

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Planbig Investments Pty Ltd
(represented by Mr Mario Sequeira of Hospitality Total Services (Aus) Pty Ltd)

Intervener: Director of Liquor Licensing
(represented by Mr Thomas Ledger of the State Solicitor's Office)

Commission: Mr Nicholas van Hattem (Presiding Member)
Ms Elanor Rowe-Harper (Member)
Dr Kim Hames (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a liquor store licence.

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

Date of lodgement of Application: 11 August 2021

Date of Hearing: 16 December 2021

Date of Determination: 16 May 2022

Determination:

The Decision of the Delegate of the Director is quashed and the Application for a Liquor Licence is granted subject to the following conditions:

- i. The Applicant will comply with standard tasting conditions.
- ii. No wine shall be sold for less than \$10 a bottle.
- iii. The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is WA craft beer.

- iv. The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is Australian craft beer.
- v. The Applicant will ensure that at least 40% of the wine stocked at the premises is WA made.
- vi. The Applicant will ensure that at least 40% of the wine stocked at the premises is Australian made.
- vii. The Applicant will ensure that at least 40% of spirits stocked at the store are WA/Australian artisan spirits.
- viii. The Applicant will ensure that non-alcoholic wine, beer and spirit options are available from the store at all times.

Authorities referred to in Determination:

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010)]
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Laveson Pty Ltd v Smith & Anor* [2003] WASCA 286
- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366
- *Lolba Holdings Pty Ltd v Director of Liquor Licensing* (LC 01/2021)
- *O'Sullivan v Farrer* [1989] HCA 61
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

BACKGROUND

- 1 This matter concerns an application ("**Application**") by Planbig Investments Pty Ltd ("**the Applicant**") for the conditional grant of a liquor store licence ("**LSL**") pursuant to sections 47 and 62 of the *Liquor Control Act 1988* (WA) ("**the Act**") for premises to be known as "Iluka Plaza Cellars" ("**the Premises**") situated at Shop 5, Iluka Plaza Shopping Centre ("**the Centre**"), 98 O'Mara Boulevard, Iluka.
- 2 The Application is for the Premises to form part of the Iluka Plaza Shopping Centre (a new Neighbourhood Shopping Centre) with a proposed floor area of approximately 117sqm, including a patron browse area and a cool room. The Premises would be a boutique liquor store with products including wine, beer, cider, pre-mixed, spirits, and liqueurs, and would be situated near the existing Tucker Fresh IGA Supermarket.
- 3 On 11 February 2021, the Applicant lodged the Application for a LSL for the Premises.
- 4 The Applicant complied with the statutory requirements prescribed by the Act and lodged documentation in support of the Application including Public Interest Assessment ("**PIA**") submissions. The Application was advertised in accordance with instructions issued by the licensing authority.
- 5 A Notice of Objection was lodged by Gina Buckle and Paul Buckle and was subsequently withdrawn on 20 May 2021.
- 6 Neither the Chief Health Officer or the WA Police Liquor Enforcement Unit lodged a Notice of Intervention or Objection.
- 7 On 27 May 2021 a delegate of the Director of Liquor Licensing refused the Application ("**the Decision**"). The delegate's reasons for deciding to refuse the Application appear in Written Reasons requested under section 18AA of the Act dated 15 July 2021 and a Notice of Decision dated 27 May 2021.
- 8 In summary, the delegate refused the Application on the grounds that the Applicant failed to discharge its onus under section 36B(4) of the Act on the submissions and evidence presented, and declined to make any findings on the matters set out in section 38(2) of the Act (that granting the Application was in the public interest).
- 9 On 22 October 2021, an intervention was lodged by the Director of Liquor Licensing ("**the Intervener**") under section 69(11) of the Act concerning whether the Commission should affirm, vary, or quash the Decision of the delegate dated 27 May 2021. The Intervener also made representations as to the evidence that was before the delegate and on the proper interpretation and application of section 36B(4).
- 10 The Applicant seeks review of the delegate's Decision pursuant to section 25(1) of the Act.
- 11 The Commission heard this matter on 16 December 2021.

SUBMISSIONS

The Applicant's Submissions

- 12 The Applicant lodged an application seeking the conditional grant of a liquor store licence for an independently owned and operated boutique liquor store, with a proposed licensed area of approximately 117sqm, including a cool room and patron browsing area. The liquor store was proposed to be known as "Iluka Plaza Cellars", and located at Shop 5, Iluka Plaza Shopping Centre, 90 O'Mara Boulevard, Iluka.
- 13 The Applicant initially provided:
 - a Initial Application lodged 11 February 2021 together with Public Interest Submissions and supporting documentation;
 - b Applicant's Further Submissions dated 7 May 2021; and
 - c Applicant's Closing Submissions dated 14 May 2021.
- 14 On 27 May 2021 a delegate of the Director of Liquor Licensing refused the Application.
- 15 The Applicant subsequently provided:
 - a Application for Review dated 11 August 2021;
 - b Applicant's Primary Submissions dated 15 November 2021; and
 - c Applicant's Responsive Submissions dated 1 December 2021.

Initial Application

- 16 The Applicant applied for the conditional grant of a LSL for the premises to be known as Iluka Plaza Cellars located within the Iluka Plaza Shopping Centre. The Centre is the site of a supermarket and a range of other retail amenity outlets.
- 17 The Iluka Plaza Shopping Centre is a Neighbourhood Shopping Centre developed in response to the increasing population of the locality and designed to provide services for the local community that are easily accessible and focus on providing the main daily to weekly household shopping and community needs.
- 18 The Applicant proposed that the Premises will supply shoppers with one-stop shopping convenience with consumers able to purchase liquor in conjunction with groceries at the adjacent IGA as well as other household shopping needs within the Centre.
- 19 The Applicant proposed a stock list. The proposed product range included:
 - a Local and international craft beer.
 - b Locally made WA products such as honey mead, honey wine, and honey port that is not available in other liquor stores within the locality.
 - c Cleanskin wine with a focus on WA products.
 - d Liquor products including small batch WA liquor products.
 - e Dietary specific alcohol (gluten and other allergen free alcohol products, as well as organic and preservative free liquor products).
 - f Low and mid-strength alcohol products and non-alcoholic beer.

- 20 The Premises is situated in a locality that has had steady population growth over a period of 10 years and requires new amenity in order to cater to consumer requirements.

Section 38(4) of the Act – Public Interest Condition

- 21 The Applicant submits that the grant of the Application is in the public interest as per section 38 for the following reasons:
- a Provides a convenient packaged liquor offering at the Iluka Plaza Shopping Centre.
 - b Operate as a small-sized liquor store to cater to requirements of the local community.
 - c Diverse range of products with no heavy discounting and/or no offering of cheap liquor products.
 - d Responsibly separate the proposed liquor store from the supermarket.
 - e Provide products that cater to the growing number of allergen and dietary sensitive consumers.
 - f Stock a range of low, mid, and zero alcohol beer, wine, and spirits to cater to health, medical, religious, or personal choices of consumers.
 - g Support and promote small local WA liquor producers.
 - h Offer personalised service through product order forms to allow for consumer requests.
 - i Implementation and enforcement of a Harm Minimisation Plan.
 - j Continue to engage with the Iluka Homeowners Association to ensure requirements of consumers are being met or exceed.
- 22 The Applicant also submits that the Licensee will join and actively participate in the Joondalup Liquor Accord and implement any relevant resolutions to reduce risk of harm and support the local liquor industry.
- 23 The Applicant submits that the Iluka Plaza Shopping Centre is a 'Neighbourhood Centre' based on the WA Planning Commission's State Planning Policy 4.2 "*Activity Centres for Perth and Peel*" list of characteristics in Table 3:
- a Will cater to 2000-15,000 persons (~ 1 km radius).
 - b Has a Nett Lettable Area (NLA) of more than 1,500sqm.
 - c Retail types including "*Supermarket/s Personal services Convenience shops*".
 - d Neighbourhood Centres provide for: "*daily and weekly household shopping needs, community facilities and a small range of other convenience services.*"
- 24 All existing liquor stores in the locality are situated on the west side of Marmion Avenue. The intersection of Shenton Avenue and Marmion Avenue is a major four lane arterial road that experiences significant congestion during peak periods.
- 25 The Applicant submits having to cross Marmion Avenue is a substantial inconvenience to consumers within the Iluka locality. The Applicant provides evidence through letters in support, one of which states that "*if you want a bottle of wine with dinner, you need to get in the car and drive anywhere between 6 – 10 minutes (round trip). It is necessary to cross the busy, four-lane Marmion Avenue, and can take much longer in peak traffic hours between*

3.00pm and 6.30pm.”, excerpt from letter of support from Mr Anthony Morabito, member of the Iluka Homeowners Association (PIA Submissions, Attachment 2).

Section 36B(4) of the Act – Consumer Requirements Condition

- 26 The Premises is situated in a rapidly growing residential area with single house developments surrounding the property. There is a commercial zoned property near the Premises that is the subject site for a planned luxury resort style retirement complex known as ‘*Odyssey Residences at Beaumaris Beach*’.
- 27 The Applicant submits that while there are existing liquor stores in the locality, the stores are located a significant distance from the Premises and do not cater to the requirements of consumers without causing significant inconvenience.
- 28 In addition, the distance of existing outlets is not the most relevant factor when deciding whether to grant new packaged liquor licences, as this approach fails to consider requirements for packaged liquor as population and residential density increases.
- 29 The Applicant submits that there has been steady population growth over a period of 10 years and the locality requires new amenity to cater to the requirements and needs of consumers.
- 30 The Applicant’s PIA Submissions quotes results from a Consumer Questionnaire, in which households were asked, “*When you consider your packaged liquor requirements, what is important to you? (Please tick all applicable)*”. The following were provided in response:
- 76.13% selected ‘Competitive Pricing’.
 - 61.94% selected ‘Located close to my home or place of work’.
 - 51.61% selected ‘Range of Products’.
 - 29.68% selected ‘Availability of WA made liquor (to support local jobs)’.

Existing packaged liquor premises within the Locality

- 31 The Applicant submits that there are no existing packaged liquor premises within Iluka or within 1.5 kms (direct) or 2 kms (by car) of the proposed Premises.
- 32 The Applicant identifies the relevant locality as a 3 km radius from Iluka Plaza Shopping Centre, in accordance with the Director’s *Public Interest Assessment Policy*.
- 33 The existing packaged liquor premises within the Iluka locality are:
- a **Liquorland Beaumaris** (licensee – Liquorland (Australia) Pty Ltd) under a liquor store licence, situated some 2.22km away from the proposed premises by straight line and 3km away by car (round trip from Iluka Plaza to Liquorland Beaumaris and back is approximately 10 minutes).
 - a. Medium sized store (approx. 120-130sqm).
 - b. Located in Ocean Reef (home to 7,840 persons with 5,738 being over 20 years of age – 2016 Census Night).
 - c. Situated at the Beaumaris City Shopping Centre.
 - d. Specialty products available as per site visit include:

- A. 1 gluten free beer option, 6 vegan wine options, 2-3 organic wines, 1 preservative free wine, 2 low-alcohol wines, limited range of craft beer from small producers, limited craft spirits.
 - e. Specialty products not available as per site visit include:
 - A. No biodynamic wine, honey mead, honey wine, low-intervention wine.
 - f. Products from WA producers not stocked at the site that will be available at the propose premises:
 - A. Black Brewing Co craft beer range (WA).
 - B. Fairbrossen Wines (WA).
 - C. Harmans Spirits (WA).
 - D. The Colony Concept (WA).
 - E. Willoughby Park Wines (WA).
 - F. L.A.S. Vino wines (WA).
 - g. Site rarely conducts tasting/education events as per conversation with staff member.
 - h. No option to request products.
- b. **Kinross Liquor** (licensee – Kinross Central Liquor Store Pty Ltd) under a liquor store licence, situated approximately 3.3 km away from the proposed premises by car (round trip from Iluka Plaza to Kinross Liquor and back is approximately 10 minutes).
 - a. Medium sized store (approx. 150sqm).
 - i. Located in Kinross (home to 6,890 persons with 4,762 being over 20 years of age – 2016 Census Night).
 - b. Situated at the Kinross Central Shopping Centre.
 - c. Specialty products available as per site visit include:
 - A. 2 gluten free beer options, 2 vegan wine option, 2-3 organic wines, 2 biodynamic wines, 5 preservative free wine, 1 low-alcohol wine, limited craft spirits, limited craft beer.
 - d. Specialty products not available as per site visit include:
 - A. The Applicant did not submit any information.
 - e. Products from WA producers not stocked at the site that will be available at the proposed premises:
 - A. The Applicant did not submit any information.
 - f. No option to request products.
- c. **Currambine Bar & Bistro** (licensee – Resolve Nominees Pty Ltd) under a tavern licence, situated approximately 2.4 km away from the proposed premises by car (round trip from Iluka Plaza to Currambine Bar & Bistro and back is approximately 10 minutes).
 - a. Medium sized store (approx. 150sqm).
 - b. Located in Currambine.

- c. Situated in the Currambine retail and commercial precinct, on the eastern side of Marmion Avenue.
 - d. Condition 5 of the liquor licence prohibits the store from establishing a browse area for packaged liquor or advertising availability of packaged liquor.
 - ii The Applicant submits that as such the premises cannot be considered to provide a reasonable alternative to the proposed Iluka Plaza Cellars.
- d **Dan Murphy's Currambine** (licensee – Endeavour Group Limited) under a liquor store licence, situated approximately 2.4 km away from the proposed premises by car (round trip from Iluka Plaza to Dan Murphy's Currambine and back is approximately 10 minutes).
- i Large store.
 - ii Located in Currambine (home to 6,912 persons with 4,931 being over 20 years of age – 2016 Census Night).
 - iii Not situated adjacent to any supermarket amenity, the closest supermarket being:
 - A. Farmer Jacks – 150 m away across Ocean Gate Parade.
 - B. Woolworths Supermarket – located 200 m away across Ocean Gate Parade.
 - iv Dan Murphy's stocks a significant range of 'own brand' products:
 - A. The Applicant submits this potentially impacts the local WA wine industry and as a result directly and indirectly affects employment and tourism opportunities that small local WA producers bring to regional areas.
- e **ALDI Currambine** (licensee – ALDI Foods Pty Limited) under a liquor store licence, situated approximately 2.8 km away from the proposed premises by car (round trip from Iluka Plaza to ALDI Currambine and back is approximately 10 minutes).
- i Situated in the Currambine Retail and Commercial precinct, on the eastern side of Marmion Avenue.
 - ii Almost all of the product range is 'own brand' products.
 - iii ALDI does not provide:
 - A. options for many products (i.e., Champagne), single option only.
 - B. refrigerated products.
 - iv No option to request products.
- 34 The Applicant submits the following in regard to the existing packaged liquor premises in the locality:
- a ALDI Currambine and Currambine Bar & Bistro cannot be considered as genuine alternatives to a full browse liquor store, with chilled products, and options for all selections.
 - b Dan Murphy's Currambine is a large destination liquor store that is not suitable for the consumers shopping at Iluka Plaza Shopping Centre.
 - c Kinross Liquor is at least a 10 minute round trip from the Iluka Plaza Shopping Centre.

- d The Iluka Structure Plan outlines that one of the primary purposes of the planned commercial centre (Iluka Plaza Shopping Centre) is “to provide a number of important services and increased amenity to existing and future populations” and the intent is “to create a mixed use Coastal Village located within comfortable walking distance of all residents. This Village will function as a local centre for residents...”
 - e The suburb of Iluka is not a ‘drive through’ suburb that people pass through on their way to a different destination. Residents should not be required to leave their local area to shop for packaged liquor after doing household provisioning at the Iluka Plaza Shopping Centre.
- 35 The Applicant, referencing case law, submits that return journeys of between 2 km and 8.6 km to purchase packaged liquor meant that, according to contemporary standards, other premises could not provide for the reasonable requirements of the section of the public relied upon for packaged liquor without substantial difficulty and inconvenience: *Laveson Pty Ltd v Smith & Anor* [2003] WASCA 286, referring to *Downes Family Trust v Woolworths (WA) Pty Ltd* [2001] WASCA 382.

Review Application

- 36 The Applicant submitted an Application for Review dated 11 August 2021. In this Application the Applicant submits that the Delegate:
- a applied a narrow approach in evaluating the application under section 36B(4) of the Act;
 - b failed to give weight to the various aspects of the application including the location within a greenfield site as part of the Master Plan within a new developing suburb;
 - c incorrectly assessed the consumer evidence provided; and
 - d gave no weight to the significant public interest merits associated with the application.
- 37 Information provided addressed the object of the Act, the section 36B(4) Consumer Requirement Condition, the section 38(4) Public Interest Condition, the section 33 powers of the licensing authority, and section 68 documentation requirements in applying for a Liquor Licence.

Evidence in Support of the Application

- 38 The Applicant outlines the evidence provided in support of the Application as follows:
- a Evidence of the available products at existing liquor stores in the locality, demonstrating that existing stores do not stock a large number of the proposed product range.
 - b Evidence of the flyer sent out by the Applicant, notifying residents in the locality of the application.
 - c Meeting with members of the Iluka Homeowners Association, who all expressed support for the application.
 - d Consumer Questionnaire responses, notably the result that 69% of respondents believed the proposed store would meet their consumer requirement for packaged liquor better than existing liquor stores in the locality.

- e Letters of support from small producers, local residents, and stakeholders, notably letters from small producers identifying products not currently available to purchase in the locality, and letter from local resident Federal MP Mr Ian Goodenough.
- f Evidence that the “*Structure Plan*” for the Iluka Plaza Shopping Centre planned for a small liquor store to cater for needs of the local community.
- g Evidence of the greenfield site in the growing suburb of Iluka.

Section 38(2) and (4)

- 39 The onus is on the Applicant to satisfy the Commission that granting the application is in the public interest having regard to the relevant considerations set out in the primary and secondary objects of the Act.
- 40 The Applicant submits that the Premises will improve amenity for consumers of liquor and related services within the locality in the following ways:
- a Convenient pedestrian and vehicle access and parking for residents in the locality;
 - b One-stop shopping convenience;
 - c Availability of a more diverse range of liquor products not currently available in the locality including high-quality Australian and West Australian wine and a large range of craft beer; and
 - d Professional and quality service of information to consumers about various liquor products available for sale.
- 41 The Applicant submits that the Premises will be consistent with the proper development of the liquor, tourism, and other hospitality industries in the State as it will:
- a Provide a range of products not currently available in Iluka or surrounding suburbs, for producers of WA wine and craft beer in particular;
 - b Be conveniently located in the Centre with ease of access and parking, where most local residents do regular household provisioning, that enables safe access to household products and related services;
 - c Provide work experience and opportunities for those who wish to be employed in the tourism, liquor, or hospitality industries;
 - d Provide greater diversity for requirements of consumers of packaged liquor, particularly consumers in the suburb of Iluka; and
 - e Adopt responsible attitudes and practices in the promotion, sale, supply, service and consumption of liquor, in the interests of the community, with reference to the Harm Minimisation Plan.
- 42 The Applicant submits that the amenity of the locality will be enhanced based on:
- a The amenity expectations of residents in the locality are informed by planned development within that locality, the Iluka Plaza Shopping Centre plans included the provision of a liquor store;
 - b The community will benefit from the supply of a more diverse product range which is more conveniently accessible for vehicle and pedestrian access for residents of Iluka and Burns Beach;

- c Opportunity for one-stop shopping within Iluka; and
- d More satisfying and complete shopping experience for residents in the locality through professional delivery of services and high-quality presentation of the liquor store.

Alcohol-Related Harm in Iluka

- 43 Crime rates in the locality are relatively low and not above what would be considered acceptable, evidence of this is addressed in the PIA submissions.

Impact on Amenity

- 44 The Applicant met with members of the Iluka Homeowners Association to discuss the Premises.
- 45 The Applicant undertook Community Consultation of at-risk groups in the locality and did not receive any notice of objection during the advertising period from any at-risk group.
- 46 The Applicant submits that evidence of this is addressed in section 10 of the PIA submissions.

Planning Matters

- 47 The Applicant submits that consistent with State Planning policies such as “*Liveable Neighbourhoods*”, the locality is designed to facilitate and encourage the delivery of essential community services within the community. This includes one-stop shopping considerations.
- 48 The Applicant submits that a majority of respondents to the Consumer Survey responded that having a packaged liquor outlet located close to their home or work is important to them.
- 49 In relation to this, in the original Decision (at paragraphs [24]-[25]), the Delegate said:
- a The majority of consumers (76.13% or 118 respondents) indicated that competitive pricing was most important to them when considering their packaged liquor requirements, which would explain in part why Dan Murphy’s Currambine is the most popular packaged liquor outlet in the locality. Other popular responses were an outlet located close to their home or work (51.94% or 91 respondents) and the product range (51.61% or 80 respondents).
 - b Similarly, the majority of respondents (61.29% or 95 respondents) felt that it was reasonable to drive up to three kilometres to purchase packaged liquor, with 27.10% (or 42 respondents) considering that it was reasonable to drive more than three kilometres and only 11.61% (or 18 respondents) indicating that it was only reasonable to travel up to one kilometre.

The Intervener's submissions

- 50 The Director of Liquor Licensing initially provided:
- a Intervention lodged 22 October 2021 by the Director of Liquor Licensing, pursuant to section 69(11) of the Act.
 - b Intervener’s Primary Submissions dated 15 November 2021.
 - c Intervener’s Responsive Submissions dated 1 December 2021.

- 51 The Intervener's primary involvement in this matter surrounds the proper interpretation and application of section 36B(4) of the Act, in light of *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 ("**Liquorland Decision**").
- 52 The Intervener also makes representations as to the evidence that was before the Director.
- 53 The Intervener submits that it is open for the Commission to affirm the Decision of the Delegate in relation to section 36B(4), outlined at paragraphs [15]-[34] of the Decision.
- 54 In the alternative, the Intervener submits 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.

Section 36B(4) of the Act – Consumer Requirements Condition

- 55 The *Liquorland Decision* provided clarity on the interpretation and application of section 36B(4) and is binding on the Commission.
- 56 The requirements of consumers to be considered are not confined to the demand for the packaged liquor product but include consumer requirements such as convenience, product range, service and efficiency.
- 57 The Commission must consider whether these consumer requirements "*cannot reasonably be met*" by the existing premises in the locality, having regard to the objects of the Act.
- 58 Archer J concluded in the *Liquorland Decision* that the phrase "*cannot reasonably be met*" means "*cannot sensibly or rationally be met*". Whether the local packaged liquor requirements cannot reasonably be met is to be considered, having regard to the contemporary standards and expectations for requirements of packaged liquor.
- 59 The Intervener submits that the Applicant's submission at paragraph 1.16 of the PIA Submissions is unsubstantiated. The Applicant submits that specialty products are not currently available in the locality including mead, low and zero alcohol beer (PIA Submissions, [1.16]).
- 60 In support of this submission the Applicant provided evidence at paragraphs 4.26, 4.99, 4.65, of the PIA Submissions and in the table titled "*Sample of Products Not Currently Available in the Locality*" which outlines the products the Applicant would have available and the products not currently available from existing premises in the locality.
- 61 The Intervener submits the evidence is overly simplistic and of limited utility for determining whether the onus under section 36B(4) has been discharged. The analysis of the five existing packaged liquor outlets is limited.
- 62 A complete analysis of the existing packaged liquor outlets' available products is required to determine whether the consumer requirements have been met.
- 63 The Intervener submits that in identifying the available products at existing outlets the Applicant does not evidence the consumer requirement.
- 64 There is no information regarding the brand, range, number of products, price range, sizing of bottles/packaging, or volume of alcohol stocked (Initial Application, [2.42]-[2.47]). As such

there is no indication as to whether the projected requirements of the Applicant's consumers could be met by existing stock levels available at the existing packaged liquor outlets.

- 65 The Intervener submits that the Applicant's analysis suggests that gluten free beer, vegan wine, organic wine, biodynamic wine, preservative free wine, low-alcohol wine, craft beer, and craft spirit options are offered in the locality. As such the Applicant's assertion that "*unique products not currently available in the locality*" will form part of the Applicant's product range may be misleading as there is not sufficient evidence to discern the speciality products already in existence in the locality, and whether any such products satisfy the consumer requirements in the locality.
- 66 The Intervener notes three limitations to the data in the Applicant's Consumer Questionnaire:
- a a sample size of 155 is very small;
 - b 52% of Respondents resided in Iluka; and
 - c in the absence of specific information of the products to be made available it is unclear how respondents were supposed to assess how the new liquor store would better meet their consumer requirements.
- 67 The Intervener submits that the conclusions made based on the Consumer Questionnaire answers are unsupported by the available data as:
- a only 11% of respondents selected that "*the current liquor stores within 3 km's do not meet my requirements*"; and
 - b only 7% of respondents selected that in response to Q10 that the reason was that other liquor stores "*do not have a good range of liquor products*".
- 68 The Intervener notes that the Applicant's submission in paragraph 2.55 of the PIA Submissions that "*none of the above stores located within the 3 km radius of the premises can cater for the "reasonable requirements" of consumers of packaged liquor across the 3 km locality*". The Intervener submits that the Consumer Questionnaire responses do not support the conclusions formed by the Applicant.

Evidence

- 69 The Applicant conducted a Consumer Requirement Questionnaire via a letter drop and an online survey collection tool (*PIA Submissions*, [6.2(c)]). The Applicant delivered a consumer survey notification to all households within a 3km radius of the proposed premises.
- 70 Below is a summary of the Consumer Requirement Questionnaire questions and responses (in order of most to least selected) (*PIA Submissions*, Attachment 2):

Q1. Please indicate which of the below stores in the locality you currently patronise within 3 km's of the proposed new Liquor Store.

a.	Dan Murphy's Currambine	106	(68.39%)
b.	Liquorland Beaumaris	14	(9.03%)
c.	ALDI Currambine	14	(9.03%)
d.	Kinross Liquor	8	(5.16%)
e.	I do not currently patronise any of the above packaged liquor stores	11	(7.10%)
f.	Currambine Bar & Bistro	2	(1.29%)
	Total	155	

Q2. How often do you purchase packaged liquor?

a.	Other (please specify)	48	(30.97%)
b.	Once a week	44	(28.39%)
c.	Once a fortnight	42	(27.10%)
d.	Twice per week	21	(13.55%)
	Total	155	

Q3. When you consider your packaged liquor requirements, what is important to you? (Please tick all applicable)

a.	Competitive pricing	118	(76.13%)
b.	Located close to my home or place of work	96	(61.94%)
c.	Range of products	80	(51.61%)
d.	Availability of parking in close proximity	76	(49.03%)
e.	Availability of WA made liquor (to support local jobs)	46	(29.68%)
f.	Co-located with easy access to grocery amenity	45	(29.03%)
g.	Ease of access to the shopping centre	37	(23.87%)
h.	Availability of chilled products	32	(20.65%)
i.	Ability to request favourite products and brands	32	(20.65%)
j.	Availability of specialty products (GF, organic, low-alcohol etc.)	28	(18.06%)
k.	Independent operator	15	(9.68%)
l.	Safety with other commercial amenity around	11	(7.10%)
m.	Other (please specify)	4	(2.58%)
	Total (155 respondents)	620	

Q4. How far do you think it is reasonable to drive to purchase packaged liquor?

a.	Up to 1 km	18	(11.61%)
b.	Over 3 kms	42	(27.10%)
c.	Up to 3 kms	95	(61.29%)
d.	Other (please specify)	0	(0.00%)
	Total	155	

Q5. Do you intend using the amenity at the new Iluka Plaza Shopping centre which will include a range of shops and services including supermarket, liquor store (subject to approval), office space, consultation rooms (medical/dental etc), child care centre, and food and beverage outlets.

a.	Yes – Regularly	90	(58.06%)
b.	Yes – Sometimes	50	(32.26%)
c.	No	9	(5.81%)
d.	Unsure	6	(3.87%)
	Total	155	

Q6. If you shop at the new IGA Supermarket at the Iluka Plaza Shopping Centre, would you do your packaged liquor shopping at the same time as you do your household grocery shopping?

a.	Yes – Sometimes	75	(48.39%)
b.	Yes – Regularly	47	(30.32%)

c.	No	21	(13.55%)
d.	Unsure	12	(7.74%)
	Total	155	

Q7. Should you choose to do your shopping at the new IGA Iluka, or any other amenity at the new Iluka Plaza Shopping Centre, how likely is it that you would also shop for your packaged liquor requirements at the new liquor store?

a.	Very likely	61	(39.35%)
b.	Likely	45	(29.03%)
c.	Somewhat likely	30	(19.35%)
d.	Unlikely	17	(10.97%)
e.	Other (please specify)	2	(1.29%)
	Total	155	

Q8. Do you believe that a new, quality, independent liquor store, operating in the new Iluka Plaza Shopping Centre (subject to approval) would meet your consumer requirement for packaged liquor in Iluka better than the current stores in the locality?

a.	Yes	108	(69.68%)
b.	No	33	(21.29%)
c.	Unsure	11	(7.10%)
d.	Unsure	3	(1.94%)
	Total	155	

Q9 If you answered YES to question 8 above, please identify why you would shop at the proposed new liquor store (Please tick all applicable).

a.	Want to patronise a liquor store close to my home.	61	(49.59%)
b.	Like to be able to walk to my local supermarket/liquor store.	58	(47.15%)
c.	Convenience of doing my grocery and liquor shopping in the safe, new shopping centre.	54	(43.90%)
d.	Easier for me to access the new supermarket and liquor store than existing options.	49	(39.84%)
e.	Liquor store in a new shopping centre with ample parking would make me feel safer.	19	(15.45%)
f.	The current liquor stores within 3km's do not meet my requirements.	14	(11.38%)
g.	Prefer a liquor store that is no co-located with a Tavern/Pub.	13	(10.57%)
h.	Other (please specify):	11	(8.94%)
	Total (123 respondents)	279	

Q10 If the existing packaged liquor premises do not meet your requirements, please identify WHY they do not.

a.	Have to travel across major roads to access from my home	41	(26.45%)
b.	Not conveniently located in Iluka Plaza Shopping Centre.	41	(26.45%)
c.	Other (please specify):	33	(21.29%)
d.	Not co-located with a supermarket.	23	(14.84%)

e.	The national chains like Liquorland and Aldi mainly promote their own brands.	23	(14.84%)
f.	Cannot request my favourite products and brands	19	(12.26%)
g.	Difficult to access with limited parking.	14	(9.03%)
h.	Do not have a good range of liquor products	11	(7.10%)
i.	Difficult to access on my journey to or from my job.	10	(6.45%)
j.	Mainly caters to Drive-Thru customers and I like to browse.	8	(5.16%)
k.	Cannot pre-order online.	3	(1.94%)
l.	Staff have limited product knowledge and time to assist me.	3	(1.94%)
m.	Do not have chilled liquor products.	1	(0.65%)
	Total (155 respondents)	230	

Q11. When weighing and balancing the positive and negative aspects of granting a liquor licence, the WA licensing authority must consider the harm or ill-health that may be caused if the application is granted in the public interest. Do you believe that the inclusion of a small 117sqm liquor store, operated by a WA based, experienced and reputable Licensee would cause an undue increase in harm or ill-health or negatively impact the Iluka locality?

a.	No	129	(83.23%)
b.	Yes	21	(13.54%)
c.	Other	5	(3.23%)
	Total Answered	155	

Q12. Please provide any other comments in regards to the proposed liquor store, including any products you would like to be available from the premises:

Total Answered	155
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Q13. What age group applies to you?

a.	18-24	1	(0.65%)
b.	25-34	9	(5.81%)
c.	35-44	37	(23.87%)
d.	45-54	60	(38.71%)
e.	55-64	33	(21.29%)
f.	65+	15	(9.68%)
	Total Answered	155	

Q14. I am ...

a.	Female	94	(60.65%)
b.	Male	61	(39.35%)
	Total Answered	155	

Q15. I reside in one of the following suburbs:

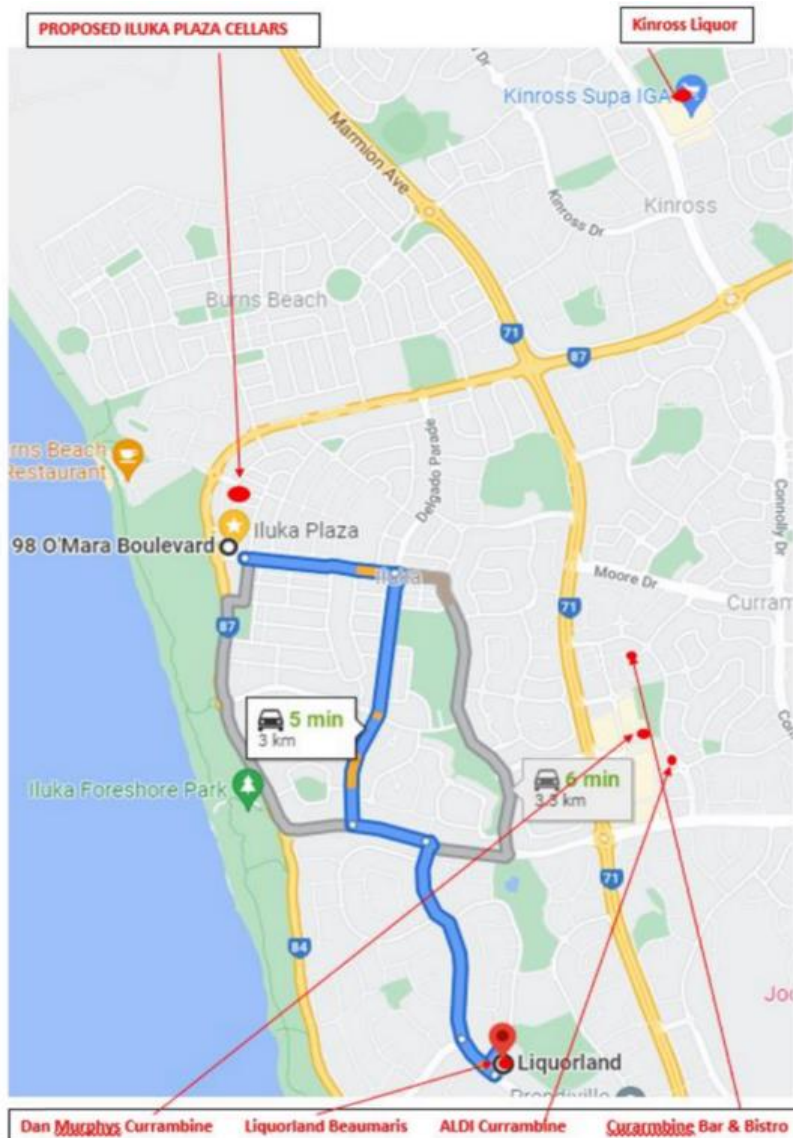
a.	Iluka	80	(51.95%)
b.	Burns Beach	36	(23.38%)
c.	Kinross	15	(9.74%)
d.	Currambine	9	(5.84%)
e.	Ocean Reef	8	(5.19%)

f.	Other (please specify) 6 (3.90%)	error	error
g.	Connolly Total Answered Total Skipped	0 154 1	(0.00%)

Q16. If you wish to go into the draw to win one of 5 IGA vouchers, please enter your contact details below.

Total Answered	124
Total Skipped	31

71 The Applicant also provided the below map identifying the location of the existing and proposed liquor stores in the locality.¹



¹ Applicant's Primary Submissions dated 15 November 2021, [7].

- 72 The Applicant submitted letters in support from:
- a Ian Goodenough (MP).
 - b Anthony Morabito (Member of the Iluka Home Association).
 - c AGEM Group.
 - d Tirage Wines.
 - e Unearthed Wine Merchants.
 - f Spirit of the Little Things.
 - g Beerfarm.
 - h Claret & Co.
 - i Cheeky Monkey Brewing Co.
 - j Larrikins of Margaret River.

LEGAL AND STATUTORY FRAMEWORK

- 73 The Commission is not required to find error on the part of the Director, but to undertake a full review and make a determination on the basis of the same materials as before the Director when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224 at [54]).
- 74 The Commission is required to make its determination on the balance of probabilities (section 16(1)(b)(ii) of the Act).
- 75 On 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:
 - a. as to any questions of law, reviewed; or
 - b. to the Director, to which effect shall be given; and
 - d make any incidental or ancillary order.
- 76 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 77 Section 16 of the Act prescribes that the Commission:
- a may make its determination on the balance of probabilities [subsection (1)]; and
 - 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 [subsection (7)(a)]; and
 - c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].

- 78 The failure to refer to any specific evidence in 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)).
- 79 For the purposes of the licence sought by the Applicant:
- a the Applicant must satisfy the licensing authority that granting the application is in the public interest [section 38(2)]; and
 - b the licensing authority must not grant the Application 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 [section 36B(4)].
- 80 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a the grant of the application would not be in the public interest; or
 - b 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; or
 - c that if the application were granted:
 - i. undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - ii. the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened; or
 - d that the grant of the application would otherwise be contrary to the Act.
- 81 Pursuant to sections 69(8a)-(8b) the Chief Health Officer 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.
- 82 An intervener under section 69 of the Act is not required to satisfy an onus of proof for its representations and can make representations or submissions on matters requiring an evaluative judgment by the Commission (including the merits of an application).

Public Interest condition

- 83 The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer* [1989] HCA 61).
- 84 When determining whether an application is in the public interest the Commission must take into account:
- a the primary objects of the Act set out in 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; and
- b. the secondary objects of the Act set out in section 5(2):
 - a. to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - b. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - c. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

85 Section 38(4) provides that 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 (subsection (a));
- b. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated (subsection (b));
- 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 (subsection (c)); and
- d. any other prescribed matter (subsection (d)).

86 No 'other ... matter' has been prescribed pursuant to s 38(4)(d).

Section 36B(4) Test

87 Section 36B(4) prohibits the licensing authority to grant an application for a packaged liquor licence unless it is 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.

88 The Government sought to insert section 36B in the Act to stop the further proliferation of packaged liquor outlets across the state [Western Australia, Parliamentary Debates, Legislative Assembly, 20 February 2018, 325 (Mr Paul Papalia, Minister for Racing and Gaming)].

89 In *Liquorland*, Archer J said (at [74]-[75]):

“I do not consider that the purpose of s 36B was to constrain the number of packaged liquor premises by sacrificing consumers' options to get liquor at a lower price and better quality. Rather, I consider that its purpose was to ensure that an additional licence would only be granted where such requirements could not reasonably be met by the existing premises (and in the context of there also being a Public Interest condition).

In my view, so long as s 36B(4) imposes a meaningful additional hurdle to the Public Interest condition, it will be consistent with, and promote, its purpose.”

- 90 For the purpose of section 36B(4), the Commission must be satisfied that:
- a there are '*local packaged liquor requirements*' – being defined in section 36B(1) as "*the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*"; and
 - b such '*local packaged liquor requirements*' cannot reasonably be met by existing packaged liquor premises in the locality.
- 91 The phrase '*requirements of consumers for packaged liquor*' in the definition of 'local packaged liquor requirements' in section 36B(4) of the Act is not limited to the physical item of packaged liquor (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 at [108]).
- 92 The phrase '*cannot reasonably be met*' in section 36B(4) of the Act means "cannot sensibly or rationally be met" (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 at [131]).
- 93 The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority as to the above.
- 94 To properly contemplate the first limb of section 36B(4), the Commission must make a finding as to the '*local packaged liquor requirements*' of consumers in the locality based on the evidence provided. This requires consideration of the interpretation of the 'requirements of consumers' and of the relevant 'locality' to be considered.

DETERMINATION

- 95 The Commission has undertaken a full review and now determines the application based on the same materials as before the Delegate when the decision was made. This is the correct and established procedure as referred to in *Hancock v Executive Director of Public Health* [2008] WASC 224.
- 96 The review has arisen primarily due to the relatively new section 36B of the Act and in particular section 36B(4). The recent decision of Justice Archer in *Liquorland* provides clarity on the correct interpretation of the provision and its application.
- 97 The Commission must be satisfied that the grant of an application is in the public interest pursuant to section 38 ("**Public Interest condition**"), and that the "local package 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" pursuant to section 36B(4) ("**Consumer Requirements condition**").

Public Interest Condition (section 38 of the Act)

- 98 The Applicant submits that the proposed Premises will:
- a cater for the requirements of consumers for liquor and related services;
 - b generate a range of benefits in the Locality, including to the liquor and tourism industries;
 - c not result in a significant increase in the level of alcohol-related harm or ill-health that may be caused to people due to the use of liquor;

- d improve the amenity of the locality by being the only packaged liquor outlet in the suburb of Iluka; and
- e not result in significant offence, annoyance, disturbance or inconvenience to people who reside or work in the vicinity.

Requirements of Consumers

99 The Applicant submits:

- a the results of the Consumer Questionnaire, letters in support, and market research, demonstrates the clear demand for the facilities, services, and products that will be provided if the Application is successful;
- b they will provide liquor products with a focus on locally made WA products such as craft beer, wine, honey mead, honey wine, honey port, and small batch liquor, that is not available in other liquor stores in the locality;
- c they will provide dietary specific products such as gluten and other allergen free products, organic and preservative free products, and low and mid-strength liquor products; and
- d there is a requirement of consumers for one-stop shopping, for premises located within walking or riding distance, and for premises conveniently located within driving distance that does not require consumers to cross major roads.

100 The Intervener submits:

- a the Applicant has not provided evidence of the proposed product range being unavailable in the area and that there is already a substantial selection of easily accessible liquor in the area; and
- b that Liquorland Beaumaris already meets the requirement of consumers for one-stop shopping convenience.

101 The Commission accepts that the Consumer Survey with 155 Respondents, the 7 letters of support from producers, 1 letter of support from a local resident (being the MP), 1 letter of support from a member of the Iluka Homeowners Association, 1 letter of support from the AGEM Property Group, market research, and support from the members of the Iluka Homeowners Association that attended the meeting on Tuesday 13 October 2020 in Currambine who generally supported the grant of the application, contains an indicatively representative sample of the consumers who would likely attend the Premises.

102 The Support Letter from Mr Ian Goodenough MP noted that the North West Metro JDAP approved the liquor store as a permitted use under the Iluka Structure Plan. This accords with the notorious fact that one-stop shopping convenience is a matter of contemporary consumer standards. Mr Ian Goodenough asserts that the Director of the Applicant has an established track record in business having owned and operated a number of IGA supermarkets in the electorate for approximately 15 years. Further, the Director, Mr Jay Shah, is an experienced Approved Manager.

103 The Support Letter from AGEM Property Group supports the Applicant's submission that the Iluka Plaza Shopping Centre was planned and designed to offer a convenient quality supermarket that provides local residents with all the amenities they require.

- 104 The Support Letter from Anthony Morabito (Member of the Iluka Homeowners Association) also notes the difficulty in obtaining liquor products in Iluka and the inconvenience of crossing the busy four-lane Marmion Avenue. He submits that the current packaged liquor premises are too far away to be accessed conveniently.
- 105 The Applicant also provided 7 letters of support from small and/or local producers, notably:
- a The Support Letter from the Director of Claret and Co (small family run Perth wine distribution company), notes that Mr Shah stocks a range of organic and preservative free wines, having over 30 types of organic wines across three of his existing venues. This provides access for low intervention, and organic and preservative free products that are not readily available at many national chain stores.
- 106 In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 at [48]-[49], Buss JA (as his honour then was) observed:
- “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 that this social fact is reflected in the development of district and regional shopping centres. See Woolworths Ltd v Drase Coosit Pty Ltd [2010] SASC 13; (2010) 106 SASR 146 [55] (Kourakis J). See also Liquorland (Australia) Pty Ltd v Hawkins (1997) 16 WAR 325.”*
- 107 The Commission has considered the Application and the evidence supplied and is satisfied that the Premises, to form part of the Iluka Plaza Shopping Centre, is in general supported by consumers.
- 108 The Commission does not accept the Intervener’s submission that the evidence supplied is overly simplistic and insufficient to determine the Application.
- 109 It is not contentious that the liquor store, operated in conjunction with the adjoining IGA Supermarket at the new Neighbourhood Shopping Centre, and being a conveniently located packaged liquor outlet in the growing suburb of Iluka, would meet the needs and desires of consumers seeking one-stop, locally sourced, convenient liquor and shopping options.
- 110 Given the above, the Commission is satisfied that the grant of the Application would cater for the requirements of consumers for liquor and related services.

Benefits to the Locality

- 111 The Applicant submits that the grant of the Application will result in:
- a an improvement to the services and facilities that already exist at the Iluka Plaza Shopping Centre, particularly in respect to the accessibility of liquor in the growing population of Iluka;
 - b stimulation of the tourism industry by supporting local WA and Australian producers of craft beer, cider, wine and spirits; some of which are currently only available at the producers’ premises and limited independent retailers; and
 - c stimulation of the liquor and tourism industries by providing market access to independent local producers, and improving awareness of local producers by providing tastings to, and increasing education of, consumers in Iluka.

112 The Commission is satisfied that the Neighbourhood Centre would benefit from the proposed packaged liquor outlet forming part of the Iluka Plaza Shopping Centre. The Commission is satisfied that the proposed Premises would result in a number of benefits to the Locality as a whole, as per below:

Liquor Industry

- a The inclusion of a boutique packaged liquor outlet in the Iluka Plaza Shopping Centre will provide a more desirable shopping experience with a locally sourced liquor range that is convenient and accessible and designed to meet consumer demands.
- b The Premises will be the only packaged liquor outlet within the Iluka Plaza Shopping Centre, as well as the only packaged liquor outlet in the suburb of Iluka.
- c The Premises will provide liquor products from small local producers that are not readily available in the locality.
- d The Premises will be an additional liquor outlet in the Locality, the Commission is satisfied that, although the range and quantity of liquor may increase in the Locality, the 117sqm boutique outlet with a focus on locally sourced products and unique specialty products (such as vegan, organic, biodynamic, low-alcohol and preservative free liquor options), falls short of creating a proliferation of liquor outlets in the locality.
- e The proposed range of locally produced and specialty liquor products will minorly assist in the development of the liquor industry in the State.

Tourism Industry

- a Iluka and the surrounding suburbs are not a known tourism destination in the Greater Perth locality like other coastal suburbs. The Commission does however find that the increasing population of Iluka will increase consumer demand for independent local outlets with a product request option.
- b The Commission finds that the grant of the Application may create some modest benefit to the tourism industry, in that customers of the proposed Premises will be provided with tasting and education opportunities which may lead to increased awareness of local WA producers, but that this is not a material consideration.

113 The Commission finds that the Applicant's director is an experienced and responsible manager of retail outlets, including licensed premises.

114 The Commission is satisfied that the granting of the Application therefore:

- a will result in various benefits to the locality;
- b would facilitate the use and development of licensed facilities; and
- c would be consistent with the primary and secondary objects of the Act.

Harm and Ill-Health

115 The Applicant submits that:

- a it is open to the Commission to conclude that the level of alcohol-related harm is comparable to, or below, the level of harm suffered generally in the State; and

- b that the potential increase in alcohol-related harm or ill-health is minimal, particularly in consideration of the Applicant's extensive experience and risk management plans/policies.

116 The Intervener submits that:

- a the data of alcohol-related hospitalisations in the City of Joondalup for 2007-2011 provided by the Applicant is over 10 years old and does not specifically address the suburb of Iluka;
- b evidence of crime in Iluka was provided, but no data was included on whether the incidents were alcohol-related and as such the conclusions of the Applicant should be given limited weight;
- c there is a risk that if demand for specialist liquor products such as low-alcohol, locally sourced, and dietary specific products were unpopular with customers upon a grant of the Application that the Applicant may stock more mainstream products in order to boost its sales;
- d the increased availability of liquor (in terms of accessibility) and increased exposure to the sale and promotion of alcohol (in terms of supermarkets selling liquor) at the Premises will result in greater consumption of alcohol, which in turn will lead to increased alcohol-related harm and ill-health in the locality; and
- e it is open for the Commission to conclude that the Applicant has not demonstrated that the grant of the Application is in the public interest because there is inadequate data regarding the existing level of harm and the likely degree of harm if the Application was granted. In particular, the data presented is over 10 years old and is therefore of limited utility. It is therefore difficult for the Commission to appropriately assess the Application pursuant to the *Carnegies* test.

117 In assessing the harm and ill health that may result, the Commission must undertake the analysis set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208, being that the Commission must:

- a make findings that specifically identify the existing level of alcohol-related harm and ill-health in the Locality;
- b make findings about the likely degree of harm or ill-health 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, as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest.

Carnegies Test – Level of Harm and Ill-Health

118 Based on the material provided, the Commission finds that there is an existing level of harm and ill-health associated with the use of liquor in the Locality.

119 The Applicant provides evidence of engagement with the WA Liquor Enforcement Unit and the WA Chief Health Officer.

- 120 Acting Sergeant Nathan Hicks of the LEU stated in email correspondence to the Applicant: *“LEU have looked at the crime stats in the locality and we did not come across any red flags”*.
- 121 The CHO requested, and was provided with, additional details about the proposed Premises. The CHO did not lodge a Notice of Intervention or Notice of Objection.

Carnegies Test – Likely Degree of Harm and Ill-Health

122 The Intervener submits that should the Application be granted there would be an increased risk of alcohol exposure, impulse purchasing, and relative availability flowing from selling liquor in the same location as ordinary food products, which would increase consumption.

123 The Intervener refers to the Consumer Questionnaire Question 11:

“When weighing and balancing the positive and negative aspects of granting a liquor licence, the WA licensing authority must consider the harm or ill-health that may be caused if the application is granted in the public interest. Do you believe that the inclusion of a small 117sqm liquor store, operated by a WA based, experienced and reputable Licensee would cause an undue increase in harm or ill-health or negatively impact the Iluka locality?”

The Intervener notes that responses to this question are irrelevant as the respondents are not in a position to appropriately answer that question and as such should be given extremely minimal weight.

124 The issue is whether the availability of alcohol products at Iluka Plaza Cellars will result in an unacceptable increase in harm and ill-health to those within the at-risk category in the Locality.

125 The submission of the Intervener is if alcohol is made available for sale within shopping centres, then there is a resulting increase in harm and ill-health as at-risk persons are highly vulnerable and susceptible to alcohol-related harm.

126 In respect to the harm occurring on or immediately around the Premises, the Commission finds that it is unlikely there will be a significant increase in harm and ill-health. Particularly considering the local demographics, and the relatively small size of the store, and the focus on locally produced and specialty products rather than budget alcohol options.

127 It is always difficult to predict what may occur if a particular application is granted. It involves a prediction as to the likelihood that something may or may not occur.

128 Ultimately, the Commission is satisfied that the granting of the Application would likely result in an increase the harm and ill-health due to the fact that alcohol will be available for sale within the Neighbourhood Shopping Centre.

Carnegies Test – Assessment

129 Whilst it is acknowledged that harm and ill-health exists within the locality and that there is a possible degree of harm that may occur due to the granting of the Application, the Commission considers that in the context:

- a. the liquor store is relatively small;

- b. the concentration of vulnerable or ‘at risk’ parties in the locality in light of the demographic in the locality;

Identified Group	Defined Locality	Western Australia
Population aged under 14	19.86%	19.26%
Indigenous Persons	0.52%	3.07%
Couple Families with Children	57.33%	45.30%
Australian Born	66.49%	60.33%

- c. the Applicant is an experienced and responsible operator of retail outlets and licensed premises;
- d. the Commission imposed the following conditions on the Premises, as per the recommendations within the *Inspector’s Report* dated 18 February 2021:
- i. the Applicant will comply with standard tasting conditions.
- e. the Commission imposed the below conditions on the Premises, as initially agreed to by the Applicant in their Closing Submissions in Response to the Notice of Objection. This Objection was subsequently revoked, however the following conditions will ensure compliance with the Public Interest condition:
- i. The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is WA craft beer.
 - ii. The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is Australian craft beer.
 - iii. The Applicant will ensure that at least 40% of the wine stocked at the premises is WA made.
 - iv. The Applicant will ensure that at least 40% of the wine stocked at the premises is Australian made.
 - v. The Applicant will ensure that at least 40% of spirits stocked at the store are WA/Australian artisan spirits.
 - vi. The Applicant will ensure that non-alcoholic wine, beer and spirit options are available from the store at all times.

Although the likelihood of harm and ill-health increasing exists, it would not be to a level as to make it inappropriate to grant the Application. It should also be noted that the primary object of the Act is to minimise harm or ill-health, not eradicate it.

In its primary submissions, the Applicant also agreed to a condition that no wine shall be sold for less than \$10 a bottle. The Commission finds that this an appropriate risk minimisation condition.

Carnegies – Weighing

130 In weighing the likelihood of alcohol related harm and ill-health against the benefits of the Application (as considered above) the Commission finds that such likelihood is not so unacceptable that it outweighs the benefits of granting the Application.

Impact on Amenity of the Area

131 The Commission is satisfied on the basis of the evidence provided that the amenity, quiet or good order of the Locality will not be adversely affected by the grant of the Application.

Offence, Annoyance, Disturbance, or Inconvenience

132 The Commission is satisfied on the basis of the evidence provided that the grant of the Application will not create undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school.

Objections

133 On balance, the Commission finds that none of the grounds of objection have been made out by the Objector and as such, the burden of establishing the validity of the objections has not been discharged in accordance with the requirement of section 73(10) of the Act.

Conclusion

134 Having regard to the relevant principles, materials filed in this review and the concessions as to proposed harm minimisation conditions, the Commission is satisfied that:

- a the grant of the application would be in the public interest; and
- b the conditions being imposed on the Licence are appropriate to minimise harm.

Consumer Requirements Condition (section 36B(4) of the Act)

135 For the purposes of this Application, section 36B(4) of the Act is mandatory and the test therein must be satisfied.

136 For the purposes of meeting the requirements of section 36B(4) of the Act, the Commission must:

- a adopt an appropriate “locality” for the purposes of section 36B; and
- b be satisfied that there are “local packaged liquor requirements”, being defined in section 36B(1) as “the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated”; and
- c be satisfied that such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the locality.

Locality

137 The Act does not include any definition as to “locality”.

138 At the time of the Application, the Director’s Policy in respect to “locality” was:

- a contained in the Director’s *Public Interest Assessment Policy*;
- b did not refer specifically to section 36B, but rather to section 38; and

c stated as follows:

“Locality

As part of a PIA submission, applicants must provide details regarding the community in the vicinity of the licensed premises (or proposed licensed premises) and any amenity issues in the locality.

The term ‘locality’ in this instance refers to the area surrounding the proposed licensed premises. This locality will be the area most likely to be affected by the granting of an application in relation to amenity issues.

Generally, the size of the locality will be that which is stipulated in ‘Specification of Locality’ at Attachment 2. However, depending on the nature of the application, the licensing authority may also determine a broader locality.

Where an applicant considers that the licensing authority's determination of the locality in accordance with the policy is not suitable having regard to its intended nature of business, the applicant may make submissions as to the appropriate size of the locality to the specific nature of the proposed business.

It should be noted however, that in terms of addressing objects 5(1)(b) and 5(1)(c) of the Act, an applicant may need to consider an area which is much broader than the ‘locality’ used for consideration of amenity issues. For example, an application for a destination liquor store, which may draw its clientele from a large geographic area, would need to address 5(1)(b) and 5(1)(c) of the Act in a much broader context. The onus is on the applicant to satisfy the licensing authority that the grant of the application is in the public interest and provide relevant evidence and submissions to discharge this onus. An applicant should address all relevant considerations under the Act, bearing in mind all the circumstances and unique features of its particular application.”

“Locality guide

The following tables are a guide when determining the specified ‘locality’ to which an application relates.

Generally, the size of the locality will be that which is stipulated below. However, depending on the nature of the application, the licensing authority may also determine the locality outside the ‘Specification of Locality’ guide. Where an applicant considers that the locality set out in this policy is not suitable having regard to its intended nature of business, the applicant may make submissions as to the appropriate size of the locality to the specific nature of the proposed business.

In regard to country cities, towns or communities, unless remotely located or the licensing authority determines otherwise, the locality is to be a radius of 3 km from the site of the intended business.

Where a premises/proposed premises is remotely located; that is, 200 km or beyond from the nearest town or country city, and more than 400 km from Perth, the applicant is to make a submission to the licensing authority regarding the appropriate size of the locality to suit the intended nature of the business.”

139 In *Liquorland Archer J* at [181] to [186] noted the following with respect to the word “locality” used in section 36B:

“In my view, the word 'locality' in s 36B denotes an area that surrounds, and is geographically close to, the location of the proposed premises (proposed site). I consider it was not intended to equate to the area(s) from which consumers would come. The following matters are particularly relevant.

*First, I consider the plain meaning of the words in s 36B supports this construction. As noted earlier, given the context and purpose of s 36B, the word 'locality' is intended to connote the same concept of neighbourhood. I consider that, in this context, it means the **geographical area surrounding the proposed site**. Section 36B seeks to add an additional hurdle before a licence may be granted under which packaged liquor can be sold.*

It seeks to ensure that there are not multiple premises in close proximity to one another selling packaged liquor.

.....

This is not to say that the 'locality' will inevitably, or even usually, be a circular area within a particular radius of the proposed site. The shape and size of the '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'.

Unfortunately, due to the 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. As has been observed in other jurisdictions, there will be some cases where it will be easy to determine the locality, and other cases where it will not be.

An example of the former would be where the proposed premises was to be placed in a small country town. An example of the latter would be where it was to be placed in the CBD.”

140 The Commission accepts that evidence provided as to the current shopping habits of consumers (as to existing premises) may well be relevant and can be considered when first deciding the relevant “locality”.

141 The concept of a “locality” must remain diverse and fluid and it is contemplated that the Director may impose different localities in respect to different applications, provided that, in the interests of natural justice, such decision is made on reasonable and ascertainable grounds.

142 The Commission finds that there are some distinctive features of the area surrounding the proposed premises:

- a the Premises is located within the suburb of Iluka which is bordered by Marmion Avenue to the East; and
- b Marmion Avenue is a significant feature of the area and there are consumers living in the suburb of Iluka and Burns Beach who would prefer to do their shopping without

crossing Marmion Avenue. This finding is supported by evidence including market research, Consumer Questionnaire responses, and Letters in Support.

- 143 For the above reasons, the Commission adopts a 3 km radius from the Premises bordered to the East by Marmion Avenue, as the Locality.

Local Packaged Liquor Requirements - Requirements of Consumers

- 144 To properly contemplate the first limb of section 36B(4), the Commission must make a finding of fact as to the “*local packaged liquor requirements*” of consumers in the Locality based on the evidence provided by the Applicant:

a. This requires consideration of the correct interpretation of “*requirements*”.

- 145 As per the above discussion, *Liquorland* has established that that “*the words 'requirements of consumers' mean the same in s 36B(1) and s 5(1)(c) and, subject to the facts and issues of a particular case, may involve consideration of the same types of matters*” including:

- a shopper convenience (including one stop shopping);
- b shopper preferences;
- c competition;
- d product range;
- e service; and
- f efficiency.

- 146 Consumer convenience and preference is assumed to mean what consumers desire, rather than what they cannot manage without: *Liquorland* at [79].

- 147 The Applicant submitted that the market research, letters in support, and Consumer Questionnaire responses demonstrate a requirement for a packaged liquor facility in the area.

- 148 The immediate surrounds of the proposed premises have some distinctive features, specifically the effect of Marmion Avenue.

- 149 The Commission is satisfied that the evidence supports the conclusion that there are requirements of consumers for packaged liquor in the Locality, particularly in respect to:

- a the ability to have one-stop shopping within the Neighbourhood Shopping Centre; and
- b a focus on stock comprising locally sourced and specialty products.

Cannot Reasonably be Met - Can Packaged Liquor Requirements be Reasonably Met by Existing Premises in the Locality?

- 150 The evidentiary onus is on the Applicant to satisfy the Commission as to the test set out in section 36B(4) that the existing packaged liquor stores cannot “*reasonably*” meet consumer requirements.

- 151 The evidence provided by the Applicant 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*”: *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010).
- 152 In *Liquorland Archer* J stated that:
- a the phrase “*cannot be reasonably be met*” means “*cannot sensibly or rationally be met*”; and
 - b the licensing authority should have regard to contemporary standards and expectations for the requirements of packaged liquor in determining whether consumer requirements could not 'reasonably' be met.
- 153 The Consumer Questionnaire responses indicated a desire for the ability to purchase packaged liquor close to home, a liquor outlet that is located within walking distance, the option for one stop shopping and that is accessible without travelling across major roads.
- 154 In response to Q3: “*When you consider your packaged liquor requirements, what is important to you? (Please tick all applicable)*”, the top five selections were:
- a Competitive pricing (76.13%).
 - b Located close to my home or place of work (61.94%).
 - c Range of product (51.61%).
 - d Availability of parking in close proximity (49.03%).
 - e Availability of WA made liquor (to support local jobs) (29.68%).
- 155 In response to Q9: “*If you answered YES to question 8 above, please identify why you would shop at the proposed new liquor store. (Please tick all applicable)*” the top five selections were:
- a Want to patronise a liquor store close to my home (49.59%).
 - b Like to be able to walk to my local supermarket/liquor store (47.15%).
 - c Convenience of doing my grocery and liquor shopping in the safe, new shopping centre (43.90%).
 - d Easier for me to access the new supermarket and liquor store than existing options (39.84%).
 - e Liquor store in a new shopping centre with ample parking would make me feel safer (15.45%).
- 156 In response to Q10: “*If the existing packaged liquor premises do not meet your requirements, please identify WHY they do not.*” the top five selections (not including ‘other’) were:
- a Have to travel across major roads to access from my home (26.45%).
 - b Not conveniently located in Iluka Plaza Shopping Centre (26.45%).
 - c Not co-located with a supermarket (14.84%).
 - d The national chains like Liquorland and Aldi mainly promote their own brands (14.84%).
 - e Cannot request my favourite products and brands (12.26%).

- 157 With an adoption of a 3 km Locality bordered by Marmion Avenue, the only other packaged liquor provider within the Locality is **Liquorland Beaumaris** (2.2 km away).
- 158 The Liquorland Beaumaris is located within the Beaumaris City Shopping Centre as a large destination store with a focus on competitive pricing and providing one stop shopping for consumers attending that shopping centre.
- 159 The Commission finds that the Liquorland is not located within the Iluka suburb and as such is not within walking or riding distance of consumers likely to attend the Premises. Further, the Commission finds that there is a contemporary consumer requirement of one stop shopping for people in the suburb of Iluka.
- 160 As such, the Commission finds that the consumer requirements established with respect to the Premises cannot sensibly or rationally be met by the other packaged liquor premises within the Locality.

Conclusion

- 161 Accordingly, the Decision of the Delegate of the Director is quashed and the Application for a Liquor Licence is granted subject to the following conditions:
- a The Applicant will comply with standard tasting conditions.
 - b No wine shall be sold for less than \$10 a bottle.
 - c The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is WA craft beer.
 - d The Applicant will ensure that at least 40% of the beer/cider lines stocked at the premises is Australian craft beer.
 - e The Applicant will ensure that at least 40% of the wine stocked at the premises is WA made.
 - f The Applicant will ensure that at least 40% of the wine stocked at the premises is Australian made.
 - g The Applicant will ensure that at least 40% of spirits stocked at the store are WA/Australian artisan spirits.
 - h The Applicant will ensure that non-alcoholic wine, beer and spirit options are available from the store at all times.



NICHOLAS VAN HATEM
PRESIDING MEMBER



ELANOR ROWE
MEMBER



DR KIM HAMES
MEMBER