

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

<b>Applicant:</b>	Liquorland (Australia) Pty Ltd <i>(represented by Mr Steven Standing as counsel, instructed by Ms Triska Di Cicco of Herbert Smith Freehills)</i>
<b>Intervener:</b>	Director of Liquor Licensing <i>(represented by Mr Toby Bishop of the State Solicitor's Office)</i>
<b>Commission:</b>	Ms Emma Power (Deputy Chairperson) Dr Kim Hames (Member) Mr Nicholas van Hattem (Member)
<b>Matter:</b>	Application for the conditional grant of a liquor store licence referred to the Liquor Commission by the Director of Liquor Licensing pursuant to section 24 of the <i>Liquor Control Act 1988</i> .
<b>Premises:</b>	Liquorland Karrinyup Karrinyup Shopping Centre 200 Karrinyup Road, Karrinyup, Western Australia, 6018
<b>Date of Hearing:</b>	30 June 2022
<b>Date of Determination:</b>	8 November 2022
<b>Determination</b>	The Application is granted.

**Authorities considered in the determination:**

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366
- *O'Sullivan v Farrer* [1989] HCA 61
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

## SUMMARY

- A. The public interest condition as set out in section 38 of the Act is satisfied.
- B. The Commission holds that 'locality' in section 36B(4) of the Act is to be defined as the area geographically close to the premises, being determined based on the circumstances of each individual case, including topographical and other features and the areas the site would be accessed by people utilising various modes of transport.
- C. In this case, for the purposes of section 36B(4), 'locality' is found to be the area prescribed in Figure 1 of the MGA Supplementary Report as submitted by the Applicant.
- D. The consumer requirement condition as set out in section 36B(4) of the Act is satisfied.
- E. The Application is granted.

## BACKGROUND

1. This matter concerns an application ("**Application**") by Liquorland (Australia) Pty Ltd ("**Applicant**") for the conditional grant of a liquor store licence referred under section 24 of the *Liquor Control Act 1988* ("**the Act**") for premises known as Liquorland Karrinyup ("**Proposed Premises**") located at the Karrinyup Shopping Centre ("**Centre**") at 200 Karrinyup Road, Karrinyup.
2. On 20 May 2020, the Applicant lodged the Application for the conditional grant of a liquor store licence for the Proposed Premises.
3. On 26 August 2020, the Director of Liquor Licensing ("**Director**") refused the Application: *Written Reasons of Decision of Director of Liquor Licensing* dated 5 January 2021.
4. On 8 October 2020, the Applicant applied for a review of the decision of the Delegate pursuant to section 25 of the Act, with such decision to be made by the Liquor Commission of Western Australia ("**Commission**") by way of hearing.
5. On 17 December 2020, the Commission heard the application for review.
6. On 20 April 2021, the Commission affirmed the decision of the Director to refuse the Application: *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 07/2021).
7. On 10 May 2021, the Applicant filed an appeal notice with the Supreme Court to appeal the Commission's decision on a question of law.
8. On 28 October 2021, Justice Archer allowed the appeal. On appeal, the Commission's decision to dismiss the Appellant's application for the conditional grant of a liquor store licence was quashed: *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 ("**Liquorland Decision**"); *Orders of the Honourable Justice Archer made 28 October 2021*.
9. The Appellant's application was remitted back to the Commission for reconsideration in accordance with the reasons for decision in the appeal.

10. Archer J identified the following questions of law at [13] of the *Liquorland Decision*:
  1. (From ground 1) is the phrase 'requirements of consumers for packaged liquor' in the definition of 'local packaged liquor requirements' in s 36B(1) of the Act limited in its scope to the physical item or product of packaged liquor?
  2. (From ground 2) what is the meaning of the phrase 'cannot reasonably be met' in s 36B(4) of the Act?
  3. (From ground 3) can the retail catchment area be a relevant consideration for the purpose of determining locality?
11. Accordingly, on 7 December 2021, the Commission made orders pursuant to section 25 of the Act. The Commission ordered that the decision of the Director to refuse Application A950124343 be quashed and directed the Director to reconsider his decision according to law.
12. On 8 April 2022, the Director referred the matter to the Commission for determination, pursuant to section 24 of the Act.
13. The matter has now been remitted for the reconsideration of the Commission afresh and according to law, with consideration to be given to the reasons of Archer J in the appeal.

## SUBMISSIONS

### Applicant's Submissions

14. The Applicant initially provided:
  - a. *Initial Application* lodged 20 May 2020, together with Public Interest Submissions and supporting documents.
15. On 26 August 2020, the Director refused the Application.
16. The Applicant subsequently provided:
  - a. *Grounds of Review* ("**Application for Review**") dated 8 October 2020;
  - b. *Applicant's Submissions* ("**Primary Submissions**") dated 3 December 2020; and
  - c. *Applicant's Submissions in Reply* dated 10 December 2020.
17. On 20 April 2021, the Liquor Commission made a decision to affirm the decision of the Director and refuse the Application.
18. The Applicant subsequently appealed the decision to the Supreme Court.
19. On 8 September 2021, the matter was heard in the Supreme Court before Justice Archer.
20. On 4 October 2021, the Applicant lodged further submissions to the Supreme Court.

21. On 28 October 2021, Justice Archer ordered that the appeal be allowed, the decision of the Commission to dismiss the Application for the conditional grant of a liquor store licence be quashed, and the Application be remitted to the Commission for reconsideration.
22. Accordingly, the Applicant provided:
  - a. *Supplementary Submissions* dated 1 February 2022 together with the additional evidence outlined at paragraph [55] of this decision;
  - b. *Applicant's Submissions* dated 16 June 2022; and
  - c. *Applicant's Responsive Submissions* dated 28 June 2022.

Applicant's Primary Submissions dated 3 December 2020

23. On 8 October 2020, the Applicant applied for a review of the decision made by the Director of Liquor Licensing on 26 August 2020 to refuse the Initial Application.
24. On 3 December 2020, the Applicant lodged *Primary Submissions*. It was submitted that the grant of the Application would be in accordance with the proper development of the liquor industry as regards to the availability of packaged liquor at major shopping centres.
25. The Applicant submitted:
  - a. the grant of the Application would be in the public interest (section 38(2));
  - b. there is no public interest evidence against the grant of the Application; and
  - c. the evidence satisfies the requirement under section 36B(4) that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.

*Ground 1 – Public Interest Condition (section 38(2))*

26. The Applicant submitted that convenience, competition in the sale of liquor, and enhanced amenity are material and significant aspects of the public interest determination.
27. To demonstrate the operation of these aspects in relation to the Application, the Applicant tendered survey evidence from Data Analysis Australia with evidence of consumer requirements that would be catered for by the proposed store. The Applicant highlighted the number of respondents that supported the proposed store.
28. The Applicant submitted that this evidence, with supporting expert evidence, illustrated that the proposed store would satisfy various consumer requirements, including one-stop shopping convenience and increased competition.
29. Additional evidence was submitted to the view that the proposed store would also be consistent with relevant planning objectives and, therefore, would be likely to enhance amenity in the locality.

*Ground 2 - No Public Interest Evidence Against the Grant of the Application*

30. The Applicant submitted that the evidence permitted no inference that the proposed store would increase the risk of harm to any person.

*Ground 3 - Local Packaged Liquor Requirements Cannot Reasonably be Met by Existing Packaged Liquor Premises (section 36(B))*

31. A determination by the Commission that there is a local packaged liquor requirement which cannot reasonably be met by existing premises necessarily involves subjective and objective elements, including:
- a. a local packaged liquor requirement needs to be identified (subjective); and
  - b. can the local packaged liquor requirement 'reasonably' be met by existing packaged liquor premises in the locality? (objective).
32. The Applicant stated the requirement that the exercise of statutory interpretation should begin with a consideration of the text itself. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision.
33. In construing these elements, the following propositions were advanced by the Applicant as arising from the plain language of section 36B:
- a. The word 'reasonably' imports a degree of objectivity and means '*sensible, not absurd, or ridiculous...not going beyond the limit of reason...not extravagant or excessive, moderate.*'
  - b. In contrast to the former section 38(2b) of the Act, in section 36B(4) the word 'reasonably' has the effect of reading down the term 'cannot.' This qualification of the term 'cannot' prevents any interpretation of the word denoting a physical impossibility or requiring to be read down by concepts of substantial difficulty or substantial inconvenience.
  - c. The words 'cannot reasonably' oblige the licensing authority to assess whether local packaged liquor requirements cannot be met by existing outlets in a way that is sensible, moderate or rational, having regard to evidence of contemporary standards, expectations and shopping habits.
34. On its proper construction, the Applicant argued, section 36B(4) differs from section 38(2b) in its terms insofar that, in light of the above matters, it poses a separate and additional test that is expressly objective in nature.
35. The Applicant also distinguished section 36B(4) from section 38(2b) on the basis that matters of convenience and other consumer preferences are relevant to:
- a. identifying what the local packaged liquor requirements actually are; and
  - b. assessing whether those requirements cannot be met by existing outlets in a way that is sensible, moderate or rational (i.e., reasonable).

36. Consequently, the Applicant argued that the Director erred in treating these matters as irrelevant to the section 36B(4) test.

*Section 36B(4) of the Act – Definition of Locality*

37. The Applicant asserted that, for the purposes of the Application, the 'locality' comprises the Centre. However, the issue of locality was presented as uncontroversial; even if 'locality' is regarded as the 2km radius defined under the licensing authority's Public Interest Assessment Policy, the Application meets the requirements of section 36(4).
38. The Applicant argued that the existing packaged liquor premises cannot '*reasonably*' meet local packaged liquor requirements because:
- a. the evidence establishes that the local packaged liquor requirements are consistent with, and reflect, contemporary consumer standards, expectations and shopping habits;
  - b. the BWS store located at the Centre cannot meet the requirements of consumers at the Centre to be able to purchase their packaged liquor in a competitive setting and with the benefits associated with competition, because BWS is currently the only packaged liquor outlet at the Centre;
  - c. the BWS store located at the Centre cannot meet the requirements of consumers for efficient one-stop shopping because it has difficulty meeting demand at peak times (even before the current expansion of the Centre is complete); and
  - d. the four other packaged liquor outlets within a 2km radius cannot meet the requirements of consumers for efficient one-stop shopping and competition in the sale of packaged liquor at the Centre, because they are not located at the Centre (they are located on the boundaries of the 2km radius).

Applicant's Submissions in Reply dated 10 December 2020

39. On 10 December 2020, the Applicant lodged *Submissions in Reply*, which focussed on the Intervener's approach to statutory construction.
40. The Applicant submitted that the Intervener's approach to construction is driven by a 'proliferation' approach. This approach was contended to depart from the guiding principle of statutory interpretation that enshrines the statutory text as being the surest indication of Parliament's intention. Rather than focussing on the meaning of the statute itself, this approach demands consideration of the meaning of 'proliferation.'
41. This approach was said to ignore the central objective test within section 36B(4), which requires a value judgement informed by evidence of contemporary standards and expectations about whether packaged liquor requirements cannot reasonably be met by existing premises.
42. As a result, the Intervener's construction of section 36B(4) leads to an unnatural interpretation of the word 'requirements' as imposing a larger hurdle than necessary. The Applicant refuted the need to construe the term 'requirements' so restrictively as to disregard matters of convenience, one-stop shopping, competition and product range from consideration.

43. Such a restrictive approach excludes evidence of consumer requirements and contemporary standards and expectations from being relied upon for the purposes of section 36B(4). On the Intervener's approach, therefore, it was argued to be unclear what evidence could be relied on by the licensing authority.

#### *Section 36B(4) – Requirements for Packaged Liquor Itself*

44. The Applicant rebutted the Intervener's claim that section 36B(4) is directed only at the 'requirements for packed liquor itself' and does not encompass considerations of convenience and the benefits of competition.
45. Matters of convenience, product choice and competition, were contended to be aspects of the requirement for packaged liquor itself rather than independent requirements that can be artificially divorced from this requirement.

#### *Section 36B - Striking the Balance*

46. Contrary to the Intervener, the Applicant stated that it is not plain that section 36B(3) is 'concerned with liquor itself.' By its express terms, the provision was argued to be concerned with premises above a certain size and within a certain distance of certain other premises.
47. In relation to section 36B(4), the Applicant submitted that even if the purpose of the provision was the avoidance of 'proliferation,' its construction of the section would still fulfil this purpose.
48. Under this construction, an application may still be refused under section 36B(4) unless the applicant could demonstrate that those requirements could not reasonably be met by existing premises.
49. This requirement is additional to, and subsequent upon, an applicant satisfying the public interest test by adducing credible and substantial evidence of subjective consumer requirements.
50. Therefore, depending on the nature of the proposed premises and the circumstances of the particular case, the Applicant submitted that section 36B(4) invariably poses a significant hurdle to the grant of a liquor store licence.

#### *Consistency with Other Provisions*

51. The Applicant submitted that South Australian cases referred to by the Intervener offer no assistance in resolving the questions posed by the instant case as the applicable provisions in those cases do not resemble the sections of the Act.
52. The case of *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405 ('*Nominees*') was also said to be of no assistance because, unlike the two provisions under consideration, in that case there is *already* an obvious and fundamental distinction between section 38(2) and section 5(1)(c) on the one hand and section 36B(4) on the other. Namely, only the latter provision calls for an objective analysis as to whether consumer requirements can reasonably be met by existing premises.



### *Applicant's Survey and Other Evidence*

53. The Applicant submitted that the Intervener's submissions endorse a test of '*established inconvenience*' which is not found in section 36B(4).
54. The correct test was identified to be whether consumer requirements can reasonably be met by existing premises.
55. In relation to this test, the Commission's clear statements that each application must be dealt with on its own merits were noted.
56. The Commission's previous comments about placing liquor outlets "at every corner delicatessen or beside every supermarket" not being in the public interest were also cited to establish their irrelevance to an application for a packaged liquor outlet within a very large shopping centre undergoing redevelopment.
57. Whether or not a particular application satisfies the test under section 36B(4) (and indeed, the public interest test under section 38(2)) is therefore dependant on the specific evidence advanced in that application.
58. The Applicant contended that extensive evidence has been advanced relating to the context of the Application, thereby permitting it to satisfy the section 36(4) test.

### Applicant's Supplementary Submissions dated 1 February 2022

59. On 1 February 2022, the Applicant lodged *Supplementary Submissions* together with the following additional evidence:
  - a. *Ethos Urban Report* dated 31 January 2022;
  - b. *Bodhi Observational Study* dated 1 February 2022;
  - c. *Statement of Nicholas Smith* (State Manager, Coles Liquor Operations WA) dated 29 January 2022;
  - d. *Form 18 Submissions in Support of an Application* lodged by Tim Richards (Centre Manager, Karrinyup Shopping Centre) dated 27 January 2022; and
  - e. MGA Supplementary Report dated 6 December 2021.
60. The Applicant's supplementary submissions and further evidence were prepared in reference to the decision of Justice Archer in the *Liquorland* Decision.
61. The Applicant's submissions can be summarised as follows:
  - a. *Liquorland* requires a fundamental reconsideration of the way in which 'locality' is identified. Accordingly, the Applicant provided a further report from MGA, which identifies (using the criteria identified in *Liquorland*) a locality that is significantly different to the 2km radius previously adopted for the Application. The significance of this newly defined locality is that only one existing packaged liquor premise remains within its boundaries; the BWS outlet at the Centre. Consequently, the Applicant submitted that, for the purposes of conducting the analysis under section 36B(4), the only relevant existing packaged liquor outlet is the BWS at the Centre.

- b. *Liquorland* also made clear that, when considering section 36B(4), a broad range of factors could be taken into account in assessing requirements of consumers (including one-stop shopping convenience and competition).
- c. The context of the Application is highly relevant. The Centre will soon be the largest shopping centre in WA by net lettable area (extrapolating from post expansion data) and already has the largest visitation numbers of any shopping centre in WA. Most large shopping centres in WA have more than one packaged liquor outlet. Further, the Applicant has filed evidence that it believes to confirm that the BWS is overcrowded at peak times and is no longer suitable for the numbers of customers now attending the Centre.
- d. The Applicant submitted that, when viewed in light of this context, there is ample evidence tending in favour of the conclusion that there are consumer requirements that cannot reasonably be met by the BWS at the Centre.

62. It was also contended that the filed evidence concerning the public interest condition is overwhelmingly in favour of the grant of the Application.

#### Applicant's Submissions dated 16 June 2022

63. On 16 June 2022, the Applicant lodged *Submissions* as to matters arising from recent Commission decisions: first, in relation to the relevance of extrinsic materials; and, second, concerning the correct approach to defining locality as it arises in section 36B(4).

#### *Extrinsic Materials*

- 64. The Applicant noted several decisions following *Liquorland* in which the Commission has referred to extrinsic materials relating to section 36B(4).
- 65. In this regard, the Applicant highlighted Archer J's statement in *Liquorland* that she did not find the extrinsic material to be of any assistance and that the extrinsic material does not cast any light on the nature of the hurdle posed by section 36B(4).
- 66. Therefore, the Applicant asserted that, in accordance with this determination of the Supreme Court, extrinsic materials are not relevant in relation to the proper construction of section 36B(4).

#### *Locality*

- 67. The Applicant referred to the recent decisions of the Commission, namely, Broadwater Village Grocer Pty Ltd (LC 13/2022) ('Broadwater') at [138] and Planbig Investments Pty Ltd (LC 23/2022) ('Planbig') at [140], owing to the recognition therein that evidence of current consumer shopping habits may well be relevant or highly relevant to deciding the relevant 'locality.' Additionally, the Applicant noted that in each of these cases, the Commission defined the 'locality' by reference to a radius (Broadwater at [141] and Planbig at [143]).
- 68. Conversely, in *Liquorland*, Justice Archer held:
  - a. at [182], that 'locality' is intended to connote the concept of 'neighbourhood', and means the geographical area surrounding the site;

- b. at [181], that 'locality' was not intended to equate to the areas from which consumers would come; and
  - c. at [185], that the shape of the locality is defined by topographical features, the areas from which the site could be accessed reasonably easily.
69. Having regard to this, the Applicant submitted that the 2 and 3 km radii will not necessarily be appropriate in any given case, including the Application. In support of this submission, the Applicant referred to the MGA's supplementary report, published in December 2021, which identified (by reference to various topographical features and local communities) a locality with a broadly oblong shape of about 3km length and of varying widths.
70. Nevertheless, the Applicant stated that the definition of 'locality' is not a particularly significant issue in the context of the Application, because, regardless of how locality is defined:
- a. apart from the BWS at the Centre, there are no packaged liquor outlets located sufficiently near the Centre so as to meet requirements of consumers at the Centre for local convenience and one-stop shopping; and
  - b. packaged liquor outlets outside the Centre are not in a position to meet consumer requirements for the benefits of close competition to the BWS at the Centre in the manner that the proposed Liquorland store at the Centre would.

### **Intervener's Submissions**

71. On 26 August 2020, the Director refused the Application for the conditional grant of a liquor store licence.
72. On 8 October 2020, the Applicant lodged an *Application for Review*.
73. The Intervener subsequently provided:
- a. *Primary Submissions of the Intervener* dated 3 December 2020;
  - b. *Intervener's Submissions in Reply* dated 11 December 2020;
  - c. *Submissions of the Intervener* dated 21 June 2022; and
  - d. *Responsive Submissions of the Intervener* dated 28 June 2022.
74. On 20 April 2021, the Liquor Commission made a decision to affirm the decision of the Director and refuse the Application.
75. On 28 October 2021, Justice Archer allowed the appeal. On appeal, the Commission's decision to dismiss the Appellant's application for the conditional grant of a liquor store licence was quashed: *Liquorland; Orders of the Honourable Justice Archer made 28 October 2021*.
76. The Appellant's application was remitted back to the Commission for reconsideration in accordance with the reasons for decision in the appeal.

## **Intervener's Primary Submissions dated 3 December 2020**

77. The Intervener made submissions: firstly, as to the proper interpretation of section 36B of the Act; and secondly, why it was open for the Commission to find that the Applicant has failed to meet the requirements of section 36B(4) in the present case.

### *The proper approach to section 36B(4)*

78. The Intervener submitted that the principles of statutory interpretation should begin with a consideration of the text itself. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular, the mischief it is seeking to remedy.

79. The following propositions arising from the plain language of section 36B were presented as uncontroversial:

- a. Section 36B applies to an application for the grant of, amongst other things, a liquor store licence.
- b. The use of the words "must not" in section 36B(4) indicates that the provision is in mandatory terms – such that it provides a mandatory prohibition on granting the licence the subject of the application unless the condition in section 36B(4) is met.
- c. The condition within section 36B(4) is that the licensing authority be satisfied of a certain state of affairs – in particular, that "local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in" the relevant locality.
- d. The evidential and persuasive onus to so satisfy the licensing authority rests upon the applicant for a licence.

80. The Intervener submitted that in order to be satisfied of such condition, there must be evidence which allows the licensing authority to make findings of fact as to:

- a. What the local packaged liquor requirements are; and
- b. What packaged liquor services are currently provided by existing packaged liquor premises in the locality.

81. Once the licensing authority has made findings as to those matters, the licensing authority is required to make a value judgement as to whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises.

82. With regard to "requirements of consumers for packaged liquor in the locality", the Intervener submitted that a narrow construction as referring to requirements for packaged liquor itself should be applied (for example, requirements for liquor of a particular type, such as bottled table wine), rather than a broad construction encompassing such requirements of consumers as to matters of taste, convenience, shopping habits, shopper preferences and the like.

83. It was submitted that the narrow construction should be preferred for several reasons:

- a. First, the narrow construction supports Parliament's intent. This was demonstrated by an analysis of the mischief that the statute was designed to overcome.

- b. Second, the narrow construction gives purpose to section 36B. It was submitted that a broad interpretation would render section 36B superfluous to section 38(2) of the Act.
- c. Third, the narrow construction supports the objects of the Act. When section 36B is contrasted with section 5(1)(c), the narrow interpretation gives some effect to the deliberate difference in drafting the provisions.
- d. Fourth, the narrow construction is consistent with the balance of section 36B. To give full effect to the purpose of the section, it is necessary for the construction to go to the ends of preventing the proliferation of packaged liquor outlets.
- e. Fifth, the narrow construction is consistent with analogous provisions: the decisions of the Supreme Court of South Australia in *Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)* (1981) 28 SASR 458 and the Western Australian Supreme Court of Appeal in *Nominees*.
- f. Finally, the Liquor Commission has accepted the narrow construction.

#### *Section 36B(4) and the present case*

- 84. The Intervener made submissions regarding whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises.
- 85. Submissions were made regarding the lack of evidence led by the Applicant regarding why the local packaged liquor requirements could not be reasonably met by the existing packaged liquor premises within the locality.

#### **Intervener's Submissions in Reply dated 10 December 2020**

- 86. The Intervener made submissions in reply, going to the point of demonstrating that, factually, the requirements of section 36B(4) have not been met, as the existing stores could satisfy peak demand for liquor.

#### **Intervener's Primary Submissions dated 21 June 2022**

- 87. The Intervener made submissions as to the interpretation and application of section 36B(4) upon the decision of the Supreme Court of Appeal returning the matter to the Liquor Commission.
- 88. The Intervener agrees with the Applicant's summary of findings from the *Liquorland* decision. The contention arises from how the Commission should properly apply the facts of the case to the holdings of law.
- 89. The Intervener submitted that the licensing authority must determine locality based on all the relevant factors, going beyond the confines of what may be submitted by the Applicant or policy documents. It was put forward that Archer J expressed a tentative view that premises outside an identified locality remain relevant to the assessment under section 36B.
- 90. Three cases were submitted by the Intervener, in which the Liquor Commission considered *Liquorland*. All the decisions provided context on how section 36B should be applied. It was noted that these decisions were not binding, however, may be used as a guide.

91. The Intervener then turned to the application of section 36B(4) to the present case. The intervener has no issue with the Applicant's position generally to the locality which was set out in the MGA Supplementary Report. The Intervener does, however, hold that the report should have considered, in addition to the other factors, the retail catchment area and the mode of transport that would be utilised to reach the retail store. These were referred to as the 'Additional Locality Considerations'.
92. It was submitted that Archer J left it open to the Commission to consider the retail catchment area in determining the relevant locality.
93. Further, it was submitted that the mode of transport, that being evidence of driving, is relevant.
94. The Intervener then considered the relevance and suitable weight that should be given to the Additional Locality Considerations. As the majority of customers would come from outside the locality as defined in the MGA Supplementary Report, and, therefore, outside the locality, the Commission's approach to locality should reflect this change.
95. The Intervener cautioned that, if the Applicant's definition of locality was accepted by the Commission, it would be open for the Commission to conclude that the Applicant has not established either the existence of consumer requirements in this locality nor the ability of existing liquor retail stores to reasonably meet consumer requirements.

## **LEGAL AND STATUTORY FRAMEWORK**

96. 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)].
97. 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)).
98. 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)].

### Section 38 Public Interest Condition

99. The expression “in the public interest,” when used in a statute, imports a discretionary value judgment (*O’Sullivan v Farrer [1989] HCA 61*).

100. 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):
  - i. to regulate the sale, supply and consumption of liquor; and
  - ii. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
  - iii. 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):
  - i. 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
  - ii. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
  - iii. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

101. 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)).

102. No 'other ... matter' has been prescribed pursuant to section 38(4)(d).

### Section 36B(4) Consumer Requirements Condition

103. 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.

104. 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.”*

105. 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.

106. 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]).

107. 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]).

108. The evidential and persuasive onus falls upon the Applicant for the grant of the licence to satisfy the licensing authority as to the above.

109. 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.

#### *Definition of Locality under section 36B(4) of the Act*

110. The definition of locality was considered in the *Liquorland* decision.

111. In *Liquorland*, Archer J held ([181]) that:

*“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”*

112. Archer J identified a number of matters that were relevant in determining the proper construction of locality ([181] – [188]):

- a. “...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” at [182].



- b. *“...a retail catchment area could be extremely large, of wildly irregular shape and even made up of several non-adjointing areas. Describing such an area as a ‘locality’ would not be consistent with the ordinary meaning of that word”* at [182].
- c. *“By using the word ‘locality’, I consider that the legislature intended to capture the geographical area surrounding, and relatively close to, the proposed site, the ‘neighbourhood’ of the site”* at [184].

113. Archer J then went on to consider how locality should properly be determined ([185] – [188]).

114. In determining locality, Archer J held that there is no prescribed test:

*“...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”* at [185].

115. However, Archer J did note some factors that may be considered:

*“This is not to say that 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’”* at [184] (emphasis added).

*“...the retail catchment area can be a relevant consideration for the purpose of determining locality”* at [188].

116. Locality is, therefore, to be the area geographically close to the premises being determined based on the circumstances of each individual case, looking to consider the topographical features and the areas the site would be accessed by people utilising various modes of transport.

## **DETERMINATION**

117. 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)***

118. In making the determination, the relevant provisions of the Act have been considered, including the Public Interest Condition imposed by section 38.

119. In this regard, the Applicant has the onus of satisfying the Commission that the establishment of the proposed liquor premises would be in the public interest.

120. In determining the public interest for the purposes of the Act, the Commission has had regard to factual matters relevant to the objects of the Act set out in sections 5(1)-(2) and 38(4). Notably, such factual matters include the possible harm or ill-health that may be caused by the proposed premises and the positive or negative effects which the grant of the application would have upon amenity.<sup>1</sup>
121. Further, the determination of public interest is not isolated from considerations of competition, convenience, product range and efficiency. This understanding was confirmed by Archer J in *Liquorland* when her honour, at paragraph 106, stated that such matters are relevant to both the Public Interest and Consumer Requirements Conditions.
122. The Applicant has presented persuasive consumer and expert evidence in favour of the view that the proposed store would satisfy consumer requirements for convenience and competition and would enhance the amenity of the locality in a manner that is consistent with planning objectives and community expectations concerning large shopping centres. In contrast, there is minimal to no indication of any negative aspects arising from granting the application.
123. The Commission finds that the grant of the application is in the public interest for the purposes of section 38.

### ***Consumer Requirement Condition (section 36B(4) of the Act)***

#### *Definition of Locality*

124. The first step in making a determination as to section 36B(4) is to determine what is to be held as the 'locality' in this case.
125. The Commission holds that the locality is the area geographically close to the premises being determined based on the circumstances of each individual case, looking to consider the topographical features and the areas the site would be accessed by people utilising various modes of transport.
126. Summarily, the Applicant submits that the locality should be what is set out in Figure 1 of the 'MGA Supplementary Report', and the Intervener submits that it is open to find that the locality be a larger area, more closely resembling the retail catchment area (although not exactly encompassing that whole area).
127. The Commission first considers whether the area prescribed by the Applicant as set out in Figure 1 of the 'MGA Supplementary Submissions' is in accordance with the regime of section 36B and the circumstances of the case.
128. The 'MGA Supplementary Report' has been made by an expert author and prepared to address considerations identified in the decision of Archer J.
129. The report has considered all the elements the Commission holds as being the correct definition of 'locality' in section 36B(4).

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<sup>1</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 per Buss J at [49], [50], *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157 at [52], [173], [175], [184], [207], [231].

130. Furthermore, the Intervener agrees with the contents of the report, save that it failed to consider two key factors, that being the retail catchment area and the mode of transport that would be utilised to reach the retail store, that being driving.
131. It should be noted that the Commission is entitled to make a finding of locality which is outside what has been submitted by the Applicant or Intervener, however, the Commission would ordinarily not deviate from expert evidence which logically and coherently applies the facts of the case to the law unless there is some compelling reason to do so.
132. The Commission holds that Figure 1 of the 'MGA Supplementary Report' is the appropriate locality for the purposes of section 36B(4) of the Act.

*What are the Local Packaged Liquor Requirements?*

133. The Commission is required to determine, within the locality prescribed, the packaged liquor requirements.
134. The Applicant has submitted several reports which provide evidence that there is a consumer need for competition, convenience, and one-stop shopping. The Intervener challenged these findings, submitting that there has been insufficient evidence presented.
135. The Commission holds that, within the locality prescribed, the local packaged liquor requirements include competition and convenience.

*Are the Local Packaged Liquor Requirements met by existing stores?*

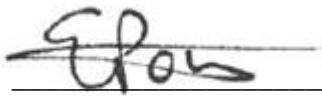
136. The Commission is then required to determine whether the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality.
137. It is uncontentious that there is only one liquor store within the locality which is a BWS located at the Centre. The question is, therefore, is this BWS unable to meet the local packaged liquor requirements of competition and convenience? Two considerations are relevant to determining the answer in this regard.
138. First, it is apparent that, as there is only one store in the locality, there is no competition. The Commission accepts that BWS does operate on a national scale with competitive pricing schemes. However, it would seem inconsistent to hold that because of this factor, the local BWS meets the competition requirement. This is because, as a matter of common sense, a competitive pricing scheme does not alleviate the obvious desire for consumers to 'shop around' or compare prices in store.
139. Second, turning to convenience, it is clear from the evidence that the BWS is, at certain times, unable to handle the high levels of patronage that are associated with the large shopping centre. This is clearly inconvenient to consumers. It could be contended that wait times and other minor inconveniences are expected and not unreasonable. It is therefore a question of reasonability, which is to be answered with common sense and rationality. Accordingly, the Commission holds that the inconvenience presented by having only one packaged liquor store goes beyond what is reasonable in this context.

140. The Commission holds that the local packaged liquor requirements are not met by the existing BWS store. Therefore, the Applicant has satisfied the consumer requirement condition as set out in section 36B(4) of the Act.

## **CONCLUSION**

141. The Commission finds that the public interest condition (section 38 of the Act) and the consumer requirement condition (section 36B(4) of the Act) have been met.

142. Accordingly, the application for the conditional grant of a liquor store licence is granted subject to standard conditions applied to liquor store licences by the licensing authority.



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**EMMA POWER**  
**DEPUTY CHAIRPERSON**



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**NICHOLAS VAN HATTEM**  
**MEMBER**



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**DR KIM HAMES**  
**MEMBER**