

BWS – Mount Gambier [2013] SALC 82

LICENSING COURT OF SOUTH AUSTRALIA

BWS – MOUNT GAMBIER

v

CENTRO MANAGEMENT, SOUTH EASTERN HOTEL, MOUNT
GAMBIER HOTEL, PARK HOTEL AND

JURISDICTION: Application for Retail Liquor Merchants Licence

FILE NO: 2041 of 2013

HEARING DATES: 8, 9, 28 and 29 October 2013 and 15 November 2013

JUDGMENT OF: His Honour Judge BP Gilchrist

DELIVERED ON: 19 December 2013

Application for a retail liquor merchant's licence - Whether the licensed premises that already exist in the vicinity of the proposed facility are adequately catering for the public demand for takeaway liquor - Whether in the exercise of the court's discretion the application should be refused - Held that the applicant has satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - Held that the applicant should be bound by the terms of the within application which is based on operating a small takeaway facility adjacent to a supermarket and that a condition should be imposed requiring the applicant to obtain permission from the Court for any alteration to the licensed premises - Held that subject to the imposition to that condition the public interest does not require the refusal of the application in the exercise of the court's discretion - Ss 43, 53, 57 and 58 Liquor Licensing Act 1997

Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern [2000] SASC 116;
(2000) 76 SASR 290

The Sommelier Fine Wine and Food [2009] SALC 34

Woolies Liquor Stores v South Eastern Hotel [1999]

Woolworths Limited v Smithfield Hotel Pty Ltd [2012] SALC 57 SASC 289

Woolworths Limited [2013] SALC 23

Woolworths Ltd v Drase Coosit Pty Ltd [2010] SASC 13

Woolies Liquor Stores v Carleton Investments & Others [1998] SASC 6682

Mac's Liquor Woodcroft [1998] SALC 2

Lovell v New World Supermarket (1990) 53 SASR 53

Woolworths Limited [2013] SALC 57

Liquorland [2013] SALC 64

REPRESENTATION:

Counsel:

Applicant:

Mr S Walsh QC with him Mr R D'Alaia

Objectors:

Mr J Firth with him Mr J Dodd and Mr D Tillett

Solicitors:

Applicant:

Clelands

Objectors:

Piper Alderman and Duncan Basheer Hannon

- 1 This is an application for the grant of a retail liquor merchant's licence.
- 2 The applicant, Woolworths Ltd, is a very large supermarket chain that operates stores across Australia. It seeks the licence in respect of premises in Mount Gambier.
- 3 The application has drawn objections from the licensees of three of the hotels in Mount Gambier, the Mount Gambier Hotel, the Park Hotel and the South Eastern Hotel, as well as from the proprietors of Centro who are presently the landlords in possession of a suspended retail liquor merchant's licence that formerly traded within that complex.
- 4 The hearing was conducted over several days in Mount Gambier and Adelaide. Whilst in Mount Gambier, the Court, in consultation with the parties, drove and walked around Mount Gambier and inspected various premises and sites. The Court's notes of this were distributed to the parties' advisors and their comments were noted.
- 5 The observations made herein about Mount Gambier and various places within it are either uncontroversial or reflect the observations of the Court as advised to the parties.
- 6 Mount Gambier is the largest rural city in South Australia. It is 440 kilometres south-east of Adelaide, just west of the Victorian border. It is a regional centre that provides an array of services to its occupants and to those who live in the smaller towns and rural areas that surround it.
- 7 It is a typical country town, comprising of a main street that historically contained the bulk of the town's retail outlets and an abundant supply of hotels. The main street, Commercial Street West/East, as its name suggests, runs in an east-west direction through the centre of Mount Gambier. Bisecting that street is Bay Road to the south, which morphs into Penola Road, to the north, as it passes through the intersection. This intersection could be regarded as the dead centre of Mount Gambier.
- 8 In more recent years there has been retail development beyond the main street. There are some retail outlets along Bay/Penola Roads as well as in the streets parallel to Commercial Street West/East. One of these is a large retail complex known as Centro, which is in the area south of Commercial Street West. I will return to it a little later.
- 9 Recently there has been a major retail development a few kilometres to the north of the intersection of Bay/Penola Roads and Commercial Street East/West on the eastern side of Penola Road, known as Mount Gambier Market Place. The proposed premises are within this development. I shall also return to it later.

- 10 To succeed in this application Woolworths need to satisfy me that the pre-requisites of ss 57 and 58 of the *Liquor Licensing Act 1997* have been met and that in the exercise of the Court's discretion, that the licence should be granted.
- 11 Section 57 concerns matters such as the suitability of the premises; the potential for them to cause undue offence, annoyance and the like to nearby workers, residents and worshippers in their vicinity; prejudice to the safety or welfare of children attending nearby kindergartens and schools; and whether the appropriate approvals, consents and the like, pertaining to the proposed premises have been granted.
- 12 None of these matters are at issue in this case.
- 13 What is in dispute is whether pre-requisite provided by s 58(2) has been met and whether in the Court's discretion the licence should be granted.
- 14 Section 58(2) requires an applicant for this type of licence to satisfy the Court 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."
- 15 In determining whether this test postulated by s 58(2) has been met licensed premises within and outside the boundaries of the relevant locality have to be considered.¹
- 16 There was some disagreement amongst the experts as to how the locality should be defined. Woolworths relied upon the expert opinion evidence of Mr Graham Burns, a planning consultant. He suggested that in light of the rezoning that enabled the Market Place to be built and because of the fact of that facility and the development in its vicinity it would be reasonable to now consider Mount Gambier as having a city precinct and a northern precinct and that as such the Jubilee Highway, which runs in an east-west direction, just north of Commercial Street, might be an appropriate boundary. On his evidence the proposed premises are in the northern precinct and that is the relevant locality.
- 17 In *The Sommelier Fine Wine and Food*,² which was a decision of this Court handed down about four years ago, it was held in the context of a similar application that the relevant locality was the City of Mount Gambier proper. Notwithstanding the changes since then I am inclined to think that that remains so. However, nothing turns on this, because in my view, even if the locality is as Mr Burns suggests, because of their

¹ *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* [2000] SASC 116; (2000) 76 SASR 290 at 299.

² [2009] SALC 34.

proximity to Jubilee Highway, all of the licensed premises within Mount Gambier that offer takeaway facilities have to be considered.

Licensed premises in and about the locality and notable landmarks

- 18 The licensed premises offering takeaway facilities in and about the location are as follows:
- 19 *The South Eastern Hotel* This is the most eastern hotel in Mount Gambier. It is situated on the northern side of Commercial Street East. It is just west of the junction of that road and Pick Avenue. It is a relatively large hotel on a large block with a relatively large car park surrounding it. It has a takeaway facility trading under the Sip N Save badge. The facility comprises of a typical drive through and an adjacent walk in bottle shop. The walk in is accessed from a door to the north that leads into the car park fronting Jubilee Highway. To enter the walk in a patron goes through a turnstile. To exit a patron would need to pass a check out and then proceed through a doorway leading to the drive through to the east. The bottle shop appeared to be of fair average quality with an adequate range of liquor. Diagonally opposite the bottle shop on the northern side of Jubilee Highway is a Harvey Norman store.
- 20 *The Federal Hotel* - This facility is west of the South Eastern Hotel on the southern side of Commercial Street East. It abuts the street and the site allows vehicle access from the north, from Commercial Street East and from west, from Crouch Street South. Crouch Street South is a small street that runs from north to south. To the south and east of the hotel is a moderately sized car park. Further south is a takeaway facility shop trading as Dan Murphy's. It operates under the hotel licence. It is a typical Dan Murphy's store of almost warehouse proportions. It contains an excellent range of liquor. It is owned by Woolworths. When Woolworths acquired the hotel it operated the takeaway facility under the BWS badge. It later sought approval for the extensions that enabled it to create the Dan Murphy's facility.
- 21 *Flanagan's Irish Pub* - This facility is south west of the Federal Hotel, on the western side of Ferrers Street, which runs north to south and abuts Commercial Street East. It is a modest sized hotel with a drive through and a small bottle shop containing a limited range of liquor, both trading under the Sip N Save badge.
- 22 *The Mount Gambier Hotel* - This hotel is north east of Flanagan's Irish Pub on the north western corner of the intersection of Bay/Penola Roads and Commercial Street East/West. It is a grand old hotel that has undertaken much refurbishment. It has a takeaway facility trading under the Sip N Save Cellars badge. The facility comprises of a typical drive through and a walk in bottle shop. The drive through is accessed from

Penola Road. The drive through has two lanes, an express lane and a browsing lane. The walk in is accessed from the drive through and appeared to have an adequate range of liquor. Immediately north of the facility is a small car park and west of that is a larger car park which adjoins a large Council car park to the west.

- 23 *The Commercial Hotel* - This facility is just west of the Mount Gambier Hotel on the northern side of Commercial Street West. It too is a grand old hotel. It has a takeaway facility trading under the Thirsty Camel badge. It comprises of a drive through that does not contain a browsing lane. It has a small walk in that has a limited range of liquor. It has a car park at the rear.
- 24 *The Park Hotel* - This hotel is a few hundred metres west of the Commercial Hotel, on the southern side of Commercial Street West. It has a takeaway facility trading under the Sip N Save badge. It has a large drive through that includes a browse lane. It has a smallish walk in that is accessed through the drive through. The walk in appeared to hold a modest range of liquor. It leads to a very large cool room. The hotel has a large car park east of and adjacent to the drive through.
- 25 *The Western Tavern* - This is the newest hotel in Mount Gambier. It was the subject of a successful application for a hotel licence in 1986. It is several hundred metres to the north west of the Park Hotel on Jubilee Highway. It is a relatively modern hotel with a large car park. It has a takeaway facility trading under the Liquorland badge. It comprises of a drive through and a small walk in. The car park has four parks allocated to the takeaway facility.
- 26 There are some other landmarks that need noting.
- 27 There are three other hotels in central Mount Gambier, none of which have takeaway facilities. To the south west of the Federal Hotel on the southern side of Commercial Street East is the South Australian Hotel. It is a modest sized hotel. Further west along Commercial Street East is Jens Hotel and around the corner to the south along Bay Rod is Mac's Hotel. Both are grand old hotels. Until relatively recently Mac's Hotel had a takeaway facility trading under the Thirsty Camel badge. That area of the hotel has since been altered into an enclosed restaurant area.
- 28 As mentioned earlier there is a suspended retail merchant's liquor licence in respect of premises within the Centro complex. Centro is about due south of the Commercial Hotel. It contains a large variety of stores including K-Mart, several cafes, a pharmacy, several clothes stores, a butcher and a news agency. The retail bottle shop which is under suspension was located in the middle of the complex. An application for the removal of the licence to similar sized premises in the north eastern

corner of Centro is pending. Adjacent to and east of Centro is a multi floored car park. West of Cento is a large Post Office. Just across the road (Helen Street) to the north is a large car park that abuts to the west a Coles Store. The store has about 10 checkouts.

- 29 There is a Woolworths store on the northern side of Commercial Street East, several hundred metres west of the South Eastern Hotel. It has of the order of 13 checkouts. It is within a shopping complex that has a number of other stores such as a pharmacy and a Bakers Delight. It is serviced by a large car par. Over a decade ago Woolworths unsuccessfully appealed a decision of this Court that refused an application for a retail liquor merchant’s licence in respect of proposed premises in the shopping centre.³
- 30 On Penola road, just south or the corner of that road and Wireless Road East, are premises that were the subject of an unsuccessful application for a retail merchant’s liquor licence in 2009.⁴
- 31 I now turn to consider the proposed premises and its surroundings.
- 32 The Mount Gambier Market Place is a massive complex. It comprises of over 17,000 square metres of floor space and it has over 1,000 car parks. In the north-eastern corner is a very large hardware store trading as Masters Hardware. To the south and running along the eastern boundary is the main part of the complex. The front section that abuts the car park to the west comprises of a series of specialty shops, bordered to the east by an open mall that includes a food court. In all there are 33 shops, 11 of which are presently vacant. It does not have a post office or hairdresser.
- 33 In the north east of the complex is a very large BIG W Store. In the south east is a large Woolworths store that has 24 checkouts including self serves. In the north-western corner of the Woolworths store is a square area within which Woolworths wish to erect build a retail takeaway liquor facility that is the subject of the within application. It proposes a BWS store. I have elsewhere described these stores as having a relatively limited range, directed towards the convenience customer.⁵ I described them as: “Reasonably attractive, reasonably friendly to browse purchasers, and containing a reasonable, albeit not an extensive range of liquor.”⁶
- 34 I have no reason to suspect that the proposed store will be any different.

³ *Woolies Liquor Stores v South Eastern Hotel* [1999] SASC 289.

⁴ *The Sommelier Fine Wine and Food* [2009] SALC 34.

⁵ *Woolworths Limited v Smithfield Hotel Pty Ltd* [2012] SALC 57 at para 32.

⁶ *Woolworths Limited* [2013] SALC 23 at para 87.

- 35 Just north of the Market Place is the Kalganyi Caravan Park, a moderately sized park. At this point Penola Road has two lanes in each direction and is an 80 Kph speed zone. Across the road and to the west is the Woodlands Grove Retirement Village, which contains well over a hundred self contained apartments and houses.

The evidence

- 36 Mr Burns' evidence establishes that over the last 25 years there has been an increase in the population of Mount Gambier from 25,858 to 31,102 persons. There also has been a substantial increase in the number of tourists visiting the area. His evidence also establishes that there are about 19,000 persons living in the northern area of Mount Gambier and surrounding areas.

- 37 He referred me to the Development Plan which includes the following:

“The District Centre Zone is intended to provide a key community focal point for the northern growth area of the City and surrounding district. Desirable land use activities will focus on serving the district shopping needs of the area and complementary land uses, including residential development, will assist in extending the usage of the Centre beyond normal working hours to enhance its vibrancy and safety.

A wide range of shopping, entertainment, office, community, cultural, religious and recreational activities are appropriate, together with low to medium density housing.”⁷

- 38 He said that this zoning change was approved by the Mount Gambier Council in 2008. It was the creation of a new district zone that paved the way for the development of the Market Place. It is located in the District Centre Zone of the Mount Gambier City Development Plan. Prior to that there was only the city zone. He said that the bulk of residential development is earmarked for the northern areas of Mount Gambier. Doubtless this is the reason why the Market Place site was developed.
- 39 Woolworths called the manager of the Market Place, Mr Andrew Tye. He said that the Market Place opened in August 2012. It now has about 45,000 weekly visits. This evidence is uncontroversial and I accept it.
- 40 Woolworths called their retail liquor manager, Mr Anthony Smith. Amongst other things Mr Smith told me about the Market Place development. He said:

“Woolworths spent about \$86 million building the centre, including the Masters and the petrol station. They did a couple of million

⁷ Exhibit A18 at p 7.

dollars, I think, to do with the roadworks at the front, putting in traffic lights, et cetera, so it was a really big investment.”⁸

- 41 This evidence is uncontroversial and I accept it.
- 42 In support of its application Woolworths called a number of so called “needs witnesses”.
- 43 Mr Brenton Lewis lives in Woodlands Drive, about a kilometre west of the Market Place. He is a company manager. He has lived in Mount Gambier all of his life. He described the Market Place as a “godsend”. It meets all of his daily and weekly shopping needs. He entertains at home and serves wine and beer to his guests. He would like to buy wine in conjunction with purchasing fresh food. He does not frequent hotels except to occasionally have meals. He prefers to buy takeaway liquor from stand alone bottle shops rather than from hotel drive throughs. At the present time he buys his takeaway liquor from the Dan Murphy’s in Mount Gambier. This involves an 8 to 10 kilometre round trip. Because of the distance he buys in greater quantities than he would if he could buy liquor in conjunction with his shopping. A BWS store at the Market Place would suit his needs.
- 44 Mr Rowland Tobin lives in Buronga Avenue, about 500 metres south of the Market Place. He is a disabled pensioner. He now does all of his shopping at the Market Place and no longer needs to go into Commercial Road for shopping. He shops two to three times a week. He still goes into the city precinct to attend the RSL club. He prefers to buy takeaway liquor from stand alone bottle shops rather than from hotel drive throughs. Like Mr Lewis he buys his takeaway liquor from Dan Murphy’s. He would prefer to buy it when he does his grocery shopping. If he could buy takeaway liquor at the Market Place he would save himself a trip to Dan Murphy’s.
- 45 Mr Stephen Young lives at Stableford Court, Orani Vale, several kilometres to the south east of the Market Place and to the north of the centre of Mount Gambier. He is a production manager. He has noticed considerable residential development in the northern areas of Mount Gambier. He and his wife now do all of their grocery shopping at the Market Place. He finds it convenient. He finds parking there easy. He does not go to the city precinct very often. His wife might go there once every couple of weeks. He buys wine, beer and spirits. His wife likes to browse and buy different wines. At present they too buy their takeaway liquor from Dan Murphy’s. It involves a special trip which they would avoid if there was a BWS at the Market Place.

⁸ Tr p 146.

- 46 Ms Leonie Greaves lives on Penola Road, about a kilometre north of the centre of Mount Gambier. She has a carers' pension. She has lived in Mount Gambier for over 25 years. She speaks very positively about the Market Place. She regularly uses the shops there and socialises there. It has changed her shopping habits. She shops there just about every day. She now rarely goes into the centre of Mount Gambier. She usually only goes there to get medication. She drinks wine, beer and spirits. Like the others she presently buys her takeaway liquor from Dan Murphy's. She goes there about once a month. It involves about a ten minute drive. She does not frequent any of the other hotels in Mount Gambier. She prefers to buy takeaway liquor from stand alone bottle shops rather than from hotel drive throughs. If there was a BWS store at the Market Place she would buy her takeaway liquor there. She would like the option of buying wine when she buys food.
- 47 Ms Simone Badenoch lives at Sturm Road, a kilometre or so to the north west of the Market Place. She is a teacher. She has noticed an increase in residential development in the northern areas of Mount Gambier. Her shopping habits have changed following the development at the Market Place. She now does all of her regular shopping there. She goes there many times a week. She buys takeaway liquor about once a week. She buys it in the city centre. It involves about a 7 kilometre round trip. A little further, if she goes to Dan Murphy's. She would prefer to buy takeaway liquor at the Market Place.
- 48 Ms Judith Paul lives at Attamurra Road, which is about 12 kilometres to the north east of the city precinct in an area known as Mil-Lel. Mil-Lel comprises of a small community of a few hundred people who mainly live on small rural blocks. It has a local school and tennis club. She is a marriage celebrant. She has noticed recent residential development in the northern areas of Mount Gambier. Like others, her shopping habits have changed following the development at the Market Place. It now provides for all of her daily and weekly needs. She drinks wine with her meals. She does not frequent hotels. At present she buys her takeaway liquor from Dan Murphy's. She now only goes into the city precinct once a week. She does so to buy liquor and to go to the post office. She finds car parking there quite difficult. In contrast to this she finds car parking at the Market Place safe and easy. She would prefer to buy her liquor at the Market Place so that she could do all of her shopping at the same time.
- 49 Ms Anne Gaffney lives on Riddoch Highway, about eight kilometres north of the city precinct. She is a transport company owner. She is involved in the Mil-Lel community. Her children go to the local school. She is President of the Tennis Club. She has lived at her current address for about 11 years. She told me that at that time it was considered quite remote but since then the demographics had changed and in the northern

areas people were building everywhere. She now does 99% of her shopping at the Market Place. She goes there nearly every day. She and her husband drink pre-mixed drinks and occasional wine. She buys most of their takeaway liquor from Dan Murphy's. It involves a 16 kilometre round trip. She goes there about once a week or fortnight. She does not like drive throughs. She said that a BWS store at the Market Place would make her life much easier. It would save her a trip to the city and she could combine her liquor purchases with her grocery shopping.

50 The objectors relied upon the upon the expert opinion evidence of Mr Alan Rumsby, a planning consultant.

51 Mr Rumsby was much less effusive about the growth in the northern areas of Mount Gambier, than Mr Burns. He described it as steady. He said:

“It's not boom town, and we're not on the precipice of a significant growth pattern, but it is, as Mount Gambier has been for a long time, a steady regional centre which attracts growth, but at a rate in the order of .8 to 1 per cent per annum as a maximum growth rate.”⁹

52 Mr Rumsby was also less impressed about the significance of the rezoning that enabled the Market Place development. He said:

“Council is committed to the city centre remaining the primary activity focus as the region's focus for a range of a whole gamut of services and facilities. It is done so in terms of the grant moneys and the moneys that it has garnered to invest in the city centre, and we're talking a long-term commitment over the last four or five years and into the future for a number of years. Whilst they're not quite the same as the MarketPlace shopping centre development, they are still in the order of seven or eight million dollars in terms of the total investment to try to make sure that the city centre maintains its role. Council has done so, not only through the grant moneys and the physical works and the programs that it's embarked upon, but in the way that it has - the language that it has put into the development plan, and the manner in which it has sought to cap the role of the district centre, and I refer to that in my statement, and it sees the Marketplace district centre as having, I think the words are 'substantial but not complete range of services for its district'”.¹⁰

53 I did not find this evidence to be particularly significant. For the reasons explained earlier, to the extent that this evidence supported his contrary view to Mr Burns about the relevant locality, it is irrelevant. For reasons that I will explain shortly, I thought that the evidence of the residents of

⁹ Tr p 217.

¹⁰ Tr p 221.

Mount Gambier and surrounding areas that were called was far more instructive in terms of the s 58(2) issue.

- 54 The objectors called Mr Jonathon Mott. He is the development manager at Federation Centres, the corporate entity that runs Centro. He said that the the previous bottle shop traded as Fishers Supa Plus and traded in conjunction with a Fishers IGA supermarket in the Centro until April 2012, when the existing lease expired. He said that Centro assumed control of the licence and that it has been trying to find a purchaser ever since. He said that seven prospective purchasers had been approached but only one, Liquorland, was still interested. He put down part the lack of interest to the within application. I accept his evidence.
- 55 They called Ms Layla Winter. She is the centre manager of Centro. Her evidence confirmed my observation that Cento is a busy shopping centre. As part of her role she has access to the sales records of individual tenancies. She said that the sales at Fishers Supa Plus fell dramatically following the establishment of the Dan Murphy's store in Mount Gambier.
- 56 She was asked some questions about Mount Gambier. In her opinion it was a single entity and she spoke of travelling all across the town as part of her normal life. She was asked about the traffic and she described is as:
- “It's awesome. Peak-hour traffic is like three cars banked up at a roundabout. It's great.”¹¹
- 57 I accept Ms Winter's evidence and I accept her perception about the traffic. But I think her perception has to be measured by reference to the observations, accepted by this Court in *The Sommelier Fine Wine and Food*, that although the congestion in Mount Gambier is insignificant by metropolitan standards it has a very real impact on local resident's perceptions of the accessibility of the city centre.¹²
- 58 Finally I heard from Mr Guy Matthews. He is the proprietor of a number of hotels, including the three objector hotels.
- 59 Mr Matthews said that the impact of the Dan Murphy's on the takeaway sales of his hotels had been dramatic, although my impression was that in more recent times, perhaps as a result of adjustments to their stock, his hotels are holding their own against what is plainly stiff competition.

¹¹ Tr p 284.

¹² [2009] SALC 38.

- 60 It was suggested to Mr Matthews that some witnesses had expressed concerns about the difficulty in getting parks in central Mount Gambier. He said:

“I have never seen a car parking problem. In my experience, there seems to be an abundance of car parks all through Mount Gambier and, you know, it’s quite obvious that there is a lot of car parking around the central part of Mount Gambier.”¹³

I accept that this is Mr Matthews’ perception.

- 61 Mr Matthews gave evidence of his support to the local community and of the sponsoring arrangements that his hotels had with sporting bodies. I accept this evidence.
- 62 It was his opinion that Mount Gambier was a single community and that people living there had no difficulty in travelling all over the town to address their needs. He gave evidence of the distances and times involved in travel with a view to demonstrating that the extra distance that might be involved to purchase liquor if this application failed was not great. Based upon his measurements the distance between the Market Place and the various takeaway facilities within Mount Gambier are between about three to five kilometres and the time to travel those distances is between five to seven and a half minutes. I have no reason to doubt this evidence. However, I expect that by the time a person walks to their car, leaves the Market Place car park and parks at one of the takeaway facilities, the time involved between leaving the Market Place and arriving at the other facility will often be much closer to ten minutes or more rather than five.

The parties’ submissions

- 63 Woolworths contended that having regard to the features of the locality, the distance of the proposed premises from all other licensed premises within Mount Gambier, the contemporary shopping habits of those living in the north of Mount Gambier, and in particular those frequenting the Market Place, and their demand for a stand-alone bottle shop next to a supermarket, the test postulated by s 58(2) has been met.
- 64 The objectors submitted that the within application should fail because the test postulated by s 58(2) has not been met and that in any event it would not be in the public interest to grant the application. They maintained that the residents of Mount Gambier have an abundant supply of liquor takeaway facilities which has been particularly enhanced by the establishment of the Dan Murphy’s store. They submitted that the extra distance involved in accessing those facilities as opposed to using a

¹³ Tr p 325.

facility within the Market Place is relatively small, being no more than a few kilometres. They contended that in light of the fact that traffic in the town is not heavy, the residents of and around Mount Gambier can reasonably be expected to travel across the town to service their needs. They said that travelling over the distances involved here is a feature of rural life and the additional travel should be seen as no more than mere inconvenience.

- 65 As to discretion, the objectors submitted that to allow this application would upset the balance within the takeaway liquor facilities operating within Mount Gambier. They contend that the Dan Murphy's has already upset that balance and that the grant of a new licence will only make matters worse.
- 66 Mr Firth, for the objectors, made reference to *Woolies Liquor Stores v Carleton Investments & Others* where Doyle CJ, with whom Millhouse and Nyland JJ agreed, dismissed an appeal against a refusal by this Court to grant a retail liquor merchant's licence at a newish shopping centre in a rapidly developing area at Woodcroft, 18 kilometres to the south west of Adelaide.
- 67 Doyle CJ wrote:

“The judge found, and to my mind this was crucial, that the distance involved in travelling to Woodcroft Town Centre was ‘far from great’. It was about 1.8 kilometres each way from the applicant's site. He found that having to travel to the Woodcroft Town Centre to get liquor did not involve ‘significant difficulty’. I should mention that the Booze Brothers outlet provided a range of liquor, surroundings and service that, in themselves, adequately met the demand of the population in the locality, subject to the issue of accessibility.

On the judge's findings, the case really came down to a case in which the residents in the vicinity of the appellant's proposed site had a strong desire to carry out as much of their local shopping as possible at Woodcroft Shopping Centre. Travelling to Woodcroft Town Centre involved making a journey that they did not want to make. But Woodcroft Shopping Centre was not capable of meeting all of their regular shopping needs, and there would be other reasons for them to make a journey further afield. The distance to the Woodcroft Town Centre was not great, and the difficulty in getting to that centre or to other centres was not significant.

In my opinion, on those factual findings the decision of the Licensing Court was correct. Under those circumstances it could not be said that the existing premises did not adequately cater for the public demand for liquor for consumption off licences premises. My own impression, based on what I have heard and

read, is that the existing premises did adequately cater for the public demand for liquor. But, more importantly, I can find no fault in the assessment made by the Licensing Court of the locality, and of the needs expressed by the witnesses.

I consider the case to be a fairly clear one. ...in the light of the judge's factual findings it is my opinion that, applying the test imposed by s 58 (2), the judge rightly refused the application."¹⁴

- 68 He submitted that the situation here was essentially the same and that the application should suffer the same fate.
- 69 Mr Walsh QC, for Woolworths, submitted that despite some apparent similarities this is a very different case that calls for a different outcome.
- 70 Primarily he contended that what was different was the change in contemporary standards and what might be regarded as reasonable by contemporary standards. Mr Walsh took me to the observations of Kourakis J (as he then was) in *Woolworths Ltd v Drase Coosit Pty Ltd* where his Honour said:

“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.

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.¹⁵ (emphasis added mine)

- 71 Mr Walsh contended that a growing appreciation of the relevance of the community's desire for one stop shopping as a relevant consideration that Cox J alluded nearly a quarter of a century ago in *Lovell v New*

¹⁴ [1998] SASC 6682.

¹⁵ [2010] SASC 13 at para 54-55; (2010) 106 SASR 146 at 158-9.

*World Supermarket*¹⁶ was “marching forwards”¹⁷ and although it was not the sole test it was of increasing prominence.

- 72 Mr Walsh submitted that the 45,000 weekly visits to the Market Place demonstrated that a significant number of people are using the shopping centre. He said that this fact makes it plain that the application is not premature as was suggested by the objectors. He said that the Market Place had become a focal point for those living in its vicinity such that the town centre was no longer the only focal point. He rhetorically asked: Why should people living at Mil-Lel and elsewhere north of the Market Place and those living in the nursing homes and retirement villages in the northern sector, who are likely to be getting all of their weekly and shopping needs being met at the Market Place, be forced to go into Mount Gambier to meet their takeaway liquor needs?
- 73 Woolworths reject the submission regarding the suggestion that in the exercise of the Court’s discretion the application should be refused. Mr Walsh asked me to note that at present there is no retail liquor merchant’s licence operating in Mount Gambier.

Analysis

- 74 In light of the objectors’ reference to *Woolies Liquor Stores v Carleton Investments & Others*, I think it is helpful to focus upon some of the findings made by this Court in that case. Judge Kelly said:

“Apart from this desire to at least nearly ‘one stop shop’ there is precious little other evidence to support a state of significant difficulty. The distances people might have to travel to the town centre for their liquor is far from great. Most people have motor vehicles. Whilst the roads within their suburbs do appear somewhat confused I gained no real picture of them having much difficulty in getting from their homes to the town centre if they choose to. The promoters of this project certainly ‘pushed’ this aspect of the case but the need witnesses, it seemed to me, hardly supported their scenario at all. What little complaint was levelled in this area was of very little moment in my view and cannot be categorised as significant difficulty.

I am not prepared to find, on the evidence as a whole that the present licensed facilities in the locality in some way inadequately cater for the proven public demand. Indeed I think they cater well. Even if the provisions of the repealed Section 63 were still applicable I would doubt very much if that onus had been overcome by the evidence in this case. It follows that I refuse the application. Might I conclude by saying this generally. Both the

¹⁶ (1990) 53 SASR 53 at 58.

¹⁷ Tr p 377.

Booze Bros Shop and the Woodcroft Tavern were, to my own knowledge, established to cope with their then population and its projected growth. They were placed in a very major shopping centre area for that very purpose. I do not see any inability to cope or any drawback in their siting to have changed that position. Simply because another supermarket and a few shops are established in a different position in the locality does not lead to the conclusion that some other liquor facility is also required. I can appreciate that many will find the latter more convenient but that is not enough to overcome the provisions of Section 58(2). The present facilities for liquor purchase are perfectly adequate in contemporary terms.”¹⁸

- 75 The Market Place could hardly be described as “another supermarket and a few shops”. It is a massive development as evidenced by the extent of investment that Mr Smith told me about.
- 76 I found the evidence of the “needs witnesses” compelling. All of them spoke of the convenience of doing their entire daily and weekly shopping at the Market Place. Whilst I am mindful of the capacity of an applicant to hand pick such witnesses my very firm impression was that these witnesses were representative of the wider community. I accept their evidence. Based upon it I find that the Market Place is a facility that provides much more than a nearly “one stop shop” that Judge Kelly spoke of in *Mac’s Liquor*. It has become a focal point that services the vast majority of the regular shopping needs of many of those who live in the northern areas of Mount Gambier and in the rural communities to the north.
- 77 Moreover, *Mac’s Liquor* was decided fifteen years ago. Judge Kelly’s reference to “perfectly adequate in contemporary terms” is in that context important. In recent years this Court has consistently and repeatedly heard evidence that establishes that many people want to shop often and they want to service their takeaway liquor needs as part of their food and grocery shopping as part of a one stop shopping experience.¹⁹ That was the evidence of many of the witnesses in this case.
- 78 Whilst it is true that Dan Murphy’s and other take way facilities in Mount Gambier are more than capable of meeting their takeaway liquor needs it requires them to either make a special trip or combine it with a one off visit to a facility such as the post office. Even though the extra distance, being a round trip of about six or more kilometres and the time of travel, being about fifteen to twenty minutes, is not, in the context of rural living, that significant, to my mind, judged by contemporary standards,

¹⁸ *Mac’s Liquor Woodcroft* [1998] SALC 2 at p 5 and 6.

¹⁹ See, for example: *Woolworths v Smithfield Hotel* [2012] SALC 57, *Woolworths Limited* [2013] SALC 57 and *Liquorland* [2013] SALC 64.

to require them to make that trip is, in all the circumstances, unrealistic and unreasonable.

- 79 That is not to say that the inability of people to purchase liquor as part of one stop shopping will always mean that their demand cannot be met by existing facilities elsewhere in or about the relevant locality.
- 80 The observations made by King CJ in *Lovell v New World Supermarket* about the absurdity of the suggestion that a first grade bottle shop 300 metres from a shopping centre being unable to meet the public demand because they would have to travel a short distance away from the shopping centre to attend to their takeaway liquor needs remain valid.
- 81 But more than that is involved here. I find takeaway liquor facilities already existing in and in the vicinity of the locality in which the proposed facility will be situated do not adequately cater for the public demand for takeaway liquor.
- 82 I now turn to the issue of discretion.
- 83 It is clear to me that at least for now; Mount Gambier does not need another takeaway liquor store that is the size of Dan Murphy's. Given that that brand is also owned by Woolworths, if the application succeeds there is the potential for that to occur. Indeed it is what did occur when Woolworths acquired the Federal Hotel.
- 84 This application is founded upon the desirability of offering a small takeaway facility adjacent to a supermarket. In accordance with s 43(1) of the Act, which enables the Court to impose "Conditions to ensure that the nature of the business to be conducted under the licence conforms with representations made to the licensing authority in proceedings for the grant of the licence or other proceedings under this Act" a condition requiring the applicant to obtain permission from the Court for any alteration to the licensed premises should be imposed.
- 85 Subject to that, the public interest does not require the refusal of the application. To the contrary, the grant of this licence is in the public interest. Many of the people living in the locality are using the Market Place. The addition of a small retail liquor facility will further add to the attractiveness of the Market Place and will meet a growing desire by many to combine their takeaway liquor purchases with their supermarket shopping. It should not substantially affect other licensed facilities presently operating within Mount Gambier. Indeed, on the evidence presented, the most affected entity is likely to be Dan Murphy's. Given who owns it, it can scarcely complain.
- 86 I accept that the grant of this application will undermine the value of the now suspended retail licence. This fact is not unimportant. But, in the

exercise of the Court's discretion it was not enough to tip the balance against granting this application.

Conclusions

- 87 In my view Woolworths has satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility at the Market Place Shopping Centre. Subject to the imposition of the condition just discussed the public interest does not require the refusal of the application in the exercise of the Court's discretion. The application is granted. I would now like to hear from the applicant as to the terms of the order that should now follow.