

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: Lolba Holdings Pty Ltd
(*represented by Mr Peter Fraser and Ms Emily Pickering of Dwyer Durack*)

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 Alya Barnes (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: CU Mart Grocery Store
Unit 40, 12 Junction Boulevard
Cockburn Central Western Australia

Date of Hearing : 26 October 2020

Date of Determination: 13 January 2020

Determination The decision of the Delegate of the Director of Liquor Licensing 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
- *Kartika Holdings Pty Ltd v Liquor Stores Association of Western Australia (Inc)* [2008] WASCA 10
- *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405
- *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (no 2)* (1981) 28 SASR 458
- *Eclipse Resources Pty Ltd v Minister for Environment (No 2)* [2017] WASCA 90
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* LC 01/2017
- *O'Sullivan v Farrer* [1989] HCA 61
- *Liquor Commission proceeding L30/01/506 – HanGaWee Outlet*
- *Kartika Holdings Pty Ltd v Liquor Stores Association of Western Australia (Inc)* [2008] WASCA 103
- *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd* (1991) 4 WAR 1

Background

- 1 This matter concerns an application ("**Application**") by Lolba Holdings Pty Ltd t/as CU Mart Cockburn (**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 Unit 40/12 Junction Boulevard, Cockburn Central, Western Australia (the "**Premises**").
- 2 At all relevant times, the Applicant has operated the grocery store known as 'CU Mart Grocery Store' ("**CU Mart**") at the Premises. CU Mart specialises in the sale of predominantly Korean and Japanese food products and ingredients.
- 3 On 20 December 2019, the Applicant lodged an application for a LSL for the Premises. The proposed licensed area ("**Proposed Licence Area**") within CU Mart comprises a counter / serverly area of approximately 9 sqm, behind which the liquor products were to be kept in a dedicated liquor fridge. It was proposed that CU Mart would only stock imported Korean and Japanese liquor, most of which would be exclusive to the Applicant.
- 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 dated December 2019 and 7 February 2020. The Application was advertised in accordance with instructions issued by the licensing authority.
- 5 The applicant proposed that the LSL would operate under CU Mart's current trading hours:
 - 10.00 am to 07.00 pm on Monday to Wednesday;
 - 11.00 am to 08.00 pm on Thursday;
 - 10.00 am to 07.00 pm on Friday and Saturday; and
 - 11.00 am to 06.00 pm on Sunday.
- 6 In support of the Application, the Applicant submitted (among other things presented for consideration) that:
 - a CU Mart is one of seven Korean supermarkets in Perth and the only one that is not licensed.
 - b In Korea, all supermarkets sell liquor, and no special licence is needed. Therefore, CU Mart's Korean customers have an expectation of being able to acquire their packaged liquor requirements at CU Mart with their groceries.
 - c CU Mart has a very strategic location with an existing strong patronage, serving up to one thousand customers per week. Since the time CU Mart opened, customers have been asking for it to stock Korean and Japanese liquor.
 - d It was difficult to obtain the products that CU Mart proposed to stock ("**Proposed Product Range**") at any premises in the location.

- e The Applicant only sought to licence, a small portion, of the existing Store. Consumer demand would dictate which Asian liquor products were included in the product range and the proposed liquor store would accommodate new products as they were launched.
 - f The majority of CU Mart's customers would likely enjoy their packaged liquor responsibly. In the PIA it was shown that there was little potential for increased harm, ill health, inconvenience or disturbance that could potentially result from the granting of the Application, but there were very real benefits that could accrue to the residents in the locality.
 - g The granting of the Application would allow the Applicant to provide the locality with important and valuable specialist packaged liquor services that are currently lacking. It was an Application for a small low risk licensed premises and the granting of the licence was in the public interest. This specialised packaged liquor service would meet a real and demonstrated local public requirement.
- 7 No notices of objection to the Application were lodged.
- 8 On 21 April 2020, the Application for the LSL was refused by a delegate of the Director of Liquor Licensing (the "**Delegate**") and a notice of decision ("**Decision**") was published. The written reasons for that Decision were sent to the Applicant on 4 June 2020. In summary, the Delegate 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.
- 9 In light of that finding, the Delegate then also determined that it was not necessary to consider 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.
- 10 On 25 June 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.
- 11 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.
- 12 The Commission heard this matter on 26 October 2020.

The Applicant's submissions

The Review

- 13 On 25 June 2020, the Applicant applied for a Review of the Decision on the basis that the Delegate had erred:
- a by failing to differentiate between the requirements of consumers for the specific specialty products to be provided by the proposed Application, instead, considering the availability of all types of packaged liquor throughout the locality;
 - b by failing to consider the reasonable requirements of consumers for the convenience of one-stop shopping in respect of the speciality products to be offered by the Applicant; and
 - c by applying and interpreting the test in Section 36B in a generic and broad manner so as to exclude the consideration of the reasonable consumer requirement for variety and range of speciality Asian products, as opposed to the range of all liquor generally.
- 14 Specifically, the Delegate erred by failing to give due and proper consideration to the principles in section 36B by:
- a finding that the Applicant had not provided sufficient analysis of the local packaged liquor requirements, insofar as finding that such analysis was “limited”;
 - b finding that the Applicant’s analysis (where provided) was incorrectly directed;
 - c failing to distinguish between the requirements for packaged liquor generally, and the specialty packaged liquor proposed to be offered by the Applicant;
 - d failing to properly apply the considerations in s36B(1) therein incorrectly applying the consumer requirement to the test;
 - e applying an incorrect test in relation to the questions it needed to satisfy itself of in relation to s36B(4);
 - f determining the Applicant had failed to discharge its onus under section 36B(4);
 - g making a finding that the mere availability elsewhere of some of the Proposed Product Range satisfied the reasonable requirements of consumers;
 - h failing to consider the inconvenience caused to reasonable consumers by being required to attend multiple stores to purchase items they could purchase at the singular venue of the Applicant’s premises;

- i failing to consider the difference between the availability of liquor, generally, throughout a locality and the convenience of one stop shopping for a full range of specialty product at one venue; and
- j placing undue weight upon the Second Reading Speech of the introduction of the Liquor Control Amendment Bill 2018 and thereby failing to have regard to the nature of the application before him.

Applicant's further submissions

- 15 The Applicant's further submissions at the hearing on 26 October 2020 were in accordance with:
- a the '*Grounds of Review*' (dated 25 June 2020);
 - b the '*Applicant's Submissions*' (dated 9 September 2020); and
 - c the '*Applicant's Responsive Submissions*' (dated 21 September 2020).
- 16 The Applicant submitted that the particular issue for determination is whether the Applicant has satisfied the Commission that the grant of the Application will be in the public interest. More specifically and having regard to the materials that were before the Delegate, the central issue is whether the Applicant has satisfied the threshold test contained within section 36B of the Act.
- 17 The Applicant's submissions can be summarised as follows:
- a In refusing the Application, the Delegate found that the Applicant had not discharged its onus under section 36B(4) of the Act. The Delegate in his consideration of the principles in section 36B, applied an incorrect test in relation to the questions it needed to satisfy itself of in relation to section 36B(4) of the Act.
 - b The Applicant submitted that the first question to be determined in relation to section 36B(4) is whether there is a local liquor requirement, in this case, for the Proposed Product Range (being distinguished from a finding with respect to the general types of liquor that are proposed to be offered).
 - c In the event the answer was yes, the second question is whether these requirements are already provided by existing packaged liquor premises in the locality.
 - d The matter of significant inconvenience to consumers should be considered, however, it was conceded that an analysis of whether "one stop shopping" is relevant to the interpretation of section 36B(4) was unnecessary in the present matter.

Local packaged liquor requirements

- e The Applicant is seeking to cater to a niche or specialist section of the market for packaged liquor. The Applicant only proposed to stock imported Korean and Japanese liquor, most of it exclusive to the Applicant.
- f The Applicant referred to 69 questionnaires (“**Consumer Evidence**”) that it placed reliance on as a representative sample of the greater population of the area. The surveys are in no way intended to represent all the consumers who will ever access the services offered by CU Mart – they are representative of the consumers who will shop at the proposed Store. It was submitted that the Consumer Evidence proved there was a strong local requirement and support for the Proposed Product Range, in particular:
 - i. the Consumer Evidence demonstrates that consumers wish to purchase the types of liquor proposed to be sold by the Applicant;
 - ii. a specific requirement for certain liquor (for example the plum soju) is a valid requirement of consumers and should be properly considered in this matter;
 - iii. the Consumer Evidence clearly established a demand for all the products listed, and furthermore, and a demand for numerous products at once;
 - iv. all 69 respondents indicated that they wished to purchase multiple product lines. Over 75% of the consumers wished to purchase five or more of the ten lines of products from the Applicant.

Packaged liquor currently provided by existing packaged liquor premises in the locality

- g The Applicant relied upon the “*locality*” as being a 3km radius from the Premises, in accordance with the Director’s policy. Within the locality there are some seven existing liquor stores and taverns and each of those stores sells some form of Japanese or Korean liquor.
- h The Delegate found that there was limited evidence provided by the Applicant in relation to packaged liquor currently provided by existing packaged liquor premises in the locality. However, the Applicant conducted a “*secret shopper*” review of the local packaged liquor stores in October and December 2019, which, they continue to assert, is the most appropriate form of product review available. The Applicant essentially put itself in the position of the consumer to whom they propose to cater and found that several of the products proposed and to be provided by the Applicant are not available anywhere within the locality. In addition, the Applicant asserts that the reason there was limited evidence of the availability of the products is because there are only limited venues offering those products in the locality, and, within those venues, limited product lines.

- i The products that were available were placed on either the top or bottom shelves largely out of sight and the staff at those venues were largely unaware of the products available or that they existed at all.
- j In relation to online shopping and the existing retailer's websites, the mere fact that a product appears on a retailer website does not mean that that product is available in the locality's store. Also, just because a product is showing as "available" at a certain store, does not mean it is available.
- k Finally, the Consumer Evidence shows that 89% of the respondents of the representative sample provided were unhappy with the existing local liquor packages.

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

- l It is submitted that the Delegate fell into error in finding that he was required to conduct an assessment of the current liquor services offered by existing packaged liquor premises in the locality, in the event that such an assessment extended beyond considering whether they could meet local requirements for the liquor services proposed by the Applicant.
- m The Proposed Product Range is simply not available and patrons would be required to travel to upwards of three different shops to service their requirements.
- n The Applicant submits that the evidence overwhelmingly demonstrates that the existing licensed outlets cannot meet the requirements of consumers for the Proposed Product Range.
- o The Consumer Evidence filed demonstrates that the consumers cannot or do not currently purchase those products in the locality. The Applicant's product lines are either individually available from one venue with the locality or unavailable within the locality.
- p The evidence of the products currently available within the locality does not meet the requirement for the specific products and types, sizes and brands of liquor proposed to be offered by the Applicant; these are points of differentiation from the existing packaged liquor offerings and therefore form a valid aspect of the local requirement consideration.
- q Of the 69 respondents to the surveys, only one indicated that they purchase Asian liquor locally, the rest travelling to other suburbs / areas to purchase their needs.

- r That is clearly inconvenient and unreasonable. The consumer demand shows a clear wish to access these products in one place, which the Applicant's Store proposes to offer.
- s The proper construction of 36B imports a consideration of the inconvenience caused to consumers if the Application is not granted. The inherent question is whether it is reasonable to require consumers to travel to multiple shops (some of which are well out of the area) to purchase all the products they want to purchase. If not granted there is and will remain significant inconvenience for patrons wishing to purchase the products proposed to be offered by the Applicant.
- t Whilst there are seven other takeaway liquor outlets within the relevant locality, none of those outlets stocked the products identified and proposed to be sold by the Applicant. Furthermore, none of the existing liquor stores stocked the range of Korean and Japanese products proposed to be carried by the Applicant.
- u The evidence before the Delegate was that the existing stores located within the locality cannot meet the local requirements for the liquor services proposed to be offered by the Applicant. Therefore, the Applicant has satisfied the requirements of the threshold test contained in section 36B of the Act.
- v Having regard to the materials that were before the Delegate, the Applicant submits that it has satisfied the requirements contained within section 38 of the Act and that in all the circumstances the Application should be granted.

The Intervener's submissions

- 18 The Intervener's submissions at the hearing on 26 October 2020 were in accordance with:
- a. the *'Primary Submissions of the Director of Liquor Licensing'* (dated 9 September 2020); and
 - b. the *'Reply Submissions of the Director of Liquor Licensing'* (dated 16 September 2020).
- 19 The Intervener intervened in the proceedings to make submissions as to the issue 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.
- 20 The Intervener's submissions can be summarised as follows:
- a The Applicant had failed to discharge its onus under s36B(4) of the Act.
 - b The following propositions are uncontroversial as arising from the plain language of s36B:

- i. S36B applies to an application for the grant of, amongst other things, a liquor store licence.
 - ii. 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.
 - iii. 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.
 - iv. The evidential and persuasive onus to satisfy the licensing authority rests upon the Applicant for the licence.
- c 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:
 - i. what the local packaged liquor requirements are; and
 - ii. what packaged liquor services are currently provided by existing packaged liquor premises in the locality.
- d 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.

The local packaged liquor requirements

- e The Intervener submitted that the “requirements of consumers for packaged liquor in the locality” is to be construed as referring to requirements for packaged liquor itself (eg requirements for liquor of a particular type, such as bottled table wine) rather than the requirements of consumers as to matters of taste, convenience, shopping habits, shopper preferences and the like.
- f The Consumer Evidence (consumer surveys of 67 persons) was a relatively small sample for the purposes of seeking to establish “requirements of consumers for packaged liquor” within the locality. Despite the limited extent of such surveys, it may be accepted that the surveys provide evidence that there is a requirement, albeit fairly limited, for Korean and Japanese liquor in the locality.
- g However, at its highest, the Applicant’s evidence only established a limited requirement for the types of liquor it proposed to sell. The evidence also showed only very modest numbers of consumers who indicated that they would be likely to purchase such products from within the locality.

Packaged liquor currently provided by existing packed liquor premises in the locality

- h The limited evidence adduced by the Applicant demonstrates that several products are currently available within the locality.
- i The Applicant asserts in its PIA that none of the existing outlets within the locality currently offer for sale certain items of the Proposed Product Range. However, that is irrelevant as the consumer evidence relied upon by the Applicant does not establish any requirement for those products.
- j There is no sufficient explanation as to how the Applicant determined what types of liquor are currently offered for sale in existing packaged liquor outlets in the locality. Rather it states that “the applicant” visited each of the stores. No explanation was given as to how the assessment was conducted, or the rigour with which it was conducted. The purpose of section 36B is to prevent or limit the proliferation of packaged liquor outlets. Given the mandatory requirement for the licensing authority to refuse an application for a liquor store licence unless satisfied that local packaged liquor requirements cannot be reasonably met, it would be expected that the Applicant can demonstrate with some rigour the manner in which it has assessed the liquor currently available for sale in the locality. One would expect that at least for the larger retailers, evidence would be produced of searches on the retailers’ website for the liquor products in question so as to demonstrate whether such product is made available at that outlet.
- k The only other evidence directed towards whether Korean or Japanese liquor was available for sale in the locality is provided by way of the Consumer Evidence. However, the surveys were unreliable and again the Applicant did not adduce sufficiently rigorous evidence of the packaged liquor offerings in the locality in order for the Commission to be satisfied that it has the full evidence before it of what those offerings are.
- l Even though it was identified within the evidence that a number of existing stores within the locality sell Japanese or Korean liquor, the Applicant only provided a limited analysis or overview of what was offered in terms of Japanese or Korean liquor at the existing liquor stores within the locality.
- m There is a paucity of evidence which makes the task required of s36B(4) impossible to undertake. For that reason, the Applicant has failed to discharge its onus. In any event, to the extent that the Applicant has adduced evidence of the packaged liquor offerings currently available in the locality, it is clear that existing packaged liquor outlets offer for sale Japanese and Korean liquor.

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

- n Within the locality there are seven existing liquor stores and taverns and each of those stores sells some form of Japanese or Korean liquor.
- o To the extent that there are local packaged liquor requirements for Korean and Japanese liquor, there is no obvious reason or clear analysis by the Applicant as to why those requirements cannot reasonably be met by existing premises. There is no reason the existing offerings cannot reasonably meet the very modest requirements for Korean and Japanese liquor as established by the consumer surveys.
- p It appears that the Applicant's case is that those existing stores cannot offer all such products in one store. However, there is no evidence to suggest a local requirement for packaged liquor is to be able to purchase all such products in the one store. In addition, the "convenience" of purchasing all such products in one store would not in any event be a "local packaged liquor requirement" within the meaning of s36B.
- q The fact that respondents to the surveys purchase such products outside of the locality could be for one or more of a number of reasons. However, the issue as to what current packaged liquor is available in the locality is not determined subjectively by what consumers understand to be available. Also, in any event, many of the respondents to the survey did not live in the locality of the proposed store.

Legal and Statutory Framework

- 21 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]*.
- 22 The Commission is required to make its determination on the balance of probabilities (s16 (1)(b)(ii) of the Act).
- 23 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.
- 24 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).
- 25 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)];
- 26 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*).
- 27 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

- 28 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).
- 29 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.

30 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)).

31 No 'other ... matter' has been prescribed pursuant to s 38(4)(d).

Section 36B(4) Test

32 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.

33 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)*].

34 "Local packaged liquor requirements" is defined as "the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated [section 36B(1)].

35 Relevantly, for 36B(4), the licensing authority must be satisfied, based on the evidence provided, that:

- a there is a “local packaged liquor requirement” - 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.

36 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”

37 The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority.

Determination

38 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*.

39 This review has arisen due to the relatively new section 36 of the Act and, relevantly, section 36(4).

40 At the time of hearing this matter, there were no published decisions dealing with section 36 although there was an ex-tempore decision of the Liquor Commission (*proceeding L30/01/506 – HanGaWee Outlet*). Both parties were given an opportunity to consider and make further submissions in respect to that decision yet declined to do so.

41 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.

42 Section 36B(3) is not applicable in this case, however, section 36(4) is mandatory and must be satisfied.

43 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 is a “local packaged liquor requirement” - 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

44 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.

45 This requires consideration of:

- a what “requirements” means;
- b what comprises “packaged liquor”; and
- c what is the relevant “locality”.

Defining “Requirements”

46 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 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.”; and
- b the now superseded section 38(2b) which referred to “*the reasonable requirements of the public for liquor*”.

47 Section 38(2b) directly related to what was commonly called the “needs” test. However, since 2007 the “public interest test” replaced the “needs test”.

48 The Commission considers that, given the retention of the “public interest test”, the argument that section 36B is a restatement or re-adoption of the “needs” test is misguided as it would result in unreconcilable inconsistencies in the legislation in respect to the “public interest test” in section 38(2).

49 Section 36(B) does not provide any guidance as to what may be taken into consideration for the purposes of making a finding as to “*local packaged liquor requirements*”. In the absence of precedent, the Commission must decide whether a broad or narrow construction is to be preferred in the light of section 18 of the *Interpretation Act (WA) 1984*.

- 50 The Applicant argues that a broad interpretation must be adopted in respect to section 36B and that due to the difference in the relevant statute at the time, existing case law supports an argument that in considering the reasonable requirements of consumers “one stop shopping” should be a relevant consideration [*Kartika Holdings Pty Ltd v Liquor Stores Association of Western Australia (Inc)* [2008] WASCA 103, *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405 and *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (no 2)* (1981) 28 SASR 458].
- 51 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])
- 52 The Commission notes that it is established law issues of convenience, one-stop shopping, and shopping preferences, are matters which form part of the public interest considerations under section 38(2).
- 53 Section 38 requires mandatory consideration of the primary and secondary objects of the Act. The “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 liquor requirements (and related service requirements) of consumers across the State.
- 54 Section 36B(4) is drafted much more narrowly and relevantly includes the words “local packaged liquor requirements” and also refers to the locality. This is clearly aimed only at “packaged liquor”, not other services or benefits, and limited in contemplation to a specific locality.
- 55 Therefore, a distinction must be made between the matters already contemplated under section 38 and section 36 as the legislative intent of the two sections are clearly different.
- 56 As such, the Commission finds that “*local packaged liquor requirements*” is to be narrowly construed and would not include those matters typically contemplated under section 38 such as contemporary standards in retailing or shopper convenience, preference or habits, one-stop shopping, easy access by motor vehicle or product choice and preference.

Packaged Liquor

- 57 In respect to the type of “packaged liquor” contemplated by the Act, section 3(1) of the Act defines the same as follows:

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

58 This definition is quite broad, and the Commission finds that, depending on the context of the application, “packaged liquor” can be taken to refer to both:

a packaged liquor in general; and

b packaged liquor of a certain distinguished categorisation or character.

59 In respect to section 36B(3) there is a clear legislative intent to prevent proliferation of large liquor stores (and therefore the bulk sale of packaged liquor) in general, however, sub-section 4 is distinguished from this broad approach.

60 If the legislative intent was to only consider the sale of “packaged liquor” in general for all types of premises, then a section similar to section 36B(3) could have easily been included to incorporate small and medium sized liquor stores. As such, the Commission considers that section 36B(4) allows for flexibility as to the scope of “packaged liquor” when considering section 36B(4).

61 Further, the issue of consumer competition must be considered where one criticism of the previous 38(2b) “needs test” was that it established an *“artificial barrier to protect some sections of the industry from competition”* and was seen to constitute *“an unjustifiable barrier to entering the liquor industry”* contrary to the then current National policies on consumer competition (*Liquor Licensing Act 1988 Report of the Independent Review Committee May 2005*).

62 As such, taking these historical issues into account, the Commission considers it is appropriate and relevant to consider the exact nature of the packaged liquor products which are asserted to be “required” by consumers and are currently offered in the locality.

63 In addition, existing case law establishes that distinguishing features such as price, type (and source) of liquor, quality, range, container (bottle, can, cask) and quantities are an important consideration in deciding “consumer requirements” and that it may be inappropriate to apply inflexible categories of liquor types (*Kartika Holdings Pty Ltd v Liquor Stores Association of Western Australia (Inc)* [2008] WASCA 103) .

64 However, the Commission is cognizant that much of the existing consumer requirements commentary relates to the “needs test” in the old section 38(2b)(a). Given this, it is necessary to freshly consider what “packaged liquor requirements” may extend to for the purposes of section 36B(4).

Locality

65 In respect to the issue of *“locality”*, in this case the P.I.A adopted a 3km radius to be the locality for the purposes of both the *“public interest test”* and the 36B(4) test. The Delegate did not object to this. The Commission also agrees that a 3km radius is appropriate to use in this instance.

- 66 Despite this, the Commission notes that the meaning or extent of “locality” may differ for other applications (depending on context) and even as between section 36B and section 38.
- 67 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.

CU Mart Application and the Local Packaged Liquor Requirements

- 68 In the PIA the Applicant makes the argument that the existing packaged liquor premises in the locality do not satisfy Asian packaged liquor requirements. The Applicant proposes to sell liquor of an extremely limited variety, falling under the following categories:
- a Korean Soju;
 - b Korean Hite / Cass Beer;
 - c Korean Rice Wine;
 - d Japanese Sake;
 - e Japanese Plum Wine;
 - f Korean Blackberry Wine;
 - g Fruit Soju;
 - h Plum Soju; and
 - i Japanese Beer.
- 69 It is further stated by the Applicant that certain products will be exclusive to CU Mart; new products will be included as they are launched; and that consumer demand will direct the product range.
- 70 The Applicant asserts matters such as the customers’ requirement for convenience and one stop shopping; the specific needs of the Asian community; product choice and range; cultural liquor consumption habits; and the existence of (and distribution of) other “specialty” Korean Liquor stores in Perth should be taken into account when establishing the local packaged liquor requirements.
- 71 However, as noted above, most of these issues are more properly considered in respect to the public interest test.
- 72 The Commission agrees that the particular characteristics of the relevant consumers must have some weight, but only insofar as they apply to product preferences, not cultural liquor

- consumption customs or purchasing habits. These issues are relevant for section 38(4), but not section 36B(4).
- 73 In addition, the fact that the Applicant proposes to supply a small range of “niche” products is relevant to the consideration of consumer requirement.
- 74 The Commission notes that the Applicant provided witness questionnaires comprising the Consumer Evidence to “*a representative selection of customers who live, work and/or visit the locality*” to establish the local liquor requirements.
- 75 In respect to the current Application, the Commission notes that the majority of the 67 witness questionnaires provided were undertaken by consumers who resided outside of the nominated locality of 3km.
- 76 In addition, it was clear from the answers to question 8 of the witness questionnaire “*Where do you currently buy your packaged / take-away Korean and Japanese liquor from?*” that several consumers travelled significant distances to meet their liquor requirements.
- 77 The question then arises whether the consumers are required to live in the locality, or is it enough that they visit the locality for shopping purposes?
- 78 Due to the niche nature of the products proposed to be sold by the Applicant and the fact that those consumers had often travelled a significant distance to shop at the CU Mart, the Commission finds it is reasonable to accept witness statements and evidence from persons who resided outside of the locality, but who were established as consumers within the locality.
- 79 In respect to the Proposed Product Range to be sold:
- a 95% of respondents indicated they would purchase Asian liquor products at the CU Mart; and
 - b all respondents (67) confirmed that they would be “likely to” purchase multiple product lines of those offered.
- 80 The Commission notes that there was some disagreement put forward as to the scope of liquor specified in the Consumer Evidence, as “rice wine” was mentioned twice, but this was asserted by the Applicant to describe Japanese rice wine and Korean Rice wine respectively.
- 81 For the purposes of this Application, the Commission finds that, due to frequent mention of Japanese and Korean Liquor in the questionnaire, and the apparent knowledge of the questionnaire respondents that may be inferred from their replies, this ambiguity is not prejudicial as the existence of the same as separate products would have been within the

respondents' common knowledge. Further, the Commission notes that an intended manner of trade and floor plan was supplied with the questionnaire in each case.

82 Given the above, the Commission is satisfied that the Applicant has established that there is a consumer requirement for the type of packaged liquor proposed to be sold by the Applicant at the subject Premises.

Can Packaged Liquor Requirements be Reasonably Met?

83 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 requirement can be met in the locality.

84 This requires consideration of:

- a the appropriate locality;
- b the packaged liquor premises present in the locality (if any);
- c whether the "local packaged liquor requirements" (as established in the first limb of the test) can be "reasonably" met at such premises.

85 The issue of "locality" is discussed above. For the purposes of this Application it is accepted that a 3km radius is the appropriate locality in which to consider the existing packaged liquor outlets.

86 The packaged liquor premises that are located within the 3km locality are as follows:

- a BWS Gateway;
- b Liquorland Gateway;
- c Celebrations at the Gate;
- d First Choice Jandakot;
- e Aldi Cockburn; and
- f Atwell Cellars.

87 The first 3 of these are in very close proximity to the relevant Premises, being essentially across the road.

88 The Applicant points to the inclusion of the word "reasonably" in section 36B as an indication that a lesser test should be applied in respect of the new section and that the same allows for the inclusion of consideration of issues such as convenience "one stop shopping".

89 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"

90 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 they cannot be provided at all, or “cannot be provided without occasioning substantial difficulty of substantial inconvenience to the relevant public.”

91 With due respect for the Applicant, although this creates a “low threshold” for the word “reasonably” the Commission does not construe the bar to be so low as to allow shopper convenience generally to be taken into account. The *Austie* interpretation of “reasonably” only requires that the **relevant liquor be readily accessed**, without great difficulty or inconvenience. Accessing liquor without additional goods (such as groceries) or additional services (such as wine tasting or education) does not create undue difficulty or inconvenience to a consumer for the purpose of section 36B(4).

92 By way of evidence, the Applicant:

- a engaged in a “secret shopper” exercise where the Applicant:
 - i visited the relevant premises in the locality;
 - ii searched for the liquor products that the Applicant will stock and that are generally not available in other packaged liquor outlets in the locality; and
 - iii noted which premises physically stocked certain products and provided a table noting which premises stocked which items; and
- b provided the responses by the respondents to the witness questionnaire in respect to the proposed Premises and the existing liquor outlets in the locality.

93 In respect to the secret shopper exercise, the Applicant, in its P.I.A, represented the information gathered in the following table (hereinafter the “Table”):

Licensed premises	Korean Soju	Korean Hite Beer 330ml	Korean Cass Beer 330ml	Korean Rice Wine (750ml)	Japanese Sake 720ml	Japanese Plum Wine (500ml)	Plum Soju	Fruit Soju	Korean Blackberry Wine	Japanese Beer
First Choice Jandakot (810 North Lake Road COCKBURN CENTRAL WA 6164)	X	X	X	X	✓	✓	X	X	X	X
BWS Gateway (Cockburn Gateway Shopping City 816 Beeliar Drive SUCCESS WA 6164)	X	X	X	X	✓	X	X	X	X	✓
Liquorland Gateway (816 Beeliar Drive SUCCESS WA 6164)	X	X	X	X	X	X	X	X	X	✓
Aldi Cockburn (816 Beeliar Drive SUCCESS WA 6164)	X	X	X	X	X	X	X	X	X	X
Atwell Cellars (Stargate Shopping Centre 129 Lydon Blvd ATWELL WA 6164)	X	✓	X	X	X	X	X	X	X	✓
The Berrigan Bar & Bistro (Lot 758 Berrigan Drive SOUTH LAKE WA 6164)	X	X	X	X	X	X	X	X	X	X
Cellarbrations at The Gate (816 Beeliar Drive SUCCESS WA 6164)	✓	X	X	X	X	X	X	✓	X	X

- 94 The Applicant asserted that such evidence was the “best available” standard as it was from a consumer viewpoint.
- 95 The following questions were asked as part of the witness questionnaires:
- a *“Is there to your knowledge, anywhere else in the locality where you can shop for Korean and Japanese Liquor and grocery products at the same time and place (i.e. one stop shop)? If so where?”;*
 - b *“Where do you currently buy your packaged / take-away Korean and Japanese Liquor from?”;*
 - c *“Are you satisfied with the packaged / take-away liquor service and facilities available to you now in Cockburn Central? If not why not?”; and*
 - d *“Could you please state what you believe is different about this proposed liquor store compared to other packaged liquor outlets in the locality?”.*
- 96 The Commission accepts that there are no “specialty” Asian Liquor Stores within the locality, nor within a substantial distance and, further, that based on the evidence provided it is unlikely that such competing stores would provide the exact same Proposed Product Range. However, this is not relevant to the test under new section 34B(4) which is strictly limited to the consideration of whether packaged liquor requirements are met in the particular locality of the proposed premises.
- 97 The Commission considers that there are fundamental defects with both the secret shopper exercise and the questions asked in the witness questionnaire from an evidentiary perspective.
- 98 In respect to the secret shopper exercise, although the Applicant stated that they *“searched for the liquor products that the Applicant will stock and that are generally not available in other packaged liquor outlets in the locality”*, the Table refers to very specific and limited stock items. It is simply not clear on the evidence provided to what degree certain products (or a range of products) were contemplated.
- 99 By way of example, BWS Gateway is noted to stock 320ml Japanese Sake yet there is no information provided as to:
- a the brands, range, number of products, price range or exclusive nature of the Japanese Sake supplied by BWS and how such products were distinguishable from the products the Applicant proposes to offer;
 - b whether Japanese Sake in a different size bottle/package was available and, if so, how such products were distinguished from the products proposed to be offered by the Applicant;

- c whether the relevant products reviewed were located in or available from the retail floor area, a storage or stock area or labelled as “out of stock” or otherwise;
 - d the amount of stock located on the shelves (or in storage as the case may be) and an indication of whether the projected requirements of the Applicant’s customers could be met by such current stock level;
 - e whether an assistant was required to be asked to locate the product(s); and
 - f whether the product(s) were available “online” from BWS and the process or time frame required to obtain such online products.
- 100 An evaluation of each of the above would assist to establish the relative difficulty or inconvenience of obtaining a relevant product.
- 101 It is noted that it was asserted that some were not clearly marked and stocked on high shelves. However, the Commission does not accept the argument that the positioning of products within the designated retail area of a premises creates significant consumer inconvenience. The Commission further considers that even being required to ask a staff member for stock location, or having stocked liquor retrieved from a storage area would not constitute evidence that a consumer’s desire for such product “cannot reasonably be met”.
- 102 The Commission would, however, stop short of the view that mere inclusion of a particular product on an online store or web page of a premises that is present in the locality, or a general promise to “stock what is requested” would automatically mean that consumer’s requirements for that product are “reasonably met”. Depending on the relevant circumstances, this may not indicate whether such product is genuinely readily available to a consumer attending that premises or locality.
- 103 Further, taking into account the consideration of consumer competition, it is not enough for the licencing authority to say an existing large-scale liquor store could meet that requirement by simply extending its stocked items - the requirement must actually be met by the stores existing at the time of the application.
- 104 The Commission further notes that specifying in the Table the volume of certain products examined by the Applicant (i.e. 330ml Korean Hite Beer, 330ml Korean Cass Beer, 750ml Korean Rice Wine, 720ml Japanese Sake, 500ml Japanese Plum Wine) allows for the information presented to be misconstrued. The Commission would not consider the ability to purchase Korean Hite Beer in a 355ml can or a 500ml bottle as opposed to a 330ml can to be unduly difficult or inconvenient.
- 105 Due to the above evidentiary issues, it is difficult for the Commission to rely on the information provided in the Table as support for the Applicant’s position that no single liquor outlet in the locality is able to provide all (or a majority) of the Proposed Product Range.

- 106 The Commission also makes the general comment that the secret shopper exercise would be of preferred probative value if the same was independently performed.
- 107 The Intervener submitted at the Hearing that there was no evidence provided that shoppers would necessarily purchase multiple ranges at one time such that there was a consumer requirement to have all the liquor listed in the Table available from one location. Although the Commission generally agrees with that submission, it notes that neither does the evidence definitively demonstrate that shoppers would not purchase multiple lines at one time and the evidence, either way, is lacking in this regard.
- 108 However, regardless of paucity of evidence, the same is not relevant for deciding consumer requirement (which does not contemplate shopping preferences) but only assists in the consideration of the relative difficulty or inconvenience to a consumer in being required to purchase liquor at multiple outlets.
- 109 In this case the Commission finds that in the absence of evidence to a sufficient standard to satisfy the Commission an accurate analysis has been undertaken (including at the minimum a consideration of the matters referred to in paragraph 99 above) it cannot satisfactorily make a judgment as to the relative availability of the relevant “packaged liquor” or the difficulty or inconvenience to consumers in obtaining the same on the basis of the secret shopper exercise or the Table.
- 110 In respect to the witness questionnaires, the Commission notes the following issues when relying on the same:
- a the fact that 53 of the 60 respondents did not shop in the locality for their Asian packaged liquor is of limited probative value;
 - b questions as to the polled respondent’s subjective knowledge of the product availability in local liquor stores is irrelevant. The test is whether the requirements are “reasonably met”, not whether the consumers are necessarily aware of that availability;
 - c the relevance of certain questions was diminished by the clear link in the questionnaire of the sale of liquor to the ability to shop for groceries at the same time (i.e. one stop shopping). As discussed above, such additional services are not a relevant concern as to whether “packaged liquor requirements” are being met.
- 111 The questions referred to in paragraph 95c and 95d are of more use to the Commission, however, go more to establishing the requirements for packaged liquor in the locality rather than whether those requirements are currently being reasonably met.
- 112 As such, the witness questionnaires cannot be given significant weight and the Commission finds that the same do not provide objective evidence as to the reasonable availability of similar packaged liquor in the locality.

113 The evidentiary onus is on the Applicant to satisfy the Commission as to the test set out in section 36B(4). 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.

114 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.

Public Interest Test

115 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).

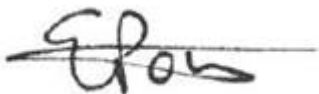
116 The Commission makes no findings in this regard.

Conclusion

117 The Commission finds that the Applicant has not discharged its onus to satisfy the Commission that the local packaged liquor requirements cannot be met by the existing packaged liquor premises in the locality in which the CU Mart premises are proposed to be situated.

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

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



Emma Power
Presiding Member