

LICENSING COURT OF SOUTH AUSTRALIA

FIRST CHOICE LIQUOR MARKET HAYBOROUGH

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

CASE NO/S: LC-23-00087

HEARING DATE: 18 September 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 9 November 2023

CATCHWORDS:

Application for Review – The applicant, Liquorland, made an application to the Liquor and Gambling Commissioner for a packaged liquor sales licence to enable the establishment of a large format liquor store on the outskirts of Victor Harbor proximate to a school and adjacent to an Aldi supermarket – The Commissioner’s delegate refused the application, having found that it was not in the community interest to grant it – She found that the relevant locality was essentially the township of Victor Harbor extending east to Chiton and Port Elliot and had a population of about 18,000 that increased to about 21,500 over summer – The delegate noted that within that locality the Liquorland group operates the two stand-alone take away liquor facilities adjacent to supermarkets and was concerned that if the application were granted that group would have a 40% share – The delegate was concerned about the proximity of the proposed premises to a school, the fact that Victor Harbor has the annual Schoolies Festival and that over summer it attracts young people who wish to party – The delegate was concerned that the historic Hotel Crown and Hotel Victor, both of which have drive throughs, might be adversely affected by the grant of the application and that this might have adverse tourist implications for the region – The delegate was concerned about the aesthetics of the proposed premises – The delegate considered that metropolitan expectations should not be equated with regional expectations and was concerned that to grant the application would create an undesirable precedent that authorised the establishment of a large format store in regional towns when one did not already exist – On review Liquorland contended that the delegate made a significant factual error as to locality, made findings without evidence to support them and in circumstances that amounted to a denial of procedural

*fairness, applied the wrong legal tests, and reached the wrong conclusion – **Held** that the idea that the Hotel Crown and Hotel Victor and the wider tourism appeal of this part of Victor Harbor would be adversely affected by the creation of a large format liquor store three kilometres away, seems inherently unlikely and it was notable that neither the local tourist association nor the local council made submissions to the effect – **Held** that unless it is self-evident, a licensing authority is not permitted to make a finding about the adverse impact that the grant of an application will have upon tourism without evidence to support that conclusion, and in this case there was none – **Held** that despite the apparent breadth of the expression “community interest” the factors to be considered in connection with this must be consistent with the objects and other provisions of the Act – **Held** that the appearance of a proposed premises is a planning matter and provided the relevant planning consents and approvals have been obtained, the personal views of the licensing authority about the aesthetics of the proposed premises are irrelevant – **Held** that the evidence established that the residents of Goolwa and Middleton regularly shop at Victor Harbor and can reasonable be expected to shop at the proposed premises given the wide pull of large format liquor stores – **Held** that the delegate erred in not finding that the locality extended to include these towns and surrounding areas – **Held** that when these towns are included, the population of the relevant locality is of comparable size to Mount Barker and can increase to up to 50,000 over summer – **Held** that those living in regional areas are entitled to expect to have access to the same range of facilities as those living in metropolitan areas and like their metropolitan neighbours, those living in regional areas are entitled to expect to have available to them reasonable access to a large format liquor store – **Held** that if market share can be a relevant consideration, it was not relevant in this case – The proposed premises intends to trade under a business model that is unique in the locality, and once the correct locality is considered, the size of the applicant’s market share is diminished – **Held** that although proximity to a school and issues around underage and harmful drinking are important considerations, the proposed premises are partially blocked from the nearby school and the applicant enjoys a good reputation in dealing with these issues – **Held** that once the correct locality is considered no issue of an undesirable precedent arises because the locality is one of the biggest regional areas in the State – **Held** that the Application for Review is allowed and the application is granted – Liquor Licensing Act 1997.*

First Choice Liquor Market Hendon [2023] SALC 85

First Choice Liquor [2015] SALC 1

The Mill at Middleton [2011] SALC 52

MC and TP Westley Cellarbrations [2006] SALC 13

Copper Cove Marina Resort [2004] SALC 2

Harding Hotels Pty Ltd & Ors v Jatadd Pty Ltd (2001) 81 SASR 222

Liquorland McLaren Vale (No. 2) [2022] SALC 53

Liquorland (Australia) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor [2018] SASFC 31

Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227; (2013) 45 WAR 446

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

Nepeor Pty Ltd v Liquor Licensing Commission and Others; Miniben Pty Ltd v Liquor Licensing Commission and Others (1987) 46 SASR 205

BWS Mount Barker [2023] SALC 31

BWS – Beer Wine Spirits [2013] SALC 7

BWS Seaford Meadows [2023] SALC 63

Hove Sip N Save [2021] SALC 7

REPRESENTATION:

Counsel:

Applicant: Mr M Roder KC with Ms A Humble

Respondent: Mr G Coppola

Solicitors:

Applicant: Jones Harley Toole

Respondent: Australian Hotels Association (SA Branch)

- 1 Liquorland (Australia) Pty Ltd made an application pursuant to the *Liquor Licensing Act 1997* for a packaged liquor sales licence to enable it to trade as a First Choice Liquor store from proposed premises adjacent to an existing Aldi Supermarket at 50-54 Adelaide Road, Hayborough, a suburb in the north-east of Victor Harbor. A delegate of the Liquor and Gambling Commissioner refused the application. She found that it was not in the community interest or the public interest to grant the application. Liquorland now seeks a review of the decision. It contends that the delegate made a significant factual error as to locality, made findings without evidence to support them and in circumstances that amounted to a denial of procedural fairness, applied the wrong legal tests, and reached the wrong conclusions.

The application

- 2 The requirements to obtain a packaged liquor sales licence have been the subject of many decisions of this Court and most recently in *First Choice Liquor Market Hendon*¹ and a full analysis is unnecessary now. It is sufficient to observe that the application must be supported by a community interest submission that establishes that the grant of the application is in the community interest. That in turn involves the identification of the relevant locality, which informs who it is that comprises of the relevant community. From there the licensing authority must make an evaluative judgment, which weighs the positive and negative aspects of the grant of the application by reference to that community.
- 3 Consideration must also be given as to whether the pre-requisites of s 57 of the Act which 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.
- 4 Finally, the licensing authority must apply the unqualified discretion conferred by s 53 of the Act 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”.

¹ [2023] SALC 85.

- 5 Liquorland's application was supported by a detailed Community Impact Submission, a report from Ekistics Planning and Design, a report from Ethos Urban, and a Data Analysis Report prepared by Dr John Henstridge and others (the Survey).
- 6 The proposed premises are located on the left-hand side of Adelaide Road, which is the main road that links Adelaide to Victor Harbor, just before that road forks to become Hindmarsh Road, as it heads west towards central Victor Harbor, and east, as it heads towards the towns of Port Elliot, Middleton, and Goolwa. The Ekistics Report described Adelaide Road as a notable feature of the locality that physically separates the existing activities on the western side from those on the eastern side. It described it as a primary arterial road with a traffic volume based on 2019 statistics of 5,800 vehicles.
- 7 The business model underpinning the application was for the proposed premises to trade as a large format liquor store under the First Choice badge, offering an extensive range of products at competitive prices.
- 8 The gist of the application was that the locality comprises of the Greater Victor Harbor area and that it is in this community's interest to have reasonable access to a large format liquor store.
- 9 The Ethos Report expressed the opinion that a large format liquor store is an important part of the network of retail outlets serving packaged liquor consumers, with emphasis on a wider range of product lines and a suitability for bulk purchases. It stated that such stores can act as a convenience type store as well as a destination store, which attracts customers from a much larger geographical area than a traditional bottle shop. It expressed the opinion that the proposed premises would complement Victor Harbor's appeal and would service the wider Fleurieu Peninsula region.
- 10 The Survey asked those who lived in the outer primary trading area whether and how often they visited Victor Harbor and its surrounding suburbs. The Survey revealed that 90% of these residents, including those who live as far away as Goolwa, visited the Greater Victor Harbor area at least once a fortnight, with over 70% visiting there, multiple times a week.² The predominant reason (74%) was for shopping.³ It revealed that for now 29% of those in the inner and outer trading area who purchase take away liquor did so at Liquorland McCracken with 20% identifying it as their main store; 25% at Liquorland Victor Central with 16% identifying it as their main store; 20% at BWS Victor Harbor with 13% identifying it as their main store. The survey showed that 1.2% identified the Thirsty Camel drive through at the Hotel Crown as their main store. It also

² Appeal Book (AB) 267.

³ AB 267.

revealed that 9% who purchase take away liquor did so at Dan Murphy's stores with 7% identifying it as their main store. It suggested that this latter figure supported the notion that a large format liquor store was an important aspect of choice.

- 11 The application drew objections from several entities. The Encounter Lutheran College, which is on the same side of the road as the proposed premises and is proximate to it, contended that it was inappropriate to have a takeaway liquor facility near a school. Mr Rodney Crossman stated that having alcohol available next to a school sends the wrong message to children and would increase juvenile drinking, adding extra problems for the town. Mr Nigel Rosenzweig expressed concern about potential disturbance to neighbouring properties and the proposed premises' proximity to a school. Discovery McCracken Pty Ltd, the licensee of the McCracken Country Club which operates a small take away liquor facility trading under the Cellarbrations badge, and Shutters Holdings Pty Ltd, the licensees of the Hotel Crown, a large hotel in central Victor Harbor, jointly contended that the grant of the licence was not in the interest of the relevant community. They submitted that the relevant community was already well catered for by a range of takeaway liquor facilities. The Australian Hotels Association (AHA) made similar submissions. It added that it was undesirable for there to be a destination store that offered liquor at cheaper prices, especially near a supermarket, which might encourage excess or impulse purchases.

The delegate's decision

- 12 The delegate noted that the Community Impact Guidelines issued by the Commissioner suggest as a guide that the locality of licensed premises outside of the Adelaide metropolitan area is the area within a five-kilometre radius of the site of the relevant premises. The delegate noted that the Ethos Report suggested a wider locality, due to the appeal of the proposed premises as a destination store, and the geographical and land use features of the Victor Harbor area. The delegate stated that she agreed with this submission. She stated that the locality included the suburbs of Encounter Bay, Chiton, Hayborough, Hindmarsh Valley, Lower Inman Valley, McCracken, Port Elliott and Victor Harbor. By reference to ABS statistics from 2021, she stated that the overall population of her identified locality was 17,995, which she notionally increased to 21,594, to reflect a 20% increase over the summer months.
- 13 Having observed that Liquorland proposed a large format liquor store that would better cater for bulk purchases, the delegate stated:

However in a regional locality with a population of approximately 18,000 for most of the year, and about 21,500 during Summer

months, with a median age of 60 years (according to 2021 Census), it is not clear what the demand for bulk purchases would be.⁴

- 14 The delegate noted a submission that the proposed premises would offer a pricing benefit to consumers and evidence that the top 25 products on offer at a First Choice liquor store are on average 5% cheaper than comparable products at a Liquorland store.
- 15 The delegate noted that a First Choice liquor store offers nearly 80% more products than a Liquorland store. She noted that the only large format liquor store offering an extensive range of products at competitive prices outside of metropolitan Adelaide were the Dan Murphy's stores at Mount Gambier and Mount Barker. She stated that based on census data from 2021 that Mount Gambier had a population of 26,878 and Mount Barker had a population of 39,217.
- 16 The delegate noted that Liquorland currently operates two takeaway liquor facilities in the locality that she had identified. One was Liquorland McCracken, which she described as a relatively modern store situated in the Coles Shopping Centre on Adelaide Road about 400 metres south of the proposed premises. The other was Liquorland Victor Harbor, which is a standalone liquor store in the Victor Central Shopping Centre, a large regional shopping centre about three kilometres south-west of the proposed premises.
- 17 The delegate noted that elsewhere within her identified locality there was the Cellarbrations McCracken Country Club, 500 metres south-west of the proposed premises; a drive through bottle shop trading under the Thirsty Camel badge at the Hotel Crown, three kilometres to the south-west of the proposed premises; a drive through bottle shop trading under the BWS badge at the Hotel Victor, three kilometres to the south-west of the proposed premises; and a drive through bottle shop trading under the Sip'n Save badge at the Royal Family Hotel in Port Elliot, four kilometres to the east of the proposed premises.
- 18 The delegate noted that the two Liquorland stores in the locality are within shopping centres. Although not expressly stated, she appears to have reasoned that it was not necessary to grant the application to fill a void in respect of a one stop shopping experience.
- 19 The delegate expressed concern that if the application were granted, Liquorland would operate 40% of the market share of package liquor outlets in her identified locality and that it would hold all the licensed package liquor outlets co-located with supermarkets. She stated that this created a potential risk of diminished competition and a barrier to further entrants into the relevant market.

⁴ AB 588.

- 20 The delegate noted that the annual Schoolies Festival is held in Victor Harbor. She stated that it was relevant to her consideration that in late spring and over the summer months, Victor Harbor is heavily populated with youth and young adults who are there to party. She stated that access to discounted liquor posed a potential risk to this cohort.
- 21 The delegate accepted that 23% of the premises in the locality were holiday homes and that tourists were likely to form a considerable part of the proposed premises' customer base. However, she added that 80% of the visitors to the region were day visitors who were less likely to purchase large quantities of liquor from a large format store.
- 22 The delegate expressed concern about the size of the proposed premises. She said:

A large format liquor store is an imposing structure in any locality and more suited to heavily built-up commercial areas. It is difficult to say it would add to the amenity of the locality: quite the contrary.⁵

- 23 The delegate referred to the decision of this Court in *First Choice Liquor*,⁶ wherein it expressed that a consequence of the grant of a licence in respect of a large format store was that it could result in the closure of takeaway liquor facilities attached to hotels that could result in the public having less choice. It stated that a cautious approach was required and that this would provide a basis to refuse an application for such a licence in the exercise of its general discretion.
- 24 The delegate reasoned that the grant of the application was not in the community interest. She then added that she would have exercised her discretion under s 53 of the Act to refuse the application on public interest grounds. She stated that metropolitan expectations should not be equated with regional expectations. She stated that the grant of the application was not necessary to meet the expectations and aspirations of the public in circumstances where the relevant community had the benefit and convenience of both drive through bottle shops as well as packaged liquor sales outlets co-located with supermarkets. She said:

If this application were granted on the sole basis that the proposed store would be the first large-format liquor store offering of its kind in the locality, I consider it could set an undesirable precedent for the grant of large-format liquor stores in regional towns of similar populations merely because one did not already exist in that locality.⁷

⁵ AB 594.

⁶ [2015] SALC 1 at [216]-[217] referred to in AB 595.

⁷ AB 595.

- 25 The delegate made reference to the Hotel Victor and the Hotel Crown, noting that the former had been part of Victor Harbor's history since 1863, and the latter since 1865. She stated that some weight must be given to the historic, tourist and community value of these hotels and the adverse impact that a large format store offering discounted liquor, would have upon them. She said:

Section 53 prohibits me from considering the economic impact on these hotels, but I do not consider it prohibits me from considering the potential detrimental impact on the township of Victor Harbor in relation to tourism if these hotels struggle to survive.⁸

Submissions on review

- 26 On review, the only entity that sought to be heard was the AHA. I proceed on the basis that the other entities who filed objections in the proceedings before the delegate maintain their objection to the application on the grounds put before the delegate and I will take their submissions into account.
- 27 Liquorland commenced its submissions by tendering Census data that confirms that the population of Mount Gambier in 2021 was 26,878 and the population of Mount Barker was 39,217.
- 28 Liquorland submitted that the delegate's finding that the Hotel Victor and the Hotel Crown would be adversely impacted by the grant of this application should not have been made. It submitted that there was no evidence that supported that finding. It submitted that if the delegate proposed to make the finding by inference, she denied it procedural fairness because she gave it no notice that such a finding was contemplated.
- 29 The AHA advised the Court that it did not seek to support or uphold this finding.
- 30 Liquorland submitted that the delegate should not have been influenced by her apparent view that the proposed premises would not be aesthetically pleasing. It noted that the area within which it is to be located is zoned for commercial stores servicing the district and that the proposed premises, like the other large format stores in the general vicinity, has been approved by the relevant planning authority. It added that if this was potentially a relevant factor, for it to have been afforded procedural fairness, it should have been informed of this and been given an opportunity to comment, and that it was denied this.

⁸ AB 595.

- 31 Liquorland submitted that the delegate erred in her finding as to the relevant locality. It submitted that although she stated that she accepted the contention in the Ethos Report indicating that due to the appeal of the proposed premises as a destination store, an extended locality was warranted, the delegate limited the locality to the east only to the town of Port Elliot. It submitted and that she should have also included the townships of Middleton and Goolwa to the east, as well as Hindmarsh Island and Clayton Bay. It noted that there was specific reference to this in the Ethos Report.⁹ It added that the results of the Survey confirmed this opinion.
- 32 Liquorland submitted that when the wider area was taken into consideration, contrary to the delegate's finding of a population of 17,995, which she notionally increased to 21,594, to reflect a 20% increase over the summer months, the population was considerably greater. It referred to 2022 Census data contained in the Ethos Report to the effect that in the Greater Victor Harbor area, there were 37,050 residents, which it contended could be conservatively increased by 25% by the influx of people over the summer months. This was based upon the opinion expressed in the Ethos Report that 23% of the 5,370 private dwellings in that identified main trading area were holiday homes, and that these typically involve self-catering over extended periods.¹⁰
- 33 Liquorland submitted that Victor Harbor should be seen as the primary service centre for the region. It submitted that the opinion expressed in the Ethos Report that: "[t]he growth in large-format liquor retailing means that it is now an important part of the retail sector serving consumers in most metropolitan and regional areas of Australia... reflected in a total of approximately 340 Dan Murphy's and First Choice Liquor stores now operating across Australia, including a combined total of 24 stores in South Australia",¹¹ should have been accepted. It submitted that this should have led to a finding that there was an expectation within the relevant community to have reasonable access to such a store and that the within application fulfilled that expectation. The effect of its submission was that the delegate erred in approaching the application from the premise that metropolitan expectations should not be equated with regional expectations. It noted that the delegate accepted that Mount Gambier and Mount Barker have large format liquor stores. It submitted that this Court is permitted to know that so too does the regional town of Gawler. It noted that the nearest large format liquor store to Victor Harbor was in the metropolitan area of Noarlunga, over 45 kilometres away from the proposed premises.

⁹ AB 232.

¹⁰ AB 240.

¹¹ AB 245.

- 34 Liquorland submitted that the delegate’s statement that the grant of the application was not necessary to meet the expectations and aspirations of the public in circumstances where the relevant community had the benefit and convenience of both drive through bottle shops as well as packaged liquor sales outlets co-located with supermarkets is indicative of error. It submitted that this suggested that she was influenced by considerations required under the now redundant “needs test”.
- 35 Liquorland submitted that the delegate erred in taking into account its 40% share of the market, should the application be granted. It noted that the delegate provided no explanation as to why the percentile of 40% was considered significant. It referred to the review of the Act conducted by the Honourable Tim Anderson KC in 2016. It noted that the Anderson Review stated that “the market will determine its own level” and that “the economics or competitive market object should not be a relevant matter for the liquor licensing regime.” It submitted that in any event, once the wider locality was considered, including as it does takeaway liquor facilities in Middleton and Goolwa, the 40% figure diminishes. In considering this submission the Court is permitted to know that there is a bottle shop attached to the Middleton Tavern trading under the Cellarbrations badge; and that in Goolwa there is a bottle shop trading under the BWS badge adjacent to a Woolworths Supermarket, and drive through bottle shops at the Corio Hotel and Hotel Goolwa, the former trading under the Sip’n Save badge and the latter under the Thirsty Camel badge.¹²
- 36 Liquorland submitted that the delegate should not have been concerned about the proximity of the proposed premises to a school. Nor should she have been concerned about the annual Schoolies Festival at Victor Harbor and the fact that the area is heavily populated with youth and young adults over the summer months who might want to party. It referred to the submissions it made to the delegate that it worked closely with the police in relation to liquor related matters in the area; that it undertook significant engagement with the police in the lead up to the Schoolies Festival and provided additional support to staff and signage; and the observations made by this Court and by the Commissioner that Liquorland enjoys a reputation of being an experienced licensee with a strong history of compliance and well developed policies and procedures to mitigate the risks associated with minors and intoxicated persons. It added that neither the police nor the Education Department lodged any objection to the application. Its submission also made the point that the proposed premises does not have Adelaide Road street frontage, is some distance from the

¹² Some reference is made to these in: *The Mill at Middleton* [2011] SALC 52; and *MC and TP Westley Cellarbrations* [2006] SALC 13.

Encounter Lutheran College, and will be physically obscured from the college by the adjacent Aldi store.

- 37 Liquorland submitted that in connection with the s 53 discretion, the delegate appeared to reason that because the size of the relevant community is quite a bit smaller than Mount Gambier and Mount Barker, the grant of the application could be setting an undesirable precedent. It contended that there are two problems with this. First, that it is based upon the wrong premise, as on its case the size of the relevant community is comparable to Mount Barker and much bigger than Mount Gambier. Second, it seems to assume a view that for some reason it would be undesirable in large regional areas for people to have access to a large format liquor store when there is no authority that supports that view. It referred to the decision of this Court in *Copper Cove Marina Resort*¹³ where Judge Kelly made particular emphasis to the observation of Doyle CJ in *Harding Hotels Pty Ltd & Ors v Jatadd Pty Ltd* where he said: “people who live in the country are as entitled to facilities of a high standard as people in the city”.¹⁴
- 38 As I understood the submissions made by the AHA, it contended that the delegate was right to be concerned only with the primary trading area and that in light of this her finding as to the relevant locality was sound. The effect of its submissions is that the relevant community is well serviced by a range of take away liquor facilities, including one immediately across the road from the proposed premises. It contended that the delegate was right to be concerned about the proximity to a school. It submitted that the delegate was right to conclude that it was not in the community interest or the public interest to grant the application.

Consideration

- 39 There are a number of difficulties with the delegate’s finding that the Hotel Victor and the Hotel Crown would be adversely impacted by the grant of this application and that she should be concerned about the tourist implications if the application were granted.
- 40 The Court is permitted to have some knowledge of Victor Harbor. It is uncontroversial that the Hotel Crown and the Hotel Victor are large hotels offering a range of services that are either side of the iconic Warland Reserve. This area contains the National Trust Museum and the Whale Centre, and abuts the Esplanade, the Granite Island Causeway, the Fisher Playground and is near the Cockle Train. In the case of the Hotel Crown, based on the Survey, take away liquor is plainly only a small component of its business. Whilst take away liquor is a more significant aspect of the Hotel Victor, the Court is permitted to know that it is operated by the

¹³ [2004] SALC 2.

¹⁴ (2001) 81 SASR 222 at 224.

Australian Leisure and Hospitality Group, which is a formidable liquor trading entity. The idea that both hotels and the wider tourism appeal of this part of Victor Harbor would be adversely affected by the creation of a large format liquor store three kilometres away, seems inherently unlikely. If it were otherwise, one might have expected the local tourist association or council to make submissions to the effect. Neither did.

- 41 Moreover, as was stated in *Liquorland McLaren Vale (No. 2)*,¹⁵ unless it is self-evident, a licensing authority is not permitted to make a finding about the adverse impact that the grant of an application will have upon tourism without evidence to support that conclusion, and in this case there was none.
- 42 Based upon the Survey, the entities that are most likely to be adversely affected by the grant of the application will be the Liquorland McCracken and the Liquorland Victor Central. Given that they are part of the applicant Liquorland, they can hardly complain. However, even if they were owned by a different entity, in light of the admonishment given by Parker J in *Liquorland (Australia) Pty Ltd v Woolies Liquor Stores Pty Ltd and Anor*,¹⁶ there was little, if any scope to take this into account. In that case, Parker J, with whom Kourakis CJ and Peek J agreed, 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.”¹⁷
- 43 There is also a difficulty with the delegate’s concern about the aesthetics of the proposed premises. Notwithstanding the apparent breadth of the concept “community interest” the factors to be considered in connection with this must be consistent with the objects and other provisions of the Act.¹⁸ The impact of the appearance of a building upon the local community is a matter for the local council. All that the Act requires is for the licensing authority to be satisfied that the requisite planning consents and the like are in place.¹⁹ The licensing authority’s opinion of the aesthetics of a proposed premises is irrelevant.
- 44 I now turn to consider the delegate’s consideration of the community interest test.
- 45 As has been mentioned in other cases, the starting point is to identify the relevant locality.²⁰ Although the community impact assessment guidelines provide some helpful assistance in determining that issue, when a case concerns a large regional centre and a large format liquor store, the

¹⁵ [2022] SALC 53 at [152].

¹⁶ [2018] SASFC 31.

¹⁷ *Ibid* at [130].

¹⁸ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 at [48]-[52].

¹⁹ Section 57(2).

²⁰ *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [16].

identification of the relevant locality can prove challenging. As this Court recently observed in *First Choice Liquor Market Hendon*,²¹ those stores are often associated with bulk purchases and attract customers from a much wider area than a typical bottle shop. It said:

... 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” (emphasis mine), it continues to have a flexible quality about it. 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.²² (Footnotes omitted).

- 46 To this I add the observation of von Doussa J in *Nepeor Pty Ltd v Liquor Licensing Commission and Others; Miniben Pty Ltd v Liquor Licensing Commission and Others*, to the effect that because extended “travel is an ordinary incident of country living” distances that might be considered unreasonable in metropolitan Adelaide might be regarded as unexceptional in regional areas.²³
- 47 This is borne out by the evidence in this case that demonstrates that a round trip of nearly 40 kilometres from Goolwa to Victor Harbor is seen by many people living in Goolwa as routine.
- 48 The Survey stated that it was prepared in accordance with accepted statistical standards and there is no reason to doubt that this was so. It establishes that the Victor Harbor area is a popular regional residential area, a tourist destination, and a supplier of goods and services to neighbouring towns and suburbs that include Middleton and Goolwa. Of those in the Greater Victor Harbor area who have purchased take away liquor in the twelve months prior to the survey, 72% said that they would use the proposed premises. It can be inferred that many of these people live in Middleton, Goolwa, and surrounding areas.
- 49 Having regard to the intended nature of the proposed premises, on the evidence presented, the delegate should have found that the relevant locality extended to the towns of Middleton and Goolwa and surrounding areas.
- 50 It follows that the relevant community is much larger than that identified by the delegate. Contrary to her view, the proposed premises needed to be considered from the premise that they are intended to cater for a significant population in a major regional area comparable in size to Mount Barker,

²¹ [2023] SALC 85.

²² *Ibid* at [53]-[54].

²³ (1987) 46 SASR 205 at 220.

and which increases in size over the summer months by more than 20% to as many as 50,000 residents.

- 51 This requires a significant reconsideration of the approach taken by the delegate and brings sharply into focus 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.²⁴

- 52 Those living in regional communities are entitled to expect to have access to the same range of facilities as those living in metropolitan areas. The observations of Doyle CJ in *Harding Hotels v Jatadd*²⁵ as set out above, make that clear.²⁶ Thus like their metropolitan neighbours, those living in regional areas, are entitled to expect to have available to them reasonable access to a large format destination store.

- 53 That is not to say that every country town or every significant area within metropolitan Adelaide can be expected to have its own large format liquor store such that an application for a packaged liquor sales licence to meet that unmet expectation will necessarily succeed. As was explained by this Court in *BWS Mount Barker*,²⁷ a licensing authority needs to be mindful of the impact that an additional take away liquor facility may have and its potential, in combination to existing facilities in a particular locality, to increase rates of risky drinking, rates of alcohol-related harm and negative amenity impacts in that locality. To be clear, this does not involve the same considerations as the former needs test, and it would be an error of law to apply that test or something very similar to it.²⁸ But what it does mean is that a licensing authority must consider the existing facilities in a particular locality, and the population and characteristics of size of the relevant locality. If it finds that saturation point has been reached, it will conclude that despite the positive aspects of the application, such as fulfilling an unmet gap in the range of take away liquor facilities available, the evaluative exercise that the Act requires will point decisively against it being in the community interest to grant the application.

- 54 In this case, in the immediate vicinity of the proposed premises are two premises trading under packaged liquor sales licences. But as was noted

²⁴ [2015] SALC 1 at [210].

²⁵ *Ibid.*

²⁶ See, also the judgment of Kourakis CJ in *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors* [2018] SASFC 131 at [14], where in respect of convenience of travel: “there can only be one standard for the South Australian community”.

²⁷ [2023] SALC 31 at [79].

²⁸ *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 at [46].

in *Liquorland McLaren Vale (No. 2)*,²⁹ not all take away liquor facilities are the same. The Cellarbrations store at McCracken is small and is not easily accessible. It plainly has as its focus the residents of the McCracken Country Club. In evaluating this application, its significance barely touches the scale. The Liquorland store adjacent to the Coles Supermarket in McCracken is doubtless a popular well stocked liquor store as it borne out by the results tabulated in the Survey. The fact that it is only 400 metres south of the proposed premises is significant. It is also significant that it is on the other side of Adelaide Road, and it is a different type of offering to the proposed premises.

- 55 Although each case must be decided on its own facts, I note that in *Liquorland (Australia) Pty Ltd (Park Holme)*,³⁰ this Court granted an application for a packaged liquor sales licence, notwithstanding that there was a BWS store about five hundred metres north of the proposed store, on the opposite side of Marion Road. I also note that in *BWS – Beer Wine Spirits*,³¹ this Court allowed the removal of a BWS store from North East Road, Collinswood into the Walkerville Shopping Centre on Walkerville Terrace, notwithstanding that there was a Fassina store a short distance away on the opposite side of Walkerville Terrace. These cases demonstrate that whilst proximity to other take away liquor facilities is an important consideration, it is not necessarily decisive.
- 56 The other take away liquor facilities in Victor Harbor are all about three kilometres away from the proposed premises, and those in Port Elliott, Middleton and Goolwa, are even further away. Thus, there is not the concentration of take away liquor facilities of the type that concerned this Court in *BWS Mount Barker*,³² where there the grant of the application would have resulted in there effectively being four bottle shops within less than a kilometre of each other, one of which was a large format liquor store.
- 57 Assuming, without deciding that because one of the stated objects of the Act is “to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public”,³³ market share might be a relevant consideration, it could only be a factor in an extreme case. And in that event, it might be expected that the Australian Competition and Consumer Commission would intervene. I note in passing that it did so in connection with licensed facilities that were considered in *BWS Seaford Meadows*.³⁴

²⁹ [2022] SALC 53 at [188].

³⁰ *Ibid.*

³¹ [2013] SALC 7.

³² *Ibid.*

³³ Section 3(1)(c).

³⁴ [2023] SALC 63 at [12].

- 58 In this case, whilst there might be common ownership of the proposed premises and the two Liquorland stores in Victor Harbor, the proposed premises will be a different type of facility to any of the other takeaway liquor facilities in the locality. Moreover, as Liquorland rightly contended, when the correct locality is considered, the extent of concentration is significantly diminished. If market share can be a relevant consideration, it is not a relevant consideration in this case.
- 59 The delegate was right to be concerned about the issue related to the proximity of the Encounter Lutheran College and about the drinking habits of younger people. As was explained in *Hove Sip n Save*,³⁵ a licensing authority should always be concerned when a proposed liquor store will be in the vicinity of schools at which teenagers attend, because this cohort has an unfortunate propensity to be afflicted by alcohol related harm. However, the evidence in this case indicates that Liquorland is acutely aware of the potential issues around this and has taken proactive measures to address them. It is also significant that it is an established proprietor of licenced premises and has extensive policies and procedures in place to address harm minimisation and to prevent the sale of liquor to minors. This allays any concerns that I might otherwise have had regarding the location of the proposed premises and issues around sales to minors and intoxicated persons.
- 60 In my respectful opinion, the delegate erred in not finding that the grant of this application was in the community interest. For now, the contemporary community expectation of the residents of the relevant locality to access to a large format liquor store can only be fulfilled by a journey of 45 kilometres each way. Even making allowance for the fact that those living in the locality routinely travel over distances that might be regarded as excessive by metropolitan standards, this places this cohort at a significant disadvantage compared to those living in the city.
- 61 The grant of this application will not result in an undue proliferation of licenced premises. There are no significant factors pointing against the grant of the licence. I find that it is in the community interest to permit the formation of a large format liquor store through the grant of this application.
- 62 I now turn to the s 53 discretion. The exercise of the delegate's discretion must be reconsidered because it proceeded upon a misunderstanding of the size of the relevant community. Given that the population is comparable to that of Mount Barker, which places it as one of the bigger regional centres in this State, no issues around the setting of an undesirable precedent arise.

³⁵ [2021] SALC 7 at [107].

63 With respect, for the reasons explained above, the delegate's views that metropolitan expectations should not be equated with regional expectations cannot be accepted. It follows that if it is in the relevant community's interest to grant an application for a packaged liquor sales licence to enable its members to access a large format liquor store, the application should not be refused on public interest grounds, simply because the relevant community is regional.

Conclusions

64 The relevant community is presently unable to access a large format liquor store without undue inconvenience. The grant of this application will address this and will complement the range of take away liquor facilities that the members of this community may wish to use. Having regard to the size and population of the relevant locality, the locality is not awash with take away liquor facilities and there are no other compelling factors pointing against the grant of the application. Having conducted the evaluative exercise that the Act requires, I find that the grant of this application is in the community interest. I am also satisfied that it is in the public interest.

65 The powers conferred on this Court on a review, include the power to make any decision that should, in the opinion of the Court, have been made in the first instance. In the exercise of this power, I grant Liquorland's Application for Review and set aside the order made by the Commissioner. In lieu of it, I grant Liquorland's application for a packaged liquor sales licence in respect of the proposed premises. As the proposed premises are yet to be constructed, this must be in the form of a certificate under s 59 of the Act.³⁶ Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court's consideration.

³⁶ This section provides that a certificate of approval can be granted as an alternative to a licence in circumstances in which a licence would have been granted but for the fact that the applicant's premises are not yet completed.