

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICANT:** FOMO Emporium Pty Ltd  
(Represented by Lavan)

**PREMISES:** FOMO Emporium  
Tenancy G17A, G17B and G18, 2 Newman Court, Fremantle

**APPLICATION REF:** A606617691

**NATURE OF APPLICATION:** CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

**DECISION OF:** Brett Snell, Deputy Director Liquor Control and Arbitration

**DATE OF DETERMINATION:** 6 October 2020

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### **Decision**

1. By application submitted on 24 October 2019, FOMO Emporium Pty Ltd (Applicant) sought the conditional grant of a liquor store licence, pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (Act), for premises to be known as *FOMO Emporium* and situated at Tenancy G17A, G17B and G18, 2 Newman Court, Fremantle (premises).
2. The application was advertised in accordance with instructions issued by the Director of Liquor Licensing (Director) and no notices of objection or intervention were lodged against the application.
3. Pursuant to ss 13 and 16 of the Act, I have decided to determine the application on the written submissions of the Applicant. After considering the application, together with the Applicant's submissions, including any evidence and/or submissions that have not specifically been referenced in this decision, I have determined, pursuant to my delegation under s 15 of the Act, to refuse the application on the basis that the Applicant has failed to discharge its onus under s 36B(4) of the Act.
4. Should the Applicant be dissatisfied with this outcome, it may seek a review of the decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the day upon which the Applicant received notice of this decision.
5. The reasons for my decision follow.

### **Reasons for Decision**

#### ***The application***

6. In summary, the Applicant intends the proposed liquor store to have a focus on showcasing high quality, independent products from artisan producers; while also stocking a comprehensive range of standard and mainstream liquor products, so that consumers will be able to obtain all of their packaged liquor requirements from the one store.

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7. The Applicant also submitted that:
  - (a) tastings and educational sessions will be held at *FOMO Emporium* and its staff will be highly trained and provided with specialised education sessions relevant to the unique products that will be offered;
  - (b) the majority of the tasting and educational sessions will be held in conjunction with a representative from the supplier of the product that is being showcased, adding an authenticity and connection to the product that will be above and beyond a standard liquor store tasting session; and
  - (c) the proposed liquor store will be approximately 240m<sup>2</sup> in size.
8. The Applicant's *Public Interest Assessment* (PIA) also included an overview of the *Kings Square* development and material addressing those matters prescribed in s 38(4) of the Act.
9. In accordance with the Director's PIA policy, the Applicant:
  - (a) relied upon the 'locality' as being a two-kilometre radius of the proposed premises; and
  - (b) addressed the issue of outlet density, for the purposes of s 38(4)(b) of the Act, by providing basic information on the existing 134 licensed premises in the locality.
10. To demonstrate that the grant of the liquor store licence will cater to the requirements of consumers and further the Act's object found at s 5(1)(c), the Applicant lodged 273 survey monkey questionnaires, which sought consumer feedback on each of the three licences proposed as part of the *Kings Square* development (which also included a special facility licence for the prescribed purpose of a food court, which was conditionally granted on 23 April 2020 and a tavern restricted licence, which was conditionally granted on 20 May 2020), with questions:
  - (a) 2 to 15 relating to the application for the tavern restricted licence;
  - (b) 16 to 25 dealing with the application for the special facility licence; and
  - (c) 26 to 38 canvassing support for the present application.
11. Of the 273 consumers surveyed, 213 responded to questions about:
  - (a) whether they supported the proposed liquor store, with 188 (88.26%) answering yes;
  - (b) whether they were likely to buy take-away liquor from the proposed premises, with 148 (69.48%) answering yes;
  - (c) how often, on average, they would be likely to purchase packaged liquor from *FOMO Emporium*, with:
    - (i) 22 (10.33%) indicating weekly;

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- (ii) 32 (15.02%) indicating fortnightly;
  - (iii) 79 (37.09%) indicating monthly;
  - (iv) 40 (18.78%) indicating yearly; and
  - (v) 40 (18.78%) indicating other time frames.
12. Of the 197 consumers who responded to a multiple-choice question (where one or more of the designated responses could be selected) about what aspects of the proposed store appealed to them:
- (a) 119 (60.41%) specified the proposed range of artisan wines;
  - (b) 110 (55.84%) specified the proposed range of craft beers;
  - (c) 85 (43.15%) specified the proposed range of small batch varieties; and
  - (d) 104 (52.79%) specified the convenience of one-stop shopping (i.e. being able to get liquor with other household shopping from the nearby supermarket.)
13. Additionally, letters of support were also lodged by 25 persons, including from the City of Fremantle, Tourism WA and Fremantle Chamber of Commerce.
14. Accordingly, the Applicant submitted that the local community stands to benefit from the new services and facilities that *FOMO Emporium* will introduce, and it is in the public interest for the liquor store licence to be granted.

***The Applicant's supplementary submissions***

15. Following the proclamation of s 36B of the Act on 2 November 2019, the Applicant conducted a second consumer survey, which ran for a day and a half on 16 and 17 March 2020, with respondents being informed that the Applicant had identified 78 unique liquor products (specified products) from a list of producers which it intends to stock, along with other more traditional brands.
16. Of the 74 respondents to the second consumer survey, 57 (77.03%) answered that they would purchase from the liquor products and 17 (22.97) said they would not. The Applicant also lodged four letters of support from residents of Fremantle and surrounding areas.
17. In order to establish what packaged liquor services are currently provided by existing packaged liquor premises in the locality, the Applicant identified 28 existing packaged liquor premises in the locality and analysed those premises, in terms of:
- (a) whether takeaway liquor was available at the premises;
  - (b) the type of liquor offered; and
  - (c) whether those premises stocked the 78 kinds of unique wine, beer or spirits that make up part of the Applicant's proposed stock list.

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18. That analysis identified that two of the specified products were available at *The Freo Doctor*, which trades under a liquor store licence at 27 Arundel Street, Fremantle and another was available at *Liquor Barons George Street East Fremantle*, which also trades under a liquor store licence in George Street, East Fremantle.
19. According to the Applicant, the responses to the second consumer survey lead to a conclusion that *FOMO Emporium's* proposed packaged liquor **and related services** (my emphasis) meet the description of being 'local packaged liquor requirements' and when considered together with the Applicant's analysis of 28 existing packaged liquor premises in the locality, demonstrate that such 'local packaged liquor requirements' 'cannot reasonably be met by existing packaged liquor premises.'
20. In arriving at this view, the Applicant referred to the decision of the the Supreme Court in *Kartika Holdings Pty Ltd v Liquor Stores Association of Western Australia (Inc)*<sup>1</sup> where it was held that "[t]he requirements are not confined to the liquor content but includes [sic] other features which distinguish a liquor product in the retail market. That could include price, type (and source) of liquor, quality, range, container (bottle, can, cask), quantities or any combination thereof.... What can distinguish a liquor product in the retail market is inherently flexible."

**Determination**

21. Section 36B was inserted into the Act by s 18 of the *Liquor Control Amendment Act 2018* (Amendment Act). The Explanatory Memorandum for the Bill, which was enacted as the Amendment Act, relevantly provides:

'As a strategy to minimise the adverse impact that packaged liquor outlets can have on the community, the Bill inserts new section 36B **to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality**. This will be complemented by additional amendments relating to large packaged liquor outlets being established in close proximity to an existing large packaged liquor outlet.' (Emphasis added.)

22. In the Second Reading speech, the Minister for Racing and Gaming said:

'... **to prevent the further proliferation** of small and medium packaged liquor outlets across the state, the act will be amended so that the licensing authority must not grant an application unless it is satisfied that existing premises in the locality cannot reasonably meet the requirements for packaged liquor.' (Emphasis added.)

23. Accordingly, the following propositions appear uncontroversial from the plain language of s 36B:
  - (a) the section applies to an application for the grant of, amongst other things, a liquor store licence;

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<sup>1</sup> [2008] WASCA 103

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- (b) the use of the words 'must not' in s 36B(4) provides a mandatory prohibition on the granting of a licence that is subject to the relevant provisions, unless the condition in s 36B(4) is met;
  - (c) the condition within s 36B(4) is that the licensing authority must be satisfied that 'local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in' the relevant locality; and
  - (d) the evidential and persuasive onus to so satisfy the licensing authority rests upon the Applicant.
24. In order to be satisfied of such condition, it is necessary for there to be evidence upon which the licensing authority can make findings of fact as to:
- (a) what the local packaged liquor requirements are; and
  - (b) what packaged liquor services are currently provided by existing packaged liquor premises in the locality.
25. Once the licensing authority has made findings as to those matters, it is required to make a value judgment as to whether the local packaged liquor requirements (as found) can **reasonably** (emphasis added) be met by the existing packaged liquor premises (based on the findings as to the packaged liquor requirements that those premises currently provide).
26. In *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd*<sup>2</sup>, Malcolm CJ, with whom Pidgeon and Walsh JJ separately agreed, made the following observations in relation to the word 'reasonable' as it then appeared in s 38 of the *Liquor Licensing Act 1988*:
- 'The word "reasonable" imports a degree of objectivity in that the word reasonable means "... sensible, ... not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate"'
27. As to the provisions of s 36B(4), which are relevant to this application, an applicant must satisfy the licensing authority as to whether or not the local packaged liquor requirements can reasonably be met by existing packaged liquor premises in the locality.
28. Consequently, a key question arises as to what is meant by the term 'local packaged liquor requirements' in s 36B of the Act, i.e. should it be construed as referring to:
- (a) requirements for packaged liquor itself (e.g., requirements for liquor of a particular type, such as bottled table wine) (the narrow construction); or
  - (b) more broadly as encompassing requirements of consumers as to matters of 'taste, convenience, shopping habits, shopper preferences and the like' (the broad construction).

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<sup>2</sup> (1991) 4 WAR 1, 10

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29. In my view, the narrow construction should be preferred for the following reasons.
30. First, the text of s 36B supports the narrow construction, especially when understood in the context of the Act as a whole, when compared and contrasted to s 5(1)(c).
31. While it is well established that under the public interest test, considerations of convenience, shopping habits, etc, are relevant to be considered for the purposes of the s 5(1)(c) object,<sup>3</sup> the definition of 'local packaged liquor requirements' is framed differently to s 5(1)(c) in a material respect.
32. The definition of 'local packaged liquor requirements' only refers to the 'requirement for consumers for packaged liquor' and fails to refer to a broader requirement for 'liquor *and related services, with regard to the proper development*' of the relevant industries. That provision requires regard to be directed to the proper development of the relevant industries in the State in considering the issue of catering for consumer requirements.<sup>4</sup> This invites a broad ambit of matters to be considered 'as part of assessing the diversity of consumer requirements and how they are to be catered for'.<sup>5</sup>
33. Adopting the narrow construction gives some effect to the deliberate difference in drafting the provisions.
34. Secondly, such an approach is consistent with the apparent object or purpose of the provision, which is to provide a restriction or limitation on the grant of certain licences. In particular, it is intended that the provision will prevent the further proliferation of small and medium packaged liquor outlets across the State and to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets exist within a locality.
35. To so limit the number of outlets within a locality, it is necessary for the narrow construction to be adopted where consideration is given to whether the existing premises within the locality can reasonably meet the requirements of consumers for packaged liquor or types of packaged liquor in that locality.
36. Adopting the broader construction would lead to further proliferation, and would hamper the ability of the licensing authority to manage the number of packaged liquor outlets in a locality, because the s 36B(4) hurdle could be cleared by an application seeking to cater to particular nuances in convenience and shopping habits, even where the intention of the proposed premises is to merely sell packaged liquor of a type which is readily available within the locality.
37. Thirdly, the narrow construction is consistent with the balance of s 36B, namely, s 36B(3), which provides a total ban on licences being granted for packaged liquor outlets where the proposed store is greater than a prescribed size, and is within a prescribed distance of an

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<sup>3</sup> See, e.g., *Woolworths Ltd v Director of Liquor Licensing* (2013) 45 WAR 446

<sup>4</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 (Banks-Smith J)

<sup>5</sup> *Ibid*

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existing store which is greater than a prescribed size. It is plain that this provision is concerned simply with liquor itself.

38. That is, there is no exception to the application of s 36B(3) if an applicant can demonstrate that a new or different service, which is required by consumers, is to be offered which is not being met by the existing store. For example, even if the existing store does not offer one stop shopping (in the sense described by Buss JA in ***Woolworths Ltd v Director of Liquor Licensing***<sup>6</sup>), and the proposed store does offer one stop shopping in that sense, there is still no capacity for the new licence to be granted. This demonstrates clearly that s 36B(3) is aimed at merely liquor itself – by limiting the proliferation of stores which sell liquor, regardless of the broader service or experience provided which might serve a consumer requirement in the broad sense.
39. There is no textual indication that sub-ss 36B(4) and 36B(3) are directed at different ends.
40. To the contrary, the second reading speech demonstrates that sub-ss 36B(3) and 36B(4) are directed to the same end – preventing the proliferation of packaged liquor outlets due to concerns over the effect that packaged liquor can have on the community (i.e. a reference to the harm that can and does occur away from licensed premises.)
41. The way to give full effect to this purpose (and to limit the supply of liquor into the community) is to adopt the narrow construction which focusses simply on whether there is a requirement for liquor itself (and not to focus on particular nuances of preferences for convenience and the like, which will do little to prevent proliferation).
42. Fourthly, the approach that leads to the narrow construction finds support in the approach of the Full Court of the Supreme Court of South Australia (in ***Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)***<sup>7</sup> (***Lincoln Bottle Shop***)), and also the approach of the Western Australian Supreme Court of Appeal (in ***Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd***<sup>8</sup> (***Austie Nominees***)), albeit in different legislative contexts.
43. In ***Lincoln Bottle Shop***, King CJ explained the relevant provisions of the *Licensing Act 1967* (SA)<sup>9</sup>:

‘An applicant for a liquor licence ... must prove ‘that the licensing of the premises is required for the needs of the public having regard to the licensed premises existing in the locality in which the premises are to be situated’ (s. 47(a), *Licensing Act, 1967*, as amended). A different, and doubtless more formidable, obstacle to the success of this application, however, is constituted by s. 22(2) which provides that a retail storekeeper’s licence shall not be granted ‘unless the court is 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’. The latter test is both different from and more stringent than the test under s. 47(a)

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<sup>6</sup> (2013) 45 WAR 446

<sup>7</sup> (1981) 28 SASR 458

<sup>8</sup> (1999) 20 WAR 405

<sup>9</sup> ***Lincoln Bottle Shop***

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... **Section 47(a) is directed towards the satisfaction of the needs of the public in relation to licensed premises. These needs are not necessarily concerned with the mere availability of liquor. They may be concerned with matters of taste, convenience, preference for one type of facility over another, the manner in which liquor is displayed and served, and the type and standard of accompanying services. Section 22(2) is concerned with the satisfaction of the public demand for liquor, as distinct from the more general concept of needs in relation to licensed premises and the services provided thereon which is embodied in s. 47(a).** ... It seems to me that a public demand for liquor consists of a desire by the public or a significant section of it to purchase liquor or liquor of a certain type. If that demand is not sufficiently and reasonably met, there is a need for liquor.'

(Emphasis added.)

44. Similar to the provisions considered by King CJ, there is a clear distinction within the Act between the reference in s 5(1)(c) to the requirements of consumers '*for liquor and related services, with regard*' to the proper development of the relevant industries, as compared to the definition of 'local packaged liquor requirements' being 'requirements of consumers for packaged liquor' in the locality.
45. ***Austie Nominees*** considered the proper construction to be given to s 38(2b) of the *Liquor Licensing Act 1988* (WA) as it stood in 1999.
46. Relevantly, s 38(1) of the *Liquor Licensing Act 1988* provided that an applicant for the grant of a Category A licence was required to satisfy the licensing authority that, having regard to specified matters, 'the licence is necessary in order to provide for reasonable requirements of the public for liquor and related services or accommodation in that area.' In considering what the reasonable requirements of the public may be, s 38(2a)(b) allowed the licensing authority to consider whether the grant or removal of the licence would convenience the public or a section of the public. It was therefore clear that matters of convenience in accessing liquor was something that falls within the 'requirements of the public for liquor and related services' as that phrase appeared in s 38(1).
47. Conversely, s 38(2b) prevented the licensing authority from granting a liquor store licence 'unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by the licensed premises already existing in the area.'
48. Despite the phrase 'requirements of the public for liquor and related services' being framed in the same terms in ss 38(1) and 38(2b), Anderson J held that a narrower construction must be given to the phrase as it appeared in s 38(2b) in order to give effect to parliament's intent.<sup>10</sup> His Honour held<sup>11</sup>:

'Looking at the section as a whole, and having regard for the legislative history and the obvious legislative policy of special restriction in regard to liquor stores, I am of the opinion that subs (2b) is not concerned – in

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<sup>10</sup> ***Austie Nominees***

<sup>11</sup> ***Ibid***



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the way that subs (1) is – with the requirements of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like, but is concerned with the requirements of the public for liquor itself.

**I think that, on the proper construction of s 38, an applicant for a liquor store licence is required by subs (2b) to satisfy the licensing authority that the reasonable requirements of the public for liquor itself (or liquor of a particular type, such as bottled table wines) and related services cannot be provided for in the affected area by licensed premises already existing in the area; that is, cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public.'**

(Emphasis added.)

49. Similar to the approach taken by Anderson J, in order to fulfil the object of s 36B(4), which is to provide a limitation or restriction on the grant of liquor store licences, I consider that the narrow construction should be preferred. In reaching this conclusion, I am aware that the narrow construction was accepted by the Liquor Commission in a recent *ex tempore* decision<sup>12</sup>, where the Commission rejected the applicant's argument that 'local packaged liquor requirements' encompassed the concept of the convenience of one-stop shopping.
50. Accordingly, I cannot agree with the Applicant's assertion that *FOMO Emporium's* proposed packaged liquor *and related services* meets the definition of 'local packaged liquor requirements' in s 36B.
51. Alternatively, I consider that the Applicant's entire evidence for meeting the condition in s 36B(4), rests on its:
  - (a) second consumer survey, to which only 57 consumers responded positively;
  - (b) four letters of support;
  - (c) proposed product list of 78 specified products and other more traditional brands of packaged liquor; and
  - (d) assessment of the existing 28 packaged liquor premises in the locality.
52. To my mind, the large number of existing packaged liquor premises in the locality casts doubt over whether the Applicant's consumer evidence is objectively reasonable, particularly given that the Applicant's second consumer survey, which was undertaken solely for the purposes of overcoming the test in s 36B, only asked respondents one question, with a simple yes or no response.
53. As such, it is also worth noting that:
  - (a) in addition to the specialist liquor products, the second consumer survey also reinforced that the premises would also stock more traditional brands of packaged liquor; and

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<sup>12</sup> (L30/01/506: *HanGaWee Outlet*)

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- (b) because the second consumer survey did not canvass which of the 78 products respondents would be likely to purchase,

respondents could have simply been indicating a desire to purchase traditional brands of packaged liquor at the proposed store.

54. Further, the second consumer survey also did not ask respondents what their purchasing habits were, including whether they already purchased packaged liquor products from “local producers, hand-picked boutique international brands, natural wines, independent craft beer producers and quality spirits from specialist distilleries” or what packaged liquor premises they currently frequented in the locality.
55. On any view, I think that 57 positive responses represent only a very modest number of consumers, particularly when contrasted with the 7,650 people who live there<sup>13</sup>; the numbers of persons who resort there and to Tourism WA’s characterisation of the locality as:

‘...within walking distance of Fremantle Harbour, Fremantle Markets, the World Heritage listed Fremantle Prison and the Fremantle train station; all places of interest to visitors. The offering of quality dining and beverage services in a prominent location within the precinct will add to the unique vibrancy and liveliness of Fremantle, and enhance the tourism offering catering for different experiences and visitor expectations.’

56. Further, in terms of the letters of support, it is also necessary to consider whether the subjective views expressed in the letters are objectively reasonable in the context of the evidence, and in particular the existing liquor services in the locality. In this regard:

- (a) Kate Hulett:

- (i) makes only a generic criticism of ‘chain stores in Fremantle’ and does not explain why buying a unique range of specialist products is currently difficult for her, particularly given the wide variety of packaged liquor available in the locality; and
- (ii) provides no insight as to why those packaged liquor premises, some of which are independently operated, stock specialist brands and unique products, including only packaged liquor produced by them in the locality, cannot reasonably meet her needs for packaged liquor products,

as such there is nothing to indicate that Ms Hulett experiences substantial difficulty or inconvenience in obtaining her packaged liquor requirements. Additionally, her desire to support an independent outlet is a matter of shopping preference and therefore does not relate to the matters under s 36B(4) of the Act; and

- (b) the letters of support from Ben Donald, Leo Visser and Simone Pirovich, which are all very similar:

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<sup>13</sup> According to the Tourism WA website, which the Applicant accessed on 12 August 2019

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- (i) also only make generic criticisms of liquor stores in Fremantle as being 'national chains', but do not appear to consider the number or variety of other packaged liquor premises in the locality; and
  - (ii) provide no insight as to why the existing packaged liquor premises in the locality, cannot reasonably meet their needs for packaged liquor products.
- 57. None of the letters of support provide any insight as to why the existing packaged liquor outlets in the locality cannot reasonably meet the writers' requirements for packaged liquor, which is the critical issue under s 36B(4) and is particularly interesting given that of the 213 responses to the Applicant's first Consumer Survey:
  - (a) 50 (23.47%) confirmed that Fremantle's town centre has sufficient diversity in packaged liquor services;
  - (b) 71 (33.33%) confirmed that they were satisfied with the existing take-away liquor services in Fremantle and the surrounding area; and
  - (c) 71 (33.33%) also confirmed that their requirements for unique, independent, hand selected liquor products were currently being met by the existing packaged liquor outlets in and around Fremantle.
- 58. Further, there is no reference in the letters of support to, or specific criticism of, any of the existing packaged liquor outlets in the locality, such as *The Freo Doctor Liquor Store*, *Liquor Barons George Street East Fremantle*, *Freo Social* (which according to the Applicant, sells a 'specialist (house-brewed only) brand' of packaged liquor) or the various other small breweries and distilleries in the locality operating under tavern licences, which together offer a large range of packaged liquor products, including international wines, craft beer and spirits in the locality.
- 59. Accordingly, I find the letters of support from Kate Hulett, Ben Donald, Leo Visser and Simone Pirovich provide little assistance in determining the question under s 36B(4) and are more directed to the question of whether the grant of the application is in the public interest under s 38(2).
- 60. I turn now to the Applicant's analysis of the packaged liquor services provided by existing packaged liquor premises in the locality, which I consider is questionable on two fronts.
- 61. First, there is no evidence, apart from the briefest account (e.g. 'mainstream commercial brands') of the type of liquor sold by the existing packaged liquor premises. As such, it is impossible for me to ascertain whether those premises also stock their own unique and/or exclusive product lines. Additionally, it is also difficult for me to ascertain the extent of wine, beer and spirits that is currently sold as packaged liquor by the existing packaged liquor premises in the locality, although, given the Applicant's description of Fremantle as a well-known tourist destination and its reference to the following description of Fremantle by the Real Estate Institute of Western Australia, I suspect it is significant:

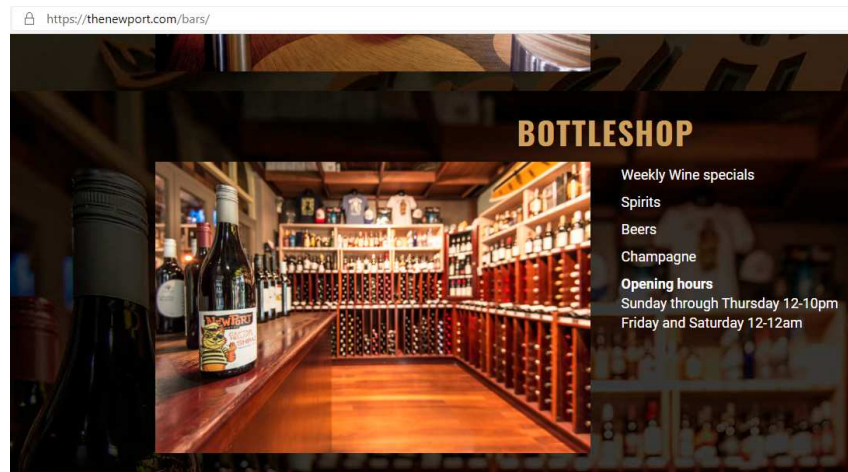
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'Fremantle is the port city of Western Australia and is characterised by its unique landscape, heritage architecture, cafes, restaurants, stores and markets. A popular destination for both residents and visitors alike, the suburb is home to more than 7,650 people and is a mixed-use area with its five square kilometres used for residential, commercial, institutional, maritime and industrial purposes.

...Busy, energetic and always alive, Fremantle is arguably the second busiest city sector of Western Australia. Enjoy alfresco dining on the cappuccino strip, which runs through a section of South Terrace, take a stroll along the Fishing Boat Harbour and stop in for a drink and a feed at Little Creatures Brewery. Pubs, clubs, shops and markets are all in abundance in Fremantle...'

62. Secondly, I consider that the Applicant's analysis of the 28 existing packaged liquor premises contains some anomalies, which limits its evidentiary value, as illustrated in the following three examples of packaged liquor premises, which the Applicant identified as not selling packaged liquor:

- (a) the *Newport Hotel*, at 2 South Terrace, Fremantle, which operates under a tavern licence, with a website that clearly shows it has a bottle-shop, which offers weekly wine specials, spirits, beers and champagne as packaged liquor (as shown below);



- (b) *Monk Craft Brewery Kitchen*, located at 33 South Terrace, Fremantle, which also operates under a tavern licence, with its licence conditioned to permit the sale of packaged liquor produced by the licensee at the premises; and
- (c) *Republic of Fremantle*, which has been conditionally granted a tavern licence for premises at 3 Pakenham Street, Fremantle, where:
- (i) the premises' website makes it clear that it will be selling packaged liquor in the form of gin and vodka; and
  - (ii) the conditionally granted licence makes it clear that the sale of packaged liquor will be restricted to liquor distilled within the building.

63. As a result of these irregularities, I find it difficult to afford substantial weight to the Applicant's analysis of the packaged liquor services currently provided in the locality.

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64. Further, in relation to the Applicant's proposed 78 specified products, I note that at 240m<sup>2</sup>, the premises would not be a small liquor store. Therefore, it seems likely to me that the majority of the Applicant's stock would not consist of the specified products, but rather be made up of the proposed 'comprehensive range of standard and mainstream products', by which the Applicant intends to ensure that consumers would be able to obtain all of their packaged liquor requirements at *FOMO Emporium*. *The Australian Concise Oxford Dictionary* defines the word 'comprehensive' as meaning 'complete; including all or nearly all elements, aspects, etc.', which suggests to me that the standard and mainstream range of liquor products would dominate the packaged liquor offering at the proposed premises.
65. Overall, and for the reasons provided, I do not consider that the Applicant has adduced sufficiently rigorous evidence that the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality, particularly given that the word 'reasonably' invokes a fairly low threshold, as outlined in paragraph 26 (above).
66. It is therefore not possible for me to undertake the task required under s 36B(4) due to the identified shortcomings with the Applicant's relevant evidence. For that reason, I find that the Applicant has failed to establish that the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.
67. The condition within s 36B(4) is mandatory. Having found that the Applicant failed to discharge its onus under s 36B(4), the application must be refused.
68. Consequently, it is not necessary for me to consider whether the Applicant had demonstrated that the grant of the application was in the public interest, in accordance with s 38(2) and I make no findings in this regard.



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