

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

**APPLICANT:** INVOGUE INVESTMENTS PTY LTD

**PREMISES:** FARMER JACKS CRAFT LIQUOR STORE

**PREMISES ADDRESS:** 707 NORTH BEACH ROAD GWELUP WA 6018

**APPLICATION ID:** A115034029

**NATURE OF MATTER:** APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

**DATE OF DETERMINATION:** 23 December 2020

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### **Background.**

1. On 11 September 2020, Invogue Investments Pty Limited (the applicant) lodged an application for the conditional grant of a liquor store licence in respect of premises situated 707 North Beach Road Gwelup and to be known as Farmer Jacks Craft Liquor Store.
2. The application is made pursuant ss 47, 62 and 68 of the *Liquor Control Act 1988* (the Act).
3. Pursuant to s 67 of the Act, the application was advertised in accordance with instructions issued by the Director of Liquor Licensing (the Director).
4. Three submissions in opposition to the application were received from Mr Ian Smelt; Mr Leslie Lee and Bruce and Jennifer Denham. In accordance with section 72A(2) these persons do not become a party to the proceedings.
5. Further, pursuant to s 69 of the Act, the Chief Health Officer (CHO) lodged a notice of intervention.
6. By letter dated 27 October 2020, a document exchange process was initiated between the remaining parties. Each party was afforded the opportunity to lodge any further evidence and submissions to be taken into consideration in the determination of the application.
7. As this is an administrative decision rather than referring to the entirety of the evidence before me, I will set out the relevant material facts. I have considered all the information submitted by the Applicant and have taken it into account. The application will be determined on the written submissions of the parties as permitted under sections 13 and 16 of the Act.

### **Brief overview of the application.**

8. The notice of application lodged by the applicant's agent was supported by a Public Interest Assessment (PIA) which explained that the proposed liquor store will occupy a portion of the existing Farmer Jacks Gwelup store (supermarket), inside the Primewest shopping centre North Beach Road, Gwelup.
9. The applicant's proposal is for a "craft" liquor store of 152 square metres. The proposed craft liquor store is targeted at those people who seek a wide, constantly changing selection of craft liquor. The proposed craft liquor selection features the following,
  - 995 craft beers (and 40 mainstream beers)
  - 43 ciders (and 16 mainstream ciders)
  - 60 craft spirits
  - 320 wines from small or independent producers (and 106 mainstream wines)

The PIA contained the following caveat.

*"Being located in a shopping centre, adjacent to a supermarket, the applicant feels it is important to carry SOME mainstream liquor products, but 80% of the product range can be classified as craft."*

*Attachment FJGW4 includes a draft product list of the applicant's proposed craft liquor stock range. It is an essential part of this application that this product selection is taken as a draft list. It is the nature of craft liquor other than products come and go with seasonality, popularity and for other reasons.*

*Whilst the applicant does not guarantee to stock all of these items all of the time, it will stock as many of them as are in demand locally, and therefore the list will be continually evolving. The concept is to be agile and nimble, and to carry small batch liquor products, especially from WA, according to the level of demand."*

10. The applicant's PIA indicated that the craft liquor store would also provide the following ancillary products and services.
  - Knowledgeable staff to recommend products based on personal preference.
  - Information sheets to help consumers decide on their craft liquor choice.
  - Food and liquor matching information.
  - Craft beer and wine tasting.
  - A range of cool drinks, water, and juice.
  - Ice, crisps, and nuts.

- Combined promotions with products in the store.
- Modern and well laid out premises.
- Trolley access from the supermarket.

**Intervention by Chief Health Officer.**

11. The Chief Health Officer (CHO) made submissions and representations on the following matters.

- supermarkets are frequented by a larger and broader proportion of the population than dedicated liquor outlets because of the daily “need” type products. Therefore, supermarkets selling liquor increase the potential reach of alcohol related harm in the community.
- there are vulnerable, at risk groups within the locality who may be adversely impacted by an additional packaged liquor outlet located within the Farmer Jacks supermarket.
- alcohol sales will be visible to all persons purchasing items at the Farmer Jacks express supermarket checkouts, given the adjacent location of the licensed checkout.
- it is intended that both alcohol and grocery items can be purchased from the licensed checkout in the same transaction.
- the proposed non-transparent barrier (freezer) separating the browse area of the liquor store from the supermarket will be outside the licensed area and could be removed at any time.

12. The CHO proposed the following trading conditions to reduce some of the potential risks of harm or ill-health.

- the entirety of the liquor display, checkout/sale area must be physically and visibly separated from the food/grocery display and sale area by solid non-see-through barricading and an entry/exit door or gate.
- the single licensed checkout is permitted to transact liquor sales only. No grocery sales are permitted at the licensed checkout.

13. It was submitted by the CHO that the application presents harm and ill-health concerns based on the impact the co-location of packaged liquor products and grocery items may have on levels of consumption and harm. The proposed conditions were recommended by the CHO to minimise risk to the community.

## Section 36B of the Act.

14. On 2 November 2019, section 36B(4) was proclaimed. In the Second Reading Speech on the introduction of the *Liquor Control Amendment Bill 2018* the Minister for Racing and Gaming stated that:

*“the McGowan government is concerned about the impact that a proliferation of large, packaged liquor outlets can have on the community. To address this issue, the act will be amended so that the licensing authority will not be able to hear or determine an application if the proposed premises is larger than a prescribed size and an existing packaged liquor outlet that also exceeds the prescribed size is located within a prescribed distance. In addition, 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.”* (Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018 p324-325)

15. This intent is reflected in the insertion of s36B into the Act. The term **local packaged liquor requirements** is defined in s36B(1) to mean “the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated.”

16. Section 36B(2) provides that the term **packaged liquor premises** means any application for the grant or removal of:

- (a) a hotel licence without restriction.
- (b) a tavern licence.
- (c) a liquor store licence; and
- (d) a special facility licence of a prescribed type.

17. S36B(4) applies to all packaged liquor outlets and provides that:

*“The licensing authority must not grant an application to which this section applies 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.”*

18. The provisions of s36B indicates a legislative intention that creates restraint on the grant of licences for packaged liquor premises. Since the insertion of s36B, applicants seeking the grant of a licence for packaged liquor premises must discharge the following two onuses under the Act.

- first, they must overcome the restrictions on the grant or removal of a licence imposed by s36B; and
- second, they must demonstrate the grant of the licence is in the public interest, as required by s38(2)

19. The provisions of s36B(4) requires an applicant to satisfy the licensing authority that local package liquor requirements cannot reasonably be met by existing packaged

liquor outlets in the locality. If the applicant fails, this test the application cannot be granted. Section 36B(4) is mandatory in its terms. The licensing authority must not grant an application to which the section applies, unless satisfied that the existing packaged liquor outlets cannot reasonably satisfy the local packaged liquor requirements. Section 36B(4) places the evidentiary burden on the applicant.

20. Consequently, there are three questions that the applicant must consider regarding section 36B(4):

- What are the local packaged liquor requirements?
- What packaged liquor services are currently provided by the existing premises in the locality?
- Can the existing packaged liquor premises in the locality reasonably meet those local packaged liquor requirements?

21. As a result, it is necessary to examine the applicant's evidence to establish whether it had discharged its' onus under s36B(4).

**The applicant's evidence in regard to section 36B(4).**

22. The applicant correctly identifies seven packaged liquor outlets in the locality. These outlets are listed in the table below.

<u>Map no.</u>	<u>Licence Ref</u>	<u>Licence Type</u>	<u>Premises Name</u>	<u>Address</u>
1	6030012922	Liquor Store	Liquorland Gwelup	Gwelup Shopping centre Cnr north beach road & Wishard Street Gwelup WA 6018
2	6030120742	Liquor Store	Andy's Meat and Liquor	Units 5 & 6, 51 Cedric Street, Stirling WA 6021
3	6020003962	Liquor Tavern	Odin Tavern	51 Erindale Road, Balcatta WA 6021
4	6030004143	Liquor Store	BWS Karrinyup	Karrinyup shopping centre 200 Karrinyup road Karrinyup WA 6018
5	6020129578	Liquor Tavern	The Saint George Hotel - BWS	2 Morris Road, Innaloo WA 6018
6	603210957917	Liquor Store	Innaloo Specialty Liquor	Shop 7, Morris Place Shopping Centre 27 Morris place Innaloo WA 6018
7	6030121104	Liquor Store	BWS Beer Wine and Spirits	Lot 1 Cnr Cedric St and Sanderling St STIRLING WA 6021

23. It should be noted that the Liquorland Gwelup store is located in the same shopping centre as the proposed liquor store and is approximately 20 metres from the proposed store.
24. The applicant predicated its' application on the "offering of liquor of a type, and a licensed service of a type, not available at Liquorland, or any other packaged liquor outlets in the locality". The basis of the different liquor offering is the proposed large range of "craft" beer, wines and spirits to be offered by the applicant.
25. The table below summarises the different craft liquor offerings available at liquor stores in the locality.

<u>Outlet</u>	<u>Craft Beer</u>	<u>Craft Spirits</u>	<u>Craft Wine</u>	<u>Craft Cider</u>
<b>Farmer Jacks proposed outlet</b>	995	60	* 320	43
<b>Liquorland Gwelup</b>	36	-	10	4
<b>Andy's Meat &amp; Liquor</b>	-	-	-	-
<b>Odin Tavern</b>	4	-	-	2
<b>BWS Karrinyup</b>	33	22	35	9
<b>The Saint George Hotel - BWS</b>	30	4	-	7
<b>Innaloo Specialty Liquor - Cellarbrations</b>	50	15	10	8
<b>Stirling – BWS Beer Wine &amp; Spirits</b>	30	-	-	7
<b><u>Total all existing outlets</u></b>	183	41	55	37

26. The applicant submitted that the collective range of craft liquor products at all the other outlets is not comparable to what is proposed for Farmer Jacks Craft liquor store, and for craft liquor devotees the range and variety is paramount. The applicant stated:

*"Even if you combine all the varieties stocked at all the existing packaged liquor outlets in the locality, and assumed they were all different products, with no duplicates, the applicant's proposed liquor store will have a far superior product range. 995 craft beers versus 183; 60 craft spirits versus 41; 320 small independent wineries versus 55 and 43 craft ciders versus 37."*

27. The applicant lodged a market survey of customers of the Primewest Shopping Centre in Gwelup where the proposed liquor store will be located conducted by Perth Market research. It was submitted that the research objectives of the market survey were to

gather a high amount of supporting evidence for the proposed craft liquor store and validating the consumer need within the locality for better access to a more comprehensive range of craft liquor. Forty-nine respondents provided information for the survey. Amongst other questions the applicant specifically asked:

- a) Are you currently a customer of the Farmer Jacks Gwelup store?
  - b) The applicant proposes to offer up to 1 000 craft beers; over 100 craft spirits; over 300 wines from small batch producers and nearly 50 craft ciders. Would such a range of craft liquor be attractive to you, and would you be likely to be a customer of this new liquor store?
  - c) What do you say about the packaged take away liquor services currently on offer in Gwelup?
  - d) Are you a fan of craft liquor, whether beer, cider, spirit or wine?
28. The applicant submits that its research has shown that there is a significant level of demand for the extensive range of craft liquor which it proposes to offer. Further, the research indicates that there is a high level of consumer demand for craft liquor products with some consumers travelling as far as Belmont, Joondalup and the Swan Valley to satisfy their requirements for craft liquor.
29. Further, the applicant submits that as none of the existing packaged liquor outlets in the locality carries anywhere near the range of craft liquor products which the applicant proposes to stock, anyone seeking the range and constantly evolving product mix which the applicant will offer has to leave the locality to obtain it.

#### **Determination.**

30. With regards to the market survey submitted by the applicant I must say at the outset that the survey sample size was very small, and I question whether it could be considered truly indicative of the opinions of the larger population in the locality. That said, the survey revealed that 43 of the 49 respondents were already customers of the Farmer Jacks Gwelup store. A majority of those surveyed (35 persons) indicated that they would likely become a customer of a liquor store with such a large range of craft liquor products. However, 26 respondents considered the packaged take-away liquor services currently on offer in Gwelup to be satisfactory. A further 6 respondents stated that they did not use packaged liquor services in the locality and 12 respondents did not answer the question. Only 5 respondents stated that the local packaged liquor service was limited.
31. In my view the applicant's analysis of the local packaged liquor requirements and whether they were being met by existing package liquor outlets in the locality was extremely limited, in that it concentrated on the availability of craft liquor rather than the overall availability of, and consumer requirements for, packaged liquor in the locality in general. As such, I was unable to draw any conclusion that would support the concept that the local requirements for packaged liquor were not being met by the existing

packaged liquor outlets in the locality. There is a lack of probative and cogent evidence to support such a position.

32. Further, the applicant, in its PIA, stated that the proposed product list was a draft list, and that the applicant would not guarantee to stock all the products on the list. The ultimate product list will depend on what has proved popular in the locality. The applicant also indicated that it would carry some mainstream liquor products. The potential exists that the ultimate product stock list could consist only of mainstream liquor products as this is what may prove popular in the locality. There is no information in the analysis provided by the applicant to dispute that this could become the case.
33. Section 36B(4) places the evidentiary burden on the applicant. When I considered the applicant's evidence, I was not satisfied that the applicant had provided sufficient evidence to show that the local packaged liquor requirements could not reasonably be met by existing packaged liquor premises in the locality in which the proposed liquor store is to be situated.
34. As a result, I cannot be satisfied as to how much and what types of liquor are offered for sale as packaged liquor in the locality. I am of the view that the applicant provided insufficient evidence to facilitate a proper assessment of the extent of the current packaged liquor services offered by existing packaged liquor outlets in the locality.
35. In my view the applicant's submissions in respect of the provisions of section 36B(4) appeared to be directed to establishing consumer shopping preferences for craft liquor, which is more correctly related to the provisions of section 38(2), rather than the issue of packaged liquor itself under section 36B(4).
36. The test in s 36B(4) is mandatory. Having concluded that the applicant failed to discharge its onus under s 36B(4), the application must be refused. It is therefore not necessary for me to consider whether the applicant had demonstrated that the grant of the application was in the public interest as required under s 38(2). As such, I make no findings in this regard. The application is refused.
37. This matter has been determined by me under delegation pursuant to section 15 of the Act.
38. If the applicant is dissatisfied with the outcome, it may seek a review of the decision under section 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this decision.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING