

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: JB Foods Pty Ltd
(represented by Mr Michael Hotchkin of Hotchkin Hanley Lawyers)

Objectors: Pilbara Community Alcohol and Drug Service

First Intervener: Commissioner of Police
(represented by Mr Gregory Stockton of the State Solicitor's Office)

Second Intervener: Chief Health Officer
(represented by Mr Gregory Stockton of the State Solicitor's Office)

Commission: Ms Emma Power (Acting Chairperson)
Mr Paul Shanahan (Member)
Mr Alex Zilkens (Member)

Matter: Application for the grant of a Liquor Store licence referred under section 24 of the *Liquor Control Act 1988*

Premises: Karratha Cellars
Tenancy 4, Tambrey Village Shopping Centre,
Bathgate Road, Nickol

Date of Hearing: 25 May 2021

Date of Determination: 12 April 2022

Determination The Application is refused

Authorities referred to in Determination:

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*
- *Liquorland (Australia) Pty Ltd v Director Of Liquor Licensing [2021] WASC 366*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd (1991) 4 WAR 1*
- *Terra Spei Pty Ltd and Shire of Kalamunda [2015] WASAT 134*
- *Woolworths Limited v Director of Liquor Licensing (2013) WASCA 227*
- *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290*

Background

- 1 This matter concerns an application (“**Application**”) by JB Foods Pty Ltd trading as Karratha Cellars (“**the Applicant**”) for the grant of a liquor store licence (“**LSL**”) pursuant to section 47 of the *Liquor Control Act 1988* (“**the Act**”) for premises located at the Tambrey Village Shopping Centre (“**the Centre**”) at Tenancy 4, Tambrey Village Shopping Centre, Bathgate Road, Nickol, Western Australia (“**Premises**”).
- 2 It is proposed that the Premises will be an independently owned and operated store comprising a licensed area of approximately 140 square metres (including a cool room and patron browse area) to be located immediately adjacent (although in a separate premises) to the IGA “Good Grocer” store at the Centre.
- 3 The Director of Liquor Licensing (“**the Director**”) referred the application to the Liquor Commission (“**the Commission**”) for hearing and determination pursuant to section 24 of the Act.
- 4 The Commission heard this matter on 25 May 2021.

Legal and Statutory Framework

- 5 Section 16 of the Act prescribes that the Commission:
 - a may make its determination on the balance of probabilities [sub section (1)(b)(ii)]; 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)].
- 6 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*).
- 7 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)].
- 8 The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority as to each of the above.

Public Interest Test

- 9 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).
- 10 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.
- 11 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)).
- 12 No 'other ... matter' has been prescribed pursuant to section 38(4)(d).

Section 36B(4) Test

- 13 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.
- 14 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)*].
- 15 For the purpose of section 36B(4), the licensing authority must be satisfied, based on the evidence provided, that:
 - a there are “*local packaged liquor requirements*” which are 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”.

Determination

- 16 The matters in contention arising under the Application and at the Hearing are primarily concerned with:
 - a the public interest test to be satisfied in respect to section 38 and, in particular, the issue of the level of harm or ill health that might be caused to people, or any group of people, due to the use of liquor; and
 - b the relatively new section 36B of the Act and, in particular, the statutory interpretation of section 36B(4).
- 17 The public interest test is well established and there is extensive legal precedent to assist the Commission in making a determination.
- 18 In this case section 36B(4) of the Act is mandatory and the test therein must also be satisfied.
- 19 The Commission considers that, and there appears to be no argument from the Applicant or the Intervenor against the proposition that, 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” – defined in section 36(4)(1) as being the requirements of consumers for packaged liquor in the “locality” the premises are to be situated; and
 - c be satisfied that such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the “locality”.

Locality

- 20 In this case the Public Interest Assessment provided by the Applicant (the “**PIA**”) initially adopted a 3 km radius from the Premises to be the “locality” for the purposes of both the “*public interest test*” and the 36B(4) test.
- 21 By a letter dated 17 April 2020, the Department of Local Government Sport and Cultural Industries (“**the Department**”) gave notice that due to the regional nature of the location in which the proposed liquor store was to be situation, the “locality” for the purposes of section 36B was to be an 8 km radius. The relevant correspondence also provided an opportunity to provide additional submissions and evidence in respect to section 36B(4).
- 22 The Act does not include any definition as to “locality”.
- 23 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.”

- d does not include the township of Karratha in the Attachment 2 list of suburbs/areas that have either a 2 km or a 3 km radius.

- 24 In *Liquorland (Australia) Pty Ltd -v- Director Of Liquor Licensing [2021] WASC 366* (“**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.”

- 25 The regional township of Karratha is elongated in shape and had evolved in this manner due to the natural features of the area (i.e., boundary hills on one side and the flood plains and ocean on the other).
- 26 As such, adopting either a circular 3 km radius or an 8 km radius result in a significant amount of “vacant” land being included in the “locality”.
- 27 The Applicant has submitted that in identifying the “locality” in respect to section 36B, the same should not be determined by an arbitrary selection of a circle with a set radius, but rather by the orthodox application of planning principles by reference to prospective amenity impacts. The Applicant further rejected that the “locality” should be set by reference to the location of existing packaged liquor stores and the distance parties usually drive to obtain packaged alcohol.
- 28 The “locality” determined by the Applicant was set by reference to the expert report dated 15 March 2021 by Rowe Group (“**Rowe Report**”) and the Retail Economics Analysis dated March 2021 prepared by Pracsys (“**Pracsys Report**”) respectively. This results in a “locality” which encompasses the residential areas of West Karratha, being the area formed by the northern boundary to the existing urban area on the north side of Dampier Road (bounded by Balmoral Road northern leg); the southern boundary of the Baynton precinct; the major water course to the west; and the smaller water course to the east (extension of Millars Well Oval).
- 29 The Commission agrees that the imposition of a radius circle is not necessarily appropriate where such “locality” adopts an artificial area that does not encompass the actual population that would reasonably be considered to use the relevant liquor store. To adopt a patently artificial radius does not reflect the licensing authority’s mandate to have regard to the primary objects of the Act and the functions of the licensing authority which require consideration of the *actual* impacts of a proposed application.
- 30 Archer J in *Liquorland* (at 185) also references “locality” being influenced by the ability to access a proposed site by foot or push bike. The Commission considers that this may be a relevant consideration where there is evidence led that the consumers of the proposed premises require this kind of access. However, where:
- a it is asserted that a vast majority of consumers attend the Premises by vehicle and for the purposes of one-stop shopping (which necessarily involves taking home multiple bags of purchases); and/or
 - b the weather/climate or difficult access conditions indicate that consumers will predominately attend the premises using a car,
- this consideration largely falls away.

31 In *Liquorland Archer J* further contemplated that premises outside of the “locality” could be of relevance and quoted Doyle CJ in *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* (2000) 76 SASR 290 (“**Seaford Rise**”) at [33] as follows:

“Premises outside an identified locality remain relevant to the question that arises under s 58(2). First of all, applying reasoning of the type used in Lincoln Bottle Shop, a demand met outside the locality without any discontent at all, or at least by choice, would not be a relevant demand. Second, for reasons identified by Bray CJ [in Hobans Glynde] and von Doussa J [in Nepeor], the process of identifying a locality cannot be allowed to dictate an artificial approach to deciding whether a grant of a licence is necessary to satisfy the relevant public demand. The identification of a locality is usually a necessarily imprecise process. A particular boundary must be identified in most cases, but the identification of that boundary does no more than identify in a general way the locality from which the relevant public demand arises: Nepeor at 216 von Doussa J. The effect of s 58(2), as with earlier provisions, is to focus attention upon a locality in which a demand is expressed and upon the facilities available at premises in that locality, but not to do so in an artificial sense, but rather by way of directing primary consideration to these matters.

32 Although Archer J expressed a “tentative view” in *Liquorland* that premises outside the identified “locality” remain relevant to the assessment under section 36B of the Act in Western Australia, the Commission believes that some caution must be used in adopting this position entirely.

33 Seaford Rise is a South Australian case and there are differences in the terminology, application and history of the comparable legislation.

34 The Commission concurs that the “locality” should not be set solely by reference to the nearest packaged liquor store as this defeats the purpose of section 36B to consider what packaged liquor services already exist (or do not exist) in the “locality”.

35 However, the “locality” must not be dictated by an artificial approach, and the *actual* consumers of the “locality” and the manner in which they currently satisfy their packaged liquor requirements must, sensibly, be taken into account.

36 As such, the 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”.

Nature of the “locality”

37 Karratha is located in the far north Pilbara and is generally considered to be a relatively remote, although busy, mining town.

38 Karratha has expanded in a manner directed by the natural features of the surroundings.

39 The majority of the residential population live in the western side of Karratha. The existing “town centre” of Karratha is located towards the east side of the township, with an additional urban area to the east of the Town Centre. To the south (towards the east side but separated from the town itself) is a large business and industry zoned area (attachment 3, Rowe Report).

- 40 The Applicant gave oral evidence of the estimated population within the “locality” described by the Applicant, being 10,500, with the Rowe Report further noting that the current population of Karratha is in the order of 15,000 persons. Therefore, it is clear the majority of the residential population resides in the west side of Karratha.
- 41 There are also a large number of fly-in-fly-out (“**FIFO**”) workers that temporarily reside in or near to Karratha at an average 5.7 km from the proposed Premises (figure 17, Pracsys Report).
- 42 The Rowe Report also notes that the traffic numbers of cars on Dampier Road (being the main road through the Town) were very high, being similar to some busy Perth metropolitan areas, indicating a significant number of persons traveling within the township.
- 43 In the event that the Commission is to adopt the “locality” argued by the Applicant, then it would appear artificial to ignore the notorious fact that the residents of Karratha are located in a country town and are required to undertake significant travel for work and other purposes.

Existing Consumer Patterns

- 44 Within the “locality” adopted by the Applicant there is one existing liquor store, being Liquor Barons Karratha (“**Tambrey Tavern**”). Tambrey Tavern consists of a very large 900 square metre retail floor area and is located 690 metres away from the proposed Premises. The Tambrey Tavern is also co-located with a tavern/restaurant and bar, but is contained in a separated building to the same.
- 45 The next largest liquor store is Beer Wine Spirits Karratha (“**BWS Karratha**”) which is located approximately 4 km from the proposed Premises in the town centre of Karratha and has a 250-280 square metre area and is co-located with a supermarket.
- 46 There are further smaller packaged liquor offerings as set out later in this decision, however, the evidence indicates that the Tambrey Tavern and BWS Karratha are the most popular destinations for the purchase of packaged liquor.
- 47 The proposed Premises is proposed to predominantly service the residential population in West Karratha. However, it appears clear on the evidence supplied that a significant portion of such population already travels to packaged liquor stores.
- 48 The Applicant undertook three surveys:
- a the Consumer Survey of 300 residents within a 3 km radius conducted by telephone in June 2019 (before the Centre commenced trading) (“**the June 2019 Survey**”);
 - b the Consumer Survey of 300 residents within an 8 km radius conducted by telephone in May 2020 (before the Centre commenced trading) (“**the May 2020 Survey**”); and
 - c the Consumer Survey of 190 persons conducted in person in March 2021 (after the Centre had commenced trading) (“**the March 2021 Survey**”).
- 49 The June 2019 Survey did not collect any information as to where the respondents purchased alcohol.

- 50 The May 2020 Survey indicated that 68% of respondents regularly shopped at BWS Karratha and 39.5% shopped at the Tambrey Tavern.
- 51 The March 2021 Survey (of respondents at the Centre) shows 46.8% shopped at the Tambrey Tavern and 41.1% shopped at BWS Karratha.
- 52 The March 2021 Survey also considered the distance the respondents lived from the Centre. 71% resided 3 km or less from the Centre, 17.4% resided 4-5 km from the Centre, 5.8% lived 6 -10 km away and 6.3% resided more than 10 km away from the Centre.
- 53 This indicates that a significant proportion of consumers that shopped at or attended the Centre, did not purchase liquor at the nearest packaged liquor store, but elected to travel further.

Town Planning Principles

- 54 The Applicant submits that town planning principles should be adopted in determining “locality” and, in addition to the physical characteristics of the area, the amenity and demographics of a particular area must inform the adoption of a “locality” and that “**amenity** means all those factors which combine to form the character of an area and shall include the present and likely future amenity.” (*Terra Spei Pty Ltd and Shire of Kalamunda* [2015] WASAT 134 at 82). The Applicant submits that the community expectations of amenity therefore must be taken into account when considering “locality”.
- 55 Although the adoption of certain town planning principles and the consideration of amenity may be helpful in considering a “locality” which does not easily conform to a circular radius, a straight adoption of these principles are of limited value for the purposes of the Commission.
- 56 Although there may be some overlap, town planning principles are fundamentally concerned with matters that are not typically considered by the licensing authority (such as topography, zoning and road distribution) and fail to consider the specific type of demographic data that is highly relevant to the licensing authority.
- 57 The Applicant has submitted that the “locality” should be considered the same for the purposes of section 38(2) and section 36B. Generally the “locality” for the purposes of section 38 is considered as per the Director’s Policy referred to in paragraph 23 above. The policy clearly indicates that the “locality” is “*the area most likely to be affected by the granting of the application in relation to amenity issues*”.
- 58 It is also established in precedent and policy that country and remote areas are treated differently to metropolitan areas when it comes to liquor and the Act.
- 59 The Commission must further consider harm and ill health concerns, particularly in respect of “at risk” groups who may be situated within or typically traveling through or to a “locality”.
- 60 In considering these issues, the Commission considers that due to:
- a the isolation of the town;
 - b the nature of the community;
 - c the spread of the at risk groups throughout the town; and
 - d the manner in which the town has been forced to expand,

the town of Karratha operates as an entire community that encompasses the whole of the township.

Conclusion

61 In considering the nature and character of the local community as a largely isolated country town that has its limited population spread over a long thin area, but with the majority of residents located in the western side of the township, as well as the distribution of, and impacts on, “at risk” persons, the Commission considers that the entire township, by its nature and the amenity provided to its population, is fundamentally connected and cannot be artificially separated into smaller areas, and should comprise an entire “locality” for the purposes of section 36B in respect to this Application.

Procedural Fairness

62 The Applicant further argued that the Department’s adoption of an 8 km radius was procedurally unfair as the Commission and the licensing authority in this case, the Director, had no power to impose such “locality”.

63 The Commission finds that it is procedurally fair and reasonable that, even where a section 24 decision is being made, the Department or Director give an indication of an appropriate “locality” for the purposes of a particular application. This allows an applicant to expressly:

- a seek and provide evidence in respect to such “locality”; and
- b provide submissions to the licensing authority as to whether a “locality” as determined by the Director or the Department is appropriate.

64 The Commission considers that in providing an 8 km radius, the Department was acting in its capacity to facilitate applications to the licensing authority and the onus is on the Applicant to then provide submissions (as it has had the opportunity to do) as to what the appropriate “locality” should be.

Local Packaged Liquor Requirements

65 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.

66 This requires consideration of the correct statutory interpretation of “requirements”.

Defining “Requirements”

Prior Legal Precedent

67 The Act does not provide any guidance as to how the word “*requirements*” is to be interpreted either in respect to the objects of the Act set out in section 5(1)(c), or section 36B.

68 However, prior to the introduction of section 36B, the words “requirements of consumers” was contemplated in the context of the section 38 public interest test. Section 38 requires mandatory consideration of the primary and secondary objects of the Act.

69 Generally, the “*requirements of consumers*” is taken to mean what consumers demand or desire, as distinct from what they cannot manage without.

- 70 The term “requirements” is referred to in section 5(1)(c), which states that one of the primary objects of the Act is: “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”.
- 71 That primary object requires a broad consideration in the context of the expectations of consumers for liquor (and related services) across the State.
- 72 In *Liquorland*, Archer J recently established 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” (at 89) however, that ‘consumer requirements’ will arise in two contexts (i.e., the test under section 36B and the test under section 38 as to public interest).
- 73 Archer J further noted at 106 “There is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant to both conditions.”
- 74 In considering the requirements of consumers the Commission must have regard to the Act's objects, including the object in section 5(1)(c).

The Application and Requirements for Packaged Liquor

- 75 The Applicant relied on the following evidence to identify a requirement of consumers in the “locality” to purchase packaged liquor at the Centre:
- a the Consumer Survey of 300 residents within a 3 km radius conducted by telephone in June 2019 (before the Centre commenced trading) (“**the June 2019 Survey**”);
 - b the Consumer Survey within an 8 km radius conducted in May 2020 both by telephone of 300 residents (before the Centre commenced trading) and online of 103 residents (“**the May 2020 Survey**”);
 - c the Consumer Survey of 190 persons conducted in person in March 2021 (after the Centre had commenced trading) (“**the March 2021 Survey**”); and
 - d the opinion evidence of Michael Chappell in the Pracsys Report.
- 76 The various surveys provided substantial evidence in respect to consumers’ attitudes towards convenience, one stop shopping at the co-located supermarket, shopping preferences and the relative amenity the Centre would provide to the local community.
- 77 The Commission has considered the various Surveys and makes the following comments.
- 78 In the June 2019 Survey:
- a 54.4% answered that they believed it would “benefit local residents to have a liquor store next to the IGA supermarket” with further comments being made as follows:
 - i 13.7% noted a one stop shop would be convenient;
 - ii 6.7% noted there would be more competition; and
 - iii 25.6% noted there are enough liquor stores already.

- b 74% of respondents said they would “support” the Premises. The Applicant asserts that “support” means the relevant respondent would shop there.
- c No question was asked specifically as to whether the respondents would purchase liquor at the Premises although the June 2019 Survey did ask the respondents what factors they considered when purchasing packaged liquor including:
 - i if it is Australian made;
 - ii if it is produced locally in WA;
 - iii value for money;
 - iv independent operator; and
 - v other.

79 A few examples of the respondents’ comments were provided, however, the full individual responses were not able to be provided by the survey provider.

80 Despite the open wording of the “support” survey question, the Commission is prepared to take this as evidence that a good proportion of the 74% would possibly attend the Premises to purchase packaged liquor.

81 Despite this, the Commission is not convinced that a 13.7% response indicates that there is any meaningful “requirement” for one stop shopping shown by this survey.

82 The May 2020 Survey had the following relevant results:

- a The survey asked the respondents:
 - i *“do you intend to shop at the new Tambrey Village Shopping Centre which will include a range of shops and services?”*; and
 - ii *“should you choose to do your shopping at the Good Grocer or use any other shop or service at the new Tambrey Village Shopping Centre, how likely is it that you would also shop for your packaged liquor requirements at the proposed new liquor store?”*
- b A significant proportion of respondents (both within 3 km from the Centre and those living 3-8 km from the Centre) stated they were very likely or likely to shop for packaged liquor at the Centre.
- c When asked why the parties would shop at the new liquor store there was a variety of reasons (as indicated from pre-prepared read out responses) given for this including:
 - i the convenience of doing your food and liquor shopping in the same safe, new shopping centre (86.8%);
 - ii more convenient for me to shop at Tambrey Village Shopping Centre than at Karratha City Centre (74.4%);

- iii closer to where I live than the Karratha City Shopping Centre (73.9%); and
 - iv a new store in a new shopping centre with ample parking feels safer to me (57.8)%.
- d The respondents in the online survey also answered the following specific query “*When you consider your packaged liquor requirements what do you consider?*” from the following nominated answers:
- i convenience (71.84 %);
 - ii co-located with other shopping amenity (46.60%);
 - iii WA made liquor (support local jobs) (26.2%);
 - iv availability of special products (GF, organic, low alcohol etc.) (26.21%);
 - v ease of access to the liquor store (33.01%);
 - vi independent operator (14.56%);
 - vii competitive pricing (72.82%); and
 - viii other (7.77%).
- 83 The March 2021 Survey contains a significantly greater amount of information for the Commission to consider:
- a The survey examined the frequency the respondents shopped for liquor, the manner in which liquor was purchased (i.e., whether it was a special trip) and the type of, and median spend on, liquor.
 - b The survey also expressly stated the range of liquor the Premises intended to sell being “... a range of Western Australian craft beer, wine and spirits, speciality products (i.e., organic, preservative free, low alcohol, no alcohol, gluten free) and an exclusive range of Italian wines and all will be situated next door to the supermarket”.
- 84 The Commission notes that the inclusion of “specialty products” was not earlier contemplated in the PIA.
- 85 In the March 2021 Survey, the Applicant further introduced the issue of exclusive Italian wines being sold in the Premises. The respondents were asked “*Would you be interested in an exclusive range of approximately 100 high quality Italian wines, which are competitively priced?*”
- 86 Although a number of parties indicated they would be “interested” in the Italian wines and availability of speciality products, the Commission does not consider such evidence to establish a “requirement” for the same. Having general interest in trying a product does not equate to there being an existing consumer requirement.

- 87 Based on the above, the Commission is satisfied that the Applicant has established that there is a requirement of consumers shopping in the “locality” for the following:
- a the type of packaged liquor proposed to be sold by the Applicant at the Premises, more specifically being “*Western Australian craft beer, wine and spirits, speciality products*”;
 - b convenience (including proximity to home and work, ease of access and parking);
 - c one stop shopping; and
 - d competitive pricing.
- 88 The Commission considers that although the Premises being operated by an independent operator may be a “preference” for some parties, it does not amount to being a consumer requirement.

Can Packaged Liquor Requirements be Reasonably Met?

- 89 In contemplating the second limb of the test in section 36B(4), the Commission must make a finding as to whether the local packaged liquor requirements can be met in the “locality”.
- 90 This requires consideration of:
- a the appropriate “locality” (as discussed above);
 - b the packaged liquor premises present in the “locality”; and
 - c whether the “local packaged liquor requirements” can be “reasonably” met at such existing premises.

Locality

- 91 The issue of “locality” is considered above. For the purposes of this Application the Commission has found that the township of Karratha is the appropriate “locality” in which to consider the existing packaged liquor outlets.

Packaged Liquor Premises in the “Locality”

- 92 The packaged liquor premises that are located within the “locality” are as follows:
- a Tambrey Tavern (Liquor Barons Karratha), which:
 - i holds a tavern licence;
 - ii contains a large browse area and drive through;
 - iii is less than 1 km from the proposed premises; and
 - iv has a lettable area of 900m².
 - b BWS Karratha, which:
 - i holds a liquor store licence;

- ii is located at the Karratha City Shopping Centre;
 - iii is around 4 km from the Premises; and
 - iv is 250-280 m² in size.
- c Bottlemart, which:
 - i holds a tavern licence;
 - ii is located around 2.5 km from the proposed premises, and
 - iii is approximately 160 m² in size.
- d Thirsty Camel, which:
 - i holds a hotel licence;
 - ii is around 3.5 km from the proposed premises, and
 - iii is around 180 m².
- e Fiorita Deli, which:
 - i holds a tavern licence;
 - ii is around 4 km from the proposed premises: and
 - iii appears to focus on gourmet food and beverages.
- f Bottle-O at Ibis Styles, which:
 - i holds a hotel licence;
 - ii is located a bit over 4 km from the proposed premises; and
 - iii has an area of 200m²; and
- g AOK Caravan Park, which holds a liquor store licence and has an area of 45 m².

93 The Commission notes there was some variation between the asserted areas of the packaged liquor stores in the Applicant's submissions as to section 36B that were provided on the 8 May 2020 and those provided in the Pracsys Report (at Figure 3).

94 The vast majority of surveyed respondents purchased packaged liquor either at the Tambrey Tavern or BWS Karratha (the March 2021 Survey notes that 46.8% of those surveyed predominately shopped at the Tambrey Tavern and 41.1% shopped at BWS Karratha). As such the Commission has predominantly considered the impact of these two packaged liquor retailers.

Applicant's Submissions

95 The Applicant has argued that consumers' local packaged liquor requirements are not reasonably met by the existing liquor stores as follows:

- a The Tambrey Tavern is the only liquor store in the "locality" proposed by the Applicant and:
 - i it does not enable "one-stop shopping", as it is a stand-alone destination which is not part of any shopping centre, and cannot "reasonably" become one;
 - ii it is located well off the main street;
 - iii it provides only a limited range of specialty liquor products compared to the proposed store, and is therefore not suited to, and cannot reasonably be expected to cater for, the tastes of consumers of more boutique liquor product brands;
 - iv it cannot (due to the exclusivity of the Applicant's licence) sell the imported Italian wines proposed to be sold by the Applicant; and
 - v the "locality" is characterised by:
 - A. a much higher concentration of young families (page 9, Pracsys Report); and
 - B. significantly higher proportion of high income earners, with increased disposable income capacity (pages 11 - 12, Pracsys Report),

who tend to prefer to consume a higher proportion of premium packaged liquor products such as bottled wine and craft beer.

- b As to BWS Karratha:
 - i the location does not provide convenient vehicular access and proximity for consumers of packaged liquor products who live close to the Premises;
 - ii the range of liquor sold at these premises does not include the more boutique range of products proposed to be sold at the Applicant's proposed Premises including imported Italian wines; and
 - iii parking would be less convenient due to the higher demand for parking at the Karratha City Shopping Centre.
- c As to the Tav Sports Bar; the Karratha International Hotel, the Ibis Styles and the AA OK Caravan Park premises, for each:
 - i it is a stand-alone destination premises which is not part of a shopping centre, and cannot provide for "one-stop shopping" convenience;
 - ii it has a limited range of products with limited opportunity for browsing;

- iii the range of liquor sold at these premises does not include the more boutique range of products proposed to be sold at the Applicant's proposed Premises including imported Italian wines;
 - iv the location does not provide convenient vehicular access for consumers of packaged liquor products who live close to the Premises; and
 - v it is not materially patronised, or not patronised, by consumers who visit the Tambrey Village Shopping Centre.
- d As to Fiorita Deli, it operates more as a restaurant than a seller of packaged liquor products, and the survey results show that no consumer shopping at the Tambrey Village Shopping Centre buys packaged liquor from Fiorita Deli.

96 The Applicant further:

- a disputed the assertion that existing retail outlets will simply order in stock as and when a client wants it as unsustainable. An assertion to that effect by an existing operator and prospective competitor is mere assertion, not evidence, on the unproved assumption that such products would be "reasonably" available simply upon request even though not previously stocked;
- b argued that Parliament should not be presumed to have intended that new liquor stores could effectively be prohibited by arming their prospective competition with the simple expedient of saying: "we'll sell whatever they say they want to sell"; and
- c asserted that there is no evidence adduced by the First Intervener which is capable of demonstrating that there is any existing liquor store within the "locality" (however defined) which can reasonably meet the requirements of consumers for a premium range of boutique wines and other liquor products conveniently located, with the option of doing so as part of "one-stop shopping" for residents in the "locality".

97 In summary, the Applicant has asserted that the current packaged liquor stores in the "locality" do not meet the requirements of consumers:

- a as they do not offer the shopping convenience of the Premises; and
- b they do not offer the same premium craft beer and wines or range of Italian wines proposed to be offered by the Applicant.

Reasonableness

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

"The word "reasonable" imports a degree of objectivity in that the word reasonable means "...sensible; ...not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate".

99 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.

Commission's Deliberation

100 As noted above, the Commission is satisfied that the Applicant established that there was a consumer requirement as follows:

- a consumer requirements of significant importance:
 - i the type of packaged liquor proposed to be sold by the Applicant at the Premises, more specifically being “*Western Australian craft beer, wine and spirits, speciality products*”;
 - ii convenience (including proximity to home and work, ease of access and parking);
 - iii one stop shopping; and
 - iv competitive pricing;
- b consumer requirements of minor or lesser importance:
 - i the Premises being operated by an independent operator.

101 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)].

102 It is not necessary for the First Intervener to provide evidence that there is any existing liquor store within the “locality” which can reasonably meet the requirements of consumers. It is the Applicant who must satisfy the Commission that “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the “locality”.

103 In the June 2019 Survey:

- a 54.5% of the respondents thought that it would “*benefit local residents to have a liquor store next to the supermarket in the new Tambrey Shopping precinct*”. Some benefits mentioned were one stop shopping, competition and looking forward to a new store.
- b 34% of the respondents did not think the Premises would “*benefit local residents*”, predominately as there were “*enough liquor stores already*” in Karratha and because of concern as to security and social issues. Out of a respondent sample size of 300 (of parties residing within 3 km of the Premises), this is a not insignificant proportion.

- 104 The Commission's concern with the survey question referred to in paragraph 103a above is it simply does not address the necessary elements of section 36B. The reference to "benefits" is too vague and does not address the relevant queries of whether "consumer requirements" were already being provided in the "locality".
- 105 The May 2020 Survey had the following relevant results:
- a When asked "*do the current packaged liquor outlets in Karratha meet your requirements as a consumer liquor and related services?*", 52.1% stated their requirements were met, 46% stated their requirements were somewhat met or not met.
 - b Although the survey respondents were able to separately indicate "*not met*" or "*somewhat met*" the Applicant did not provide such breakdown, which would have been helpful for the Commission. However an analysis indicates that a mere 8 of the 300 respondents noted their needs were "*not met*".
 - c In the online portion of the survey, although the categories of "*somewhat met*" and "*not met*" are again combined it is interesting to note that of 103 responses only 13 stated their requirements were "*not met*".
 - d Further there are a significant number (over 25) of unprompted comments from the respondents that indicate or reference an opinion that there are already enough liquor outlets in the area.
- 106 The March 2021 Survey put the question a little differently to respondents being "*Would this proposed liquor store meet your requirements better than where you currently buy most of your packaged liquor?*", the results being as follows:
- a yes, better (71.1%);
 - b the same (10.1%);
 - c no, not as well (11.9%); and
 - d don't know (6.9%).
- 107 The reasons given by respondents that the proposed liquor store at Tambrey Village Shopping Centre meets respondent requirements better than their current packaged liquor store were stated as follows:
- a has a good range of WA made craft beer, wine and spirits (45.6%);
 - b proximity of the liquor store to home/work (44.2%);
 - c convenience of doing my liquor shopping together with other shopping (44.2%);
 - d competitive pricing (31.0%);
 - e availability speciality products: organic, low alcohol, etc (23.0%);
 - f access to imported Italian wines (19.%);

- g availability of carparking (10.9%);
- h knowledgeable staff and friendly service (3.5%); and
- i other personal preferences (2.7%).

108 This appears to be significantly different to the prior surveys in response where the vast majority of respondents felt their needs were already or somewhat met.

Consumer requirement for the type of packaged liquor proposed to be sold by the Applicant

109 The Applicant provided a stock list and products currently stocked at the South Perth premises, which is intended to be largely replicated at Karratha Cellars, totalling some 1867 products (not including the liquor accessories listed).

110 The Applicant's submissions state, as contained in the statutory declaration of Jordan Brindle, that it is evident that almost 60% of the stock provided at the South Perth liquor store are not stocked or available for purchase at BWS Karratha and 50 are not stocked at Tambrey Tavern.

111 The Applicant further provided evidence that:

- a BWS Karratha did not stock 184 of the lines; and
- b Tambrey Tavern did not stock 97 of those lines.

112 The Commission considers that this represents a very small percentage of the proposed stock lines (respectively 9.9% and 5.2%), not the 50%-60% asserted by the Applicant.

113 The products that are unavailable are largely separated into the following categories:

- a craft beers (sourced from Western Australia and overseas);
- b specialist whiskey;
- c wines of various varieties (predominately Western Australian);
- d artisan gins; and
- e liqueurs.

114 A further analysis of the stock listed as not available in BWS Karratha and/or Tambrey Tavern indicates that:

- a ten of the products listed are chocolate bars;
- b several of the items are listed several times in different packaging (i.e., by single, 4 pack and carton) further reducing the actual products being unavailable to:
 - i for BWS Karratha:

A. 44 beer lines;

- B. 40 wines by the bottle from 15 vineyards (mainly WA sourced);
- C. 3 varieties of Whiskey from 1 brand;
- D. 26 varieties of Gin (over 6 brands);
- E. 5 liqueur lines from 1 brand; and
- F. 1 mixer;

and

ii for Tambrey Tavern:

- A. 14 beer lines;
- B. 30 wines by the bottle from 10 vineyards (mainly WA sourced);
- C. 3 varieties of Whiskey from 1 brand;
- D. 26 varieties of Gin (over 6 brands);
- E. 5 liqueur lines from 1 brand; and
- F. 1 mixer.

115 Apart from the mere assertion of the Applicant, there has been no evidence provided that the Tambrey Tavern or BWS do not stock “*Western Australian craft beer, wine and spirits, speciality products*” or other premium or boutique craft beers or wines.

116 No analysis of the survey data has been given, nor was any other evidence adduced to explain why the stock lines which are asserted to be not available in either BWS Karratha or the Tambrey Tavern constitute evidence that a particular consumer requirement is not being met and cannot be met by another product or range of products. Accordingly, the Applicant’s submissions largely rest on the arguments as to convenience and one-stop shopping.

117 In this case, the Commission finds that:

- a the Applicant has not made out its case to a sufficient degree that the stock it intends to sell is necessarily differentiated (by way of being premium craft beer or premium wines) to the packaged liquor sold by the existing packaged liquor stores in the “locality”;
- b consumers in the “locality” can have their packaged liquor requirements for “*Western Australian craft beer, wine and spirits, speciality products*” met at the existing packaged liquor stores in the “locality”; and
- c in particular, the Tambrey Tavern and BWS Karratha already meet such consumer requirements.

118 The Commission did not find that there was a consumer requirement for speciality (i.e., low alcohol, organic or gluten free wines). In any event, it is noted that no persuasive evidence

was supplied that such range of products is not available in other packaged liquor stores in the “locality”.

- 119 The Commission finds that the consumer requirement as to the range of packaged liquor in the “locality” is already being met.

Consumer requirement for Convenience (including proximity to home and work)

- 120 The May 2020 Survey noted that 74.9% of respondents considered that the proposed liquor store would “*add overall amenity*”.
- 121 This response is not particularly helpful to the Commission to show a “*consumer requirement*”, however, the Commission is prepared to accept that it may indicate that the inclusion of the Premises would add convenience by way of proximity for a certain number of consumers.
- 122 However in the May 2020 Survey 69.9% of respondents also answered that existing packaged outlets met their requirements by being “*located close to my home*”.
- 123 The March 2021 Survey did not repeat this question, but rather asked consumers the reasons the proposed liquor store at Tambrey Village Shopping Centre meets respondent requirements better than their current packaged liquor store with the response option of “*Proximity of the liquor store to home / work*” resulting in 44.2% of parties that purchased liquor.
- 124 The Commission considers that the presence of the Tambrey Tavern, being less than 1 km away, reasonably meets the requirements of those consumers in relation to mere proximity to home or work.
- 125 In addition, the BWS Karratha is located only a further 4 km from the Premises. The Commission finds that, when travelling by car in Karratha to and from home and work, that the proximity requirements of consumers are sensibly and rationally met by the relatively close location of the BWS Karratha.

Consumer Requirement for One Stop Shopping

- 126 The Consumer requirement for “one stop” shopping is largely related to convenience of shoppers.
- 127 In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 at 74 Buss JA observed that “*...in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres.*”
- 128 This is a relevant consideration for the Commission.
- 129 However, in this case, the Commission is not contemplating a “large suburban shopping centre” but rather a smaller scale, boutique shopping experience, in a shopping precinct (as opposed to a traditional centre) located in a country town.

- 130 As such, the Commission considers that, in such circumstances, satisfying a one stop shopping requirement does not necessarily necessitate consumers being able to:
- a complete grocery and liquor shopping in one transaction;
 - b complete grocery and liquor shopping using one trolley;
 - c complete grocery and liquor shopping under “one roof” of a shopping centre, but rather “one stop” shopping for convenience;
 - d can include being able to undertake different aspects of grocery and packaged liquor (and possibly other) shopping by undertaking one trip from home;
 - e may involve attending different “shops” in a closely adjacent shopping precinct;
 - f may require the use of more than one trolley; and/or
 - g may involve a short walk or drive between shops and include the need to change parking places to conveniently get shopping to a vehicle.
- 131 In the last occurring survey, the March 2021 Survey, 34.7% of respondents considered that “*The convenience of doing my liquor shopping together with other shopping*” was “*important*” when purchasing liquor. 44.2% considered that Tambrey Village Shopping Centre would meet this requirement better than their current store. However, the Commission notes this percentage is likely largely based on the response that 46.8% of respondents currently shopped at the Tambrey Tavern.
- 132 In this case the Commission considers that the BWS Karratha is located in the Karratha City Shopping Centre and therefore meets consumer requirements as to one stop shopping in a single centre.
- 133 The Tambrey Tavern and Tambrey Village Shopping Centre are nearby as the crow flies. However, the Commission finds it unlikely that the close proximity of these two premises would satisfy the requirements of consumers as to “one stop shopping” in a conventional sense as:
- a the Tambrey Tavern and the IGA supermarket are not quite close enough to be considered a part of the “shopping precinct” that includes Tambrey Village Shopping Centre; and
 - b although the trip between the same is quite short (in the region of 3 minutes by car) but is not connected by an adjoining car park, or a major single road.
- 134 The Commission therefore finds that requirements of consumers as to one stop shopping are not sensibly and rationally met by the Tambrey Tavern.

Consumer requirement for Competitive Pricing

- 135 In this case, the Commission does not consider that the Applicant has provided evidence to a degree necessary to satisfy the Commission that the other packaged liquor stores do not provide competitive pricing for consumers, or that this requirement is not reasonably met by such packaged liquor stores.

Conclusion as to Consumer Requirements

136 Due to the above, the Commission finds that the Application cannot be granted as the Applicant has not discharged its onus under section 36B(4) of the Act.

Public Interest Test

137 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).

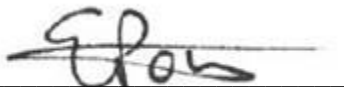
138 The Commission makes no findings in this regard.

Conclusion

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

140 The Application is dismissed.

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



**EMMA POWER
PRESIDING MEMBER**



**PAUL SHANAHAN
MEMBER**



**ALEX ZILKENS
MEMBER**