

IN THE LIQUOR LICENSING)
COURT OF WESTERN AUSTRALIA)
July 1,2,3,4,5,29,30,31, August 1,
2,12,13,14, September 23 1991,
November 18 & December 17 1992

CRT 98/90

IN THE MATTER of an application
by BAROQUE HOLDINGS PTY
LTD for the grant of a liquor store
licence for premises to be known as
MIRRABOOKA LIQUOR situated at
Lot 432 Honeywell Boulevard,
Mirrabooka

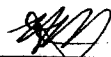
and

IN THE MATTER of objections by
ALJOHN (1982) PTY LTD and
CHRISTOFF & SONS PTY LTD

Mr D McLeod appeared for the applicant (instructed by Messrs McLeod & Co)

Mr D Mossenson appeared for Aljohn (1982) Pty Ltd & Christoff and Sons Pty Ltd
(instructed by Messrs Phillips Fox)

Reserved Decision of His Honour Judge Greaves 8 February 1993

Hugh to initial plse: 

Greaves J:

1. I have already observed in my Directions of 18 November 1992 that the effect of the order of the Full Court in this case is to require reconsideration upon the evidence previously before this Court and upon the market survey evidence of the question whether the applicant has established that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services in this affected area in accordance with the approach to the application of s.38 of the Act to the evidence by the Full Court.

2. I am also required to consider the first and sixth grounds of objection and reconsider the second ground of objection to determine whether the objectors have established any such ground upon their evidence referred to in paragraphs 18, 47 and 48 of the reasons of this Court of 18 October 1991.

3. As I stated on 18 November 1992, in the end I am in no doubt that in this case the proper determination of the issues will depend upon the weight which I should give to the evidence in accordance with the reasons of the Full Court.

4. I have now received the evidence in Exhibits 99 to 103 and heard cross examination of Dr Fenton and Mrs Gilchrist.

5. I note the observations of Ipp J. in his reasons for judgment in the Full Court about the survey evidence when he said at page 18:

"It is merely evidence tending to establish one of the limbs of the enquiry. Moreover, I would have thought that the room for credibility disputes on these issues is limited. It would be rather difficult to refute the testimony of an individual in Mirrabooka who says that he or she would prefer to purchase liquor from a store that is significantly nearer and more accessible to his or her home."

6. In concluding that the survey evidence should have been admitted, Ipp J. made the further observation at page 20 of his reasons:

"I wish to stress that nothing that I have said should be taken to be any reflection on the weight to be attributed to the survey evidence. The learned judge did not consider it necessary to examine the detail of that evidence nor to determine whether the market survey was conducted effectively and scientifically. It is similarly not necessary for me to comment on those matters."

7. The survey evidence, together with the other substantive evidence for the applicant, is evidence of a representative sample of a relevant section of the public identified by the Full Court, from which the requirements of the public in the affected area may be proved by inference.

8. For the reasons given in paragraph 5 of the "Applicant's Submissions on Rehearing" dated 17 December 1992, counsel for the applicant submitted at page 8 that "there is ample reason for the Court to find that the subjective requirements of the relevant public are objectively reasonable in the present case." The factors to which counsel referred are relevant to the inquiry. The question is what weight is to be given to the evidence of those factors in determining objectively the reasonable requirements of the public as identified by the Full Court. At page 22 of his reasons, Ipp J. observed:

"In the present case, however, none of the licensed premises in the affected area or outside the affected area enable those persons who do their shopping in the

Mirrabooka Village Shopping Centre to purchase their liquor at the same time and at the same place that they do their other shopping. Furthermore, many of the inhabitants in Mirrabooka and Koondoola are not able to afford their own private transport and there are presently no licensed premises in Mirrabooka, which conveniently caters for their particular needs."

9. These are matters to be taken into account in determining whether the requirements of the public identified by the Full Court in this case are objectively reasonable on all the evidence. In this regard, Ipp J. explained the importance of considering the desire of a significant section of the public to purchase their liquor at the same time and at the same place that they do their shopping in determining the reasonable requirements of the public under s.38(1) of the Act at page 23 of his reasons.

10. In my opinion, however, the weight to be given to such matters in the present case must be judged on the evidence as a whole including, of course, the evidence for the objectors.

11. The objectors bear the onus of proof of establishing their objections including that under s.74(1)(d). In my opinion, the evidence for the objectors in this case is to be preferred and given greater weight than that for the applicant in determination of the applicant's case under s.38 and the objector's case under s.74(1)(d).

12. In determining whether the requirements of the public identified by the Full Court are objectively reasonable in the present case, I take into account the evidence of the objectors' witnesses residing in Mirrabooka and Koondoola about their utilisation of existing licensed premises. I found that evidence both reliable and persuasive and I prefer it to the evidence for the applicant notwithstanding that some of the witnesses were existing customers of the objectors.

13. In this regard, I refer in particular to the evidence of Mr Peter Brennan in Exhibit 50, Ms Frances Currie in Exhibit 75, Mrs Dorothy Eccles in Exhibit 56, Ms Ruth Hatton in Exhibit 57, Miss Carolyn Head in Exhibit 76, Mrs Jaqueline Ingram in Exhibit 61, Mrs Raewynn King in Exhibit 89, Mrs Angela Lauder in Exhibit 70, Ms Margaret Lewis in Exhibit 47, Miss Marilyn Seinor in Exhibit 69, Mrs Linda Villiers in Exhibit 64, Mr Neil West in Exhibit 71 and Mrs Daisy Williams in Exhibit 55.

14. In considering whether the requirements of the public identified by the Full Court in this case are objectively reasonable, I also take into account but to a lesser extent the evidence of Mr George Armstrong in Exhibit 67 about the catchment of the Mirrabooka Square regional shopping centre. In the same way, I take into account the evidence of Mr James McCollum in Exhibit 82, Mr Terry Morphew in Exhibit 85, Mr Maurice Abel in Exhibit 40, Mr Vic Nicoloff in Exhibit 58 and Mr Patrick O'Toole in Exhibit 92 about the catchments of existing licensed premises which specifically identify and serve the suburbs of Mirrabooka and Koondoola.

15. In approaching the determination of this application under s.38 and these objections under s.74(1)(d) in accordance with the reasons of the Full Court, I find that the subjective requirements of the public identified by the Full Court are not objectively reasonable having

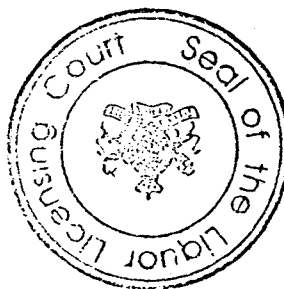
regard to the matters which the Court is required to take into account under s.38(1) and (2) and under s.74(1)(d).

16. I reach this conclusion notwithstanding that I acknowledge that the evidence for the applicant reveals that a significant section of the public desires a liquor store at the shopping centre and that Mirrabooka and Koondoola are suburbs where no liquor store currently exists. In my opinion, the evidence is not such that it is in itself sufficient to establish a reasonable requirement. In reaching this conclusion, I have had no regard for the question whether there are insufficient liquor store licences in the area to meet the requirements of the public. As always, I have considered only whether the grant is necessary to provide for the reasonable requirements of the public.

17. Having heard the evidence and seen the witnesses and having considered the issues in accordance with the reasons of the Full Court, I prefer the evidence for the objectors to the evidence for the applicant and I conclude that the applicant has failed to establish its case under s.38 that the requirements of the public identified by the Full Court are objectively reasonable. I find that the objectors have established their ground of objection under s.74(1)(d) that the grant of the application is not necessary to provide for the requirements of the public.

18. In the circumstances, therefore, it is not now necessary for me to consider and determine the first and sixth grounds of objection. In my opinion, the evidence does not establish any reason on the merits of this case why this application should be granted pursuant to s.33(1) in the public interest notwithstanding that a valid ground of objection has been made out. The contrary is the case. Even if the evidence for the applicant were to be preferred, I am of the opinion that this application should be refused in the public interest because I consider that to grant this licence would not contribute to the proper development of the liquor industry in this State and would not facilitate the use and development of licensed facilities reflecting the diversity of consumer demand for reasons which it is not presently necessary for me to explain.

19. Accordingly, in my opinion, the applicant has failed to discharge its onus upon it under s.38 upon the evidence in accordance with the reasons of the Full Court. The objector has established the second ground of objection on the balance of probabilities. In those circumstances, the application should be refused.



IN THE LIQUOR LICENSING)
COURT OF WESTERN AUSTRALIA)
ON JULY 1, 2, 3, 4, 5, 29, 30, 31, AUGUST 1,)
2, 12, 13, 14 and SEPTEMBER 23, 1991)

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LTD for the grant of a liquor store
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IN THE MATTER of objections by
ALJOHN (1982) PTY LTD, TREVOR
ATFIELD, CHRISTOFF & SONS
PTY LTD and Others

Mr D McLeod appeared for the applicant (instructed by Messrs McLeod & Co)

Mr D Mossenson appeared for the objectors (instructed by Messrs Phillips Fox)

Reserved decision of His Honour Judge Greaves
18 October 1991

Handwritten signature and initials in the bottom right corner.

GREAVES J:

1. The plan of this proposed liquor store, its site and locality are depicted in Exhibit 5. The Director of Liquor Licensing specified an affected area of a radius of four kilometres from the site within the Mirrabooka Village Shopping Centre. That affected area is depicted variously in Exhibits 13 and 14.

2. The applicant is the trustee of the Baroque Unit Trust, the registered proprietor of the shopping centre and the proposed licensee of the liquor store in the shopping centre.

3. The proposed store has an area of 221.5 square metres and may, therefore, be described as an average suburban liquor store. Something of the circumstances in which the present application was conceived is reflected in the evidence of Mr Christopher Thompson, who designed the proposed premises, at paragraph 7.01 et seq of Exhibit 29, where he says:

"The Mirrabooka liquor proposal applies to a 221.5 square metre shop located in an internal corner of the Mirrabooka Village Shopping Centre which is centrally placed in the northern neighbourhood of Mirrabooka. See Fig 11.

The plans accompanying the Mirrabooka Liquor application were prepared in my office following extensive consultation with, and on behalf of, the client company. I have a long association with Mr Frank Giannasi architect and we had early discussions in relation to the proposed store when Mr Giannasi was preparing his design of the Mirrabooka Village Shopping Centre.

... My instructions were to design a modern packaged liquor store suited to the trading environment of Mirrabooka Village Shopping Centre which is primarily the northern neighbourhood of Mirrabooka.

... The Mirrabooka Village Shopping Centre was constructed in 1990 on a site planned for neighbourhood shopping in 1986 when Thompson and Ong were sub consultants to Feilman Planning Consultants acting for Homeswest, the land developer in north Mirrabooka.

The site was sold at auction and plans for the centre were prepared by Frank Giannasi architect acting for Baroque Holdings Pty Ltd.

The site plan illustrated in Fig 11 shows the specific shopping centre site. Lots on the southern or right hand side of the site have frontage to Boyare Avenue and consist of a service station and a medical centre.

The tenancies at the time of preparing this report are identified on the site plan and consist of: Chinese restaurant, pizza, deli, fish and chips, video hire, hair salon, pharmacy, Cheap Foods supermarket, hot bread shop, coffee lounge, florist and gift shop, and newsagent. Two shops (other than the proposed licensed store) are vacant."

4. Photographs of the Mirrabooka Village Shopping Centre and the proposed liquor store appear at page 73 of Exhibit 29. The principal witness for the applicant was Mr John Michael Russell whose evidence is contained in Exhibit 9. Mr Russell expands on the circumstances of this application. He has been involved in retailing since 1957 and at paragraph 4.6 he says that "for most of the time since 1972 I have been a proprietor and manager of supermarkets, and I am presently carrying on that business within the Cheap Foods chain". At paragraph 5.1, Mr Russell continues:

"Having been involved in retailing all my life, I have more recently become involved in shopping centre development.

... With the exception of Joe Aloï, my associates in the proprietorship of the Mirrabooka Village Shopping Centre are different from my associates at the Carramar Shopping Centre. All of the partners in the Mirrabooka Village Shopping Centre are agreed that if a store licence is granted for the liquor store at the Mirrabooka Village Shopping Centre, the business should continue in our proprietorship, as we are agreed in the benefits that can be derived from the joint ownership and operation of the liquor store and the shopping centre generally.

There are only five partners in the proprietorship of the Mirrabooka Village Shopping Centre, and we are all friends. Two of the other partners are brothers of Joe Aloï, who I have been associated with since 1971.

In about mid 1989 my partners and I, who were not at that time associated in business, discussed the possibility that we might look for an opportunity to develop a shopping centre. Then in early 1990 we became aware that Homeswest had an area of land in Mirrabooka which was zoned for a shopping centre, and which Homeswest intended to put out for tender.

... From the time we first started planning the shopping centre, we had always considered a liquor store to be an important part of the total concept. An area for a liquor store was allocated in the earliest plans that were drawn up.

... From our past experience, we knew that the key to the success of a neighbourhood shopping centre is to have as complete a range of food outlets as possible. A packaged liquor outlet is a very important part of that range.

... Our main aim in seeking a store licence is to provide a complete food service, and the convenience of one stop shopping to our regular shopping centre customers. We considered the service provided at the packaged liquor outlets in surrounding areas ..."

5. A little later in his evidence, Mr Russell refers to the feasibility study which the applicant instructed Mr Richard Todd to prepare to support this application at paragraph 13 of Exhibit 9. At paragraph 13.5, Mr Russell states:

"It was encouraging that Mr Todd's report confirmed that the proposed store could operate at a reasonable profit level with the scale of operation we had intended. We would be happy with profitability results in the vicinity of what Mr Todd predicts. In fact we would not be alarmed if the projected profitability had been half as good, because as owners of the shopping centre we see the liquor store as providing a valuable additional service to customers, and that must improve the popularity of the shopping centre, and therefore its value."

6. This, therefore, is the application of a shopping centre developer which seeks the grant of a liquor store licence in a suburban shopping centre which it owns and for premises in which the applicant itself intends to trade to provide one stop shopping to local residents.

7. From the start, the case for the applicant was presented upon the claim that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area, and in particular that locality which is depicted on Exhibit 5. The case for the applicant is that the evidence establishes that this locality should be regarded as a discrete part of the affected area by reference to planning and

physical criteria.

8. The planning criterion relied upon is that it is proposed to establish the liquor store in a neighbourhood shopping centre and thereby increase the range of one stop shopping available to the customers of that centre. The physical criterion relied upon is that the locality in which this shopping centre has recently opened is, by virtue of the surrounding road network introverted and self contained.

9. In the present case, I do not think I need to say more than that to discharge its onus under s.38 of the Act, this applicant is required to satisfy the Court that having regard to the matters referred to in s.38, this grant is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. They are the relevant criteria by which this application is to be determined and I have no doubt that in the case of an application for a suburban liquor store licence within a metropolitan affected area of this size, it is not uncommon for an applicant such as the present to emphasise the requirements for liquor and related services of those members of the public who reside in the immediate locality of the premises proposed. As I understand the case for this applicant, it is for that purpose that it seeks to identify the locality depicted on Exhibit 5 as a part of the affected area whose residents' requirements for packaged liquor and related services would be served by the grant of this application.

10. I refer to the evidence of Mr Thompson at paragraph 5.05 et seq of Exhibit 29 which requires some comment:

"North Mirrabooka is sharply defined by roads and other geographic and planning delineators (See 2.08). Centrally placed in the north Mirrabooka neighbourhood is the Mirrabooka Village Shopping Centre and the applicant premises.

The road pattern adopted for Mirrabooka and north Mirrabooka in particular has been designed to a contemporary and 'introverted' way in that access in and out of the neighbourhood is carefully limited to a few points onto the surrounding road pattern as shown on Fig 7.

Access from north Mirrabooka to Mirrabooka Avenue is restricted to use of Boyare Avenue in the south west corner of the neighbourhood. Access to Beach Road is limited to entry points at Torquata Drive and Honeywell Boulevard and access to Alexander Drive occurs at the south east corner of the neighbourhood. Access to the south across the Reid Highway and ROS reserves is via Northwood Drive which connects to Boyare Avenue.

The planning of the north Mirrabooka Neighbourhood has included a network of roads which adopt a hierarchy of scale of size and capacity. Extensive use is made of cul-de-sac roads, many of which are also service roads running alongside the perimeter road. The cul-de-sac roads are usually grouped to meet on a larger road which collects the traffic and in turn leads onto an even more important local road which may connect with the perimeter roads or enables vehicular movement within the neighbourhood from one side to the other. What appear to be relatively short straight line distances from sites within the north Mirrabooka neighbourhood to reach the outer perimeter roads are frequently converted into quite long road trips by the nature of the subdivision design "introverted" road network."

11. I accept the general tenor of this evidence other than his subjective conclusion. It will be necessary to examine the extent to which the evidence of the residents called by both the applicant and objectors demonstrates that they are constrained by the pattern to which

Mr Thompson refers and I shall return to that evidence.

12. Mr Thompson addressed the population of the affected area and that part which he identifies as "north Mirrabooka" at paragraph 4.17 et seq of Exhibit 29:

"The total population at the 1981 census was 44,002 persons made up of 17,429 "under eighteen" people and 26,573 adults. In 1986, the total population had increased by 11,436 or 25.99% to 55,438 persons made up of 19,272 "under eighteen" people and 36,266 adults."

13. Mr Thompson estimates the 1990 population of the affected area between 69,000 and 70,000 persons. At paragraph 5.13 et seq, Mr Thompson expresses his opinion about the population of "the north Mirrabooka neighbourhood":

"Population growth in Mirrabooka has been rapid, with an annual average growth rate of 45.46% between 1981 and 1986, compared with growth of 4.7% for the affected area and 2.04% for the Perth statistical division.

Table 6 indicates the rapid growth in new dwellings in Mirrabooka from 153 in 1981 to 1,239 in 1986, an increase of 1086 dwellings or 709% in the intercensal period. Dwelling numbers have further increased by 1,748 dwellings or 140% to an estimated 2,987 at 31/12/90.

Based on the 31/12/90 private dwelling estimate and the 1986 occupancy rate, a population estimate of 9,300 - 9,500 has been calculated for Mirrabooka.

... Reference to approved plans of subdivision of north Mirrabooka (See Fig 7) indicates a final yield of 2,156 residential lots and a further four aged persons dwelling sites totalling eighty units and five group dwelling sites totalling sixty units (unit yields are approximate). North Mirrabooka therefore has a total dwelling capacity of 2,296 dwellings, with subdivision in the area complete.

Based on this dwelling capacity of 2,296 dwellings and the latest dwelling estimate of 1,842 for north Mirrabooka, the capacity for growth in the area is an additional 454 dwellings or 24.6%. The data suggests an ultimate population of 7,200 - 7,400 for north Mirrabooka based on the 1986 occupancy rate of 3.15 for Mirrabooka CDs (See Table 6)."

14. All the evidence in this case points to the not surprising conclusion that the population of this affected area and this part of this affected area has been increasing rapidly and continues to increase. It is evidence which this Court has heard in several cases.

15. In addition to the evidence of increased population over the last ten years and the likelihood of further increase of the population in the affected area in the foreseeable future, the applicant relies upon the fact that since 1982 only two licences have been granted in the affected area, namely the Ballajura City Liquor Store and Budget Liquor. Those premises and the remaining ten licensed premises already existing in the affected area are listed in the evidence of Mr Thompson at page 12 of Exhibit 29. Those licensed premises are also depicted on Exhibit 14 which is an enlargement of Figure 3 which follows page 12 of Exhibit 29. Table 1 also lists the distance between each of the licensed premises already existing in the affected area and the proposed liquor store. It will be observed that in sum, there is one hotel, five taverns and six liquor stores already existing in the affected area. There remains pending an earlier application by Coles Myer Ltd for a liquor store licence at Noranda Square Shopping Centre, within the affected area, which was twice refused by this Court and, I was

informed, remains subject to appeal.

16. The objectors to the present application are the licensees of Mirrabooka Tavern, Budget Liquor, Malaga Tavern and Humphrey's Tavern and Linda Villiers, a resident. The licensees of Mirrabooka Tavern and Budget Liquor situated at the Mirrabooka Square Shopping Centre are associated companies. The grounds of objection are contained in the re-amended notice of objection dated 12 June 1991. They are set out in paragraph 3.1 of the notice:

- "3.1.1 That the grant of the application would be contrary to the public interest.*
- 3.1.2 That the grant of the application is not necessary in order to provide for the requirements of the public.*
- 3.1.3 That the premises accommodation or services proposed to be provided if the application is granted will be inadequate to meet the requirements of the public or will be unsuitable or unsatisfactory for any other reason.*
- 3.1.4 That the position, nature, state of repair or standard of the premises or proposed premises renders them unsuitable to be licensed, or to be licensed under a licence of the class to which the application relates.*
- 3.1.5 That the grant of the application would otherwise be contrary to the provisions and intent of the Liquor Licensing Act, 1988.*
- 3.1.6 That if the application were granted:—*
 - 3.1.6.1 undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or*
 - 3.1.6.2 the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened."*

17. The grounds of objection contained in paragraphs 3.1.3, 3.1.4 and 3.1.5 were not pursued at the hearing with any vigour and could not be established on the evidence. Particulars of each ground of objection which remains are contained in paragraphs 4.1, 4.2 and 4.6 of the notice.

18. The principal evidence for the objectors was given by Mr James McCollum (Exhibits 82, 83 and 84) on behalf of Mirrabooka Tavern and Budget Liquor, Mr Terry Morphew (Exhibits 85 and 86) on behalf of the Malaga Tavern, Mr Vic Nicoloff (Exhibit 58) on behalf of the Balga Bottle Barn and Mr Patrick O'Toole (Exhibits 92 and 93) on behalf of Humphrey's Tavern. Mrs Linda Villiers (Exhibit 64) gave the principal evidence in support of the last ground of objection. Mr Peter Goff also gave planning evidence on behalf of the objectors which is contained in Exhibits 43 and 44.

19. Not unusually, the primary case for the objectors to this application is in large part a mirror of the case presented for the applicant under s.38 of the Act. In addition, of course, the objectors rely on the ground of objection under s.74(1)(a) and s.74(1)(g) and (e). In short, the objectors assert that there is no foundation for the claim that the Court should have regard to a discrete part of the affected area in the determination of this application, that

there is no evidence upon which the Court could determine that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area in the foreseeable future, that the grant is not necessary to provide for the requirements of the public or reasonable requirements of the public now and that the grant would in any event be contrary to the public interest.

20. I have thought it necessary to summarize the case for the applicant and objectors in this way in this case in an attempt to identify the ultimate issues for determination. That is because, as will be clear already, the applicant and objectors each called an unusually large amount of evidence in support of and against this application. Accordingly, notwithstanding that this remains an application for a suburban liquor store licence, I have attempted this summary in order that the evidence for the applicant and objectors may be approached and considered in accordance with the requirements of the Act, the proper exercise by the Court of its discretion and consistently with the authorities.

21. Until recently, it might have been thought that many cases under the Liquor Act 1970 and the Liquor Licensing Act 1988, if not in other jurisdictions, had marked out the approach which this Court is required to take in the exercise of its discretion in the determination of the question whether the grant of a liquor store licence is necessary to provide for the reasonable requirements of the public for liquor and related services in an affected area. The applicant in the present case submits that as a result of the decision of the Full Court in Charlie Carter Pty Ltd v Streeter and Male Pty Ltd and Another (unreported decision of W A Full Court, Appeal No. 116/90 delivered 21/6/90), there is now a different test for the determination of the reasonable requirements of the public. It is submitted for this applicant that previous authority is no longer reliable and that the principal question to be asked in determining the issues raised by s.38 of the Act is whether there is a reasonable requirement by the public for the purchase of liquor in the manner and under the circumstances contemplated by the proposed licence.

22. This is a direct reference to what Malcolm C. J., with whom the other members of the Court agreed, said at page 22 of his reasons:

"The question is not now whether there are insufficient store licences or other licences to meet the requirements of the public. The question is whether there is a reasonable requirement by the public for the purchase of liquor in the manner and under the circumstances contemplated by the proposed licence. There is no question of protecting the monopoly or market share of an existing licensee."

23. I do not accept the submission that this statement represents a departure from the interpretation which this Court has previously placed upon s.38. It is, indeed, a plain re-statement of the body of s.38(1) of the Act. It is to be noted that a little earlier in his reasons, the learned Chief Justice observed at page 16:

"The requirements of the public in the affected area for liquor facilities may be proved by inference from the evidence of a representative sample of a relevant section of the population of the affected area ... This is the 'subjective evidence'. It is then necessary to determine whether the subjective evidence of requirements is objectively reasonable. If it is, it is then necessary to determine whether the proposed licence will meet those requirements in whole or in part."

24. Again, at page 18 of his reasons, the learned Chief Justice continued:

"It is plain that evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public may in itself be sufficient to

establish a reasonable requirement ..."

25. It was the conclusion of this Court, in that case, that the evidence did not demonstrate that the requirements of the public, reflected in the subjective evidence, were objectively reasonable, that the Full Court held was in error. In my opinion, it is quite plain that s.38 requires the Court to determine the reasonable requirements of the public upon the evidence in accordance with the criteria therein set out, including s.38(2)(c)(ii). There is nothing in the reasons of the Full Court which should lead to the conclusion that the determination whether the subjective requirements of the public are objectively reasonable in this case is now to be determined in some way different from the approach previously adopted.

26. I reach this conclusion notwithstanding the observation of the learned Chief Justice at page 22 of his reasons that the question under s.71 of the Liquor Act 1970 was very different from that posed by s.38(1). Of course, I entirely accept what His Honour says. The fact remains, however, that the convenience of the public in any one case remains a relevant criterion in the determination of the reasonable requirements of the public for liquor and related services or accommodation in an affected area and in many cases the consideration of that convenience in the exercise of the discretion invested in the Court involves, inter alia, a consideration of the licensed premises already existing in the affected area, including their number and distribution.

27. I now proceed to examine the subjective evidence called for the applicant and objectors in this case. I wish firstly to set out the reasons for which I refused to admit certain survey evidence which the applicant sought to adduce in support of its case during this hearing.

28. I refused to admit the evidence of Dr David Mark Fenton, which for the purposes of identification was marked respectively A, C, D, E and F in these proceedings. I also refused to admit certain of the evidence of Janet Gilchrist. The whole of her evidence, including that which was excluded, is contained in Exhibit 39, otherwise marked as Exhibit B, G, H and J respectively. At page 2 of Exhibit A, Dr Fenton describes what he calls his *"attitudinal survey in regard to establishment of liquor store at Mirrabooka Village Shopping Centre"* in this way:

"Earlier this year I was commissioned to undertake an attitudinal survey relevant to the establishment of a liquor outlet on a site within the Mirrabooka Village Shopping Centre, located in Honeywell Boulevard near its intersection with Boyare Avenue. I was instructed that the liquor outlet was to be a licensed store to be known as 'Mirrabooka Liquor'.

On instructions I received, I identified three research objectives. The research objectives were:

- (a) to identify community intentions to purchase liquor at the proposed liquor store;*
- (b) to identify community attitudes towards the establishment of the proposed liquor store; and*
- (c) to identify possible changes in liquor purchasing habits as a result of the establishment of the proposed liquor store.*

Survey area.

I was instructed to conduct an attitudinal survey within the Mirrabooka and Koondoola

locality."

29. Dr Fenton then goes on to describe the questionnaire prepared, the methodology of the survey and the execution of the survey. Attached to Exhibit A is document DF2 being *"attitudes towards the establishment of a proposed liquor store at Mirrabooka Village amongst residents of the suburbs of Koondoola and Mirrabooka."* Dr Fenton describes the survey in more detail at paragraph 2 of that document, and for the sake of clarity I think that I should repeat part of that description in his words:

"The sample was defined on the basis of a land use survey of the suburbs of Koondoola and Mirrabooka undertaken by Janet Gilchrist, and which is described in her report titled, 'Report on attitudes of catchment area residents to the establishment of a liquor store at Mirrabooka Village'.

The land use survey identified all houses and units existing in the suburbs of Koondoola and Mirrabooka on the 11th and 12th May 1991. The location of each house and unit was recorded on a 1:5000 map of Koondoola and Mirrabooka. A count of all houses and units identified 1,295 houses and units in Koondoola and 1,925 houses and units in Mirrabooka.

A decision was made to base the survey on a sample of respondents from 350 houses and units within both suburbs.

... The sample was based on 144 (41.1%) respondents from Koondoola and 206 (58.9%) respondents from Mirrabooka. There were 142 (40.6%) males and 208 (59.4%) females within the sample. Respondents were aged between 18 and 87 years of age, with a mean age of 36.7."

30. There follow eleven tables and explanation which extract, in summary form, the answers to the first six questions asked of the 350 respondents and contained in the questionnaire which is Appendix A to the document. For reasons which will become apparent, there is no need for me to refer to the body of the evidence of Dr Fenton in setting out the reasons for which it was excluded.

31. The evidence of Mrs Gilchrist which was admitted is contained in pages 1 and 2 and the first paragraph of page 3 of Appendix 2 to Exhibit 39. She identifies the purpose of her evidence at paragraph 1 as follows:

"This report identifies the catchment area of Mirrabooka Liquor which is proposed within the Mirrabooka Village Shopping Centre. It presents information concerning the attitudes of catchment area residents to the establishment of the proposed liquor store. Resident attitudes were obtained from a household survey of the catchment areas (identified herein) carried out by Dr Mark Fenton of environment behaviour."

32. Much of the evidence of Mrs Gilchrist which was admitted and is substantially contained on page 2 of Appendix 2 repeats the opinions expressed by Mr Thompson to which I have already referred in these reasons. In the end, all that Mrs Gilchrist says really comes as little surprise and that is that retailers at the Mirrabooka Village Shopping Centre may expect residents from the suburb of Mirrabooka to form their primary catchment and the suburb of Koondoola their secondary catchment.

33. In her subsequent evidence, which was excluded, Mrs Gilchrist goes on to state how Dr Fenton relied upon her land use survey which is Exhibit D. She continues at paragraph 3.1:

"Dr Fenton's survey used acceptable survey research methodology and produced statistically reliable results as described by him in his report titled 'attitudes towards the establishment of a proposed liquor store at Mirrabooka Village Shopping Centre amongst residents of the suburbs of Koondoola and Mirrabooka'. The results of the sample survey can be accepted as representing the attitudes of all persons aged 18 years and over who are resident in the store's primary and secondary catchment areas."

34. Mrs Gilchrist then proceeds in the body of her evidence to interpret and express opinion about the data gathered by Dr Fenton. As in the case of Dr Fenton, it is not necessary for me to refer to the body of that evidence in setting out my reasons for excluding it.

35. I have said sufficient to show that the purpose of the evidence of Mrs Gilchrist was twofold: firstly, to express from a town planner's point of view the likely catchment of a liquor store in a neighbourhood shopping centre, and secondly, to offer some interpretation and opinion about the statistical data contained in the evidence of Dr Fenton. I refer, by way of example to page 6 of Appendix 2 to Exhibit 39 where Mrs Gilchrist states:

"28.3% of catchment area residents overall, would not purchase liquor from the proposed store because they do not purchase liquor at all. Only 25.7% in the primary catchment (Mirrabooka) are non purchasers compared to 31.9% in the secondary catchment (Koondoola). These people, although they live locally are excluded from the market for liquor in this location. When liquor purchases only are considered, 69.3% overall, said they would purchase liquor at Mirrabooka Liquor. 79.1% of liquor purchasing residents in Mirrabooka said they would purchase from the proposed store. This is consistent with the generally accepted expectation of retailers to capture about 75% - 80% of customers from a primary catchment area. A further 9.8% of liquor purchasing residents said they didn't know if they would purchase there. It is likely that only some of these respondents would eventually purchase there, if the store is established. Only 11.1% said they would not purchase there. In Koondoola 54.1% of liquor purchasing residents said they would purchase at Mirrabooka Liquor. This is somewhat above the generally accepted retailer expectation of capturing about 50% of potential customers from a secondary catchment area. 17.3% were uncertain and 28.6% said they would not purchase there."

36. It was submitted on behalf of the objectors in this case that the whole of the evidence of Dr Fenton and that part of the evidence of Mrs Gilchrist which I have identified and which interprets the data presented by Dr Fenton, should be excluded in any consideration of the reasonable requirements of the public for liquor and related services in the affected area.

37. The objectors advanced these submissions vigorously and they were equally vigorously opposed on behalf of the applicant. Both the applicant and objectors submitted a written outline of their respective submissions which I have taken into account. The authorities referred to show that the approach which the law requires to be taken to the reception of evidence of this nature is complex, to some extent uncertain, and certainly dependent upon the purpose for which the evidence is tendered.

38. I reached the conclusion in this case for reasons which will appear shortly that the evidence of Mrs Gilchrist and Dr Fenton objected to should not be received because, in my opinion, the analysis of Mrs Gilchrist of the data supplied by Dr Fenton suggests little more than a conclusion that on balance more residents of the suburbs of Mirrabooka and Koondoola favour establishment of the proposed liquor store because it is closer to their

homes than other packaged liquor outlets. It might be thought that as such this conclusion is neither surprising nor objectionable. I consider, however, that it is objectionable for reasons which will appear shortly.

39. While the evidence of Mrs Gilchrist ventures this conclusion upon the survey data, in my opinion, her evidence is not otherwise evidence of an expert nature. Her evidence in relation to planning issues was not objected to and was received in the usual way that such evidence is received in this jurisdiction. Neither she nor Dr Fenton otherwise has expertise in the liquor industry and liquor retailing and does not purport to. Since neither witness has that expertise, I reached the conclusion that the survey data was advanced as primary evidence of witnesses not before the Court which Mrs Gilchrist and Dr Fenton purport to condense and repeat in their evidence. In that sense, the source materials and the tables are "*documents generated by the applicant*" as described by Bray C. J. in Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd (1973) 4 SASR 503 at 509. The learned authors of "Cross on Evidence" (Volume 1) at paragraph 29155 state the same conclusion in this way:

"An expert may base his opinion upon material compiled over a field which is wider than the issue before the court. Where he gathers raw data specifically for the court hearing, this must be authenticated like any evidence."

40. I therefore reach the conclusion in this case that owing to the purpose for which the present survey evidence was tendered, to adopt the words of Bray C. J. in the Hoban's Glynde case, "*hearsay of the type offered here shrieks for cross examination.*" It is for that reason that I have not considered it necessary to examine the body of the evidence objected to in any further detail, nor to consider the various submissions advanced on behalf of the objectors inviting the Court to determine whether the evidence in this case establishes that the survey was conducted "*effectively and scientifically*".

41. If it is necessary, I also observe that the determination of this application may only be made upon a consideration of the requirements of the public in the affected area as a whole and that survey evidence of this nature, emphasising certain attitudes of residents of part of the affected area should not be received.

42. The applicant advanced a number of submissions, the thrust of which was to the effect that this Court may inform itself according to a very wide evidentiary prescription under s.16 of the Act and that accordingly, this Court should receive evidence of this nature to determine what weight should be placed upon it. In my experience, there are occasions in this jurisdiction when it matters very little whether objection to evidence which should be sustained is couched in terms of admissibility or weight. I am of the opinion, however, that in the present circumstances and having regard to the purpose for which this evidence was adduced, to admit the present survey evidence without affording the objectors the opportunity to cross examine the primary witnesses is unfair and objectionable. I am of the opinion that the approach which I have adopted in determining the admissibility of this evidence is consistent with that expressed in the joint judgment of Lockhart, Wilcox and Gummow J. J. in Arnotts Ltd v Trade Practices Commission (1990) 97 ALR 555 at 602 to 605. In that case, the Full Court observed that the admissibility of survey evidence has been a matter of controversy over many years and continues:

"It would be tedious to refer to all the reported cases in which the admissibility of survey evidence has been considered. Many of the decisions were cited by McLelland J. in Ritz Hotel Ltd v Charles of the Ritz Ltd (1988) 15 NSWLR 158 at 178. At that reference His Honour summarized the situation in these words:

'There is a substantial preponderance of authority in support of the proposition

that survey evidence, and expert evidence in relation thereto, are admissible to prove the state of mind of the public or a section of the public on some particular matter, when that is in issue. However, two distinct bases emerge from the cases in justification of the admissibility of such evidence. The first is that although out-of-court statements by persons interviewed in the course of a survey as to their impressions or opinions are of a hearsay nature, the admission of such statements as evidence of the existence of those impressions or opinions falls within a recognised exception to the hearsay rule. On this approach, the primary evidence is that of the individual responses of those interviewed, interpretative expert evidence being subsidiary. The second basis is that such statements are to be treated not as hearsay, but as original data providing a foundation for expert evidence as to the state of public opinion on the matter in question. On this approach, the primary evidence is that of the expert, and evidence of the individual responses is subsidiary.'

McLelland J. went on to deal with the first basis identified by him, saying that the evidence fell within a recognised exception to the hearsay rule. In that case, this was so. The evidence was tendered in support of a case that particular trade marks would deceive or cause confusion to members of the public. It was tendered to show the public perception of the significance of the word 'Ritz', not to prove the correctness of that perception. The relevant rule is stated in Phipson (13th ed, para 734) in these words: 'Whenever the physical condition, emotions, opinions and state of mind of a person are material to be proved, his statements indicative thereof made at or about the time in question may be given in evidence.' In Ratten v R (1972) AC 378 at 387 the judicial committee of the Privy Council explained the rule in these terms:

'If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonial", ie as establishing some fact narrated by the words.'

However, when a party seeks to adduce evidence of answers given by respondents to a market survey in order to prove what products they customarily purchase or consume, that party seeks to rely upon the answers testimonially. The evidence is tendered as proof of the facts asserted by the interviewees, so the evidence is hearsay.

... However, it is not very profitable - at least in this court - to spend time in determining whether a particular survey is hearsay evidence. Even if it is, ordinarily the court will have a discretion under Order 33, Rule 3 to permit the evidence to be adduced. To call the persons who responded to the survey will almost always result in appreciable expense and delay. Given the existence of a discretion, it seems more sensible to concentrate attention upon the necessity for, and reliability of, the survey evidence, rather than to worry about its compliance with rules regarding hearsay evidence which were developed before this type of problem arose. This is not a situation, like that encountered in Pearce v Button (1986) 8 FCR 408 where the evidence sought to be adduced is the subject of 'a real dispute about matters which go to the heart of the case': see per Lockhart J. (at 422); see also Multi Modal Ltd v Polakow (1987) 78 ALR 553 at 558."

43. In my opinion, it is quite plain that the survey evidence adduced in the present case is the subject of a real dispute about matters which go to the heart of the case, namely the requirements of the public for liquor and related services in the affected area.

44. Quite apart from the survey evidence adduced on behalf of the applicant which I excluded in this case, the applicant called fourteen witnesses to give subjective evidence of

their packaged liquor requirements: Lee-Anne Unwin (Exhibit 28), Stephen Nalder (Exhibit 27), Pamela Anne Dryden (Exhibit 26), Margaret Holmes (Exhibit 19), Stuart David Robertson (Exhibit 12), Shirley Lynes (Exhibit 20), James Henry Bromsgrove (Exhibit 21), Margaret Lloyd (Exhibit 22), Hau Diep (Exhibit 24), Tracey Jane O'Connor (Exhibit 23), Susan Carol Cartwright (Exhibit 25), Kerri Clifton (Exhibit 34), Marianne Robyn Hayes (Exhibit 33), David Walter Faulkner (Exhibit 32).

45. Their evidence was substantially to the effect that since the opening of the Mirrabooka Village Shopping Centre, they have individually enjoyed those facilities in place of the regional shopping centre at Mirrabooka Square. They enjoy the one stop shopping facilities at Mirrabooka Village as they have enjoyed similar, although larger, facilities at Mirrabooka Square. They would like the additional facility of a liquor store at Mirrabooka Village. I gained the impression from the evidence for the applicant that in the case of a noticeable number of residents of Mirrabooka, many individuals patronize the Mirrabooka Village Shopping Centre through lack of private transport. I also gained the impression that this was a more important factor to local residents than the physical constraints of the local road pattern which Mr Thompson suggested.

46. Indeed, the evidence in this case as a whole, in my opinion, demonstrates that those residents of Mirrabooka with the benefit of private transport move quite freely in and out of that suburb. This conclusion is consistent with evidence which I have heard in other applications for liquor store licences in the metropolitan area of Perth where it appears that individual members of the public purchase packaged liquor in and out of an affected area depending on many factors such as the occasion and the price at which different lines are offered.

47. The subjective evidence for the objectors falls into two categories. It is firstly the evidence of residents of the suburb of Mirrabooka who currently continue to patronize the Mirrabooka Square Shopping Centre for a range of requirements including packaged liquor. They were predominantly people with private transport, although on occasion one person or another would use the taxi service to travel home with their shopping. I refer to the evidence of the following witnesses: Francis Susan Currie (Exhibit 75), Carolyn Anne Head (Exhibit 76), Angela Lauder (Exhibit 70), Ruth Ann Hatton (Exhibit 57), Jacqueline Ingram (Exhibit 61), Margaret Anne Lewis (Exhibit 47), Marilyn Ruth Seinor (Exhibit 69), Dorothy Eccles (Exhibit 56), Daisy Gloria Williams (Exhibit 55) Neil Dereck West (Exhibit 71).

48. Secondly, the evidence for the objectors addressed the sixth ground of objection. These residents of Mirrabooka opposed the grant of this application because they were primarily of the view that there is a sufficient number of licensed premises offering packaged liquor in the affected area and because they were opposed in principle to the establishment of licensed premises in their neighbourhood. I refer to the evidence of the following witnesses: Sergeant Graham Wells (Exhibits 72 and 73) Marilyn Ruth Seinor (Exhibit 69), Neil Dereck West (Exhibit 71), Daisy Gloria Williams (Exhibit 55), Patrick O'Toole (Exhibit 92), Valerie Ashman (Exhibit 77), Ruth Hatton (Exhibit 57), Jacqueline Ingram (Exhibit 61), Arthur Stanely Jackson (Exhibit 45), Raewyn Sharran Fay King (Exhibit 89), Susan Glenda Lewis (Exhibit 48).

49. As a whole, the subjective evidence for the applicant and the objectors is, in my opinion, of people whose liquor requirements are necessarily limited by their income.

50. The evidence for the applicant may be described as representative of a section of the public in the affected area whose requirements would be satisfied by the grant of this application. It is not, however, evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public and therefore evidence

which may in itself be sufficient to establish that the grant of the application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. I reach that conclusion for a number of reasons. Firstly, the evidence is of a relatively small section of the public in the affected area, now and in the foreseeable future, which would prefer to have a liquor store close to where those people live. It is a section of the public with limited liquor requirements.

51. I doubt whether it is useful in any one case to compare the numbers comprising a given section of the public with similar evidence in other cases and circumstances. My experience in this jurisdiction leads me to the conclusion that the section of the public referred to in this case is not significant.

52. Secondly, even if it were considered that the evidence in this case should lead to the conclusion that it is sufficient in itself to establish that the grant of this application would provide that section of the public with significant convenience, advantage or benefit, I would in this case, take the same approach to that evidence which Hope J. explained in Vine v Smith (1980) 1 NSWLR 261 at 267:

"It is not merely a matter of what the neighbourhood requires and whether that is according to some unstated standard reasonable; it is also a question whether the demands of those in the neighbourhood, to adapt an expression used by Mr Ward, ought to be acceded to. In the end, it would seem that what is raised by the section is all one question and that read as a whole the language used merely serves to emphasize the objective character of the enquiry and to show that other considerations may enter into its resolution than the mere satisfaction of the demands made by persons in the neighbourhood." (My emphasis).

53. A little later at page 270, Hope J. concluded that:

"The fact that there was a significant demand or need by people in the neighbourhood for the outlet, and that it would provide them with a significant convenience, advantage or benefit would not necessarily establish that the reasonable requirements of the neighbourhood justified the grant of the licence, any more than the fact that the people who claimed they wanted the new outlet obtained their liquor elsewhere would prevent the applicant from establishing his case."

54. I take that approach in this case because in deciding whether this grant is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area, I am of the opinion that the evidence demonstrated that the requirements of the section of the public, which the applicant identified, for liquor for consumption off the premises are reasonably and sufficiently provided for by the licensed premises already existing in the affected area and by some outside the affected area. It was in recognition of these requirements that this Court recently granted the application of Christoff & Sons Pty Ltd for the conditional grant of a liquor store licence for premises now trading as Budget Liquor at the Mirrabooka Square Shopping Centre. (See Christoff & Sons Pty Ltd v Coles Myer Ltd Crt 33/90) At paragraph 35 of the reasons for decision in that case, the Court observed:

"Each applicant is required to satisfy the Court that the grant of its application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. I have had regard to the evidence of Mr Thompson (Exhibit 29) and Mr Goff (Exhibit 91) in relation to the number and condition of the licensed premises already existing in the affected area and the manner in which, and the extent to which, those premises are distributed throughout the area. I accept the submission made by Mr Mossenson in his brief summary of final

submissions at paragraph 1.3.3 that the evidence establishes that the distribution of those licences is unsatisfactory from any public perspective. He submitted that save for the Mirrabooka Tavern there is no other licence located to serve the very centre and middle of the affected area until one moves into the last thirty percentile of the radius. This means that for much of this affected area there is a very large gap of licences which are capable of providing specialist packaged liquor services. I accept this submission and in my view it may be applied in the case of each application."

55. Likewise, in this case, I accept the submission of Mr Mossenson at paragraph 3.5.3 of his summary of objectors' final submissions that:

"Had the situation been that Budget Liquor was not granted a licence in March this year, and that the only licence operating in Mirrabooka was the Mirrabooka Tavern, which has been there since 1982, then the situation would have been totally different in view of the growth in population that has occurred in Mirrabooka since 1982. The fact of the matter is, however, that Budget Liquor was given a licence by this Court to operate in and service not just the surrounding area, but also a regional catchment. The surrounding area or most immediate part of that regional catchment is the very area which this applicant wishes to cater to. This fact is quite clear from the cross examination of Mr Todd."

56. My conclusions in this regard lead me to discount the importance in this affected area and in this part of this affected area of the plainly increasing population.

57. Thirdly, I am of the opinion that the evidence of those witnesses who opposed the grant of this application equally demonstrates having regard to all the matters referred to in s.38, that the grant of this application is not necessary to provide for the requirements of the public for liquor and related services in the affected area, now or in the foreseeable future.

58. I should also observe that the evidence of Mr Russell, which I referred to at paragraphs 4 and 5, makes it quite clear that this applicant seeks the grant of this licence to advance the fortunes of the new shopping centre as much to provide a packaged liquor service to the public. This Court has previously held that such evidence does not go to establish the reasonable requirements of the public within the scheme of the Act. If anything, it emphasises the private interest of the applicant in making the application over the public interest otherwise demonstrated by the evidence. For this reason also, I am of the opinion that this application should be refused.

59. Accordingly, I find that the second ground of objection has been made out and that the applicant has failed to establish that the grant of this application is necessary to provide for the reasonable requirements of the public for liquor and related services in the affected area. For these reasons, I do not find it necessary to determine the remaining grounds of objection and the application is refused.

