

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: Planbig Investments Pty Ltd
(Represented by Hospitality Total Services (Aus) Pty Ltd)

PREMISES: *Iluka Plaza Cellars*
Shop 5 Iluka Plaza Shopping Centre, 98 O'Mara Boulevard,
Iluka

APPLICATION REF: A143232475

NATURE OF MATTER: **REASONS FOR DECISION**

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

DATE OF DETERMINATION: 15 July 2021

Decision

1. On 27 May 2021, under delegation pursuant to s15 of the *Liquor Control Act 1988* (Act), I:
 - (a) refused an application by Planbig Investments Pty Ltd (Applicant) for the conditional grant of a liquor store licence, pursuant to ss 47 and 62 of the Act, for premises to be known as *Iluka Plaza Cellars* and situated at Shop 5, *Iluka Plaza Shopping Centre* (Centre), 98 O'Mara Boulevard, Iluka (proposed premises) on the grounds that the Applicant had failed to discharge its onus under s 36B(4) of the Act; and
 - (b) issued a notice of decision to that effect, pursuant to s18AA of the Act.
2. Pursuant to s 18AA(3) of the Act, the Applicant has requested written reasons for my decision. These are those reasons.

Background

3. The application, which was lodged on 11 February 2021, sought the conditional grant of a liquor store licence for an independently owned and operated boutique liquor store, with a proposed licenced area of approximately 117m², including a cool room and patron browse area.
4. The proposed liquor store would be operated in conjunction with the IGA Supermarket (IGA) at the Centre, which is a new Neighbourhood Shopping Centre.
5. According to the Public Interest Assessment (PIA) lodged in support of the application:
 - (a) the proposed liquor store would offer one-stop shopping convenience among other consumer requirements for those people resorting to the IGA or the Centre;
 - (b) the premises would have a diverse, convenient and contemporary offering of products and service, to cater to the requirements of consumers;
 - (c) the Applicant would supply a product range that meets the reasonable requirements of local residents and those resorting to the locality, while also supporting Western Australian liquor producers;
 - (d) the product range will include (but not be limited to):

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- (i) local and international craft beer,
 - (ii) locally made Western Australian products (i.e. honey mead, honey wine and honey port), which is not available in other liquor stores in the locality,
 - (iii) locally produced craft beer;
 - (iv) cleanskin wine focussed on Western Australian products;
 - (v) specialty and premium local and international liquor products;
 - (vi) small batch Western Australian liquor products; and
 - (vii) dietary specific, organic and low alcohol liquor products.
6. To discharge its obligation under s 38(2) of the Act and to demonstrate that the grant of the licence will cater to the requirements of consumers, the Applicant:
 - (a) lodged a number of Consumer Questionnaires and noted that most respondents supported the establishment of the liquor store;
 - (b) letters of support from producers and suppliers of Western Australian liquor products; and
 - (c) a letter of support from local resident, Mr Ian Goodenough MP, Federal Member for Moore.
7. As noted in Attachment 2 to the Director's *Public Interest Assessment* policy, the specified locality in respect of the application is a three-kilometre radius of the proposed premises.
8. In relation to the provisions of s 36B(4) of the Act, the Applicant submitted the locality is currently under catered to and that the grant of the licence is both suitable and relevant to establishing a small packaged liquor offering at the Centre, to cater to the requirements of local consumers.
9. In its submissions addressing the provisions of s 36B(4) of the Act, the Applicant identified the following existing packaged liquor outlets in the locality:
 - (a) *Liquorland Beaumaris*, which is licensed under a liquor store licence;
 - (b) *Kinross Liquor*, which is also licensed under a liquor store licence;
 - (c) *Currambine Bar & Bistro*, which is licensed under a tavern licence;
 - (d) *Dan Murphy's Currambine*, which is licensed under a liquor store licence; and
 - (e) *ALDI Currambine*, which is also licensed under a liquor store licence.
10. With respect to the abovementioned packaged liquor outlets, the Applicant submitted that:
 - (a) *ALDI Currambine* and *Currambine Bar & Bistro* should not be considered as genuine alternatives to a full browse liquor store;
 - (b) *Dan Murphy's Currambine* is a destination liquor store, is very large, and not suitable for those who are shopping at the Centre;
 - (c) *Kinross Liquor* is located at least ten-minute drive from the proposed premises;
 - (d) while the eastern side of Marmion Avenue has a small cluster of package liquor outlets, the western side has a notable lack and *Liquorland Beaumaris* is not well patronised by residents; and
 - (e) access across Marmion Avenue is a relevant factor when considering whether or not consumers living in Iluka face "substantial inconvenience or substantial difficulty" in accessing existing packaged liquor outlets on the eastern side of Marmion Avenue, with many of the intersections being major intersections that experience significant delay during peak periods.

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11. The Applicant also asserted that:
 - (a) none of the identified packaged liquor outlets can cater to the 'reasonable requirements' of consumers across the three-kilometre locality;
 - (b) *Iluka Plaza Cellars* will offer a neighbourhood liquor store to cater to the reasonable requirements of consumers in the locality; and
 - (c) Iluka is not a 'drive through' suburb that people pass through on their way elsewhere and the residents of Iluka should not be required to leave their local area to do their packaged liquor shopping, after they have done their other household provisioning at the Centre.
12. In conclusion, the Applicant submitted that the 'greenfield' development of a new Neighbourhood Centre at the Centre supports the submission of the Applicant that additional amenity, such as the liquor store sought, is required in Iluka.

Relevant Statutory Provisions

13. 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.
14. Section 36B(4) of the Act prevents the licensing authority from granting an application for a packaged liquor outlet, which includes a liquor store licence¹, unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.

Determination

15. 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*² and *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing*³ on how these provisions are to be construed.
16. Section 36B(3) is not applicable in this case, however, s 36B(4) is mandatory and must be satisfied.
17. 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):

¹ *Liquor Control Act 1988*: s 36B(2)

² LC 01/2021, dated 13 January 2021

³ LC 07/2021, dated 20 April 2021

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- (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.
18. Considering 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; and
 - (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***,⁴ 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.
19. In my view, the Applicant’s submissions need to be considered in light of the above findings by the Liquor Commission.
20. In addressing the provisions of s 36B(4) of the Act, the Applicant identified the five existing packaged liquor premises in the locality and relied on its Consumer Questionnaire to establish a consumer requirement for packaged liquor at the Centre.
21. Contrary to the abovementioned findings of the Liquor Commission, the results of the Applicant’s questionnaire of 155 consumers suggests that consumers support the application on those matters typically contemplated under s 38(2) of the Act, such as convenience, one stop shopping and consumer preference.
22. Additionally, the overwhelming majority of consumers (68.39% or 106 respondents) currently patronise *Dan Murphy’s Currambine*, with the second most patronised packaged liquor outlets being *Liquorland Beaumaris* and *ALDI Currambine*, who each scored 9.03% (or 14 respondents), as shown in the table below:

ANSWER CHOICES RESPONSES	RESPONSES
<i>Liquorland Beaumaris</i>	9.03% (14 responses)
<i>ALDI Currambine</i>	9.03% (14 responses)
<i>Kinross Liquor</i>	5.16% (8 responses)
<i>Dan Murphy’s Currambine</i>	68.39% (106 responses)
<i>Currambine Bar & Bistro</i>	1.29% (2 responses)
I do not currently patronise any of the above packaged liquor stores	7.10% (11 responses)

⁴ (1991) 4 WAR 1

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23. Contrary to the Applicant's claim that *Liquorland Beaumaris* is not well patronised by local residents, these results would suggest that it is.
24. Further, the majority of consumers (76.13% or 118 respondents) indicated that competitive pricing was most important to them when considering their packaged liquor requirements, which would explain in part why *Dan Murphy's Currambine* is the most popular packaged liquor outlet in the locality. Other popular responses were an outlet located close to their home or work (51.94% or 91 respondents) and the product range (51.61% or 80 respondents).
25. Similarly, the majority of respondents (61.29% or 95 respondents) felt that it was reasonable to drive up to three kilometres to purchase packaged liquor, with 27.10% (or 42 respondents) considering that it was reasonable to drive more than three kilometres and only 11.61% (or 18 respondents) indicating that it was only reasonable to travel up to one kilometre.
26. 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.
27. In respect to the Applicant's analysis of the existing packaged liquor outlets in the locality, it is simply not clear on the evidence provided to what degree certain products (or a range of products) were contemplated. In this regard I note that there is no information provided:
 - (a) as to the brands, range, number of products, price range, different sizes of bottles/packaging or the amount of stock located on the shelves (or in storage as the case may be); and
 - (b) any indication of whether the projected requirements of the Applicant's customers could be met by such current stock level sold at any of the existing packaged liquor premises in the locality.
28. As noted by the Liquor Commission in LC 01/2021, an evaluation of each of the above would assist to establish the relative difficulty or inconvenience of obtaining a relevant product. By way of example, there was no information provided as to:
 - (a) the brands, range, number of products, price range or exclusive nature of the liquor supplied by the existing packaged liquor outlets and how such products were distinguishable from the products the Applicant proposes to offer;
 - (b) whether different sizes of bottles or packaging was an issue for consumers and if so, if those sizes were available at the existing packaged liquor outlets and, if so, how such products were distinguished from the products proposed to be offered by the Applicant;

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- (c) the amount of stock located on the shelves and an indication of whether the projected requirements of the Applicant's customers could be met by such current stock level;
 - (d) the levels of customer service required to locate relevant product(s); and
 - (e) whether the product(s) were available online from the existing packaged liquor outlets and the process or time frame required to obtain such online products.
29. As noted in LC 01/2021, an evaluation of each of the above would assist in establishing the relative difficulty or inconvenience of obtaining a relevant product.
30. However, it is clear on the evidence from the Applicant's limited analysis of *Liquorland Beaumaris* and *Kinross Liquor* alone that:
- (a) gluten free beer;
 - (b) vegan wine options;
 - (c) organic wines;
 - (d) biodynamic wines;
 - (e) preservative free wines;
 - (f) low-alcohol wines;
 - (g) craft beer; and
 - (h) craft spirits,
- are already available in the locality.
31. Additionally, in relation to the Applicant's claims regarding consumers in Iluka facing inconvenience in accessing existing packaged liquor outlets on the eastern side of Marmion Avenue, while I note that some of the roads are very busy at different times, I have not been persuaded that the existing packaged liquor premises on the eastern side of Marmion Avenue cannot reasonably meet the packaged liquor requirements in the locality, given that the Applicant's consumer evidence clearly establishes that relevant consumers are presently purchasing packaged liquor from some of those outlets, such as *Dan Murphy's Currambine*.
32. Due to the above evidentiary issues, it is difficult for me to rely on the information provided in the Applicant's PIA as support for its position that no other packaged liquor outlet in the locality is able to provide for local packaged liquor requirements in the locality.
33. Consequently, I have not been persuaded by the Applicant's submissions and evidence and do not consider that the Applicant has established a requirement by consumers in the locality for the type of packaged liquor proposed to be sold (i.e. a core range of beer, wine, cider and spirits; a specialty range of products and WA made products) at the proposed premises.
34. Due to this finding, 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.
35. As the test set out in section 36B(4) was not met, it was unnecessary for me to then consider whether the Applicant has 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.

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Right of Review

36. Should it be dissatisfied with this outcome, the Applicant 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