

**LICENSING COURT OF SOUTH AUSTRALIA**

BWS WOODCROFT

**JURISDICTION:**                    **Licensing Court of South Australia**  
Liquor Licensing Act 1997

**CASE NO/S:**                        29 of 2022

**HEARING DATE:**                26 and 27 October 2022

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

**DELIVERED ON:**                9 December 2022

**CATCHWORDS:**

*Application for review of the Commissioner’s decision to refuse an application for a packaged liquor sales licence in respect of proposed premises in the Woodcroft Market Plaza Shopping Centre – The Commissioner found that the applicant is an experienced and reputable licensee and that it has well trained staff and a comprehensive range of policies and procedures – The Commissioner noted evidence of a lower level of crime rate in the locality compared to the State as a whole and that the relevant locality had a low level of liquor licence density and was not awash with take away liquor facilities – Based on submissions that he called for he found that in light of the effects and impacts of the Covid-19 pandemic, he ought to proceed with extra caution in dealing with an application for an additional take away liquor facility – The Commissioner refused the application because he considered that the grant of the application would set an undesirable precedent because it was likely to result in the wholesale alignment of packaged liquor stores and shopping centres – The locality has within it two take away liquor facilities, one of which is attached to a hotel and the other being a stand-alone facility – **Held** that in light of the low take away liquor facility density in the locality, the measure of added convenience to a significant number within the relevant community of being able to purchase packaged liquor store in the proposed premises, the fact that the proposed premises is attached to a large full line supermarket with abundant parking and the absence of adverse factors such as a concerning vulnerability to members of the relevant community to the adverse consequences of alcohol the Commissioner erred in concluding that the negative aspects of the application outweighed the positives – The evidence does not establish that the effects and impacts of the Covid-19 pandemic continue to*

*result in increased consumption of alcohol – Held that in light of the unique characteristics of the relevant shopping centre the Commissioner erred in concluding that the grant of this application would create an undesirable precedent – Held that the Commissioner erred in finding that it was not in the public interest to grant the application – Held that the application for review is allowed and in lieu of the Commissioner’s decision refusing the application, the application is granted – Liquor Licensing Act 1997.*

*Liquorland (Australia) Pty Ltd (Parkholme)* [2020] SALC 37  
*Woolworths Ltd (BWS – Woodcroft) v Carleton Investments Pty Ltd and others* [2016] SALC 35  
*Mac’s Liquor Woodcroft* [1998] SALC 2  
*Hove Sip n Save* [2021] SALC 7  
*Woolworths Ltd v Drase Coosit Pty Ltd & Ors* [2010] SASC 13; (2010) 106 SASR 146  
*Liquorland McLaren Vale (No 2)* [2022] SALC 53  
*BWS Cumberland Park* [2022] SALC 70  
*BWS Para Hills* [2022] SALC 73  
*Woolworths Ltd v Carleton Investments Pty Ltd* [2016] SASCFC 157  
*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298  
*Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61  
*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361  
*Cross on Evidence, 12th ed, 2019, LexisNexis, Sydney*  
*W G Miller: The Data of Jurisprudence*  
*Reich v Client Server Professionals of Australia Pty Ltd* [2000] NSWIRComm 143; (2000) 49 NSWLR 551  
*Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd* [2002] SASC 17; (2002) 81 SASR 337  
*Cellarbrations Mannum* [2021] SALC 42  
*Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors* [2018] SASCFC 31

## **REPRESENTATION:**

Counsel:

Applicant: Mr T Besanko with Mr P Connelly

Objector: Mr S Henry KC with Mr B Allen

Solicitors:

Applicant: Clelands Lawyers

Objector: Wallmans Lawyers

- 1 This is an application seeking a review of a decision of the Commissioner for Liquor and Gambling (the Commissioner) wherein he refused an application by the applicant, Endeavour Group Ltd, (Endeavour) for a packaged liquor sales licence to trade under the BWS badge at proposed premises within the Woodcroft Market Plaza Shopping Centre (Woodcroft Plaza) at 217 Pimpala Road, Woodcroft.
- 2 Endeavour contends that the Commissioner made several errors in reaching his decision and that on the evidence presented the licence should have been granted.
- 3 The application before the Commissioner was opposed by Carleton Investments Pty Ltd, the licensee of the Woodcroft Tavern (the objector). The objector contends in this Court that the Commissioner was right to refuse the application.
- 4 A packaged liquor sales licence is one of several categories of liquor licences available under the *Liquor Licensing Act 1997*. It is within a special category of applications defined in the Act as a ‘designated application’. Pursuant to s 53A of the Act, a ‘licensing authority may only grant a designated application if ... satisfied that granting the designated application is in the community interest.’ Thus to have succeeded in its application Endeavour needed to persuade the Commissioner that the grant of the application was in the community interest.
- 5 Endeavour also needed to satisfy the Commissioner 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.
- 6 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’.

- 7 In refusing the application the Commissioner found that it was not in the community interest to grant the application. He also found that it was not in the public interest to do so.
- 8 The material that Endeavour placed before the Commissioner included a Community Impact Report (the CI Report) that was prepared by the planning expert, Mr Graham Burns, as well as submissions made by its lawyers (the submissions).
- 9 The CI Report noted that the proposed store was to be co-located with a Woolworths supermarket at Woodcroft Plaza. The supermarket is over 40 years old. It is a large full line supermarket occupying some 3,880 square metres. The submissions state that the supermarket has an average of over 21,000 transactions per week. Woodcroft Plaza has several other offerings, comprising of a bakery, several take away food outlets, a chemist, a beauty salon, a hairdresser, a real estate agency, a newsagency, an op shop, a gymnasium and two ATMs. It is serviced by a car park containing 304 spaces. It was substantially developed and extended in 2014-5. It is near to two large retirement villages, and it was submitted that it plays an important role in the lives of those who reside there. The CI Report noted that there is a prevalence of retirement housing in the area around Woodcroft Plaza and that there has been a steady increase in the median age of its residents.
- 10 Endeavour pitched its case on the basis that Woodcroft Plaza is very popular and is easily accessed and well serviced by public transport. The submissions stated that the Woolworths supermarket at Woodcroft Plaza is a full-line supermarket that offers an extensive range of products and shopping experience relative to smaller supermarkets and the many members of the public living in the vicinity of Woodcroft Plaza, including retirees who might walk to it, would welcome the opportunity of accessing a convenient modern bottle shop as part of their shopping trip.
- 11 As was observed in *Liquorland (Australia) Pty Ltd (Parkholme)*<sup>1</sup> the starting point in a case such as this is the identification of the relevant locality.
- 12 In a previous application to this Court, in respect of a retail merchant's liquor licence at the same shopping centre, the Court held that 'the relevant locality plainly includes the entire suburb of Woodcroft and extends further north, south and west into adjoining suburbs'.<sup>2</sup> This observation was made in connection with the former 'needs test'.

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<sup>1</sup> [2020] SALC 37 at [16].

<sup>2</sup> *Woolworths Ltd (BWS – Woodcroft) v Carleton Investments Pty Ltd and others* [2016] SALC 35 at [26].

- 13 In *Liquorland Parkholme* the Court noted that under that test, because it was concerned with the adequacy of the existing facilities in the relevant locality to cater for the public demand for liquor, the issue of locality was very much directed towards identifying the relevant trade area which included secondary catchment areas. It noted that under the Act in its current form, because the focus is on ‘members of the community and any relevant stakeholders’ and the guidelines that guide designated applications refers to the locality as referring ‘to the area surrounding the licensed premises/proposed licensed premises and is the area most likely to be affected by the granting of the application’ and suggest as a guide that the locality of licensed premises in the Adelaide Metropolitan Area is the area within a two kilometre radius of the site of the relevant premises, the ‘locality’ is much more focussed on primary trade catchment areas, as opposed to the secondary catchment areas.
- 14 In this case the CI Report considered that the relevant locality was defined by a two-kilometre radius.
- 15 It is convenient for me to now make some observations about the suggested locality and the area that abounds it. I do so by reference to the findings made by this Court in the most recent previous application concerning this shopping centre<sup>3</sup> and the observations made on a view conducted with the lawyers for Endeavour and the objector in this case.
- 16 Woodcroft is a suburb of metropolitan Adelaide. It is located about 20 kilometres south of the central business district. By road it is connected to the city by the Southern Expressway and Main South Road through Panalatinga Road.
- 17 Panalatinga Road commences just near the junction of Main South Road and Old South Road and runs in a north south direction. It comes off the Southern Expressway through an exit lane. Relevantly, it is subject to an 80kmh speed limit.
- 18 Woodcroft is bordered to the north by Reynell Road, to the south by Bains Road, to the west by Panalatinga Road, and to the east by the Hills Face Zone.
- 19 About halfway between Reynell Road and Bains Road is Pimpala Road. All of these roads run in an east west direction, and they all bisect Panalatinga Road.
- 20 North of Reynell Road is the suburb of Reynella East. To the northeast is Happy Valley. To the west of Panalatinga Road are the suburbs of Old Reynella and Reynella and to the southwest, Morphett Vale.

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<sup>3</sup> *Woolworths Ltd (BWS – Woodcroft) v Carleton Investments Pty Ltd and others* Ibid.

- 21 On the western corner of the intersection of Panalatinga Road and Bains Road is the Woodcroft Town Centre.
- 22 Woodcroft Market Plaza is accessed from Pimpala Road. It is about 300 metres east of intersection of Pimpala Road and Panalatinga Road. It is about a kilometre and a half from the Woodcroft Town Centre. By road the distance is about 1.8 kilometres.
- 23 In earlier proceedings in this Court the Woodcroft Town Centre was described as follows:

The Woodcroft Town Centre is anchored by a Cheap as Chips store, an Aldi Supermarket and a Drakes Supermarket. It has about ten cafes, restaurants and takeaway food outlets. It has a chemist, numerous fashion stores, numerous health and beauty shops, a Flight Centre shop, a Health Partners Optical/Dental shop, a People's Choice Credit Union, SA Pathology, a Smokemart, a newsagency and post office, Woodcroft Orthodontics, a Medical Centre, a Caltex 24 hour Service Station, a Little Learners Child Care Centre, a bus terminal, a Community Centre/Library, as well as the Woodcroft Tavern and the Woodcroft BWS store.<sup>4</sup>

- 24 In that same case it was noted that the Woodcroft Tavern contained a takeaway liquor facility about 300 metres south of the BWS store that traded under the Thirsty Camel badge. It was described as containing 'a large drive through that connects to a walk-in area. The walk-in bottle shop is of fair quality offering a moderate range of liquor'.
- 25 The BWS store was noted as being located in the northern end of the Woodcroft Town Centre; that it does not permit free access into and out of the store from the centre; and that it is a typical BWS store that could be described as a convenience store offering a reasonably good range of liquor.
- 26 Based on the recent view conducted by the Court with the parties' lawyers, all of these descriptions appear to remain accurate.
- 27 About three kilometres or so west of the intersection of Pimpala Road and Panalatinga Road is the Southgate Shopping Centre. It is a reasonably large shopping centre that is anchored by a Coles Supermarket, a Target store and includes a variety of stores. It also contains a retail liquor store trading under the Liquorland badge. In the previous case it was described as a typical, if not slightly larger than normal, Liquorland store, that could be described as a convenience store offering a reasonably good range of liquor. That description appears to remain accurate.

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<sup>4</sup> Ibid at [36].

- 28 About two kilometres northeast of the intersection of Reynell Road and Panalatinga Road is the Happy Valley Shopping Centre on Kenihans Road. It is a moderately sized shopping centre anchored by a Foodland Supermarket. It contains about twenty retail facilities. It contains a retail liquor store trading under the BWS badge.
- 29 The Crown Inn is on Old South Road in Old Reynella. The St Francis Winery Resort Hotel is also in Old Reynella. Both are a few hundred metres northwest of the intersection of Reynell Road and Panalatinga Road.
- 30 The Emu Hotel is on Main South Road, Morphett Vale, about four kilometres southwest of the intersection of Panalatinga Road and Bains Road. Amongst its offerings is a drive through bottle department trading under the BWS badge. In addition to this is a take away liquor facility within a nearby moderately sized shopping centre, known as the Morphett Vale Village Shopping Centre. It also trades under the BWS badge.
- 31 The submissions contended that there was only one facility within the locality that was trading under a packaged liquor sales licence, being the BWS store in the Woodcroft Town Centre. They contended that it, and the take away liquor facility attached to the Woodcroft Tavern, catered for those who frequent that centre. They contended that they are not convenient options for those living in the vicinity of the Woodcroft Plaza of those who rely upon that centre for their daily or weekly grocery shopping needs.
- 32 The submissions contended that the take way liquor facilities in the Southgate Shopping Centre, the Happy Valley Shopping Centre and the Morphett Vale Village Shopping Centre were all a considerable distance from the proposed store that were either on the periphery of the relevant locality or were outside of it and were irrelevant to Endeavour's application. They noted that in an earlier application for a retail liquor merchant's licence for premises at the Woodcroft Plaza this Court said of these take away liquor facilities: 'by and large they do not really cater for the bulk and are out of their area in that sense and play little if any part in their daily lives'.<sup>5</sup>
- 33 The Commissioner noted that the application before him was one of a number that had been lodged for packaged liquor sales licences and resolved that it would be appropriate to call for submissions on the issue of harm. He invited submissions from Associate Professor Michael Livingston, who has conducted extensive research examining the relationships between the availability of alcohol, alcohol consumption and

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<sup>5</sup> *Mac's Liquor Woodcroft* [1998] SALC 2 at p 4.

alcohol related harm and from the Royal Australasian College of Surgeons (RACS), and Australia's National Research Organisation for Women's Safety (ANROWS). He also had before him submissions from the Australian Competition and Consumer Commission (ACCC) noting that there are a substantial number of packaged liquor sales licences that are owned by a small coterie of entities, including Endeavour, and that this created issues regarding the potential exclusion of others and consequential competition concerns.

- 34 Professor Livingston submitted that there was a clear association between the density of liquor facilities and alcohol related harm including violence.
- 35 RACS asserted that the Covid-19 pandemic was associated with an increased incidence of domestic violence. It also asserted that there was increased alcohol consumption in 2020 and an increase in domestic violence in the same period. The inference being that the two were connected. It asserted that Covid-19 had resulted in increased stress, pressure and uncertainty. It submitted that allowing further saturation of liquor outlet density would be to send the wrong message and would set a dangerous precedent for future applications.
- 36 ANROW's asserted that alcohol is involved in around half of all domestic and family violence and that there was a clear association indicating that alcohol increases the severity of that violence. It asserted that a study in May 2020 conducted by the Australian Institute of Criminology, that examined the impacts of the Covid-19 pandemic on domestic violence, reported an increase in alcohol consumption in the three months from February 2020. It also asserted that another study 'highlighted that the changes to alcohol consumption during large-scale disasters may increase harm to families'.
- 37 Underpinning RACS and ANROW's submissions is the contention that the impacts of the Covid-19 pandemic included a noticeable increase in alcohol consumption.

### **The Commissioner's decision**

- 38 The Commissioner found that the relevant locality was the area within a two-kilometre radius of the proposed premises. He found that many of the people who shop at the Woodcroft Plaza live within the locality. He found that for these shoppers the grant of the application would be likely to result in increased convenience should they wish to purchase take away liquor when shopping. He found that the number who would benefit was significant and comparable to the numbers considered by this Court in *Liquorland Parkholme*.<sup>6</sup> He noted that surveys demonstrated that there was significant community support for the application and that 95% of

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<sup>6</sup>[2020] SALC 37.

those surveyed thought that it would be more convenient to do their grocery and liquor purchasing from the same location. He qualified this with an observation made by this Court in refusing an application concerning the same proposal in 2016 that the alternative of shopping at the Woodcroft Market Plaza and purchasing take away liquor from the Woodcroft Town Centre involved no more than a five minute drive and that it was not a difficult trip.<sup>7</sup>

- 39 The Commissioner dismissed the concerns expressed by ACCS. He noted that they did not deal specifically with the within application and that they did not establish that the grant of this application would result in diminished competition, market saturation or market dominance.
- 40 The Commissioner noted that Endeavour is an experienced and reputable licensee and that it has well trained staff and a comprehensive range of policies and procedures.
- 41 The Commissioner noted evidence of a lower level of crime rate in the locality compared to the State as a whole. He noted that the relevant locality had a low level of liquor licence density and was not awash with take away liquor facilities.
- 42 Based on the submissions made by Professor Livingston, RACS and ANROWS, he stated that in light of the effects and impacts of the Covid-19 pandemic, he ought to proceed with extra caution in dealing with an application for an additional take away liquor facility.
- 43 The Commissioner considered that the grant of the application would set an undesirable precedent because it was likely to result in ‘the wholesale alignment of packaged liquor stores and shopping centres’. He stated that the increased co-location of liquor stores and supermarkets was inconsistent with the objects of the Act and Parliament’s intention. This appears to be a reference to the observations made by this Court in *Hove Sip n Save* where it said:

The legislature has made a clear policy decision not to go down the path that other jurisdictions have taken in connection with allowing the wholesale alignment of take away liquor facilities with supermarkets. In conformity with this, and the views previously expressed by this Court and the Supreme Court that it is not in the public interest for there to be an over-supply of retail liquor outlets...<sup>8</sup>

- 44 He concluded by saying:

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<sup>7</sup> BWS Woodcroft Ibid.

<sup>8</sup> Ibid at [139].

Having considered the Objects of the Act, I am of the view that granting this application would not be consistent with ensuring that the sale and supply of liquor occurs in a manner that minimises harm and potential for harm caused by the excessive or inappropriate consumption of liquor, and would not be consistent with the responsible development of the licensed liquor industry. Rather, granting this application would be a further step towards proliferation and would provide a precedent that would support the wholesale alignment of packaged liquor and shopping centres, which is not desirable in circumstances where the approval of the application will confer little more benefit to the community than providing even more convenience in a locality where consumers already have one-stop-shop options in and about a locality within a 5 minute drive of the proposed offering.

### **Endeavour's case on review**

- 45 Endeavour submitted that the Commissioner erred in finding that it was not in the community interest or the public interest to grant this application because he gave too much weight to his concern about the alignment of packaged liquor stores and shopping centres.
- 46 It submitted that it was notable that the only entity that had expressed opposition to its application was a commercial competitor within the locality. It submitted that whether or not the application might result in some economic impact upon the objector was irrelevant.
- 47 Next, it submitted that this Court should not be concerned that on three previous occasions applications for a bottle shop at the Woodcroft Plaza had failed, because each of these were made under the now redundant 'needs' test. It noted that this Court in *Liquorland Parkholme*<sup>9</sup> had observed that the needs test no longer applies and to apply it, or something like it, would be an error.
- 48 It submitted that on review this Court is required to conduct a real review of the Commissioner's findings and reasons and may decide for itself whether the grant of the application is in the community interest and not contrary to the public interest.
- 49 It submitted that in conducting the evaluative exercise that the community interest test requires, this Court should not be concerned about the so-called wholesale alignment of supermarkets and bottle shops. It submitted that to conclude otherwise would be to misconstrue and take the observations made in *Hove Sip n Save* out of context.
- 50 It submitted that in *Hove* the concern expressed by the Court was in connection with the wholesale alignment of take away liquor outlets with

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<sup>9</sup> Ibid.

supermarkets, not shopping centres. It also made the point that the Court's remarks as to the risk of setting an undesirable precedent were coloured by the 'small number of the local community who visit the Hove Shopping Centre' and were directed towards the particular facts of that case, which it submitted are readily distinguishable from the present application.

- 51 It noted that other factors relevant to the refusal of the application in *Hove* included the poor quality of the application, such as a lack of statistics and general information about facilities in the locality or vulnerable groups, the deficiencies in the petition evidence, the applicant's lack of relevant experience in the sale of liquor, concerns about the applicant's appreciation of what is required of a licensee of a packaged liquor sales licence, the relatively small size of the shopping centre in which the proposed premises was to be situated in, and the limited number of customers using that centre.
- 52 It submitted that in contrast to this, its application was comprehensive, it enjoys a good reputation as a packaged liquor licensee, and it is proposing a good quality bottle shop in a well patronised and relatively much larger shopping centre.
- 53 It submitted that the Commissioner seemingly failed to have regard to the Court's earlier warning in *Hove* that any argument as to the undesirability of aligning take away liquor facilities with supermarkets needed to be supported by evidence.
- 54 It submitted that the Commissioner failed to give sufficient weight to the observations of Kourakis J (as he then was) in *Woolworths Ltd v Drase Coosit Pty Ltd & Ors* that it is a 'notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres'.<sup>10</sup>
- 55 Reference was also made to the recent observation made by this Court in *Liquorland McLaren Vale* that the 'fact that a proposed store might be very conveniently located cannot be a defining characteristic that dooms an application for a packaged liquor sales licence to failure'.<sup>11</sup>
- 56 It submitted that there was no evidence before the Commissioner that would support a finding that the location of the proposed store in a standalone tenancy not immediately adjacent to the Woolworths supermarket will lead to an increase in alcohol consumption, let alone an increase in alcohol related harm. It submitted that the evidence does not rise above the risk of harm attendant upon the grant of any new packaged

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<sup>10</sup> [2010] SASC 13; (2010) 106 SASR 146 at [55].

<sup>11</sup> *Liquorland McLaren Vale* [2022] SALC 53 at [155].

liquor licence. It noted observations made in *Liquorland McLaren Vale* that harm minimisation does not equate to harm eradication.

- 57 It submitted that the Commissioner's concern that the grant of this application would be a further step towards proliferation was inconsistent with his earlier findings that the liquor licence density for the locality was lower than the State average and that the locality is clearly not 'awash' with take away liquor facilities.
- 58 It submitted that this Court should find that there is a significant portion of the population who would prefer to shop at a convenient and easily accessible neighbourhood shopping centre such as Woodcroft Plaza in contrast to larger and more congested centres such as the Woodcroft Town Centre.
- 59 It submitted that the circumstances of this locality are not unlike that considered by the Court recently in *BWS Cumberland Park*,<sup>12</sup> where the Court was prepared to grant an application for a new BWS store in an established well populated locality notwithstanding a standalone BWS store already existing in the locality and two other BWS stores existing on the edge of, or indeed just outside of, the relevant locality.
- 60 It submitted consistent with the Court's observations in *Liquorland Parkholme* and *BWS Para Hills*,<sup>13</sup> there is no evidence of any greater number of vulnerable persons in this community as opposed to the general population, nor any evidence the application poses anything but a low risk of harm to the community.
- 61 It submitted that there is nothing unusual about the area under consideration in this case. By reference to *Liquorland Parkholme* it submitted that this is an unexceptional, non-descript locality and the application is a modest one which involves no more than a request for a packaged liquor sales licence to enable the creation of an attractive, convenience style bottle shop in a shopping centre with a popular supermarket.
- 62 It submitted that the submissions made by Professor Livingston, RACS and ANROWS lacked probative value in this case as they were expressed at a general level and were not specific to this application or the local community.
- 63 It submitted that if the Court was concerned about the impact of Covid-19 on drinking patterns, those concerns should be allayed by research papers that indicate that although there was an increase in alcohol consumption in March 2020, consumption decreased in subsequent months. These

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<sup>12</sup> *BWS Cumberland Park* [2022] SALC 70.

<sup>13</sup> *BWS Para Hills* [2022] SALC 73.

papers were annexed to an affidavit of its Business Development Manager, Mr James Scott-Mackenzie. Mr Scott-Mackenzie's affidavit annexed details of research from academics from the Ehrenberg Bass Institute for Marketing Science at the University of South Australia that surveyed findings related to wine and alcohol consumption in Australia during the pandemic, a survey conducted by Roy Morgan, and statistics collected by the Australian Bureau of Statistics.

- 64 Endeavour could have produced its own sales figures to make good its assertion that the Covid-19 pandemic has not been associated with a sustained period of increased alcohol consumption. It noted that had it done so, the objector would have been entitled to inspect the data relied upon by BWS. It stated that for commercial reasons it did not wish to share that information with the objector.
- 65 Instead it has sought to make good its assertion through successive National Wastewater Reports prepared by the Australian Criminal Intelligence Commission in respect of the analysis of wastewater across the various States and Territories (the Wastewater Reports). The Wastewater Reports detail findings signed off by the University of Queensland and the University of South Australia. They purport to provide accurate data regarding the consumption of methylamphetamine, amphetamine, cocaine, MDMA, MDA, heroin, cannabis, oxycodone, fentanyl, nicotine, alcohol and ketamine. Alcohol is measured by quantifying the amount of a specific metabolite of ethanol, ethyl sulphate, in wastewater to extrapolate the number of standard drinks per 1,000 persons.
- 66 Report 16<sup>14</sup> demonstrated that for the twelve month period between December 2020 and December 2021, alcohol consumption had not changed substantially and that alcohol consumption in South Australia was the lowest in the country. It showed that between August 2019 to February 2022, consumption in the Adelaide metropolitan area had gone from about 1,300 standard drinks per 1000 residents per day, dropping to around 700 standard drinks per 1,000 residents in April 2020, with minor fluctuations around 1,000 standard drinks per 1,000 residents in the months that followed. The regional averages were generally lower, fluctuating between 500 to 700 standard drinks per 1,000 residents.
- 67 Report 17<sup>15</sup> covers sampling in April and June 2022. It indicated that across Australia there was a decrease in alcohol consumption over the period from December 2021 to April 2022, but an increase in South Australia. In metropolitan Adelaide this is from about 1,000 standard drinks per 1,000 residents in February 2022 to about

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<sup>14</sup> Exhibit (Ex) W3.

<sup>15</sup> Ex W4.

1,500 standard drinks per 1,000 residents in June 2022. There appears to be a trend emerging from about October 2020 of increasing alcohol consumption in metropolitan Adelaide, but the amount is below consistent measures of greater than 1,500 standard drinks per 1,000 residents measured in the period from June 2017 to February 2019. The report states that South Australia along with Western Australia have the lowest alcohol consumption in the country.

- 68 Endeavour contends that the results of the Wastewater Reports should allay any concerns that this Court might have about the impact of Covid-19 on current alcohol consumption in the general community and in the relevant community.

### **The objector's case on review**

- 69 The objector submitted that the locality should be seen as the relevant area of interest and that it is the same area referred to and described in *Woolworths Ltd (BWS - Woodcroft) v Carleton Investments Pty Ltd and others*<sup>16</sup> in which the Court considered the licensed premises in and about the locality which included all of the take away liquor facilities identified earlier in these reasons. It noted that they comprised of six packaged liquor outlets or seven, if the Emu Hotel's drive through and bottle shop are counted separately. It noted that of these, the majority are owned by Endeavour and trade under the BWS badge.
- 70 Further, it informed the Court that the Crown Inn at Reynella is currently the subject of an application for transfer to Endeavour. It contended that if that transfer proceeds, the premises will most likely also trade as a BWS. It submitted that to grant the current application would result in yet another BWS store in the general locality. It submitted that to permit Endeavour to obtain such a dominance would not be consistent with stated object of the Act such as the expectations and aspirations of the public, and the responsible development of the licensed liquor industry.
- 71 The objector noted that there was a long history of refused applications in connection with Woodcroft Plaza. Whilst noting that these were rejected under a different test, it submitted that the repeated rejections were not without some significance. It submitted that the previous applications failed because of consistent findings that the proposed premises would merely provide a degree of extra convenience to some members of the public within the locality. It submitted that the degree of extra convenience was insufficient to justify the grant of the application. It submitted that the Commissioner was right to find that the approval of the application would '... provide little more benefit to the community than providing even more convenience in a locality where consumers already have one-stop-shop

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<sup>16</sup> [2016] SALC 35.

options in and about the locality within a 5 minute drive of the proposed offering ...’.

- 72 The objector noted that this Court held in *Liquorland McLaren Vale*, that the Commissioner was entitled to be concerned by submissions from RACS and ANROWS about the impact of Covid-19. It submitted that its evidence revealed increased sales of take away liquor at the Woodcroft Tavern was in the words of this Court in *BWS Cumberland Park* ‘compelling evidence that there was, and remains, a substantial increase in alcohol consumption as a result of the pandemic’ and in conformity with what was said in that case ‘now is not the right time to be increasing the opportunities for members of the public to purchase liquor from an additional take away liquor outlet’.<sup>17</sup>
- 73 This evidence comprised of its sales records as contained in an affidavit of Ryan Jones sworn on 13 October 2022. Mr Jones is the General Operations Manager of the corporate group that owns the objector. The sales records demonstrated that by reference to its trading figures in the months from January to September 2019, in January to September 2022, sales of beer were up 5%, wine up 56%, RTD’s up 45% and spirits up by 50%, with overall volume up 25%. It submitted that these figures speak loudly against any suggestion that sales have now dropped back to pre-Covid-19 levels.
- 74 The objector submitted that in these proceedings Endeavour would have been able to place the evidence of its trading figures to refute the objector’s evidence of increased sales of take away liquor since the commencement of the Covid-19 pandemic. It submitted that its failure to do so enabled the making of the inference that its figures would not have assisted its case. Reference was made to *Jones v Dunkel*.<sup>18</sup> That case is frequently cited as authority for the principle that where there is an unexplained failure by a party to give evidence or call witnesses or tender documents or other evidence in an appropriate case, an inference may be drawn that the uncalled evidence would not have assisted the party.
- 75 The objector submitted that the Commissioner was right to consider it undesirable for there to be a packaged liquor store aligned with all or most shopping centres across the State. It said that the grant of the application would set an undesirable precedent. It submitted that the Full Court’s findings in *Woolworths Ltd v Carleton Investments Pty Ltd* that the shopping centre ‘... comprises no more than a large supermarket and a handful of retail outlets ...’<sup>19</sup> remains true. It said that if a BWS store is justified at this shopping centre, it would be very difficult to refuse an application for the grant of a packaged liquor sales licence to permit the

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<sup>17</sup> *BWS Cumberland Park* [2022] SALC 70 at [56].

<sup>18</sup> [1959] HCA 8; (1959) 101 CLR 298.

<sup>19</sup> [2016] SASCFC 157.

establishment of a BWS store at comparable centres or in association with comparable supermarkets, leading to a wholesale alignment of liquor stores with supermarkets throughout the State.

### **Consideration**

- 76 I commence with a consideration of the relevant locality.
- 77 Although the objector contends that it should be regarded as much larger than the area within two kilometres of the proposed premises, it offers no reason as to why. The fact that a larger locality was applied in connection with previous applications concerning the same shopping centre is not to the point. They were decided under the former ‘needs’ test.
- 78 As was observed in *Liquorland Parkholme*:
- ... the ‘locality’ is now focussed upon the local community and is much more focussed on primary trade catchment areas, as opposed to the secondary catchment areas. The accumulated experience of this Court is that in most parts of metropolitan Adelaide, leaving aside large discount liquor stores, a two kilometre radius from existing or proposed take away liquor facilities is a fair estimate of where the vast majority of the patrons of those facilities will reside.<sup>20</sup>
- 79 If within metropolitan Adelaide the relevant locality has a much lower dwelling density than the norm, it might be that the primary catchment area extends beyond a two kilometre radius, such that a case could be made to consider a larger locality. The evidence in this case was to the effect that there are policies in place encouraging higher dwelling density directed towards a gross residential density of 20 dwellings per hectare.<sup>21</sup> I am permitted to know that this figure is typical of metropolitan Adelaide.
- 80 That is not to say that the location of take away liquor facilities outside of the locality are irrelevant. If the areas immediately surrounding the locality are awash with such facilities this fact would be a relevant consideration in determining whether, by reference to the community residing in the locality, it is in their interests to grant the application. If a significant number of members of the relevant community can already conveniently purchase take away liquor from one of many take away liquor facilities inside and just outside of the relevant locality it might be thought that the added convenience that an additional facility within the locality comes at too high a price, having regard to the fact that there will inevitably be some negative consequences as a result of the grant of a packaged liquor sales licence.

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<sup>20</sup> Ibid at [20].

<sup>21</sup> Ex W1 at 7.

- 81 But in my view the observations made by this Court about the take away liquor facilities in *Mac's Liquor Woodcroft*, to the effect that those beyond the two in Woodcroft Town Centre are largely irrelevant, remain valid. To access them requires traversing Main South Road. Given the much closer proximity of the facilities at Woodcroft Town Centre I think it likely that the majority of those within the relevant community would purchase their take away liquor from those facilities as opposed to those further away.
- 82 I now turn to conduct the evaluative exercise that the Act requires.
- 83 On the positive side, Woodcroft Plaza is extremely popular, and it can be taken as a given that many members of the relevant community will take advantage of the proposed premises. Because one of the existing facilities in the locality already trades under a BWS badge the grant of the application will not result in any expansion of the range of liquor or the type of service but it will add to convenience and for many relieve them of a trip that they would otherwise have to undertake to purchase take away liquor.
- 84 Endeavour can be expected to operate a well-run bottle shop. Its staff can be expected to be alert to the need not to serve minors or intoxicated persons.
- 85 The grant of this application will result in some extra employment opportunities.
- 86 Within the relevant locality there is only one other facility trading under a packaged liquor sales licence and one other facility selling take away liquor, it being attached to a hotel. Both are about 1.8 kilometres by road away from the proposed store. Accordingly, given a relevant population of 22,410 persons, even with the grant of this application the take away liquor outlet density is well below the State Average.<sup>22</sup>
- 87 Of course, it must be recognised the grant of this application may have some negative consequences. As I observed in *Liquorland Parkholme*:
- The addition of another take away liquor facility will increase the opportunities for such persons to obtain alcohol. Passing an attractive liquor outlet when walking in and out of a supermarket increases the risk for those for whom alcohol is a problem, to succumb to the temptation to buy it.<sup>23</sup>
- 88 Given the social profile of the relevant community and the limited number of take away liquor facilities in the immediate vicinity, I think it is unlikely

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<sup>22</sup> Albeit with qualifications this Court suggested that the average might be of the order of one facility per 2,000 residents. The grant of this application would result in there being one facility per 7,000 residents.

<sup>23</sup> *Ibid* at [44].

that the grant of this application will result in a worrying level of increased harm due to the excessive or inappropriate consumption of liquor, either to the relevant community as a whole, or to any group within that community.

- 89 In my opinion, it will not cause any adverse cultural, recreational or tourism impacts.
- 90 I think it is unlikely to have an adverse social impact or impact on the amenity of the locality of the proposed premises. To the contrary, it is likely to add to the popularity of Woodcroft Plaza and its viability.
- 91 Through the letters sent to the various entities, Endeavour has consulted with the relevant key stakeholders and interest groups in the community.
- 92 There are no issues regarding Endeavour's products and services or its relevant knowledge, experience and competency in relation to the service of liquor.
- 93 There are no issues regarding the plans for the proposed premises.
- 94 Having made the evaluative judgment that the Act requires, I am satisfied that it is in the community interest to grant this application.
- 95 I now turn to consider whether it is in the public interest to grant the application.
- 96 The objector was right to submit that if the evidence established that there had been an ongoing increase in alcohol consumption as a result of the Covid-19 pandemic, on public interest grounds, the Court could conclude that now was not the right time to be granting packaged sales liquor licences so as to increase the opportunities for the public to buy and consume alcohol.
- 97 As to its submission that the *Jones v Dunkel* principle should apply I make the following observations.
- 98 First, the principle is not an absolute rule. It enables an adverse inference to be called. It does not compel the making of that inference.
- 99 Secondly, even where the inference is drawn, the rule cannot be used to fill gaps in the evidence or to convert conjecture into suspicion: '[t]he failure [to call a witness] cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably'.<sup>24</sup>

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<sup>24</sup> *Jagatramka v Wollongong Coal Ltd* [2021] NSWCA 61 at [49]; See, also: *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [64] and J D Heydon AC, *Cross on Evidence*, 12<sup>th</sup> ed, 2019, LexisNexis, Sydney at [1215].

- 100 In this case, Endeavour contends that it did not adduce evidence of its trading figures because it does not wish its nearest commercial competitor to be appraised of its trading figures. I accept that explanation. Thus the application of the principle falters at the first hurdle.
- 101 Even if it were otherwise, I would not draw the inference because I can be far from certain what the evidence would be. It is not inconceivable that Endeavour's trading figures for its BWS store at Woodcroft Town Centre would demonstrate a fall in trade at that store commensurate with the increase in trade at the Thirsty Camel. If this were so it would be understandable why it would not wish to share its trading figures with a direct commercial competitor.
- 102 The fact that this is a real possibility is demonstrated by the evidence of the Wastewater Reports, which demonstrates an overall decline in alcohol consumption in the metropolitan area of South Australia over the relevant period.
- 103 Moreover, the fact that the objector has had an increase in sales, apart for telling us that the objector is enjoying a period of sales growth, tells us very little. There could be any number of reasons why sales have increased at that venue. Hotels come into and out of vogue. Common experience informs us that changes in menu, layout, décor or staff, can influence the popularity of one licensed venue over another. It is conceivable that the Woodcroft Tavern is drawing trade away from the Emu Hotel or the Crown Inn. If there are more people going to a hotel, more people might be expected to purchase take away liquor from that hotel.
- 104 Importantly, the fact that take away liquor sales at the Woodcroft Tavern have increased does not establish that there has been an overall increase in alcohol consumption indicative of a State-wide trend or of a trend within the local community. Indeed, had there been a discernible increase in problem drinking in the relevant locality, I might have expected this to have brought this to the attention of the Commissioner by the police or the local council. It is telling that neither made any objection to this application.
- 105 Based upon the Wastewater Reports, I conclude that there has not been a sustained and significant increase in alcohol consumption in the State as a result of the impact of the Covid-19 pandemic. Based on the evidence adduced in this case, this issue is not relevant to the public interest discretion.
- 106 But there are potentially other public interest considerations in play.
- 107 It is in the public interest to ensure that each case is decided on its own unique facts. But it is also in the public interest for entities like the two

licensing authorities to be consistent and predicable. Like cases should result in like outcomes.<sup>25</sup>

- 108 In conformity with the expectation of consistency and predictability, this Court must always have an eye to the future ramifications of its decisions. In an appropriate case this might result in it refusing an application on public interest grounds to avoid creating an undesirable precedent.<sup>26</sup>
- 109 Limiting the number of packaged liquor sales licences adds to their value. Because of their enhanced value their owners can be expected to operate good quality stores that are compliant with the Act and the conditions of their licences.
- 110 Every new packaged liquor sales licence increases the opportunities for members of the public to buy alcohol and to be tempted to buy alcohol. Having too many could add to the social and health costs that are already associated with the consumption of alcohol.
- 111 It is therefore not in the public interest for this Court to create a precedent that could result in a proliferation of packaged liquor sales licenses.
- 112 Parliament can be taken to express the will of the people. Despite a recent wide-ranging review of the State's liquor laws it resolved not to go down the path taken in other jurisdictions of permitting the wholesale alignment of supermarkets and bottle shops. It is therefore not in the public interest for this Court to create a precedent that could result in this occurring.
- 113 As was explained in *Hove Sip n Save*, if it is sufficient to establish grounds for the grant of a packaged liquor sales licence upon proof that a relatively small number of the local community who visit a small shopping centre would find it convenient to have the option of purchasing take away liquor as part of their visit to that centre, an undesirable precedent would be established. As was observed in that case, if this was where the bar was set 'it is difficult to see how a licensing authority could refuse any application made by an experienced licensee for the grant of a packaged liquor sales licence in respect of any premises in the vicinity of a supermarket that does not already share an alignment with a take away liquor facility'.<sup>27</sup>
- 114 Even with the caveat that the previous applications for retail liquor merchant licences for premises at Woodcroft Plaza were made under the

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<sup>25</sup> See, for example: W G Miller: *The Data of Jurisprudence* at 335 'If a group of cases involves the same point, the parties expect the same decision'. This passage was cited by the Full Industrial Commission of NSW in *Reich v Client Server Professionals of Australia Pty Ltd* [2000] NSWIRComm 143; (2000) 49 NSWLR 551

<sup>26</sup> *Liquorland (Australia) Pty Ltd and others v Lindsey Cove Pty Ltd* [2002] SASC 17; (2002) 81 SASR 337.

<sup>27</sup> *Ibid* at [138].

now redundant ‘needs’ test, the fact that over a period of nearly twenty years there has been a consistent rejection of such applications has weighed heavily on my mind.

115 But upon reflection and by comparison to other cases decided after the abolition of the ‘needs’ test, my concerns have been allayed.

116 In the locality under consideration in *Hove*, there was a BWS store attached to a hotel near the Esplanade, about a kilometre south east of the proposed premises, a drive through attached to another hotel, about 1.5 kilometres to the south east of the proposed premises, a Cellarbrations store contained in Brighton Central, a shopping centre about 1.7 kilometres or so to the south of the proposed premises and on the same side of Brighton Road, a Fassina liquor store about 1.5 kilometres to the north east of the proposed premises and a drive through attached to the another hotel, just short of two kilometres due east. Thus the grant of the application in *Hove* would have resulted in there being six take away liquor facilities within the locality.

117 In the locality under consideration in this case, there is only one facility trading under a packaged liquor sales licence and one take away liquor facility trading under a general and hotel licence. In contrast to *Hove* the grant of the application in this case will result in there being three take away liquor facilities within the locality.

118 I am mindful of the observations that I made *Liquorland McLaren Vale (No. 2)*<sup>28</sup> to the effect that ‘the measure of licensed premises density is much more nuanced than simply adding up the number of licensed premises and dividing the overall relevant population by that number to arrive at a ratio’. But in these cases, with the exception of the Fassina outlet in *Hove*, which is relatively much larger, the relevant take away liquor facilities in the localities in this case and in *Hove* are all of generally comparable size.

119 Accordingly, I find that to grant this application would not create a precedent that could result in a proliferation of packaged liquor sales licenses.

120 As for the issue of supermarket alignment, in *Liquorland Parkholme* the shopping centre under consideration there was the major, if not the only, shopping centre in the relevant locality, and it was anchored by a supermarket that was within the top third of all South Australian supermarkets in term of its business that attracts up to 30,000 shoppers every week.

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<sup>28</sup> [2022] SALC 53 at [186].

121 In *Cellarbrations Mannum*,<sup>29</sup> there were two supermarkets in the town of Mannum. The supermarket with which the proposed store was to be co-located was nearly three times the size and turnover of the other supermarket. In connection with the larger supermarket the Court observed of the members of the relevant community: ‘Having been provided with an opportunity to shop in a large, well-stocked supermarket, its members are shopping there in droves.’<sup>30</sup> The Court later added:

The grant of a packaged liquor sales licence in connection with a shopping centre anchored by a substantial supermarket in circumstances where the nearest like shopping centre is over 35 km away, does not raise any concerns about creating an undesirable precedent of the type that concerned the Court in *Hove Sip n Save*.<sup>31</sup>

122 In *BWS Cumberland Park*,<sup>32</sup> the shopping centre that was to contain the proposed store was described as quite large by Adelaide standards and the other shopping centres located in the locality were on its periphery and were smaller. In dismissing any concerns from a public interest perspective this Court said:

In summary, this is a modest application to create an attractive convenience type bottle shop to be co-located with one of the busiest supermarkets in the State in a large shopping centre that might be expected to include within its retail offerings a bottle shop.<sup>33</sup>

123 In *BWS Para Hills*,<sup>34</sup> the shopping centre that was to contain the proposed store was one of three in the locality, but the other two were described as significantly smaller.

124 In contrast to these, in *Hove* the supermarket with which the proposed store was to be co-located conducted about 6,200 transactions per week, and that most of its customers used the store to complete ‘top up’ shopping. The relevant shopping centre had 54 car parks. And a much larger shopping centre was less than two kilometres on the same side of the road.

125 In this case, of the two shopping centres within the relevant locality, Woodcroft Plaza is significantly smaller than Woodcroft Town Centre. Whilst this calls for comparison with *Hove* in which there was a much larger shopping centre that included a bottle shop within a convenient distance from the shopping centre that was to include the proposed store,

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<sup>29</sup> [2021] SALC 42.

<sup>30</sup> *Ibid* at [109].

<sup>31</sup> *Ibid* at [128].

<sup>32</sup> [2022] SALC 70.

<sup>33</sup> *Ibid* at [58].

<sup>34</sup> [2022] SALC 73

a closer examination of the facts of each case shows that there are some striking differences.

- 126 The Woolworths supermarket in Woodcroft Market Plaza conducts over 21,000 transactions per week. This is more than three times the number of transactions conducted at the supermarket in *Hove*. It is a full line supermarket that can be taken to attract a much wider range of customers than those using it to complete ‘top up’ shopping which was the main cohort using the supermarket in *Hove*.
- 127 Woodcroft Market Plaza has 304 car parks, more than five times as many than at the shopping centre in *Hove*. Thus, whilst Woodcroft might be smaller than Woodcroft Town Centre, it is significantly larger than the shopping centre that was considered in *Hove*. The supermarket that anchors it is significantly larger and more popular. And, as just observed, it is within a locality that contains relatively few take away liquor facilities.
- 128 The fact that it is adjacent to two large retirement villages and is located in an area where there is a prevalence of retirement housing is also important. It enables the inference contained in the submissions that it plays an important role in the lives of those who reside there. It also enables the inference that many of these retirees ‘may be put out significantly by having to make a special trip to purchase alcohol’<sup>35</sup> and as submitted before the Commissioner, they would welcome the opportunity of accessing a convenient modern bottle shop as part of their shopping trip to Woodcroft Market Plaza.
- 129 In light of these matters, Woodcroft Market Plaza can fairly be regarded as relatively unique.
- 130 Thus, in my opinion, the grant of this application would not create a precedent that could result in the wholesale alignment of supermarkets and bottle shops.
- 131 The absence of concerns about the impact of Covid-19, and of adverse future implications should the application succeed, leads me to conclude that public interest considerations do not require the refusal of the application.

### **Conclusion**

- 132 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

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<sup>35</sup> *Liquorland (Australia) Pty Ltd v Woolworths Ltd and Ors* [2018] SASCF 31 at [5] per Kourakis CJ.

in the first instance.<sup>36</sup> In the exercise of this power, I grant Endeavor's application for review and set aside the orders made by the Commissioner. In lieu of them, I find that the grant of the application is in the community interest and the public interest. Endeavour's application for a packaged liquor sales licence in respect of the proposed premises is therefore granted. Counsel is to forward to the Clerk of the Court draft minutes of orders for the Court's consideration.

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<sup>36</sup> See s 22(8)(b) of the Act.