

LICENSING COURT OF SOUTH AUSTRALIA

LIQUORLAND (AUSTRALIA) PTY LTD – PARKHOLME SHOPPING CENTRE

v

WOOLWORTHS LIMITED AND HURLEY HOTELS PTY LTD

JURISDICTION: Application for a Retail Liquor Merchants Licence

FILE NO: 2204 of 2016

HEARING DATE: 19, 20, 21 September and 25 October 2016

JUDGMENT OF: His Honour Auxiliary Judge WD Jennings

DELIVERED ON: 3 April 2017

*Application for a Retail Liquor Merchants 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 not satisfied the prerequisites for the grant of a retail liquor licence for the proposed facility - **Held** that had the position been otherwise the Court in the exercise of its discretion should refuse to grant the licence - Ss 3, 53, 57, 58 and 59 Liquor Licensing Act 1997.*

First Choice Liquor [2015] SALC 1

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

Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2) (1981) 28 SASR 458

Liquorland (Aust) Pty Ltd v Woolies Liquor Store Pty Ltd [2014] SASCFC 87

*Nepeor Pty Ltd v Liquor Licensing Commission*¹ (1987) 46 SASR 205

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

Woolies Liquor Stores Pty Ltd v Liquorland (Aust) Pty Ltd [2004] SASC 112

BWS Mt Gambier [2013] SALC 82

Woolies Liquor Stores Pty Ltd v Carleton Investments (1998) 73 SASR 6

Lovell v New World Supermarket Lovell v New World Supermarket (1989) 53 SASR 53

Nuriootpa Vine Inn v Licensing Court [1999] SASC 152,

Mandamo Pty Ltd v Crystalcorp Developments Pty Ltd (2004) 89 SASR 21

Woolworths v BWS Arndale [2014] SALC 14

Cufone v Harvey (1986) 40 SASR 261

MC & TP Westley Cellarbrations [2006] SALC 13 and [2008] SALC 16

Woolworths Ltd v Smithfield Hotel Pty Ltd [2012] SALC 57

Woolworths Limited v Fassina Investments Pty Ltd (2015) 122 SASR 535

BWS – Mt Barker [2016] SALC 33

Woolworths Ltd (BWS – Woodcroft) v Carleton Investments Pty Ltd and others [2016] SALC 35

Woolworths Ltd v Carleton Investments Pty Ltd & Ors [2016] SASCF 157

BWS – Seaford [2015] SALC 19

REPRESENTATION:

Counsel:

Applicant: Mr M Roder SC

Woolworths Objectors: Mr J Walsh QC

Hurley Hotels Pty Ltd Objectors: Mr B Doyle

Solicitors:

Applicant: Jones Harley Toole

Woolworths Objectors: Clelands

Hurley Hotels Pty Ltd Objectors: Duncan Basheer Hannon

- 1 This is an application for the grant of a retail liquor merchants licence by Liquorland (Australia) Pty Ltd for a Liquorland adjacent to a Coles supermarket in the Parkholme Shopping Centre, a neighbourhood shopping centre located on the south-western corner of the intersection between Marion Road and Oaklands Road.
- 2 The proposed retail bottle shop is to be accommodated in a new building to be constructed on the northern side of the enclosed entrance foyer leading into the Coles Supermarket. The proposed new building will have a total floor area of 157 square metres comprised of:
 - 121.5 square metres of selling area;
 - 27.5 square metres of cool room area; and
 - 8.0 square metres of stock area.
- 3 The City of Marion Development Plan indicates that the Parkholme Shopping Centre is located in a neighbourhood centre zone.
- 4 The current Parkholme Shopping Centre is comprised of a Coles Supermarket and other shops and facilities contained within the shopping centre are:
 - Sahra Sushi
 - Baker's Delight
 - Parkholme Newsagency
 - Parkholme Butchers
 - Asian Super Snackbar
 - Sticky Fingers Bakery
 - Monn Hairdressers
 - Terry White Chemists
 - Australia Post Office
 - CBA Bank
 - Public Toilets.

- 5 To succeed in this application, the applicant needs to satisfy the Court that the pre-requisites of ss 57 and 58 of the Act have been met and that in the exercise of the Court’s discretion the licence should be granted.
- 6 Section 57 relates to 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. These are not an issue here.
- 7 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.”
- 8 Whether the applicant has discharged this onus is what is in issue in this case.

Observations about the general locality

- 9 At the commencement of the hearing the Court conducted a view of the general locality and selected licensed premises in the company of the parties and their representatives.
- 10 The view commenced at the Parkholme Shopping Centre and noted that there was no point of entry into the centre from Marion Road. There is only an exit lane. It also noted that there is no interconnection between the Coles Supermarket and the other tenancies.
- 11 About 500 metres north of the proposed premises is the BWS Ascot Park. It is on the eastern side of Marion Road and is clearly visible from the Parkholme Shopping Centre.
- 12 About four kilometres south of the proposed premises is the Marion Shopping Centre. It has a Dan Murphy’s store in the south west corner of the carpark. Within the shopping centre itself, is a Woolworths store and an adjacent BWS store. It also contains a Coles Supermarket.
- 13 About two kilometres due south of the proposed premises is the Marion Hotel. It has a bottle shop. It has a dedicated car parking area for browse shoppers. It has a good number of fridges and appeared well stocked. Across the road is a petrol station and Foodland Supermarket.

- 14 About three kilometres north east of the proposed premises is the Castle Plaza Shopping Centre. It contains numerous retail outlets, a Foodland Supermarket, and in the south east corner a Cellarbrations bottle shop attached to the Castle Tavern.
- 15 Although not visited the Court notes that about three kilometres due west of the proposed premises along Oaklands Road is a Fassina Bottle Shop. The Court is permitted to know that this is a relatively large and well stocked outlet.
- 16 Although not visited, the Court notes that about four and a half kilometres north-east of the proposed premises on the eastern side of South Road is the Avoca Hotel. In *First Choice Liquor* Judge Gilchrist described this as having a “walk-in bottle shop is of better than average quality offering a broad range of liquor in an attractive, well laid out facility.”¹
- 17 Although not visited, the Court notes that the Tonsley Hotel is about three kilometres south east of the proposed premises on the western side of South Road in Clovelly Park. In *First Choice Liquor* Judge Gilchrist described this as having “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 through the drive-through. The walk-in bottle shop is of a reasonable size and standard.”²

The applicant’s witnesses

- 18 The applicant’s case comprised of several “needs witnesses”, a planner, the Operations Manager for the Coles Supermarkets Division, and a senior economist.

Francesca Jane Porter

- 19 She lives in Mitchell Park and has lived there since 2005. She has twin sons aged 12. She was recently made redundant. She supports the application.
- 20 She uses some of the other facilities at the shopping centre including bank and post office. She would prefer a “one-stop shop” which would enable her to purchase food from the supermarket as well as wine, and she said that they would go “hand-in-hand”. She goes to the shopping centre five times a week and walks there, as she does not drive. She currently purchases liquor from the BWS or Dan Murphy’s at Marion. She spends about \$60 per fortnight on liquor. She has also purchased liquor from the Marion Hotel. Her husband normally purchases their

¹ [2015] SALC 1 at [37].

² [2015]SALC 1 at [42].

liquor needs and does this at Dan Murphy's at Marion, as he drives. She says that hotels are not always easy to purchase liquor because of the inconvenience of the drive-through bottle shops. She said that the proposed liquor store would be good for the locals and create jobs. She said she does not now go to the BWS liquor store at all.

Julie Lindur

- 21 She lives in Morphettville. She is 73 years of age, is retired and lives on her own. She supports the application and said it would be convenient for her to be able to purchase food and wine in the one location.
- 22 She lives approximately three kilometres from the Parkholme Shopping Centre and drives there approximately three times a week. She does her main shopping at Coles, and uses the post office and the bakery approximately once a fortnight.
- 23 She used to shop at Marion and then Warradale, but both are too congested and she said there is good access to Parkholme where she described the car parking as excellent and never being a problem for her.
- 24 She has a drink three or four times a week, and on special occasions. She currently goes to the Morphett Arms Hotel but does not find that convenient. She said it is not convenient for her to go to the BWS store nearby, and she has never been there from the Parkholme Shopping Centre.
- 25 In cross-examination, she agreed that the Morphett Arms Hotel is about 100 metres away from her residence and said she has been there on a few occasions. She has not been to Fassina's as there is no supermarket there, and said she enjoys going to Parkholme and is happy with the facilities there, and with the car parking.
- 26 She does not like the Morphett Arms drive-through shopping area as it is often windy and rain comes into that area.

Clive Easterbrook

- 27 He lives in Marion and has lived there for four years with his wife. He is 72 years of age. He works part-time.
- 28 The Parkholme Shopping Centre is approximately 600 metres from his residence. Both he and his wife drink liquor. They both have cars and drive to the shopping centres two or three times a week. They have one big shop per week, and the others are for smaller purchases. They can get everything they need at the Parkholme Shopping Centre. They purchase liquor once a week and would like to be able to purchase it at Coles as this would provide for them a "one-stop-shop".

- 29 He said, in relation to the Marion Hotel and the BWS, that Marion Road “gets very busy”. He supports the application as it would be a lot easier for them to purchase liquor whilst shopping there rather than making special trips to Dan Murphy’s. It is always easy for them to park at Parkholme and it would be more convenient for them to purchase all their requirements there.
- 30 In cross-examination he said that whilst they could walk to the shopping centre it is easier for them to drive, and driving there is very convenient. Ninety nine per cent of his liquor purchases are from Dan Murphy’s, where he goes once a week. He described the traffic on Marion Road as “a pain” and “Marion Road isn’t a road you want to play with”.

Rhett Cook

- 31 He lives in Parkholme. He is 35 years of age and works as a Judge Handicapper and Clerk in the horse-racing industry at Morphettville racecourse. His wife is currently studying to be a teacher. She was to give evidence at this hearing but had commitments at university. They are a one-wage family.
- 32 He ruled out going to BWS because Marion Road is a “horrible road”. He has not been to the BWS for six months. Ninety per cent of their shopping is done at Parkholme and they would prefer a “one-stop shop”. They do one major shop per week and go there three or four times per week. He drinks beer and red wine. His wife uses the post office, cheesecake store, takeaway food and Baker’s Delight at Parkholme. He also gave evidence that his wife travels to Kurralta Park Shopping Centre on Anzac Highway because that has the closet Liquorland available to them.

Kerry Lee Holmes

- 33 She lives in Parkholme and has lived there for four years. She works at an electronics company at Lonsdale. She took time off work to give evidence before the Court.
- 34 She currently purchases most of her liquor at Dan Murphy’s at Marion. She would like at one-stop shop at Parkholme. She does not have any problems parking there. She uses other stores, including the bakery, chemist, Chinese restaurant and cheesecake store. She does lots of small shopping and one large shop per month. Coles has an excellent fruit and vegetable facility.
- 35 She and her partner both drink and spend approximately \$100 per week on liquor, which is purchased mainly from Dan Murphy’s at Marion. She does not use the other shops in the Marion Shopping Centre.

- 36 She said that going to BWS after shopping at Parkholme would be “very inconvenient” as she is often there at 4.30pm and there are problems with traffic on Marion Road. Also, they do not sell strongbow cider, which she drinks. She said the traffic on Marion Road was often backed up to Oaklands Road. The Marion Hotel is not convenient as she goes past there on her way to work early in the morning, and when she is coming home she would not dream of trying to make a right-hand turn in peak hour traffic from Marion Road.

Sophie Wong

- 37 She is the Operations Manager for the Coles Supermarkets Division. She has a commerce degree and an MBA in Business Administration. She is responsible for some 42 stores in South Australia and the Northern Territory.
- 38 The aim, insofar as it is possible, is to co-locate liquor stores with supermarkets.
- 39 The size of the proposed liquor store is 157 square metres and would contain 1,100 lines.
- 40 The proposed store would be modern and provide easy access for customers with trolleys. The turnover of the Coles store at Parkholme is \$750,000–\$800,000 per week, and some 28,000–30,000 people visit the store per week.
- 41 The purpose of the proposed bottle shop is to increase the company’s profit and also to support local suppliers and the community. She said people are generally time-poor and the current trend is for people to have multiple shops rather than one big shop each week.
- 42 Coles has Fly-Buys and a loyalty scheme both at their supermarkets and at their liquor stores. This proposal, unlike the nearby BWS store, would offer a one-stop shop for their customers and would negate the current requirements for them to make an additional trip for their liquor purchases.
- 43 It is proposed that there would be regular wine tastings on Friday nights. Their employees are trained in their various product lines and could make recommendations to customers.
- 44 In cross-examination she agreed that the Avoca Hotel has an attractive bottle shop as well as a drive-through, with an attractive and good range of wines as well as a tasting area. She also agreed that the Marion Hotel was pleasant and had a good range of wines including red wines. She described the other tenancies in the Parkholme Shopping Centre as complementary to the Coles Supermarket.

Jeffery Smith

- 45 He is a planning consultant and he prepared a detailed report for the Court, in which he noted.
- 46 The Parkholme Shopping Centre is a landmark shopping centre of longstanding, servicing the local community for a period in excess of 50 years.
- 47 Parkholme is situated in the City of Marion and Marion has a well-established metropolitan centres retail structure.
- 48 Given its longevity and tenancy mix, the Parkholme Shopping Centre has sustained its position as an important retail centre for the local community.
- 49 Liquorland will add to the range of facilities available in this well-recognised, substantial neighbourhood shopping centre of longstanding.
- 50 The shopping centre is serviced by metropolitan bus routes traversing Marion Road and Oaklands Road, and a community bus service operated by the Marion Council provides a regular door-to-door service to the Parkholme Shopping Centre for the aged and disabled.
- 51 Population growth from 2006–2011 has been reasonably steady.
- 52 There has been strong growth in the area for people aged 25-39 years and over 65 years, and the latter group has resulted in the development of aged care and retirement villages.
- 53 He concluded by saying that the proposal:
- has been approved by the City of Marion;
 - will service the suburbs of Morphetville, Parkholme, Ascot Park, Clovelly Park, Edwardstown, Mitchell Park and Marion;
 - will be reasonably accessible and very convenient as a consequence of the location of the shopping centre abutting Marion Road and Oaklands Road, both of which are arterial roads carrying significant traffic volumes.
- 54 In cross-examination, he accepted that due to the east-west direction being the most convenient there would be a deal of trade involving those using Oaklands Road to travel beyond the locality.
- 55 He also noted that further changes to the car parking arrangements would suggest that two car parks immediately adjacent to the entrance of the supermarket complex are to be lost.

56 Elderly residents of the area would benefit from the service provider of the community bus service operated by the City of Marion.

57 In cross-examination he agreed that the bus service:

- requests that people use only two recyclable bags and therefore this service would not facilitate one-stop shopping, including alcohol;
- travels more frequently to Marion Westfield and Castle Plaza and that both of those centres have a greater range of supermarkets and banks.

58 Having said that Liquorland would service an area in which there has been considerable growth in the 20-39 year-old cohort, he agreed in cross-examination that the population material from which he drew that information was experimental and required caution.

59 Having said that Liquorland will service an area with continued growth in the development of new housing in various forms, he agreed in cross-examination that this was based on his observation rather than on any reliable statistics.

Sean Stephens

60 He is a managing partner and senior economist at Central Economics Pty Ltd. He has an Honours Degree in Economics from the University of Newcastle, and his areas of expertise are urban economics and the assessment of economic impacts of local and regional economies associated with urban development projects.

61 He also prepared a comprehensive report and concluded as follows:

“Economic Benefit Considerations

4.31 The proposed Liquorland Park Holme will ensure that residents of the trade area are served by an appropriate range of take home liquor outlets. This will include locations well-suited to serving passing trade, as well as locations, such as the proposed store, that provide synergies with adjacent and complementary supermarket/grocery retailing.

4.32 Liquorland is a well-known brand providing a strong mix of product categories. The proposed Liquorland store will provide in the order of 500 to 600 wine stock keeping units (SKUs). The store will also sell a wide range of popular spirit brands, as well as major brand and boutique beers plus ciders and other specialty drinks.

- 4.33 In addition to consumer benefits, the Liquorland store would directly generate approximately 6 to 8 jobs.
- 4.34 It is also important to recognise that the co-location of Coles and Liquorland is entirely consistent with the State Government land use policies seeking to reduce travel requirements, and encourage multi-purpose trips at a single location. Additional costs in terms of time and money will be incurred by residents if the nearest take home liquor outlet to Coles at Parkholme Shopping Centre is a minimum of 400 metres away.
5. Conclusions
- 5.1 The proposed site of Liquorland will operate in a manner complementary to the role and function of Parkholme Shopping Centre as a supermarket-based shopping centre meeting the comprehensive day-to-day needs of surrounding residents.
- 5.2 The Main Trade Area that would be served by the proposed Park Holme Liquorland has experienced ongoing population growth over the past 15-years, and this is expected to continue for the foreseeable future. Spending on take home liquor by Main Trade Area residents is forecast to increase by +\$3.6 million per annum between 2016 and 2026 associated with population growth of more than 3,500 persons. Additional liquor retailing will help meet this growth in demand, including provision of the proposed Park Holme Liquorland.
- 5.3 A review of the current network of liquor stores serving residents of the Main Trade Area indicates that at present the focus of most surrounding stores is on serving passing trade. This is in contrast to the proposed Liquorland at Parkholme Shopping Centre which will have a close functional relationship to adjacent supermarket and specialty shops. The demographics of the surrounding population suggest that the ability to undertake shopping for take home liquor items in combination with purchases of other day-to-day grocery and other items, as will be enabled by a Liquorland [sic] at Parkholme Shopping Centre, would deliver a strong community benefit.
- 5.4 I am of the professional opinion that the proposed Liquorland is consistent with the normal efforts of the retail industry to meet growing market demand, and also ensures consumers achieve their contemporary expectations for convenient access to take home liquor facilities both now and into the future.”

Objectors' witnesses

62 The objectors relied upon the evidence of the manager of an adjacent retail liquor store, a planner, and the general manager of an entity that operates hotels in the general vicinity, and the bottle shop manager of a nearby hotel.

Shaun Dwyer

63 He is the current manager of BWS at Ascot Park and has worked there for about one year.

64 The store is roughly 380 square metres and is larger than the proposed Liquorland store.

65 There are approximately 1,600 lines at BWS which sells 34% wine, 33% beer and 33% spirits.

66 Potential customers often come into the store to browse and seek advice from staff.

67 Approximately 80% of customers are regulars from the surrounding area. He knows his regular customers well and a number of people who use the store come in after shopping at Parkholme. These people carry Coles shopping bags and he has spoken to them about where they have been. None of those people have complained to him about walking from the shopping centre.

68 He said the BWS is approximately 500 metres from the Parkholme Shopping Centre, and that the BWS is easily accessible from there. He personally uses the Parkholme Shopping Centre to buy his lunch, and he also uses the pharmacy and the newsagency.

69 The majority of BWS customers come from Ascot Park, Mitchell Park, Parkholme, Marion, Morphettville, Edwardstown and Clovelly Park. The BWS also gets some passing trade, and BWS has specials from time to time.

70 He is familiar with the roads in the area and said that 4.00pm–6.00pm is the busiest time for Marion Road.

71 In relation to the non-busy periods, access from Marion Road to BWS is very easy.

Graham Ashley Burns

72 He prepared a comprehensive report and he concluded as follows:

“The proposed Liquorland outlet will add an additional 157 square metres of retail floor space to the Park Holme Shopping Centre, with no apparent off street parking provided for this additional floor space;

Vehicle access into and out of the Park Holme Shopping Centre is constrained by the configuration of surrounding transport infrastructure;

Persons walking to and from the shops in Park Holme Shopping Centre are required to navigate a busy car park;

The closest licensed premises to the proposed Liquorland outlet is BWS Ascot Park, at the corner of Marion Road and Third Avenue and within the boundaries of the Park Holme Neighbourhood Centre Concept Plan. BWS Ascot Park is well stocked and is surrounded by ample off street parking which is easily accessed;

Vehicle access between BWS Ascot Park and Park Holme Shopping Centre is safe, direct and convenient due to median breaks along Marion Road, and traffic light sequencing at the Marion Road/Oaklands Road intersection;

Marion Hotel and its associated bottle-shop, is the next nearest licensed premises to the proposed Liquorland outlet. The bottle-shop is well stocked with an above average range of wines and is provided with dedicated parking for customer browsing;

Marion Hotel is in a Neighbourhood Centre Zone and diagonally opposite a Foodland Supermarket and chemist in the same zone, with safe and convenient access across Marion Road available from a pedestrian activated crossing;

Fassina Liquor Merchants is a large free standing retail bottle-shop which is conveniently located to persons living in the western half side of the locality;

The statistical area is characterised by a high proportion of elderly persons, below household income, and higher unemployment compared to South Australia;

A high percentage of persons in the statistical area either did not have a car or only had one car compared to South Australia, which I attribute to the higher percentage of elderly persons in the statistical area;

There has been negligible population growth in the statistical area between 2006 and 2011; and

The SEIFA Index Shows the Locality is disadvantaged compared to surrounding areas, the wider metropolitan area and South Australia.”

- 73 In his oral evidence he said he was impressed with the range of products the Marion Hotel and the standard and quality of wines on display there. He also said that the Fassina Liquor Merchants store on Anzac Highway is well stocked with a large array of wine and is a very attractive store, and he also said that the Avoca Hotel has an impressive bottle shop.
- 74 In cross-examination he agreed that the population in the area were relatively disadvantaged.
- 75 He also agreed that the phenomena of one-stop shopping has become more substantial and has continued to grow.

Samuel Charles McInnes

- 76 He filed an affidavit. He is the general manager of the Hurley Hotel Group, which owns and operates the Marion and Tonsley Hotels. He deposed to his executing right-hand turns from where the Marion Hotel is located. He said the Tonsley and Marion Hotels provide full hotel service, and the Marion has a Sip'n Save bottle shop. The Hurley Hotel Group are always looking to upgrade their hotels and concept plans had been prepared for the Marion Hotel, which include a new retail bottle shop and a complete redevelopment of the hotel costing some \$12 million. He agreed in cross-examination that these plans are "preliminary" and have not been put to Council. The hotel has an even male/female patronage, although perhaps with more males. The patronage of the drive-through bottle shops at both hotels is an equal component of males and females.

Nicholas Limberis

- 77 He also prepared an affidavit and is the bottle shop manager at the Marion Hotel.
- 78 He said the bottle shop includes two lanes. The customers range in age from 18-70 years, with the male/female split being 60:40. His staff assists customers in carrying out their purchases and high percentage of people browse the bottle shop during the period 4.00pm–6.00pm. He has not witnessed any problems with women being uncomfortable using the drive-through service.

The applicant's case

- 79 Mr Roder SC, opened this case on the basis of a community expectation that there would be a bottle shop in "such an established (shopping) centre" as the Parkholme Shopping Centre and that hotels in and about the locality were essentially irrelevant as one cannot buy groceries there. Stripped to its essentials the applicant's case was pitched primarily on the basis that there was a community expectation that this centre would

have a retail liquor shop and that those using the centre would be expected to be able to combine their retail liquor shopping with their other use of the centre. Or to put it another way, in connection with this shopping centre there was a community expectation of a “of one-stop shopping” experience. It further contended that the prevailing access to liquor outlets is for many so inconvenient, they cannot be said to be adequately catering for the public demand for liquor for consumption off licensed premises and the grant of this licence is necessary to satisfy that demand.

Some general observations about these applications

80 A starting point before turning to the s 58(2) test is to reflect upon the objects of the Act, which are prescribed by s 3(1) to include:

- “(a) to encourage responsible attitudes towards the promotion, sale, supply, consumption and use of liquor, to develop and implement principles directed towards that end (the ‘responsible service and consumption principles’) and minimise the harm associated with the consumption of liquor; and
- (b) to further the interests of the liquor industry and industries with which it is closely associated—such as the live music industry, tourism and the hospitality industry—within the context of appropriate regulation and controls; and
- (c) to ensure that the liquor industry develops in a way that is consistent with the needs and aspirations of the community; and
- (d) to ensure as far as practicable that the sale and supply of liquor contributes to, and does not detract from, the amenity of community life; and
- (e) to encourage a competitive market for the supply of liquor.”

81 The s 58(2) test requires the Court to identify the relevant locality, an assessment of whether existing licensed premises in that locality do not adequately cater for public demand for off-licence consumption, and whether the grant of a licence is necessary to satisfy that demand.

82 It is for the applicant to demonstrate to the Court that the licensed premises in the locality do not “adequately cater for the public demand for liquor” and that “the licence is necessary to satisfy that demand”.

- 83 Public demand for liquor is satisfied if it is available in a “reasonably and realistic sense”: the corollary of that proposition is that the public may have to tolerate some inconvenience in obtaining liquor.³
- 84 In determining the issue of adequacy the Court must have regard to the accessibility of existing premises to the public in the locality and in that context, issues of distance, time taken to get to existing premises amongst others are relevant. In assessing that issue the Court must have regard to contemporary standards.
- 85 In some cases the Court will find it necessary to consider whether the range of liquor demanded by the relevant public is being adequately met by the existing facilities. This is not such a case.
- 86 Plainly consideration must be given as to what is the relevant locality. It should be noted that “locality”, however, does not simply mean “the local community”.
- 87 In *Liquorland (Aust) Pty Ltd v Woolies Liquor Store Pty Ltd*⁴ Parker J, self-evidently stated that the concept of locality has a geographical connotation. He then observed that there is no reason to doubt longstanding observations such as that the word is used in the Act to denote, in a general way, the fact of being local, or neighbouring, as opposed to distant or remote: *Nepeor Pty Ltd v Liquor Licensing Commission*⁵ per von Doussa J. The purpose of the word is to focus attention upon the local, as distinct from purely general, character of the public demand.⁶
- 88 As to the issue of whether or not existing premises do not adequately cater for public demand for off-premises consumption, I agree with the submissions of Mr Doyle that the authorities establish the following propositions:
- It is not for the objectors to show the adequacy of the existing premises. The applicant must demonstrate that those premises do not adequately cater for the public demand for liquor consumption.
 - It is relevant to have regard to premises within and outside the locality.⁷

³ *Woolworths Ltd v Drase Coosit Pty Ltd* [2010] SASC 13 at [53] per Kourakis J, referring to *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 at 459-460.

⁴ [2014] SASFC 87 at [62]-[63].

⁵ (1987) 46 SASR 205 at 215.

⁶ *Nepeor* at 206-207 per King CJ.

⁷ *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* (2000) 76 SASR 290 at 296 per Doyle CJ, and at 299 per Debelle J, *Woolies Liquor Stores Pty Ltd v Liquorland (Aust) Pty Ltd* [2004] SASC 112 at [14] per Debelle J, *BWS Mt Gambier* [2013] SALC 82.

- The notion of public demand connotes demand emanating from a sufficient area of the community to constitute the public.⁸
- Section 58(2) has a narrower focus than s 58(1) in that the language is focussed on the demand for and availability of liquor, and the wishes and preference of the public in relation to matters of style, choice, convenience and the like, while not wholly irrelevant in the context of s 58(2), carry less weight, because the court is concerned with the demand of liquor and its availability, and not with the wider concept of the needs of the public.⁹
- When considering the extent to which public demand is adequately catered for, it is implicit in the word “adequately” that the test does not require that every aspect of the public demand within the locality is catered for without any convenience, or that all preferences are catered for. As Kourakis J said in *Drase Coosit* (supra), the matter is viewed in a reasonable and realistic sense and some level of inconvenience will often have to be tolerated.¹⁰
- A mere preference to shop in a particular way which is not presently catered for will not necessarily suffice: see generally *Carleton Investments*.
- The authorities caution against giving excessive weight to the evidence of need witnesses.¹¹
- When considering the relative merits of existing facilities, while there may be a degree of “sameness” about particular branded stores which entitles the Court to make assumptions as to the range on offer, it is well recognised that takeaway

⁸ *Nepeor* at 215-216 per von Doussa J.

⁹ *Woolies Liquor Stores Pty Ltd v Carleton Investments* (1998) 73 SASR 6 at p 10.

¹⁰ As it was put by Judge Griffin in *Mattim Holdings Pty Ltd v Fassina Holdings Pty Ltd*:

“In assessing whether existing premises do not adequately cater for the public demand the court is required to assess a variety of relevant factors by reference to contemporary standards. Following such an assessment, if public demand for liquor in the locality cannot be adequately met without unreasonable difficulty and inconvenience then that will be relevant. In this context the issues of distance to be travelled, the amount of time taken, traffic conditions, entrenched shopping habits or aversions arising out of one or more of these factors may be relevant.

In this assessment process, the court must take care not to confuse public demand with individual desires. The same may be said about the issues of traffic congestion or difficulties with parking. The court must discern the relevant of these issues by reference to contemporary standards and in the process recognised that not all preferences can be reasonably met and some level of inconvenience may have to be tolerated.” (unreported, delivered 29 April 2011)

¹¹ See: *Nuriootpa Vine Inn v Licensing Court* [1999] SASC 152, *Mandamo Pty Ltd v Crystalcorp Developments Pty Ltd* (2004) 89 SASR 21 at [16] per Anderson J.

facilities offered by hotels vary enormously¹² and that some hotels offer a particularly attractive offering which can cater well for the public demand.

- Finally, when considering public demand, the focus is on the present and not the future predicted circumstances of the locality.¹³

89 As to the notion of one stop shopping, much has been written about this in the case law.

90 In *Nepeor Pty Ltd v Liquor Licensing Commissioner*¹⁴ Cox J observed that there had been a perceived shift in community expectations regarding one-stop shopping..

91 In *Lovell v New World Supermarket* Cox J said:

“As the Chief Justice has pointed out there was evidence of an increased public demand for liquor in the locality caused by the development of the shopping centre, but I think it clear that perceived shift in public expectations about liquor marketing also played an important part. Witness after witness in this case spoke of the manifest convenience of doing all of the weekly shopping in the one place. There was a time when any reference to one-stop shopping in a licensing case would be made merely to illustrate, by way of its inevitable exclusion, the narrowness and rigidity of the statutory restraints upon the grant of any new licence. Now the community’s wish for one-stop shopping I accepted as a relevant and important consideration, as it plainly is, although taken alone, it is not likely in any particular instances to be decisive. Further, I think in recent cases the court has shown a proper responsiveness to the preference of many people such as a number of the witnesses who testified in this case, for buying their liquor from a modern bottle shop that is not part of a hotel.”¹⁵

92 In *Woolworths Limited v Drase Coosit Pty Ltd*¹⁶ Kourakis J, as he then was, considered the issue of one-stop shopping in light of the objects of the 1997 Act. His Honour stated:

“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;

¹² see, eg, *Woolworths v BWS Arndale* [2014] SALC 14 at [137].

¹³ *Cufone v Harvey* (1986) 40 SASR 261 at 262 per King CJ, *MC & TP Westley Cellarbrations* [2006] SALC 13 and [2008] SALC 16 per Judge Beazley, *Woolworths Ltd v Smithfield Hotel Pty Ltd* [2012] SALC 57 at [75] per Judge Gilchrist.

¹⁴ (1987) 46 SASR 205.

¹⁵ (1989) 53 SASR 53 at [58].

¹⁶ (2015) 122 SASR 535.

Although there are statements of the Court that a preference for one-stop shopping is not of itself sufficient, the identification of the relevant public demand is a question of fact to be decided 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 the existence of some unmet demand is unlikely to be seriously disputed. The more difficult question will 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;

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. The supply of liquor in shopping centres does not appear to have impinged upon the objectives of the Act. The routines of contemporary Australian life are such that the facility of one-stop shopping is of great importance to working people.”

- 93 More recently, in cases such as this, reference is often made, as happened here, to the decision of the Full Court in *Woolworths Limited v Fassina Investments Pty Ltd*¹⁷ where the Full Court considered and re-evaluated the construction of s 58(2) of the Act.
- 94 In that case Parker J analysed the earlier decision of the Full Court in *Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd*, being a decision that reflected the prevailing view as to what the test under s 58(2) entailed. He said:

“I will make several observations about these three paragraphs in the judgment of Doyle CJ. In the first of these paragraphs the former Chief Justice recognised that when determining an application for a retail liquor licence the Licensing Court must make a normative judgment about contemporary expectations of accessibility.

I consider that the reference by Doyle CJ in the second of the paragraphs that I have cited to a ‘mere preference’ for one stop shopping was not intended to deny that consideration significant weight when the normative standard is determined. The point being made by Doyle CJ was that the preferences of some consumers, whether that be a liking for one-stop shopping or a desire for a liquor store in any other location, were not, of themselves determinative. Nevertheless, the preferences and aspirations of significant sections of the community are an important

¹⁷ (2015) 122 SASR 535.

consideration in fixing the normative standard that is required by the words ‘adequately cater’.

I also note that, as Doyle CJ observed in the last of the three paragraphs that I have cited, the change in the language of the current provision will generally not produce a different result than the 1985 provision. That said, it remains important to identify clearly the extent of the change so that it can be given effect in those cases where it will lead to a different result. For the reasons that follow, this is one of those cases.

I stress that s 58(2) re-focuses the test from a question as to whether the demand in a locality can be ‘met’ without unreasonable inconvenience by existing local retail facilities to require an assessment by the licensing authority of whether the existing facilities ‘adequately cater’ for that demand. The term ‘adequately cater’ has altered the focus of the public demand test to require consideration of the public’s expectations as to the accessibility of retail liquor services.

The extent to which existing facilities cater for the contemporary shopping habits of the public as a whole, or significant sections of it, is an important element of the ‘adequately cater’ test. The degree of difficulty and inconvenience that the public, or a significant section of it, will suffer, if an application is refused, is an important element of that test. However, it is not the sole criterion. Contemporary patterns of family, work, and social life that rely on the convenience of one-stop shopping are also relevant considerations. In that respect, the current provision has effected a significant relaxation of the former test.”¹⁸

Consideration

- 95 With these matters in mind I now approach the consideration of the within application.
- 96 I commence by observing that whilst the decision in *Fassina* is significant, the Full Court did not overrule or depart from the observations made in *Carleton Investments*. Rather, it emphasised that while the preferences of some consumers, whether that be a liking for one-stop shopping or a desire for a liquor store in any other location, were not, of themselves, determinative, the preferences and aspirations of **significant sections of the community** are an **important consideration** in fixing the normative standard that is required by the words “adequately cater”.
- 97 In *Fassina* the Full Court decided that the Licensing Court had erred by failing to attach sufficient significance to the contemporary community

¹⁸ (2015) 122 SASR 535 at [47]-[51].

expectations about the Arndale shopping centre. This was of particular importance “because of the status of Arndale as a large regional centre based upon its size, location and very substantial patronage”.¹⁹ It was clearly established on the evidence in that case that the contemporary community expectation was that a very large regional centre of that type would include a retail liquor store.

98 I agree with Mr Doyle that the decision is not authority for any proposition that a desire of users of shopping centres generally, that there be a retail liquor store within the centre, is in some way decisive of the statutory test.

99 This was confirmed by this Court’s decision in *BWS – Mt Barker*.²⁰ In that case, the applicant sought a BWS store within a shopping centre in Mt Barker that was anchored by a Woolworth’s supermarket. The shopping centre was classified as a regional centre and, as well as being well serviced by a car park immediately in front of the centre and a multi-storey car park nearby, it contained: a Cheap as Chips, a real estate agency, a doctor, a dental practice, a fish shop takeaway food facility, a café, a newsagency, a fruit and vegetable shop, and a hair and beauty salon.

100 Judge Gilchrist held there was a need for caution in determining what *Woolworths v Fassina* stood for.²¹ He said that the decision:

“...does not stand for the proposition that the absence of a takeaway liquor facility in a shopping centre means that other proximate takeaway liquor facilities are not adequately catering for the public’s demand for liquor for consumption off premises.”

101 It is notable that in connection with a not dissimilar application in *Woolworths Ltd (BWS – Woodcroft) v Carleton Investments Pty Ltd and others*²² wherein this Court refused an application for a retail liquor licence in connection with a suburban shopping centre, the Full Court of the Supreme Court refused leave and in doing so said:

“*Fassina* concerned an application for a retail liquor merchant’s licence at the Arndale Central Shopping Centre. In *Fassina* Parker J observed that community expectations about the availability of a liquor store were of particular importance because of the status of Arndale as a large regional centre based upon its size, location and very substantial patronage. The shopping centre is very different. It

¹⁹ See [55].

²⁰ [2016] SALC 33.

²¹ 2016 SALC 33 at [144].

²² [2016] SALC 35.

comprises no more than a large supermarket and a handful of retail outlets.”²³

- 102 It follows that the re-evaluation in *Fassina* has not radically changed the law. Indeed it is notable that where the Court has found that “one-stop shopping” has justified the grant of a retail liquor merchant’s licence has generally involved an application concerning proposed premises within a large residential or district centre. It is significant that in this case the proposed premises are within a neighbourhood shopping centre (or a shopping centre that is located in a neighbourhood centre zone).
- 103 Turning now to the facts of this case, whilst the needs witnesses in this case establish that for many living in the vicinity of the Parkholme Shopping Centre, it would be very convenient for them to be able to combine their purchasing of take away liquor with their other use of the centre, their evidence did not establish that there is a community expectation that that shopping centre would have within its offering, a retail liquor outlet.
- 104 The needs witnesses establish that at times Marion Road can be a difficult road to traverse. That said, traversing that road will often be an issue for those using the Parkholme Shopping Centre. Moreover, Marion Road’s characteristics are not so unique as to of themselves establish that a retail liquor shop within the Parkholme Shopping Centre is necessary to service the public demand in the locality. It is of some moment that there is a BWS store approximately 500 metres away from the Parkholme Shopping Centre, that has an extensive range of liquor and good car parking facilities, as does the Marion Hotel, which is not that far away.
- 105 In determining issues such as the degree of inconvenience in accessing existing licensed premises the Court is not solely reliant on what it has been told by the needs witnesses. It can be informed by the locality’s characteristics and its sense of contemporary standards.
- 106 Having regard to what was seen on the view and evidence of the area, the areas surrounding the Parkholme Shopping Centre cannot be described as compact and the centre is plainly surrounded by many busy roads. It is on the corner of Marion Road and Oaklands Road and has to its west, Morphett Road and to its east, South Road.
- 107 In light of this, my very strong impression is that people in the locality around the Parkholme Shopping Centre, whether that locality be defined by the evidence of Mr Smith or Mr Burns or by reference to the “main trade concept” used by Mr Stephens, are used to travelling on major roads and travelling distances on those roads to access amenities, that are

²³ *Woolworths Ltd v Carleton Investments Pty Ltd & Ors* [2016] SASCFC 157.

by contemporary suburban standards, relatively long. In other words, travelling relatively long distances on busy roads is for many living in the locality part of ordinary life and is unexceptional.

- 108 As such, the evidence does not establish that it is, by those standards, particularly inconvenient for the relevant public to access the existing premises in and about the locality, they being, amongst others, the BWS at Ascot Park, the BWS and Dan Murphy's at Westfield Marion, the Marion Hotel, the Tonsley Hotel, the Fassina store on Oaklands Road, the Morphett Arms Hotel and the Liquorland at Kurralta Park. I find that these outlets are more than adequately meeting the relevant public's needs.
- 109 In my view the test postulated by s 58(2) of the Act has not been met.
- 110 Had it been otherwise, I would feel the same concern that troubled this Court in *BWS – Seaford*, where it said:

“Even without direct evidence I am entitled to know that the creation of another takeaway liquor facility in this locality would put a strain on the viability of the takeaway facility at the Beach Hotel at Seaford and the Cliff Avenue Liquor Store. For the sake of a virtually identical store to one no more than five minutes' drive down the road this is a potential price that is too heavy to pay.

To put it another way, the grant of this licence will not add to the range of facilities in the locality. It has the potential to result in the public ultimately having less choice not more. Thus the grant of the licence carries with it the risk that within this locality the competitive market for the supply of liquor might be compromised. In light of the fact that for those who wish to access the type of facility proposed they are able to access such a facility within a short distance, I would exercise the Court's discretion and refuse the application.”²⁴

- 111 The granting of the licence in this case may assist one form of consumer, such as those reflected by the need witnesses at the expense of other groups, especially the adjacent hotels and their patrons. As such, the granting of the licence could also have the effect of impairing the statutory objectives referred to earlier herein, which can only be met by Hotels eg: the promotion of hospitality, live music and the amenity of community life, and which encourage a competitive market for the supply of liquor.
- 112 In the end result I find that the applicant has not discharged its onus of demonstrating that the existing licensed premises do not adequately cater for public demand for consumption of packaged liquor in the locality,

²⁴ [2015] SALC 19 at [93]-[94]

and if it had, I would exercise the Court's wide discretion to refuse the application.

113 The application is therefore dismissed.