

Parafield Plaza Supermarket PLSL Decision

Catalina Retail Group Pty Ltd (**the Applicant**) have applied for a Packaged Liquor Sales Licence in respect of their existing Parafield Plaza Supermarket (**PP Supermarket**) situated at 482 Salisbury Highway, Parafield Gardens, SA.

The Applicant has submitted a completed Community Impact Assessment form (**CIAF**) prepared by expert town planning consultancy MasterPlan as their community impact submission, and has filed written submissions in support of their application. The Australian Hotels Association SA (**AHA**) has filed written submissions opposing the grant of the application. The Independent Pub Group Pty Ltd also filed an objection to the application, but their objection is no longer pressed on the basis that the Applicant has applied to vary their application and has proposed a number of conditions that, in the event the licence were to be granted, will tightly condition the licence, as discussed in more detail below.

This application may only be granted if the licensing authority (**the Authority**) is satisfied that the grant of the application is in the community interest. In determining this application under section 53A(2) of the *Liquor Licensing Act 1997* (**the Act**), I must have regard to:

- the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor;
- the cultural, recreational, employment or tourism impacts; and
- the social impact in, and the impact on 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)

I must also apply the Community Impact Assessment Guidelines (**the Guidelines**), which state: *“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.”*

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 a range of matters, including: the applicant’s products/services in terms of key features and potential customers; business/professional experience, in particular relevant knowledge, experience and competency in relation to the service of liquor; general description of facilities and services; relevant construction details (e.g. materials, finishes, acoustic treatment, etc.); details of any food, including menu; liquor services (e.g. bar) and range of liquor; types of entertainment; types of accommodation; a statement as to whether the community supports the proposed business, including providing evidence of such support; and a statement as to why the granting of the application is in the community interest.

Applicants are also required to provide, where applicable: a map and report regarding the locality generated through the Community Impact Portal; a business plan/plan of management; and a site or property plan, floor plan and/or photographs/artists impressions of the site/building.

Pursuant to section 3(2) of the Act, when deciding whether or not to grant this application, I must have regard to the objects of the Act as set out in section 3(1) of the Act.

Section 3(1) of the Act provides that:

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

(a) to ensure that the sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive or inappropriate consumption of liquor; and

(b) to ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly, consistent with the principle of responsible service and consumption of liquor; and

(c) to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public; and

(d) to facilitate the responsible development of the licensed liquor industry and associated industries, including the live music industry, tourism and the hospitality industry, in a manner consistent with the other objects of this Act.

(1a) For the purposes of subsection (1)(a), harm caused by the excessive or inappropriate consumption of liquor includes—

(a) the risk of harm to children, vulnerable people and communities (whether to a community as a whole or a group within a community); and

(b) the adverse economic, social and cultural effects on communities (whether on a community as a whole or a group within a community); and

(c) the adverse effects on a person's health; and

(d) alcohol abuse or misuse; and

(e) domestic violence or anti-social behaviour, including causing personal injury and property damage.

The Applicant must also satisfy the Authority that the pre-requisites in section 57 of the Act have been met, in relation to such matters as: the suitability of the premises; the potential for them to cause undue offence, annoyance disturbance or inconvenience to nearby residents, workers and worshippers in the vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools in the vicinity of the premises; and whether the appropriate approvals, consents and exemptions, in respect of the proposed premises have been obtained.

Additionally, section 53 of the Act gives the Authority “*an unqualified discretion to grant or refuse an application under this 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)*”, and section 53(1a) provides that the Authority must refuse an application if it is satisfied that granting the application would be contrary to the public interest.

Section 53(1b) provides that the Authority must refuse an application for a licence if it is satisfied that granting the application would be inconsistent with the objects of the Act.

Section 38 of the Act provides that a Packaged Liquor Sales Licence authorises the licensee to do various things including, relevantly, sell liquor on the licensed premises for ‘consumption off’ the licensed premises.

Section 38(3) of the Act provides that it is a condition of a Packaged Liquor Sales 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.

Licensed premises will not be regarded as physically separate from premises used for other commercial purposes unless:

- (a) the licensed premises are separated from the other premises by a permanent barrier that is not transparent and is of a height of at least 2.5metres; and
- (b) the licensed premises cannot be accessed from the other commercial premises (save for the exception in section 38(5) of the Act which provides that access via a shopping centre mall is permissible).

Section 38(6) of the Act provides that the Authority may grant an exception from the requirements in section 38(3) of the Act that 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 if, in the opinion of the Authority, 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, and the Authority has provided such exemptions, particularly where there are no packaged liquor outlets in a regional town and granting the general store an exemption will obviate the need for residents to drive lengthy round trips to purchase packaged liquor.

Section 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 Authority is satisfied that there is a proper reason to do so.

Regulation 7AB of the *Liquor Licensing (General) Regulations 2012 (the Regulations)* provides that for the purposes of section 38(7) of the Act that premises of the following kinds are prescribed:

- (a) premises used primarily as a restaurant or for the preparation and sale of food for immediate consumption off the premises (or both);
- (b) premises ordinarily known as or advertised as a supermarket, convenience store or delicatessen;**
- (c) premises used primarily for the sale of non-consumable, domestic or commercial goods and merchandise;
- (d) petrol stations, including any parts of a petrol station—
 - (i) that consist of a shop, or shops, selling goods by retail; or
 - (ii) used for or in connection with the repair and servicing of motor vehicles;
- (e) premises used primarily for the sale of tobacco products and e-cigarette products;
- (f) premises used directly or indirectly in connection with the sale of firearms or ammunition;
- (g) premises that are a public conveyance;

(h) premises that may be accessed by the public directly from premises of a kind referred to in paragraph (a) to (g)

(Emphasis added)

Nature of the business/ proposed offering

The Applicant operates the PP Supermarket in Parafield Gardens, a suburb approximately 16kms north of Adelaide, which sells a very large range of Asian products and groceries along with a much smaller range of general (non-Asian) grocery items. It was clear from the site visit that the PP Supermarket, whilst not the size of a full-line supermarket, is quite large and is a similar size to a typical Drakes or Foodland supermarket operating in South Australia. MasterPlan describe the PP Supermarket as follows:

Although the supermarket stocks a wide selection of grocery and food products, the store is of a specialised nature, promoting itself as an Asian supermarket selling a wide selection of Asian foods, groceries and locally grown fresh produce in a 'market-style' setting. The store layout features product stacked in bulk throughout the store. In this respect, the store is distinct from supermarket brands such as Coles, Woolworths, Aldi and Foodland, in that it serves a specific demographic.

The PP Supermarket is the 'anchor' tenant in a small 'Neighbourhood Centre' size shopping centre which includes a number of other smaller tenancies such as 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.

The Applicant initially applied to sell packaged liquor from the PP Supermarket for 'consumption off' from 9am – 6pm Monday – Friday, from 9am – 5pm Saturday, and from 11am – 5pm Sunday, without proposing any specific limitations or conditions to be placed on the licence, and sought an exemption from the requirements in section 38 of the Act that the licensed premises must be devoted entirely to the sale of liquor, and must be physically separate from premises used for other commercial purposes, on the following basis:

The premises is mainly used as a Supermarket, there will only be a very small section behind the sales counter that will be used for the sale of liquor so it would not be feasible to have a physically separate store. This is the same set-up as most other Asian Grocery stores that sell liquor for takeaway.

MasterPlan advise that the outlet will not require any internal or external building work, will be small in scale containing just over 100 lines of liquor, with most product lines coming from South East Asia, and list the product lines proposed to be stocked in Attachment D of their report.

The Applicant has provided the following answers in relation to the questions in CBS' application form regarding the objects of the Act:

How will you minimise the harm and the potential for harm associated with the excessive or inappropriate consumption of liquor?

All staff that serve liquor will complete the RSA course which will give the understanding in hour to minimise harm and associated harm from the excessive or inappropriate consumption of liquor. There will be no consumption of liquor on site

How will you ensure that the sale, supply and consumption of liquor is undertaken safely and responsibly?

Liquor will be sold and supplied to people after they have had ID check if they look under 25 years of age. Liquor will not be left unattended and require a signature.

Explain the type of business to be conducted under this licence and how the supply of liquor will be consistent with the expectations and aspirations of the public.

The Asian Grocery store that will sell Asian based liquor for the local community that is not available in the traditional liquor stores

How will this licence contribute to the responsible development of the liquor industry in South Australia and what are the benefits to associated industries?

Help the local community get access to liquor from other cultures to expand the variety available.

The Authority has approved a number of exemptions to the requirements in section 38 of the Act in granting Packaged Liquor Sales Licences in the past to Asian and other ethnic specialty stores, general stores in regional areas, and the like, generally subject to restrictive conditions in relation to such matters as the range of liquor that can be sold, where the liquor can be stored/ displayed, etc. I provided a number of such licences to the parties as examples of what had been approved by the Authority in the past and the generally restrictive conditions applicable to those licences.

The Applicant through their lawyers subsequently advised the Authority that they were agreeable in the event the application were granted to the following conditions, or conditions to the following effect, being imposed on the licence:

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. Liquor is to be displayed within a locked cabinet which is to be electronically surveilled.
4. The sale of liquor restricted to the following types:
 - Korean made liquor
 - Japanese made liquor
 - Chinese made rice wine (and not other types of Chinese made liquor)
5. The range of liquor to be displayed at any one time is to be no greater than 30 individual lines of products.
6. Liquor will not be sold in quantities greater than six bottles or cans.
7. Liquor cannot be delivered off premises to any purchaser.

In light of the conditions proposed by the Applicant, The Independent Pub Group Pty Ltd advised that their objection was no longer pressed on the proviso that if the licence were to be granted, it would be subject to at least the 7 additional conditions proposed by the Applicant. The AHA's objection stands irrespective of the conditions proposed.

The change in conditions now sought by the Applicant represents a variation of the application. I consider it appropriate that the Applicant be permitted to vary the application as per the conditions listed above and allow the variation pursuant to section 51(3) of the Act.

Locality

MasterPlan consider that given the outlet is of a specialised nature, and very small in scale, that a 2.0-kilometre radius around the outlet (as suggested by the Guidelines) is not an accurate representation of the actual locality, and are of the view that the outlet's locality is influenced by the location of other supermarkets (as the outlet will be located within a long-established supermarket), as influenced by natural and artificial physical barriers.

MasterPlan define the locality of the proposed offering as almost precisely corresponding to the suburb of Parafield Gardens, as defined by:

- Little Para River to the north;
- Kings Road to the northeast;
- Gawler Central Railway Line to the southeast;
- Ryan's Road to the southwest; and
- Port Wakefield Road to the west.

MasterPlan have calculated that the population of the locality was 17,099 persons as at the 2016 Census, through the aggregation of state suburbs within the locality.

MasterPlan observe that the locality was developed during the 1960's and the 1970's, and is characterised by a low-density built form, with detached single-storey dwellings sited on large allotments being the most common type of housing. The locality has not experienced widespread urban renewal, and most of the original housing stock is still standing.

The locality consists of a younger population compared to Greater Adelaide, which is reflected in the median ages of the two areas, with the locality containing a median age of 35, compared to Greater Adelaide's median age of 39, which MasterPlan consider may be explained by the locality's higher population growth rate.

MasterPlan have carried out analysis of socio-demographic and economic data sourced from the Australian Bureau of Statistics (**ABS**), and note that the locality contains a higher-than-average share of residents who were born in Asia, which they contend helps to explain why retail outlets such as the PP Supermarket stocks a wide range of groceries, beverages and related food items sought by and popular with the surrounding Asian community.

MasterPlan have provided a table showing the percentage of people in the locality by country which they submit demonstrates the locality's significant Asian-born population, represented by larger than average Vietnamese, Indian, Filipino, Cambodian and Afghani communities, and state that the *"scale of the locality's Asian-born population can be appreciated when recognising that approximately 22.2% of the locality population was born in Asia; compared to approximately 10.0% of the Greater Adelaide population"*.

MasterPlan are of the view that:

This substantial Asian-born population makes the locality somewhat unique in the Greater Adelaide context, and clearly demonstrates why establishments such as Parafield Plaza Supermarket exist. It is a supermarket which caters for a significant Asian community living in close proximity.

MasterPlan observe that the locality has lower median incomes compared to Greater Adelaide, which suggests that residents of the locality could be less well-off compared to the average resident of Greater Adelaide, and that the locality has a larger share of dwellings

which are publicly rented, which indicates that the residents within the locality may be more socioeconomically disadvantaged than the broader population.

Masterplan note that the locality had a notably higher unemployment rate compared to Greater Adelaide as at the 2016 Census, which reinforces the notion that the locality may be more disadvantaged compared to Greater Adelaide more broadly, but qualify this by observing that unemployment levels have since reduced significantly.

MasterPlan note the existing packaged liquor options available in the locality. Liquorland is in the same shopping centre as the PP Supermarket, and the Slug 'N' Lettuce Tavern is 1.9kms to the north of the proposed outlet and contains a small walk-in BWS outlet.

Whilst attending the PP Supermarket on the site visit, I, along with the legal representatives for the parties also attended the Liquorland store at the shopping centre. That store carries the typical standard range of Liquorland products according to the store employee on duty at the time of the site visit, and it was apparent that it carries only a very limited range of liquor products sourced from Asian countries.

MasterPlan also observe that whilst not in the locality, the Parafield Airport Liquor Store on Kings Road, Parafield, stocks Asian sourced liquor products, namely Korean and Japanese spirits and mixed drinks.

Although not stated in MasterPlan's report, consulting google maps reveals that the distance between the PP Supermarket and the Parafield Airport Liquor Store is around 4 kms and a drive of 6 minutes by car.

The community Interest test

Having considered the relevant locality, I must next consider whether the grant of this application is in the community interest. This involves an evaluative exercise that weighs the positives and negatives that will come with the grant of a new licence and outlet for the purchase of takeaway liquor in the locality.

MasterPlan are of the opinion that the proposed offering is in the community interest and describe the benefits that will flow from the grant of the application as follows:

I am of the opinion that the local community, specifically those who are of Asian descent, will 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 Parafield Plaza Supermarket.

In my opinion, the proposed Packaged Liquor Sales Licence outlet will be in the community interest given the anticipated benefits to the local community who I expect will benefit from being able to purchase a select range of Asian beverages while purchasing groceries and other food items. I cannot foresee that the outlet will have a negative social or amenity impact, due to the small scale and targeted nature of the proposal, the characteristics of the site and locality, the adoption of CPTED measures in the design of the premises, and the implementation and enforcement of policies to minimise harm.

Turning to the potential negative effects that may arise from the grant of the application, requires consideration of the potential harm and risks that may flow in the event the application is granted, the risk management measures to be adopted by the Applicant, and any other relevant factors in relation to risk mitigation and harm minimisation.

The Applicant has submitted a Risk Management Plan (**RMP**) to the Authority as part of their application. The RMP identifies the relevant legislation, risk groups, and outlines various measures and controls to manage the risks identified.

Attachment “A” of the MasterPlan report also sets out a number of measures and policies that will be adopted by the Applicant, including:

- A notice which clearly notifies the Approved and Active Responsible Person (RSA accreditation) will be displayed at point-of-sale at all times;
- Patrons purchasing alcoholic beverages will be subject to a 5.0% surcharge on all alcohol purchased, unless a minimum of \$20.00 of groceries are purchased in the same transaction;
- The entire store is highly illuminated with tube-fluorescent LED lighting and is electronically surveilled 24/7 using a 1080p HD IP cameras system with UPS power backup;
- Alcohol displayed behind the counter will at all times be within clear sightlines of staff, outside of reach of patrons and clearly observable to patrons standing at the counter. All other alcoholic stock will be securely stored in the supermarket back-of-house storeroom and out of sight;
- No liquor shall be consumed on premises or outside of premises. Signage with this requirement will be prominently displayed at the point of sale to reinforce compliance;
- Internal policy and training protocols will be implemented for staff training purposes. This will be aimed at ensuring that staff better understand if a patron is intoxicated, and if so the supply of alcohol to that patron will be prohibited. Staff will be trained to identify typical warning signs, inclusive of speech assessment, visual assessment, breath assessment if applicable, movement and gait assessment, basic communication and cognitive assessment based on simple, courteous and non-threatening questions;
- Intoxicated persons will be refused service and will be asked to leave the premises;
- Customers will be asked for identification if customers appear to be under 25 years of age. This policy already applies to current tobacco licensing requirements which we adhere to. Inclusive of school uniform policy where no person in a school uniform, regardless of age, is to be served restricted substances.

The AHA considers the measures identified by the Applicant as inadequate and observes that in the *Liquorland (Australia) Pty Ltd (Park Holme)* [2020] SALC 37 (***Liquorland Park Holme***) decision the Court noted that even without direct evidence the Court could proceed from the premise that the addition of a new take away liquor facility will have some negative consequences, and said at [43] – [44]:

... common experience informs us that for many in the community, alcohol is a problem. Excessive consumption of alcohol carries with it serious health risks. It can fuel domestic violence. It can shatter relationships and cause families to become dysfunctional. It can cause social problems and result in violent and anti-social behavior. It can cause financial problems and result in people making risky and poor decisions.

It can be assumed that some of the relevant community will be afflicted by these issues. It can be assumed that some will be alcohol dependent and that some of these will be attempting to abstain from drinking or reduce their consumption. 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.

The AHA also refers to Gilchrist J's comments in *Hove Sip 'n' Save* [2021] SALC 7 (**Hove**) at [105] – [106]:

Operating a take away liquor facility is a serious business. Much of the alcohol that is consumed in this State is purchased from such facilities. Thus, there is a significant potential for the products sold in them to cause harm to members of the community.

Harm minimisation is a key component of the community interest test. In conformity with this, there is a heavy burden on the proposed operators of take away liquor facilities to demonstrate the steps they will take to ensure that liquor is not sold or supplied to minors or intoxicated persons and that their sale and supply of liquor will not promote harmful drinking practices.

MasterPlan has provided analysis that is relevant to evaluating the risk of harm posed by the grant of the application. They have considered the educational facilities in the locality, and note that the Karrendi Primary School abuts the rear of the PP Supermarket, but do not consider the proximity of this establishment to the outlet to represent an unacceptable risk to students who may visit the supermarket, and note that all products will be located behind the counter.

MasterPlan also note that the locality does not contain any drug and alcohol rehabilitation centres, nor a hospital, but does have 1 disability service provider, Novita, which has a 'therapy hub' at 422 Salisbury Highway, Parafield Gardens, located 700 metres northeast of the proposed outlet, but do not consider that the establishment of the proposed outlet would represent an unacceptable risk to this facility, or its patients.

There is one retirement village in the locality approximately 1.5kms from the proposed outlet. MasterPlan do not consider the ability to purchase alcohol to be harmful or risky to the interests of this sector of the community.

There are no dry areas gazetted in the locality.

MasterPlan observe that the locality has a higher overall crime rate than the State average, and that 'theft from shop' is a relatively prevalent offence in the locality, but submit that there is no evidence that the proposed outlet would lead to an increase in the 'theft from shop' category of crime given that all products will be displayed behind the counter.

MasterPlan provide analysis in relation to the socio-economic profile of the locality and observe that the locality records lower SEIFA indexes across all measurable criteria compared to the indexes of Greater Adelaide and Australia, which indicates that the locality has a lower socio-economic standing compared to Greater Adelaide and Australia more generally.

Community support

It is clear from the petition provided by the Applicant that a number of customers who shop at the PP Supermarket are supportive of the Applicant selling Asian packaged liquor products at the supermarket. The AHA have argued that little reliance can be placed on the survey results due to the fact that the Applicant has varied their application and now seeks to offer a smaller range of liquor. The Applicant in their submissions in reply takes issue with those submissions and notes that the variation it has proposed to the application would mean that while only 30 products would be displayed at any one time, the range of liquor to be sold will remain largely what was annexed to the petition and survey.

The AHA's objection to the grant of the application

The AHA have objected to the application for a number of reasons, which are summarised as follows:

- There are 11 educational institutions in close proximity to the Supermarket and some of the products proposed to be sold might appeal to children (including flavours such as Green Grape, Cherry Blueberry, Apple Grapefruit, Peach Strawberry, Watermelon Pineapple Pomegranate, Calamansi (a citrus flavour), Lychee, Banana, Peach, Plum, Raspberry, and White Grape. Some have names including the word "Jelly") See Attachment D of the Product List;
- The AHA refers to Gilchrist J's decision in Hove and comments in that case regarding inexperienced liquor retailers, and submit that the *"policies of the applicant do little to avail His Honour's concerns. They simply re-state the law (e.g., no on-premises consumption, no service of intoxicated patrons). There is no evidence of the training that is envisaged (is it merely RSA training? If so, that is not enough). The adequacy or otherwise of lighting and anti-theft systems is irrelevant when alcohol will be behind the permanently staffed counter. The proposal to increase the price of liquor unless a certain quantity of groceries is purchased is illusory. Twenty dollars is hardly a disincentive"*
- The locality has much *lower* personal and household incomes than Greater Adelaide; much *higher* unemployment levels than Greater Adelaide (regardless of the increase in the *overall* employment rate, as Mr. Burns has identified, it remains a fact that this locality still has higher *rates* than Greater Adelaide);
- The additional data sourced shows, "to quote Mr. Burns, *that the locality records lower indexes across all measurable criteria compared to the indexes of Greater Adelaide"*
- Total offences are *higher* in the locality as compared to Greater Adelaide, and the link between intoxication and offending is well known;
- There is nothing provided to justify or support the exemptions sought pursuant to section 38 of the Act, beyond the bare statement that they are sought. Parliament has shown a clear intention to differentiate supermarkets from liquor sales, and such exemptions should not be granted merely because they are sought;
- *the general prohibition on liquor in supermarkets must be observed. The exemptions that have been granted to this general rule (as identified in an email from the Delegate of 22/11/22) are far removed from the circumstances of the within application";*
- *The community engagement that has occurred was for a quite different trading model and is essentially misplaced. There has been no community engagement that has embraced the conditions proposed by the applicant in an email of 25/11/22; and*
- The general discretion (section 53) should be utilised to decline this application.

The AHA submits that liquor should not be sold in a prescribed premises (given section 38(7) and the regulations) unless there is proper reason to do so, and that no such reason exists here.

The AHA refers to the store inspection as revealing a very large store that sells items that are broadly but not exclusively Asian in origin and asserts that the *"store does not have a particular region or ethnicity focus, unlike the facilities to which exemptions have been granted. Witness, for example, one aisle labeled with 3 different countries of origin, and a fourth (Filipino) in the bakery. Hence, there is no proper reason as that term has been used to exempt this store."* The AHA also observe that during the inspection the store representative commented that

customers came from as far as Burnside to shop at the Supermarket and contend that in light of this there is even less reason to grant an exemption “*as customers who are prepared to travel long distances to purchase groceries will be prepared to do the same to purchase liquor*”.

The AHA submit that approval of the application would send the wrong message to supermarket operators and could prove to be a precedent for future applications:

If an exemption were to be granted in this case, it would send the wrong message to supermarket operators. The speed and unanimity with which the Parliament acted to prevent ALDI stores selling liquor, albeit under a s 39 category licence if successful, should be taken to convey the message that liquor in supermarkets must remain very much the exception. The grant of this application would render it difficult to resist further applications by large full-service supermarkets, even if the sales were to be limited by stock numbers. Once the genie has been released from the bottle, it cannot be recaptured.

In addition the AHA takes issue with the variation to the application and submits that in light of the changes proposed any community engagement must be disregarded:

Quite clearly, changing the product range from 130 to 30 lines, limiting sales quantities to 6, and changing from “Asian” products to only Korean and Japanese liquor and to Chinese rice wine, is a far greater change of tack than a simple name alteration. Hence it is submitted that the community engagement that has occurred in this case must be disregarded. And in that event the application must be declined on the basis of no community engagement that is in any way relevant.

The AHA submit that the Authority should also use its general discretion to refuse the application on the basis that there is no liquor in supermarkets permitted and there is no proper reason to depart from this rule, and that to grant the application would set a precedent that would be undesirable and would undermine the clear intention of Parliament, and cites *Rhino Room* (2020) SALC 40 in support of these contentions.

Applicant’s submissions in Reply

The Applicant has filed submissions in reply in relation to the matters raised by the AHA.

The Applicant concedes that the PP Supermarket is more than a specialty store focused on gifts or a small Korean specialty grocery store, but notes that the same can be said for ‘Homes Supermarket’ on Gouger Street and ‘Hong Kong Grocery’ on Grote Street which are current holders of Packaged Liquor Sales Licences. The Applicant submits that the PP Supermarket is a specialist Asian supermarket and that the “*sale of some non-Asian products from the PP Supermarket is clearly ancillary and subordinate to the sale of Asian products and does not convert the store into something other than an Asian supermarket*”.

The Applicant goes on to provide examples of some of the non-Asian products that are sold by the Homes Supermarket on Gouger Street, Adelaide to underscore the point that the sale of these items does not convert the Homes Supermarket into something other than a specialty Asian supermarket:

It is plain from the vast majority of the products that are sold and the look and feel of the store including its signage that it is a speciality Asian supermarket. The character of the store is plainly Asian. The sale of a small number of products that can be purchased at other supermarkets is ancillary. The PP Supermarket is catering for those cultural and ethnic groups who wish to take advantage of the highly specialised store.

The Applicant submits that the PP Supermarket is distinguishable from the 260 or more conventional supermarkets in South Australia on the basis that it is “a *single, individual and independent store with a less than 1 percent overlap with the products offered in any Woolworths, Coles, Foodland, IGA, Foodworks, Aldi, convenience store or service station in South Australia. This overlap, on any reasonable view, does not tip the scales to convert the PP Supermarket into something other than a specialist Asian supermarket*”, and goes on to list various other factors that it says distinguishes the PP Supermarket from conventional supermarkets, including listing a large number of products and items that it does not stock, many of which can be found in conventional supermarkets, including things such as newspapers, cigarettes, sliced bread, dairy creams, dips, deli meats, batteries, breakfast cereals, fresh or gourmet cheeses, or seasonal items such as hot cross buns or Christmas confectionary.

The Applicant has enclosed a large number of PDF Google reviews with its submissions, which include various comments and reviews by people who presumably have shopped at the PP Supermarket. Without traversing all of this material, suffice to say that it tends to support the Applicant’s position that the PP Supermarket is not regarded as a full-line, mainstream or conventional supermarket by the public, but rather is regarded as a large Asian specialty supermarket, with many reviewers describing it as a great Asian supermarket and others complaining that the supermarket does not cater sufficiently for those seeking to purchase non-Asian items and essentials.

The Applicant also takes issue with the AHA’s observation that the PP Supermarket does not have a particular region or ethnicity focus “unlike the facilities to which exemptions have been granted”, and submits that this cannot be a correct basis to deny the application given, as if that were correct, the Homes Supermarket, Hong Kong Grocery Store and Koreana Mart would not have been able to obtain Packaged Liquor Sales Licences. The Applicant refers to the various products that can be seen on the websites of these stores in support of its point that they stock products from a variety of different countries. Additionally, the Applicant points to the conditions on a number of licences in support of this point:

It must also be recognised that the conditions imposed on, for example, the licences granted to Happy Mart (licence No. 57702271), Hong Kong Grocery Store and Seoul Grocery (licence No. 57702263) simply provide that “[t]he business conducted under the licence shall at all times be that of an Asian grocery store” (our underlining). There is nothing prohibiting those stores from selling grocery supplies from any Asian country.

In relation to the AHA’s assertion that granting a Packaged Liquor Sales Licence in this instance “*would send the wrong message to supermarket operators*” and that the “*grant of this application would render it difficult to resist further applications by large full-service supermarkets*”, the Applicant submits that each application must be determined on its own facts and that given the unusual and exceptional facts applicable in this case, the grant of this application would not render it difficult to resist applications by large operators of chain supermarkets:

..... the grant of this application would not set any relevant precedent that would somehow bind the Commissioner in considering any future application. As the Court has said, including recently in BWS Para Hills [2022] SALC 73 at [55]-[57], each application must be considered on its own facts. It may be accepted that there is a “public interest” for decisions of the licensing authority to be “consistent and predictable”, and that “[l]ike cases should result in like outcomes”: see BWS Woodcroft [2022] SALSC 108 at [107]. However, each case must ultimately be determined by reference to its own peculiar facts and whether those facts satisfy both the “community interest” test and the “public interest” requirement. Here, the applicant operates a specialty Asian supermarket that

lacks a ready comparison in Metropolitan Adelaide. Further, and relevantly, the liquor that it proposes to sell is boutique and not readily available elsewhere in the locality and indeed Metropolitan Adelaide. What the applicant proposes to sell is high-end alcohol from certain Asian countries that is entirely consistent with its character as a speciality Asian supermarket. Thirdly, and following on from these reasons, it is simply not the case that the grant of this application “would render it difficult to resist” similar applications by large operators of chain supermarkets. The facts of this case are unusual and exceptional.

The Applicant further submits that the AHA’s submissions that the application should be declined on the basis that no relevant community engagement has occurred is without merit. The Applicant asserts that “*the community engagement that has occurred was for the purpose of establishing general demand for and interest in the categories of liquor proposed and the general absence of objections against any such application*”, and contends that the changes proposed are not changes that would sensibly require further community consultation:

There appears to be some confusion on the AHA’s behalf in that it suggests that our client is changing the product range from 130 to 30. That is not correct. The range of liquor proposed to be sold is largely that which was annexed to the petition and survey. It is simply that the applicant is agreeable to a condition being imposed which limits the range of liquor to be displayed at any one time to no greater than 30 individual lines of product. Further, and importantly, the nature of the “change” is in fact simply a narrowing of the number of products that will be sold, and the conditions upon which they will be sold. This is not a relevant “change” that could sensibly be said to require community consultation.

The “change of tact” in Liquorland McLaren Vale [2021] SALC 44 was an issue because (1) stakeholders were consulted about a specific well-known liquor store, ‘Liquorland’ and (2) the change to a different store, a ‘Vintage Cellars’, has a different reputation and alcohol offering. This is to be distinguished from the situation here where the public was presented with a survey and petition which included a list of premium Asian liquor products, the majority of which is proposed to be sold.

In relation to the general discretion available, the Applicant submits that section 53A of the Act requires the Authority to have regard to, amongst other things, cultural, recreational, employment or tourism impacts; social impact in, and the impact on the amenity of, the locality of the premises or proposed premises.

Additionally, as regards the objects of the Act, the Applicant observes that section 3(2) of the Act mandates that: “*Subject to this Act, in deciding any matter before it under this Act, the licensing authority must have regard to the objects set out in subsection (1).*”, and that one of the objects in (1) is “*to regulate and control the promotion, sale, supply and consumption of liquor – to ensure as far as practicable that the sale and supply of liquor is consistent with the expectations and aspirations of the public.*” The Applicant contends that “*there would arguably be public expectation and aspiration for a store specialising in Asian products that are not available in mainstream supermarkets to also have a selection of related liquor that is not conveniently available in mainstream Liquor outlets. This argument is supported by the continued offering of liquor at all three Homes Supermarkets stores, Hong Kong Grocery, Koreana Mart and Happy Mart implying the existence of community demand. Further, this argument is supported by the community engagement undertaken*”.

The Applicant notes that the PP Supermarket is a large store and refers to the public benefits of convenience and one-stop shopping:

A store of this size is very likely to be perceived and treated by those members of the community who wish to purchase speciality Asian products as a one-stop shop. It has previously been acknowledged that “one stop shopping” is a benefit to the community: see *Woolworths Limited v Director of Liquor Licensing* [2013] WASCA 227 at [78]; *Woolworths Limited v Drakes Coosit Pty Ltd* [2010] SASC 13 at [55] per Kourakis J (as His Honour then was); *Liquorland McLaren Vale No. 2* [2022] SALC 53 at [93]-[94]. PP Supermarket has customers that come from afar, as noted by the AHA, to source niche/ethnic food items. For such persons it would be very inconvenient to have to drive out of their way (and out of the locality) to find another outlet (if any) that would have Asian liquor to suit Asian cuisines. It is to be recognised that the applicant proposes to sell imported Asian liquor not readily available elsewhere; the proposal is to sell speciality liquor in a speciality store to those members of the community who wish to shop at a speciality store in preference to mainstream supermarkets.

The Applicant concedes that the PP Supermarket will not provide one-stop-shopping for some customers, due to its niche nature, but submits that this is not be a reason for the application to fail.

In respect of convenience, the Applicant points to the fact that “*there is no nearby shopping centre, larger or otherwise, which contains a suitable liquor store that services the niche of Asian liquor*”.

In terms of liquor saturation, it is asserted that there “*is little risk of liquor saturation in the locality as there are no stores in the locality offering what our client proposes to sell*”.

In terms of harm minimisation the Applicant notes the fact that on their amended proposal there will only be 30 liquor products displayed in a small, segregated display area and suggests that the liquor proposed to be offered is not likely to be sold in a significant range or quantity as measured by the number of lines and indicated also by the presumed premium price point.

The Applicant submits that the application is readily distinguishable from other takeaway packaged liquor offerings in the locality and asserts that “*specialty ethnic stores are not so common in SA that the authority would not be able to handle an increase (if any) in similar applications leading from the granting of this specific application, especially with regards to the degree of proposed restrictions*”.

The Applicant submits that there is no evidence that the grant of the application with the proposed conditions would lead to an unacceptable increase in the risk of harm to the local community, and suggest that “*the absence of objections or oppositions from any stakeholders other than the AHA supports this. In any event, the proposed conditions themselves are significant and should be afforded significant weighting in the determination of community impact*”.

The Applicant notes the recent comments by the Court that harm minimisation does not equate to harm eradication (see *BWS Para Hills* [2022] SALC 73 at [76]; *Liquorland McLaren Vale No. 22* [2022] SALSC 53 at [135]) and submits that:

The relevant question, is whether there is an unacceptable risk of alcohol related harm from the grant of the particular application. There is nothing to suggest that there will be such an unacceptable risk from the grant of this application. The risk of alcohol related harm posed by this application does not extend beyond the general risk that comes with the grant of any new packaged liquor sales licence. Further, in the absence of specific evidence, which is absent here, it cannot be assumed that aligning take away liquor facilities with supermarkets will necessarily lead to an increase in alcohol consumption or,

more relevantly, an increase in the harm associated with the consumption of alcohol: see *Liquorland McLaren Vale No. 2* [2022] SALC 53 at [153]-[155]. These remarks have even greater force in the context of the present application, where the Commissioner has before him a set of exceptional facts, namely a speciality Asian supermarket that seeks itself a small range of speciality Asian liquor pursuant to very strict/stringent conditions.

The Applicant refers to the evaluative exercise of weighing positives and negatives that must be undertaken when considering 'community interest' and submits that in this instance the obvious positives outweigh any potential negatives:

The major positive would be the establishment of a convenient one-stop supermarket for those members of the community who wish to purchase speciality Asian products, including specialist Asian liquor. By contrast, the only real negative is the general risk of harm attendant upon the grant of any new packaged liquor sales licence.

The Applicant contends that in all the circumstances there is a proper reason to grant the licence.

Decision

I am satisfied that the Applicant has correctly identified the locality likely to be affected by the grant of the application.

I do not agree with the AHA's submission that the community consultation should be disregarded and that the application should be refused on the basis there has been no relevant community consultation. I consider that the community consultation is still relevant to the application as amended and demonstrates community support for the application.

It was clear from the site visit that the Liquorland located in the same complex has a very limited range of Asian liquor products and has not tailored their offering to the demographics of the locality, but rather stocks the 'standard' Liquorland offering. The PP Supermarket is a large Asian specialty supermarket that stocks a very wide range of Asian products, as well as some other generic groceries. The demographics of the locality are not those of a typical Adelaide suburb. As noted by MasterPlan, the locality has a much higher proportion of people who are of Asian descent, at over double the State average, and the existing offerings in the locality do not cater well for those wishing to purchase Asian niche liquor products. The survey results point to community support for the proposed offering, and in my view, regardless of whether the Supermarket stocks 130 lines, 30 lines, or only 10 lines of liquor products from Asia, some members of the local community are clearly supportive of the application being granted, and many who shop at the Supermarket will find such an offering to be both desirable and very convenient.

I have considered the harm that might be caused (whether to a community as a whole or a group within a community) due to the excessive or inappropriate consumption of liquor, and given the low number of product lines to be stocked, the risk mitigation measures identified by the Applicant, and the fact the packaged liquor will be stored behind the checkouts in an area that is under surveillance and out of reach to customers, I am satisfied on the material before me that the risk of harm posed by the proposed application is quite low.

I note the AHA's submissions that there are a number of items in the product list at Attachment D of the MasterPlan report that could potentially be appealing to minors, but consider that this concern can be addressed by adding an appropriate condition to the licence in the event the application is granted, namely, that products containing the word "jelly" in the product name may not be stocked.

The locality is clearly not 'awash' with liquor, and the application need not be refused on the basis of any proliferation concerns.

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. In relation to the Applicant's assertion that the grant of the application may result in one-stop-shopping for some people who shop 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. The grant of the application will clearly provide greater convenience for some shoppers who wish to purchase Asian packaged liquor.

Having considered the submissions, expert evidence and having undertaken a site visit, I am satisfied that it would be in the community interest to grant the application subject to stringent conditions and with a significantly reduced range of liquor products than what was sought by the Applicant.

I now turn to whether it is appropriate to grant the exemptions to the requirements of section 38 of the Act that are sought by the Applicant. The ordinary position under section 38 of the Act is that a Packaged Liquor Sales Licence is subject to the condition 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 Authority may grant an exemption from this condition if, in the opinion of the Authority, it is in the public interest to do so.

In considering the public interest it is clearly relevant, as observed by the Court, that Parliament has made a clear decision not to go down the same path as some other jurisdictions in terms of the wholesale alignment of supermarkets and packaged liquor. Additionally, as observed by the AHA, there is a fundamental principal that liquor must not be sold in prescribed premises "unless there is a proper reason to do so", and a supermarket is a prescribed premises.

The Authority has granted exemptions in relation to a number of Packaged Liquor Sales Licences in the past, as noted above, so it must be accepted that in certain circumstances it may be appropriate to grant a Packaged Liquor Sales Licence that caters 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. Each application must be considered on its own facts and merits, and in respect of the present application, if the Liquorland in the same shopping centre as the PP Supermarket had a more extensive range of Asian sourced liquor products than a 'standard' Liquorland store so as to better cater to the demographics of the locality, or there was another outlet in the locality which had an extensive range of Asian sourced liquor products, this would have likely tipped the balance towards the outright refusal of this application.

Given the current lack of niche Asian liquor products currently available in the locality I am of the view that, as required by section 38(7) of the Act, there is a proper reason to grant a Packaged Liquor Sales Licence to the Applicant.

I am satisfied that any required approvals and consents in relation to the law relating to planning are in place to permit the sale of liquor from the premises as required by section 57 of the Act. There is no reason why the application should be refused on the basis of the matters outlined in section 57 of the Act in relation to 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; or prejudice to the safety or welfare of children attending nearby kindergartens and schools.

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).

Paul Bertram
Senior Hearings Delegate