

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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WOOLWORTHS LTD v DRASE COOSIT PTY LTD & ORS

[2010] SASC 13

Judgment of The Full Court

(The Honourable Chief Justice Doyle, The Honourable Justice White and The Honourable Justice Kourakis)

9 February 2010

LIQUOR LAW - LICENSING - APPLICATION FOR NEW LICENCE - HEARING OF APPLICATION - MATTERS FOR CONSIDERATION - REQUIREMENTS OF NEIGHBOURHOOD OR LOCALITY

Licensing Court dismissed an application for a retail liquor merchant's licence for a proposed bottle shop at a brand direct outlet centre - Judge held that the centre was not the relevant 'locality' for the purposes of s 58(2) of the Liquor Licensing Act 1997 (SA) - Judge held that applicant had not demonstrated the required demand under s 58(2) - appeal against dismissal of application.

HELD: applicant failed to show that visitors to the centre have an unmet demand for the supply of alcohol for "off premises" consumption - grant of a licence not necessary to satisfy the demand for liquor within the locality, even if the locality comprised only the centre - in any case, the fact that the centre is unique does not necessitate the conclusion that it is the locality for the purposes of s 58(2) - appeal dismissed.

Licensing Act 1967 (SA) s 47(a); Liquor Licensing Act 1997 (SA) s 3, s 23(b), s 53, s 58(2), s 59, s 60, referred to.

Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290, applied.

New York Bar and Grill Pty Ltd v West Paddock Pty Ltd [1998] SASC 7020, distinguished.

Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd (1973) 4 SASR 503; Lincoln Bottle Shop Pty

Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458; Nepeor Pty Ltd v Liquor

Licensing Commission (1987) 46 SASR 205; Woolies Liquor Stores Pty Ltd v Carleton

Investments Pty Ltd (1998) 73 SASR 6, discussed.

**On Appeal from LICENSING COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE CHIVELL)
[2009] SALC 8**

**Appellant: WOOLWORTHS LTD Counsel: MR S WALSH QC WITH MR G GRIFFIN - Solicitor:
GRIFFIN HILDITCH LAWYERS**

**Respondent: DRASE COOSIT PTY LTD Counsel: MR J FIRTH - Solicitor: WALLMANS
LAWYERS**

Respondent: CHRIS LEWIS PTY LTD No Attendance

Respondent: TWO WARDS ENTERPRISES PTY LTD No Attendance

Respondent: ELMES HOTELS PTY LTD & R J & D J ELMES PTY LTD No Attendance

Hearing Date/s: 10/12/2009

File No/s: SCCIV-09-1392

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**WOOLWORTHS LTD v DRASE COOSIT PTY LTD & ORS
[2010] SASC 13**

Full Court: Doyle CJ, White and Kourakis JJ

- 1 **DOYLE CJ:** This is an appeal by leave against a decision of the Licensing Court dismissing an application for a retail liquor merchant's licence for proposed premises, pursuant to s 58(2) of the *Liquor Licensing Act 1997* (SA) ("the Act"). The applicant was Woolworths Ltd ("the appellant"). Drase Coosit Pty Ltd ("the respondent") opposed the grant of the application. There were other objectors in the Licensing Court, who have been joined as respondents to this appeal. Those objectors took no active role in the appeal to this Court.
- 2 The appellant is the holder of a sub-underlease relating to a supermarket located within the Harbour Town Shopping Centre. The appellant proposes to establish a walk-in bottle shop separated from the supermarket premises. Although the supermarket is currently operational, modifications will have to be made to it to accommodate the proposed bottle shop. Accordingly, the appellant sought a certificate under s 59 of the Act for the proposed premises. The effect of such a certificate is that, subject to the premises being constructed in accordance with approved plans, a retail liquor merchant's licence will be granted in respect of the premises. The only issue on appeal is whether the Judge erred in finding that the appellant had not met the requirements of s 58(2) of the Act, which provides:

58—Grant of hotel licence or retail liquor merchant's licence

...

- (2) An applicant for a retail liquor merchant's licence must satisfy the licensing authority that the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.

Background

- 3 The Harbour Town Shopping Centre is located on Tapleys Hill Road, West Beach ("Harbour Town"). It is the only brand direct outlet centre in South Australia, and one of only 15 such centres in Australia. A brand direct outlet centre is characterised by the retail outlets within the centre selling products at lower prices, selling stock of lower quality and putting less effort into the presentation of stock. There are 115 outlets at Harbour Town. These outlets include retail outlets, cafés, restaurants, and the appellant's supermarket. Liquor for consumption off the premises cannot be purchased.
- 4 Mr Dimasi, an expert witness called by the appellant, gave evidence that Harbour Town attracted approximately 60,000 visitors a week. This figure has

probably increased since the opening of the appellant's supermarket. Another expert witness called by the appellant, Mr Burns, gave evidence to the effect that 11,000 people visited Harbour Town each week. The clash with Mr Dimasi's figure went unnoticed in the Licensing Court; on the Judge's finding, the figure was 60,000 people each week. Mr Firth, counsel for the Respondent, did not challenge the Judge's finding on appeal. There was evidence that the appellant's supermarket averaged 13,400 transactions a week.

5 Evidence indicated that 46% of Harbour Town's customers came from within ten kilometres. Around 16% of its customers came from regional South Australia or interstate. Evidence based on data derived from the use of customer loyalty cards at the supermarket indicated that 70% of the supermarket's customers came from within ten kilometres of Harbour Town. Eleven percent of customers came from non-metropolitan South Australia and interstate.

6 Mr Dimasi and Mr Burns described Harbour Town as "unique" in the State. It was unique because it was the only brand direct outlet centre in the State, and because it drew its customers from greater distances than centres which are larger in size than Harbour Town. They considered that the evidence relating to the origin of the supermarket's customers established a similar unique pattern, unlike other supermarkets in the State. Neither of them gave evidence with any specificity of the catchment areas for other shopping centres or supermarkets. Drawing from those conclusions, both expressed the view that Harbour Town itself was the "locality" for the purposes of s 58(2) of the Act.

7 The appellant led evidence from four lay witnesses. Those witnesses either worked in Harbour Town, or did their grocery shopping at the supermarket. In their evidence, they said that they were currently purchasing liquor from outlets closer to their homes, but that they would purchase liquor from a bottle shop at Harbour Town if one was established, due to the convenience of being able to do so while they did their shopping or where they worked. It appears that at least two of them would continue to shop at the liquor outlets that they currently used for some purposes.

8 The appellant's case in the Licensing Court was that Harbour Town was the relevant locality. It argued that 60,000 people a week went to Harbour Town. Although it was impossible to prove that their demand for liquor for consumption off licensed premises was not satisfied by existing outlets, common sense suggested that a reasonable proportion of that total would want a liquor outlet at Harbour Town, and would use such an outlet if one were established. On that basis, the appellant argued that there was a demand for liquor for consumption off premises which was not currently met by premises in the locality, and it was necessary for a licence to be issued to the appellant to satisfy that demand. The appellant also argued that the evidence of the lay witnesses as to their demand for liquor in Harbour Town suggested that there was an unsatisfied demand for liquor within the locality which the grant of a licence would meet.

9 The Judge was not satisfied that the customers of the supermarket were, like the customers of Harbour Town, from all parts of Adelaide. The Judge compared the statistics relating to the customers of the supermarket to those which related to Harbour Town generally, concluding:

[31] It can be seen from these figures that Woolworths has a much more local customer base than the Harbour Town centre overall. ...

The Judge expressed the view that the 11% of people who came from non-metropolitan South Australia and interstate may have been staying at a caravan park situated about 1.2 kilometres west of Harbour Town. On that basis, he said that as many as 81% of the supermarket's customers might be drawn from within a ten kilometre radius of the supermarket. He continued:

[35] I suspect that these figures are close to the norm for centres of this size. I have been given no figures to compare them with. However, the applicant has not demonstrated that the Woolworths operation at Harbour Town is unique in that regard.

10 The Judge referred to an earlier decision of the Licensing Court in which the Court held that the Marion Shopping Centre was a "locality" for the purposes of s 58(2) of the Act. This centre was very large, drawing about 1,000,000 customers per month. The Judge rejected the submission that the relevant locality was Harbour Town itself. He said:

[47] I am not satisfied that the uniqueness which justified the Marion Cellars licence applies here. The people who are likely to frequent a bottle shop in or adjacent to the Woolworths Harbour Town supermarket are no more likely to travel long distances than do the customers of the supermarket itself. The uniqueness of the complex as a whole, because it is a brand direct outlet, will not apply to the proposed bottle shop. ... For that reason, it seems to me that the customer base for the proposed bottle shop will be little different from that of other bottle shops in similarly sized shopping centres...

[48] I therefore conclude that the relevant locality should be determined in the conventional manner.

11 The Judge referred to *Nepeor Pty Ltd v Liquor Licensing Commission* (1987) 46 SASR 205, and in particular to the passage in the judgment of von Doussa J in which he said at 216:

The evidence of the applicant should indicate the "catchment area", an expression used by counsel, from which the alleged public demand arises; or more accurately, the places from which the people come whose demands aggregate to constitute the "public demand". The evidence will, in a particular case, identify "the public" and in turn the "locality". ...

The Judge noted that there was no evidence led by the appellant as to a relevant "catchment area", other than that which suggested that 70% of the supermarket's customers came from within ten kilometres of the supermarket. This was too large. He found that the locality comprised a circular area with a radius of three

kilometres, with Harbour Town at its centre: at [57]. He concluded, referring to the requirement imposed by s 58(2) as to the necessary “public demand”:

[60] As I said at the outset, the applicant carries the onus of satisfying that requirement. The applicant did not attempt to do so. Its entire case was pitched at establishing that the relevant locality was the shopping centre itself, and that the premises operated by the objectors were irrelevant to the demand for liquor there. ...[Three of the needs witnesses] were all shoppers who drive to Harbour Town from suburbs containing licensed outlets much closer than the applicant’s proposed premises, and who would merely appreciate the convenience of “one-stop shopping”... This falls a long way short of proving that existing premises in the locality do not adequately cater to the demands of the public for bottled liquor.

12 There are at least three retail liquor merchants within the locality so defined. The Judge noted that there was no suggestion by the appellant that there was some inadequacy in the existing retail liquor merchants within that locality. This comes against the background of the Judge’s observation at [42] that:

[42] ...the applicant confined its case to the uniqueness of the Harbour Town complex, and did not attempt to include the airport itself, and its more than 9,000 employees. I can only presume that this was a forensic decision made by the applicant. I heard little about the needs of those employees, and I infer that their needs are met by licensed outlets close to where they reside.

Accordingly, he concluded that the test in s 58(2) was not met, and he dismissed the application.

Submissions on appeal

13 Mr Walsh QC, counsel for the appellant, submits that the Judge erred in concluding that the locality was not Harbour Town. Mr Walsh also submits that the Judge erred in para [47] of his reasons. He submits that that passage discloses that the Judge required that the proposed bottle shop, rather than Harbour Town as a whole, be unique in order for the relevant locality to be Harbour Town. Mr Walsh emphasises that the evidence discloses that Harbour Town is not like any other shopping centre in the State in that it draws people from all parts of the State, and in that sense, it is unique. Mr Walsh submits that in light of that, and in light of the evidence of Mr Dimasi, the Judge should have found that the relevant locality was Harbour Town.

14 Mr Walsh argues that, in any case, the Judge erred in rejecting the evidence of the expert witnesses that, having regard to the catchment area of the supermarket, it is unique. He argues that the witnesses were never given an opportunity to comment on the correctness of the view expressed by the Judge that, when one takes account of those staying at the nearby caravan park, the catchment area of the supermarket would be “close to the norm for centres of this size”: at [35].

15 Mr Walsh submits that if the Judge found that the relevant locality was Harbour Town, then as there is no retail liquor merchant operating from within

Harbour Town, common sense would suggest that there was a demand for packaged liquor that was not met in the locality. He relied on the number of people visiting Harbour Town. On that basis, the Judge should have granted the application.

16 Mr Firth supports the Judge's conclusion in relation to the relevant locality. He submits that, even if the relevant locality is Harbour Town, it would not follow that it is necessary, in order to meet the demand for liquor within the locality, to grant the licence. He submits that there are a number of licensed liquor retailers not far from Harbour Town, which, in most cases, customers must pass or go nearby to get to Harbour Town. He points out that the appellant did not attempt to show that those outlets were inadequate in any respect.

17 Mr Walsh submits that, even if the Judge correctly identified the relevant locality, the Judge erred in para [42], which I have set out above. He submits that the Judge was not entitled to use the absence of evidence of the needs of the employees at the Adelaide Airport to form a basis for a finding that there was no unmet demand on the part of airport employees for alcohol. He points to evidence given by one of the needs witnesses called by the appellant that employees of the Adelaide Airport frequent a business that she owns situated in Harbour Town.

Consideration of submissions

18 Even if the locality is Harbour Town itself, the Judge was right to refuse the application, even though there are no licensed premises in that locality.

19 The identification of the locality within which there is a demand for liquor, and a consideration of whether other premises in that locality adequately cater for the demand for liquor, have been a part of the process of deciding whether to grant an application for a licence since the enactment of the *Licensing Act 1967* (SA) ("the 1967 Act").

20 But this Court has emphasised that the identification of a locality can rarely be precise, and that the identification of the locality should not result in an artificial approach to the issues posed by s 58(2) of the Act and by its predecessors.

21 In *Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd* (1973) 4 SASR 503 this Court considered the question of how one defines a locality in the context of s 47(a) of the 1967 Act, under which an applicant had to satisfy the Court that "... the licensing of the premises is required for the needs of the public having regard to the licensed premises existing in the locality in which the premises are to be situated". On that question, in the passage often later referred to with approval, Bray CJ said at 512:

I agree that the definition of the relevant locality for the purposes of s 47(a) is often a task of considerable difficulty and that it is impossible to define it by some rule of thumb

applicable to all cases. But, after all, the subject of the inquiry is the needs of the public and it would obviously be wrong to consider the need for the proposed licence at the proposed site on the part of that section of the public dwelling in some particular area without also taking into account the ability to satisfy the needs of that section of the public at licensed premises nearer to that particular area than the proposed site. I am inclined to think that either the locality should have been more narrowly defined, in which case there may not have been any significant population increase to be considered, or else that the ability of the Paradise and Reservoir Hotels to cater for the population in the outer area of the locality should also have been taken into account. It cannot be right to define a locality so as to exclude licensed premises capable of serving it and then say that, as those licensed premises are not in the locality, no regard need be had to them. Even if certain licensed premises are not in the locality defined by the Court, their ability to satisfy the needs of that portion of the public which it is claimed need the proposed licence, or part of it, must be relevant to the questions raised by s 47(a). Indeed it may be that the word "locality" should be treated in a much looser and more cavalier fashion without necessarily requiring the definition of a precise area, but I do not pursue the question.

22 In *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* [2000] SASC 116; (2000) 76 SASR 290 I referred to what Bray CJ said, and applied those principles to s 58(2) of the Act. The passage to which I refer is a lengthy one, but I set it out because it says all that I wish to say on the matter. I said at [34]:

[34] Premises outside an identified locality remain relevant to the question that arises under s 58(2). First of all, applying reasoning of the type used in *Lincoln Bottle Shop*, a demand met outside the locality without any discontent at all, or at least by choice, would not be a relevant demand. Secondly, for reasons identified by Bray CJ and von Doussa J, the process of identifying a locality cannot be allowed to dictate an artificial approach to deciding whether a grant of a licence is necessary to satisfy the relevant public demand. The identification of a locality is usually a necessarily imprecise process. A particular boundary must be identified in most cases, but the identification of that boundary does no more than identify in a general way the locality from which the relevant public demand arises: *Nepeor* at 216 von Doussa J. The effect of s 58(2), as with earlier provisions, is to focus attention upon a locality in which a demand is expressed and upon the facilities available at premises in that locality, but not to do so in an artificial sense, but rather by way of directing primary consideration to these matters. It should not be overlooked that s 58(2), after the reference to whether existing facilities adequately cater for public demand, goes on to provide that the licence will not be granted unless the court also concludes that "the licence is necessary to satisfy that demand". Consideration of the ability of the facilities in the locality to cater for the demand in the locality is not the end of the matter. The grant of the licence must be necessary to satisfy the demand. Section 58(2) is not concerned solely with the ability of premises in a locality to meet the public demand in that locality. It requires a wider consideration of the means by which that demand is or can be satisfied. It is also relevant to bear in mind that in most cases, although not all cases, however the locality is identified there will be shopping facilities and licensed premises not far from the extremities of the locality which will in fact be playing a part in meeting the demands of people within the locality. It will also often be the case that, however the locality is identified, for a fair number of people in the locality, shopping facilities and licensed premises not far outside the locality will actually be closer and more convenient than the applicant's premises. When an application is made for a licence, the focus is naturally upon the applicant's

proposed premises. There is a natural tendency to draw the locality around and by reference to those premises. This should not lead the court to ignore the relevance of shopping facilities and licensed premises outside the locality. As King CJ said in *Nepeor* at 206-207, with reference to a similar provision in the *Licensing Act*, and its use of "locality":

... "Its purpose is simply to focus attention upon the local, as distinct from purely general, character of the public demand with which the section is concerned. It is unnecessary, and indeed futile, to attempt to delineate by boundaries the area within which the relevant public demand is to be looked for. The concept is simply that of demand which might be expected to be met at least in part by the proposed licensed premises."

I apply these principles to the present case.

23 Some of the public visiting Harbour Town come from the suburbs within a few kilometres to the west, south and north of Harbour Town. No doubt some of the public also come from the east, but I put this area to one side because Adelaide Airport is immediately east of Harbour Town, and establishes a natural break and substantial barrier between Harbour Town and suburbs immediately to the east. There is no evidence that members of the public to the west, south and north of Harbour Town have any difficulty obtaining liquor from existing licensed premises in and adjacent to these suburbs. Indeed, for many of them other licensed premises would be closer than the proposed retail outlet at Harbour Town. As the Judge said in his reasons at [61]:

[61] Indeed, the evidence led by the objectors establishes the contrary of the requirement of s 58(2). All of the licensed premises in the locality I have defined, particularly the Glenelg and West Beach bottle shops, appear well-run, well fitted out, well-stocked and convenient. No criticism was made of any of the licensed outlets in the locality (in marked contrast with the criticism of the existing bottle shop in the *Marion Cellars* case). Even taking into account the reluctance of some people to shop at a hotel such as the Lockleys Hotel for bottled liquor, there is ample evidence that the two bottle shops and the Hotel are adequately catering to the demand for bottled liquor in the locality.

For the vast majority of members of the public in this category, the only reason for buying alcohol for consumption off the premises at Harbour Town would be the convenience of one stop shopping, or a refusal to accept as adequate existing premises that the Judge found to be adequate.

24 It follows that this segment of the public who visit Harbour Town were not shown to be making a reasonable and relevant demand for the sale of liquor at Harbour Town. In saying this I am not pointing to the failure to call any such persons. I agree with Mr Walsh that it is not always necessary to do so. My point is that when, as Mr Walsh urged, one uses common sense and a knowledge of existing licensed premises, there is no reason to conclude that any demand for the sale of liquor at Harbour Town by members of the public in the segment I am now considering, is a reasonable and relevant demand. It is certainly not a

demand which makes it necessary or appropriate to grant a licence. Any demand could really be nothing more than a demand based on minor inconvenience.

25 As to the members of the public who come from further afield, and I accept that they do so in substantial numbers, a similar comment applies. I accept, as Mr Walsh submits, that it is not practical for the appellant to prove from where visitors to Harbour Town come, what local facilities for the sale of liquor for consumption off premises they have, and what outlets they pass or go close to on their way to and from Harbour Town. In relation to this, it was sensible and reasonable to invite the Judge to apply his own knowledge, as he was entitled to do by s 23(b) of the Act. This Court can do so on appeal.

26 I am prepared to draw on my general knowledge of Adelaide, and of licensed premises for the consumption of liquor off premises in Adelaide. I am satisfied that the vast majority of visitors to Harbour Town from further afield than the adjacent suburbs will pass or go nearby a number of outlets for the sale of liquor for consumption off premises. They would do so on the way to Harbour Town and on the way home. They could avoid doing so only by taking a circuitous route. Many of these members of the public will come from a locality in which there are conveniently located licensed premises, offering a range of liquor that meets their needs. Some will have established shopping patterns, perhaps based on where they work or where they go for other reasons, and will contentedly obtain the liquor they want when shopping according to these patterns. I am not referring now to licensed premises within a few kilometres of Harbour Town. I am referring to licensed premises on roads leading to and from Harbour Town, and to licensed premises throughout the metropolitan area.

27 Having regard to the nature of Harbour Town, I am satisfied that most of the people going to Harbour Town would not be doing so for daily shopping needs. Those who do that are more likely to be residents of the adjacent suburbs. The nature of Harbour Town suggests that a very substantial proportion of the visitors to it would make occasional trips to shop at discount outlets, and when doing so may find it convenient to use the existing supermarket or, if the appellant's application is granted, to buy alcohol there. But I am not prepared to infer that these people are expressing a demand for the purchase of liquor at Harbour Town for consumption off premises for which a licence is necessary.

28 When I have regard to other existing licensed premises that they pass, that are near to their home or place of work, or are conveniently located having regard to existing shopping patterns, and when I have regard to the likely pattern of use of Harbour Town, I am firmly of the view that any demand for the purchase of liquor at Harbour Town is a demand that, for the vast majority of people, is readily and contentedly met at other licensed premises. I am satisfied that any such demand would be based not on an inability to obtain or difficulty in obtaining liquor elsewhere, but on the mere convenience of making a purchase of

liquor when, for other reasons, they visit Harbour Town. It follows that even if Harbour Town is the locality, and even though there are no premises in that locality able to satisfy a demand for liquor, the demand for the sale of liquor in the locality is not a reasonable demand; it is an insubstantial demand because of the way in which it can readily be satisfied at other licensed premises; it is not a demand for which "... the licence is necessary": s 58(2).

29 It was open to the Judge to refuse the application on this basis. This is the basis on which I would dismiss the appeal.

30 To the extent necessary, it may be that the Judge was entitled to exercise the Court's very wide discretion under s 53 of the Act to refuse the application. Implicit in the case of the appellant is the proposition that a large shopping centre, attracting a substantial number of people each week, and which does not contain an outlet for the sale of liquor for consumption off the premises, is one in respect of which the Licensing Court should be prepared to grant a licence for the sale of liquor for consumption off premises. It is not necessary to decide the point, but if this argument were to succeed it would raise a question of whether the grant of a licence on such a basis would be a sound exercise of the Court's discretion.

31 I return to the question of the locality.

32 I agree with Mr Walsh that Harbour Town is unique, having regard to the type of outlets there, and having regard to its unusually wide customer catchment area.

33 But neither of these circumstances leads to the conclusion that Harbour Town constitutes the locality for the purposes of s 58(2). There is no necessary link between its unique character, and the identification of the relevant locality. The two expert witnesses, Mr Dimasi and Mr Burns, seemed to think there was. I disagree. This is ultimately a question for the Court to decide.

34 It is clear that Harbour Town attracts people from nearby suburbs. I have no doubt that a number of them use the supermarket at Harbour Town. There is no reason why the locality should not be identified in the usual way, taking into account the facilities at Harbour Town and in neighbouring suburbs, and where people live and shop and patterns of movement. The circumstance that Harbour Town is used extensively by people from relatively far away is also a factor, but does not to my mind point towards a conclusion that Harbour Town is the locality. Harbour Town is a feature of the locality, a facility which happens to be used by people from near and far.

35 It is not necessary, for the purposes of the appeal, to identify with any precision the relevant locality. My tentative view is that it extends to the west to the coast, to the north for a few kilometres and to the south for a few kilometres. The Judge gave his opinion at [57]: he had in mind a circular area based on

Harbour Town with a radius of three kilometres. Because of the impact of the airport land, I would not take that approach, but that is not to say that the Judge is wrong.

36 The Judge found, and I do not think Mr Walsh challenged this, that if that was the locality the case under s 58(2) was not made out. The same would apply if the locality was that identified by me. Either way, the Judge rightly refused the application.

37 I emphasise, to avoid misunderstanding, that I do not ignore the fact of visitors to Harbour Town from far afield, or the fact that a number of them are likely to purchase liquor, if liquor could be purchased at Harbour Town. The relevant issue is the reason for that demand being made at that place, and whether the ability of other licensed premises to satisfy that demand means that any residual demand does not warrant the grant of a licence.

38 It is not part of my reasoning that a visitor to Harbour Town from 10 kilometres or more away should be able to satisfy his or her demand for liquor at one of the local outlets. My approach is that having regard to the availability of other outlets, on the way to and from Harbour Town, and near where they live or work as the case may be, the demand that such persons express must be a very limited one, and the grant of the licence is not necessary to satisfy that demand. It can be satisfied elsewhere, without any discontent or significant inconvenience on the part of the public.

39 That is sufficient to dispose of the appeal.

40 I refer to the criticism of the Judge's reasons at para [47], which passage is set out above. In that paragraph, and at para [35] in his reasons, the Judge makes his own analysis of the evidence as to the catchment area for Harbour Town and for the supermarket. I do not understand the Judge to be saying that the application could succeed only if the proposed licensed premises would be unique. The Judge's point was that the catchment area for the supermarket and the proposed bottle shop would be predominantly within an area less than 10 kilometres away. The Judge might or might not be right in that, but in any event the number of people coming to the premises from outside the locality has no great bearing on the fixing of the locality, assuming that their reason for coming is primarily to visit the discount shopping outlets at Harbour Town.

41 I do not consider that the needs of people working at Adelaide Airport are of much relevance at all. There is no need to deal with this issue.

42 At the end of the day this was an attempt to persuade the Licensing Court that it should grant a licence for premises in suburban Adelaide on the basis that those premises offered a unique kind of discount shopping, coupled with a supermarket; on the basis that the centre attracted a very large number of people from near and far, and on the basis that it could be assumed that a fair proportion

of those people made a practice of purchasing alcohol for consumption off premises, and would do so at the centre if a licence were granted. For the reasons I have given, even though the premises of this argument were made out as a matter of fact, that does not lead to the conclusion that the licence should be granted.

43 I would dismiss the appeal.

44 **WHITE J:** I agree that the appeal should be dismissed for the reasons given by the Chief Justice.

45 **KOURAKIS J:** I would dismiss the appeal. For the reasons given by Doyle CJ in [26]-[28] of his reasons the appellant has failed to show that visitors to the Harbour Town Shopping Centre (Harbour Town) have an unmet demand for the supply of alcohol for “off premises” consumption. Visitors who are residents of adjacent suburbs are well served by nearby retail outlets. Visitors from further afield will almost certainly have convenient outlets closer to home, or on the major arterial routes on which they travel to Harbour Town. In *Nepeor Pty Ltd v Liquor Licensing Commission*,¹ von Doussa J explained that “where it is alleged that the public demand emanates from people who live some distance from the proposed premises, regard must be had to other existing facilities that are closer to their place of residence than the proposed premises”.²

46 I wish, however, to make additional observations about two particular aspects of s 58(2) of the *Liquor Licensing Act 1997* (SA) (the Act) to elucidate how my reasons for dismissing the appeal relate to the case put by the appellant.

47 First, I do not accept that Harbour Town is the relevant “locality” for the purposes of s 58(2) of the Act. There is a necessary mutuality between the terms “locality” and “public demand” in that subsection. In *Nepeor*, von Doussa J explained the inter-relationship of those terms in this way:

The evidence of the applicant should indicate the ‘catchment area’, an expression used by counsel, from which the alleged public demand arises; or more accurately, the places from which the people come whose demands aggregate to constitute the ‘public demand’. The evidence will, in a particular case, identify ‘the public’ and in turn the ‘locality’. The second question proposed by Bray CJ in *Tomley Investment Co Pty Ltd v Victoria (Tapleys Hill) Pty Ltd* (1978) 17 SASR 584 at 588 will be answered against that evidence, namely: ‘can the public get the type of liquor they want from the existing facilities for the supply of liquor in the locality?’. Although s 38(1) now speaks of a public demand which ‘cannot be met by other existing facilities for the sale of liquor’, the clear contemplation of the section is that those existing facilities, to be relevant to the inquiry, must be ones which service the demand for liquor in the area in which the public demand exists.³

48 In my opinion, the relevant geographical locality for the supply of “off premises” alcohol extends beyond Harbour Town and the immediately adjacent suburbs and includes the suburbs from which the prospective purchasers of liquor will travel and the routes taken by them.

¹ (1987) 46 SASR 205.

² *Nepeor Pty Ltd v Liquor Licensing Commission and others* (1987) 46 SASR 205 at 216.

³ *Nepeor Pty Ltd v Liquor Licensing Commission and others* (1987) 46 SASR 205 at 216. King CJ expressed the same idea in the following passage:

In my view the use of the word ‘locality’ in that section is not for the purpose of confining the relevant demand to that existing in an area of land delineated by definitive boundaries. Its purpose is simply to focus attention upon the local, as distinct from purely general, character of the public demand with which the section is concerned. It is unnecessary, and indeed futile, to attempt to delineate by boundaries the area within which the relevant public demand is to be looked for. The concept is simply that of demand which might be expected to be met at least in part by the proposed licensed premises (*Nepeor Pty Ltd v Liquor Licensing Commission and others* (1987) 46 SASR 205 at 206-07).

49 A significant number of the persons who shop at the Woolworths supermarket come from beyond a 10 km radius of Harbour Town. Even if it be assumed that all of the country and interstate visitors are at least temporarily resident within a 10 km radius of Harbour Town, nearly 20 per cent of the supermarket's customers come from far afield. It is more likely, I think, that the temporary residences of the interstate and country visitors are fairly evenly distributed throughout metropolitan Adelaide. Such visitors are at least as likely to have been attracted to Harbour Town by the factory outlets as its proximity to their temporary residences. Indeed some visitors from country towns close to Adelaide may travel to Harbour Town and other retail centres in Adelaide for a one day shopping trip. Moreover, the nature of the Harbour Town centre is such that I would not assume that all, or even most, of the 70 per cent of Woolworths customers who visit from within a 10 km radius come from within an even smaller radius of say 3 km from Harbour Town.

50 Woolworths processes about 13,000 transactions weekly. Even allowing for shoppers who visit more than once a week, the number of shoppers who travel from far afield must be significant. The potential demand for "off premises" liquor from those shoppers cannot be ignored and I would therefore extend the concept of a locality to include the areas from where they have travelled. I appreciate that to do so stretches, and geographically contorts, the concept of a locality, but to do so is more consistent with the Act, as a whole, than to ignore more distant retail premises that reasonably cater for the postulated demand. In this particular case, there are retail liquor outlets close to the proposed store; in the case of a proposed greenfield, destination type, retail outlets there may not be. If existing outlets en route must be ignored, a licence may be granted in such a case even though the unmet demand is no greater than in this case.

51 I acknowledge that in *New York Bar and Grill v West Paddock*⁴ it was held that the Marion Shopping Centre constituted its own locality. However, the grant of a hotel license in a large regional shopping centre is, I think, best explained on the basis that the demand for "on premises" alcohol by the multitude of visitors to such centres cannot reasonably be met by hotel premises closer to their places of residence, work or recreation.

52 Secondly, I wish to emphasise that it was not the appellant's case that the demand of the visitors to Harbour Town was not adequately catered for because they could not purchase their liquor supplies at the same retail centre from which they procure their other household supplies.

53 On the authorities the public demand for liquor is satisfied if it is available in a "reasonable and realistic" sense; the corollary of that proposition is that the public may have to tolerate some inconvenience in obtaining alcohol.⁵ The

⁴ [1998] SASC 7020.

⁵ *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 at 459-60.

implied qualification of the phrase “do not adequately cater for” by the concept of reasonableness is, I think, drawn from the objects of the Act and its predecessors. Section 3 of the Act refers to “responsible attitudes towards the promotion, sale, supply, consumption and use of ‘liquor’”, the minimisation of the “harm associated with the consumption of liquor” and ensuring that the sale and supply of liquor does not “detract from the amenity of community life”. On the other hand s 3(1)(e) of the Act declares that it is an object of the Act to encourage a competitive market for the supply of liquor. If adequacy of supply is measured primarily by reference to the proximity of other licensed premises and not the concept of responsible supply, the competition objective may be undermined. Ultimately, the assessment of the degree to which a particular part of the public demand for liquor is adequately catered for entails the fixing of a normative standard which addresses the objectives of the Act.

54 There are authoritative statements of this Court that mere convenience, including a preference for “one-stop shopping”, is not enough to establish that existing premises do not adequately cater for the public demand for “off premises” alcohol.⁶ However, the identification of public demand, which is not adequately catered for, is a question of fact; it must be decided both on the evidence presented in a particular case and by the Licensing Court’s assessment of contemporary community standards. The concept is not a static one. On most applications for a retail liquor licence the existence of some unmet demand is unlikely to be seriously disputed; an applicant is unlikely to risk the investment of a substantial amount of capital if there were not a significant demand. The more difficult question will usually be where the balance should be struck between allowing the public demand to be more adequately catered for and the maintenance of community standards concerning the responsible promotion and sale of liquor.

55 Recent Australian social history shows that facilities which one day are thought to be no more than matters of convenience quickly become, or at least are soon thought to be, necessities. The routines of contemporary Australian life are such that the facility of one stop shopping is of great importance to working people. The development of district and regional shopping centres reflects that social fact. Many shopping centres now include “off premises” retail liquor outlets. I accept that some of those licences may have been removed into a centre from nearby outlets,⁷ but the point of present significance is that the very existence of retail liquor outlets in shopping centres may reflect an increasing demand for liquor at such centres. Moreover the supply of liquor in shopping centres does not appear to have impinged upon the objectives of the Act. However, as I have said, the appellant did not attempt to support its application in that way.

⁶ *Woolies Liquor Stores Pty Ltd v Carleton Investments* (1998) 73 SASR 6 at 11.

⁷ *Liquor Licensing Act 1997* (SA) s 60.