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### OTR PLSL Application Decision

On The Run Pty. Ltd. (**the Applicant**) has applied for a packaged liquor sales licence (**PLSL**) authorising the sale of liquor through direct sales transactions only.

This application is not a designated application pursuant to section 53A of the *Liquor Licensing Act 1997* (**the Act**), however, given the nature and scope of the proposed operation, I sought further submissions from the Applicant in order to assist my consideration as to whether the grant of this application is consistent with the objects of the Act, and whether or not it would be contrary to the public interest.

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.

Additionally, s 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 s 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.

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Section 53(1b) requires 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.

### **Background/ Nature of the proposed business**

The Applicant proposes to sell liquor by way of direct sales transactions only (as defined in section 4 of the Act). The complete sales transaction, including ordering, payment and providing delivery instructions will be conducted using the 'OTR' application ('**OTR' app**) on a mobile device. There is no physical liquor store premises for customers to attend, and the liquor products will be dispatched from a central location.

The Applicant submits that the expectations and aspirations of the public in respect of the supply of packaged liquor have changed and continue to move towards more and more purchases of liquor products by using on-line (and in particular app-based) purchasing systems, with delivery of liquor direct to customers.

The Applicant maintains that the demand and expectations of the public to be able to obtain products (including liquor) without the need to attend a physical store has accelerated and increased due to a desire for safe purchasing environments and social distancing as a result of the Covid-19 pandemic. This submission is consistent with information and submissions I have been provided in relation to other PLSL applications and it is clear to me that there has been a significant increase in ecommerce and online liquor purchases in recent years due to COVID-19.

The Applicant has made the following submissions in support of its application:

- The "app-based orders and delivery system" provides a convenient and safe means of satisfying the demand for packaged liquor;
- the Covid-19 pandemic has heightened the importance of convenience and safety;
- a greater number of people are now working from home and as a result, are not in a position to attend liquor stores in person as part of the commute to and from work;
- many customers now prefer to obtain a variety of products by way of app-based purchase and delivery, rather than attending physical stores;
- The 'OTR' app-based ordering system will allow customers to order and pay for liquor using payment methods provided for by the 'OTR' app (credit or debit card, use of saved credit or debit card details, and PayPal); and
- the existing 'OTR' app will be updated and modified to enable liquor sales to occur and will include appropriate age verification measures and warnings in respect of the responsible consumption of liquor.

The Applicant has provided information to the Authority in relation to the number of active users of the 'OTR' app and estimates of the projected monthly growth in users on a confidential basis. Suffice to say that OTR has strong brand recognition, with a significant number of people already using the 'OTR' app, and this number is expected to increase over time.

### **Potential Harm**

The Applicant has made the following submissions in respect of harm minimisation:

- The 'OTR' app will contain appropriate warnings discouraging the rapid and excessive consumption of liquor, and encouraging the responsible consumption of liquor.

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- The 'OTR' app will not promote or advertise the business in a way which tends to encourage minors to consume liquor.
- The 'OTR' app will require purchasers to:
  - enter their date of birth at the time of each purchase; or
  - provide their date of birth at the time of the first purchase (with those details to be retained by the licensee); or
  - provide their date of birth as part of the initial 'sign-up' process when the 'OTR' app is first downloaded by users (with those details to be retained by the licensee).
- The 'OTR' app has for some time been used in connection with fuel sales and is targeted at users of driving age, and consequently it is not anticipated that a large number of users will be under 18 years of age.
- There will be compliance with all applicable laws and codes of practice.

In respect of delivery of liquor, the Applicant has confirmed that all liquor will be delivered by OTR employees or external courier services. Those delivering liquor will be required to ensure that:

- liquor is delivered only to the purchaser or to a person nominated by the purchaser (who must be 18 years or older), in accordance with delivery instructions provided by the purchaser by way of the 'OTR' app;
- the person taking delivery of liquor is 18 years of age or older and signs a declaration stating their name and that they are 18 years of age or older; and
- proof of age evidence is produced if it is not obvious that the person taking delivery of the liquor is 18 years of age or older.

### **Cultural, recreational, employment or tourism impacts**

The Applicant stated that the grant of this licence and the addition of 'On the Run' as a retailer of liquor will benefit the community in the following ways:

- the 'OTR' app is a safe and convenient mode of ordering delivery of liquor;
- it will enhance competition in the packaged liquor market in South Australia in terms of price and ordering/delivery experience;
- it will provide for a further distribution system/infrastructure in South Australia for the delivery of packaged liquor, which will encourage and facilitate an enhanced delivery performance across the direct sales sector, also reducing the likelihood of shortages and substantial delays in order fulfillment;
- it will provide producers and wholesalers of liquor with an additional avenue to sell packaged liquor on a wholesale basis; and
- it will contribute to employment and expansion opportunities in liquor production, wholesaling, packaging, warehousing, administration, and delivery services.

The Applicant has advised that it is a wholly owned South Australian family company, a substantial employer of South Australians, and submits that the entry of such a business into the South Australian delivered liquor market has inherent benefit to the liquor industry.

It is not clear how many South Australians are currently employed by OTR and in what capacity, nor what the impact the grant of this application will have on employment. Given that the sale of liquor will occur only through direct sales transactions, I would expect that any increase in staff numbers would be a minimal number of delivery drivers, unless an existing courier service is used.

I can accept that the grant of this application will increase the availability of liquor delivered directly to peoples' homes. However, it does not necessarily follow that this "inherent benefit

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to the liquor industry” will provide a benefit to the community as a whole, or be consistent with the Objects of the Act, or that approving this application will be in the public interest.

### **Social impact and impact on the amenity of the locality**

The Applicant has referred to other “significant comparable businesses” noting that entities associated with Coles operate a number of liquor outlets and provided a photograph of a “Coles Express” convenience store and petrol station. It was also noted that Woolworths’ branded convenience stores and petrol stations are common in South Australia.

The Applicant further submits that Woolworths Group Ltd was granted a packed liquor sales licence in February 2020, and that this licence is the same category and on the same terms as the licence now sought by the Applicant. I note the premises name as stated on the licence is woolworths.com.au. The Applicant has advised that the woolworths.com.au website provides for the sale and delivery of food (grocery items) and lists numerous South Australian liquor licence numbers.

Whilst the Applicant suggests that it is possible for any member of the public to make liquor purchases through the Woolworths on-line ordering system from any location in the State, it would appear that there are certain limitations. In particular, I note that the delivery of liquor products purchased from this website is not available to all locations, yet it is my understanding that no such restrictions on the delivery of liquor products purchased will apply to those using the ‘OTR’ app in the event the application is approved.

The Applicant asserts that as there are a number of existing major convenience store and petrol station brands already operating in the liquor market in South Australia, it is appropriate and consistent that this licence should also be granted.

There is no dispute that Coles and Woolworths (or entities closely associated with these entities) hold liquor licences in South Australia, however there are certain important distinctions. Perhaps the most important distinction is the fact that the ‘OTR’ app is far more likely to be used by people under the age of 18 years of age (i.e. minors) who are licensed to drive vehicles or motorcycles and who shop at OTR to purchase fuel, or other affiliated businesses within the Peregrine group such as Krispy Krème and Subway, particularly given the loyalty rewards offered by the OTR App as described on the App store:

*The OTR App conveniently stores all your loyalty rewards in the one place. Scan your OTR App barcode to get your 5<sup>th</sup> item FREE on a wide range of products from C Coffee, Krispy Kreme, EAT, Moe’s Dog and Shake, Chill, Subway, Oporto, Wokinabox and HappyWash.*

If this application is approved, minors under the age of 18 who use the ‘OTR’ app will potentially be exposed to liquor products or advertisements whenever they use the app.

The attractiveness of the OTR App to minors is also not necessarily limited to those who hold a driver’s licence and would be looking to use the App to purchase fuel. Subway, Chill (slushies), Krispy Kremes, Moe’s Dog and Shake (hot dogs and soft serves), Oporto and Wokinabox are all attractive and popular food items for minors and given the prevalence of minors entrusted with their own mobile phones and the fact they are likely to use the App for reward points, I take into account the potential exposure of alcohol to minors regardless of whether they have a driver’s licence.

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Whilst I accept that the Applicant will need to put in place measures to verify age and restrict the sale of alcohol to those aged at least 18 years of age, the presence of alcohol products and advertisements on the App will serve to further normalise the purchase of alcohol with other daily staples such as fuel, snacks and coffee to minors, before they have attained the legal age to purchase and consume alcohol. This is not in the public interest, and in my view is not consistent with the expectations and aspirations of the public.

Secondly, petrol stations such as “Coles Express” and “Caltex Woolworths” operate under a variation of the associated supermarket brand, and the convenience style grocery stores co-located with the petrol stations are much smaller than a traditional Coles or Woolworths supermarket. Importantly, it is not possible to purchase fuel using either the Coles or Woolworths mobile apps, which means that there is less likelihood of minors being exposed to liquor products offered for sale than would be the case with the ‘OTR’ app if this application is approved.

In addition, Coles Express has its own App which allows for the purchase of fuel by “Pay at Pump” but does not allow a customer to order or pay for any other items than fuel.

The Applicant maintains that the OTR brand is likely to be perceived as a convenience store brand rather than simply as a petrol station brand and as a result, customers are extremely unlikely to perceive OTR locations as relevant to the supply of liquor. I find that OTR is easily recognizable as both a convenience store and petrol station brand, even though not all outlets sell petrol.

The Applicant is proposing to further blur the lines by providing for the sale of liquor, petrol and food items from the same mobile app. I am of the view that this poses a significant risk to the community by including liquor as a daily convenience item to be ordered together with other daily purchases such as coffee, Subway and Krispy Kremes as are available at OTR. I accept that liquor will not be available for collection in-store, however I don't think this detracts from my concerns regarding the frequency of exposure and normalisation of liquor purchases to users of the OTR App.

In addition, OTR outlets are well known for operating 24 hours a day, 7 days a week under the slogan of “we never close”. By implication, OTR App users may be utilising the App for fuel or other purchases mentioned above at any time of the day or night when they may be making poor choices in relation to liquor purchases, irrespective of when it is delivered.

I am aware that the Applicant has referred to a number of other liquor licences it holds for “Guzman Y Gomez” restaurants. These are Restaurant and Catering licences. Several of these restaurants are located in OTR outlets which also sell fuel, including; Salisbury Downs, Greenacres, Glandore, Linden Park and Old Noarlunga. I note that the operation of a packaged liquor outlet, and the risks associated with selling take away liquor, are very different to those of operating a restaurant.

It was also put to me that the grant of this licence will benefit customers in the South Australian liquor market by providing additional and much needed competition in the delivered packaged liquor market. I do not consider that there is any pressing need for further competition in relation to the availability of or delivery of packaged liquor, or that this would provide any benefit to the community.

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### Decision

I note that SAPOL has not objected to the application and no submissions have been lodged by any parties opposing the grant of this application.

Undertaking the evaluative exercise that the Act requires, involves weighing the positive aspects of the proposed application with the negative aspects in order to determine whether granting the application is in the public interest and is consistent with the Objects of the Act.

I have considered and have had regard to the Objects of the Act, as required by section 3(2) of the Act, in determining the application.

Harm minimisation is a key component of the community interest test, underpinned by the first object of the Act: *“to ensure 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.”*

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 I am satisfied on the material before me that the risk of harm posed by the proposed application is significant.

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)”*.

I have considered the requirements of section 38 of the Act, particularly s38(7) which provides that:

A packaged liquor sales licence may only be granted in respect of premises of a prescribed kind if the licensing authority is satisfied that there is proper reason to do so

Prescribed premises are defined by the *Liquor Licensing (General) Regulations 2012* and includes the following:

- (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 or advertised as a supermarket, convenience store or delicatessen;
- ....
- (d) petrol stations, including any part of a petrol station
  - (i) that consist of a shop, or shops selling goods by retail

I am mindful, as observed by Gilchrist J in *Hove Sip N Save* [2021] SALC 7 [at 139], that the legislature has chosen not to go down the same path other jurisdictions have taken in relation to allowing the wholesale alignment of takeaway liquor facilities with supermarkets.

Whilst the Applicant is proposing to sell liquor via direct sales transactions only, and not from the physical premises of OTR outlets, in my view the requirements of section 38 are still



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relevant. It is quite clear that a packaged liquor sales licence could not ordinarily be granted for premises such as OTR which often include both a convenience store and petrol station, and at times also a restaurant. I must therefore have due regard to the intent of Parliament that the sale of packaged liquor not be associated with premises of a prescribed kind such as a petrol station or convenience store as would be the case here, albeit in an app environment.

Whilst the present application, if granted, would not result in the physical co-location of packaged liquor and daily convenience items and staples (such as coffee), and consequently does not offend s 38 of the Act, it would result in a virtual co-location with the co-mingling of coffee, popular food items, petrol and liquor purchases, and would be another step towards normalising the purchase of packaged liquor when consumers are obtaining their daily coffee, or petrol, or other convenient and attractive food items such as Subway and Krispy Kremes. In my view this is contrary to the public interest.

Additionally, in my view the grant of this application would not be consistent with the Objects of the Act as approving the application would not ensure that the “*sale and supply of liquor occurs in a manner that minimises the harm and potential for harm caused by the excessive and inappropriate consumption of liquor*”, will not be “*consistent with the expectations and aspirations of the public*”, and will not “*facilitate the responsible development of the licensed liquor industry*”: per s 3(1)(a),(c) and (d) of the Act.

There are a plethora of dedicated liquor apps available to the public and online liquor sales comprise a significant and increasing proportion of liquor purchases. I do not accept that there is any shortage of online liquor purchase and delivery options already available to the public, or that the need for further competition is a factor that would weigh in favour of the grant of this application.

I do not accept that the public would have any expectation or aspirations that this application would be granted or that alcohol would be available for purchase on the ‘OTR’ app.

I am concerned that granting this application would set an undesirable precedent, would not be consistent with facilitating the responsible development of the licensed liquor industry, and would tend to normalise the purchase of liquor with other daily staples such as fuel and attractive food items. Given the use of the ‘OTR’ App by minors, this is undesirable and presents an exposure risk that I am not prepared to countenance.

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, and 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.

For the reasons above, I consider that granting this application would be contrary to the public interest and would be inconsistent with the Objects of the Act.

Accordingly, OTR’s application for a Packaged Liquor Sales Licence is refused.

**Dini Soulio**  
**Liquor and Gambling Commissioner**