

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant:	Liquorland (Australia) Pty Ltd <i>(represented by Mr Stephen Standing - counsel and Ms Triska Di Cicco – Herbert Smith Freehills)</i>
Intervener:	Director of Liquor Licensing <i>(represented by Mr Toby Bishop of State Solicitor's Office)</i>
Commission:	Ms Emma Power (Deputy Chairperson) Ms Pamela Hass (Member) Ms Shelley Davies (Member)
Matter:	Application pursuant to section 25 of the Liquor Control Act 1988 for a review of a decision by the delegate of the Director of Liquor Licensing to refuse an application for a Liquor Licence
Premises:	Liquorland Southern River Square Shopping Centre Southern River East, Western Australia
Date of Hearing:	14 November 2022
Date of Determination:	21 June 2023
Determination	The Decision of the Delegates of the Director is affirmed, and the Application for a Liquor Licence is refused.

Authorities referred to in Determination:

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Liquorland (Australia) Pty Ltd -V- Director of Liquor Licensing [2021] WASC 366*
- *Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police (LC 3/2022)*
- *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290*
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*

BACKGROUND

1. This review concerns whether the Liquor Commission (**Commission**) should affirm, vary or quash the decision of the delegate (**Delegate**) of the Director of Liquor Licensing (**Director**) dated 20 July 2022 (**Decision**), which refused the Applicant's (**Application**) for the conditional grant of a liquor store licence for 'Liquorland Southern River East' (**Store**), pursuant to ss 41 and 62 of the *Liquor Control Act* 1988 (WA) (**LC ACT**).
2. The proposed Store is said to be a 'convenience liquor store' located adjacent to the Coles supermarket at the new Southern River Square Shopping Centre in Southern River (**Centre**). It is described as being designed to service a particularly fast-growing community residing in new residential real estates in the immediate vicinity of the Centre. The proposed Store comprises a total licensed area of 197m², comprised of a selling area of 151m², a cool room area of 33m² and a stock area of 13m².
3. The Application was advertised for public comment in accordance with instructions issued by the Director. No notices of intervention or objection were lodged by any other party.
4. In summary, the Delegate refused the Application on the basis that the Applicant failed to discharge its onus under section 36B(4) of the LC Act, and accordingly did not consider it necessary to consider whether the Applicant had demonstrated that the grant of the Application was in the public interest for the purposes of section 38(2) of the LC Act.
5. On 19 August 2022, the Applicant applied for a review of the decision of the Delegate pursuant to section 25 of the LC Act (**Review**), with such decision to be made by the Commission by way of hearing.
6. The Director intervened in the proceedings to make submissions as to the issues that arose under s 36B(4) of the LC Act.
7. The Commission heard this matter on 14 November 2022.

Submissions by the Applicant

Context of the Application

8. This is an application for a licence for a 197sqm liquor store (Store) adjacent to the Coles supermarket at the Centre.
9. The Centre is a new Neighbourhood Activity Centre (completed in August 2022) to service a particularly fast-growing community residing in new residential estates in the immediate vicinity of the Centre.
10. The suburb of Southern River is large and can be divided into Southern River East (south of Southern River Road) and Southern River West (north of Southern River Road). The forecast population of Southern River East is projected to grow by 687.2% between 2016 and 2031. This is one of the fastest growing areas in the City of Gosnells and Western Australia, being located in what is known as the south-east growth corridor. Between 2011 and 2016, the area experienced growth of nearly 20%, which is expected to have continued at a similar rate to 2022.
11. The recently completed Centre includes a Coles supermarket, chemist, McDonald's, medical centre, dentist, hairdresser and childcare centre. The Centre developer expects approximately 840,000 visits per year.
12. Two tests are relevant to this Application. The first is under s38(2) of the LC Act, which requires the Applicant to satisfy the Licensing Authority that the grant of the Application would be in the public interest (the public interest condition). The second test is under s 36B(4), which provides that the Licensing Authority must not grant the Application unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed Store is to be situated (the consumer requirement condition).

The Review

13. The grounds in support of this Application are as follows.

There is a coherent body of persuasive evidence that the grant of this Application would be in the public interest.

- a. The Applicant has tendered independent, objective and representative survey evidence by way of a survey undertaken on behalf of the Applicant by Data Analysis Australia in January 2021 (**DAA Survey**), which comprises logical and probative evidence of consumer requirements that would be catered for by the proposed store.

- b. There are many consumers of packaged liquor in the locality. This is indicated by the fact that 62% of survey respondents have purchased packaged liquor in the last 12 months.
- c. Of the survey respondents who have purchased packaged liquor in the past 12 months, 83% of survey respondents would use the store.
- d. 87% of survey respondents who have purchased packaged liquor in the past 12 months support the proposed store.
- e. The evidence from consumers, experts and the Applicant is that the proposed store would satisfy various existing and future consumer requirements, including the requirement to purchase packaged liquor at the Centre (being a conveniently located neighbourhood activity centre), and the requirement for one-stop shopping convenience at the Centre.
- f. The evidence establishes that the demonstrated consumer requirements are consistent with, and reflect, contemporary consumer standards, expectations and shopping habits, and in respect of which the Applicant will rely upon expert reports of Ethos Urban, Bodhi Alliance, MGA Town Planners (**MGA**), submissions in support of the Application, *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366, the policy objectives stated in State Planning Policy 4.2 and the evidence of the Applicant's State Manager.
- g. The survey and expert evidence of consumer requirements in relation to the proposed store is uncontradicted.

There is no public interest evidence against the grant of the Application. In particular, there is no evidence specific to this Application of adverse consequences from the grant of the Application which could properly be weighed against the evidence supporting the Application.

- h. There is no direct evidence that the grant of this particular Application would be likely to contribute to or increase the risk of alcohol related harm to any people or any groups of people.
- i. There is no intermediate evidence from which it could properly be inferred that the grant of this particular Application would (having regard to the location and nature of the store, existing licensed premises and other relevant factors) be likely to contribute to or increase the risk of alcohol related harm to any people or groups of people.

The grant of the Application would be in accordance with the proper development of the liquor industry as regards the availability of packaged liquor at a neighbourhood activity centre.

The Liquor Control Act requires each application to be determined by the Licensing Authority on an evaluation of the evidence before it. In this case, the weight of the evidence is in favour of the grant of the Application.

The evidence in this Application satisfies the requirement under s36B(4) of the Liquor Control Act that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed store is to be situated.

- j. The locality should be found to be that described in the MGA Supplementary Report dated 16 November 2021 **(MGA Supplementary Report)**.
 - k. The evidence referred to in ground 1 above identifies the local packaged liquor requirements of consumers.
 - l. The evidence establishes that the local packaged liquor requirements of consumers are consistent with, and reflect, contemporary consumer standards, expectations and shopping habits, and in respect of which the Applicant relies upon the expert reports of Ethos Urban, Bodhi Alliance, MGA, submissions in support of the Application, *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366, the policy objectives stated in State Planning Policy 4.2 and evidence from the Applicant's state manager.
 - m. Local packaged liquor requirements cannot 'reasonably' be met by existing packaged liquor premises in the locality because there are no existing packaged liquor outlets within the locality.
 - n. Existing packaged liquor outlets located outside the locality are not relevant to the test under s36B(4), but even if they were, cannot 'reasonably' meet the local packaged liquor requirements demonstrated by the evidence, because they cannot meet the existing and future requirements of consumers to purchase liquor at the Centre (being a conveniently located neighbourhood activity centre) and for efficient one-stop shopping (for liquor and other goods and services) at the Centre.
14. The Applicant's submissions at the hearing on 14 November 2022 were in accordance with:
- a. The Grounds of Review (dated 19 August 2022) outlined above;
 - b. The Applicant's Submissions (dated 31 October 2022); and
 - c. The Applicant's Responsive Submissions (dated 7 November 2022).

Public Interest Condition

DAA Survey – consumer requirements

15. The Applicant submits that the DAA Survey was designed to elicit statistically valid representative evidence of consumers' views. As the site is not yet constructed, it comprised a door to door survey within 3 km of the Centre (the locality then applicable under the Director's Public Interest Assessment Policy).
16. The key findings relied on by the Applicant are summarised in the Applicant's grounds outlined above at paragraphs 13 a) to i). In addition, the Applicant submits that the DAA Survey results should be viewed in the context of the requirement for convenience purchases as distinct from the requirement for liquor purchases made from a destination liquor store.
17. The Applicant made the following submissions in relation to the DAA Surveys:
 - a. 92% of respondents thought it would be useful if they needed to make small purchases, such as a bottle of wine, or a six pack of beer, perhaps at the last minute;
 - b. 91% of respondents thought it would be useful to take their trolley in the Store (including in the cool room);
 - c. 76% thought they would purchase their packaged liquor in Store at the same time as doing their grocery or other shopping;
 - d. 71% thought the Store would be closer to home, increasing to 94% for those in close proximity to the Centre;
 - e. 68% thought the Store would be easier to access than their current stores, increasing to 79% for those in close proximity to the Centre;
 - f. more than a quarter (27%) thought they would purchase their packaged liquor online at the same time as doing their grocery or other shopping, for home delivery or 'click and collect';
 - g. the relatively low number of survey respondents identifies the neighbourhood that surrounds the proposed Store and is indicative of an area that is at the start of a significant growth phase; and
 - h. the relatively high number of non-drinking survey respondents (55.8%) is not relevant on the basis that the Applicant is not required to establish a majority of consumers have a requirement for liquor, rather the Applicant need only establish that a material or significant number of consumers have a particular requirement. It does not matter that some, or even a majority of members of the public, have no requirement for liquor at all, provided that a not insignificant, or immaterial number of consumers, do have that requirement.

18. During the hearing, the Commission asked why the DAA Survey did not contain a question regarding whether the existing stores could reasonably meet consumer requirements. The Applicant submitted that a layperson cannot answer what is meant by, “reasonably met”, rather that is a question for the Commission.

Convenience

19. The Applicant relies on Table 27 on page 254 of the Applicant’s Public Interest Assessment **(PIA)** to evidence that purchases of liquor prefer to make their liquor purchases while they are shopping, one-stop shopping is one reason and the other is convenience per se.
20. The Court of Appeal and this Commission have led that convenience is a relevant consumer requirement and it is a notorious fact of contemporary Australian life that the convenience of one-stop shopping is of great importance, especially to working people. Moreover, there is direct evidence of the expectation for convenience, including the convenience of packaged liquor and one-stop shopping, at the Centre.
21. The area is in a growth phase and developers of nearby estates reported feedback from purchasers that the development of the Centre was an important factor in purchasing a home in the area and that the area is undersupplied with all convenience retail outlets including liquor stores.
22. Nine witnesses provided submissions in support of the Application said that their reasons for supporting the Store are: location and one stop shopping, price, safety and security and parking.

Amenity

23. The Proposed Store is consistent with relevant planning objectives and would be likely to enhance amenity in the locality.
24. The evidence also establishes a contemporary expectation that the public will have access to the benefits that would flow from a liquor store licence at the Centre. Those benefits would include:
- a. access to packaged liquor at a convenient location that is geographically close to residents in the area;
 - b. facilitation of combined grocery and packaged liquor shopping; and
 - c. reduction of unnecessary consumer trips (and hence energy consumption, traffic congestion and vehicle emissions), and corresponding savings in time for consumers.

The Consumer Requirement Condition

The Locality

25. The Applicant submitted that the following principles are relevant to determining the locality, that is, the concept of 'locality should be determined by reference to *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 (Karrinyup Decision) where Archer J held that:
- a. '...locality denotes an area that surrounds, and is geographically close to, the location of the proposed premises....;' [181];
 - b. locality '...was not intended to equate to the area(s) from which consumers would come....;' [181], [198];
 - c. '...locality is intended to connote the same concept of neighbourhood....it means the geographical area surrounding the proposed site; [182]'
 - d. '...the legislature intended to capture the geographical area surrounding, and relatively close to, the proposed site, the 'neighbourhood' of the site;' [184];
 - e. although locality was not intended to equate to the areas from which consumers would come, the retail catchment area could '...at the very least illuminate the practical impact of topographical features or the areas from which the proposed site is likely to be accessed on foot or bike...;' [181], [187], [188]. (In this regard, Her Honour was not saying that retail catchment was a relevant factor in its own right, but only that it might help in an assessment of topographical features - which are relevant in their own right. Further, the identification of areas likely to be accessed on foot or pushbike was referred to by her Honour as a possible indication of the extent of the neighbourhood);
 - f. 'locality' will not inevitably, or even usually, be defined by a radius. The shape of the locality is defined by topographical features, the areas from which the site could be accessed reasonably easily on foot or by bike, and the geographical spread of any community in the area of the proposed site; [185];
 - g. the factors that will be relevant in determining locality will vary from case to case, and in some cases, it will be difficult to determine the locality; [178];
26. Therefore, for the purpose of the consumer requirement test, the Applicant submits that the proper 'locality' is identified in the MGA Supplementary Report as follows:
- a. The locality boundary is defined predominantly by natural features existing to the north, northwest and east. Manmade barriers (roads) also define the southern extent (Tonkin Highway) and the northern extent (Balfour Road).

- b. Natural features include a 'Private Recreation' reserve located immediately northeast of the subject land, at the northern side of Southern River Road. The presence of the Southern River Reserve limits access from the suburb of Gosnells to the east via Southern River Road only. These features serve to define boundaries to the locality, because they inhibit efficient vehicle movements from the suburbs of Huntingdale and Gosnells to the Centre.
- c. The boundary is also defined by Yangtze Avenue 'Parks and Recreation' reserve to the west of Holmes Road and north – west of the Centre, along with the 'Parks and Recreation' reserves at the western edge of the locality, surrounding the termination point of Southern River Road.
- d. Balfour Street to the North is considered a locality boundary because it is a significant east-west connection extending between Ranford Road and Huntingdale Road servicing residential estates to the north and south of it. It separates communities on either side in conjunction with the natural barriers adjoining it. Residents at the northern side of Balfour Street are closer both in terms of distance and travel time to the alternative activity centres therefore residents to the north of Balfour Street are more likely to be part of neighbourhoods surrounding alternative activity centres.

(Locality A – outlined by the black dashed line)



- e. Ranford Road and Tonkin Highway are barriers forming the southwestern and southern boundaries of the locality respectively. There are no north-south crossings over Tonkin

Highway leading to and from the locality, and there are no residential communities to the west of Ranford Road.

Local packaged liquor requirements

27. The Applicant's Data Analysis Australia Report dated January 2021 (**DAA Report**) provides a breakdown of the types of liquor usually purchased, and the Applicant has adduced evidence that the proposed store would provide a selection of all of those types of liquor.
28. There are various sources of evidence which establish the existence of local packaged liquor requirements; the Applicant relies on expert reports of Ethos Urban, Bodhi Alliance, MGA, submissions in support of the Application, *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366, the policy objectives stated in State Planning Policy 4.2 and the evidence of the Applicant's State Manager.

Packaged liquor services currently provided

29. Locality A, as identified by the Applicant's expert town planning consultants MGA, does not contain any existing packaged liquor premises. In BWS Kelmscott, the Commission accepted that packaged liquor retailers outside the locality are not relevant in considering whether local packaged liquor requirements 'cannot reasonably be met by existing premises in the locality.'
30. There are six other packaged liquor outlets in the wider 3 km locality that was applied by the Director. MGA notes that most significant constraint for residents in the locality attending alternative liquor stores is travel distance and travel time by road, with distances to each alternative premises ranging between 3.4km to 4.5km from areas immediately surrounding the Centre.
31. Further, the level of accessibility of the nearest packaged liquor outlets for residents in the locality does not meet with the expectations of State Planning Policy 4.2, which identifies an approximate catchment of 1km and a walkable catchment of 800m.
32. The simple point about the nearest packaged liquor outlets is that, regardless of how the 'locality' is defined, none of them are located in the area that surrounds, and is geographically close to, the Centre. They could not, on any reasonable basis, be described as being in the same neighbourhood, and are not physically in a position that would enable them to meet the proven requirements of the public in the neighbourhood of the Centre for local packaged liquor convenience at the Centre.

Submissions by the Intervener

33. The submissions by the Intervener at the hearing on 14 November 2022 were in accordance with:
- The Intervener's Primary Submissions (dated 31 October 2022); and
 - The Intervener's Responsive Submissions (dated 7 November 2022).
34. The Director has elected not to make submissions in relation to the public interest test under section 38 of the LC Act, save to say that the proliferation of liquor outlets is not in the public interest. However, it is the Director's position that a public interest assessment is not required, nor does the test arise, because the Consumer Requirements condition is not satisfied.

The Consumer Requirement Condition

Analysis of section 36B(4) - Locality

35. The Director agrees with the Applicant's submissions regarding locality' in terms of Archer J's comments as to the relevant factors in determining a 'locality' for the purposes of s 36B(4).
36. However, the Director disagrees with the Applicant's assertion as to what constitutes the locality for the purposes of s 36B(4), and submits that the appropriate locality is that area which comprises the areas bordered in blue, orange and red (that is, Cluster Groups 1, 2 and 3 which represented the door-to-door sample area for the DAA Survey, minus the red radius line) contained within the Applicant's DAA Report as shown below:

(Locality B)



North- west boundary

37. To the north, the MGA Supplementary Report asserts that Balfour Street will have a tendency to separate 'communities' on either side. It is unclear why this would be the case simply on the basis, that residents on the northern side of Balfour Street are 'closer' in terms of distance and travel time to another activity centre. The existence of another existing activity centre is not necessarily evidence of a distinct locality, particularly when those north of Balfour Road are less than 2km from the Store. Balfour Road is also not a major or anterior road – it is a two-lane regional road. This can be contrasted with Warton Road to the north, which contains two-lanes in each direction (dual-carriageway), and links Piara Waters and Canning Vale (to the south) with Southern River and Huntingdale. In any event, there are multiple access points from residents north of Warton Road (Garden Street intersection, Amherst Road intersection) into Southern River. As such, to adopt Balfour Street as a northern boundary is artificial and arbitrary.
38. Moreover, the DAA Survey results from those residents in Clusters 1G, 2G, 1F and 2F26 (that is, capturing residents north of both Balfour Street and Warton Street) indicates a willingness of some of these residents to traverse Warton Road to purchase packaged liquor. 54.8% of North-West respondents currently purchased their packaged liquor from Dan Murphy's Southern River, which is located south of Warton Road. This captures some of the respondents in Clusters 1G and 2G, who reside north of Warton Road. Further, 61.3% of North-West respondents thought they would use Southern River Square at least once a week, which indicates a willingness of at least some respondents north of Warton Road to traverse it. 66.7% of North-West respondents who expect to purchase at least some liquor at the Store either disagreed, or were neutral, in relation to whether the Store was 'easier to access' than their current store, further supporting a position that access across Warton Road is not an issue.
39. Accordingly, there is no compelling reason to adopt the Applicant's northern boundary. Balfour Street is an unremarkable, arbitrary, artificial boundary designed to exclude four of the six liquor stores otherwise in the locality.

South-west Boundary

40. To the south, the Director agrees that Ranford Road is a natural and appropriate geographical boundary north of Tonkin Road. The Director also agrees that the portion south of Southern River Road, and north of Matison Street, should be excluded as this area is bushland. However, for the same reasons as above, the Director does not agree that the portion south of Warton Road, down until Southern River Road, should be excluded. This has the effect of excluding Clusters 1E and 1D from the locality.

South-east Boundary

41. As the area is not yet developed and contains no residences, the Director agrees that the portion in Figure 1 south of Southern River Road (excluding Cluster 1C), and south of Holmes Street and Verna Street, should be excluded from the locality.
42. However, the Director disagrees that Clusters 2B, 3B, 2C, 3C and 3D should be excluded by virtue of the existence of the Southern River Wungong. First, for residents living east of Southern River Wungong, Chamberlain Road provides relatively simple access to Southern River Road, which in turn provides access to the Site (noting that Southern River Road contains a bridge which crosses the river). That is not a particularly difficult, or long, trip by car. Secondly, residents in Clusters 2B, 2C, 3B, 3C and 3D have the Bottle-O Ashburton Liquor Store Gosnells in close proximity, and on the eastern side of the river. However, in terms of the North-East data (which captures Clusters 2C, 3C and 3D), 43.8% of respondents currently purchased takeaway liquor from Dan Murphy's Southern River, while only 18.8% currently purchased takeaway liquor from the Bottle-O Ashburton Liquor Store Gosnells. This result does not support a position that residents in those clusters are unwilling to traverse Chamberlain Road and Southern River Road to access packaged liquor west of their location. This is particularly so given that for residents in Clusters 2B, 2C, 3B, 3C and 3D:
- a. Bottle-O Ashburton is located within the Ashburton Village Neighbourhood Activity Centre (**NAC**), which also contains a newsagent, convenience store, medical clinic and fish and chip shop; and
 - b. Cellarbrations at Huntingdale is significantly closer to where they live, but these residents overwhelmingly choose to drive to Dan Murphy's, some 2km further.
43. The Applicant's supplementary locality is unrealistic, irrationally small, not supported by the consumer evidence and would appear to have been crafted to exclude all nearby liquor stores for the purposes of discharging the onus under s 36B(4).
44. It is open to the Commission to instead adopt the Director's locality – Locality B, and to find that there are 6 existing packaged liquor stores in the Locality B.

What are the local packaged liquor consumer requirements?

45. The consumer preferences for alcohol appear fairly typical, and seem reflective of the consumer preference to primarily purchase alcohol at Dan Murphy's (i.e. a large destination store, with a wide cross-section of liquor options). While specific brands are not identified, it can be assumed, based off the overwhelming numbers of respondents who purchase liquor at Dan Murphy's, that the consumer requirement is largely that of mainstream products.
46. Most problematically, 55.8% of respondents either never purchased takeaway liquor, or barely at all, in the previous 12 months. 'Never' was the most common answer given.

Contemporary consumer standards, expectations and shopping habits must be considered in the context of this locality. In circumstances where the majority of respondents are fundamentally not interested in the product that is being offered, it is difficult to maintain there is a consumer requirement for packaged takeaway liquor in the locality.

47. The Applicant uses various statistics that offer general support for a liquor store, but those statistics do not evince a consumer requirement for this Store, for the purposes of s 36B(4). Statistics which evince general 'support' for the store (e.g. the 71% who supported the Application, and for purchasers of takeaway liquor, 87%) are unconvincing, as it is not clear on which basis the Store is 'supported', particularly in light of some of the other answers.
48. While there is evidence that consumers desire a NAC, ultimately this does not necessarily equate to consumers desiring a liquor store within that NAC. The fact that the inclusion of a liquor store in association with a liquor store is an 'expected service' is irrelevant if the consumer requirements do not reflect a desire to purchase packaged liquor.
49. The Applicant's submissions regarding the consumer requirement for one-stop (or one-trolley) shopping is diminished by the fact that 70% of survey respondents were happy with a separate trip to purchase takeaway liquor. This consumer preference is supported by the relatively high percentage of consumers who currently purchased their alcohol at Dan Murphy's Canning Vale, which is located well outside the locality. Conversely, only 29% indicated that purchasing packaged liquor at the same time and under the same roof as where they did their supermarket shopping was their main way of purchasing packaged liquor.

What packaged liquor services are currently provided by the existing premises in Locality B?

50. There are six licensed premises in Locality B predominantly involved in the sale of packaged liquor. These are as follows:
 - a. The Ashburton Liquor (Bottle-O) Store (located at 68 Ashburton Drive, Gosnell within Ashburton Village NAC, and 2.9 kilometres from the subject land by road).
 - b. Cellarbrations Huntingdale (located at 5 Pipit Close, Huntingdale within Huntingdale Forum NAC), 2.9 kilometres from the subject land by road). This store is located opposite an IGA, and is lined with fridges containing wine, cider and beer.
 - c. Dan Murphy's (located on the corner of Warton Road and Holmes Street, Southern River, within the Amherst Village NAC, 2.6 kilometres from the subject land by road).
 - d. BWS Southern River (located at 271 Amherst Road, Southern River within Amherst Village NAC, 2.6 kilometres from the subject land by road).
 - e. ALDI Southern River (located at 346 Warton Road, Southern River, within Amherst Village NAC, 2.6 kilometres from the subject land by road).

- f. Liquorland Southern River (located at Bristle Avenue, Southern River, within Southern River NAC, 3.8 kilometres from the subject land by road).

51. It is notable that nowhere in any of the Applicant's documents is there evidence of what specific products are stocked at these competing premises.

Can the existing packaged liquor premises in the locality reasonably meet those local packaged liquor consumer requirements?

52. The Applicant has not provided sufficient evidence that local packaged liquor requirements cannot reasonably be met by existing stores in the locality.

53. The locality already has 6 packaged liquor outlets within it. Of those, all except ALDI stock mainstream product lines of wine, beer and spirits. According to the Applicant's proposed stock list, the Store will similarly stock a wide range of mainstream liquor products.

54. However, aside from a general consumer preference to 'beer', 'wine' and 'spirits', it is difficult to know precisely what the consumer requirements of the locality are. The most probative guide to consumer preferences in relation to specific brands is the fact that most respondents tend to purchase their alcohol at Dan Murphy's – a large destination store that stocks mainstream lines (among other products).

55. The Applicant places an over-reliance on 'general' purchasing habits of respondents; the 'likely visitation to the Centre'; and the 'reasons' for purchasing packaged liquor, in support of a consumer requirement, without analysing precisely what the consumers intend on purchasing. The fact that 62% of respondents purchased packaged liquor at some point during the past 12 months; that 55% of respondents 'thought they would use the Store'; that 83% of those in the Inner Region thought they would use the Centre 'at least weekly'; or that 'local residents like to shop in a destination store like Dan Murphy's but also tend to use a smaller local store' is not evidence of a consumer requirement for the specific products that will be offered at the Store. The Applicant has not conducted that analysis. Moreover, the purported 'benefits' of the Store (that is, one-stop shopping, everyday value, internal layout, amenity of area, security of the locality, and benefits to the community) are limited in their ability to influence the consumer requirements test under s 36B(4). While economic benefits of 'some kinds' are a permissible consideration (and indeed, s 5(1)(c) of the LC Act refers to 'regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State').

56. The benefits to the area, the security of the locality, and benefits to the community are therefore not permissible considerations.

57. Most problematically for the Applicant, the majority of respondents in the locality either have not drunk, or barely drunk, alcohol in the previous 12 months, which would appear reflective

of the relatively high Islamic and Buddhist populations in the locality. The consumer preferences of those living in the locality represent a relatively high percentage of non-drinkers. The unique characteristics of this locality is a fundamental problem for the Application; it would appear difficult for the Commission to come to the conclusion that existing stores do not sensibly or rationally meet consumer requirements, when such consumer requirements in this specific locality for packaged liquor are so comparatively low.

58. The consumer evidence is that 90% of consumers always travelled to supermarkets by car, and an overwhelming number travelled in a separate trip to purchase packaged liquor. This is consistent with Dan Murphy's Southern River's dominant market share for purchasers in the locality, despite being located in the far north-eastern pocket of the locality, and Dan Murphy's Canning Vale (situated outside the locality) being the equal second-highest.
59. In simple terms, consumers in this locality are content to drive up to (and in excess of) 3 kilometres to purchase packaged liquor, and do not walk or ride their push-bikes. This appears consistent with a review of the map, and the semi-rural nature of part of the locality (i.e. Holmes Street, south of Southern River Road; Matison Road; Gay Street) which are thin roads with no distinct bike paths. The MGA Supplementary Report even confirms this.
60. This consumer preference informs the question as to whether it is objectively reasonable, in this locality, for the closest packaged liquor outlet from the Store to be 2.6 kilometres away. While that distance may be considered unreasonable in an inner city locality, it may not be so in an outer-metropolitan suburb with a relatively high Muslim (and thus, non-drinking) population.
61. To the extent that the Applicant relies on some respondents indicating a preference for one-stop shopping, it is relevant that this Application relates to a NAC, and not the development of a large district or regional shopping centre. While the NAC would offer 'convenience shopping', this is a different concept to that advanced by Buss JA in Woolworths, who referred to 'one-stop shopping in large suburban shopping centres is of great importance...and that this social fact is reflected in the development of district and regional shopping centres'. Further, given that MGA's own analysis is that Amherst Village (which contains Dan Murphy's, BWS Southern River, and ALDI Southern River) functions 'more like a small district centre', and also contains access to a supermarket, such a consumer requirement is already met.
62. Much like in the evidence regarding the local packaged consumer requirements, the Applicant relies heavily on survey evidence that indicates consumers feel positively or favourable towards the Store, but that does not answer whether other stores cannot already reasonably meet their consumer requirements. The fact that Mr Sean Stephen's (a retail economist) analysis identified a market opportunity for an additional packaged liquor outlet in the locality; that 'escape spending' would continue to increase over time, and that 'the Southern River

Square shopping centre will be used regularly by a significant share of the surrounding population', is wholly irrelevant to the question of whether the Applicant has discharged its onus under s 36B(4). The Store may well be 'highly convenient' for people wishing to combine supermarket and basic grocery and liquor shopping trips at a single integrated location, but that says nothing about whether existing stores cannot reasonably meet consumer requirements.

Legal and Statutory Framework

63. Section 16 of the LC Act prescribes that the Commission:
- a. may make its determination on the balance of probabilities [sub section(1)]; and
 - b. is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)];
64. The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*).
65. For the purposes of the licence sought by the Applicant:
- a. the Applicant must satisfy the licensing authority that granting the Application is in the public interest [section 38(2)]; and
 - b. the licencing authority must not grant the Application unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated [section 36B(4)].
66. The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority as to each of the above.

Section 36B(4) Test

67. Section 36B(4) prohibits the licensing authority to grant an application unless it is satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.
68. For the purpose of section 36B(4), the licensing authority must be satisfied, based on the evidence provided, that:

- a. there are “local packaged liquor requirements” - being defined in section 36B(1) as “the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated”; and
- b. such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the locality.

Public Interest Test

69. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).
70. When determining whether an application is in the public interest the Commission **must** take into account:
 - a. the primary objects of the LC Act set out in section 5(1):
 - i. to regulate the sale, supply and consumption of liquor; and
 - ii. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii. to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State; and
 - b. the secondary objects of the LC Act set out in section 5(2):
 - i. to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - ii. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - iii. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
71. Section 38(4) provides that the matters the licensing authority **may** have regard to in determining whether granting an application is in the public interest include:
 - a. the harm or ill health that might be caused to people, or any group of people, due to the use of liquor (subsection (a));
 - b. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated (subsection (b));

- c. whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises (subsection (c)); and
 - d. any other prescribed matter (subsection (d)).
72. No 'other ... matter' has been prescribed pursuant to s 38(4)(d).

DETERMINATION

73. The matters in contention arising under the Application and at the Hearing are primarily concerned with:
- a. the relatively new section 36B of the LC Act and, in particular, the statutory interpretation of section 36B(4); and
 - b. the public interest test to be satisfied in respect to section 38 and, in particular, the issue of the level of harm or ill health that might be caused to people, or any group of people, due to the use of liquor.
74. The public interest test is well established and there is extensive legal precedent to assist the Commission in making a determination.
75. In this case s 36B(4) of the LC Act is mandatory and the test therein must also be satisfied.
76. The Commission considers that, and there appears to be no argument from the Applicant nor Intervenor that, for the purposes of meeting the requirements of section 36B(4) of the LC Act the Commission must:
- a. adopt an appropriate "locality" for the purposes of s 36B; and
 - b. be satisfied that there are "local packaged liquor requirements" – defined in s 36(4)(1) as being the requirements of consumers for packaged liquor in the locality the premises are to be situated; and
 - c. be satisfied that such "local packaged liquor requirements" cannot reasonably be met by existing packaged liquor premises in the locality.

Section 36B v Public Interest

77. In its initial application for review the Applicant asserted:

"The Decision Maker erred by assessing if the grant of the Application was in the public interest when it had already determined that the Application failed the threshold requirement under s 36B(4)."

78. This argument is misconceived.

79. Although a preliminary finding that an applicant has not satisfied the licensing authority as to the test in s36B results in a situation where the public interest test does not technically need to be further considered, a finding under s36B does not preclude the licensing authority from making a determination of the public interest test under s 38.
80. The LC Act does not set any order to consideration of the two sections, each deal with separate considerations and neither is stated to be contingent upon the other.
81. Further, the outcome of making a finding under each section has a different outcome.
82. If an application is not granted due to the failure of the applicant to satisfy the licensing authority that granting the application is in the public interest, then s 38(5) will apply and the applicant is generally precluded from making an application for the grant or removal of a licence in respect of the same premises or land within 3 years after the licensing authority's decision.
83. No such prohibition applies when an applicant fails to meet the test in s 34B.
84. As such, it is open for the Director and the Commission to make a finding in respect to both of s38 and s36B.

Deciding a Locality under s36B

85. In this case the Applicant initially, in the PIA adopted a 2km radius from the Premises as the relevant "locality" for the purposes of the 36B(4) test.
86. The Applicant then provided supplementary submissions in November 2021 and April 2022 which identified the locality as an irregular area shown in Figure 1 of the MGA Supplementary Report (dated November 2021).
87. It is asserted by the Applicant that such locality:
 - a. reflects the criteria identified by Archer J, in *Liquorland (Australia) Pty Ltd -V- Director of Liquor Licensing [2021] WASC 366* ("**Liquorland**"); and
 - b. is consistent with the policy criteria in State Planning Policy 4.2, in particular at 5.1.2 regarding neighbourhood activity centres being, 'local community focal points that help to provide for the main daily to weekly household shopping and community needs,' and (in table 3) that such centres are typically characterised by an indicative service population within a radius of about 1km.
88. The LC Act does not include any definition as to "locality".
89. In *Liquorland (Australia) Pty Ltd -V- Director of Liquor Licensing [2021] WASC 366* Archer J at 181 to 186 noted the following with respect to the word "locality" used in s 36B (emphasis added by the Commission):

“In my view, the word 'locality' in s 36B denotes an area that surrounds, and is geographically close to, the location of the proposed premises (proposed site). I consider it was not intended to equate to the area(s) from which consumers would come. The following matters are particularly relevant.

*First, I consider the plain meaning of the words in s 36B supports this construction. As noted earlier, given the context and purpose of s 36B, the word 'locality' is intended to connote the same concept of neighbourhood. I consider that, in this context, it means the **geographical area surrounding the proposed site**. Section 36B seeks to add an additional hurdle before a licence may be granted under which packaged liquor can be sold.*

It seeks to ensure that there are not multiple premises in close proximity to one another selling packaged liquor.

.....

*This is not to say that the 'locality' will inevitably, or even usually, be a circular area within a particular radius of the proposed site. **The shape and size of the 'locality' may be influenced by topographical features (including man-made features such as roads) and the areas from which the proposed site could be accessed reasonably easily on foot or push-bike. If there is a community in the area of the proposed site, the geographical spread of that community may also influence the shape and size of the 'locality'.***

Unfortunately, due to the variety of factual situations that may arise, it is impossible to prescribe a specific test to be applied or even an exhaustive list of the factors that will or may be relevant in the determination of the locality in any given case. As has been observed in other jurisdictions, there will be some cases where it will be easy to determine the locality, and other cases where it will not be.

An example of the former would be where the proposed premises was to be placed in a small country town. An example of the latter would be where it was to be placed in the CBD.”

90. The word “locality” is also used in section 38 of the LC Act and is primarily defined using the Director’s “Public interest assessment policy.” At the time of the Application, the Director’s Policy in respect to “locality” stated as follows:

“Locality

As part of a PIA submission, applicants must provide details regarding the community in the vicinity of the licensed premises (or proposed licensed premises) and any amenity issues in the locality.

The term 'locality' in this instance refers to the area surrounding the proposed licensed premises. This locality will be the area most likely to be affected by the granting of an application in relation to amenity issues.

Generally, the size of the locality will be that which is stipulated in 'Specification of Locality' at Attachment 2. However, depending on the nature of the application, the licensing authority may also determine a broader locality.

Where an applicant considers that the licensing authority's determination of the locality in accordance with the policy is not suitable having regard to its intended nature of business, the applicant may make submissions as to the appropriate size of the locality to the specific nature of the proposed business.

It should be noted however, that in terms of addressing objects 5(1)(b) and 5(1)(c) of the Act, an applicant may need to consider an area which is much broader than the 'locality' used for consideration of amenity issues. For example, an application for a destination liquor store, which may draw its clientele from a large geographic area, would need to address 5(1)(b) and 5(1)(c) of the Act in a much broader context. The onus is on the applicant to satisfy the licensing authority that the grant of the application is in the public interest and provide relevant evidence and submissions to discharge this onus. An applicant should address all relevant considerations under the Act, bearing in mind all the circumstances and unique features of its particular application."

"Locality guide

The following tables are a guide when determining the specified 'locality' to which an application relates.

Generally, the size of the locality will be that which is stipulated below. However, depending on the nature of the application, the licensing authority may also determine the locality outside the 'Specification of Locality' guide. Where an applicant considers that the locality set out in this policy is not suitable having regard to its intended nature of business, the applicant may make submissions as to the appropriate size of the locality to the specific nature of the proposed business.

In regard to country cities, towns or communities, unless remotely located or the licensing authority determines otherwise, the locality is to be a radius of 3 km from the site of the intended business.

Where a premises/proposed premises is remotely located; that is, 200 km or beyond from the nearest town or country city, and more than 400 km from Perth, the applicant is to make a submission to the licensing authority regarding the appropriate size of the locality to suit the intended nature of the business."

91. It is noted that the relevant Policy includes the suburb of Southern River in the Attachment 2 list of suburbs/areas that have a 3km radius imposed.
92. In any event, the factors which can be contemplated in deciding “locality” must remain diverse and fluid and it is contemplated that the Director may impose different localities in respect to different applications, provided that, in the interests of natural justice, such decision is made on reasonable and ascertainable grounds.
93. The Commission has considered the following, non-exhaustive factors in deciding the locality in this instance:
 - a. The geographical area surrounding the site.
 - b. The topographical features of the area, including natural and manmade barriers; and
 - c. The geographical spread of the community.

The geographical area surrounding the site.

94. The Commission notes that the locality nominated by the Applicant approximately reaches 1 to 2 km outwards from the proposed premises. It is noted that the proposed locality does not encompass the entirety of the suburb of Southern River.
95. Although this is necessarily geographically close to the Premises, the Commission would argue that such an area is far too small to be considered a natural locality and that a larger area would still be considered to be “close by”.
96. The Commission further notes that the Director’s Policy as to locality, also indicates a general position that it may be anticipated that non-metropolitan localities may be considered naturally geographically larger in size. The Commission would tend to apply this reasoning to Southern River as it is more than 15km outside of the Perth CBD.

Natural and Manmade and Topographical Features of the Area

97. The regional urban area that the Centre is located in, the suburb of Southern River, which is partially new housing and development and partially semi-rural in nature.
98. Any adopted locality of a “radius” type would necessarily include a large proportion of rural area.
99. The imposition of a radius circle is not necessarily appropriate where such the same encompasses an artificial area. To adopt a patently artificial radius does not reflect the licensing authority’s mandate to have regard to the primary objects of the LC Act and the functions of the licensing authority which require consideration of the actual impacts of a proposed application.
100. The area becomes more rural towards the southern boundary by the more established suburban areas of Canningvale, Huntingdale and Gosnells to the north.

101. A small waterway/river is located to the east of the suburb of Southern River. The same is a relative minor waterway. The river provides a natural barrier in some place, although there is access to the immediately neighbouring area of Gosnells over Southern River Road (on which road the Centre is located).
102. Given the lack of residential areas towards the Southern part of Southern River, and the easy access over Southern River Road, the Commission does not consider the river to be a topographical feature that unduly impeded the access of persons to the degree that any locality would necessarily stop at that point.
103. The MGA Supplementary Report also refers to Tonkin Hwy to the southeast being a manmade barrier defining the locality. The Commission agrees with this characterisation of Tonkin Hwy.
104. The Commission would also assert that the other predominate manmade barriers or boundaries of the locality would be the major roads being Ranford to the Southern West, and Warton Road to the Northwest and Corfield Road to the Northeast.
105. The reasons in the MGA Supplementary Report provided for Balfour Road to be adopted as the North Western boundary of the proposed locality are not compelling. The Commission asserts that this road/boundary has been chosen with a view to exclude any existing packaged liquor stores from the locality.
106. Archer J in *Liquorland* (at 185) also references locality being influenced by the ability to access a proposed site by foot or push bike. The Commission considers that this reference is indeed to refer to an area that is simply “close to” the relevant site. However, where there is evidence led that the consumers of the proposed premises require this kind of access, this may be more of a relevant consideration to the geographical spread of the community and neighbourhood.
107. In this case there does not appear to be ready access to bicycle routes in the area. The DAA Survey also notes that the supermarket is accessed predominately by car as there is currently little alternative (paragraph 39 DAA Report).
108. The Commission also comments that where the locality comprises a non-metropolitan area, a larger community spread and a lack of facilities to allow pedestrian or bicycle access, common expectations may encompass a necessity to travel further distances to access community facilities or activity centres.

The geographical spread of the community

109. As noted above, the majority of the community is located to the north of the Premises, with the southern part of the suburb being largely rural in nature.

110. The Commission notes that the MGA Supplementary Report heavily relies on the zoning and future development and population spread that may occur in Southern River.
111. The possible future development and population of the area is of limited assistance to the Commission in this case. Such things may affect a locality in the future, but is not necessarily indicative of a current locality.

Retail Catchment Area

112. Archer J in *Liquorland* considered that to solely refer to a “retail catchment area” as the locality would not be correct, however, accepted that it is a relevant consideration at 188.
113. In this case, the MGA Supplementary Report refers to the retail hierarchy of the area and, in particular an indicative catchment of 1km for neighbourhood centres as defined in the State Planning Policy 4.2, Activity Centres for Perth and Peel (“**SPP 4.2**”).
114. The fact that the relevant Centre is a “neighbourhood activity centre” does not necessarily mean that other activity centres will not be present in a “locality”. In particular, the Commission does not agree with the reliance on a retail catchment area of a single small neighbourhood activity centre being considered an appropriate locality.
115. The Commission further considers that the Applicant has lent too much weight to the possible future population growth and their potential access to community facilities in considering the appropriate *current* locality.

Conclusion on Locality

116. In considering the above factors, the Commission does not accept that the “locality” in this case is limited to the locality suggested by the Applicant.
117. The above factors indicate to the Commission that the relevant locality for the purposes of the Application and s36B is the area outlined in red on Plan 1 annexed to this decision.
118. Further, the Commission would generally note that, where an applicant artificially limits a locality to an area being less than single suburb, the resulting implication is every small suburb in WA must have a packaged liquor store to meet consumer requirements (subject to the additional public interest test). However, as a matter of public interest, it is not in keeping with the objects of the LC Act, nor is it desirable, that every suburb has a packaged liquor outlet.

Local Packaged Liquor Requirements

119. To properly contemplate the first limb of section 36B(4), the Commission must make a finding of fact as to the “*local packaged liquor requirements*” of consumers in the locality based on the evidence provided by the Applicant.
120. This requires consideration of the correct statutory interpretation of “requirements”.

Defining “Requirements”

Prior Legal Precedent

121. The LC Act does not provide any guidance as to how the word “requirements” is to be interpreted either in respect to the objects of the LC Act, or section 36B.
122. However, prior to the introduction of section 36B, the words “requirements of consumers” was contemplated in the context of the section 38 public interest test. Section 38 requires mandatory consideration of the primary and secondary objects of the LC Act.
123. Generally, the same is taken to mean what consumers demand or desire, as distinct from what they cannot manage without.
124. The term “*requirements*” is referred to in section 5(1)(c), which states that one of the primary objects of the LC Act is: “*to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*”.
125. That primary object requires a broad consideration in the context of the expectations of consumers for liquor (and related services) across the State.
126. In *Liquorland (Australia) Pty Ltd -V- Director Of Liquor Licensing [2021] WASC 366* Archer J recently established that, “*the words 'requirements of consumers' mean the same in s 36B(1) and s 5(1)(c) and, subject to the facts and issues of a particular case, may involve consideration of the same types of matters*” (at 89) however, that 'consumer requirements' will arise in two contexts (i.e. the test under s36B and the test under s 38 as to public interest).
127. Archer J further noted at 106, “*There is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant to both conditions.*”
128. In considering the requirements of consumers the Commission must have regard to the LC Acts' objects, including the object in s 5(1)(c).

The Application and Requirements for Packaged Liquor

129. The Applicant submitted that there is a local packaged liquor requirement as evidenced by the following:
 - a. the DAA Surveys:
 - i. established that there is a local packaged liquor requirement to be able to purchase liquor at the Centre in conjunction with other purchases; and
 - ii. provide compelling evidence of local packaged liquor requirements on the part of consumers for a local store with one-stop / one-trolley shopping convenience at the Centre;

- b. Ethos Urban gave evidence that the survey evidence is consistent with the views of policy makers and industry participants;
 - c. the survey evidence is consistent with the evidence of the Applicant’s State manager Mr Smith;
 - d. The evidence of social engagement and impact evaluation consultants Bodhi Alliance confirms local packaged liquor requirements for one-stop shopping convenience at the Centre;
 - e. The direct evidence in support of the Store from developers, and from customers that currently shop at the Centre; and
 - f. The fact that the liquor store is consistent with the State Planning Policy regarding Neighbourhood Activity Centres.
130. With respect to the Applicant, the general views of policy makers or industry participants, or the opinion of an Applicant is not enough to be considered evidence of an actual consumer requirement. It may be indicative, at the highest, of a general stance that it is the experience of the industry that consumers wish to purchase packaged liquor in a convenient manner.
131. In respect to the arguments as to the State Planning Policy, town planning principles and concerns simply do not overlap to a sufficient degree to properly inform the Commission or licensing authority as to what is a highly regulated industry. The mere existence of State Planning Policy is simply not enough to properly establish a consumer requirement in respect to package liquor supply at a particular shopping centre or in a particular locality.
132. In this case the Commission considers that the Applicant is primarily asserting that there is a consumer requirement for convenience and one-stop shopping.
133. The Commission has reviewed the DAA Surveys.
134. In this case the following results are of particular interest:
- a. Table 9oi
 - b. Table 48 DAA Report shows the following results for the question “*How often do you think you would purchase liquor from the proposed Liquorland store?*”:

About once a week or more	9.9%
About once a fortnight	9.3%
About once a month	11.2%
A few times a year	24.7%
<u>Never</u>	42.6%
Don't know/can't say	2.2

- c. Table 50 shows the same results to the same question even where only considering those parties who expected to make Southern River Square would be their main shopping centre.
 - d. 44.9% of respondents expected no benefit would be gained from Liquorland (as opposed to 49.7% stating there would be a benefit). These numbers were also similarly reflected where the respondents did consider that Southern River Square would be their main shopping centre (table 92 and 93 of DAA Report);
135. The numbers indication little or no interest in the purchase of packaged liquor are strikingly high in this instance.
136. The Commission principally attributes this to the larger proportion of the population with an Islamic religious affiliation in the locality.
137. Further the DAA Report indicates that making a separate trip to purchase liquor was utilised by 70% of purchaser, with a far smaller 29% purchasing the same under the same roof as their supermarket shopping.
138. Although it is noted that a certain percentage of respondents:
- a. generally supported the Application (71%);
 - b. thought it would be “*useful if they needed to make small purchases*” (92% of those expecting to purchase liquor from the store); and
 - c. thought it would be “*useful to take their trolley in there*” (91% of those expecting to purchase liquor from the store);
- the Commission considers that with regards to general support and “usefulness”, that this falls short for establishing a consumer requirement.
139. On the basis of the evidence provided and, in particular the DAA Survey, the Commission finds that the Application has failed to establish that there is a considerable requirement for one-stop shopping that includes liquor purchases at the Centre.

Can Packaged Liquor Requirements be Reasonably Met?

140. In contemplating the second limb of the test in section 36B(4), the Commission must make a finding as to whether the local packaged liquor requirements can be met in the locality.
141. This requires consideration of:
- a. the appropriate locality (as discussed above);
 - b. the packaged liquor premises present in the locality; and
 - c. whether the “local packaged liquor requirements” can be “reasonably” met at such existing premises.

142. In this case the Commission found that the Applicant has failed to discharge the onus of satisfying the Commission that there is a consumer requirement for one-stop or convenience shopping for packaged liquor in the locality.
143. It appears that part of the reason this could not be established, is that the locality is serviced by several other packaged liquor stores of various types.
144. In the DAA Survey, when asking what liquor stores purchasers of liquor used, it was clear that the majority of purchasers attended large destination stores (such as Dan Murphy's) that were not necessarily within the locality.
145. Liquorland Southern River was the next most highly used (18.8% of liquor purchasers). This Liquorland is co-located with a Coles in the locality at the Southern River Shopping Centre a mere 2.8km from the proposed Premises.
146. It is clear this premises already services any consumer requirements for one-stop Shopping and convenience in the locality.
147. The other packaged liquor stores in the locality are:
 - a. Ashburton Liquor Store [co-located with a deli and convenience store (not a supermarket)];
 - b. Celebrations Huntingdale (co-located with an IGA supermarket);
 - c. Dan Murphys and Brooklands Tavern; and
 - d. ALDI Liquor Southern River (located within an Aldi Supermarket).
148. BWS Southern River falls just outside of the locality being across Warton Road.
149. A high percentage of liquor outlets allow for one-stop shopping convenience in the locality.
150. Given the above, the Commission finds that, even if the Applicant had established a consumer requirement for one-stop shopping convenience, such requirement is reasonably met at the existing premises in the locality.

Public Interest Test

151. As noted above in this Determination at paras. 77 to 84, a finding that an applicant has not satisfied the Commission as to the test on section 36B, does not result in a situation where the Commission is precluded from making a determination on the question of the public interest test under section 38.
152. Sections 36 and 38 deal with separate considerations.
153. The Commission therefore may make a determination on the applicability of the public interest test under section 38 in this matter.

154. “Public Interest” is not defined in the LC Act. In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; 45 WAR 446, the court found that in the assessing whether an application is in the public interest, the licensing authority is bound to take into account the relevant factual matters and the primary and secondary objects of the LC Act.
155. Although the Commission has an “absolute discretion” to grant or refuse any application under the LC Act [section 33(1)], this discretion is not an arbitrary or unlimited power and must be exercised consistently with the objects and other provisions of the LC Act (*Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446 [48]).
156. The Commission must consider the primary and secondary objects of the LC Act. The primary and secondary objects of the LC Act are as set out in paragraph 70 above.
157. Each primary object is considered equal and in the event of any consistency between the primary and secondary objects, the primary objects take precedence.
158. There are also considerations in section 38(4) which the licensing authority *may* also take into account in determining whether granting an application is in the public interest.
159. These key factors are:
- a. the harm or ill-health that might be caused to people, or a group of people, due to the use of liquor;
 - b. the impact on the enmity, quiet or good order of the locality in which the licensed;
 - c. whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licenced premises;
 - d. any effect the granting of the application might have in relation to tourism, or community or cultural matters; and
 - e. any other prescribed matter.
160. In weighing these considerations tension may arise between the object of minimising harm or ill-health and other objects of the LC Act.
161. The Director/Intervenor has elected not to make submissions about public interest under section 38 other than asserting that the proliferation of liquor outlets is not in the public interest.

Requirements of Consumers and Benefits to the Locality

162. The Applicant asserts the Application would provide numerous benefits to the local community including:
- a. Convenience and one-stop shopping;

- b. Everyday value;
 - c. Benefits of the updated internal layout of the new store;
 - d. Security of the locality; and
 - e. Stocking and promoting of Western Australia Wines.
163. As discussed above the Commission accepts that convenience and one-stop shopping is a benefit to the area and community, however notes that this service is already provided in the Locality.
164. The issue of “everyday value” is not considered to be a significant benefit to the community. The other numerous packaged liquor stores in the area already provide “value” by allowing the community to shop and compare prices, with the existing Liquorland presumably already reflecting the same price range.
165. The Commission does not consider that the updated layout of the store provides any meaningful benefit to the locality.
166. The security measures referred to are standard measures that would be generally required with any packaged liquor store of a similar type.
167. In any event, the Application does not appear to have any significant negative effects on the community and locality.
168. With respect to the stocking and promoting of Western Australia wines, this Commission accepts this may provide a limited benefit to the area.

Development of the Liquor Industry, Tourism Industry and Entertainment Industry

169. The Applicant argues that the Application would be consistent with, and reflects, contemporary standards, expectations and shopping habits and is in accordance with the proper development of the liquor industry.
170. The Applicant does not make any additional arguments as to the contribution of the Application to the Tourism or Entertainment Industry.
171. The Commission does not consider that there are any compelling reasons that the Application would not be consistent with the proper development of the liquor and related industries.

Impact on The Amenity of The Area

172. The Applicant asserts that the clustering of retail activities in accordance with local planning laws and objectives, and the consequent reduction of travel enhances the amenity and enjoyment of life within the Locality.
173. The Commission is satisfied on the basis of the evidence provided, that the amenity, quiet or good order of the Locality will not be adversely affected by the grant of the Application.

Offence, annoyance, disturbance or inconvenience

174. The Commission is satisfied on the basis of the evidence provided that, despite the high proportion of persons of the Muslim faith in the Locality, and the close proximity of a Muslim place of worship, the grant of the Application will not create undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school.

Harm and Ill-Health

175. When assessing harm and ill-health, the Commission must undertake the analysis set out in *Carnegies Realty Pty Ltd, Director of Liquor Licensing [2015] WASC 208* being the following four steps:

- a. make findings that specifically identify the existing level of alcohol-related harm and ill-health in the Locality;
- b. make findings about the likely degree of ill-health to result from the grant of the Application;
- c. assess the likely degree of harm to result from the grant of the Application against this existing degree harm; and
- d. weigh the likely degree of harm, as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest.

Carnegies Test – Existing Level of Harm and Ill-Health

176. The Chief Health Officer did not intervene in the Application.

177. In the PIA the Applicant asserts that there is a moderate risk community due to:

- a. the relatively advantaged score on the SEIFA Index of Relative Socio-economic Advantage and Disadvantage; and
- b. other economic factors which indicate a relatively affluent and socio-economically advantaged area.

178. Crime statistics and alcohol related health statistics were not of concern within the area.

179. The main groups considered at risk are children and families which make up a high proportion of the community.

180. Given the above, the Commission finds that the current level of harm, and ill health in the community is relatively low.

Carnegies Test – Likely Degree of Harm and Ill Health

- 181. The Applicant asserts that there is no evidence from which it would be inferred that the grant of the Application would contribute to an increased risk of alcohol related harm to the people in the locality.
- 182. The Commission finds that there is no evidence provided that would lead to a finding that the grant of the Application would result in any significant increase in the degree of harm or ill health in the locality.

Carnegies Test – Assessment and Weighing of degrees of Harm

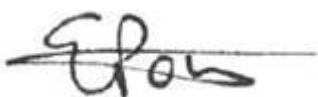
- 183. In this case, as the Commission is prepared to accept that only very minimal harm is likely to occur due to the grant of the Application, the Commission finds that in weighing the relevant factors, the grant of the Application is in the public interest with respect to the issue of ill health and harm.

Public Interest Conclusion

- 184. The Commission finds that in the absence of evidence, there are no issues as to detrimental effects on amenity of the area, nor evidence of current or potential Ill-health or alcohol related harm that could result from the grant of the Application.
- 185. In other words, the Commission finds that no significant public interest matters arise and that the Applicant has met its onus to satisfy the Commission that the Application is in the public interest.

CONCLUSION

- 186. The Commission finds that the Applicant has not discharged its onus to under s 36B(4) of the LC Act.
- 187. The Commission found that the Applicant has satisfied the public interest test.
- 188. The Application is dismissed and the decision of the Director is affirmed.



**EMMA POWER
PRESIDING MEMBER**



**PAMELA HASS
MEMBER**



**SHELLEY DAVIES
MEMBER**

Plan 1

