

**LICENSING COURT OF SOUTH AUSTRALIA**

**FIRST CHOICE LIQUOR MARKET HENDON**

**JURISDICTION:** Application for a review of a decision of the Commissioner

**CASE NO:** LC-23-00054

**HEARING DATE:** 27 June 2023

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

**DELIVERED ON:** 4 September 2023

**CATCHWORDS:**

*Application for review of a decision of a delegate of the Commissioner for Liquor and Gambling refusing an application seeking the grant of a packaged liquor sales licence in respect of proposed premises in the newly developed Hendon Central Shopping Centre on Tapleys Hill Road – The delegate found that the grant of the application was not in the community interest or the public interest – The applicant, Liquorland (Australia) Pty Ltd is an experienced reputable operator of licensed premises – Its application was for the proposed premises to trade as a large format liquor store trading under the “First Choice” badge – Its application was pitched on two bases – The first was that it would meet the one-stop shopping expectations of those shopping at Hendon Central – The second was that it would provide these shoppers and those residing to the north and east of the proposed premises more convenient access to a large format liquor store such that an area well beyond the two kilometre radius suggested in the guidelines also needed to be considered – There is a large BWS store across the road from Hendon Central accessible by a controlled pedestrian crossing – There is a drive through attached to a hotel on that side of the road 500 metres from the proposed premises also trading under the BWS badge – Within a couple kilometres of the proposed premises are other shopping centres that include amongst their offerings bottle shops – The AHA opposed the application – It submitted that the proposed premises was not a true large format retailer and that it was no more than a slightly larger than normal convenience type store – It submitted that the relevant community is already well catered for by the many take away liquor facilities in the locality, and to grant this application would saturate the relevant community with take away liquor facilities, which was contrary to the community’s interest and the*

*public interest – It submitted that the community’s desire to combine their liquor purchasing with their use of Hendon Central was already catered for by the BWS liquor store across the road – The delegate essentially accepted the submissions made by the AHA – Despite having accepted Liquorland’s submission that the relevant locality was the area within five or so kilometres of the proposed premises, which was based upon the assertion that the proposed premises were to be a large format liquor store she found that they “would not be offering anything customers don’t already have access to across the road” – The delegate found that the BWS was able to meet the needs of the Hendon Central’s shoppers to one-stop shop and that the grant of the application would result in undue proliferation and would set an undesirable precedent – **Held:** That the evidence established that the proposed premises would be a typical First Choice liquor store that will carry of the order of 2,500 lines or more and which will be identified by the public as a large format liquor store – **Held:** That the delegate erred in finding that it would be essentially the same as the BWS store across the road – **Held:** That the relevant locality included the area within five kilometres of the proposed premises and extended to the Lefevre Peninsula – **Held:** That for this later cohort, which numbered 15,930 people, the distances involved in accessing a large format liquor store were unreasonable. When their interests are taken into account, having regard to the other positives of the application, the balance tips in favour of finding that the grant of the application is in the community interest – **Held:** That this case is very much a case decided on its own facts such that no issue of an undesirable precedent arises and it is in the public interest to grant the application – Liquor Licensing Act 1997.*

*Hove Sip n Save [2021] SALC 7*

*First Choice Liquor [2015] SALC 1*

*Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors [2018] SASCFC 31*

*Liquorland McLaren Vale (No. 3) [2023] SALC 2*

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

*Fairview Park Cellars [2023] SALC 18*

*Cellarbrations Walkley Heights [2023] SALC 49*

*Woolworths Ltd v Drake Coosit Pty Ltd [2010] SASC 13; (2010) 106 SASR 146*

*Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor [2018] SASCFC 31*

*Liquorland Parkholme Shopping Centre [2017] SALC 2*

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

*BWS Mount Barker [2023] SALC 31*

**REPRESENTATION:**

Counsel:

Applicant: Mr M Roder KC

Objector: Mr G Coppola

Solicitors:

Applicant: Jones Harley Toole

Objector: Australian Hotels Association

- 1 Liquorland (Australia) Pty Ltd wishes to establish a bottle shop trading under the First Choice badge (the proposed premises) in the newly constructed Hendon Central Shopping Centre (Hendon Central) on Tapleys Hill Road, Hendon. To do so, it needs to be granted a packaged liquor sales licence under the *Liquor Licensing Act 1997*. Its application for the grant of that licence was considered by a delegate of the Commissioner for Liquor and Gambling (the delegate). She refused the application. Liquorland has applied to this Court by way of a review under s 22 of the Act, seeking the reversal of that decision. It contends that the delegate made several errors in reaching her decision, and that on the evidence presented, the licence should have been granted.
- 2 The Australian Hotels Association (AHA), which made submissions to the delegate opposing the grant of the application, contends on the review that she was correct in refusing the application and that her decision should be upheld.
- 3 A packaged liquor sales licence is within a special category of applications defined in the Act as a ‘designated application’. Pursuant to s 53A of the Act, a “licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.”
- 4 In deciding that question, s 53A(a) of the Act provides that the authority must have regard to:-
  - (i) the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor; and
  - (ii) the cultural, recreational, employment or tourism impacts; and
  - (iii) the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
  - (iv) any other prescribed matter; and
- 5 In addition to these, s 53A(b) provides that the authority must apply the community impact assessment guidelines (the guidelines).
- 6 The guidelines provide instruction as to how to identify the relevant locality, which in turn informs who are the relevant community. They relevantly provide:

#### **Guide to Locality Area**

The following is intended as a guide only. Applicants are required to identify the geographic area from which they expect to draw customers having regard to the intended nature of business of the

licensed premises. Adelaide Metropolitan Area: The locality of a premises in the Adelaide Metropolitan Area is the area within a 2km radius of the site of the relevant premises.

- 7 The guidelines stipulate that at the time of lodgement, a designated application must be accompanied by a submission addressing how the application is in the community interest. The guidelines contemplate that the submission will be made after the applicant has consulted with the relevant key stakeholders and interest groups in the community. The guidelines provide that “[a]pplicants are required to show, as part of their application, that they have engaged with members of the community and any relevant stakeholders.” They provided that “[e]vidence of this may include petitions, survey results and/or letters of support.”
- 8 The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that, if relevant, is expected to address matters such as:
  - the applicant’s products/services in terms of key features and potential customers;
  - business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor;
  - general description of facilities and services;
  - construction details (e.g. materials, finishes, acoustic treatment, etc.);
  - details of any food, including menu;
  - liquor services (e.g. bar) and range of liquor;
  - types of entertainment;
  - types of accommodation;
  - a statement as to whether the community supports the proposed business, including providing evidence of such support; and
  - a statement as to why the granting of the application is in the community interest.

Applicants are also required to provide, where applicable:

- a map and report regarding the locality generated through the Community Impact Portal;

- a business plan/plan of management; and
  - a site or property plan, floor plan and/or photographs/artists impressions of site/building.
- 9 The applicant also needed to satisfy the delegate that the pre-requisites of s 57 of the Act have been met. Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises, have been granted. None of these matters were of concern in this case.
- 10 In addition to these matters, and as with any other licence application, a licensing authority has, under s 53 of the Act, an unqualified discretion to grant or refuse an application under the Act “on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application)”. It must refuse to grant the licence if it is satisfied that to grant the application would be contrary to the public interest. It must also refuse to grant a licence if it “is satisfied that to grant the application would be inconsistent with the objects of the Act”. Section 53(2) provides that a licensing authority “should not grant an application as a matter of course without proper inquiry into its merits, taking into account the operation of Division 13”.
- 11 Section 3(2) mandates that: “Subject to this Act, in deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1).” Section (3)(1) provides:

### **3 Objects**

- (1) 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.
- 12 Section (3)(1a) 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.

### **The application before the Commissioner**

- 13 Liquorland included in its application to the delegate an extensive document titled ‘Community Impact Assessment Form’ (the Submission). Amongst other material the Submission contained reports from the planning consultants, Ekistics (the Ekistics report) and the economist, Sean Stephens (the Ethos report).
- 14 At the time when the Submission was made, the Hendon Central was still under construction. It has subsequently been completed and most of its available tenancies have now been occupied and are trading. It is situated on the eastern side of Tapleys Hill Road. It contains a large car park that abuts Tapleys Hill Road.
- 15 Hendon Central is anchored by a very attractive, large full-line supermarket trading under the Foodland badge. Within the car park are two fast food outlets, Kentucky Fried Chicken and Hungry Jack’s. Elsewhere in the shopping centre is a bank, a pharmacy, a newsagent, a sushi shop, a nail shop, a barber and a café. The Ekistics report indicated that Hendon Central will cover 15,000 m<sup>2</sup>. Of this, the Foodland occupies 2,050 m<sup>2</sup>. The proposed premises, which are to the north of the Foodland, and are presently unoccupied, will occupy approximately 700 m<sup>2</sup>. Adjacent to the north-western corner of the Hendon Central car park is a controlled pedestrian crossing across Tapleys Hill Road and bus stops servicing routes that include services from Port Adelaide to the City.

- 16 Tapleys Hill Road is a busy road that runs from north to south, parallel to the coastline, connecting Old Port Road, Queenstown, to the north, to Anzac Highway, Glenelg, to the south. The Ekistics report stated that based on 2018 statistics, in the vicinity of the proposed premises it carries a traffic volume of 22,330 vehicles per day. Heading north from Glenelg it passes through the suburbs of West Beach, Fulham Gardens, Seaton and Royal Park. To the west of Fulham Gardens is Henley Beach. To the west of Seaton, from south to north are the suburbs of Grange and Tennyson. To the west of Royal Park is West Lakes. To the east of Royal Park is Woodville South and Woodville. North of Royal Park is Port Adelaide which is bounded to the to the east by Queenstown and Alberton. To the west it is bounded by the Lefevre Peninsula, which contains the suburbs of Semaphore, Semaphore Park, Semaphore South, Ethelton, Glanville, New Port, Exeter, Birkenhead, Peterhead, Largs Bay, Largs North, Taperoo, Osborne, North Haven and Outer Harbor.
- 17 Take away liquor facilities trading under the First Choice badge are generally regarded as large format liquor stores and there are a number of them across metropolitan Adelaide. Take away liquor facilities trading under the Dan Murphy's badge are also regarded as large format liquor stores. The Ethos report identified the characteristics of these stores. It stated that they rely upon a location with prominent frontage to a main road and have generous car parks. It stated that they typically have a floor size of between 900 m<sup>2</sup> and 1,500 m<sup>2</sup>, in contrast to a typical convenience type bottle shop which is much smaller, being between 100 m<sup>2</sup> and 250 m<sup>2</sup>. It stated that the business model is based on a high proportion of bulk purchases, often associated with functions and events, as well as providing a range of convenience orientated products and smaller sales. Thus, the basket size in terms of dollar spend will often be double that of a traditional bottle shop. It stated that the trade area is significantly larger than a typical bottle shop with consumers willing to travel additional distances, usually by car, to access the range and scale of products on offer. It stated that as a general rule a large format liquor store would expect to draw consistent patronage from a five kilometre radius.
- 18 Liquorland contended that the proposed premises would have all of these characteristics. Through the Ethos report it stated that the proposed premises would serve a customer base that was relatively constrained to the south of Hendon Central, but it would also serve customers in the north, including suburbs beyond Port Adelaide on the Lefevre Peninsula. It suggested that the locality was the area within five kilometres of the proposed premises.
- 19 The Ethos report identified three trade areas. These were: the primary trade area (PTA), which includes the suburbs of Hendon and Port Adelaide to the north, Woodville to the east, parts of Seaton to the south, and Semaphore Park to the west; a secondary east trading area, that includes

Wingfield to the north, and Woodville South to the south and which is bounded by South Road to the east and Hanson Road to the west; and a secondary north trading area, that encompasses the Lefevre Peninsula, and extends from North Haven in the north and Semaphore South to the south. It collectively described these trading areas as the main trading area (MTA). It noted that in 2022, the PTA had a population of 62,550 and the MTA had a population of 108,480. It noted that the socio-economic profile of the MTA population was slightly older than average, with marginally lower income levels.

- 20 The Ekistics report adopted the locality suggested in the Ethos report. It stated that within its proposed locality there were 15 facilities that sold take away liquor that comprised of a mix of stand-alone bottle shops, drive throughs attached to hotels and one trading under a liquor production and sales licence.
- 21 The most significant of these is a stand-alone bottle shop trading under the BWS badge directly across the road from the proposed premises. About 500 metres to the south, again on the western side of Tapleys Hill Road is the Hendon Hotel. It contains a two-lane drive through facility that also trades under the BWS badge. About one kilometre north of the proposed premises is the Alberton Hotel. It contains a two-lane drive through facility that trades under the Sip'n Save badge. About 1.5 kilometres north of the proposed premises is a stand-alone bottle shop trading under the Liquorland badge. It is within the St Clair Village Shopping Centre and is adjacent to a Coles Supermarket. About 1.7 kilometres to the north east of the proposed premises in Pennington, is a stand-alone bottle shop trading under the Fassina badge.
- 22 Further away from the proposed premises are the following:
  - stand-alone bottle shops trading under the Liquorland badge in Westfield West Lakes, and the Port Adelaide Plaza Shopping Centre;
  - bottle shops and drive throughs attached to hotels being;
    - The Seaton Hotel Sip'n Save;
    - Bartley Cellars Thirsty Camel, West Lakes;
    - West Lakes Cellars Sip'n Save;
    - Liquorland Grand Junction Drive Thru, Pennington;
    - Port Admiral Hotel, Port Adelaide;
    - BWS Finsbury Drive, Woodville; and

- Pirate Life Brewing, Port Adelaide and Big Shed Brewing, Royal Park, both of which specialise in craft beer.
- 23 The Ethos report stated that there are no large format liquor stores within the locality. It acknowledged that there are three Dan Murphy's, and one First Choice store, located just outside the defined locality. These comprise of Dan Murphy's Fulham Gardens, just over five kilometres to the south of the proposed premises on the eastern side of Tapleys Hill Road, Dan Murphy's Welland, just over six kilometres to the east of the proposed premises on the southern side of Port Road, First Choice Hindmarsh, just over seven kilometres to the east of the proposed premises on the southern side of Port Road, and Dan Murphy's Brickworks (Torrensville), just over nine kilometres to the north east of the proposed premises on the western side of South Road.
- 24 Included in the Submission were the results of a survey which showed that: 82% of respondents expect to use Hendon Central, 60% supported the application, and this rose to 67% for those who purchased takeaway liquor in the last 12 months, 66% thought it would create good competition, 61% said it would be convenient to shop there, 56% thought it made sense to have a liquor store there, 55% thought the store would provide a good range and choice and 22% who said they have concerns about the application. The most used current supermarket of those surveyed was located in the West Lakes Shopping Centre, being 2.35 kilometres away from the proposed premises.
- 25 Liquorland's application to the Commissioner was pitched on two bases. The first was that the proposed premises would be very convenient to those shopping at Hendon Central. The second was that the proposed premises would fill an existing gap in the relevant market, of a large format retailer offering a large range of liquor products at competitive prices in the coastal suburbs to the north west of Adelaide. It submitted that it would be the only such retailer within five kilometres of the proposed premises and that those shopping at Hendon Central and the wider community would find it very convenient to have access to such a facility.
- 26 The AHA submitted that the proposed premises was not a true large format retailer. It submitted that by comparison to typical true large format retailer the floor space that the proposed premises was to occupy was small, and that in truth, the proposed premises was no more than a slightly larger than normal convenience type store.
- 27 The AHA submitted that the relevant community is already well catered for by the many take away liquor facilities in the locality, noting that many of them are operated by Liquorland. It submitted that to grant this application would saturate the relevant community with take away liquor facilities, which was contrary to the community's interest and the public

interest. It submitted that the community's desire to combine their liquor purchasing with their use of Hendon Central was already catered for by the BWS liquor store across the road. It challenged the results of the survey. It made the point that those expressing support might not have appreciated the relatively small size of the proposed premises as a large format retailer, nor the fact that Liquorland already operate numerous take away liquor facilities in the vicinity of the proposed premises.

### **The Delegate's decision**

- 28 The delegate noted that the proposed premises intended to trade as a large format liquor store. She noted that Liquorland had contended that the relevant locality was the area within a five kilometre radius of the proposed premises. She accepted that contention.
- 29 The delegate found that the space available to customers at the proposed premises was 540 m<sup>2</sup> and stated that this was a smaller area than a typical large format liquor store. She noted evidence that the area of the nearby BWS store across the road from the proposed premises was 300 m<sup>2</sup> which she stated was twice the size of a typical convenience type bottle shop. She then found that both were 'mid-range' bottle shops, larger than a typical convenience store but smaller than a large format store.
- 30 The delegate then turned to consider the issue of harm. She expressed no significant concerns regarding the potential impact that the granting of the application would have on the amenity of the area.
- 31 The delegate found that the grant of the application would result in an increase in employment in the locality.
- 32 The delegate accepted that many find it convenient to purchase take away liquor as part of a one-stop shopping experience. But she added that it would not be "inconvenient for customers undertaking their shopping at the Foodland Supermarket to either cross the road by foot or in their vehicle to obtain their liquor products". It appears that this was an important finding in connection with her ultimate conclusion that the grant of the application was not in the community interest.
- 33 The delegate then went on to consider what the position would be if she was wrong to find that the proposed premises would not comprise of a large format liquor store. She noted that there were four large format liquor stores just outside of the locality. She noted that such stores are regarded as destination stores and that people are prepared to travel some distance to access them. She then found:

Given it has been suggested that the proposed outlet would be used primarily as an "occasional destination", rather than for convenience, which the experts contend is the role typical bottle

shops play, there does not appear to be a need for “convenient” access to large format stores and therefore needing to drive 10 to 15 minutes to access should not be considered unreasonable.

- 34 The delegate concluded by noting that the application was supported by the local council, police and the community and the only objection was voiced by the AHA. But she then stated that the existing outlets in the locality, and in particular the BWS bottle shop across the road, pointed against the grant of the application being in the community interest. She stated that the BWS bottle shop was meeting the need for one-stop shopping, that it was of a similar nature to the proposed premises such that the proposed premises “would not be offering anything customers don’t already have access to directly across the road”.
- 35 The delegate then went on to consider whether the grant of the application was in the public interest. By reference to the decision of this Court in *Hove Sip n Save*,<sup>1</sup> where it said: “it is not in the public interest for there to be a proliferation of bottle shops selling essentially the same range of liquor within short compass of each other”,<sup>2</sup> she stated that she did not consider it to be in the public interest to allow an application that would result in a take away liquor outlet directly across the road from an existing liquor outlet with similar offerings. Whilst she accepted that the proposed premises would be larger than the existing BWS liquor outlet, she stated:

... ultimately all liquor outlets, irrespective of their size, are meeting the demand of the community to be able to purchase liquor products, and are adding to the availability of liquor in the community and therefore the potential harm alcohol consumption can cause to the community.

If this application was granted, on the grounds that it was slightly larger or it did offer a slightly different offering to the existing BWS liquor outlet, I think it is reasonable to be concerned that doing so could create an undesirable precedent of allowing larger stores to be granted in locations where an application for a smaller store would not, purely because of their size, potentially causing the concerns identified by the Court in *First Choice St Mary’s* to come to fruition.

- 36 The delegate’s reference to “the concerns identified by the Court in *First Choice St Mary’s*” appears to be a reference to the following passage from the judgment of this Court in *First Choice Liquor*:<sup>3</sup>

I appreciate that s 53(1) expressly provides that the Court must not, in exercising its discretion, take into account the economic effect on other licensees in the locality affected by the application. But that

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<sup>1</sup> [2021] SALC 7.

<sup>2</sup> *Ibid* at [135].

<sup>3</sup> [2015] SALC 1.

does not mean that it must ignore the potential for the grant of a retail liquor merchant's licence that is intended for a large format store to result in the public ultimately having less choice not more. Given the existence of a large format store in relatively close proximity to the proposed premises, in this case there is a very real risk that over time the grant of this licence might result in the closure of some of the takeaway facilities attached to some of the hotels in the locality. As such, in my view, the Court should take a cautious approach and exercise its discretion to refuse the application.<sup>4</sup>

- 37 The delegate stated that even if she had been satisfied that the community interest test had been met, the application had to be refused on public interest grounds.

### **Submissions on review**

- 38 Liquorland submitted that the delegate erred in evaluating the application from the understanding that the proposed premises and the nearby BWS store were "similar offerings". Its case was that they were materially different. One being a convenience store, that might be described as slightly larger than usual but only offering the range expected of a badged convenience store, the other being a large format retailer, offering a large range of liquor products at competitive prices.
- 39 Liquorland submitted that the Ekistics report identified that the First Choice store would provide benefits to the community in two ways. First, by filling a substantial gap in the market to the north in particular of access to a large format store. Second, through the parallel benefit to the community, of having such a facility located immediately adjacent to the main shopping area of a large format supermarket and other tenancies, noting that from the perspective of convenience it would be the only take away liquor facility co-located in the locality. It submitted that this was supported by the opinions expressed in the Ethos report. It said it provided detailed evidence of the different nature of large format facilities from smaller retail bottle shops and the different market that they served. It said that there is a community expectation or aspiration that there should be such a facility, because of the distances from other facilities. It submitted that this evidence was unequivocal and uncontradicted. It submitted that this opinion was confirmed by the community survey. It noted that the AHA had not sought to adduce evidence, nor has it applied to or sought to cross examine the authors of the Ekistics report or the Ethos report. It is submitted that, in the absence of any contrary evidence or testing of that evidence, the opinions expressed in those reports, which were credible, should be accepted.

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<sup>4</sup> Ibid at [217].

- 40 It noted the observations of Kourakis CJ in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors*<sup>5</sup> where he observed that:

It is notorious that there are many people who shop as and when needed, adapting “just in time” business model to their domestic requirements. There are many who no longer undertake a larger weekly, or fortnightly, grocery or alcohol shopping expedition.<sup>6</sup>

and added that as a matter of common experience, there are various categories of shoppers who would significantly benefit from the convenience of one-stop shopping.

- 41 Liquorland submitted that the notion that one-stop shopping would be available by reason of the existence of the BWS store on the other side of a major arterial road carrying more than 22,000 vehicles a day cannot be accepted. It submitted that this does not accord with any modern view of the benefits of one-stop shopping and that the primary focus of the BWS store was to meet the needs of passing traffic travelling in a northerly direction along Tapleys Hill Road. It added that in any event the existence of the BWS store across the road was irrelevant to other significant aspects of its case based on the proposed role of the proposed premises as a large format store servicing an area of the market which in no way could be said to be met by a typical BWS store.

- 42 It noted the observation made by this Court in *First Choice Liquor* where it said:

By reference to contemporary community standards in my view members of the public now expect to have available to them reasonable access to a large format destination store offering a vast array of liquor products at the competitive prices as part of the range of takeaway facilities servicing their needs for takeaway liquor. Depending upon what facilities are available in and about a particular locality it is reasonably arguable that if the public in and about that locality does not have reasonable access to such a store, the test postulated by s 58(2) of the Act may have been met.<sup>7</sup>

- 43 Liquorland noted that the objects of the Act include, relevantly, s 3(1)(c) to ensure, as far as practical, that the sale and supply of liquor is consistent with the expectations and aspirations of the public. It submitted that this Court had accepted the existence of a community aspiration for access to large format liquor stores.

- 44 It submitted that there was no basis to conclude that the proposal was likely to have any significant detrimental aspect. It submitted that in

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<sup>5</sup> [2018] SASFC 31.

<sup>6</sup> *Ibid* at [3].

<sup>7</sup> *Ibid* at [210].

circumstances where there is evidence of a well-understood community benefit, including the provision of community one-stop shopping and competition, and the provision of an alternative offering of a large format liquor store into a locality where there is currently none, it must follow that the Court should be satisfied that the application is in the community interest.

45 On review, the AHA submitted that the delegate was right to conclude that there was little difference between the proposed premises and the BWS across the road from Hendon Central. It submitted that the journey between the two was easy and significantly different to the finding of an inconvenient journey that underpinned the decision of this Court in *Liquorland McLaren Vale (No. 3)*.<sup>8</sup>

46 The AHA submitted that the journeys to the four large format stores identified were on modern roads, and were not difficult undertakings. It submitted that for those within the relevant locality for who one-stop shopping was important, aside from the convenient access to the nearby BWS store, they had many opportunities to do so elsewhere at any one of the Port Adelaide Plaza, St Clair Village, and West Lakes Shopping Centre, each of which contain liquor outlets trading under the Liquorland badge.

47 The AHA submitted that a factor that seems to have been overlooked is the fact of the two fast food outlets in the carpark of Hendon Central. It submitted that it was notorious that Kentucky Fried Chicken and Hungry Jack's stores attract minors. It referred to the response that Liquorland received from South Australia Police (SAPOL) which included:

From a Western District perspective we know that licensed premises, particularly those which sell alcohol for consumption off site, are sometimes vulnerable to criminal offending.

The main issues reported to Police tend to be Theft related involving persons of varying age. Licensed premises do often attract a much younger demographic, particularly during the warmer months.<sup>9</sup>

48 The AHA submitted that what was significant about the results of the survey was that somewhere between 33% and 40% of those surveyed did not express support for the application. I understood it to contend that these figures were hardly consistent with widespread community support for the application.

49 The AHA submitted that the delegate made the right decision and the application for review should be dismissed.

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<sup>8</sup> [2023] SALC 2.

<sup>9</sup> Appeal Book, p 356.

## Consideration

- 50 The fate of this application “involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new licence and hence a new take away facility for the purchase of take away liquor in the relevant locality”.<sup>10</sup>
- 51 This in turn requires the identification of the relevant locality.
- 52 In *Liquorland (Australia) Pty Ltd (Park Holme)*<sup>11</sup> this Court noted that under the former needs test the issue of locality was very much directed towards identifying the relevant trade area and this included not just the primary trade catchment areas, but also the secondary catchment areas. It noted that under the Act in its current form, it speaks of “members of the community and any relevant stakeholders” and how they might be impacted by the grant of the application. It held that as a result the concept of locality is now focussed upon the local community and is much more focussed on primary trade catchment areas, as opposed to the secondary catchment areas. This led it to endorse what is stated in the guidelines that the locality of licensed premises in the Adelaide Metropolitan Area should generally be regarded as the area within a two kilometre radius of the site of the relevant premises.
- 53 But despite the fact that the concept of locality is now less elusive than it once was, given that the guidelines require an applicant “to identify the geographic area from which they expect to draw customers having regard to the intended nature of business of the licensed premises”<sup>12</sup> (emphasis mine), it continues to have a flexible quality about it.<sup>13</sup> This is particularly important in a case such as this, in which the applicant relies upon the special nature of its intended business model, which is based on it being a large format liquor store.
- 54 In connection with applications for packaged liquor sales licences and determining the relevant locality, these stores can have implications in various ways. The presence of one or more large format destination stores in the vicinity of a proposed premises in metropolitan Adelaide, even if four or five kilometres away from it, would be a significant factor to take into account in determining whether the grant of a packaged liquor sales licence was in the community interest. This is so, because the pull of such stores extends beyond a distance of two kilometres and the stores are often associated with bulk purchases. That extended pull also means that if a proposed premises is intended to trade as a large format store, the relevant community may extend well beyond those who live within a two kilometre

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<sup>10</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [27].

<sup>11</sup> *Ibid* at [16]-[20].

<sup>12</sup> Sch 2, Community Impact Assessment Guidelines.

<sup>13</sup> *Fairview Park Cellars* [2023] SALC 18 at [53].

radius, because depending upon the whereabouts of other large format stores, people living much more than two kilometres away from the proposed store, might be expected to regularly use it, and their interests may have to be considered.

- 55 Returning to this case, I accept as accurate the opinion expressed in the Ethos report as to the characteristics of a large format liquor store. They conform with the observations made by this Court in *First Choice Liquor*.
- 56 This Court recently observed in *Cellarbrations Walkley Heights*<sup>14</sup> that the First Choice Liquor store in the Ingle Farm Shopping Centre is a sizable bottle shop. In this case photographs of that store were tendered. They illustrate that the store looks like a typical First Choice Liquor. Having inspected the proposed premises, it will be of comparable size to that store.
- 57 Mr Roder KC submitted that the license area is 20% bigger than the First Choice at Ingle Farm. That submission was not challenged by Mr Coppola. The proposed premises is based on the business model of a large format liquor store. There is no reason to doubt that it will be other than a typical First Choice Liquor store that will carry of the order of 2,500 lines or more and which will be identified by the public as a large format liquor store.<sup>15</sup> With respect, in my opinion, the delegate erred in approaching this case from the premise that there was little to differentiate the proposed premises from the nearby BWS store. The proposed premises might be a smaller than the usual large format store. The BWS store is plainly a larger than the usual convenience based store. But when the different sizes (one being of the order of twice as big as the other), the range (one being of the order of twice as many as the other), and the trading badge (one being aligned with a large format store, the other, being aligned with a convenience based store) the delegate's finding that the proposed premises "would not be offering anything customers don't already have access to directly across the road" cannot be sustained.
- 58 Moreover, it is difficult to reconcile the delegate's view that the two stores were essentially the same, with her conclusion that an area larger than the suggested two kilometre radius should apply. In concluding that a five kilometre radius was appropriate, the delegate was plainly acting on the opinions expressed in the Ekistics report and the Ethos report, both of which proceeded on the basis that the proposed premises was a large format liquor store.
- 59 There is, as was observed by this Court in *First Choice Liquor*, a contemporary community expectation of reasonable access to a large format liquor store. For a number of those living in the east and south of

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<sup>14</sup> [2023] SALC 49 at [57].

<sup>15</sup> *First Choice Liquor* [2015] SALC 1 at [143].

the proposed premises, access to the existing large format liquor stores identified by the delegate, involves journeys of five kilometres or less. But for those living west and north of the proposed premises, the position is quite different.

- 60 It is evident from the map contained in the Ethos report<sup>16</sup> that for those living on the Lefevre Peninsula, the distance to the large format liquor stores identified by the delegate is considerably greater. The map suggests that the distance between Semaphore South and the Dan Murphy's at Welland is around 10 kilometres. That distance increases for those living in the suburbs north of Semaphore South. For those living in North Haven, the distance appears to be closer to 15 kilometres. These would frequently involve round trips of more than 30 minutes and, depending upon traffic conditions, perhaps as much as 45 minutes. For those living in metropolitan Adelaide, this could not be described as reasonable access.
- 61 The Ethos report states that the population of its secondary north trading area was, in 2022, 15,930. Because the proposed premises will be around five kilometres closer, many of this cohort who wish to purchase liquor from a large format liquor store can be expected to shop at the proposed premises to fulfil that desire. I find that the number of this cohort is sufficiently large that they must be considered as part of the relevant community.
- 62 In this case there are a number of positive aspects of the application.
- 63 As was observed by this Court in *Liquorland (Australia) Pty Ltd (Park Holme)*:
- Liquorland is part of the Coles Group, which is an experienced liquor retailer. It has sound policies in respect of the responsible service of alcohol. It has established training programs for its retail liquor staff that reinforce the need for compliance with those policies. Liquorland stores use sound anti-theft measures.<sup>17</sup>
- 64 There is no reason to expect that the proposed premises will be other an attractive, well stocked and well managed liquor store and that its staff will be alert to the need not to serve minors or intoxicated persons.<sup>18</sup>
- 65 Hendon Central is a significant retail development in Royal Park. The Submission stated that the redevelopment, of what was formerly a large industrial building,<sup>19</sup> was at a cost of \$25,000,000. Consistent with what Kourakis J (as he then was) said in *Woolworths Ltd v Drake Coosit Pty*

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<sup>16</sup> AB, p 234.

<sup>17</sup> Ibid at [38].

<sup>18</sup> *Liquorland (Australia) Pty Ltd (Park Holme)* Ibid at [38].

<sup>19</sup> AB, p 139.

*Ltd*,<sup>20</sup> it is unlikely that the developers would have risked the investment of such a substantial amount of capital if there were not a significant demand for a substantial retail facility in and around Royal Park. As noted earlier, Hendon Central is anchored by a very attractive, large full-line supermarket trading under the Foodland badge.

- 66 To this I would add the following observation that Kourakis J made in *Drake Coosit*:

The routines of contemporary Australian life are such that the facility of one stop shopping is of great importance to working people. The development of district and regional shopping centres reflects that social fact. Many shopping centres now include “off premises” retail liquor outlets. I accept that some of those licences may have been removed into a centre from nearby outlets, but the point of present significance is that the very existence of retail liquor outlets in shopping centres may reflect an increasing demand for liquor at such centres.<sup>21</sup> (Footnote omitted)

- 67 I do not think that there can be any doubt that the addition of an attractive, well stocked and well managed liquor store, will add to attractiveness of Hendon Central, and that it would be welcomed by those using the shopping centre who live nearby and those who live further away who are willing to travel to take advantage of the extensive range and discounts that it will offer.

- 68 As was stated in *Liquorland (Australia) Pty Ltd (Park Holme)*, the addition of an attractive liquor store in a shopping centre creates risk for those for whom drinking might be a problem. But it is notable that the delegate did not identify any matters of significant concern regarding the potential impact the granting of the application would have on the amenity of the area or the harm that it may pose to the community and, in particular, at-risk groups. On my reading of the material I come to the same conclusion. In doing so, I have taken into account the submission made by the AHA regarding the comment made by SAPOL and the presence of two fast food outlets at Hendon Central. But I note that the letter from SAPOL then went on to observe that appropriate crime prevention measures would include CCTV, ensuring products and displays were not close to entry and exit points, the use of alarm systems, possibly having security in peak periods, and using industry specific crime prevention initiatives.<sup>22</sup> I also note that the Ekistics report identifies that Liquorland has a comprehensive suite of harm minimisation measures that includes CCTV, providing staff with a security pendant that allows staff members to alert police,

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<sup>20</sup> [2010] SASC 13; (2010) 106 SASR 146 at [54].

<sup>21</sup> *Ibid* at [55].

<sup>22</sup> AB, p 356.

minimising seclusion points within the proposed premises, and having a single point of entry and exit to which is attached a buzzer.

- 69 It must be accepted that those living in the immediate vicinity of the proposed premises are already well serviced in terms of their access to take away liquor. The BWS store across the road is a perfectly adequate bottle shop. The bottle shop/drive through attached to the Hendon Hotel provides those who are comfortable buying take away liquor from a hotel and a drive through, a more than acceptable facility from which to do so. The Liquorland bottle shop in the St Clair Village Shopping Centre, and the Fassina bottle shop in Pennington, are not quite so conveniently located to many in the vicinity of the proposed premises, but for those living slightly north of the proposed premises, they can be taken to be perfectly adequate bottle shops that are conveniently located.
- 70 In light of this, had the proposed premises been earmarked to be a typical convenience type bottle shop, notwithstanding the obvious convenience to those shopping at Hendon Central, in my opinion, issues around undue proliferation would have held sway. But when their interests of those residing in the secondary north trading area identified in the Ethos report are taken into account, in my opinion, that tips the balance in favour of finding that the grant of the application is in the community interest.
- 71 I now turn to consider the issue of public interest.
- 72 With respect, in my opinion the delegate erred approaching this issue on the basis that the proposed premises would be selling essentially the same range of liquor as BWS store across the road, and the BWS drive through. For the reasons explained above, they are quite different offerings.
- 73 A further potential difficulty with her reasoning on this issue was her reliance upon what this Court said in *First Choice Liquor*.<sup>23</sup> In light of the observations of Parker J in *Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor*,<sup>24</sup> I think that reliance may have been misplaced. That case was an appeal from a decision of this Court in *Liquorland Parkholme Shopping Centre*.<sup>25</sup> There, a judge of this Court, stated that he would have exercised his discretion under s 53 to refuse an application for a retail liquor merchant's licence, because of his concern that it would adversely impact the adjacent hotels. In the Full Court, Parker J, with whom Kourakis CJ and Peek J agreed, accepted the submission made on appeal that this Court's holding was contrary to the express requirement in s 53(1) of the Act. That provision provides that in exercising its discretionary powers, a licencing authority is not to take into account an

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<sup>23</sup> [2015] SALC 1.

<sup>24</sup> [2018] SASFC 31.

<sup>25</sup> [2017] SALC 2

economic effect on other licensees in the locality affected by the application. He said:

It is clearly not permissible to take into account that other licensees in the locality may suffer a loss of revenue if a particular licence application is approved.<sup>26</sup>

- 74 True it is that a provision of the Act that Parker J made reference to in reaching his decision, s 3(1)(e), which expressed the objective of encouraging a competitive market for the supply of liquor, has since been repealed. But in my opinion, the effect of his judgment remains such that what was said in this Court in *First Choice Liquor* needs to be re-evaluated.
- 75 That is not to undermine what this Court has said about the need for the licensing authorities to display a degree of restraint in dealing with applications for packaged liquor sales licences. Aside from the obvious need to be mindful of take away liquor density, and its potential to cause harm, that restraint results in collateral benefits to the relevant community and to the public at large. It will result in these licenses being valuable commodities, which will encourage the holders of these licenses to ensure compliance with the Act and the conditions of the licence. In conformity with the observations of Doyle CJ in *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd & Anor*,<sup>27</sup> that approach also “provides some measure of protection from undue or excessive competition which in turn reduces the risk of the potential failure of an existing licensee to provide the range of facilities at existing licensed premises that should be provided in the community’s interest”.<sup>28</sup> That is a good thing.
- 76 But in light of the admonishment given by Parker J in *Liquorland (Aust) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor*, a licensing authority’s concern about the impact of a new packaged liquor sales licence upon existing facilities can only be applied in a very general way and not in a case specific way. It must now be accepted that in a particular case, the circumstances where a licensing authority can take into account the actual potential adverse economic impact that the grant of an application will have on other existing licensed facilities will be very limited, and the receipt of direct evidence of that adverse impact, will not be allowed.<sup>29</sup>
- 77 In any case, whilst the grant of this application is very likely to have some adverse impact on the amount of liquor sold at the BWS store across the road from the proposed premises, and the BWS drive through attached to the Hendon Hotel, there is no reason to assume that it will lead to their

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<sup>26</sup> Ibid at [130].

<sup>27</sup> [2002] SASC 17; (2002) 81 SASR 337.

<sup>28</sup> *BWS Mount Barker* [2023] SALC 31 at [78].

<sup>29</sup> *Liquorland Mount Barker* [2022] SALC 21.

demise. The existence of those facilities reflects the market they serviced before Hendon Central was created, and that is, the high volume of passing trade heading north along Tapleys Hill Road, those living west of Tapleys Hill Road, and those who prefer to purchase their take away liquor from a hotel drive through. Given the ease of access to the Hendon Hotel drive through and the BWS store and the degree of inconvenience for those driving north along Tapleys Hill Road, to access Hendon Central and then continue their journey north along Tapleys Hill Road, it is to be expected that that market will continue, notwithstanding the grant of the application.

78 Whilst the delegate was right to be concerned as to whether the grant of this application could create an undesirable precedent, this is very much a case decided on its own facts. Indeed, I would go so far as to say that it is a paradigm example of the observation made in *Liquorland McLaren Vale (No. 3)* that “sometimes the addition or subtraction of a fact may make all the difference”.<sup>30</sup>

79 The grant of this application will enhance the attractiveness of a newly established and well-appointed shopping centre. It will provide great convenience to those using the shopping centre who wish to combine that use with the purchase of take away liquor. The fact that the proposed premises abuts Tapleys Hill Road and is adjacent to a large car park makes it well suited to act as a large format liquor store. Whilst many of the relevant community can already access a large format liquor store without undue inconvenience, for a substantial number of others living in the relevant community, that is not so. The grant of this application will address this and will complement the range of take away liquor facilities that they, and the other members of the community, may wish to use. I find that the grant of this application is in the public interest.

### **Conclusion and order**

80 In my respectful opinion, the delegate erred in finding that the grant of this application was not in the community interest, and she erred in finding that it was not in the public interest.

81 The application for review is upheld. Liquorland’s lawyers are directed to forward draft minutes of order to the Court to reflect this outcome.

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<sup>30</sup> [2023] SALC 2 at [60].