

LICENSING COURT OF SOUTH AUSTRALIA

PARAFIELD PLAZA SUPERMARKET

JURISDICTION: Application for a Review of or an Appeal from a decision of the Commissioner

CASE NO/S: LC-23-00029

HEARING DATE: 4 May 2023

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 9 August 2023

CATCHWORDS:

*Application for review – The Commissioner’s delegate granted a packaged liquor sales licence to permit the sale of a limited range of Asian style liquor from within an Asian style supermarket and in doing so granted exemptions enabling the licensed premises to not be devoted entirely to the business conducted under the licence, to not be physically separate from premises used for other commercial purposes, and in respect of premises of a prescribed kind normally excluded by regulation – The application was opposed by the AHA – Whether in respect of the proceedings before the delegate the AHA was denied procedural fairness – Whether in light of a change to the business model there was appropriate community engagement – Whether the delegate treated this as a “one stop shop” case and if so was he in error in so doing – Whether the delegate erred in referring to Asian populations generally as opposed to the actual ethnic origins within the locality – Whether the delegate erred in relying on the “lack of Asian products” in the nearby Liquorland store – Whether the delegate erred in relying upon the fact that the Commissioner had previously granted exemptions in relation to a number of packaged liquor sales licences for specialist stores – Whether the conditions imposed by the delegate impermissibly distorted the nature of the licence – Whether some of conditions imposed by the delegate were illusory and provide no real protection – Whether the delegate erred in granting exemptions enabling the licensed premises to not be devoted entirely to the business conducted under the licence, to not be physically separate from premises used for other commercial purposes, and in respect of premises of a prescribed kind normally excluded by regulation – Whether the delegate erred in finding that the grant of the application was in the community interest – Whether the delegate erred in granting the licence and thereby established a precedent that is undesirable – **Held** that there was no*

denial of procedural fairness as the AHA was given a sufficient opportunity to state its case – **Held** that community engagement is not a static concept and provided that any change to the business plan is not so significant as to conclude that the requisite liaison with relevant key stakeholders and interest groups in the community had not occurred – **Held** that it is clear that the delegate did not approach this case from the premise that it was pitched as a “one stop shop” case – **Held** that the delegate was entitled to not give that much weight to the lack of direct correlation between the ethnic origins of the majority of people in the locality and the ethnic origins of the liquor that is proposed to be sold – **Held** that because Liquorland is part of a chain nothing can be gleaned from the fact that it does not offer niche Asian liquor products– **Held** that the fact that the Commissioner had previously granted exemptions in relation to a number of packaged liquor sales licences did not create any precedent in connection with a new application for a packaged liquor sales licence as they were a result of the transitional provisions and the delegate erred in taking them into account – **Held** that the changes to the Act creating new types of licenses means that the holders of such licences may now trade in ways not previously allowed and may, for example, sell a limited range of products – **Held** that the complaint that the delegate imposed conditions that impermissibly changed the nature of a packaged liquor sales licence must be rejected – **Held** that because licence conditions might be drafted inelegantly often the literal construction will have to yield to one that reflects common sense and looked at in that light the conditions are not illusory – **Held** that it was open to find that it is in the public interest to make speciality Asian liquor more readily available to the persons using that supermarket – **Held** that the expression “there is a proper reason to do so” as it appears in s 38(7) of the Act is vague and has no obvious limitations and that in determining its meaning it is appropriate to consider extrinsic materials which include the Anderson Review Report – When so considered, given the specialist nature of the supermarket, the exemption was appropriate – **Held** that given the limited range of liquor to be sold, the risk that granting the application could cause appreciable harm to members of the relevant community is slight; the grant of the application will result in greater convenience for customers who shop at the Parafield Plaza Supermarket; members of the relevant community would be attracted to Asian style liquor products that were not specific to their particular Asian ethnicity in the same way as they were attracted to other Asian style products on offer at the supermarket; on balance the grant of the application is in the community interest – **Held** that the grant of a packaged liquor sales licence that permits the sale of take away liquor in a supermarket must be seen as a very exceptional thing, and if it provided any opportunity for this licence to transition into one that permitted the sale of a range of liquor from within a conventional supermarket in metropolitan Adelaide there would have been every reason to refuse it in the public interest – **Held** that whilst the conditions imposed by the delegate go a long way to allaying that concern, more was required, and the delegate should have also made it a condition of the licence that the primary business of the licensee at the premises is the sale of Asian style food and

grocery products – Application for review allowed – Liquor Licensing Act 1997, Liquor Licensing (Liquor Review) Amendment Act 2017, Liquor Licensing (General) Regulations 2012.

Board of Education v Rice & Ors [1911] UKLawRpAC 18; [1911] AC 179
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1
Liquorland McLaren Vale. [2022] SALC 44
Spoon by Aramais [2009] SALC 5
Pierce & Ors v Liquor Licensing Commissioner & Anor (1987) 47 SASR 22.
Swanport Bottle Shop Pty Ltd v Bridgeport Hotel Pty Ltd (1987) 47 SASR 449
Australian Wine Traveller Pty Ltd v Liquor Stores Association Inc [2000] SASC 139; (2000) 77 SASR 15
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27
Certain Lloyd's Underwriters v Cross [2012] HCA 56, (2012) 248 CLR 378
The Curious Squire [2014] SALC 23
Liquorland (Australia) Pty Ltd (Park Holme) [2020] SALC 37
Rhino Room Pty Ltd trading as The Howling Owl [2020] SALC 40
On the Run Pty Ltd [2022] SALC 109.
Hyde Park Gourmet Grocer [2009] SALC 32

REPRESENTATION:

Counsel:

Appellant: Mr G Coppola

Respondent: Mr T Besanko

Solicitors:

Appellant: Australian Hotels Association (SA)

Respondent: Botten Levinson Lawyers

- 1 This is an application made by the Australian Hotels Association (AHA) seeking a review of a decision made by a delegate of the Liquor and Gambling Commissioner (the delegate) to grant a packaged liquor sales licence subject to conditions to Catalina Retail Group Pty Ltd (Catalina) in respect of premises in the Parafield Gardens Shopping Centre (the Shopping Centre).
- 2 What sets this case apart from a typical application for a packaged liquor sales licence is that it involves the sale of take away liquor from within a supermarket, being a business model that is generally not permitted by the *Liquor Licensing Act 1997* (the Act).
- 3 Section 38(3) of the Act provides that it is a condition of a packaged sales liquor licence “that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes”. The imposition of this condition is not absolute. Section 38(6) of the Act provides that a licensing authority may grant an exception from the requirements stipulated in s 38(3) if it considers that it is in the public interest to do so. The Act provides an example to illustrate the circumstances where it may be appropriate to make such an exception, namely a general store in a regional location.
- 4 Section s 38(7) of the Act provides that a packaged liquor sales licence “may only be granted in respect of premises of a prescribed kind if the licensing authority is satisfied that there is a proper reason to do so”. Premises of a prescribed kind are set out in reg 7AB of the *Liquor Licensing (General) Regulations 2012* (the Regulations). They include “premises ordinarily known as or advertised as a supermarket, convenience store or delicatessen”.
- 5 Catalina operates a relatively large Asian style supermarket trading as the Parafield Plaza Supermarket (the PP Supermarket). It is by some measure the largest trading entity in the Shopping Centre. It sells a large range of Asian products and groceries along with a much smaller range of general grocery items as well as toasters and other cooking utensils. Some areas of the Supermarket with their tubs of fresh fish on ice and meat products on display have a distinctly Asian market feel about them. Overall the PP Supermarket is noticeably different to conventional supermarkets, and it does not sell the full range of products that are available at those supermarkets. A patron of the PP Supermarket would therefore need to go elsewhere to complete all of their regular shopping needs.
- 6 Other tenants in the Shopping Centre include SA Lotteries, Australia Post, Terry White Chemist, Pizza Chef, First Choice Nina Bakery,

Toloo Supermarket, Liquorland, Mr Chicken, Golden Star BBQ, Lotus Blanc and Magik Masala.

- 7 In its original form Catalina's application was based on a business model to enable it to sell packaged liquor from the supermarket for consumption off the premises from 9:00 am to 6:00 pm Monday to Friday, from 9:00 am to 5:00 pm Saturday, and from 11:00 am to 5:00 pm Sunday, without proposing any specific limitations or conditions to be placed on the licence. It was proposed that it would sell over 100 lines of specialised and boutique liquor from Asian countries such as China, Korea and Japan. Because the model envisaged that the point of sale of liquor would be within the PP Supermarket the application sought exemptions from s 38 of the Act.
- 8 In contending that it was in the public interest to grant a s 38(6) exemption and in contending that there was a proper reason to grant the licence in respect of premises that are of a prescribed kind, Catalina relied upon the fact that its business model contemplated the sale of liquor from a very small section behind the sales counter, that the range of liquor would be no more than about 100 lines, and that the range, being confined to Asian liquor, would complement the type of products on sale at the PP Supermarket.
- 9 Before any consideration of the exemptions provided for by s 38, because this was an application for a packaged liquor sales licence, and was therefore a "designated application" for the purposes of the Act, Catalina had to run the gauntlet of s 53A of the Act. To be granted the licence it needed to satisfy the licensing authority that granting the application was in the community interest. In resolving that issue s 53A(2) of the Act requires the licensing authority to have regard to:
 - the harm that might be caused (whether to a community as a whole or a group within the community) due to the excessive or inappropriate consumption of liquor;
 - the cultural, recreational, employment or tourism impact; and
 - the social impact in, and the impact of the amenity of, the locality of the premises or proposed premises; and
 - the nature of the business conducted or to be conducted under the licence (as prescribed).
- 10 Community impact guidelines have been issued which relevantly provide that:

The **onus is on the applicant** to satisfy the licensing authority that the grant of the application **is in the community interest** and to provide relevant evidence and submissions to discharge this onus.

- 11 Catalina 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.
- 12 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.”
- 13 As with any designated application, the starting point is to identify the relevant locality as that informs what is the relevant community. The guidelines suggest as a guide that within metropolitan Adelaide the locality will generally be that area within two kilometres of the proposed premises.
- 14 The Shopping Centre is within the suburb of Parafield Gardens, about 16 kilometres north of the Adelaide CBD. To the west, it is bounded by Port Wakefield Road, a major road which connects Adelaide with northern suburbs to towns such as Two Wells and Port Wakefield before becoming the Princes Highway. To the south, it is bounded by Ryans Road, which runs perpendicular to Port Wakefield Road and connects that road to Salisbury Highway, which runs parallel to Main North Road from Mawson Lakes to Salisbury, eventually turning and terminating at Main North Road. To the east, is the Parafield Airport. To the north, is Kings Road, which runs perpendicular to Port Wakefield Road and connects that road to Main North Road, before turning southeast and terminating at North East Road.
- 15 The Shopping Centre is just off the eastern side of Salisbury Highway between Kelleway Street and Blackie Avenue.

- 16 Suburbs that are adjacent to Parafield Gardens include Paralowie and Salisbury to the north, Parafield to the east, Mawson Lakes to the south, and Globe Derby Park to the west.
- 17 Catalina's application was supported by a planning report prepared by MasterPlan that suggested that an area smaller than the suggested two-kilometre radius defined the relevant locality. It argued that because of the highly specialised nature of the proposed business, the fact that the supply of liquor would be on a very small scale, and that there were natural barriers, the relevant locality was essentially the suburb of Parafield Gardens. It suggested that the locality was defined as the area bounded by the Kings Road, Port Wakefield Road, and Ryans Road. By reference to the 2016 census it contended that within this locality there were 17,099 residents. It stated that the population profile of the locality was younger than the Greater Adelaide metropolitan area with a much a higher-than-average share of residents who were born in Asia, being 22.2% compared with 10.00%. It identified this racial profile as being predominantly Vietnamese, Indian, Filipino, Cambodian and Afghani.
- 18 Masterplan noted that the locality had a notably higher unemployment rate compared to Greater Adelaide. Observations can be misleading, but on the Court's view, the Shopping Centre and the surrounding area looked relatively disadvantaged compared to typical Adelaide suburbs. No one in this case contended otherwise.
- 19 The AHA filed submissions opposing the application. It contended that there was no evidence of an unmet community demand for the liquor that was proposed to be sold. It noted that there were 11 educational institutions in the locality; that it was notorious that children congregate in shopping centres; and that given that the names of some of the drinks on offer included names of fruits and the word "jelly", the proposal carried with it a real risk of harm. It submitted that Catalina's policies did little to allay this concern as they essentially re-stated the law. It noted that the locality had a relatively low income, high unemployment rate, and high level of offending. It submitted that there was nothing about the proposal that justified granting the exemptions sought pursuant to s 38 of the Act.
- 20 Catalina responded through its lawyers. The response included the results of a survey in which customers of the PP Supermarket were invited to sign a petition which contained the following statement:

We, the undersigned customers of Parafield Plaza Supermarket (Shop 8/482 Salisbury Hwy, Parafield Gardens) petition the Liquor and Gambling Commissioner to grant a Packaged Liquor Sales Licence to Catalina Retail Group Pty Ltd to enable it to sell Asian liquor in the **attached** "Products List" from behind the counter of the

express checkout at the Parafield Plaza Supermarket for takeaway purposes.

- 21 In all 77 customers signed the petition. Many of the signatories identified themselves as living outside of the locality.
- 22 The response also included answers to a questionnaire that asked whether the person would purchase any Asian Liquor from the PP Supermarket of the type specified in an attached product list; whether it would be convenient to purchase that liquor when purchasing Asian groceries; and whether the person believed the proposed range of liquor would complement the existing range of Asian groceries on offer at the PP Supermarket. Over 100 people completed the questionnaire. The majority circled “yes” to all three questions.
- 23 The response submitted that the range of proposed alcohol to be offered would have a highly positive impact upon the many Asian residents who live in the locality. It submitted that the range was targeted to reflect Asian culture and that the proposal would create a distinct point of difference giving rise to a distinct type of facility. It submitted that the sale of highly priced niche Asian alcohol was unlikely to have a tangible effect upon criminal offending in the locality. It noted that of the 11 educational institutions identified by the AHA, five were kindergartens or early learning centres and only two were high schools. It submitted that Catalina’s experience as proprietor of the PP Supermarket was that it very rarely observed a congregation of high school students. It noted that much of the labelling was to be in a foreign language and that there would be no advertising. It submitted that the risk of children being exposed to alcohol as a result of the proposal was low. It attached a comprehensive “Liquor Management Plan” and noted that Catalina had extensive experience in the sale of cigarettes and had a strong appreciation of suitable harm minimisation policies.
- 24 Following negotiations with a former objector, Catalina revised its proposed business model so as to limit the range of lines to 30 and to limit the type of liquor to Korean and Japanese made liquor and Chinese made wine. It also agreed to the following conditions being placed upon the licence:
 - The business conducted under this licence shall at all times be that of an Asian supermarket with the sale of liquor being ancillary to this.
 - Liquor is to be displayed separately from grocery and other products and any liquor display is to be located within direct sight of the sales counter and out of reach of customers.

- Liquor is to be displayed within a locked cabinet which is to be electronically surveilled.
 - Liquor will not be sold in quantities greater than six bottles or cans.
 - Liquor cannot be delivered off premises to any purchaser.
- 25 The AHA filed a further submission. It submitted that the community engagement was for a different trading model than that reflected by the amended application and there was therefore no community engagement. It maintained its submission that liquor should not be sold from supermarkets. It noted that the PP Supermarket’s website advertised “Serving the widest variety of groceries, everyday”, and “An independent, locally-owned grocer serving the best of Australian and Asian foods in Parafield”, and that it contained customer testimonial such as “like an Asian Coles or Foodland store”.
- 26 The AHA submitted that if the application was granted it would send the wrong message to supermarket operators. It submitted that the grant of the application would make it difficult to resist further applications by large full-service supermarkets, even if sales were to be limited by stock numbers.
- 27 Catalina again responded through its lawyers. It submitted that regardless of how the PP Supermarket was advertised on its web site, the fact remained that it was a specialist Asian supermarket. It attached a number of Google reviews that it contended showed that the public does not view the PP Supermarket as a full-line mainstream conventional supermarket. It noted that parliament had not prohibited the alignment of liquor sales and supermarkets. It noted that what was involved here was a specialist Asian style supermarket and that the application was unusual and exceptional.
- 28 The delegate formed the view that the change in conditions represented a variation of the application. Section 51(3) of the Act permits a licensing authority to “allow an applicant to vary the application at any time before the application is decided”. The delegate resolved to exercise that power such that his consideration was in respect of the amended business plan.
- 29 The delegate accepted MasterPlan’s suggested locality. He noted that MasterPlan identified the existing packaged liquor options available in the locality comprised of a conventional bottle shop in the Shopping Centre trading under the Liquorland badge, a short distance away from the Supermarket, and a small walk-in facility trading under the BWS badge in the Slug ‘N’ Lettuce Tavern, about 1.9 kilometres to the north of the Supermarket. It was accepted that both offer a very small range of liquor

products sourced from Asian countries. He noted that MasterPlan had also observed that whilst not in the locality, the Parafield Airport Liquor Store on Kings Road, Parafield, about four kilometres away, stocks Asian sourced liquor products such as Korean and Japanese spirits and mixed drinks.

- 30 The delegate noted that MasterPlan argued that the local community, and specifically those who were of Asian descent, would benefit from the establishment of a “one stop shop” destination for the purchase of groceries and a limited range of specialised and boutique alcoholic beverages in one convenient location at the PP Supermarket. He noted that it argued that due to the small scale and targeted nature of the proposal, the characteristics of the site and locality, the adoption of CPTED measures¹ in the design of the premises, and the implementation and enforcement of policies to minimise harm that the proposal carried little risk of negatively impacting upon the relevant community.
- 31 The delegate noted that it was proposed that various measures would be implemented to address the issue of harm minimisation. These included imposing a 5.0% surcharge on all alcohol purchased, unless a minimum of \$20.00 of groceries are purchased in the same transaction, having the store under continuous electronic surveillance, displaying alcohol behind a counter outside of reach of patrons and within clear view of staff, prohibiting consumption of alcohol within and outside of the Shopping Centre with prominent signs displayed at the point of sale stating this, formulating internal policy and training protocols aimed at ensuring that staff better understand if a patron is intoxicated, refusing service to intoxicated persons and asking them to leave the premises, and calling for identification if customers appear to be under 25 years of age.
- 32 The delegate concluded that members of the relevant community would benefit from being able to purchase a selected range of Asian liquor beverages while purchasing groceries and other food items from the PP Supermarket and that therefore the proposed premises was in the community interest. He added that he could not foresee that the outlet will have a negative social or amenity impact.
- 33 Having found that the grant of the application was in the community interest the delegate then turned to consider whether it was appropriate to grant the exemptions to the requirements of s 38 of the Act.
- 34 The delegate stated that the Commissioner had previously granted exemptions in relation to a number of packaged liquor sales licences and reasoned that as such it “must be accepted that in certain circumstances it may be appropriate to grant a Packaged Liquor Sales Licence that caters

¹This is an acronym for ‘Crime prevention through environmental design’.

to either a certain ethnicity, or provides niche liquor products from a particular geographic region such as Asia, particularly in circumstances where the existing offerings in the locality do not, or only cater to a very limited extent to those niche markets.” He then went on to find that because there was a current lack of niche Asian liquor products currently available in the locality, there was a proper reason to grant Catalina a packaged liquor sales licence. He concluded as follows:

This is a finely balanced application but all things considered I am satisfied that it is in the community and public interest, and that there is a proper reason to grant the Applicant a Packaged Liquor Sales Licence subject to stringent conditions, as noted below:

1. The business conducted under this licence shall at all times be that of an Asian supermarket with the sale of liquor being ancillary to this;
2. Liquor is to be displayed separately from grocery and other products and any liquor display is to be located within direct sight of the sales counter and out of reach of customers;
3. Display of liquor shall be limited to display in a locked cabinet behind the express checkouts which is to be electronically surveilled;
4. The sale of liquor shall not exceed 6 bottles or cans per person per transaction;
5. The range of liquor is to be no greater than 30 individual lines of products;
6. Liquor shall only be sold to persons on the premises and cannot be delivered off premises to any purchaser;
7. There shall be no advertising or promotional materials for liquor sold under this licence in the licensed premises or within the shopping centre where the licensed premises is located; and
8. The sale and supply of liquor restricted to the following types:
 - Japanese made liquor
 - Korean made liquor
 - Chinese made rice wine (and not other types of Chinese made liquor)

(Note: No liquor products may be stocked that contain the word "Jelly" in the product name).

The Application for Review

- 35 The AHA contended that the delegate made several errors in concluding that the application should be granted. It contended that it was denied procedural fairness: that the application misfired because of a lack of community engagement, the delegate erred in treating this as a “one stop shop” case, he erred in referring to Asian populations generally within the locality, he erred in not relying on the “lack of Asian products” in the nearby Liquorland store, he erred in relying upon the fact that the Commissioner had previously granted exemptions in relation to a number of other packaged liquor sales licences, he conditioned down the licence to such an extent that it bears little or no relationship to a packaged liquor sales licence, he erred in granting exemptions under ss 38(3) and 38(7) of the Act, some of the conditions he imposed were illusory and provide no real protection, he erred in finding that the grant of the application was in the community interest, and he erred by giving insufficient weight to the fact that the grant of this licence would set an undesirable precedent.

Was there a breach of procedural fairness?

- 36 The AHA contended that the delegate erred in not permitting it to respond to the final submission made by Catalina and that as a result it was denied procedural fairness. This complaint concerns Catalina’s response to the AHA’s second submission. Presumably in reliance upon a practice direction issued by the Commissioner that provides: “A person who has lodged a submission under s 77 is not entitled to lodge a submission in reply to the Applicant’s reply” the AHA was not invited to respond to it.
- 37 The AHA submitted that the further submissions filed by Catalina contained a number of new matters such as the results of a survey, a detailed product list, details of its website, census data and references to online reviews. It submitted that to be denied the opportunity to test what it described as untested assertions and that this amounted to a failure to be afforded procedural fairness and that this vitiates the delegate’s decision.
- 38 Catalina submitted that the Act did not afford the AHA with the right to respond to every submission received by the delegate in connection with an application. It submitted that the delegate correctly exercised his discretion to not call for further written submissions from the AHA in circumstances where he determined Catalina’s submission on 21 December was “largely responsive to the AHA’s submission on 2 December”. Next, it submitted that in any event, the AHA can advance submissions to this Court about the reply submissions in this review.

Consideration

39 In conformity with the principle of procedural fairness a licensing authority must give “a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view”.² But it is important that a party is permitted no more than a fair opportunity. Parties are not entitled to endless opportunities to correct or contradict any relevant statement prejudicial to their view. If it were otherwise, legal proceedings could become something akin to a perpetual game of ping pong. It also needs to be understood that in carrying out their adjudicative functions licensing authorities do not have unlimited time and resources. They are obliged to apply their limited resources fairly and proportionately, mindful that there will be other parties waiting their turn in the queue for their matter to be determined. It should not be lost on anyone that in the end this case was about an application for a packaged liquor sales licence to sell a range of 30 products of no more than six bottles in any one transaction in a specialist Asian supermarket situated within a shopping centre that could hardly be described as a retail magnet. With all respect to those involved, this case is not major litigation.

40 It also must be recognised that: “Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”³ In this case the AHA was given the opportunity to put its primary submissions in opposition to the application and to respond to the reply made by Catalina. With respect, at that point I think the delegate was entitled to form the view that it had been given a sufficient opportunity to state its case.

41 Moreover Catalina is correct in submitting that in the within review the AHA was given the opportunity to address any perceived injustice.

Was there appropriate community engagement given the change to the application?

42 The AHA submitted that the delegate erred in entertaining the revised application on the basis that it was so fundamentally different to the business model that was the subject of community consultation that there had been no effective consultation. Reference was made to the decision in this Court in *Liquorland McLaren Vale* where it said:

... where, as here, a precursor to an application is the applicant’s liaison and engagement with the relevant key stakeholders and

² *Board of Education v Rice & Ors* [1911] UKLawRpAC 18; [1911] AC 179, 182 (Lord Loreburn LC).

³ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [37] per Gleeson CJ.

interest groups in the community, based upon matters that include the key features of the applicant's products and services, to permit the applicant to change tack at this late stage, would be to deny the relevant key stakeholders and interest groups the opportunity to have input into the new proposal.⁴

- 43 Catalina submitted that in making this complaint the AHA's reliance upon *Liquorland McLaren Vale* was misplaced. First it submitted that the case is plainly distinguishable in that it involved an application to vary its application from a "Liquorland" branded store to a "Vintage Cellars" branded store. It submitted that this meant that the very nature and product range of the store was to be manifestly different from that in respect of which community consultation had occurred. It submitted that this stands in stark contrast to the situation here where there was no application to vary the brand under which the liquor would be sold and that all that was involved was an agreement to restrict the number of products and their origin from that which had been originally proposed. Catalina added that in any event, the community engagement that occurred revealed a general demand for and interest in the categories of liquor proposed. It submitted that it cannot be right that every time the licensing authority is contemplating imposing a condition, or an applicant seeks the imposition of a condition, that varies slightly from the initial application that there must be renewed community consultation in connection with the proposed condition.
- 44 Catalina submitted that an additional factor that needed to be considered was the fact that its application only received two objections to the application, both of which were from commercial competitors. It submitted that the delegate and this Court could be comfortably satisfied that the tightening up of the different product lines that can be sold at any one time, and a limitation as to the origin of the liquor sold, would not have led to objections that have not otherwise been made, or submissions that the application was not in the community interest or contrary to the public interest. In other words, so it submitted, any further community consultation would not have made any difference. It submitted that if this Court considers that further community consultation should occur in connection with the application, it can direct that this occurs under ss 22(8)(b) and (d) of the Act⁵ and then make a decision about the review.
- 45 Finally, Catalina submitted that there is nothing expressed in the Act which requires community consultation. Rather, in determining whether an application is in the "community interest", s 53A(2)(b) requires the

⁴ [2022] SALC 44 at [77].

⁵ Section 22(8) deals with the powers of this Court on a review of a Commissioner's decision. Section 22(8)(b) empowers the Court to "make any decision that should, in the opinion of the Court, have been made in the first instance". Section 22(8)(d) empowers the Court to "make any incidental or ancillary order".

application of the guidelines, and the guidelines require the provision of “[e]vidence of community engagement and consultation”, which might include “petitions, survey results and/or letters of support”. Catalina noted that the guidelines expressly contemplate that an applicant might indicate to the licensing authority “measures [that] will be implemented to counteract concerns raised through this consultation process”, which plainly could include the imposition of conditions on any licence which is granted.

Consideration

- 46 Section 53A(2)(b) expressly provides that in determining whether a designated application is in the community interest a licensing authority “must apply the community impact assessment guidelines”. The guidelines stipulate that a designated application must be accompanied by a submission addressing how the application is in the community interest and contemplate that the submission will be made after the applicant has liaised with the relevant key stakeholders and interest groups in the community. The guidelines generally impose an obligation upon an applicant to include with the application a community impact submission that if relevant is expected to address matters such as: “the applicants products/services in terms of key features and potential customers and range of liquor and 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”. I therefore reject Catalina’s submission that there is nothing expressed in the Act which requires community consultation.
- 47 But it also must be accepted that community consultation is not a static process and that as a result of it aspects of the proposed business might change to allay concerns. Section 51(3) of the Act authorises a licensing authority to allow an applicant to vary an application at any time before the application is decided. This is qualified by s 51(4) which provides that if the application to vary is allowed, the authority must ensure that the other parties to the application and any person who made written submissions in relation to the application are given notice of the variation a reasonable time before the hearing or determination of the application. This occurred, such that on the face of it, the delegate was entitled to proceed as he did.
- 48 The only qualification to this is whether the revised application involves such a substantial change to the proposed business and the products and range of liquor that are the subject of the application, that the requisite liaison with relevant key stakeholders and interest groups in the community will not have occurred. Whether a change is substantial enough to reach that conclusion is a matter of fact and degree.

- 49 In *Liquorland McLaren Vale* this Court held that a change that involved trading under a new badge that comprised of a different business model involved such a change to the products and range of liquor that would have been the subject of the application that the late change could not be entertained. This Court is permitted to know that most entities trading under a packaged liquor sales licence would carry at least 1,000 lines of wines, beer and spirits.
- 50 In its initial application Catalina proposed selling in the order of 100 lines of specialised and boutique liquor from Asian countries such as China, Korea and Japan. By comparison to the typical entity trading under a packaged liquor sales licence this is an extremely limited range of products. In its revised application Catalina continues to propose selling specialised and boutique liquor from Asian countries such as China, Korea and Japan, except that the number of products will now be no greater than 30 lines of products and Chinese products will be limited to rice wine. It continues to be by comparison to the typical entity an extremely limited range of products, only even more so.
- 51 In my opinion the change here is not so substantial as to conclude that the requisite liaison with relevant key stakeholders and interest groups in the community has not occurred.

Did the delegate err in relying upon the MasterPlan report which asserted that this would be a “one stop shop” in the face of a concession by Catalina that this would not be the case for all customers?

- 52 Through this ground the AHA contend that Catalina “waxed and waned” as to the grounds of its application. It submitted that the MasterPlan report spoke of “one stop shopping” whereas in a submission made by Catalina on 21 December 2022 it stressed that the PP Supermarket was not a conventional supermarket with the irresistible inference being that it does not provide a one stop shopping experience. It submitted that at best the proposed premises might provide a level of convenience to a tiny, but unidentified percentage of the relevant population who shop at the PP Supermarket and wish to purchase any of the very limited range of products offered in quantities of six or less. It submitted that this was not enough to justify the grant of the licence.
- 53 Catalina submitted that the MasterPlan report did not say that all persons who shopped at the PP Supermarket would enjoy “one stop shopping” if the application was granted. It submitted that properly understood the report expressed the opinion that persons of Asian descent would benefit from the establishment of a “one stop shop” destination for the purchase of groceries and a limited range of specialised and boutique alcoholic beverages. Catalina submitted that in any event the question of whether the proposed premises would provide additional convenience for shoppers

at the PP Supermarket was a question for the delegate. It submitted that it was apparent from the delegate's reasons that he decided for himself the benefit of convenience for customers who shop at the PP Supermarket who wish to purchase Asian packaged liquor as part of that shopping expedition.

Consideration

- 54 In my opinion Catalina was correct to submit that the MasterPlan report did not say that all persons who shopped at the PP Supermarket would enjoy "one stop shopping" if the application was granted and that he did no more than express his opinion that persons of Asian descent would benefit from the establishment of a "one stop shop" destination for the purchase of groceries and a limited range of specialised and boutique alcoholic beverages at the PP Supermarket. Moreover the delegate did not approach this case from the premise that it was pitched as a "one stop shop" case. That is made clear from his reasons where he said:

In relation to the Applicant's assertion that the grant of the application may result in one-stop-shopping for some people at the PP Supermarket, I consider that this would apply to only a limited number of people, and place little weight on this asserted benefit. (Emphasis mine)

Did the delegate err in referring to Asian populations generally within the locality, while not giving force to the submission as to the actual ethnic origins within the locality and the lack of appeal the products sought to be sold would have to that range of people?

- 55 The AHA submitted that the analysis of the population profile of the locality as outlined by the MasterPlan report reveals that the top six countries of birth identified were Vietnam, India, England, the Philippines, Cambodia and Afghanistan and that it followed that if there were people within the locality who identified as Japanese, Korean or Chinese they must be of very small number. It submitted that it followed that any added convenience that the proposed premises would provide barely touches the scale, given the profound lack of correlation between the ethnic heritage of the overwhelming number of people living in the locality and the ethnic origin of the liquor that the proposed premises intends to sell.
- 56 Catalina submitted that the question is not whether the different ethnic groups living within the locality would find the proposed product offering appealing. The question is whether those persons who shop at the PP Supermarket, or who live in the locality and otherwise wish to purchase niche Asian liquor, namely Japanese or Korean liquor or Chinese rice wine, would benefit from the availability of this sort of liquor at the PP Supermarket, having regard to the lack of availability of such liquor in

the locality and the fact that the PP Supermarket is a speciality Asian supermarket. It submitted that the delegate was correct to conclude that there would be customers of the PP Supermarket who would benefit from additional convenience in being able to buy liquor at the supermarket whilst they shopped for other goods, and that there were otherwise persons in the locality who would benefit from the availability of boutique Asian liquor in the locality.

Consideration

- 57 The findings that the delegate made in connection with this issue were: the PP Supermarket is a large specialty Asian specialty supermarket; the PP Supermarket stocks a wide range of Asian goods; the demographics of the locality were atypical of most Adelaide suburbs; and the locality had more than twice the State average of people of Asian descent.
- 58 None of these findings are controversial. The size of the PP Supermarket, the range of products on sale there, and the profile of the relevant community allowed the inference that it is a popular supermarket amongst people of Asian heritage who are attracted to buying Asian style products. It might be expected that amongst the products on offer would be those that are ethnic specific. But it would also be reasonable to infer that members of the relevant community would be attracted to “Asian” style products that were not specific to their particular Asian ethnicity.
- 59 It is implicit in the delegate’s statement that: “Australia is a multicultural society and there is significant force to the Applicant’s submissions that the grant of the application will result in greater convenience for customers who shop at the PP Supermarket”, that the delegate drew the inference that members of the relevant community would be attracted to “Asian” style liquor products that were not specific to their particular Asian ethnicity in the same way as they were attracted to other Asian style products on offer there. In my opinion the delegate was entitled to not give that much weight to the lack of direct correlation between the ethnic origins of the majority of people in the locality and the ethnic origins of the liquor that is proposed to be sold. On reviewing the evidence I come to the same conclusion.

Did the delegate err in not relying on the “lack of Asian products” in the Liquorland store?

- 60 The AHA submitted that had there been an unmet demand in the locality for Asian style liquor products it would have been expected that the Liquorland store that was adjacent to the PP Supermarket would have met that demand. I understood it to contend that the fact that Liquorland did not stock a range of Asian style liquor products compelled the inference that there was no unmet demand for those products.

- 61 Catalina submitted that it cannot be inferred that because Liquorland is not selling the niche Asian liquor products that Catalina proposes to sell, there is no demand in the locality for such products. Catalina pointed to the fact that Liquorland is a very different store that operates as part of a wider network of stores and that there could be anyone of a number of reasons why Liquorland is not selling niche Asian liquor products at the store. Catalina submitted that its community engagement through its petition and survey completed by customers of the PP Supermarket clearly revealed a demand for Asian liquor. It submitted that it was open to infer that there is a significant demand for these products given that it has applied for a licence to sell them.

Consideration

- 62 In my opinion, Catalina's submissions in respect of this ground must be accepted. Liquorland is part of a chain. The fact that it fails to offer niche Asian liquor products is not proof that there is no demand in the locality for such products.

Did the delegate err in relying upon the fact that the Commissioner had previously granted exemptions in relation to a number of packaged liquor sales licences for specialist stores?

- 63 The AHA submitted that the fact that the Commissioner had previously granted exemptions to a number of packaged liquor sales licences for specialist stores was irrelevant. It submitted that all of these were in connection with licences that were previously special circumstances licences and that under the transitional provisions they had to transition to one or other of the new categories of licence. It submitted that these provided no precedent in connection with a fresh application for a licence under the new regulatory regime.
- 64 As I understand it Catalina contends that the delegate was entitled to rely upon the fact that other Asian style stores are legally permitted in this State to sell a small range of liquor as part of their offering.

Consideration

- 65 In my opinion the AHA's complaint about the delegate's use of exemptions granted by the Commissioner is well made. As a result of the changes to the Act that included the abolition of the special circumstances licence, provision was made through cl 3 of Schedule 2 of the *Liquor Licensing (Liquor Review) Amendment Act 2017* that effectively mandated the transition of existing special circumstances licences into one or other of the current categories of licence. That clause relevantly provides as follows:

- (2) A special circumstances licence under old Part 3 Division 2 will, on the relevant day, be taken to be—
- (a) in a case where the licensee also holds a gaming machine licence in respect of the premises to which the special circumstances licence relates—a general and hotel licence under new Part 3 Division 2; or
 - (b) in the case of a special circumstances licence that authorises the sale of liquor on the licensed premises for consumption off the licensed premises—a packaged liquor sales licence under new Part 3 Division 2; or
 - (c) in any other case—an on premises licence under new Part 3 Division 2.
- (3) Despite subclause (2), the Commissioner may, on the Commissioner's own initiative or on application by the licensee, issue the holder of a special circumstances licence under old Part 3 Division 2 a licence of a class under new Part 3 Division 2 that the Commissioner considers appropriate taking into account the trade authorised under the licence.

66 Accordingly, the granting of exemptions in connection with transitioning special circumstances licences did not create any precedent relevant to a new application for a packaged liquor sales licence, and the delegate erred in taking this into account. Whether, and if so how, this impacts on the fate of Catalina's application will be addressed later in these reasons.

Was it an error of law to "condition down" a licence to such an extent that it bears little or no relationship to a packaged liquor sales licence?

67 The AHA referred to various authorities that held that conditions cannot be imposed upon a licence that fundamentally distort the nature of the licence. These included the decision of this Court in *Spoon by Aramais*⁶ where Judge Soulio had to consider an application for a special circumstances licence. A pre-requisite to the grant of such a licence was a finding that the proposed business model could not be conducted under an existing category of licence. Judge Soulio observed that the Act did not permit the imposition of a condition or an exemption that distorted a licence for a hotel. He made reference to the decision of the Full Court in *Pierce & Ors v Liquor Licensing Commissioner & Anor*⁷ where the Court rejected an application to mould a hotel licence so as to permit the premises to trade as a cocktail bar and lounge in conjunction with a restaurant. He noted that to similar effect was the decision of the Full Court in *Swanport Bottle Shop Pty Ltd v Bridgeport Hotel Pty Ltd*,⁸ where the Court rejected

⁶ [2009] SALC 5.

⁷ (1987) 47 SASR 22.

⁸ (1987) 47 SASR 449.

an application to mould a retail liquor merchant's licence denying a retail liquor merchant the capacity to sell kegs. Judge Soulio noted that these cases were decided under predecessor legislation, and that following changes to the legislation the Court had greater power to grant exemptions and impose conditions than was previously the case. But he concluded that it remained the case that there were certain characteristics of particular categories of licence that had to be maintained. The AHA relied upon this in submitting that to impose upon a packaged liquor sales licence a condition that only permits the sale of no more than 30 individual lines of products, limited to Japanese and Korean made liquor and Chinese made rice wine, so distorts that type of licence as to be beyond power.

- 68 Catalina submitted that there was nothing unusual about conditions imposed on its licence and the conditions here do not fundamentally alter the nature of the licence being granted. It contended that its licence is very much a packaged liquor sales licence in that it permits it to sell liquor on the licensed premises for consumption off the licensed premises.

Consideration

- 69 In *Australian Wine Traveller Pty Ltd v Liquor Stores Association Inc*⁹ Doyle CJ observed that in connection with the Act as it was prior to recent amendments that changed the categories of licence, it permitted the sale of liquor through ten different licences. He noted that each category conferred different entitlements and obligations and most were structured to fit a business of a well-known type, such as a hotel, bottle shop or restaurant.
- 70 It is instructive that the title of licences such as a hotel licence, a retail liquor merchant's licence and a restaurant licence, reflect the type of business that would be conducted under the licence. In the case of a hotel licence it authorised the license to trade as a hotel as that concept would be generally understood, namely that it would be open for certain minimum hours, it would offer for sale liquor for on and off premises consumption, and that meals would be available at certain times. Such a licence could only be granted if the licensing authority was satisfied, having regard to the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are or are to be situated, that the licence was necessary in order to provide for the needs of the public in that locality. Those needs could be expected to apply to the full suite of services that a hotel might be expected to provide. Similarly an entity holding a retail liquor merchant's licence could only be granted that licence if the licensing authority was satisfied that the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are

⁹ [2000] SASC 139; (2000) 77 SASR 15.

proposed to be, situated do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand. Because the focus was on demand, there was an expectation that the licensee would sell for off premises consumption, an extensive range of beers, wines and spirits, because if it were otherwise, the public demand would already be adequately catered for.

- 71 It is instructive that the hotel licence has now been replaced by the licence now described as a general and hotel licence. The holder of such a licence can sell liquor for consumption on premises at any time and sell for consumption off premises between 8 am and 10 pm subject to the qualification that it can only do so for up to 13 hours a day. There is no longer an expectation that meals will be provided. There is no longer a requirement that the premises be open for certain minimum hours. The licence can be granted even though it is not necessary to meet the needs of the public. It is sufficient that it is in the interests of the relevant community to grant the licence. Collectively these changes suggest to me that an entity trading under a general and hotel licence may now trade in a way that might not resemble how entities that previously traded under a hotel licence were expected to trade.
- 72 In my opinion the change in the description of a licence from a retail liquor merchant's licence to a packaged liquor sales licence is also significant. The title of the licence is no longer focussed on the attributes of the licensee, i.e. a merchant. It is now focussed upon what the licensee can sell, i.e. packaged liquor. The licence can be granted even though it is not necessary to adequately cater for the public demand for liquor for consumption off licensed premises. It is sufficient that it is in the interests of the relevant community to grant the licence. These changes suggest to me that an entity trading under a package liquor sales licence may now trade in a way that might not resemble how entities that previously traded under a retail liquor merchant's licence were expected to trade. In my opinion the Act contemplates that provided it is in the interests of the relevant community, the holders of such licences may now trade in ways not previously allowed and may, for example, sell a limited range of products.
- 73 Accordingly, the complaint that the delegate imposed conditions that impermissibly changed the nature of a packaged liquor sales licence must be rejected.

Did the delegate err in granting an exemption under s 38(3) of the Act and should the application have been refused in light of the prohibition contained in s 38(7) of Act and the relevant regulations made thereunder?

- 74 The AHA submitted that the effect of s 38(3) and (7) of the Act and reg 7AB of the Regulations is that, as a general rule, liquor should not be sold in supermarkets.
- 75 Whilst it accepts that it is not an absolute rule, it submitted that the example provided for in s 38 namely “a general store in a regional location might satisfy the licensing authority that it is in the public interest that an exemption from the condition in subsection (3) be granted” informs how the public interest exemption is to be construed and applied. It submitted that the facts in this case are vastly different to the example provided in the Act and the delegate erred in granting the exemption under s 38(3).
- 76 The AHA submitted that supermarkets are places where children congregate. It pointed to evidence that this locality has a larger than average number of children and that the relevant locality contains 11 schools, one of which directly abuts the shopping centre. It submitted that it is not in the public interest to have unsupervised children in premises where liquor is sold for take away consumption. It submitted that the delegate was plainly concerned that the proposal had a significant potential for harm as evidenced by the conditions that he imposed. These included a ban on advertising, requiring the liquor to be locked up and subjected to electronic monitoring, and limiting the quantity of sales and the range of liquor.
- 77 The AHA submitted that there was no proper reason to provide the exemption to the prohibition created by s 38(7).
- 78 Catalina submitted that the delegate’s finding of a current lack of niche Asian liquor products currently available in the locality was sufficient to justify the conclusion that the exemptions should be granted. It noted that the AHA did not challenge that finding and added that there was no basis for it to do so. Catalina referred to the MasterPlan report which identified two other take away liquor facilities in the locality, being the nearby Liquorland store and the Slug ‘N’ Lettuce Tavern, with a small walk-in BWS attached, located at 130 Martins Road, Parafield, just under two kilometres from the proposed premises. It noted evidence that neither sold an extensive range of niche Asian liquor products.
- 79 Catalina submitted that the locality contains a significant number of persons born in Asian countries and a significant number of them wish to shop for Asian products at the PP Supermarket. It submitted that it was in the public interest to make speciality Asian liquor more readily available to such persons.

80 It submitted that the expression “proper reason” as contained in s 38(7) is very broad. It submitted that when the lack of niche Asian liquor products is added to the fact that the PP Supermarket is a speciality Asian supermarket that caters for persons wishing to purchase Asian products and serving a community of which a significant number are of Asian descent, the finding of “proper reason” was entirely justified.

Consideration

81 The AHA’s submission that, as a general rule, liquor should not be sold in supermarkets, is well made. As will become apparent later in these reasons, it is a submission of some significance. But it does not mean that in this case the exemptions provided for in s 38 should not have been granted.

82 True it is that the exception allowed for by s 38(6) typically applies in regional towns where there are no readily alternative packaged liquor outlets so as to obviate the need for residents to drive lengthy round trips to purchase packaged liquor. However, it does not follow that these are the only circumstances where this exemption will apply. In that context it is important to recognise how examples provided in legislation are to be treated. Section 20 of the *Legislation Interpretation Act 2021* provides:

An example included in an Act or a legislative instrument—

(a) is not exhaustive; and

(b) may extend, but does not limit, the meaning of the provision of the Act or legislative instrument to which it relates. (Emphasis mine)

83 In other words, they are a guide, not a fetter.

84 In my opinion the delegate was right to find that there is a current lack of availability of niche Asian liquor products in the locality. He was right to find that the locality contains a significant number of persons born in Asian countries and a significant number of them wish to shop for Asian style products at the PP Supermarket. Subject to some qualifications that I will elaborate upon shortly, I find that it is in the public interest to make speciality Asian liquor more readily available to such persons and that this justified the grant of the exemption that s 38(6) of the Act permits.

85 I now turn to consider s 38(7). It is a new provision in the Act. In construing what it means it must be recognised that the starting point in construing as with any provision of a statute, begins with a consideration

of the text and that extrinsic materials cannot be used to displace the clear meaning of the text.¹⁰

- 86 But this does not mean that extrinsic materials have no place to play in the task of statutory construction, especially if the words used are vague or ambiguous. In *Certain Lloyd's Underwriters v Cross*,¹¹ French CJ and Hayne J stated:

Whilst consideration of extrinsic materials should not displace the clear meaning of the text of a provision, the purpose of a provision may be elucidated by appropriate reference to them. It has often been said that the clear meaning of the text of a statute or a statutory provision is the surest guide to the meaning of “the intention of the legislature”, an expression used metaphorically. Nevertheless, it is uncontroversial that in determining the meaning of the text of a statute or provision a court may take into account the general purpose and policy of a provision and, in particular, the mischief that it is intended to remedy. (Footnotes omitted)

- 87 The expression “there is a proper reason to do so” as it appears in s 38(7) of the Act has no obvious limitations. In my opinion in determining how it is to be applied, it is appropriate to explore whether there are extrinsic materials that may throw some light on what was intended.
- 88 The prohibition created by s 38(7), was part of the wide-ranging amendments to the Act that amongst other things changed many of the categories of licence and abolished the special circumstances licence. These amendments followed a review of the Act conducted by the Honourable Tim Anderson KC in 2016 that culminated into a formal report that I will refer to as the Review Report. Following the tabling of the Review Report in Parliament, the Government published a formal response that accepted most of the recommendations made. I will refer to the response as the Government Response.
- 89 The origins of reg 7AB of the Regulations can be found in the Review Report, specifically recommendation 76 thereof, which states that “Legislation should expressly prohibit specific types of business from holding a Packaged Liquor Sales Licence”.
- 90 The Government Response accepted this recommendation.
- 91 Further in the Review Report, at 5.7.42, the Honourable Tim Anderson expressed his view about the types of businesses or certain premises that should be subject to this prohibition that are almost word for word the wording of reg 7AB.

¹⁰ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

¹¹ [2012] HCA 56, (2012) 248 CLR 378 at [70].

- 92 Later in the Review Report, at 10.8.11, these premises are described as “obvious businesses ... that should be excluded for public interest reasons” from obtaining a packaged liquor sales licence.
- 93 By accepting recommendation 76 and effectively duplicating paragraph 5.7.42 of the Review Report, it seems that the intention of Parliament was to implement this recommendation for the reasons the Honourable Tim Anderson suggested in his Review Report.
- 94 Importantly, however, there is a further discussion about packaged liquor sales elsewhere in the Review Report.
- 95 At 2.8 is the following:
- 2.8.1 If the ‘needs test’ is removed as I have suggested and replaced by some form of community impact and public interest test and having regard to the objects of the Act, and in particular to minimise harm, it will not be automatic that a supermarket will succeed in an application to sell liquor for off-premises consumption.
 - 2.8.2 Clearly, there will be many examples where it will not be possible for the Licensing Authority to grant a supermarket such a privilege because of the potential increase in harm and there being no benefit to the community over and above an additional outlet. The considerations of balancing the benefit to the community versus the potential detriment to the community will need to be weighed up by the Licensing Authority.
 - 2.8.3 Section 37(2) of the Act currently requires that the licensed premises in relation to a Retail Liquor Merchant Licence must be physically separate from premises used for other commercial purposes.

“It is a condition of a retail liquor merchant's licence that the licensed premises must be devoted entirely to the business conducted under the licence and must be physically separate from premises used for other commercial purposes.”
 - 2.8.4 I recommend that this requirement should be retained in principle under the new Packaged Liquor Sales Licence but amended to make it clear that provided the licensed premises are separated by some form of permanent and substantial physical barrier, licensed premises can co-exist with the supermarket operation under the main roof of a supermarket complex.

2.8.5 In addition, a separate point of sale or check-out should be required on such licensed premises operated by an adult with responsible service of alcohol training. A responsible person, as approved for the purposes of section 97 of the Act, must supervise and manage the licensed premises at all times.

2.8.6 I deal with the topic of supermarkets and liquor licences in Chapter 10.

96 The conditions of a packaged liquor sales licence are considered at 4.10 of the Review Report, where at 4.10.9 it is stated that an eligible business under this category of licence will include “specialist grocers authorised to sell specific liquor products”. It is further stated at 6.5.28 that:

Packaged Liquor Sales Licences which were previously held under a Special Circumstances Licence and generally apply to premises with limited or restricted off-premises sales (e.g. provided by Cultural Specialist Grocers), should be subject to the same terms and conditions discussed above. (Emphasis added mine)

97 In the discussion around the Community Interest test, the Review Report at 9.6.6 states as follows:

I also recommend giving the Licensing Authority discretion to include any other application if it thinks there may be community and/or public interest factors that need to be examined. An example—

- where a licensee seeks to amend the condition on a Packaged Liquor Sales Licence (which may have been previously held under a Special Circumstances Licence) to extend its restricted range of off-premises sales; or
- a cultural specialist grocer wishing to sell other lines of liquor (Emphasis added mine)

98 At 10.8.4 of the Review Report it is stated:

The provision requiring the licensed premises to be devoted entirely to the business under the licence should be retained. I also consider that the exceptions provided in section 37(2) of the Act should remain, in particular exception number 2 which allows a licence to be granted if the “*demand for liquor in the relevant locality is insufficient to justify the establishment of separate premises or there is some other proper reason for granting the exemption*”. This exception from the ‘physically separate’ requirement may be needed in smaller regional stores or for specialist grocery stores. (Emphasis added mine)

99 In my opinion the Review Report and the Government Response should be regarded as relevant extrinsic materials that can be relied upon to inform the construction of s 38(7). In my opinion they contemplate that a licensing authority might find that there is a proper reason to grant a packaged liquor sales licence to a cultural specialist store trading in premises ordinarily known as or advertised as a supermarket, convenience store or delicatessen.

100 Returning to the facts of this case, although the PP Supermarket it is a supermarket, it is also fits the description of a cultural specialist grocery store. Subject to some qualifications that I will elaborate upon shortly, in my opinion, and for essentially the same reasons why the exemption provided by s 38(6) applies in this case, I conclude that the delegate was right to hold that the exception to the requirement of s 38(7) had also been met in this case.

Were the conditions imposed by the delegate illusory and provide no real protection?

101 The AHA took issue with the expressions “a locked cabinet” and “electronically surveilled” as appear in the conditions imposed by the delegate. It submitted that these expressions were so vague as to be meaningless.

102 It took issue with the condition prohibiting the sale of more than six bottles or cans per person per transaction. It submitted that whilst the condition was presumably intended to prevent the number of products that a patron could purchase it was illusory because it did not prevent a customer from attending the Supermarket on multiple occasions on a single day purchasing six bottles at a time.

103 It took issue with the condition precluding advertising or promotional materials for liquor sold under this licence in the licensed premises or within the shopping centre where the licensed premises is located. It contended that this only applied to the licensee and that there was nothing to prevent someone else, such as the property owner, from undertaking such advertising or promotion.

104 It took issue with the use of the word “Note” in connection with the prohibition of stocking products with the word “Jelly” in the product name. It contended if it is construed as meaning that it is a condition, rather than a note, it is ineffectual because the prohibition is directed only to the English word jelly and not to the use of that word or its equivalent in any language.

105 Catalina submitted that there was some tension between the AHA’s submission that the conditions are illusory and provide no real protection

and its contention that the conditions are so significant that they have fundamentally changed the nature of the licence granted, such that it cannot be described as a packaged liquor sales licence.

- 106 It submitted that in any event, this ground is without merit. It submitted that the evidence before the delegate clearly disclosed what “electronically surveilled” meant, and that is evidently what the delegate is referring to by the imposition of condition 3. It pointed to material that it placed before the delegate that included its policy which set out the conditions under which it would sell liquor, which stated: “The entire store is highly illuminated with tube-florescent LED lighting and is electronically surveilled 24/7 using a 1080p HD IP cameras with UPS power backup. It submitted that if there was any ambiguity as to what was meant by “electronically surveilled”, this makes it clear what is proposed (i.e. high-definition CCTV with a backup power source).
- 107 Catalina submitted that Condition 4 is clear. It operates as a limit on the amount of liquor that can be purchased at any one time by a customer.
- 108 It submitted that Condition 7 is also clear and operates as a restriction on Catalina’s ability to advertise the sale of liquor. It submitted that these are sensible conditions that provide additional safeguards on the sale of liquor.
- 109 It submitted that Condition 8 restricts the use of the word “Jelly”, which might have appeal to children. It submitted that any concern that it did not go far enough is amply allayed by Condition 7 which bars advertising and its policies that direct it not to sell liquor to persons in school uniform and to check the age of customers who look under 25.

Consideration

- 110 In *The Curious Squire*¹² this Court made some observations about how the conditions of a licence are to be construed. It commenced by making the point a liquor licence is a legal document that contains statements of rights and obligations and as such it should be construed in the same way as other legal documents that stipulate rights and obligations, such as a statute or a written contract. It then observed that “[i]n connection with licence conditions ... consideration must be given to the fact that conditions are often inserted by the consent of the licensee and intervening or objecting parties and that they may have been drafted by laypersons with some urgency in the context of a conciliated outcome”. It said:

They might therefore be inelegantly expressed or contain internal inconsistencies when read with other conditions within the licence. In undertaking the task of construction the Court must ask itself what a reasonable person, knowing the background giving rise to the

¹² [2014] SALC 23 at [48]-[49].

condition, would understand the words to mean. When there is ambiguity, this may inform which construction should be preferred. It might on occasions indicate that the strict meaning of the words used makes no sense and that therefore there must have been a serious linguistic error in the drafting. In such a case the literal construction will have to yield to one that reflects common sense.¹³

- 111 As a matter of common sense “a locked cabinet” is plainly intended to mean a cupboard or something similar that is not accessible without being opened by some type of mechanism, whether that be a key, padlock, or electronic device. As a matter of common sense “electronically surveilled” is plainly intended to mean that the area is subject to an electronic camera that records activity undertaken in that area.
- 112 Again with the observations made in *The Curious Squire* in mind, I think it is plain enough that the condition restricting the sale of liquor to not exceed six bottles or cans per person per transaction is intended to mean per transaction per day and that it prohibits the continuous sales to a person over the course of a day. The fact that the prohibition regarding the use of the word “Jelly” is under the heading of a Note, is inconsequential. It is plainly intended to be a condition. In the context of an Asian style store and an application based upon the ethnicity of the community a reasonable person, knowing that background would assume that the prohibition applies to not only the English word jelly but any other language equivalent.
- 113 Whilst I accept that the condition precluding advertising or promotional materials would not prevent someone else, such as the property owner, from undertaking such advertising or promotion, the likelihood of this causing an issue is so remote as to no warrant concern.
- 114 I therefore reject the submission that the delegate imposed conditions that were illusory and offered no real protection.

Was the grant of this application in the community interest?

- 115 The AHA submitted that the application had little to commend it. It submitted that the proposed premises did not create a one stop shop experience; the locality was relatively impoverished; the migrant population within the locality was unconnected with the types of liquor that were proposed to be sold; the licence that was ultimately granted had little in common with the initial proposal; and the survey that was relied upon to indicate community support was of marginal relevance because many who responded to it lived outside of the locality. It submitted that if there was an unmet demand for Asian style liquor products a large range of such products was on offer at the Parafield Airport Liquor Store. It

¹³ Ibid.

submitted that it was of little consequence that this facility was not in the relevant locality because it was easily accessible by car. It submitted that the delegate was plainly and rightly concerned that the proposal carried with it a risk of harm as evidenced by the many conditions that he imposed. It submitted that in connection with an application that the delegate himself described as “finely balanced”, in light of these concerns, the application should have been refused.

- 116 Catalina submitted that the delegate was correct to find that the grant of the application was in the public interest (and the community interest), given: the community engagement that occurred clearly established the general demand for and interest in the categories of liquor proposed; the present lack of availability of boutique Asian liquor in the locality; the additional convenience that will exist for persons who shop at the PP Supermarket who, in addition to wishing to purchase their Asian groceries wish to purchase their Asian liquor at the same time; and the convenience to other persons in the locality who wish to enjoy boutique Asian liquor but at present have difficulty sourcing it.
- 117 Catalina submitted that this case comprised of no more than a modest application to sell a small range of niche Asian liquor products in a speciality Asian grocery store that does not operate as part of a chain. It noted that it had been granted subject to very stringent conditions. It submitted that the locality is not awash with liquor (let alone Asian liquor) and there is no evidence of any particular harm that might arise consequent on the grant of this particular application, in contradistinction to any other application for a packaged liquor sales licence.
- 118 Catalina noted that aside from the AHA, the application only met one other objection opposing the grant of the application who no longer pressed its objection on the basis that Catalina varied its application and proposed a number of conditions. It noted that the application met no further opposition from any other stakeholders, including SAPOL and the Council, which it submitted is significant. It submitted that the AHA’s apparent concerns about community harm and setting a dangerous precedent for the sale of liquor in the community must be viewed in light of the fact that it is the peak industry body representing operators selling liquor in South Australia.

Consideration

- 119 As was stated by this Court in *Liquorland (Australia) Pty Ltd (Park Holme)*¹⁴ the community interest test “... involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a

¹⁴ [2020] SALC 37 at [27].

new licence and hence a new take away facility for the purchase of take away liquor in the relevant locality.”

- 120 I repeat what I said earlier: this case was about an application for a packaged liquor sales licence to sell a range of 30 products of no more than six bottles in any one transaction in a specialist Asian supermarket situated within a shopping centre that could hardly be described as a retail magnet. As such the risk that granting the application could cause appreciable harm to members of the relevant community is slight. Based upon my review of the evidence, I find that the grant of the application will result in greater convenience for customers who shop at the PP Supermarket and that members of the relevant community would be attracted to Asian style liquor products that were not specific to their particular Asian ethnicity in the same way as they were attracted to other Asian style products on offer at the Supermarket. Although I consider that the delegate erred in taking into consideration the fact the Commissioner had issued packaged liquor sales licenses in respect of special circumstances licences that had transitioned, I do not consider that this effects the outcome. Having independently reviewed the evidence, like the delegate, I find that the grant of the application is in the community interest.

Did the delegate err in granting the licence and thereby establishing a precedent that is undesirable?

- 121 I understood the AHA to submit that based upon the grant of this application, it would be difficult to conceive how any other application to combine a specialist supermarket with an outlet for a limited range of liquor could not succeed, and that this would be inconsistent with the very clear policy evinced by the Act of not permitting the wholesale alignment of supermarkets and take away liquor.
- 122 Catalina submitted that this concern is misconceived for three reasons.
- 123 First, because each application must be considered and determined on its own particular facts. It submitted that to reason simply that it must be in the community interest to grant one application because the licensing authority concluded in connection with a different application that it was in the community interest to grant that application would be erroneous, not least because it would involve the authority failing to make a proper assessment of whether the particular application under consideration was in the community interest.
- 124 Secondly, this is a unique case. Catalina submitted that it was significant that the Supermarket is a speciality Asian supermarket. It submitted that the vast majority of products that are sold are of Asian origin and is plainly distinguishable from the 260 or more conventional supermarkets in South Australia. It submitted that it looks and feels nothing like a Woolworths,

Coles, IGA Foodland, Drakes or ALDI supermarket and is not part of a chain. Catalina submitted that as such no precedent would be established by the grant of this application.

- 125 Thirdly, that the delegate himself stated that the grant of the licence would not set any relevant precedent that would somehow bind the Commissioner in considering any future application.

Consideration

- 126 There is no doubt that a licensing authority can use the discretion conferred by s 53 of the Act to refuse an application because it considers that to grant it would set an undesirable precedent.¹⁵

- 127 As I noted earlier, the AHA's submission that, as a general rule, liquor should not be sold in supermarkets, is well made. As was observed by this Court in *On the Run Pty Ltd*.¹⁶

In other jurisdictions in Australia, the wholesale alignment of take away liquor facilities with branded retail facilities is permitted, but in this State we have not gone down that path. Thus, a licensing authority must proceed from the premise that the wholesale alignment of liquor facilities with other retail facilities, from a public interest perspective, may have some negative connotations.¹⁷

- 128 Thus the grant of a packaged liquor sales licence that permits the sale of take away liquor in a supermarket must be seen as a very exceptional thing. If the grant of this application provided any opportunity for this licence to transition into one that permitted the sale of a range of liquor from within a conventional supermarket in metropolitan Adelaide, there would have been every reason on public interest grounds to refuse it.

- 129 An example of this under the Act as it was prior to the recent changes can be found in the judgment of this Court in *Hyde Park Gourmet Grocer*.¹⁸ That case concerned an application for a special circumstances licence to permit the sale of packaged liquor in premises trading as the Hyde Park Gourmet Grocer. The proposal was that it would sell a limited range of liquor of a premium, boutique, organic or collectable nature of about 100 or perhaps 200 different lines. The Court observed that notwithstanding the store's excellent range of organic and gourmet foods there was little to distinguish the business from many IGA branded Supermarkets containing a separate deli area. It then noted that if the licence was granted, "even with appropriately worded conditions, the Court would be faced with complaints from consumers as to the limited range and this would be a

¹⁵ *Rhino Room Pty Ltd trading as The Howling Owl* [2020] SALC 40 at [24].

¹⁶ [2022] SALC 109.

¹⁷ *Ibid* at [36].

¹⁸ [2009] SALC 32.

“stepping stone” to seeking a full retail liquor merchant’s licence.” The Court considered that to grant the licence “would encourage applications for the grant of a liquor outlet in every upmarket supermarket” and rejected it on that basis.

- 130 The business model currently operated by Catalina at the PP Supermarket could change or it could sell the business to another entity. The possibility that in time the business could return to the conventional supermarket that it once was, cannot be excluded. The same would be true of any specialist supermarket. Thus the concern that the grant of this application would set an undesirable precedent is a matter that requires consideration.
- 131 The delegate’s imposition of a condition restricting the type of liquor that the licensee can sell or supply under the licence, limited as it is to Japanese made liquor, Korean made liquor, and Chinese made rice wine, goes a long way to allaying this concern. This is so because any application to vary or remove this condition would have to satisfy the community interest test.¹⁹
- 132 But in my opinion, more was required. To allay any possibility that this licence could in time permit the sale of liquor within a conventional supermarket, and in conformity with the examples provided in the Review Report, such as “Cultural Specialist Grocers’ and ‘a cultural specialist grocer wishing to sell other lines of liquor’, a condition to ensure that the licence is limited to that style of business was also needed. With respect, the delegate should have also made it a condition of the licence that the primary business of the licensee at the premises is the sale of Asian style food and grocery products.

Conclusion

- 133 Notwithstanding the error made by the delegate, the Court is independently satisfied that the grant of the application is in the community interest and that the circumstances permitting the exemptions provided for by s 38 have been made out. But in order to ensure that the application does not create an undesirable precedent, and to protect the integrity of the grant of this application for the future, an additional condition over and above those made by the delegate was required.
- 134 The application for review is therefore allowed for the purpose of adding a condition of the licence that the primary business of the licensee at the premises is the sale of Asian style food and grocery products.

¹⁹ Section 53A(4)(b) of the Act provides that a designated application includes an application “that the licencing authority has determined, in accordance with the community impact guidelines, to be a designated application”. Schedule 1 of the guidelines provides that an application to remove or vary a condition restricting the type of liquor that the licensee can sell or supply under a packaged liquor sales licence is a designated application.