

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant:	South Freo Fresh Pty Ltd <i>(represented by Mr Henry Jackson SC under instructions from CGL Legal)</i>
Interveners:	Commissioner of Police (First Intervener) Chief Health Officer (Second Intervener) <i>(represented by Ms Rachel Paljetak and Mr Thomas Ledger of the State Solicitor's Office)</i>
Commission:	Ms Sarah Oliver (Presiding Member) Mr Alex Zilkens (Member) Ms Kirsty Stynes (Member)
Matter:	Application pursuant to section 25 of the <i>Liquor Control Act 1988</i> for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a liquor store licence.
Premises:	Loco Liquor Express, Shops 10 & 11, 195 Hampton Road, South Fremantle
Date of Hearing:	12 December 2019
Date of Determination:	26 June 2020
Determination:	The decision to refuse the application for a conditional grant of a liquor store licence is affirmed.

Authorities referred to in Determination:

- *Liquorland (Australia) Pty Ltd v Executive Director of Health* [2013] WASC 51
- *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Woolworths v Director of Liquor Licensing* [2013] WASCA 227
- *Carnegies Reality Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Gull Liquor* (1999) 20 SR(WA) 321
- *Woolworths v Director of Liquor Licensing* [2013] WASCA 227
- *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd* [2019] WASC 114
- *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014)
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 16/2015)
- *Liquorland (Australia) Pty Ltd v Commissioner of Police* (LC 18/2015)
- *Kenny J, Interveners and Amici Curiae in the High Court* (1998) 20 Adel LR 159

Background

- 1 On 4 February 2019, the Applicant applied to the Director of Liquor Licensing (“Director”) for the conditional grant of a liquor store licence in relation to premises known as “Loco Liquor Express” (“the Licence Application”).
- 2 The Licence Application relates to a liquor store that the Applicant proposes will be included within an existing IGA supermarket store located at 195 Hampton Road, South Fremantle. The proposal is for a small liquor store of around 35m². It is proposed that the store will include a range of products from local microbreweries, boutique wine farms, and local spirit distillers that are not readily available at other group owned liquor stores in the locality.
- 3 The Licence Application was advertised and Notices of Intervention were submitted by:
 - (a) the Commissioner of Police (“the COP”) on 8 March 2019; and
 - (b) the Chief Health Officer (“the CHO”) lodged on 11 March 2019.
- 4 On 27 June 2019, a delegate of the Director refused to grant the Licence Application. Reasons for that decision were published on 7 August 2019. On 19 August 2019, the Applicant applied for a review of the delegate’s decision pursuant to section 25 of the Act.
- 5 On 1 November 2019, section 18 of the *Liquor Control Amendment Act 2018* (“the Amendment Act”) came into operation. Section 18 inserted a new section 36B into the *Liquor Control Act 1988* (“the Act”). On 6 December 2019, the Liquor Commission of Western Australia (“the Commission”) determined, as a preliminary issue in this case and at the request of the parties, that section 36B(4) does not apply in the context of the present review proceedings.
- 6 The Commission heard the application for review on 12 December 2019.

Relevant Principles

- 7 The Applicant bears the onus of demonstrating that the conditional grant of the liquor store licence for the proposed premises is in the public interest (section 38(2) of the Act and regulation 9EA of the *Liquor Control Regulations 1989*; *Liquorland (Australia) Pty Ltd v Executive Director of Health* [2013] WASC 51 at [54]; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014)). That onus cannot be discharged by mere assertion. Any assertions or opinions must be supported by an appropriate level of evidence (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 16/2015) at [62]).
- 8 In determining whether the Applicant has discharged that onus, the Commission must have regard to, and must exercise its judgment in accordance with, the objects and provisions of the Act. The objects of the Act include the primary objects in section 5(1) and the secondary objects in section 5(2). The primary objects of the Act are (section 5(1)):
 - (a) to regulate the sale, supply and consumption of liquor; and
 - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - (c) to cater 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.

- 9 In *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510 (“*Lily Creek*”), Ipp J (with whom Owen J (at [76]) and Miller J (at [77]) agreed) rejected an earlier finding in *Re Gull Liquor* (1999) 20 SR(WA) 321 at 335 that there was a tension or conflict between the objectives in sections 5(1)(a) and 5(1)(b) of the Act. His Honour found (at [18]):

“In my view, however, there is no tension between the two primary objects. The object described by s 5(1)(a) is to regulate the sale, supply and consumption of liquor. The object contained in s 5(1)(b) is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. When s 5(1)(a) is read together with s 5(1)(b), it is apparent that the Licensing Authority, in regulating the sale, supply and consumption of liquor, is required to have regard to the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor.”

- 10 His Honour considered it significant that the primary object in section 5(1)(b) is to "minimise" harm or ill-health, not to prevent harm or ill-health absolutely. His Honour said that the word "minimise" is consistent with the need to weigh and balance all relevant considerations (at [20]).
- 11 However, His Honour did consider that there was the possibility for tension to arise between the primary object in section 5(1)(b) of the Act and secondary objects under the Act. His Honour explained (at [19]):

“It is obvious, however that tension may arise between the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor and certain of the objects contained in s 5(2). There will be occasions when s 5(2) objects could only be achieved by the grant of licences for the sale and supply of liquor in circumstances under which such grants may tend to cause harm or ill-health to people. Section 5 makes it plain that the Licensing Authority is required to bear s 5(2) objects in mind as well as the primary objects when fulfilling its functions. This indicates that the Licensing Authority must undertake a weighing and balancing exercise when conflict between objects arises.”

- 12 The Commission has an absolute discretion under section 33(1) of the Act to grant or refuse an application on any ground or for any reason it considers in the public interest. That discretion is only confined by the scope and purpose of the Act, read as a whole (section 33(1); *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 at [32], citing *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 at [6]-[7]).
- 13 The Commission is required to make its determination on the balance of probabilities (section 16(1)(b)(ii)).
- 14 Section 38(4) of the Act states that regard may be had to the following matters when considering whether the granting of an application is in the public interest:
- (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
- (d) any effect the granting of the application might have in relation to tourism, or community or cultural matters; and
- (e) any other prescribed matter. [No other matters have been prescribed to date].

15 In *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, the Court of Appeal provided guidance as to how the Commission should discharge its role of determining whether an application is in the public interest. The Court held that (at [46]-[55]), in determining whether an application is in the public interest, the Commission:

- (a) is obliged to evaluate the evidence, make findings and draw conclusions from the evidence;
- (b) is bound to have regard to the factual matters (the evidence, factual findings and conclusions reached) relevant to the objects of the Act as set out in section 5; and
- (c) may have regard to factual matters (the evidence, factual findings and conclusions reached) relevant to the matters set out in section 38(4).

16 In *Lily Creek*, Ipp J also made the following relevant observations in relation to the determination of whether an application is in the public interest (at [21]-[22]):

“It follows that the mere fact that s 5(1)(b) is a primary object does not necessarily mean that where harm or ill-health may be caused to people by the grant of a licence, no licence should be granted. Where there is a prospect of harm or ill-health being caused by the grant of a licence, and that grant will advance s 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind that the object under s 5(1)(b) is to be accorded primacy).

The Licensing Authority may decide that the possibility of harm or ill-health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill-health of a particular serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances.”

- 17 Further guidance was also provided by Allanson J in *Carnegies Reality Pty Ltd v Director of Liquor Licensing* [2015] WASC 208. His Honour there considered the manner in which the Commission ought to address questions of alcohol related harm and ill-health, and said the Commission should apply the following steps (at [41]-[42]):
- (a) make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - (b) make findings about the likely degree of harm to result from the grant of the application;
 - (c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - (d) weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether an applicant has satisfied the Commission that it is in the public interest to grant the application.
- 18 Section 25(2c) of the Act provides that when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 19 On a review under section 25 of the Act, the Commission may:
- (a) affirm, vary or quash the decision subject to the review; and
 - (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; and
 - (c) give directions:
 - i. as to any question of law, reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - (d) make any incidental or ancillary order.
- 20 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health* [2008] WASC 224).

Role of Interveners

- 21 An issue arose in this application for review as to the proper role of Interveners. As noted earlier, the COP and the CHO both intervened in the Licence Application, and both Interveners were represented at the hearing before the Commission and made submissions in relation to the Licence Application.

- 22 Pursuant to section 69(6)(c) of the Act, the COP may intervene in proceedings before the licensing authority for the purposes of introducing evidence and making representations (relevantly to the present case):
- (a) on the question of whether, if a particular application were granted, public disorder or disturbance would be likely to result (section 69(6)(c)(ii)); or
 - (b) as to any other matter relevant to the public interest (section 69(6)(c)(iv)).
- 23 Pursuant to sections 69(8a)(b) and 69(8b) of the Act, the CHO may intervene in proceedings before the licensing authority for the purposes and 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.
- 24 Pursuant to section 73 of the Act, any person who is authorised to intervene in any application may instead or in addition exercise that right by way of objection. Grounds for objecting to any application are specified in section 74(1) of the Act.
- 25 Unlike an intervention, where a notice of objection is lodged:
- (a) the Director may make a determination that the objection shall not be heard (section 74(4)). Such a determination is not subject to review under section 25 of the Act (section 74(5)); and
 - (b) if the objection is heard, the objector bears an onus of establishing the validity of any objection (section 73(10)).
- 26 The Act is otherwise silent on the roles of Interveners as against objectors, and the issue does not seem to have attracted any direct judicial consideration. The issue received some consideration in *Re Gull Liquor* (1999) 20 SR(WA) 321, but some of the findings there were criticised in the Court of Appeal decision in *Lily Creek*.
- 27 In *Lily Creek*, Ipp J (in the course of considering the objects of the Act) referred to the concept of minimisation of harm as underlying other parts of the statutory regime. In this regard, His Honour said (at [20]):

“This concept underlies those sections of the Act that provide for objections to the grant of licences on grounds based on harm or ill-health to people. Section 73(2) provides (subject to that section) for a right to object to an application made under the Act “on any ground permitted by s 74”. Section 74(1)(b) permits an objection to be made on the ground that “the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor”. The word “undue” in s 74(1)(b) emphasises that the Licensing Authority is required to undertake a comparative task where there is a conflict between the primary object in s 5(1)(b) and the other objects described in s 5(2).”

28 It is well settled, and there is no dispute, that this Commission is required to undertake a comparative and evaluative task in determining whether it is satisfied that the grant of an application is in the public interest. What has arisen in the present case is a dispute as to whether the Interveners have gone further than the role of Intervener allows, because it is said that the Interveners have made submissions on matters that require an evaluative judgment as to the merits of the application, rather than simply putting forward material for consideration by the licensing authority (Applicant’s Responsive Submissions at [2]).

29 To consider this issue, the best starting point is to consider the terms of the legislation. Section 69(6)(c) provides that the COP may intervene in proceedings before the licensing authority:

“...for the purpose of **introducing evidence or making representations** –

- (i) as to **whether** or not any person is a **fit and proper person**; or
- (ii) on **the question of whether**, if a particular application were granted, public disorder or disturbance **would be likely** to result; or
- (iii) as to the interest that any person may have in a licence; or
- (iv) as to any other matter relevant to the public interest.” [Emphasis added]

30 Similarly, a local government may intervene in proceedings before the licensing authority (section 69(7)):

“...for the purpose of **introducing evidence or making representations** –

- (a) as to **whether** the premises are **suitable** to be, or to continue to be, licensed or the subject of a permit; and
- (b) as to **whether** a proposed alteration to, or redefinition of, licensed premises should be approved; and
- (c) on **the question of whether**, if a particular application were granted, persons who reside, work or worship in the vicinity **would be likely** to suffer undue offence, annoyance, disturbance or inconvenience.” [Emphasis added]

31 The chief executive officer of Tourism Australia may also intervene (section 8AA):

“...for the purposes of **introducing evidence or making representations** –

- (a) as to **whether** any tourism benefits **might result** if a particular application is granted; and
- (b) as to any other matter relevant to the **proper** development of the tourism industry in the State.” [Emphasis added]

32 Under section 69(8a)(b), the CHO may intervene in proceedings:

“...for the purposes of **introducing evidence or making representations** in relation to the relevant matters.” [Emphasis added]

33 The term *relevant matters* in section 69(8a) is defined in section 69(8b) to mean “*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*” [emphasis added].

34 Section 69(13) gives an Intervener standing for the purposes of any appeal. It provides:

“A person who intervenes in any proceedings –

*(a) may, unless the licensing authority certifies that that person has no interest in the application other than that of **providing argument or fact to enable the licensing authority to reach an informed decision**, be held on any appeal to have become a party to the proceedings;...*” [Emphasis added]

35 Having regard to the language used in section 69, it is the Commission’s opinion that an Intervener is not prevented by the terms of the legislation from making representations or submissions as to matters that require an evaluative judgment by the Commission. The use of language such as “whether”, “would be likely”, “suitable” and “proper” all suggest matters that are relevant to an evaluative judgment. Similarly, the joinder of Interveners in any appeal proceedings also reflects an intention that an Intervener enjoy the benefits and burdens of being a party to the proceedings (see Kenny J, *Interveners and Amici Curiae in the High Court* (1998) 20 Adel LR 159).

36 In *Re Gull Liquor*, relying largely on section 73(2) and section 74(1)(b) (which related to objections on the basis of “undue” harm) of the Act, the Court concluded that the onus was on the Executive Director *“to satisfy the Court on a balance of probabilities that the application should be refused in the public interest, in order to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor”*. Ipp J rejected that conclusion in *Lily Creek*, saying (at [25]):

*“I do not, with respect, accept this reasoning. As a matter of language, the word “undue” in s 74(1)(b) has no bearing whatever on the standard of proof applicable to establishing “harm or ill-health” as referred to in s 5(1)(b). There is no reference to “undue” in s 69(8a), which section empowers the Executive Director to 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”. **Section 69(8a) assumes that evidence and representations as to harm or ill-health caused by the use of liquor will be relevant, whether or not it establishes that the harm or ill-health is “undue”**. I have explained that in my view the word “undue” is inserted in s 74(1)(b) merely to emphasise that a comparative exercise is required to be undertaken in the event that a conflict arises between the minimisation of harm or ill-health, on the one hand, and the need to achieve one or more of the objects contained in s5(2), on the other.”*

37 In the present case, the Commission observes that the COP is authorised to intervene and make submissions as to (amongst other things) any other matter relevant to the public interest. In our view, that would extend to making submissions as to whether the Applicant has discharged its onus of establishing that the grant of the licence would be in the public interest, and the evaluative process to be undertaken by the Commission in considering the application. In our view, the COP has not exceeded the role of an Intervener in this matter.

38 In relation to the CHO, the matters over which the CHO can intervene are more limited than the COP. However, in our view, in making submissions as to the minimisation of harm or ill-health from alcohol use, it is acceptable for the CHO to make submissions as to the evaluative task to be undertaken by the Commission.

39 Ultimately, it is really a question of the weight to be given to the submissions made by the Interveners, given that they do not bear any onus in the proceedings.

Submissions of the Parties

40 The following is a brief summary of the primary submissions advanced by the parties. Further discussion of the parties' submissions can be found in the Consideration section of this decision.

41 The Applicant submitted that the relevant matters for consideration in determining whether the present application is in the public interest are the following:

- (a) the extent to which the application will cater for the requirement of consumers for liquor and related services, with regard to the proper development to the liquor industry, [and] the tourism industry – section 5(1)(c);
- (b) the extent to which the application will contribute to alcohol related harm and ill-health – section 5(1)(b) and section 38(4)(a)); and
- (c) the extent to which the application will contribute to the facilitation and development of licensed premises 'reflecting the diversity of requirements of consumers' – section 5(2)(a). The Applicant submitted that this matter ought to be given due weight in the assessment of the application, in light of the niche offer proposed by the Applicant.

42 Whilst the Applicant is not required to demonstrate error in the delegate's decision, the Applicant submitted that the delegate's decision does reveal error, in that the delegate misunderstood the evidence, wrongfully excluded from his consideration the benefits to the industry arising from this application, considered irrelevant matters (being the other risk factors the delegate identified – such as disadvantage, density of outlet etc), and failed to properly apply the four steps set out in the *Carnegies* decision. The Applicant submitted that the delegate had erred in assessing the benefits of the grant of the licence as "marginal".

43 The Applicant argued that the application is unlikely to have a material impact on the existing rates of alcohol related harm and ill-health, and the benefits associated with it outweigh any negative aspects of the application, such that the licence ought to be granted. The Applicant submitted that the proposed premises will provide access to niche products not otherwise available in the locality within the context of a low risk 'one-stop shop'.

44 The Interveners, the COP and the CHO, submitted that the refusal of the application on the basis that the Applicant had failed to discharge its onus to satisfy the delegate that the grant of the application was in the public interest was both cogent and compelling, and submitted that it was therefore open for the Commission to affirm the delegate's decision.

45 The Interveners submitted it is open for the Commission to find that there is already a high level of pre-existing alcohol-related harm in the locality, and that, given the presence of disadvantaged and at-risk groups within the locality, as well as the risk factors associated with the Applicant's proposed manner of trade (including the resultant increased availability of packaged liquor, the association of alcohol with ordinary groceries and the risk of impulse purchasing), there is a strong likelihood that the grant of the application will bring about an increase in alcohol-related harm and ill-health in the locality.

- 46 Whilst acknowledging that increased competition and consumer choice, as well as the increased convenience of 'one-stop shopping', may be benefits that weigh in favour of the grant of the application, the Interveners submitted that it would be open to the Commission to find that the benefits associated with the application are marginal.
- 47 Further, insofar as the Applicant sought to differentiate the proposed premises from the existing twelve (12) packaged liquor retailers in the locality on the basis that they will stock products from local wineries, breweries and distilleries, the Interveners submitted that the evidence adduced by the Applicant tends to indicate that these products will not be a significant feature of the Applicant's proposed liquor store. The Interveners noted that the Applicant's own evidence established that while the Applicant would stock thirteen (13) select specialist liquor products not readily available in the locality, the Applicant also intended to stock a significant number of mainstream liquor products.
- 48 The Interveners submitted that when the likely increase in alcohol-related harm or ill-health is weighed against the factors in favour of the application (the fourth step in the *Carnegie* test), it would be open for the Commission to conclude that the Applicant has not discharged their onus of establishing the grant of the application is in the public interest.

Consideration

- 49 As noted earlier, the Applicant submitted that the relevant matters for consideration in determining whether the present application is in the public interest are the following:
- (a) the extent to which the application will cater for the requirement of consumers for liquor and related services, with regard to the proper development to the liquor industry, [and] the tourism industry – section 5(1)(c);
 - (b) the extent to which the application will contribute to alcohol related harm and ill-health – section 5(1)(b) and section 38(4)(a)); and
 - (c) the extent to which the application will contribute to the facilitation and development of licensed premises 'reflecting the diversity of requirements of consumers' – section 5(2)(a).
- 50 The Commission agrees that these are the relevant matters for consideration, and the following discussion addresses each of these matters.

Sections 5(1)(c) and 5(2)(a) matters

- 51 Having regard to sections 5(1)(c) and 5(2)(a) of the Act, the primary benefits of the Licence Application appear to be:
- (a) the convenience of one transaction liquor and grocery shopping; and
 - (b) increased competition and consumer choice and the facilitation of the development of the liquor industry, through the offering of a specialised range of products that are not necessarily readily available elsewhere.

- 52 The matters in section 5(1)(c) and section 5(2)(a) overlap significantly in the circumstances of the present Licence Application. The Applicant has emphasised the fact that it is intended that the premises will offer a specialist range of locally made and international products, which are not available elsewhere, and that the sale of these items will facilitate the development of the liquor industry, as well as catering for the requirements of consumers.
- 53 Further, the Applicant argues that the products that would be offered will complement the grocery items provided through its supermarket business, and will allow customers the convenience of one-stop shopping. To evidence the benefits to consumers, the Applicant appointed Perth Market Research to conduct an ‘intercept survey’ of customers at the IGA supermarket in December 2018 (Public Interest Assessment (“PIA”) [2.9] and [17.1]). The intercept survey indicates the majority of the fifty-one (51) persons interviewed (41 of the 51 interviewed (80%)) considered that the ability to purchase liquor at the store would be convenient. Comments in support of the convenience to consumers included four specific references to the benefits of one-stop shopping, and comments such as “10/10” and “*All my shopping needs in one place!*” (see PIA pages 95, 11 and 159). Three (3) respondents were less enthusiastic, describing the level of convenience as “*a bit*” (PIA page 151), “*slightly convenient*” (PIA page 187) and “*semi-important*” (PIA page 239). Seven (7) respondents (or 14%) did not see any benefits to them in terms of convenience (PIA pages 107, 259, 155, 175, 211, 195 and 255).
- 54 Given the generally positive response in the intercept survey, the Commission is prepared to accept that the grant of the Licence Application would provide benefits to consumers of liquor through the convenience of one transaction liquor and grocery shopping.
- 55 The Applicant also contends that the benefits that would flow from the grant of the Licence Application include benefits directed to the ‘proper development of the liquor industry’ (Applicant’s submissions at [43]). The Applicant has provided letters of support from various specialist and niche producers, and argues that the grant of a licence in this case would facilitate the proper development of the liquor industry via the Applicant’s intention to stock products from small-scale, boutique and specialist producers that currently find it difficult to get their products stocked and sold. In relation to these benefits, the Applicant has challenged the finding of the delegate that he was not permitted to have regard to these letters of support, because “*much of that support was based on the fact that the grant of the application may benefit those other businesses, which are essentially Economic Benefit considerations*” (delegate’s decision at [62]).
- 56 The Commission agrees with the Applicant’s submission that the delegate has erred in this regard and in his interpretation of McGrath J’s decision in *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd* [2019] WASC 114. In that case, His Honour was concerned with economic benefits that were not benefits directly related to the development of the liquor industry. In that case, the claimed benefits were to the City of Rockingham and the local community (through employment opportunities and investments), an increase of vitality in the precinct and the extent to which the granting of the application may contribute to the further development of the commercial precinct. Those benefits can properly be described as “macro-economic” benefits, that are not associated with the development of the liquor industry. In the present case, the benefits advanced by the Applicant are benefits directly associated with the proper development of the liquor industry and in the circumstances the evidence is admissible and relevant.

- 57 The Applicant has provided letters of support from Geographe Distillery, Fermoy Estate, the Western Australian Brewers Association, Otherside Brewing Co, Billabong Brewing, The Beer Farm, Innate Brewers Pty Ltd, Eagle Bay Brewing Co, Below & Above Wines, LS Merchants, Wilson Brewing Co, Mind Spirits & Co, Rocky Ridge Brewing Company, and Nail Brewing. These letters generally speak of the difficulty faced by small producers in having their products stocked, the critical importance of being able to stock their products with independent retailers, and the benefits the current Licence Application would have in terms of providing a venue for the sale of their products. In the Commission's view, those are all matters that are relevant to the development of the liquor industry in Western Australia.
- 58 The letters of support are consistent with the Applicant's stated intention that, if the Licence Application is granted, the premises will provide "*mainstream products*" as well as a range of products from local microbreweries, boutique wineries and local spirit distillers that are not readily available at other group owned liquor stores in the locality, as well as gluten free, organic and international products (see PIA at [7.5], and Attachments 6 and 7).
- 59 The following licensed premises were identified by the Applicant in its PIA as falling within suburbs that fall, either wholly or in part, within the locality of the premises the subject of the Licence Application (see PIA at [2.14] and [4.6]):
- (a) Liquorland, South Fremantle;
 - (b) Dan Murphy's, South Fremantle;
 - (c) BWS, Beaconsfield;
 - (d) Hamilton Tavern, Hamilton Hill;
 - (e) Liquorland, Hamilton Hill;
 - (f) Cellarbrations, Hamilton Hill;
 - (g) Liquorland, Fremantle;
 - (h) Liquor Barons, Fremantle;
 - (i) Cellarbrations, Fremantle;
 - (j) Newport Hotel, Fremantle;
 - (k) Sail & Anchor Tavern/BWS, Fremantle; and
 - (l) The Freo Doctor Liquor Store, Fremantle.
- 60 In December 2018, the Applicant appointed Perth Market Research to undertake a mystery shopper exercise at the twelve (12) licensed premises identified in the preceding paragraph (PIA at [4.7]). The mystery shopper exercise involved the shopper attempting to purchase thirteen (13) specified liquor products at each of the licensed premises, the thirteen (13) specified liquor products being products the Applicant intends to stock (based on their customers' demand) which the Applicant says are not generally available in other packaged liquor outlets in the locality (PIA at [5.4]). Those thirteen (13) products are:
- (a) Otherside Harvest Red Ale;
 - (b) Rocky Ridge Ace Pale Ale;
 - (c) Billabong Gluten Free Ginger Beer;

- (d) Settlers Ridge Blend 51 (Organic);
- (e) Settlers Ridge Sauvignon Blanc (Organic);
- (f) Fermoy State Semillon Sauvignon Blanc;
- (g) Fermoy Estate Cabernet Merlot;
- (h) Reyneke Shiraz Cabernet (Organic);
- (i) Bullwhether Single Malt Whiskey Bourbon Cask or Port Cask;
- (j) Tattarang Springs Distillers Cut Gin;
- (k) Six Dogs Blue Gin;
- (l) Canefire Dark Rum; and
- (m) Gelas Armagnac France.

- 61 The mystery shopper exercise revealed that five (5) of the thirteen (13) products were stocked at other liquor outlets in the locality, but that seven (7) of the outlets did not carry any of the selected liquor products (PIA at [5.6]-[5.7]). The conclusion reached in the PIA was that the thirteen (13) products were not readily available in other packaged liquor outlets in the locality, and in fact most local packaged liquor outlets have none of the products on their shelves (PIA at [5.21]).
- 62 The Commission accepts that the mystery shopper exercise demonstrates a gap in the locality in relation to eight (8) of the thirteen (13) items the Applicant intends to sell if the Licence Application is granted. The Commission also accepts that the stocking of liquor products from small scale producers would have a benefit to the development of the liquor industry. However, the level of that benefit would depend to some extent on the level of demand in the locality for the thirteen (13) identified products.
- 63 In order to demonstrate (amongst other things) that there is a demand for these products, the Applicant relies on the 'intercept survey' of customers (PIA [2.9] and [17.1]). The Commission notes that, of the fifty-one (51) customers who completed surveys in relation to this matter (Attachment 17 to the PIA), 16 (or 31%) did not indicate any intention to purchase any of the thirteen products. The survey therefore only provides some support for the assertion that there is a demand for these products in the locality.
- 64 Having regard to all of the circumstances before it, the Commission finds that the benefits of the Licence Application are the convenience to customers, increased competition and consumer choice, and the facilitation of the development of the liquor industry, through the offering of a specialised range of products that are not necessarily readily available elsewhere.

Sections 5(1)(b) and 38(4)(a) matters

- 65 In determining whether granting of an application is in the public interest, the Commission needs to consider the existing level of harm or ill-health due to the use of liquor in the locality in which the premises is to operate. The term 'locality' is not defined in the Act. In the Director's *Public Interest Assessment Policy*, the term 'locality' relevant to South Fremantle means as an area of three kilometres surrounding the premises.

- 66 The following suburbs were identified by the Applicant in its PIA as falling, either wholly or in part, within the locality of the premises the subject of the Licence Application (see PIA at [2.14]):
- (a) South Fremantle;
 - (b) Beaconsfield;
 - (c) Hamilton Hill;
 - (d) White Gum Valley;
 - (e) Fremantle; and
 - (f) North Coogee.
- 67 Although these six suburbs fall within the three-kilometre radius of the premises, the PIA noted that four of the suburbs have only small portions within the radius, and were therefore excluded from the demographic study (PIA at [2.15]). The demographic study focussed instead on the suburbs of South Fremantle and Beaconsfield (PIA at [2.16]).
- 68 The demographic study (limited to South Fremantle and Beaconsfield) was conducted by reference to the 2016 Census data prepared by the Australian Bureau of Statistics (PIA at [3.11]). Based on that data, the PIA identified that the locality was not in a low socio-economic area, but instead the socio-economic environment was strong and a population that appears to be relatively affluent and stable (PIA at [3.18.6]), with 49.8% of persons employed in professional occupations and as managers (PIA at [3.18.1]). The median age in the locality was 43, which is higher than the Western Australian figure of 36 (PIA at [3.21.1]), with a higher than average number of people in the locality owning their own homes (PIA at [3.21.3]) with average mortgage repayments at less than 30% of their household income, showing the locality has low figures for mortgage stress (PIA at [3.18.4]).
- 69 The data also revealed that priority groups such as Aboriginal people, children and young people, migrant groups from non-English speaking countries and mining communities or communities with a high number of itinerant workers were under-represented in the locality (PIA at [3.14] to [3.17] and [3.19]). The conclusion reached in relation to the demographic study was that the data points to a stable and mature locality with a below average representation of all priority groups considered in the study (PIA at [3.22]).
- 70 The delegate concluded that the demographic study of the locality should have included the other suburbs falling within the three-kilometre radius of the proposed premises (at [70]). The Commission agrees. As noted earlier, the Director's *Public Interest Assessment Policy* recommends that the locality in relation to a licence application include suburbs within the three-kilometre radius. The reasons given by the Applicant for excluding the suburbs other than South Fremantle and Beaconsfield are not persuasive, particularly when regard is had to the declared residences of the respondents to the Applicant's survey of customers. As the delegate observed, 51% of the respondents to the survey resided in suburbs other than South Fremantle and Beaconsfield (at [69]). In particular, 21% of respondents stated they resided in Fremantle, and 4% stated they resided in Hamilton Hill.
- 71 The fact that 4% of respondents to the survey stated they resided in Hamilton Hill tends to undermine the submission made by the Applicant that Hamilton Hill should be excluded from the locality for the purposes of the Licence Application. It was submitted by the Applicant that

there is unlikely to be a material impact on residents of Hamilton Hill because of the limited road access to the premises from Hamilton Hill (primary submissions at [71]-[75]). Even with the geographical issues raised by the Applicant, 4% of the respondents to the survey were from Hamilton Hill. In all the circumstances, the Commission finds that regard should be had to Hamilton Hill when assessing whether the Licence Application is in the public interest.

72 Further, the Applicant contends that Fremantle should be excluded from the locality, as its figures are affected by the fact that Fremantle is one of the metropolitan area's premier entertainment districts (primary submissions at [83]). It is submitted that the proposed premises will be a small, suburban supermarket-based liquor store some considerable distance from that entertainment district and is most unlikely to be accessed by those heading to Fremantle for a night out (primary submissions at [84]). Whilst there is merit in the Applicant's submission about the impact of the entertainment district, in the Commission's view it is not appropriate to exclude Fremantle from the locality, given its close proximity to South Fremantle. This is particularly so given that 21% of respondents to the Applicant's intercept survey stated they resided in Fremantle.

73 The CHO provided some statistical data as to the level of socio-economic disadvantage in suburbs falling within the locality of the premises, but which were excluded from the Applicant's demographic study (see CHO's Intervention, section [2.2]). Those statistics indicate that Hamilton Hill was ranked (in the 2016 Socio-Economic Index for Areas data released by the Australian Bureau of Statistics) as being within the second highest level of disadvantage in the State. Further, the CHO points to the fact that as at the time of the 2016 Census, two of the eight suburbs falling in the locality reported unemployment rates that were above the State rate (CHO's Intervention at [2.2.2]). Hamilton Hill's unemployment rate was 9.7%, with a median weekly income of \$608 (CHO's Intervention at Table 2, [2.2.2]).

74 Having regard to the further statistical information provided by the CHO, the Commission accepts the Interveners' submission that, whilst some parts of the locality can be properly described as "affluent" or "stable", other parts of the locality are not capable of being described in such terms, including Hamilton Hill. The Commission further accepts the submission of the Intervener that the vulnerability and risk factors of those experiencing disadvantage are not negated by the presence of affluence in other areas of the locality.

75 In all the circumstances, the Commission can give little weight to the demographic study provided by the Applicant in assessing whether the grant of the licence is in the public interest.

Existing level of harm and ill-health in the locality

76 The Interveners submit that there is a high level of pre-existing alcohol-related harm in the locality. The Applicant does not dispute that there is a high level of pre-existing alcohol-related harm in Hamilton Hill (primary submissions at [71]) and Fremantle (primary submissions at [82]).

77 In particular, the COP has provided crime data from 2018 as to the levels of alcohol-related offending in Fremantle and Hamilton Hill, which (with the exception of alcohol-related domestic assaults in Fremantle) are significantly higher than the State and metropolitan averages (COP's Intervention at 5 and [29]-[30]). The crime data shows that Hamilton Hill had a significantly higher than average recorded domestic assault rate where alcohol was a contributing factor (COP's intervention at [29]-[30]).

78 The crime data (IMS data) provided by the COP in the COP's intervention (page 5) covers domestic assaults, non-domestic assaults and threatening behaviour offences in Beaconsfield, Fremantle, South Fremantle, White Gum Valley and Hamilton Hill, as well as providing crime rates for the metropolitan area and the State. These crime statistics cover the period 2016 to 2018, and relate to incidents involving alcohol and where alcohol was not a contributing factor. In relation to crimes where alcohol was a contributing factor, the statistics show that:

- (a) the crime rates for all offences in Hamilton Hill are significantly higher than the State and metropolitan rates;
- (b) the crime rates for all offences in Fremantle are significantly higher than the State and metropolitan rates; and
- (c) the crime rates in South Fremantle increased significantly in 2017 compared to 2016 (particularly in relation to non-domestic assaults and threatening behaviour offences), and whilst non-domestic assaults and threatening behaviour offending reduced in 2018, the rate of alcohol-related domestic assaults increased by 60% compared to 2017. The rate of alcohol-related domestic assaults in 2018 was higher than the metropolitan rate.

79 The evidence before the Commission also includes the alcohol-related hospitalisation data provided by the CHO in the CHO's intervention (at section [2.1]). These statistics covered the following statistical areas: Fremantle – South, Fremantle, North Coogee and Hamilton Hill. These statistics show that:

- (a) in the period 2011-2015, the total hospitalisation rate for 'all alcohol-related conditions' for residents of Fremantle – South was significantly higher (1.20 times) than the corresponding State rate;
- (b) in the period 2011-2015, the overall chronic alcohol-related hospitalisations for residents of Fremantle - South were significantly higher than the State rate (1.39 times). In particular, there were significantly higher rates of persons suffering from alcoholic liver disease (2.42 times the State rate) and alcoholic mental health and neurological disorders (1.58 times the State rate);
- (c) in the period 2011-2015, the total hospitalisation rate for 'all alcohol-related conditions' for residents of Fremantle was significantly higher (1.79 times) than the corresponding State rate;
- (d) in the period 2011-2015, there were eight (8) specific alcohol-related conditions for residents of Fremantle that were significantly higher than the State rate, including alcoholic mental and neurological disorders (3.09 times), alcoholic liver disease (2.21 times), self-inflicted injuries (2.01 times), poisoning (1.84 times) and assaults/abuse (1.82 times);
- (e) in the period 2013-2015, the total hospitalisation rate for 'all alcohol-related conditions' for residents of Hamilton Hill was significantly higher (1.23 times) than the corresponding State rate;

- (f) in the period 2013-2015, the total hospitalisation rate for 'acute alcohol-related conditions' (which includes motor vehicle accidents, falls, self-inflicted injuries, assaults and poisonings) for residents of Hamilton Hill was significantly higher (1.18 times) than the corresponding State rate; and
- (g) in the period 2013-2015, the total hospitalisation rate for 'chronic alcohol-related conditions' (which includes alcoholic liver disease, alcoholic mental and neurological diseases, cancers and strokes) for residents of Hamilton Hill was significantly higher (1.33 times) than the corresponding State rate.

80 On the basis of the evidence before the Commission, the Commission finds that there is a high level of existing harm and ill-health in the locality of the proposed premises due to the use of liquor.

Likely degree of harm to result from the grant of the application

81 The Commission is to determine whether the grant of the Licence Application is reasonably likely to result in increased harm or ill-health to people, or any group of people, in the locality due to the use of alcohol.

82 As discussed earlier, there are twelve (12) existing licensed premises in the locality. However, the present Licence Application differs from the existing premises, as the present application relates to a liquor store within a supermarket. Therefore, in the Commission's view, the likely degree of harm to result from the grant of the application would arise from the association of alcohol with grocery items and the risk of impulse purchasing. In our view, this is not really a case where there would be any great increase in the risk of harm more generally because of an increase in the availability of packaged liquor in the locality, given the number of existing packaged liquor outlets in the locality. In saying that, the Commission accepts and recognises that there is a substantial body of evidence establishing that an increase in the availability of packaged liquor is associated with increased harm or ill-health, both to alcohol consumers and others impacted by alcohol use (see CHO's Intervention at section [4.1]).

83 In *Woolworths v Director of Liquor Licensing* [2013] WASCA 227, Buss JA stated that it is a notorious fact that in contemporary Australian life one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres. However, the present case does not involve a liquor store within a supermarket in a large suburban shopping centre. Rather, the proposed store is located in a small, stand-alone suburban IGA supermarket. In those circumstances, the convenience of one-stop shopping is unlikely to carry as much persuasive influence as it does in the context of a liquor licence in a large shopping centre.

84 The CHO refers to international experience and research, and submits that the sale of alcohol within supermarkets can lead to increased consumption and alcohol-related harm (CHO Intervention at section [3.1]). It is submitted that, unlike dedicated liquor outlets, supermarkets are generally frequented by a larger and broader proportion of the population (which the Commission notes also includes children, whether accompanied by an adult or not) because of the daily 'need' type products for sale. In those circumstances, selling liquor within supermarkets increases the potential reach of alcohol-related harm, given the regularity of exposure to the sale and promotion of alcohol that would occur in such a setting.

- 85 It is also submitted by the CHO that selling alcohol within supermarkets presents alcohol as a harmless, everyday product and sends the message that alcohol is an important, necessary part of life, rather than an intoxicating and potentially harmful drug (at [3.2]-[3.3]). The CHO notes the increased accessibility of alcohol may impact on drinking behaviours, such as frequency and volume of consumption, with harm, safety and wellbeing implications (at [3.3]). The Commission finds those submissions particularly persuasive, particularly in the context of the present Licence Application where the supermarket concerned is one directed to convenience shopping.
- 86 The CHO also refers to research that indicates that the visibility, accessibility and promotion of alcohol products can lead to impulse purchasing (CHO's Intervention at [3.4]). In the present case, the liquor products are going to be visible from areas within the supermarket, and there is an intention to have a checkout from which both grocery and liquor items can be purchased. The Commission accepts the research cited by the CHO establishes that there is a risk of increased alcohol-related ill-health and harm when alcohol is sold in a supermarket setting. In the Commission's view, that risk of harm includes the risk that consumers may choose to use their funds to purchase alcohol products rather than grocery items.
- 87 Having regard to all the evidence before it, the Commission finds that the grant of the Licence Application would reasonably result in an increase in alcohol-related ill-health and harm in the locality.

Assessment of the degree of harm to result from the grant of the application against the existing degree of harm

- 88 Having regard to all the evidence before it, the Commission finds that the grant of the Licence Application would reasonably result in an increase in the degree of alcohol-related ill-health and harm in the locality, above and beyond the existing level of harm. That increase in the level of harm arises by virtue of the different nature of the liquor offering in the present case to the stand-alone liquor stores in the locality.
- 89 The research establishes that the sale of alcohol within supermarkets can lead to increased consumption and alcohol-related harm, as well as the normalisation of alcohol, which can impact on the patterns of alcohol use and lead to an increase in alcohol-related harm and ill-health.
- 90 Further, the hospitalisation rates and crime data reveal that there is already a high level of alcohol-related harm and ill-health in the locality. In Hamilton Hill and Fremantle, in particular, the rates of alcohol-related domestic and other assaults are significantly higher than the State and metropolitan rates. It is against those statistics that the relevance of research which indicates that the harm associated with packaged liquor sales usually occur away from the licensed premises, and at a later time and place, irrespective of a licensee's ability to maintain and adhere to regulatory requirements at the point of sale, becomes particularly relevant in this case.

Is it in the public interest to grant the application?

- 91 The onus is on the Applicant to demonstrate that the grant of the application is in the public interest. The task before the Commission is to balance the objectives of the Act set out in sections 5(1) and 5(2) and determine if the Applicant has discharged that onus.

- 92 The Act does not envisage or require that the grant of an application should not result in any increase in harm or ill-health in a locality, but recognises that whilst an application might result in some harm and ill-health, the benefits to consumers and the liquor, tourism and hospitality industries, and hence the community, of granting the application may outweigh the potential for such an increase in harm and ill-health.
- 93 The Commission recognises there are a number of benefits associated with the grant of this application and must, as best it can, endeavour to balance those benefits against what the Commission views as the likely increase in harm and ill-health over and above that already occurring in the locality and community, due to the use of liquor.
- 94 The evidence before the Commission supports a finding that the proposed liquor store will in some respects cater for the requirements of consumers and contribute to the proper development of the liquor industry. The premises would provide one-stop shopping for customers, provide choice and competition, and contribute to the proper development of the liquor industry by providing for sale a range of boutique, local and international products, over half of which are not readily available in the locality.
- 95 In *Liquorland (Australia) Pty Ltd v Commissioner of Police* (LC 18/2015), the Commission relevantly commented:
- “A measured approach requires a careful consideration of the broader public interest and simply because a service is convenient or more convenient than that currently available does not itself satisfy the primary and secondary objects or the public interest as specified in the Act. A liquor outlet...beside every supermarket to satisfy the convenience of some members of the public...would not be...in accordance with the provisions and intent of the Act.”*
- 96 In this case, the provision of the one-stop shopping experience for customers is at the very heart of the increase in the risk of alcohol-related ill-health and harm in this case. Therefore, in balancing the relevant factors, it is important to consider whether there is a sufficient demand for the provision of this one-stop shopping experience and/or a demand for the range of boutique, local and international products that are not readily available in the locality.
- 97 The Commission has some concerns about whether the evidence presented by the Applicant persuasively establishes that there is a demand for the boutique products that the Applicant intends to sell if the licence were granted. As noted earlier in this decision, the Applicant commissioned an ‘intercept survey’ of customers at the premises in December 2018 (PIA [2.9] and [17.1]). Of the fifty-one (51) customers who completed surveys in relation to this matter (Attachment 17 to the PIA), 31% did not indicate any intention to purchase any of the thirteen products the Applicant claims are not readily available elsewhere in the locality. The Commission therefore finds that the survey only provides limited support for the assertion that there is a demand for these identified products in the locality.
- 98 Similarly, in relation to the mystery shopper exercise, the Commission noted earlier that the exercise revealed that five (5) of the thirteen (13) products were stocked at other liquor outlets in the locality, but that seven (7) of the outlets did not carry any of the selected liquor products (PIA at [5.6]-[5.7]). The Commission accepts that the mystery shopper exercise demonstrates a gap in the locality in relation to *some* of the thirteen (13) items the Applicant intends to sell if the Licence Application is granted. However, the exercise might equally indicate an absence of demand for the relevant products in the locality.

- 99 It is also important to acknowledge that the thirteen (13) items the Applicant intends to sell if the Licence Application is granted are not the entirety of the liquor that would be stocked at the premises. Rather the thirteen (13) products would be sold alongside a large range of other liquor items, including mainstream products, craft beers, wines and spirits that would be readily available at other liquor outlets (see Attachment 6 (draft wine stock list) and Attachment 7 (sample planogram for beers, ciders and spirits) to the PIA). The thirteen items would only represent a small portion of the liquor offered for sale if the application were granted. In all the circumstances, the mystery shopper exercise is of marginal assistance in the assessment of the public interest in this case.
- 100 When the Commission weighs and balances all of the competing factors, the Commission is not satisfied that the Applicant has discharged its onus of establishing that the grant of the Licence Application is in the public interest.
- 101 The Commission finds that, whilst there are benefits associated with the Licence Application, those benefits are marginal and insufficient to outweigh the public interest in minimising the risk of increased alcohol-related ill-health and harm if the application were granted.
- 102 The Commission therefore affirms the delegate's decision.



SARAH OLIVER
PRESIDING MEMBER