

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Liquorland (Australia) Pty Ltd
(represented by Mr Steven Standing as counsel and Ms Triska Di Cicco of Herbert Smith Freehills)

Intervener: Director of Liquor Licensing
(represented by Mr John Carroll of State Solicitor's Office)

Commission: Ms Emma Power (Deputy Chairman)
Ms Elanor Rowe (Member)
Ms Kirsty Stynes (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 Karrinyup
Karrinyup Shopping Centre
200 Karrinyup Rd, Karrinyup, Western Australia

Date of Hearing : 17 December 2020

Date of Determination: 20 April 2021

Determination The Decision of the Delegate of the Director is affirmed and the Application for a Liquor Licence is refused.

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd (1991) 4 WAR 1*
- *Hancock v Executive Director of Public Health [2008]*
- *WASC 224 Liquorland (Australia) Pty Ltd v Director of Liquor Licensing LC 07/2017*
- *Eclipse Resources Pty Ltd v Minister for Environment (No 2) [2017] WASCA 90*
- *Woolworths Ltd v Director of Liquor Licensing [2013] WA Liquorland Gateways LC 07/2017*
- *Liquorland Midland LC 35/2018*
- *Woolworths v Director of Liquor Licensing LC 34/2011*
- *Liquorland Midland LC/35/2018*
- *Mohammadi v Bethune [2018] WASCA 98*
- *Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28, (1998) 194 CLR 355*
- *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd*
- *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405*

Background

- 1 This matter concerns an application ("**Application**") by Liquorland (Australia) Pty Ltd t/as Liquorland ("**the Applicant**") for the grant of a liquor store licence ("**LSL**") pursuant to section 47 of the Liquor Control Act 1988 ("**the Act**") for premises located at the Karrinyup Shopping Centre ("**the Centre**") at 200 Karrinyup Road, Karrinyup.
- 2 The Application is for a second packaged liquor store ("**Store**") at the Centre, with a proposed floor area of 150sqm. The Store will carry Liquorland's usual range of beers, wine and spirits and ancillary products such as low alcohol soft drinks, ice, chips, nuts, chocolates and cigarettes.
- 3 On 20 May 2020, the Applicant lodged the Application for a LSL for the Store.
- 4 The Applicant complied with the statutory requirements prescribed by the Act and lodged documentation in support of the Application including Public Interest Assessment ("**PIA**") submissions (undated). The Application was advertised in accordance with instructions issued by the licensing authority.
- 5 The Applicant proposed that the Store's LSL operational hours would be mostly aligned with the adjacent Coles supermarket, which will trade as follows:
 - a 08.00 am to 09.00 pm on Monday to Friday;
 - b 08.00 am to 05.00 pm on Saturday; and
 - c 11.00 am to 05.00 pm on Sunday.
- 6 In support of the Application, the Applicant submitted (among other things presented for consideration) that:
 - a the Centre is currently being redeveloped and expanded;
 - b it is in the public interest for the Application to be granted; and
 - c the existing packaged liquor outlets in the locality cannot reasonably meet local packaged liquor requirements.
- 7 On 26 August 2020, the Application for the LSL was refused by the Director of Liquor Licensing ("**the Director**") and a notice of decision ("**Decision**") was published. In summary, the Director found that the Applicant failed to discharge its onus under section 36B(4) of the Act in relation to whether existing packaged liquor premises already met the local packaged liquor requirements. The Director did not provide any commentary as to whether the Applicant had demonstrated that the grant of the Application was in the public interest as required under section 38(2) of the Act.

- 8 Although written reasons for that Decision were requested, the same had not been provided at the time of the hearing.
- 9 On 8 October 2020, the Applicant applied for a review of the decision of the Delegate pursuant to section 25 of the Act ("**Review**"), with such decision to be made by the Liquor Commission of Western Australia (**the "Commission"**) by way of hearing.
- 10 The Director of Liquor Licensing (**the "Intervener"**) intervened in the proceedings to make submissions as to the issues that arose under 36B(4) of the Act.
- 11 The Commission heard this matter on 17 December 2020.

The Applicant's submissions

The Review

- 12 On 8 October 2020, the Applicant applied for a Review of the Decision. The Applicant submitted that 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 major shopping centres. The Applicant also put forward the following grounds for review.

The grant of the Application would be in the public interest (section 38(2))

- a The Applicant has tendered independent, objective and representative survey evidence ("**the DAA Survey**") from Data Analysis Australia ("**Consumer Evidence**"), which comprises logical and probative evidence of consumer requirements that would be catered for by the proposed Store.
- b A significant percentage of survey respondents supported the proposed Store and would use it.
- c The Consumer Evidence, as well as evidence from experts and the Applicant, is that the proposed Store would satisfy various consumer requirements including, one stop shopping convenience and increased competition.
- d The Consumer Evidence takes in to account the fact that there is an existing Beer Wine & Spirits packaged liquor outlet ("**BWS**") at the Centre. A significant percentage of respondents agreed or strongly agreed that it would be beneficial to have the Store in the Centre, even with the BWS nearby, and that good competition with the BWS store to improve prices and service would be one such benefit.
- e The evidence establishes that the above consumer requirements are consistent with, and reflect, contemporary consumer standards, expectations and shopping habits.
- f The proposed Store would offer a comparison-shopping opportunity for liquor at the Centre that would be consistent with the multiple comparison-shopping opportunities

that will be available to consumers at the Centre, in relation to other retail goods such as groceries and clothing.

There is no public interest evidence against the grant of the application

- g 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 evidence satisfies the requirement under s36B(4) that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality

- j The existing packaged liquor premises in the 'locality' (which for the purposes of this Application comprises the Centre, alternatively the 2km radius defined under the Licensing Authority's Public Interest Assessment Policy) cannot 'reasonably' meet those local packaged liquor requirements because:
 - i the evidence establishes that the local packaged liquor requirements are consistent with, and reflect, contemporary consumer standards, expectations and shopping habits;
 - ii the BWS store located at the Centre cannot meet the requirements of consumers at the Centre to be able to purchase their packaged liquor in a competitive setting and with the benefits associated with competition, because BWS is currently the only packaged liquor outlet at the Centre;
 - iii the BWS store located at the Centre cannot meet the requirements of consumers for efficient one stop shopping because it has difficulty meeting demand at peak times (even before the current expansion of the Centre is complete); and
 - iv the four other packaged liquor outlets within a 2km radius cannot meet the requirements of consumers for efficient one stop shopping and competition in the sale of packaged liquor at the Centre, because they are not located at the Centre (they are located on the boundaries of the 2km radius).

Applicant's further submissions

- 13 The Applicant's further submissions at the hearing on 17 December 2020 were in accordance with:
- a the '*Grounds of Review*' (dated 8 October 2020);
 - b the '*Applicant's Submissions*' (dated 3 December 2020); and
 - c the '*Applicant's Submissions in Reply*' (dated 10 December 2020).

Background to Application

- 14 The Centre is very large and is currently being extended from a net lettable area of 53,000sqm to 101,273sqm. Post-expansion, there will be 290 retail outlets in the Centre, including a Coles supermarket, a Woolworths supermarket (and adjoining BWS liquor store), an Aldi supermarket, and large retailers including Myer, David Jones and Big W. When the current \$800 million expansion is complete, it will be amongst the 20 largest centres in Australia.
- 15 The Application is for a relatively small, second packaged liquor outlet at the Centre, with a floor area of 150sqm. The Store would be located adjacent to the Coles supermarket at the eastern end of the Centre and would form part of a new fresh food precinct. It would be located approximately 80 metres from the BWS store (which is also located in the fresh food precinct). If the LSL is granted, packaged liquor outlets would represent only 0.34% of the net lettable area and less than 1% of outlets.
- 16 The Applicant submitted that it would be in the public interest to grant the Application because there is persuasive, uncontradicted evidence that the proposed Store would satisfy consumer requirements for convenience and competition in packaged liquor sales and would (consistent with planning objectives and community expectations for large shopping centres) enhance the amenity of the locality.
- 17 Nevertheless, the Applicant submitted that the Application turns on the proper construction of s36B(4), under which the Director found that the Applicant had not discharged its onus. However, the Applicant submitted that it has satisfied the threshold test contained within section 36B of the Act and that the evidence "*amply*" satisfies the requirement under that section 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.
- 18 This is because, having regard to contemporary standards:
- a there is a local packaged liquor requirement to shop for liquor at the Centre with the efficiencies and other benefits associated with close competition which the existing liquor store at the Centre self-evidently cannot, by itself, satisfy;

- b the requirements of local packaged liquor consumers for one stop shopping and competition in the sale of liquor at the Centre cannot be met by other packaged liquor outlets in the locality, because those outlets are not located at the Centre;
- c the existing liquor store at the Centre has difficulty meeting demand at peak times, even before the current expansion of the Centre is complete.

Proper construction of s36B(4)

- 19 Section 36B(4) requires a consideration of the following issues:
- a what are the local packaged liquor requirements?
 - b what packaged liquor services are currently provided by the existing premises in the locality? and
 - c can the existing packaged liquor premises in the locality reasonably meet those local packaged liquor requirements.
- 20 The proper construction of s36B(4) involves a separate and additional test for applicants for liquor stores, in that:
- a previously, applicants only had to establish that the grant of the application would be in the public interest, and this could be established on the subjective evidence of consumer requirements, regardless of the existence of nearby outlets;
 - b however, s36B(4) now involves an expressly objective test for applicants; they have to show that local packaged liquor outlets cannot reasonably meet local packaged liquor requirements.
- 21 The objective exercise of determining whether local packaged liquor requirements “*cannot reasonably*” be met by existing outlets cannot be conducted in an evidential vacuum and must be done in a sensible, moderate or rational manner. The assessment will involve a value judgment to be made in accordance with the evidence led in each case, and the Licensing Authority must have regard to evidence of “*contemporary standards, expectations and shopping habits*” when making that objective assessment.
- 22 In this case, the Director has erred by treating matters of convenience and other consumer preferences and expectations as matters which are only relevant under the public interest test but not also under s36B(4). However, such matters must necessarily be considered when:
- a identifying what the local packaged liquor requirements actually are;
 - b assessing whether those requirements cannot be met by existing outlets in a way that is reasonable.

The “locality”

- 23 “*Locality*” is not a defined term. The Licensing Authority’s Public Interest Assessment Policy is to the effect that the Authority will (for the purpose of public interest factors in s38) typically regard the locality for inner metropolitan suburbs such as Karrinyup as being within a radius of 2km. However, the locality assessed by the Licensing Authority for the purposes of s38 is not necessarily the same as the locality for the purposes of s36B(4).
- 24 For this Application, having regard to the scale of the Centre (with more than 6.6 million customer visits per year) and its specific function as a large, standalone activity Centre promoting efficient, competitive retail activities and access to goods and services, the locality should (at least for the purposes of s36B(4)) be regarded as the Centre. However, the Application satisfies the requirements of s36B(4) regardless of how the locality is defined.

Local packaged liquor requirements

- 25 The Consumer Evidence established that there is a local packaged liquor requirement to be able to purchase liquor at the Centre in conjunction with other purchases and with the various benefits of close competition.
- 26 There is compelling evidence of local packaged liquor requirements on the part of consumers for:
- a additional one-stop shopping convenience at the Centre;
 - b the benefits of efficient competition including comparison shopping (both as regards price and range) with the existing BWS store and consumer choice at the one location i.e. the Centre.
- 27 The Consumer Evidence is consistent with the views of policy makers and industry participants as well as the Applicant’s State Manager. Local packaged liquor requirements for one stop shopping convenience and efficient competition at the Centre are confirmed.
- 28 However, it is apparent that the Intervener considers that “*requirements*” should be given a different, more limited construction than under s5(1)(c); accordingly, while matters of convenience, one stop shopping and shopping preferences are matters for consideration in assessing consumer requirements under s5(1)(c) and 38(2) in relation to the public interest, they are not relevant to “*requirements*” in s36B(4). For this reason, the Intervener has fallen into error.

Packaged liquor services currently provided by existing premises in the locality

- 29 The only packaged liquor outlet at the Centre is the BWS store, which was the most used liquor store reported in the survey. The BWS store is crowded at peak times and struggles

to cope, and that is even before the expansion of the Centre takes effect. It is unsurprising that BWS would be crowded at times given that it is a convenience style packaged liquor outlet in a large shopping centre. This is also reflected by the responses from the Consumer Evidence. It should be inferred that the current extensions to the Centre (which will double the net lettable area) will put the BWS under more pressure post expansion.

30 Apart from the BWS at the Centre, there are four other packaged liquor outlets in the wider 2km Locality. Two of those liquor stores are co-located with supermarkets within the neighbourhood centres, one is a drive-through outlet and the remaining store is a speciality liquor store. Those stores are dispersed and located on the periphery of the 2km Locality some distance away from the Centre and its immediate surrounds, with the closest being 1.8km away.

31 None of the packaged liquor outlets are located at the Centre and are for that reason not physically in a position that would enable them to meet the requirements of the public for additional packaged liquor at the Centre.

Whether the local packaged liquor requirements can be reasonably met by the existing packaged liquor requirements

32 There is direct evidence of the expectation for one stop shopping at the Centre.

33 The evidence establishes a contemporary expectation and requirement by consumers to be able to purchase liquor from competitive, co-located packaged liquor outlets at large shopping centres such as the Centre and that the public will have access to the benefits that flow from the co-location of competing liquor outlets at the one shopping Centre. Those benefits include:

- a. facilitation of comparison shopping (both for price and range);
- b. reduction of unnecessary consumer trips; and
- c. competitive pressure, which leads to benefits at the local level in matters such as service standards, quality of premises and range.

34 The evidence of stakeholder feedback (including from BWS staff and Centre management) is that the BWS store is crowded and struggles to cope at peak times. This evidence is highly significant because it relates to the Centre in its pre-development format. There is an inescapable inference that, when the Centre nearly doubles in size, many more people will visit the Centre, and pressure on BWS will increase.

35 The anticipated increase in visitors to the Centre post-expansion, particularly to the fresh food precinct and new supermarkets, suggests that the BWS store will be put under even more pressure.

36 The only relevant existing packaged liquor outlet (BWS) does not now and (even more so post-expansion) will not reasonably meet packaged liquor requirements at the Centre.

Conclusion

37 The Intervener has taken the wrong approach to statutory construction, especially in light of the key principles as set out by the President of the WA Court of Appeal recently¹ including that the statutory text is the surest guide to Parliament's intention, and that assumptions should not be made about the desired or desirable reach or operation of the relevant provisions. Undue reliance is placed on identifying a "*mischief*" by the Intervener which has led to a construction which is unnatural and inconsistent.

38 The Intervener is construing s36B(4) in reverse – by only referring to the statutory text in support of, and after, identifying his "*narrow*" construction. It is apparent that the Intervener's construction is driven by his view of "*proliferation*". Moreover, there is no foundation for the assertion that the Applicant's construction of s36B(4) would "*do little to prevent proliferation*".

39 The Applicant does not dispute that s36B(4) was introduced as an additional restraint on the grant of licences for packaged liquor outlets. However, the Intervener's approach is unduly restrictive and involves matters that are not necessary to understand the ordinary meaning and operation of s36B(4). It ignores the obvious, dominant feature of 36B(4), namely that it contains an objective test for the grant of packaged liquor outlets.

40 The Intervener's approach would mean that evidence of consumer requirements for matters such as convenience, greater product choice and the efficiencies and other benefits of competition in relation to the sale of packaged liquor (including the opportunity for comparative shopping) could not be relied upon for the purposes of s36B(4). Nor could evidence of contemporary standards and expectations in relation to such requirements.

41 On the Intervener's approach, it is not clear what evidence could be relied upon by the licensing authority to assist in making its value judgement in this case as to whether existing packaged liquor outlets can reasonably meet the packaged liquor requirements of consumers who go to what will be one of Australia's largest shopping centres.

42 The new and additional task under s36B(4) is to consider, objectively whether the subjective consumer requirements can reasonably be met by existing premises. Notably, s36B(4) speaks of local packaged liquor "*requirements*" in the plural. The Intervener's construction ignores the multi-faceted nature of the word "*requirements*".

¹ Australian Leisure and Hospitality Group v Commissioner of Police [2020] WASCA 157 at [151] to [155]

43 The short and simple point is that the scope of s36B(4) is made perfectly clear by its text; whether or not local packaged liquor requirements cannot “reasonably” be met by existing packaged liquor requirements introduces an expressly objective test not found in any other provision of the Act.

The Intervener's submissions

44 The Intervener’s submissions at the hearing on 17 December 2020 were in accordance with:

- a the ‘*Primary Submissions of the Intervener*’ (dated 3 December 2020); and
- b the ‘*Intervener’s Submissions in Reply*’ (dated 11 December 2020).

45 The Intervener intervened in the proceedings to make submissions as to the issues that arose under s36B(4) of the Act. The Intervener did not address the issue as to whether, if the Commission found that the Applicant had discharged its onus under s36B(4), the grant of the Application would be in the public interest.

46 The Intervener submitted that:

- a the Applicant’s contended interpretation of s36B(4) is incorrect; and
- b the Applicant had not satisfied the requirements of s36B(4) and had thereby failed to discharge its onus under that section.

Proper approach to s36B(4)

47 The Intervener submitted that the language which has been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision and in particular, the mischief it is seeking to remedy.

48 S36B(4) was inserted by s18 of the *Liquor Control Amendment Act 2018 (WA)* (Amendment Act). The explanatory Memorandum for the initiating Liquor Control Amendment 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.”

49 In the Second Reading speech, the Minister for Racing and Gaming stated:

“... 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.”

- 50 It is clear that the mischief s36B(4) is to address is:
- a the proliferation of small and medium sized liquor outlets; and
 - b the power of the licensing authority to manage proliferation of liquor within a locality.
- 51 The following propositions are uncontroversial as arising from the plain language of s36B:
- a S36B applies to an application for the grant of, amongst other things, a liquor store licence.
 - b The use of the words “*must not*” in s36B(4) indicates that the provision is mandatory – such that it provides a mandatory prohibition on granting the licence the subject of the application unless the condition in s36B(4) is met.
 - c The condition within s36B(4) is that the licensing authority be satisfied of a certain state of affairs – in particular that “*local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in*” the relevant locality.
 - d The evidential and persuasive onus to satisfy the licensing authority rests upon the Applicant for the licence.
- 52 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 packed liquor premises in the locality.
- 53 Once the licensing authority has made findings as to those matters, the licensing authority is required to make a value judgement as to whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises.

Local packaged liquor requirements

- 54 With regard to “*requirements of consumers for packaged liquor in the locality*”, the Intervener submitted that a narrow construction as referring to requirements for packaged liquor itself should be applied (for example, requirements for liquor of a particular type, such as bottled table wine), rather than a broad construction encompassing such requirements of consumers as to matters of taste, convenience, shopping habits, shopper preferences and the like.
- 55 The narrow construction is to be preferred as it gives effect to s36B(4) and addresses the mischief it was designed to overcome. In summary, the narrow construction:
- a gives purpose to s36B;
 - b supports the objects of the Act;

- c is consistent with the balance of s36B;
- d is consistent with analogous provisions; and
- e has been accepted by the Liquor Commission.

Packaged liquor currently provided by existing liquor premises in the locality

- 56 The Applicant identified five liquor stores that sell packaged liquor within a 2km radius of the proposed Store, being:
- a BWS Karrinyup – distance 80m;
 - b Scarborough Cellars – distance 1.85km;
 - c Liquorland Gwelup – distance 1.90km;
 - d BWS The Saint Drive – distance 2km; and
 - e Innaloo Specialty Liquor trading as Cellarbrations Morris Place – distance 2km.

Whether the local packaged liquor requirements can be reasonably met by the existing packaged liquor requirements

- 57 The Intervener made submissions that:
- a The Applicant conducted two surveys as part of the Consumer Evidence, a door-to-door survey and an intercept survey, asking various questions about consumer behaviours and desires. However, no evidence was led by the Applicant or analysis was directed towards, why the local packaged liquor requirements could not be reasonably met by the existing packaged liquor premises within the locality.
 - b For example, no evidence was produced by the respondents to the surveys as to whether they were able to obtain packaged liquor, in accordance with their requirements, from one of the existing premises within the locality, and if not, why not. The questions asked of the respondents in the Survey simply did not address the issue.
 - c On the Applicant's own evidence, the proposed premises "*functions in the same manner*" as that of BWS which already exists within the Centre. There is no evidence that the proposed store will offer anything new or different to the BWS (let alone if any such new or different offering would serve a requirement for packaged liquor within the proper construction of s36B(4) that is not already being met within the locality).
 - d Despite the above, the Applicant submitted that existing packaged liquor premises cannot reasonably meet the local packaged liquor requirements because there is a

contemporary consumer requirement for the co-location of liquor outlets because such co-location drives competition and reduces prices and increases range.

- e However, if such an argument were successful, s36B(4) would have no work to do because the introduction of more liquor outlets within a locality (which sell substantially the same product range) would lead to increased competition and potentially drive down prices. Accordingly, any new liquor outlet co-located with another outlet would necessarily meet the s36B(4) hurdle.
- f Such a result “*offends the plain intent of the provision*”, as expressed through the text within its context in the Act. A requirement for “*competition*” or the “*efficiencies of competition*” is plainly not a concept that falls within the meaning of “*local packaged liquor requirements*” upon proper construction of s36B(4); and nor is the “*convenience*” of one stop shopping.

58 The Intervener also addressed the Applicant’s arguments as to the current availability of liquor from the BWS as follows:

- a The Applicant’s assertion that “*there is stakeholder feedback...that the BWS store is crowded at peak times*” and that “*this is confirmed by survey respondents saying they would expect shorter queues if there were two liquor stores at the Centre*” and the sparse evidence underlying the same, falls far short of evidence from which the Commission could consider whether established inconvenience (due to unreasonable waiting or queuing times) means that local packaged liquor requirements could not reasonably be met by the existing packaged liquor premises within the locality.
- b The Intervener asserted that *if* the Applicant’s evidence could establish that the existing BWS store and other existing stores in the locality could not satisfy peak demand for liquor, that might, in some cases, allow the Licensing Authority to find that local packaged liquor requirements cannot reasonably be met by those existing stores. However, the Applicant’s evidence in this case goes nowhere near establishing such fact for at least four reasons:
 - i The evidence is that the BWS is crowded or busy at peak times. That is not evidence of difficulty or inability in meeting peak demand;
 - ii Even if there was evidence that the BWS had difficulty meeting peak demand, the Applicant’s evidence in no way seeks to establish the extent to which it is said that the BWS cannot meet peak demand. In those circumstances, the Licensing Authority is unable to make findings as to whether the requirement for liquor “cannot reasonably be met.”

- iii The Applicant’s evidence does not consider the extent to which other packaged liquor outlets in the locality in any event can meet the peak demand. In addition, the evidence is only aimed at requirements in the Centre as opposed to the locality (which is a much smaller geographical area than the locality);
- iv The only other evidence directed towards the extent to which the current BWS store is “*busy*” is a leading question (and answer) in the survey which asked participants: “*you would expect shorter queues if there are two liquor stores*” – to which a significant number of respondents said yes. The difficulty with the data is:
 - A. it is self-evident that a second store selling the same or similar products in close vicinity to the first will reduce queue times – if indeed queues currently exist – and as such, the answer to the question tells the reader nothing;
 - B. there was no question to ask what the queue lengths currently are, nor whether they caused any concern or difficulty to the consumer (and as such, no inference can be drawn from the length of queuing that the existing store cannot reasonably meet existing requirements); and
 - C. given the self-evident answer, and the nature of the manner in which the question was being asked, it is not possible to infer from the answer that those who answered “yes” consider current queue times to be unreasonable or to place an unreasonable limitation upon their ability to meet their requirements for liquor.

Legal and Statutory Framework

- 59 The Commission is not required to find error on the part of the Director, but to undertake a full review and make a determination on the basis of the same materials as before the Director when the decision was made *Hancock v Executive Director of Public Health [2008] WASC 224, [53]*.
- 60 The Commission is required to make its determination on the balance of probabilities (s16 (1)(b)(ii) of the Act).
- 61 On review under section 25 of the Act, the Commission may:
- a affirm, vary or quash the decision subject to the review; and
 - b make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - c give directions:
 - i as to any questions of law, reviewed; or

- ii to the Director, to which effect shall be given; and
 - d make any incidental or ancillary order.
- 62 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 63 Section 16 of the 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)].

Public Interest Test

- 66 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).
- 67 When determining whether an Application is in the public interest the Commission **must** take into account:
- a the primary objects of the 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 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.
- 68 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)).
- 69 No 'other ... matter' has been prescribed pursuant to s 38(4)(d).

Section 36B(4) Test

- 70 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.
- 71 The Government sought to insert section 36B in the Act to stop the further proliferation of packaged liquor outlets across the state [*Western Australia, Parliamentary Debates, Legislative Assembly, 20 February 2018, 325 (Mr Paul Papalia, Minister for Racing and Gaming)*].
- 72 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.
- 73 The word “reasonably” invokes a fairly low threshold. In *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd* (1991) 4 WAR 1, Malcolm CJ noted that:
- “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: *Shorter Oxford Dictionary at 1667*”
- 74 The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority.

Determination

- 75 The Commission has undertaken a full review and now determines the application based on the same materials as before the Delegate when the decision was made. This is the correct and established procedure as referred to in *Hancock v Executive Director of Public Health [2008] WASC 224*.
- 76 This review has arisen primarily due to the relatively new section 36 of the Act and, in particular, section 36(4).
- 77 In the second reading speech of the *Liquor Control Amendment Act 2018* which introduced the relevant section, it was clear that the purpose of the section was twofold. Firstly, to prevent large package liquor stores from being established in close proximity to existing large packaged liquor outlets and secondly, to prevent the further proliferation of small and medium liquor outlets across the State where liquor requirements are already met in the relevant locality.
- 78 Section 36B(3) is not applicable in this case, however, section 36(4) is mandatory and must be satisfied.
- 79 The Commission considers that for the purposes of meeting the requirements of section 36B(4) of the Act the Commission must be satisfied that:
- a there are “local packaged liquor requirements” – defined in section 36(4)(1) as being the requirements of consumers for packaged liquor in the locality the premises are to be situated; and

- b such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the locality.

Local Packaged Liquor Requirements

80 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.

81 This requires consideration of:

- a the correct statutory interpretation of “requirements”; and
- b what is the relevant “locality” to be considered.

Defining “Requirements”

82 Although there is substantial case law in respect to what “requirements” may mean, such case law contemplates the statutory interpretation of that term in the context of:

- a one of the primary objects of the Act set out in section 5(1)(c) “(c) *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*”. It is further established that section 5(1)(c) of the Act does not impose a positive onus on an applicant to establish that there is a need or requirement for the granting of an application (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing LC 07/2017 [22]*); and
- b the now superseded section 38(2b) which referred to “*the reasonable requirements of the public for liquor*”. Section 38(2b) directly related to what was commonly called the “needs” test. However, since 2007 the “public interest test” as set out in section 38 of the Act replaced the “needs test”.

83 Although the same have some similarities, the Commission considers that section 36B is not simply a restatement or re-adoption of the “needs” test. To simply readopt this test would result in irreconcilable inconsistencies in the legislation in respect to the “public interest test” in section 38(2).

84 As such, the same constitutes a separate and additional test. This concept is not disputed by the parties.

85 The Act does not provide any guidance as to how the word “*requirements*” is to be interpreted.

86 Prior to the introduction of section 36B, the word “requirements” was only contemplated in the context of the section 38 public interest test. Section 38 requires mandatory consideration of the primary and secondary objects of the Act. The term “*requirements*”

referred to in section 5(1)(c) being “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.” requires a broad consideration in the context of the expectations of consumers for liquor (and related services) across the State.

87 It is established law that issues of convenience, competition, one-stop shopping, and shopping preferences, are matters which form part of the public interest considerations under section 38(2) and are included in the contemplation of consumer “requirements” in the context of section 5(1)(c).

88 The Applicant has argued that there is no basis to attribute any artificial, different or narrower meaning to “requirements” in section 36B(4) than in section 5(1)(c), and that to do so would be to ignore the principles of statutory interpretation. In particular, the Applicant asserts that when considering “requirements” the Licensing Authority must have regard to the consumer requirement for the benefits of one stop shopping and competitive co-location which reflect contemporary standards, expectations and shopping habits in accordance with the proper development of the liquor industry when:

- a identifying what the packaged liquor requirements actually are; and
- b assessing whether those requirements cannot be met by existing outlets in a way that is sensible, moderate or rational.

89 The Applicant further asserts that issues such as convenience, product choice and competition are not independent requirements that have a life of their own or can be artificially divorced from the requirement of packaged liquor itself.

90 The Intervener conversely asserts that, for the purposes of section 36B, a narrow construction that requires a plain language statutory interpretation and consideration of the context of the section should be applied (*Eclipse Resources Pty Ltd v Minister for Environment (No 2) [2017] WASCA 90 [120]-[121]*)

91 The starting point in relation to statutory construction is consideration of the text of the provision.

92 The relevant text of the Act is as follows:

- a in section 5(1)(c) the stated object is:

“(c) 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.”

- b section 36B(4) reads:

“(4) 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.”

c in section 36B(1) “local packaged liquor requirements” is a defined term:

“**local packaged liquor requirements**, in relation to an application to which this section applies, means the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated;” and

d section 3(1) of the Act defines “packaged liquor” as follows:

“**packaged liquor** means liquor delivered to or on behalf of the purchaser in sealed containers for consumption off the licensed premises;”

93 The basic definition of “requirement” is “*something required*”, being:

a *something wanted or needed (a necessity); or*

b *something essential to the existence or occurrence of something else (a condition)*

(Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/requirement>. Accessed 21 Dec. 2020).

94 This term is an attributive identifying noun and must therefore obtain its exact meaning from the context in which the word is used.

95 In section 5(1)(c) the “requirements” referred to are for “*liquor and related services*” with a further required consideration of “*the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*”.

96 The reference to “requirements” in this section has an established broad meaning. Some of the matters considered in this context include:

a the fact that shopper convenience is notoriously of great important to Australian shoppers (*Woolworths Ltd v Director of Liquor Licensing [2013] WA Liquorland Gateways LC 07/2017 at [17], Liquorland Midland LC 35/2018 at [68]*);

b that providing competition is a legitimate public interest consideration (*Woolworths v Director of Liquor Licensing LC 34/2011 at [57]*); and

c that it is not unusual for there to be two supermarket related liquor stores in a large suburban shopping centre, and that there are many shopping complexes that contain three or four liquor stores adjacent to the main supermarket outlets (*Liquorland Midland LC/35/2018 at [69]*).

- 97 However, it is important to note that the above broad considerations were expressed when considering the “public interest test” in section 38(2). Such considerations are often cited as a justification to grant a licence where existing or competing liquor stores were already in existence in the immediate locality. Therefore, the fundamental underlying basis of these concepts and decisions clearly have a different prevailing purpose to the new section 36B.
- 98 In section 36B(4) the reference to “requirements” is used within the defined term “*local packaged liquor requirements*” set out in section 36B(1). That defined term includes the phrase “*requirements of consumers for packaged liquor in the locality*”.
- 99 The term “*packaged liquor*” is defined in section 3 of the Act as “*liquor delivered to or on behalf of the purchaser in sealed containers for consumption off the licensed premises*”.
- 100 There is nothing in the Act which supports the view that the defined term of “*packaged liquor*” means anything other than what is expressly noted in that definition, which refers only to a physical product and does not reference any other services and benefits associated with the provision of such liquor.
- 101 The Commission considers that this indicates that the word “requirements” when used in section 36B necessitates a far more precise meaning that is strictly limited to consumer requirements for “packaged liquor” itself.
- 102 Further, the restriction of the requirements to the “locality” in section 36B as opposed to the reference to the “State” in section 5(1)(c) would indicate a narrower focus must be applied.
- 103 The fact that section 36B only applies to licences of a particular type also supports the fact a different application of the word “requirements” is required.
- 104 This “plain meaning” approach to interpretation does not support the view that the word “requirements” should have a consistent meaning throughout the Act.
- 105 In addition to considering the plain meaning of the statutory text, a provision must be construed so that it is consistent with the language and purpose of all the provisions of the statute (*Mohammadi v Bethune [2018] WASCA 98* at [32]; *Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355* at [69]).
- 106 The following passage from *Mohammadi* is relevant:

“ The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of the provisions.”

107 Section 18 of the *Interpretation Act 1984 (WA)* (“***the Interpretation Act***”) also provides the following guidance:

“ In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.”

108 In addition, as set out in section 19(1)(a) of the Interpretation Act, extrinsic material also may be used to confirm the ordinary meaning conveyed by the text of the statutory provision taking into account its context in the statute and the purpose or object underlying the statute.

109 Material that the Commission may have regard to therefore includes relevant parliamentary debates, second reading speeches and explanatory memoranda.

110 In the second reading speech of the Liquor Control Amendment Act 2018, the Hon Paul Papalia CSC MLA, Minister for Racing and Gaming stated the amendments to the Act were “... to prevent the further proliferation of small and medium packaged liquor outlets across the state...” (Western Australia, Parliamentary Debates February 2018, 325). This clearly sets out an intent to limit the number of packaged liquor outlets in Western Australia.

111 The Commission does not consider that the adoption of a different meaning for “requirements”, and thereby enforcing a stricter test in section 36B(4), is in opposition to the stated objects of the Act. From the Second Reading Speech it is clear that it is considered that the “*proper development of the liquor industry*” may include considerations that prevent proliferation of packaged liquor stores.

112 In respect to the issue of competition, the Applicant has asserted that the benefits of efficient competition, including comparison shopping, as well as should be taken into account for the purposes of the section 36B(4) test.

113 The fact that it may be of benefit to a consumer to be able to comparison shop, or a contemporary expectation that there may be more than one liquor store in a shopping centre are well established as being relevant to the public interest test. It is further recognised that issues of one stop shopping, convenience and competition can be considered to constitute “requirements” of consumers in that they are desirable factors when considering the liquor industry in general and the manner in which liquor is supplied.

114 However, these matters must be reassessed in the light of the stated statutory intention of non-proliferation of packaged liquor stores. In such examination it must be recognised that such considerations are biased towards encouraging the introduction of more liquor stores, whereas the object of section 36B(4) is necessarily to limit packaged liquor stores in a specific locality. Such considerations are inherently in opposition.

- 115 As such, the correct interpretation of section 36B(4) must consider that “requirements” for packaged liquor as a physical item/product, as distinct from “requirements” as ordinarily understood for the purposes of section 5(1)(c).
- 116 The approach suggested by the Applicant would essentially result in:
- a an artificial and isolated consideration of the word “requirements” by refuting that the context that the word is used is relevant;
 - b the first limb of the new test in section 36B(4) being a repetition of the existing public interest test by virtue of contemplating essentially the same considerations.
- 117 Given the above, the Commission has difficulty in adopting the approach asserted by the Applicant as the same would have the undesirable result of:
- a repeating the “public interest” test in section 38(2); and
 - b ignoring the clear stated parliamentary intent of section 36B to prevent packaged liquor outlet proliferation.
- 118 As such, the Commission is of the view that it is preferable that the words “*requirements of consumers for liquor and related services*” in section 5(1)(c) has a distinct and separate meaning to the words “*requirements of consumers for packaged liquor*” in section 36B to give effect to the operation of section 36B.
- 119 The Commission finds that “*local packaged liquor requirements*” does not include those matters typically contemplated under section 38 such as contemporary standards in retailing or shopper convenience, preference or habits, one-stop shopping or product choice and preference, or competition, but is limited in scope to consumer requirements for packaged liquor products alone.

Locality

- 120 In respect to the issue of “*locality*”, this term must be considered when considering both the actual requirements of consumers *and* whether those requirements are being met.
- 121 In this case the PIA adopted a 2km radius from the Store to be the locality for the purposes of both the “*public interest test*” and the 36B(4) test.
- 122 The Delegate did not object to this.
- 123 In its Primary Submissions the Applicant asserts that the locality for the purposes of section 36B(4) should be limited to the Centre due to the large number of customer visits and its function as a standalone activity shopping Centre.
- 124 The Commission notes that the meaning or extent of “*locality*” may be considered different for different applications (depending on context) and even as between section 36B and section 38.

- 125 The concept of a “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 grounds and that the applicants have a full opportunity to provide submissions in respect to the issue of locality.
- 126 The Commission would consider it a notorious fact that people are more likely to do their food (and consequently liquor) shopping needs in a shopping centre that is closely located to them. However, in this case, as a Secondary Activity Centre, the Centre may be considered to have a wider catchment of consumers.
- 127 The report by MGA Town Planners dated 14 May 2020 included in the PIA (“**the MGA Report**”) states at 4.2 and 4.3 that approximately 80% of the sales at the Centre arise from an extensive “Main Trade Area” which reaches the southern edge of the City of Joondalup including the suburbs of Marmion and Duncraig to the north and the suburbs of Wembley Downs and Woodlands to the south.
- 128 The Centre currently services a population of up to 150,000 (MGA Report at 5.5) and the Retail Sustainability Assessment Draft Karrinyup Structure Plan prepared by Pracsys for AMP Capital identified that following redevelopment the Centre will service an even broader primary catchment area comprising a population of 246,860 and a total trade area population of 544,080 (the report prepared by Bodhi Alliance dated 15 May 2020 included in the PIA (“**the Bodhi Report**”) at 4.3).
- 129 The 2km “locality” radius comprises a portion of the Main Trade Area with a population of approximately 26,534.
- 130 As such, the Commission recognises that the customer base of the proposed Store is sourced from a large area.
- 131 It is also acknowledged that the Centre development will result in a substantial increase to the shopping floorspace of the Centre from 53,000m² to 90,000m² to include, among other improvements, a “fresh food precinct” (which will incorporate the co-located Coles store).
- 132 The Centre currently receives 6.6 million customer visits per annum.
- 133 On the evidence provided, the Commission finds that the Centre is already substantial and, following redevelopment, will service an even larger population from areas beyond a 2km radius.
- 134 However, this evidence must be balanced with:
- a the notorious fact that people are more likely to do their grocery (including liquor) shopping in the immediate area that they live; and

- b the fact that the information presented as to consumer attendance/visits at the Centre does not provide any information as to the proportion of the parties which visit the Centre to attend to their grocery shopping or liquor shopping requirements.
- 135 As part of the DAA Survey undertaken by the Applicant, 313 of the surveys completed were by households within the 2 km radius area from the Centre (door to door surveys) and 160 surveys were completed by shoppers in the Centre (intercept surveys) 53% of whom were also residents of the locality.
- 136 Based on the Consumer Evidence provided in the DAA Survey, 56% of the door to door survey respondents used the Woolworths located in the Centre as their primary supermarket, and up to 97% used it occasionally. Of the parties who had purchased liquor in the last 12 months 24.3% used the BWS at the Centre as their primary liquor store, however, a substantial number purchased liquor from other liquor stores within the 2km locality.
- 137 The Consumer Evidence also indicated that the region in which the survey respondents lived directly impacted the supermarket predominantly used by those respondents (DAA Survey Report at 4.2 para 49).
- 138 In 3.5 of the PIA, the Applicant acknowledges that Liquorland's customers are generally convenience shoppers who purchase alcohol as part of their weekly grocery shop.
- 139 As such, the evidence of the door to door surveys within a the 2km radius which relates to the current usage of the Woolworths and BWS and proposed use of the Coles and Liquorland is highly relevant.
- 140 The Applicant also makes a number of assertions as to the desirability of co-located liquor and supermarket premises. It is noted that of the four packaged liquor premises located in the 2km locality radius (excluding the Centre BWS), two of these liquor premises are co-located with a supermarket and one is located in a retail centre.
- 141 Given the above, there appears to be two groups of consumers attending the Centre, those who reside in the 2km locality and destination shoppers from further afield.
- 142 As such, it is reasonable to adopt a locality of 2km so that the genuine shopping habits of the persons comprising the proposed retail catchment area of the Store can be considered. Without evidence that establishes that shoppers in the locality are not likely to comprise the majority of consumers for the Store, the Commission cannot reasonably make a finding that the locality should be restricted to the Centre.
- 143 Further, in this case if the Commission were to confirm that the "locality" was limited to the Centre, much of the Consumer Evidence provided to the Commission in respect to the door

to door surveys would become substantially irrelevant due to the significant number of respondent residents that did not ordinarily attend the Centre for their liquor shopping needs.

144 In the absence of persuasive evidence that establishes that the locality should be limited to the Centre due to the specific shopping habits of the proposed consumers of the Centre, the Commission finds it is reasonable to adopt a 2km radius as the “locality” for the purposes of this Application.

The Application and Requirements for Packaged Liquor

145 The Applicant asserts that the Consumer Evidence in the DAA Survey identify that there is a requirement of consumers in the locality to purchase packaged liquor at the Centre with the particular benefits of:

- a one-stop shopping convenience; and
- b efficient competition, including comparison shopping.

146 In particular, it was asserted that the Commission should have regard to contemporary standards, expectations and shopping habits and that the above issues are not independent requirements that can be artificially divorced from the requirement for packaged liquor itself.

147 However, as noted above, the Commission has found that to take into account these matters would not give effect to the legislative intent of section 36B and that these issues are more properly considered in respect to the public interest test.

148 The Applicant has asserted that granting the Application would have a number of benefits for consumers visiting the Centre. This is not disputed, however, is not relevant when considering the requirements for “packaged liquor” itself within that locality.

149 As such, the Commission must consider whether there is evidence that establishes that the consumers shopping in the locality require “packaged liquor” as defined in the Act.

150 It is proposed that the range of products to be provided will be substantially similar to other Liquorland stores in the State and remainder of the country. As such the “packaged liquor” being considered is a general range of wine, beer and spirits. Although it is noted that a number of products are exclusive to Coles, and locally produced, it has not been asserted that the Applicant will provide any niche or unique types of liquor products not normally available at similar liquor stores.

151 The Consumer Evidence shows that:

- a 64.5% of the door to door survey respondents and 65% of the intercept survey respondents supported the Liquorland store;

- b 71% of the door to door survey respondents and 69% of the intercept survey respondents thought they would use the proposed Liquorland; and
 - c 41% of the door to door survey respondents and 32% of the intercept survey respondents thought they would use the proposed Liquorland at least once a month.
- 152 Based on the above, the Commission is satisfied that the Applicant has established that there is a requirement of consumers shopping in the locality for the type of packaged liquor proposed to be sold by the Applicant at the subject Store.

Can Packaged Liquor Requirements be Reasonably Met?

- 153 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.
- 154 This requires consideration of:
- a the appropriate locality (as discussed above);
 - b the packaged liquor premises present in the locality;
 - c whether the “local packaged liquor requirements” (as established in the first limb of the test) can be “reasonably” met at such premises.

Locality

- 155 The issue of “locality” is considered above. For the purposes of this Application it is found that a 2km radius is the appropriate locality in which to consider the existing packaged liquor outlets.

Packaged Liquor Premises in the Locality

- 156 The packaged liquor premises that are located within the 2km locality are as follows:
- a BWS Karrinyup – located 80 metres as the crow flies and 120 metres walking distance from the proposed Store – co-located with the Woolworths supermarket on the Centre;
 - b Scarborough Cellars – located 1.85km from the proposed Store – located in a retail centre, but 200m away over a street from the closest IGA supermarket;
 - c Liquorland Gwelup – located 1.90km from the proposed Store – located in the Gwelup Neighbourhood Activity Centre and co-located with a Famer Jack’s supermarket;
 - d BWS at the St George Hotel – located 2km from the proposed Store – drive through liquor adjoining a tavern; and
 - e Innaloo Specialty Liquor trading as Cellarbrations Morris Place – located 2km from the proposed Store – located in the Morris Place Activity Centre adjoining an IGA supermarket.

Packaged Liquor Products

157 The Applicant did not provide any evidence that the type of product to be provided was distinguished in any substantial manner from that provided by the other packaged liquor premises in the locality. The products to be provided are Liquorland's "usual range" with some items being exclusive to Coles Liquor (PIA paragraph 3.2 page 11) and were not anticipated to result in a shift of consumer behaviour as to the "type of quantity of alcohol being purchased and consumed" already in the Centre/locality (PIA paragraph 3.5 page 14).

Reasonableness

158 In contemplating this limb of the test, it is important to continually consider the issue of reasonableness. As noted above, *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd* states as follows:

"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"

159 Further, in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405*, it was established the test for meeting reasonable requirements (in the context of the old section 38(2b) test) was that the relevant product cannot be provided at all, or "cannot be provided without occasioning substantial difficulty of substantial inconvenience to the relevant public."

160 Although the test applied in *Austie* established a relatively "low threshold" for the word "reasonably", in the light of the changes to the Act and the stated purpose of section 34B, the Commission does not construe this threshold as to allow shopper convenience or general retail competition to be taken into account.

161 The *Austie* interpretation of "reasonably" only requires that the relevant liquor be readily accessed, without great difficulty or inconvenience.

162 In this context, the Commission finds that the inability to shop in a co-located supermarket, or to not have competing liquor stores within very close proximity, does not create a great difficulty or inconvenience to consumers, or prevent liquor from being readily accessed by consumers.

Can Local Packaged Liquor Requirements be Reasonably Met? Premises Outside the Centre.

163 The Applicant has argued that consumers' local packaged liquor requirements are not reasonably met by the liquor stores located outside of the Centre, as the same are not located at the Centre and therefore are not able to provide efficient one shop shopping or a competitive setting.

164 This approach is problematic for several reasons:

- a as established above, the requirements for packaged liquor does not extend to competition, consumer convenience and similar issues, it is limited to the availability of packaged liquor itself;
- b even if the Commission was to accept the assertion that issues of one shop-shopping and convenience were relevant, two of the four liquor premises are co-located with supermarkets and one other is within retail area being a short distance of a supermarket. Therefore it is difficult to argue that such convenience “requirements” are not already met;
- c as noted in above in paragraph 70, the 2km locality is included in the “Main Trade Area” from which the Centre attracts its consumers. As such, it is reasonable to expect that some of those consumers may have their packaged liquor requirements met by other stores in the locality;
- d the Consumer Evidence relied upon establishes that a substantial proportion of consumers living in the 2km locality (Door to Door Survey) already currently purchasing their liquor requirements from local stores outside of the Centre being:
 - i 75.7% of consumers purchasing most of their packaged liquor from premises outside of the Centre; and
 - ii 24.6% of consumers purchasing most of their packaged liquor from premises outside of the Centre but from within the locality,

(*Table 10 - Door to Door Survey Results - DAA Survey*). Therefore it is illogical to argue the same cannot meet consumer requirements by virtue of their location, when a substantial number of local consumers predominately use such packaged liquor stores; and
- e although the Commission does not accept that competition is a matter properly considered under section 36B(4), the mere fact that liquor stores are not located in the same Centre does not prevent the same from being “competitive” with each other when attracting consumers from the same trade area.

165 The Commission further does not find that travelling up to 2km to an alternative liquor store which holds a substantially similar type and range of product (but that is not located in a Centre) to constitute a “great difficulty or inconvenience” to consumers who live in the locality.

Can Local Packaged Liquor Requirements be Reasonably Met? Premises Inside the Centre.

166 In respect to the Centre and the existing BWS, the Applicant has argued that as there is only one liquor store located in the Centre such premises:

- a does not provide for competitiveness; and
- b cannot currently, and will not be able in the future to, meet demand of consumers.

167 Following the proposed extension to the Centre, there will be two additional supermarkets in the Centre and a fresh food hall in that “precinct”. The Store would be one of two liquor stores in the Centre and be co-located with the new Coles supermarket (the other liquor store being the existing BWS co-located with the Woolworths supermarket).

168 The Commission acknowledges that the Centre expansion is highly relevant with respect to deciding whether consumer requirements in the locality will be able to be reasonably met.

169 However, the Commission is not satisfied as to the level of evidence presented to it in respect to both:

- a the capacity of the BWS to meet consumer needs; and
- b the impact the Centre expansion will have on the liquor requirements of the consumers in, or visiting, the locality.

170 In respect to the BWS premises, it is asserted in the Bodhi Report [*Executive Summary paragraph (g) page 5*] that shopper demand and expectations for packaged liquor:

- a are not being met currently in the Centre; and
- b are not likely to be met when the Centre’s expansion is complete.

171 The assertion that shopper demand is not being met currently by the BWS is based upon “stakeholder feedback” from the Karrinyup Shopping Centre management that “*the Centre and the existing liquor store are very busy at peak times*” (Bodhi Report paragraph 8.1.3 page 42) and based upon two conversations with BWS staff confirming the store is “*crowded at peak times*”.

172 With respect to the Applicant, this is of very little use to the Commission. There is no clear assertion or analysis of what “peak times” are or what “crowded” may mean. Are peak times, daily or weekly peak times, or seasonally based? Does “crowded” mean a line of consumers out the door with excessive wait times or does it simply mean more busy than usual? Does such busyness or crowding amount to making it “unreasonable” for consumers to make liquor purchases at those times?

173 Each matter will strictly turn on its facts as to whether certain factors prevent packaged alcohol from being readily available or constitute a “great difficulty or inconvenience” to

- consumers. Without further analysis the Commission cannot come to a finding of fact regarding these matters in this case.
- 174 It is asserted by the Applicant that once the expansion of the Centre occurs, the new fresh food precinct will “likely further increase demand for packaged liquor as more people will be attracted to the Centre to do their food and grocery shopping due to the expensed level of services and choices” [Bodhi Report Executive Summary paragraph (g) page 5].
- 175 The WA average over the 23 largest shopping centres in the State is 1.8 packaged liquor stores per centre (*Ethos Urban Report - paragraph 4.39*). The Applicant has argued that it is a contemporary expectation of consumers that a large shopping centre may have 2 or 3 liquor competing stores (*Ethos Urban Report paragraph 4.1 – 4.56*).
- 176 It is acknowledged that the Commission has previously confirmed it has no objection to the grant of a new licence in large shopping centres where there is already a liquor store operating in that shopping centre, provided that, the public interest test is met (*Liquorland Secret Harbour LC 06/2017; Liquorland Gateways LC 07/2017; Liquorland Midland LC 35/2018*).
- 177 However, these decisions were made prior to the introduction of section 36B(4) and were made in the context of both making findings as to the public interest and the proper development of the liquor industry in the State (i.e. section 38 considerations).
- 178 Conversely, as the express stated intent of section 36B(4) is to prevent the proliferation of packaged liquor stores, such decisions must now be re-evaluated in the light of the new section.
- 179 Currently the Centre receives approximately 6.6 million annual visits. It was asserted to the Commission that it may rely on its specialist knowledge to infer that following the Centre expansion, the consumer requirement for packaged liquor will increase.
- 180 The Commission agrees that it can generally make this inference and it is accepted the expansion will increase the number of consumer visits to the Centre. It is not unreasonable to extrapolate from this position that a second packaged liquor store would receive custom.
- 181 However, a mere statement of increased numbers, or the statement that some customers would attend the proposed Store is not enough to satisfy the test in section 36B(4). It must be able to be found on the balance of probabilities that the existing packaged liquor stores cannot reasonably meet the consumer requirements.
- 182 To assist the Commission in coming to such conclusion it would be helpful for the Applicant to present evidence in respect to, and undertake an analysis of, the following:
- a the anticipated increase in shoppers for the Centre;

- b the current and proposed proportion of shoppers likely to purchase packaged alcohol at the Centre;
- c the manner in which the proposed food precinct development would attract destination consumers that were more likely to purchase packaged alcohol (although it is acknowledged that this is considered to some extent in the Ethos Urban Report in respect to consumer expectations);
- d the actual manner in which the existing liquor store is not reasonably able to meet consumer requirements (i.e. lack of stock floor space, storage limitations, crowding, wait times etc);
- e trading figures and commercial analysis relating to Coles Liquorland stores that may operate in similar Centres that would allow the Commission to come to the conclusion that one liquor store is not able to meet consumer demand in similar centres.

Can Local Packaged Liquor Requirements be Reasonably Met? General

183 It is conceded that the Consumer Evidence supplied supports the Application in general as well as the contention that a certain proportion of consumers living in, or shopping in, the locality would use the Liquorland, however, it is also interesting to note that of the persons living in the locality who had purchased liquor in the last 12 months, in answer to question 8a *“Would the proposed Liquorland store assist you in meeting any of your takeaway liquor requirements?”*:

- a for the Door to Door Surveys - 48.5% responded that the proposed Liquorland would not assist them as opposed to 45.5% who confirmed that it would (*Table 40 - Door to Door Survey Results - DAA Survey*).
- b for the participants of the intercept survey, 42.1% responded that the proposed Liquorland would not assist them, as opposed to 44.6.5% who confirmed that it would (*Table 40 - Intercept Survey Results - DAA Survey*).

184 This shows a fairly large proportion of consumers surveyed that feel the Liquorland would not assist them.

185 Question 9a also provides results that do not necessarily support the contention consumer demand is not currently being met.

186 Of the parties asked question 9a - *“What benefits, in any, do you think you would gain by having a Liquorland store in this shopping centre as well as the BWS Store that already trades adjacent to the Woolworths Supermarket:*

- a in the Door to Door Surveys 50.2% of respondents answered “I see no benefit” (as opposed to 47.9% who expected a benefit) (*Table 52 - Door to Door Survey Results - DAA Survey*); and
 - b in the Intercept Surveys of the 46.9% of respondents answered, “I see no benefit” (as opposed to 48.1% who expected a benefit) (*Table 52 - Door to Door Survey Results - DAA Survey*).
- 187 These results do not support the contention that consumers are unable to have their packaged liquored requirements met in the locality.
- 188 In any event, evidence that the Liquorland may “assist” in meeting “any... *takeaway liquor requirements*” for a proportion of the consumers in the locality does not directly address the issue of whether the requirements of such consumers *cannot be met* by the existing packaged liquor store.
- 189 In addition, the questions in the DAA Survey as to whether consumers would use the Liquorland are largely linked to the idea of those consumers also shopping at the Centre or the proposed Coles and directly reference issues of convenience (questions 5, 7, 10b). This taints the issue of whether the respondents are considering issue of grocery shopping and convenience, rather than simply the ability to access packaged liquor.
- 190 In this case the Commission finds that on the basis of the evidence supplied, the Commission cannot make a finding:
- a that there is existing undue difficulty or inconvenience to consumers in obtaining packaged liquor from the existing packaged liquor outlets in the locality; or
 - b that the existing packaged liquor stores in the locality cannot reasonably meet consumer requirements.
- 191 The evidentiary onus is on the Applicant to satisfy the Commission as to the test set out in section 36B(4) that the existing packaged liquor stores cannot “reasonably” meet consumer requirements. The evidence provided by the Applicant must be “*relevant, reliable, and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case*” [*Busswater Pty Ltd v Director of Liquor Licensing (LC 17 of 2010)*]. The Commission finds that the Applicant’s evidence is lacking in this regard.
- 192 Given the above, the Commission affirms the decision of the Delegate that the evidence provided to it does not sufficiently support a finding that the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.
- 193 Due to this finding, the Commission further finds that the Application cannot be granted as the Applicant has not discharged its onus under section 36B(4) of the Act.

Public Interest Test

194 As the test set out in section 36B(4) is not met, it is unnecessary for the Commission to consider whether the Applicant has demonstrated that the grant of the Application is in the public interest pursuant to section 38(2).

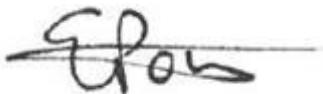
195 The Commission makes no findings in this regard.

Conclusion

196 The Commission finds that the Applicant has not discharged its onus to satisfy the Commission that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor premises in the locality in which the Liquorland Store is proposed to be situated.

197 The decision of the Delegate is affirmed, and the Application is dismissed.

198 The Commission notes that as the Application was not granted due to the failure of the Applicant to meet the test in section 36B(4), section 38(5) does not apply to the Application.



EMMA POWER

PRESIDING MEMBER