¹ He said that the applicant has been selling lottery tickets for approximately 5 years without incident.⁵²
- 43 Mr Desteno deposed to a low level of shoplifting occurring in the supermarket. He said that the supermarket has CCTV cameras throughout

⁴³ Tr

⁴⁴ Aff [46], [50].

⁴⁵ Aff [52]-[53].

⁴⁶ Aff [80]-[82].

⁴⁷ Annexure "PD 6".

⁴⁸ Aff [110]

⁴⁹ Aff [107]-[108]. H

⁵⁰ Aff [11]-[112].

⁵¹ Aff [114].

⁵² Aff [115].

the store which can be viewed in the manager's office to monitor customer behaviour. He said that the applicant intends to extend this to the liquor store.⁵³

- 44 Annexed to his affidavit, Mr Desteno provided a Licensee Risk Assessment Management Plan using a template provided by Consumer and Business Services.⁵⁴ The Plan provides check boxes and some boxes for comment, and is designed to outline things that a licence holder or an applicant should consider to ensure that the sale of liquor minimises harm and considers the community expectations. One portion of the Plan refers to what steps would be taken to reduce the likelihood of consumption of alcohol by minors and advertisements appealing to minors. The question of whether the premises is located near a school was answered by the applicant: 'No'. This is a notable oversight given the proximity of the proposed premises to several schools. To the question of how often special promotions will be conducted the applicant answered 'Rarely', with no detail of what special promotions would involve, despite stating in a separate portion of the assessment that special promotions would include free sampling of products in-store. There was no discussion of policies relating to these tastings in connection with minors who potentially might attend the proposed premises. Where the assessment asks to 'List other practices that you will put into place to make sure you comply with the General Code', the applicant simply wrote 'N/A'.⁵⁵

The URPS report and Ms Mader

- 45 The proposed premises are on the western side of Brighton Road, just south of the corner of that road and Holder Road. The URPS report contained a map depicting the features within a two kilometre radius of the proposed premises, which it identified as the relevant locality. The major road in the suggested locality is Brighton Road, which runs from north to south. Based on the report and the Court's own knowledge the features of the road, which are not controversial, are as follows. Brighton Road is a main arterial road which joins Anzac Highway, Glenelg, to the north, to the suburb of Seacliff, about seven kilometre away to the south. It is a significant road that carries much traffic, although it is not as significant or as busy as the other major north/south road in the general vicinity, Marion Road, which is parallel to Brighton Road, about three kilometre to the east. Within the two kilometre radius, Brighton Road travels through the suburbs of Somerton Park and North Brighton to the north, then Hove and Brighton, to the south. A little beyond the two kilometre radius to the north is Glenelg South and to the south, is Seacliff.

⁵³ Aff [117]-[119].

⁵⁴ Aff [110].

⁵⁵ Annexure PD 7 pp 8-9.

Less than a kilometre away to the west is the Esplanade, which runs north/south along the shoreline.

- 46 Based on the report and the Court's own knowledge the features of the suggested locality and its adjoining suburbs, in addition to the suburbs just identified, are that it contains the suburb of Warradale, which is east of Brighton Road, and about due east of Hove and further east, bordering on or beyond the 2 kilometre radius, are the suburbs of Oaklands, Oaklands Park and further still, Park Holme. It is reasonable to observe that the suburbs immediately east of Brighton Road in this area are less affluent than those west of it.
- 47 About 500 metres south of the proposed premises, to the east of Brighton Road, is the Hove Railway Station. Ms Mader reported that she believes any risk related to alcohol being purchased for consumption on the train is unlikely, given the distance and that the proposed store is not in the line of sight from the station.⁵⁶
- 48 About 500 metres to the north of the proposed premises, on the same side of Brighton Road, is Brighton Secondary School. Just under a kilometre further to the north, again on the same side of Brighton Road, is Sacred Heart College Senior School. To the south east, a few hundred metres away, is Marymount College.
- 49 Ms Mader proffered four suggestions as to why the proposed store is unlikely to encourage the purchase of alcohol or underage consumption.
- 50 The first is that parents are likely to be the main supplier of alcohol to people under 18 years.
- 51 The second is that there are already five licensed premises within the same locality. Ms Mader did not explain further the reasoning for this suggestion, but it could be assumed that it was to demonstrate that there is already a risk of exposure from the other premises.
- 52 The third is that the applicant intends to enforce a policy of nil supply to any young person in school uniform.
- 53 Lastly, Ms Mader reports that there are no treatment facilities for young people within two kilometres of the proposed premises.
- 54 By and large the points raised by Ms Mader are flawed.
- 55 The fact that parents might be the suppliers of alcohol to minors does not negate the obligation for licensees to do what they can to prevent the sale and supply of liquor to minors. Any premises which sells alcohol can play

⁵⁶ Community Impact Analysis p 9.

a part in preventing underage drinking through policies such as promoting a rigorous regime for checking customer's ages, prohibiting the sale of alcohol to adults accompanied by minors, and by ensuring that advertising and promotions of liquor do not target young people.

- 56 The fact that there are other licensed premises already within the locality is not to the point.
- 57 As for the policy of nil supply to any young person in school uniform, it is a positive, albeit that it would be a brazen school student who would attempt to purchase take away liquor from a bottle shop whilst in school uniform. What also matters, and is of greater practical significance, are the other policies that the licensee will implement to address the potential sale or supply of liquor to minors generally.
- 58 In addition to schools, also located within two kilometre radius of the proposed premises are many parks, outdoor recreational areas and sporting clubs. The Community Impact Analysis report identifies:
- 12 named public parks/recreational areas;
 - Brighton Oval;
 - 14 sporting clubs.⁵⁷
- 59 Ms Mader said that the proposed premises is not adjacent to any public open space. She said that the closest informal or formal public open space is the Dulcie Perry Park, which is a large open park with modest playground facilities. She noted that it is located on the eastern side of Brighton Road which is expected to provide a natural barrier for persons who buy alcohol to consume it in this park.⁵⁸ In addition, she thought it unlikely that the Brighton Oval would be either positively or negatively impacted by the proposed premises as it has its own clubrooms and social club.⁵⁹
- 60 A portion of the foreshore near the Somerton Yacht Club and the adjacent area are permanent dry zones. Ms Mader reported that she considered the proposed premises would be unlikely to effect the efficacy of these zones.⁶⁰
- 61 I note in passing that not included in the discussion within the Community Impact Assessment was the fact that the proposed premises is also proximate to both Somerton and Brighton Beaches and is less than a kilometre from the Esplanade and foreshore more generally. The

⁵⁷ Community Impact Analysis p 12.

⁵⁸ Community Impact Analysis p 12.

⁵⁹ Community Impact Analysis p 12.

⁶⁰ Community Impact Analysis p 13.

possibility of customers purchasing alcohol for consumption on the beach is apparent, which may have wider safety implications for both the consumer as well as the safety and enjoyment of other patrons of the beach.

62 Based upon census data, Ms Mader stated that some 23,793 residents live within a two kilometre radius of the proposed premises. URPS identified that the population profile of these persons as :

- 25.68 per cent over the age of 60;
- 48.3 percent aged 25-64 years; and
- 25.9 percent aged 0-24 years.

63 This represents a population percentage broadly consistent with that of the Greater Adelaide averages for each cohort, but slightly more in the 65 plus cohort and slightly less in the others.

64 The population in the suggested locality rates slightly higher on indicia of socio-economic advantage when compared to the Greater Adelaide averages. However, it is not particularly affluent to any great degree when compared to other typical suburbs on the SEIFA Index. The SEIFA Index measures the relative disadvantage by calculating a rank from indicia of disadvantage such as unemployment, low income and poor internet access.⁶¹

65 Ms Mader also reported that there is a smaller percentage of Aboriginal and Torres Strait Islander Peoples in the 2 kilometre radius than that of the wider Greater Adelaide area. Ms Mader stated that this smaller percentage also creates a smaller risk of negative impacts on Aboriginal and Torres Strait Islander Peoples.⁶²

66 Ms Mader only made brief reference to other take away liquor facilities in and about the suggested locality. They comprise of a BWS store attached to the Esplanade Hotel near the Esplanade, about a kilometre south east of the proposed premises, a drive through attached to the Brighton Metro Hotel, on the corner of Brighton Road and Sturt Road, about 1.5 kilometres to the south east of the proposed premises, a Cellarbrations store contained in Brighton Central, a shopping centre about 1.7 kilometre or so to the south of the proposed premises and on the same side of Brighton Road, a Fassina liquor store about 1.5 kilometre to the north east of the proposed premises on Oaklands Road, about 500 metres from the intersection of that road and Brighton Road, and a drive through attached to the Warradale Hotel, just short of two kilometres due east.

⁶¹ Community Impact Analysis p 6.

⁶² Community Impact Analysis p 8.

- 67 Based on the Court's own knowledge the features of Brighton Central, which are not controversial, are that it is a much larger shopping centre than the Hove Shopping Centre. It is anchored by a larger Foodland supermarket than the Foodland supermarket in the Hove Shopping Centre and it contains a much larger range of other offerings and a much larger number of car parks.
- 68 In cross-examination, Ms Mader agreed that she had strictly applied the two kilometres radius, as suggested by the guidelines, despite the fact that a significant portion of the area identified is sea. Ms Mader stated that she had not considered other suburbs which may fall just outside two kilometres towards the east of Brighton Road, some of which are less affluent.⁶³ Ms Mader was not able to comment on the number of shoppers who may come from outside of the two kilometre locality to use the Hove Foodland.⁶⁴
- 69 Ms Mader concluded her report by stating that the proposed premises is considered neutral in relation to the cultural, recreational or tourism impacts on the community in its local context. She summarised its positives as being the convenience of the main road location and the convenience of being adjacent to a supermarket.⁶⁵ In cross-examination, Ms Mader stated that she had not considered analysing the patronage of the Cellarbrations store at Brighton Central. Nor did she attempt to contact the proprietor of the Cellabrations store for information. As such, Ms Mader agreed that the evidence she relied upon to identify the benefits of the proposed premises was largely general in nature.⁶⁶

Should the evidence taken de bene esse be received?

- 70 I turn now to consider whether the evidence of Mr Philip Desteno and Ms Mader should be received.
- 71 The general practice of this Court in connection with applications for review made prior to the recent amendments of the Act was to adopt a fairly flexible approach that took into account how the proceedings were conducted before the Commissioner and how extensive the reasons were.⁶⁷ The Court was also generally amenable to receiving fresh evidence not tendered before the Commissioner.⁶⁸
- 72 Mr Coppola submitted that this practice needs to be reconsidered. He said that in light of the fact that the Commissioner is permitted to hear and determine all applications for licences, the previous decisions on this issue

⁶³ Tr 13.16.

⁶⁴ Tr 18.08-16.

⁶⁵ Community impact Analysis p 15.

⁶⁶ Tr 17.24-28.

⁶⁷ *Jackpots on Hindley* [2009] SALC 35.

⁶⁸ *The Airport Club* [2006] SALC 11.

can now be distinguished. He argued that proceedings before the Commissioner should be seen as the primary forum in which applications for new liquor licences are determined. He argued that if this Court allowed the tender of evidence that was not placed before the Commissioner, this would have the potential to undermine the integrity of proceedings before the Commissioner. He submitted that the review exercised by this Court should be seen as an appeal in the strict sense and that the role of this Court was simply to identify whether or not the Commissioner had fallen into error.

73 There is very little case law regarding the nature of a review under s 22 of the Act. Judge Beezley said as much in *The Airport Club*,⁶⁹ as did Judge Soulio in *Jackpots on Hindley*.⁷⁰ This is the first occasion that I have found it necessary to seriously consider the issue.

74 In *Coal and Allied v AIRC*⁷¹ Kirby J observed that in determining an issue such as this:

...the only safe starting point is a careful examination of the language and context of the statutory provisions affording the appellate right, together with a consideration of the powers enjoyed by, and duties imposed on, the body to which the appeal lies.

75 Section 22(4) provides:

(4) A review is in the nature of a rehearing.

76 Section 22(5) provides:

(5) On a review, the Court may exercise any one or more of the following powers:

- (a) affirm, vary or quash the decision subject to the 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.

77 Although the Act speaks of a review, I think that what is envisaged is a form of appeal and in respect of appeals that are by way of a rehearing there is a generally accepted view of what they entail.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 at [69].

78 In *Coal and Allied v AIRC* Gleeson CJ and Gaudron and Hayne JJ described the attributes of an appellate tribunal that conducts an appeal by way of rehearing and which may receive fresh evidence on appeal as follows:

Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error.⁷²

79 The corollary of this, is that if further evidence is admitted, and that evidence is significantly different to that presented before the Commissioner, the Court must decide for itself what decision should be made.

80 This then begs the question as to when the Court should permit the calling of evidence on the review.

81 At common law in connection with an appeal by way of rehearing, a court will ordinarily only allow the receipt of fresh evidence on an appeal if it is satisfied that it either was not available at the time of the original hearing or that notwithstanding the exercise of reasonable diligence, its existence could not have been discovered in time to be used in the original trial. Having met that test the court must then be satisfied that the evidence proposed to be adduced is reasonably credible and that had it been available at the trial, it is likely that the opposite result would have been reached.⁷³

82 I think these principles must be modified in connection with proceedings under the Act. The proceedings before the Commissioner can take a variety of forms, which can range for a formal hearing at which oral evidence is called and witnesses are cross examined, to an informal hearing conducted on the papers. An additional factor is that this type of litigation is not in the nature of a conventional inter parties dispute. Ultimately, the Court must be guided by what is in the public interest. That means that the Court can be concerned about matters beyond the immediate interests of the parties before it.

83 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 endeavor to place all relevant evidence

⁷² Ibid at [14].

⁷³ *Clark v Stingel* [2007] VSCA 292 at [25].

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.

84 In this case, as I mentioned earlier, the Commissioner resolved not to conduct a hearing. That did not prevent the applicant from placing evidence before the Commissioner. But it suggests that its failure to do so was not as a result of a forensic choice.

85 The evidence of Mr De Steno and Ms Mader is relevant. In endeavouring to arrive at the correct conclusion in this case, I think that the Court would be assisted by the receipt of this evidence. In all the circumstances, I have resolved to receive it.

The applicant's submissions

86 In *Liquorland (Australia) Pty Ltd (Park Holme)*⁷⁴ this Court noted that the guidelines, as published by the Commissioner, suggest that as a guide the locality of premises in the Adelaide Metropolitan Area is generally the area based on a two kilometre radius of the site of the relevant premises.

87 The applicant acknowledged that in this case part of that two kilometre radius was not populated, it being part of the ocean. It submitted that it did not follow that the radius should be expanded to include perhaps some further area north, east or south, but said that if it did, it would also add extra population numbers.

88 The applicant pointed out that in *Park Holme*, the Court noted that the suburbs in that locality were typical metropolitan suburbs. It said that the same was true of the locality under consideration here.

89 It submitted that a study based on the local government geographical area the locality would rank within the 11 most advantaged of South Australian local government geographical areas with 61 more disadvantaged areas in South Australia. It submitted that this relatively high ranking indicated that the community is less vulnerable to alcohol-related harm than most South Australian communities.

90 It noted that the guidelines published by the Commissioner invite a level of consultation to be undertaken by an applicant. It pointed out that it wrote to numerous entities, none of whom expressed any concern as to the application.

⁷⁴ [2020] SALC 37.

- 91 It asked me to note that the relevant population numbers were about 24,000 serviced by two bottle shops and a drive through. It said that in light of this the locality was not already awash with take away liquor facilities. It said that given the relatively low number of outlets already in the locality, there can be no finding that potential harm will result if the application is granted.
- 92 It submitted that there was no evidence that there were a greater number of vulnerable persons in this community as opposed to the general population.
- 93 The applicant pointed to the convenience of co-locating liquor outlets with supermarkets. It submitted that the proposed premises will offer a point of difference to the other takeaway liquor facilities in the locality, which has the potential to enhance competition, which in turn has to potential to improve the range, service and price of the takeaway liquor offerings in the locality.
- 94 It submitted that the proposed premises would provide employment opportunities, with perhaps as many as six or more new staff positions being created.
- 95 It submitted that it is reasonable to assume that there will be benefits to other retailers near to the site, as well as to the supermarket itself.
- 96 It submitted that it and its director, Mr Philip Desteno, are experienced grocery retailers in South Australia. It noted that Mr Desteno has undertaken his Responsible Service of Alcohol training and prepared a liquor management plan, as attached to his affidavit. It said that he is accustomed to operating a regulated environment as the holder of a tobacco licence and lotteries agency with no history of difficulty. It said that Mr Desteno has acknowledged that he has no background in liquor retail so he sought advice from the highly experienced Sip n Save organisation as to staffing, product range and the like.
- 97 It submitted that the applicant is the very sort of new entrant to the packaged liquor market anticipated by the Anderson report into liquor licensing in 2016.
- 98 It said that the new test reflected the view that former needs test was anti-competitive. It said that this application will bring about additional competition in the packaged liquor market as described in *Park Holme* as being a positive outcome for the community in a locality where there are very little, if any, negative outcomes likely to flow from a new licence being granted.
- 99 It concluded that like the proposed premises in *Park Holme*, what is proposed here is a modest proposal to enable the creation of a small,

attractive, convenience style bottle shop that many of the local community can be expected to use and will find it very convenient.

The AHA's submissions

- 100 The AHA submitted that the applicant needed to establish that the Commissioner erred and it contended that it had not done so. In submitting that the application for review should be dismissed, it essentially repeated the submissions that it made to the Commissioner. The AHA also argued that because a significant proportion of the two kilometre radius was unoccupied (it being in the sea) a larger area had to be considered. It said that when this was considered it included less affluent areas and more retail liquor facilities, both of which pointed against it being in the community interest to grant the application.

Consideration

The relevant locality

- 101 In *Park Holme* the Court observed that the 'locality' is now focused upon the local community and is therefore much more concerned with primary trade catchment areas, as opposed to the secondary catchment areas, and that a two kilometre radius from existing or proposed take away liquor facilities is a fair estimate of where the vast majority of the primary catchment cohort will reside. This is broadly consistent with the evidence of Mr Philip Desteno regarding where those who shop at the supermarket that anchors the Hove Shopping Centre in which the proposed premises will trade, reside. I do not think that it is of any great moment that a fair proportion of the two kilometre radius is within the sea. I do not think that it follows that the primary catchment area must be larger so as to arrive at a population number that might be expected if the entire two kilometre radius area was populated and therefore result in a greater area. The identification of the primary catchment area is not some theoretical exercise.
- 102 In this case the majority of persons who might be expected to use the Hove Shopping Centre and hence might purchase liquor from the proposed premises can be expected to live within two kilometres of the centre. Thus, this defines the relevant locality.

The community assessment test

- 103 Whilst it must be accepted that the abolition of the 'needs test' has removed a significant barrier in connection with applications for licences to sell take away liquor, the effect of the legislative changes is not all the one way. The imposition of the requirement to comply with the community impact assessment guidelines has significantly upped the ante in connection with an applicant's obligation to satisfy a licensing authority

of its awareness of the vulnerabilities of its potential customers and its knowledge, experience and competency in relation to the responsible service of liquor, especially to vulnerable persons.

- 104 In *Park Holme* it was noted that even without direct evidence this Court could proceed from the premise that the addition of a new take away liquor facility will have some negative consequences. It 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 result in violent and anti-social behavior. 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.

- 105 Operating a take away liquor facility is a serious business. Much of the alcohol that is consumed in this State is purchased from such facilities. Thus, there is a significant potential for the products sold in them to cause harm to members of the community.

- 106 Harm minimisation is a key component of the community interest test. In conformity with this, there is a heavy burden on the proposed operators of take away liquor facilities to demonstrate the steps they will take to ensure that liquor is not sold or supplied to minors or intoxicated persons and that their sale and supply of liquor will not promote harmful drinking practices.

- 107 In this case it is of some significance that there are a number of schools near the proposed premises and some of their students might reasonably be expected to visit the Hove Shopping Centre, and perhaps even more-so, if it contains a take away liquor facility. The potential for alcohol to cause harm to minors is well known. Unfortunately within this cohort binge drinking is not uncommon. Such drinking can cause brain damage or death. Intoxicated teenagers are known to place themselves in risky situations, such as drink driving, having unprotected sex, and placing themselves in vulnerable situations, that in the context of seaside suburbs, would include swimming when it is unsafe.

- 108 Concerns that this Court had in connection with the sale or supply of liquor to intoxicated persons or minors were allayed in *Park Holme* because of

evidence that established that the applicant in that case was acutely aware of the responsibility that comes with being a licensee of a retail liquor outlet. It demonstrated that it was an experienced liquor retailer, with sound policies in respect of the responsible service of alcohol, and established training programs for its retail liquor staff that reinforced the need for compliance with those policies.

- 109 In this case the applicant has no experience in selling take away liquor. That is not to say that only an experienced retail liquor seller can be granted a packaged liquor and sales licence. But what it does mean is that applicants for such a licence need to be able to demonstrate to the licensing authority that they have a thorough understanding of what the responsible sale of alcohol entails, and demonstrate that they have policies and plans in place to ensure that they, and those who will work for them, will do all that is reasonably possible to minimise the harm and potential for harm caused by the excessive or inappropriate consumption of liquor.
- 110 The fact that the applicant in this case, through its experience as a supermarket operator, appreciates issues around the prohibition of the sale and supply of certain things to minors goes part of the way to demonstrating the requisite understanding, as does the completion of the responsible service of alcohol program by Mr Philip Desteno and Mr Damien Desteno. But it is not enough for an applicant to say that because it intends to trade through a franchise, it will have access to policies and training programs in respect of the responsible service of alcohol. What really matters is what the policies and programs are, and what has and is to be done with them. And in connection with this, there are some concerning aspects of the applicant's application.
- 111 I find it troubling that the applicant did not think it was necessary to bring to the attention of the Commissioner the fact that it no longer intended to trade under the Cellarbrations badge. It is consistent with the lack of attention to detail identified by the Commissioner. It does not instil confidence that the applicant is fully aware of the responsibility that comes with being a licensee of a take away liquor facility.
- 112 In this case the Commissioner expressed his concern about the applicant's lack of attention to detail regarding the issue of harm minimisation and its implied submission that there were no 'at risk' groups within the locality.
- 113 I share that concern. There are people who are vulnerable to the adverse effects of alcohol in any community.
- 114 Finally are some of the answers that the applicant provided in the Licensee Risk Assessment and Management Plan. The oversight regarding schools in the area is of concern. So too are the vague answers in respect of special promotions, the absence of any discussion of policies relating to tastings

in connection with minors who potentially might attend the proposed premises, and the failure to list any other practices that it would put into place to make sure that it complied with the General Code. Collectively these tend to suggest that the applicant did not adequately turn its mind to what policies it would put in place to prevent the likelihood of sale or supply of liquor to minors, such as measures as simple as signage and appropriate training policies for staff.

- 115 The effect of all of this is that I have real concerns as to whether the applicant has sufficient awareness, knowledge, experience and competency in relation to the appropriate conduct of a packaged liquor sales licence. This of itself might have been sufficient to refuse the application. But in addition to this, there are a number of other factors that point the same way.
- 116 As was stated in *Park Holme*, the community assessment test ‘involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new licence and hence a new take away facility for the purchase of take away liquor in the relevant locality.’⁷⁵
- 117 Whist each case must be evaluated on its own facts, it is natural and appropriate to make comparisons with previously decided cases.
- 118 The characteristics of the locality under consideration here are not significantly different to those that were under consideration in *Park Holme*. That is scarcely surprising given that the localities are not far apart. Because part of the locality in this case picks up areas near the coastline, if anything, some of this locality might be better off than parts of the locality in *Park Holme*, but I do not think anything turns on it.
- 119 There are, however, some striking differences between other aspects of this application and those under consideration in *Park Holme*.
- 120 In this case, the supermarket that anchors the Hove Shopping Centre to which the proposed premises is to be attached, is considerable less busy than the supermarket under consideration in *Park Holme*. Based upon Mr Philip Desteno’s evidence, the Hove Shopping Centre could be described as a relatively small neighbourhood shopping centre.
- 121 In *Park Holme*, the supermarket that anchored the shopping centre to which the proposed liquor store was to be attached is extremely popular. Some 30,000 shoppers visit it every week. In *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*,⁷⁶ Kourakis CJ described it as likely to be in the top one-third of all South Australian supermarkets that has attracted a mix of adjacent tenants, within a shopping centre, that he noted was

⁷⁵ Ibid at [27].

⁷⁶ [2018] SASFC 31 at [2].

described by an expert planning consultant as a ‘landmark’ shopping centre.

- 122 The only opportunity for those using the Park Holme Shopping Centre to combine their liquor purchasing with their shopping for groceries, was at locations several kilometres away, one of which is the busy Westfield Marion Shopping Centre, another the busy Castle Plaza, and a third, a drive through attached to a hotel near the Coles Supermarket at Warradale. The other alternative was to cross the busy Marion Road and use the BWS store about 500 metres to the north.
- 123 In this case, less than two kilometres south of the Hove Shopping Centre, and on the same side of the road, is Brighton Central, that contains a larger Foodland supermarket that has adjacent to it a take away liquor facility trading under the Cellarbrations badge, as well as many other offerings. It follows that for those members of the relevant community who wish to purchase liquor in combination with their supermarket shopping, they can already conveniently do so.
- 124 In *Park Holme*, this Court found that many of the users of the Park Holme Shopping Centre could be taken to share the values of many contemporary Australians for whom the ability to undertake ‘one-stop shopping’ is very important. These matters led this Court to find that many members of the relevant community within the locality could be expected to take advantage of the opportunity to purchase liquor in combination with their other use of the facilities on offer at the shopping centre.
- 125 Contrary to the situation in *Park Holme*, in this case it cannot be said that there would be a contemporary community expectation that within the retail offerings contained within the Hove Shopping Centre there would be a take away retail liquor facility.⁷⁷
- 126 In summary, as with the addition of any new retail business, there will be some positive employment impact if the application is granted. It is reasonable to infer that some members of the relevant community would will find it convenient to purchase liquor from the proposed premises. That said, given the size of the Hove Shopping Centre and the number of people who use the Hove Foodland, I think it likely that the number will be relatively small.
- 127 On the hand, it can be taken as a given that there will be some in the relevant community who will be at risk of being adversely affected by the grant of this application. There are a number of schools within close proximity to the proposed premises which adds to that risk. There are some significant shortfalls in applicant’s case for demonstrating that it has a sufficient understanding of the need to have policies and procedures in

⁷⁷ (*Woolworths Ltd v IPG Management (SA) Pty Ltd & Ors*) [2015] SASFC 97 at [7].

place to ensure that liquor is not sold or supplied to minors or intoxicated persons and that its sale and supply of liquor will not promote harmful drinking practices.

- 128 The application is in respect of proposed premises contained in a small shopping centre. There would not be a contemporary community expectation that within the retail offerings contained within that centre there would be a take away liquor facility. Members of the relevant community can already conveniently combine their liquor shopping with their supermarket shopping.
- 129 Having undertaken the evaluative exercise that weighs the positives and negatives that will come with the grant of this application, I am not satisfied that the grant of the application is in the community interest.

The public interest discretion

- 130 Although not strictly necessary, I turn now to consider whether in any event the Court would have exercised its discretion under s 53 of the Act to refuse the application. Although there is obviously a strong correlation between the community interest and the public interest,⁷⁸ given that the public interest test has been retained, it must follow that the new criteria for the grant of a package liquor licence do not mean that all of the considerations relevant to the exercise of the discretion under s 53 of the Act, as it was prior to the recent amendments, are no longer relevant. Sometimes there will be additional factors relevant to the public interest test that extend beyond the community interest test.
- 131 In *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd*⁷⁹ Doyle CJ discussed a number of factors relevant to the exercise of the public interest discretion. He made the point that 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.⁸⁰ Having cautioned against the Court using ‘the discretion as a basis for imposing views about what is desirable’ he stated that it could do so if the views were ‘firmly linked to the principles on which the Act operates or is administered.’⁸¹
- 132 In connection with the former ‘needs test’ Doyle CJ said that its rationale was to afford an element of protection to encourage a licensee to provide facilities that the public want, coupled with a recognition ‘that the consumption of alcoholic liquor is associated with certain social problems,

⁷⁸ Ibid at [59].

⁷⁹ [2002] SASC 17; (2002) 81 SASR 337.

⁸⁰ Ibid at [28], 343.

⁸¹ Ibid at [28], 343.

and for that reason the number of premises at which the public may ...purchase liquor for consumption off the premises should be limited.⁸²

133 He gave examples of when the public interest discretion would be exercised. He said that these might include circumstances where existing premises are capable of catering for the public demand, or if licences are granted in circumstances likely to lead to existing premises failing to meet the obligation of licensees to satisfy existing public demand. He also identified circumstances where the grant of the licence would set an undesirable precedent. He spoke of the adverse consequences of increased number of retail liquor merchant's licences, undue or excessive competition, and the potential failure of existing licensees to provide the range of facilities at existing licensed premises that should be provided in the public interest.

134 Whilst some re-evaluation of these sentiments must be undertaken as a result of the removal of the 'needs test', they still have some relevance today.

135 In the past, this Court has said 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.⁸³

136 I think this remains so, notwithstanding the changes of the Act. Although most of the following remarks were directed to the now redundant 'needs' test, I think that some of the observations by King CJ in *Lovell v New World Supermarket Pty Ltd* continue to be important. In that case King CJ said:

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 standards in the service of liquor which are necessary in the public interest. It is, however, a matter of degree.⁸⁴

137 This echoes the views that King CJ expressed earlier in *Waiata Pty Ltd v Lane* where he spoke of some of the considerations that the Court might consider in exercising the s 53 discretion. He said:

⁸² Ibid at [31], 343-3.

⁸³ *Nuriootpa Cellars* [2009] SALC 12 at [198] per Judge Rice. See also, albeit in connection with a hotel licence: *Jackpots on Flinders* [2006] SALC 18 at [54] per Judge Rice.

⁸⁴ (1990) 53 SASR 53 at 55-56.

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.⁸⁵

138 In this case there are a number of take away liquor facilities within a relatively short distance of the proposed premises and for those who want to ‘one stop shop’ there is a perfectly adequate take away liquor facility that will fulfil that need less than two kilometres away on the same side of the road. Under the former ‘needs test’ members of the public were expected to put up with some inconvenience in meeting their take away liquor needs.⁸⁶ In this case, any inconvenience that the members of this locality have in meeting their take away liquor needs barely touches the scale. In other words, this licence is not ‘needed’ either by reference to the former ‘needs test’ or at all. Indeed, in this case, the community interest test could only be met by concluding that it is sufficient that some of the relatively small number of the local community who visit the Hove Shopping Centre would find it convenient to have the option of purchasing take away liquor as part of that visit. If this was sufficient to meet the community interest test, it is difficult to see how a licensing authority could refuse any application made by an experienced licensee for the grant of a packaged liquor sales licence in respect of any premises in the vicinity of a supermarket that does not already share an alignment with a take away liquor facility.

139 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

⁸⁵ (1985) 39 SASR 290 at 293-294.

⁸⁶ *Woolworths Ltd v Drase Coosit Pty Ltd* [2010] SASC 13 at [53] per Kourakis J, referring to *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 at 459-460.

concluded that it would not be in the public interest to grant this application because it would set an undesirable precedent.

Conclusions

- 140 The Court is not satisfied that the grant of the application is in the community interest.
- 141 If it were otherwise, the grant of this application would set an undesirable precedent. If it succeeded, other like cases would be difficult to refuse and this could lead to an over-supply of take away liquor facilities. It would not be in the public interest to allow that to occur.
- 142 The Commissioner was right to refuse the applicant's application. Accordingly, the application for review is dismissed.