

LICENSING COURT OF SOUTH AUSTRALIA

ON THE RUN PTY LTD

JURISDICTION: **Licensing Court of South Australia**
Liquor Licensing Act 1997

CASE NO/S: 59 of 2022

HEARING DATE: 7 October 2022

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 9 December 2022

CATCHWORDS:

*Application for review of the Commissioner’s decision to refuse an application for a packaged liquor sales licence that was to be subject to a condition that only permitted the sale of liquor through direct sales transactions – The Commissioner refused the application on public interest grounds – The Commissioner was concerned that if the application succeeded persons under the age of 18 could be potentially exposed to liquor products and advertisements whenever they use the OTR app – He was also concerned that the presence of alcohol advertisements on the OTR app had the potential to normalise in the minds of minors the purchase of alcohol by aligning it with daily staples such as fuel, snacks and coffee – He rejected the submission that the grant of the licence would add additional and much needed competition in the delivery packaged liquor market and stated that there was no pressing need for further competition in relation to the availability of or delivery of packaged liquor – The Commissioner made a finding that the grant of the application carried with it a significant risk of harm – He was also concerned that if the application succeeded it would result in the virtual co-location with the co-mingling of coffee, popular food items, petrol and liquor purchases, and would be another step towards normalising the purchase of packaged liquor – **Held** that although the Commissioner was right to be concerned that those using the OTR app, including minors, would be exposed to liquor advertisements and that the grant of the application would result in the alignment of OTR’s direct sales licence and the other aspects of its business, this had to be balanced with the public interest for licensing authorities to be seen as principled and in conformity with that expectation parties are entitled to expect consistency in decision making – **Held** that in this case there are no discernible differences between this*

*application and those sought and granted to Coles and Woolworths – **Held** that as such unless the consequences of following the approach taken in those cases is so undesirable that it is appropriate not to follow them, for the sake of consistency this application should have been granted – **Held** that for now, there is no evidence before this Court that would justify it arriving at a decision that was inconsistent with decisions made by the Commissioner in respect of earlier applications – **Held** that the Commissioner erred in finding that it was not in the public interest to grant the application – **Held** that the application for review is allowed and in lieu of the Commissioner’s decision refusing the application, the application is granted – Liquor Licensing Act 1997, Liquor Licensing (General) Regulations 2012, Licensing Act 1967.*

Dalgety Wine Estates Pty. Ltd. v. Rizzon & Anor (1979) 141 CLR 552
Waiata Pty. Ltd. v. Lane & Ors (1985) 39 SASR 290
Shahin Enterprises Pty Ltd [2018] SALC 111
Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 72 ALR 1
BWS Woodcroft [2022] SALC 108
Nevistic v Minister for Immigration and Ethnic Affairs [1981] FCA 41;(1981) 34 ALR 639
Re Drake v Minister for Immigration and Ethnic Affairs (No 2) [1979] AATA 179; (1979) 2 ALD 634
Liquorland (Australia) Pty Ltd & Ors v Lindsey Cove Pty Ltd & Anor [2002] SASC 17; (2001-2002) 81 SASR 337
Hove Sip n Save [2021] SALC 7

REPRESENTATION:

Counsel:

Applicant: Mr B Doyle KC with Mr J Dodd

Solicitors:

Applicant: Piper Alderman

- 1 This is an application seeking a review of a decision by the Commissioner for Liquor and Gambling (the Commissioner) refusing an application made by On The Run Pty Ltd (OTR) for a packaged liquor sales licence (PLS licence).
- 2 A PLS licence is one of a number of licences that the *Liquor Licensing Act 1997* provides for. Section 38(1) of the Act provides that subject to the Act and any conditions a PLS licence permits the holder of that licence:
 - (a) to sell liquor on the licensed premises on any day over a continuous period authorised by the licensing authority (which must not exceed 13 hours) between the hours of 8 am and 10 pm for consumption off the licensed premises; and
 - (b) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is delivered only between the hours of 8 am and 10 pm); and
 - (c) to sell or supply liquor by way of sample for consumption on the licensed premises.
- 3 Amongst conditions that might be imposed upon a PLS licence is one that only permits the sale of liquor through direct sales transactions.¹ (I shall refer to this type of licence as a direct sales licence), The effect of this condition is that there is no actual licensed premises. This has significant consequences. In connection with such licences, concepts like the relevant community and locality that are critical in determining the eligibility of a conventional PLS licence are meaningless. As such, the onerous requirements necessary to obtain a licence described in the Act as a ‘designated application’, which can only be granted upon a finding that it is in the community interest to do so, do not apply.²
- 4 Based on figures published in the Review of the South Australian Liquor Licensing Act 1997 by the Honourable TR Anderson QC (the Anderson Review), in the period between 30 June 2005 and 31 May 2016 the number of direct sales licences increased from 116 to 494. I understand that that number is increasing. In contrast to this, over that same period, the number of hotel licences and retail liquor merchant licences remained essentially the same.
- 5 OTR operates a series of petrol stations across the State. These stations offer much more than fuel. They typically also offer the equivalent of a

¹ Prior to recent amendments to the Act, such a licence was a separate category of licence known as a direct sales licence.

² This is made clear through the definition section of the Act, s 4, which relevantly describes a ‘designated application’ as (d) a packaged liquor sales licence, other than if the licence is, or is proposed to be, subject to a condition authorising the licence to only sell liquor through direct sales transactions’.

convenience style grocery store and often contain other offerings such as fast-food facilities. They enable purchases of its range of product through an app.

- 6 On 5 July 2021 OTR applied to the Commissioner for the grant of a direct sales licence. Although in conformity with the relevant form an address in Kensington, being OTR's head office, was nominated as the address of the licensed premises, the application made it clear that the licence, if granted, would be subject to a condition authorising the licence to only sell liquor through direct sales transactions.
- 7 Pursuant to s 53 of the Act, a licensing authority has 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)'. And, it must refuse to grant the licence if it is satisfied that to grant the application would be contrary to the public interest. It must also refuse to grant a licence if it 'is satisfied that to grant the application would be inconsistent with the objects of the Act'.
- 8 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.
- 9 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.
- 10 By email dated 17 January 2022, the Commissioner, through his delegate, invited submissions from the applicant as to why the grant of this application was in the public interest.
- 11 By letter dated 16 February 2022 the applicant, through its lawyers, responded. It stated that no liquor sales would occur from ONR premises and that there would be no physical connection between OTR premises and liquor sales. It stated that OTR is not simply a petrol station but is also a well-known convenience brand. It stated that it was no different than the alignment of Coles and Woolworths to petrol stations and noted that Woolworths had recently been granted by the Commissioner a PLS subject to a condition authorising the licence to only sell liquor through direct sales transactions. (Coles also had previously been granted this type of licence). It stated that the grant of the licence would benefit customers by providing additional and needed competition in the delivered packages liquor market.

The Commissioner's decision

- 12 On 30 May 2022, the Commissioner refused the application and published reasons for doing so.
- 13 The Commissioner acknowledged OTR's submission that there are a number of existing major convenience stores and petrol station brands already operating in the South Australian liquor market. But he thought that an important point of distinction was 'the fact that the 'OTR' app is far more likely to be used by people under the age of 18 years of age (i.e. minors) who are licensed to drive vehicles or motorcycles and who shop at OTR to purchase fuel, or other affiliated businesses within the Peregrine group such as Krispy Kreme and Subway, particularly given the loyalty rewards offered by the OTR app as described on the App store.'
- 14 The Commissioner reasoned that if the application succeeded persons under the age of 18 could be potentially exposed to liquor products and advertisements whenever they use the app. He reasoned that this cohort of minors was also likely to include minors who are unlicensed, given the range of popular food items available on the OTR app.

- 15 The Commissioner was also concerned that the presence of alcohol advertisements on the OTR app had the potential to normalise in the minds of minors the purchase of alcohol by aligning it with daily staples such as fuel, snacks and coffee. He stated that this was not in the public interest nor was it consistent with the expectations and aspirations of the public.
- 16 The Commissioner noted that OTR had submitted that the grant of the licence would be beneficial because it would add additional and much needed competition in the delivery packaged liquor market. He rejected this stating that he ‘did not consider that there is any pressing need for further competition in relation to the availability of or delivery of packaged liquor, or that this would provide any benefit to the community’.
- 17 The Commissioner made a finding that the grant of the application carried with it a significant risk of harm.
- 18 The Commissioner made reference to s 38 of the Act and in doing so it appears that he was reflecting upon the restriction imposed by s 38(7) which provides that: ‘A packaged liquor sales licence may only be granted in respect of premises of a prescribed kind if the licensing authority is satisfied that there is a proper reason to do so’. This in turn picks up reg 7AB of the *Liquor Licensing (General) Regulations 2012*, which includes amongst ‘premises of a prescribed kind’, ‘petrol stations, including any parts of a petrol station that consist of a shop, or shops, selling goods by retail.’³
- 19 He stated that if this application succeeded ‘it would result in the virtual co-location with the co-mingling of coffee, popular food items, petrol and liquor purchases, and would be another step towards normalising the purchase of packaged liquor’. He stated that this was contrary to the public interest.
- 20 The Commissioner stated that there are ‘a plethora of dedicated apps available to the public and online sales comprise a significant and increasing proportion of liquor sales’. He stated that the fact that there is no shortage of online liquor and delivery options weighed against granting the application. The Commissioner seemed to be saying: ‘enough is enough’.
- 21 The Commissioner concluded by stating that the grant of the application was not in the public interest and was inconsistent with the objects of the Act.

³ Reg 7AB(d)(i).

OTR's submissions on review

- 22 Mr Doyle KC, counsel for OTR, noted that there was no opposition to the application, either by the Commissioner of Police, or any commercial or individual objector.
- 23 Mr Doyle submitted that the Commissioner erroneously assumed that the combined operation of s 38(7) and reg 7AB of the Regulations created some general legislative policy against packaged liquor being associated with premises of a prescribed kind, even if the sales are by delivery and no alcohol is displayed at prescribed premises and the sale is conducted by an app which has no physical location. He submitted that there was no warrant for the Commissioner to conclude that it was contrary to the public interest to permit the virtual co-location with the co-mingling of coffee, popular food items, petrol and liquor purchases. He submitted that the Commissioner erred in approaching the application from the premise that to grant it would set an undesirable precedent by tending to normalise the purchase of liquor with other daily staples such as fuel and attractive food items.
- 24 Mr Doyle submitted that the Commissioner seems to have treated that application that it would, in effect, turn OTR stores into de facto bottle shops. He said that the Commissioner's finding that the grant of the application would lead to an unacceptable risk of harm, including harm to minors, was made without a proper evidentiary foundation and overlooked the fact that because it involved sale by delivery within a limited band of hours,⁴ there would be an inevitable delay between the purchase of and availability of liquor. He added that the Commissioner also failed to have regard to the very onerous obligations imposed upon the deliverer to ensure that delivery is not made to minors, as prescribed by 107A of the Act and reg 15A of the Regulations.⁵
- 25 Mr Doyle submitted that the Commissioner failed to have regard to the public benefit that the additional competition and point of difference that would flow from the grant of the application and erroneously assumed that any benefit, in terms of additional employment that the grant of the application would lead to, as virtually non-existent.
- 26 Mr Doyle submitted that the only area of concern that the Commissioner could have considered was that the use of OTR's website would see advertisements for or references to alcohol on a medium that might also contain advertisements and the like regarding attractive non-alcohol products and necessities such as petrol. He made the point whilst this might not be desirable, the fact is that these days on any computer or like

⁴ Section 38(1)(b) of the Act provides that liquor can only be delivered to an address in the State between the hours of 8 am and 10 pm.

⁵ These collectively impose requirements regarding age verification and strict delivery obligations.

device, different products are only ever a click away from each. He then added that in any case, notwithstanding this, licences identical to that sought here were granted to entities associated with Coles and Woolworths that permit those entities to not only to advertise alcohol and groceries in a common medium, but also to arrange co-ordinated collection or delivery of alcohol and non-alcohol items. He noted that on contrast to these, OTR's offering would not allow co-ordinated collection or delivery. He submitted that the concept of alignment of liquor products with attractive non-alcohol products and necessities, such as petrol, is either offensive to harm minimisation principles, or it is not. He said that it cannot be right that it is acceptable for one operator to facilitate co-ordinated collection and delivery of alcohol and non-alcoholic products over much but not all of the State, and yet it be unacceptable for another.

- 27 Mr Doyle submitted that the Commissioner's differentiation between the earlier successful applications by Coles and Woolworths and OTR's application was flawed. He said that there was no rational basis to conclude that the OTR app might be used to a greater extent by minors than would be the case in relation to other market participants such as Coles or Woolworths. He said that if anything, because the OTR app is likely to be widely used by drivers, this would tend to skew the demographic towards non-minors. He then made the point that minors cannot receive deliveries of alcohol by using the OTR app and that the notion that there is some significant risk posed by a person buying petrol or doughnuts late at night and making an imprudent purchase of alcohol for delivery at some later date to a residential address is hard to fathom. He said that the prospect of some unacceptable risk arising from a delivery that would not be received until the next day at the earliest is without an evidential foundation.
- 28 Mr Doyle concluded by submitting that this Court should exercise the discretion conferred by the Act afresh. He submitted that it should find that the application is not contrary to the public interest, or the objects of the Act and it should therefore grant the application.

Consideration

- 29 I accept Mr Doyle's submission that s 38(7) of the Act and reg 7AB of the Regulations are confined to **the physical** co-location of premises trading under a PLS licence and premises of a prescribed kind. The use of the word 'premises' in s 38(7) is instructive. That word is defined in s 4 of the Act as follows:

“premises” includes—

- (a) land;

- (b) any building or structure on land, including a temporary or moveable building or structure;
- (c) a public conveyance;
- (ca) a motor vehicle (within the meaning of the *Road Traffic Act 1961*) or a vehicle of a kind prescribed by the regulations;
- (d) a part of premises;

30 It can be seen that they are all actual premises. In my opinion the word ‘premises’ does not include ‘virtual premises’.

31 I now turn to make some general observations about the discretion vested in a licensing authority to reject an application.

32 The discretion has been described as ‘the widest of possible discretions’.⁶ In *Waiata Pty Ltd v Lane & Ors*, King CJ explained that in connection with the *Licensing Act 1967* the primary purpose of the discretion is the protection of the general public interest. He spoke of it as enabling ‘the shaping and development of an orderly and harmonious system of liquor facilities designed not only to meet the public need for liquor facilities but also to protect the wider public interest in the preservation of the community from adverse social effects.’ This in turn requires consideration of matters such as ‘the undue proliferation of licences or of certain types of licences’ and ‘the promotion and maintenance of a suitable balance between the various types of liquor facility available in a locality’.⁷

33 Although written in connection with previous legislation these observations remain valid under the current Act.⁸

34 To this I add the observations of Mason CJ, Wilson and Dawson JJ in *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* where they said:

Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree.⁹

35 With these matters in mind, I now turn to consider the Commissioner’s exercise of discretion to refuse the application.

36 In other jurisdictions in Australia, the wholesale alignment of take away liquor facilities with branded retail facilities is permitted, but in this State

⁶*Dalgety Wine Estates Pty. Ltd. v. Rizzon & Anor* (1979) 141 CLR 552 at 566.

⁷ (1985) 39 SASR 290 at 294,

⁸ See, for example: *Shahin Enterprises Pty Ltd* [2018] SALC 111 at [22]-[27].

⁹ [1987] HCA 27 at [7]; (1987) 72 ALR 1 at 5.

we have not gone down that path. Thus, a licensing authority must proceed from the premise that the wholesale alignment of liquor facilities with other retail facilities, from a public interest perspective, may have some negative connotations.

37 In light of this, I respectfully agree with the Commissioner's concern that those using the OTR app, including minors, would be exposed to liquor advertisements. I think he was also right to be concerned that the grant of the application would result in the alignment of OTR's direct sales licence and the other aspects of its business. These matters pointed towards exercising the discretion to refuse the application.

38 But another important consideration is the public interest for licensing authorities to be and be seen to be just and principled institutions. An important characteristic of such institutions is consistency in decision making. As was observed in *BWS Woodcroft* 'Like cases should result in like outcomes'.¹⁰

39 In *Nevistic v Minister for Immigration and Ethnic Affairs* Deane J stated:

There are many reasons for the desirability of consistency in the making of decisions affecting rights, opportunities and obligations under the law. Paramount amount (sic) them is the fact that inconsistency in the treatment of those amenable to the law involves an element of injustice. Particularly where there is competition or correlativity between right, advantages, obligations and disadvantages, equality of treatment under the law is an ingredient of modern concepts of justice and the rule of law.¹¹

40 To like effect was that statement by Brennan J (as he then was) in *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)*:

Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice.¹²

41 That is not to say that a licensing authority is powerless to correct what is an undesirable precedent.

42 As Deane J further observed in *Nevistic v Minister for Immigration and Ethnic Affairs*:

...while consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it. As Smither J pointed out in *Re Gungor and Minister for Immigration and Ethnic Affairs* (Administrative Appeals Tribunal: 30 May, 1980), consistency must

¹⁰ [2022] SALC 108 at 107.

¹¹ [1981] FCA 41;(1981) 34 ALR 639 at 646.

¹² [1979] AATA 179; (1979) 2 ALD 634 at 639.

ultimately be related to policy and is safely sought by reference to policy only when the policy is appropriate and acceptable. Decision makers may be consistently wrong and consistently unjust. The Tribunal is not bound by either its own previous decisions or by the content of government policy. There have been and will be cases in which the Tribunal concludes that it should refuse to follow a previous decision of the Tribunal or reject or disregard the dictates of a relevant policy of the government. The existence of such cases serves to emphasise the fact that each applicant to the Tribunal is entitled to have his or her application for review decided on its own particular merits. The desire for consistency should not be permitted to submerge the ideal of justice in the individual case.¹³

- 43 The issues that arise in this case are whether there are discernible differences between this application and those sought and granted to other entities such as Coles and Woolworths, and if not, are the consequences of following the approach taken in those cases so undesirable that it is appropriate not to follow them or other valid reasons for refusing the application.

Discernible differences between this application and those previously sought and granted?

- 44 Although the Commissioner found material differences, respectfully, I struggle to see any differentiation between OTR's application, and the applications made by and granted to Coles and Woolworths.
- 45 One cannot get a driver's licence in this State unless the person is at least 16 years of age. As such, the number of persons driving to an ONR who are minors is likely to be a relatively small number. It is true that minors may be attracted to facilities co-located with ONR store such as Krispy Crème, Subway and the like. But many Coles and Woolworths stores are also co-located with facilities that minors might find attractive.
- 46 I accept that if OTR is granted this application members of the public, including minors, will have access to liquor advertisements. But the same is also true of those who use a Coles or Woolworths website, given that they have been granted direct sales licences.
- 47 Thus, unless there is good reason not to follow the precedent set by the grants of the applications made by entities such as Coles and Woolworths, in conformity with the principle of consistency in decision making, the application should be granted.

¹³ [1981] FCA 41;(1981) 34 ALR 639 at 646-7.

Are the consequences of following the approach taken in those cases so undesirable that it is appropriate not to follow them?

- 48 The starting point is to consider whether there are any adverse issues in connection with the approach previously taken by the Commissioner.
- 49 With respect, and accepting that the exercise of the discretion is very much a question of fact and degree, I think there are.
- 50 Although many shopping centres across the State contain bottle shops that are co-located with supermarkets, there is not a direct alignment of brand names. True it is, that stores trading under the Liquorland badge are typically aligned with Coles' supermarkets and that stores trading under the BWS badge are typically aligned with Woolworths' supermarkets. It is also true that Coles through its sales dockets offer discounts at Liquorland stores as do Woolworths at BWS stores. But so far as I am aware, there are no bottle shops in this State that trade directly as Coles or Woolworths.
- 51 The grant of direct sales licences to Coles and Woolworths, albeit in a virtual reality, has created that alignment. A visit to the Coles' web page contains advertisements for liquor. The same is true of a visit to the Woolworth's web page.
- 52 Thus, whilst there is already a strong association between grocery sales and liquor sales, allowing brand name supermarkets to sell liquor through direct sales licences under essentially the same brand, makes that association even stronger.
- 53 The Commissioner was quite right to say that there is no pressing need for a further direct sales licence in this case. Similarly, there was no pressing need to grant such licences to Coles or Woolworths when they applied.
- 54 That being so, in my opinion a licensing authority, be it the Commissioner or this Court, would have been entitled to exercise its discretion to refuse the applications made by Coles and Woolworths for such licences.
- 55 But the fact of the matter is that in respect of these applications the discretion was not exercised, and the licenses were granted.
- 56 The issue that now arises is whether the adverse consequences of following a less than desirable precedent outweigh the strong public interest in there being consistency in decision making.
- 57 Factors that would be relevant to breaking with a less than desirable precedent would include whether the precedent had resulted in an increase in alcohol consumption, whether it is creating problems around the

consumption of liquor by minors or is it having a negative impact upon drinking habits generally.

- 58 As it is, there is no reliable evidence before this Court that is supportive of any of these conclusions. If there had been an increase in issues around drinking by minors and drinking habits more generally, either because of the increase in direct sales licences or because of the grant of those licences to Coles and Woolworths, it might have been expected that the Police would have sought to be heard on the application. It is telling that they did not.

Are there other valid reasons for refusing the application?

- 59 As noted earlier, an additional factor that the Commissioner may have taken into account in exercising his discretion was that in connection with applications for direct sales licences, his view seems to have been that there already are enough.
- 60 Notwithstanding the breadth of the discretion conferred by s 53 it is not without some limitations. As Doyle CJ observed in *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd*¹⁴ a licensing authority must be careful not to use the discretion as a basis for imposing its views about what is desirable.¹⁵
- 61 If the Commissioner took the ever-increasing number of direct sales licences into account in exercising his discretion, as is made clear by King CJ in *Waita*¹⁶ and Doyle CJ in *Lindsey Cove*,¹⁷ he could only validly do so for purposes consistent with the Act or to the advance and maintain principles and policies contained in the Act.
- 62 I think it is clear enough that the Act evinces an intention that there should be a range of liquor facilities to serve the public's desire to purchase take away liquor.
- 63 Thus, it would be a valid use of the discretion to refuse applications for direct sales licences if there was evidence that the continued increase in them is upsetting the balance between the various types of take away liquor facilities.
- 64 Section 3(1) directs that the sale and supply of liquor must occur in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor.

¹⁴ [2002] SASC 17; (2001-2002) 81 SASR 337.

¹⁵ *Ibid* at [27].

¹⁶ *Ibid*.

¹⁷ *Ibid*.

- 65 It would therefore also be a valid use of the discretion to refuse these applications if there was evidence that they were contributing to excessive or inappropriate alcohol consumption.
- 66 The recent run of applications for conventional PLS licences demonstrates, that notwithstanding the increase in direct sales licences, the preparedness of entities to apply for conventional PLS licences has not diminished. In other words, the surge in the number of direct sales licences does not appear to have upset the range of liquor facilities required to meet the public desire for take away liquor and the wider community interests. It must be accepted that most of the new applications have been made by entities associated with Coles and Woolworths. But not all.
- 67 As for issues around alcohol consumption, as was observed in *Hove Sip n Save* ‘the evidence that this Court has received in recent years is that overall, the consumption of alcohol is diminishing’.¹⁸ This period included the period identified in the Anderson Review during which there was a significant increase in the number of direct sales licences. It follows that that increase has not resulted in a corresponding increase in alcohol consumption.
- 68 Thus, on the current state of the evidence, for now a licensing authority could not rely upon the increased number of direct sales licences as of itself justifying the exercise of the discretion to refuse further applications.

Summary and conclusion

- 69 In conclusion, whilst there are some concerning aspects of this application, factually it is indistinguishable from similar applications made by and granted to Coles and Woolworths. For now, there is no evidence before this Court that would justify it arriving at a decision that was inconsistent with decisions made by the Commissioner in respect of earlier applications. There are powerful public interest considerations in maintaining consistency of decision making. With this in mind, in my opinion the application should have been granted.
- 70 The powers conferred on this Court on a review, include the power to make any decision that should, in the opinion of the Court, have been made in the first instance.¹⁹ In the exercise of this power, I grant OTR’s application for review and set aside the order made by the Commissioner. In lieu of it, I find that the grant of the application is in the public interest. Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court’s consideration.

¹⁸ [2021] SALC 7 at [10].

¹⁹ Section 22(8)(b).