

**LICENSING COURT OF SOUTH AUSTRALIA**

**POLICE ASSOCIATION OF SOUTH AUSTRALIA**

**JURISDICTION:** Application to seek permission to apply for Review of a Decision of the Commissioner

**FILE NO:** LC-22-00025

**HEARING DATE:** 14 and 29 September 2022

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

**DELIVERED ON:** 13 October 2022

**CATCHWORDS:**

*Application for directions seeking permission to review a decision of the Liquor Commissioner to grant a variation of the liquor licence held by Adelaide Oval SMA Ltd (AOSMA) to enable the sale and supply of liquor through aluminium cans – A similar application to vary was opposed by the Police Commissioner and was ultimately rejected by the Liquor Commissioner’s delegate in 2020 – When the subsequent application was made, the Police Commissioner filed a Notice of Intervention and the Police Association of South Australia (PASA) assumed that the Police Commissioner would oppose the application – The Liquor Commissioner resolved to deal with the application through a hearing and through his delegate a directions hearing was conducted and the matter was scheduled for a hearing – Prior to the scheduled hearing date, representatives of AOSMA and the Police Commissioner conferred and reached agreement that the variation would be allowed subject to certain commitments being made – PASA were made aware of this prior to the scheduled hearing – The terms of the agreement were forwarded to the Liquor Commissioner who indicated that he would approve them and the scheduled hearing was cancelled – The Liquor Commissioner subsequently issued reasons approving the variation which he amended slightly – PASA relies upon a provision in the Act that permits a party who did not participate in the proceedings to apply for permission to seek a review in cases where the Liquor Commissioner did not hold a hearing – It contends that because the scheduled hearing did not proceed there was no hearing – AOSMA contends that the provision only applies to unadvertised applications and as this application was advertised the provision has no application – Next it contends that the mere fact that there was a directions hearing means that there was a hearing – Finally it contends that the Liquor Commissioner’s consideration leading to his approval and published reasons*

*demonstrates that there was a hearing – **Held** that the Liquor Commissioner intended to hold a hearing and it was a matter for the him as to how that hearing was conducted – **Held** that the Liquor Commissioner’s consideration of the agreed resolution was a hearing such that PASA has no opportunity to seek a review of the Liquor Commissioner’s decision – If it were otherwise should permission be granted? – PASA contends that it has a legitimate interest in the proceedings – It submits that AOSMA will not be especially prejudiced if the application is granted and that there are serious public interest and police and public safety considerations at play such that permission should be granted – AOSMA contends that it would be a serious thing to grant permission to review a consent position agreed upon by AOSMA and the Police Commissioner, especially given that PASA appear to have made a decision not to participate in the proceedings notwithstanding that it knew before the Liquor Commissioner had reached his decision that the Police Commissioner no longer opposed the application – **Held** that the gravitas of the parties was a matter relevant to the application and AOSMA and the Police Commissioner can be taken to have a joint commitment to make the Adelaide Oval a safe venue – **Held** that the evidence established that the risk of aluminium cans being used as projectiles was low – **Held** that the Act is focussed on harm minimisation not eradication – **Held** that the advantages in using cans in reducing spillage is self-evident and the Liquor Commissioner was entitled to give weight to the fact that a trial use of cans at the MCG was successful and well received – **Held** that although PASA has a legitimate interest in the proceedings and there was no relevant delay in the making of PASA’s application for permission to seek a review, there is no adequate explanation of PASA’s failure to engage with the Liquor Commissioner upon learning that the Police Commissioner intended to no longer oppose AOSMA’s application – **Held** that the grant of permission will result in some adverse consequences to AOSMA – **Held** that the prospects of PASA successfully reviewing the Liquor Commissioner’s decision are poor – **Held** that if PASA had the right to seek permission to review, permission would have been refused – **Held** that the application is dismissed – Liquor Licensing Act 1997, Police Act 1998, Adelaide Oval Redevelopment and Management Act 2011.*

*Jefferies v New Zealand Dairy Production and Marketing Board [1967] 1 AC 551*

*Baxendale’s Vineyard Pty Ltd v The Geographical Indications Committee [2007] FCA 22*

*Hadid v Lenfest Communications Inc & Ors (1996) 70 FCR 403*

*Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72*

*House v The King (1936) 55 CLR 499*

*Coast Protection Board v Carramatta Holdings Pty Ltd and Others [2015] SASFC 64; (2015) 122 SASR 409*

*Athans v The Queen [2022] SASCA 71*

*State of South Australia v Collings [1996] SASC 6145; (1996) 65 SASR 432*

*Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355*

*Ex parte Thackeray (1874) 13 SCR (NSW) 1*

*T A Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992  
*Hove Sip n Save* [2021] SALC 7  
*Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 221 ALR 402; (2005) 79 ALJR 1816  
*Amaca Pty Ltd v Werfel* [2020] SASCF 125  
*Evans v Scales and Partners* [1994] SASC 4384  
*Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247  
*Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475  
Kersley RH, *Broom's Legal Maxims* (10<sup>th</sup> ed, Sweet & Maxwell, 1939)  
*McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416  
*Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154  
*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6 at [31]; (1996) 185 CLR 259  
*Watts v Welch* [1950] SASR 289  
*Prasad v Workers Compensation Commission* [2010] NSWSC 418  
*Adelaide Oval SMA Ltd* [2018] SALC 73  
*Liquorland McLaren Vale* [2022] SALC 53

## **REPRESENTATION:**

### Counsel:

Applicant: Mr B Doyle KC with Mr P Pedler  
Respondent: Mr M Roder KC with Mr J Hill

### Solicitors:

Applicant: Pedler Lawyers  
Respondent: Minter Ellison

- 1 This is an application made by the Police Association of South Australia (PASA) for permission to review a decision of the Liquor and Gambling Commissioner (the Liquor Commissioner) in connection with his order permitting a variation of the conditions of the liquor licence held by Adelaide Oval SMA Ltd (AOSMA) so as to permit the sale of alcoholic beverages in cans at Adelaide Oval.
- 2 At issue is whether in the circumstances of this case permission can be granted and if so whether it should be.

### **Relevant legislative provisions**

- 3 In order to put the competing submissions into context it is necessary to reflect upon various provisions in the *Liquor Licensing Act 1997*.
- 4 Prior to amendments to the Act that took effect from November 2019, the powers of the Liquor Commissioner to deal with applications were more limited than is presently the case. Pursuant to s 17 of the Act, as it then was, the Liquor Commissioner's primary responsibilities were to deal with uncontested matters and to attempt to conciliate contested matters, except those in which the Commissioner of Police (the Police Commissioner) had lodged an objection on the ground that to grant the application would be contrary to the public interest. The types of contested matters that the Liquor Commissioner could adjudicate upon were limited to applications for limited licences, applications for small venue licences, and matters which the parties requested the Liquor Commissioner to determine. All other contested applications that were unable to be conciliated had to be referred to this Court. Pursuant to s 22(1) of the Act, as it then was, the right of review to this Court was limited to a party to the proceedings.
- 5 Under the Act in its current form, the powers of the Liquor Commissioner have become much more expansive.
- 6 Whilst the Liquor Commissioner retains the power to conduct a conciliation to deal with a contested application, there is no longer an obligation to do so. Instead, the decision to attempt conciliation is a matter for the Liquor Commissioner's absolute discretion.<sup>1</sup>
- 7 There is no longer any limitation upon the range of matters that the Liquor Commissioner can deal with. This Court can only deal with a matter at first instance if the Liquor Commissioner refers the matter to the Court for determination.<sup>2</sup> I think it would be reasonable to suggest that the Act now contemplates that unless the application involves a question of substantial public importance or a question of law, it would only be in an

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<sup>1</sup> Section 78 of the Act.

<sup>2</sup> Section 21(1) of the Act.

exceptional case that the Liquor Commissioner would refer an application to the Court.

- 8 As was previously the case, the Act requires the Liquor Commissioner in dealing with proceedings to act without undue formality. As before, it also provides that the Liquor Commissioner is not bound by the rules of evidence but may be informed on any matter as seen fit.<sup>3</sup>
- 9 The Act empowers the Liquor Commissioner to summons witnesses to give evidence, to take an oath or affirmation verifying evidence, and to answer questions put by the Liquor Commissioner or some other person.<sup>4</sup>
- 10 Whereas prior to the 2019 amendments a party was entitled to appear before the Commissioner, either personally or through a range of potential representatives,<sup>5</sup> the right of appearance is now qualified. Before identifying the various ways through which an entity might appear, s 20(1) of the Act provides:

A party to, or another person involved in, proceedings before the Commissioner, **other than proceedings relating to an application under Part 4 in relation to which the Commissioner has determined not to hold a hearing**, may appear in those proceedings... (Emphasis mine)

- 11 To put this into context, reference needs to be made to s 81(1) of the Act which provides:

The Commissioner may, in the Commissioner's absolute discretion-

- (a) **determine an application** under this Part entirely on the basis of the application and any written submissions made **without holding a hearing**; or
- (b) hold a hearing in relation to an application under this Part.  
(Emphasis added mine)

- 12 It follows that there is no right to personal representation before the Liquor Commissioner in respect of an application to which the Liquor Commissioner has resolved pursuant to s 81(1)(a) of the Act not to hold a hearing.
- 13 In determining a matter a licensing authority, be it the Liquor Commissioner or this Court, must go further than what is required in a conventional inter parties dispute.

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<sup>3</sup> Section 18 of the Act.

<sup>4</sup> Section 19 of the Act.

<sup>5</sup> Section 20 of the Act, as it then was.

- 14 Section 53(2) stipulates that ‘a licensing authority should not grant an application as a matter of course without proper inquiry into its merits, taking into account the operation of Division 13’. Division 13 of the Act deals with the making of submissions to the Commissioner. In other words, the Liquor Commissioner is obliged to consider the parties’ submissions before making the order. As part of the consideration he is required by s 53(1a) of the Act not to grant the application if to do so would be contrary to the public interest. Pursuant to s 53(2) he is also required to consider whether the grant of the application would be inconsistent with the objects of the Act. Again, if he concluded that it was, he is required to refuse it. Finally, he has to consider whether in the exercise of the unqualified discretion conferred by s 53(1), he should grant or refuse the application.
- 15 Reference must also be made to s 3(2) of the Act. It mandates that: ‘Subject to this Act, in deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1)’. Subsection s 3(1) provides:

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

- (a) to ensure that the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor; and
  - (b) to ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly, consistent with the principle of responsible service and consumption of liquor; and
  - (c) to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public; and
  - (d) to facilitate the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry, in a manner consistent with the other objects of this Act.
- 16 Section (3)(1)(a) provides that for the purposes of s 3(1)(a) ‘harm caused by the excessive or inappropriate consumption of liquor includes’:
- (a) the risk of harm to children, vulnerable people and communities (whether to a community as a whole or a group within a community); and
  - (b) the adverse economic, social and cultural effects on communities (whether on a community as a whole or a group within a community); and
  - (c) the adverse effects on a person’s health; and

- (d) alcohol abuse or misuse; and
  - (e) domestic violence or anti-social behaviour, including causing personal injury and property damage.
- 17 These provisions apply in respect of all applications, including those which are uncontested and those that are resolved by agreement.
- 18 PASA's application to this Court is made pursuant to s 22(1) of the Act. It provides that in relation to an application under Part 4 of the Act, which includes an application to vary a condition of a licence, relevantly the following entities may apply for a review of the Liquor Commissioner's decision:
- (a) in the case of a decision of the Commissioner where the Commissioner **held a hearing** in respect of the application – **a person involved in the hearing;**
  - (b) in the case of a decision of the Commissioner relating to a designated application (other than a decision of a kind referred to in paragraph (a))—
    - (i) the applicant; or
    - (ii) if the Commissioner of Police intervened or made written submissions in relation to the application—the Commissioner of Police; or
    - (iii) any other person who made written submissions relating to the application;
  - (c) **in any other case-**
    - (i) the applicant; or
    - (ii) the licensee (in a case where the licensee is not the applicant); or
    - (iii) if the Commissioner of Police intervened or made written submissions in relation to the application – the Commissioner of Police; or
    - (iv) **any other person with the permission of the Court.**  
(Emphasis added mine)

### **The facts**

- 19 I now turn to discuss the facts giving rise to this application.
- 20 Prior to the Liquor Commissioner's order, there was in place a condition on AOSMA's licence in the following terms:

Liquor shall only be sold or supplied in plastic cups, except in corporate facilities, dining rooms, or at functions and receptions.

- 21 In 2020 an application was made by AOSMA for this condition to be removed (the 2020 application).
- 22 The Liquor Commissioner, through his delegate, resolved to exercise the discretion conferred by s 81(1)(a) of the Act, and dealt with the 2020 application, without holding a hearing.
- 23 In connection with the 2020 application, the delegate noted that it was not supported by the City of Adelaide which had expressed some safety concerns. The delegate noted that the Police Commissioner had lodged an intervention. That intervention was authorised by s 28AA of the Act, which relevantly permits the Police Commissioner's intervention on the question 'whether, if the application were to be granted, public disorder or disturbance would be likely to result';<sup>6</sup> or 'whether to grant the application would be contrary to the public interest'.<sup>7</sup> The delegate noted that the Police Commissioner was concerned that there would be a risk to public safety, a risk of public disturbance, and inconsistencies relative to similar venues interstate. Ultimately the delegate was not persuaded that AOSMA had placed sufficient material to allay the delegate's concerns about an increased risk to public safety and the application was refused.
- 24 On 23 May 2022, AOSMA, through its lawyers, made a further application to the Liquor Commissioner in connection with the condition regarding plastic cups. Rather than seeking its wholesale removal, it now proposed that the condition be amended to read as follows:

Liquor shall only be sold or supplied in plastic cups or aluminium cans, except in corporate facilities, dining rooms, or at functions and receptions.

- 25 Following receipt of AOSMA's application, by e-mail dated 26 May 2022, an officer of the Liquor Commissioner advised AOSMA's lawyers and the City of Adelaide that the application had been listed for determination on 27 June 2022. It also directed that the application be advertised,<sup>8</sup> and that proof of the advertising was to be provided at least seven days prior to the listed determination date.
- 26 On 31 May 2022, PASA became aware of AOSMA's application. It understood that the Liquor Enforcement Branch (LEB) of South Australian Police (SAPOL) would be opposing the application for the variation. Immediately following this, LEB was advised that the President of the

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<sup>6</sup> Section 28AA (2)(b).

<sup>7</sup> Section 28AA (2)(c).

<sup>8</sup> Section 52 of the Act directs that certain types of applications must be advertised, and it also provides that a licensing authority may direct that other applications be advertised.

PASA, Mark Carroll, would raise the matter at a Police Federation of Australia (PFA) executive meeting and that a letter would be written to the Minister for Police.

- 27 In the meantime, the Police Commissioner took steps to file a Notice of Intervention in connection with AOSMA's application. By e-mail dated 16 June 2022, an officer of the Liquor Commissioner forwarded to AOSMA's lawyers a copy of that Notice. The e-mail also advised: 'As the determination date is 27 June, all submissions are required by 20 June 2022, if you wanted to hold off until after this date to see if any more are received. You have the right to provide a response to the submission(s) ...'
- 28 By e-mail dated 20 June 2022, an officer of the Liquor Commissioner advised the parties that a directions hearing via the internet was scheduled before one of the Liquor Commissioner's delegates, Ms Thomas, at 11.00 am on 27 June 2022.
- 29 By e-mail dated 21 June 2022, AOSMA's lawyers enquired of the Liquor Commissioner's office whether any additional submissions had been received and by return e-mail of the same date they were advised that none had been.
- 30 On 27 June 2022, Ms Thomas conducted the directions hearing. She directed SAPOL to file any further submissions by close of business on 13 July 2022 and for AOSMA to file any responding submissions by close of business on 20 July 2022. She also directed that the matter be set down for hearing before the Liquor Commissioner on 26 July 2022. Following this, SAPOL and AOSMA filed submissions.
- 31 On 29 June 2020, the PFA Executive met, and after discussion, a motion was carried formally opposing the reintroduction of aluminium cans to patrons in all areas of stadiums in Australia in the interest of police safety and general public safety.
- 32 On 6 July 2022, Mr Carroll wrote to the Minister for Police in the following terms:

Adelaide Oval SMA Limited has applied to amend its liquor licence and allow for the sale of alcohol in aluminium cans.

The Police Association opposes this amendment and SAPOL is likely to do the same.

At an executive meeting on Wednesday 29 June, the Police Federation of Australia highlighted its opposition to the sale of aluminium cans at *all* Australian stadiums.

The PFA represents more than 65,000 police officers in Australia.

The association's opposition to the move puts the safety of police, emergency services personnel, and the general public as a priority.

Patrons often use aluminium cans as dangerous projectiles in an attempt to seriously injure police officers, emergency services personnel, other patrons and players.

We know this from experience.

It would be a retrograde step to revert back to the sale of aluminium cans at Adelaide Oval.

The association urges you to confirm your opposition to the SMA's licencing variation.

- 33 A copy of this letter was sent to LEB and to the Police Commissioner.
- 34 By e-mail dated 14 July 2022, Chief Inspector Greg Hutchins APM, the Officer in Charge of LEB, invited AOSMA's lawyers to participate in a discussion to enable SAPOL to air its concerns and to explore possible resolution. It advised the Liquor Commissioner's office of this, with a view that the matter might be resolved prior to the hearing scheduled for 26 July 2022.
- 35 On 18 July 2022, representatives from SAPOL and AOSMA met and reached agreement. The terms of their discussions and their agreement were recorded in a letter from AOSMA's lawyers to the Liquor Commissioner dated 20 July 2022.
- 36 The letter recorded that whereas AOSMA initially wanted a review after six months, it was agreed that the period of the review would be extended to twelve months. It noted SAPOL's concern of the possibility of the danger to potential safety by the throwing of cans in the public areas and the playing arena and that AOSMA made a number of commitments to address this. These included making announcements on screens warning patrons against using cans as projectiles and informing them that using a can as a projectile was a criminal offence, and that it would attract a ban from attending Adelaide Oval for up to two years. It recorded that it was agreed that at the completion of each day of any major events at Adelaide Oval, AOSMA and SAPOL would conduct a review and debrief.
- 37 The letter then went on to record a number of initiatives that AOSMA proposed. It stated that AOSMA would employ staff dedicated to the rapid collection of cans, especially in the area known as 'The Hill'. It stated that AOSMA had no intention of ceasing the service of alcohol in cups, noting that these would eventually be other than single use plastic cups, which are being phased out. It noted that because it intended to retain the infrastructure around dispensing alcohol through taps, there would be no difficulty in supplying alcohol through this mechanism should the need

arise to not supply liquor in cans for a particular event or during an event. It noted that AOSMA only supplies mid-strength beer to patrons at 'The Hill' and that it intends that this practice will continue. It recorded AOSMA's commitment to a proactive approach to the responsible service of alcohol, which presently includes a response mechanism to reduce alcohol service from four per transaction, down to two and then zero, should the need arise. It stated that it intended to apply this to the supply of liquor through cans.

- 38 On the morning of 22 July 2022, Mr Carroll was advised by an officer from LEB that SAPOL would no longer be opposing the licence variation following negotiations that had taken place with AOSMA. Mr Carroll queried whether this meant that cans would now be sold at Adelaide Oval and upon being informed that they would be, he expressed his objection.
- 39 By e-mail dated 25 July 2022, Ms Thomas, on behalf of the Liquor Commissioner, advised AOSMA's lawyers and Chief Inspector Hutchins that the Liquor Commissioner was willing to grant the application on the terms agreed by the parties and that the hearing scheduled for the following day had been cancelled.
- 40 On 27 July 2022, the Liquor Commissioner formally granted the application to vary the condition and provided brief reasons for doing so. After reciting what was agreed he wrote:

I have considered the information provided by both parties in terms of the public interest and public safety. In particular, I note that the Melbourne Cricket Ground (MCG) recently undertook a trial to reintroduce aluminium cans at the venue. Whilst there continued to be alcohol related incidents during the trial, thus far these have not been attributable to the re-introduction of aluminium cans, and the change has been well received at the MCG.

I have also considered the very low occurrence of alcohol related incidents involving aluminium cans historically. SAPOL noted two incidents involving aluminium cans at sporting venues, one in 1971 and the other in 1989. These incidents occurred a significantly long time ago and the current safety, service and monitoring arrangements in place at the oval, including responsible service of alcohol measures, security personnel and real time CCTV monitoring, are significantly different to what was in place back when these incidents occurred.

I am advised that the venue will continue to offer drinks in plastic cups, this change to their licence will allow them to also offer cans for certain lines. I am further advised that the venue will not be removing any infrastructure used for the provision of alcoholic beverages on tap into cups and therefore will be able to quickly revert to plastic cups only should the need arise.

Having considered all this, I am of the opinion that the application ought to be granted as agreed between the parties, with an additional variation to ensure that liquor sold or supplied in aluminium cans must be opened by the licensee at the point of sale. I consider this will further reduce the risk of cans being used by patrons as a projectile.

- 41 The Liquor Commissioner then issued a formal order varying the condition in the following terms:

Liquor shall only be sold or supplied in plastic cups or aluminium cans, except in corporate facilities, dining rooms, or at functions and receptions. Liquor sold or supplied in aluminium cans must be opened by the licensee at the point of sale.

- 42 In the meantime, in an article published in the Adelaide Advertiser online on 26 July 2022, it was reported that the AOSMA was seeking to sell cans of beer at Adelaide Oval. It noted that a police spokesman said that SAPOL had initially opposed AOSMA's original application to vary its licence but had negotiated a twelve-month trial incorporating a number of conditions designed specifically to prevent public safety issues. The article also recorded PASA's strong opposition to the application and quoted Mr Carroll that it was 'totally unnecessary' and that 'Public safety should be the priority here, not the sale of alcohol.'

- 43 On 29 July 2022, Mr Carroll advised the Police Commissioner, in writing, of PASA's concern at SAPOL's failure to oppose the application.

- 44 On 25 August 2022, PASA made an application to this Court seeking permission to review the Liquor Commissioner's decision.

- 45 In his affidavit tendered in this Court in support of the application, Mr Carroll stated that because PASA had informed SAPOL and the Minister for Police that it opposed AOSMA's application for the variation to the condition it did not think it was necessary to make submissions directly to the Liquor Commissioner. He said that he 'expected that SAPOL would make strong submissions against the variation of the licence conditions on the grounds of public interest and safety as was the usual practice of SAPOL' and as it had done in respect of the earlier application.

- 46 He stated that SAPOL's decision to withdraw its opposition to the application took PASA by surprise. He made reference to the Liquor Commissioner's published decision and noted that he took into account that there was a trial being undertaken at the MCG in connection with the sale of liquor in aluminium cans. He said that PASA would have made a submission to the Liquor Commissioner that any consideration of the variation should be deferred until after that trial had been concluded. He added that it would have further submitted that the measures proposed by AOSMA to mitigate the risk to the public were not satisfactory; the

commercial advantages to AOSMA in selling beer in cans should not outweigh public safety issues; the sale of liquor in cans was likely to result in alcohol being sold more quickly; and that there was a fundamental difference between the MCG and Adelaide Oval, the former being fully seated, whereas Adelaide Oval has a large standing area under the old score board<sup>9</sup> with a history of unruly and anti-social behaviour. He stated that he had been made aware through a Victorian colleague of an incident at Marvel Stadium during an AFL game on 18 March 2022 when a female patron had been hit in the head with an aluminium can thrown from behind her.

- 47 In a further affidavit, Mr Carroll annexed amongst other things the licences issued in respect of the MCG and Marvel Stadium in Docklands, Melbourne.
- 48 The MCG licence contains a number of restrictions regarding the sale of liquor generally and the sale of liquor in cans. For example, at international one day cricket matches and sporting events on 26 December (which I am permitted to know is the first day of the Boxing Day Test Match) only low alcohol beer and spirits, being 3.5% alcohol by volume or less, and low alcohol cider, being 5% alcohol by volume or less, can be sold. As for cans, open cans cannot be sold where the anticipated crowd is greater than 75,000, or where the scheduled commencement time is after 6.00 pm, excluding Big Bash Cricket. In addition, in respect of public beverage outlets on Level 4 of the MCG, the beverage must be decanted into plastic cups.
- 49 Marvel Stadium licence restricts the sale of beer generally to 3.5% alcohol by volume or less for all sporting events after 7.00 pm. It only permits sale of liquor in cans where the crowd is reasonably anticipated to be less than 42,000 patrons and not during any A league soccer games. In addition, in respect of public beverage outlets on Level 3, the beverage must be decanted into plastic cups.

### **The parties' submissions**

- 50 Mr Doyle KC, counsel for PASA, submitted that in this case there was no hearing as it was cancelled following AOSMA's advice to the Liquor Commissioner that it had resolved the issues raised by the Police Commissioner and the advice from the Liquor Commissioner's office that the hearing scheduled for 26 July 2022 would not proceed. He submitted that s 22(1)(c) therefore applies, and that subject to it being granted permission, PASA can seek a review of the Liquor Commissioner's decision.

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<sup>9</sup> This is plainly the same area that was identified by AOSMA's lawyers as 'The Hill'.

- 51 Mr Doyle submitted that matters relevant to the grant of permission are whether the applicant has a real and genuine interest in the matter; whether PASA's election not to participate in the proceedings before the Commission should count against its application for permission; whether AOSMA would be unduly prejudiced if permission were granted; and whether there is a reasonable prospect of success if permission is granted.
- 52 Mr Doyle submitted that the first of these matters was clearly established as PASA is a registered industrial association that represents the interests of police officers, including police officers who would be attending at events at Adelaide Oval.
- 53 In connection with the second, he submitted that PASA's election not to participate in the proceedings before the Liquor Commissioner was due to its misapprehension as to the Police Commissioner's position. He submitted that I should be satisfied on the evidence that PASA did not make a conscious decision not to participate in the proceedings before the Liquor Commissioner.
- 54 As to the third, he submitted that AOSMA would not be substantially prejudiced if permission were granted as it did not endure the trouble and expense of a trial before the Liquor Commissioner and as it has retained the infrastructure necessary to supply beer by taps, it would not suffer undue interference if PASA's application ultimately succeeded, and the variation was revoked.
- 55 As to the fourth matter, he noted that in conformity with s 53 of the Act, the Liquor Commissioner could not grant the variation without a 'proper inquiry into its merits'. He noted that the Liquor Commissioner needed to be satisfied that the grant of the application was in the public interest and was not inconsistent with the objects of the Act, which included harm minimisation, which in turn included things such as the potential for anti-social behaviour, personal injury and property damage. He submitted that it is at least arguable that the Liquor Commissioner did not conduct a proper inquiry into the merits. He submitted that the Liquor Commissioner's reasons do not identify the public benefit or other object of the Act that would be advanced by the grant of the application. He submitted that some explanation was needed in granting the application, given that two years earlier the Commissioner's delegate had refused a similar application because of public safety concerns.
- 56 Mr Doyle submitted that the Court should not be concerned that the grant of permission would create an undesirable precedent because of the uniqueness of the application.
- 57 Mr Doyle submitted that if the Liquor Commissioner took into account the environmental benefits that were contended for by AOSMA, he erred,

because there is no present legislative requirement to transition to cans. He added that in any event, 100% recyclable plastic cups are presently available. He further submitted that the Commissioner erred by placing too much reliance upon the trial at the MCG for the reasons identified by Mr Carroll. He submitted that it does not appear that the Liquor Commissioner was aware of the significant limitations on the sale of liquor in cans at the MCG and Marvel Stadium. He submitted that the Liquor Commissioner's finding of a 'very low occurrence of alcohol related incidents involving aluminium cans historically' was not founded on reliable evidence at comparable stadia or events where cans are actually served. He submitted that permission should be granted because there are significant safety and public interest considerations in play.

- 58 Mr Roder KC, counsel for AOSMA, submitted that it was instructive that the effect of ss 22(1)(a) and (b), is that in connection with designated applications a person who did not participate in the proceedings before the Liquor Commissioner has no right of review. He submitted that this should inform how s 22(1)(c) is to be construed. He said that it would be incongruous that a significant type of application, which he said is how a designated application should be characterised, would have a limited right of review confined to participants before the Liquor Commissioner, yet a less important type of application would not be subject to that constraint. He submitted that this suggests that the reach of s 22(1)(c)(iv) is limited to cases where a party affected by an application had no knowledge of it, and that it does not apply to applications that have been advertised. Hence, he said that because AOSMA's application was advertised, and PASA knew about it before the Liquor Commissioner had issued his decision, the provision does not apply in this case.
- 59 Next he submitted that in any event, in this case there was a hearing before the Liquor Commissioner. He submitted that the Liquor Commissioner resolved to conduct a hearing and through his delegate conducted a directions hearing, and allocated time for the determination of the matter. He said that what followed was that upon being informed that the parties had negotiated a resolution, the Liquor Commissioner resolved to deal with the matter without requiring an oral hearing. He submitted that this does not mean that there was no hearing. He submitted that it is clear from the Liquor Commissioner's reasons that he considered that he had moved to the point of a hearing because he described AOSMA and the Police Commissioner as parties.
- 60 Mr Roder submitted that it would be absurd if there were any difference in connection with whether permission to review was available, depending upon whether or not the parties had gone before the Liquor Commissioner and told him orally of their consent, and asked him to make the order, as opposed to being heard by making written submissions. He submitted that whether the Liquor Commissioner hears from the parties orally or by

receiving written statements is a matter of procedure only. In support of this he referred me to the decision of the Privy Council in *Jefferies v New Zealand Dairy Production and Marketing Board*.<sup>10</sup> In that case the Privy Council held that it was up to the Board to determine how proceedings before it were conducted. He submitted that the fact that there was no oral evidence adduced in this case does not mean that the Liquor Commissioner did not hold a hearing.

61 Mr Roder submitted that it would be open for me to conclude that the fact that a directions hearing was held was sufficient to establish that there had been a hearing. He referred me to various cases that supported this contention. These included *Baxendale's Vineyard Pty Ltd v The Geographical Indications Committee*.<sup>11</sup> An issue arose in that case as to which Registry of the Federal Court should deal with an appeal from the Administrative Appeals Tribunal. The relevant rule provided that this was to be determined by reference to the 'District Registry in the State or Territory in which the tribunal heard the matter.' The case commenced with a directions hearing in Adelaide. Subsequent directions hearings took place in Adelaide, Melbourne and Sydney. The taking of oral evidence occurred in Wangaratta and Melbourne. The point that Mr Roder relies upon was Mansfield J's view that the initial directions hearing was part of the hearing and that as that had occurred in Adelaide, an appeal lodged in the Adelaide Registry was competent.

62 To like effect was the observation of Hill J in *Hadid v Lenfest Communications Inc & Ors* where he said:

The narrow interpretation sought to be given to the word "hearing" in s50 is, in my view, not warranted. The word "hearing" is equally apt to refer to a "directions **hearing**" or an "interlocutory **hearing**" (emphasis added), as it is to a hearing on the merits...<sup>12</sup>

63 Next, he submitted that in any event, even if I were against him on that, permission should not be granted.

64 Mr Roder submitted that I should find that PASA chose not to participate in the proceedings before the Liquor Commissioner. He submitted that it would only be in exceptional circumstances that this Court would countenance granting a party that chose not to participate in proceedings before the Liquor Commissioner, permission to seek a review of his decision. He added that the Police Commissioner is no mere interested party. To the contrary, the Police Commissioner has a special statutory role under the *Police Act 1998*. Reference was made to s 6 of that Act which provides: 'Subject to this Act and any written directions of the Minister, the

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<sup>10</sup> [1967] 1 AC 551 at 568.

<sup>11</sup> [2007] FCA 22.

<sup>12</sup> (1996) 70 FCR 403 at 407.

Commissioner is responsible for the control and management of SA Police.’ He submitted that the Police Commissioner’s consent to the variation was a matter of great significance.

- 65 Mr Roder submitted that I need to be cautious in dealing with PASA’s contention that there are important matters of ‘public interest’ involved in this case. Referring to the judgment of McHugh J in *Oshlack v Richmond River Council*<sup>13</sup> he submitted that it is a vague and imprecise concept, and an argument could be put that many cases concern matters of public interest. He added that it is in the public interest for parties to be able to resolve amongst themselves a disputed application, and that it is in the public interest that upon the Liquor Commissioner’s approval of that resolution, the matter should be considered finalised.
- 66 Mr Roder submitted that the Liquor Commissioner’s decision involved the exercise of a discretionary judgment. He noted the well-known restraints applying to a review of such judgments. He submitted that unless it has been demonstrated that the Commissioner misapplied the relevant legal principles, failed to take into account relevant matters, took into account irrelevant matters, or reached a conclusion that was so unreasonable or unjust as to require this Court to substitute its own discretionary judgment, it cannot interfere.<sup>14</sup> He submitted that none of these matters had been established in this case.
- 67 Mr Doyle replied that it was understandable why the right of review would be limited to actual participants in a hearing and in respect of designated applications. He submitted that in connection with the former, it can be assumed that the hearing would involve some inconvenience and expense to the parties and the full hearing was likely to result in a correct outcome such that limiting the right of review so that it would not extend to persons who were not participants, was understandable. As for designated applications, he submitted that these require extensive consultation. He submitted that it can therefore be expected that all potentially affected parties had a chance to make submissions thus rendering it unnecessary to give persons who did not participate in the proceedings before the Liquor Commissioner the right of review.
- 68 Mr Doyle submitted that it was understandable why the Parliament would have provided for the Court to have a discretion, not an obligation, to grant permission to a broader category of persons who may wish to challenge the correctness of an outcome where there has been no formal hearing. He said that in such a case, the principle of finality was of less importance because the parties will not have gone to the trouble and expense of exchanging arguments, possibly conducting cross-examinations, making forensic

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<sup>13</sup> [1998] HCA 11; (1998) 193 CLR 72 at [71].

<sup>14</sup> *House v The King* (1936) 55 CLR 499.

decisions about the calling of witnesses, and incurring expenses and so forth. He added that where there has not been a substantive hearing, there is a greater likelihood that a decision will be incorrect. He submitted that the circumstances of this case demonstrated the utility of a power in the Court in its discretion to grant permission in a particular case especially where there are serious public interest issues in play.

- 69 By reference to majority judgments in *Coast Protection Board v Carramatta Holdings Pty Ltd and Others*<sup>15</sup> he contended that even though the order in this case was effectively a consent order, this does not prevent this Court from setting it aside if it is in the public interest.
- 70 Mr Doyle queried whether what was involved was a truly discretionary judgment but added that even if it was, it was reasonably arguable that the bar set in respect of a review of such a judgment had been met. He then submitted that even if it were otherwise, if on review this Court admits further evidence, it must review the original discretionary judgment in light of that evidence. By reference to the decision of the Court of Appeal in *Athans v The Queen*,<sup>16</sup> he submitted that this Court is not constrained by having to identify error and it is sufficient for it to intervene if it concludes that in light of that further evidence a different decision should have been arrived at.

### **Consideration**

#### *Was a hearing held?*

- 71 The answer to this question involves an exercise of statutory construction. The principles that apply in undertaking that exercise are well established. With the canons of construction firmly in mind,<sup>17</sup> one starts with the text of the provision under consideration, which must be read and understood in the context of the Act read as a whole and where apparent, the mischief to which the provision is directed. Of particular importance in this case is the principle of construction that: ‘A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals’.<sup>18</sup>
- 72 Section 81(1)(a) of the Act enables the Liquor Commissioner to conduct a unique type of proceeding that is quite unlike the proceedings that the Liquor Commissioner was previously able to conduct. As observed earlier, when this sub-section is read with s 20, it is apparent that in connection with this type of proceeding there is no right of appearance. The expression

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<sup>15</sup> [2015] SASFC 64; (2015) 122 SASR 409.

<sup>16</sup> [2022] SASCA 71 at [29].

<sup>17</sup> *State of South Australia v Collings* [1996] SASC 6145; (1996) 65 SASR 432 at [12].

<sup>18</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [70] per McHugh, Gummow, Kirby and Hayne JJ.

‘entirely on the papers and any written submissions’ indicates that the receipt of oral or written evidence, the cross examination of witnesses, and making of oral submissions, will not occur. In contrast to this, when the Liquor Commissioner resolves to deal with the proceedings through a hearing, s 20(1) of the Act grants a right of appearance, and in connection with that hearing, the receipt of oral or written evidence, the cross examination of witnesses, and making of oral submissions, are at least a possibility.

- 73 It is understandable why in the former case there would be an opportunity for an entity that was not involved in the proceedings before the Liquor Commissioner to seek permission to review, whereas in respect of proceedings where there was a hearing, there would be no such opportunity.
- 74 Accepting that this is a matter for the Liquor Commissioner’s absolute discretion, it might be expected that the Liquor Commissioner would resolve to not hold a hearing in respect of uncontested matters and matters that are seemingly uncontroversial or straightforward. In connection with such matters, if they do not involve designated applications, there will often have been no advertisement that informs members of the public that the application has been made. There is therefore a real possibility that an interested party will have had no realistic opportunity to participate in the proceedings before the Liquor Commissioner and might only find out about them after the matter had been concluded.
- 75 In contrast to this, in the case of designated applications, because community engagement is required, there would be every expectation that interested parties would be aware of the proceedings, including those in which the Liquor Commissioner has resolved not to conduct a hearing.
- 76 And in respect of applications for which the Liquor Commissioner has resolved to hold a hearing, even if they are not designated applications, it is much more likely that they will be applications of a type that the Act requires to be advertised, or if not, will be of a type that the Liquor Commissioner has directed to be advertised.
- 77 In this case the Liquor Commissioner did not resolve to deal with AOSMA’s application entirely on the basis of the application and any written submissions made without holding a hearing. It follows that the Liquor Commissioner intended to deal with the matter by way of a hearing.
- 78 As observed earlier, Mr Doyle would have it that notwithstanding this, there was no hearing. I disagree.
- 79 As was explained above, when the Liquor Commissioner was advised by AOSMA’s lawyers that AOSMA and the Police Commissioner had reached a resolution and was provided with the details including various undertakings, the Liquor Commissioner’s role in the proceedings had not

come to an end. He had to independently satisfy himself that in the exercise of his discretion, having regard to the public interest and the objects of the Act, that it was appropriate to make the order. That he undertook this exercise is evidenced by the fact that he did not simply adopt the proposed variation as jointly presented. He added the qualification requiring cans to be opened at the point of sale.

- 80 In my opinion the Commissioner's consideration of the material put before him and his consideration of it comprised of a 'hearing.' The fact that it was conducted on the papers without requiring the personal attendance of the parties was neither here nor there. Nor was the fact that some of the material that he relied upon might not have been admissible in a conventional court of law. Although there are provisions that suggest that proceedings before the Liquor Commissioner might be by way of personal appearance and the giving of oral evidence, there was no requirement in the Act for the proceedings to be conducted in that way. Clearly the rules of natural justice apply and that in turn means that the parties to the proceedings had the right to be heard. But '[t]he right to be heard is one thing, the manner of hearing is another'.<sup>19</sup> Provided natural justice is afforded to the parties, the manner in which the proceedings are dealt with is a matter for the Liquor Commissioner.<sup>20</sup> The edict in the Act about the need to act without undue formality and the removal of the shackles of the strict rules of evidence are not hollow words. They grant the Liquor Commissioner considerable latitude as to how hearings are conducted. In my opinion the observations of Lord Denning in *T A Miller Pty Ltd v Minister of Housing and Local Government*<sup>21</sup> are completely apposite to hearings before the Liquor Commissioner. He said:

A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law... No doubt in admitting [hearsay evidence] the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and contradicting it. (Footnotes omitted)<sup>22</sup>

- 81 I find that in this case the Liquor Commissioner held a hearing. Accordingly, in my opinion, PASA has no opportunity to apply for permission to review the Liquor Commissioner's decision. Having reached

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<sup>19</sup> *Ex parte Thackeray* (1874) 13 SCR (NSW) 1 at 15-16 per Martin CJ.

<sup>20</sup> See, for example: *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 at 561 and *T A Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992 at 995.

<sup>21</sup> [1968] 1 WLR 992.

<sup>22</sup> *Ibid* at 995.

this conclusion, it is not necessary for me to deal with Mr Roder's alternate submissions in respect of this issue.

82 In case I am wrong I will now go on to consider whether permission should be granted.

*Should permission be granted?*

83 Ultimately the touchstone for determining whether permission should be granted is what is in the interests of justice. There is no encyclopaedic list that determines this. But at one extreme, a party with little or no real interest in the proceedings, who made an informed conscious decision not to seek to be heard in connection with the proceedings before the Liquor Commissioner, who belatedly made an application seeking permission, which if granted would cause considerable inconvenience to the other party, and which enjoyed no real prospect of a successful review, would plainly not be granted permission. At the other extreme, a party with a legitimate interest in the proceedings, who was unaware of and had no real opportunity to participate in the proceedings before the Liquor Commissioner, who made a timely application for review, that if granted would cause little inconvenience to the other party, and which enjoyed good prospects of success, could reasonably expect to be granted permission to review. Between these two extremes is a matter of degree.

84 In connection with these, consideration also needs to be given to the public interest. Mr Roder may be right in contending that the concept 'public interest' may be vague and imprecise. But that does not relieve a licensing authority of the obligation to consider it. To the contrary, the Act mandates that a licensing authority must refuse an application if it considers that to grant it, would not be in the public interest. It follows that a licensing authority must consider matters beyond the interests of the parties before it, and in the end the public interest trumps any other considerations.<sup>23</sup> Thus, there may be occasions when, despite the fact that there are many matters that point against the granting of permission, permission might still be granted, because the public interest requires it.

85 I now turn to consider the facts in this case.

86 PASA is an industrial association that represents the interests of members of SAPOL. I do not think it can be seriously contended that it does not have a legitimate interest in these proceedings.

87 AOSMA's application was advertised and PASA admits that it was aware of it. Whilst I can understand why PASA did not find it necessary to be separately represented at the early stages of the proceedings, no satisfactory explanation has been provided to the Court why it took no immediate action

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<sup>23</sup> *Hove Sip n Save* [2021] SALC 7 at [82].

following the advice it received on the morning of 22 July 2022 that the Police Commissioner no longer opposed AOSMA's application. It could have immediately contacted the Liquor Commissioner advising that it was concerned about the Police Commissioner's change in position and asked for an opportunity to be heard. As it was, I think the only reasonable inference to be drawn in this case is that following the advice received on the morning of 22 July 2022, PASA made a conscious decision not to attempt to intervene in the proceedings before the Liquor Commissioner at that stage.

- 88 To adopt the words of Kirby and Heydon JJ in *Waterways Authority v Fitzgibbon*, the proceedings before the Commissioner should not be regarded as a rehearsal, warm up or dummy run.<sup>24</sup> This was the time and place for PASA to seek to be heard in respect of AOSMA's application. Subject to the overriding public interest issues that I spoke of earlier, in my opinion this Court should be very reluctant to grant permission to review to an entity that was aware of an application pending before the Liquor Commissioner and who has not provided an adequate explanation as to why no attempt was made to participate in those proceedings. If it were otherwise, the integrity of the proceedings before the Commissioner would be seriously compromised.
- 89 The application for permission to review was lodged within a month of PASA becoming aware of the Liquor Commissioner's decision, such that delay is irrelevant.
- 90 It is reasonable to infer that AOSMA will suffer some prejudice if permission is granted. For now, it is entitled to assume that subject to the ongoing review regarding the supply of liquor in cans this matter has been resolved. If permission is granted, it will be put to the expense and inconvenience of a hearing before this Court and the uncertainty of the outcome.
- 91 I turn now to the prospects of a successful review if permission is granted.
- 92 One of PASA's complaints concerns the brevity of the Liquor Commissioner's reasons.
- 93 Complaints about the adequacy of a decision-maker's reasons must always be considered in context.<sup>25</sup> As Kitto J explained in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*:

What the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.<sup>26</sup>

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<sup>24</sup> [2005] HCA 57; (2005) 221 ALR 402; (2005) 79 ALJR 1816 at [115].

<sup>25</sup> *Amaca Pty Ltd v Werfel* [2020] SASCF 125 at [22].

- 94 And so it is in respect of the giving of reasons, and the extent of those reasons by the Liquor Commissioner and this Court.
- 95 If a matter is uncontested or resolved by the agreement of the parties, and is uncontroversial, to produce reasons explaining why, by reference to s 53 of the Act, the application was granted, would be unnecessary. As McHugh JA explained in *Soulemezis v Dudley (Holdings) Pty Ltd*, ‘neither the need nor the appearance of justice requires that reasons be given for every decision made...’.<sup>27</sup> In these cases, requiring the publication of reasons would unnecessarily impede the orderly disposition of matters before the Commissioner and this Court.<sup>28</sup>
- 96 To these, the presumption of regularity would apply. This can be traced to the Latin maxim<sup>29</sup>, the English equivalent being: ‘everything is presumed to be rightly and duly performed until the contrary is shown’.<sup>30</sup> This principle has been consistently applied across a range of Australian Courts as illustrated by the survey of cases undertaken by Anderson J in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.<sup>31</sup> In *Minister for Natural Resources v NSW Aboriginal Land Council*.<sup>32</sup> McHugh JA stated the principle as follows:
- Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.<sup>33</sup>
- 97 In cases where the outcome is controversial or of public importance, even if uncontested or resolved by the agreement of the parties, there should be some explanation as to why the application has been granted. But it need not be elaborate. The presumption of regularity would continue to apply. And the reasons certainly would not warrant being ‘scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed’.<sup>34</sup>
- 98 To this I would add the observations of Mayo J in *Watts v Welch* where, in connection with reasons published by a court of summary jurisdiction, he stated that ‘it will be presumed to have found as a fact everything necessary

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<sup>26</sup> (1963) 113 CLR 475 at 504.

<sup>27</sup> (1987) 10 NSWLR 247 at 279.

<sup>28</sup> *Evans v Scales and Partners* [1994] SASC 4384 per Debelle J.

<sup>29</sup> ‘omnia praesumuntur rite esse acta’.

<sup>30</sup> Kersley RH, *Broom’s Legal Maxims* (10<sup>th</sup> ed, Sweet & Maxwell, 1939) p 642.

<sup>31</sup> [2020] FCA 416 at [330]-[336].

<sup>32</sup> (1987) 9 NSWLR 154.

<sup>33</sup> *Ibid* at 164.

<sup>34</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6 at [31]; (1996) 185 CLR 259 at 264 per Brennan CJ, Toohey, McHugh and Gummow JJ.

to support its conclusion although the same are not explicitly stated'.<sup>35</sup> In my opinion, similar considerations apply when considering the reasons of the Liquor Commissioner.

- 99 Finally, consideration also needs to be given to the fact that the Liquor Commissioner is in effect a specialist tribunal that can be taken, through the Office's accumulated knowledge and experience, to have a proper understanding of what is or is not in the public interest and will have taken this into account in his deliberations and conclusions.<sup>36</sup>
- 100 Returning now to the Liquor Commissioner's reasons, although he did not mention it, it is reasonable to infer that he took into account the gravitas of the parties who negotiated the terms of the variation and the circumstances in which resolution was achieved.
- 101 This was no last-minute deal cobbled together by a private licensee, who might be expected to be primarily focussed on his or her own interests, and a group of residents. The negotiating parties were representatives of AOSMA and the Police Commissioner.
- 102 AOSMA is a legal entity recognised by the *Adelaide Oval Redevelopment and Management Act 2011*. It occupies Adelaide Oval through a sub-lease issued by a Minister of the Crown. It manages an iconic sporting venue that is a major tourist destination. This Court has previously commented that its alcohol management plan was formulated with input from several sources, including LEB and that it is an impressive document.<sup>37</sup> The Liquor Commissioner was entitled to assume that AOSMA has no interest in Adelaide Oval's reputation being tarnished by safety concerns. The Liquor Commissioner was entitled to assume that it has a genuine commitment around the safe and responsible supply of liquor and of working co-operatively with SAPOL to achieve this.
- 103 The office of Police Commissioner is position of great responsibility. It can be taken as a given that the Police Commissioner does not act rashly and would have given serious consideration to the positives and negatives surrounding AOSMA's application. Thus the fact that he consented to the variation of terms was a matter that the Commissioner was entitled to give considerable weight.
- 104 Based on the letter recording the discussions between the representatives of AOSMA and the Police Commissioner, the Liquor Commissioner was entitled to assume that they had a detailed and considered meeting.

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<sup>35</sup> [1950] SASR 289 at 292.

<sup>36</sup> *Prasad v Workers Compensation Commission* [2010] NSWSC 418 at [42] per Harrison J.

<sup>37</sup> *Adelaide Oval SMA Ltd* [2018] SALC 73 at [24].

- 105 Even if the Liquor Commissioner did not take these matters into account, if this Court were to conduct a review of the Liquor Commissioner's decision, these are matters that it would take into account.
- 106 That said, we all make mistakes, and if this Court were persuaded that there was a very real prospect that the Police Commissioner's consent and the Liquor Commissioner's endorsement of that consent were misplaced, a case for granting permission to review could be made out. The point I wish to make is that these are not conclusions that this Court would reach lightly.
- 107 The Liquor Commissioner's reasons make no reference to environmental factors. There is no reason to infer that he took them into account.
- 108 Contrary to PASA's submission, the Liquor Commissioner was entitled to rely upon the fact that the use of cans had been well received at the trial at the MCG. The fact that there were some areas of the MCG where cans could not be sold, and that sale of cans was not permitted for certain events, did not significantly diminish the relevance of the trial use of cans at that venue. The convenience to patrons by the use of cans as opposed to open plastic cups is self-evident. It is a matter that is so notorious it can be inferred without elaboration. Common experience informs us that liquid is much more prone to spillage from the wide opening of a plastic cup than the much smaller opening of a can. Anyone who has attended a sporting function at which beer and other beverages are supplied in plastic cups could depose to the frequent spillage that occurs. This results in part of the product being lost to the purchasing patron and spillage onto other patrons. Either way, it can be very annoying, and it would be reasonable to assume that on occasions it is the source of animosity between patrons. It is self-evident that these events are less likely to occur and the spillage much less voluminous if the patron is using a can.
- 109 What is also significant about the trial at the MCG is that it apparently demonstrated that the supply of liquor in cans was not of itself a factor relevant to any alcohol related incidents at that venue.
- 110 Whilst the licences applicable to the MCG and Marvel Stadium demonstrate that for certain events only beer at 3.5% by volume of alcohol can be sold, it is also significant that at the Adelaide Oval the bars servicing 'The Hill' also only sell beer that is 3.5% by volume of alcohol.
- 111 I do not doubt the sincerity expressed by Mr Carroll about PASA's concern for the safety of police, emergency services personnel, and the general public. Notwithstanding the hearsay nature of the evidence of an incident at Marvel Stadium on 18 March 2022, I am prepared to accept that it occurred. But this does not seriously undermine the Liquor Commissioner's observation that even at a time when there was much less rigour around responsible consumption of liquor at Adelaide Oval, and much fewer

monitoring arrangements in place, incidents involving the use of aluminium cans as projectiles were extremely rare.

- 112 Moreover, as this Court has recently observed, harm minimisation is just that. It is not harm eradication.<sup>38</sup> In *Liquorland McLaren Vale*, I made the point that in connection with this, ‘[a]s a society, through our legislatures, choices must be made when striking the balance between competing interests.’
- 113 Common experience informs us that from time to time there are alcohol related incidents at major sporting functions such as gross drunkenness, rude, insulting and boorish behaviour, and on occasions, violence.
- 114 Alcohol related issues could be avoided at sporting venues by breathalysing every patron upon entry, not admitting patrons who had a blood alcohol reading over a certain limit, and not selling or supplying alcohol at the venue.
- 115 As a society we have chosen not to go down that path. Doubtless this is in recognition that many people enjoy consuming alcohol at sporting venues and most people who do so, do it responsibly, and without adverse consequences to others.
- 116 In connection with this application, it is of some significance that Adelaide Oval not only caters for South Australians. It is marketed as a tourist destination for interstate and international visitors. It can be reasonably inferred that for many of those who are contemplating visiting it, the availability of alcoholic beverages adds to its attractiveness. It also is obvious that the income generated by its sales is of benefit to the AOSMA, which has flow on implications for the economy of the State.
- 117 Thus, it is reasonable to infer that the supply of liquor at Adelaide Oval in a convenient receptacle that minimises the prospect of, and consequences of spillage, is consistent with the expectations and aspirations of the public and makes some contribution to tourism, all of which are consistent with the objects of the Act.

### **Summary and conclusions**

- 118 Having found that the Liquor Commissioner held a hearing, I do not consider that it is open for PASA to seek permission to review his decision.
- 119 If I am wrong about that, I would accept that PASA has a legitimate interest in the proceedings and in making the within application seeking permission to review the Liquor Commissioner’s decision. I would also accept that

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<sup>38</sup> *Liquorland McLaren Vale* [2022] SALC 53 at [138].

there was no relevant delay in the making of PASA's application for permission to seek a review of the Liquor Commissioner's decision.

120 However, there are matters that point against granting permission.

121 First, are my concerns about PASA's failure to engage with the Liquor Commissioner upon learning that the Police Commissioner intended to no longer oppose AOSMA's application. That failure has not been adequately explained.

122 Next, is the fact that the grant of permission would result in some adverse consequences to AOSMA.

123 Finally, and most importantly, I consider that the prospects of PASA successfully reviewing the Liquor Commissioner's decision are poor.

124 The Liquor Commissioner was entitled to be satisfied that historically the use of aluminium cans as projectiles at Adelaide Oval was extremely rare. He was entitled to give considerable weight to the fact that he was being asked to endorse a proposal agreed upon by two entities with considerable gravitas who could be expected to have a mutual commitment to maintain Adelaide Oval as a safe venue. He was entitled to rely upon the fact that a trial use of cans at the MCG was well received and did not indicate a relationship between the use of cans and alcohol related incidents at that venue. The difficulties associated with spillage from plastic cups for purchasing patrons and other patrons is self-evident, as is the likelihood of much less spillage if liquor is supplied in cans. It therefore can be reasonably inferred that the use of cans will meet with the approval of patrons.

125 There is no reason to assume that the Liquor Commissioner did other than independently satisfy himself that it was appropriate to make the order that is the subject of the review. Based on the evidence placed before this Court, there is every reason to suggest that this Court, if it conducted a review, would come to the same conclusion.

126 In all the circumstances, had it come to it I would not have been persuaded that it is in the interests of justice to grant PASA permission to seek a review of the Liquor Commissioner's decision.

127 The application is dismissed.