

Liquor Commission of Western Australia
(Liquor Control Act 1988)

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

Respondent: Director of Liquor Licensing
(represented by Mr Thomas Ledger of the State Solicitor's Office)

Commission: Ms Alya Barnes (Presiding Member)
Dr Kim Hames (Member)
Mr Paul Shanahan (Member)

Matter: Application for review of the decision of the Director of Liquor Licensing to refuse the application for a conditional grant of a liquor store licence pursuant to section 25 of the Liquor Control Act 1988.

Premises: Cellarbrations Canning Vale
214 Campbell Road, Canning Vale, WA 6155

Date of Hearing: 15 September 2022

Date of Determination: 25 January 2023

Determination: The application is refused and the decision of the Director of Liquor Licensing is confirmed.

Authorities referred to in Determination:

- *Liquor Control Act 1988* (WA)
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88
- *Hancock v Executive Director of Public Health* [2008] WASC 224 (Hancock) [53]-[54] (Martin CJ).
- *Liquorland Australia Pty Ltd v Director of Liquor Licensing* [2021] WASC 366

Background

- 1 This is an application for a review of the decision made by a delegate of the Director of Liquor Licensing (the “**Director**”) on 4 March 2022 to refuse the Applicant’s application for a liquor licence for a liquor store in premises at 214 Campbell Road, Canning Vale (the “**Premises**”). The Director published reasons for that decision (the “**Decision of the Director’s Delegate**”) on 25 May 2022 (the “**Reasons**”). The application was made on 13 June 2022 pursuant to section 25 of the *Liquor Control Act 1988* (the “**Act**”).
- 2 In the Reasons, the Director’s Delegate concludes that the Applicant’s application for the licence should be refused because the evidence adduced by the Applicant was insufficient to discharge the onus borne by the Applicant under section 36B(4) of the Act¹.
- 3 On 1 July 2022, the Director lodged an intervention pursuant to section 69(11) of the Act.
- 4 The Applicant seeks the licence so that it can trade from the Premises under the name ‘Cellarbrations Canning Vale’. The Premises are adjacent to a supermarket which trades as ‘Canning Vale IGA’. Both the Premises and the supermarket would be part of the ‘Ranford Shopping Centre’, which is a retail shopping strip on Campbell Road in Canning Vale.

The Applicant’s primary submissions

- 5 The Applicant’s representatives, Canford Hospitality Consultants Pty Ltd, have provided two documents that each purport to be the Applicant’s primary submissions, being:
 - a. the Applicant’s letter to the Executive Officer of the Commission dated 8 June 2022 (the “**Grounds of Review**”); and
 - b. the document annexed to an email sent by Alastair Cockman of Canford Hospitality Consultants Pty Ltd to the Executive Officer of the Commission and to the Intervener’s Counsel on 1 September 2022 (the “**Applicant’s Primary Submissions**”).

However, the Applicant’s Primary Submissions (see b. above) retrospectively refer to the Grounds of Review (see a. above) as “*the Applicant’s Grounds for Review (8th June 2022)*”².

- 6 The Grounds of Review submit that the Commissioner for Police, the Chief Health Officer, the City of Gosnells and the Chief Executive Officer of Tourism WA have not sought to intervene to oppose the Applicant’s application for a liquor licence for the Premises. The Commission believes that the lack of any intervention from those parties has no relevance to this matter.
- 7 Much of the submissions in the Grounds of Review and the Applicant’s Primary Submissions concern the Applicant’s allegations of errors in the Reasons. Those submissions are of limited assistance to the Commission as the Commission does not seek any error on the part of the Director’s Delegate when undertaking a review under section 25 of the Act. Instead, the Commission undertakes a full review and makes a fresh determination based on the materials

¹ Section 36B(4) of the Act states that “[t]he licensing authority must not grant an application to which this section applies [(which includes any liquor store licence)] 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.”

² See paragraph 2.2 of the Applicant’s Primary Submissions.

that were before the Director's Delegate when the Decision of the Director's Delegate was made (*Hancock v Executive Director of Public Health* [2008] WASC 224). Notwithstanding those matters:

- a. the Director relies on the reasoning in the Reasons³; and
 - b. the Applicant's submissions alleging errors in the Reasons (including in the Grounds of Review and in the Applicant's Primary Submissions) are effectively the Applicant's response to that reasoning.
- 8 The Commission has read and considered those parts of the Grounds of Review and the Applicant's Primary Submissions that deal with the Applicant's allegations of errors in the Reasons as to the way in which the Director's Delegate interpreted the Applicant's evidence when making the Decision of the Director's Delegate. However, the Commission does not intend to summarise all those submissions in these reasons for the Commission's determination.
- 9 The Grounds of Review assert the Decision of the Director's Delegate is incorrect to the extent:
- a. The Reasons wrongly suggest there is only a consumer requirement for one-stop shopping in large suburban shopping centres, rather than in shopping centres of any other size.
 - b. The Reasons fail to take account of the principle in the decision in *Liquorland (Australia) v Director of Liquor Licensing* [2021] WASC 366 (the "**Liquorland Karrinyup decision**") that the purpose of section 36B of the Act is not "*to constrain the number of packaged liquor premises by sacrificing consumers' options to get liquor at a lower price and better quality*" but is instead to "*ensure that an additional licence [will] only be granted where such requirements could not reasonably be met by the existing premises (and in the context of there also being a Public Interest condition).*" The Reasons also fail to recognise that:
 - (i) 'limited edition and short run craft beers' ("**L&SCB**") are a niche product line of packaged liquor;
 - (ii) other liquor outlets in the locality will not offer the same range of L&SCB which the Applicant proposes to offer in its proposed liquor store at the Premises; and
 - (iii) the greater range and availability of L&SCB at the Applicant's proposed store will satisfy the requirement of section 36B(4) to show that "*local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.*"
 - c. The Reasons wrongly suggest that it is necessary for an Applicant to show that its proposed range of liquor and licensed services would be required by everyone in the locality.

³ See paragraph 3 of the 'Outline of Primary Submission of the Intervener' dated 1 September 2022

- d. The Reasons wrongly suggest that the survey results in the Public Interest Assessment (“PIA”) the Applicant provided in support of its application for a licence was not objective evidence. The Reasons were also wrong to the extent the Director’s Delegate did not give greater evidential weight to those survey results and did not recognise those results as showing “*an overwhelming requirement for this specialist range of liquor products*”.

Conversely, the Commission does not need “*to find ‘strong’ or ‘overwhelming’ consumer demand for a liquor of a particular type*” (such as L&SCB) in order to satisfy the requirements of section 36B(4) of the Act [the Applicant claims support for this assertion from the decision of Banks-Smith, J in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 (the “**Australian Leisure decision**)”].

- e. The Reasons were wrong to the extent they suggest that the Director’s Delegate failed to recognise and give proper weight to the fact that “*the proposed liquor store would have a range of at least 140 limited edition and short-run craft beers which none of the existing packaged liquor outlets in the locality have*” in addition to a “*core range of craft beers*”.
- f. The Reasons were wrong to the extent they characterise consumer demand for short run craft beers as merely “*an interest in a product*” rather than recognising the serious dedication and keen interest which some consumers (who are referred to as ‘devotees’ in the Applicant’s Primary Submissions) have in those products.

10 The Applicant’s Primary Submissions assert many of the same matters as the Grounds of Review, albeit expressed in different terms. The Applicant’s Primary Submissions also assert:

- a. The Reasons were wrong in finding that “[t]he additional hurdle in s 36B is to prevent multiple premises in close proximity to one another selling packaged liquor”, and wrong in failing to recognise that consumer requirements for L&SCB is distinct from consumer requirements for other kinds of packaged beer.
- b. The Reasons fail to take account of Archer J’s interpretation of the meaning of the phrase “*cannot reasonably be met*” in section 36B(4) of the Act in the Liquorland Karrinyup decision.
- c. The PIA addresses each of the matters listed in section 38(4) of the Act, being matters which the licensing authority may have regard to in determining whether granting the liquor licence sought by the Applicant is in the public interest. In that regard:
- (i) as to section 38(4)(a) of the Act (which invites the decision maker to have regard to “*the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor*” by the proposed licensed premises), the Applicant’s Primary Submissions relevantly says:

“3.2.4 Given that the Applicant is simply seeking to return a packaged liquor service only recently removed from the locality, and given the low rates of offending in the locality, it can be said that they are not adding any potential for undue harm or ill-health.”

- (ii) As to section 38(4)(b) of the Act (which invites the decision maker to have regard to “*whether the amenity, quiet or good order of the locality might in some manner be lessened*” by the proposed licensed premises), the Applicant’s Primary Submissions relevantly says:

“3.3.1 *The store proposed through this application is modestly sized and the previous, much larger, Liquorland store was an active tenant of the shopping centre for the past 20 years, having only recently closed down, in 2017.*”

- (iii) As to section 38(4)(c) of the Act (which invites the decision maker to have regard to “*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*”), the Applicant’s Primary Submissions relevantly says:

“3.4.1 *The proposed Cellarbrations store is smaller than the previously operated Liquorland store. During the Liquorland store’s tenure (some 20 years) – no complaints were received, as far as the Applicant is aware*”.

- d. The Reasons fail to take account of Banks-Smith J’s finding in the Australian Leisure decision that section 5(1)(c) of the Act “*requires regard be directed to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements*”.
- e. The Reasons were in error in finding that “*a preference or support for an independent operator does not amount to a consumer requirement and as stated earlier, nor does an interest in a product (i.e., craft beer) demonstrate a consumer requirement*” as that is at odds with the relevant authorities.

The Intervener’s Submissions

11 The Director’s ‘Intervener’s Outline of Primary Submissions’ of 1 September 2022 (the “**Intervener’s Submissions**”) include submissions that:

- a. The Commission is required to make its determination on the balance of probabilities (see section 16(1)(b)(ii) of the Act), and the onus is on the Applicant to adduce sufficient probative evidence to discharge its onus under section 36B(4) of the Act.
- b. As Intervener, the Director does not bear an onus of proof in this matter (see *Re Gull Liquor, Gingers’ Roadhouse* (1999) 20 SR (WA) 321, per Greaves J).
- c. The interpretation and application of section 36B of the Act in the Reasons is both correct and consistent with the binding authority of the Liquorland Karrinyup decision. In that regard, the Director repeats those parts of the Reasons.
- d. If the Applicant is able to discharge its onus under section 36B(4), then the Applicant still bears the onus (under section 38(2) of the Act) of satisfying the Commission that the grant of the Application is in the public interest, and submissions as to the public interest must be supported by an appropriate level of evidence.

- e. The Commission also has an "*absolute discretion*" under section 33(1) of the Act to grant or refuse an application on any ground or for any reason it considers in the public interest. That discretion is only confined by the scope and purpose of the Act, read as a whole. Accordingly, the Commission may refuse an application, even if it meets all the statutory requirements, where granting the application is inconsistent with the Act's objects and purposes.
- f. The expression "*in the public interest*", as used in both ss 38(2) and 33(1), imports a discretionary value judgment. That general discretion is only confined by the scope and purposes of the statute (see *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 at [48], per Buss, JA). The factual matters which the Commission is bound to take into account in determining whether granting an application is "*in the public interest*" are the matters relevant to the objects and purposes of the Act, including the primary and secondary objects set out in section 5 of the Act. In determining whether it is satisfied that the grant of the Application is "*in the public interest*" the Commission is also entitled to take into account those matters set out in section 38(4) of the Act.
- g. For the purposes of the section 36B(4) analysis:
 - (i) The only relevant evidence is the PIA, the intercept survey results (attachment CCV25 to the PIA) and the online surveys and mystery shopper report cover letter (attachment CCV26 to the PIA).
 - (ii) The 'locality' in this case (in accordance with the Liquorland Karrinyup decision) is a 2-kilometre radius from the Premises, which includes six packaged liquor outlets. The number of those outlets in that area increased from two stores in 2008 to five stores in 2016 and to six stores in 2021.
 - (iii) The Applicant's evidence as to those other outlets and their offerings was limited as it dealt only with the availability of L&SCB in that area, and not other products. There is no indication as to whether the projected requirements of the Applicant's customers could be met by the existing stock levels already stocked at these five outlets.
- h. The intention of the Applicant's surveys appears to be to gather evidence in support of the Applicant's purported point of difference, being that a relatively small range of L&SCB is not available elsewhere in the locality.
- i. The questions asked in the intercept survey conducted by the Applicant inside the Canning Vale IGA store in June 2021 mean the assertion (at [9.21] of the PIA) that "*the responses received from an overwhelming number of respondents [in the survey] provide further very clear evidence that the chain liquor stores do not provide the range of craft beers that are required by the people in the locality, nor do they provide the type, or brand or craft beer that is required*" cannot be maintained. The inherent limitations in the data from those questions means that those survey results can be given little weight.

- j. Considering Archer J's decision in the Liquorland Karrinyup decision in relation to section 36(4), it is open for the Commission to find that:
- (i) The Applicant misrepresented some of the data from the surveys.
 - (ii) The Applicant did not ask the survey respondents certain pertinent questions that would have some bearing on the analysis to be undertaken under section 36B(4) of the Act regarding the existing consumer habits of respondents.
 - (iii) In relation to consumers' requirements in relation to product range, service and efficiency, the Applicant has not provided sufficient evidence as to the products offered (and not currently offered) at the six competing stores, in order for the Commission to make an informed determination.
 - (iv) The Applicant consequently failed to discharge its onus under section 36B(4).

The Applicant's Responsive submissions

- 12 The Applicant's 'Responsive Submissions' of 8 September 2022 (the "**Applicant's Responsive Submissions**") include submissions that:
- a. The Director has mischaracterised L&SCB as 'craft beer' in the Intervener's Submissions and have ignored the Applicant's evidence as to the concept and distinction of L&SCB.
 - b. The Director has misapplied the principles in the Liquorland Karrinyup decision by failing to recognise that there is no need for the licensing authority to find a strong or overwhelming level of consumer requirement for the purposes of section 36B(4). In the Liquorland Karrinyup decision, it was judged sufficient that only 11% of survey respondents stated their requirements for packaged liquor were not already met by the existing outlets in the locality.
 - c. The Applicant's submissions and evidence as to the public interest test should be accepted in the absence of any submissions in that regard from the Director.
 - d. The Directors' focus on the number of packaged liquor outlets in the locality ignores the rapid and sustained population growth in that area and paints a very incomplete picture. The number of packaged liquor outlets in the locality has not kept pace with population growth and is lagging behind what is commonly found in WA communities and localities.
 - e. One-stop shopping is of great importance to people who live time poor lifestyles.
 - f. Change is part of the proper development of the industry.
 - g. The Director's assertion that "*there is no indication as to whether the projected requirements of the Applicant's customers could be met by the existing stock levels already stocked at these five outlets*" misunderstands the Applicant's application, and the "*liquor of a particular type*" which the Applicant proposes to stock (i.e., the L&SCB), for which there is strong and demonstrated demand amongst the local community, and which none of the existing packaged liquor outlets stock.

- h. There is clear evidence that none of the 'large destination outlets' carry the L&SCB products that the Applicant's store will be carrying, and the survey respondents were provided with an intended manner of trade document and proposed stock list. The manner of trade document confirms that the L&SCB products are 'exclusive to Cellarbrations at Canning Vale' (see attachments CCV10 to CCV18 to the PIA).
- i. The Director's assertion in paragraph 11h above as to the intention of the surveys is misleading as the Applicant canvassed widely for local opinion (see paragraphs 9.3 to 9.8 of the PIA).
- j. The Director's assertion that the survey results are biased, does not explain how this might be fatal to the Application.

The Applicant's primary oral submissions

- 13 At the hearing on 15 September 2022, the Applicant's representative made further submissions, including that:
- a. The Commission should support local producers, including producers of L&SCB.
 - b. L&SCB products are effectively distinct from other beer products, and craft beer devotees are not driven by price.
 - c. Liquor stores that are part of a chain can only stock L&SCB that are supplied to all the stores in their chain.

The Directors' oral submissions

- 14 At the hearing, the Director's Counsel made the further submissions, including that:
- a. Only two of the 30 fridges at the Premises are proposed to be stocked with L&SCB.
 - b. The Applicant's surveys did not identify the relevant local consumer requirements for packaged liquor, as those surveys did not ask where the respondents to the surveys currently purchase their L&SCB.
 - c. The Applicant's surveys did not identify what packaged liquor requirements are already met by existing local outlets, as the:
 - (i) only relevant question in the surveys about that issue (being question 3.3) asks whether the existing packaged liquor outlets in the locality meet the survey respondent's packaged liquor needs, including for West Australian, Australian and international craft beer (to which 53% of respondents said 'yes');
 - (ii) the survey respondents can only be expected to have answered that question as a matter of subjective impression as they cannot be expected to have a comprehensive knowledge of, and a perfect recollection of, the stock of the other six packaged liquor outlets in the locality;
 - (iii) the evidence of the mystery shopper can only be considered relevant if the Commission accepts the Applicant's characterisation of L&SCB as being entirely distinct from other 'craft beer' because of its limited edition and/or short run nature; and

- (iv) there is no evidence at all of what stocks of L&SCB, other craft beer, other beer and other packaged liquor is stocked by each of the other six packaged liquor outlets in the locality.

The Applicant's responsive oral submissions

- 15 At the hearing, the Applicant's representative also made further submissions in response to the oral submissions made by the Director's Counsel at that time, including a submission that the desire to achieve growth in the sales of the IGA supermarket that is adjacent to the Premises is not the principal driver in the Applicant's application for a liquor licence for the Premises.

LEGAL FRAMEWORK

- 16 The Commission is required to undertake a review of this matter on its merits and by way of rehearing, and (as noted in the paragraph 7 above) is to make its own determination based on the materials before the Director's Delegate^{4 5}.
- 17 The Commission is not bound by the rules of evidence or by any practices or procedures applicable to courts of record and is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms⁶.
- 18 In determining the review, the Commission may:
- a. affirm, vary or quash the Decision;
 - 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 questions of law reviewed or give directions to the Director, to which effect will be given; or
 - d. make any incidental or ancillary order⁷.
- 19 The Commission is required to make its determination on the balance of probabilities⁸ (as noted in the Intervener's submissions in paragraph 11a above).
- 20 Relevant to this application for a grant of a liquor store licence is section 36B of the Act, which is titled 'Restrictions on grant or removal of certain licences authorising sale of packaged liquor' and which says:

"(1) In this section —

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

⁴ *Hancock v Executive Director of Public Health* [2008] WASC 224 (Hancock) [53]-[54] (Martin CJ).

⁵ Act, section 25(2c).

⁶ Act, section 16(7)(a)-(b).

⁷ Act, section 25(4).

⁸ Act, section 16(1)(b)(ii).

packaged liquor premises means premises to which a licence referred to in subsection (2) relates;

prescribed area means the area prescribed for the purposes of this section;

prescribed distance means the distance prescribed for the purposes of this section;

proposed licensed premises, in relation to an application to which this section applies, means —

- (a) if the application is for the grant of a licence — the premises to which the application relates; or
- (b) if the application is for the removal of a licence — the premises to which the licence is sought to be removed;

retail section —

- (a) in relation to packaged liquor premises — means the part or parts of the premises on which packaged liquor is displayed for the purposes of sale or sold; and
- (b) in relation to proposed licensed premises — means the part or parts of the premises on which packaged liquor is to be displayed for the purposes of sale or sold.

- (2) This section applies to an application for the grant or removal of any of the following licences —
 - (a) a hotel licence without restriction;
 - (b) a tavern licence;
 - (c) a liquor store licence;
 - (d) a special facility licence of a prescribed type.
- (3) The licensing authority must not hear or determine an application to which this section applies if —
 - (a) packaged liquor premises are situated less than the prescribed distance from the proposed licensed premises; and
 - (b) the area of the retail section of those packaged liquor premises exceeds the prescribed area; and
 - (c) the area of the retail section of the proposed licensed premises exceeds the prescribed area.
- (4) The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.

(5) *Regulations made for the purposes of the definition of prescribed distance in subsection (1) may prescribe different distances in relation to packaged liquor premises in different areas of the State.”*

21 Section 36B(3) is not relevant in this matter. However, the restriction in sub-section 4 of section 36B is relevant. That section prohibits the authority from granting the licence “*unless it is satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated*”⁹.

22 Furthermore, it is incumbent on the Applicant, pursuant to section 38, to show that it is in the public interest for the licensing authority to grant the licence. Section 38 is titled ‘Some applications not to be granted unless in the public interest’ and says:

“(1) *Subsection (2) applies to —*

(a) *an application for the grant or removal of a licence of a kind prescribed; or*

(b) *an application for a permit of a kind prescribed; or*

(c) *any other application to which the Director decides it is appropriate for subsection (2) to apply.*

(2) *An Applicant who makes an application to which this subsection applies must satisfy the licensing authority that granting the application is in the public interest.”*

23 Accordingly, to grant the liquor store licence to the Applicant, the licensing authority must find that the Applicant on the balance of probabilities, has proved two requirements:

a. 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*”¹⁰; and

b. that the grant of the application would be in the public interest.

24 Sections 36B and 38 are not mutually exclusive. Accordingly, it follows that if section 36B is not satisfied, then the application fails and it is unnecessary to consider section 38 of the Act.

25 It is clear from the *Liquorland Karrinyup* decision that “*liquor requirements*” can and should be construed broadly such that it could include liquor of a “particular type”¹¹.

26 Section 36B(4) requires an assessment of the Applicant’s evidence to determine:

a. what the packaged liquor requirements in the locality are; and

b. whether those requirements can reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.

⁹ Section 36B(4) of the Act

¹⁰ *Liquorland Australia Pty Ltd v Director of Liquor Licensing* [2021] WASC 366

¹¹ *Ibid* as cited in the Application at paragraph 11.22.1.1.

- 27 According to Archer J in the *Liquorland Karrinyup* decision, the words “*requirements of consumers*” mean the same in section 36B(1) and section 5(1)(c) and, subject to the facts and issues of a particular case, may involve consideration of the same types of matters¹².
- 28 If, after establishing certain local packaged liquor requirements exists, it transpires those liquor requirements can be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, then the application must fail.
- 29 It has been held that the word “cannot reasonably be met” in section 36B(4) means “cannot sensibly or rationally be met”¹³.

DETERMINATION

- 30 In this matter the Applicant submits there is a particular packaged liquor requirement in the locality, being the requirement for “*short run/limited edition craft beer*” (“**S&LCB**”). For the Applicant this means: “*a small batch and part of a specialty line. Those products are exclusive to Cellarbrations at Canning Vale and not otherwise available in the locality (Refer to PerthMarket Research report – attachment CCV26)*”¹⁴.
- 31 It submits further that this purported requirement cannot reasonably be met by existing liquor stores in the locality (presumably due, amongst other things, to the exclusive distribution rights over certain S&LCB), hence the need for the licensing authority to then consider and find in the affirmative, that it is in the public’s interest to grant the licence.
- 32 What is not in issue in this matter, and is not therefore addressed in the determination that follows, are the issues of fit and proper person (section 37(1)(b)(i) of the Act), the standard of the proposed premises being sufficient and suitable (section 37(f)(i) of the Act), the likelihood of the proposed premises causing offence, annoyance, disturbance or inconvenience to persons in the vicinity or adversely affecting the amenity or quiet or good order in the locality (section 37(3) and section 38(4)(b)&(c) of the Act), the meaning of locality generally (section 36B of the Act), or the question of harm or ill-health to the public (section 38(4)(a))¹⁵.
- 33 The central issue in this matter is the issue of “*consumer requirements*” (the “**Central Issue**”) and in that respect, due regard must be given to the objects of the Act including the object in section 5(1)(c)¹⁶ to “*cater for the requirements of consumers for liquor related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*”.
- 34 There is a plethora of information in this matter that includes six (6) support statements of business owners located adjacent to the proposed premises; and nine (9) statements of distributors of S&LCB. Following a review of that material, and for the following reasons, the Commission does not consider that particular “*evidence*” relevant to the Central Issue.

¹² Ibid paragraph 89 page 26

¹³ Ibid paragraph 131

¹⁴ PIA paragraph 8.3, page 96

¹⁵ All references are to the Act.

¹⁶ *Liquorland Australia Pty Ltd v Director of Liquor Licensing* [2021] WASC 366, paragraph 96, page 26.

- 35 The support business owners' statements do not speak to whether there is a consumer requirement in the locality for S&LCB, but rather those owners'/operators' desire to have a liquor store in the shopping complex to support their businesses.
- 36 The Applicant in Section 8 of its PIA says that the proposed stock list "*will offer a constantly evolving and wide range of limited edition and short run craft beers which are unavailable at the chain liquor stores which exist in the locality today*"¹⁷. Despite this, at the hearing a distinction was made that it was not the "lines of beer" that were being committed to, but rather, the breweries as suppliers.
- 37 The distributors statements, whilst showing support for the Applicant, generally provide that certain of their stock is not or cannot be made available to the large liquor outlets in the locality (BWS, Liquorland and Dan Murphy's) essentially due to the nature of the S&LCB produced by them as a short supply product that is ever changing. As such their product is antithetical to large liquor store's business models that require regular supply and batch volume. While this may be the case, the statements do not however, show that the distributors could and would supply their stock to the Applicant, although the Commission is asked to draw this inference from their existing supply relationship with the Celebrations Baldivis liquor store and the fact they each positively respond to the question "*How important is it to a craft liquor producer, such as yourself, to have product exposure in a store such as this one proposed for Canning Vale*". In the absence of a clear commitment to the Applicant with respect to supply in the locality, and particularly since the Applicant itself clarified that the distribution agreements were critical, not the beer, the Commission finds the distributor's statements irrelevant to the Central Issue and has accordingly, disregarded them.
- 38 Other information to support the view there is an unmet packaged liquor requirement in the locality, being the consumer requirement for S&LCB and bearing in mind there are six liquor stores in the locality offering a broad range of alcohol, includes:
- a. James Robert Allen's evidence;
 - b. intercept surveys; and
 - c. 'mystery shopper' evidence.
- 39 The first step for the Commission is to assess and then decide whether any of the information set out in paragraph 38 above establishes that there is a consumer requirement in the locality for short run/limited edition craft beer.
- 40 If the evidence shows there is, then the next step is to consider whether the requirement is or is not "*reasonably*" catered for by other local packaged liquor outlets. What follows is an analysis of that information with respect to the first step, and the second is addressed for completeness.

Is there a consumer requirement in the locality for short run/limited edition craft beer? --- James Robert Allen's statement

- 41 Mr Allen is the manager of Celebrations Baldivis and provided an 11 page statement that includes several Facebook posts that show an active consumer interest in sourcing and

¹⁷ PIA paragraph 11.9.3.11, page 126

purchasing craft beer. According to Mr Allen's statement, there is a growing demographic of craft beer aficionados who prefer to satisfy their liquor needs with locally produced S&LCB, a quality-over-quantity approach and a somewhat bespoke preference. Recognising a gap in the market, Mr Allen re-directed Celebrations Baldivis' business model to focus on unique craft beer and successfully turned that business around. Social media; the personal and knowledgeable service of the Baldivis staff; and word of mouth were key ingredients for its success, and it is this new model that Mr Allen wishes to employ for the proposed liquor shop at the Premises. For Mr Allen, the desire for craft beer has changed the liquor landscape and a grant to the Applicant would be consistent with the need to regulate the liquor industry as a developing industry.

- 42 While that may all be true, the difficulty the Commission faces is that Mr Allen's statement does not demonstrate a local consumer requirement for the type of liquor the subject of the application (emphasis added). Instead, the Applicant is asking the Commission to draw that conclusion based on:
- a. Facebook posts which show an (possibly national) interest to purchase S&LCB as a varied and novel product from Baldivis Cellarbrations; and
 - b. a submission that population statistics indicate that the population will grow significantly in the Canning Vale area,

which is said to establish that there is, or will be, a local consumer requirement for S&LCB.

- 43 The Applicant may consider it axiomatic that, if given the chance to meet the requirement, the requirement will follow. However, the work of the Commission is to decide whether it is satisfied on the facts presented before it that there is a current consumer requirement for packaged liquor in the locality where there are already six existing packaged liquor outlets. In those circumstances, the 'short run and limited edition' nature of S&LCB is, and must be, key to the Application.
- 44 The Commission has carefully considered Mr Allen's evidence and considers that little or no weight should be given to it. While the proposal may have merit in general, Mr Allen's evidence does not directly speak to the proposed liquor store at the Premises or to the consumer requirement in the locality.

The Intercept surveys

- 45 The Applicant conducted two surveys; being an intercept survey inside the Canning Vale IGA supermarket (comprised of 519 responses) and an online survey questionnaire via QuestionPro (comprised of 138 responses). Notwithstanding this, attachment CCV25 of the Application in fact comprises 499 questionnaires.
- 46 What is clear from the CCV25 surveys is that there is an overwhelming interest in supporting local enterprises - whether it is locally produced alcohol or a locally owned independent liquor store - and that there is also a strong interest in trying new craft beer that the Applicant proposes to offer. However, that is not to say that the Commission can be satisfied there is a consumer requirement for S&LCB in the locality, being the Central Issue in this matter. We also note that the preference for buying or supporting "local" is not a statutory requirement, as opposed to "*packaged liquor*" that is.

- 47 The survey respondents respond to certain questions posed by the Applicant that are central to the application and to determining whether there is a consumer requirement for the S&LCB that cannot otherwise be met by liquor premises in the locality.
- 48 30 questions in the Survey cover the survey respondent's understanding as to locality; cover what the proposed liquor store is about; cover the availability of the current packaged liquor outlets in the locality; and cover the potential impact to the community. Attached to the survey is the intended manner of trade document; a map of the locality; a floor plan; and the proposed stock list. The questionnaire asks the respondents to review these attachments before completing the questionnaire.
- 49 The Commission has reviewed the survey and the survey respondent's answers and the Commission has found that the survey is problematic as the questions:
- a. largely comprise of 'yes' or 'no' type questions that lead the survey respondent to respond in the affirmative (or negative) to the questions;
 - b. are not open ended (such as "*what do you like to drink?*", "*what drinks that you enjoy, are you not able to easily obtain and why?*") and, accordingly, make it hard to discern the survey respondent's position as to their liquor requirements;
 - c. lead the survey respondent to provide the Applicant's preferred response such as "*convenience*", "*like local*", "*support independent businesses*"; and
 - d. do not ask how the survey respondents currently meet their liquor requirements for craft beer, let alone for S&LCB.
- 50 Furthermore, despite the numerous participants being questioned, their answers for supporting the application are notably repetitive, which suggests that they have been guided to respond a certain way. This could be due to the IGA staff assisting with completing the hard copy witness questionnaires¹⁸. However, the repetitive nature of the responses impacts on the credibility of the survey evidence and the Commission finds that evidence to be unreliable.
- 51 In response to the question "*Are you interested in Craft Beer*", the Commission has calculated that 56.9% responded 'yes' (disregarding the 2 responses that checked both yes and no). In response to the question "*are you interested in purchasing the limited edition/short run craft beers from the International Craft Breweries proposed by the Applicant*", 51% of the respondents confirmed that they are. Although it is accepted that it is not necessary to find an "*overwhelming or strong requirement*" for the consumer requirement with respect to section 5 (1)(c) of the Act¹⁹, these percentages appear particularly underwhelming, especially considering the evidence that several other liquor outlets in the locality supply at the very least, craft beer to satisfy this moderate requirement and in all likelihood, satisfy any S&LCB need.
- 52 98% of the participants answered 'yes' to the question "*Bearing in mind the above style of operation for this proposed liquor store, would you be likely to be a customer?*". The Applicant reasons that this means the participants are attracted to the extensive range of West Australian, Australian and International Craft Beer that the Applicant proposes to offer. This point was pressed by the Applicant's representative at the hearing noting that the survey

¹⁸ PIA, paragraph 9.10, page 105

¹⁹ Banks-Smith J, *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 paragraph 45

participants were directed back to the documents attached to the survey. However, it is unclear what aspect of the application the respondents were responding to in answering in the affirmative given the multi-faceted nature of the question and the fact that the attached documents relate to many aspects of the proposed liquor store. As such, the conclusion the Applicant wishes the Commission to draw (i.e., that there is a consumer requirement for the liquor range it proposes) cannot be reached.

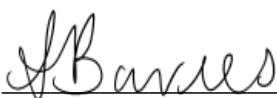
Mystery Shopper report by Perth Market Research

- 53 The Mystery Shopper report by Perth Market Research represents an audit of other premises in the locality to determine if the stock the Applicant proposes to carry is already supplied by those other stores in the locality. As the range of short run limited edition craft beers (S&LCB) produced is “*constantly changing and evolving*”, a second online audit was also carried out. It seems contradictory and somewhat farcical to ask, on the one hand, the Commission to rely on this data to show other stores do not have the Applicant’s proposed stock, and therefore other stores in the locality cannot reasonably meet the purported consumer requirement, yet on the other hand, carry out a further audit because the stock changes.
- 54 The issue of whether other liquor stores in the locality stock the same S&LCB products that the Applicant proposes to carry is also only significant if the product range of S&LCB available on the market at any time is so limited that the majority of that range is covered by the S&LCB which the Applicant proposes to carry. The Applicant gave no evidence to suggest that is the case. The Applicant’s evidence as to the dynamic nature of the market for S&LCB products also tends to suggest that is not the case.
- 55 A much more probative and helpful exercise would have been for the ‘Mystery Shopper’ to audit each of those other liquor stores as to what craft beer they carry; to say whether any of that craft beer is S&LCB; and to say how those other stores have committed to making S&LCB available to consumers, if at all.
- 56 The report concluded that there is a “*significant lack of short run, limited-edition craft beer available*” in the existing packaged liquor outlets in the locality and that staff knowledge of craft beer was limited. Notwithstanding that conclusion, the report shows:
- a. Dan Murphy Southern River and Dan Murphy’s Canning Vale “*craft beer (and short run, limited-edition craft beer) was displayed in an open display fridge on the right-hand side of the store with signage above it*”. Thus, a broad range of craft beer and some S&LCB is already available in the locality, although that S&LCB is not necessarily easily identifiable as S&LCB because it is reportedly “*mixed in with the craft beer*”.
 - b. The craft beer display in the BWS Canning Vale and BWS Southern River stores was tidy and “*easy to find*”, but the short run and limited-edition variety (S&LCB) was harder to identify.
 - c. Liquorland Southern River had a limited range of craft beer, albeit not of the short run and limited-edition (S&LCB) type.
 - d. Aldi Southern River also stocks at least one craft beer, but no short-run and limited-edition beers (S&LCB).

- 57 Clearly, the Mystery Shopper report shows some availability of S&LCB in the locality, but the extent of that availability is unknown because the question was not asked “*what short run and limited edition beer do you carry?*” Despite this, it appears to the Commission on the balance that if there was a consumer requirement for S&LCB, then that requirement can be sensibly and rationally met by the existing packaged liquor premises in the locality.
- 58 Indeed, the report records that Dan Murphy’s has “*a good craft beer selection that is well displayed*”, albeit that it appears to be different stock to what the Applicant proposes to carry.
- 59 Another difficult argument in this matter is that, despite the understanding that S&LCB is by its very nature in short supply and constantly changing, the Commission is being asked to find that the other local packaged liquor premises cannot “*reasonably*” meet the requirement for this type of liquor. However, on that analysis, and given the very nature of S&LCB, the Commission must ask itself what liquor shop could “*reasonably*” meet that requirement?
- 60 Even if there was a local consumer requirement for S&LCB and if there was also a supply deficit for S&LCB in the locality (which the Commission has not found), then the Applicant nevertheless only proposes to hold 13% of its stock as S&LCB. Indeed, of the 36 cabinets proposed in the layout map included in its intended manner of trade document, only eight (8) will be stocked with craft beer and only two (2) of those 36 will be S&LCB. This indicates that the Applicant’s evidence to the Commission as to the strength of the demand for S&LCB is significantly overstated.

CONCLUSION


- 61 While there is a plethora of information in this Application, and while the Applicant has clearly committed significant time and money in collating that information, that information does not shift the Applicant’s burden to show, on the balance of probabilities, that the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are to be situated. Accordingly, the application must fail and that the Decision of the Director’s Delegate is affirmed.



ALYA BARNES
PRESIDING MEMBER



DR KIM HAMES
MEMBER



PAUL SHANAHAN
MEMBER