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[SUPREME COURT OF WESTERN AUSTRALIA]

LIQUORLAND (AUSTRALIA) PTY LTD and Others v AUSTIE NOMINEES PTY LTD

B Pidgeon, Wallwork and Anderson JJ

11 February, 1 April 1999

Liquor and Licensing — Liquor store licence — Application — Whether reasonable requirements of the public cannot be provided for by existing licensed premises — Liquor Licensing Act 1988 (WA), s 38(2b).

C *Words and Phrases — Liquor licensing — ''Reasonable requirements of the public for liquor'' — ''Cannot be provided for'' — Liquor Licensing Act 1988 (WA), s 38(1), (2b).*

The Liquor Licensing Court conditionally granted a liquor store licence. Section 38(1) of the *Liquor Licensing Act* 1988 (WA) provides for the grant or removal of a licence, subject to the licensing authority being satisfied that ''the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area''.

D Section 38(2b) provides:

''Notwithstanding anything else in this section —

(a) a liquor store licence shall not ... be granted in respect of ... premises unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premised already existing in that area ...''

Held (allowing the appeal): (1) The restriction imposed by the phrase ''cannot'' E in s 38(2b) is not confined to physical impossibility, but should be interpreted to mean ''cannot be provided for without occasioning substantial difficulty or substantial inconvenience''.

(2) As s 38(2b) indicates a clear legislative intention that a particular restriction be imposed on the grant of liquor store licences, a narrower meaning must be given to the application of the phrase ''reasonable requirements of the public for liquor and related services'' in s 38(2b), than that given in s 38(1).

(3) Therefore, on a proper construction of s 38, an applicant for a liquor store F licence is required by subs (2b) to satisfy the licensing authority that the reasonable requirements of the public for liquor itself and related services cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public, in the affected area by licensed premises already existing in the area.

(4) Observations by Anderson J on whether and in what circumstances the Liquor Licensing Court can have regard to its experience, or evidence in other cases, in determining a matter.

G CASES CITED

The following cases are cited in the judgment:

Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 920441, 28 August 1992).

Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1.

Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 940563, 12 October 1994).

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458.
Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 980601, 19 October 1998).
Liquorland (Australia) Pty Ltd v Hawkins (1997) 16 WAR 325.
Papadopoulos v Opal Inn Pty Ltd (1972) 3 SASR 348.
Pearce v Lake View & Star Ltd [1969] WAR 84.
South Eastern Hotel Pty Ltd v Woolies Liquor Stores Pty Ltd (1998) 71 SASR 402.
Tomley Investment Co Pty Ltd v Victoria (Tapley's Hill) Pty Ltd (1978) 17 SASR 584.
Woolies Liquor Stores v Carleton Investments (unreported, Supreme Court, SA, Library No S6602, 15 May 1998).
Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 940553, 7 October 1994).

The following further cases were cited in argument:

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321.
Australian Gas Light Co Ltd v Valuer-General (1940) 40 SR (NSW) 126.
Costopolous v Petona Pty Ltd (unreported, Supreme Court, WA, Full Court, Library No 7724, 23 June 1989).
Customs, Collector of v Agfa-Gevaert Ltd (1996) 186 CLR 389.
Customs, Collector of v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280.
Hope v Bathurst City Council (1980) 144 CLR 1.
Life Insurance Co of Australia Ltd v Phillips (1925) 36 CLR 60.
Lovell v New World Supermarket Pty Ltd (1990) 53 SASR 53.
New South Wales Associated Blue-Metal Quarries Ltd v Commissioner of Taxation (Cth) (1956) 94 CLR 509.
Taxation (Cth), Commissioner of v Broken Hill South Ltd (1941) 65 CLR 150.

APPEALS

C L Zelestis QC and *P D Evans*, for the appellant in the first appeal.

W S Martin QC, for the appellant in the second appeal.

M J McCusker QC and *M H Zilko*, for the respondent in both appeals.

Cur adv vult

1 April 1999

PIDGEON J. I have read in draft the reasons to be published by Anderson J. I agree with those reasons and the orders proposed.

WALLWORK J. I entirely agree with the reasons for judgment of Anderson J. There is nothing I wish to add to his Honour's reasons.

ANDERSON J. These are two appeals from a decision of the Liquor Licensing Court of Western Australia delivered on 10 August 1998 by which the court conditionally granted to the respondent in each appeal, Austie Nominees Pty Ltd, a liquor store licence for premises to be known as Big Bomber Liquors at 152 Stirling Highway, Nedlands. The appellants are five of the nine licensee objectors who had appeared in the Licensing Court to oppose the respondent's application.

The proposed licence; the affected area

A liquor store licence authorises the licensee to sell packaged liquor from the premises. In this case, the proposed store is to be located adjacent to an existing Foodlands supermarket at the corner of Stirling Highway and Taylor Road in the suburb of Nedlands. It is to be a comparatively large liquor store with a total floor area of about 433 m^2. There was town planning evidence to the

effect that the site is located so as to be convenient for commuter traffic leaving the city for the south-western suburbs in the late afternoon and evening. The affected area for the purposes of the application is a radius of 3 km from the site. This area is mainly residential and there was evidence that the population of the area is about 34,000 of which 78 per cent is aged 18 years or over. The supermarket is a smallish neighbourhood centre, with a floor area of about 900 m². It has been there for some years and is open seven days a week from 8 am to 8 pm. It is visited by about 5,500 customers weekly.

Stirling Highway is a major traffic artery connecting Perth and Fremantle, a distance of some 16 km. There was evidence that its annual weekday traffic count in the affected area is nearly 33,000 vehicles. There are no liquor stores on Stirling Highway between Perth and Cottesloe, which is some 10 km from Perth. There is, however, a number of liquor stores in the affected area and at least four hotels. One of these hotels — the Captain Stirling Hotel — is on Stirling Highway, located about 1 km east of the site. It has a substantial drive-through bottle department from which packaged liquor is sold.

The legislation

The relevant legislative provisions are contained in s 38 of the *Liquor Licensing Act* 1988 (WA) and the relevant parts of that section must be set out, the focus being on subs (2b).

"38(1) An applicant for the grant or removal of a Category A licence must satisfy the licensing authority that, having regard to —

(a) the number and condition of the licensed premises already existing in the affected area;

(b) the manner in which, and the extent to which, those premises are distributed throughout the area;

(c) the extent and quality of the services provided on those premises; and

(d) any other relevant factor, being a matter as to which the licensing authority seeks to be satisfied,

the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area.

(2) Taking into account the matters referred to in subsection (1), the licensing authority in considering what the requirements of the public may be shall have regard to —

(a) the population of, and the interest of the community in, the affected area;

(b) the number and kinds of persons residing in, resorting to or passing through the affected area, or likely in the foreseeable future to do so, and their respective expectations; and

(c) the extent to which any requirement or expectation —

(i) varies during different times or periods; or

(ii) is lawfully met by other premises, licensed or unlicensed.

(2a) In considering what the reasonable requirements of the public may be for the purposes of an application under subsection (1) the licensing authority may have regard to

(a) the subjective requirements of the public, or a section of the public, in the affected area for liquor and related services, whether those requirements are objectively reasonable or not; and

(b) whether the grant or removal of the licence will convenience the public or a section of the public in the affected area,

but the licensing authority may disregard either or both such considerations as it sees fit.

(2b) Notwithstanding anything else in this section —

(a) a liquor store licence shall not, other than in accordance with paragraph (b), be granted in respect of, or removed to, premises unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area; and

(b) where application is made for the removal of a liquor store licence to premises situated not more than 500 metres from the premises from which the licence is sought to be removed, the licensing authority need not have regard to the reasonable requirements of the public for liquor and related services in the affected area.''

Category A licences are defined in s 3 to mean:

''(a) a hotel licence, which may be granted —

(i) without restriction;

(ii) as a hotel restricted licence; or

(iii) as a tavern licence;

(b) cabaret licence;

(c) a casino liquor licence;

(d) a special facility licence; or

(e) a liquor store licence.''

It can be seen from s 38(2b) that liquor store licences are singled out for special attention within Category A licences. It is obvious the legislature intends that there be a special onus on applicants for this particular type of Category A licence. Unless subs (2b) prescribes a requirement which is more onerous than the requirements enumerated in s 38(1), the subsection is otiose which could not have been intended. The difficulty is to divine in what way the test to be satisfied by applicants for liquor store licences is different from the test to be satisfied by applicants for other Category A licences.

In my opinion, this raises the question of the proper construction of s 38(2b) and is a question of law. I would not uphold the submission made on behalf of the respondent that the appeal is incompetent because it does not turn on a question of law within the meaning of s 28(2). The construction point arises in the following way. In considering the grant of every Category A licence under s 38(1), the licensing authority must decide whether the proposed licence is ''necessary'' to provide for the reasonable requirements of the public for liquor and related services by looking at, amongst other things, the number and condition of licensed premises already trading in the affected area: s 38(1)(a). In considering the grant of a liquor store licence under s 38(2b), the licensing authority is required to look to whether the reasonable requirements of the public for liquor and related services ''cannot'' be provided for by existing licences. In one sense, no Category A licence is ''necessary'' unless existing licences ''cannot'' provide for the reasonable requirements of the public for liquor and related services. So, on one view of s 38(2b), an applicant who has satisfied the test to be met under s 38(1) will have satisfied the test to be met in s 38(2b). As I have said, that result could not have been intended. Hence, the need to consider the proper construction of subs (2b).

Subsections (2a) and (2b) are new provisions. They were introduced into s 38 by Act number 12 of 1998 in May of 1998. That amendment came after a series of cases in which this Court decided how the expression ''necessary in order to provide for the reasonable requirements of the public'' is to be understood in s 38(1). It is helpful to look at the cases on s 38(1) because it seems to me to be fairly obvious that the new subsections are a reaction to those cases.

The construction of s 38(1)

The first case which should be looked at is *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1991) 4 WAR 1. That was an appeal against the refusal of the Liquor Licensing Court to grant a liquor store licence to a supermarket operator in the north-western town of Broome. As the *Liquor Licensing Act* then stood, applications for liquor store licences fell to be considered under s 38(1) and (2); that is, by reference to the same tests which had to be satisfied by applicants for other forms of Category A licence. There were already 16 licences in the Broome area, including two unrestricted hotel licences permitting the sale of packaged liquor and two liquor store licences. The total population of Broome was only about 7,000 people. Objections were made to the grant of the licence on the ground that it was not necessary in order to provide for the reasonable requirements of the public in Broome. For its part, the applicant adduced a substantial body of subjective evidence of desire or demand on the part of the public in Broome to be able to purchase their liquor while shopping at the applicant's supermarket. The supermarket was located in the Sea View Shopping Centre which was an air-conditioned mall in the suburban shopping centre style, containing a range of specialty and convenience shops as well as the supermarket. The Liquor Licensing Court accepted that a significant section of the public in Broome shopped at the shopping centre and at the supermarket and would find it convenient to be able to purchase their packaged liquor there. However, the learned judge held that this preference for ''one-stop shopping'' did not establish that a liquor licence at the supermarket was ''necessary'' within the meaning of s 38(1) unless there was proof that a significant section of the public found it positively inconvenient to get their liquor at existing outlets.

On appeal to this Court it was held, in effect, that this was too strict a test. Malcolm CJ, with whom Pidgeon and Walsh JJ agreed, said that in the context of s 38(1) the test of what is ''necessary'' is in terms of ''reasonable requirements''. Malcolm CJ said (at 9-10):

> ''Necessary' is a word which has the same connotation as words such as 'needs' and 'need'. Thus in *Buttery v Muirhead* [1970] SASR 334 at 337 Bray CJ said:
>
> > '''Needs of the public'' must mean ''need'' in the sense of ''demand'', meaning by that a reasonable demand by contemporary standards. It cannot mean ''need'' in the sense of necessity judged by some ethical or sociological test.'
>
> In the context of s 38(1) the test of what is 'necessary' is in terms of 'reasonable requirements'. Thus the factual inquiry is directed at the issue of 'reasonable requirements' of the public. The question then is whether the proposed licence is necessary in order to provide for those requirements. In this context 'necessary' probably means no more than that the licence is 'reasonably required' in order to provide for the 'reasonable requirements' of the public. The word 'reasonable' imports a degree of objectivity in that the word reasonable means '... sensible; ...

not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate': see *The Shorter Oxford English Dictionary*, at p 1667.

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: see *Coles Myer Ltd v Liquorland Noranda* (unreported, Supreme Court, WA, Library No 8267, 28 May 1990), per Rowland J (at 8); per Nicholson J (at 5). 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.''

The learned Chief Justice expressed his final conclusions in the following words (at 10-11):

''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: see *Shreeve v Martin* (1969) 72 SR (NSW) 279 at 284-285, per Wallace ACJ and at 292, per Walsh JA; *Vine v Smith* [1980] 1 NSWLR 261 at 266, 269; *Coles Myer Ltd v Liquorland Noranda*, per Rowland J at 11. In my view, to the extent that the learned judge held that in the absence of positive evidence of inconvenience the subjective evidence was incapable of establishing that there was a reasonable requirement by a significant section of the public to purchase liquor at the applicant's supermarket the learned judge was in error.''

This case therefore established that the ''reasonable requirements'' spoken of in s 38(1) may be based simply on convenience. This was confirmed in *Baroque Holdings Pty Ltd v Aljohn (1982) Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 920441, 28 August 1992). That case concerned an application for a liquor store licence for a store in the Mirrabooka Village Shopping Centre. Objections were taken to the grant on a number of grounds and the objections were upheld on a number of grounds, some of which are not relevant to the present proceedings. However, one of the grounds upon which the Liquor Licensing Court refused the grant was 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.''

This approach was held to be erroneous if, and to the extent that, it treated as decisive the question whether there were already in existence sufficient store licences or other licences to meet the requirements of the relevant section of the public as to the availability of liquor. Ipp J, with whom Wallwork and White JJ agreed, referred to *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* as authoritatively deciding that it was a reasonable requirement, based on convenience, for members of the public to purchase their liquor at the same time and at the same place that they do their other shopping. His Honour said:

''This requirement may not be met by the existence of other licensed premises in the vicinity. Under s 38(2)(c)(ii), the licensing authority, in considering what the requirements of the public may be, shall have regard to the extent to which any requirement is met by other premises. In the present case, however, none of the licensed premises in the affected area

A 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 ... As is explained in *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* ... the test under s 28(1) [sic s 38(1)] is whether the licence is necessary in order to provide for the reasonable requirements of the public. The interests of the public are of paramount importance; they override the interests of any existing individual licensed premises in the affected area, or outside the B affected area.''

This decision, therefore, confirmed that if there was proof of a subjective desire for one-stop shopping and if the proposed licence would meet that ''requirement'' and if the requirement was not otherwise being met, the test under s 38(1) was prima facie satisfied because it should be accepted that the desire for one-stop shopping was objectively reasonable having regard for contemporary standards and shopping habits. The question was not so much C whether there were other licensed premises from which liquor could be purchased without inconvenience, but whether the proposed licence satisfied an objectively reasonable requirement for a particular manner of shopping for liquor.

This construction of s 38(1) was confirmed again in *Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 940563, 12 October 1994). In that case, Rowland J (with whom Seaman J agreed) said:

D ''Where it is found that there is a substantial section of the public in the affected area who would find it convenient to be able to do their weekly or other shopping at one shopping centre, ie, one-stop shopping ... the remaining question for the purposes of s 38 ... is whether, in all the circumstances ... those ... requirements, subjectively held, are objectively reasonable so as to require the grant of a licence — *Charlie Carter Pty Ltd v Streeter & Male*.

E One would start with the premise that, by itself, the fact-finding that there was a significant section of the public who would find it convenient might be sufficient to satisfy the overall test. There may, however, be other considerations which would lead to a contrary conclusion. If, for example, there was another outlet in the relevant shopping centre which could quite reasonably accommodate the section of the public which shopped there, that may well justify a refusal. If there was another outlet that was available to the shoppers in the centre so as to enable the F convenience of 'one-stop shopping' to be effected, that may be another reason for refusal.''

After dealing with other matters, Rowland J went on to say:

''I have read and re-read the whole of the reasons to ascertain why it is that the judge concluded that the reasonable requirements of the section of the public who supported the grant did not, for the purposes of the Act, require the grant of the licence. The only consideration which I can G ascertain from these reasons seems to be that there are other liquor outlets in the affected area, some of which are accessible by road to any of the centre's shoppers and are only a few kilometres away.

It is difficult to understand why that should be a relevant factor by itself, in view of the finding that there was a substantial number of the public who would find it reasonably necessary to do their shopping at one stop.

It is true that, under s 38(1), the licensing authority is bound to have

> regard to the number of licensed premises existing in the affected area, and their distribution; but the requirements of s 38(2) make it necessary for the licensing authority to have regard to the expectations of the public in the area and the extent to which those expectations are met by other premises. The findings of the Liquor Licensing Court in this case are that there is a substantial number of the public who have reasonable expectations that they could do their shopping at the one stop. Those expectations are not met simply because there are other premises to which they could, one assumes, drive after they have completed their shopping.''

These cases did not mean that all that an applicant for a liquor store licence needed to do to get the licence was to locate the proposed store in a supermarket. This was made clear in a decision handed down almost contemporaneously with *Halson Nominees Pty Ltd v Winthrop Cellars Pty Ltd.* In *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 940553, 7 October 1994), it was held that the Liquor Licensing Court had not erred in refusing the grant of a licence to an applicant for a liquor store licence proposed to be located in a shopping centre, although there was no other liquor store under the roof of that shopping centre. In that case, the evidence was that there was an existing packaged liquor outlet very near to the supermarket. The existing outlet and the supermarket were separated only by the parking area which served them both. The applicant contended that the cases to which I have referred established that a desire for one-stop shopping was now accepted as being objectively reasonable and therefore, in effect, every supermarket should have a liquor store. This Court (Malcolm CJ, Rowland and Anderson JJ) held that the Liquor Licensing Court Judge had not erred in finding as a fact that, in view of the presence of the existing outlet so close to the supermarket as to be almost part of the shopping centre, any subjective requirement of the relevant section of the public for a liquor store to be located within the supermarket was not objectively reasonable.

There is perhaps one other case that ought to be mentioned and that is *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (unreported, Supreme Court, WA, Full Court, Library No 980601, 19 October 1998). In that case, a liquor store licence was granted in respect of premises in the Kingsley Village Shopping Centre against the objections of seven licensee objectors who objected on the ground presented by s 74(1)(d) — that the licence was not ''necessary''. The appeal from the decision to grant that licence was dismissed, this Court (Kennedy, Wallwork and Steytler JJ) holding that the learned Liquor Licensing Court Judge had not erred in his approach. The approach was summarised by Steytler J as follows:

> ''The learned judge dealt with the application under s 38 and the objection under s 74(1)(d) as one issue. He found that there was 'clear evidence' that there was a subjective requirement for packaged liquor at the proposed premises and that those requirements were objectively reasonable because, notwithstanding the proximity of a tavern, the liquor store would offer a range of liquor of 'far and away beyond that available at the tavern and ... at a price which is likely generally to be lower'. He went on to find that this range of liquor would be offered 'in the context of the retail shopping exercise'. As to other competing liquor outlets, the learned judge found that each of the premises in question was well run and that there was a good range of liquor available at them but that it was not a range of liquor

A which was available to people who were shopping at the Kingsley Shopping Centre. His Honour went on to say:

> 'It seems to me that when one has regard to convenience, which is relevant in the overall consideration, the convenience of the public to be able to purchase the range of packaged liquor of the type at the price that I have explained at the proposed store is objectively reasonable.'''

B The practical effect of this line of cases was that it was comparatively easy to get at least one liquor store licence in or adjacent to a supermarket or substantial shopping centre. Once the reasonable requirements of the public were held to encompass the preference which notoriously exists amongst a significant section of modern day shoppers to shop at regional shopping centres in the manner of one-stop shopping, it became difficult for licensee objectors successfully to object. Even if they proved that they operated ''well run'' outlets nearby from which a ''good range of packaged liquor'' was available, as C in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd*, if the applicant could show that those who shopped at the shopping centre found it convenient to get their liquor there at the same time as they shopped for their groceries and other requirements, the ''necessary'' test prescribed by s 38(1) would be satisfied, prima facie, at least. The underlying theme in these decisions is that the answer to the question whether the licence is ''necessary'' to meet the ''reasonable requirements'' spoken of in s 38(1) may be based simply on considerations of convenience to the public and public taste and preference as D to the manner of shopping.

The construction of s 38(2b)

In my opinion, the amendments that were made to s 38 by the *Liquor Licence Amendment Act* 1998 (WA) No 12 of 1998 and in particular the introduction of subs (2b)(a) should be taken to be a legislative response to the abovementioned cases.

E In the first place, subs (2a) embraces the concepts of subjective requirements and mere convenience as relevant considerations in deciding on the grant of Category A licences generally. This subsection aims, I think, to resolve the question as to whether and to what extent the subjective requirements of shoppers and matters of mere shopping convenience can be taken into account in determining whether the licence is ''necessary'' under s 38(1). Subsection (2a) expressly permits the licensing authority to take those things into account in an application under s 38(1), or disregard them as it sees fit in the particular F case.

Subsection (2b) is exclusively concerned with liquor store licences. The subsection plainly signifies a legislative intention that there be, to use the words of Doyle CJ in *Woolies Liquor Stores v Carleton Investments* (unreported, Supreme Court, SA, Library No S6602, 15 May 1998), a ''particular restraint'' on the grant of liquor store licences. No doubt this reflects a recognition that a proliferation of liquor stores selling packaged liquor at discount prices may G result in a decline in other forms of Category A licences such as hotels and taverns, and that if this happened, it would disadvantage a significant section of the public who prefer that form of supply. See the observations of King CJ in *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 at 460-461. See also the remarks of Murray J in *Liquorland (Australia) Pty Ltd v Hawkins* (1997) 16 WAR 325 at 334, where his Honour said that although it was no part of the philosophy of the *Liquor Licensing Act* to protect

a monopoly or the market share of an existing licensee, the capacity of existing licensed premises to continue to offer services in respect to the supply of liquor to members of the public in the affected area should be taken into account. These cases expressly recognise that it is a legitimate objective in the field of liquor licensing to ensure, so far as reasonably practicable, the viability within the affected area of a range of Category A licences. This is not for the purpose of advancing the economic interests of existing licensees but to satisfy the requirements of the public for a range of licence types. Diversity of consumer demand is, of course, a matter to which the licensing authority is bound to have regard pursuant to s 5(2)(c) of the *Liquor Licensing Act*.

What then is the extent of the additional restriction in subs (2b)? On behalf of the appellants, it was submitted that the key to the difference between the test in s 38(1) and the test in s 38(2b) is the phrase at the end of subs (2b)(a): "... cannot be provided for by licensed premises already existing in that area" and particularly the word "cannot". It was the appellants' submission that whilst "cannot" does not denote complete physical impossibility, it does denote more than inconvenience or some degree of difficulty. So it was argued the phrase should be understood as if it read "cannot be provided for without occasioning substantial difficulty or substantial inconvenience".

This interpretation of "cannot" is the interpretation arrived at in the South Australian cases which considered the meaning of the word in what was s 22(2) of the *Licensing Act* 1967 (SA) which provided that a retail store keeper's licence was not to be granted:

> "22(2) ... unless the court is satisfied that the public demand for liquor cannot be met by other existing facilities for the supply of liquor in the locality in which the applicant proposes to carry on business in pursuance of the licence."

See *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd*; *Tomley Investment Co Pty Ltd v Victoria (Tapley's Hill) Pty Ltd* (1978) 17 SASR 584; *Papadopoulos v Opal Inn Pty Ltd* (1972) 3 SASR 348; *Woolies Liquor Stores v Carleton Investments*.

In my opinion, the submission of the appellants in respect to the meaning of the word "cannot" in subs (2b)(a) should be accepted, but it does not completely solve the problem. It remains necessary to decide whether the phrase "reasonable requirements of the public for liquor and related services" in subs (2b) is to be given the same wide meaning as it is given in subs (1). If the phrase is to be construed as referring to requirements based on preference and convenience, as it has been construed for the purposes of subs (1), I cannot see how subs (2b) really does impose any additional onus or extra restraint in respect to the grant of liquor store licences. If, for example, a preference for one-stop shopping is within the concept of "reasonable requirements ... for liquor and related services" in subs (2b), it would follow that existing licensed premises in the affected area which were not in or adjacent to a supermarket or substantial shopping centre "cannot" provide for that requirement and the test under subs (2b) would be satisfied, no matter how strictly the word "cannot" was construed. The line of cases starting with *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* would have the same outcome today notwithstanding the amendment introducing subs (2b). In my opinion, that could not have been intended. The only way that the intention of parliament to impose a particular (new) restriction on the grant of liquor store licences can be given effect to is to give a narrower meaning to the phrase "reasonable requirements ... for liquor and related services" in the new subsection than in subs (1). That this is the

A legislative intention is confirmed by the introductory words of subs (2b) "notwithstanding anything else in this section ...". Those introductory words signify that for the purposes of subs (2b) a stricter approach is to be taken to the concept of reasonable requirements for liquor and related services.

The correct test under s 38(2b)

Looking at the section as a whole, and having regard for the legislative history and the obvious legislative policy of special restriction in regard to
B liquor stores, I am of the opinion that subs (2b) is not concerned — in the way that subs (1) is — with the requirements of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like, but is concerned with the requirements of the public for liquor itself.

I think that, on the proper construction of s 38, an applicant for a liquor store licence is required by subs (2b) to satisfy the licensing authority that the reasonable requirements of the public for liquor itself (or liquor of a particular
C type, such as bottled table wines) and related services cannot be provided for in the affected area by licensed premises already existing in the area; that is, cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public.

There are still questions of degree about which value judgments must be made. It remains a question for judgment in every case whether the licensing authority ought to be satisfied that the "requirements ... for liquor and related services", in this narrower sense, "cannot" be provided for by licensed
D premises already existing in the affected area. See, for example, *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd* in which King CJ held that an existing outlet could not meet the demand in the area for wines because, although there was an ample quantity and good range in stock, the stock was not in a practical sense accessible to shoppers because it was kept in boxes in the store room.

The judgment appealed from

E This gets to the question whether the learned Liquor Licensing Court Judge took the correct approach in his disposition of this matter. I regret to say I have come to the conclusion that he did not. His Honour held that an applicant for a liquor store licence must satisfy first the test under s 38(1) and then the test under s 38(2b). With respect, I do not think that can be correct. What his Honour said on this subject was this:

> "Once an applicant for the grant of a liquor store licence, such as the present, has satisfied the licensing authority that the grant of the licence is
F necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area, s 38(2b)(a) of the Act then requires the applicant to satisfy the licensing authority on the balance of probabilities that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises existing in that area."

Once it is accepted that subs (2b) provides for a test that is both different
G from and more stringent than the test under s 38(1), it becomes quite unnecessary to consider whether the test provided for by s 38(1) has been satisfied. The task is to judge the application in the light of the test in s 38(2b)(a) and this required his Honour to reach a conclusion as to what that test is. I am afraid I cannot see that his Honour did so. I think the closest his Honour came to it is at p 21 of his judgment where he said:

> "What s 38(2b)(a) requires is that the licensing authority shall not make a

grant of a liquor store licence unless on the merits of the case the licensing authority is satisfied, as a value judgment, that those reasonable requirements cannot be provided for by the licensed premises already existing in the affected area. In my opinion, there remains no question of protecting the monopoly or market share of an existing licensee. Section 38(2b)(a) directs the licensing authority in each case to satisfy itself on the merits that the reasonable requirements of the public for liquor and related services in the affected area established in accordance with s 38(1) and (2) cannot be provided for by the licensed premises already existing in that area.

In my opinion, in considering whether it is so satisfied in each case, it will not be useful for the licensing authority to substitute different words for those employed by Parliament. Section 38(2b)(a) requires the licensing authority in each case to make a value judgment whether, given the reasonable requirements of the public for liquor and related services in the affected area relied upon by the applicant, if established in accordance with s 38(1) in the manner which I have described, the licensing authority is satisfied that those reasonable requirements cannot be provided for by licensed premises already existing in the affected area.''

As I understand his reasoning, the learned judge has in the end done no more than apply the test in s 38(1) as it has been expounded in the cases to which I have referred — really a convenience test. His Honour appears to have concluded that the test in s 38(2b) was satisfied because (a) the proposed store would provide a convenient service to those residing in the part of the affected area in which the proposed store is located and those passing through the affected area along Stirling Highway and (b) none of the existing outlets provided a service which was as convenient. As to people passing through, his Honour concluded (AB, p 40): ''. . . there is a substantial section of the public passing through the affected area which would find it convenient to purchase liquor products at the proposed store.''

That is, with the greatest respect, to decide the case as if it was governed by s 38(1).

In my opinion, ground 1 of appeal 132 of 1998 and ground 4 of appeal 133 of 1998 must be upheld. These are the grounds in the respective appeals which plead, in effect, that his Honour applied the wrong test when considering whether he was satisfied that the requirements referred to in s 38(2b) ''cannot be provided for by licensed premises existing in the affected area''.

Reliance on ''experience'' of the court as a specialist tribunal

The appellants in both appeals challenge the finding made by his Honour which I have set out above to the effect that people travelling through the affected area on Stirling Highway ''would find it convenient to purchase liquor products at the proposed store''. Although I do not consider that this finding as to convenience is relevant to the question that actually is presented for consideration under subs (2b), something should be said about this part of the judgment because it does raise important questions as to the extent to which the Liquor Licensing Court can use knowledge and experience gained in other cases in deciding the case in question. What his Honour said (AB, p 40) was:

''Quite apart from the evidence of Dr Henstridge, I am of the opinion that it is open to infer from the evidence of the traffic volume on Stirling Highway, and I do infer, that there is a substantial section of the public

A passing through the affected area which would find it convenient to purchase liquor products at the proposed store.

In my opinion, it is reasonable to draw this inference from the evidence of traffic volume on this part of Stirling Highway, because (a) the volume of traffic is numerically substantial, (b) experience in this Court suggests that evidence of this kind speaks for itself and is not speculative, (c) there is no evidence to the contrary, and (d) the inference is consistent with the B proposal by the licensee of the Captain Stirling Hotel to increase the size of its bottle shop facility on Stirling Highway over the next two years.''

This passage of his Honour's judgment could mean simply that a liquor store located on Stirling Highway at the proposed site is very likely to attract a substantial volume of passing trade. If that is all that was intended to be conveyed, it does not, with respect, address the question which falls to be answered under s 38(2b). If his Honour meant to go further and to find that, in point of fact, licensed premises within the affected area cannot provide for the C requirements of people passing through the area along Stirling Highway because those licences are not on the highway and if his Honour based that finding on ''experience in this court'', then I think he has fallen into error. It is true that the Liquor Licensing Court is a specialist tribunal, but this means no more than that its findings of fact are entitled to considerable weight when they involve an assessment of matters peculiar to the field of liquor licensing — such as availability of liquor supply, assessment of contemporary standards, D accessibility of licensed premises to the public and so on: see *South Eastern Hotel Pty Ltd v Woolies Liquor Stores Pty Ltd* (1998) 71 SASR 402 at 405, per Doyle CJ. There are, however, well established limitations on the extent to which a specialist tribunal can draw on its experience and knowledge about relevant matters to make findings of fact in the case before it. The point is that the court is a judicial tribunal and is bound to act judicially and it must observe fundamental rules of natural justice.

The passage in the learned judge's reasons: ''... experience in this court E suggests that evidence of this kind speaks for itself and is not speculative ...'' suggests that the court has formulated a general rule for itself based on ''experience'', that is, evidence in other cases. I would seriously doubt that the court has the right to decide cases in that manner, that is, using evidence in selected cases to formulate a rule applicable to all cases: see *Pearce v Lake View & Star Ltd* [1969] WAR 84 at 87, 89, 91. But at the very least it should have been made clear to the parties what the ''rule'' is and how it was intended to be applied. It is not clear to me, with respect, what is the particular rule or F process of reasoning engaged in by the learned judge in the passage referred to. It is possible that the objectors may have been in a position to point up fallacies in the rule or to point to critical differences between the cases out of which the rule evolved and the case in question. They were not given that opportunity. Therefore, I think that even if the question whether the test in s 38(2b)(a) has been satisfied is to be judged by reference to mere convenience, his Honour's conclusions as to that, based as they were upon a preconception as to the G relationship between highway traffic volumes, the relevant requirement for liquor and the capacity of existing outlets to satisfy that demand, cannot stand.

Notice of contention

By its notices of contention in the appeals, the respondent contends that the learned judge's finding in relation to people using Stirling Highway ought to be affirmed on the basis of evidence given by or on behalf of the objectors and to

undisputed evidence given on behalf of the respondent. There was evidence, largely uncontradicted, that people driving on Stirling Highway would find it convenient to purchase their liquor requirements at the proposed premises rather than at existing licensed premises. As I have tried to explain, however, the finding to that effect, even if it had been based on that evidence, did not answer the true question under subs (2b). The matters raised in the notice, even if made good, do not assist the respondent.

How the appeal should be disposed of

The appellant in the first appeal is content that, should the ground of appeal relating to the proper construction of s 38(2b) be made out, the case be remitted to the Liquor Licensing Court to be disposed of according to law in the light of the judgment of this Court. The appellant in the second appeal submitted that the case should not be remitted because there was simply no evidence capable of satisfying the test under s 38(2b)(a). Mr Wayne Martin QC, who appeared on behalf of the appellants in the second appeal, submitted that, on the proper construction of s 38(2b), there was no evidence capable of supporting a finding that public requirements for liquor or liquor of a particular type and related services in the affected area cannot be provided for by existing licences in the affected area.

On a proper construction of s 38(2b)(a), it is necessary to carefully examine the evidence as to the existing facilities in order to determine whether public demand for liquor can or cannot be met by them: see *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd* (at 461-463). Because his Honour believed he was concerned with public requirements in the wider sense of requirements, his consideration of the evidence was devoted mainly to questions of convenience and preference as to manner of shopping. He did not (because he did not believe it was necessary to) really focus on the evidence concerning the capacity of existing outlets to meet the demand in the affected area for access to a reasonable range of liquor supplies, including bottled table wines. I would not be prepared to say that, on the whole of the evidence, his Honour could not properly find that the existing premises cannot meet that demand. Therefore, I would propose that the appeals be allowed, the decision to grant the liquor store licence to the respondent be quashed and the matter be remitted to the Liquor Licensing Court to be dealt with according to law.

Solicitors for the appellant in the first appeal: *Freehill Hollingdale & Page.*

Solicitors for the appellant in the second appeal: *G D Crockett & Co.*

Solicitors for the respondent: *Jackson McDonald.*

MADELEINE COX