

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND MCLAREN VALE (No. 2)

JURISDICTION: Application for Review of or an appeal from a decision of the Commissioner

FILE NO: 28 of 2022

HEARING DATE: 1 and 2 June 2022, written submissions from intervenor

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 29 July 2022

CATCHWORDS:

*Application seeking review of a decision by the Commissioner for Liquor and Gambling refusing an application for a package liquor sales licence in respect of proposed premises adjacent to a supermarket in McLaren Vale, a wine growing and tourist destination – The Commissioner refused the application because he considered that it might adversely affect some wineries in the locality and therefore have an adverse effect on tourism in the locality; He considered that the fact that the proposed premises was to be located adjacent to a supermarket and was therefore very conveniently located in respect of the shoppers using that supermarket potentially increased the risk of harm; He considered that there were already many opportunities for those in the locality to purchase liquor for off licence consumption; He accepted submissions that the Covid-19 pandemic had led to added stress in the community, that this might be resulting in more alcohol consumption and associated risk of violence, including domestic violence and that a cautious approach was warranted – During the hearing of the review the Court was advised that a store that was trading under a packaged liquor sales licence at premises near the proposed premises had ceased trading at those premises – **Held** that although the ‘needs test’ has been removed it does not follow that applications for packaged liquor sales licences will be significantly easier to obtain as the Act is now more focussed towards harm minimisation – That said harm minimisation is just that, it is not harm prevention, such that the mere fact of any risk that the grant of a packaged liquor sales licence could cause harm is not of itself a valid reason to refuse an application – **Held** that in making the discretionary judgment as to whether the application is of net benefit to the local community and is in the public interest the licensing authority must balance each of the objects and arrive at an appropriate synthesis in the particular circumstances of the case by the way of a discretionary judgment, recognising that harm minimisation is of prime importance – **Held** that the absence of objections from the local council and the*

*police was evidence capable of supporting an inference that the relevant community did not have a particular problem with alcohol related harm – **Held** that to address harm minimisation a licensee does not have to keep tabs on its customers – **Held** that without direct evidence it was not open for the Commissioner to find that the grant of the licence would have an adverse effect on tourism in the locality – **Held** that without direct evidence it was not open for the Commissioner to find that the mere fact of a bottle shop’s co-location with a supermarket would create an appreciable risk of increased harm – **Held** that in light of this the Commissioner may have given too much emphasis to the convenience that the proposed store would bring to the local community – **Held** that a licensing authority can take into account prevailing social circumstances in resolving to take a cautious approach – **Held** that because the Act refers to the potential for harm, hypothesis and conjecture about the risk of future harm that falls short of probability may be relied upon – **Held** that expert evidence based upon reputable research can have probative value and can be relied upon – **Held** that it may be appropriate to be concerned about licensed premises density – **Held** that it was open for the Commissioner in his public interest discretion to be concerned that the application might set an undesirable precedent – **Held** that the Commissioner’s decision cannot stand but how the matter is to be dealt with requires further consideration – **Held** that there are serious issues regarding the current relevance of the evidence previously put in respect of the social implications of the Covid-19 pandemic – **Held** that the evidence about what is to be made of the packaged liquor sales licence formerly trading in McLaren Vale is incomplete – The parties are invited to provide further submissions – Liquor Licensing Act 1997, Liquor Licensing (Liquor Review) Amendment Act 2017.*

Liquorland McLaren Vale [2022] SALC 44

Liquorland (Australia) Pty Ltd v North Adelaide Village Shopping Centre Pty Ltd and Village Cellars (SA) Pty Ltd [2012] SALC 42

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

Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227

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

Hove Sip n Save [2021] SALC 7

Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258; (2000) 22 WAR 510

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

Cole v South Tweed Heads Rugby League Football Club Limited [2004] HCA 29; (2004) 217 CLR 469

Haynes v Ceduna Community Hotel Ltd [2011] SAEOT 7

Return to Work Corporation of South Australia v BI (Contracting) Pty Ltd & Ors [2022] SASCA 49

Woolworths Liquor BWS Arndale [2014] SALC 14

Nardi v Director of Liquor Licensing (Occupational and Business Regulation) [2005] VCAT 323

Malec v JC Hutton Pty Ltd [1990] HCA 20; (1990) 169 CLR 638

H v Schering Chemical Ltd [1983] 1 All ER 849

Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor [2014]
SASCFC 87

Liquorland (Australia) Pty Ltd & Ors v Lindsey Cove Pty Ltd & Anor [2002] SASC
17; (2002) 81 SASR 337

Cellarbrations Mannum [2021] SALC 42

Nancollas v Insurance Officer [1985] 1 All ER 833

REPRESENTATION:

Counsel:

Applicant: Mr M Roder QC with Mr R Harley
Objector: Mr S Henry QC with Mr G Coppola
Intervenor: Ms V Montandon

Solicitors:

Applicant: Jones Harley Toole
Objector: Pedler Lawyers/Australian Hotels Association (SA)
Intervenor: Crown Solicitor's Office

- 1 The applicant, Liquorland (Australia) Pty Ltd (Liquorland), applied to the Commissioner for Liquor and Gambling (the Commissioner) for a packaged liquor sales licence in respect of proposed premises at Tenancy 21 of the McLaren Vale Shopping Centre, in Main Road, McLaren Vale. The Commissioner refused the application. Pursuant to s 22 of the *Liquor Licensing Act 1997*, Liquorland 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.
- 2 The Australian Hotels Association (AHA), which made submissions to the Commissioner, participated through counsel on the review.
- 3 In dealing with the application for review, I commence with an overview of the relevant legislative provisions.
- 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 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
 - (b) must apply the community impact assessment guidelines.
- 6 The community impact assessment guidelines (the guidelines) stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has liaised 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’.

- 7 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.

- 8 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.

- 9 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)’.¹ It must refuse to grant the licence if it is satisfied that to grant the application would be contrary to the public interest.² It must also refuse

¹ Section 53(1).

² Sections 53(1a).

to grant a licence if it ‘is satisfied that to grant the application would be inconsistent with the objects of the Act’.³ 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’. 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.

- 10 In refusing the application, the Commissioner 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

- 11 As mentioned earlier, the application was in respect of proposed premises in the McLaren Vale Shopping Centre in Main Road, McLaren Vale. McLaren Vale, which is part of the City of Onkaparinga, is a town situated about 35 kilometres south of Adelaide within an area that is replete with vineyards and wineries, and which is a major tourist attraction. Main Road, as the name suggests, is the main street in McLaren Vale that runs approximately from east to west and bisects the town.
- 12 The application that was the subject of the consultation required by the guidelines and which was the subject of the decision by the Commissioner was based on the proposed store trading under the Liquorland badge, with some emphasis on liquor products produced in the McLaren Vale region. It belatedly made an application to amend its application in this Court on the basis that the proposed store would trade under the Vintage Cellars badge. The Court refused the application.⁴ Accordingly, this review proceeds by reference to a business model based on a Liquorland store.
- 13 This Court has heard evidence in other cases to the effect that stores trading under the Liquorland badge are convenience based, that stock a range of products directed towards the convenience customer. In contrast to this, those trading under a Vintage Cellars badge are more in the nature of an up-market store, that have some focus on fine wine and other premium liquor products.⁵ For now, the Court assumes that this remains the case.

³ Section 53(1b).

⁴ *Liquorland McLaren Vale* [2022] SALC 44 at [78] and [79].

⁵ See, for example: *Liquorland (Australia) Pty Ltd v North Adelaide Village Shopping Centre Pty Ltd and Village Cellars (SA) Pty Ltd* [2012] SALC 42 at [35] and [37].

- 14 The application before the Commissioner was supported by an extensive document titled 'Community Impact Assessment Form', which included a planning report prepared by Ekistics Planning and Design, a retail economic analysis prepared by Ethos Urban Pty Ltd, and a data analysis survey prepared by Data Analysis Australia.
- 15 The Ekistics report noted that the guidelines identify the relevant locality to comprise of the area within two kilometres of the proposed store. It noted that within that area there were currently three takeaway licensed facilities, being a store operating under a packaged liquor sales licence and trading under the BWS badge in the McLaren Vale Shopping Centre, another store on Main Road, just east of the BWS store, operating under a packaged liquor sales licence specialising in wine sales and trading as Australian Boutique Premium Wines, and a bottle shop and drive through attached to the McLaren Vale Hotel, Main Road, several hundred metres to the west of the proposed store, trading under the Thirsty Camel badge. It stated that considering this, the existing density of liquor stores in the relevant locality, which has a population of 3,096 residents, was one per 1,032 residents.
- 16 The report argued that because of the unique nature of the business being conducted by Australian Boutique Premium Wines, it could be excluded from consideration, such that the existing density was much lower.
- 17 In addition to this, it stated that because of the location and function of the McLaren Vale township, it ought to be seen as serving a much wider catchment than the area within two kilometres of the proposed store, such that the existing density should be seen as even lower.
- 18 The report noted that the locality experienced relatively slow population growth compared to the rest of the State. It then went on to make the point that the township experiences seasonal fluctuations in line with tourism to the region, with related employment opportunities.
- 19 It stated that the population profile was relatively unremarkable.
- 20 The report analysed the layout of the McLaren Vale Shopping Centre. Its analysis is consistent with the observations made by the Court on its view and the description that follows is uncontroversial.
- 21 The McLaren Vale Shopping Centre is towards the eastern edge of the town, on the northern side of Main Road. That part of the town slopes upwards from west to east.
- 22 The shopping centre is on two levels. One is on a lower level, facing west, with large adjacent car parks to the west, northwest and northeast.
- 23 The other is on a higher-level facing south, with an adjacent car park to the southeast, which is immediately adjacent to Main Road, McLaren Vale.

- 24 The lower and upper levels of the McLaren Vale Shopping Centre are connected by a path and stairway or ramp. Those who wish to shop at both levels can do so using the path or by driving from the lower car park to the upper car park within the shopping centre or vice versa.
- 25 The lower level is anchored by a very large full line Coles Supermarket of some 3,800 m² in area. The proposed store faces the mall within the lower area, adjacent to the Coles Supermarket. On the western edge of the Coles Supermarket in the lower area is a chemist, a butcher, a take-away food outlet, a travel agent and a newsagency.
- 26 The higher level is anchored by a Foodland Supermarket of some 1,700 m² in area. On the southern edge of the Foodland Supermarket are numerous other stores and businesses, including the BWS store described earlier.
- 27 The report recorded whilst there were several community buildings within the locality, none were located within the McLaren Vale Shopping Centre. It suggested that there would be no over representation of vulnerable persons or at-risk groups using the proposed store.
- 28 The report alluded to evidence that there are about 1.2 million visitors to the City of Onkaparinga area per year and that plans are in place to increase this to up to 1.6 million by 2023.
- 29 The report stated that the proposed store would provide an added convenience to the patrons of the Coles Supermarket, who would be able to combine their liquor purchasing with their grocery and household needs under the one roof, so as to provide a 'one stop' shopping experience that would add to the choice of those using the McLaren Vale Shopping Centre and the locality more generally.
- 30 The Ethos Report described McLaren Vale as being 'on the peri-urban fringe of Adelaide'. It suggested that the anticipated customer base of the proposed store would overwhelmingly be those seeking to combine their take-away liquor purchasing with their use of the Coles Supermarket.
- 31 The report contrasted the offerings at the Coles and Foodland Supermarkets. It described the former as having 'an important role in meeting the comprehensive grocery needs of the local community'. It described the latter as a 'smaller supermarket better suited to quick top up grocery trips, or sourcing specialised products or brands, not typically provided by Coles'.
- 32 The report stated that the BWS store was of high-quality internal fit-out with a typical BWS product range. It noted that it was 120 metres walking distance from the proposed store. It suggested that this store was less integrated to the Foodland Supermarket than would be the case in respect of the proposed store because all users of the Coles Supermarket would pass the proposed store, whereas that was not the case for those using the Foodland Supermarket. It

stated that the proposed store would significantly enhance the convenience of many of the residents of McLaren Vale, who presently shop at the Coles Supermarket. It suggested that the proposed store would serve a different market to the BWS store, the former meeting the one stop shop need, the latter meeting passing trade, some cross-over use by shoppers at the Foodland Supermarket and other adjacent shops, as well as tourists and visitors.

- 33 The report concluded by suggesting that this application presented an opportunity to correct what was otherwise a current network of liquor stores that were poorly servicing the residents of McLaren Vale and surrounds.
- 34 The data analysis survey prepared by Data Analysis Australia was focussed towards identifying the support for the application and the consequential development of the proposed store. Because of restrictions related to the Covid-19 pandemic, the methodology used was confined to telephone interviewing. Between 14 and 20 May 2020 numerous landline and mobile phone listings with addresses within a two-kilometre radius of the proposed premises were engaged resulting in 207 responses, 68% of which were female. It was suggested that this over representation of females was not unexpected as females are more likely to answer the telephone and agree to be surveyed. To this was added the observation that because males tend to be more supportive of liquor stores, the under representation of males means that the result of the survey is likely to understate the support for the liquor store.
- 35 Of those surveyed, 79% had purchased take-away liquor in the preceding year. Some 63% had purchased liquor from the McLaren Vale BWS store and 52% used this store as their main store for purchasing take-away liquor. It noted that 17% purchased directly from wineries and breweries and 9% used this as their main source.
- 36 The survey revealed that 59% supported the application for the proposed store, 28% opposed it, and the remainder did not have an opinion one way or the other. Factors influencing support for the application included the convenience to shop at the proposed store at the same time as shopping at other stores at the centre, competition with the existing BWS store, and taking advantage of FlyBuys, loyalty schemes and shopper dockets.
- 37 The report indicated that 72% of those surveyed said that they would use the proposed store if the licence was granted.
- 38 The report suggested that concerns about any antisocial behaviour and the provision of easy access to liquor were at a low level and based on information supplied by those surveyed, the level of alcohol related incidents within the locality was low.
- 39 Liquorland's Community Impact Assessment Form also 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 dated 1 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’.

- 40 Amongst others, letters were also sent to the Commissioner for Police and the City of Onkaparinga. Neither expressed any objection to the application. There were letters of support from other traders in the McLaren Vale Shopping Centre.

Submissions by objectors

- 41 Two parties filed submissions with the Commissioner opposing the application, AHA and Samuel Gorge Winery.
- 42 AHA noted that packaged liquor sales now account for approximately 80% of liquor sales consumed in Australia and that people tend to drink at home rather than at licensed premises. It submitted that because liquor is being consumed at home and in private places there is a greater possibility of domestic violence occurring. It submitted that this informed how the community interest test was to be applied in this case.
- 43 It noted that McLaren Vale is a designated wine region, that offers world class wine and culinary experiences, boutique breweries and distilleries, and natural attractions and that it is a prominent tourist destination. It submitted that when viewed in this context, the application is not an unremarkable application for a bottle shop in an average suburb in greater Adelaide. It submitted that the potential for it to have an adverse effect upon an area replete with boutique and typically family-owned businesses with whom it would compete, was real and this was a very relevant factor weighing against the grant of the application.
- 44 It submitted that the Australian Boutique Premium Wines bottle shop cannot be ignored in respect of the application and, that when it is taken into account, it reveals that, if the application were granted, there would be four take away liquor facilities in a community of approximately 3,100 people and that having a ratio of one such facility per 775 people is a matter of real concern.
- 45 It submitted that the so-called need for shoppers to be able to experience the ‘one stop shopping experience’ was already being met at the McLaren Vale Shopping Centre by reason of the BWS store. It added that this was

complemented by a well-stocked drive-through and bottle shop attached to a nearby hotel.

- 46 It submitted that the application was not in the community interest as if granted, it would lead to liquor saturation and could have an adverse effect tourist and economic activity in a unique area.
- 47 Samuel Gorge Winery, which trades under a liquor production and sales licence, submitted that it was not in the community interest to have another commercially owned retail outlet in Main Street, McLaren Vale and that if granted it would adversely impact upon the viability of existing winery outlets. It provided no evidence in support of its submissions.

The Commissioner calls for further submissions

- 48 The Commissioner noted that the application before him was one of a number that had been lodged for packaged liquor sales licences and resolved that it would be appropriate to call for submissions on the issue of harm. He invited submissions from 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).

Professor Livingston

- 49 Amongst other qualifications, Professor Livingston has a Doctorate of Philosophy in population health, and he completed his doctrinal thesis in 2012, examining the links between alcohol availability and alcohol related problems.
- 50 In providing written submissions, Professor Livingston noted that his submission was of a general nature and did not deal with specific local issues. He stated that his study was focussed upon a review of published academic research.
- 51 He noted that nearly 80% of alcohol consumed in Australia is sold at packaged liquor outlets and that the percentage is increasing. He stated that there was substantial international research that linked the density of liquor outlets within a neighbourhood to the rate of alcohol related problems experienced within that neighbourhood and that this was especially so when there were dramatic changes in the density of packaged liquor outlets. He cited an example in Finland when grocery stores were permitted to sell beer, resulting in a twenty-fold increase in the number of places where alcohol could be purchased. He said that this resulted in a sharp increase in the consumption levels and alcohol related harm, particularly amongst heavy drinkers. He contrasted this to the experience in Los Angeles following riots

and the closure of several packaged alcohol outlets and a reduction in risky sexual behaviour and violence.

- 52 He stated that this research led researchers to hypothesise that there might be a link between gradual differences in packaged liquor outlet density, alcohol consumption and alcohol related problems.
- 53 He stated that his research revealed that in an average postcode area in Melbourne, a 10% increase in the density of packaged liquor outlets could lead to a 15% increase in assault, a 3.35% increase in family violence and a 1.9% increase in hospitalisations due to alcohol specific chronic disease. He stated that ‘... there is robust and consistent local evidence that increasing the number of packaged liquor outlets in a neighbourhood is likely to increase rates of risky drinking, rates of alcohol-related harm and negative amenity impacts in that neighbourhood’. He added that whilst the impact of any one individual store might not be great, it was the cumulative effect that could be substantial.
- 54 He then stated that there was some evidence that suggested that what was perhaps more important, was sales volume rather than store density and this might indicate that ‘granting licences for large chain outlets, which are likely to sell more alcohol at cheaper prices than smaller outlets’ was the real issue. He stated that the number of outlets has a larger impact on disadvantaged socio-economic neighbourhoods and that big-box stores might contribute more to alcohol problems than smaller stores because they sell more alcohol.

RACS

- 55 RACS responded to the Commissioner’s invitation through a letter dated 23 July 2021. It noted that RACS had for many years been advocating against the harmful effects of alcohol, which it stated was responsible for an estimated one in eight hospitalisations. It asserted a positive relationship between alcohol outlets and increased rates of violence. It asserted ‘a sharp increase in domestic and non-domestic violence where there are more than two hotels and one bottle shop per 1000 residents. It asserted that the third most common setting for assaults leading to hospitalisation was within licensed premises and that 60% of alcohol related violence occurs in and around drinking establishments.
- 56 It then asserted that there was substantial evidence that regulating the physical availability of alcohol was an effective way of reducing the negative effects of alcohol.
- 57 RACS concluded by reflecting upon the effects of the Covid-19 pandemic, noting that it was associated with an increased incidence of domestic violence. It stated that about half of the reported cases of interpersonal violence, domestic violence and sexual assault, are related to excessive alcohol consumption and that there appears to be a direct relationship

between increased alcohol consumption in 2020 and an increase in domestic violence in the same period. It cautioned that in this period of increased stress, pressure and uncertainty, allowing further saturation of outlet density would be to send the wrong message and would set a dangerous precedent for future applications.

ANROWS

- 58 ANROWS identified itself as an independent non-for-profit company established to provide accessible evidence to develop policies and practices for the prevention and response to violence towards women.
- 59 Its submission commenced by asserting that alcohol is involved in around half of all domestic and family violence and that although there was little evidence that alcohol was the primary driver of violence against women, there was a clear association indicating that alcohol increases the severity of the violence.
- 60 Its submission asserted that in planning for the location of the sale and supply of alcohol there should be collaboration with Aboriginal and Torres Strait Islander peoples and organisations.
- 61 Amongst other things, it asserted that a study in May 2020 conducted by the Australian Institute of Criminology, that examined the impacts of the Covid-19 pandemic on domestic violence, reported an increase in alcohol consumption in the three months from February 2020. It also asserted that another study ‘highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families’.
- 62 It asserted the need for greater community awareness of the connection between increased alcohol consumption due to Covid-19 pandemic, and the risk of alcohol related harm.

Liquorland responds

- 63 Liquorland obtained a report from the statistician, Dr John Henstridge, to critique Professor Livingston’s submissions from a statistical perspective.
- 64 Dr Henstridge stated that Professor Livingston’s submissions bore little clear relevance to the position in South Australia. He noted that much of the published research that Professor Livingston relied upon, stated that local factors were critical when comparing the density of liquor outlets and possible harm. He made the point that the evidence in Australia is that whilst there had been an increase in outlet density, there has been a decrease in overall alcohol consumption and that this underscores the need to recognise that the impact of outlet density might be much more subtle than Professor Livingston suggested.

- 65 He stated that all that the studies referred to by Professor Livingston established, was that the relationship between density and harm was complex. He cautioned that it was inappropriate, in the absence of firm evidence, to hypothesise about the impact of an additional outlet in a modest sized town with its own unique characteristics, based on studies from places like metropolitan Melbourne.
- 66 Liquorland responded to Professor Livingston's submission by asserting that his submission was pitched at a general level and did not deal with the facts pertinent to its application for the proposed store. It also pointed to the deficiencies in his submission and adopted Dr Henstridge's criticisms.
- 67 It submitted that the RACS' submissions similarly lacked any connection with the particular application and were of a general nature only.
- 68 It submitted that there was no evidence that the grant of this application would lead to an unacceptable increase in the risk of harm to the McLaren Vale community.
- 69 It submitted that if these general submissions were accepted, it would follow that no more applications for package liquor sales licenses would succeed. It submitted that this would be contrary to the views expressed in the Anderson Review that underpinned the abolition of the 'needs test' and replaced it with the 'community interest test', which it said contemplated more licenses, not less.

The Commissioner's decision

- 70 The Commissioner commenced his consideration by determining the relevant locality and reasoned that Liquorland had correctly identified a two kilometre radius from the proposed store and that it captured the entire township of McLaren Vale.
- 71 He then noted that the community interest test required him to make an evaluative judgment that weighed the positives and negatives that would come from the grant of the application.
- 72 On the positive side, he found that many of the residents of the locality would find it convenient to use the proposed store.
- 73 He found that Liquorland was an experienced and reputable licensee that has well developed policies and procedures in place and found that it could be expected to appropriately mitigate any risk to the relevant community, which he was satisfied was 'fairly low'.
- 74 He noted that neither the Commissioner of Police nor the City of Onkaparinga objected to the application.

- 75 He noted that the application, if successful, would create some limited additional employment opportunities.
- 76 The Commissioner recorded as a negative that the application, if successful, could have an adverse effect on tourism in the area. He said: ‘The presence of another packaged liquor store might offer an easy alternative and could discourage tourists from wine tasting experiences that the region offers’.
- 77 He recorded as a negative the impact that the grant of the licence would have on licence density. He said without inclusion of the Australian Boutique Premium Wines, the density was one take away liquor outlet per 1,032 people and with it included, it was one per 774 people. He noted that there were 116 other licensed premises in the locality permitting sale of take away liquor and concluded by stating; ‘The high liquor licence density and high availability of liquor in the locality weighs against the grant of this application.’
- 78 He stated that he accepted that ‘one-stop shopping’ was a factor to be considered in determining the community interest test, but added that the convenience that comes with one stop shopping ‘does not equate to the elimination of all inconvenience’. He implicitly, if not expressly, found that the nearby BWS store was conveniently servicing the needs of those who use the McLaren Vale Shopping Centre, including those who shop at the Coles Supermarket and those who frequent the lower level of the shopping centre.
- 79 The Commissioner was clearly concerned by the ease of access to the proposed store, relative to the Coles Supermarket, and the exposure to sales and discounts and their collective potential to compromise problem drinkers who would otherwise have to make a conscious decision to walk or drive to the BWS store or elsewhere to buy take away liquor. He made reference to the observations of this Court in *Liquorland (Australia) Pty Ltd (Park Holme)* about the problems that alcohol can cause and that ‘[p]assing 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’.⁶ He implicitly found that some members of the relevant community were problem drinkers and that some of them would be attempting to reduce their alcohol consumption or stop it altogether. He implicitly found that some of these shop at the Coles Supermarket or use the other facilities in the lower level of the shopping centre.
- 80 He then referred to the submissions of Professor Livingston, RACS and ANROWS, and stated that notwithstanding their generality, he could place some weight on them.
- 81 He thought it relevant that 80% of alcohol consumed in Australia is sold at packaged liquor outlets and that this percentage was increasing. He accepted the submission by ANROWS of the need for greater community awareness

⁶ [2020] SALC 37 at [44]

of the connection between alcohol consumption due to the Covid-19 pandemic and the risk alcohol related harm. He accepted the submission advanced by RACS that ‘at a time of increased stress, pressure and uncertainty placed on individuals and families, further saturation of outlet density ... sends an incorrect message to the community.’

- 82 He was mindful of the impact of the Covid 19 pandemic and stated that whilst its effects and impacts may ease: ‘I must proceed with extra caution in considering packaged liquor store applications co-located with supermarkets which would have the effect of increasing the accessibility and exposure of alcohol to residents in that community’.
- 83 Collectively, he thought the negatives outweighed the positives and found that the community interest test had not been met.
- 84 The Commissioner then added that in any event, to grant this application would ‘create an undesirable precedent likely to result in the wholesale alignment of packaged liquor stores with supermarkets’. Thus, he would have refused the application on the ground that it was not in the public interest to grant it.

The application for review – further evidence – further submissions

- 85 At the hearing of the application for review, Liquorland tendered an affidavit that deposed to developments that had occurred after the Commissioner’s decision. The affidavit indicates that although Australian Boutique Premium Wines remains the holder of a packaged liquor sales licence, it is not trading as a bottle shop from the premises in Main Road, McLaren Vale and that those premises are currently vacant. It also reveals that an entity known as McLaren Vale Central Joint Venture has received planning approval to develop a three-storey motel of 82 rooms at a site very near to the rear of the carpark servicing the lower level of the McLaren Vale Shopping Centre. The purpose of the tender was to demonstrate that Australian Boutique Premium Wines can be ignored from consideration and to reinforce Liquorland’s case that the proposed store would be of net benefit to the community as it would complement the up-coming motel development.
- 86 AHA tendered a report from Corporate Ascent that reviewed published information in connection with tourism in the McLaren Vale region. It reveals that McLaren Vale receives on average about 375,000 visitors per year. Of these 325,000 are day trip visitors and 50,000 stay overnight, who stay on average between two and three days. It stated that the region enjoys a reputation for outstanding food and drink, as well as adventure, arts, culture, wellness and nature and water experiences. The report supports the contention that McLaren Vale is a very popular tourist destination. It was tendered to fortify AHA’s submission that the grant of this application could have negative tourism implications.

- 87 The Commissioner filed a submission stating that when he considered the application, he was unaware that the co-location of packaged liquor outlets with supermarkets such as Coles, had broader implications and a greater potential for harm in the community than was initially evident. He based this on his understanding that persons can order liquor and groceries together through the Coles online store. He understood that this practice was contingent on the co-location of the Coles supermarket and an affiliated bottle shop. As such, he understood that the establishment of the proposed store would likely have the corollary effect of enabling shoppers ordering groceries online from the existing Coles Supermarket in the McLaren Vale Shopping Centre to also order liquor for home delivery and/or pick-up as part of the same transaction. He stated that had he been aware of this, he would have sought further submissions and had regard to them as a possible additional consequence of the grant of the subject licence. He stated that this might be relevant in determining whether the grant of the licence might lead to an amplified risk of harm that arises from the ready availability and convenience of online liquor purchases. He stated that it might also be relevant to the consideration of the locality for the purposes of the community interest assessment and the merits of the application more generally.

Liquorland's submissions on review

- 88 Liquorland submitted that the Court should have no regard to the submissions filed by the Commissioner.
- 89 It submitted that the notion that a co-delivery of alcohol and grocery items was contingent on there being a co-location between a supermarket and a store trading under a packaged liquor sales licence was wrong. It stated that a co-delivery of alcohol and grocery items was already taking place in McLaren Vale, and it was not limited to co-deliveries by Coles. It stated that co-deliveries also occur with supermarkets that are not aligned with stores trading under a packaged liquor sales licence and that some hotels presently supply take away liquor to be transported in a single delivery with supermarket goods from independent supermarkets.
- 90 It submitted that whilst the notion of click and collect grocery items and alcohol would generally rely on co-location, if it were to be contended that this potentially could lead to an unacceptable increased risk of harm, there would need to be some form of evidence to support this and that there was none. It submitted that given that the practice had been going on Australia-wide for over a decade, and that it involves only a very small percentage of alcohol sales, the absence of that evidence was telling. It submitted that the Commissioner's submission was an unhelpful and unnecessary distraction and should not be considered.

- 91 I note at this point that AHA adopted a neutral position in respect of the Commissioner's submissions and stated that that it did not wish to rely upon them as part of its case.
- 92 Liquorland submitted that it was not open for the Commissioner to find that the proposed store might have negative impacts upon local wineries and might adversely affect tourism. It submitted that this was complete speculation and it made no sense. It submitted that it was absurd to think that because some wineries will have their wines sold through a Liquorland store that wineries generally will be worse off. It then made the point that there was no evidence to suggest this. It submitted that if there were such evidence, it might have been expected that the AHA would have introduced it and that it is telling that it did not. It submitted that it was notorious that there are bottle shops in other wine regions, such as the Barossa Valley and the Adelaide Hills, and there is no evidence that the operation of the wineries and fine food establishments in those areas has been impacted by them.
- 93 Liquorland challenged the Commissioner's finding that the co-location of a packaged liquor store would create appreciable risk. It submitted that the Commissioner's approach was inconsistent with a vast body of authority in this Court, the Supreme Court of this State, and the Supreme Courts of other States, regarding the positive impacts and the public interest in co-location. I understood it to rely, amongst others, upon cases such as *Woolworths Ltd v Director of Liquor Licensing*,⁷ where by reference to the judgment of Kourakis J (as he then was) in *Woolworths Ltd v Drase Coosit Pty Ltd & Ors*⁸ it was said that it is a 'notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres'.⁹
- 94 It pointed to the observations of Kourakis J *Drase Coosit* where he said: 'the supply of liquor in shopping centres does not appear to have impinged upon the objectives of the Act'.¹⁰ It also referred to the observations in this Court in *Hove Sip n Save* where it said:

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

⁷ [2013] WASCA 227.

⁸ [2010] SASC 13; (2010) 106 SASR 146 at [55].

⁹ *Ibid* at [78]

¹⁰ *Ibid* at [55].

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

- 95 It submitted that in conformity with these, the Commissioner's finding could not have been made in the absence of specific evidence that addressed this. It submitted that there was no such evidence. It submitted that if there were such evidence, it might have been expected that the AHA would have introduced it, and that it is telling that it did not.
- 96 It accepted that alcohol could cause some harm. It accepted that Parliament could have resolved to ban the sale and supply of alcohol all together. But it noted that Parliament had not gone down that path and resolved to regulate its sale and supply, in recognition that for some, this might be an issue.
- 97 It submitted that in determining an application, a licensing authority must have regard to all of the objects of the Act, none of which have primacy over the others.
- 98 It submitted that, looked at in this light, the fact of the selling of alcohol in a way that is highly convenient and desired by substantial sectors of the community, was a positive, not a negative. It submitted that the Act should not be construed so as to discourage the purchasing of alcohol by only permitting the grant of a new packaged liquor sales licence in respect of premises that are inconveniently located, so that people do not use it.
- 99 It accepted that its case may have struggled to meet the former 'needs test' but submitted that in light of the abolition of that test, an assessment of the expectations and aspirations of the public does not involve any objective reasonableness analysis or any requirement for an objective assessment as to the extent to which existing licensed premises are adequately catering for public demand. It submitted that one of the purposes of abolishing the 'needs test' was that it led to anti-competitive objections. I understood it to contend that the removal of the 'needs test' ought to make it easier for an applicant to obtain a packaged liquor sales licence.
- 100 It took issue with the Commissioner's identification of exposure to discounts and sales as a negative. It submitted that members of the community are entitled to reasonably priced liquor. It submitted that there was no suggestion that Liquorland's advertising or pricing procedures are anything other than responsible.
- 101 Liquorland submitted that Parliament's only qualification in respect of the alignment of bottle shops and supermarkets was its requirement that they be

¹¹ [2021] SALC 7 at [10].

in physically separate premises. I understood it to contend that it followed that, in all other respects, Parliament took no issue with that alignment and that this should inform how the Act should be applied.

- 102 Liquorland challenged the Commissioner's general finding of potential harm on several bases.
- 103 First, that it was inconsistent with his finding that this was a 'fairly low risk' proposal.
- 104 Second, that to the extent that it relied upon the submissions of Professor Livingston, RACS and ANROWS, that reliance was misplaced because these submissions were pitched at a very general level and were not directed towards this locality or this application.
- 105 Third, to the extent that the submission raised legitimate issues about the relationship between the density of packaged liquor outlets and the risk of alcohol related harm, the ratio in this case, with or without the inclusion of Australian Boutique Premium Wines, was not at a level of concern. It submitted that if the submissions made by the RACS were to be relied upon, they suggested that the asserted sharp increase in domestic and non-domestic violence occurred when there are more than two hotels and one bottle shop per 1,000 residents. It submitted that in conformity with this, over saturation of take-away liquor facilities would only be an issue in connection with McLaren Vale, with its population of around 3,000, if there were six hotels and three bottle shops, that is nine facilities, whereas here, depending upon the view taken of Australian Boutique Premium Wines, if the application were granted there might be three or four.
- 106 Liquorland challenged the Commissioner's acceptance of ANROWS' submission about the need for community awareness of the connection between alcohol consumption due to the COVID-19 pandemic and the risk of alcohol related harm, and his acceptance of the submission advanced by RACS about sending the incorrect message at a time of increased stress, pressure and uncertainty placed on individuals and families. It submitted that these submissions were made without evidence to back them up and they were not relevant to this application.
- 107 Liquorland challenged the Commissioner's concern about the impact of the Covid-19 pandemic and his perceived need to proceed with extra caution in considering packaged liquor store applications co-located with supermarkets. It submitted that there was no evidence that raised such concern.
- 108 Liquorland submitted that the Commissioner's concern about the grant of the application creating an undesirable precedent was misplaced. It said he appears to have treated it as if it were an application for a packaged liquor sales licence in a typical metropolitan area of Adelaide. It accepted that this Court might be concerned that a precedent could be created that would result

in a bottle shop on a every corner in a metropolitan area. It submitted that the grant of this application, relating as it does to a unique locality, would not create such a precedent.

- 109 It submitted that contrary to how the Commissioner appears to have approached it, the application was in connection with a locality that is the focal point for a much wider rural setting and in determining the community test, consideration needed to be given as to what facilities might be expected in the town. It submitted that there would be a community expectation of the existence of a stand-alone liquor store adjacent to the largest and only full line supermarket in McLaren Vale. It submitted that ‘this is the sort of thing that one expects the community the size of McLaren Vale and the surrounding areas to aspire to’ and that the Commissioner appeared to have given no consideration to the enhanced competition that the proposed store would bring.
- 110 Liquorland also took issue with the adequacy of the Commissioner’s reasons. It submitted that there was no adequate explanation as to how he reached his conclusions in respect of tourism, harm caused by co-location or his apparent dismissal of its case that density should be addressed by reference to numbers of the broader population, and tourists.
- 111 Liquorland’s overarching submission was that this was a modest application by a reputable licensee that concerned a locality that had not demonstrated issues around alcohol related harm, that would offer a significant number of persons in and around the locality with the opportunity to conveniently purchase alcohol as part of their use of the McLaren Vale Shopping Centre, that would provide a point of difference relative to the other alcohol offerings, posed little risk of leading to increased harm and that it should have been granted.
- 112 Finally, it submitted that this Court is in as good a position to deal with this matter as the Commissioner, and that based on the evidence presented, the Court should set aside the Commissioner’s decision and grant the application.

AHA’s submissions on review

- 113 AHA submitted that the Commissioner reached the correct conclusion and that he was right to have found that the central issue in the case was the potential harm that the grant of the application might entail.
- 114 It submitted that harm from alcohol can take many forms, including harm to the drinker’s health, which might be short-term through binge drinking or long-term excessive drinking; harm to the drinker’s family, which can comprise of harm that arises from the diversion of part of the family budget to alcohol and which would be better spent on necessary items such as food, clothing, education, and the like; domestic and family violence; and violence

to non-family members, be that members of the public or perhaps friends of the drinker.

- 115 It submitted that Liquorland, as the applicant, had the onus of establishing the extent to which alcohol related harm was already present in the relevant community and the extent to which additional harm is likely to arise if the licence were granted to enable the Commissioner to determine whether that additional harm, if any, was acceptable. It submitted that when looked at in this light, any deficiencies in the evidence should be seen as an issue for Liquorland, and not anyone else.
- 116 Indeed, AHA went as far as to submit that Liquorland's failure to properly address the issue of alcohol related harm was a fatal flaw in its application. It then rhetorically asked: 'Where is Liquorland's evidence that the proposed store will not cause any additional harm, or evidence that seeks to quantify the additional harm?' It submitted that there was none.
- 117 It submitted that the fact that there were no formal letters of objection from entities such as the police, the local council or other agencies did not establish an absence of existing alcohol related harm. It noted that the commissioning letter did not invite a comment on issues of harm but simply said: here is our application, you do not have to reply, but if you do, here is the address. It added that the letter from Drug and Alcohol Services, referring as it did to the link between increased levels of violence, including domestic violence, to the increased proximity of off-licensed premises, could hardly be described as neutral. It submitted that even without that letter, there was no basis upon which the Commissioner could have made a positive finding that alcohol related harm was not an issue in this case.
- 118 AHA submitted that the tenor of Liquorland's community impact assessment report seemed to reflect the notion that alcohol related harm is contingent upon the relative socioeconomic status of the community in terms of the relative advantage or disadvantage and that in wealthier communities, issues such as family, domestic and public violence associated with problem drinking either do not exist or exist to an acceptable degree. It submitted that there was no evidence to support this. It submitted that there was no reason to think that the added convenience of access to more liquor in a wealthy area ought to outweigh an increase in the risk of violence to family and public in that area or that the risk would be any different than in poorer areas.
- 119 By reference to this Court's decision in *Liquorland (Park Holme)*¹² it submitted that it can be assumed that for some in the relevant community, alcohol is a problem and that the addition of another takeaway liquor facility, especially an attractive one adjacent to a supermarket, will increase opportunities for them to succumb to the temptation to buy and consume

¹² Ibid.

alcohol. It noted that in that case, the Court spoke of weighing up the positives and negatives of the application that included some sort of comparison between added convenience to shoppers and the risk of harm for those for whom alcohol is a problem. It submitted that the potential for additional harm cannot sensibly be addressed by a mathematical comparison to the average. It said: ‘Do you say, well if there is 10 per cent more than average, then it is legitimate to tip the scales, or is it 20 per cent or 30 per cent?’. It submitted that ‘each problem drinker is entitled to the same consideration, regardless of where they live, and regardless of the concentration of other problem drinkers around them. And more to the point, each family of a problem drinker is entitled to the same consideration’.

- 120 AHA then made the point that the Act speaks of harm reduction and minimisation as opposed to the risk of harm being at an acceptable level. It then rhetorically asked in terms of what is acceptable: ‘How much harm?’, ‘How much public violence?’, ‘What level of domestic violence?, What level of impact on families? How many beaten wives and how many hungry children are the equivalent of a hundred shoppers being able to buy liquor and groceries in the one trip?’
- 121 It submitted that it was not enough that Liquorland enjoyed a reputation as being a good operator of licensed premises and that it had appropriate policies and procedures in place to deal with theft and sale of alcohol to minors and intoxicated persons. It submitted that it needed to demonstrate more and have mechanisms in place to identify problem drinkers and people who are susceptible to or commit acts of domestic violence. It said that it may be possible to keep a list of customers, monitor how much they buy, interview those whose liquor purchasing profile indicates possible harm tendencies, and find out whether they have a problem. It submitted that having identified problem drinkers, it could have policies in place such as refusing them service, or charge them premium prices, to discourage consumption.
- 122 It submitted that for Liquorland to genuinely minimise the risk that had been identified, it needed to do these things and it does not propose to do so.
- 123 AHA submitted that the Commissioner was right to be concerned about the impact that the grant of the application would have upon tourism. It submitted that tourism is an important part of the McLaren Vale community, township and economy. It said that because Liquorland is proposing to stock a range of local wines, there was a risk that tourists, having visited a limited number of cellar door outlets, will go to Liquorland, see the range there, and decide that they will stock up on the local range at the Liquorland and go home, rather than visit more cellar doors. It submitted that whilst this might not affect the wineries, as their wine will still be sold, tourism as a whole will become gradually worse off, because the attraction at McLaren Vale is the vibrancy of the whole wine-tasting cellar door lunch scene.

- 124 AHA submitted that nothing can be drawn from the Act that suggests Parliament's imprimatur to the alignment of bottle shops and supermarkets.
- 125 It submitted that there was compelling evidence before the Commissioner that increased density of packaged liquor outlets, especially involving chain stores, with their increased purchasing power and capacity to offer discounted liquor, increased the risk of alcohol related harm. It submitted that the Commissioner was right to find that in this case, involving as it did a chain bottle shop aligned to a supermarket, that the risk outweighed any of the positive considerations in support of the application. It submitted that the very fact of the alignment was built on the financial advantages it brought through things like the Flybuys rewards program and supermarket docket discounts on liquor sold from the bottle shop.
- 126 AHA submitted that the Commissioner was entitled to reject the application on public interest grounds. It noted that s 53(1) gives a licensing authority an unfettered and unqualified discretion enabling the refusal or a grant on grounds that the authority considers sufficient. It submitted that it is legitimate to take into account the undesirable precedent effects in granting an application. It submitted that even without proof of the exact amount of harm that might be caused in a particular locality, it is an appropriate use of the general discretion to refuse an application which would have that negative tendency, because of the precedent effect. It invited the Court to take notice of the fact that there are several applications for review in respect of chain stores co-located with supermarkets in centres in which the Commissioner's reasoning in rejecting them is along very similar lines. It submitted that if one of those applications is successful on review, that will have a precedent effect, not just for those that are on review now, but also for the undetermined cases pending before the Commissioner. It submitted that the Commissioner was right to be concerned about this trend and was right to exercise the general discretion under s 53(1).

Consideration

- 127 It is convenient for me to commence by dealing with Liquorland's submissions about the implications of the abolition of the 'needs test' and the implications of the provisions in the Act that have replaced it.
- 128 Liquorland is correct to contend that the tests applicable to a packaged liquor sales licence have changed and that the removal of the 'needs test' will result in some applications succeeding under the new tests in circumstances where they would not have succeeded under the old. Indeed, such was the case in *Liquorland (Park Holme)*.¹³ As was stated there:

It must be firmly understood that the issue in this case is not whether the grant of this application in respect of the proposed premises is

¹³ Ibid.

necessary to service the public's needs. That is no longer the test that the Court must apply and to continue to apply that test, or something like it, would be to ignore the clear directive of the Parliament to apply a new test, and would lead to error.¹⁴ (Footnote omitted)

- 129 But as was further observed by this Court in *Hove Sip n Save*,¹⁵ 'the legislative changes are not all the one way'.¹⁶ In that case the Court spoke of the requirements imposed by the guidelines that include significantly upping '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'.¹⁷
- 130 There are other changes that need to be considered. It is notable that prior to the enactment of the *Liquor Licensing (Liquor Review) Amendment Act 2017* (the amending Act), the objects of the Act included 'to encourage a competitive market for the supply of liquor'.¹⁸ That object has been removed. This indicates that the encouragement of a competitive market for the supply of liquor, although relevant to the expectations and aspirations of the public, is no longer a specified objective, and is therefore of less importance than was previously the case.
- 131 It is also notable that the Act in its present form, has much more comprehensive provisions contained in its objects provision dealing with the issue of harm minimisation.
- 132 In addition to these matters, the amending Act, not only authorises the Commissioner to deal with contested applications for new bottle shops, but it also empowers him to go beyond the cases presented by the applicant and other parties and to do, as he did here, and that is to call for submissions from others on topics of his choosing. Amongst other matters, it can be safely assumed this was aimed at enabling the Commissioner to address issues around harm minimisation.
- 133 A licensing authority plainly must have regard to all the objects of the Act in considering an application. But in my opinion, the Act now contemplates that harm minimisation has primacy over the other objects, especially in connection with a designated application. I therefore reject Liquorland's submission to the effect that all the Act's objects must be treated equally.
- 134 That said, I do not think that the focus of harm minimisation is as extreme as the AHA submitted. Many of the submissions it advanced were tantamount to contending that if there was any risk that the grant of a packaged liquor

¹⁴ Ibid at [46].

¹⁵ [2021] SALC 7.

¹⁶ Ibid at [103].

¹⁷ Ibid at [103].

¹⁸ Section 3(1)(e) of the Act, as it then was.

sales licence could cause harm, it would have to be refused. On that approach, no application could succeed.

- 135 As has been observed in other jurisdictions, ‘harm minimisation’ is just that. Its focus is on minimising harm or ill-health, not preventing it altogether.¹⁹
- 136 In saying this, I wish to emphasise that the Court should not be understood as condoning, understating or underplaying the harmful effects of alcohol or its connection with violence. Violence of any type should be deplored. The pain and misery caused by domestic violence, especially towards women, plays out all too frequently in our daily news feeds. The connection between violence and excessive alcohol consumption is self-evident. One does not need evidence from organisations like the RACS to know that alcohol is a major health problem in this country and is responsible for many hospital admissions, chronic disease, and early death. Common experience informs us of the devastation that alcohol dependence can cause to individuals and their families.
- 137 But it also must be acknowledged that alcohol is a substance that is widely used in the community and for the most part is enjoyed without adverse consequences. Added to this is the fact that South Australia enjoys a reputation for producing world class alcohol products. This, in combination with its natural beauty and ‘food’ culture, has added significantly to its desirability as a tourist destination, which in turn has major economic benefits for the State.
- 138 As a society, through our legislatures, choices must be made when striking the balance between competing interests. We could have taken the view, that whatever the benefits that alcohol brings to the State, and even though it is enjoyed by many, its negative consequences are too high a price to pay and that its production, sale, supply and consumption should be prohibited.
- 139 Some jurisdictions across the world have made that choice. This State, through its Parliament, has not. Instead, it has gone down the path of emphasising harm minimisation. This ‘is not a synonym for a form of prohibition. Rather, it responds to the reality that prohibition has proved, and continues to prove, a very blunt and ineffective tool for the control of the use of addictive substances and their consequences.’²⁰
- 140 As such Parliament must be taken to understand and accept that by not prohibiting the production, sale, supply and consumption of alcohol, there will be some adverse consequences.

¹⁹ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258; (2000) 22 WAR 510, 515 per Ipp J.

²⁰ *Kordister Pty Ltd v Director of Liquor Licensing & Anor* [2012] VSCA 325 at [13] per Warren CJ and Osborne JA.

- 141 The grant of every new liquor licence, be it a limited licence for school fete, or a general and hotel licence in connection with a major development, will involve some additional point of sale and supply of liquor and an opportunity for some of those for whom alcohol is a problem, to access alcohol more easily than would otherwise be the case.
- 142 Parliament could have made the choice that there are already too many opportunities for people to acquire alcohol. It could have taken the path that it has taken in respect of poker machines and said, enough is enough, and put in place measures to diminish the overall number of places where alcohol could be sold and supplied. It has not done so.
- 143 In light of this, Parliament must also be taken to understand and accept that by permitting the grant of new licences, the adverse consequences that can result from alcohol consumption may increase.
- 144 In Victoria similar objects in its licensing legislation were described as recognising ‘that the manner of supply and consumption of liquor may positively contribute to the amenity of community life and may encourage a culture of responsible consumption of alcohol’.²¹ It was then observed that having regard to this, ‘harm minimisation is not simply one of limiting the supply of alcohol. Rather, it is concerned with regulating supply of alcohol so as to ensure, as far as practicable, net community benefit’.²² The same is true of the Act here.
- 145 In the end, a licensing authority must ‘balance each of the objects and arrive at an appropriate synthesis in the particular circumstances of the case by the way of a discretionary judgment’,²³ recognising that harm minimisation is of prime importance.
- 146 Thus, whilst as I said, there will be cases that will succeed under the new test that would not have succeeded under the ‘needs test’, it should not be assumed that it is now significantly easier to prosecute a case for the grant of a packaged liquor sales licence.
- 147 I now turn to the specific complaints made by the parties.
- 148 I reject AHA’s submission that Liquorland failed to properly address the issue of alcohol related harm in the local community. In my opinion, Liquorland was entitled to rely upon the fact that neither the Commissioner for Police nor the City of Onkaparinga expressed any objection to the application. It was entitled to rely upon the fact that the Drug and Alcohol Service of South Australia did no more than make a general statement of the Government’s commitment to reducing the impact of alcohol and drugs and

²¹ *Kordister* Ibid at [17].

²² *Kordister* Ibid.

²³ *Kordister* Ibid.

its general observation of evidence linking the physical availability of alcohol to the risk of violence and a strong association between increased proximity to off-premises licensed outlets and alcohol consumption at levels associated with risks of short-term harm. It was of some significance that the Service made no observations to the effect that these were issues in connection with the community in the locality under consideration in this case. Collectively these matters supported the inference that the relevant community did not have a particular problem with alcohol related harm.

- 149 I also reject AHA’s submission that to properly address harm minimisation a licensee of a take-away liquor facility is required to keep a tab on its customers to identify problem drinkers and people who are susceptible to or commit acts of domestic violence and contemplate refusing them service or charging them premium prices to discourage consumption. This would impose unrealistic and unreasonable obligations upon licensees. The level of surveillance required would require the making of inquiries that ‘would ordinarily be regarded as impertinent and invasive of privacy’.²⁴ They would leave licensees susceptible to complaints of discrimination based on stereotypical views as to the profile of a problem drinker or person with a propensity for alcohol related violence.²⁵
- 150 I accept AHA’s submission that nothing can be drawn from the Act that suggests Parliament’s imprimatur to the alignment of bottle shops and supermarkets. The relevant section is s 38(3). It provides that there must be a ‘condition of a packaged liquor sales licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes’. Section 38(6) then goes on to enable the dispensation of that condition and provides as an example ‘a general store in a regional location’. If anything, this reveals a concern about the interrelationship between supermarkets and bottle shops.
- 151 I accept Liquorland’s submission that I should have no regard to the Commissioner’s submissions to this Court. There is no evidence that a co-delivery of alcohol and grocery items is contingent on there being a co-location between a supermarket and a store trading under a packaged liquor sales licence. There is no evidence that the practice has led to an increased risk of harm.
- 152 I accept Liquorland’s submission that it was not open for the Commissioner to find that the proposed store might have negative impacts upon local wineries and might adversely affect tourism. This was not a matter which

²⁴ *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29; (2004) 217 CLR 469 at [130] per Callinan J.

²⁵ See, for example: *Haynes v Ceduna Community Hotel Ltd* [2011] SAEOT 7.

was so notorious that no evidence was required to make that finding.²⁶ In any case, the matters alluded to by Liquorland suggest that the proposed store was unlikely to have any adverse impact upon tourism in the locality and if it were otherwise, one might have expected the local tourist association or council to make submissions to the effect. It is telling that they did not.

153 I accept Liquorland’s submission that it was not open for the Commissioner to find that the co-location of a packaged liquor store to a supermarket would, of itself, create appreciable risk of increased harm. This too was a matter which was not so notorious that no evidence was required to make the finding. I repeat certain observations that I made about this issue in connection with an application for disclosure that was made in these proceedings:

As was pointed out to the parties during argument, this Court has received mixed evidence as to the performance of bottle shops aligned to supermarkets, relative to unaligned bottle shops.

I take the following from *Liquorland* which concerned an application to remove an underperforming Liquorland bottle shop in the Athelstone Shopping Centre to a location in Newton:

‘As to the closure of the Liquorland at Athelstone and the non-renewal of the lease for that store, ... prior to its closure ... [t]he trading was flat and was slightly declining. The opening of the Cellarbrations store some 18 months ago had led to a downturn in its sales ... The store closed on 16 September 2012. The other concerns that led to the closure of the store was the anticipated Dan Murphy’s store at the Highbury Hotel which he said would have a similar effect on the Liquorland store’s trading as did the opening of Cellarbrations. This would be likely to further reduce the turnover at the Liquorland store... No business case could be made, he said, to renew the lease. It was a “loss-making store”.’

Then there was this evidence given in *Woolworths Liquor - BWS Arndale* where Mr Fassina, having spoken of purchasing a retail liquor licence trading inside the shopping centre, said:

‘We couldn’t make things work in the shopping centre, ... No matter what we did we couldn’t build it up enough to warrant basically the rental ...

... if they had a car, of course - they would call into a pub and just get a slab in the boot which is a lot easier for them, than actually having to negotiate a trolley...

²⁶ *Return to Work Corporation of South Australia v BI (Contracting) Pty Ltd & Ors* [2022] SASCA 49 at [68]-[69] per Livesey P and Bleby JA.

So at the end of the day we were just losing money on the site and we just had to decide to leave and relocate.’

...

This is to be contrasted with evidence given in connection with an application by Woolworths to remove an underperforming unaligned stand-alone BWS bottle shop on Main North Road into the Sefton Park Shopping Centre, where it was said on its behalf:

‘... retail liquor bottle shops, supermarkets and shopping centres compliment one other and that whilst ideally Woolworths would prefer to align its own supermarket with its own bottle shop, it was content to align a bottle shop with a competitor supermarket.’²⁷

- 154 I accept that there may be something about a close alignment of a bottle shop store co-located with a supermarket that creates an appreciably greater risk of harm. The point that I make, is that to act upon this, there would need to be some evidence to support such a finding, and in this case, that evidence was lacking.²⁸
- 155 I accept Liquorland’s submission that the Commissioner may have given too much emphasis to the convenience that the proposed store would bring to the members of the relevant community. An applicant for a packaged liquor sales licence could only be expected to make an application if it were anticipated that the proposed store would be economically viable. A proposed store near a supermarket might be regarded as a convenient location that attracts considerable custom. But as the history of cases before this Court shows, that will not always necessarily be the case. Moreover, there are other places where a store, trading under a packaged liquor sales licence, might be even more conveniently located than next to a supermarket. This Court has heard evidence that some bottle shops on major roads carrying large volumes of traffic on the way home from the city are very well patronised by passing trade.²⁹ The point I wish to make is that fact that a proposed store might be very conveniently located cannot be a defining characteristic that dooms an application for a packaged liquor sales licence to failure.
- 156 Other factors that influenced the Commissioner in rejecting the application included his concerns about the social implications of the Covid-19 pandemic, and in particular its potential impact upon drinking behaviours and increased alcohol related harm; licensed premises density, having regard to the existing take away liquor facilities in and about the relevant locality; and

²⁷ *Liquorland McLaren Vale* Ibid at [60]-[64].

²⁸ Whilst there was evidence from Professor Livingston relating to increased alcohol consumption in Finland and elsewhere following changes permitting the sale of alcohol products in grocery stores, his evidence was focussed on the effects of increased opportunities to buy alcohol, not the alignment between alcohol and those stores.

²⁹ *Woolworths Liquor - BWS Arndale* [2014] SALC 14 at [104].

his concern that in the face of numerous other applications before him, the grant of the application could set an undesirable precedent.

- 157 Because the community interest and the public interest are paramount considerations, conceptually I have no difficulty with the Commissioner's view that issues around the impact of the Covid-19 pandemic and licensed premises density might warrant the taking of a cautious approach. As was observed by the Victorian Civil and Administrative Tribunal in *Nardi v Director of Liquor Licensing (Occupational & Business Regulations)*³⁰ in the context of concerns about harm minimisation: 'Once there are circumstances prevailing which give the decision-maker pause, or ring alarm bells, a conservative approach is compelled'.³¹
- 158 That is not to say that if there is the slightest doubt about the potential for harm minimisation an application must be rejected. If that were so, no application would be granted. But if there is a proper evidentiary basis that raises a legitimate concern, a licensing authority might conclude that caution is required, and it is in the community interest or the public interest, to at least for the time being, refuse the application.³²
- 159 In connection with the issue of harm minimisation, it is notable that s 3(1)(a) speaks of minimising the potential for harm and s 53A(2)(a)(i) speaks of harm that might be caused. Both require predicting the future.
- 160 In *Executive Director of Health v Lily Creek International Pty Ltd*,³³ Ipp J discussed this concept and suggested that the judgment of Deane, Gaudron and McHugh JJ in *Malec v JC Hutton Pty Ltd*,³⁴ which dealt with the assessment of future losses in personal injury cases, provided some guidance as to how this issue in a licensing context, should be dealt with. The judgment in *Malec* makes the point that in connection with determining future events, hypothesis and conjecture are permissible and findings can be based on possibilities that fall short of being probable. By reference to *Malec*, Ipp J wrote:

In my opinion, where the degree of probability is less than 51 per cent, it does not follow that the possibility of such harm or ill-health is to be ignored. In my view, there is nothing in the wording of s 5(1)(b) that leads to such a view. On the contrary, the public interest considerations that underlie s 5(1)(b) indicate that the potential of harm or ill-health is to be taken into account irrespective of whether the prospect of harm or ill-health is a possibility or a probability. The wording of s 69(8a) is also indicative of an intent to this effect.

³⁰ [2005] VCAT 323.

³¹ Ibid at [44]. See also *Kordister*, Ibid at [34].

³² *Nardi v Director of Liquor Licensing* Ibid at [51].

³³ Ibid.

³⁴ [1990] HCA 20; (1990) 169 CLR 638.

Section 33 of the Act confers upon the Licensing Authority an absolute discretion to grant or refuse an application on any ground that the Licensing Authority considers in the public interest. The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on a balance of probabilities, would be a powerful public interest consideration. The section is therefore consistent with the view that the mere possibility of harm or ill-health would always be a relevant matter for the Licensing Authority when discharging its functions.³⁵

- 161 These observations are in my opinion wholly applicable to the Commissioner and this Court in discharging their obligations under the Act. In determining whether the grant of the application will be in the interests of the local community, the licensing authority will be concerned about the attributes of those who reside in the community and those who might be expected to use the proposed premises. If there is evidence that because of those attributes, the grant of the application might result in an appreciable risk of increased alcohol related harm, the application might be refused, even if that risk is only measured in terms of possibility rather than probability.³⁶ In my opinion, the same approach applies in determining whether the grant of the application is in the public interest, that is, that the possibility of adverse risk, as opposed to probability, may be enough to refuse an application.
- 162 In connection with these matters, I reject Liquorland's submission that the submissions of Professor Livingston, RACS and ANROWS were of no probative value and that the Commissioner erred in acting upon them.
- 163 Professor Livingston's submissions were based upon research that he examined as part of his doctrinal thesis. I am permitted to know that his thesis would have been subjected to considerable scrutiny by eminent academics.
- 164 RACS is a highly regarded organisation that can be taken to adhere to rigorous standards of ethics and integrity. It asserted that there was substantial evidence about the connection between limiting the physical availability of alcohol and reducing the negative effects of alcohol.
- 165 I think it can be inferred that in both cases the research relied upon was reputable. There could be no serious challenge that Professor Livingston and the RACS are experts.
- 166 ANROWS is a research organisation established as an initiative of Australia's National Plan to Reduce Violence against Women and their Children 2010–2022 by the Commonwealth Government and all state and territory governments garnishing and analysing evidence to inform policy and practice on women's and children's safety. It can be taken to adhere to

³⁵ Ibid at [26]-[30].

³⁶ *Executive Director of Health v Lily Creek International Pty Ltd* Ibid.

rigorous standards of ethics and integrity. I think it can be inferred that the research that it relied upon was reputable.

167 There is clear authority that when an expert gives opinion evidence based on reputable research the evidence is probative and inferences can be drawn from that evidence.³⁷

168 Based on the ANROWS' submission and to a lesser extent the RACS' submission, I think the Commissioner was entitled to find that there had been, at least for a time, an increase in alcohol consumption since the commencement of the impact of the Covid-19 pandemic; that the pandemic has been a matter of considerable social significance; and that the changes to alcohol consumption that it may have led to, might have increased the risk of harm to families.

169 Although the Supreme Court has made it clear that a licensing authority should not be concerned about protecting the interests of existing licensees or enforcing some vague notion that the grant of the licence will result in the undue proliferation of licences,³⁸ I think the Commissioner was entitled to be concerned about this issue. In *Liquorland (Australia) Pty Ltd & Ors v Lindsey Cove Pty Ltd & Anor*, Doyle CJ made the following observations:

... the consumption of alcoholic liquor is associated with certain social problems, and for that reason the number of premises at which the public may consume liquor (other than with meals) or purchase liquor for consumption off the premises should be limited, and that there should be continuing supervision of the manner in which those premises are conducted.³⁹

170 Notwithstanding that these observations were made in the context of the now redundant 'needs test' as was explained in *Hove Sip n Save*,⁴⁰ they remain relevant to applications under the new tests. They are also consistent with Professor Livingston's submission which established a clear link between licensed premises density and the potential for increased alcohol related harm. Whilst his submissions and those made by RACS and ANROWS were expressed at a general level and were not specific to this application and this community, I think it was open to the Commissioner to rely upon them as evidence that having regard to existing liquor premises density, the grant of this application would add to the availability of liquor in the relevant locality, that it might have the potential to cause increased harm, and that this was a relevant consideration.

³⁷ See, for example: *H v Schering Chemical Ltd* [1983] 1 All ER 849 at 853 per Bingham J.

³⁸ *Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor* [2014] SASCF 87 at [76] per Parker J.

³⁹ [2002] SASC 17; (2002) 81 SASR 337 at [28]

⁴⁰ *Ibid* at [134].

- 171 Allied to this is the fact that 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. These are matters relevant to the community interest and the wider public interest.⁴¹
- 172 As for the Commissioner's decision to reject the application on public interest grounds, whilst I accept Liquorland's submission that McLaren Vale is different to a typical suburb in metropolitan Adelaide, an important part of its case for the grant of the licence was that the proposed store would be co-located with the largest and only full line supermarket in the locality. I think it is reasonable to assume that McLaren Vale is not the only locality in the State that does not have a bottle shop directly co-located with the largest and only full line supermarket in that locality. I therefore think that the Commissioner was entitled to consider the potential for this application, if successful, to set a precedent that could be relied upon in other cases and that this was a relevant factor in the exercise of his public interest discretion.⁴²

Summary and disposition

- 173 In summary, in my opinion there are some difficulties with the Commissioner's decision.
- 174 Without evidence, he was unable to find that the proposed store might have negative impacts upon local wineries, and might adversely affect tourism, and he erred in doing so.
- 175 Without evidence, he was unable to find that there is something about a close alignment of a packaged liquor store co-located with a supermarket that creates an appreciably greater risk of harm than would be the case for an unaligned store, and he erred in doing so.
- 176 As a corollary of this, whilst that the Commissioner was entitled to be concerned about the proximity of the BWS store to the proposed premises, he may have given too much weight to the convenience that the proposed store would provide to the members of the local community that shop at the Coles Supermarket in considering the negatives aspects of the application.
- 177 For these reasons, the Commissioner's decision cannot stand.
- 178 In light of this conclusion, nothing would be served by conducting an analysis of the adequacy of the Commissioner's reasons.
- 179 What now needs to be determined is what follows from my conclusion that the Commissioner's decision cannot stand.

⁴¹ *Hove Sip n Save* Ibid at [136].

⁴² See, for example: *Liquorland (Australia) Pty Ltd v Lindsey Cove Pty Ltd* Ibid at [43]-[48].

180 Pursuant to s 22(8) of the Act, one of several options is available. That sub-section provides that on review, this Court may:

- (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.

181 I appreciate that Liquorland's stated preferred position is for this Court to determine the application. Liquorland would have it that its case for the grant of a packaged liquor sales licence was so overwhelming in favour of it, that this Court should have little hesitation in granting it.

182 I have not reached a concluded view, but I do not consider that the outcome is quite as clearcut as Liquorland would have it. Moreover, I have real concerns about the state of the evidence.

183 On review, having identified errors in the Commissioner's decision, if this Court is to deal with the application it 'is obliged to conduct a real review of the evidence and the delegate's findings and reasons'.⁴³ In undertaking that exercise the Court is not bound by the Commissioner's findings and may decide for itself what it is to be made of this evidence. It may also decide for itself whether the grant of the application is in the community interest and the public interest.

184 I am mindful that each case must be decided on its own facts and caution needs to be exercised in what is to be made of broad evidence and sweeping submissions that express general issues of concern in connection with applications for new packaged liquor sales licences. But even with that caveat, I think there is little doubt that the Covid-19 pandemic has caused considerable social disruption and stress, and based on the submissions made by RACS and ANROWS about the social implications of the Covid-19 pandemic, I am prepared to accept that it might have influenced drinking behaviour and that in turn might be adding to alcohol related harm. Where this takes us remains to be seen. My difficulty is the lapse of time since the submissions about the implications of the Covid-19 pandemic were made, bearing in mind the speed with which circumstances related to it can change. For example, the free access to interstate and international travel that we now enjoy would have been unthinkable, less than a year ago. I think that there is a real risk that the evidence that I am being asked to evaluate in respect of this issue might be out of date.

⁴³ *Cellarbrations Mannum* [2021] SALC 42 at [99].

- 185 This application was made on 6 November 2020. Part of the ANROWS' submission was based upon a study conducted in May 2020. RACS' submission was made in July 2021. It is now nearing the end of July 2022. In the intervening periods relevant research may have progressed and may paint a different picture as to the potential impact of the Covid-19 pandemic on drinking patterns and its relationship with alcohol related harm. In the period since submissions were received by the Commissioner, stress associated with the Covid-19 pandemic may have abated. Drinking patterns may be returning to normal. The incidence of domestic violence might have diminished. That said, it is possible that the latest research might point in the opposite direction. My difficulty is that I do not know.
- 186 As for liquor premises density, the submissions by Liquorland, AHA and others focussed on relative ratios. I think that the measure of licensed premises density is much more nuanced than simply adding up the number of licensed premises and dividing the overall relevant population by that number to arrive at a ratio.
- 187 Some hotels are very small, have limited trading hours and have no dedicated area selling liquor for off licence consumption. Others are very large, have multiple bars that trade late and which contain take-away liquor facilities of warehouse proportions.
- 188 Some bottle shops are tiny, focus on selling premium products to discerning customers and are barely noticeable. Others comprise of large retail stores offering discounted products under the mantra of 'we won't be beaten on price', that sell take-away liquor on an almost industrial scale.
- 189 In this context, I am troubled about the lack of clarity concerning Australian Boutique Premium Wines. We know that for now it is no longer trading as a bottle shop on Main Road, McLaren Vale, but that is all we really know.
- 190 Australian Boutique Premium Wines may have no intentions of trading as a packaged liquor sales store in the McLaren Vale region in the foreseeable future. If that were so, it might be appropriate to eliminate it from consideration in this case. On the other hand, its absence from McLaren Vale may be temporary, and it may be planning to resume trading in the town near the proposed premises under a revised business model focussed on discounted liquor. If that were so, this might be highly relevant to the issue of licensed premises density and other relevant issues. Again, my difficulty is that I do not know.
- 191 Both are important matters. The determination of this application requires the exercise of a discretionary judgment that looks at the full factual picture. In

connection with such an exercise, '[t]he addition or subtraction of one factor in a given situation may well tip the balance'.⁴⁴

- 192 Because I am not sure as to how this application should be dealt with, for now I express no concluded view as to whether I would have found that it was in the community interest or the public interest to grant the application.
- 193 Liquorland has foreshadowed that if permitted, it would now seek the proposed store to trade under a different badge, being Vintage Cellars, which the Court is permitted to know operates under a different business model to a Liquorland Store. An option that it might consider is whether it should ask the Court to simply quash the decision that is the subject of this review and for it to make a fresh application in light of current circumstances, untrammelled by the fate of its earlier application, focussed upon its current preferred business model and based upon current evidence on a range of topics.
- 194 Another alternative might be for the Court to refer the matter back to the Commissioner. He clearly has the power to call for further submissions that might concern issues such as the current prevailing social conditions. It is doubtful that this Court possesses that power and it would need to be persuaded that it did and, if so, that it was appropriate to use it. Because the position with the Commissioner is clear, the preferable course might be for him to re-evaluate the application in light of these reasons and any further information that is to hand.
- 195 Or I might be persuaded that notwithstanding my concerns, the Court should accede to Liquorland's stated position and deal with the application. If I am to proceed with the matter, the parties should be given at least the opportunity to reflect upon whether they wish to make any application to the Court to adduce further evidence.
- 196 I will list this matter on a mutually convenient date to receive further submissions from the parties, in light of these reasons.

⁴⁴ *Nancollas v Insurance Officer* [1985] 1 All ER 833 at 840 per Sir John Donaldson.