

DECISION OF THE DIRECTOR OF LIQUOR LICENSING

APPLICANT: Broadwater Village Grocer Pty Ltd
(Represented by Ryan & Durey, Solicitors)

OTHER PARTIES: Chief Health Officer

Baytown Holdings Pty Ltd
(Represented by Jessica Patterson Law & Consultancy Pty Ltd)

PREMISES: *Broadwater Village Liquor Store*
Shops 9 and 13, Broadwater Shopping Village,
539 Bussell Highway, Broadwater

APPLICATION REF: A913537865

NATURE OF MATTER: **REASONS FOR DECISION**

DECISION OF: Brett Snell, Deputy Director Liquor Control and Arbitration

DATE OF REASONS: 15 July 2021

Background

1. On 7 December 2020, an application was lodged by Broadwater Village Grocer Pty Ltd (Applicant), for the conditional grant of a liquor store licence, pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (Act), for premises to be known as *Broadwater Village Liquor Store* and situated at Shops 9 and 13, Broadwater Shopping Village, 539 Bussell Highway, Broadwater (proposed premises).
2. The application was advertised in accordance with instructions issued by the Director of Liquor Licensing (Director), which resulted in the lodgement of a notice of intervention by the Chief Health Officer, pursuant to s 69 of the Act and a notice of objection by Baytown Holdings Pty Ltd (licensee of *Brew Plus*), pursuant to s 73 of the Act.
3. On 12 May 2021, under delegation pursuant to s15 of the Act, I refused the application on the grounds that the Applicant had failed to discharge its onus under s 36B(4) of the Act and issued a notice of decision to that effect, pursuant to s18AA of the Act.
4. The Applicant has requested written reasons for my decision, pursuant to s 18AA(3) of the Act. These are those reasons.
5. All the evidence tendered by the parties has been considered in the determination of the application and the failure to refer to specific evidence in these written reasons does not mean that the evidence was not considered.

The Application

6. The notice of application was accompanied by a *Public Interest Assessment* (PIA), which addressed both the provisions of ss 38(2) and 36B(4) of the Act, explaining that the Applicant currently operates a supermarket business trading as the *Broadwater Village Grocer* and was 'seeking to expand its offering to include liquor sales.'

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7. Accordingly, it was proposed to locate the premises adjacent to the Applicant’s existing supermarket business.
8. It was submitted by the Applicant that the proposed premises will be a small boutique sized premises, approximately 51 m² in size, which would ‘offer consumers a contemporary boutique style browse facility’, with approximately 370 to 430 product lines, as follows:

Category	Sub-Category	Approx. No. of Product Lines
Wine	- White	100-110
	- Red	110-120
	- Rose	5-8
	- Sparkling	10-15
	- Cask & Fortified	20-25
Beer		45-50
Cider		9-10
Premixed		20-25
Spirits & Liqueurs		60-65
TOTAL		370-430

9. The Applicant further submitted that while the proposed range of products has been specifically selected for its potential customers, it would monitor the changing requirements and demands of the customers and change its lines as required.
10. The Applicant’s PIA explained that the proposed premises would provide the local community of Broadwater and its surrounds with a convenient packaged liquor outlet:

“Broadwater Village Liquor will operate as an independent boutique grocer and liquor store that supplies shoppers with a one stop shopping experience allowing consumers to purchase their groceries and liquor needs in one convenient location.”
11. According to the Applicant, the ‘locality’ for the purposes of s 36B of the Act, should be a two-kilometre radius of the proposed premises, on the basis that:
 - (a) there were no existing packaged liquor facilities within area; and
 - (b) the premises would provide tourists and older persons with a convenient liquor facility within walking distance from their accommodation, as they do not like to travel far to make their purchases and prefer retail facilities within walking distance.
12. The Applicant also submitted that the extensive parking facilities at *Broadwater Shopping Village* would enable patrons to conveniently access the proposed premises and obtain their packaged liquor requirements, without having to enter a larger shopping complex and compete for parking spaces.
13. To demonstrate that the grant of the application would provide for the requirements of consumers, the Applicant undertook various forms of market research, including conducting a Consumer Survey, whereby respondents were asked to answer 12 questions about the proposed premises and their requirements for packaged liquor, with approximately 100 responses received. Seven witness statements and five letters of support were also obtained.

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14. An analysis of the existing packaged liquor premises located in a three- and four-kilometre radius of the proposed premises was also provided by the Applicant.

The Intervention

15. The notice of intervention made representations on the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health.
16. Specifically, representations were made that the proposal to establish a liquor store within the existing supermarket and the ensuing association of alcohol and grocery products, may increase the potential reach of alcohol-related harm, given that:
 - (a) unlike dedicated liquor outlets, supermarkets are generally frequented by the broader population because of the daily 'need' type products for sale there and would therefore increase the sale and promotion of alcohol; and
 - (b) the Applicant did not intend to sufficiently separate the supermarket's checkout area from the proposed licensed area, meaning that members of vulnerable, at-risk groups within the locality, may be adversely impacted while purchasing their daily 'need' type products, because:
 - (i) alcohol would be visible to all persons purchasing items from the supermarket; and
 - (ii) it was intended for both alcohol and grocery items to be able to be purchased from the licensed checkout in a combined transaction.
17. Accordingly, a number of conditions were recommended by the Intervenor to reduce some of the potential risks of alcohol-related harm or ill-health posed by the application.

The Objection

18. Pursuant to s 74 of the Act, the objection proceeded on the ground that the grant of the application would be contrary to the Act, on the basis that the Applicant could not satisfy the requirements of s 36B(4) of the Act.

Relevant Statutory Provisions

19. An applicant for the grant of a liquor store licence must satisfy the licensing authority in respect of two separate and distinct tests under the Act:
 - (a) first, it must overcome the Act's restrictions on the grant or removal of certain licences authorising the sale of packaged liquor, which are set out in s 36B of the Act; and
 - (b) secondly, it must demonstrate, pursuant to s 38(2) of the Act, that the grant of the application is in the public interest.
20. Pursuant to s 73(10) of the Act, the burden of establishing the validity of any ground of objection lies on the objector, whereas an intervenor carries no onus to establish their assertions of fact or opinion.¹

¹ Refer Greaves J, *Re Gull Liquor* (1999) 20 SR (WA) 321

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21. Section 36B(4) of the Act prevents the licensing authority from granting an application for a packaged liquor outlet, which includes a liquor store licence², unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.

Determination

22. Section 36B was introduced into the Act with effect from 2 November 2019 and while its provisions are still relatively new, the Liquor Commission has made findings in ***Lolba Holdings Pty Ltd v Director of Liquor Licensing***³ and ***Liquorland (Australia) Pty Ltd v Director of Liquor Licensing***⁴ on how these provisions are to be construed.
23. Section 36B(3) is not applicable in this case, however, s 36B(4) is mandatory and must be satisfied.
24. In this regard, the Liquor Commission has found that:
- (a) the object of s 36B(4) is to limit packaged liquor outlets in a specific locality; and
 - (b) the correct interpretation of the term ‘local packaged liquor requirements’ in s 36B(4):
 - (i) excludes those matters typically contemplated under s 38, such as contemporary standards in retailing or shopper convenience, preference or habits, one-stop shopping or product choice and preference, or competition; and
 - (ii) is instead limited in scope to consumer requirements for packaged liquor itself.
25. In light of the changes to the Act and the stated purpose of s 38(4), the Commission also found that the word ‘reasonably’ in s 36B(4):
- (a) does not allow for shopper convenience or general retail competition to be taken into account;
 - (b) invokes a fairly low threshold, with reference to the comments of Malcolm CJ in ***Charlie Carter Pty Ltd v Streeter and Male Pty Ltd***,⁵ that the ‘word “reasonable” imports a degree of objectivity in that the word reasonable means “...sensible; ...not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate: Shorter Oxford Dictionary at 1667”’; and
 - (c) does not create difficulty or inconvenience to consumers or prevent liquor from being readily accessed by consumers simply due to an inability to shop in a co-located supermarket.

² *Liquor Control Act 1988*: s 36B(2)

³ LC 01/2021, dated 13 January 2021

⁴ LC 07/2021, dated 20 April 2021

⁵ (1991) 4 WAR 1

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26. In Attachment 2 to the Director's *Public Interest Assessment* policy, which provides guidance on the specified 'locality' for applications, prospective applicants are advised that country cities, towns or communities will generally be subject to a locality that is a three-kilometre radius from the site of the proposed premises.
27. In ***Re Romato; Ex Parte Mitchell James Holdings Pty Ltd***⁶ McLure J observed that the principles of administrative law do not prohibit discretionary decision-makers from developing policies which structure the exercise of discretion, provided that such policies are not treated as a fixed determinative rule by decision-makers, regardless of the merits of an individual case. Her Honour also observed that 'where a decision-maker adopts a policy, it is entitled to apply that policy provided applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case'.
28. *Prima facie*, Broadwater, as part of the Busselton Local Government Area, is situated in a country city and pursuant to the Director's policy, would ordinarily be subject to a locality that is a three-kilometre radius of the proposed premises.
29. In my view, the Applicant's 'exceptional reasons' that the Director's policy should not apply are that:
 - (a) first, there are no existing packaged liquor facilities with a two-kilometre radius of the proposed premises; and
 - (b) secondly, that consumer convenience dictates a lesser area.
30. Having considered the Applicant's submissions in respect of this matter, I was not persuaded there was any valid reason to divert from the Director's policy, given that the Applicant's assertions were not germane to s 36B(4) of the Act (i.e. they relied on factors already found by the Commission to be irrelevant under s 36B(4)).
31. Further, I did not accept the Applicant's assertion that the local packaged liquor requirements 'cannot reasonably be met' simply because consumers cannot walk or ride a bicycle to their closest packaged liquor premises. In my view, this assertion is not supported by any legal precedent in the substantial review of case law undertaken by the Liquor Commission in LC 07/2021.
32. Conversely, however, I have noted that in ***Downes Family Trust & Ors -v- Woolworths (WA) Pty Ltd***⁷, Owen J observed that carrying heavy products, such as liquor, can make pedestrian access substantially difficult and inconvenient.
33. Additionally, when considered against the stated purpose of s 36B(4), I concluded that:
 - (a) the grant of licences for packaged liquor outlets so that they are within walking distance of consumers would not achieve the stated object of limiting the number of packaged liquor outlets in a locality; and
 - (b) manipulating the locality to unique areas that exclude existing packaged liquor outlets would make the provisions of s 36B(4) ineffective.

⁶ [2001] WASCA 286

⁷ [2001] WASCA 382

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34. I also considered some of the Applicant's assertions to be contradictory, such as its submissions about the consumer requirement to walk to the proposed premises and those about patrons being able to conveniently drive there.
35. Similarly, I have also noted that some of the holiday accommodation identified by the Applicant as being 'located nearby to the premises', are actually located more than two-kilometres from the proposed premises, such as *Busselton Holiday Park*, which is situated 3.2 kilometres from the proposed premises.
36. The Applicant's evidence also included an analysis, not only of the local packaged liquor outlets within a three-kilometre radius of the premises, but also those within a four-kilometre radius of the premises, which included:
- (a) *BWS Abbey*, licensed under a liquor store licence and situated at approximately 2.1 kilometres from the proposed premises;
 - (b) *Amelia Park Lodge*, licensed under a hotel licence and situated at approximately 2.2 kilometres from the proposed premises;
 - (c) *Brew Plus*, licensed under a liquor store licence and situated at approximately 3.1 kilometres from the proposed premises;
 - (d) *Liquorland Vasse*, licensed under a liquor store licence and situated approximately 3.2 kilometres from the proposed premises; and
 - (e) *Harvest Bar*, which is subject to a conditionally granted tavern licence, and situated approximately 3.2 kilometres from the proposed premises.
37. In the Applicant's analysis of the existing packaged liquor premises situated in the three-kilometre locality, it was noted that:
- (a) *BWS Abbey* stocks 1,342 product lines, which include:
 - (i) a nationally dictated mainstream base range that is the same in every BWS store;
 - (ii) promotions outside of the core range; and
 - (iii) a "Luvva Locals" promotion, where specialist products are determined by customers voting through social media channels; and
 - (b) while *Amelia Park Lodge* does not have a dedicated bottle shop, customers can purchase a limited amount of packaged liquor in the form of bottles of white, red, sparkling, and rosé wines.
38. I have also noted that in response to Question 4 of the Consumer Survey, which asked consumers about whether their requirements for packaged liquor in Broadwater and the surrounding area were being met by existing outlets:
- (a) four respondents failed to answer this question;
 - (b) 12 respondents indicated that their requirements were being met by existing packaged liquor outlets; and

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- (c) of the 73 consumers who responded in the negative, the majority indicated that this was because there was no packaged liquor outlet in walking or riding distance.
39. I also considered that the Consumer Survey established that:
- (a) the majority of consumers indicated that they currently purchase generic or mainstream liquor products, such as beer (including craft beer), wine and spirits; and also identified brands and types of liquor, such as *Carleton Dry*, *Swan Draught*, cask wine, prosecco, champagne, gin, scotch and malt whiskey; and
 - (b) consumers were already purchasing packaged liquor from the existing packaged liquor premises in the locality or elsewhere.
40. Accordingly, it is my view that the results of the Consumer Survey do not support the contention that consumers are unable to have their packaged liquor requirements met in the locality. Further, I consider the Customer Survey itself fails to adequately address the central issue under s 36B(4) of the Act as interpreted by the Liquor Commission in LC 07/2021, but rather is more concerned with those public interest matters considered under s 38(2) of the Act.
41. Similarly, despite the Applicant's submission that it will provide 'unique quality liquor products and services... including wines and beers from smaller local producers in Margaret River and Great Southern region', I noted that no restrictive trading conditions were proposed by the Applicant to ensure that it would actually trade in this manner. Further, I also consider that the very small size of the proposed premises (i.e. 51 m²) would work against the Applicant's intention to stock 'unique liquor products' and be likely to result in the Applicant changing its lines to more commercially viable offerings (i.e. mainstream liquor products).
42. Additionally, I cannot find that travelling up to three kilometres to patronise a packaged liquor premises, which holds a substantially similar type and range of product (i.e. the offer of mainstream liquor products, together with some specialist local liquor products), would constitute a great difficulty to the overwhelming majority of consumers who live or holiday in the locality. In this regard, I note there was no evidence submitted by the Applicant that visitors to Broadwater do not drive to the locality or that they remain in Broadwater for the entirety of their stay and do not visit elsewhere in the Busselton Local Government Area or Margaret River, or frequent existing packaged liquor outlets (which, pursuant to s 36B(2), includes unrestricted hotel and tavern licences).
43. On the contrary, the Applicant's PIA highlighted that Busselton is the gateway to the Margaret River Wine Region and South West, with hospitality venues spread throughout the region, as well as wineries and micro-breweries.
44. The evidentiary onus is on the Applicant to satisfy the licensing authority as to the test set out in s 36B(4) that the existing packaged liquor outlets 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

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the existence of the facts asserted in each case'.⁸ I find that the Applicant's evidence is lacking in this regard.

45. In LC 01/2021, the Liquor Commission noted that, for the purposes of s 36B(4), the licensing authority must be satisfied, based on the evidence provided, that:
 - (a) there is a "local packaged liquor requirement" - being the requirements of consumers for packaged liquor in the locality the premises are to be situated; and
 - (b) such "local packaged liquor requirements" cannot reasonably be met by existing packaged liquor premises in the locality.
46. In this case, based on the evidence submitted, I formed the view that while there may be a local packaged liquor requirement for liquor itself, it can reasonably be met by the existing packaged liquor outlets in the locality.
47. Accordingly, I considered that the application could not be granted, given that the Applicant did not discharge its onus under section 36B(4) of the Act.
48. As the test set out in section 36B(4) was not met, it was unnecessary for me to then consider whether the Applicant had demonstrated that the grant of the Application was in the public interest pursuant to s 38(2) of the Act and I made no findings in that regard.

Right of Review

49. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

⁸ Refer *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)