

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Endeavour Group Limited
(Represented by Ms Susan Nicholson of Cullen Macleod Lawyers)
- Interveners:** Commissioner of Police (First Intervener)
Chief Health Officer (Second Intervener)
(Represented by Mr Toby Bishop of the State Solicitor's Office)
- Director of Liquor Licensing (Third Intervener)
(Represented by Ms Felicity Negus of the State Solicitor's Office)
- Commission:** Ms Kate Pedersen (Chairperson)
Ms Sandra Di Bartolomeo (Member)
Dr Kim Hames (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:** BWS – Beer Wine Spirits Kelmscott
Kelmscott Plaza Shopping Centre
2889 Albany Highway, Kelmscott, WA, 6111
- Date of Hearing:** 31 March 2022
- Date of Determination:** 31 August 2022
- Determination:** The Decision of the Delegate of the Director of Liquor Licensing is quashed, and the Application for a Liquor Store Licence is granted.

Authorities considered in the determination:

- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Woolworths v Director of Liquor Licensing* (2013) WAR 446
- *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd* (unreported, FCt SCt of WA, 1994)
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017)
- *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27

Overview

1. This Application turns on 3 broad questions:
 - a) the relevant locality to be considered for the purposes of section 36B(4) of the Act;
 - b) whether there is an unmet consumer requirement in that locality, and whether a premises outside that locality can be considered in answering that question; and
 - c) whether in all the circumstances, including the existence and likelihood of alcohol-related harm and ill-health, it is in the public interest to grant the application.
2. For the reasons explained below, the Commission finds:
 - a) the relevant locality is the suburbs of Kelmscott and Camillo (and a small portion of Mount Nasura north of the Armadale Hospital, and a small portion of north Armadale between the railway and Albany Highway, within 3km of the Premises);
 - b) there is an unmet consumer requirement in that locality, and for the purposes of making that determination, premises outside the locality, namely Liquorland North Armadale should not be considered; and
 - c) the Application is in the public interest.

Background

3. On 10 December 2019, Endeavour Group Limited (formerly known as Woolworths Group Limited) (the **Applicant**) lodged an application for the conditional grant of a liquor store licence under sections 47 and 62 of the *Liquor Control Act 1988 (WA)* (the **Act**) for premises to be located at the Kelmscott Plaza Shopping Centre (**Kelmscott Plaza**), 2889 Albany Highway, Kelmscott, to be known as BWS – Beer Wine Spirits Kelmscott (the **Application**).
4. The proposed liquor store is said to be a modern, browse style store located in a specialty tenancy next to the existing Woolworths Supermarket at the Kelmscott Plaza. It is described as being designed to provide complementary and ancillary services to the Supermarket and to cater to customers of the Supermarket who want to purchase packaged liquor at the same time as they purchase groceries. The proposed liquor store comprises a trading area of 184m² (including a display trading floor area and walk-in cool room) and a non-trading (stock room) of 12.45m².
5. The Application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing (**Director**).
6. By Notice of Intervention under section 69(6)(c)(ii) and (iv) of the Act dated 21 January 2020 the Commissioner of Police (**CoP**) intervened in the Application. The CoP made public health representations including with respect to the potential for alcohol-related harm and ill-health, or disturbances which may occur as a result of the proposed liquor store, as well as representations that existing local packaged liquor outlets already reasonably catered to the consumer of liquor in the locality for the purposes of section 36B(4) of the Act.
7. By Notice of Intervention under section 69(8a)(b) of the Act dated 23 January 2020 the Chief Health Officer (**CHO**) intervened in the Application to present evidence to support harm and ill-health concerns with respect to the proposed liquor store.

8. Mr Ian Newman lodged a submission in opposition to the Application on 23 January 2020 under section 72A of the Act. The submission asserted that the Application is not in the public interest because: Kelmscott is adequately serviced by an existing Dan Murphy's; Kelmscott is a low socio-economic area that does not need more retail outlets for wine and spirits; the proposed location will cause annoyance to existing customers of the shopping centre due to increased traffic flow and the introduction of undesirable elements such as begging; and the car park nearest the proposed location is regularly at full capacity, such that the proposed store will create more problems for traffic flow.
9. By Notice of Decision dated 14 May 2020, a delegate of the Director refused the Application. The delegate's reasons for deciding to refuse the Application appear in written reasons requested under section 18AA(3) of the Act dated 15 July 2020.
10. In summary, the delegate refused the Application on the basis that the Applicant failed to discharge its onus under section 36B(4) of the Act, and accordingly did not consider it necessary to consider whether the Applicant had demonstrated that the grant of the Application was in the public interest for the purposes of section 38(2) of the Act.
11. The Applicant seeks review of the delegate's decision pursuant to section 25(1) of the Act.
12. The Commission heard this matter on 31 March 2022. The Director intervened in the Application for review to make representations with respect to the proposed liquor store. Oral and written submissions were received from the Director, and the CHO and CoP (which provided joint submissions).
13. For the reasons that follow, the decision of the delegate is quashed, and the Application is granted.

Legal framework and principles

The Commission's role on review

14. The Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review and make a determination on the basis of the same materials that were before the Director (*Hancock v Executive Director of Public Health* [2008] WASC 224, [54]; section 25(2c) of the Act).
15. On review pursuant to section 25 of the Act, the Commission may:
 - a) affirm, vary or quash the decision of the Director (section 25(4)(a));
 - 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 (section 25(4)(b));
 - c) give directions:
 - (i) as to any questions of law reviewed; or
 - (ii) to the Director, to which effect shall be given (section 25(4)(c)); and
 - d) make any incidental order (section 25(4)(d)).

16. When conducting a review, the Commission:
 - a) may make its determination on the balance of probabilities (section 16(1)(b)(ii));
 - b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply (section 16(7)(a));
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (section 16(7)(b)); and
 - d) is to act speedily and with as little formality and technicality as is practicable (section 16(7)(c)).
17. Pursuant to section 69(6)(c) of the Act, the Commissioner of Police may intervene in proceedings before the licensing authority for the purpose of introducing evidence or making representations in relation to, relevantly, the question of whether, if a particular application were granted, public disorder or disturbance would be likely to result; or as to any other matter relevant to the public interest (section 69(6)(c)(ii) and (iv) of the Act).
18. Pursuant to section 69(8a) and (8b) of the Act, the CHO may intervene in proceedings before the licensing authority for the purpose of introducing evidence or making representations in relation to 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.
19. The Commission is obliged to determine the Application by reference to the issues which arise from the Application in the context of the relevant provisions of the Act, the evidence (including notorious facts) before the Commission and any submissions made by the applicant and the interveners (*Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, [55] (Buss JA)).

The Licence under the Act

20. As explained in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 (**Liquorland**) at [2], an applicant for a liquor store licence must satisfy the 'licensing authority' (being either the Director or the Commission depending on context) of two things:
 - 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 (**Consumer Requirements condition**); and
 - b) that the grant of the application is in the public interest (the **Public Interest condition**).
21. Each criterion is explained below.

Consumer Requirements condition

22. The Consumer Requirements condition is imposed by section 36B(4) of the Act, which provides:

“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.”

23. Section 36B(4) was considered at length in *Liquorland*. Justice Archer found that its purpose was to ensure that an additional licence would only be granted where consumer requirements could not reasonably be met by the existing premises (and in the context of there also being a Public Interest condition) (*Liquorland* [74]).
24. To apply the test, the Commission is required to consider whether, having regard to the objects of the Act that arise on the evidence or by notorious fact (including the object of catering 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), it is satisfied that the requirements of consumers for packaged liquor in the relevant locality cannot reasonably be met by existing packaged liquor premises in that locality (*Liquorland* [101]).
25. The test is objective and requires the Commission to be satisfied that the requirements of consumers for packaged liquor in the locality cannot sensibly or rationally be met by existing premises (*Liquorland* [104], [131], [134]).
26. Consideration of ‘requirements of consumers for packaged liquor’ in section 36B(1) allows consideration of the same types of matters as are relevant to section 5(1)(c) of the Act (*Liquorland* [89], [102]). Relevant matters are not limited to the physical item or product of packaged liquor and can include convenience, product range, service and efficiency (*Liquorland* [106], [108]).
27. The term ‘locality’ in section 36B(4) connotes the concept of neighbourhood, and denotes an area that surrounds, and is geographically close to, the location of the proposed premises, rather than the area(s) from which consumers would come, and to which the retail catchment area can be a relevant consideration (*Liquorland* [181], [182], [188]).
28. Justice Archer also explained that the shape and size of a locality may be influenced by topographical features (including man-made features such as roads) and the areas from which the proposed site could be accessed reasonably easily on foot or push-bike. If there is a community in the area of the proposed site, the geographical spread of that community may also influence the shape and size of the locality (*Liquorland* [185]).

Public Interest condition

29. The Public Interest condition is imposed by section 38(2) of the Act. Section 38 relevantly provides:

“38. Some applications not to be granted unless in the public interest

(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.

(3) For the purposes of subsection (2), the applicant must provide to the licensing authority -

- (a) any prescribed document or information; and
- (b) any other document or information reasonably required by the licensing authority for those purposes.

(4) Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include -

- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
- (b) whether the amenity, quiet or good order of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated might in some manner be lessened; and
- (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and
- (ca) any effect the granting of the application might have in relation to tourism, or community or cultural matters; and
- (d) any other prescribed matter.”

30. The Public Interest condition requires the Commission to consider the positive and negative aspects of the Application and how the Application will promote the objects of the Act (*Liquorland* [31]). The risk of negative consequences such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there may be considered, as well as the effect the granting of the licence may have in relation to tourism or community or cultural matters (*Liquorland* [105]).

31. The Commission must consider how an application will promote the object of the Act to ‘cater for the requirements of consumers and related services, having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State’ (see section 5(1)(c) of the Act; *Liquorland* [32]). This in turn requires the Commission to consider:

“...whether, having regard to all of the evidence and any notorious facts,there were consumer requirements in the [relevant] locality for the range of liquor products and services which the appellant proposed to provide and whether, in all the circumstances, it was in the public interest to grant the application, particularly in order to contribute to the proper development of the liquor industry in a manner which reflected the diversity of consumer requirements” (*Liquorland* [33] citing *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227)).

32. There are two stages in determining whether the grant of an application is in the public interest. First, the Commission must evaluate the evidence and make findings and draw conclusions from the evidence; and second it must apply the public interest criterion to the relevant circumstances, in particular the findings it has made, and the conclusions it has drawn (*Woolworths v Director of Liquor Licensing* [2013] WASCA 227 [55] (Buss JA);

Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208 [41]). This includes, where relevant, findings specifically identifying the existing level of harm and ill-health in the relevant area due to the use of liquor; and about the likely degree of harm to result from the grant of the application, to be assessed against the existing degree of harm. The Commission must then weigh the likely degree of harm as assessed, together with any other relevant factors (both positive and negative) to determine whether the applicant has established that it is in the public interest to grant the application (*Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 [42])).

33. Determining the public interest is a discretionary value judgment to be made having regard to the objects of the Act (*Liquorland* [34], [105]; *Woolworths v Director of Liquor Licensing* [2013] WASCA 227 [48] (Buss JA)). In exercising its broad discretion, it is for the Commission to decide what weight it will give to the competing interests and other relevant considerations under the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 [37] (Templeman J); *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [36] (Heenan J)).

The Applicant's Submissions

34. The Applicant asserts that the grant of the Application will service the significant existing (and unmet) demand for a liquor store that offers the possibility of one-stop shopping, which demand will only increase given the area's projected growth. The Applicant also says that the Application meets both the Consumer Requirements and Public Interest conditions.
35. By way of overview, the Applicant submitted:
- a) the locality for the purposes of the consumer requirement condition is the suburbs of Kelmscott and Camillo;
 - b) the consumer requirement condition is met because the Application caters for proven existing requirements of consumers for one-stop shopping because:
 - i. there is a need for a one-stop shop in the locality, which is demonstrated by 36% of people surveyed saying grocery shopping using the same trolley was an important feature;
 - ii. while Liquorland Kelmscott and Dan Murphy's Kelmscott are nearby, they do not offer one-stop shopping; and
 - iii. there is no other one-stop shop in the locality; and
 - c) the public interest test is met because:
 - i. viewed as a whole, positive benefits outweigh perceived and alleged risks of an increase to alcohol-related harm;
 - ii. the Application promotes the proper development of the liquor industry in the Prescribed Area;
 - iii. it is not in the public interest to deprive a significant and growing metropolitan area of the level of retail amenity available elsewhere;
 - iv. the existing level of harm in the locality is no greater than that which is commonly accepted in the community; and

- v. a small risk of increase in harm is within acceptable bounds (the Applicant also noted that neither the CHO, the CoP, nor local businesses or residents objected to the Application, however the Commission notes that Mr Ian Newman made a submission in opposition to the Application).

36. The Applicant's submissions are explained further below.

The Consumer Requirements condition

Locality

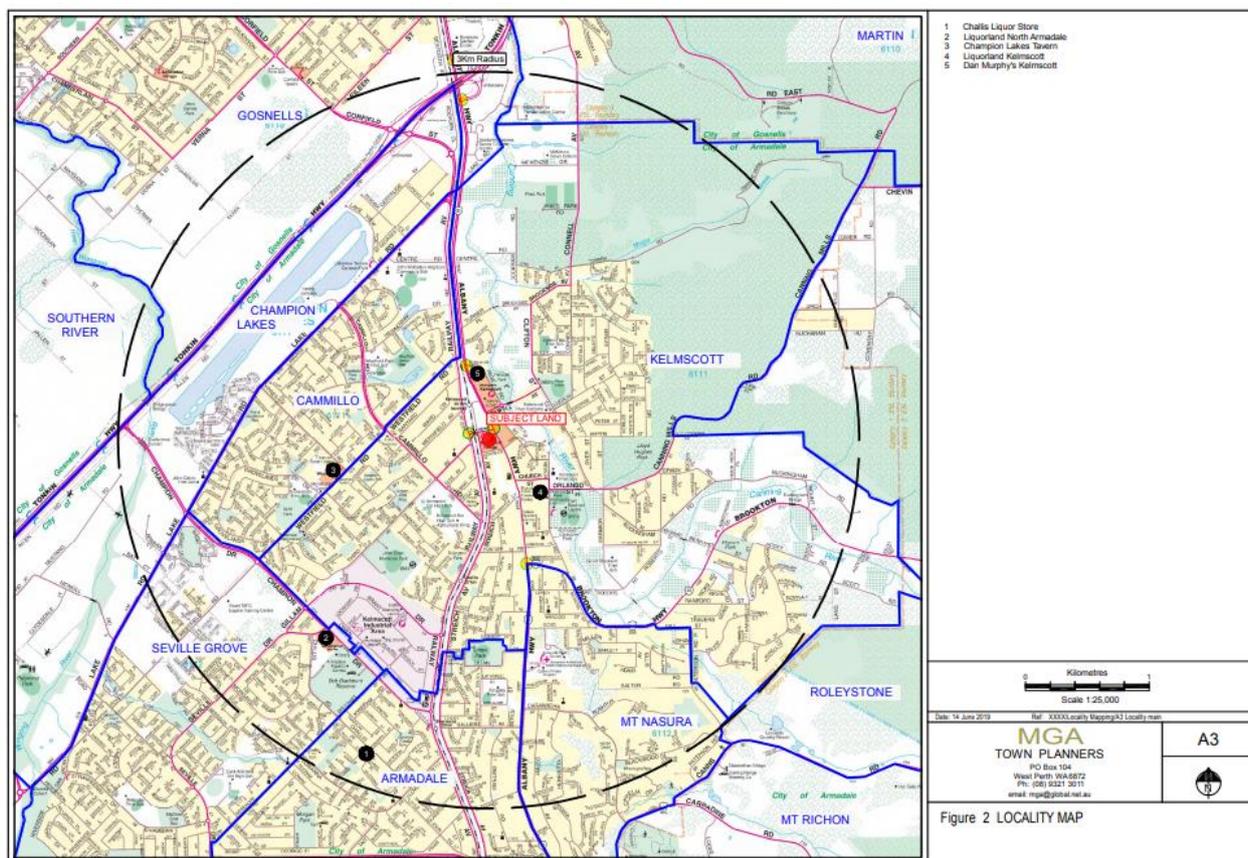
37. The Applicant submitted that the following principles are relevant to determining the locality:

- a) the locality must be construed in accordance with *Liquorland* at [181] to [182] as “denoting an area that surrounds, and is geographically close to, the location of the proposed premises” and being “intended to connote the same concept of neighbourhood;”
- b) the size and shape of a locality may be influenced by topographical features and the areas from which the site could be accessed on foot or bike, and barriers or impediments, and things that knit people together in common activities may also influence the determination of a locality; and
- c) the purpose of section 36B(4) of the Act is to ensure that there are not multiple premises in close proximity to one another selling packaged liquor (citing *Liquorland* at [182]).

38. Factually, the Applicant submitted that the locality is the area comprised of the suburbs of Kelmscott and Camillo because:

- a) that is the area which closely surrounds and is close to the Premises, with the vast majority of the populated areas of those suburbs falling within 1-1.5km of the Premises;
- b) there are no significant barriers or impediments to movement between the Premises and Kelmscott and Camillo; and
- c) the Premises are easily accessible on foot or by bike from that area.

39. At hearing, the Applicant relied upon Document 1R (or attachment 14 before the Director), being an MGA town planning report dated November 2019 which contained the following locality map (p.338 of the bundle) showing a 3km radius from the Premises:



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40. The Applicant submitted that using the scale of the map, only Kelmscott and Camillo fall within 1km of the Premises, and the whole of those suburbs are within 1.5km of the Premises. This was said to meet the classic conception of a neighbourhood.
41. The Applicant submitted that the Premises was effectively hemmed in by natural and manmade obstacles or impediments to movement. These were submitted to be:
 - a. the lakes in the suburb of Champion Lakes to its north west;
 - b. Tonkin Highway to its north west;
 - c. the Lloyd Hughes Park to its east (bounding the suburb of Kelmscott to the east) which was said to form a natural barrier to movement;
 - d. Albany Highway and the Armadale Hospital campus to its south and south east; and
 - e. the Kelmscott industrial park to its south west.
42. The Applicant accepted that a very small portion of Armadale falls within the locality, being 3 to 5 blocks of residences to the north of the Premises, and on the same side of Albany Highway.
43. In response to the Director's submission that there was no reason to exclude Armadale or Mount Nasura, the Applicant submitted with respect to Armadale, that access to the Premises was hindered by the industrial area and the railway line, which is only permeable in a limited number of places. As to Mount Nasura, the Applicant submitted that access was hindered by Armadale Hospital and Brookton Highway.
44. The Applicant also submitted that areas outside the locality are irrelevant to the Consumer Requirements condition.

Requirements of consumers

45. The Applicant submitted that once the locality is determined, the relevant question becomes whether the local packaged liquor requirements of consumers in that locality cannot be reasonably met by existing premises, which requires consideration of what consumers demand or desire, as distinct from what they cannot manage without (citing *Liquorland* [40], [10], [79]).
46. It was submitted by the Applicant that 'requirements of consumers' has the same meaning as 'requirements of consumers' in section 5(1)(c) of the Act, and requires consideration of the same types of matters. Consideration should be given to the requirement for packaged liquor and also shopper convenience and preferences, including the convenience of one-stop shopping (citing *Liquorland* [79]; *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446 [75]-[79]). It further submitted that:
 - a) the consumer requirements test is not intended to constrain the number of packaged liquor premises by sacrificing consumers' options to get liquor at a lower price and better quality (citing *Liquorland* [74]); and
 - b) the assessment of whether the requirements of consumers "cannot be met" is objective and requires consideration of whether they cannot sensibly or rationally be met (citing *Liquorland* [104]).

Evidence of consumer requirements – cannot be met

47. As to the evidence of consumer requirements, the Applicant noted that the evidence of market research did not perfectly correspond with the locality but explained that it was not open to it to update the survey and present new evidence. Nonetheless, it submitted that the market research remained relevant to and probative of the requirements of consumers because 87% of survey respondents lived within 1km of Premises, such that the survey was direct evidence of requirements of a substantial number of consumers in the locality.
48. The Applicant noted that the locality was served by 3 packaged liquor premises, none of which allowed one-stop shopping, being:
 - a) the Champion Lakes Tavern approximately 1.8km from the Premises;
 - b) Liquorland Kelmscott approximately 880m from the Premises; and
 - c) Dan Murphy's Kelmscott approximately 670m from the Premises.
49. It submitted that although Dan Murphy's and Liquorland were nearby, they did not offer one-stop shopping as they are separated from the Centre by Albany Highway. The Applicant also submitted that the question of whether one-stop shopping is available is a matter of degree, but that the essence of it is convenience, marked by the ability to easily visit multiple shops in close proximity without the need to make a second trip in a vehicle. One aspect of that convenience was said to be the ability to visit multiple shops using a single trolley.
50. The Applicant submitted that the absence of one-stop shopping in the locality was unusual because the Premises sit within a District Area Centre (**DAC**) as that term is used in State Planning Policy 4.2, and there is a reasonable expectation for a DAC to contain a liquor store connected to a supermarket to enable single-trolley grocery and liquor purchases, being a level of retail amenity commonly available to, and expected by, consumers in the Greater Perth area.

51. The Applicant explained that the market survey showed:
- a) 55% of respondents supported the proposed Premises;
 - b) 54% of respondents would be likely to purchase from it;
 - c) 91% of respondents shop at the supermarket;
 - d) 54% of respondents who had purchased packaged liquor in the past 12 months identified that having a liquor store located where they could do their supermarket shopping was an important feature of a liquor store; and
 - e) 36% of respondents said grocery shopping using the same trolley was an important feature of a liquor store.
52. This was said to establish that a significant proportion of people within the locality who support the Application are likely to shop at the Premises because it will provide the ability to shop at the same time they do their grocery shopping. The Applicant submitted this was consistent with its research across Australia upon which it relied, which reveals that approximately 46% of consumers like to purchase packaged liquor as part of their grocery shopping or other shopping trip (Smith Statement, [4.6]).
53. The Applicant submitted that it is a notorious fact, recognised by the Court of Appeal in *Woolworths v Director of Liquor Licensing* (2013) WAR 446 at [84] that one-stop shopping is of great importance, and that the success of the BWS model reflects that fact. In this sense, the Applicant explained that the market survey does not stand on its own as evidence in support of consumer requirements, but is supported by the success of the BWS business model.
54. Taking all these matters together, the Applicant submitted that the Commission should be satisfied that the Consumer Requirements condition is met because:
- a) there is a significant requirement for one-stop shopping within the Locality;
 - b) that requirement is consistent with the requirements and expectations of consumers in Western Australia and Australia wide; and
 - c) that requirement is not met by existing packaged liquor premises as there is no other premises in the locality that can provide one-stop shopping.

Relevance of premises outside the locality to whether consumer requirements are met

55. The Applicant rejected the proposition that licensed premises outside of the locality are relevant to the assessment of whether local packaged liquor requirements are being met for the purposes of section 36B(4) of the Act. It submitted that the tentative view of Archer J in *Liquorland* at [202] that premises outside an identified locality remain relevant was not the subject of argument in the case. Furthermore, the Applicant observed that the South Australian authority relied upon in *Liquorland* was based on a different legislative provision.
56. The Applicant submitted that having regard to a premises outside the locality would be contrary to:
- a) the express words of section 36B(4), which direct attention to whether local packaged liquor requirements are “*met by existing packaged liquor premises in the locality*” (emphasis added); and
 - b) the evident purpose of section 36B is to ensure there are not multiple premises in close proximity to one another selling packaged liquor.

57. Accordingly, the Applicant submitted that the Commission cannot have regard to Liquorland North Armadale in determining whether the requirements of consumers can reasonably be met by existing premises within the section 36B locality.

The Public Interest condition

58. If the Consumer Requirements condition did not preclude the grant of the Application, the Applicant acknowledged that the Public Interest condition must be satisfied. It acknowledged the Commission's absolute discretion to grant or refuse the Application for any reason in the public interest, and that the discretion must be exercised consistently with the objects and other provisions of the Act including section 5, section 5(2) and section 38(4).
59. The Applicant submitted that consideration of the public interest is not confined to matters solely within the section 36B locality, but rather was to be assessed by the geographic area most likely to be affected by the grant of the Application. The appropriate area for assessing the public interest was said to be the 3km radius prescribed by the Director's Public Interest Assessment policy.
60. The Applicant submitted that there are two stages in determining whether the Application is in the public interest:
- a) first, the Commission must evaluate the evidence and make findings of fact and draw conclusions, including by inference, and including with respect to the nature of facilities, services and products, and also the existing level of harm and ill-health in the Prescribed Area and likely degree of harm to result from the grant of the Application; and
 - b) second, it must apply the public interest criterion to findings it has made. This requires a weighing and balancing of competing interests and considerations and is a question of fact and degree which requires the Commission to: assess likely degree of harm against existing harm; and weigh the likely degree of harm with other factors (including benefits) to determine whether the Application is in the public interest.
61. The Applicant also submitted that the object of minimising harm does not take precedence over other primary objects to be weighed in considering the Application, and the Commission has a wide discretion in deciding what weight to give competing objectives and relevant considerations.

Catering for consumer requirement

62. The Applicant submitted that it demonstrated a significant consumer requirement for one-stop shopping within the Prescribed Area which is not being met because no existing premises are sufficiently proximate to a full-scale supermarket to allow one-stop shopping.
63. The Applicant also submitted that an important consideration is projected population growth in the Prescribed Area, because the number of consumers whose needs are not being met will increase, and the public interest in catering to those requirements assumes greater importance.
64. The Applicant also referred to other beneficial impacts of the grant of the Application on the Prescribed Area, including the creation of Premises offering a large and diverse range including 300 items which will be exclusive to the Applicant, at competitive prices, and which will be modern, appealing and well run by an experienced licensee.

Proper development of liquor industry

65. The Applicant submitted that the grant of the Application is consistent with the proper development of the liquor industry in the Prescribed Area because it is a reasonable expectation for a DAC to have a liquor store connected to a supermarket, which is a level of amenity common throughout DACs in Greater Perth.
66. The Applicant submitted that the fact that the Premises is close to an established, large format destination store does not diminish that proposition. It noted that the licensing authority has previously granted many similar applications which reflects that customers have different purchasing needs and require a range of stores to meet their requirements. The Applicant also cited the Commission's decision in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017) in which it was held:

"It is a notorious fact that large shopping centres of this nature (in this instance classified as a District Centre) generally contains competing liquor stores associated with the larger supermarket outlets (Coles, Woolworths, IGA and Aldi). There are enough examples of the juxtaposition of such liquor stores State-wide to evidence the fact that the licensing authority has recognised (subject to satisfying the public interest requirements) this trend as being in accordance with the proper development of the liquor industry."

Existing alcohol-related harm and ill-health

67. The Applicant accepted that the evidence demonstrates an existing level of alcohol-related harm in the Prescribed Area and that in certain respects, that level of harm is higher than experienced in the metropolitan area.
68. However, it noted that the number of alcohol-related incidents in the suburbs of Kelmscott, Camillo, Champion Lakes, Mount Nasura and Seville Grove are generally at or below the corresponding State rate. The Applicant submitted that the evidence establishes that alcohol-related harm in the Prescribed Area is at a level generally consistent with that experienced throughout the State, and which appears to be decreasing between 2018 and 2019.
69. The Applicant also submitted that the statistics relied upon by the CoP from the Armadale Police Station relating to drink driving needed to be treated with caution because:
- a) it was not clear how data was gathered or what constitutes alcohol-related driving offending;
 - b) the Armadale precinct is large, and the Prescribed Area forms a small portion of it such that inferences may not be able to be drawn; and
 - c) to the extent that any inference can be drawn, the level of alcohol-related harm is trending downward in total and in category (other than 'private residence own').
70. The Applicant also submitted that the CoP's evidence with respect to move on orders was of very little probative value.
71. The Applicant also submitted that the SEIFA scores set out by the CHO for the suburbs in the Prescribed Area are only an indicator of potential harm rather than evidence of existing harm. The Applicant submitted that the evidence referred to by the CHO with respect to SEIFA scores, and also child vulnerability and treatment episodes in the Prescribed Area did not disclose a level of alcohol-related harm or ill-health in the Prescribed Area which is markedly different from other areas in the State.

Likely degree of harm to result from grant

72. The Applicant submitted that there are features of the Application which render it unlikely to cause a significant increase in alcohol-related harm, including:
- a) there is not a high concentration of vulnerable or 'at risk' parties in the Prescribed Area;
 - b) the Premises are small and designed to cater to existing customers of the Supermarket;
 - c) the grant of the Application will not introduce bulk or cheap liquor to the area because the Dan Murphy's already provides a large, destination liquor store catering for bulk liquor shopping with discount prices;
 - d) the Applicant is an experienced, well-regarded and responsible operator of licensed premises; and
 - e) the Applicant has adduced evidence of its own analysis of the impact of opening a new liquor store in proximity to existing premises on the sales of the latter, which shows that a redistribution of market share occurs as consumers adjust their patterns. That is, a new store does not result in an increase in sales of liquor nor consumption.
73. Accordingly, the Applicant says that while there is a risk of an increase to alcohol-related harm, there are no factors that indicate the magnitude of that risk is high, or that the potential increase will be significant.
74. The Applicant also says that the potential increase must be assessed in light of the existing levels of alcohol-related harm in the Prescribed Area, which are not markedly different to that commonly found in the State. The Applicant says that this is not a case where a small risk of increase in harm is intolerable due to the high levels of existing harm, but rather a case in which the existing harm is no greater than that which is commonly accepted in the community, and where a small risk of an increase in harm is within acceptable bounds.
75. The Applicant also submitted that there was no evidence in support of the submission by the CoP and CHO that the risk of alcohol-related harm or ill-health was increased because the Premises will have increased visibility to children, young people and at risk groups in the community as well the general community, and that it would expose a large volume of the community to a liquor outlet who may have opportunistic access to the Premises. Although the Applicant acknowledged that the CHO referred to academic literature dealing with an association between outlet density and various forms of alcohol-related harm, that literature was said to reveal that the association between outlet density and alcohol-related harm are complex and not well understood. The Applicant also submitted that none of the studies identified the visibility or potential for opportunistic access to be a factor increasing the alcohol-related harm or ill-health associated with those premises. Accordingly, the Applicant submitted that in the absence of evidence, no weight should be given to the submission by the CoP and CHO.
76. Similarly with respect to the incident reports provided by the CoP, the Applicant suggests that the inference advanced by the intervenors that a large proportion of offenders are consuming liquor at a private residence and that they have likely purchased that liquor at packaged liquor outlets in the locality was not supported by the evidence. This was said to be because the incident report statistics reveal nothing about whether packaged liquor was involved, and if so, where it was purchased from.

The Director's Submissions

77. The Director's involvement in the review of the Application was expressed to be primarily with respect to the interpretation and application of section 36B(4) of the Act, and also to make representations as to the evidence that was before the Director in relation to harm and ill-health and locality. Ultimately, the Director submitted that it was open to the Commission to conclude that the decision in respect of section 36B(4) should be affirmed, or in the alternative, if the Applicant has discharged its onus under that section, that it is open to the Commission to refuse the Application on the basis the Applicant has not demonstrated that the grant of the licence is in the public interest.

The Consumer Requirements condition

78. The Director explained that the term 'local packaged liquor requirements' in section 36B(4) is defined in section 36B(1) to mean "*the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*" and accepted that the range of requirements of consumers is broad, and not limited to a physical item or product of packaged liquor, and has been interpreted to include convenience and one-stop shopping.

79. The Director also acknowledged that the purpose of section 36B is not to constrain the number of packaged liquor premises, but to ensure a licence is only granted where consumer requirements are not reasonably being met. This prevents multiple premises in close proximity to one another selling packaged liquor. It noted that section 36B is an objective test, whereas the public interest test is a discretionary value judgment.

Locality

80. As to locality, the Director submitted that the locality should capture the geographical area surrounding the proposed site, and should take into account factors including:

- a) geographical and topographical features, including man made features such as roads;
- b) the areas from which the proposed site could be accessed reasonably easily on foot or bike;
- c) if there is a community in the area, the spread of that community; and
- d) in some cases, the retail catchment of the proposed site.

81. In its responsive submissions, the Director submitted that Albany Highway and Brookton Highway influence the neighbourhood such that the locality need not be limited to a 1.5km radius from the Premises and should not be confined to the suburbs of Kelmscott and Camillo. The Director also submitted that there is no need to exclude the residential areas along Albany Highway, including parts of Armadale.

82. At the hearing, it was submitted that the same reasons relied upon by the Applicant with respect to geographical proximity and barriers as to why Kelmscott and Camillo fall within the locality equally apply to the northern parts of Armadale and Mount Nasura.

Evidence of consumer requirements

83. The Director submitted that the consumer requirement for one-stop shopping is being met in the locality because:
- a) 88% of respondents to the market survey shop at Dan Murphy's, with 69% buying most of their liquor there;
 - b) Dan Murphy's is in same block and same car park as Coles; and
 - c) only 24% of respondents considered their needs were not being met.
84. Although Dan Murphy's and Coles are not situated immediately next to each other, the Director submitted that they form part of the same complex and the inconvenience of travelling between them is minimal. Accordingly, it was submitted by the Director that it is open to the Commission to conclude that Dan Murphy's and Coles provides one-stop shopping.
85. The Director submitted that the ability to use the same trolley for grocery shopping is not a key feature of the one-stop shopping requirement, and that the Applicant has attempted to reduce the requirement for "one-stop shopping" to "one-trolley shopping." The Director cited two authorities (*Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd* (unreported, FCt SCt of WA, 1994)) in support of the proposition that "one-stop shopping" is not "one-trolley shopping." It submitted that the 'notorious fact' recognised by the Court of Appeal in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 is one-stop shopping, not packaged liquor stores attached to supermarkets.
86. In its responsive submissions, the Director submitted that the evidence does not support the contention that there is a significant unmet demand for one-stop shopping. Although the Director acknowledged that the Dan Murphy's is on the other side of Albany Highway from the Kelmscott Plaza Shopping Centre, the Director submitted it is co-located with a Coles supermarket, enabling "one-stop shopping" within the locality.
87. The Director also submitted that the Applicant places more significance on the convenience of being able to use the same trolley than is warranted. This was said to be because of the 55% of respondents to the market survey within 2km who support the store, half of those who have purchased liquor in the past 12 months consider the same trolley feature to be important, which was not a significant subset.
88. The Director noted that the Applicant bears the evidentiary burden to satisfy the requirements of section 36B(4), and that if it fails to do so, the Application must be refused. The Director submitted that there is no evidence provided that the local packaged liquor requirements are not met by existing packaged liquor premises in the locality because 91% of the respondents to the market survey considered existing outlets meet their overall needs, and only 24% said they do not have packaged liquor located where they can do their supermarket shopping.
89. The Director identified the relevant question for the Commission to determine as being whether the Dan Murphy's, in the same block of land and sharing the same carpark as a Coles supermarket, is not sufficient to meet local packaged liquor requirements for "one-stop shopping."

Relevance of premises outside the locality to whether consumer requirements are met

90. The Director submitted the Commission can take into account Liquorland Armadale North 3km away from the proposed store in making that determination. The Director noted that Liquorland Armadale North is located in a shopping centre containing a Coles supermarket, and therefore allowing for “one-trolley shopping.”
91. The Director relied upon the tentative view expressed by Archer J in *Liquorland* that premises outside an identified locality remain relevant to the section 36B assessment. It noted that there are packaged liquor retailers outside the Applicant’s defined locality, being Liquorland Armadale North (3.3km from the Premises) and the Challis Liquor Store (3.2km from the Premises).

The Public Interest condition

92. The Director explained the principles that apply in the assessment of the Public Interest condition and made submissions as to the existing level of harm or ill-health in the locality and the degree of harm likely to result if the Application is granted.
93. As to the relevant area for consideration of the public interest, the Director submitted that the Commission may determine a broader locality than the 3km radius set out in the Policy. The Director noted that the Applicant had not provided data to demonstrate the retail catchment area of the Premises.

Proper development of the liquor industry

94. The Director submitted that the utility of other successful applications where the proposed liquor store was close to an established, large format destination store was diminished because the locality in each application is different and depends on its own circumstances.
95. The Director referred to the Liquor Commission decision of *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017), [61] cited by the Applicant which observes that large shopping centres generally contain competing liquor stores associated with large supermarket outlets, being a trend in accordance with the proper development of the liquor industry. The Director submitted that it is open for the Commission to consider that the Proposed Store would not lead to increased competition, but that rather it would lead to the Endeavour Group Limited increasing their market share, and potentially decrease competition in the area.

Existing alcohol-related harm and ill-health

96. As to the existing level of harm or ill-health, the Director noted the evidence produced by the CHO that alcohol was the primary drug of concern in almost a third, and a drug of concern in almost half of 1,528 treatment episodes in the locality, including a portion of Armadale.
97. The Director also observed that crime data from the CoP demonstrates that Armadale experiences significantly elevated levels of alcohol-related harm. As to the Applicant’s suggestion that the crime data indicated a decreasing trend, the Director submitted that no trend could be discerned in the three-year period to predict future alcohol-related incidents. However, the Director submitted that it is clear that the rates of alcohol-related incidents in Kelmscott and Armadale are consistently higher than the metropolitan rate.

98. Further, the crime data for Kelmscott indicates elevated levels of harm in every offence category compared to the metropolitan average, including alcohol-related assaults (family) and alcohol-related threatening behaviour. The Director also submitted that the data on drink driving offences provided by the CoP shows that in 2019, of the 154 alcohol-related driving offences, private premises were the drink location for 131 of those offences, which is said to lead to a logical conclusion that much of that alcohol was purchased from packaged liquor outlets.

Likely degree of harm to result from grant

99. The Director noted evidence from the CHO establishing that four of the six suburbs said to be in the locality experience a greater level of disadvantage and a lack of advantage in general. The Director then submitted that an increase in the availability of packaged liquor may increase the risk of harm to vulnerable members of the community.
100. The Director referred to evidence from the CHO that those who experience poorer socioeconomic outcomes bear a disproportionate burden of the negative alcohol-related consequences and are more susceptible to harm from alcohol use.
101. The Director then submitted that if the licence is granted, physical availability of liquor will increase, there will be increased visibility and convenience, leading to an increased risk of impulse buying and therefore increased consumption. In short, the Director submitted that greater convenience suggests liquor purchases will increase, and that it is reasonable to accept the proposition that the more supply and convenience, the greater the consumption.
102. Accordingly, the Director submitted that it is open to the Commission to conclude that the risks to an already vulnerable community outweigh the minimal benefits that the grant of the licence would have.

The CHO and COP Submissions

103. The CHO and CoP submitted that it is open to the Commission to affirm the Decision, or in the alternative, if the Commission finds that the Applicant has discharged its onus under section 36B(4) of the Act, that it is open to the Commission to refuse the Application on the basis that the Applicant has not demonstrated that the grant of the licence would be in the public interest.
104. The CHO did not make submissions with respect to the Consumer Requirement condition, and the CoP expressed agreement with the Director as to the construction and effect of section 36B(4) of the Act to this Application.
105. As to the public interest, by way of overview, the CHO and CoP submitted it is open to the Commission to conclude that the likely negative outcomes for the locality, given the existing rates of alcohol-related harm and the presence of multiple demonstrated risk factors for alcohol-related harm, outweigh the benefits of the grant of the licence for consumers.

The locality relevant to the Public Interest condition

106. The CHO and CoP agreed with the Applicant's submission that the public interest test is not confined to locality but is properly assessed with reference to the geographic area most likely to be affected by the grant of the Application.

107. However, the CHO and CoP submitted that for the purpose of undertaking the public interest assessment, the geographic area relevantly affected by the grant of the Application is broader than the Prescribed Area, and is the area bounded by the northern part of Armadale to the South, Roleystone to the East, the northern boundary of Kelmscott to the North and Camillo/Seville Grove to the West.

Existing alcohol-related harm and ill-health

Locality specific risk factors

108. The CHO and CoP submitted that disadvantage is part of a complex mix of risk factors that increase the potential for alcohol-related harm in the locality and referred to research suggesting that those who experience lesser socio-economic advantage bear a disproportionate burden of negative alcohol-related consequences and are more susceptible to harm from alcohol use.
109. The CHO and CoP also referred to the higher proportion of children aged 0 to 14 years in the locality compared to the State average and referred to Australian Early Development Census results indicating a large proportion of children within the locality report poorer development outcomes in comparison to the State average. The CHO and CoP also referred to the 1,528 treatment episodes for people residing in Kelmscott, Camillo, Champion Lakes, Seville Grove, Armadale and Mount Nasura at services funded by the Mental Health Commission between 2017 and 2019. It was noted that alcohol was a primary drug of concern in 29% of treatment episodes, and a drug of concern in 43% of treatment episodes.
110. The CHO also submitted that the application of a broader public interest area means that the relative disadvantage of Armadale and Seville Grove should be considered.

Increased risk of harm associated with proposed co-location with supermarket

111. The CHO and CoP submitted that the relationship between the proposed BWS Kelmscott and the local supermarket can further contribute to harm in the locality within the existing mix of liquor licences offering packaged liquor. This was said to be because the opportunistic access to liquor at the BWS Kelmscott may increase the risk of harm to vulnerable members of society.
112. The CHO and CoP then submitted (although without reference to evidence, but noting that the onus to satisfy the Commission is on the Applicant) that the proposed BWS Kelmscott will contribute further risk factors to the vulnerable community because it will be highly visible, very accessible and will provide opportunistic availability of liquor in the shopping centre environment. It was submitted that compared to local outlets not associated with a supermarket, BWS Kelmscott will:
- a) provide community members increased opportunities to purchase liquor when they might not have otherwise; and
 - b) frequently expose a large volume of the community who may not have otherwise been exposed to a liquor outlet or alcohol because of its relationship and close proximity to a long established supermarket.

Consumer buying habits

113. In response to evidence presented by the Applicant that when a new liquor store opens in an area where liquor is readily available that consumers adjust their buying habits rather than buying more, the CHO and CoP submitted that in the absence of sales figures from both stores, the data does not support that assertion.

Crime and alcohol-related violence data

114. The CHO and CoP submitted that the data with respect to the levels of harm in the locality supports a strong inference that a large proportion of offenders coming to the attention of WA Police are consuming liquor at a private residence and that they have likely purchased that liquor at packaged liquor outlets in the locality. The CHO and CoP refer to the CoP Intervention in support of that submission, although no specific reference is given for the proposition that liquor has likely been purchased in the locality, and none can be found on review. The CHO and CoP submit that it is open to deduct from this that an additional packaged liquor outlet in the locality conveniently located to the established Woolworths supermarket could potentially contribute to existing alcohol-related offending.

Likely degree of harm to result from grant

115. The CHO and CoP submit that it is open for the Commission to conclude that there is a likelihood that the grant of the Application will bring about an increase of alcohol-related harm and ill-health in the locality.

Disadvantage/lack of advantage within the community

116. The CHO and CoP submit that it is well established that people with low socio-economic status are more vulnerable and at risk of alcohol-related harm or ill-health.

Increased availability of packaged liquor

117. The CHO and CoP submit that there are at-risk groups within the locality which may be impacted by the grant of an additional packaged liquor licence. It is said that the introduction of packaged liquor adjacent to a supermarket increases the availability of alcohol because those who shop for their groceries are likely to be exposed to the sale and promotion of alcohol, and studies show that this increases the frequency and/or volume of consumption of alcohol products as well as the corresponding harm that can follow. However, the CHO Intervention relied upon in support of that proposition did not refer to a study in support of that proposition (see 3.1.3 of the CHO Intervention).

Association of alcohol with ordinary groceries

118. The CHO and CoP refer to the CHO Intervention in support of the proposition that the opening of the BWS Kelmscott visibly and physically associated the Premises with the Woolworths, and there is an increased likelihood that a large proportion of the locality, including those at risk, will be exposed to liquor products and related promotions as part of their grocery shopping. It is submitted by the CHO and CoP that the large opening of the Premises supports visual engagement and interaction with supermarket shoppers presenting ongoing and regular opportunities for BWS to engage customers with liquor product advertisements and product placements to influence their attitudes to purchasing behaviours. However, the CHO Intervention cited by the CHO and CoP does not present evidence in support of these propositions.

Price and impact on at-risk grounds

119. The CHO and CoP submit that the price of products at a liquor store conveniently located adjacent to a supermarket adds to the risk factors present within the locality and increases the potential for harm that may result.

Applicant's harm minimisation strategies

120. In response to the Applicant's submissions about harm minimisation policies and procedures, the CHO and CoP submit that while not seeking to diminish the importance of harm minimisation, they do not have the effect of mitigating the degree of harm that may result from the grant of the Application, because packaged liquor is associated with a range of harms that occur away from licensed premises, in private environments away from the control of a licensee.

Weighing the competing factors

121. The CoP (and not the CHO) made submissions with respect to the weighing of the likely increase in alcohol-related harm against any factors in favour of the Application. The CoP acknowledges that the convenience of one-stop shopping might be a factor weighing in favour of an Application, but that it is not determinative.

122. As to the Applicant's submission that predicted population growth evidences a future increased consumer requirement for the proposed store, the CHO and CoP submit that in an established area, population growth is of limited use because: the rate and location of growth is uncertain; where demand warrants an additional packaged liquor store, market forces will naturally drive applicants to apply for a new licence; and speculation on future consumer needs reasonably requires speculation on future levels of harm.

123. The CoP and CHO submitted that other consumer benefits advanced by the Applicant (including a diverse range of products; 400 exclusive products; competitive pricing; and online purchasing) offer little or no benefit to the consumer and should not be given any weight.

124. Ultimately, the CoP submitted that it is open to the Commission to conclude:

- a) in respect of the market survey that 45% of participants did not overtly support the Application;
- b) only 29% of respondents found co-location of the supermarket and liquor store to be appealing;
- c) the marginal benefits associated with the Application are outweighed by the likely increase in harm or ill-health due to the use of liquor by reason of the grant of the Application; and
- d) accordingly, the Applicant has not discharged its onus to satisfy the Commission that the grant of the Application is in the public interest.

Determination

125. As with all applications of this nature, the Commission had a voluminous amount of material before it that has been tendered by the applicant and the interveners, which exceeded 890 pages without including the primary and responsive written submissions relied upon by the Applicant and the interveners.

126. At the hearing of this matter, each party was asked to identify any evidence upon which it relies which is not referred to in its written submissions. No party did so. Accordingly, while all evidence has been considered in the determination of this Application, particular attention has been given to those materials referred to in the parties' written submissions.
127. The failure to refer to specific evidence in these written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)).

The Consumer Requirement condition

128. As explained, the Applicant must satisfy the Commission of the Consumer Requirement condition, being that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.

The Locality: section 36B(4)

129. Applying *Liquorland*, the term locality connotes the concept of neighbourhood, and denotes an area that surrounds and is geographically close to, the location of the Premises (*Liquorland* [181], [182]).
130. The Commission accepts the Applicant's submission that the locality is comprised of the suburbs of Kelmscott and Camillo because the vast majority of the populated areas of Kelmscott and Camillo fall within 1 to 1.5km of the Premises; there are no significant barriers to movement between the Premises and Kelmscott and Camillo; and the Premises are easily accessible on foot and by bike from that area. These suburbs also have geographical proximity to the focal point of the Premises. The Commission observes that 87% of survey respondents lived within 1km of the Premises, which supports this geographical area as being the locality or neighbourhood of the Premises.
131. At the hearing, it was submitted by the Director that the same reasons relied upon by the Applicant with respect to geographical proximity and barriers as to why Kelmscott and Camillo fall within the locality equally apply to parts of Armadale to its north and Mount Nasura.
132. Having regard to the practical impact of topographical features and the ease of accessing the Premises on foot or push-bike, the Commission does not accept that the whole of Mount Nasura is within the neighbourhood or locality of the Premises. This is because Mount Nasura is separated from the Premises by Albany Highway, much of the suburb is also separated by the barrier of Armadale Hospital, and indeed much of the suburb falls outside the 3km radius (which is not itself determinative but indicative of the fact that that Mount Nasura is not within the neighbourhood of the Premises). Indeed, the Mount Nasura community is geographically focused to the south east of Armadale Hospital, not the north of the Hospital. While a small portion of Mount Nasura north of the Armadale Hospital may be considered to fall within the locality, the rest of the suburb, in our view, does not. The spread of the Mount Nasura community does not influence the shape and size of the locality in this instance.
133. Given the Applicant's concession, it is accepted that there is a small portion of the north of Armadale between the railway and Albany Highway, and within 3km of the Premises, which might be considered to be within its locality. However, there is no question that the bulk of Armadale is focused to the south west, and at greater than 3km away from the Premises. Again, the spread of the Armadale community does not influence the shape and size of the locality so as to include wider portions of Armadale within the locality.

134. Accordingly, the Commission finds that the locality of the Premises is largely comprised of the suburbs of Kelmscott and Camillo, with a small portion of Mount Nasura north of the Armadale Hospital, as well as a small portion of north Armadale.

Local packaged liquor requirements and whether met

135. As explained by Archer J, the 'requirements of consumers' means the same in section 36B(1) as in section 5(1)(c) of the Act. It requires consideration of whether, having regard to the objects of the Act that arise on the evidence or by notorious fact (including the object of catering 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), the Commission is satisfied that the requirements of consumers for packaged liquor in the relevant locality cannot reasonably be met by existing liquor premises in that locality (*Liquorland* [101]).
136. In deciding whether the requirements of consumers cannot reasonably be met by existing premises, the Commission will consider those requirements, and whether they can be *reasonably* met by existing premises, taking into account (among other things) the object in section 5(1)(c) of the Act (*Liquorland* [102]). In this sense, the task requires a two-stage analysis: first the consideration of consumer requirements, and second, whether they can reasonably be met.
137. In considering the object of section 5(1)(c) in this context, the Commission will need to have regard to the proper development of the liquor industry in identifying the consumer requirements that, in this context, the Act seeks to cater for and in determining whether those requirements can be *reasonably* met by existing premises (*Liquorland* [102]).
138. Applying the two-stage analysis, the Commission's first stage consideration of 'requirements of consumers' necessitates consideration of the requirement for packaged liquor in the locality and also shopper convenience and preferences, including notorious facts such as the convenience of one-stop shopping (*Liquorland* [79]; *Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446 [75]-[79]).
139. As has been explained, the Applicant and the Director take different views as to the significance of the market survey in revealing the requirements of consumers in the locality.
140. The Director pointed out that 91% of the respondents to the market survey considered that existing outlets met their overall needs, and only 24% of respondents considered that their needs with respect to one-stop shopping were not being met. The Applicant acknowledged that it is difficult to reconcile 91% of respondents saying their overall needs were being catered for with the other answers given to the market survey. It suggested that the general question of whether requirements were being met was superseded by specific questions about one-stop shopping. For the Applicant, the short point was that 55% of survey respondents supported the proposed premises. 54% of respondents identified having a liquor store located where they could do their supermarket shopping as an important feature, and 36% said that it was important to be able to do grocery shopping and liquor shopping using the same trolley (and 36% of respondents also responded that the existing range of packaged liquor outlets in their local area did not sufficiently meet their packaged liquor requirements in terms of being able to do grocery shopping and liquor shopping using the same trolley).

141. There is a degree of artificiality in scrutinising the market survey results question by question as opposed to considering whether it reveals shopper convenience and preference. In the Commission's view, it is significant that 55% of survey respondents supported the Premises, 54% of respondents identified having a liquor store located where they could do their supermarket shopping as an important feature, and more than a third of respondents considered it important to be able to do grocery shopping and liquor shopping using the same trolley.
142. The Commission also accepts that this evidence is consistent with evidence presented of the Applicant's research across Australia that one-stop shopping is of great importance and reflected in the success of the BWS model. In combination, this evidence forms a foundation in fact for inferring the existence of relevant consumer requirements in the locality of the Premises in the manner explained in *Woolworths v Director of Liquor Licensing* (2013) WAR 446 at [84] (Buss JA).
143. It is also relevant to consider the proper development of the liquor industry (*Liquorland* [101]). The Applicant submitted that the absence of one-stop shopping in the locality was unusual because the Premises sit within a District Area Centre as that term is used in State Planning Policy 4.2, and there is a reasonable expectation for a DAC to contain a liquor store connected to a supermarket to enable single-trolley grocery and liquor purchases, being a level of retail amenity commonly available to, and expected by, consumers in the Greater Perth area.
144. Indeed, in *Woolworths v Director of Liquor Licensing* (2013) WAR 446 at [78] (Buss JA) observed that the Commission had overlooked the notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and this social fact is reflected in the development of district and regional shopping centres. As to notorious facts about consumer requirements, the Applicant cited the Commission's more recent decision in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017) in which it was held:
- "It is a notorious fact that large shopping centres of this nature (in this instance classified as a District Centre) generally contains competing liquor stores associated with the larger supermarket outlets (Coles, Woolworths, IGA and Aldi). There are enough examples of the juxtaposition of such liquor stores State-wide to evidence the fact that the licensing authority has recognised (subject to satisfying the public interest requirements) this trend as being in accordance with the proper development of the liquor industry."*
145. The Commission finds this reasoning to be compelling. That is, in addition to the market survey, there is evidence and notorious fact which points to a consumer requirement for the convenience of one-stop shopping in large suburban shopping centres, including by the use of a single trolley.
146. Although the Director made cogent submissions that one-stop shopping should not be conflated with one-trolley shopping, the authorities relied upon by the Director (*Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; *Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd* (unreported, FCt SCt of WA, 1994) do not necessarily reflect discussion of consumer requirements in contemporary Australian life. As reflected in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017), one contemporary trend now acknowledged to be in accordance with the proper development of the liquor industry is liquor stores associated with the larger supermarket outlets.

147. For these reasons, the Commission is satisfied that the evidence supports a conclusion that there are requirements of consumers for packaged liquor in the locality in respect of having a liquor store located where consumers can conveniently do their supermarket shopping, including being able to do supermarket shopping and liquor shopping using the same trolley.
148. Having identified consumer requirements for packaged liquor in the locality, the second stage of analysis requires the Commission to next consider whether it is satisfied that the requirements of consumers 'cannot reasonably be met' by existing packaged liquor premises in the locality (*Liquorland* [101]), which means 'cannot sensibly or rationally be met' by existing premises (*Liquorland* [104], [131], [134]).
149. The Commission should also have regard to contemporary standards and expectations for the requirements of packaged liquor in determining whether consumer requirements could not reasonably be met (*Liquorland* [133]).
150. The locality is served by 3 packaged liquor premises:
- a) the Champion Lakes Tavern approximately 1.8km from the Premises;
 - b) Liquorland Kelmscott approximately 880m from the Premises; and
 - c) Dan Murphy's Kelmscott approximately 670m from the Premises.
151. Of these, the Champion Lakes Tavern is a small premises close to a small IGA and Aldi, but which is 76m from the entry to the supermarkets and separated by carpark and vehicle access-ways, inhibiting efficient single trolley grocery and liquor purchases (MGA report 9.5, Attachment 1R to the Application). Liquorland Kelmscott is separated from the Premises by Albany Highway. It is not collocated with a supermarket, and predominantly services local residents making trips solely for the purchase of packaged liquor (MGA report 9.6, 10.1, Attachment 1R to the Application). Accordingly, the Applicant submitted that the focus of the Commission should be on whether Dan Murphy's Kelmscott can reasonably meet the requirements of consumers, to which it submitted the answer was no.
152. Dan Murphy's Kelmscott is also separated from the Premises by Albany Highway but is located on the same side of the highway as a Coles supermarket. The question becomes whether Dan Murphy's Kelmscott is capable of offering one-stop shopping (or indeed the more nuanced question of one-trolley shopping) for consumers who frequent the Coles supermarket. The Applicant relied upon the MGA report and explained by reference to the Kelmscott Town Centre Redevelopment Plan (MGA Report, Figure 8, Attachment 1R to the Application) that there was an approximately 200m distance between Dan Murphy's Kelmscott and Coles to its south, with the Coles carpark further south and not located between Coles and the Dan Murphy's Kelmscott. The distance between the Dan Murphy's entrance and carpark and the Coles building is shown in the photograph of Dan Murphy's Kelmscott at 9.7.3 of the MGA Report (in which the Coles building is shown in white separated from the Dan Murphy's by a carpark). The two premises are also separated by a service road. Indeed, the MGA Report concluded that the Dan Murphy's store functions as a destination outlet and does not facilitate combined grocery and liquor purchases (9.7, Attachment 1R to the Application). Rather, the MGA report explained that a separate vehicle trip must be made to access the store (9.7.2, Attachment 1R to the Application). The Applicant submitted that the distance between the two premises was too far to be considered one-stop shopping, with people shopping at both exposed to the weather. It was also submitted that the same trolley could not be used because Dan Murphy's uses its own trolleys.

153. Ultimately, the Commission accepts that the question of whether one-stop shopping is available is a matter of degree, but that the essence of it is convenience, marked by the ability to easily visit multiple shops in close proximity without the need to make a second trip in a vehicle. One aspect of that convenience is the ability to visit multiple shops using a single trolley. While in 2013, and in the factual circumstances of a particular application, such a requirement may have been satisfied by a liquor premises outside of, but adjacent to a shopping plaza, the Commission finds it is not satisfied here. Although the Dan Murphy's Kelmscott is in the same block of land as a Coles supermarket, it is not sufficient to meet local packaged liquor requirements for "one-stop shopping." This is because contemporary standards and expectations as demonstrated by the market survey report and notorious fact require the convenience of one-stop shopping. One-stop shopping is not provided by Dan Murphy's Kelmscott because it is not conveniently located to the Coles supermarket and does not facilitate convenient combined grocery and liquor purchases, and nor is such convenience provided by any other existing premises in the locality.

Relevance of premises outside the locality to whether consumer requirements are met

154. The *Liquorland* decision does not purport to express a concluded view as to whether packaged liquor retailers outside the locality are relevant to the section 36B assessment.
155. The Commission accepts that the South Australian provision considered in *Seaford Rise* as cited by Archer J is different to section 36B. The South Australian provision referred to in *Liquorland* required consideration of whether licensed premises in the locality do not adequately cater for the public demand for liquor, and the licence is necessary to satisfy that demand. Those two questions might, as contemplated in *Seaford*, be answered 'yes' and 'no' respectively. The reason a licence is not necessary to satisfy demand might well be by reason of premises outside the locality satisfying any such demand.
156. When considering the requirements of section 36B, the task of statutory construction must begin with a consideration of the text itself (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 [47]). As the Applicant notes, section 36B(4) expressly requires the Commission to consider whether local packaged liquor requirements are met by existing packaged liquor premises *in the locality*. It would be a strained construction to disregard those plain words and find that the question under section 36B(4) is not whether 'local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality', but rather whether 'local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises *both in and outside of* the locality.'
157. The discussion of *Seaford Rise* in *Liquorland* demonstrates the centrality of demand to the South Australian legislation. If there is no demand, including because it is met by a facility outside the locality, an application cannot be granted. As Archer J explained at [172], the Court in *Seaford Rise* endorsed reasoning to the effect that 'if members of the public who are within the locality choose to satisfy their requirements for liquor from facilities outside the locality, and do so without discontent, then their requirements have been met and cease to be a demand for the purposes of [the South Australian legislation].' A similar result may occur in the context of section 36B, but such consideration comes at the consumer requirements stage, rather than in considering whether local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality. That is, if a premises outside a locality satisfied consumer requirements for packaged liquor, then there would be no local packaged liquor requirement needing to be met. In this sense, a premises outside an identified locality may remain relevant to the section 36B assessment in the sense described by Archer J.

158. Here though, for the reasons explained above, the evidence presented by the Applicant does establish a consumer requirement for packaged liquor in the locality. For the reasons explained above, the Commission does not accept that it may have regard to Liquorland North Armadale in determining whether consumer requirements cannot reasonably be met by existing liquor premises for the purposes of section 36B(4) of the Act.
159. In any event, although Liquorland North Armadale is located in a shopping centre containing a Coles supermarket, and therefore allows for one-trolley shopping, the MGA report explains that the centre is only efficiently accessible for residents in the suburbs of Armadale and Seville Grove west of the railway line, with the Kelmscott Industrial area being a barrier inhibiting road connections south, from the northern parts of the suburb of Kelmscott (10.2, Attachment 1R of the Application). It therefore does not cater for residents of the locality. Accordingly, the Commission finds that Liquorland North Armadale does not sensibly and rationally meet the requirements of consumers in the locality.

Conclusion on the Consumer Requirements condition

160. The Commission is satisfied that the Consumer Requirements condition is met because:
- a) there is a requirement for one-stop shopping within the locality;
 - b) that requirement is consistent with the requirements and expectations of consumers in Western Australia and Australia wide; and
 - c) that requirement is not met by existing packaged liquor premises as there is no other premises in the locality that can sensibly and rationally provide one-stop shopping.

The Public Interest condition

161. As explained above, because the Commission is satisfied that section 36B(4) does not preclude the grant of the Application, it must assess whether the Public Interest condition is met.
162. The Public Interest condition requires the Commission to consider the positive and negative aspects of the Application and how it will promote the objects of the Act (*Liquorland* [31]). The risk of negative consequences such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there may be considered, as well as the effect granting the licence may have in relation to tourism or community or cultural matters (*Liquorland* [105]).
163. Under section 33(1) of the Act, the Commission has an absolute discretion to grant or refuse the Application on any ground, or for any reason, that it considers in the public interest. This power must be exercised consistently with the objects set out in sections 5(1) and 5(2) of the Act, as well as the purpose of the Act. The object of minimising harm or ill-health caused to people due to the use of liquor does not take precedence over the other primary objects of the Act, which include to cater for the requirements of consumers with regard to the proper development of the liquor industry.
164. In considering the Public Interest condition, the Commission is not confined to consideration of the section 36B locality, but rather can consider the geographic area most likely to be affected by the grant of the Application. The Commission finds that the Director's Public Interest Assessment Policy which refers to a 'Prescribed Area', being a 3km radius, is an appropriate guide to the relevant geographic area in this case.

Benefits of the Application: consumer requirements and development of the liquor industry

165. The Commission finds, as explained above, that the Applicant has demonstrated a consumer requirement for one-stop shopping which is not being met by existing premises in the locality. The Commission also accepts that the Applicant is an experienced licensee and that the Premises will be well run and offer a large and diverse range, including exclusive items at competitive prices.
166. The Commission also finds, consistent with *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017), that the grant of the Application is consistent with the proper development of the liquor industry because it is a reasonable expectation for a DAC to have a liquor store connected to a supermarket, which is a level of amenity common throughout DACs in Greater Perth.

The existing level of alcohol-related harm and ill-health

167. The CoP relied upon evidence with respect to crime (both alcohol-related and not) in the suburbs of Kelmscott, Camillo, Champion Lakes, Mount Nasura, Roleystone, Armadale and Seville Grove for the years 2017-2019. This was said to demonstrate higher levels of alcohol-related harm when compared to the State average for Camillo, Champion Lakes and Mount Nasura, but with the area of most concern being Armadale and Kelmscott.
168. The Applicant accepts that the evidence demonstrates an existing level of alcohol-related harm in the Prescribed Area and that in certain respects, that level of harm is higher than experienced in the metropolitan area. However, the Applicant submitted that the number of alcohol-related incidents in the suburbs of Kelmscott, Camillo, Champion Lakes, Mount Nasura and Seville Grove are generally at or below the corresponding State rate. The Applicant submitted that the evidence establishes that alcohol-related harm in the Prescribed Area is at a level generally consistent with that experienced throughout the State, and which appears to be decreasing between 2018 and 2019.
169. The CoP also presented evidence with respect to alcohol-related driving offending gathered from the Armadale Police Station.
170. The Applicant also submitted that the statistics relied upon by the CoP from the Armadale Police Station relating to drink driving needed to be treated with caution because:
- a) it was not clear how data was gathered or what constitutes alcohol-related driving offending;
 - b) the Armadale precinct is large, and the Prescribed Area forms a small portion of it such that inferences may not be able to be drawn; and
 - c) to the extent that any inference can be drawn, the level of alcohol-related harm is trending downward in total and in category (other than 'private residence own').
171. The Applicant also submitted that the CoP's evidence with respect to move on orders was of very little probative value.
172. The CHO adduced evidence about the Australian Bureau of Statistics Socio-Economic Index for Areas (**SEIFA**) scores for suburbs in the Prescribed Area, as well as evidence about alcohol treatment data by way of evidence of 1,528 'treatment episodes' between 2017 and 2019 for people residing in the suburbs of Kelmscott, Camillo, Champion Lakes, Seville Grove, Armadale and Mount Nasura at treatment services funded by the Mental Health

Commission. This revealed that alcohol was the primary drug of concern in almost a third of episodes, and a drug of concern in almost half of treatment episodes.

173. The Applicant accepted that the SEIFA scores for Kelmscott, Camillo, Seville Grove and Armadale reflected relative disadvantage in socio-economic terms, but noted that the level of disadvantage is less pronounced when the suburbs are ranked on a national, rather than State basis (see MGA Report, Table 11, p.24).
174. The Applicant also submitted, as must be accepted, that the SEIFA scores set out by the CHO for the suburbs in the Prescribed Area are only an indicator of potential harm rather than evidence of existing harm. The Applicant submitted that the evidence referred to by the CHO with respect to SEIFA scores, and also child vulnerability did not disclose a level of alcohol-related harm or ill-health in the Prescribed Area which is markedly different from other areas in the State.
175. As to treatment episodes involving alcohol, the Applicant noted that no evidence was presented as to corresponding rates in other places or in the State. Further, the numbers involved per year equated to 146 people per year where alcohol was the primary drug of concern, and 218 where it was a drug of concern, in the context of a total population of 24,437 in the Prescribed Area.
176. Overall, the Applicant submitted that while it is open to the Commission to conclude that there is an existing level of alcohol-related harm and ill-health in the Prescribed Area, the evidence does not reveal a level of alcohol-related harm or ill-health markedly different to other areas in the State.
177. Based on the material provided by the CHO and CoP, the Commission finds that there is an existing level of harm and ill-health associated with the use of liquor in the locality. This is demonstrated by the number of alcohol-related incidents in each suburb. However, in the suburbs of Camillo, Champion Lakes, Mount Nasura and Seville Grove, the Commission finds that the number of alcohol-related incidents are generally close to or below the corresponding metropolitan rate. The statistical data provided by the CHO also indicates that the areas of Kelmscott and Armadale have significantly higher rates of alcohol-related incidents than the metropolitan average. Although the link between alcohol and mental health treatment episodes is concerning, the Commission accepts that the rates are statistically insignificant compared to the context of the total population under consideration.

The likely degree of harm and ill-health if Application granted

178. Assessing the likely degree of harm and ill-health that may occur if the Application is granted necessarily requires a level of prediction, which can only be done by reference to a degree of probability. As the evidence from the CHO demonstrates, the presence of relative socio-economic disadvantage is a factor that bears upon that probability, and those who experience socio-economic disadvantage bear a disproportionate burden of the negative alcohol-related consequences and are more susceptible to harm from alcohol use. The Commission accepts that using a metropolitan ranking system, four of the six suburbs considered experience a greater level of disadvantage and a lack of advantage in general.

179. However, the Applicant submitted that the Application is unlikely to cause a significant increase in alcohol-related harm, because:
- a) there is not a high concentration of vulnerable or 'at risk' parties in the Prescribed Area as explained in the MGA Report (5.0-5.9, Attachment 1R of the Application);
 - b) the Premises are small and designed to cater to existing customers of the supermarket;
 - c) the grant of the Application will not introduce bulk or cheap liquor to the area because the Dan Murphy's already provides a large, destination liquor store catering for bulk liquor shopping with discount prices;
 - d) the Applicant is an experienced, well-regarded and responsible operator of licensed premises; and
 - e) the Applicant's evidence of its own analysis of the impact of opening a new liquor store in proximity to existing premises on the sales of the latter shows that a redistribution of market share occurs as consumers adjust their patterns (see Smith Statement, [11.2] and Annexure 1, Document 1V of the Application). That is, a new store does not result in an increase in sales of liquor nor consumption.
180. Accordingly, the Applicant says that while there is a risk of an increase to alcohol-related harm, there are no factors that indicate the magnitude of that risk is high, or that the potential increase will be significant. Further, the Applicant explains that this is not a case where a small risk of increase in harm is intolerable due to the high levels of existing harm, but rather a case in which the existing harm is no greater than that which is commonly accepted in the community, and where a small risk of an increase in harm is within acceptable bounds.
181. The Applicant also submitted that there was no evidence in support of the submission by the CoP and CHO that the risk of alcohol-related harm or ill-health was increased because the Premises will have increased visibility to children, young people and at risk groups in the community as well the general community, and that it would expose a large volume of the community to a liquor outlet who may have opportunistic access to the Premises. Although the Applicant acknowledged that the CHO referred to academic literature dealing with an association between outlet density and various forms of alcohol-related harm, that literature was said to reveal that the association between outlet density and alcohol-related harm is complex and not well-understood. The Applicant also submitted that none of the studies identified the visibility or potential for opportunistic access to be a factor increasing the alcohol-related harm or ill-health associated with those premises. Accordingly, the Applicant submitted that in the absence of evidence, no weight should be given to the submission by the CoP and CHO.
182. Similarly with respect to the incident reports provided by the CoP, the Applicant suggests that the inference advanced that a large proportion of offenders are consuming liquor at a private residence and that they have likely purchased that liquor at packaged liquor outlets in the locality was not supported by the evidence. This was said to be because the incident report statistics reveal nothing about whether packaged liquor was involved, and if so, where it was purchased from.
183. The Commission accepts that the Premises are small and designed to cater to existing customers and that the Applicant is an experienced, well-regarded and responsible operator of licensed premises. The Commission also acknowledges that the Premises would not introduce bulk or cheap liquor to the area because the Dan Murphy's already provides a large,

destination liquor store catering for bulk liquor shopping with discount prices. The Commission therefore finds that it is unlikely that there will be an increase in harm and ill-health which may occur on or around the Premises.

184. Given that there is an association between outlet density and various forms of alcohol-related harm (CHO Intervention [3.1.1]), the Commission is satisfied that the granting of the Application may result in an increase in consumption and therefore the potential for increased harm and ill-health. However, in the absence of supporting evidence, the Commission is not satisfied that opportunistic access by reason of an additional liquor premises will add any further degree of harm of a significant level to that already occurring in the locality.

Assessment of likely degree of harm against existing degree of harm

185. Although the Commission has found that alcohol-related harm and ill-health exist within the locality, and that the degree of harm may increase due to the granting of the Application, the Commission considers that it would not be at a level as to make it inappropriate to grant the Application. While the Commission accepts that people with low socio-economic status are most vulnerable or at risk to alcohol-related harm or ill-health, there is not a significantly high concentration of vulnerable or 'at risk' parties in the Prescribed Area as compared to the State generally.
186. The Commission accepts that this is a case in which the existing harm is no greater than that which is commonly accepted in the community, and where a small risk of an increase in harm is within acceptable bounds.

Weighing of the factors

187. To complete the *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 analysis, the Commission must weigh the likely degree of harm, as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest. In weighing the likelihood of alcohol-related harm and ill-health against the benefits to the locality of the grant of the Application (set out above), the Commission finds that such likelihood is not so unacceptable that it outweighs the benefits of granting the Application.

Conclusion

188. Accordingly, the Decision of the Delegate of the Director is quashed, and the Application for a Liquor Store Licence is granted.



KATE PEDERSEN
CHAIRPERSON



SANDRA DI BARTOLOMEO
MEMBER



DR KIM HAMES
MEMBER