

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

Applicant: Springbok Foods Pty Ltd
(represented by Mr Phil Cockman
of Canford Hospitality Consultants Pty Ltd)

Interveners: Commissioner of Police
Director of Liquor Licensing
(both represented by Mr John Carroll of
State Solicitor's Office)

Executive Director of Public Health

Commission: Mr Eddie Watling (Acting Chairperson)
Dr Eric Isaachsen (Member)
Mr Michael Egan (Member)

Matter: Application pursuant to section 25 of the
Liquor Control Act 1988 for a review of a
decision by the delegate of the Director of
Liquor Licensing to refuse an application for
a liquor store licence for premises known as
Springbok Foods Pty Ltd, Canning Vale.

**Date of Determination:
(on papers)** 11 August 2014

Determination: The application is dismissed and the decision
of the delegate of the Director of Liquor
Licensing is affirmed.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227

Background

1. On 29 May 2013, Springbok Foods Pty Ltd (“the applicant”) lodged an application for a liquor store licence for premises located at Shop 2, 87-91 Catalano Circuit, Canning Vale. The application was supported by a Public Interest Assessment (“the PIA”) and a range of other material relevant to the application including:
 - a. proposed liquor stock list;
 - b. 138 public interest witness petitions;
 - c. 6 public interest witness questionnaires;
 - d. discretionary trust deed;
 - e. lease of premises details;
 - f. code of conduct; and
 - g. harm minimization management plan.
2. The applicant has applied for a liquor store licence for a small proportion (less than 10% of premises) of an existing store operating as a national wholesale distributor and retailer of a large range of African and South African groceries and food products in Australia.
3. A notice of intervention was lodged by the Commissioner of Police (“the Police”) on 16 July 2013, and also by the Executive Director of Public Health (“the EDPH”) on 18 July 2013 (collectively referred to as “the interveners”).
4. On 18 July 2013, the applicant advised the Department of Racing Gaming and Liquor (“the Department”) that the advertising requirements of the application had been met and a section 40 certificate obtained from the City of Canning.
5. Kronor Pty Ltd, trading as Market City Tavern, 280 Bannister Road Canning Vale lodged an objection to the application on 18 July 2013 (“the Objector”).
6. A number of submissions and responsive submissions were received from all parties between the dates of their initial submissions and by close of business, 31 March 2014.
7. On 8 April 2014, the delegate of the Director of Liquor Licensing (“the Director”) determined that the application be refused.
8. On 9 May 2014, the applicant lodged an application for a review of the decision of the Director under section 25 of the *Liquor Control Act 1988* (“the Act”).
9. Submissions and responsive submissions were received from the parties to the proceeding over the period ending 20 June 2014.
10. At the request of the applicant, this matter before the Commission is to be determined on papers.

Submissions by the applicant

11. The applicant proposes a limited and specialised liquor store featuring African liquor products, mainly from South Africa, to compliment the specialist South African grocery lines currently provided in the applicant's store. This is proposed to provide the local community and the local South African community in particular, with a convenient "one-stop" shopping service.
12. It was submitted that the proposed liquor store will initially trade as per its following current trading hours:
 - i. Monday to Friday - 9:00am to 6:00pm
 - ii. Saturday - 9:00am to 6:00pm
 - iii. Sunday - 10:00am to 3:00pm

However, the application is for the maximum hours permitted by the Act for a liquor store operation to enable the applicant to dispatch wholesale orders for customers, in the evenings until 10:00pm.

13. The grounds for the review, as specified in the application for review, are stated as follows:
 - I. the applicant only intends to licence a small proportion of the Springbok Foods Canning Vale grocery store (i.e. less than 10% of the floor space of the subject premises). The main and dominant use of Springbok Foods will still be as a specialist South African grocer and wholesaler;
 - II. the Director states that, in his opinion "*the evidence of consumer demand is flawed and therefore unreliable because it fails to take into account the grant of a liquor store licence to Kalahari – A Taste of Africa in Willeton*". However, he accepts the locality definition for Canning Vale is 2km radius of the subject premises, but then considers *Kalahari – A Taste of Africa* even though it is located outside the locality (i.e. approximately 3.5 km from the subject premises);
 - III. the applicant says that the objective evidence presented was relevant and probative and should not have been dismissed. The applicant is not being naive if it is following the Director's policy on "locality";
 - IV. the Director determined that the applicant made two contradictory statements (Director's decision A 223980 at page 8), as follows:
 - "*the local African population being forced to make a special trip or drive far away to satisfy their requirements for South African liquor products, which is very inconvenient for them;*
 - and
 - *Springbok Foods attracts customers from some distance, given that people are prepared to travel further to obtain their specialist African requirement...*".

The applicant does not consider these statements to be contradictory

and will provide submissions in this regard;

- V. the Director determined that “*I do not consider that members of the public are well versed to comment on the public interest...*”. The applicant says that the general public is entitled to their own interpretation of what the “public interest” means, with particular relevance to their community and locality. After all they are experts in their locality and their community;
 - VI. the Director determined “Springbok Foods is not part of a district or regional shopping centre and I do not consider that the services offered at the proposed premises could be considered to equate those offered by a district or regional shopping centre, particularly given the applicant’s evidence that the premises is more of a specialist grocer”. The applicant says it is equally “notorious” with the WA public that one stop shopping is a sought after convenience in a small shopping centre.
14. A critique of the Director’s decision was submitted in support of the review application reiterating the significance of the proposed licence for meeting the consumer requirements for one-stop shop facilities for African products.
15. The applicant pointed out that there are a number of examples of specialist liquor stores already in place and operate under conditions similar to those that would apply if this application is granted.
16. With regard to locality, the applicant highlighted its comments in the PIA, specifically that:
- a. none of the existing outlets in the 2km locality is attached to a specialist South African supermarket and therefore do not provide the convenience of one-stop shopping;
 - b. none of the existing outlets in the 2km radius stocks the range of South African liquor products that the applicant proposes to stock; and
 - c. this application is consistent with that view as “the proposed liquor store will have different features” and different packaged liquor products compared to the other packaged liquor outlets existing in the locality.
17. The applicant submitted that in many decisions handed down by the Director and the Commission it has been observed that:
- a. one-stop shopping is in demand amongst the WA public;
 - b. one-stop shopping is a very reasonable requirement of the WA public; and
 - c. liquor stores, as part of a supermarket, are at a low risk end of the spectrum of licensed premises.
18. With regard to the proximity of the *Kalahari - A Taste of Africa* liquor store, the applicant submitted that this store is outside the 2 km radius specified in the Director’s locality policy and also does not meet the requirement of

consumers as it has very limited South African liquor lines and does not provide the range of specialist South African grocery items provided by the applicant. The applicant further submitted that the *Kalahari - A Taste of Africa* is primarily a café serving food and coffee which happens to have a very limited number of South African grocery lines taking up less than half of the floor space.

19. Similarly, the applicant submitted that the Objector's premises, the Market City Tavern, which is within the 2km locality of the proposed licence, stocks only a limited range of South African liquor products without the applicant's grocery range.
20. It was submitted that with regard to the potential risk of alcohol related harm due to the granting of this application, the proposed liquor store is to be less than 10sqm and all the packaged liquor items are to be stocked behind the service counter with members of the public only having access by reference to a staff member. According to the applicant the proposed licenced premises will be a very small "low" risk licensed venue of a specialist nature.
21. Further, with a proposed licensed area at less than 10sqm and with only 30% of its stock being "mainstream" (normal Australian liquor products), this licence cannot be regarded as being a "general liquor store", but rather a specialised liquor store with the provision of some mainstream liquor products to allow customers to avoid a second trip to another packaged liquor outlet.
22. The applicant submitted that should the application be successful, the applicant would accept almost all of the trading conditions proposed by the interveners, with the exception of restricting the hours of trade specified in the Act (as proposed by the Police) and a modification of the proposed condition "there is to be no advertising of liquor on the external façade of the premise" (as proposed by the EDPH) to read "there is to be no advertising of liquor products or their prices on the façade of the premises".

Submissions on behalf of the Commissioner of Police ("the Police")

23. The Police submitted that:
 - a. the applicant has not demonstrated the extent to which the licence will weigh in the public benefit by satisfying the alleged consumer requirements;
 - b. the proposal for a one-stop shop selling both supermarket goods and alcohol will increase the risk of alcohol related harm to the community;
 - c. there is insufficient evidence before the Commission to conclude that there will not be offence, annoyance, disturbance or inconvenience caused to people working in the vicinity of the proposed premises.
24. Whilst the stated intent of the application is to service an unmet specialty requirement for South African liquor products, and also provide one-stop convenience shopping for both South African supermarket and liquor products, if the applicant were to trade at the maximum permitted hours and also to trade with 30% of its liquor stock not being from South Africa, the applicants store would in fact be a general liquor store.

25. In those circumstances it was submitted that where the proposed licence is really a general liquor store licence as opposed to a licence for a speciality liquor store, the following questions need to be addressed:
- a. first, to what extent will the proposed licence be meeting the consumer requirements for a general store in that location?
 - b. secondly, what are the negative public interest factors that will arise from the existence of a general liquor store in that location?
26. It was submitted that if it is not intended to operate as a general liquor store then the applicant has not demonstrated the extent to which it would satisfy any alleged consumer requirement for specialty South African liquor products which is presently unmet. As none of the applicant's evidence takes into account the service that *Kalahari - A Taste of Africa* provides, it is not possible to make an assessment of the additional benefits that the public will enjoy upon the grant of a further licence.
27. With regard to the asserted consumer requirement for a one-stop shop that offers both specialty South African grocery and liquor products, it was submitted that where liquor is sold alongside groceries, the consumption of alcohol is paired with the sale of supermarket goods and that pairing creates an association between alcohol and supermarket goods, both as ordinary everyday products, which can influence 'at risk' groups and contribute to future problematic drinking patterns and their associated harms.
28. It was also submitted that there is insufficient evidence provided by the applicant in relation to the potential offence, annoyance, disturbance or inconvenience impact upon other businesses within the locality as a consequence of the granting of this licence.
29. In conclusion it was submitted that overall, there is insufficient evidence to allow the Commission to ascertain the extent to which the proposed licence will weigh in the public benefit by satisfying the alleged consumer requirements for specialty South African liquor and grocery products.
30. The Police noted that it is for the Commission to decide if the various harms enumerated by section 34(4) of the Act outweigh any potential benefits in granting the liquor licence, and if so whether such harms can be met by appropriate conditions, including conditions that:
- a. the licensee should be permitted to trade only at its current trading hours;
 - b. no trade is permitted on Christmas Day, Good Friday or ANZAC Day or other gazette public holiday in Western Australia;
 - c. the sale and supply of liquor under this licence is limited to only South African products;
 - d. as per the application, the licensed area is not to occupy more than ten percent (10%) of the floor space;
 - e. an area be delineated from the grocery items for the display and purchase of liquor products;

- f. as per the application, all sales transactions are to take place at the front counter within the licensed area, separate from the grocery items;
- g. as per the application, liquor products may only be picked up at the rear entrance of the premises after payment has been made;
- h. as per the application, storage of liquor products is to be in the warehouse;
- i. as per the application, there is to be no public access to the warehouse;
- j. plans and specifications must be submitted as per section 66 of the Act;
- k. no promotions, advertising or incentives which encourage cheap or discounted liquor or which encourage excessive consumption;
- l. the licensee is prohibited from advertising liquor products on the external façade of the premises;
- m. a CCTV system is to be in place complying with the Director's policy *Security at Licensed Premises* (amended 19 June 2013); and
- n. dress standards to be in accordance with the Director's policy *Dress Standards for Licensed Premises* (amended 2 April 2014).

Submissions by the Executive Director Public Health (“the EDPH”)

31. The EDPH submitted that the purpose of its intervention is to make representations regarding trading conditions that may assist to minimize alcohol-related harm by:
- a. ensuring that liquor products within the existing specialty supermarket are separated from general grocery items sold at the store; and
 - b. supporting the applicant's proposed manner of operation to be maintained both now and in the future.
32. It was noted by the EDPH that a feature of the application that distinguishes the proposed liquor store from other similar applications by specialty supermarket stores seeking a licence to sell culturally specific liquor products, is the applicant's intention to also sell mainstream Australian liquor products and that this positions the application in a different context to other specialty stores that sell culturally specific liquor only.
33. With regard to the availability of South African products, the EDPH submitted that the applicant made no mention in the PIA of *Kalahari – A Taste of Africa* which was recently granted a liquor store licence (2013) and is located within an approximate 3.5 km radius of the proposed premises and that whilst this distance is outside the 2 km radius locality policy of the Director, it is a relevant consideration in response to the applicant's submissions that customer requirements are not being met.

34. It was submitted that although the applicant identified that there are four existing licensed premises within the 2 km locality of the premises which sell packaged liquor, including two taverns and two liquor stores, the applicant's comparison of how the proposed store differs from the existing liquor stores only considers access to South African liquor products and groceries and neglects to provide a comparison regarding mainstream liquor products.
35. It was submitted that in respect to harm and ill-health associated with liquor sales and consumption, the integration of liquor alongside supermarket items presents liquor as a harmless everyday commodity and without conditions, could impact on people's attitude towards drinking and might encourage impulse or unplanned purchases of liquor resulting in increased consumption, which is not conducive to the health of the community.
36. The EDPH pointed out there is also some uncertainty as to the applicant's intention with regard to trading hours, the use of the warehouse area for liquor pick-ups and the intention to dispatch wholesale orders from this area when the applicant has applied for a liquor store licence and not a wholesaler's licence.
37. It was submitted that should the application be approved, the following conditions be applied;
 - a. only African liquor products are permitted to be sold;
 - b. the liquor is to be located behind the licensed point of sale counter;
 - c. there is to be no advertising on the external façade of the premises.

Submissions by Director of Liquor Licensing ("the Director")

38. It was submitted that insufficient information has been submitted by the applicant to make it possible for the licensing authority to satisfy itself that the application is in the public interest.
39. The applicant submitted that the proposed licence would cater for the requirement of consumers for liquor and related services due to the specialist nature of the store's South African products, however, the extent to which the claimed consumer requirement is already being met within the vicinity of the proposed licence is a relevant consideration for determining the additional resultant benefits that might be said to be in the public interest.
40. Contrary to the submissions contained within the applicant's PIA, the Objector relevantly submitted that its own store, Market City Tavern, within the locality of the proposed store, stocks a number of South African liquor products.
41. The *Kalahari – A Taste of Africa* liquor store, which was granted a liquor store licence in 2013 so that it could provide a range of South African liquor products, is already contributing to meeting consumer requirements for these special products.
42. The fact that the *Kalahari – A Taste of Africa* liquor store is outside the 2km locality policy of the Director does not constrain the Commission from considering whether the proposed licence will cater for the requirement of

consumers for liquor and related services – such a consideration is not confined to the locality of the proposed premises (Director's decision A 190334 dated 19 September 2008 at page 11).

43. The applicant's submission that it attracts customers from 'some distance' in itself is inviting the Commission to consider a much wider locality when determining whether the grant of the proposed licence is in the public interest.
44. It was submitted that the 138 witness petitions and the 6 witness questionnaires provide no probative evidence in relation to the question of whether there is a particular consumer requirement for a one-stop shop that offers specialty South African grocery and liquor products. The nature of this evidence is such that no conclusive outcome can be reached regarding the significance of a consumer requirement for one-stop shopping for these specialty products. It was pointed out that the questionnaires were also completed **prior** (Commission's emphasis) to the granting of a liquor store licence to *Kalahari A Taste of Africa*.
45. It was submitted that the applicant has not produced sufficient probative evidence for the Commission to be able to quantify the extent of the alleged consumer requirements and therefore the Commission is unable to determine the 'weight' of the public benefit that is said to flow from satisfying those requirements.
46. In any event, there is an absence of evidence supporting the applicant's submissions relating to the various harms enumerated by section 38(4) of the Act. Under such circumstance a weighing and balancing exercise in satisfying section 5(1)(c) of the Act against any corresponding public harm or detriment such as that found in section 5(1)(b) of the Act or section 38(4) is not possible.
47. It was submitted that the decision of the Director should therefore be confirmed.

Submissions by Kronor Pty Ltd – Market City Tavern (“the Objector”)

48. The grounds of objection are:
 - a. the grant of a liquor store licence is not in the public interest (section 38(2)); and
 - b. the grant of a liquor store licence would be contrary to the Act because the application has not properly established that the proposed liquor store will 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 (section 5(1)(c) of the Act).
49. It was submitted that the main argument of the applicant seems to be that it intends to trade predominantly in South African liquor and this is the justification for the liquor store application.
50. There is no causal link between this argument involving the sale of South African liquor and the public interest. In other words the mere fact that the

proposed liquor store premises will trade predominantly in South African liquor is not itself an argument that it is in the public interest.

51. The objector submitted that the population figures referred to by the applicant for persons born in South Africa living in the locality and greater Perth of 2.5% and 1.6% respectively are extremely low to provide justification for the approval of this application, more so as not all of these persons would consume alcohol.
52. The existing *Market City Tavern*, located 250m from the proposed liquor store already caters for the requirements of consumers for liquor and related services, including the provision of South African liquor products.
53. It was submitted that the objector had met with the applicant and offered to withdraw the objection if the applicant agreed to a liquor licence condition limiting the sale of liquor to South African products only. However, an agreement was not reached.

Determination

54. Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
55. On a review under section 25 of the Act, the Commission may –
 - a. affirm, vary or quash the decision subject to the review;
 - 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;
 - c. give directions as to any question of law, reviewed; or to the Director, to which effect shall be given; and
 - d. make any incidental or ancillary order.
56. In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).
57. Pursuant to section 38(2) of the Act, an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest.
58. To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
59. Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR*

241). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:

- i. *“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.*
- ii. *The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*

60. Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd* supra). The primary objects of the Act are:

- 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 of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

61. Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:

“[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest”.

62. Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek*

International Pty Ltd & Ors [2000] WACA 258).

63. On 8 April 2014, the Director refused the application for a liquor store licence for the premises Springbok Foods Pty Ltd (decision number A223980) on the basis:
- (a) the survey and questionnaire evidence offered little in terms of probative value;
 - (b) there was little evidentiary value attached to members of the public being asked to attest to those matters prescribed in s38(4) of the Act;
 - (c) the Director's concerns:
 - (i) about the veracity or otherwise of the applicant's evidence;
 - (ii) regarding the assertion that the grant of the licence will provide a one stop shopping service, given that the premises is unlikely to offer one-stop shopping in the manner that is consistent with the model that is generally accepted by the courts;
 - (d) the existence of two licensed premises located in reasonable proximity (i.e. 500 metres in relation to *Market City Tavern* and 3.5 km *Kalahari – A Taste of Africa*) which are:
 - authorised to sell packaged liquor;
 - stock South African products;
 - capable of catering to the relevant requirements of consumers, particularly given the applicant's own admission that consumers are prepared to travel some distance in order to purchase their specialist African and/or South African requirements.
64. The applicant maintains that the various witness petitions and questionnaires and results of the applicant's own inspection of other licensed premises in the locality, which form part of the PIA, represent positive objective evidence of an unmet requirement for specialised South African liquor products in the locality of the proposed premises, as well as a desire on the part of customers for the convenience of shopping for specialty South African grocery and liquor products at the same time in the same location.
65. The applicant also points to the recent growth of the business and the 2.5% of the local population born in South Africa as further evidence of a "niche" market of customers for specialised liquor and grocery products.
66. The nature of the questions in the witness petitions about the public interest and minimising harm or ill-health to anyone in the locality are of limited value as there is no evidence that the petitioners are aware of the importance of these terms in the context of the Act.
67. Whilst the petitions and questionnaires represent some, albeit limited, evidence of an unmet consumer requirement for specialised South African liquor products, the same could not be said of "mainstream" Australian liquor

products. The nearby *Market City Tavern* offers a full range of Australian liquor products (as well as a selective range of South African liquor products), and the sale and supply of Australian liquor products to customers shopping for South African liquor products at the applicant's premises merely to provide convenience in the event some of those customers also require Australian liquor products does not demonstrate that such a service in the circumstances of this application satisfies section 5(1)(c) of the Act.

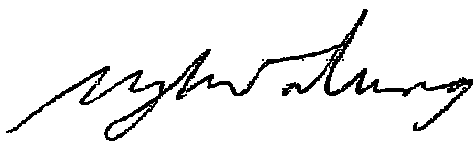
68. At best, without further evidence of consumer requirement, the public benefit to be derived from the grant of the licence is likely to be limited to a relatively small number of people within the defined locality and beyond.
69. In support of the contention that the application satisfies section 5(1)(c) of the Act, the applicant has also relied upon what it claims to be a "notorious" fact within the Western Australian public that one stop shopping is a sought after convenience in small shopping centres.
70. Having regard to the nature of the applicant's business and the shops within the South City Home Trade Centre (within which the applicant's store is located) and surrounding area, the one stop shopping referred to by Buss JA in *Woolworths Ltd v Director of Liquor Licensing* ([2013] WASC 227), which is relied upon by the applicant as support for its proposition, is vastly different to the one stop shopping the applicant contends will occur at its store if the proposed licence is granted.
71. The convenience of purchasing liquor products with other food and grocery products in the same store in the circumstances of this application is not, of itself, a persuasive factor in demonstrating a consumer requirement for liquor and related services as envisaged by section 5(1)(c) of the Act.
72. Although *Kalahari – A Taste of Africa* licence is not within the Director's 2 km radius location policy as applied to the proposed premises, the fact that the witness petitions and questionnaires for this application predated the grant of that liquor store licence is a significant issue when determining whether the grant of this application is in public interest.
73. The determination of the size of the locality for the purposes of a licence application will very much depend on, amongst other things, the type of licence applied for, the nature of the business and its target market, and the size and nature of the proposed premises. *Kalahari – A Taste of Africa* is a relatively small liquor outlet, however, it operates in a similar market, offering specialised South African liquor and grocery products.
74. The Commission accepts the Director's submission that the licensing authority is not constrained by a 2 km radius locality when considering whether the proposed licence will cater for the requirements of consumers for liquor and related services. Locality is only referred to in the Act in sections 38(4)(b) and 74(1)(g)(ii) relating to impact on the amenity of the locality, with the Director's policy on *Public Interest Assessment* stating:

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.

75. It is therefore pertinent in this application, which is based on a specialty product liquor store licence, to consider how the requirement of consumers are being catered for within a reasonable proximity of the proposed licensed premises. In this instance, the Commission considers that the *Kalahari – A Taste of Africa* liquor store which is providing a range of South African liquor products, is within a distance that is relevant to this application.
76. It also has been submitted on behalf of the Director that by making a submission that the applicant's business attracts customers from "some distance" away, the applicant is inviting the Commission to consider a much wider locality when determining whether the grant of the proposed licence is in the public interest.
77. Both the interveners, the EDPH and the Police have expressed concern about the potential for the "normalisation" of liquor purchases and impulse or unplanned purchases of liquor; however, it is reasonable to infer from their submissions that these concerns are largely based on the prospect of the proposed licensed premises operating as a general liquor store (selling all types of liquor products) and potentially expanding its operation in the future rather than relying on the sale of specialised South African liquor products to a relatively "niche" market as envisaged in the application.
78. In addition, the interveners as mentioned above in paragraph 77, have expressed concern about the proposal to extend the trading hours of the business in line with the maximum hours permitted for a liquor store. This concern stems from the apparent contradiction between the stated intended purpose to operate a specialty supermarket with culturally specific liquor products to satisfy an existing consumer requirement and the proposal to also stock mainstream Australian liquor products and trade longer hours.
79. The Commission notes that the Objector, whilst having a commercial interest in the outcome of this licence, has been prepared to withdraw its objection subject to the application being restricted to the sale of South African liquor products only. An agreement towards this end has not been reached.
80. Although the applicant conceded at one point during the application process before the Director that it "will only stock and sell liquor products of African origin", the applicant has pursued its application to sell both African liquor products together with some mainstream liquor products, such as bourbon, whisky and beer. As stated, this is an aspect of the application about which the interveners are particularly concerned.
81. The applicant contends in the PIA that individual members of the African population in the locality, in particular the South African population, are currently forced to make a special trip or to drive far away to satisfy their requirements for South African liquor products and that this is very inconvenient for them.
82. Yet, in response to the observation by the Police that of the 138 respondents who completed a "Public Interest Witness Petition", only two (2) provided an address within the 2 km radius of the premises, the applicant submitted that its business "attracts customers from some distance" and that "people are prepared to travel further to obtain their specialist requirements".
83. The apparent inconsistency in these two submissions was pointed out by the

Director in his reasons for refusing the application.

84. It is evident from these submissions, as was evident before the Director, that the applicant draws a not insignificant number of customers from some distance away from its premises.
85. Although it would have been preferable for the applicant to have been advised formally that the locality would extend beyond 2 km to take account of the impact of the grant of the licence to *Kalahari – A Taste of Africa*, it is entirely reasonable for the Director to have regard to the potential impact of the grant of that licence on the requirements of consumers in light of the documentation accompanying the PIA and the submissions on this issue from the applicant.
86. It could not be said that the applicant was unaware that the impact of the grant of the licence to *Kalahari – A Taste of Africa* would not be a consideration as it was widely canvassed by the interveners and addressed in responsive submissions by the applicant.
87. The fact the public interest witness petitions and other supporting documentation presented in the PIA predate the grant of the licence to *Kalahari – A Taste of Africa* also severely limits the probative value and weight of this evidence for consumer requirement. It was open to the applicant to defer the licencing authority's consideration of the application to provide more up-to-date and relevant objective evidence of a consumer requirement.
88. The deficiencies in this evidence are further exacerbated by the uncertainty surrounding the likely extent of the proposed trading in mainstream liquor products in the short, medium and long term.
89. In evaluating the material before it, the Commission is not persuaded that the applicant has discharged its onus under section 38(2) of the Act in that:
 - a. there is insufficient probative evidence that the requirement of consumers for specialty South African liquor products is not currently being met within the meaning of sections 5(1)(c) and 5(2)(a) of the Act; and
 - b. the PIA and submissions by the applicant relate as much to the establishment of a general liquor store as to a specialty liquor product store and there is no evidence that there is a consumer requirement for a general liquor store in this locality.
90. The application is therefore refused.



EDDIE WATLING
ACTING CHAIRPERSON