

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

- Applicant:** Broadwater Village Grocer Pty Ltd
(represented by Mr Steven Sumich and Mr Simon Wright of Broadwater Village Grocer Pty Ltd, and Ms Alyce Cassettai of Ryan & Co Solicitors)
- Intervener:** Chief Health Officer
(represented by Ms Keahn Sadinha of the State Solicitor's Office)
- Objector:** Baytown Holdings Pty Ltd
(represented by Ms Jessica Patterson of Jessica Patterson Law & Consultancy Pty Ltd)
- Commission:** Emma Power (Acting Chairman)
Kirsty Stynes (Member)
Nicholas van Hattem (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 the grant of a Liquor Licence.
- Premises:** Broadwater Village Liquor Store
Shops 9 and 13 Broadwater Village Shopping Centre
539 Bussell Highway, Broadwater
- Date of Hearing:** 25 October 2021
- Date of Determination:** 30 March 2022

Determination

The Decision of the Delegate of the Director is quashed and the Application for a Liquor Licence is granted subject to the following conditions:

- a. the licensed checkout is permitted to transact liquor sales only. No grocery sales are permitted at the licensed checkout;
- b. the entire liquor display and sale area must be physically and visibly separated from the food/grocery display and sale area by solid non-transparent barricading and an entry/exit door or gate;
- c. the liquor browse/display area is to be closed off when not open for trade; and
- d. there is to be no advertising or promotion of liquor (including signage indicating liquor is available from within the supermarket but excluding directional or Premises name signage) on the external façade of the premises.

Authorities referred to in Determination:

- *Aldi Foods Pty Ltd v Chief Health Officer* (LC 12/2018)
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366
- *Lolba Holdings Pty Ltd v Director of Liquor Licensing* (LC 01/2021)
- *O'Sullivan v Farrer* [1989] HCA 61
- *South Freo Fresh Pty Ltd v Commissioner of Police and Others* (LC 13/2020)

Background

- 1 This matter concerns an application ("**Application**") by Broadwater Village Grocer Pty Ltd ("**the Applicant**") for the conditional grant of a liquor store licence ("**LSL**") pursuant to sections 47 and 62 of the *Liquor Control Act 1988* ("**the Act**") for the premises to be known as "Broadwater Village Liquor Store" ("**the Premises**") located at the Broadwater Shopping Village ("**the Local Centre**") in Broadwater, Western Australia.
- 2 The Application is for the Premises to form a part of the existing Broadwater Village Grocer (grocery store operated by the Applicant) with a proposed floor area of approximately 51-55m² plus an additional storage room and cool room facilities. The Premises would be a 'small boutique' size with a total of approximately 370 to 430 product lines including, wine, beer, cider, premixed, and spirits and liqueurs.
- 3 On 7 December 2020, the Applicant lodged the Application for an LSL for the Premises.
- 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. The Application was advertised in accordance with instructions issued by the licensing authority.
- 5 By a Notice of Intervention under section 69(8a)(b) of the Act dated 11 January 2021 the Chief Health Officer ("**CHO**") intervened in the Application. The CHO did not oppose or support the Application but made representations on 'relevant matters' in support of the position that if the Application is granted, certain conditions should be imposed on the licence pursuant to section 64 of the Act.
- 6 Baytown Holdings Pty Ltd ("The Objector"), licensee of Brew+, objected to the Application on 6 January 2021 under sections 73(2) and 73(4) of the Act. The objection was made on the basis that granting the Application would not be in the public interest and as such would be contrary to the Act (section 74(1)(a)).
- 7 Pursuant to section 73(5)(b) of the Act, the Objector sought to amend its objections in its Closing Submissions dated 18 March 2021 to include as a ground of objection that granting the Application would be contrary to the Act as section 36B(4) of the Act cannot be satisfied (section 74(1)(j)).
- 8 On 12 May 2021 a delegate of the Director of Liquor Licensing refused the Application. The delegate's reasons for deciding to refuse the Application appear in Written Reasons requested under section 18AA(3) of the Act dated 15 July 2021 and a Notice of Decision dated 12 May 2021.
- 9 In summary, the delegate refused the Application on the grounds that the Applicant failed to discharge its onus under section 36B(4) of the Act however declined to make any findings on or otherwise resolve the intervention and the objection and declined to decide whether he was satisfied of the matter set out in section 38(2) of the Act (that granting the Application is in the public interest).
- 10 The Applicant seeks review of the delegate's decision pursuant to section 25(1) of the Act.
- 11 The Commission heard this matter on 25 October 2021.

The Applicant's Submissions

- 12 The Applicant operates the Broadwater Village Grocer located within the Broadwater Shopping Village, approximately 7 kilometres west of Busselton. The Broadwater Shopping Village is a “Local Centre” designed to provide services for the immediate neighbourhoods that are easily accessible and focus on the main daily household shopping and community needs.
- 13 The Applicant applied to expand its offering at the Broadwater Village Grocer to include packaged liquor sales. The Applicant proposed to operate as an independent boutique grocer and liquor store that supplies shoppers with a one-stop shopping experience allowing consumers to purchase their groceries and liquor needs in one convenient location.
- 14 The Applicant proposed a stock list with between 370 to 430 lines of liquor products, consistent with a convenient and complementary service for shoppers at Broadwater Village Grocer and at the Broadwater Shopping Village as a whole.
- 15 The Applicant proposed a range of packaged liquor products including WA wine not available at larger chain outlets, with a particular focus on Margaret River and Great Southern region wines. The range of products were specifically selected for the boutique Premises and the customers in the locality.
- 16 The Premises is situated in a locality where there are a high number of tourists and retirees. The Applicant submits that the demographics of the locality are critical in establishing consumer requirement for a liquor store at the Broadwater Shopping Village, with no other packaged liquor facilities within two kms of the Premises. The Premises proposes to provide tourists and older persons with a convenient liquor facility within walking distance from their accommodation.

Locality

- 17 Before addressing the key considerations of section 36B(4) of the Act, the locality must be identified.
- 18 In *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 (“**Liquorland Decision**”), Justice Archer held (at [181]) that the word 'locality' in section 36B(4) “denotes an area that surrounds, and is geographically close to, the location of the proposed premises”. Her Honour also said (at [185]):

“This is not to say that the 'locality' will inevitably, or even usually, be a circular area within a particular radius of the proposed site. The shape and size of the 'locality' may be influenced by topographical features (including man-made features such as roads) and the areas from which the proposed site could be accessed reasonably easily on foot or push-bike. If there is a community in the area of the proposed site, the geographical spread of that community may also influence the shape and size of the 'locality'.”
- 19 The Applicant’s position is that the locality for the purposes of this Application should be a two km radius from the Premises given the unique demographics of the area.
- 20 The locality contains a high number of tourist accommodation and retirement facilities in close proximity to the Premises. The Applicant submits that tourists and older persons do not want to drive once stationed at their holiday location or home, preferring facilities that are within walking or riding distance.

- 21 This also includes retirees and older persons using their mobility scooters. The market research and witness statements forming part of the Applicant's Submissions evidence the requirement for facilities to be located in close proximity to accommodation to enable residents to walk or ride.
- 22 The Applicant lodged Census data that supported the contention that persons who live in the locality include older persons. The Applicant also referred to the Busselton cruise ship operations, which pre-COVID, attracted thousands of visitors every year as well as the expansion of the Busselton-Margaret River Airport which will see regular interstate flights (including Melbourne to Busselton) and significantly increase tourism numbers to the region.
- 23 The Applicant submitted that the proposed premises is unique, being immediately surrounded by numerous accommodation facilities, including six resorts, three caravan parks, and three retirement villages as well as other accommodation facilities.
- 24 The Applicant also lodged several letters from accommodation operators detailing the proximity of the Premises to their facilities as well as the requirement for holiday makers to access packaged liquor on foot.
- 25 The Applicant submitted that these features ought to be considered when determining the locality for the purposes of the Application. It is submitted that, unlike permanent residents, tourists, holiday makers and retirees do not like to travel as far for their purchases, preferring facilities that are within walking or riding distance. Given this, a two kilometre radius should be adopted as the locality for this Application.

Local Packaged Liquor Requirements

- 26 The Applicant submitted that the market research, letters in support, and witness statements demonstrate a requirement for a packaged liquor facility in the area.
- 27 The Applicant's market research included conducting a Consumer Survey whereby respondents were asked to answer 12 questions about the proposed premises and their requirements for packaged liquor. Of the approximately 100 responses submitted, 95% of respondents purchased packaged liquor often (at least once a month). The respondents also purchased a range of packaged liquor, with nearly 65% purchasing beer, 67% purchasing wine and 28% purchasing spirits.
- 28 In the Liquorland Decision, Justice Archer held that '*requirements of consumers for packaged liquor*' in section 36B(4) of the Act is not limited in its scope to the physical item or product of packaged liquor. Justice Archer said that '*[t]here is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant...*'
- 29 The Applicant submits that the evidence lodged with the Application also demonstrates the consumer requirement for one-stop shopping and convenience in accessing liquor, especially by foot, bike or mobility scooter. The Applicant maintains that in addition to the locally produced packaged liquor requirement in the locality, there is also a requirement for one-stop shopping convenience and better access to liquor.

Existing Packaged Liquor Premises

- 30 There are no packaged liquor facilities within a two kilometre radius of the Premises.
- 31 There are two packaged liquor facilities situated within a three kilometre radius from the Premises:
- a BWS - Beer Wine Spirits Busselton (“**BWS Abbey**”) (licensee – Endeavour Group Limited) under a liquor store licence, situated approximately 2.1km away by straight line and by car; and
 - b Amelia Park Lodge (licensee - Newtown Lodge Pty Ltd) under an unrestricted hotel licence, situated approximately 2.2 kms away by straight line and 2.3 km away by car.
- 32 The Applicant engaged Independent Consultant, Kathrine Dehavilland to conduct an audit on the existing licensed premises.
- 33 Ms Dehavilland's report records that Amelia Park Lodge operates as a tavern, restaurant and function centre with guesthouse accommodation. Whilst it operates pursuant to an unrestricted hotel licence, there is no dedicated packaged liquor facility and therefore does not offer customers any browse area for the purchase of packaged liquor. Whilst Amelia Park Lodge does sell wine for takeaway consumption, the range is limited with five bottles of white wine and eight bottles of red plus sparkling and rosé. Amelia Park Lodge operates predominantly as an on-premises venue with limited packaged sales with most consumers not aware you can purchase packaged liquor from the premises. As such, Amelia Park Lodge should not be taken into account, or very little weight attributed to the ability for it to meet consumer packaged liquor requirements, for the purposes of section 36B(4).
- 34 The BWS in Abbey, is located in a small strip of shops with a retail space of approximately 190m² with an additional 60m² of walk-in cool room space. BWS Abbey stocks approximately 1,300 lines of liquor, with the range based on the standard national base range available at all BWS outlets. Outside of the core range and promotional program, only a small selection of products can be tailored to the locality, but these product options are also limited as they must be the BWS national product database. BWS stock a limited range of local wines, with very few lines from small producers. BWS Abbey does not offer one-stop shopping convenience, with only a restaurant/café located nearby.

Existing Premises cannot reasonably meet Local Packaged Liquor Requirements

- 35 In *Liquorland*, Archer J held that the meaning of the phrase 'cannot reasonably be met' in section 36B(4) of the Act means “*cannot sensibly or rationally be met*”.
- 36 The Applicant reiterates that there is no packaged liquor outlet within two kms of the Premises and the demographics of the locality are unique due to the high number of tourist accommodations and retirement facilities. For this reason, the requirements of the public for packaged liquor in the locality cannot be reasonably met. Persons living within the locality, or tourists visiting the locality, must drive some distance (at least a four kms round-trip) from their home or accommodation in order to purchase packaged liquor. The Applicant submits, that in a regional city such as Busselton with a population of approximately 38,000 people, this is unreasonable.
- 37 As set out in the Applicant's Submissions, the Applicant lodged evidence which demonstrated that tourists and residents prefer to shop close to home, preferably within walking or riding distance. As it stands, this is not possible within a two kilometre locality of the Premises. In response to question 4 of the Applicant's Consumer Survey, which asked about whether

consumer requirements for packaged Liquor in Broadwater and the surrounding area were being met by existing outlets, 73 respondents indicated that their requirements were not being met, with the majority indicating that this was due to the lack of packaged liquor outlets in walking or riding distance. Even factoring in the BWS in Abbey, tourists and residents would still need to travel some distance to the nearest packaged liquor outlet, with most consumers noting that walking to BWS Abbey is not an option due to distance. Further, road access to BWS Abbey is limited due to the roundabout on Bussell Highway.

- 38 As set out in the Applicant's Submissions, the Applicant's stock consultant, Luka Sumich, identified that liquor from the Margaret River and Great Southern regions have very little or no footprint in the locality. As detailed in Ms Dehavilland's Report, BWS Abbey carries only 90 lines of red and white wine from Western Australia (as a whole), accounting for only approximately 6.7% of the liquor they stock. In contrast, the Applicant is proposing 173 lines of red and white wines from the Margaret River and Great Southern regions, accounting for approximately 40% of the total proposed lines.
- 39 The Applicant's proposed stock list was carefully curated, with a focus on small producers from the Great Southern and Margaret River regions, whilst offering a limited range of mainstream commercial products. A good selection of craft beers, especially from small boutique breweries were proposed given the growing market trend and demand. Further, given the proximity to high end accommodation resorts, premium wines will also be available. As identified in Ms Dehavilland's Report, products from local, smaller producers are not readily available in the locality. The Applicant also refers to the letters of support lodged whereby producers detailed the availability (or lack thereof) of their liquor in the locality. As a result, these packaged liquor requirements of consumers are not being met, and it is this gap that the Applicant is looking to fill.
- 40 11% of respondents to the Applicant's market research stated that their requirements for packaged liquor are currently being met with 89% of respondents stating that the Premises would cater to their requirements for packaged liquor better than what presently exists, and nearly 98% of respondents are at least likely to purchase packaged liquor at the Premises.

Applicant's Conclusion

- 41 It is submitted that Broadwater Village Liquor Store will provide consumers with the ability to satisfy their packaged liquor requirements in conjunction with one-stop shopping convenience at the Broadwater Village Grocer. The intent of the Premises is to operate as a one-stop shopping experience, offering locally produced packaged liquor products in a convenient location.

Proposed Harm Minimisation Conditions

- 42 At the hearing of 25 October 2021 the Applicant agreed that the following harm minimisation conditions proposed by the CHO in the Notice of Intervention dated 11 January 2021 could be imposed:
- a the licensed checkout is permitted to transact liquor sales only. No grocery sales are permitted at the licensed checkout;
 - b the entire liquor display and sale area must be physically and visibly separated from the food/grocery display and sale area by solid non-transparent barricading and an entry/exit door or gate;
 - c the liquor browse/display area is to be closed off when not open for trade; and

- d there is to be no advertising or promotion of liquor (including signage indicating liquor is available from within the supermarket) on the external façade of the premises.

The Intervener's Submissions

- 43 The CHO initially provided:
 - a a Notice of Intervention dated 11 January 2021, pursuant to section 69(8a)(b) of the Act;
 - b further submissions dated 25 February 2021; and
 - c closing submissions dated 18 March 2021.
- 44 The CHO made representations on 'relevant matters' regarding the Applicant's proposal for consideration in the decision making process. The CHO provided evidence in support of the following harm minimisation conditions being placed on the licence pursuant to section 64 of the Act (together, "**the Proposed Conditions**").

The proposed conditions are in the public interest

- 45 The CHO considered the four-limbed test set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 ("**Carnegies**") when considering harm minimisation (section 5(1)(b) of the Act).

Existing level of harm and ill health

- 46 There is an at-risk group of individuals residing in Broadwater and nearby Vasse, Abbey and West Busselton who between July 2017 to July 2020 were the subject of 112 'treatment episodes' with agencies receiving Mental Health Commission funding. Of the 112 treatment episodes, alcohol was identified as the primary drug of concern in 57 treatment episodes or 51%, and as a drug of concern in 67 treatment episodes or 60%.
- 47 The Applicant contended in their Responsive Submissions dated 11 March 2021 that the CHO's data "*cannot be considered in isolation*" and that "*[i]n order to assess the levels of harm and ill-health with other similar areas in Western Australia, comparative data must be provided*".

The likely degree of harm that may result from granting the Application and not imposing the Proposed Conditions

- 48 Under this limb the CHO relies on two principal streams of possible harm:
 - a the risks of alcohol exposure, impulse purchasing, and relative availability, flowing from selling liquor and grocery products together in supermarkets; and
 - b harm to at-risk individuals if the Proposed Conditions are not imposed.
- 49 Quantitative research of data from several countries indicates that consumption of specific alcohol products (e.g., wine or beer) materially increases when those products are made available within supermarkets and, inversely, consumption materially decreases when they are removed for purchase from supermarkets. In each case the change in consumption appears to be somewhat independent of trends in domestic consumption of alcohol generally.

- 50 The literature postulates several risk factors as explaining the phenomenon noted above, namely:
- a *'alcohol exposure'*, that the manner and context in which alcohol is made available informs community views of normal drinking patterns and behaviour. Offering alcohol as a grocery product or an everyday commodity normalises it as a normal part of culture rather than an intoxicating and potentially harmful drug;
 - b *'impulse purchasing'*, that visual reminders and circumstantial/contextual cues may cause customers to purchase goods (including alcohol) from a supermarket which they would not have purchased had they not been available or visually displayed. The CHO suggests that products designed for hedonistic consumption, including alcohol, are more prone to impulse purchasing than functional items.
 - c *'relative availability'*, that the consumption of addictive substances, such as alcohol, appears dependent in part on product availability, promotion and price.
 - d A further, longer-term, consideration, is that there is expert evidence postulating that alcohol exposure can have detrimental effects on children manifesting later in life, in that the normalisation of alcohol may influence children's future consumption patterns and behaviour.
- 51 The Commission at [85] in *South Freo Fresh Pty Ltd v Commissioner of Police and Others* (LC 13/2020) has previously found submissions of the CHO as to alcohol exposure *"persuasive, particularly in the context of the present Licence Application where the supermarket concerned is one directed to convenience shopping"*.
- 52 In the same decision, the Commission at [86] accepted that the research cited by the CHO as to impulse purchasing *"establishes that there is a risk of increased alcohol-related ill-health and harm when alcohol is sold in a supermarket setting. In the Commission's view, that risk of harm includes the risk that consumers may choose to use their funds to purchase alcohol products rather than grocery items"*.
- 53 In *Aldi Foods Pty Ltd v Chief Health Officer* (LC 12/2018) the Commission at [59] also stated concerns as to the proximity of alcohol products to the checkout area that would also be used for groceries in respect to *"the risk of unplanned or opportunistic purchasing of alcohol"*.
- 54 On 19 February 2021 Broadwater Village Grocer appeared to be the only conventional supermarket in an approximate 4 km radius from the premises. It is submitted the inclusion of alcohol sales from within the supermarket could increase the risks of alcohol exposure and impulse purchasing to a broader group of people within the community than would otherwise have been attracted to a liquor store independent of a supermarket.
- 55 The risk is that, absent the Proposed Conditions, alcohol exposure and impulse purchasing opportunities would be increased for these residents.
- 56 Following from the above, the CHO submits that if the Application is granted without the Proposed Conditions, people with existing alcohol use issues in the locality will likely find it more difficult to purchase groceries and return home without an alcohol reminder and/or impulse purchasing opportunity.

The likely degree of harm that may result from granting the Application and not imposing the Proposed Conditions, against the existing level of harm

- 57 The CHO accepts that it is difficult to quantify precisely the degree of harm that may result from granting the Application without the Proposed Conditions, but respectfully submits that there will likely be a material increase in harm.
- 58 The Applicant contended that the sale of liquor alongside food and grocery items or what it called 'one-stop shopping convenience' has harm minimising effects as 'the sale of food and liquor together increases the likelihood that food and liquor will be consumed together'. The CHO accepts that consuming food alongside alcohol can reduce intoxication but submits that the Applicant cannot guarantee that purchased liquor and food will be consumed together. To the contrary the research provided by the CHO indicates that selling liquor with groceries in a supermarket is likely to increase consumption of that liquor.
- 59 The Applicant contended that 'factors that will assist in reducing harm' include "*the mature demographic of the locality, with the median age over 41 years*" and "*the numerous accommodation facilities located within close proximity to the Premises*".
- 60 As to demographics, data provided by the CHO indicated that in 2019, almost one in five (19.1%) Western Australians aged 40-49 years drank at levels that placed them at-risk of alcohol-related harm and ill-health over their lifetime and more than one in four (28.4%) reported consumption that placed them at risk of harm after a single occasion of drinking. The Applicant responded at heading 3.2 of the Responsive Submissions by, correctly, observing that the data showed that the 18-24 and 25-29 age groups appeared to be more at risk than the 40-49 year old age group (but the 30-39 age group appeared to be less at risk).
- 61 As to accommodation facilities, the Applicant clarified that their proximity would reduce the risk of drink-driving as individuals could walk to the Premises to purchase liquor. The CHO's first response is that that should be true of residential or other facilities in the same proximity, so the relevance of an 'accommodation' use is not very clear. The CHO's second response is that a reduction in drink-driving should be given little weight: the logical extreme of the Applicant's argument is that, to reduce the risks of drink driving, liquor should be available for purchase within walking proximity of all or most premises. Clearly that approach would give rise to a number of new risks. The CHO's third response is that insofar as the research indicates that the sale of liquor from supermarkets increases consumption of liquor, it is entirely possible that drink-driving events may increase as liquor consumption increases. Lastly, even patrons who live extremely close will likely drive to the Premises where they seek to purchase physically bulky and/or weighty quantities of liquor (accompanied or not by groceries).

Catering for the requirements of consumers of liquor and related services (Act, section 5(1)(c))

- 62 The CHO, consistent with its position that it neither supports nor opposes the Application, has no position as to whether it is in the public interest to grant the Application having regard to the primary object in section 5(1)(c).
- 63 That said, the CHO submits that the Applicant has not provided any evidence or analysis suggesting that the Proposed Conditions are inconsistent with, or materially detract from, attainment of the primary object in section 5(1)(c).

Imposition of Proposed Conditions

64 The Intervener submits that section 64(3)(cc) might provide a more favourable avenue for imposing the Proposed Conditions than section 64(3): the Commission might conclude that the Conditions are *'desirable in order to... minimise harm or ill-health caused to people, or any group of people, due to the use of liquor'*, and may not need to balance that against any (possibly contrary) public interest considerations.

The Objector's Submissions

65 Baytown Holdings Pty Ltd (ACN 096 951 067) ("**the Objector**") is the licensee in respect of Brew+, which operates pursuant to liquor store licence number 603208441816 from premises situated at 231 Bussell Highway, West Busselton.

66 The Objector provided:

- a a Notice of Objection dated 6 January 2021 together with a letter from the Objector dated 5 January 2021;
- b Further Submissions and Evidence dated 25 February 2021; and
- c Closing Submissions dated 18 March 2021.

67 Brew+ is a new modern and significantly sized store within 3.3 kms driving distance to the Applicant's location. It has the normal range of mainstream products as well as a mix of local craft beer, premium/local spirits and WA wines. Brew+ has always been primarily focused on supplying locally produced products including a small selection of Great Southern wines. The Objector submits that given their location in the Margaret River Wine Region demand for Great Southern wines has always been very limited. Brew+ already sells many of the brands mentioned in the PIA.

68 As the Applicant is only proposing a Premises of approximately 55sqm the size of this proposed licensed area is also too small to provide an adequate range and selection of liquor products for most consumers.

69 The localities of Broadwater, West Busselton, Vasse, and Abbey are serviced for take-away, packaged liquor by existing licences held by Brew+, Cape Cellars, BWS Abbey and Liquorland Vasse. The Objector submits that existing licensed premises provide a larger product selection for consumers residing or visiting the area than the proposed Applicant can provide in their limited size premises.

70 The Applicant's location and surrounding area has no major intersections, traffic or physical impediments preventing easy access to the mentioned existing licenses. On any normal day, driving within the speed limit, it should take 3-4 minutes to reach any of the existing liquor stores.

71 Cape Cellars and Liquorland Vasse have larger supermarkets and liquor stores within their shopping centres so as to accommodate one stop shopping for both groceries and liquor.

72 The Objector disputes the Applicant's proposed relevant locality being a two km radius from the Proposed Premises. The Objector submits:

- a the licensing authority policy clearly states that *"[i]n regard to country cities, towns or communities, unless remotely located or the licensing authority determines otherwise, the locality is to be a radius of 3 km from the site of the intended business"*

- b the Applicant has not presented any extraordinary circumstances to justify the licensing authority departing from established policy. As far as is known, the Applicant has not lodged any separate submission regarding the appropriateness of a two km radius, as required.
- 73 The Objector submits that as there is no determination by the licensing authority of any alternative radius applying, the relevant locality for the application is a three km radius as per the policy.
- 74 Within the three km locality there are two existing packaged liquor outlets. There are also existing packaged liquor premises located on the periphery of the three km locality.
- 75 The Objector submits that the Applicant has not identified or analysed the existing packaged liquor available in the area to the standard set by the Liquor Commission in respect of section 36B(4) of the Act.
- 76 The Objector submits that the Applicant has not provided evidence of its particular proposed stock range being unavailable in the area. As such, the absence of the necessary evidence should enable the licensing authority to conclude that section 36B(4) cannot be satisfied.
- 77 The Objector submits that most, if not all, of the proposed range is already available across the various existing outlets within and on the boundary of the three km locality, and some outlets already stock at least most of the range individually. In support of these propositions, the Objector provided copies of the stock lists for Cape Cellars and Brew+.
- 78 The Objector notes that the consumer evidence produced by the Applicant is generic as to liquor generally and does not address specific products. It is not apparent from the evidence as to what degree consumers were in contemplation of specific products. The Objector submits these are a “fundamental defect” in the evidence.
- 79 Individually and collectively the existing packaged liquor stores offer a large and diverse range of packaged liquor, including the liquor proposed to be sold by the Applicant.
- 80 The Objector submits that it should be open to the licensing authority to conclude that there is absence of evidence to a sufficient standard to satisfy the Commission that an accurate analysis has been undertaken and that 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. It is open to the decision maker to conclude that the Application does not contain evidence of high probative value or adequate persuasiveness to enable the licensing authority to be satisfied under section 36B of the Act.
- 81 The Applicant has focused on issues of convenience to support its application which the Liquor Commission has determined are irrelevant when deciding the key primary question set out in section 36B(4) of the Act in *Lolba Holdings Pty Ltd v Director of Liquor Licensing* (LC 01/2021).
- 82 The Objector submits that the Applicant will not satisfy the requirements under section 36B(4). As section 36B(4) is a mandatory provision, there is no need for the licensing authority to determine the matter under section 38(2) of the Act. The Objector notes that even if the Applicant does satisfy the requirements under section 36B(4) the Application should be refused for the same reasons. The grant would result in a proliferation which is a situation to be prevented.
- 83 The Objector submits that to grant the licence would be contrary to the Act, any grant would not be in the public interest, and the Objector has provided sufficient evidence and submissions for the licensing authority to refuse the Application. The Objector further submits

that in addition, or in the alternative, such a determination could be made by exercising the overriding discretion in the Act under section 33, should it be thought necessary to do so.

Legal and Statutory Framework

- 84 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 at [54]).
- 85 The Commission is required to make its determination on the balance of probabilities (section 16(1)(b)(ii) of the Act).
- 86 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.
- 87 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).
- 88 Section 16 of the Act prescribes that the Commission:
- a may make its determination on the balance of probabilities [subsection (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)].
- 89 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)).
- 90 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 licensing authority must not grant the Application unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated [section 36B(4)].

- 91 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a the grant of the application would not be in the public interest; or
 - b the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
 - c that if the application were granted:
 - i undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - ii the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened;
 - d that the grant of the application would otherwise be contrary to the Act.
- 92 Pursuant to section 69(8a)-(8b) the Chief Health Officer may intervene in proceedings before the licensing authority for the purpose of introducing evidence or making representations in relation to relevant matters means the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health.
- 93 An intervener under section 69 of the Act is not required to satisfy an onus of proof for its representations and can make representations or submissions on matters requiring an evaluative judgment by the Commission (including the merits of an application).

Public Interest condition

- 94 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer* [1989] HCA 61).
- 95 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.

- 96 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)).
- 97 No 'other ... matter' has been prescribed pursuant to section 38(4)(d).

Section 36B(4) Test

- 98 Section 36B(4) prohibits the licensing authority to grant an application for a packaged liquor licence 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.
- 99 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)*].
- 100 In *Liquorland*, Archer J said (at [74]-[75]):
- “I do not consider that the purpose of s 36B was to constrain the number of packaged liquor premises by sacrificing consumers' options to get liquor at a lower price and better quality. Rather, I consider that its purpose was to ensure that an additional licence would only be granted where such requirements could not reasonably be met by the existing premises (and in the context of there also being a Public Interest condition).*
- In my view, so long as s 36B(4) imposes a meaningful additional hurdle to the Public Interest condition, it will be consistent with, and promote, its purpose.”*
- 101 For the purpose of section 36B(4), the Commission must be satisfied 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.
- 102 The phrase ‘*requirements of consumers for packaged liquor*’ in the definition of ‘local packaged liquor requirements’ in section 36B(4) of the Act is not limited to the physical item of packaged liquor (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 at [108]).
- 103 The phrase ‘*cannot reasonably be met*’ in section 36B(4) of the Act means “*cannot sensibly or rationally be met*” (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 at [131]).

- 104 The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority as to the above.
- 105 To properly contemplate the first limb of section 36B(4), the Commission must make a finding as to the “*local packaged liquor requirements*” of consumers in the locality based on the evidence provided. This requires consideration of the interpretation of the ‘requirements of consumers’ and of the relevant ‘locality’ to be considered.

DETERMINATION

- 106 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.
- 107 This review has arisen primarily due to the relatively new section 36 of the Act and, in particular, section 36(4). As discussed above the recent decision of Justice Archer in *Liquorland* provides clarity on the correct interpretation of the provision and its application.
- 108 The Commission must be satisfied that the grant of an application is in the public interest pursuant to section 38 (“**Public Interest condition**”), and that the “*local package 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*” pursuant to section 36(4) (“**Consumer Requirements condition**”).

Public Interest Condition (s 38 of the Act)

- 109 The Applicant submits that the proposed Premises will:
- a fulfil a consumer requirement for liquor and related services;
 - b generate a range of benefits in the Locality, including to the liquor industry and tourism industry; and
 - c not result in a significant increase in the level of alcohol-related harm or ill-health in the Locality.

Requirements of Consumers

- 110 The Applicant submits:
- a that the results of the Consumer Survey, letters in support, and witness statements, demonstrate the clear demand for the facilities, services, and products that will be provided if the Application is successful;
 - b they will provide liquor products with a focus on locally produced wines, with WA wine representing over 72% of the total wine range, as well as spirit offerings including a range of locally produced spirits; and
 - c there is a requirement of consumers for one-stop shopping, for premises located within walking or riding distance, and for locally produced products with a focus on stock comprising red and white wines from the Margaret River and Great Southern regions.
- 111 The Objector submits:
- a that the Applicant has not provided evidence of the particular proposed stock range being unavailable in the area and that there is already a substantial selection of easily accessible liquor in the area;

- b the Premises is too small to be able to provide an adequate range and selection of liquor products for most consumers; and
 - c that Cape Cellars and Liquorland Vasse already meet the requirement of consumers for one-stop shopping.
- 112 The Commission accepts that the Consumer Survey with 100 respondents, together with the 5 letters from producers, 7 witness statements, and 5 additional letters, contains an indicatively representative sample of the consumers who would likely attend the Premises.
- 113 The Commission has considered the Application and evidence supplied and is satisfied that the proposed Premises, which will form part of the Broadwater Village Grocer, in general is supported by consumers.
- 114 The Commission does not accept the Objector's submission that the requirements of consumers are already met by Cape Cellars and Liquorland Vasse in regard to one-stop shopping convenience.
- 115 It is not contentious that the liquor store co-located with the grocery store, in the Local Centre, with numerous accommodation facilities located nearby and providing locally produced liquor, would meet the needs and desires of consumers (both residents and tourists) seeking one-stop, locally sourced, convenient liquor and shopping options.
- 116 Given the above, the Commission is satisfied that the grant of the Application would cater for the requirements of consumers for liquor and related services.

Benefits to the Locality

- 117 The Applicant submits that the grant of the Application will result in:
- a an improvement to the services and facilities that already exist at the Local Centre, particularly in respect to the accessibility of liquor;
 - b stimulation of the tourist industry by providing a convenient one-stop shopping location within walking and riding distance of numerous accommodation facilities; and
 - c increased range of locally produced liquor products in a boutique packaged liquor store, with a focus on stock comprising red and white wines from the Margaret River and Great Southern regions.
- 118 The Commission is satisfied that the Local Centre would benefit from the proposed packaged liquor outlet forming part of the Broadwater Village Grocer. The Commission is satisfied that the proposed Premises would result in a number of benefits to the Locality as a whole, as per below:

Liquor Industry

- a The expansion of the Broadwater Village Grocer to include a boutique liquor outlet will provide a more desirable shopping experience with a locally sourced liquor range that is convenient and accessible and designed to meet consumer demands.
- b The Premises will be the only liquor outlet within the Broadwater Shopping Village.
- c The Premises will provide liquor products from small local producers that are not readily available in the Locality.
- d The Premises will be an additional liquor outlet in the Locality, the Commission is satisfied that, although the range and quantity of liquor may increase in the Locality, the

55m² boutique outlet with a focus on local products, falls short of creating a proliferation of liquor outlets in the locality.

- e The proposed range of locally produced liquor, with a focus on wines from the Margaret River and Great Southern regions, and a spirit offering from the Great Southern region that no other liquor store in the locality stocks, will minorly assist in the development of the liquor industry in the State.

Tourism Industry

- a The City of Busselton is a popular tourist destination in the Margaret River region. Attractions in the region include wineries and micro-breweries. Annual visitor numbers exceed 850,000, with over 750,000 being intrastate visitors. There is an established cruise industry in Busselton, and there are a number of developments in progress to increase tourism numbers within the region.
 - b The Commission finds that the Premises is surrounded by numerous accommodation facilities, including resorts and caravan parks as well as other accommodation facilities. The increasing population and unique demographics in the locality will drive consumer demand for independent local venues. The proximity of accommodation facilities will allow tourists in the locality to purchase packaged liquor at a location within walking or riding distance of their accommodation.
 - c The Commission finds that the expansion of offerings at the Broadwater Village Grocer to include a liquor outlet may create some modest benefit to the tourism industry, in that visitors to the area will be provided with a more convenient one-stop shopping Local Centre.
- 119 The Commission finds that one of the Applicant's directors is an experienced and responsible manager of retail outlets including licensed premises.
- 120 The Commission is satisfied that the granting of the Application therefore:
- a will result in various benefits to the locality;
 - b would facilitate the use and development of licensed facilities; and
 - c would be consistent with the primary and secondary objects of the Act.

Harm and Ill Health

- 121 The Applicant submits that:
- a it is open to the Commission to conclude that the level of alcohol-related harm is comparable to, or below, the level of harm suffered generally in the State; and
 - b that the potential increase in alcohol-related harm or ill-health is minimal.
- 122 The CHO submits that:
- a there is an at-risk group of individuals within the Locality and the introduction of the Broadwater Village Liquor Store will result in increased harm and ill-health to these persons;
 - b the Locality already experiences a high level of alcohol-related harm and ill-health; and
 - c the increased availability of liquor (in terms of accessibility) and increased exposure to the sale and promotion of alcohol (in terms of supermarkets selling liquor) at the

proposed Premises will result in greater consumption of alcohol, which will in turn lead to increased alcohol-related harm and ill-health in the Locality.

123 In assessing the harm and ill-health that may result, the Commission must undertake the analysis set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 being that the Commission must:

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

124 *Carnegies Test – Level of Harm and Ill Health*

- a Based on the material provided, the Commission finds that there is an existing level of harm and ill-health associated with the use of liquor in the Locality.
- b The statistics relate primarily to alcohol related admissions to treatment agencies with Mental Health Commission funding.
- c The CHO does not comment on the degree of the existing level of harm or provide comparative data of the level of harm between different areas.

125 *Carnegies Test – Likely Degree of Harm and Ill Health*

- a The CHO submits that there are two principal streams of possible harm should the Application be granted, namely:
 - i increased risk of alcohol exposure, impulse purchasing and relative availability flowing from selling liquor and grocery products together in supermarkets; and
 - ii harm to at-risk individuals if the conditions proposed by CHO are not imposed.
- b Reference is made to studies which conclude that consumption materially increases when alcohol products are made available within supermarkets, and materially decreases when removed for purchase from supermarkets.
- c The issue is whether the availability of alcohol products within the Broadwater Village Grocer will result in an unacceptable increase in harm and ill-health to those within the at-risk category in the Locality.
- d The submission of the CHO is if alcohol is made available for sale within supermarkets, then there is a resulting increase in harm and ill-health. Further, at-risk persons are highly vulnerable and susceptible to alcohol-related harm.
- e In respect to the harm occurring on or immediately around the Premises, the Commission finds that it is unlikely there will be an increase in harm and ill-health.
- f It is always difficult to predict what may occur if a particular application is granted. It involves a prediction as to the likelihood that something may occur.

- g Ultimately the Commission is satisfied that the granting of the Application would likely result in an increase in the harm and ill health due to the fact alcohol will be available for sale at the supermarket.

126 *Carnegies Test – Assessment*

- a Whilst it is acknowledged that harm and ill-health exists within the locality, and that there is a possible degree of harm that may occur due to the granting of the Application, the Commission considers that in the context:
 - i the liquor store is relatively small;
 - ii there is not a high concentration of vulnerable or “at risk” parties in the Locality;
 - iii the Applicant is an experienced and responsible operator of retail outlets and licensed premises; and
 - iv the Commission imposes the following conditions on the Premises, as proposed by the CHO (with minor amendments to conditions B and D):
 - A. the licensed checkout is permitted to transact liquor sales only. No grocery sales are permitted at the licensed checkout;
 - B. the entire liquor display and sale area must be physically and visibly separated from the food/grocery display and sale area by solid non-transparent barricading and an entry/exit door or gate;
 - C. the liquor browse/display area is to be closed off when not open for trade; and
 - D. there is to be no advertising or promotion of liquor (including signage indicating liquor is available from within the supermarket but excluding directional or Premises name signage) on the external façade of the premises.

Although the likelihood of harm and ill-health increasing exists, it would not be to a level as to make it inappropriate to grant the Application.

- b It should also be noted that the primary object of the Act is to minimise harm or ill-health, not eradicate it.

Carnegies Test – Weighing

127 In weighing the likelihood of alcohol related harm and ill-health against the benefits of the Application (as considered above) the Commission finds that such likelihood is not so unacceptable that it outweighs the benefits of granting the Application.

Impact on Amenity of the Area

128 The Commission is satisfied on the basis of the evidence provided that the amenity, quiet or good order of the Locality will not be adversely affected by the grant of the Application.

Offence, annoyance, disturbance or inconvenience

129 The Commission is satisfied on the basis of the evidence provided that the grant of the Application will not create undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school.

Objections

- 130 On balance, the Commission finds that none of the grounds of objection have been made out by the Objector and as such, the burden of establishing the validity of the objections has not been discharged in accordance with the requirement of section 73(10) of the Act.
- 131 Having regard to the relevant principles, materials filed in this review and the concessions as to proposed harm minimisation conditions, the Commission is satisfied that:
- a the grant of the application would be in the public interest; and
 - b the conditions being imposed on the Licence, as agreed by the Intervenor, are appropriate to minimise harm.

Consumer Requirements Condition (section 36B(4) of the Act)

- 132 For the purposes of this Application, section 36B(4) of the Act is mandatory and the test therein must be satisfied.
- 133 For the purposes of meeting the requirements of section 36B(4) of the Act, the Commission must:
- a adopt an appropriate “locality” for the purposes of section 36B; and
 - b be satisfied that 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
 - c be satisfied that such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the locality.

Locality

- 134 The Act does not include any definition as to “locality”.
- 135 At the time of the Application, the Director’s Policy in respect to “locality”:
- a was contained in the Director’s “Public interest assessment policy”;
 - b did not refer specifically to section 36B, but rather to section 38; and
 - c stated as follows:

“Locality

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

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

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

Where an applicant considers that the licensing authority’s determination of the locality in accordance with the policy is not suitable having regard to its intended nature of

business, the applicant may make submissions as to the appropriate size of the locality to the specific nature of the proposed business.

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

"Locality guide

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

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

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

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

136 It is usual that a country location such as Broadwater would generally have a three km radius set as to locality.

137 In *Liquorland Archer J* at [181] to [186] noted the following with respect to the word "locality" used in section 36B:

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

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

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

.....

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

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

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

- 138 The Commission accepts that evidence provided as to the current shopping habits of consumers (as to existing premises) may well be highly relevant and can be considered when first deciding the relevant “locality”.
- 139 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 and ascertainable grounds.
- 140 The Commission finds that there are some distinctive features of the area surrounding the proposed premises:
- a the premises are located near multiple short stay accommodation facilities; and
 - b the demographic surrounding the premises includes people more inclined to walk or bicycle to shops than to drive.
- 141 For the above reasons, the Commission adopts a three km radius from the premises as the Locality.

Local Packaged Liquor Requirements - Requirements of Consumers

- 142 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.
- a This requires consideration of the correct interpretation of “*requirements*”.
- 143 As per the above discussion, *Liquorland* has established that that “*the words 'requirements of consumers' mean the same in s 36B(1) and s 5(1)(c) and, subject to the facts and issues of a particular case, may involve consideration of the same types of matters*” including:
- a shopper convenience (including one stop shopping);
 - b shopper preferences;
 - c competition;

- d product range;
- e service; and
- f efficiency.

- 144 Consumer convenience and preference is assumed to mean what consumers desire, rather than what they cannot manage without: *Liquorland* at [79].
- 145 The Applicant submitted that the market research, letters in support, and witness statements demonstrate a requirement for a packaged liquor facility in the area.
- 146 The immediate surrounds of the proposed premises have some distinctive features, specifically the predominance of tourist accommodation facilitates and retirement housing.
- 147 The Commission is satisfied that the evidence supports the conclusion that there are requirements of consumers for packaged liquor in the Locality, particularly in respect to:
- a the ability to have one-stop shopping with the co-located grocer;
 - b the premises being located within walking or riding distance for consumers located within the relevant tourist accommodation and retirement facilities; and
 - c a focus on stock comprising red and white wines from the Margaret River and Great Southern regions.

Can Packaged Liquor Requirements be Reasonably Met?

- 148 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 17/2010)].
- 149 In *Liquorland* Archer J stated that:
- a the phrase “cannot be reasonably be met” means “cannot sensibly or rationally be met; and
 - b the licensing authority should have regard to contemporary standards and expectations for the requirements of packaged liquor in determining whether consumer requirements could not 'reasonably' be met.
- 150 Due to the adoption of the 3 km Locality the other packaged liquor providers within the Locality are:
- a BWS Abbey (2.1 km away); and
 - b Amelia Park Lodge (2.2 km away).
- 151 In this case, the Amelia Park Lodge operates predominately as a tavern, restaurant and function centre with limited liquor purchasing facilities.
- 152 The Commission finds that:
- a the nature of Amelia Lodge and the services provided there are substantially different to the Premises; and

- b the requirements of consumers as set out in paragraph 145 are not met by Amelia Lodge.

153 In respect to the BWS, it is noted that:

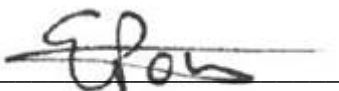
- a the same is not co-located with a grocery or other shopping facilities;
- b the BWS is not within walking or riding distance of the majority of the consumers that are likely to attend the Premises; and
- c the BWS will not stock the same degree of red and white wines from the Margaret River and Great Southern regions as it is anticipated the Premises will stock and sell.

154 As such, the Commission finds that the consumer requirements established with respect to the Premises cannot sensibly or rationally be met by the other packaged liquor premises within the Locality.

Conclusion

155 Accordingly, the Decision of the Delegate of the Director is quashed and the Application for a Liquor Licence is granted subject to the following conditions:

- a the licensed checkout is permitted to transact liquor sales only. No grocery sales are permitted at the licensed checkout;
- b the entire liquor display and sale area must be physically and visibly separated from the food/grocery display and sale area by solid non-transparent barricading and an entry/exit door or gate;
- c the liquor browse/display area is to be closed off when not open for trade; and
- d there is to be no advertising or promotion of liquor (including signage indicating liquor is available from within the supermarket but excluding directional or Premises name signage) on the external façade of the premises.



**EMMA POWER
ACTING CHAIRPERSON**



**KIRSTY STYNES
MEMBER**



**NICHOLAS VAN HATTEM
MEMBER**