

LICENSING COURT OF SOUTH AUSTRALIA

BWS PARA HILLS

JURISDICTION: Application for Review of a decision of the Commissioner

CASE NO/S: 55 of 2022

HEARING DATE: 26 September 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 18 October 2022

CATCHWORDS:

*Review of the Commissioner's decision to refuse an application for a packaged liquor sales licence in respect of proposed premises in the Para Hills Mall Shopping Centre – The Commissioner found that the application was 'low risk', made by an applicant who enjoys a good reputation as the proprietor of packaged liquor stores – The relevant locality contains approximately 20,000 persons, who have no concerning vulnerabilities in respect of alcohol – The locality enjoys a lower crime rate and unemployment rate relative to many other communities, contains no dedicated drug and alcohol rehabilitation facilities, and for now, has only two take away liquor facilities, one of which is attached to a hotel and the other being a stand-alone facility that might be expected to draw much of its custom from passing trade – Despite the positive aspects of the application, the Commissioner found that it was not in the community interest or the public interest to grant it because of his concern of the proximity of a packaged liquor store 500 metres from the proposed store, the fact that the Shopping Centre was not of a size that would necessarily be for many a one-stop shopping experience and his conclusion that the grant of the application would involve potential harm – **Held** that in light of the low take away liquor facility density in the locality, the measure of inconvenience involved in accessing the only packaged liquor store in the locality, and the absence of any other shopping centre in the locality that is a one stop shopping experience and which contains a packaged liquor store, the Commissioner erred in concluding that the negative aspects of the application outweighed the positives and erred in finding that it was not in the public interest to grant the application – **Held** that the application for review is allowed and in lieu of the*

*Commissioner's decision refusing the application, the application is granted –
Liquor Licensing Act 1997.*

Liquorland McLaren Vale [2022] SALC 53

Liquorland Australia Pty Ltd (Parkholme) [2020] SALC 37

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

Hove Sip n Save [2021] SALC 7

BWS - Seaford [2015] SALC 19

Cellarbrations Mannum [2021] SALC 42

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

BWS Cumberland Park [2022] SALC 70

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

Police Association of South Australia [2022] SALC 72

REPRESENTATION:

Counsel:

Applicant: Mr T Besanko

Solicitors:

Applicant: Clelands Lawyers

- 1 The applicant, Endeavour Group Ltd, who I will refer to in these reasons as BWS, applied to the Commissioner for Liquor and Gambling (the Commissioner) for a packaged liquor sales licence to trade under the BWS badge at proposed premises within the Para Hills Mall Shopping Centre at Wilkinson Road, Para Hills (the PHM Shopping Centre). The Commissioner refused the application.
- 2 Pursuant to s 22 of the *Liquor Licensing Act 1997*, BWS now seeks a review of that decision. It contends that the Commissioner made several errors in reaching his decision and that on the evidence presented the licence should have been granted.
- 3 The Australian Hotels Association, which made submissions to the Commissioner, did not seek to make any submissions on the review.
- 4 A packaged liquor sales licence is one of several licences available under the Act. It is within a special category of applications defined in the Act as a ‘designated application’. Pursuant to s 53A of the Act, a ‘licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.’
- 5 In deciding that question, s 53A(a) of the Act provides that the authority must have regard to:-
 - (i) the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
 - (ii) the cultural, recreational, employment or tourism impacts; and
 - (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
 - (iv) any other prescribed matter; and
- 6 In addition to these, s 53A(b) provides that the authority must apply the community impact assessment guidelines (the guidelines).
- 7 The guidelines stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has consulted with the relevant key stakeholders and interest groups in the community. The guidelines provide that ‘applicants are required to show, as part of their application, that they have engaged with members of the community and any relevant stakeholders.’ They provided that ‘[e]vidence of this may include petitions, survey results and/or letters of support.’

- 8 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that, if relevant, is expected to address matters such as: ‘the applicant’s products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest. Applicants are also required to provide, where applicable: a map and report regarding the locality generated through the Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of site/building.’
- 9 The applicant also needed to satisfy the Commissioner that the pre-requisites of s 57 of the Act have been met. Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.
- 10 In addition to these matters, and as with any other licence application, a licensing authority has, under s 53 of the Act, an unqualified discretion to grant or refuse an application under the 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)’. It must refuse to grant the licence if it is satisfied that to grant the application would be contrary to the public interest. It must also refuse to grant a licence if it ‘is satisfied that to grant the application would be inconsistent with the objects of the Act’. Section 53(2) provides that a licensing authority ‘should not grant an application as a matter of course without proper inquiry into its merits, taking into account the operation of Division 13’.
- 11 Section 3(2) mandates that: ‘Subject to this Act, in deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1)’. That subsection, which is s 3(1) provides:

The object of this Act is to regulate and control the promotion, sale, supply and consumption of liquor—

- (a) to ensure that the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor; and
 - (b) to ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly, consistent with the principle of responsible service and consumption of liquor; and
 - (c) to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public; and
 - (d) to facilitate the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry, in a manner consistent with the other objects of this Act.
- 12 Section (3)(1)(a) provides that for the purposes of s 3(1)(a) ‘harm caused by the excessive or inappropriate consumption of liquor includes’:
- (a) the risk of harm to children, vulnerable people and communities (whether to a community as a whole or a group within a community); and
 - (b) the adverse economic, social and cultural effects on communities (whether on a community as a whole or a group within a community); and
 - (c) the adverse effects on a person’s health; and
 - (d) alcohol abuse or misuse; and
 - (e) domestic violence or anti-social behaviour, including causing personal injury and property damage.
- 13 Division 13 relates to the making of submissions in respect of applications. Through s 76, it empowers the Commissioner of Police to make written submissions to the Commissioner in respect of an application. Through s 77, it creates a general right for persons to make submissions. Through s 78(1)(a), it enables the Commissioner to ‘call for further written submissions to be made in relation to a particular application’ and through s 78(1)(b), it enables the Commissioner to invite a person or body determined by the Commissioner to make written submissions in relation to a particular application.
- 14 The Commissioner refused the application on two grounds. He found that it was not in the community interest to grant it. He also found that to grant the application would be contrary to the public interest.

The application before the Commissioner

- 15 The application before the Commissioner was supported by an extensive document titled ‘Community Impact Report’ (the Report), which was prepared by MasterPlan, planning consultants.
- 16 The Report noted that the PHM Shopping Centre is anchored by a Woolworths Supermarket which has serviced the local community for over 46 years. It stated that in addition to the supermarket there are a variety of smaller tenancies that include a newsagency, butcher, fish and chip shop, delicatessen, hairdresser, chemist, fruit and vegetable shop, bakery, post office, pizza take away, and Salvation Army op shop. It noted that the proposed store is intended to compliment the supermarket so as to provide customers with a one-stop shopping experience and enable them to buy their groceries and drinks in the one convenient location.
- 17 It stated that the PHM Shopping Centre is located on the southern corner of the junction of Kesters and Wilkinson Roads, within a Neighbourhood Centre Zone as defined in the City of Salisbury Development Plan.
- 18 Kesters Road runs broadly from east to west and bisects Bridge Road to the west and Main North Road further to the west. Wilkinson Road forms a T-junction with Kesters Road that runs broadly from north to south.
- 19 For planning purposes, a Neighbourhood Centre Zone is intended to provide ‘a range of shopping, community, business, and recreational facilities for the surrounding neighbourhood and to provide the main focus of business and community life outside a district centre’.
- 20 The Zone in which the PHM Shopping Centre is located includes three commercial properties on the western side of Wilkinson Road and community, office and educational land uses to the south.
- 21 The community land use includes a library and facilities focussed on activities such as health, fitness and well-being, adult vocational learning and seniors programs.
- 22 The Report identified the relevant locality as comprising of the area within two kilometres of the proposed store. The Commissioner accepted this. No issue is taken with this and in connection with this review I proceed from the premise that this is the relevant locality.
- 23 The Report stated that there were no places of worship within close proximity to the proposed store; there are two aged care facilities, both more than a kilometre away from the store; no drug or alcohol treatment facilities; no dry area; no high schools; and no other buildings, facilities or areas that indicated high risk in terms of alcohol related problems.

- 24 The Report noted that within the locality there are, in addition to the PHM Shopping Centre, two other shopping centres.
- 25 One is about 1.8 kilometres by car away from the proposed premises. It is situated on Bridge Road, north of the intersection of that road and Kesters Road. It contains a Drakes Mini Supermarket and some other small offerings.
- 26 The other is about 1.7 kilometres by car to the southeast of the PHM Shopping Centre on Nelson Road, Para Hills. It contains an IGA supermarket and some other small offerings.
- 27 Each is significantly smaller than the Shopping Centre under consideration here.
- 28 The Report also noted that within the locality there were currently two take away liquor facilities.
- 29 One, being a store operating under a packaged liquor sales licence and trading under the Fassina badge, on Bridge Road, just south of the intersection of Bridge Road and Kesters Road, about 500 metres to the west of the proposed store.
- 30 The other being a drive through trading under the Thirsty Camel badge that is attached to the Somerset Hotel on Bridge Road, operating a general and hotel licence, about a kilometre north of the intersection of Bridge Road and Kesters Road and about 150 metres south of the Drakes Mini Supermarket, that I just mentioned. The Report stated that the connection between the hotel and that supermarket is not convenient because to get from one to the other it is necessary to walk through a car park.
- 31 The Report stated that based on its research there were 19,280 persons living within the locality.
- 32 The Report noted that the locality enjoys a significantly lower crime rate by comparison to the State average. It stated that the income was slightly lower than that of Greater Adelaide, but those in the locality also enjoyed lower housing costs and the unemployment rate was lower.
- 33 The Report contended that the grant of the application was not expected to result in any increase in the sale of alcohol, but rather would draw custom away from the take-away outlets already existing within the locality. It therefore argued that the grant of the application ought not be considered as causing a negative impact for at risk persons within the relevant community.

- 34 The Report contained the details of a survey which indicated that 79% of those surveyed supported the application and 95% considered that it was more convenient to do their grocery shopping and liquor shopping in the one location.
- 35 The Report included copies of correspondence with various entities who were invited to comment upon the application. These included a letter from the Drug and Alcohol Service of South Australia (DASSA) dated 10 July 2020. The letter made a general observation that the State Government is committed to reducing the impact of alcohol and drugs on the whole community, with some emphasis on young people and school-age children. It stated the existence of a ‘growing body of evidence linking the physical availability of alcohol to the risk of violence, including domestic violence’. It also stated that research had ‘found a strong association between increased proximity to off-premises licensed outlets and alcohol consumption at levels associated with risks of short-term harm at least weekly’.
- 36 Amongst others, letters were also sent to the Commissioner for Police and the City of Salisbury. Neither expressed any objection to the application.
- 37 The Commissioner resolved to exercise the powers conferred upon him by s 78(1)(b) of the Act which enables the invitation of submissions from a person or body determined by the Commissioner. He invited submissions from the Australian Competition and Consumer Commission (ACCC), Associate Professor Michael Livingston, who has conducted extensive research examining the relationships between the availability of alcohol, alcohol consumption and alcohol related harm, the Royal Australasian College of Surgeons (RACS), and Australia’s National Research Organisation for Women’s Safety (ANROWS).
- 38 Whilst the ACCC noted that there was a concern that Coles and Woolworths, through the repeated securing of packages liquor sales licences, could saturate the market and diminish competition, the Commissioner put this to one side. He wrote:

To whatever extent that matters of competition may be relevant to determining if the grant of a PLSL application is in the community interest or in balancing public interest considerations, I consider that it is relevant that this particular applicant does not currently operate any other packaged liquor sales stores in the locality, and on that basis I do not hold concerns that the grant of this particular application will result in diminished competition, market saturation or market dominance by the Applicant in the locality.

- 39 The submissions of Professor Livingston, RACS and ANROWS were the same as recorded by this Court in *Liquorland McLaren Vale*¹ and I will not repeat all of what I said about them here.
- 40 The effect of Professor Livingston's submissions was that research indicates a correlation between the density of packaged liquor outlets, heavy drinking and alcohol problems and domestic violence, general violence and alcohol specific disease.
- 41 The effect of RACS submissions was that there was substantial evidence that regulating the physical availability of alcohol was an effective way of reducing the negative effects of alcohol; the Covid-19 pandemic has been associated with an increased incidence of domestic violence, half of which are related to excessive alcohol consumption; and that in this period of increased stress, pressure and uncertainty, allowing further saturation of outlet density would be to send the wrong message and would set a dangerous precedent for future applications.
- 42 The effect of ANROWS' submissions was that a study in May 2020 conducted by the Australian Institute of Criminology reported an increase in alcohol consumption in the three months from February 2020 and another study 'highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families'. It asserted the need for greater community awareness of the connection between increased alcohol consumption due to the Covid-19 pandemic, and the risk of alcohol related harm.
- 43 BWS responded to these submissions by making the following points:
- These submissions do not address the issue of harm in the relevant locality;
 - The community interest test involves an evaluative judgment that weighs the positives and negatives of an application and it is unclear whether the submissions reviewed any of the material that commented on the positive aspects of the application;
 - There is no BWS store in the locality and the proposed premises will offer a different product range;
 - The proposed premises will be a modest sized store operated by an experienced liquor retailer with extensive policies and procedures and detailed staff training and induction;
 - The proposed site is not near a congregation area for school children and there is no risk of minors being exposed to liquor products;

¹ [2022] SALC 53.

- There are no aged care facilities in close proximity to the proposed premises; and
- Apart from the general letter from DASSA none of the many stakeholders who were notified of the application expressed any objection, including SAPOL and the City of Salisbury.

44 In connection with these submissions the Commissioner wrote:

It is clear from the expert evidence put forward by the Applicant that the liquor licence density for the locality is significantly lower than the State average and that the locality is clearly not 'awash' with take away liquor facilities.

I have carefully considered the submissions by RACS, ANROWS and Professor Livingston and consider that I can place some weight on these submissions, at least at a general level, despite the submissions to the contrary by the Applicant. Alcohol causes significant harm in the community and it is for this very reason that alcohol is a highly regulated product.

The Applicant is an experienced and reputable licensee who operates an established business, with well trained staff and a comprehensive range of policies and procedures, which I consider would adequately mitigate the risk of harm to vulnerable members of the community.

I have considered the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor, and I am satisfied on the material before me that the risk of harm posed by the proposed application is relatively low.

45 The Commissioner stated that he was satisfied that the proposed store would not negatively impact upon the activities conducted at the community buildings and facilities in the locality.

46 The Commissioner was not concerned about the profile of persons residing within the locality. He wrote:

There is no evidence before me that suggests the locality in question is particularly vulnerable, or that the present application poses anything but a low risk of harm to the community...

47 The Commissioner accepted that the granting of the application would provide additional convenience to some members of the relevant community. He accepted that the proposed premises would provide some employment opportunities, some of which would be for the benefit of members of the relevant community.

- 48 In determining the community interest test the Commissioner was required to undertake ‘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’.²
- 49 On a positive note, the Commissioner was faced with an application which was described by him as being ‘low risk’. It was made by an applicant who enjoys a good reputation as the proprietor of packaged liquor stores and has appropriate policies and procedures in place in connection with the safe and responsible supply of alcohol. The application sought to establish a packaged liquor store for the benefit of a community, many of whom can be taken to support the application. It was within a locality of nearly 20,000 persons, who have no concerning vulnerabilities in respect of alcohol, and which enjoys a lower crime rate and unemployment rate relative to many other communities and contains no dedicated drug and alcohol rehabilitation facilities. For now that locality has only two take away liquor facilities, one of which is attached to a hotel and the other being a stand-alone facility.
- 50 Despite the positive aspects of the application, the Commissioner refused it.
- 51 By reference to the remarks of King CJ in *Lovell v New World Supermarket Pty Ltd*³ that were adopted by this Court in *Hove Sip n Save*,⁴ he identified as a negative, the fact that there was a packaged liquor store 500 metres away from the proposed store.
- 52 By reference to *BWS - Seaford*,⁵ he identified that there were a limited number of tenancies within the PHM Shopping Centre, such that the addition of the proposed store would not, for many, result in a one-stop shopping experience.
- 53 In view of these matters, and that having regard to risk of harm that comes with the grant of any new packaged liquor sales licence, he concluded that the negatives outweighed the positives.
- 54 The Commissioner then went on to add:

Additionally, having considered the broad public interest discretion available in s 53 of the Act, I am also of the view that it would not be in the public interest to grant this application as the potential benefits that may accrue with the grant of this application are not sufficient to offset or counter-balance the potential harm that may be

² *Liquorland Australia Pty Ltd (Parkholme)* [2020] SALC 37 at [27].

³ (1990) 53 SASR 53 at 55-56.

⁴ [2021] SALC 7 at [136].

⁵ [2015] SALC 19 at [79].

caused to members of the community in the event that the application were to be granted.

Consideration

55 Whilst it was appropriate for the Commissioner to make comparisons with previously decided cases,⁶ care must be taken in doing so.

56 The observation of King CJ in *Lovell* that the Commissioner referred to was this:

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.**⁷

57 That last sentence is important, because it emphasises that there is no mathematical formula that determine these matters and in the end, each case must be decided on its own facts.

58 The observations made by King CJ in *Lovell* were in connection with the previous ‘needs’ test and were in response to a submission made in that case about the significance of the widespread community desire to one-stop shop, and its relevance in determining whether the ‘needs’ test had been met. King CJ was making the point that just because a shopping centre does not contain a take-away liquor facility, that of itself does not establish that the facility is needed, especially if there is already a first-grade bottle shop within 200 or 300 metres, because if it were otherwise, there would be too many bottle shops. This is consistent with the observation made by this Court in *Liquorland McLaren Vale* where it said:

... limiting the number of packaged liquor sales licences adds to their value, which in turn encourages the owners of these licences to operate good quality bottle shops that are compliant with the obligations imposed by the Act and the conditions of the licence.⁸

⁶ *Hove Sip n Save* ibid at [117].

⁷ Ibid.

⁸ [2022] SALC 53 at [171].

- 59 An additional matter that has emerged from the evidence before this Court in *Liquorland McLaren Vale* is a relationship between liquor premises density and increased alcohol related harm.⁹
- 60 *Hove Sip n Save* and its reference to *Lovell* is important in the sense that it demonstrates that firstly, the abolition of the ‘needs’ test does not mean that packaged liquor licences are there for the asking and secondly, the number and whereabouts of other take away liquor facilities in and about the relevant locality are very relevant consideration in respect of the community interest and public interest tests. But this case should not be understood as standing for the proposition that the existence of a packaged liquor store within a few hundred metres of a proposed store will doom an application for a packaged liquor sales licence to failure. I repeat, each case must be decided on its own facts.
- 61 In this case, the fact that there is a very good quality packaged liquor store just 500 metres away from the proposed store is an important consideration. But other additional considerations are the fact that the Fassina store is the only packaged liquor store in the locality, located on a busy road, and the only other take away liquor facility is attached to a hotel. We know from past cases that many in the community do not wish to purchase liquor from take away facilities attached to hotels.¹⁰ Thus for many of those residing in the locality who wish to purchase liquor within the locality and from somewhere else other than a hotel, the Fassina store is the only option.
- 62 This is factually quite different to the situation in *Hove Sip n Save* in which there were two packaged liquor stores as well as three take away facilities attached to hotels within the relevant locality.
- 63 The fact that the Fassina store is located on a busy road is a relevant consideration. The following observations of Kourakis CJ in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*, notwithstanding that they are contained in a dissenting judgment, are valid. He said:
- Members of the South Australian public are entitled to a measure of convenience in balancing their busy lives and, if they are less mobile, in negotiating urban congestion and other obstacles.¹¹
- 64 This Court is permitted to know that Bridge Road carries traffic in two lanes in either direction. It may not be as formidable as Main North Road, which was observed by this Court in *Woolworths Limited v Smithfield Hotel Pty Ltd*¹² or Marion Road, which was observed in *Liquorland*

⁹ Ibid at [170].

¹⁰ See, for example *Cellarbrations Mannum* [2021] SALC 42 at [111]-[112].

¹¹ [2018] SASFC 31 at [13]. See, also *BWS Cumberland Park* [2022] SALC 70 at [41].

¹² [2012] SALC 57.

Australia Pty Ltd (Parkholme).¹³ But for many of the relevant community who wish to purchase take away liquor as part of their shopping expedition to the PHM Shopping Centre, using the Fassina store on Bridge Road would involve some measure of inconvenience, especially during peak hours.

65 Given the relatively low density of take away liquor facilities within the locality, with respect, I think the Commissioner erred in being particularly concerned about the proximity of the Fassina store to the proposed premises.

66 As for the Commissioner's reference to *BWS - Seaford*, it is also important to reflect upon the facts in that case.

67 The proposed store in that case was to be located in the Seaford Meadows Shopping Centre which was described as 'a recently constructed neighbourhood shopping centre that services the newly developed suburb of Seaford Meadows'. The Court went on to observe that '[f]or now the Seaford Meadows Shopping Centre comprises of the Woolworths Supermarket and a relatively small range of supporting specialty stores and eating outlets'.

68 In that case the applicant was arguing that it was necessary for a bottle shop to be added to the stores at the Seaford Meadows Shopping Centre because the existing take away liquor facilities in and about the locality were not adequately meeting the needs of the public.

69 Amongst other commentary about the characteristics of the relevant locality the Court noted:

About two kilometres south of the proposed premises is the Seaford Central Shopping Centre... It is a much more substantial shopping centre than the Seaford Meadows Shopping Centre... In contrast to this the Seaford Central Shopping Centre it contains two large supermarkets, a Foodland and a Woolworths, a Big W store, a Cheap As Chips, a BWS store, Barossa Fine Foods, a butcher, a bakery, a fruit and vegetable shop, numerous cafés, a Hungry Jack's, a Subway, a Wendy's, various gifts, homewares, electronics, health and beauty and fashion and accessories stores, pharmacies, jewellers, mobile phone stores, a post office, a travel agency, a H & R Block office, a newsagency, and various banks and credit unions.¹⁴

70 A matter that influenced the Court in rejecting the application was the fact there were a limited number of tenancies within the Seaford Meadows

¹³ Ibid.

¹⁴ [2015] SALC 19 at [18].

Shopping Centre, such that adding the proposed store would not, for many, result in a one-stop shopping experience.

- 71 But this observation must be considered in context.
- 72 Within the locality in that case, as will be observed from the description set out above, there was a shopping centre that truly was a one-stop shopping experience. Moreover, it contained the very same badged store that was being proposed at the Seaford Meadows Shopping Centre and it was less than five minutes away by car, driving on easy to navigate roads. In connection with the ‘needs’ test, which contemplated that need was not established just because access to a take-away liquor facility involved some inconvenience, the degree of inconvenience involved in *BWS - Seaford*, barely touched the scale.
- 73 *BWS - Seaford* should not be understood as standing for the proposition that because the number of outlets in a shopping centre is limited, and for many will not comprise of a one-stop shopping experience, an application for a packaged liquor sales licence will necessarily fail. That is not to say that this is an irrelevant factor. It clearly is relevant. If, as was the case in *Hove Sip n Save*, there is a much larger shopping centre nearby that already contains a good quality packaged liquor store, the case in favour of a new packaged liquor sales licence at the smaller shopping centre would be significantly weakened.
- 74 In this case, the other shopping centres within the locality are significantly smaller than the PHM Shopping Centre. And the one take away liquor facility that is proximate to a shopping centre is not very conveniently connected to that shopping centre and it is attached to a hotel.
- 75 In this case, the Commissioner found that many who use the PHM Shopping Centre would find it very convenient to use the proposed store. He was right to make that finding. With respect, I think the Commissioner erred in being particularly concerned about the size of the PHM Shopping Centre and the relatively limited number of offerings that it contains.
- 76 Every application for a new licence, carries a risk of additional alcohol related harm.¹⁵ The Commissioner was therefore right to be concerned about the potential for alcohol related harm, should the application succeed. But as I observed in *Police Association of South Australia*, harm minimisation is just that. It is not harm eradication.¹⁶ Thus the question is not whether there is any risk. The question is whether there is an unacceptable risk. In light of the Commissioner’s finding that this was a

¹⁵ *Liquorland McLaren Vale* ibid at [141].

¹⁶ [2022] SALC 72 at [112].

low-risk application, respectfully he should have found that the risk here was acceptable.

- 77 In my respectful opinion, the Commissioner erred in his evaluation of the positives and negatives concerning this application and he should have found that the community interest test had been met.
- 78 As with other BWS stores, the proposed store will be an attractive, well stocked store providing a local convenience offering.
- 79 There are some places of worship in the locality. It can be inferred that many of the parishioners of the places of worship would frequent the Shopping Centre and though the required advertisement of this application would have been aware of it. None have expressed any concern about the application.
- 80 None of the other matters raised by s 57 of the Act are of concern here.
- 81 I find that the premises will be suitable. I find that there is negligible potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity or that they will prejudice the safety or welfare of children attending nearby kindergartens and schools. I find that the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted.
- 82 I now turn to the issue of discretion.
- 83 In finding that the application was not in the public interest, the Commissioner did not identify any matters additional to those that he relied upon in finding that the community interest test had not been met. In light of my conclusion that his determination of the community interest test miscarried, it becomes necessary for this Court to consider afresh the issue of discretion.
- 84 As I observed in *BWS Cumberland Park*:
- Had there been compelling evidence that there was, and remains, a substantial increase in alcohol consumption as a result of the pandemic a licensing authority would have been entitled to take the view that now is not the right time to be increasing the opportunities for members of the public to purchase liquor from an additional take away liquor outlet.¹⁷
- 85 The most recent evidence placed before this Court suggests that if this was an issue, it is no longer one.¹⁸

¹⁷ Ibid at [56].

¹⁸ *BWS Cumberland Park* ibid at [35].

- 86 In summary, this is a modest application to create an attractive convenience type bottle shop to be co-located with a supermarket in a shopping centre that for planning purposes is classified as a Neighbourhood Centre Zone. It is in a relatively safe part of metropolitan Adelaide that has a low density of take away liquor facilities in the immediate vicinity of the proposed store. The profile of people residing within the locality can be described in respect of potential alcohol related problems as ‘low risk’. It will be operated by an experienced and reputable operator. It will result in some modest employment opportunities. Apart from a general expression of concern by the DASSA, it met with no opposition from any other stakeholders, including the police and the City of Salisbury. Concerns about the impact of the pandemic on alcohol consumption, on the evidence available to this Court, have been allayed.
- 87 In light of all of this, I cannot discern any grounds that would warrant a finding that it is not in the public interest to grant this application. To the contrary, I make a specific finding that it is in the public interest to grant it.

Conclusion

- 88 The powers conferred on this Court on a review, include the power to make any decision that should, in the opinion of the Court, have been made in the first instance.¹⁹ In the exercise of this power, I grant BWS’s application for review and set aside the orders made by the Commissioner. In lieu of them, I find that the grant of the application is in the community interest and the public interest. BWS’s application for a packaged liquor sales licence in respect of the proposed premises is therefore granted. Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court’s consideration.

¹⁹ See s 22(8)(b) of the Act.