

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICANT:** SYLVER PTY LTD

**PREMISES:** CELLARBRATIONS CANNING VALE

**PREMISES ADDRESS:** 214 CAMPBELL ROAD, CANNING VALE

**APPLICATION ID:** A022449671

**MATTER:** APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

**DECISION OF:** PETER MINCHIN  
DIRECTOR LIQUOR CONTROL AND ARBITRATION

**DATE OF REASONS:** 25 MAY 2022

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### **Introduction**

- 1 On 4 March 2022, I issued a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising Sylver Pty Ltd (the applicant) that after consideration of the evidence and submissions presented in the application, I had determined that the applicant had failed to discharge its onus under s 36B(4) of the Act and therefore the application was refused.
- 2 Pursuant to s 18AA(3) of the Act, the applicant has requested written reasons for my decision. These are my reasons.

### **Background**

- 3 The applicant lodged an application for the conditional grant of a liquor store licence for premises to be located at the Ranford Shopping Centre, 214 Campbell Road, Canning Vale and to be known as Cellarbrations Canning Vale.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing (the Director). There were no objections or interventions in respect of the application.
- 5 The application was determined on the applicant's written submissions, as permitted under ss 13 and 16 of the Act. In addition, these written reasons have been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.<sup>1</sup>

### **Brief overview of the application**

- 6 According to the applicant, the proposed liquor store will meet the local community requirements for packaged liquor. A liquor store which was located at the far end of the same shopping complex closed in 2017. The applicant submitted that people in the

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<sup>1</sup> S 16(7) of the Act.

locality have been used to having the convenience of a liquor store within the Ranford Shopping Centre (the Centre). The proposed liquor store will be located adjacent to the IGA Canning Vale Supermarket (the supermarket), which is also operated by the applicant.

- 7 The applicant advised that the closure of the previous liquor store had a negative impact on the turnover of the supermarket, which occupies approximately 51% of the floor space of the Centre.<sup>2</sup> According to the applicant, the operation of a liquor store in combination with a supermarket will present an opportunity for business growth.<sup>3</sup>
- 8 In defining the locality for the purposes of the application, and in particular s 36B of the Act, the applicant was guided by the “Public Interest Assessment” policy of the Director and further defined the locality taking into consideration natural and man-made boundaries and the physical location of the subject site.
- 9 The applicant submitted that there are six existing packaged liquor outlets in the locality.
- 10 In respect of analysing the existing packaged liquor services in the locality, the applicant stated that for the purpose of this exercise, it would evaluate the size and range of craft beers in the locality, with a focus on limited edition speciality lines of craft beer that are not currently available in the locality.<sup>4</sup> Further, the applicant stated that emphasis would be placed on small batch and limited release craft beers, which the applicant asserted is not available at any other existing packaged liquor outlet in the locality.
- 11 The applicant engaged Perth Market Research (PMR) to conduct a mystery shop of premises in the locality.<sup>5</sup> The applicant also provided statements from craft brewers and distributors from whom it intended to get its limited edition/short run craft beers.
- 12 The report from PMR only provided information on the availability of limited edition/short run craft beer. The report concluded that there is a significant lack of limited edition/short run craft beer available at the existing packaged liquor outlets in the locality.
- 13 According to the applicant, the main focus, and point of difference with its proposed store will be the extensive range of West Australian (20 lines), Australian (21 lines) and International (26 lines) limited edition/short run craft beer. The applicant further stated that the proposed size of the liquor store will allow for a wide range of other liquor to be displayed, which will include<sup>6</sup>:
  - local popular craft and boutique beers;
  - a range of quality liqueurs;
  - national and international brands of red and white wine;

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<sup>2</sup> PIA at 2.8

<sup>3</sup> PIA at 1.34

<sup>4</sup> PIA at 7.3

<sup>5</sup> CCV26

<sup>6</sup> PIA at 8.4

- a range of premium spirits; and
  - ready-to-drink lines and fortified wines.
- 14 To support the application, the applicant conducted an intercept survey inside the Canning Vale IGA supermarket and an online survey questionnaire via QuestionPro. There were 519 responses to the intercept survey and 138 responses to the online survey.
- 15 The applicant also lodged evidence and submissions on the existing levels of harm in the locality; the socio-economic profile of the locality and the likely impact the grant of the application will have on the amenity of the area.

### Determination

- 16 An applicant for the grant of a liquor store licence must satisfy the licensing authority that:
- the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality;<sup>7</sup> and
  - the grant of the application is in the public interest.<sup>8</sup>
- 17 There is no presumption in favour of the grant of the application, and the burden of persuasion imposed on the applicant must be satisfied by the evidence submitted in any particular case. Consequently, the applicant must adduce sufficient probative evidence to discharge its onus under the Act. The evidence must be “*relevant, reliable and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case.*”<sup>9</sup> It should also be noted that the commercial interests of an applicant do not necessarily coincide with the public interest.
- 18 This application, in my view, turned on the evidence lodged by the applicant to discharge its onus under s 36B(4) of the Act.
- 19 In *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing*<sup>10</sup>, Archer J made some observations in respect of s 36B(4):
- the phrase “requirements of consumers for packaged liquor” in the definition of “local packaged liquor requirements” in s 36B(1) of the Act is not limited in its scope to the physical item or product, and includes consideration of matters such as convenience and one-stop shopping;
  - in applying s 36B, it is necessary for the licensing authority to have regard to the objects of the Act;
  - the purpose of s 36B is not to constrain the number of packaged liquor premises by sacrificing consumers’ options to get liquor at a lower price and better quality, but

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<sup>7</sup> Section 36B(4)

<sup>8</sup> Section 38(2)

<sup>9</sup> LC 17/2010 *Busswater Pty Ltd v Director of Liquor Licensing*

<sup>10</sup> [2021] WASC 366

rather to ensure that an additional licence would only be granted where consumer requirements are not already being reasonably met;

- the additional hurdle in s 36B is to prevent multiple premises in close proximity to one another selling packaged liquor;
- the test in s 36B is an objective test, whereas the test in s 38(2) requires a discretionary value judgement;
- in assessing whether the local packaged liquor requirements “cannot reasonably be met”, the licensing authority needs to determine whether those requirements cannot sensibly or rationally be met, however this does not involve determining whether consumer requirements cannot be provided for without occasioning substantial difficulty or substantial inconvenience;
- the word “locality” in s 36B connotes the same concept of “neighbourhood”, being a geographical area surrounding the proposed site and the meaning of “neighbourhood” includes “a district or locality”; and
- the locality identified by the licensing authority should capture the geographical area surrounding, and relatively close to, the proposed site and need not be a circular area within a particular radius and may include factors such as:
  - geographical and topological features including man-made features such as roads;
  - areas from which the proposed site could be accessed reasonably easily on foot or push-bike;
  - if there is a community in the area, the geographical spread of that community; and
  - in some cases, the retail catchment area of the proposed site.

#### *Locality for the purposes of s 36B*

20 As noted by Archer J in **Liquorland**, the “locality” for the purposes of s 36B will not necessarily or even usually be a circular area within a particular radius of the site. The shape and size of the “locality” will be influenced by topographical features and the areas from which the proposed site could reasonably be accessed on foot or push-bike. However, due to a variety of factual situations that may arise, it is impossible to prescribe a specific test to be applied or even an exhaustive list of the factors that will or may be relevant in the determination of the locality in any given case. Further, the retail catchment area may be relevant in assessing the “locality” because, at the very least, it could illuminate the practical impact of topographical features of the area. Notwithstanding, the “locality” will be an area that surrounds, and is geographically close to, the proposed premises and depend on the facts and circumstances of each case.

- 21 In determining the locality for this application, the applicant was guided by the Director's Public Interest Assessment policy which indicated for the suburb of Canning Vale a 2km radius of the subject site would be appropriate. However, the applicant then considered the physical location of the subject premises; the presence of natural or man-made boundaries that may separate one community from another and the community most likely to be impacted by the grant of the application.
- 22 The applicant's approach to the determination of the locality for the purposes of s 36B would appear to be reasonable in the circumstances of this case, although I note that Hakea Prison, Melaleuca Women's Prison, Banksia Hill Juvenile Detention Centre and the vacant tract of land west of Nicholson Road would constitute natural barriers.

*Existing packaged liquor outlets in the locality*

- 23 As noted in [9] above, the applicant identified six existing packaged liquor outlets in the locality, being:
- BWS Canning Vale located in the Livingston Market Place, Canning Vale;
  - Dan Murphy's located at 888 Nicholson Road, Canning Vale;
  - Brookland Tavern/Dan Murphy's located at 7 Holmes Street, Southern River;
  - Liquorland Southern River located in the Southern River Shopping Centre;
  - BWS Southern River located in the Vale Shopping Centre, Southern River; and
  - Aldi Southern River located at 428 Warton Road, Southern River.
- 24 Other than the report from PMR, which only provided information on the availability of limited edition/short run craft beer in the locality, the applicant provided no evidence on the existing liquor offerings from the packaged liquor outlets in the locality. Amongst the six premises in the locality there are two large destination liquor outlets (Dan Murphy's stores) which are each likely to provide approximately 3,000 to 4,000 lines of liquor products, including a wide range of craft beer, boutique beer, liqueurs, local, national and international red and white wines, spirits and ready-to-drink lines. It is likely that the other premises in the locality also provide a wide range of popular liquor products, however the applicant has chosen a limited number of specific producers of craft beer to justify the application.

*Applicant's survey evidence*

- 25 The applicant conducted two surveys: an intercept survey at the Canning Vale IGA and an online questionnaire via QuestionPro. There were 657 results in total from the two surveys. Whilst the applicant referred to the survey results as objective evidence, it is really the subjective views of the respondents to the various questions posed.
- 26 However, the weight to be afforded to such evidence depends on the efficacy surrounding the collection of the data and the objectivity of the questions.

27 Most survey responses (519) were collected inside the Canning Vale IGA supermarket which may skew the survey results in favour of the applicant. The survey should perhaps have been conducted more broadly throughout the locality. In addition, the survey questions and the applicant's analysis of the survey results is misleading.

28 For example, in section 2 of the questionnaire, respondents are advised that:

*The proposal is for an independent and convenient browse-style liquor store of approximately 112sqm which will adjoin the Canning Vale IGA supermarket, offering local residents the convenience of a full service supermarket and a quality packaged liquor offering adjacent to each other.*

*The main focus, and point of difference, will be the extensive range of West Australian, Australian and International Craft Beer. There will be a range of products labelled "limited edition". This means that the product is small batch and part of a speciality line. Those products are exclusive to Cellarbrations at Canning Vale and not otherwise available in the locality.*

29 Question 2.1 then asks respondents "bearing in mind the above style of operation for this proposed liquor store, would you be likely to be a customer?" According to the applicant, 98% of respondents answered yes to this question. The applicant then asserts that this is due to the extensive range of West Australian, Australian and International Craft Beer that the applicant proposes to offer. The applicant also states that the survey results show 98% of the participants are attracted by the significant offer of limited edition/short run craft beer.<sup>11</sup>

30 However, the conclusions drawn by the applicant are not supported by the evidence. It is unclear if respondents answered yes to the question because of the convenience factor; the desire to buy wine and other general liquor products; the offering of craft beer; or the offering of limited edition/short run craft beer.

31 In addition, almost 50% of respondents indicated that the existing premises in the locality met their packaged liquor needs (question 3.3), however, some of these respondents also answered other questions in the survey relating to limited edition/short run craft beer, which have then been used to justify the grant of the application. Importantly however, the survey does not ask respondents where they currently buy their packaged liquor, particularly limited edition/short run craft beer, which for many respondents the existing premises meet their requirements.

### *Conclusion*

32 The applicant intends to sell a wide range of popular or mainstream liquor products from its proposed liquor store. However, to try and create a point of difference between its proposed store and existing packaged liquor outlets in the locality, the applicant states that it will offer a relatively small range of limited edition/short run craft beer.

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<sup>11</sup> PIA at 9.13.2

Approximately 67 lines of limited edition/short run craft beer will be offered at the proposed store out of the many hundreds of lines of mainstream liquor products that will also be available. Clearly, the provision of limited edition/short run craft beer will be a very small component of the applicant's proposed business under the licence.

- 33 Apart from the PMR report, which only provided information on the availability of limited edition/short run craft beer in the locality, the applicant provided no details or analysis of the existing range of popular or mainstream liquor products available from existing packaged liquor outlets in the locality, which includes two large destination outlets (Dan Murphy's). Further, the applicant failed to provide any information on where respondents to its surveys currently purchase their liquor, including limited edition/short run craft beer, if there is a requirement for such products. Existing shopping habits is relevant to the determination of the matters for consideration under s 36B(4).
- 34 Although some respondents to the surveys expressed an interest in craft beer or limited edition/short run craft beer or expressed an interest in trying a particular product, this does not demonstrate a consumer requirement for the purposes of s 36B(4) of the Act. Further, there will always be individuals who may have or express a desire for a specific liquor product which is not readily available in the locality, however whether this desire is objectively reasonable in the assessment of the local packaged liquor requirements and whether the existing packaged liquor outlets can reasonably meet those requirements is ultimately a value judgement to be made with regard to the evidence as a whole and the scheme of the Act.
- 35 It is not uncommon for retailers to create a point of difference in the marketplace and offer some products (i.e., from different craft breweries or wineries) which its competitors may not provide or for larger retailers or buying groups to provide "home brand" or "private label" liquor products. However, most outlets will also provide a large range of popular or standard mainstream liquor products, simply because that is what the public desire.
- 36 The Liquor Commission has expressed reservations about the weight that may be applied to surveys. This is because, among other reasons, the outcome of surveys is dependent upon the method of selection and sampling of respondents, the objectivity of the surveys, the type of questions asked, and the geographical and demographic composition and nature of the locality.
- 37 In my view, little weight can be given to the applicant's survey data because of the way the questions were framed, the selection and sampling of respondents, the lack of objectivity in the survey and the poor analysis applied to the data.
- 38 The applicant states that since the closure of the Liquorland store at the Centre in 2017, the applicant's supermarket business has declined and the operation of a liquor store in combination with a supermarket will present an opportunity for business growth. Improving the applicant's supermarket business appears to be a primary motivation for the application. However, the positive or negative financial impact on the supermarket business, or other businesses in the Centre, is immaterial to the grant to the application. The financial impact on these extraneous businesses is not part of the public interest

considerations under s 38(2).<sup>12</sup> Notwithstanding that there was a liquor store operating at the Centre until 2017, this application must be determined in accordance with the Act as it applies today, based upon the merits of the application and importantly, the evidence presented. In the five years since the closure of the Liquorland store, shoppers have adjusted their shopping habits.

- 39 Although some members of the community may find it more convenient to purchase their liquor and groceries at the same time at the Centre, this service already exists at several sites within the locality. The applicant acknowledges this fact in its submissions.<sup>13</sup> Further, purchasing liquor with groceries should not be confused with the notorious fact of one-stop shopping in large suburban shopping centres.<sup>14</sup> Consequently, the weight to be given to this aspect of the application is significantly diminished.
- 40 I also note that almost 50% of respondents to the survey indicated that the existing premises in the locality meet their packaged liquor needs, which further diminishes the applicant's case. Also, a preference or support for an independent operator does not amount to a consumer requirement and as stated earlier, nor does an interest in a product (i.e. craft beer) demonstrate a consumer requirement. This is supported by the fact that many respondents answered "yes" to questions in section 2 of the survey and ticked some boxes related to questions on limited edition/short run craft beer but then indicated that the existing packaged liquor premises in the locality meet their packaged liquor requirements.<sup>15</sup>
- 41 The onus is on the applicant to adduce sufficient probative evidence to discharge its onus under s 36B(4) of the Act. This evidence must be "*relevant, reliable and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case.*"<sup>16</sup> However, when I considered the applicant's evidence, I was of the view that the applicant did not undertake a proper analysis of the data from the surveys and more importantly, the applicant did not ask respondents all the necessary questions to assist in the proper determination of this application and allow the decision-maker to make the necessary findings of fact and be satisfied that the local packaged liquor requirements could not reasonably be met by the existing packaged liquor outlets in the locality. The word "reasonably" means no more than sensible, not irrational, or absurd.<sup>17</sup>
- 42 The applicant consequently failed to discharge its onus under s 36B(4) of the Act and the application must therefore be refused.

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<sup>12</sup> **Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police** [2020] WASCA 157

<sup>13</sup> PIA at 8.7

<sup>14</sup> **Woolworths Ltd v Director of Liquor Licensing** [2013] WASCA 227

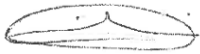
<sup>15</sup> See for example the questionnaires of J Meyer, K Lloyd, B Lloyd, S Yates, N Francis, J Barig, K Polini and K Fripp.

<sup>16</sup> LC 17/2010 **Busswater Pty Ltd v Director of Liquor Licensing**

<sup>17</sup> **Charlie Carter Pty Ltd v Streeter and Male Pty Ltd** (1991) 4 WAR 1



- 43 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
- 44 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin  
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING



Department of  
**Local Government, Sport  
and Cultural Industries**

Your Ref:

Our Ref: A022449671

Enquiries: Mary Ioannidis  
☎ (08) 6551 4957

Mr Phil Cockman  
Canford Hospitality Consultants Pty Ltd  
[phil@canford.com.au](mailto:phil@canford.com.au)

Dear Mr Cockman

**APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE:  
CELLARBRATIONS CANNING VALE**

As requested, please find attached the reasons for the decision in respect of the above matter.

Should you have any queries regarding this please contact me on (08) 6551 4957.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Ioannidis'.

Mary Ioannidis  
RESEARCH SUPPORT AND REGULATORY OFFICER

25 May 2022

[Enc]