

*BWS – Beer Wine Spirits* [2013] SALC 7

**LICENSING COURT OF SOUTH AUSTRALIA**

BWS – BEER WINE SPIRITS

**JURISDICTION:** Application to Remove Retail Liquor Merchant's Licence

**FILE NO:** 4088 of 2012

**HEARING DATES:** 5, 6, 7 and 19 December 2012

**JUDGMENT OF:** His Honour Judge WD Jennings

**DELIVERED ON:** 15 February 2013

**REPRESENTATION:**

Counsel:

Applicant: Mr M Roder SC with Mr R D'Aloia

Respondent: Mr S Henry SC with Mr B Allen

Solicitors:

Applicant: Clelands Lawyers

Respondent: Wallmans Lawyers

- 1 This is an application pursuant to the *Liquor Licensing Act 1997* by Woolworths Limited for the removal of a Retail Liquor Merchant's Licence that is currently used as a BWS (Beer Wine Spirits) store located at 31 North East Road, Collinswood to proposed premises within the Walkerville Shopping Centre (which is currently under construction) at 104 Walkerville Terrace, Walkerville. It is proposed that the new store will occupy Tenancy 13, and will be known as BWS.
- 2 The application is opposed by Fassina Investments Pty Ltd.
- 3 Fassina contends that the existing and proposed premises are not in the same locality such that the application must fail.
- 4 Next it contends that the positioning of the proposed premises are such that they cannot comply with the Act and in particular the requirement prescribed by s 37(2) that they must be physically separate from premises used for other commercial purposes.
- 5 Finally it contends that in the exercise of the Court's discretion the application should be refused.

### **The evidence**

- 6 I propose to deal initially with the evidence of the two planners and then with the lay evidence.
- 7 **Mr Graham Burns**, a certified practising planner, prepared a detailed report in support of the application.
- 8 In his report he said:

The BWS Collinswood bottle shop is the subject of the removal application. It is located in the Collinswood Shopping Centre at 31 North East Road, Collinswood. The shopping centre is bounded by Cassie Street to the north, North East Road to the east, Redmond Street to the south and Roseberry Lane to the west. It is located on the north-western side of North East Road.

Collinswood Shopping Centre comprises a Foodland IGA supermarket of approximately 760 square metres and a Chem-mart pharmacy located on the southern and northern ends of the centre, respectively. Foodland IGA trades seven days a week from 8am to 9pm. BWS Collinswood is located next door to the Foodland IGA supermarket. Other shops in the shopping centre include a bakery, travel agent, florist and

hairdresser. Most of the shops trade seven days a week with trading times varying from between 8am and 9pm daily. The Chem-mart Pharmacy trades seven days a week from 8.30am until 8.30pm.

Access into and out of the centre is available from two entrances – one entrance off Cassie Street and the other entrance off Redmond Street.

There are 66 off-street parking spaces in front of the Collinswood Shopping Centre.

The corner of North East Road and Gawler Terrace/Smith Street is controlled by traffic lights. The traffic lights are such that motorists driving to Collinswood Shopping Centre from suburbs to the south, such as Walkerville and Gilberton, can do so with relative ease and safety by crossing North East Road into Cassie Street and then into the shopping centre car park.

Another group of shops – all food related – is located on the north eastern side of Cassie Street. The shops in this part of the centre consist of a pizza shop, a gourmet butcher, a chicken shop, a Thai gourmet takeaway and a yiros takeaway. Off-street parking is located in front of this group of shops. The food shops are also accessed from Cassie Street.

9 He had this to say in relation to the proposed premises:

On 29 November 2011, the Town of Walkerville Development Assessment Panel approved an application by Fabcot Pty Ltd to ‘Construct a Shopping Centre Complex Comprising a Supermarket, Retail Liquor Outlet and Nine Specialty Shops Together With Basement Car Parking, Landscaping and Outdoor Advertisements’ at 104 Walkerville Terrace, Walkerville.

The shopping centre is now under construction at the corner of Walkerville Terrace and Victoria Terrace. ... The shopping centre is due for completion in April 2013, and will have frontage to Walkerville Terrace and Victoria Terrace. It will be anchored by a 4,200 square metre Woolworths Supermarket. The supermarket will be supported by speciality shops totalling 1,335 square metres inclusive of the proposed retail liquor store.

The site of the new shopping centre is surrounded by retail and commercial premises on three sides, while the River Torrens Linear Park is located to the east.

And this to say in relation to the proposed retail bottle shop:

The proposed retail bottle shop will be located in Tenancy 13.

The tenancy adjoins the entrance to the basement car park ...

... the store will be fitted out with a walk-in cool room and stock room, while the main trading floor area will be fitted out with shelves and cabinets for the storage display and sale of beers, wines, spirits and other beverages. The total floor area of the proposed bottle shop is 211 square metres, inclusive of the walk-in cool room.

10 He then referred to nearby services and facilities and noted that:

The area surrounding BWS Collinswood is primarily residential in nature except for along North East Road and Walkerville Terrace where a mix of commercial and retail facilities exist. There are also more fast food facilities along North East Road compared to Walkerville Terrace, with a concentration of such facilities in the Collinswood Neighbourhood Centre at the corner of Cassie Street and North East Road and McDonalds a short distance to the north-east, also on North East Road.

The suburb of Walkerville accommodates all of the following primary schools – Walkerville Primary School, St Andrews School and St Monica's Parish School. Walkerville Primary School is located at the corner of Stephen Terrace and Church Street.

...

The YMCA facility in Smith Street, near Walkerville Terrace is a multi-purpose community recreation facility. ... In personal discussion with the Chief Executive Officer, he was told that the facility has a catchment area which broadly covers the inner north eastern region of metropolitan Adelaide. Between 1,100 and 1,200 persons pass through the centre each week, and approximately 15-25 children's parties are held on weekends.

Walkerville Recreation Gardens and associated clubrooms on Smith Street are used for district football and cricket. It also has tennis courts and bowling greens and practice cricket pitches. Walkerville Pre-kindy is located next to the main oval. The nearby Walkerville Primary School also uses the sports fields.

- 11 He then dealt with the Walkerville Council Urban Master Plan, and Transportation including a description of Walkerville Terrace, Stephen Terrace, North East Road and Smith Street. Significantly, for the purposes of this case, in relation to Smith Street he said:

“Smith Street is a major local road running north south between Walkerville Terrace and North East Road. Smith Street is significant because it provides direct access between North East Road and Walkerville Terrace. In addition, the presence of traffic lights at the Smith Street – North East Road – Cassie Street intersection ensures that access to and from North East Road is safe and convenient.”

- 12 On the issue of locality of the existing BWS premises, he said:

“In my opinion, the proposed premises at 104 Walkerville Terrace, Walkerville are clearly within the locality of the existing premises.

I have adopted a radius of 1.5 kilometres for defining that Locality. In adopting this radius, I have considered the Licensing Court’s judgment in Gilberton Grog Shop 1, in which the Court determined the locality of the (then) proposed premises at 31 North East Road Collinswood. In that matter, the Court noted that the boundaries of the locality were not precise but accepted that ‘... it extends by radius from the proposed site [at Collinswood] some 1.5 to 2.0 kilometres’.

The site of the proposed premises at 104 Walkerville Terrace is comfortably contained within this radius. Indeed the proposed premises are also encompassed within the 1.0 kilometre radius boundary, which is also shown on my Locality Plan.

The ‘Gilberton Grog Shop’ matter involved the removal of a Retail Liquor Merchant’s Licence from 17-19 Gilbert Street, Gilberton to 31 North East Road, Collinswood more than 10 years ago. The Gilberton Grog Shop was approximately 1.7 kilometres from what was then the proposed site at 31 North East Road, Collinswood. In that matter, the Licensing Court found that ‘this is indeed a removal from one site to another within the same locality and I see no discretionary or other reason to reject this application’.

I agree with the Court's adoption of the radius approach in *Gilberton Grog Shop 1*. The radius approach is also appropriate on this occasion because there are very few physical barriers which would impede access and hence distort the radius. For example, while the River Torrens and the O'Bahn Transport Corridor are physical barriers, bridge crossings at Stephen Terrace, Park Terrace and Ascot Avenue are such that convenient movement across this barrier is possible. The Parklands surrounding North Adelaide are another physical barrier, but unlike the River Torrens this physical feature more clearly defines and influences the extent of the locality, but barely distorts the radius.

Main roads sometimes define the limits of a locality because they can act as a physical barrier. However in this matter I do not consider North East Road (for example) is a physical barrier of any significance because of the existence of traffic signals at regular intervals at intersections at Northcote Terrace/Nottage Terrace/Stephen Terrace, at Smith Street/Cassie Street, at Galway Avenue, at Hampstead Road and at Ascot Avenue. ...

I note the Licensing Court's further comments in the judgment of *Gilberton Grog Shop 2* (2001) SALC 12, when it approved the removal of the Gilberton Grog Shop licence on Gilbert Street some 1.7 kilometres south of the existing premises at Collinswood.

‘... to suggest Collinswood is somehow “cut off” in this area is something I’m not prepared to accept. I am sure a very significant section of the Gilberton/Walkerville population would see Collinswood and in particular this supermarket as being within their locality ...’.

I also do not accept that Collinswood is cut off from suburbs such as Walkerville and Gilberton. As noted above, traffic signals along North East Road allow motorists to safely and conveniently drive from suburbs on one side of the road to suburbs on the other side of the road. In addition there is a sheltered right turn lane on North East Road and Fuller Street which is not controlled by traffic signals, but where vehicles can safely turn into Fuller Street between breaks in traffic flow along the main road. In addition I would expect that a significant number of people living in Collinswood, Medindie Gardens and Nailsworth would for example regard Walkerville as their locality by virtue of the proximity of such facilities as Walkerville Primary School, St Andrews Primary School, St Monica's Parish School, Walkerville Sports Grounds, the YMCA gym and recreation centre, various churches, the Post Office, and cafes and restaurants. The majority of these facilities happen to be located south of North East Road. ...

Even if the locality was determined using the site of the proposed premises at Walkerville as the measuring point the existing licensed premises at Collinswood would still be within a radius of 1.5 kilometres from the proposed premises. ... North East Road would not be a physical barrier because of the existence of traffic lights at regular intervals along that road.”

13 He concluded:

- the proposed BWS bottle shop at 104 Walkerville Terrace, Walkerville will be conveniently and centrally located in the Walkerville Shopping Centre which is under construction and due for completion in late 2013. Walkerville Shopping Centre will contain a large Woolworths Supermarket and be supported by a number of speciality shops;
- Walkerville BWS will be located in Tenancy 13 of the Walkerville Shopping Centre and will have a total floor area in the order of 211 square metres and dual frontage to Walkerville Terrace and the internal mall;
- the proposed bottle shop will offer ease of access for both pedestrians and vehicles, plentiful supply of under-cover, off-street parking as well as conveniently located on-street parking along Walkerville Terrace;
- the locality is characterised by an older affluent population and higher residential densities compared to metropolitan Adelaide as a whole;
- Walkerville Council’s adopted Urban Master Plan envisages the future development of Walkerville Town Centre as a mixed use precinct;
- the closest licensed premises to the proposed bottle shop is Fassina Liquor Merchants Walkerville, a stand-alone walk-in retail bottle shop with an emphasis on fine wines; and
- the removal of BWS Collinswood from 31 North East Road, Collinswood to BWS Walkerville is consistent with State and Local Government planning policy which encourages an appropriate mix of retail and residential facilities that create active and vibrant spaces and focal points for community shopping, relaxation and interaction.

...

Relevantly, he said the Collinswood BWS is located less than 1.0 kilometre by road from the proposed premises. The proximity of the proposed premises to the existing premises and the ease of access between them, is such that the proposed premises is clearly within the same locality as the existing premises.

- 14 **Mr Jeff Smith**, Planner, prepared a report and gave evidence on behalf of Fassina.
- 15 His report contained data and commentary on various aspects of the proposal, including factors influencing movement within and between nearby suburbs, statistical data and commentary relevant to the population in the local area, all of which he said were relevant to the identification and description of the relevant locality.
- 16 As to the issue of “locality” he referred to *Buttery and Muirhead*<sup>1</sup>, when Justice Zelling said:

“Locality is a word which will differ from Application to Application according to the type of community that is envisaged, the type of work which they do, the way in which they use, transport and other facilities, and in general whether they are a group bound together as a community having common interests. I am not to be taken as propounding a general test of locality which is applicable in every case but in this type of case these are the sort of factors which go to make up a locality”.

- 17 As to the issue of “accessibility” and North East Road he said:

“North East Road is a major arterial road linking the city to the north eastern suburbs. It has a central median extending from the intersection with Northcote Terrace/Stephen Terrace/Nottage Terrace to beyond Galway Avenue. It is a narrow median with limited opportunity to provide for cross movement of vehicles and only one median opening offering a protected right turn for movement of traffic to the south east of North East Road, into the suburb of Walkerville.

...

Because it is a major arterial road, and because of limited opportunity to provide for protected right turn movements, traffic restrictions have been imposed on this turning movement from North East Road.

...

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<sup>1</sup> (1970) SASR 344

Right turn movements into Smith Street for outbound traffic is restricted in the afternoon peak (4pm-6pm).

...

The existing premises is very accessible to the residential area to the north of North East Road but has limited accessibility to residential areas to the south east and south.

...

Traffic restrictions apply to right turning traffic, traversing North East Road on weekdays, during the morning peaks for inbound traffic and afternoon peaks for outbound traffic.

North East Road carries about 45,800 vehicles per day (AADT) in the section between Hampstead Road and Stephen Terrace.

North East Road is identified in the Development Plan as being in a Primary Arterial Road.”.

18 He then referred to “Socio Economic Profiles of the surrounding Area” and said that he had prepared separate statistical data for Walkerville and Collinswood.

19 As to the issue of the existing premises he said:

“I consider the existing premises has a locality somewhat constrained by two heavily trafficked roads (North East and Main North) that provide a reasonable degree of impediment to movement across them, and by Nottage Terrace and Hampstead Road that are somewhat more accessible but still, in themselves major roads.

The northerly extent of the locality for the existing premises is somewhat ill defined. In my opinion it is limited to a distance of approximately 1.5 kilometres. For the ease of accumulating statistical data I have determined it to be the northern extent of the area of the City of Prospect, defined by Third Avenue and McInnes Avenue.

It is the area defined by these roads and the Council boundary that I consider to be the primary locality pertinent to the existing premises.”

20 On the question of the location of the proposed premises he said:

“I consider the River Torrens and O’Bahn busway to be barriers limiting movement between Walkerville and the more easterly suburbs of Royston Park, Joslin and St Peters.

I have considered the arrangement of the road network and the focus that Walkerville Terrace provides for north easterly – south westerly movement through the suburb. I have noted the lower traffic volumes carried by Walkerville Terrace and consider it to be somewhat more accessible than North East Road.

Collinswood and Walkerville neighbourhood centres contain a similar range of facilities. Given the facilities available at the Walkerville Neighbourhood Centre I expect there to be little reason for residents of Walkerville to attend retail facilities north of North East Road.

The suburb of Gilberton has good accessibility to the Walkerville Neighbourhood Centre.

Medindie is a part of the Walkerville Council Area. It has a reasonable level of accessibility northerly and easterly, and a reasonable degree of connectivity to North Adelaide.

For the purpose of this assessment however I believe there is a greater community of interest between residents of Medindie and Walkerville than there is between the residents of Medindie and Collinswood.”

21 He then concluded:

“The key conclusion arising from an assessment of the circumstances of both the existing and the proposed licensed premises:

- The existing premises are located in a small shopping centre.
- The existing premises are located in an area that is bounded by arterial roads.
- These features restrict the relative accessibility of the premises.
- The locality of the existing premises is constrained to a significant extent by North East Road, having as it does limited and somewhat inconvenient accessibility to and from areas on the south eastern side of North East Road.

...

It is my opinion that the locality of the existing premises appears to have little in common with the locality of the proposed premises. I believe the existing premises and the proposed premises are situated in different localities.”

### **Evidence of the lay witnesses**

- 22 **Woolworths** called two lay witnesses, Mr Malcolm Balkwill, its Relief State Operations Manager and Mr Ben Wilson, a resident of Belt Street, Walkerville.
- 23 **Mr Balkwill** said that the proposed new supermarket at Walkerville in large will occupy some 4200 square metres. By comparison the Woolworths store at Marden occupies 1600 square metres, Sefton Park 3000 square metres and the North Park store occupies 3600 square metres. The proposed Walkerville supermarket will contain a bakery, butcher and seafood areas all providing “fresh food” in addition to the grocery area. There are to be a number of specialty shops which are currently 70% leased. The objective is to make the supermarket a “destination point” and an “outing experience” for customers. According to Woolworths’ property people the primary catchment area is 1½ kilometres radius which fans or radiates out from the supermarket location: this he said was in accord with his experience. The secondary catchment area would include other supermarkets including their own stores.
- 24 He said that the Foodland store at Collinswood was by comparison a “convenience” shop. He said that shop had a broader and deeper range of shopping options than the Walkerville IGA shop.
- 25 People shop at large supermarkets for a weekly shop although there is a trend for people to shop two or three times a week as they are busier working and also looking for fresh food.
- 26 He referred to a reward data plan which showed where people who visited the BWS store on more than four occasions in a twelve month period lived (Exhibit A6).
- 27 It is common in South Australia for Woolworths stores to have BWS stores within their premises. He gave the Marion Supermarket as an example and said that shoppers found the combination of the two convenient. Customers liked underground covered car parking and that was what was proposed at the Walkerville supermarket. Liquor would be stored in some common areas within the store and moved into the liquor store (may be two to three times a day). The access door would otherwise be closed. This he said was standard practice.
- 28 **Mr Wilson** who works at the airport has lived in Belt Street Walkerville for four years. He and his wife have two children aged 9 and 3 years. The 9 year old attends St Andrews Primary School and the younger

child, Walkerville Pre-kindy. One of his son's best friends lives in Collinswood.

- 29 He goes to the BWS store at Collinswood approximately every two weeks. He uses two routes to get there and said the drive there is not inconvenient. He also goes to the Fassina store (which he said has a better range of wines) but he probably uses the BWS store more. He and his wife also shop at the Foodland store if they need items such as bread or milk. He had seen children from the local school in the Collinswood bakery and he has also seen some of his neighbours at the Foodland store.
- 30 They do their major shopping on a weekly or fortnightly basis either at Norwood, North Adelaide or the Burnside Village.
- 31 He said it would be convenient for them to be able to do their weekly shopping at the large proposed supermarket and to use the BWS store.
- 32 **Fassina** called Mr Clifford, the Store Manager of its Walkerville store, Mr Chidley who owns the Walkerville IGA shop, Ms Morgan who lives at Alfred Street, Walkerville and Mr Dollman who lives with his parents at Edwin Avenue, Collinswood.
- 33 **Mr Clifford** has been the Store Manager for 3 years and his role includes staffing and stock controls. He has an experienced assistant manager. The Fassina store trades between 9am and 7pm Monday to Wednesday, 9am to 8pm on Thursday to Saturday and from 10am to 6pm on Sunday.
- 34 He visited the BWS store at Collinswood recently and said that it was a smaller store with a less extensive range than their shop and that it offered fewer services. The Fassina store offered a more extensive range of wines with a focus on premium wines (the wines range from \$5 a bottle with some as expensive as \$1500-\$2000).
- 35 He has got to know some clients personally and through their delivery service said they (probably 70%) lived in Walkerville, Vale Park or Gilberton. They do not deliver to anyone in Collinswood. He said whilst it was possible, he was not aware of any clients coming from north of North East Road.
- 36 He recently conducted a customer survey (over 14 days) which designated the number of customers by suburb and it showed the following: Broadview 12, Collinswood 6, Nailsworth 3, Walkerville 343, Vale Park 60 and Medindie 14. In cross-examination he admitted that the survey was undertaken whilst the Fassina premises were being

renovated and in an unattractive state which “screwed” the result in favour of locals.

- 37 **Mr Chifley** owns the IGA at Walkerville. He described it as 100% a convenience store. Some customers do their weekly shopping there. Students from the local schools are customers: they come in for fruit and after school shopping. He is not aware of regular customers who come from north of North East Road. He does not regard the Foodland at Collinswood as a competitor. He described North East Road as extremely busy, “the big divide” and difficult to get across. He said that the local retailers had mixed views about the Woolworths proposed new supermarket.
- 38 **Ms Morgan** is 25 years of age and has lived at Alfred Street Walkerville since September of this year. She lived with her parents at Salisbury Terrace Collinswood between the ages of 9 and 18, and thereafter for about another year “on and off”.
- 39 Whilst she lived at Collinswood she had purchased alcohol from the Collinswood BWS store and went to the Foodland at Collinswood but could not recall shopping at all at the Walkerville shops. Since she moved she shops at the Walkerville IGA three to four times a week. She also shops at a supermarket at North Adelaide (she works in the city).
- 40 She thinks since moving (which is only some two to three months) she has only shopped at Collinswood once when visiting her parents. She said there is no reason to shop at the Foodland store at Collinswood as the Walkerville IGA is closer. When she was younger and living at Collinswood she attended Walkerville Primary School (from years 5-12). She agreed the school was highly regarded.
- 41 **Mr Dollman** has lived with his parents at Edwin Avenue, Collinswood since 2006. Prior to that he lived with his parents for some 18 years at Church Terrace, Walkerville. He knew of only one or two students at that time who came from Collinswood and said that was “not the norm”.
- 42 Whilst living at Walkerville his parents shopped at the Walkerville IGA the “vast majority” of the time and at Foodland Collinswood perhaps once a week. Now they do all of their supermarket shopping at Foodland Collinswood and the Central Market and only rarely (when visiting his grandparents) do they shop at Walkerville. Collinswood he said represented an easy trip and he would prefer not to cross the North East Road. He said it was a “bit of a divide” between Collinswood and Walkerville.

## Consideration

### *Locality*

43 Section 61(2) of the Act provides that:

“An applicant for the removal of a retail liquor merchant’s licence must satisfy the licensing authority that the licensed premises already existing in the locality to which the licence is to be removed do not adequately cater for the public demand for liquor for consumption off licensed premises and the removal of the licence is necessary to satisfy that demand.”

44 On the face of it, this provision would seem to suggest that for this application to succeed Woolworths would need to prove that the licence was needed. However, the Full Court in *Liquorland v Hurley’s Arkaba Hotel and Others*<sup>2</sup> made it clear that that is not necessarily so. Perry J, with the concurrence of the other members of the Full Court, observed that:

“it would be a strange and anomalous result if s 61(2) was to oblige an applicant for removal of a retail liquor merchant’s licence to have to face all over again the very onerous test of need which would be applicable if the applicant was to apply for a new licence in the same locality.”

45 The Full Court went on to hold that provided the removal was within the same locality proof of need was not required.

46 The issue that is presented in this case is what the Court meant by the use of the expression “same locality”. Mr Henry, counsel for Fassina contends that it means that the locality of existing licence and the locality of the proposed licence must be identified and both must be within the same locality.

47 Mr Roder, counsel for Woolworths, contends that the focus should be on the existing premises and provided the premises of the proposed licence is not outside of the locality of the existing premises they can be said to be within the same locality, such that need does not have to be established.

48 Mr Henry then goes on to contend that on the evidence I should find that the proposed and the existing premises are in different localities. Next he says that even if the position is as Woolworths contend, the two premises are not within the same locality.

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<sup>2</sup> (2001) 80 SASR 59

- 49 In order to resolve these competing arguments I commence by noting what DeBelle J said of the expression “locality” in *Woolies Liquor Store v Seaford Rise Tavern*:

“Although the task of defining a boundary is frequently undertaken in applications for retail liquor merchant’s licences, the limitations inherent in a defined locality must be recognised. First, it is a somewhat artificial concept since there are obvious difficulties in defining the locality with precision. The locality in which the demand exists is not capable of precise delineation. Secondly, the purpose of defining the locality is not to fix lines on a map but rather to focus attention upon the local, as distinct from the purely general, character of the public demand with which s 58(2) is concerned: per King CJ in *Nepeor v Liquor Licensing Commissioner* at 206. This necessarily imprecise process is no more than a means to the end of identifying the relevant public demand and the relevant licensed premises.”<sup>3</sup>

- 50 I think it follows that the focus must be as suggested by Woolworths, and that the task is to determine the physical locality of the patrons, excluding passing trade, that might be expected to use the existing premises and then to ask the question as to whether the proposed premises are within the same locality.
- 51 In this case much was made of the fact that the existing premises are on the northern side of North East Road and that it is a heavily trafficked arterial road that divides communities to the north and south with a view to demonstrating that it defines the relevant boundary of the locality.
- 52 In determining the locality, reference is often made to the statement of von Doussa J in *Nepeor v Liquor Licensing Commission* where he said:

“In other cases, particular physical features of the area, such as a river, or some other significant obstruction to the free movement of people, might provide the basis for including or excluding particular areas from consideration in a precise way.”<sup>4</sup>

- 53 The statement is helpful and doubtless forms the basis of the objector’s submission. It explains the approach taken by the court in cases such as *Liquorland (supra)* where Judge Gilchrist found the relevant locality by reference to boundaries to the east, south and west fixed by the relevant terraces within the City of Adelaide and to the north by the River Torrens. His Honour adopted the same approach in *Woolworths Limited*

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<sup>3</sup> (2000) 76 SASR 290

<sup>4</sup> (1987) 46 SASR 205 at 215

*v Smithfield Hotel Pty Ltd*<sup>5</sup> in concluding that the relevant locality was bounded to the west by Main North Road.

- 54 However, it does not follow that every major road or arterial road will necessarily define the boundary of a particular locality. For example, in *Liquorland* the Full Court had no difficulty with the notion that premises on opposite sides of Unley Road 600 metres apart were within the same locality. Ultimately what is required is identifying the relevant public demand.
- 55 Importantly I find that Smith Street with the traffic lights at the junction of Smith Street and North East Road provides easy, safe and convenient access from Walkerville to the Collinswood Shopping Centre and to the immediate surrounds of Collinswood and vice versa. That finding is supported by the evidence of Mr Wilson.
- 56 More importantly this finding is supported by the motor vehicle trip we took on the view. We travelled from the Walkerville Shopping Centre up Smith Street over the traffic lights and into Cassie Street and left into the Collinswood Shopping Centre; and the return trip by turning left out of Cassie Street into North East Road and right into Fuller Street and Church Terrace and then left into Smith Street was also an easy and convenient route.
- 57 I reject Mr Smith's locality which is to a large extent based on his perception of the constraints caused by North East Road.
- 58 Furthermore, in cross-examination it became clear that some of the data and tables relied upon by Mr Smith were in fact sourced from a Mr Alistair Tutte. More importantly the accuracy of some of the statistics and tables contained in the report were inconsistent and did not support the propositions they were said to support, eg:

“The population in the locality of the existing premises has a number of characteristics that are significantly different from the characteristics of the locality in the vicinity of the proposed premises. In particular it has:

- a younger age profile,
- a lower percentage of home ownership,
- a lower percentage of car ownership, and
- lower income levels.”

I reject that evidence and his conclusions.

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<sup>5</sup> [2012] SALC 57

- 59 It is desirable in my view, when considering the question of locality where there has been an application that is not dissimilar to that which has been dealt with by the Court on a previous occasion, to ensure where it is supported by the evidence and where circumstances have not materially changed, that there is a consistency of approach.
- 60 In this case, the Court in the *Gilberton Grog Shop No 1* has previously adopted the radius approach and Mr Burns adopting a similar approach here is persuasive.
- 61 This approach is consistent with Exhibit A6 (which is attached) which shows a wide and diverse catchment area for the sampled customers of their current store. That exhibit in my view, more accurately reflects the locality and relevant public demand in this case than the locality as defined by Mr Burns. I find that the two premises are within the same locality. There is nothing in any of the lay evidence including that of Mr Clifford or Mr Chidley which persuades me otherwise.

***The positioning of the proposed premises***

- 62 Mr Henry submits that the proposed premises are not physically separate within the meaning of s 37(2) of the Act. Section 37(2) provides:

“It is a condition of a retail liquor merchant’s licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.

Exceptions –

1. Goods may be sold in the same premises if they are of the kind normally associated with, and incidental to, the sale of liquor (eg glasses, decanters, cheeses and pates).
2. The licensing authority may grant an exemption from the above condition if satisfied that the demand for liquor in the relevant locality is insufficient to justify the establishment of separate premises or there is some other proper reason for granting the exemption.”

- 63 He submitted that here the proposed premises do not satisfy this mandatory condition. In support thereof he referred to the proposed liquor store as delineated in the plan (Exhibit A3) and submitted that as a customer of Woolworths had unimpeded access to the proposed bottle shop, the premises are not physically separate. Furthermore he submitted that as long as the proposed liquor store’s liquor deliveries are dependent

upon access through the supermarket, those premises are not physically separate whether or not the door between the two was open or shut.

- 64 Having said that he submitted that if Woolworth's argument was that at some time of the day the door will be closed and therefore the premises are separate, the corollary is that at some times of the day the door will be open and they will not be physically separated. Pursuant to s 37(2) they must be separate "all of the time".
- 65 He also posed the question, what would happen if the liquor store was sold or transferred to someone else.
- 66 The fact that the proposed premises adjoin a common area that abuts a supermarket is, in my view neither here nor there. The Act talks of the "licensed premises" being physically separate. If this application is granted the licensed premises will be defined as a discrete area within the wider shopping complex. That area does not have to be accessed from the supermarket and those who enter the proposed premises after shopping at the supermarket will have had to have passed through the supermarket's checkouts and entered the common mall area before doing so.
- 67 As for the access to deliveries through a common doorway s 37(2) in this context was considered by this Court in *Bennie's Cellars*<sup>6</sup>.
- 68 The applicant there, who was coincidentally also Woolworths, made application to remove an existing retail licence into an area of its supermarket at Whyalla that was previously used to sell fruit and vegetables. The area was separated from the main store and was only accessible by a separate entrance. However, what was considered as of concern was the fact that the proposed premises had a roller door that when opened would give access to the supermarket generally. It was intended for the roller door to be used for stocking.
- 69 The Court rejected the submission that this was in breach of s 37(2). It noted that the applicant in that case had made it clear that it did not intend to allow the roller door to be used as a means of permitting public access through the supermarket to the liquor store. In light of that evidence the Court thought it appropriate to impose a condition of the licence reflecting that evidence and making it clear that the door could only be opened for stocking purposes. But beyond that the Court thought that the positioning of the roller door did not contravene s 37(2). I respectfully agree.

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<sup>6</sup> [2005] SALC 3

70 I accept that if this licence was transferred and access to the supermarket was denied that would seriously undermine the capacity of the retail liquor store to operate. But I think the short answer to that is, if this application succeeds, as things presently stand, Woolworths would not be able to transfer the licence without permitting that access.

*Discretion*

71 Finally Mr Henry submitted that the Court should exercise its discretion pursuant to s 53 not to grant the application regardless of whether the Court accepts his client's other submissions.

72 In support of that he said that the BWS Collinswood store and other shops in the Collinswood centre conveniently served the population on the north side of North East Road where its local custom comes from. To transfer the licence would be to deny those people of that convenience shopping and would be contrary to the policy of the Act.

73 I reject that submission for a number of reasons. First, it is not as if those persons do not have other convenient options. Immediately to the northeast of BWS Collinswood is a large retail liquor outlet trading as "First Choice". Whilst this might not be as convenient for those wishing to make their liquor purchases whilst shopping at the Collinswood shops, to travel further along Main North East Road to make their purchases is not a major inconvenience and it provides an impressive range of liquor.

74 Moreover, whenever a retail licence is removed, some members of the public will be inconvenienced whilst others will benefit. Ultimately what is required is a balancing of the various interests. The shopping complex where the proposed premises are to be located is relatively large and is likely to attract a greater custom than the Collinswood shopping centre. The presence of a retail liquor facility is likely to add to the attractiveness of the new complex and will be to the advantage of those who use it. It is likely to serve more members of the public than BWS Collinswood.

75 I have taken into account the fact that just a relatively short distance from the proposed premises is the objector's store. This is not an irrelevant consideration. It would not be in the public interest to have like facilities side by side. But these are not like facilities. And, they are not side by side.

76 The BWS range has been described by the Court "as relatively limited and directed towards the convenience customer".<sup>7</sup> That accords with my

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<sup>7</sup> *Woolworths Limited v Smithfield Hotel Pty Ltd* [2012] SALC 57 at para 31

own understanding. My expectation is that many of the customers of these stores make small purchases as part of their general food shopping.

- 77 In contrast to this I find that Fassina offers a large range of wines with an emphasis on more premium products. I expect that many of its customers make the trip to its store at Walkerville for the sole purpose of buying liquor (probably wine) and unlike those using BWS stores would not necessarily do so as merely coincidental with other shopping.
- 78 Whilst the grant of this application will undoubtedly affect Fassina, I expect that some using the shopping complex who are looking for a “special” bottle of wine or who wish to browse in a large welcoming retail facility, which I find the Fassina at Walkerville to be, will continue to visit Fassina, notwithstanding the presence of another retail facility up the road. It is notable that Fassina seems to have successfully coexisted with the existing BWS Collinswood notwithstanding their proximity to each other.
- 79 In my view the public interest supports the grant of this application.

### **Conclusion**

- 80 I am satisfied that the application for the removal of the applicant’s Retail Liquor Merchant’s Licence involves the movement of the licence from one facility to another within the same locality for the purposes of the Act.
- 81 I find that the proposed premises will be of an appropriate standard for carrying on the business of a retail liquor outlet and that there are no issues concerning s 60(1)(b)(i) and (ii) of the Act.
- 82 I am satisfied that the proposed premises will be devoted entirely to the business of a retail liquor facility and are physically separate from premises used for other commercial purposes.
- 83 In my view, the public interest does not require me, in the exercise of my discretion, to refuse the application.
- 84 I therefore grant the application, subject to imposing conditions conforming to the condition imposed in the *Bennie’s Cellars’* case.

Exhibit 196

