JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
CITATION	**:**	LIQUORLAND (AUSTRALIA) PTY LTD -v- DIRECTOR OF LIQUOR LICENSING [2021] WASC 366
CORAM	**:**	ARCHER J
HEARD	**:**	8 SEPTEMBER 2021 FURTHER SUBMISSIONS ON 4 OCTOBER 2021
DELIVERED	**:**	28 OCTOBER 2021
FILE NO/S	**:**	GDA 7 of 2021
BETWEEN	**:**	LIQUORLAND (AUSTRALIA) PTY LTD Appellant AND DIRECTOR OF LIQUOR LICENSING Respondent

ON APPEAL FROM:

Jurisdiction	**:**	LIQUOR COMMISSION OF WESTERN AUSTRALIA
Coram	**:**	MS EMMA POWER (DEPUTY CHAIR) MS ELANOR ROWE (MEMBER) MS KIRSTY STYNES (MEMBER)
File Number	**:**	LC 07/2021

Catchwords:

Construction of s 36B(4) of the Liquor Control Act - Consumer requirements -

'Cannot reasonably be met' - 'Locality' - Relevance of retail catchment area

Legislation:

Liquor Control Act 1988 (WA), s 5(1)(c), s 36B, s 38

Result:

Appeal allowed

Category: A

Representation:

Counsel:

Appellant	:	S M Standing
Respondent	:	J M Misso & M I Olds

Solicitors:

Appellant	:	Herbert Smith Freehills
Respondent	:	State Solicitor's Office (WA)

Case(s) referred to in decision(s):

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167
Armstrong v Edgecock [1984] 2 NSWLR 536
Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2017] WASC 88
Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2020] WASCA 157; (2020) 56 WAR 102
Birch v Allen (1942) 65 CLR 621
Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208
Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1991) 4 WAR 1
Commissioner for Consumer Protection v Carey [2014] WASCA 7
Conservation Council of WA Inc v Hon Stephen Dawson MLC, Minister for Environment; Disability Services [2019] WASCA 102
Downes Family Trust v Woolworths (WA) Pty Ltd [2001] WASCA 382
Hayman v Cartwright [2018] WASCA 116; (2018) 53 WAR 137

Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd (1973) 4 SASR 503
Hossain v Minister for Immigration and Border Protection [2018] HCA 34; (2018) 264 CLR 123
Hunter v Reyneke (1986) 6 NSWLR 576
Kartika Holdings Pty Ltd v Liquor Stores Association of WA [2008] WASCA 103
Kelly v R [2004] HCA 12; (2004) 218 CLR 216
Lincoln Bottle Shop v Hamden Hotel (1978) 19 SASR 326
Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405
Lucas v Mooney (1909) 9 CLR 231
Lynn v The State of New South Wales [2016] NSWCA 57; (2016) 91 NSWLR 636
McRedmond v Tassell [2002] NSWSC 1163
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Morgan v Goodall [1985] 2 NSWLR 655
MZAPC v Minister for Immigration and Border Protection [2021] HCA 17
Nepeor Pty Ltd v Liquor Licensing Commission (1987) 46 SASR 205
Osland v Secretary, Department of Justice (No 2) [2010] HCA 24; (2010) 241 CLR 320
Pitt, Son & Badgery Ltd v Municipal Council of Sydney (1908) 24 WN (NSW) 203
Registrar of Titles (WA) v Franzon (1975) 132 CLR 611
Russo v Aiello (2003) 215 CLR 643; [2003] HCA 53
Tomley Investment Co Pty Ltd v Victoria (Tapleys Hill) Pty Ltd (1978) 17 SASR 584
Toohey v Taylor [1983] 1 NSWLR 743
Wacando v Commonwealth [1981] HCA 60; (1981) 148 CLR 1
Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd (1998) 73 SASR 6
Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290
Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227; (2013) 45 WAR 446

ARCHER J:

Background

1 In May 2020, the appellant applied for a liquor store licence for a proposed liquor store to be located at the Karrinyup Shopping Centre (**Centre**).

2 An applicant for a liquor store licence must satisfy the 'licencing authority'[1] of two things:

1. that the grant of the application would be in the public interest (**Public Interest condition**); and

2. that 'local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated' (**Consumer Requirements condition**).

3 The Public Interest condition is imposed by s 38(2) of the *Liquor Control Act 1988* (WA) (**Act**).

4 The Consumer Requirements condition is imposed by s 36B(4). Section 36B(1) defines the phrase 'local packaged liquor requirements' in s 36B(4) to mean 'the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated'.

5 On 26 August 2020, the Director of Liquor Licensing (**Director**) refused the application on the basis that he was not satisfied that the Consumer Requirements condition had been met.

6 Liquorland sought a review of the Director's decision by the Liquor Commission of Western Australia (**Commission**).

7 On 20 April 2021, a three-member Commission made a decision (**Decision**)[2] to affirm the decision of the Director.

8 The Commission held that 'requirements of consumers for packaged liquor' in the definition of 'local packaged liquor requirements' in s 36B(1) refers to the requirements of consumers for packaged liquor *as a physical item or product*, as distinct from the broader range of matters

[1] The 'licensing authority' will be either the Director or the Commission, depending on context - see the definition in s 3 of the *Liquor Control Act 1988* (WA).
[2] ***Liquorland (Australia) Pty Ltd v Director of Liquor Licensing*** LC 07/2021.

which are taken into account in considering consumer requirements in the context of the Public Interest condition,[3] such as consumer convenience (including the convenience of one stop shopping).[4]

9 Ultimately, the Commission was not satisfied that the Consumer Requirements condition had been met. Accordingly, the Public Interest condition was not considered.

10 By these proceedings, the appellant appeals against the Commission's decision. The respondent filed submissions and appeared in the hearing only to make submissions as to the Act's interpretation, to assist the court in the absence of any other party or contradictor. The court is, as always, grateful for such assistance.

The appeal

11 In its three grounds of appeal, the appellant asserts that the Commission erred in that:

> 1. it held that the phrase 'the requirements for packaged liquor' is limited in its scope to the physical item or product of packaged liquor when the sub-section, properly construed, does not so limit the meaning of the phrase.
>
> PARTICULARS
>
> (a) Properly construed the sub-section provides for the consideration of the 'requirements for packaged liquor' by reference to the same matters as are considered under the public interest test in s 38(2) of the Act; and
>
> (b) The sub-section creates a different test to the public interest test in s 38(2) of the Act in that the sub-section applies an objective element by asking whether or not 'the requirements for packaged liquor' can 'reasonably' be met by existing packaged liquor premises in the relevant locality, which element is not part of the public interest test.
>
> 2. it held that the phrase 'cannot reasonably be met' means, in effect, 'cannot without great or undue difficulty or inconvenience be met' when the phrase, in the sub-section properly construed, means, in effect, 'cannot sensibly, rationally or moderately be met' having

[3] And also in the context of considering the now repealed 'needs test' in s 38(1) - see the discussion of ***Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd*** (1999) 20 WAR 405 (***Austie Nominees***) under the heading 'The history of the Act'.
[4] Decision [115] and [119].

regard to contemporary standards and expectations for the requirements of packaged liquor.

3. it held that the relevant 'locality' is to be determined by reference to the area from which customers of the proposed premises will be drawn when the sub-section, properly construed, requires that the relevant locality is to be determined by reference to the area, district or neighbourhood within which the proposed premises are to be located.

12 The respondent asserts that:[5]

(a) on its proper construction, the phrase 'requirements of consumers for packaged liquor' in the definition of 'local packaged liquor requirements' in s 36B(1) of the [Act] means the requirements of consumers for packaged liquor products or items, and does not encompass the same matters which have been held to be relevant in ascertaining 'the requirements of consumers for liquor and related services, having regard to the proper development of the liquor industry…' in s 5(1)(c) of the [Act];

(b) in determining whether the 'requirements of consumers for packaged liquor' cannot reasonably be met by existing premises in the locality of the proposed liquor store, the [Commission] correctly had regard to whether there was anything that prevented packaged liquor from being readily accessed by consumers in the locality, or which created great difficulty or inconvenience to consumers in accessing packaged liquor in the locality; and

(c) it was open to the Commission to determine the relevant 'locality' for the purpose of s 36B(4) of the [Act] by reference to factors including the area from which the proposed liquor store might be expected to draw custom.

The issues

13 The 'questions of law' arising from these grounds were described as follows:[6]

1. (From ground 1) is the phrase 'requirements of consumers for packaged liquor' in the definition of 'local packaged liquor

[5] Respondent's submissions dated 13 July 2021 [1] (**Respondent's Submissions**).

[6] During the hearing, there was some discussion about the questions of law that arose - see ts 18 - 19, 36 and 83 - 84. I have since modified the first question having regard to what needed to be determined by ground 1.

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?

14 The questions of law identify the first three issues.

15 Once the questions of law have been answered, it will be necessary to determine:

1. did the Commission err in law?

2. if the Commission erred, was that error material?

16 Before dealing with the issues, I will set out the relevant legal framework.

Legal Framework

Appeals from decisions of the Commission

17 Because the Commission was constituted by three members, its decision may only be appealed to the Supreme Court and only on a question of law.[7]

18 While called an 'appeal', it is in the nature of judicial review.[8] However, the questions of law are not confined to jurisdictional errors, and extend to non-jurisdictional questions of law.[9]

19 Ordinarily, statutes conferring decision-making authority are interpreted as incorporating a threshold of materiality in the event of non-compliance.[10] Neither party suggested that the Act did not incorporate a threshold of materiality and I find that it does. Therefore, to succeed, the appellant needs to prove that an error was material. That is, the appellant

[7] Section 28(2) of the Act.
[8] ***Carnegies Realty Pty Ltd v Director of Liquor Licensing*** [2015] WASC 208 [37] (Allanson J); ***Osland v Secretary, Department of Justice (No 2)*** [2010] HCA 24; (2010) 241 CLR 320, 331 - 332 [18] (French CJ, Gummow and Bell JJ).
[9] ***Commissioner for Consumer Protection v Carey*** [2014] WASCA 7 [72] (McLure P).
[10] ***Hossain v Minister for Immigration and Border Protection*** [2018] HCA 34; (2018) 264 CLR 123, 134 - 135 [29] - [30] (Kiefel CJ, Gageler and Keane JJ). See also ***MZAPC v Minister for Immigration and Border Protection*** [2021] HCA 17 [31] - [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

needs to prove that there is a realistic possibility that, if the Commission had not erred, a different decision could have been made.[11]

20 In considering whether the Commission made an error, its reasons should not be construed with an eye keenly attuned to the identification of error. The 'reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed'.[12]

Statutory construction

21 The principles to be applied in statutory construction were recently summarised by Buss P in ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** (most citations omitted):[13]

> The focus of statutory construction is upon the text of the provisions having regard to their context and purpose.
>
> The statutory text is the surest guide to Parliament's intention. A decision as to the meaning of the text requires consideration of the context, in its widest sense, including the general purpose and policy of the provision.
>
> The context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed.
>
> However, legislative history and extrinsic materials cannot displace the meaning of statutory text. Further, the examination of legislative history and extrinsic materials is not an end in itself.
>
> The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.
>
> The purpose of a statute may, in a particular case, be ascertained from its long title. The long title may properly be referred to, where there is ambiguity, for guidance on the intended scope of the Act. It may not be used to contradict any clear and unambiguous language in the statute.

[11] ***MZAPC*** [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
[12] ***Apache Northwest Pty Ltd v Department of Mines and Petroleum*** [2012] WASCA 167 [36] (Newnes JA), citing ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** [1996] HCA 6; (1996) 185 CLR 259, 271 - 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).
[13] ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** [2020] WASCA 157; (2020) 56 WAR 102 (***ALH Group (2020)***) [151] - [161] (Buss P). Quinlan CJ and Vaughan JA agreed with the recitation of principles in these paragraphs – see [3].

However, if there is any uncertainty, it may be resorted to for the purpose of resolving the uncertainty.

A section in a statute which specifically states the purposes or objects of the statute is relevant to the proper construction of the statute. It is necessary to consider the method by which Parliament has implemented the specified purposes or objects. The purposes or objects must be read and understood in the context of the statute as a whole.

By s 29 of the *Interpretation Act 1984* (WA), every section of an Act takes effect as a substantive enactment without introductory words. This provision was included in the *Interpretation Act* to avoid the repetition of enacting words before each section. A section in a statute which specifically states the purposes or objects of the statute therefore, of itself, takes effect as a substantive enactment.

Section 18 of the *Interpretation Act* provides that, in the interpretation of a provision of a written law (including all Acts for the time being in force), a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object. The requirement in s 18 that one construction be preferred to another can apply only where two constructions are otherwise open. If the ordinary meaning conveyed by the text of a provision is to be modified by reference to the purposes or objects underlying the written law, the modification must be able to be identified precisely as that which is necessary to give effect to those purposes or objects and it must be consistent with the text otherwise adopted by the draftsperson. Section 18 requires a court to construe a written law, and not rewrite it by reference to its purposes or objects.

The view has been expressed that a section in a statute which specifically states the purposes or objects of the statute cannot cut down the meaning of another provision of the statute if that meaning is, in its textual and contextual surroundings, plain and unambiguous. This view has been based primarily on similar observations in ***Wacando v Commonwealth***[14] in relation to the proper construction of a preamble to a statute. See also s 31(1) of the *Interpretation Act*, which states that the preamble to a written law forms part of the written law 'and shall be construed as a part thereof intended to assist in explaining its purport and object'.

[14] ***Wacando v Commonwealth*** [1981] HCA 60; (1981) 148 CLR 1, 15 - 16 (Gibbs CJ), 23 (Mason J, as his Honour was then).

> More recently, in ***Lynn v The State of New South Wales***,[15] Beazley P stated that the object provisions of a statute cannot control clear statutory language. Her Honour then elaborated:
>
> > 'Further, there are many statutes where the objects of the Act are directed to disparate ends and are not necessarily harmonious. Nonetheless, as Gleeson CJ observed in ***Russo v Aiello*** (2003) 215 CLR 643; [2003] HCA 53 at [5], the statement of legislative objects is "not an exercise in apologetics", rather, it gives practical content to terms such as "reasonable", "justification" and "satisfactory". Likewise, the long title of an Act may be referred to as an aid to construction of the provisions of the Act: ***Pitt, Son & Badgery Ltd v Municipal Council of Sydney*** (1908) 24 WN (NSW) 203 at 204; ***Birch v Allen*** (1942) 65 CLR 621.'

22 The task of statutory construction in this case involves, among other things, construing the phrase 'requirements of consumers' in s 36B of the Act. This phrase also appears in s 5(1)(c). There is ordinarily a presumption that the same word will bear the same meaning wherever it appears throughout an Act. However, that presumption may be displaced by the context in which the word appears.[16]

The relevant provisions of the Act

23 In the Background section of these reasons, I set out a summary of the legislative provisions. The following is a more detailed account.

24 An applicant for a liquor store licence must satisfy the licencing authority of the Public Interest condition and the Consumer Requirements condition.

25 As I will explain, in considering whether these conditions have been met, the Commission must have regard to the objects of the Act.

The objects of the Act - section 5

26 Section 5 provides:

> **5. Objects of Act**
>
> (1) The primary objects of this Act are —

[15] ***Lynn v The State of New South Wales*** [2016] NSWCA 57; (2016) 91 NSWLR 636 [54] (Beazley P; Gleeson JA relevantly agreeing).

[16] ***Conservation Council of WA Inc v Hon Stephen Dawson MLC, Minister for Environment; Disability Services*** [2019] WASCA 102 [156], citing ***Registrar of Titles (WA) v Franzon*** (1975) 132 CLR 611, 618 (Mason J, as his Honour then was).

> (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.
>
> (2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects —
>
> (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), (c) deleted]*
>
> (d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
>
> (e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and
>
> (f) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.
>
> (3) If, in carrying out any of its functions under this Act, the licensing authority considers that there is any inconsistency between the primary objects referred to in subsection (1) and the secondary objects referred to in subsection (2), the primary objects take precedence.

27 Each of the objects inform the subject matter, scope and purpose of the Act.[17]

28 When the Commission determines whether it is satisfied that the Public Interest condition has been met, the Commission is carrying out one

[17] ***ALH Group (2020)*** [32] (Quinlan CJ and Vaughan JA).

of its functions under the Act.[18] Similarly,[19] when the Commission determines whether it is satisfied that the Consumer Requirements condition has been met, the Commission is carrying out one of its functions under the Act.

29 Accordingly, the Commission must, when engaged in either task, have regard to the primary objects and the secondary objects of the Act.[20]

The Public Interest condition - section 38

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

> **38. Some applications not to be granted unless in the public interest**
>
> (1) Subsection (2) applies to -
>
> (a) an application for the grant or removal of a licence of a kind prescribed; or
>
> (b) an application for a permit of a kind prescribed; or
>
> (c) any other application to which the Director decides it is appropriate for subsection (2) to apply.
>
> (2) An applicant who makes an application to which this subsection applies must satisfy the licensing authority that granting the application is in the public interest.
>
> (3) For the purposes of subsection (2), the applicant must provide to the licensing authority -
>
> (a) any prescribed document or information; and
>
> (b) any other document or information reasonably required by the licensing authority for those purposes.
>
> (4) Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include -
>
> (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and

[18] ***ALH Group (2020)*** [24] (Quinlan CJ and Vaughan JA).
[19] As a matter of logic, the same would follow in relation to s 36B(4). Both parties agreed – see ts 11 and 37.
[20] Section 5(2) of the Act.

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

31 In 'considering whether the grant of an application is in the public interest, the Commission must consider the positive and negative aspects of the application and how the application will promote the objects of the Act'.[21]

32 Accordingly, in considering the Public Interest condition, the Commission must consider, among other things, how the application will promote the object of the Act to 'cater for the requirements of consumers and related services, having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.'[22]

33 This requires the Commission to consider[23]

> whether, having regard to all of the evidence and any notorious facts, … there were consumer requirements in the [relevant] locality for the range of liquor products and services which the appellant proposed to provide and whether, in all the circumstances, it was in the public interest to grant the application, particularly in order to contribute to the proper development of the liquor industry in a manner which reflected the diversity of consumer requirements.

34 Determining the public interest is a discretionary value judgment.[24]

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[21] ***ALH Group (2020)*** [20] (Quinlan CJ and Vaughan JA).
[22] Being the object in s 5(1)(c).
[23] ***Woolworths Ltd v Director of Liquor Licensing*** [2013] WASCA 227; (2013) 45 WAR 446 (***Woolworths v DLL)*** [89] (Buss JA, as his Honour then was). See also ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** [2017] WASC 88 (***ALH Group (2017)***) [65] - [69].

The Consumer Requirements condition - section 36B(4)

35 The Consumer Requirements condition is imposed by s 36B(4). Section 36B provides:

> **36B. Restrictions on grant or removal of certain licences authorising sale of packaged liquor**
>
> (1) In this section -
>
> *local packaged liquor requirements*, in relation to an application to which this section applies, means the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated;
>
> *packaged liquor premises* means premises to which a licence referred to in subsection (2) relates;
>
> *prescribed area* means the area prescribed for the purposes of this section;
>
> *prescribed distance* means the distance prescribed for the purposes of this section;
>
> *proposed licensed premises*, in relation to an application to which this section applies, means -
>
> (a) if the application is for the grant of a licence - the premises to which the application relates; or
>
> (b) if the application is for the removal of a licence - the premises to which the licence is sought to be removed;
>
> *retail section* -
>
> (a) in relation to packaged liquor premises - means the part or parts of the premises on which packaged liquor is displayed for the purposes of sale or sold; and
>
> (b) in relation to proposed licensed premises - means the part or parts of the premises on which packaged liquor is to be displayed for the purposes of sale or sold.
>
> (2) This section applies to an application for the grant or removal of any of the following licences -

[24] ***Woolworths v DLL*** [48] (Buss JA, as his Honour then was). And see ***ALH Group (2017)*** [16].

> (a) a hotel licence without restriction;
>
> (b) a tavern licence;
>
> (c) a liquor store licence;
>
> (d) a special facility licence of a prescribed type.
>
> (3) The licensing authority must not hear or determine an application to which this section applies if -
>
> (a) packaged liquor premises are situated less than the prescribed distance from the proposed licensed premises; and
>
> (b) the area of the retail section of those packaged liquor premises exceeds the prescribed area; and
>
> (c) the area of the retail section of the proposed licensed premises exceeds the prescribed area.
>
> (4) The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.
>
> (5) Regulations made for the purposes of the definition of prescribed distance in subsection (1) may prescribe different distances in relation to packaged liquor premises in different areas of the State.

36 As can be seen from s 36B(2), s 36B applies to various types of licence applications, including liquor store licences. These are given the collective name of 'packaged liquor premises' in s 36B(1). I will therefore refer to licences covered by s 36B as '**packaged liquor licences**'.

37 The phrase 'the locality in which the proposed licensed premises are, or are to be, situated' appears in both s 36B(1) and s 36B(4). I will use '**relevant locality**' as shorthand for this phrase.

38 Section 36B(4) refers to requirements that 'cannot reasonably be met'. The word 'reasonable' imports a degree of objectivity in that the word reasonable means sensible; not irrational, absurd or ridiculous; not

going beyond the limit assigned by reason; not extravagant or excessive; moderate.[25]

The history of the Act

39 Prior to 1998, s 38(1) of the Act relevantly required an applicant for a liquor store licence to satisfy the licencing authority that the licence was 'necessary in order to provide for the reasonable requirements of the public for liquor and related services or accommodation in that area'. This was referred to as a 'needs test',[26] and was plainly an objective test.[27]

40 Cases dealing with this provision established that, if there was proof of a subjective desire for one-stop shopping and if the proposed licence would meet that 'requirement' and if the requirement was not otherwise being met, the test under s 38(1) was prima facie satisfied. It was accepted that the desire for one-stop shopping was objectively reasonable having regard to contemporary standards and shopping habits.[28]

41 By treating one-stop shopping as a 'requirement', it can be seen that the word 'requirements' has been interpreted as meaning something desired as distinct from essential.

42 In 1998, the *Liquor Licence Amendment Act 1998* (WA) relevantly amended s 38 to add a new s 38(2b).

43 Section 38(2b) imposed an additional restraint in relation to the grant of liquor store licences. It provided that such a licence shall not be granted in respect of, or removed to, premises unless the licensing authority is satisfied that the reasonable requirements of the public for liquor and related services in the affected area cannot be provided for by licensed premises already existing in that area.

44 This was said to reflect 'a recognition that a proliferation of liquor stores selling packaged liquor at discount prices may result in a decline in other forms of Category A licences such as hotels and taverns, and that if this happened, it would disadvantage a significant section of the public who prefer that form of supply'.[29]

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[25] ***Charlie Carter Pty Ltd v Streeter & Male Pty Ltd*** (1991) 4 WAR 1, 10 (Malcolm CJ); ***Austie Nominees***, 409 - 410 (Anderson J).
[26] See, for example, ***Woolworths v DLL*** [8] (Martin CJ).
[27] See ***Austie Nominees***, 409 (Anderson J).
[28] ***Austie Nominees***, 410 - 411 (Anderson J).
[29] ***Austie Nominees***, 413 (Anderson J).

45 In ***Austie Nominees***, Anderson J, with whom Pidgeon and Wallwork JJ agreed, accepted the appellant's argument that the phrase 'cannot be provided for' did not mean complete physical impossibility, but did denote more than inconvenience or some degree of difficulty. He accepted that the phrase should be understood as if it read 'cannot be provided for without occasioning substantial difficulty or substantial inconvenience'.[30]

46 Anderson J also dealt with the meaning of the phrase 'reasonable requirements of the public for liquor and related services' in the new s 38(2b). His Honour said it would have no work to do if it was given the same wide meaning as it was given in subs (1).[31] His Honour held, therefore, that it must have a narrower meaning in subs (2). He concluded:[32]

> … subs (2b) is not concerned — in the way that subs (1) is — with the requirements of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like, but is concerned with the requirements of the public for liquor itself.
>
> I think that, on the proper construction of s 38, an applicant for a liquor store licence is required by subs (2b) to satisfy the licensing authority that the reasonable requirements of the public for liquor itself (or liquor of a particular type, such as bottled table wines) and related services cannot be provided for in the affected area by licensed premises already existing in the area; that is, cannot be provided for at all, or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public.
>
> There are still questions of degree about which value judgments must be made. It remains a question for judgment in every case whether the licensing authority ought to be satisfied that the 'requirements … for liquor and related services', in this narrower sense, 'cannot' be provided for by licensed premises already existing in the affected area. See, for example, ***Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd*** in which King CJ held that an existing outlet could not meet the demand in the area for wines because, although there was an ample quantity and good range in stock, the stock was not in a practical sense accessible to shoppers because it was kept in boxes in the store room.

[30] ***Austie Nominees***, 414 - 415.
[31] ***Austie Nominees***, 415.
[32] ***Austie Nominees***, 415, endorsed in ***Downes Family Trust v Woolworths (WA) Pty Ltd*** [2001] WASCA 382 [12] (Owen J).

47 In ***Kartika Holdings Pty Ltd* v *Liquor Stores Association of WA***,[33] Martin CJ acknowledged that it was necessary to give a narrower meaning to the phrase in s 38(2b) than was given to the same phrase in s 38(1) of the section, in order to give effect to the purpose of the legislation (being to impose a particular restraint on the grant of liquor store licences).

48 In 2006, the *Liquor and Gaming Legislation Amendment Act 2006* (WA) amended s 38 to remove the needs test and introduce the public interest test. It also added s 5(1)(c).

49 In relation to the addition of s 5(1)(c), the relevant Minister said, during his second reading speech:[34]

> To add a higher emphasis on the needs of consumers, the act will be amended so that one of its primary objects will be 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.

50 In relation to the addition of the public interest test, the relevant Minister said:[35]

> A key reform is the creation of a public interest test for new licences to replace the current needs test. Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest, and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts on the community. Although the public interest test will involve consideration of the amenity of a locality in the context of the facilities and services provided for consumers, the competitive impacts on other liquor businesses will not be considered. It should be noted, however, that the government does not consider proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test.

51 In 2018, s 36B was inserted into the Act by s 18 of the *Liquor Control Amendment Act 2018* (WA). It reintroduced an objective test for the grant of the types of licences with which it dealt, which included liquor store licences.

52 The Explanatory Memorandum relevantly stated that s 36B was inserted as[36]

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[33] ***Kartika Holdings Pty Ltd v Liquor Stores Association of WA*** [2008] WASCA 103 [8] - [9] (Martin CJ). See also [56] (EM Heenan AJA).
[34] Hansard, Legislative Assembly, 20 September 2006, page 6341.
[35] Hansard, Legislative Assembly, 20 September 2006, page 6342.

> a strategy to minimise the adverse impact that packaged liquor outlets can have on the community … to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality.

53 During his second reading speech, the relevant Minister said that the purpose of the amendment was 'to prevent the further proliferation of small and medium packaged liquor outlets across the state'.[37] In the Parliamentary debates on the Bill, the Minister said that the new s 36B would 'enable the community to determine whether it feels consumers in its area have adequate, reasonable access to a liquor supply'.[38]

Ground 1 – local packaged liquor requirements

The appellant's submissions

54 By ground 1, the appellant alleges that the Commission erred in holding that the phrase 'the requirements for packaged liquor' is limited in its scope to the physical item or product of packaged liquor when the sub-section, properly construed, does not so limit the meaning of the phrase.

55 The question of law is, on a proper construction of s 36B, 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?

56 The appellant contends that the phrase 'requirements of consumers' ought to be construed as having the same meaning as that phrase has been given in s 5(1)(c). The appellant's propositions may be summarised as follows:

1. The phrase 'requirements of consumers' in s 5(1)(c) has been interpreted as encompassing such matters as shopper convenience and preferences (including the convenience of one stop shopping) and competition.

2. Wherever possible, language in a statute should be given a consistent meaning wherever it appears.

3. This is particularly apposite in this case, given s 5(2) requires the licencing authority to have regard to the primary objects stated in s 5(1) in carrying out its functions under the Act.

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[36] Explanatory Memorandum, Liquor Control Amendment Bill 2018 (WA), 1.
[37] Hansard, Legislative Assembly, 20 February 2018, page 325.
[38] Hansard, Legislative Assembly, 15 March 2018, page 897.

4. The purpose of s 36B(4) – to impose a further limitation on the grant of packaged liquor licences – is plain from its text. Given that, it is inappropriate to have regard to extrinsic material in which it was said that the Government intended to 'prevent the further proliferation' of packaged liquor outlets.

5. The appellant's construction would not mean s 36B(4) would be simply a repetition of the Public Interest condition. Section 36B(4) imposes an objective test that is not part of the public interest test.

6. Accordingly, the same meaning should be given to the phrase where it appears in s 36B(4).

7. In giving it a different meaning, the Commission erred.

The respondent's submissions

57 The respondent contends that the Commission's construction was correct.

58 The respondent submits that the Consumer Requirements condition in s 36B is limited to the *availability and accessibility* of packaged liquor, not matters of convenience, one stop shopping or competition.[39] The respondent submits that the Consumer Requirements condition in s 36B requires the Commission to consider whether packaged liquor would not be 'readily accessible'.[40]

59 The respondent conceded that it may be difficult to draw a line between convenience and one stop shopping on the one hand and 'accessibility' on the other. The respondent conceded that a sufficient level of inconvenience could constitute inaccessibility. Nevertheless, he submitted it was a line the Commission was required to draw.[41] The respondent's propositions may be summarised as follows.

60 **First**, the respondent submits that the principle of construction relied upon by the appellant, namely that, wherever possible, language in a statute should be given a consistent meaning wherever it appears, is of limited weight and not a rigid rule. The respondent submits it is a

[39] See ts 42 and 49.
[40] See ts 50. See also ts 42, 44 and 47 - 51.
[41] See ts 42, 44, 47 - 51 and 53 - 54.

rebuttable presumption, particularly where the statutory context demands that a word or phrase be given a different meaning in different places.[42]

61 I accept that the presumption may be displaced by the context in which the word appears.[43]

62 **Second**, the respondent submits that the surrounding words and context of the phrase 'requirements of consumers' in s 36B and s 5(1)(c) are different. The respondent identifies three distinctions.

63 The ***first distinction*** is that s 36B relates to the 'requirements of consumers for packaged liquor *in the [relevant] locality*'. The respondent notes that s 5(1)(c) does not limit consumer requirements to requirements in the locality.[44]

64 This is a distinction without substance. In considering consumer requirements in the context of evaluating the Public Interest condition, courts consider the consumer requirements in the relevant locality.[45]

65 The ***second distinction*** is that s 36B(1) refers to the 'requirements of consumers for *packaged* liquor'. The respondent notes that s 5(1)(c) refers to liquor more generally.[46]

66 I do not accept this is a meaningful distinction. Section 36B(1) refers to the requirements of consumers for packaged liquor because s 36B is about applications for licences under which packaged liquor may be sold.

67 The ***third distinction*** is that s 5(1)(c) requires the licensing authority to consider the requirements of consumers *having regard to the proper development of the liquor industry*. Section 36B(4) does not.[47] The respondent submits that matters of convenience are only relevant to the object in s 5(1)(c) because of those words.[48] Later, I will explain why I reject this submission.

68 **Third,** the respondent submits that Parliament's intention in enacting s 36B was to prevent the further proliferation of small and medium packaged liquor outlets across the State. The respondent submits

[42] Respondent's Submissions [17].
[43] ***Conservation Council of WA Inc*** [156], citing ***Registrar of Titles (WA)***, 618.
[44] Respondent's Submissions [16].
[45] See, for example, ***Woolworths v DLL*** [89].
[46] Respondent's Submissions [16].
[47] Respondent's Submissions [18].
[48] See ts 39 - 45.

that, if the requirements of consumers included matters such as convenience and competition, those requirements will often be served by the approval of more liquor store licences because a new liquor store will generally add to competition and convenience for consumers.[49] The respondent submits that the appellant's construction would therefore mean the Consumer Requirements condition could be easily passed in certain situations, which would be less consistent with the purpose of the provision than a narrower construction.[50]

69 The respondent further submits that, while s 36B(4) provides that the extent to which existing packaged liquor outlets can meet the requirements of consumers is to be objectively assessed, it does not require that the requirements of consumers for packaged liquor themselves be reasonable. He submits that, therefore, on the appellant's construction, the test could be met by an unreasonable requirement, such as a requirement to purchase packaged liquor within the same *mall* of the shopping centre as shops selling cakes.[51] The respondent submits that this would not limit the proliferation of small and medium packaged liquor outlets, and would therefore be inconsistent with the purpose of s 36B.[52]

70 During the hearing, the respondent clarified that he did not contend that the appellant's construction would mean that a single individual's idiosyncratic requirement, or a fanciful requirement held by multiple consumers, would permit the Consumer Requirements condition to be met. He acknowledged that the Consumer Requirements condition as a whole would require the Commission, even on the appellant's construction, to evaluate whether the evidence showed there were consumer requirements that *could not reasonably be met* by existing premises.[53]

71 The respondent further acknowledged that the Public Interest condition would also have to be met before a licence could be granted. The respondent conceded[54] that in the second reading speech in relation to the 2006 amendments, the relevant Minister said that the government did not consider proliferation of liquor outlets to be in the public interest and proliferation was not an outcome that would be supported by the public interest test.[55] However, the respondent contended that non-proliferation

[49] ts 46. See also Respondent's Submissions [20].
[50] ts 46 - 58.
[51] Respondent's Submissions [21] - [22].
[52] Respondent's Submissions [22].
[53] ts 47 - 48.
[54] ts 55 - 56, but see ts 76.
[55] See Hansard, Legislative Assembly, 20 September 2006, page 6342.

was a specific goal of s 36B and so had a great importance in the construction of that section.[56]

72 The respondent gave as an example an application for a licence in a locality where there is an existing liquor store selling imported wine. In the hypothetical example, the applicant could provide the imported wine for a better quality at a lower price. In such a case, the Consumer Requirements condition would be met on the appellant's construction, but not on the respondent's construction. The respondent acknowledged that, even on the appellant's construction, the Public Interest condition would still need to be met. However, he contended that a construction that would make it harder to meet the Consumer Requirements condition would better promote the purpose of s 36B.[57]

73 The respondent did not contend that the purpose of s 36B was to completely prevent the future establishment of small and medium packaged liquor outlets across the State. Plainly, that was not its purpose. Rather, it was intended to ensure that such outlets are only established when consumer requirements are not already being reasonably met.

74 Having regard to the Act as a whole, 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).

75 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.

76 **Fourth**, in his written submissions, the respondent asserted that, if competition could be considered in the context of s 36B(4) (which it could be on the appellant's construction), s 36B(4) would have no work to do.[58] During the hearing, the respondent conceded that was not correct.[59] If the proposed new premises would be in competition with existing premises, it would still be necessary to prove that a requirement for competition could not reasonably be met by the existing premises.

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[56] ts 56.
[57] See ts 57 - 58.
[58] Respondent's Submissions [20].
[59] ts 56.

77 **Fifth,** the respondent submits that it is unlikely that Parliament intended that the same factors needed to be considered in relation to each of the two conditions. He submits that there would be no purpose in considering matters of convenience in the context of s 36B and then again in considering the same requirements under s 5(1)(c) for the purpose of determining whether it is in the public interest to grant the licence.[60]

78 This submission fails to appreciate that s 5(1)(c) operates on the consideration of each of the conditions. As noted earlier, the Commission *must*, when engaged in assessing either condition, have regard to the primary objects and the secondary objects of the Act.

Discussion

The object in section 5(1)(c)

79 The 'requirements of consumers' in s 5(1)(c) has been interpreted to include such matters as shopper convenience and preferences (including the convenience of one stop shopping).[61] In addition, 'consumer requirements' has been (understandably) assumed to mean what consumers demand or desire, as distinct from what they cannot manage without.

80 In ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police***, Banks-Smith J in said:[62]

> Taking into account ***Woolworths v DLL***, the extrinsic materials to which I have referred, the usual meaning accorded the words 'to have regard to' and the plain reading of the section, I consider s 5(1)(c) requires regard be directed to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements.
>
> Catering for consumer requirements is not to be considered in isolation. The potential and opportunity for proper development of the industry (including change) is not to be ignored.
>
> Assuming there is appropriate probative evidence, the words invite a broader ambit of matters to be considered as part of assessing the diversity of consumer requirements and how they are to be catered for.

81 The respondent submitted that the requirement to have regard to the 'proper development of the industry' underpinned Banks-Smith J's

[60] Respondent's Submissions [23] - [24].
[61] See, for example, ***Woolworths v DLL*** [52], [69] - [79] and [84] (Buss JA, as his Honour then was).
[62] ***ALH Group (2017)*** [67] - [69].

conclusion in the last paragraph extracted above. The respondent submitted:[63]

> Consequently, matters of convenience, one stop shopping, competition and product range are taken into account under s 5(1)(c) in determining whether it is in the public interest for a liquor store licence to be granted.

82 That is, the respondent submitted that matters of convenience, one stop shopping, competition and product range were *only* to be taken into account under s 5(1)(c) because the section included the words 'with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State'. The respondent submitted that, therefore, those matters were not to be taken into account when considering the Consumer Requirements condition.[64]

83 I do not accept this. In my view, Banks-Smith J was not here referring to such matters. Rather, her Honour was explaining that the issue of catering for 'consumer requirements' must be considered in the context of, and having regard to, the proper development of the liquor industry.

84 I further note that, prior to the introduction of s 5(1)(c), 'consumer requirements' in what was the original 'needs test' had been interpreted as including convenience and one stop shopping.[65]

The Consumer Requirements condition - section 36B(4)

85 Before construing s 36B(4), the definition of 'local packaged liquor requirements' in s 36B(1) should be read into it. It can then be construed in its context and having regard to its purpose.[66]

86 In addition, as noted earlier, I will use '**relevant locality**' as shorthand for 'the locality in which the proposed licensed premises are, or are to be, situated'. I will also use '**packaged liquor licence**' as shorthand for the licences covered by s 36B.

87 Section 36B(4) then becomes:

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[63] Respondent's Submissions [11].
[64] ts 39 - 45.
[65] See, for example, ***Charlie Carter***, 10 - 11. Although the Act's objects at the time of this decision included an object to contribute to the proper development of the liquor, hospitality and related industries in the State, it did not do so in the context of consumer requirements. Further, the Court in ***Charlie Carter*** did not refer to the Act's objects in its reasons.
[66] ***Kelly v R*** [2004] HCA 12; (2004) 218 CLR 216, 253 [103] (McHugh J). See also ***Hayman v Cartwright*** [2018] WASCA 116; (2018) 53 WAR 137 [54] (Buss P, Mazza and Beech JJA).

> the licensing authority must not grant an application for a [packaged liquor] licence unless satisfied that the requirements of consumers for packaged liquor in the [relevant locality] cannot reasonably be met by existing packaged liquor premises in the [relevant locality].

88 I have not found the extrinsic materials to be of any assistance. The purpose of s 36B(4) is plain from its text – to add an additional hurdle for applicants for packaged liquor licences. The extrinsic material does not cast any light on the *nature* of that hurdle.

89 In my view, 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.

90 **First**, the words are the same.

91 **Second**, the surrounding words and context of the phrase in each section do not suggest that a different meaning was intended.

92 The reference in s 36B to the relevant locality is not significant. Section 5(1)(c) has been interpreted as requiring, in considering the Public Interest condition, consideration of the particular locality in which the proposed premises is to be located.

93 The reference in s 36B to 'packaged liquor' is also not significant. The words are there because it is the provision that deals with licences under which packaged liquor may be sold. There is no reason to give additional significance to those words.

94 Further, as I have explained, the reference in s 5(1)(c) to the proper development of the industry is not why the 'requirements of consumers' in that subsection has been interpreted to include such matters as shopper convenience and preferences.

95 **Third**, this construction is not inconsistent with the statutory purpose. Under this construction, an additional hurdle is imposed on applicants for packaged liquor licences.

96 In considering both the Consumer Requirements condition and the Public Interest condition, the Commission must have regard to the Acts' objects, including the object in s 5(1)(c).

97 By s 36B(4), the Commission must be satisfied that the requirements of consumers for packaged liquor in the relevant locality cannot reasonably be met by existing packaged liquor premises in the

relevant locality. In considering the public interest, the Commission may, by s 38(4)(ca), consider any effect the granting of the application might have in relation to tourism, or community matters.

98 Plainly, the Commission could be satisfied that granting an application was in the public interest without being satisfied that the requirements of consumers for packaged liquor in the relevant locality could not reasonably be met by existing packaged liquor premises in the relevant locality.

99 **Fourth**, this construction does not mean that the words 'consumer requirements' have no work to do.

100 First, while I accept that this construction means that 'consumer requirements' will arise in two contexts in considering whether the Consumer Requirements condition has been met, I do not accept that this means the issues will be identical in each context.

101 Under this construction, the Commission will need to consider whether, having regard to those objects of the Act that arise on the evidence or by notorious fact (including the object of catering for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State), it is satisfied that the requirements of consumers for packaged liquor in the [relevant locality] cannot reasonably be met by existing packaged liquor premises in the [relevant locality].

102 Although this involves consideration of 'consumer requirements' in two contexts, each aspect has work to do because the contexts are different. In deciding whether the requirements of consumers cannot reasonably be met by existing premises, the Commission will consider those requirements, and whether they can be *reasonably* met by existing premises, taking into account (among other things) the object in s 5(1)(c). In considering the object in s 5(1)(c) in this context, the Commission will need to have regard to the proper development of the industry in identifying the consumer requirements that, in this context, the Act seeks to cater for and in determining whether those requirements can be *reasonably* met by existing premises.

103 Second, the phrase has work to do, and different work to do, in relation to each condition.

104 The Consumer Requirements condition requires consideration of whether consumer requirements cannot reasonably be met by the existing premises (having regard to the objects of the Act). It is an objective test.

105 The Public Interest condition looks to, among other things, the risk that granting the application may have negative consequences, such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there. It also looks to any effect the granting of the licence may have in relation to tourism or community or cultural matters. Determining the public interest is a discretionary value judgment (to be made having regard to the objects of the Act).[67]

106 There is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant to both conditions.

107 **Fifth**, this construction will not lead to absurd outcomes. Regardless of how low the hurdle is in s 36B, the Public Interest condition would prevent absurd outcomes.[68]

Conclusion on ground 1

108 For these reasons, I would answer the question of law in relation to ground 1 in the negative - the phrase 'requirements of consumers for packaged liquor' in the definition of 'local packaged liquor requirements' in s 36B(1) of the Act is *not* limited in its scope to the physical item or product of packaged liquor.

109 Further, I am satisfied that the Commission erred as alleged in ground 1 and I would uphold this ground. The respondent did not contend such an error would not be material, and I am satisfied that it was. There is a realistic possibility that, if the Commission had not erred, a different decision could have been made.

Ground 2 – cannot reasonably be met

110 In ground 2, the appellant asserts that the Commission erred in its construction of the phrase 'cannot reasonably be met' in s 36B(4). The appellant alleges that the Commission found that it means 'cannot without great or undue difficulty or inconvenience be met'. The appellant alleges that the proper construction is that it means 'cannot sensibly, rationally or

[67] ***Woolworths v DLL*** [48] (Buss JA, as his Honour then was). And see ***ALH Group (2017)*** [16].
[68] This was conceded by the respondent – see ts 56 - 57.

moderately be met' having regard to contemporary standards and expectations for the requirements of packaged liquor.[69]

111 The question of law is, on a proper construction of s 36B(4), what is the meaning of the phrase 'cannot reasonably be met' in that subsection.

112 The respondent submits that the Commission did not construe the phrase in the way alleged. The respondent further submits that the appellant's construction unnecessarily adds words to the phrase.

The Commission's decision

113 I am conscious of the need to not over-zealously scrutinise the Commission's reasons. Nevertheless, I am satisfied that the Commission *did* consider that the phrase 'cannot reasonably be met' in s 36B(4) meant 'cannot without great or undue difficulty or inconvenience be met'.

114 This is most apparent from the section of the Decision headed 'Reasonableness'.[70]

115 In that section, the Commission referred to what the word 'reasonably' had been said to mean in ***Charlie Carter***.

116 It then said (bold emphasis added):[71]

> [159] Further, **in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd*** (1999) 20 WAR 405, **it was established the test for meeting reasonable requirements** (in the context of the old section 38(2b) test) **was that the relevant product cannot be provided at all, or '*cannot be provided without occasioning substantial difficulty of*** [sic] ***substantial inconvenience to the relevant public***'.
>
> [160] **Although the test applied in *Austie* established a relatively 'low threshold' for the word 'reasonably'**, in the light of the changes to the Act and the stated purpose of section 34B, the Commission does not construe this threshold as to allow shopper convenience or general retail competition to be taken into account.
>
> [161] **The *Austie* interpretation of 'reasonably' only requires that the relevant liquor be readily accessed, without great difficulty or inconvenience**.

[69] Ground 2 and the Appellant's Outline of Submissions filed 22 June 2021 (**Appellant's Submissions**) [32] and [55].
[70] Decision [158] - [162].
[71] Decision [159] - [161].

117 It is apparent from this that the Commission misunderstood or misapplied what was said in ***Austie Nominees***. As noted earlier, in ***Austie Nominees***, the Court found that 'cannot be provided for without occasioning substantial difficulty or substantial inconvenience', was the meaning of the phrase '*cannot be provided for*' (the **Difficulty Test**). It did *not* relate to the phrase 'reasonable requirements of the public for liquor and related services'.

118 The Commission then said (bold italics added):[72]

> [162] In this context, the Commission finds that the inability to shop in a co-located supermarket, or to not have competing liquor stores within very close proximity, does not create a great difficulty or inconvenience to consumers, ***or*** prevent liquor from being readily accessed by consumers.

119 In the context of the previous paragraphs, this is difficult to follow. In referring to ***Austie Nominees*** in [159] - [161] of its Decision, the Commission appeared to consider that great difficulty and inconvenience would demonstrate that liquor could not be readily accessed. In [162], the Commission appeared to be describing these matters as alternatives, without any explanation for what appears to be a shift. This was not an isolated reference. Later, the Commission said, '[e]ach matter will strictly turn on its facts as to whether certain factors prevent packaged alcohol from being readily available or constitute a "great difficulty or inconvenience" to consumers'.[73]

120 The respondent relies on those references to submit that the Commission did not simply (mistakenly) apply the Difficulty Test set out in ***Austie Nominees*** to the very different words of s 36B(4). The respondent submits that the Commission built upon the Difficulty Test by adding the alternative to reflect the different words in s 36B(4).[74]

121 I do not accept this. It is plain from the paragraphs extracted above that the Commission mistakenly thought that the Difficulty Test applied to the 'reasonable requirements' phrase. Further, although appearing to state on those two occasions that these matters were alternatives, on another occasion, the Commission appeared to find that an alleged consumer requirement did not satisfy the Consumer Requirements

[72] Decision [162].
[73] Decision [173].
[74] See ts 59 - 60.

condition because it did not 'constitute a "great difficulty or inconvenience"'.[75]

122 In my view, it is more likely that the Commission was using 'or' to connote 'or, in other words'.

123 In my view, this inference is supported by another occasion on which the Commission appeared to express matters in the alternative.

124 At [190], the Commission wrote:

> In this case the Commission finds that on the basis of the evidence supplied, the Commission cannot make a finding:
>
> a. that there is existing undue difficulty or inconvenience to consumers in obtaining packaged liquor from the existing packaged liquor outlets in the locality; or
>
> b. that the existing packaged liquor stores in the locality cannot reasonably meet consumer requirements.

125 Again, the Commission did not explain why it appeared to express those matters as alternatives. The respondent suggested that the Commission was saying that the evidence that had been supplied was 'not enough to meet this formulation that we've come up with, neither is it enough to meet the test [set out in s 36B(4)]. So it's looked at both as alternatives'.[76] If this is correct, it would mean that the Commission had inexplicably decided to consider whether a test different to the statutory test had been met. This would not be a productive or sensible exercise, and I would be slow to conclude this is what the Commission did. In my view, it is more likely that the Commission saw these two matters as meaning the same thing, and was again using 'or' to connote 'or, in other words'.

126 Finally, I note that the appellant submitted that other passages in the Decision suggest that the Commission was applying an absolute test that the consumer requirements could not be met, rather than one qualified by the word 'reasonably'.[77] I would not infer from this that the Commission did not appreciate that s 36B(4) contained the word 'reasonably'. It was plainly aware of this fact.[78]

[75] Decision [165].
[76] ts 61.
[77] Decision [185], [187] - [188].
[78] See, for example, Decision [191] - [192].

127 Having regard to all of the matters I have outlined, it is not entirely clear what the Commission considered the test to be. Nevertheless, having regard to the Decision as a whole, I am satisfied that the Commission interpreted the phrase 'cannot reasonably be met' as meaning 'cannot be met without causing great difficulty or inconvenience'.

Was this an error?

128 This was plainly an error.

129 Construing the phrase in this way is to effectively apply the same test as applied to the then s 38(2b) of 'cannot be provided for'. It gives no weight to the adjective 'reasonably'.

130 The word 'reasonable' has been said to import a degree of objectivity in that the word reasonable means sensible; not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive.[79]

131 In my view, the word 'reasonably' in s 36B(4) is intended to bear the same meaning. Accordingly, the phrase 'cannot reasonably be met' means 'cannot sensibly or rationally be met'.

132 The respondent submits that the appellant's construction involves reading words into the text that are not there and that are not necessary.[80] I do not accept this. The appellant's construction simply confirms that the meaning of the word in s 36B is its ordinary meaning.[81]

133 For completeness, I note that it was common ground that 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.[82]

Conclusion on ground 2

134 The question of law in relation to ground 2 is what is the meaning of the phrase 'cannot reasonably be met' in s 36B(4) of the Act. In my view, the answer is 'cannot sensibly or rationally be met'.

135 I am satisfied that the Commission erred as alleged in ground 2 and I would uphold this ground. The respondent did not contend such an

[79] ***Charlie Carter***, 10; ***Austie Nominees***, 409 - 410.
[80] ts 63.
[81] The respondent accepted that 'reasonably' in this context means 'sensible; not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive' – see ts 64.
[82] See Appellant's Submissions [61] - [63] and ts 65.

error would not be material, and I am satisfied that it was. There is a realistic possibility that, if the Commission had not erred, a different decision could have been made.

Ground 3 – locality

136 By ground 3, the appellant alleges that the Commission erred in holding that the relevant 'locality' in s 36B(4) is to be determined by reference to the area from which customers of the proposed premises will be drawn (**retail catchment area**).

137 The appellant submits that the retail catchment area cannot be a relevant consideration. The respondent submits it can be. The question of law is whether, on a proper construction of s 36B(4), the retail catchment area can be a relevant consideration for the purpose of determining locality.

The parties' submissions

138 The appellant points out that s 36B(4) refers to existing licensed premises in the locality '*in which the proposed licensed premises are, or are to be, located*'. The appellant submits that the 'text draws attention to a territorial or geographic concept, namely, where it is that the premises are located'.[83]

139 The appellant submits that the relevant locality is 'the area, district or neighbourhood within which the proposed premises are to be located and which is to be defined by reference to such matters as topographical and geographical features, transport facilities, communal activities and residential and other aggregations'.[84]

140 In its written submissions, the appellant contended that the retail catchment area could not be a relevant factor because it could change over time, whereas a 'locality' is a fixed area.[85] During the hearing, the appellant conceded that a number of the matters it submitted were relevant factors could also change over time.[86] Nevertheless, the appellant maintained its submission that the retail catchment area could not be a relevant factor.

141 The appellant notes that the evidence showed that customers to the Centre were drawn from a large area stretching from Joondalup to

[83] Appellant's Submissions [68].
[84] Appellant's Submissions [74].
[85] Appellant's Outline of Reply Submissions filed 6 August 2021 (**Appellant's Reply**) [28] and [38].
[86] ts 26 - 27.

Wembley Downs. It submits that describing this area as a 'locality' would be unworkable. It notes that the Commission itself did not treat this area as the 'locality'. Instead, the Commission simply defined the locality as the area within a 2km radius from the Centre.[87]

142 The respondent submits that the 'locality' should be determined having regard to numerous factors, including the retail catchment area of the proposed premises, geographical features, ease of access, and the products and services intended to be provided at the proposed premises.[88]

143 The respondent submits that the text and context of s 36B(4) does not limit the range of matters which may be considered in determining the 'locality'. The respondent notes this is in contrast to s 36B(3) of the Act. Section 36B(3) prevents the licensing authority from even hearing an application if packaged liquor premises are situated less than the prescribed distance from the proposed premises (and if the area of the retail section of each exceeds the prescribed area).[89]

Relevant case law

144 The appellant submits that cases in New South Wales support its construction of 'locality' as a territorial or geographic concept. It acknowledges that courts in South Australia have taken a different approach, but submits the South Australian approach should not be adopted.[90]

145 The respondent submits the opposite. He submits that the New South Wales legislation is significantly different to s 36B, while the South Australian legislation is similar.[91]

New South Wales

146 In its original form, s 29(1)(e) of the *Liquor Act 1912* (NSW) provided that objections may be made to the granting of liquor licences on the ground 'that the reasonable requirements of the neighbourhood do not justify the granting of such application'. Section 29(1)(e) was amended to provide that objections may be made to the granting of liquor licences on the ground 'that the needs of the public in the neighbourhood of the premises can be met by facilities for the supply of liquor existing in, and

[87] Appellant's Submissions [69].
[88] Respondent's Submissions [41].
[89] Respondent's Submissions [42].
[90] Appellant's Submissions [70] - [74].
[91] Respondent's Submissions [48] - [53].

outside, the neighbourhood'. Later, s 29(1)(e) was repealed and replaced by s 45(2) and s 45(4), in relevantly identical terms.[92]

147 In ***Armstrong v Edgecock***,[93] the New South Wales Court of Appeal was considering s 29(1)(e) in its amended form. The issue before the Court was whether the line of judicial authority on 'neighbourhood' was affected by the introduction of the words 'of the premises' into the statutory test imposed by s 29(1)(e) and, if so, to what extent. The Court held that it *was* affected, holding that the amendment meant that the retail catchment area of the proposed premises was no longer relevant in determining the neighbourhood of the premises.[94]

148 Hutley AP, with whom Priestley JA agreed, said that the determination of a neighbourhood is 'a territorial investigation'.[95]

149 Glass JA agreed with Hutley AP's reasons, but added:[96]

> The extent of the area from which the premises, if licensed, would draw their custom is now an irrelevant consideration. On the other hand it would be relevant to consider topographical and geographical features, transport facilities, communal activities and residential aggregations in determining the extent of the neighbourhood. Beyond stating these matters I doubt if any more assistance can be given those who are called upon to ascertain the boundaries of the relevant neighbourhood before inquiring whether the needs of the public in it are catered for in the manner provided. This, however, is consequent upon the vague nature of the criterion which does not admit of any precise definition. Two attributes can I think be predicated of the neighbourhood test. It will denote an area smaller than the trading area which has hitherto been the goal of magisterial determination. Secondly the neighbourhood of the premises will remain constant regardless of the nature or scale of the trading conducted in them.

150 The respondent pointed to the fact that the New South Wales provisions refer not only to facilities in the neighbourhood but also to facilities *outside* the neighbourhood. The respondent submits that this is why the Court in ***Armstrong*** construed the provision in the way that it did and says it therefore does not assist the appellant in this case.

151 I agree that the New South Wales provisions are differently worded. I agree that Hutley AP attached significance to the reference in

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[92] See ***Morgan v Goodall*** [1985] 2 NSWLR 655, 657 - 658 (McHugh JA, as his Honour then was).
[93] ***Armstrong v Edgecock*** [1984] 2 NSWLR 536.
[94] ***Armstrong***, 539.
[95] ***Armstrong***, 540.
[96] ***Armstrong,*** 542.

s 29(1)(e) to facilities outside the neighbourhood. However, its significance was to *reinforce* the construction that he had reached as to what 'neighbourhood' meant. As can be seen from the passages I have underlined in the below extract, it was not the sole reason.

152 Hutley AP said (underlining added):[97]

> The first step in the construction of the new provision is to construe it according to its terms and not to approach it through the fog of authorities on its predecessor, and, in my opinion, one begins the task by identifying the physical area of the 'neighbourhood of the premises'. This must be a territorial investigation, because it is only after this has been completed can one consider what are the needs of the public *in* (my emphasis) the neighbourhood. It is only then that the issue as to whether the needs can be met from facilities in and outside the neighbourhood [sic].
>
> The trading area of the business in the premises seeking a licence is irrelevant to the issue of what is the neighbourhood of the premises because the 'neighbourhood of the premises' cannot increase or decrease by reason of the trading practices of a particular business. Though the Act is concerned with the supply of liquor, the legislature has not defined neighbourhood of the premises as the trading area of the premises, or the expected area. The trading practices or intended trading practices of the would be licensee are important, but in relation to the satisfaction of the needs of those in the neighbourhood of the premises. As applied to an application by a proprietor of a supermarket, it is the extent to which the needs of persons in a neighbourhood for supermarket liquor facilities if they are different from others which would be the subject of the hearing. For example, a store, such as David Jones Ltd in Castlereagh Street, may have a trading area which embraces the whole of the County of Cumberland, but it would be ridiculous to describe that as the neighbourhood of the store. A discount house may attract business from far and wide by a vigorous advertising campaign by radio and television, but that does not enlarge the neighbourhood of its premises.
>
> That the trading area of a business is not the test of a neighbourhood is made clear by the need to consider facilities outside the neighbourhood. If a business has a trading area which comprises a whole city so that that is the neighbourhood in which the needs of the public have to be considered, the inquiry as to whether facilities outside the neighbourhood could satisfy the needs of the public in that city would be a farce. It is inherent in the inquiry as to whether facilities outside the neighbourhood could satisfy the needs of its public that a neighbourhood is a relatively confined area. Once the area is fixed, then

[97] ***Armstrong***, 540.

> the Bench can begin the task of analyzing the needs of the public in that area.

153 Like Glass JA, Hutley AP also commented on the vagueness of the concept of a neighbourhood. He said:[98]

> It is not required in this case to define what a neighbourhood is. O'Connor J, in ***Lucas v Mooney*** (1909) 9 CLR 231 at 236, said: '… What is neighbourhood in one set of circumstances would not be in another set of circumstances', and Higgins J said that the word neighbourhood was meant to be vague (at 237).
>
> … in many cases, the search for the neighbourhood of the premises will require a finding of the community, in which the premises are to be found. This approach would not be of any assistance in the centre of the City of Sydney where there is no community, and neighbourhood may have to be fixed by the capacity of the citizens to walk (if they retain this capacity), but in the suburbs and the towns of New South Wales may be of real assistance.
>
> … the 'neighbourhood of the premises' may depend more on transport facilities, pattern of movement of those living reasonably close to the premises and even the existence of institutions which make a locality, such as primary schools, churches and clubs which knit people together in their common activities.

154 Subsequent New South Wales cases confirmed that the retail catchment area was not relevant to determining the neighbourhood.[99] However, subsequent cases also made plain that this does *not* mean that the 'public' whose needs were to be considered were only those who lived or worked in the 'neighbourhood'. In ***Hunter v Reyneke***,[100] the New South Wales Court of Appeal held that the 'public in the neighbourhood' included those persons who, not living or working there, enter the neighbourhood area for the purpose of patronising a hotel or purchasing a bottle of liquor.

155 By the time of the decision in ***Hunter***, the relevant provision was s 45(2). It provided:

> Subject to section 57, objection to the grant of an application for … a hotelier's licence or an off-licence to sell liquor by retail may be taken … on the ground that the needs of the public in the neighbourhood of the premises to which the application relates can be met by facilities for the supply of liquor existing in, and outside, the neighbourhood.

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[98] ***Armstrong***, 540 - 542.
[99] See, for example, ***Morgan***, 659 - 660, ***Hunter v Reyneke*** (1986) 6 NSWLR 576, 579 - 580 and ***McRedmond v Tassell*** [2002] NSWSC 1163 [14] - [16].
[100] ***Hunter***, 576 - 577 (Glass JA), 580 (Priestley JA, with whom Glass and Mahoney JJA agreed).

156 Section 45(4) provided that the applicant bore the onus of proving that the needs of the public in the neighbourhood of the premises … cannot be met by facilities for the supply of liquor existing in, and outside the neighbourhood'.

157 Priestley JA, with whom Glass and Mahoney JJ agreed, described the issue to be determined as being the meaning of the word 'public'. His Honour said:[101]

> The main ground of appeal was that the Licensing Court had decided the application upon a wrong understanding of some key words in s 45(2) and s 45(4). A central part of the two subsections consists of the words 'on the ground that the needs of the public in the neighbourhood of the premises to which the application relates …'. Since the ground in s 45(2) was enacted in 1981 (by Act No 68 of 1981) some parts of this group of words have been considered by this Court. In ***Toohey v Taylor*** [1983] 1 NSWLR 743 the word 'needs' was interpreted as meaning 'the reasonable demands or expectations of the public'. In ***Armstrong v Edgecock*** [1984] 2 NSWLR 536 it was held that 'neighbourhood' meant a geographical area and not, as had apparently been thought in regard to the different words of the objection replaced by that in s 45(2), the trading area from which the business of the licensed premises was drawn. This construction of 'neighbourhood' was applied by this Court in ***Morgan v Goodall*** (1985) 2 NSWLR 655 . In the present case what must be considered is the meaning of the word 'public'.

158 His Honour said that this issue had not been decided in ***Armstrong*** or ***Morgan***:[102]

> In both cases the attention of the court was directed to the meaning of 'neighbourhood' and to the different context in which the word was found in s 45(2) from that in which it was found in the objection previously contained in the *Liquor Act 1912*, s 29(1)(e), until 1981. In both ***Armstrong*** and ***Morgan*** the court in dealing with the meaning of 'neighbourhood' made it clear that it could not be ascertained by reference to the trading area from which the custom for liquor in the neighbourhood was drawn.
>
> It was argued before us that to give to the word 'public' the meaning given to it by the Licensing Court in the present case was to reintroduce the prohibited trading area test. I do not think this argument is right. First, neither ***Armstrong*** nor ***Morgan*** in my opinion went any further in this respect than saying that the concept of the trading area was irrelevant in determining the territorial extent of the neighbourhood and second, in any event, the approach adopted by the Licensing Court in

[101] ***Hunter***, 578.
[102] ***Hunter***, 579.

> the present case does not seem to me to be a reintroduction of the trading area concept, although it does have some elements in common with that concept. It therefore seems to me that it is open to the court now to approach the construction of 'the public' in s 45(2) without any need either to have in mind or to exclude from mind any notions of trading area.

159 His Honour went on to discuss the vagueness of the criterion of 'neighbourhood':[103]

> … The vagueness of the criterion can be seen when three different types of localities, which may well be found, dependent on the facts, to be neighbourhoods for the purposes of s 45(2), are considered. It must also be borne in mind in considering the content of 'neighbourhood', and later of 'public', that the objection in s 45(2) is available in opposing an application for a hotelier's licence as well as an off-licence.
>
> One familiar situation in New South Wales is that of a small country town; another is that of a major commercial centre with a very small number of residents, such as the Sydney central business district; a third is an area with a substantial permanent population and also a substantial periodical population of visitors. Other types can be readily classified. Within the third of the ones I have mentioned there is scope for great variety. Visitors to some holiday resorts will stay there for weeks at a time, visitors to some resorts may be there for a day or for hours at a time only, and there may be any number of intermediate variations. In regard to some of the various kinds of 'neighbourhood' the relevant territorial identification should be comparatively easy; in regard to others it may be quite difficult. I do not think the Licensing Court can have any better guidance in approaching the factual question of 'neighbourhood' than that given by Glass JA in ***Armstrong*** when he said (at 542):
>
> > 'The extent of the area from which the premises, if licensed, would draw their custom is now an irrelevant consideration. On the other hand it would be relevant to consider topographical and geographical features, transport facilities, communal activities and residential aggregations in determining the extent of the neighbourhood. Beyond stating these matters I doubt if any more assistance can be given those who are called upon to ascertain the boundaries of the relevant neighbourhood before inquiring whether the needs of the public are catered for in the manner provided.'
>
> With the foregoing considerations in mind, when the meaning of 'public' in s 45(2) comes to be decided it is clear that that meaning has to accommodate all the different kinds of 'neighbourhood' some examples of which have been given, and must also accommodate the

[103] ***Hunter***, 579 - 580.

> 'needs' of each neighbourhood for liquor whether supplied by a hotelier or an off-licensee.
>
> If one thinks of the needs of the public in the neighbourhood of premises to which an application for a hotelier's licence relates and then thinks of a neighbourhood to which large numbers of people resort (who come from far and wide outside the neighbourhood) chiefly at particular times during the weekend, it would seem impossible to confine the meaning of 'public' in the way for which the appellant contends. It seems to me that 'public' in the subsection must mean those people present in the neighbourhood at any time rather than those with a permanent or regular connection to it by residence, work or otherwise.
>
> …
>
> My conclusion therefore is that the Licensing Court did not make an error of law in so construing 'public in the neighbourhood' as to include the residents of the neighbourhood and additionally those shoppers from outside the neighbourhood who patronised the Safeway store. …

160 Although the New South Wales legislation uses the word 'neighbourhood', rather than 'locality', the respondent did not suggest that this was a material point of distinction. The respondent treated the word 'neighbourhood' as being synonymous with 'locality', in this context.[104] In my view, the respondent was right to do so.

161 In the Oxford English Dictionary, the meaning of 'locality' is said to include 'the precise situation or position of something or someone; *esp.* the geographical location of a plant, mineral, etc' and a 'region or district (of undefined extent) considered as the site occupied by a particular person or thing, or as the scene of certain activities; a neighbourhood'. In the Macquarie dictionary, its meaning is said to include 'a place, spot, or district, with or without reference to things or persons in it' and 'the place in which a thing is or occurs'.

162 The meaning of 'neighbourhood' in the Macquarie dictionary includes 'a district or locality'.

163 The meaning to be given to ordinary words in a statute may be influenced by context and purpose. In my view, having regard to the context and purpose of the New South Wales legislation, and s 36B of the Act, I consider that 'neighbourhood' in the former and 'locality' in the latter

[104] See, for example, ts 66, 69 - 70. The respondent's position on this appeared to shift somewhat in his submissions filed after the hearing, with leave – see the Respondent's Supplementary Submissions filed 4 October 2021.

were intended to reflect the same concept.[105] To similar effect, as will be seen, the word 'locality' in the South Australian legislation has been construed as denoting, 'in a general way, the fact of being local, or neighbouring, as opposed to distant or remote'.[106]

South Australia

164 The relevant legislative provisions in South Australia have changed on several occasions.[107] Nevertheless, in broad terms, courts in South Australia have held that the retail catchment area is a relevant factor in determining 'locality'.

165 In the 1987 decision ***Nepeor Pty Ltd v Liquor Licensing Commission***,[108] the Supreme Court (In Banco) was considering s 38(1) of the *Licensing Act 1985* (SA). It provided that 'a retail liquor merchant's licence shall not be granted … unless the licensing authority is satisfied that the public demand for liquor in the locality in which the premises are situated cannot be met by other existing facilities for the sale of liquor'.

166 Von Doussa J, with whom King CJ and Bollen J agreed, said that the approach that had been taken to earlier provisions (which were to similar, but not identical, effect) applied to s 38(1).[109]

167 His Honour noted and endorsed statements to the effect that the notion of 'locality' is an indefinite and flexible term and cannot be defined with precision. His Honour agreed that the factors which will be relevant when considering 'locality' will vary from case to case.[110] His Honour said that the word was used in the Act[111]

> to denote, in a general way, the fact of being local, or neighbouring, as opposed to distant or remote. Often the 'locality' is, as a matter of fact, not a matter for dispute as the relevant area is geographically discrete, as, for example, in the case of a country town … In other cases, particular physical features of the area, such as a river, or some other significant obstruction to the free movement of people, might provide the basis for including or excluding particular areas from consideration in a precise way. However, in a case like the present one, where the proposed premises are within a built-up region which, on any view, extends well beyond areas which could conceivably be relevant to the

[105] And see ***Morgan***, 660.
[106] ***Nepeor Pty Ltd v Liquor Licensing Commission*** (1987) 46 SASR 205, 215.
[107] There is a useful summary of the changes up to 1998 in ***Woolies Liquor Stores Pty Ltd v Carleton Investments Pty Ltd*** (1998) 73 SASR 6.
[108] ***Nepeor Pty Ltd v Liquor Licensing Commission*** (1987) 46 SASR 205.
[109] ***Nepeor***, 213 - 214.
[110] ***Nepeor***, 214 - 215.
[111] ***Nepeor***, 215.

> inquiry, precise delineation or definition, will rarely be possible. Nevertheless, if the concept and purpose of the section is recognised, it is capable of rational application in a practical way.

168 His Honour further said (underlining added):[112]

> Section 38(1) assumes that the applicant will endeavour to establish a 'public demand' which the licensing of the proposed premises will meet. The meaning of the word 'public' is also elusive. It is related to the concept of 'locality'. … In my opinion, in s 38(1) 'public demand' is descriptive of a demand emanating from a sufficient area of the community to constitute the public, that is from people in the 'locality'. The evidence of the applicant should indicate the 'catchment area', an expression used by counsel, from which the alleged public demand arises; or more accurately, the places from which the people come whose demands aggregate to constitute the 'public demand'. The evidence will, in a particular case, identify 'the public' and in turn the 'locality'. The second question proposed by Bray CJ in ***Tomley Investment Co Pty Ltd v Victoria (Tapleys Hill) Pty Ltd*** (1978) 17 SASR 584 at 588 will be answered against that evidence, namely: 'can the public get the type of liquor they want from the existing facilities for the supply of liquor in the locality?'. Although s 38(1) now speaks of a public demand which 'cannot be met by other existing facilities for the sale of liquor', the clear contemplation of the section is that those existing facilities, to be relevant to the inquiry, must be ones which service the demand for liquor in the area in which the public demand exists.
>
> Precise delineation of the 'locality' is unnecessary so long as the alleged public demand is matched against the existing facilities of established licensed premises in the area from which the demand comes. Thus, where it is alleged that the public demand emanates from people who live some distance from the proposed premises, regard must be had to other existing facilities that are closer to their place of residence than the proposed premises, as Bray CJ said in ***Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd*** (supra). It is no longer possible to approach the application of s 38(1) with preconceived notions that the relevant 'locality' will be a confined area limited by practical restrictions on travel. The number of people who attend at the Tea Tree Plaza Shopping Centre indicate that people from a wide area make daily visits there to acquire goods and services, and it is the present demands emanating from those people which Nepeor and Miniben identify as the 'public demand' upon which their applications are based.

169 The appellant sought to distinguish this case on the basis that the reference in s 38(1) of the *Licensing Act* to 'other existing facilities' was not limited to existing facilities *in* the *locality* in which the proposed

[112] ***Nepeor***, 215 - 216.

premises were to be located.[113] This is indeed a difference. However, other South Australian cases have concluded that, even where the provision under consideration expressly refers to existing facilities in the locality, it is relevant to consider existing facilities outside of the locality. Some of these cases were discussed in ***Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern*** (***Seaford Rise***).[114]

170 The provision under consideration in ***Seaford Rise*** was s 58(2) of the *Liquor Licensing Act 1997* (SA). It provided:

> An applicant for a retail liquor merchant's licence must satisfy the licensing authority that the licensed premises already existing in the locality in which the premises or proposed premises to which the application relates are, or are proposed to be, situated, do not adequately cater for the public demand for liquor for consumption off licensed premises and the licence is necessary to satisfy that demand.

171 The Full Court of the Supreme Court held that premises outside of the locality could still be relevant.

172 Doyle CJ, with whom Nyland J agreed, noted that it had been held in relation to what had been s 22(2) of the *Licensing Act 1967* (SA)[115] that, even though it referred to existing facilities in the locality, licensed premises outside the locality might be relevant. Doyle CJ endorsed the reasoning in ***Lincoln Bottle Shop v Hamden Hotel***[116] to the effect that, if members of the public who are within the locality choose to satisfy their requirements for liquor from facilities outside the locality, and do so without discontent, then their requirements have been met and cease to be a demand for the purposes of s 22(2).[117]

173 Doyle CJ also endorsed what had been said by Bray CJ in ***Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd***.[118] In ***Hoban's Glynde***, the Supreme Court (In Banco) was considering s 47(a) of the *Licensing Act 1967* (SA). Section 47(a) provided that the licence applicant had to satisfy the court that 'the licensing of the premises is required for the needs of the public having regard to the licensed premises existing in the locality in

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[113] Appellant's Reply [37].
[114] ***Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern*** (2000) 76 SASR 290.
[115] 'Under the *Licensing Act 1967* (SA), an applicant for a retail storekeeper's licence had to meet a double test. First, the applicant had to prove that the grant of the licence was required for the needs of the public having regard to the licensed premises existing in the locality. That was a test that applied to the grant of most licences. An applicant for a retail storekeeper's licence then had to meet a more stringent test set by the then s 22(2) which required the applicant to satisfy the court that "the public demand for liquor cannot be met by other existing facilities for the supply of liquor in the locality"' – see ***Seaford Rise*** [30].
[116] ***Lincoln Bottle Shop v Hamden Hotel*** (1978) 19 SASR 326, 330.
[117] ***Seaford Rise*** [29] - [31].
[118] ***Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd*** (1973) 4 SASR 503.

which the premises are to be situated'. Again, although s 47(a) referred specifically to premises existing in the locality, Bray CJ considered that licensed premises outside of the locality would still be relevant. Bray CJ said:[119]

> It cannot be right to define a locality so as to exclude licensed premises capable of serving it and then say that, as those licensed premises are not in the locality, no regard need be had to them. Even if certain licensed premises are not in the locality defined by the Court, their ability to satisfy the needs of that portion of the public which it is claimed need the proposed licence, or part of it, must be relevant to the questions raised by s 47(a). Indeed it may be that the word 'locality' should be treated in a much looser and more cavalier fashion without necessarily requiring the definition of a precise area, but I do not pursue the question.

174 Doyle CJ said Bray CJ's approach continued to be relevant in the application of s 58(2), despite the changes in terminology.[120]

175 Doyle CJ said:[121]

> Premises outside an identified locality remain relevant to the question that arises under s 58(2). First of all, applying reasoning of the type used in ***Lincoln Bottle Shop***, a demand met outside the locality without any discontent at all, or at least by choice, would not be a relevant demand. Second, for reasons identified by Bray CJ [in ***Hobans Glynde***] and von Doussa J [in ***Nepeor***], the process of identifying a locality cannot be allowed to dictate an artificial approach to deciding whether a grant of a licence is necessary to satisfy the relevant public demand. The identification of a locality is usually a necessarily imprecise process. A particular boundary must be identified in most cases, but the identification of that boundary does no more than identify in a general way the locality from which the relevant public demand arises: ***Nepeor*** at 216 von Doussa J. The effect of s 58(2), as with earlier provisions, is to focus attention upon a locality in which a demand is expressed and upon the facilities available at premises in that locality, but not to do so in an artificial sense, but rather by way of directing primary consideration to these matters.

176 Doyle CJ further said that the concluding words of s 58(2) (that 'the licence is necessary to satisfy that demand') supported his construction.[122] This is a point of distinction from the Western Australian provision. Section 36B does not include these words or words to this effect.

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[119] ***Hoban's Glynde***, 512.
[120] ***Seaford Rise*** [33].
[121] ***Seaford Rise*** [34].
[122] See ***Seaford Rise*** [34] - [35].

177 Doyle CJ said that 'premises outside the identified locality are likely to be of less significance than premises within the identified locality, because the emphasis (although not exclusively so) of s 58(2) is on demand in a locality, and satisfaction of that demand within the locality'.[123] His Honour said, however:[124]

> licensed premises outside the locality cannot be put to one side, nor are they relevant only in the limited way in which they were considered to be relevant in cases like ***Lincoln Bottle Shop*** in the application of the former s 22(2). In my view the correct approach for a provision like s 58(2) is that indicated by Bray CJ in ***Hoban's Glynde Pty Ltd v Firle Hotel Pty Ltd***.

178 The appellant submitted that the South Australian approach was circular.[125] I do not accept this. The South Australian approach looks to the area from which it is expected that customers of the proposed new premises would come. Once that area is loosely identified, the approach looks to whether the demands of customers in that area are being met by existing premises in that area, and premises outside that area from which those customers' demands could met. This is not circular.

Analysis of question of law

179 There is plainly a difference in the approaches taken in New South Wales and South Australia. There is, however, some commonality. First, the word 'locality' (or 'neighbourhood') cannot be defined with precision. Second, the factors that will be relevant in determining the locality will vary from case to case. Third, in some cases, it will be difficult to determine the locality.

180 The cases from New South Wales and South Australia illustrate the various complexities and considerations that are raised by provisions such as these. Ultimately, however, s 36B must be construed according to its terms, having regard to its context and the purpose of the Act.

181 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.

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[123] See ***Seaford Rise*** [36].
[124] ***Seaford Rise*** [36].
[125] ts 27 - 30.

182 **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.

183 **Second**, a retail catchment area could be extremely large, of wildly irregular shape and even made up of several non-adjoining areas. Describing such an area as a 'locality' would not be consistent with the ordinary meaning of that word.

184 **Third**, if the legislation had intended the relevant area to be the retail catchment area, it could have easily said so. Similarly, if the legislature intended that the relevant area be fixed at a particular distance, it could easily have said so (as it did in s 36B(3)). 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.

185 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'.

186 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.

187 I do not accept that the retail catchment area could never be relevant to the assessment of the 'locality'. At the very least, it could

illuminate the practical impact of topographical features or the areas from which the proposed site is likely to be accessed on foot or push-bike.

188 Accordingly, I would answer the question of law in relation to ground 3 positively. That is, on a proper construction of s 36B(4), the retail catchment area can be a relevant consideration for the purpose of determining locality.

189 Although I have answered the question positively, this does not dispose of the allegation in ground 3 that the Commission erred in determining the 'locality' by reference to the retail catchment area. This is because, as I will explain, the Commission did more than simply take the retail catchment area into account as one of many relevant factors. Rather, the Commission appeared to consider, in effect, that the locality *was* the retail catchment area, albeit then to be reduced in size.

190 Before turning to explain this, I make one further observation. The word 'locality' is used in five places outside of s 36B in the Act.[126] Neither party referred to this or addressed whether its meaning in those sections could assist in determining its meaning in s 36B. In my view, its use in those other places tends to confirm that it was intended to mean the geographical area surrounding, and relatively close to, the proposed site. However, the weight of that observation is reduced by the fact that, in two of those places, it appears to be used in contrast to the word 'vicinity'.[127]

The Commission's decision

191 Ground 3 alleges that the Commission erred in holding that the relevant 'locality' in s 36B(4) is to be determined by reference to the retail catchment area.

192 The evidence before the Commission included answers to survey questions. It is apparent that shoppers at the Centre were asked to answer survey questions while in the Centre. In addition, door to door surveys were carried out on people who lived within the 2km radius of the Centre. It appears that the Commission referred to people who lived within the 2km radius of the Centre as '**residents**'. I will do the same.

[126] See s 38(4)(b), s 41(6), s 61A(1), s 74(1)(g)(ii) and s 99(1).

[127] See s 38(4)(c) and s 74(1)(g)(i). See also s 61A where 'region or locality' is qualified by 'that is subject to a geographical indication' (the phrase 'geographical indication' is itself defined to mean, in relation to wine goods, an indication that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin).

193 In its Decision, the Commission set out what had been established by the evidence. In particular:

1. The retail catchment area was, on the evidence, a large area stretching from the southern edge of Joondalup in the north and including Wembley Downs and Woodlands to the south.[128]

2. 53% of the consumers who were surveyed while shopping in the Centre were residents.

3. 56% of the residents surveyed in their homes used the Woolworths located in the Centre as their primary supermarket, and up to 97% used it occasionally. Of those who had purchased liquor in the last 12 months, 24.3% used the BWS at the Centre as their primary liquor store, while a substantial number purchased liquor from other liquor stores within a 2km radius of the Centre.[129]

4. The region in which the survey respondents lived directly impacted the supermarket predominantly used by those respondents.[130]

5. Liquorland's customers were generally convenience shoppers who purchased alcohol as part of their weekly grocery shop.[131]

194 Having regard to this evidence, the Commission considered that the evidence as to the residents' current usage of the Woolworths and BWS and proposed use of the Coles and Liquorland was highly relevant.[132]

195 It appears that the Commission considered its task was to determine whether the 'locality' was simply the Centre (the appellant's contention) or an area within a 2km radius of the Centre.[133] The latter area appears to have been based on '[t]he Licensing Authority's Public Interest Assessment Policy … to the effect that the Authority will (for the purpose of public interest factors in s 38) typically regard the locality for inner metropolitan suburbs such as Karrinyup as being within a radius of 2km'.[134]

[128] Decision [127].
[129] Decision [136].
[130] Decision [137].
[131] Decision [138].
[132] Decision [139].
[133] Decision [12(j)], [142] - [144].
[134] Decision [23].

196 The Commission chose the latter. Its reason was[135]

> so that the genuine shopping habits of the persons comprising the proposed retail catchment area of the Store can be considered. Without evidence that establishes that shoppers in the locality are not likely to comprise the majority of consumers for the Store, the Commission cannot reasonably make a finding that the locality should be restricted to the Centre.

197 It was an error for the Commission to consider it was required to choose between two options. The Commission was required to determine what the locality was, on the facts that it found on the evidence in this case.

198 In addition, although the Commission did not determine that the locality *was* the retail catchment area, it seems that this was only because it considered it was required to find that the locality was one of the two options. Had it not felt so constrained, it appears it would have found the locality to be the retail catchment area. In my view, the Commission construed 'locality' as meaning the retail catchment area, and then applied the policy to reduce that area to the 2km radius. This was an error.

Conclusion on ground 3

199 Although answering the question of law adversely to the appellant, I am satisfied that the Commission made the error alleged in ground 3 in that it incorrectly construed 'locality' as meaning the retail catchment area. Accordingly, I would uphold ground 3.

200 The appellant conceded, however, that this error was not material.[136]

Further observations

201 Although this is sufficient to dispose of ground 3, I am conscious of the burden placed on the licensing authority in having to apply concepts which cannot be precisely defined. For that reason, I will make two further observations.

202 First, I consider that, for the reasons given by Doyle CJ in ***Seaford Rise***,[137] premises outside an identified locality remain relevant to the assessment under s 36B, despite its reference to 'existing packaged liquor premises in the locality in which the proposed licensed premises are, or are

[135] Decision [142].
[136] ts 85.
[137] Apart from the point of distinction referred to above.

to be, situated'. I note, however, that this was not the subject of argument in the appeal and represents only my tentative view.

203 Second, echoing von Doussa J's observations in ***Nepeor***, I consider that if the concept and purpose of s 36B is recognised, it is capable of rational application in a practical way.

Conclusion

204 I would uphold each ground of appeal. I am also satisfied that the errors in ground 1 and 2 were material. Accordingly, I would allow the appeal.

205 I will hear from the parties as to final orders.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AG
Research Associate to the Honourable Justice Archer

26 OCTOBER 2021