

**LICENSING COURT OF SOUTH AUSTRALIA**

**CELLARBRATIONS MANNUM**

**JURISDICTION:** Application for review of or an appeal from the Commissioner's Decision

**FILE NO:** 3 of 2021

**HEARING DATE:** 25, 26, 31 March 2021

**JUDGMENT OF:** His Honour Judge BP Gilchrist

**DELIVERED ON:** 14 May 2021

**CATCHWORDS:**

*Application seeking a review of a decision of the Commissioner for Liquor and Gambling to grant a packaged liquor sales licence in respect of premises at Mannum, an historic country town that services the Mid Murray Council area – The Australian Hotels Association contends that the decision should be revoked. It submits that the scheduling of the hearing was governed by the Act and that in accordance with it the hearing should not have been conducted at the time when it was, because applications for packaged liquor sales licences that had been lodged earlier had not been dealt with and that as a matter of law the decision is therefore invalid – Next it contends, that even it were otherwise, because there were private communication between a representative of the applicant and the delegate, the appearance of impartiality and independence was compromised and the delegate's decision cannot stand – Finally, it contends that if the Court was to deal with the application, it should be refused on the merits – **Held** that the Act and the regulation promulgated thereunder create an expectation that applications will be dealt with in the order in which they are lodged but a failure to do so does not render any decision void – **Held** that in this case no injustice was caused by the failure to do so – **Held** that once an entity had filed submissions in opposition to an application the Commissioner assumed an adjudicatory function in respect of which private communications with an applicant can become problematic – **Held** that in this case as some of those communications amounted to adverse submissions the objector should have been given the opportunity to comment and in all the circumstances there was a perception of a lack of impartiality and therefore a denial of procedural fairness – **Held** that as no issues of credit were involved in the delegate's decision and this Court heard evidence in the circumstances it*

*should deal with the application – **Held** that on the merits the application should be granted such that the delegate reached the correct decision and the application for review must therefore be dismissed – Liquor Licensing Act 1997, Liquor Licensing (General) Regulation 2012:*

*Liquorland (Australia) Pty Ltd (Park Holme) [2020] SALC 37*  
*Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355*  
*Hove Sip n Save [2021] SALC 7*  
*BWS – Mt Barker [2016] SALC 33*  
*CNY17 v Minister for Immigration and Border Protection [2019] HCA 50*  
*The City of St Kilda v Evidon Pty Ltd [1990] VR 771*  
*Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337*  
*Fox v Percy [2003] HCA; (2003) 214 CLR 118*  
*Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227*  
*Liquorland (Australia) Pty Ltd v North Adelaide Village Shopping Centre Pty Ltd and Village Cellars (SA) Pty Ltd [2012] SALC 42*  
*Erythos Holdings Pty Ltd [2015] SALC 34*

#### **REPRESENTATION:**

Counsel:

Applicant: Mr G Coppola

Respondent: Mr M Roder QC with Mr I Rice

Intervenor: Ms V Montandon

Solicitors:

Applicant: Australian Hotels Association

Respondent: Griffins Lawyers

Intervenor: Crown Solicitor's Office for Liquor and Gambling  
Commissioner of South Australia

- 1 On 23 December 2020, a delegate of the Commissioner for Liquor and Gambling (the delegate) granted a packaged liquor sales licence to Mannum Liquor Pty Ltd in respect of premises at the Mannum Green Shopping Centre, 67 Adelaide Road, Mannum.
- 2 The Australian Hotels Association (AHA) contends that the decision should be revoked. It submits that the scheduling of the hearing was governed by the *Liquor Licensing Act 1997* (the Act). It said that in accordance with the Act the hearing should not have been conducted at the time when it was, and that as a matter of law the decision is therefore invalid. Next it contends, that even it were otherwise, because there were private communication between a representative of Mannum Liquor and the delegate, the appearance of impartiality and independence was compromised such that the delegate's decision cannot stand and the matter must be remitted to the Commissioner for a re-hearing. Finally, it contends that if the Court was to deal with the application, it should be refused on the merits.

### **Background**

- 3 Mannum is an old historic town situated on the side of the River Murray, about 80 kilometres or so south east of Adelaide. The main road leading into Mannum is Adelaide Road, which sweeps around from the east of the town to eventually run parallel to the river, becoming Mannum's main street, Randell Street.
- 4 Mr John Naylor is the proprietor of Mannum Liquor. He operates two large format supermarkets, one of which is in Mannum, trading as IGA Fresh Mannum Green (IGA Mannum). IGA Mannum anchors the Mannum Green Shopping Centre, which is situated on the outer edge of the town of Mannum, about 1.5 kilometres to the east of the main street.
- 5 The IGA Mannum is one of two supermarkets in Mannum. It is by some measure the larger of the two. It has over 2,200 square metres of retail shopping space. It carries over 20,000 shopping lines. It contains a full service butcher, a full service deli, an in-house bakery, and a large fresh green-grocer. It carries an extensive range of dairy and frozen food as well as boating, camping and fishing merchandise. During normal trading periods it has an average turnover of \$278,000 per week. By any measure it is a substantial supermarket.
- 6 The other supermarket trades as Foodland Mannum. It is situated on the river side of Randell Street. It has about 800 square metres of retail shopping space. It carries about 10,000 shopping lines. Its turnover is about a third of IGA Mannum.
- 7 There are two hotels in Mannum, the Pretoria Hotel, situated in the middle of the main street on the river side of Randell Street, and the

Mannum Hotel, which is further west on the other side of Randell Street. Both sell take away liquor. The Pretoria Hotel trades under the Sip n Save badge. The Mannum Hotel trades under the Liquor Legends badge.

- 8 An application for a packaged liquor sales licence is 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.’
- 9 In deciding that question, 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
  - (v) must apply the community impact assessment guidelines.
- 10 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.’
- 11 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that, if relevant, is expected to address matters such as: ‘the applicants products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest. Applicants are also required to provide, where applicable: a map

and report regarding the locality generated through the Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of site/building.’

- 12 In making the application to the Commissioner, Mannum Liquor was provided with considerable assistance by Mr Paul Tisato, a consultant with considerable experience in the liquor industry. He prepared the ‘Community Impact Submission’. It was a relatively comprehensive document that included submissions on topics such as the relevant locality, which it described as the Mannum township and the surrounding small towns, the community impact, the cultural, recreational and tourism impacts and the nature of the business that was proposed.
- 13 The application, which was lodged on 7 August 2020, was supported by a statement from Mr Naylor. Amongst other things, Mr Naylor spoke of his belief that the addition of a retail liquor store would successfully add to the suite of products available at the Mannum Green Shopping Centre. He said that he regarded the addition of a Cellarbrations liquor store as a natural extension of the established every day and gourmet offerings at IGA Mannum that would enable shoppers to purchase liquor as part of a one stop shopping experience at the Mannum Green Shopping Centre.
- 14 The application drew opposition from the AHA. It filed a written submission. It submitted that the Census Quickstats revealed that Mannum is disadvantaged in terms of income and employment when compared with the rest of Australia, and that it has a relatively higher number of Aboriginal and Torres Strait Islanders than the general population. It contended that that the application contained inadequate material relating to harm minimisation. It said that in light of the existing take away liquor facilities in Mannum, if this application succeeded the locality would be awash with such facilities. It also spoke of the potential for the proposed premises to have a negative tourism impact by drawing people away from the river.
- 15 By email dated 9 September 2020, an officer of the Commissioner advised Mr Tisato that the application would be determined on 12 October 2020. On that day, Mr Tisato emailed the Commissioner’s office seeking an update on the status of the application. On the following day, an officer of the Commissioner advised Mr Tisato: ‘This one received a submission therefore a decision won’t be made in the normal process time’.<sup>1</sup> Mr Tisato emailed the Commissioner’s office on 29 October 2020 seeking an update. He was advised by an officer of the Commissioner on 2 November that ‘Packaged Liquor Sales applications with a physical store take a little while to be assessed by our delegates’.<sup>2</sup>

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<sup>1</sup> Exhibit A4.

<sup>2</sup> Exhibit A4.

- 16 On 9 December 2020, Mr Tisato sent a lengthy email to the Commissioner's office that was copied into the Commissioner himself. Having noted that two months had passed since the original proposed determination date had been set, he spoke of his and Mr Naylor's difficulty in understanding the length of time that was being taken to deal with the application. The email also included the following:

It is clear that the submission received from AHA (SA) as "objector" to this application is based purely on commercial grounds. It is obvious that their strategy is to lodge submissions (objections) to all applications for Packaged Liquor Sales Licences with a physical store. Their goal is to protect the commercial interests of their members by either delaying the grant of this category of licence, or ultimately blocking the grant of these licence types. These submission by the AHA (SA) as opposed to genuine submissions received from the community directly affected by the application, should not be considered as anything other than what they are, a mechanism of protection of commercial interest and highly anti-competitive.

I would suggest to you that this clear strategy should be considered as vexatious in nature. I would further suggest that as this strategy continues to be successful, that it will continue in all applications for Packaged Liquor Sales Licences with a physical store.<sup>3</sup>

- 17 The email then went on to complain about aspects of the AHA's submission and recited extracts from the Anderson Review that were plainly intended to undermine the AHA's submission. The email concluded with a request for a response.
- 18 An officer of the Commissioner responded later that day advising that the delegate would contact Mr Tisato to discuss the application. It would seem that on 10 December 2020, the delegate contacted Mr Tisato and advised him that a determination would be made on 18 December 2020.
- 19 On 21 December 2020, Mr Tisato sent any email to the Commissioner's office seeking an update. It would seem that on that day the delegate contacted Mr Tisato and sought further information about what harm minimisation policies or procedures that Mannum Liquor intended to put in place. As a result, on 22 December 2020, Mr Tisato forwarded a copy of Mannum Liquor's 'Licensee Management Plan'. On the following day, 23 December 2020, the delegate issued a determination granting the application.
- 20 For reasons that will become apparent shortly, it is convenient at this point to note that applications for packaged liquor sales licences for proposed premises at Hove and Mount Gambier were lodged with the Commissioner

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<sup>3</sup> Exhibit A4.

prior to 7 August 2020. The application in respect of the Hove premises has since been abandoned. At the time of the hearing of this application for review, the application in respect of the Mount Gambier premises was not yet determined.

### **The delegate's determination**

- 21 The delegate commenced his consideration of the application by reflecting upon what was the relevant locality. In conformity with the decision of this Court in *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>4</sup> the delegate directed his consideration to the anticipated primary catchment area of the proposed premises and stated that about a 10 to 15 kilometre radius was appropriate. He found that around 3,000 persons were within the relevant locality.
- 22 The delegate then turned to consider the potential for the proposed premises to cause harm. He noted that the only objector to the application was the AHA and that entities such as South Australian Police and the Mid Murray Council had not objected. He referred to Mannum Liquor's 'Licensee Management Plan' and said that he was satisfied that it appropriately addressed issues around the responsible service of alcohol.
- 23 The delegate found that the application, if granted, would result in an increase in employment within the locality.
- 24 The delegate noted that a significant number of people shop at the Mannum Green Shopping Centre. He found that the proposed premises would appeal to many of those shoppers. He said that whilst this additional convenience was not decisive of the community interest test, it was a relevant consideration.
- 25 The delegate noted evidence of community support, evidenced by letters of support from the local Member of Parliament and the President of the Mannum Football Club.
- 26 The delegate summarised the AHA's submissions. He rejected its submission that to grant the application would mean that the locality was awash with take away liquor facilities. He queried the AHA's contention that the residents of Mannum were disadvantaged in terms of income and employment. He said that in any case, even if asserted disadvantage and the asserted relatively higher number of Aboriginal and Torres Strait Islanders than the general population were correct, it did not follow that the community interest test would fail.
- 27 He found that the proposed premises was a different offering to the existing take away liquor facilities. He found that they would offer a

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<sup>4</sup> [2020] SALC 37.

significant range of liquor that would result in added convenience to those who shop in the locality who could be expected to take advantage of the opportunity to combine their liquor purchasing with their other shopping at the Mannum Green Shopping Centre.

### **The application for review**

- 28 As was noted at the outset, the AHA's application for review is based upon three grounds. The first relates to the timing of the hearing. The second relates to the fact of private communications with the delegate. The third concerns the application on its merits.

*The hearing should not have been conducted at the time when it was*

- 29 The AHA noted that s 54 of the Act provides that:

The order in which applications for new licences are determined must be consistent with the requirements of the regulations.

- 30 It noted that reg 13 of the *Liquor Licensing (General) Regulation 2012* provides:

(1) For the purposes of section 54 of the Act, applications for new licences must, subject to subregulation (2), be determined in the order in which they are received by the licensing authority.

(2) A licensing authority may, if satisfied that special circumstances justify it doing so, hear and determine particular applications together regardless of the order in which they were received.

- 31 The AHA accepted that where reg 13(1) speaks of 'applications for new licences' it cannot mean all licences. It said that it clearly means application for the same type of licence. It submitted that the effect of s 54 of the Act and reg 13 of the Regulations is that applications for the same type of licence must be determined in the order in which they are received by the licensing authority unless the licensing authority is satisfied that special circumstances justify it hearing and determining particular applications together.

- 32 It submitted that in this case, that meant that the delegate should not have proceeded to hear and determine Mannum Liquor's application until after he had heard and determined the applications in respect of packaged liquor licences in connection with premises at Hove and Mount Gambier.

- 33 In support of this submission, Mr Coppola, who represented the AHA, referred me to the judgment of Brennan CJ in *Project Blue Sky v Australian Broadcasting Authority*<sup>5</sup> where he said:

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<sup>5</sup> (1998) 194 CLR 355.



If the power exercised by a repository is within the ambit of the power reposed, there can be no unlawfulness on the part of the repository in exercising it. Either there is power available for exercise in the manner in which the repository has exercised it and the exercise is lawful or there is no power available for exercise in the manner in which the repository has purported to exercise it and the purported exercise is invalid.

A provision which directs the manner of the exercise of a power is quite different from a provision which prescribes an act or the occurrence of an event as a condition on the power - that is, a provision which denies the availability of the power unless the prescribed act is done or the prescribed event occurs.<sup>6</sup>

- 34 Mr Coppola argued that the Act and the regulation denied the availability of the power to determine an application unless the prescribed act is done, that is, that the application is dealt with in the order in which it was filed. He said that because that did not happen in this case, the purported exercise of power by the delegate was invalid.
- 35 Mr Roder QC, counsel for Mannum Liquor, made reference to other passages in *Project Blue Sky*. In that case, McHugh, Gummow, Kirby and Hayne JJ said as follows:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.<sup>7</sup>

- 36 He submitted the facts of this case demonstrated the absurdity that would follow if s 54 and reg 13 were effectively mandatory provisions, which directed that the applications for packaged liquor licence at Hove or Mount Gambier had to be heard and determined first. He said that the outcome of those applications could not possibly be of any relevance to the outcome of this application.
- 37 He submitted that a failure to hear applications in the order dictated by s 54 and reg 13 did not necessarily mean that the order was invalid and of no effect. He submitted that unless that failure resulted in an injustice it was of no consequence. He said that there was no evidence of an injustice in this case.

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<sup>6</sup> Ibid at 373 [36]-[37].

<sup>7</sup> Ibid at 388-9; [91].

- 38 Ms Montandon made submissions on this issue on behalf of the Commissioner. She said that the Act must be interpreted pragmatically and in accordance with its objects, a key feature of which was to create an efficient, flexible and fair licensing regime unburdened by undue technical formality. She submitted that the notion that licence applications had to be dealt with strictly in the order in which they were filed, regardless of the level of complexity involved, was inconsistent with this. She submitted that reg 13 should be read down, so that it only applied when the applications for licences were likely to potentially impact upon each other.
- 39 Ms Montandon put forward similar submissions to Mr Roder in contending that if the Commissioner was obliged to deal with the applications in the order in which they were filed, his failure to do so did not render his decision void.

*The appearance of impartiality and independence was compromised*

- 40 Mr Coppola submitted that as the AHA had made submissions as it was it was entitled to procedural fairness, which in turn meant that it was entitled to expect a process that was, and was seen to be, impartial and independent. He said that the fact of private communications between Mr Tisato and the Commissioner's office was a 'bad look'. He said that Mr Tisato had effectively made submissions without the AHA being given an opportunity to comment. He said that it was not the delegate's role to effectively give an applicant a 'heads up' by identifying a weakness in the application, and inviting the receipt of further material to remedy that weakness.
- 41 Mr Roder said that he did not accept that what was involved here was a curial process that demanded procedural fairness. He said that the process was essentially administrative and there was nothing untoward in there being communications with an applicant, and the calling for further material in the context of an application that is ultimately focussed upon the community interest and the public interest.
- 42 Next, he said that in any event, even if there had been a breach of procedural fairness, it did not follow that the decision was a nullity. He said that it was incumbent on the AHA to identify the practical consequence of the alleged breach and in this case none was provided.
- 43 Finally, he said that even if the delegate's decision was vitiated because of the private communications, it did not follow that the matter needed to be remitted to another delegate for a re-hearing. He said that this Court could determine the matter and that in doing so, it should confirm the grant of the licence.

*Evidence and submissions as to the merits the application*

- 44 On review Mannum Liquor supplemented the evidence given before the delegate with further evidence from Mr Naylor and evidence from the planner, Mr Smith.
- 45 The AHA provided supplementary evidence from Mr Luke Jarvis, the bottle shop manager of the Pretoria Hotel.
- 46 Mr Naylor said that over the Christmas/New Year period, IGA Mannum trades at around \$480,000 per week and that during long weekends, Easter and school holidays, which average turnover was around \$400,000 a week. He put this down to the fact that many people own residences in the Mannum area and stay there during holidays as do many tourists and that when in Mannum they visit his store.
- 47 He said that in the general vicinity of the IGA Mannum is the largest and only full line supermarket outside of Murray Bridge.
- 48 He spoke of difficulties associated with parking in the main street of Mannum. He said that there was ample parking at the Mannum Green Shopping Centre. He was cross examined about this. Based on that cross-examination I find that like most country towns, the availability of car parks in Mannum waxes and wanes. More to the point, the fate of this application is not going to turn on the availability of parking.
- 49 In cross examination, Mr Naylor accepted that there are many vacant tenancies at the Mannum Green Shopping Centre and that this had been so for some time.
- 50 Mr Naylor spoke of his experience as a retail operator, his success in meeting audits in connection with gaming, and of his confidence that his staff would meet the requirements of ensuring harm minimisation. He said that he has state of the art security systems and CCTV and will use these at the proposed premises. He said that he intends to recruit an experienced bottle shop manager to not only manage the proposed premises, but to help educate and train staff on an ongoing basis.
- 51 He said that he was aware that the Mannum Community College is only 600 metres from the proposed premises. He said that his policies would deal with issues such as preventing sales of liquor to minors and intoxicated persons. He said that he intended to erect signage advertising a policy of requiring ID for persons who look under 25, that alcohol will only be supplied to persons 18 and over, and that the secondary service of alcohol is illegal.
- 52 Mr Smith analysed Australian Bureau of Statistics data and information supplied by the Mid Murray Council. He noted that the Council controls

over 6,000 square kilometres stretching from the eastern side of the Mount Lofty ranges through to Cadell, along 220 kilometres of River Murray frontage and accommodating 61 shack settlements. He said that based on the 2016 census, the Council area has 8642 residents. Further, as detailed on the Council's website, this number can swell to up to 20,000 during holiday periods.

- 53 He noted that the delegate identified the relevant locality as being the area of Mannum and surrounds and had identified the relevant population as being 2,298. He said that in his opinion the locality was better defined by the area that has Mannum's post code and this revealed that there were 7,700 persons in 2016 which he said was likely to now be 8,100 persons.
- 54 The effect of Mr Smith's evidence was that the delegate understated the number of persons in the relevant locality.
- 55 Mr Jarvis said that he has been the bottle shop manager of the Pretoria Hotel for three and a half years. He said that the hotel carries a large range of cold beer and that he cannot remember a time when anyone complained about the unavailability of cold beer. He said that the hotel has 29 designated car parks, three of which are dedicated for bottle shop customers.
- 56 Mr Roder submitted that on the merits, the case for the grant of the application had been comfortably met. He said that Mannum is the largest centre out of the entire council area and that for now, there are no traditional bottle shops in that area.
- 57 He said that IGA Mannum was no small country supermarket, it is a modern full-line supermarket and is the only such supermarket in the entire council area. He said that the nearest modern supermarket and the nearest place where traditional one-stop shopping, including purchasing liquor, is in Murray Bridge, some 35 or 40 kilometres away.
- 58 Mr Roder asked me to note that even during quiet periods the IGA Mannum turns over around \$280,000 per week. He said that when regard was had to the trading figures of the Foodland Mannum and the impact that the IGA Mannum had on those figures it showed that even during the quieter period, people are spending \$240,000 a week in Mannum buying supermarket items, which was not being spent before. He said that people are voting with their feet for the supermarket. He said that in light of the unavailability of anything like this elsewhere in the council area, it was difficult to see how having one traditional bottle shop area located next to a major supermarket would give rise to concerns that there is some sort of a floodgates argument, or a bottle shop on every street argument, or the like.

- 59 Mr Roder submitted that in the end, all that was being proposed is a well-run Cellarbrations store to provide one stop shopping in the only place in the entire council area where it would be appropriate, that is some distance from the hotels, neither of which offer the range that could be expected of a Cellarbrations kind of offer.
- 60 Mr Coppola challenged Mr Smith's evidence about the number of persons in the locality. He said that, at best, it amounted to no more than an estimate. He said that in the main what Mr Smith put forward were very rubbery figures based on assumptions about unoccupied dwellings and the unproven assumption of the number of people who visit them.
- 61 He submitted that I should find that the relevant number of people in the locality is 4,084 being the standing population. He said that I can assume that people who visit Mannum by way of houseboat or those camping, would not require, or expect availability of liquor next to a supermarket.
- 62 Mr Coppola said that given the relatively small number of people involved, the two existing facilities offering take away liquor were more than adequate.
- 63 Mr Coppola was critical of the delegate's failure to refer to a submission advanced by the AHA, Mannum was a tourist town, that the tourism was focused about the river, and that the grant of this application had a potential negative tourist impact by drawing people away from the river.
- 64 Mr Coppola said that there was insufficient material to demonstrate that the application would benefit the community. He said that what is involved here amounts to no more than a single use supermarket, a fish and chip shop and chemist next to it, such that a visit to Mannum Green Shopping Centre can hardly be seen as a typical one stop shopping experience. He said that when this fact is weighed with the harm prospects through the creation of another liquor outlet in Mannum, I should find that the community interest test has not been met and I should refuse the application.

### **Consideration**

#### *The timing of the hearing*

- 65 There is an important passage from the judgment of Brennan CJ in *Project Blue Sky* that follows from the passage that Mr Coppola referred me to which says as follows:

A third kind of provision must be distinguished from provisions which restrict the ambit of the power and provisions which prescribe conditions on its availability for exercise. A provision may require the repository or some other person to do or to refrain from doing

something (sometimes within a period prescribed by the statute) before the power is exercised but non-compliance with the provision does not invalidate a purported exercise of the power: the provision does not condition the existence of the power. (Footnotes omitted)<sup>8</sup>

- 66 In other words, Brennan CJ agreed with the proposition contained in passage from the joint judgment that Mr Roder referred to, that sometimes, on the proper construction of the relevant provisions, a conclusion may be reached that non-compliance with the provisions does not invalidate a purported exercise of the power. What is required is the ascertainment of the legislative intention: did the Parliament intend that any act that fails to comply with the condition is invalid?
- 67 It is understandable why Parliament thought it appropriate to make provision that applications should, subject to a specific exception, be dealt with in the order in which they are filed. The statutory provisions and the regulations were in existence at a time when applications for hotel licences and retail liquor merchant's licences had to meet a 'needs' test. A recent grant of an application in a particular locality for a hotel licence or retail liquor merchant's licence under those tests was very likely to seriously diminish the likely success of a yet to be determined application in respect of the same class of licence in the same locality. Although the needs test has been removed, similar considerations about the undesirability of the proliferation of bottle shops selling essentially the same range of liquor within short compass of each other, remain.<sup>9</sup>
- 68 Sometimes the fairest way to deal with relatively contemporaneous applications, whose fate might depend upon each other, is to hear both at the same time. Hence reg 13(2). But in other situations, there might be a justified sense of grievance if an application lodged at an earlier point in time failed, because of an applicant who filed later who had effectively jumped the queue. Through reg 13(1) a licensing authority is directed to not allow queue jumping. That now begs the question as to whether Parliament intended a failure to comply with this direction, renders a consequential order invalid.
- 69 It must be said that this would be a surprising result given that often, listing matters outside of the order in which they are filed, will not result in the adverse consequences that might sometimes be associated with queue jumping.
- 70 The Commissioner has a wide discretion as to how to deal with applications. In some instances, the Commissioner will deem it necessary to conduct a full hearing. But in other cases, the Commissioner might elect to apply s 81(1)(a) of the Act, which empowers the Commissioner to

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<sup>8</sup> Ibid at 374; [38].

<sup>9</sup> *Hove Sip n Save* [2021] SALC 7 at [135].

determine an application without holding a hearing. If the fate of an application that the Commissioner deemed appropriate to determine without a hearing could have no bearing on the fate of other applications, it makes no sense why Parliament would demand that the application must wait its turn in the queue that might involve applications that require full hearings and, that if it were otherwise, the decision of the licensing authority would be null and void. It seems to me to be far more likely that Parliament intended to create an expectation that applications will be dealt with in the order in which they are received, and that if a licensing authority has failed to adhere to that expectation and as a result an injustice to another party has occurred, that injustice can be remedied on review. In short, I think that s 54 and reg 13 are directory, and not mandatory.

- 71 In this case there is no suggestion that the AHA has suffered any injustice by the Commissioner's failure to deal with the various applications in the order in which they were received. Accordingly, that failure does not in any way impugn the delegate's decision.

*Was the appearance of impartiality and independence compromised?*

- 72 It must be accepted that there is a significant administrative component to the role of the Commissioner and many of the functions that he or she might perform have nothing to do with any form of adjudicatory function.
- 73 This will be apparent from a brief survey of some of the provisions of the Act.
- 74 Pursuant to s 8 of the Act, the Commissioner is declared to be responsible to the Minister for the administration of the Act.
- 75 Pursuant to s 9 of the Act, the Commissioner's staff consists of the inspectors and other officers necessary to assist the Commissioner in the administration and enforcement of this Act and any other Acts under which the Commissioner exercises functions and powers. Those inspectors are authorised officers for the purposes of the Act. As such they have wide powers consistent with some of the powers conferred on police officers. If necessary they can forcibly enter licensed premises,<sup>10</sup> require a person to hand over books of account, documents and records relating to the business conducted under a licence, and require any person who is in a position to provide information relating to the sale, purchase or supply of liquor to answer any question on that subject and state his or her full name and address and date of birth.<sup>11</sup>
- 76 The Commission can share information gained in the course of the administration of the Act with other State and Territory and

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<sup>10</sup> Section 121(1) of the Act.

<sup>11</sup> Section 121 (1) of the Act.

Commonwealth agencies responsible for the administration of liquor licensing laws.<sup>12</sup>

- 77 Subject to the Minister's approval, the Commissioner may formulate codes of practice that can regulate aspects of a licensee's business that can result in the imposition of sanctions for non-compliance.<sup>13</sup>
- 78 The Commissioner is required to publish guidelines that identify designated applications and which deal with matters relevant as to whether the grant of such applications are in the community interest.<sup>14</sup>
- 79 Amongst other things, the Commissioner has an obligation to be aware of issues or perceived issues of public order and safety and is authorised to take steps to address these which can, in extreme circumstances, include suspending a licence without giving the licensee notice of the intention to suspend.<sup>15</sup>
- 80 In connection with applications made under the Act for new licenses, applications to vary the conditions of existing licenses, and applications to redefine licensed premises applications that are uncontentious and unopposed, it is to be expected that the Commissioner will act essentially as an administrative body and deal directly with and informally with an applicant. If it were otherwise, the Commissioner would not be discharging the requirement imposed by s 18 of the Act, to act without undue formality.
- 81 I am therefore hesitant to be critical of what transpired in this case.
- 82 But the point needs to be made that when an application for a new licence is opposed and an entity exercises the right conferred by s 77 of the Act to provide written submissions in connection with the application, the Commissioner is obliged to have regard to these.<sup>16</sup> In such circumstances the Commissioner is acting as an adjudicator. And in connection with that role, the fact of private communications with a party may become problematic.
- 83 As Eldeman J observed in *CNY17 v Minister for Immigration and Border Protection*, being an adjudicator carries with it an expectation that the adjudicator will conform to certain standards. He said:

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<sup>12</sup> Section 11 of the Act.

<sup>13</sup> Section 11A of the Act.

<sup>14</sup> Section 53B of the Act.

<sup>15</sup> Section 128B of the Act.

<sup>16</sup> Section 77 (1) of the Act provides: 'If an application has been advertised under this Part, a person may, by notice lodged in a manner and form approved by the Commissioner, at least 7 days before the day appointed for the determination or hearing of the application (or such lesser period as the licensing authority may allow), make written submissions to the Commissioner in respect of the application.' Section 77 (5) obliges the Commissioner to take such submissions into account.



A deduction from the world around us, usually as a natural implication if it is not expressed, is that in exercising powers to adjudicate upon the rights of others an adjudicator will be, and will be seen to be, impartial and independent.<sup>17</sup>

84 When a party to an adjudication privately corresponds with the adjudicator that important perception of impartiality and independence can be seriously eroded. That is why it is an entrenched practice that save exceptional circumstances, lawyers will not communicate with a judge about a matter that is already underway, without the other side being present.

85 In *The City of St Kilda v Evindon Pty Ltd*,<sup>18</sup> Kaye, McGarvie and Ormiston JJ explained that when there is a departure from this practice, it raises doubts about the integrity of the process and reduces confidence. As they said: ‘People would be inclined to wonder why the breach of practice had occurred and how far it had gone.’ They then went on to say:

While litigation produces winners it also produces disappointed losers who are prone to look for reasons for their failure other than a lack of strength and merit in their cases. If a judicial officer has been placed in a situation which arouses a suspicion of unfairness or partiality, human nature is likely to lead the loser to harbour the suspicion and to allow it to grow to a belief that the loss was due to unfairness or partiality of the judicial officer. That tends to destroy the community confidence in the judicial officer. Confidence in those who constitute its courts and tribunals is a basic necessity for a successful civilised democracy.

86 In *CNY17 v Minister for Immigration and Border Protection* the High Court recognised that not all private communications with an adjudicator will necessarily arouse the suspicion of unfairness or partiality. It held that the test is whether the adjudicator should recuse him or herself on the ground of apprehended bias which is based upon whether “a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide”.<sup>19</sup> This in turn raises the question as to whether in the eyes of that observer the evidence or representations made could have influenced the outcome. This involves a factual inquiry that must be looked at from the relevant statutory context.<sup>20</sup>

87 Having regard to the statutory context relevant in this case, the hypothetical fair-minded lay observer would appreciate that part of the Commissioner’s role is administrative and that the Commissioner is

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<sup>17</sup> [2019] HCA 50 at [108].

<sup>18</sup> [1990] VR 771.

<sup>19</sup> *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 at 344.

<sup>20</sup> *CNY17 v Minister for Immigration and Border Protection* *ibid*.

expected to act without undue formality. The observer would appreciate that the proceedings before the Commissioner are less formal than a court and that parties are often either unrepresented or represented by persons other than lawyers. As such, the observer would appreciate that the mere fact of private communications between an applicant and the Commissioner's office would not necessarily be a cause for concern.

- 88 But the hypothetical fair-minded lay observer would also appreciate that there is a marked difference between an applicant unilaterally inquiring about matters such as to when a determination might be made, as opposed to an applicant unilaterally attempting to influence the outcome of the case by making submissions adverse to the interests of the other party without the other party knowing about them and therefore being unable to respond to them. The observer might conclude that in respect of the latter, the communications had crossed an unacceptable line.
- 89 This brings me to the email from Mr Tisato of 9 December 2020 and that which followed.
- 90 The effect of that email was that Mr Tisato was submitting that the AHA's submissions were devoid of merit, that its opposition to the grant of the licence was part of a deliberate strategy of obstructiveness, and that its opposition was inconsistent with intended objects of the amendments to the Act following the Anderson Review.
- 91 It will be recalled that part of the AHA's submissions complained about the inadequacy of material relating to harm minimisation that was contained in Mannum Liquor's application. In light of the communication between the delegate and Mr Tisato in connection with this wherein the delegate requested further information, it is reasonable to infer that the delegate shared the AHA's concern. That communication and Mr Tisato's supply of the 'Licensee Management Plan' on 22 December 2020 was conducted without the AHA's knowledge.
- 92 Given that the determination granting the application was issued on the following day, it is reasonable to infer that the provision of the Plan was a significant factor in determining the fate of the application.
- 93 Collectively, these matters would give the fair-minded lay observer considerable concern.
- 94 I stress that the issue here is not one of actual bias, or actual lack of impartiality and independence. What is at issue here is perception. Having regard to the content of Mr Tisato's email of 9 December 2020 and that which followed, I think that the hypothetical fair-minded lay observer might apprehend that the delegate did not approach Mannum Liquor's application in an impartial way and decided the case other than on its merits.

- 95 The AHA's complaint that it was denied procedural fairness has been made good.
- 96 Having reached this conclusion, I now turn to consider where to from here.
- 97 The powers of this Court on review under s 22 of the Act are as follows. The review is in the nature of a rehearing. On a review the 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.<sup>21</sup>
- 98 Mr Coppola submitted that having found a denial of procedural fairness, I should remit that matter back to the Commissioner for a re-hearing.
- 99 Because the review is a re-hearing, this Court is obliged to conduct a real review of the evidence and the delegate's findings and reasons.
- 100 In cases where the delegate has received oral evidence and has made an assessment of the truthfulness, credibility and reliability of a witness, this Court must make due allowance for the advantage held by the delegate in having seen and heard the witnesses.<sup>22</sup> In such a case, especially if the credit finding was important to the outcome, a finding of a denial of procedural fairness would almost certainly lead to a conclusion that a re-hearing was required.
- 101 In this case the delegate did not hear oral evidence. I did. To the extent that there are any credit issues, I am not in any way compromised in dealing with them by what transpired before the delegate. In all the circumstances, I have resolved that the most expeditious way to deal with this matter is for this Court to decide the case on its merits.

*Should the application be granted*

- 102 As was observed in *Liquorland (Australia) Pty Ltd - Park Holme*,<sup>23</sup> notwithstanding the changes to the Act, in cases such as this the starting point is to identify the relevant locality.
- 103 That exercise is rarely precise and in the case of regional areas, it is even less so.

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<sup>21</sup> Section 22(5) of the Act.

<sup>22</sup> *Fox v Percy* [2003] HCA; (2003) 214 CLR 118 at [23].

<sup>23</sup> [2020] SALC 37.

- 104 The delegate found that the relevant locality was the township of Mannum and surrounds as described by the Mid Murray Council. That finding was not seriously challenged by Mr Coppola. Nor could it be. It is apparent from the popularity of the IGA Mannum that people from all over the Mid Murray Council area are shopping there and it is reasonable to infer that many of those will avail themselves of the opportunity to purchase liquor from the proposed premise if this application is granted.
- 105 Much of the debate around the issue of locality was directed towards what is its relevant population. It is uncontroversial that Mannum is a tourist destination and that its numbers swell significantly during weekends and holiday periods. This is confirmed by the unchallenged evidence of Mr Naylor of a significant increase in sales at the IGA Mannum which can increase from an average of just under \$280,000 per week in normal trade to \$480,000 per week during peak periods. I accept that putting a number on the increase in population involves a fair degree of guesswork. It is not necessary to resolve this. Mr Naylor's evidence of IGA Mannum's trading figures speak for themselves.
- 106 There will be some who shop at IGA Mannum who are just passing through and who should not be considered as part of the relevant community. But this Court is permitted to know that Mannum is not located on a major thoroughfare that leads to other places. It and its surrounds, are very much destinations, and it is therefore reasonable to infer that the majority of the visitors to the IGA Mannum are the relevant community.
- 107 The township of Mannum is described in the Mid Murray Council Area 'Community District Action Plan' as 'an important regional centre'.
- 108 This Court has previously made observations to the effect that there is generally a contemporary community expectation that regional town centres would provide, to the town's residents and those living in the surrounds, a diverse range of services and facilities that would include good quality stand-alone takeaway liquor outlets.<sup>24</sup>
- 109 In this regard, the evidence regarding the trading figures of the IGA Mannum is telling. The relevant community has made its position clear. Having been provided with an opportunity to shop in a large, well-stocked supermarket, its members are shopping there in droves.
- 110 It can be reasonably inferred that many of these people will share the values of many contemporary Australians for whom the ability to undertake 'one-stop shopping' is very important.<sup>25</sup>

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<sup>24</sup> *BWS – Mt Barker* [2016] SALC 33 at [135].

<sup>25</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 at [78] per Buss JA.

- 111 As I observed in *Liquorland (Australia) Pty Ltd v North Adelaide Village Shopping Centre Pty Ltd and Village Cellars (SA) Pty Ltd*: “I am permitted to know that some people do not like purchasing takeaway liquor from a hotel and would prefer to make their purchases from a dedicated retail facility”.<sup>26</sup>
- 112 I am also permitted to know that many women would prefer to purchase take away liquor from a stand-alone bottle shop rather than a hotel.<sup>27</sup> This is consistent with the submissions made by Mr Tisato in this case when the application was lodged, where he said that the Cellarbrations’ primary target demographic was females between the ages of 20 to 40 years.
- 113 It therefore can also be reasonably inferred that many of the relevant community in this case would welcome the opportunity to purchase their take away liquor needs as part of their visit to the IGA Mannum and would prefer to do so rather than make a separate trip to one of the local hotels.
- 114 I accept Mr Naylor’s evidence regarding the state of the art security systems and CCTV that will be used at the proposed premises and of his intention to recruit an experienced bottle shop manager to not only manage the proposed premises but to help educate and train staff on an ongoing basis. Based on his evidence and the submissions made to the delegate by Mr Tisato that accompanied the application, it can be assumed that the proposed premises will be an attractive, well stocked and well managed convenience type liquor store and that its staff will be alert to the need not to serve minors or intoxicated persons. The proposed range of liquor to be sold at the proposed premises is extensive. I am permitted to know that the support provided to those trading under the Cellarbrations badge is significant. All of this leads me to conclude that it is unlikely that there will be issues regarding the proposed store’s products and services or Mannum Liquor’s relevant knowledge, experience and competency in relation to the service of liquor.
- 115 The addition of a popular new facility within the Mannum Green Shopping Centre has the potential to make it more attractive and may lead to other tenancies there.
- 116 The proposed premises will offer a point of difference to the take away liquor facilities attached to the two local hotels. This has the potential to enhance competition, which in turn has the potential to improve the range, service and price of the take away liquor offerings in the locality.
- 117 The proposed premises will provide some employment opportunities.

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<sup>26</sup> [2012] SALC 42.

<sup>27</sup> *Erythos Holdings Pty Ltd* [2015] SALC 34 at [56].

- 118 I do not accept the submission that the proposed premises will draw people away from the river to the detriment of tourism. Based on the IGA Mannum's trading figures, it is obvious that many people are already visiting the Mannum Green Shopping Centre. There is no evidence that this has had any detrimental effect on tourism. To the contrary, the substantial increase in trade during holidays establishes that Mannum is a very popular tourist destination and it can safely be inferred that its main attraction remains the river. In my opinion, the grant of this application will not cause any adverse cultural, recreational or tourism impacts.
- 119 It goes without saying that there will be negative consequences involved in the granting of this application. The addition of another take away liquor facility will increase the opportunities for persons for whom alcohol is a problem to obtain alcohol. But the evidence does not establish that there are any greater number of such persons in this community as opposed to the general population.
- 120 Based on the change in trade figures for the Foodland Mannum before and after IGA Mannum started trading, it is clear that many of the people who shop at IGA Mannum were previously shopping at places other than Mannum. It is reasonable to infer many of these were people coming from Adelaide and other places who previously either brought supermarket supplies with them when they went to Mannum or stocked up at places on the way, like Murray Bridge. Because some people do not like buying taking away liquor from hotels, it is reasonable to assume that some of people coming from Adelaide and other places will buy liquor from the proposed premises instead of bringing it with them. In other words, I expect that a number of the people who will buy liquor from the proposed premises if this application is granted, will not presently be buying liquor from the hotels in Mannum.
- 121 It must be accepted that having three take away liquor facilities in a fairly small country town raises legitimate issues of concern. But my concerns have been allayed by the fact that the new facility is towards the outskirts of the town, some distance away from the two hotels, it is a different type of facility, being a stand-alone bottle shop as opposed to being part of a hotel, and the fact that it is likely that a number of its customers will be those who for now purchase their take away liquor outside of Mannum.
- 122 This leads me to conclude that the grant of this application is unlikely to result in a worrying level of increased harm due to the excessive or inappropriate consumption of liquor, either to the relevant community as a whole, or to any group within that community. As such, I think it is unlikely that the grant of this application will have an adverse social impact or impact on the amenity of the locality of the proposed premises.

- 123 There are no issues regarding the plans for the proposed premises. None of the matters raised by s 57 of the Act are of concern here. I find that the premises will be suitable. There is no evidence to suggest that they have the potential to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity or that they will prejudice the safety or welfare of children attending nearby kindergartens and schools. I find that the appropriate approvals, consents and the like, pertaining to the proposed premises have been granted.
- 124 Having made the evaluative judgment that the Act requires, I am satisfied that it is in the community interest to grant this application.
- 125 I now turn to consider whether it is in the public interest to grant this application.
- 126 As was noted in *Hove Sip n Save*, notwithstanding the strong correlation between the community interest and the public interest tests, the retention of the public interest test must mean that the new criteria for the grant of a package liquor licence do not render irrelevant all of the considerations relevant to the exercise of the discretion under s 53 of the Act, as it was prior to the recent amendments.<sup>28</sup> If the grant of this application would lead to an undue proliferation of like licensed facilities or if it was to set an undesirable precedent, in the public interest the application would be refused.
- 127 For the reasons set out above I am satisfied that the grant of this application will not lead to an undue proliferation.
- 128 The grant of a packaged liquor sales licence in connection with a shopping centre anchored by a substantial supermarket in circumstances where the nearest like shopping centre is over 35 km away, does not raise any concerns about creating an undesirable precedent of the type that concerned the Court in *Hove Sip n Save*.
- 129 In all the circumstances I have come to the conclusion that this is not a case where it is necessary to refuse the application in the public interest.

### **Conclusion**

- 130 Having decided the case for myself, I have reached the same conclusion as the delegate and have found that the application should be granted. The application for review must therefore be dismissed.

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<sup>28</sup> [2021] SALC 7 at [130].