

**LIQUOR STORES ASSOCIATION INC v WINE  
NET AUSTRALIA PTY LTD  
[1999] SASC 238**

**Full Court: Perry, Duggan and Nyland JJ**

1 PERRY J. This is an appeal against a grant to the respondent (“Wine Net”) of a retail liquor merchant’s licence. Wine Net obtained the grant with respect to premises situated at 30 Little Sturt Street, Adelaide, from which it intends to trade under the name “Wine Net Australia”.

2 The objector to the licence is the incorporated association which represents the interests of all retail liquor stores in South Australia, of which there are approximately 160.

3 It is immediately apparent from the conditions which are set out in the application for the licence, that if the grant is upheld, it will result in a trading activity which bears little resemblance to the conventional trading operation conducted by a retail liquor store. The conditions which, in its application Wine Net volunteered to accept, are:

“1.... To sell liquor on any day except Good Friday and Christmas Day between the hours of 8.00 am and 9.00 pm for consumption off the Licensed Premises.

2. Liquor may only be sold pursuant to the Licence by internet or mail order and not by a purchaser attending at the Licensed Premises to inspect and take delivery of the liquor.

3.....Liquor sold pursuant to the Licence may be stored at or away from the Licensed Premises.

4. Liquor will not be displayed or advertised at the Licensed Premises.

5.....The Licence will authorise the sale of bottled wine only.”

4 As to proposed condition 5, on the hearing of the application, Wine Net indicated that it sought a licence which would be conditioned to permit it to sell only Australian bottled wine in quantities of not less than six bottles.

5 The grant was in terms of the application, with an additional condition that sales not take place other than between the hours authorised for such a licence in the *Liquor Licensing Act 1997* (“the Act”). I must say that as a

matter of general principle, the appropriateness of a condition obliging a licensee to comply with a provision of the Act might well be doubted. Quite apart from other considerations, it raises the question whether a breach of the condition should be regarded as an offence against s45 of the Act, or as a breach of the substantive provision of the Act which it replicates, which may well have a different penalty.

6 In its notice of objection, the appellant raised the following grounds:

“3.1 . That the grant of the application would not be consistent with the objects of this Act or would be contrary to this Act in some other way;

3.2 That the grant of the application is not necessary in order to provide for the public demand for liquor for consumption off licensed premises in the area in which the premises or proposed premises to which the application relates are situated;

3.3... That the position, nature or quality of the premises renders them unsuitable to be licensed, or to be licensed under a Licence of the kind to which the application relates;

3.4 That if the application were granted:-

3.4.1 ..undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises or proposed premises to which the application relates would be likely to result; or

3.4.2 the amenity of the locality in which the premises or proposed premises to which the application relates are situated would be adversely affected in some other way.”

7 The appeal raises important and fundamental questions as to evidence of need, the concept of locality and the nature of the trading operation which may be permitted under a retail liquor merchant’s licence.

8 Once again, there is a lack of properly recorded findings of fact by the learned Licensing Court judge.<sup>1</sup> In those circumstances, it will be convenient if I first summarise the evidence given before the learned Licensing Court judge. Fortunately, there were no serious factual disputes in the evidence.

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<sup>1</sup> See a similar criticism voiced by the Full Court in *South Eastern Hotel Pty Ltd and Ors v Woolies Liquor Stores Pty Ltd* (unreported) [1998] SASC 6819 per Doyle CJ at para 9.



### The Evidence

9 Wine Net, which was incorporated for the purposes of making the application and holding the licence, has three directors. They are all young men of about 25 years of age. Two of them are still studying at universities, Troy Martin at the University of South Australia, and Mark Davies at the University of Adelaide. At the time of the hearing, Mr Martin was completing his degree in a Bachelor of Management and Mr Davies, who already held a Bachelor of Arts, was completing a second degree, namely, a Bachelor of Commerce.

10 The third director was Evan Dixon, who had worked with Link Telecommunications, Fuji Xerox and Sharpe Danke. He was said to have “considerable experience in maintaining and selling to data bases”. The proposed premises were described in the inspector’s report as

“... a home office area located at the rear of a two-storey building (private residence) at 30 Little Sturt Street, Adelaide. The proposed licensed premises itself has no street frontage. Access is through a rear gate at the end of the driveway on the southern side of the building.”

11 Wine Net leased the premises pursuant to a *residential* tenancy agreement from the owner of the premises. That Wine Net proposed to conduct the business from a room in residential premises obviously gave rise to planning considerations. As to that, the inspector reported:

“The Corporation of the City of Adelaide has advised that the business operations proposed in this application comply with the provisions of the *Development Act 1993* with respect to Home Activities. No further approval is therefore required.”

12 No formal correspondence with the Corporation confirming that position was tendered, but no issue was raised as to that aspect of the matter.

13 Mr Martin, who was the only one of the three directors to give evidence, described the room from which the business was to be operated as “just a small office” in which would be housed “basic office equipment”, including a computer, telephone, fax machine and printer.

14 Mr Dixon, who lives on the premises was put forward as the person who would operate the business. It was intended that for the first year of trading he would be the only one of the three directors to be paid a salary.

15 The intention was to establish an Internet site. Although proposed condition 2 envisaged sales to be made only by Internet or mail order, Mr Martin’s evidence showed that he countenanced sales by telephone orders.

His evidence was that Mr Dixon would be "... selling via telephone, via computer and via mail order to customers both within South Australia and also nationwide".

16 It is clear, however, that the proposed business operation would focus predominantly on sales effected through the Internet. It was to that method of sales that the evidence of the "need" witnesses was directed.

17 What was envisaged was that originally a data base of customers would be established and that initially a publication, including a mail order form, would be posted to them. Presumably this would provide the option of placing orders via the Internet.

18 Mr Martin's evidence was in part:

"... statistics that are available on Internet usage worldwide indicate that there is a strong market between the ages of 20 and 35 which loosely falls into the generation X category. There is also a strong market from 55 to 65 amongst people in senior positions who have computers as part of their every day work, and also amongst retired and newly retired people."

19 Mr Martin put forward a wine list of approximately 550 wines. No stock would be housed at the Sturt Street premises. While orders would be accepted for purchases in lots of no less than six bottles, sales would basically be confined to pre-packaged mixed dozens or half-dozens. Customers would not be able to choose their own mix. Upon receipt of an order, Wine Net would arrange for it to be delivered either direct from the cellar door, if the wines were to be supplied by a vigneron, or, as would be the case for some wines, delivery would be arranged direct from a wholesaler.

20 If the mixed cases of wine included wines from more than one maker, it is not clear how or where the cases would be prepared. As Mr Martin Baily, president of the appellant association and an experienced wine retailer, pointed out, if wines were to be supplied by a wine maker, there would be resistance to the idea that one wine maker might pack a box including wines from another source. Mr Baily said during the course of his evidence:

"... I don't know what arrangements the applicants have made - we couldn't get Hardys to put Penfolds wines in a Hardy's box, I don't believe, and ship it off. It would have to be consolidated at some point and then packaged there, so you'd put two bottles of this winery and two bottles of that winery."

21 Given that sales under the proposed licence would be concentrated in mixed half-dozens or full dozens, it is surprising that Mr Martin did not clearly

indicate during the course of his evidence precisely how the packaging was to be done.

22 Be that as it may, Wine Net proposed that the deliveries would be effected by a courier engaged by Wine Net, and that the deliveries would be made, at least in the case of local customers, within one or two days of the order being accepted.

23 Mr Martin acknowledged that there would be a difficulty with respect to customers who might be under age. It would be impractical to obtain proof of age at the time the order was placed. Even although carriers might be instructed to ask about the age of the customer when delivering wine, it is likely that many customers would not be present when the deliver was made.

24 There might also be difficulties in confining trading within the hours permitted under the Act for this class of licence. I am not sure that I completely understand the evidence given on this aspect of the matter. I have the impression that Wine Net's computer could be programmed not to respond immediately to orders placed out of hours, but would presumably respond to them at a later time when the next period of trading resumed. But on the evidence, I am not satisfied that Wine Net would be able to stop orders being placed out of hours.

25 I do not pause to consider that aspect of the matter further, or the difficult question as to the place at which, in law, the sale is effected when the business is in the nature of one in which offers, in the form of orders, are solicited. It may well be that acceptance of particular orders should be regarded for legal purposes as effected at the point at which the acceptance is received, that is, the address at which the customer receives the communication accepting the order. If that is so, the sale would not take place on or from the licensed premises.

26 Those are questions which are not determinative of the outcome of the appeal which, in my opinion, must fail for other reasons.

27 One of the features of Wine Net's proposed business was the information which it would offer customers as to the products offered for sale. As I understand it, the web site would offer a considerable amount of information about the wine makers, grape varieties, particular wines and vintages being offered for sale, and "virtual reality" graphics. Instead of browsing in a bottle shop, the potential customer would browse through the web site, seeking whatever depth of information he or she wished before coming to a decision. As an illustration of the variety of information which could be made available in that format, a video was tendered of another web site operated by a United States company trading under the name "Virtual Vineyards".

28 A number of so-called “need” witnesses were called.

29 Alison Rawling, a travel consultant, conducted a business as a Japanese web site translator and had much experience in the operation of computers, including the Internet. She purchased a number of items through international web sites, for example, CDs and clothes. Although leading a busy life, she did, however, have free time on Thursdays and Fridays.

30 On Fridays she attended the Central Market. Surprisingly, she was not aware of the presence there of Vintage Cellars, a well known retail bottle store. She spent much time entertaining at home. She gave evidence that she was too busy to go to a bottle shop. She said, “I don’t really have time to wander around a bottle shop at the moment”.

31 But it turns out that a liquor store which she described as having a “fantastic” range, namely, Rose Park Cellars, was only twenty metres away from her home! Ms Rawling had not heard of the Internet order facility through which she could access Baily & Baily’s St George Cellars, and neither did she realise that they had some 3,000 lines of wine available.

32 Mr Garrath van der Linden, who lives at Stirling, is the manager of an organisation known as Opticom Multimedia, a body established to train people with physical disabilities in information technology. He gave evidence as to the extent of usage of the Internet by persons with physical disabilities. While some use it purely for recreational purposes, there are many who use it for shopping. He was not aware of any web sites at which people with physical disabilities could purchase liquor, and he thought that the establishment of such a web site would be of “tremendous benefit” to such people. He felt that there were “literally thousands” of such people in Adelaide.

33 Marc Kabbaz, the bar manager at a city restaurant, gave evidence that he worked extended hours from 6.30 pm until the early hours of the morning, from Thursday to Sunday. On other days, he studied graphic design at the Croydon Institute.

34 He gave evidence that finding “available hours in the day when retail stores are actually open is fairly difficult”. Apart from wines, he bought imported whiskies, which he obtained from Walkerville Wine Cellars. Those cellars were only some 200 metres from his house. Although he said that he did not like carrying more than a couple of bottles of wine at a time, he had never asked them to deliver. Because of what he suggested were constraints on his time, he would find it easier to order by Internet. Again, he was not aware of the Baily & Baily Internet service, but after it was described to him, he said he would find it “satisfactory”.

35 Arch Boonen is predominantly a wine drinker. He lives at Broadview. He orders most of his wine from Cellarmasters by mail order. He felt that the proposed Internet facility would be of attraction to him because of the information which he would be able to obtain before making purchases. Furthermore, he suggested that the Internet would be more convenient than ordering by mail. Strangely, he seemed to have little concept of a modern bottle shop. Part of his cross-examination reads as follows:

“MR BEAZLEY: Do you understand that the concept of a retail bottle shop is to go there and be able to browse and walk around and even to taste some wines if there’s tastings going on, and to ask the people behind the counter what sort of wines are there and they give advice to you about that?

MR BOONEN: No, I didn’t know that.

MR BEAZLEY: How long have you been living in South Australia?

MR BOONEN: All my life.”

36 I have already referred to part of the evidence of Mr Martin Baily, the president of the Liquor Stores Association, who provides an Internet service through which orders may be placed with St George’s Cellars at Glenunga, one of the several liquor stores in the chain which he conducts.

37 Mr Baily confirmed that the objection which he had lodged was on behalf of the Association as a whole.

38 Taken at its face value, the Internet service which his organisation provides is superior from the point of view of consumers to that proposed by Wine Net at least in several respects. In the first place, the range of wines available from Baily & Baily is very substantially larger than that which was proposed for Wine Net. Furthermore, Baily & Baily are prepared to supply and deliver just one bottle. As well, supply from the Internet by Baily & Baily is not limited to wine, but extends to the whole range of liquor.

39 Mr Baily’s company had been trading on the Internet for about eighteen months. Orders came from other places in Australia and foreign countries, including Singapore, Hong Kong, the United States and even Russia. It was not uncommon for somebody to place an order, say, from the United Kingdom, for delivery of wine to a resident in Adelaide.

40 Mr Baily acknowledged that there was a problem with controlling access by under age customers, but he did not think it was a large problem as few under age drinkers would trouble to place an order and wait a day or two for



delivery. In any event, most orders were for delivery of a larger quantity than an under age drinker was likely to seek.

41 He described freight costs as very high.

42 The level of orders via the Internet to Baily & Baily stores was not large - in the year prior to the hearing in the Licensing Court the turnover of Baily & Baily from Internet orders was only of the order of \$85,000, nearly half of which went to the United States.

43 An even more significant statistic is that almost all of the orders were from outside South Australia. Of the \$85,000, only about \$15,000 was produced by orders from persons within South Australia.

44 Mr Baily confirmed that the Torrens Arms Hotel was offering an Internet purchasing facility, and that the Australian Wine & Brandy Producers Association was working to develop an Internet service listing all 900 or so wine makers in Australia. He was aware also of two other wine retailers in Melbourne who were offering Internet facilities.

45 He thought that there was approximately \$12 million worth of mail order business done out of South Australia, most of it direct to Cellarmasters which operates from Sydney.

46 The basis of opposition by Mr Baily and of the Association which he represented, as expressed in his evidence, was their concern to ensure that no licence be granted other than in accordance with the strict requirements of the Act, and that undue proliferation be avoided.

### **The Judgment under Appeal**

47 It is clear from his reasons for decision that it was a matter of concern to the learned Licensing Court judge that there was only one South Australian retail liquor merchant offering an Internet service, namely, Baily & Baily. He regarded it as "anti-competitive" not to countenance another service of that kind. He makes his position clear in that respect in the following passage which appears early in his reasons:

"When all the dust has settled and despite protestation to the contrary this case does, to an extent, involve questions of competition. If the objectors are successful then such would ensure that no other new applicant for a Retail Liquor Merchant's Licence wishing simply to sell via the Internet could be admitted, because whilst Internet sale and purchase is demanded by the public (as evidenced by Baily & Baily's own move to the Internet and indeed the 'needs' evidence called in this case) nevertheless, that web

site combined with all the others could be said to satisfactorily meet that demand. Quite apart from this, however, there are wider issues to be canvassed.”

48 He goes on to find that the locality is “the whole of South Australia. He indicated that “everyone” agreed that that was so.

49 For reasons which I will come to, in my opinion, that finding is flawed. I point out that in the liquor licensing jurisdiction, even if there is an agreement of the parties, this cannot deflect either the Licensing Court or this Court on appeal from exercising an independent judgment reflecting the public interest rather than the interest of the parties, being a judgment based upon a proper construction of the legislation.

50 The learned judge held that there was a “clear demand for liquor” to be purchased by way of the Internet. He thought that it would be a “great boon” to the disabled, and that there was a “very significant population wanting to shop in this way”. He went on to observe that liquor merchants in South Australia had been “slow off the mark in producing their wares on the Internet”, and that this was probably the position also interstate. As for Baily & Baily, he said:

“... it can hardly be sensibly be argued that an applicant such as I have here should be denied a licence simply because there is one South Australian operator who participates via the Internet.”

51 He considered that to adopt that view would be to favour a monopoly, contrary to one of the objects of the Act as defined in s3. The reference to a monopoly is misconceived. A monopoly operates to exclude competitors. But the retail trade in packaged liquor is a completely open industry. Any liquor store may, at any time, offer Internet facilities whenever it wishes. There is no reason to suppose that others apart from Baily & Baily will not do so if there is a demand for it.

52 After referring again to “anti-competitiveness”, the learned judge proceeded:

“I have been told by counsel that the grant of this licence opens up the field to people without actual ‘selling’ premises and that is undesirable and impossible to keep in check. Of course that is not so. There are a number of examples of like situations whereby sale by mail order has been permitted for years and has proven extremely popular. Cellarmaster is the move obvious. It has not proved a difficulty to keep a rein on these. Nor is it any different from any category of licence really where a “reining in” is required or desirable. A judgment in every case has to be made as to whether there is an adequate catering for public demand. If

there is presently only one South Australian Internet provider of a wide range of liquor and others have been slow off the mark, so be it. This should not rule out this applicant as long as it meets the test of Section 58(2)....”

53 He described the “need” witnesses as “simply speaking of contemporary needs” and representative of many in the community “who have embraced all of this new technology with open arms”. After describing the danger of juveniles obtaining liquor via the Internet as “no longer worrying concerns”, he concludes that there is “... significant present demand which, whilst presently fairly small, was nevertheless sufficient to justify another outlet on the Internet”.

54 Exercising his power under s42(2)(b) of the Act, the learned Licensing Court judge gave an authorisation exempting Wine Net from despatching liquor to purchasers from the licensed premises.

55 In my opinion, the reasoning of the learned judge does not give proper weight to the provisions of the Act governing the grant of a licence of this kind.

56 For many years the grant of a retail liquor merchant’s licence has been circumscribed by rather more onerous statutory requirements than is the case with any other class of licence.

57 Under the 1967 Act, no such licence could be granted unless the court was satisfied-

“... that the public demand for liquor cannot be met by other existing facilities for the supply of liquor in the locality in which the applicant proposes to carry on business in pursuance of the licence.”<sup>2</sup>

58 Under the 1985 Act, the wording was changed but was held by this Court to pose an equally stringent test. The 1985 Act permitted the grant of such a licence only where the licensing authority was satisfied:

“.. that the public demand for liquor in the locality in which the premises are situated cannot be met by other existing facilities for the sale of liquor.”<sup>3</sup>

59 Judicial pronouncements interpreting and applying the statutory formulae for the grant of this class of licence in those two Acts are referred to in the

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2 *Licensing Act 1967*, s22(2).

3 *Liquor Licensing Act 1985*, s38(1).

recent decision of this Court in *Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd and Ors*.<sup>4</sup>

60 It is sufficient for present purposes if I summarise the interpretation of the test under the earlier Acts, as laid down in those pronouncements:

- (a) The word “cannot” in s22(2) of the 1967 Act did not connote physical impossibility.
- (b) It was sufficient if the demand for liquor within the locality could only be met “with extreme difficulty or hardship”.<sup>5</sup>
- (c) Mere inconvenience was not enough.<sup>6</sup> The public demand “cannot be met” by the existing facilities if they do not make liquor of the type demanded by the public “available in a realistic and realistic sense” to those members of the public requiring it.<sup>7</sup>
- (d) Matters of taste, preference and convenience, which might be relevant to the more general test of “need” relevant to other classes of licences under the 1967 Act were not relevant to the s22(2) test.<sup>8</sup>
- (e) The test is satisfied if the public demand for liquor in the locality “cannot be met without unreasonable difficulty and inconvenience”, as to which questions of distance, conditions of traffic and entrenched shopping habits are not to be disregarded.<sup>9</sup>

61 In the 1997 Act, the onus upon an applicant for a retail liquor merchant’s licence is set out in s58(2) which provides:

“An applicant for a retail liquor merchant’s licence must satisfy the licensing authority that the licensed premises already existing in the

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4 Doyle CJ, Millhouse and Nyland JJ, 15 May 1998, unreported, judgment No S6682.

5 *Tomley Investment Co Pty Ltd v Victoria (Tapleys Hill) Pty Ltd* (1978) 17 SASR 584 per Bray CJ at 587.

6 *Papadopoulos v Opal Inn Pty Ltd* (1972) 3 SASR 348 per Bray CJ at 351.

7 *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 per King CJ at 460.

8 *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (supra) at 460.

9 *New World Supermarkets Pty Ltd and L.H. and B.J. Martin Pty Ltd v Liquor Licensing Commissioner and Jattadd Pty Ltd*, King CJ, Legoe and Bollen JJ (1989) 152 LSJS 182 at 184.

locality in which the premises or proposed premises to which the applicant 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.”

62 The change in wording from s22 of the 1967 Act and s38(1) of the 1985 Act is immediately apparent.

63 But in *Woolies Liquor Stores Pty Ltd* (supra), Doyle CJ, with whom Millhouse and Nyland JJ agreed, held in effect that while the test under the 1997 Act is somewhat less stringent, its application involves much the same considerations. In particular, the test for the grant of a liquor merchant’s licence under the 1997 Act, as was the case with the earlier two Acts, focuses attention “more closely on the demand for and availability of liquor” as opposed to matters of “style ... availability of choice .... matters of preference, matters of convenience ....”.<sup>10</sup>

64 Importantly, in *Woolies Liquor Stores* Doyle CJ made the following observation:<sup>11</sup>

“As was the case under s22(2) of the *Licensing Act* 1967, and s38(1) of the 1985 Act, mere inconvenience in getting liquor from an existing outlet is not enough to justify the grant of a new licence. Nor is a mere preference to shop at a particular place, or a preference for ‘one-stop shopping’ enough to establish that existing premises do not adequately cater for the public demand. The fact that the public wish to purchase liquor at a proposed new outlet, or would prefer to be able to purchase their liquor at that outlet, does not of itself establish that existing premises do not adequately cater for the public demand. The court is required to assess that wish or preference by reference to contemporary standards to determine whether, if the demand for liquor is to be met at existing premises, it can be said that those premises do adequately cater for the public demand.”

65 That the difference between the test postulated in the 1997 Act and the test under by the two earlier Acts does not amount to very much is apparent from the further observation of Doyle CJ in the *Woolies* case:

“... I expect that the outcome in a given case will be pretty much the same as the outcome would have been under the previous legislation.”<sup>12</sup>

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<sup>10</sup> Ibid at 6.

<sup>11</sup> Ibid at 6.

66 For reasons which I will come to, there are some fundamental considerations which stood in the path of the decision reached by the learned Licensing Court judge. But even approaching the matter in the terms upon which he dealt with the application, in my opinion, it could not be said that the onus of proof was satisfied.

67 In particular, in my view, the evidence given by the “need” witnesses fell far short of what was required to justify the grant. They all had relatively convenient access to liquor stores, and insofar as they spoke of a wish to purchase via the Internet, this was indicative simply of a desire to effect their purchases of liquor by a means which they might find more convenient than other means, rather than illustrating a situation in which other outlets did not “adequately cater” for their needs.

68 If they were seriously concerned to purchase liquor via the Internet rather than from a bottle shop, it is surprising that none of them had heard of the Internet facility offered by Baily & Baily, notwithstanding the manner in which that service was advertised.

69 Insofar as the witness Mr van der Linden identified a particular requirement of people with disabilities, there was nothing to suggest that this could not be met either by the Internet service from Baily & Baily or by the more conventional technique of placing orders by telephone to any one of the many existing liquor stores. Furthermore, given that Mr van der Linden estimated that 98% of the people with a disability of whom he spoke were on disability support pensions, one wonders whether they would be likely to be happy to confine their orders to wine as opposed to other forms of liquor, and furthermore, in cartons of either six or twelve bottles.

70 Insofar as the learned Licensing Court judge placed so much emphasis on competition and the fact that Baily & Baily was the only South Australian liquor store offering the ability to purchase by the Internet, it must be noted that questions of competition as identified in the objects enumerated in s3 of the Act<sup>13</sup> cannot be allowed to deflect the court from ensuring that, before the grant of a licence is made the onus upon the applicant, in this case pursuant to s58(2), is satisfied.

71 More fundamentally, however, it seems to me that the learned judge erred in granting a licence on the basis that the trading activity pursuant to the licence

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12 Ibid at 7.

13 Section 3 provides in part:

“The object of this Act is ...  
(e).....to encourage a competitive market for the supply of liquor.”

would represent only one, narrow aspect of the trading operation which would ordinarily be expected from the holder of a retail liquor merchant's licence. The holders of the 160 or so licences of this class presently trading in South Australia do so out of retail premises to which the public has access. That they do so is in part a reflection of the very nature of the licence which is attached to premises which, having regard to the scheme of the Act, should ordinarily be accessible by the public, and to the fact that to trade in that way is a reflection of contemporary public demand.

72 That demand voiced in countless cases before the Licensing Court over many years is for liquor stores to offer a wide range of liquor, accessible to the public in a way which permits browsing, and served with a degree of expertise which enables customers who wish to do so to obtain some advice and assistance as to their purchases. Increasingly, it has become a feature of the operation of retail liquor stores that they also offer a delivery facility, and that they will respond to telephone and mail orders. There is a developing trend towards wine tastings, information distributed by flyers and brochures and the availability of aids to service of liquor such as provision of glasses and tubs.

73 Against that background, in my view, it is not a proper exercise of the discretion to grant a licence which is limited to nothing more than one means of placing an order, namely, via the Internet. One might as well grant a retail liquor merchant's licence to an operator who wished simply to take telephone orders, orders by fax, mail orders, or orders obtained by door to door soliciting.

74 Furthermore, to countenance the grant of such a licence in circumstances where the licence holder does not propose to store liquor at the premises or allow access by the public, is to create a most undesirable precedent.

75 Historically, licensed premises are premises open to the public for the purposes of either "on premises" sales or "off premises" sales of liquor. The essential characteristic of off-licences is that they permit the sale of liquor at the premises for consumption off the premises.

76 The licence attaches to the premises, not to a mere marketing technique, the exercise of which is in no relevant sense tied to particular premises. In this case, there was no significance in the geographic locality of the premises, in that the licence could equally well be operated from anywhere within or outside of the State, or for that matter, from a moving caravan or car.

77 The onus under s58(2) can only be satisfied if an inquiry is made as to whether or not the licensed premises-

“... already existing in the locality in which the premises or proposed premises to which the application relates are ..... situated do not

adequately cater for the public demand for liquor for consumption off licensed premises ....”

78 In *D’Oro Distributors Pty Ltd v The Superintendent of Licensed Premises and Kiley*<sup>14</sup> Bray CJ observed:

“In truth, the authorities show that phrases like ‘needs of the public’ and ‘locality’ in licensing legislation of this sort have received a fairly flexible and varying interpretation according to the type of licence sought and the nature of the business proposed to be carried on.”

79 But however flexibly one may approach the question of the definition of the “locality”, I do not consider that it can properly be regarded as the whole of the State.

80 That the concept of licensed premises in the Act relates to premises from which the business is carried on in a real and substantial way, is supported by a number of provisions.

81 Section 57(1)(a) provides that the applicant for a licence must satisfy the licensing authority-

“... that the operation of the licence would be unlikely to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises.”

82 Section 97 (1)(a) provides that the business conducted under licence must “at all times when the licensed premises *are open to the public*” be personally supervised and managed by a natural person (a responsible person), as defined, who must wear identification in a “form and manner” approved by the Commissioner.

83 Other provisions relate to persons taking liquor away from licensed premises (s102(1)(b)); or persons being on licensed premises for the purpose of purchasing (s103(2)); the behaviour of persons making their way to or from licensed premises (s106(1)(b)); sale to intoxicated persons (s108); the display of a copy of the licence at or near the front entrance to licensed premises (s109(1)); and the sale or supply of liquor to a minor “on licensed premises”.

84 At the very least these provisions point to the fact that ordinarily the Act contemplates that licensed premises will be open to the public, and

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14 (1968) SASR 220 per Bray CJ at 226-227.



furthermore, that the operation of the licence will have a real relationship to the immediate area in which it is situated.

85 Section 42(2) of the Act provides:

“It is a condition of a licence authorising the sale of liquor for consumption off the licensed premises that liquor sold under that authorisation-

(a) .....

(b) if the liquor is not delivered personally to the purchaser at the licensed premises - must unless the licensing authority gives an authorisation to the contrary, be despatched to the purchaser from the licensed premises;

(c) ... and must not be consumed on the licensed premises unless the licence authorises the sale of liquor for consumption on the licensed premises and the liquor could have been lawfully sold and consumed on the licensed premises under that authorisation.”

86 In this case, the learned Licensing Court judge gave an authorisation pursuant to s42(2)(b) applying to all of the liquor sold pursuant to the licence. I have some hesitation in thinking that it is a proper application of s42(2)(b) for the court to authorise the whole trading operation to be carried on in that way.

87 It might be argued that to authorise the dispatch of all liquor sold from a location other than the licensed premises in circumstances in which no liquor will be stored at the licensed premises, being premises to which the public will not have access, is to create a novel species of licence which does not conform to the essential characteristics of a retail liquor merchant's licence as contemplated by the Act.<sup>15</sup>

88 However, I do not express a concluded view as to that argument, as it was not fully addressed by counsel on the hearing of the appeal, which may be disposed of on other grounds.

89 Moreover, it may be proper for the Court to permit a retail trading operation limited to a small niche market, for example, the supply of liquor with gift baskets, so long as it is carefully controlled. I understand that there

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<sup>15</sup> As to the problems attached to attempts to embark upon “fundamental remoulding” of any type of licence under the Act, see *Pierce and Ors v Liquor Licensing Commissioner and Anor* (1987) 47 SASR 22 per Jacobs J at 26 and per Johnston J at 35-37.

are one or two licences of that kind which have already been issued. I make it plain that the validity of those licenses is not at issue in this case.

90 Furthermore, I would not wish to be understood to suggest that modern marketing techniques should not be part and parcel of the operation of a retail liquor merchant's licence, or for that matter, any other licence under the Act. Neither should I be understood to mean that it is not desirable for traders operating under such a licence to permit orders to be made by the Internet. That is already happening to a small extent, and as I have said, there is every reason to suppose that if the public demand warrants it, other stores will follow suit. The development of innovative marketing techniques to stimulate and meet changing public demands should be part and parcel of any retail liquor trading operation.

91 It is unnecessary to deal with other difficulties which the respondent encounters. But I mention, so as to indicate that I have not overlooked the point, that having regard to the evidence of Mr Baily, it seems likely that by far the greatest proportion of the trade which would be attracted to the operation proposed by the respondent would be derived from outside the State of South Australia. It seems to me that on a proper construction of the Act, the relevant demand for the purposes of a hotel licence and a retail liquor merchant's licence, which are the only two licences the issue of which under the Act requires proof of a relevant demand, is a demand generated within this State.

92 To make it clear, while I entertain serious reservations as to the intrinsic legitimacy of a grant of this classification of licence being made in favour of such a limited trading operation, I base my decision upon the view that the respondent did not satisfy the onus postulated by s58(2) of the Act, and in any event, the grant did not, in my opinion, reflect a proper exercise of the discretion.<sup>16</sup>

93 I emphasise that I do not approach the matter on the footing that access by the public to the Internet to place orders for liquor should be denied; rather, the basis for my view is that the grant of a retail liquor merchant's licence to a proposed business offering no more than such a facility cannot properly be justified, either on the evidence called in this case, or on a proper exercise of the discretion conferred upon the Licensing Court under the Act as it stands.

94 For these reasons, I would allow the appeal, quash the order under appeal and substitute an order dismissing the respondent's application.

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<sup>16</sup> The licensing authority has an unqualified discretion to grant or refuse any licence: see s53(1) of the Act.



95 DUGGAN J. I agree that this appeal should be allowed and I concur in the making of the orders proposed by Perry J.

96 The internet has proved to be a most useful medium for the advertising and marketing of products and there can be no objection from a licensing viewpoint to its use as a marketing tool by the holder of a retail liquor merchant's licence who conducts a retail liquor outlet to which the public has access. However the concept put forward by the respondent in its application to the Licensing Court is quite different. According to the proposal, the respondent would operate the business from premises comprised of a home office. The principal function of the premises would be to provide a location for the communication equipment required to receive orders and arrange for delivery. No stock would be stored at the premises so that no physical sales would take place there.

97 The *Liquor Licensing Act 1997* contemplates that a licensed retail liquor merchant's outlet will operate as a normal retail outlet with facilities for the public to make liquor purchases on the premises. It is unnecessary to refer to the various provisions in the Act which make this clear, but the onus imposed by s58(2) on an applicant for a licence to satisfy the licensing authority that there is a need in the locality in which the premises are, or will be, situated is an example. In my view the matters relevant to this test which must be considered by reference to a locality in the geographical sense (*Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd and Ors*) (unreported, 15 May 1998 Judgment No S6682) cannot be assessed when there are no premises which function as an ordinary retail outlet.

98 The learned Licensing Court judge found that the relevant locality was the whole of South Australia and then went on to consider whether demand was already satisfied by the holder of a retail liquor licence which utilises the internet for marketing and sales purposes. The holder of the licence which presently utilises the internet operates premises which had to satisfy the need test in relation to the locality in which the shop is situated in order to obtain its licence in the first place. In my respectful view, however, the concept of need in the sense contemplated by the Act cannot be applied to the circumstances of the present case where the premises to be licensed are an irrelevant consideration to the test of need in a particular locality. South Australia and beyond might well be the market which the internet and other communication systems assist in creating, but it does not follow that this market can be equated with the relevant locality for the purposes of s58(2).

99 I have reached the conclusion that the proposal is so far removed from the concept of a retail liquor merchant's outlet as envisaged by the present

licensing legislation that it was inappropriate to grant a licence and the appeal must be allowed.

100 NYLAND J. I agree that the appeal should be allowed for the reasons expressed by Perry J and I agree with the orders proposed by him.

**JUDGMENT CITATIONS  
LISTED IN ORDER OF APPEARANCE IN JUDGMENT**

1. See a similar criticism voiced by the Full Court in *South Eastern Hotel Pty Ltd and Ors v Woolies Liquor Stores Pty Ltd* (unreported) [1998] SASC 6819 per Doyle CJ at para 9.
2. *Licensing Act* 1967, s22(2).
3. *Liquor Licensing Act* 1985, s38(1).
4. Doyle CJ, Millhouse and Nyland JJ, 15 May 1998, unreported, judgment No S6682.
5. *Tomley Investment Co Pty Ltd v Victoria (Tapleys Hill) Pty Ltd* (1978) 17 SASR 584 per Bray CJ at 587.
6. *Papadopoulos v Opal Inn Pty Ltd* (1972) 3 SASR 348 per Bray CJ at 351.
7. *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 per King CJ at 460.
8. *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (supra) at 460.
9. *New World Supermarkets Pty Ltd and L.H. and B.J. Martin Pty Ltd v Liquor Licensing Commissioner and Jattadd Pty Ltd*, King CJ, Legoe and Bollen JJ (1989) 152 LSJS 182 at 184.
10. Ibid at 6.
11. Ibid at 6.
12. Ibid at 7.
13. Section 3 provides in part:

“The object of this Act is ...  
(e) ... to encourage a competitive market for the supply of liquor.”
14. (1968) SASR 220 per Bray CJ at 226-227.
15. As to the problems attached to attempts to embark upon “fundamental remoulding” of any type of licence under the Act, see *Pierce and Ors v Liquor Licensing Commissioner and Anor* (1987) 47 SASR 22 per Jacobs J at 26 and per Johnston J at 35-37.
16. The licensing authority has an unqualified discretion to grant or refuse any licence: see s53(1) of the Act.