



IN THE SUPREME COURT OF WESTERN AUSTRALIA

GDA/4/2023

BETWEEN:

**LIQUORLAND (AUSTRALIA) PTY LTD
(ACN 007 512 414)**

First Appellant

AND

DIRECTOR OF LIQUOR LICENSING

First Respondent

**ORDERS OF THE HONOURABLE JUSTICE LEMONIS
MADE ON 26 APRIL 2024**

UPON THE APPEAL NOTICE filed 12 July 2023, AND UPON HEARING Mr S. Standing for the Appellant and Ms R. Paljetak for the Respondent, IT IS ORDERED THAT:

1. The appeal be allowed.
2. The decision of the Liquor Commission of Western Australia in matter LC/09/2023 to dismiss the Appellant's application for the grant of a liquor store licence for premises at the Southern River Square Shopping Centre and to affirm the Director of Liquor Licensing's decision, be quashed.
3. The Appellant's application for review of the Director of Liquor Licensing's decision to refuse the grant of a liquor store licence for premises at the Southern River Square Shopping Centre be remitted to the Liquor Commission of Western Australia, differently constituted, for reconsideration in accordance with the reasons for decision in this appeal.
4. There be a direction that the Commission shall permit the Appellant to adduce further evidence in relation to issues relevant to the public interest, and the issues arising under section 36B(4) of the Liquor Control Act 1988, provided any further evidence is not to be adduced for the purposes of raising new issues which could reasonably have been raised when the application was first made.
5. There be no order as to costs.
6. There be liberty to apply in respect of the direction in order 4.

BY THE COURT

THE HONOURABLE JUSTICE S LEMONIS

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : LIQUORLAND (AUSTRALIA) PTY LTD -v-
DIRECTOR OF LIQUOR LICENSING [2024] WASC
128

CORAM : LEMONIS J

HEARD : 16 & 17 JANUARY 2024

DELIVERED : 23 APRIL 2024

FILE NO/S : GDA 4 of 2023

BETWEEN : LIQUORLAND (AUSTRALIA) PTY LTD
Appellant

AND

DIRECTOR OF LIQUOR LICENSING
Respondent

Catchwords:

Appellant applied for packaged Liquor Store Licence - Licensing authority constituted by the Director of Liquor Licensing refused to grant licence - Appellant sought review to the Liquor Licensing Commission, which failed - Appellant now appeals against the Commission's dismissal of the review application - Appellant must demonstrate an error of law on the part of the Commission - Consideration of whether appellant has demonstrated any error of law

Legislation:

Interpretation Act 1984 (WA)
Liquor Control Act 1988 (WA)
Liquor Control Regulations 1989 (WA)

Result:

It is not necessary to decide ground 1(a)

Ground 1(b) is not made out

Ground 2 is made out

Grounds 3(a) to (g) are not made out. It is not necessary to decide ground 3(h)

Ground 4 is made out

Ground 5 is not made out

Parties to provide further submissions as to the consequential orders to give effect to these findings

Category: B

Representation:

Counsel:

Appellant : S Standing

Respondent : R Paljetak

Solicitors:

Appellant : Herbert Smith Freehills

Respondent : State Solicitor's Office

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

Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321

Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police
[2017] WASC 88

BWS v ARV[No 2] 2021 WASCA 62

Charlie Carter Pty Ltd v Streeter & Male Pty Ltd (1999) 4 WAR 1

Commissioner for Consumer Protection v Carey [2014] WASCA 7

Farnell Electronic Components Pty Ltd v Collector of Customs (1996) 72 FCR
125; [1996] FCA 1135

Hancock v Executive Director of Public Health [2008] WASC 224

Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR
531

Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405

Liquorland (Australia) Pty Ltd v Director of Liquor Licensing [2021] WASC
366

Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51
LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Prichard v M 6
8 Legal Pty Ltd [2024] WASCA 4
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Rodger v De Gelder [2015] NSWCA 211
Sand Volley Australia Pty Ltd v Director of Liquor Licensing [2019] WASC 209
Shepherd v The Queen [1990] HCA 56; 170 CLR 573
Sydney Metro v Expandamesh Pty Ltd [2023] NSWCA 200
Woolworths Limited v Director of Liquor Licencing [2013] WASCA 227

LEMONIS J

LEMONIS J:

1 This appeal arises out of an unsuccessful application by the
appellant (Liquorland) for the grant of a liquor store licence under the
Liquor Control Act 1988 (WA) (Act).

2 An application for a liquor store licence is made to the licensing
authority pursuant to the provisions of the Act. Such a licence, if
granted, would permit Liquorland to sell packaged liquor from its
proposed new store the subject of the application.

3 Liquorland applied for the conditional grant of a liquor store
licence in respect of premises to be located within the Southern River
Square Shopping Centre in Southern River (the Centre). The proposed
liquor store was to be adjacent to the Coles supermarket at the Centre.
The reason the application sought a conditional grant was that the
proposed premises were not complete at the time the application was
heard.¹

4 Section 36B and s 38 of the Act applied to Liquorland's
application.²

5 For introductory purposes, it is sufficient to observe that the
applicant for a liquor store licence must satisfy the licensing authority
that:³

1. 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); and
2. the grant of the application would be in the public interest
(public interest condition).

6 The consumer requirements condition arises under s 36B(4) of the
Act. The public interest condition arises under s 38 of the Act.

7 Liquorland's application was initially made to the licensing
authority constituted by the Director of Liquor Licensing. The Director

¹ Section 62(2) of the Act.

² Section 36B(2) of the Act, s 38(1) and (2) of the Act and *Liquor Control Regulations 1989 (WA)*
reg 9EA(d).

³ See *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 [2] (*Liquorland
Karrinyup*).

was not satisfied that Liquorland had established the consumer requirements condition and therefore refused the application. The Director did not address the public interest condition.

8 Pursuant to s 25 of the Act, Liquorland applied to the Liquor Commission of Western Australia (Commission) for a review of the Director's decision. As Martin CJ observed in *Hancock v Executive Director of Public Health*:⁴

... when [the Commission] is conducting a review of a decision made by the Director, it is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the materials before the Director, and to make its own determination on the basis of those materials.

9 Section 25(2b)(a) of the Act required that in conducting the review, the Commission be constituted by three members. This was because the decision under review related to an application for the grant of a licence.

10 On 21 June 2023, the Commission constituted by the Deputy Chairperson and two members delivered joint written reasons in respect of the review. In effect, the Commission found that Liquorland had not established the consumer requirements condition, but had established the public interest condition. It was however necessary for Liquorland to establish both conditions to succeed in the review. Accordingly, the Commission dismissed the review and affirmed the Director's decision.

11 Liquorland now appeals against the Commission's decision.

The appeal

Introductory observations

12 Section 28 of the Act sets out the rights of appeal where a party to proceedings is dissatisfied with the Commission's decision. Section 28(2) provides that no appeal lies against the decision of the Commission constituted by three members except to the Supreme Court on a question of law. Thus, in this appeal, Liquorland must establish error on a question of law.

⁴ *Hancock v Executive Director of Public Health* [2008] WASC 224 [54].

13 An appeal under s 28(2) is in the nature of judicial review.⁵
However, s 28(2) is not confined to jurisdictional errors of law. It
applies to all errors of law, jurisdictional or otherwise.⁶

14 Section 28(5) of the Act sets out the options available to me on
hearing the appeal. It states:

On an appeal under this section to the Supreme Court, the Supreme
Court may -

- (a) affirm, vary or quash the decision appealed against; or
- (b) make any decision that the Commission could have made
instead of the decision appealed against; or
- (c) send the decision back to the Commission for reconsideration in
accordance with any directions or recommendations that the
Court considers appropriate, and, in any case, may make any
ancillary or incidental order the Supreme Court considers
appropriate.

Grounds of appeal and applicable principles

15 There are five grounds of appeal. Grounds 1 and 3 are
accompanied by numerous particulars. It is sufficient for present
purposes to set out the grounds without reciting the particulars. Where
necessary, I set out the particulars later in these reasons.

16 The grounds are as follows:

Ground 1

1. The Commission erred in law by misconceiving its function
under the *Liquor Control Act 1988* (WA) (Act) to evaluate the
evidence and draw conclusions from the evidence including
inferences from facts established by the evidence, and by
misconstruing the concept of local packaged liquor requirements
in s 36B(4) of the Act, and thereby failed to apply itself to the
relevant issues and constructively failed to exercise its
jurisdiction, by failing to consider -
 - a. whether the local packaged liquor requirements
contended for by the appellant could or should be
inferred from the facts established by the evidence;

⁵ *Liquorland Karrinyup* [18].

⁶ See by way of analogy, *Commissioner for Consumer Protection v Carey* [2014] WASCA 7 [72] (McLure P), [170] (Murphy JA agreeing).

- b. whether the planning evidence adduced by the appellant was capable of supporting an inference that local packaged liquor requirements could not reasonably be met;
- c. the specific evidence of purchasers of liquor regarding their requirements for liquor from the proposed store.

...

Ground 2

- 1. The Commission erred in law in that it misconstrued the concept of local packaged liquor requirements in s 36B(4) of the Act by finding, in it[s] reasons at [139], in effect, that the appellant had not established a 'considerable requirement' for one stop shopping, when it should have considered whether a not insignificant or immaterial number of consumers had the requirements for convenience and one stop shopping contended for.
- 2. This ground gives rise to the following question of law, namely, whether, on the proper construction of s 36B(4) of the Act, it is sufficient for an applicant to establish that a not insignificant or immaterial number of consumers have the requirement contended for, or whether an applicant must establish a considerable requirement.

Ground 3

- 1. The Commission erred in law by misconstruing the concept of 'locality' in s 36B(4) of the Act and impermissibly circumscribing its evaluation of the evidence relating to 'locality'.

...

Ground 4

- 1. The Commission erred in law at [104] and [105] of its reasons in that it -
 - a. asserted, in the absence of any supporting evidence, that MGA Town Planners had chosen Balfour Road as a locality boundary so as to exclude any packaged liquor stores from the locality, that Warton Road should be preferred to Balfour Road as a locality boundary, and that Corfield Road should be the boundary to the east;

- b. failed to state or adequately state its reasons for those findings;
 - c. found that the reasons in the MGA Supplementary Report for Balfour Road to be adopted as a locality boundary were not compelling and thereby adopted the wrong test under the Act, and
 - d. misconceived its function under the Act to evaluate the evidence and draw conclusions from the evidence.
2. This ground gives rise to the following questions of law, namely, what is the nature and extent of the Commission's duty under the Act to evaluate evidence, find facts and draw conclusions from the evidence before it? Further, what is the nature and extent of the Commission's duty to state the reasons for its findings? Further, what is the standard of proof to be applied by the Commission in determining whether to accept or reject evidence?

Ground 5

1. The Commission erred in law in that at [140] to [150] of its reasons, it misconstrued the concept of local packaged liquor requirements in s 36B(4) of the Act and failed to apply itself to a relevant issue to be decided on the appellant's application and thereby constructively failed to exercise its jurisdiction by determining, in effect, that existing liquor stores in the locality reasonably met any consumer requirement for one stop shopping and convenience in the locality, when the relevant question on the appellant's case was whether any existing liquor stores in the locality reasonably met consumer requirements for one stop shopping and convenience at the location of the proposed new store.
2. This ground gives rise to the following question of law, namely, what is the meaning of 'local packaged liquor requirements' in of s 36B(4) of the Act, including whether a local packaged liquor requirement can be a requirement for packaged liquor at a particular location within a locality as compared to the locality as a whole?

17 Liquorland does not press ground 1(c).⁷

18 As can be seen, each ground asserts an error of law. Broadly speaking, the grounds of appeal include contentions that the Commission misconstrued the Act and misconceived its function under

⁷ Liquorland's responsive written submissions to the Commission, par 4.

the Act. They therefore raise a question as to the proper construction of the Act.

19 A particular emphasis of at least part of Liquorland's grounds of appeal is that in coming to the conclusions which it reached, the Commission did not give adequate reasons, took into account irrelevant considerations and failed to respond to substantial arguments put to the Commission regarding matters of significance.

20 In most cases, a decision does not involve an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.⁸ The appeal is not by way of rehearing. As a consequence of the limited scope of the jurisdiction, the court hearing the appeal does not have express or implied power to receive additional evidence.⁹

21 In *Woolworths Limited v Director of Liquor Licensing*,¹⁰ Buss JA (as his Honour then was) observed in the context of decisions made by an administrative tribunal or body that:

At least in the absence of a contrary intention in the statute which established it, an administrative tribunal or body will make an error of law in deciding a matter if it identifies a wrong issue or asks itself a wrong question. So acting will result in the tribunal or body exceeding the authority or powers conferred by the relevant statute. That is, if an administrative tribunal or body identifies a wrong issue or asks itself a wrong question in relation to a matter it will not have jurisdiction to make the decision that was made. (citations omitted)

A purported, but misconceived and inadequate, attempt by an administrative tribunal or body properly to hear and determine a matter in accordance with the applicable statute may constitute a constructive failure to exercise its jurisdiction. As Gaudron J explained in *Yusuf*, 'there is said to be a "constructive failure to exercise a jurisdiction" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form' [41].

In *Yusuf*, McHugh, Gummow and Hayne JJ referred to the High Court's decision in *Craig* and then said [82]:

⁸*Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 353. See also *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 [6] - [7].

⁹*Carey* [71] (McLure P), [170] (Murphy JA agreeing), [167] (Buss JA).

¹⁰*Woolworths Limited v Director of Liquor Licensing* [2013] WASC 227 [65] - [67].

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive (cf *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82). Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law (*Craig* (1995) 184 CLR 163 at 179).

- 22 The nature of jurisdictional error on the part of a statutory decision-maker was explained in the joint judgment of the High Court in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*¹¹ as follows:

Jurisdictional error on the part of a statutory decision-maker in making a decision can include: misunderstanding the applicable law; asking the wrong question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.

- 23 A failure by the Commission to take account of a relevant consideration which it was obliged to take into account is an error of law.¹² However, a failure to take into account a particular piece of evidence does not necessarily constitute a failure to take into account a relevant consideration.¹³

- 24 Further, it is an error of law to make a finding of fact, or to draw an inference, which is incapable of arising from the evidence.¹⁴

¹¹ *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [3].

¹² *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [53] - [57].

¹³ *Paridis* [57].

¹⁴ *Carey* [81] (McLure P), [170] (Murphy JA agreeing).

However, the making of a wrong finding of fact does not constitute an error of law if there is some basis in the evidence for the finding.¹⁵

25 In *Hancock*, Martin CJ held the Commission is obliged to give reasons for decision, at least where there is a right of appeal to this court from the Commission's decision.¹⁶ As to the fulfilment of this obligation, Martin CJ observed:¹⁷

... where there is a conflict in submissions which is significant to the outcome, it is necessary for the Commission to set out the differing positions advanced by the parties and the reasons why it prefers one position over another.

26 Further, in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*, Banks-Smith J (when sitting as a judge of this court) observed:¹⁸

It is well recognised that when an administrative decision-maker gives reasons, they are meant to inform. They should not be over scrutinised for perception of error. They should be read as a whole and considered fairly.

At the same time, the reasons must enable the parties to comprehend the process of reasoning and evaluation. It is not enough to summarise evidence and state conclusions. The evaluation must be apparent. (footnotes omitted)

27 Her Honour also stated that:¹⁹

The preponderance of authority is to the effect that what is required to satisfy the duty to take into account relevant considerations is proper, genuine and realistic consideration of the relevant matter. (footnote omitted)

28 As can be seen from the observations of Martin CJ and Banks-Smith J, the requirement to give adequate reasons is not an abstract concept. It is informed by the substantive nature of the decision that the Commission is required to make. Ordinarily, it is sufficient for the Commission's reasons to reveal its evaluation and reasoning process in respect of the substantive issues raised for consideration. Further, ordinarily, 'inadequate reasons' in relation to an

¹⁵ *Carey* [81] (McLure P), [170] (Murphy JA agreeing).

¹⁶ *Hancock* [64].

¹⁷ *Hancock* [69].

¹⁸ *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [14] - [15]. See also *Sand Volley Australia Pty Ltd v Director of Liquor Licensing* [2019] WASC 209 [31].

¹⁹ *Australian Leisure and Hospitality Group Pty Ltd* [37].

ancillary issue would not constitute a failure to provide adequate reasons such as to give rise to an error of law.

29 The Commission is also obliged to comply with the requirements of procedural fairness.²⁰ Such requirements ordinarily require the Commission to respond to a substantial argument put to it.²¹ A failure to accord procedural fairness is a form of jurisdictional error.²²

30 The matters I have set out at [23] - [29] do not have the result that a court on appeal should scrutinise the Commission's reasons on a 'line by line, word by word' type analysis.

31 As Edelman J (when sitting as a judge of this court) observed in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health*.²³

On appeal from a decision of the Liquor Commission, a court should not be 'concerned with looseness in the language ... nor with unhappy phrasing' of the decision maker; the reasons for the decision under review should not be 'construed minutely and finely with an eye keenly attuned to the perception of error'. (footnote omitted)

32 In a similar vein, Archer J in *Liquorland Karrinyup* observed:²⁴

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'. (footnote omitted)

33 And, as Banks-Smith J observed in the passage set out at [26] above, the reasons 'should be read as a whole and considered fairly'.

Principles of statutory construction

34 Given that the grounds raise questions as to the proper construction of the Act, it is useful at this point to identify the applicable principles of statutory construction.

²⁰ *Hancock* [38] - [40].

²¹ *Rodger v De Gelder* [2015] NSWCA 211 [93].

²² *Rodger* [94], citing *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 [60].

²³ *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51 [23].

²⁴ *Liquorland Karrinyup* [20].

35 Those principles were recently summarised in the joint reasons for decision of the Court of Appeal in *Prichard v M 6:8 Legal Pty Ltd.*²⁵ Their Honours observed:²⁶

This court recently reiterated the importance of statutory text to the exercise of statutory construction in *Chief Executive Officer, Department of Water and Environmental Regulation v Waroona Resources Pty Ltd.* Consistently with that discussion, statutory construction is a process of determining the objective meaning of the legislation by the application of recognised rules of interpretation to the legislative text, understood as a whole and in its context. As the High Court observed in *Zheng v Cai*:

'It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws ... the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.' (citations omitted)

(footnotes omitted)

36 Their Honours also observed that:²⁷

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The statutory text is the surest guide to Parliament's intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy.

Legislative purpose is to be ascertained from what the legislation says, rather than any assumption about the desired or desirable reach or operation of the relevant provisions. Identifying the legislative purpose is itself an objective exercise of statutory construction, which does not involve a search for what those who promoted or passed the legislation may have had in mind when it was enacted. ... Nor is it for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose. (footnotes omitted)

²⁵ *Prichard v M 6:8 Legal Pty Ltd* [2024] WASCA 4.

²⁶ *Prichard* [41].

²⁷ *Prichard* [43] - [44].

37 Further, in the joint judgment of the High Court in *Project Blue Sky v Australian Broadcasting Authority*,²⁸ their Honours observed:

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme. (footnotes omitted)

38 Section 18 of the *Interpretation Act 1984* (WA) provides that in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether or not expressly stated) shall be preferred to a construction that would not do so.

39 Further, pursuant to s 19(1) of the *Interpretation Act*, I can have regard to certain extrinsic material to confirm that the meaning of the provision is the ordinary meaning conveyed by the text, taking into account context and the legislation's purpose or object. I can also have regard to the extrinsic material to determine the meaning of a provision when it is ambiguous or obscure. The parties do not suggest that the extrinsic material is of assistance to the matters of construction raised by the appeal.

Structure of reasons

40 In dealing with the matters raised by this appeal, it is useful to first identify the relevant statutory provisions of the Act and to explain their effect in general terms. This will provide an overall background to the matters under consideration. I will then summarise the Commission's reasons for affirming the Director's decision, before turning to the grounds of appeal. I will deal more specifically with the provisions of the Act when addressing each of the grounds.

²⁸ *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [70].

Relevant provisions of the Act

41 This appeal principally concerns the construction and application of s 36B of the Act. Given its importance to this appeal, I will set out s 36B in full:

(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 -

- (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.

42 Section 3 defines the phrase 'packaged liquor' used in s 36B to mean 'liquor delivered to or on behalf of the purchaser in sealed containers for consumption off the licensed premises'.

43 Section 5 sets out the objects of the Act. The primary objects are:

- (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.

44 These objects are not given priority according to the manner in which they are ordered. Further, one object may well point in one direction, while a second object points in another direction. For example, the object of minimising harm or ill-health may in some instances suggest an interpretation that limits the growth of further facilities, while the object of catering for the requirements of consumers with regard to the proper development of the liquor industry may suggest a more expansive approach. Given that s 5 does not establish a

hierarchy within the primary objects, a particular object should not be given primacy over another unless the provision under consideration warrants it.

45 Section 5(2) provides that in carrying out its functions under the Act, the licensing authority shall have regard to the primary objects and also to certain identified secondary objects. Relevantly to this appeal, the secondary objects are:

- (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
- ...
- (e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

46 Section 5(3) provides that if in carrying out its functions under the Act, the licensing authority considers there is an inconsistency between the primary objects and the secondary objects, the primary objects take precedence. This does not address the scenario where there is an inconsistency between the primary objects.

47 Section 36B(4) also needs to be looked at together with s 38, which imposes the public interest requirement. As I explained earlier, an applicant for a packaged liquor store licence must satisfy the licensing authority of both the consumer requirements condition and the public interest condition. In interpreting the provisions of the Act that impose those conditions, the prima facie position is that the provisions are intended to give effect to harmonious goals.²⁹

48 In terms of s 38(4), it sets out particular matters to which the licensing authority may have regard in determining whether the grant of an application for a liquor store is in the public interest. These matters 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
- (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

²⁹ *Project Blue Sky* [70].

- (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;
- ...

General observations regarding s 36B

49 Section 36B was comprehensively considered by Archer J in *Liquorland Karrinyup*. The parties relied on her Honour's reasons in different respects and did not suggest that her Honour's analysis was incorrect. I cannot discern any error and I will adopt her Honour's reasoning as set out below.

50 Her Honour observed:

1. the purpose of s 36B was to ensure that an additional licence would only be granted where such requirements could not reasonably be met by the existing premises;³⁰
2. 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.³¹

51 Her Honour observed that the phrase '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. Her Honour also observed that 'consumer requirements' has been understandably assumed to mean what consumers demand or desire, as distinct from what they cannot manage without.³²

52 Her Honour held that the phrase 'requirements of consumers' means 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.³³ Thus, the phrase as used in s 36B(1) includes such matters as shopper convenience and preferences, including the convenience of one stop shopping.

³⁰ *Liquorland Karrinyup* [74].

³¹ *Liquorland Karrinyup* [182].

³² *Liquorland Karrinyup* [79].

³³ *Liquorland Karrinyup* [89].

53 Her Honour also held that the phrase 'cannot reasonably be met' in
s 36B(4) conveys 'cannot sensibly or rationally be met'.³⁴

54 I make the following additional observations.

55 Broken down into its constituent parts, s 36B(4) requires the
Commission to address the following four matters:

1. what is the relevant locality;
2. what are the requirements of consumers for packaged liquor in
the relevant locality;
3. what packaged liquor services are provided by existing
packaged liquor premises in the relevant locality; and
4. whether the local packaged liquor requirements cannot
reasonably be met by those existing packaged liquor premises.

56 Logically, these matters should be addressed in the order in which
I have set them out. Each step leads to the next.

57 The comparative assessment which the licensing authority must
undertake pursuant to s 36B(4) is between two factors. The first is the
local packaged liquor requirements in the relevant locality. The second
is the packaged liquor services provided by existing packaged liquor
premises in the relevant locality. The required assessment is directed to
whether the former cannot reasonably be met by the latter. In effect,
s 36B(4) requires that there be a demand/supply analysis, with the
result that the application must not be granted unless the demand cannot
reasonably be met by the supply. And, perhaps to state the obvious,
s 36B(4) envisages that one such comparison is to be made by reference
to one locality. In this respect, the language 'local packaged liquor
requirements cannot reasonably be met by existing packaged liquor
premises in the [relevant] locality' is speaking of one comparison
referable to one locality.

58 The parties approached this appeal on the basis that s 36B(4)
concerns the relevant consumer requirements in the locality for the
range of products and services which the new store will provide. I
think that is the correct approach. The analysis required by s 36B(4) is
not envisaged to be an analysis at large, by reference to *all* consumer
requirements for packaged liquor in the locality irrespective of whether

³⁴ *Liquorland Karrinyup* [130], [131] and [134].

they have any correlation to the application. Rather, the analysis is directed to the substance of the application itself, so is directed to the products and services which the new premises is intended to provide.

59 Further, it seems to me that in most cases, the comparison to be undertaken pursuant to s 36B(4) requires the Commission to make, at least, a broad assessment of the nature, scope and extent of such requirements. Without doing so, it is difficult to see how an assessment can be made as to whether the requirements of consumers are reasonably met by the existing stores. For example, a consumer requirement to purchase liquor in bulk that is relatively modest in quantitative terms may reasonably be met by a large bulk liquor store in the locality. It may not reasonably be met by a boutique liquor store. As can be seen in this example, the necessary starting point for each analysis is that the requirement is assessed to be relatively modest in quantitative terms.

General observations regarding 'locality'

60 In *Liquorland Karrinyup*, Archer J also undertook a comprehensive analysis of the meaning of the word 'locality'.

61 Her Honour made three general observations. The word 'locality' cannot be defined with precision. The factors that will be relevant in determining the locality will vary from case to case. In some cases, it will be difficult to determine the locality.³⁵

62 Her Honour also expressed the following views as to the meaning and determination of the word 'locality' in s 36B(4):³⁶

1. it denotes an area that surrounds, and is geographically close to, the location of the proposed premises. It was not intended to equate to the area(s) from which consumers would come;
2. it is intended to connote the same concept of neighbourhood and in that context means the geographical area surrounding the proposed site;
3. the legislature intended to capture the geographical area surrounding, and relatively close to, the proposed site, being the neighbourhood of the site;

³⁵ *Liquorland Karrinyup* [179].

³⁶ *Liquorland Karrinyup* [181] - [187].

4. the shape and size of the locality may be influenced by topographical features (including man-made features such as roads) and areas from which the proposed site could be accessed reasonably easy on foot or push-bike;
5. 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;
6. 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; and
7. the locality is not to be determined by reference to a retail catchment area. However, a retail catchment area may still be of relevance, for example illuminating the ease of access to the proposed site.

63 I would add one observation and then one qualification.

64 In ascertaining the relevant locality, it will be necessary to determine its boundaries. It would only be possible to discern what existing stores are in the locality by delineating its boundaries. However, it is important that the delineation of the boundaries does not become the primary driver for the assessment of the locality. It is important that the chosen area reflects a locality in the sense required by the Act. In some cases, this may require an adjustment of what might initially be thought to be appropriate boundary delineations to ensure that the selected area aligns with the concept of a locality.

65 The qualification is this. I am not sure that in every case the locality denotes an area that surrounds, and is geographically close to, the location of the proposed premises. It may well be that the proposed premises are of such a scale that they in effect dictate the scope of the locality. However, if that is not the case, I am not necessarily persuaded the assessment of locality should proceed on the assumption that locality reflects the neighbourhood of the proposed premises. To proceed in that way interprets the legislation as conveying that the relevant locality is the locality 'of the proposed premises'. This may not reflect the same concept as the 'locality *in which* the [premises] are, or are to be, situated', that being the language of the Act. The former focuses attention on an area emanating out from the premises, whereas the latter focuses attention on what is the existing neighbourhood into which the premises are to be placed. These are however nuanced and

difficult questions. And, as Archer J observed in *Liquorland Karrinyup*, it is impossible to prescribe a specific test to be applied, or an exhaustive list of factors to take into account. The issue that is troubling my mind was not argued before me and I am certainly not convinced the approach that her Honour took, after very carefully considering the issue, is wrong. That being so, I will follow her Honour's reasons.

Liquorland's case before the Commission

66 Before turning to the Commission's reasons, it is necessary to explain the nature of Liquorland's case before the Commission.

67 Liquorland's case was that the evidence demonstrated there is 'a local packaged liquor requirement to be able to purchase liquor at the Centre in conjunction with other purchases'.³⁷ This was also put as 'requirements on the part of consumers for a local store with one-stop/one-trolley shopping convenience at the Centre'.³⁸ In Liquorland's responsive submissions to the Commission, the relevant requirement was put as being 'for the convenience (including the convenience of one stop shopping) of being able to buy liquor at the Southern River Square Shopping Centre'.³⁹

68 In substance, Liquorland's case put to the Commission was that the relevant requirement was for the convenience of purchasing liquor at the Centre, including as part of a one stop shopping experience. The requirement was directed to the Centre, not the locality overall.

69 As to the extent of that requirement, respectfully, Liquorland's case as put to the Commission was somewhat unclear.

70 Liquorland's primary submissions before the Commission identified the relevant requirement, albeit under the heading of Public Interest, as follows:⁴⁰

No particular level of support needs to be established; the question is simply whether the evidence identifies a consumer requirement on the part of a significant section of the public.

...

³⁷ Liquorland's written submissions to the Commission, par 61.

³⁸ Liquorland's written submissions to the Commission, par 62; see also par 38.

³⁹ Liquorland's responsive written submissions to the Commission, par 30.

⁴⁰ Liquorland's written submissions to the Commission, par 35 and par 38.

... the DAA surveys should be accepted as evidence clearly demonstrating that a significant section of the public has a requirement (mainly based on convenience and one-stop/one-trolley shopping) for the proposed Store.

71 Liquorland's responsive submissions to the Commission identified the relevant requirement as follows:⁴¹

An applicant need only establish that a material or significant number of consumers have a particular requirement. It simply does not matter that some, or even a majority, of members of the public, have no requirement for liquor at all, provided that a not insignificant or immaterial number of consumers do have that requirement; ...

72 These two sentences do not sit well together. A requirement that is 'not insignificant or immaterial' as referred to in the second sentence does not necessarily equate to a requirement that is 'material or significant'.

73 During the hearing before the Commission, Liquorland submitted that 'all the Commission needs to be satisfied about, is that there's a significant section of the public that has a requirement for liquor' provided by the proposed premises.⁴² Given this submission, the Commission was entitled to proceed on the understanding that Liquorland's case was that it had to establish that a significant section of the public has a requirement to purchase liquor from the proposed premises.

74 That is not how Liquorland has presented its case on this appeal. Its case on appeal is that it need only establish that a 'not insignificant or immaterial number of consumers' has the relevant requirement.⁴³ In effect, Liquorland's submission is that s 36B(4) incorporates a *de minimis* requirement, namely that the relevant requirements must be not insignificant or immaterial. Liquorland contends on appeal that it need only demonstrate that this *de minimis* requirement is met. I address this in more detail at [129] - [136] below.

75 Ultimately, I have come to the view that the way Liquorland presented its case to the Commission does not affect the outcome of this appeal. However, it does explain the manner in which the Commission dealt with the consumer requirements condition, which is the subject of ground 2.

⁴¹ Liquorland's responsive written submissions to the Commission, par 18.

⁴² Hearing before the Commission, ts 6.

⁴³ Ground 2(1) in the Amended Appeal Notice.

76 I turn now to the Commission's reasons.

Commission's reasons

77 The Commission delivered joint reasons of all three members. I will initially set out in summary form the key aspects of the Commission's reasons. I will address the reasons in more detail when considering the grounds of appeal.

78 The Commission's reasons commenced by setting out a brief background to the matter.

79 The reasons then set out in detail Liquorland's submissions.⁴⁴ These submissions were directed to locality, the consumer requirements condition and the public interest condition.

80 The reasons noted that the Director elected not to make submissions in relation to the public interest condition, other than to say that the proliferation of liquor outlets is not in the public interest. The reasons also noted the Director's position that because the consumer requirements condition was not satisfied, the public interest assessment was not required and did not arise.⁴⁵

81 The reasons set out in detail the Director's submissions in relation to the consumer requirements condition. These submissions also addressed the question of locality.⁴⁶

82 The Commission identified the legal and statutory framework including the relevant test under s 36B(4) and the public interest test under s 38. The Commission also observed that the 'failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered'.⁴⁷

83 The Commission approached its task by first determining the relevant locality. In doing this, the Commission determined the relevant locality was that outlined in the plan attached to the reasons.

84 Having determined the locality, the Commission then went on to consider the question of the local packaged liquor requirements, that is the consumer requirements condition. The Commission referred to

⁴⁴ Commission's reasons [8] - [32].

⁴⁵ Commission's reasons [34].

⁴⁶ Commission's reasons [35] - [62].

⁴⁷ Commission's reasons [64].

what it understood to be the key aspects of the evidence relied on by Liquorland.

85 The Commission stated that Liquorland had 'failed to establish there is a considerable requirement for one stop shopping that includes liquor purchases at the Centre'.⁴⁸ The Commission then went on to consider whether the local packaged requirements can reasonably be met in the locality. The Commission found that even if Liquorland had established a consumer requirement for one stop shopping convenience, such a requirement is reasonably met at the existing premises in the locality.⁴⁹

86 Finally, the Commission dealt with the public interest requirement. The Commission found that no significant public interest matters arose and that Liquorland had met its onus to satisfy the Commission that the application was in the public interest.⁵⁰

87 Ultimately given these findings, the Commission found that Liquorland had not discharged the onus under s 36B(4) of the Act. As a consequence, the Commission dismissed the application and affirmed the decision of the Director.⁵¹

88 I turn now to the grounds of appeal.

Grounds of appeal

89 It is convenient to deal first with grounds 1, 2 and 5, which address the Commission's findings in respect of the consumer requirements condition. I will then address grounds 3 and 4, which address the Commission's reasoning in relation to locality.

Grounds 1, 2 and 5

90 At a conceptual level, these grounds make the following complaints:

1. Ground 1 - Liquorland contends that the Commission erred in its approach to evaluating the evidence by focusing on particular topics of evidence separately, and not having regard to their collective effect. Liquorland also contends that the

⁴⁸ Commission's reasons [139].

⁴⁹ Commission's reasons [150].

⁵⁰ Commission's reasons [185].

⁵¹ Commission's reasons [186] - [188].

Commission failed to have regard at all to evidence regarding likely future development and population growth.⁵²

2. Ground 2 - Liquorland contends that the Commission's finding that it had failed to establish that there is a *considerable* requirement for one stop shopping that includes liquor purchases at the Centre, reflects that the Commission asked itself the wrong question and therefore made an error of law. Specifically, Liquorland contends that it was not necessary for it to establish that the necessary requirement was a considerable one.⁵³
3. Ground 5 - Liquorland contends that the Commission erred in law by determining that existing liquor stores in the locality reasonably met any consumer requirements for one stop shopping and convenience in the locality. Again, Liquorland says that the Commission asked itself the wrong question. Liquorland says the correct question is whether any existing liquor stores in the locality reasonably met consumer requirements for one stop shopping and convenience at the location of the proposed new premises.⁵⁴

91 In considering these grounds, it is necessary to interpret the Commission's reasons in respect of the consumer requirements condition.

Commission's reasons regarding the consumer requirements condition

92 The Commission identified that for the purposes of meeting the requirements of s 36B(4), the Commission must:⁵⁵

1. adopt an appropriate 'locality' for the purposes of s 36B;
2. be satisfied that there are 'local packaged liquor requirements', being the requirements of consumers for packaged liquor in the locality the premises are to be situated; and
3. be satisfied that such 'local packaged liquor requirements' cannot reasonably be met by existing packaged liquor premises in the locality.

⁵² Liquorland's written submissions on the appeal, par 10.

⁵³ Liquorland's written submissions on the appeal, pars 14 - 20.

⁵⁴ Liquorland's written submissions on the appeal, par 28.

⁵⁵ Commission's reasons [76].

93 The Commission addressed the meaning of the word 'requirements'. The Commission appears to have adopted the formulation set out by Archer J in *Liquorland Karrinyup* that 'There is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant to both [the consumer requirements condition and the public interest condition]'.⁵⁶ The Commission stated that in considering the requirements of consumers the Commission must have regard to the objects of the Act, including s 5(1)(c).⁵⁷

94 In assessing whether there was a local packaged liquor requirement, the Commission primarily focused on the results sets out in a survey undertaken on behalf of Liquorland by Data Analysis Australia (the DAA Survey). The Commission noted Liquorland's submissions that the DAA Survey:⁵⁸

1. established that there is a local packaged liquor requirement to purchase liquor at the Centre in conjunction with other purchases; and
2. provided compelling evidence of local packaged liquor requirements on the part of consumers for a local store with one-stop/one-trolley shopping convenience at the Centre.

95 The Commission noted Liquorland's submissions that the survey evidence was consistent with the views of policy makers and industry participants, the evidence of Liquorland's state manager and the evidence of social engagement and impact evaluation consultants. The Commission also noted Liquorland's submissions that there was direct evidence in support from developers and from customers that shop at the Centre, and that the liquor store was consistent with the State Planning Policy regarding Neighbourhood Activity Centres.⁵⁹

96 The Commission stated that the general views of policy makers or industry participants, or the opinion of Liquorland:⁶⁰

... is not enough to be considered evidence of an actual consumer requirement. It may be indicative, at the highest, of a general stance that it is the experience of the industry that consumers wish to purchase packaged liquor in a convenient manner.

⁵⁶ Commission's reasons [127].

⁵⁷ Commission's reasons [128].

⁵⁸ Commission's reasons [129].

⁵⁹ Commission's reasons [129].

⁶⁰ Commission's reasons [130].

97 Further, the Commission stated that the 'mere existence of State Planning Policy is simply not enough to properly establish a consumer requirement in respect to package liquor supply at a particular shopping centre or in a particular locality'.⁶¹

98 The Commission stated that it considered that Liquorland 'is primarily asserting that there is a consumer requirement for convenience and one-stop shopping'.⁶²

99 The Commission then referred to the results from the DAA Survey which the Commission considered were of particular interest. Specifically, the Commission set out the results for the question 'How often do you think you would purchase liquor from the proposed Liquorland store?' as follows:⁶³

About once a week or more	9.9%
About once a fortnight	9.3%
About once a month	11.2%
A few times a year	24.7%
Never	42.6%
Don't know/can't say	2.2

100 The Commission expressed the opinion that a second table in the DAA Survey showed the same results to the same question even where only considering those parties who expected to make the Centre their main shopping centre.⁶⁴

101 The Commission noted that the tables to the DAA Survey stated that 44.9% of respondents expected no benefit would be gained from the proposed premises, as opposed to 49.7% stating that there would be a benefit. From looking at the tables to the DAA Survey, in particular tables 92 and 94, it would appear that the correct percentage for those who expect no benefit was 44.6%, however nothing turns on that for the purposes of this appeal.

⁶¹ Commission's reasons [131].

⁶² Commission's reasons [132].

⁶³ Commission's reasons [134(b)].

⁶⁴ Commission's reasons [134(c)].

102 The Commission stated that the numbers indicating little or no
interest in the purchase of packaged liquor is strikingly high in this
instance.⁶⁵

103 The Commission noted that the DAA report set out that 71% of
respondents generally supported Liquorland's application. The
Commission also noted that the DAA report set out that a high
percentage of respondents thought the proposed premises would be
useful if they needed to make small purchases and it would be useful to
take their trolley in there. The Commission found that general support
and usefulness falls short of establishing a consumer requirement.⁶⁶

104 Ultimately, the Commission found that:⁶⁷

On the basis of the evidence provided and, in particular the DAA
Survey, the Commission finds that the Application has failed to
establish that there is a considerable requirement for one-stop shopping
that includes liquor purchases at the Centre.

105 The Commission did not identify what it understood a
'considerable' requirement to be. The Commission then went on to
consider what is described as the second limb of the test in s 36B(4).
The Commission stated that it 'must make a finding as to whether the
local packaged liquor requirements can be met in the locality'. The
Commission stated that:⁶⁸

142. In this case the Commission found that the Applicant has failed
to discharge the onus of satisfying the Commission that there is
a consumer requirement for one-stop or convenience shopping
for packaged liquor in the locality.

143. It appears that part of the reason this could not be established, is
that the locality is serviced by several other packaged liquor
stores of various types.

106 The Commission set out that in the DAA Survey it was clear the
majority of purchasers attended large destination stores that were not
necessarily within the locality, referring in particular to a Dan Murphy's
store. This specific part of the Commission's reasons is not the subject
of complaint. In *Liquorland Karrinyup*, Archer J expressed the
tentative view that stores outside the locality were relevant to the

⁶⁵ Commission's reasons [135]. It would appear that the word 'indication' is intended to mean 'indicating'.

⁶⁶ Commission's reasons [138].

⁶⁷ Commission's reasons [139].

⁶⁸ Commission's reasons [142] - [143].

assessment under s 36B.⁶⁹ As I understand the analysis undertaken in *Liquorland Karrinyup*, stores outside the locality may be relevant in assessing the extent to which there are requirements in the locality.⁷⁰ I think it would have been preferable for the reasons to explain how the Dan Murphy's store outside the locality was relevant to the Commission's assessment. It is unnecessary to say anything further on this topic given no complaint was made concerning the relevance of the Dan Murphy's store to the required assessment.

107 The Commission observed that Liquorland Southern River was the next most highly used, comprising 18.8% of liquor purchasers. The Commission also observed that this store was co-located with a Coles in the locality at the Southern River Shopping Centre, 2.8 km from the proposed premises the subject of the application.⁷¹ The Commission found that:⁷²

It is clear this premises already services any consumer requirements for one-stop Shopping and convenience in the locality.

108 The Commission then referred to other packaged liquor stores both within and outside of the locality. The Commission found that:⁷³

A high percentage of liquor outlets allow for one-stop shopping convenience in the locality.

109 Ultimately, the Commission found that even if Liquorland 'had established a consumer requirement for one-stop shopping convenience, such requirement is reasonably met at the existing premises in the locality'.⁷⁴

Analysis

110 With respect to the Commission members, unfortunately their findings in relation to the consumer requirements condition were contradictory.

⁶⁹ *Liquorland Karrinyup* [202].

⁷⁰ *Liquorland Karrinyup* [172], [202].

⁷¹ Commission's reasons [145].

⁷² Commission's reasons [146].

⁷³ Commission's reasons [149].

⁷⁴ Commission's reasons [150].

111 The Commission initially found that Liquorland's application had
'failed to establish that there is a *considerable* requirement for one-stop
shopping that includes liquor purchases *at the Centre*' (my emphasis).⁷⁵

112 When the Commission went on to consider the question of
whether packaged liquor requirements can be reasonably met, the
Commission described its earlier finding as being Liquorland 'has failed
to discharge the onus of satisfying the Commission that there is *a*
consumer requirement for one-stop or convenience shopping for
packaged liquor *in the locality*' (my emphasis).⁷⁶ In conclusion when
dealing with that topic, the Commission said even if Liquorland 'had
established *a* consumer requirement for one-stop shopping
convenience, such requirement is reasonably met at the existing
premises in the locality' (my emphasis).⁷⁷

113 Accordingly, the Commission's primary formulation of its finding
was that Liquorland failed to establish a *considerable requirement* that
includes liquor purchases *at the Centre*. The subsequent formulation
was that Liquorland failed to establish *a* consumer requirement in *the*
locality. These findings contradict each other in two respects. First, as
to the extent of the requirement - 'considerable' compared to 'a'.
Second, as to the area in which the requirement is being considered - a
requirement 'at the Centre', compared to 'in the locality'.

114 Having read the Commission's reasons as a whole, it is not easy to
discern which of these two formulations is to be preferred.

115 For the following three reasons, in my view the Commission's
reasons convey that the finding in relation to the local packaged liquor
requirement is that which appears at [139] of the reasons, which I have
set out above at [104].

116 First, that finding is in the section of the Commission's reasons
that specifically addresses the question of a local packaged liquor
requirement under s 36B(4), namely [129] - [139].

117 Second, this section of the Commission's reasons is predominantly
directed to those aspects of the DAA Survey which address the
consumer requirements to purchase packaged liquor at the Centre. The
matters set out are not referable to a requirement to purchase liquor in
the locality overall.

⁷⁵ Commission's reasons [139].

⁷⁶ Commission's reasons [142].

⁷⁷ Commission's reasons [150].

118 Third, the matters set out are not capable of sustaining a finding that there was no requirement to purchase liquor at the Centre. As I have explained, 'requirement' or 'requirements' is understood to convey a demand or desire to purchase packaged liquor. The material extracted from the DAA Survey, in particular in the table which I have set out at [99] above, clearly reflects that there is at least a desire from some consumers to purchase liquor while at the Centre as part of a one stop shopping experience.

119 Accordingly, I do not think the words 'the Application has failed to establish that there is a *considerable* requirement' can be read down to mean 'the Application has failed to establish that there is *any* requirement'.

120 Ultimately, in my view, on the proper interpretation of the Commission's reasons, the Commission found that Liquorland 'has failed to establish that there is a considerable requirement for one-stop shopping that includes liquor purchases at the Centre'. This is the finding to which ground 2 is directed.

121 I will now turn to the specific grounds relevant to the assessment of the consumer requirements condition, addressing them in the following order: ground 2, ground 1 and ground 5.

Ground 2

122 It is worthwhile to set out again the principal complaint made by ground 2:

The Commission erred in law in that it misconstrued the concept of local packaged liquor requirements in s 36B(4) of the Act by finding, in it[s] reasons at [139], in effect, that the appellant had not established a 'considerable requirement' for one stop shopping, when it should have considered whether a not insignificant or immaterial number of consumers had the requirements for convenience and one stop shopping contended for.

123 There are two aspects to this ground. First, that the Commission erred by finding that it was necessary for Liquorland to establish there was a considerable requirement. Second, that the correct test is whether Liquorland had established there was a not insignificant or immaterial number of consumers who had the relevant requirement. This second aspect, by using the phrase 'a not insignificant or immaterial number of consumers', proceeds on the premise that there is a *de minimis* requirement implied into s 36B(4).

124 Given how Liquorland conducted its case before the Commission as I have explained at [66] - [73] above, I can see how the Commission thought Liquorland's case was directed to the need to establish a considerable requirement. As I have explained at [73], the Commission was entitled to proceed on the understanding that Liquorland's case was it needed to satisfy the Commission that a *significant* section of the public had a requirement to purchase liquor from the proposed premises. The word significant is a synonym for considerable, so it is understandable the Commission approached the matter in the way in which it did at [139] of the reasons.

125 Notwithstanding this, I still need to assess whether the Commission's findings accord with the applicable test under s 36B(4).

126 The Director's counsel concedes that it was not necessary for Liquorland to establish that there was a considerable requirement for one stop shopping, submitting that the requirements do not have to meet a particular threshold in order to further engage s 36B(4). Consistently with that position, the Director's counsel also submitted that s 36B does not import a *de minimis* requirement.⁷⁸

127 The phrase local packaged liquor requirements is defined in s 36B(1) to mean:

... the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated; ...

128 As can be seen, the definition does not use the word considerable, or any other word to that effect. The definition is then applied in the comparative analysis to be undertaken pursuant to s 36B(4). That task is directed to whether the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality where the proposed new premises will be situated. The analysis is not predicated on there being a considerable requirement. Rather, the analysis is directed to whether the requirements, whatever they may be, cannot be reasonably met by the existing premises.

129 The second aspect of this ground is allied to the first. The second aspect in effect suggests that there must be a not insignificant requirement, albeit not reaching the level of a considerable requirement.

⁷⁸ Appeal hearing, ts 75 - ts 78.

130 The second aspect requires consideration of whether s 36B(4) imposes a '*de minimis* threshold', namely that the relevant requirements must be not insignificant or immaterial.

131 The *de minimis* principle is a canon of construction that the law does not concern itself with trifling matters.⁷⁹ In *Farnell Electronic Components Pty Ltd v Collector of Customs*,⁸⁰ Hill J noted that:

... there are many references in texts and cases to the *de minimis* rule as a rule of construction. F A R Bennion, *Statutory Interpretation* (2nd ed, 1992), p 780 refers to there being a general rule of statutory interpretation that:

'unless the contrary intention appears, an enactment by implication imports the principle of the maxim *de minimis non curat lex* (the law does not concern itself with trifling matters).'

Similarly, Halsburys Law of England (4th ed, 1995), Vol 44(1), par 1441, under the title 'Statutory Interpretation' says:

'De Minimis Principle. Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim *de minimis non curat lex* (the law does not concern itself with trifling matters); so if an enactment is expressed to apply to matters of a certain description it will not apply where the description is satisfied only to a very small extent.'

132 In my view, the importation of the *de minimis* principle into s 36B would introduce a further evaluative task into the legislative scheme which is both unnecessary and not warranted by either the primary or secondary objects of the Act.

133 What is truly trifling may depend on many matters, such as quantity, quality, cost and uniqueness. As the Director's counsel pointed out on the hearing of the appeal, there may be a demand for a unique type of liquor within a locality that is not presently provided for. The demand may be trivial in terms of quantity, however that ought not by itself be a possible ground for refusing to grant a liquor licence that would facilitate such a unique demand.

134 In addition, s 33(1) provides to the licensing authority an absolute discretion, subject to the Act, to refuse an application on any ground or

⁷⁹ *Sydney Metro v Expandamesh Pty Ltd* [2023] NSWCA 200 [54]; *Farnell Electronic Electric Components Pty Ltd v Collector of Customs* (1996) 72 FCR 125; [1996] FCA 1135.

⁸⁰ *Farnell* (127 - 128).

for any reason that the licensing authority considers to be in the public interest. Section 33(2) also provides that an application for a licence may be refused even if the applicant meets all the requirements of the Act. Section 33 does not however provide the Commission with an arbitrary or unlimited power and does not permit the Commission to grant or refuse an application other than consistently with the objects and provisions of the Act.⁸¹

135 A relatively minor requirement is a factor that may warrant the refusal of an application in the public interest consistently with the objects and provisions of the Act. A relatively minor requirement could likewise be taken into account in considering whether the public interest condition in s 38 is satisfied. Accordingly, the Act provides a basis that would allow the licensing authority to reject an application in respect of a relatively minor requirement.

136 For these reasons, in my view, the intention does appear from the provisions of the Act that the *de minimis* requirement is not imported into s 36B(4). Accordingly, s 36B(4) does not necessitate that the requirements of consumers for packaged liquor in the relevant locality must be more than trifling.

137 The absence of a *de minimis* requirement reinforces my view that s 36B(4) does not require the applicant for a packaged liquor store licence to establish that the relevant consumer requirements are considerable. Further, even if a *de minimis* requirement was to be imported (contrary to my view), such a requirement does not reach the level of considerable. It would only necessitate that the relevant consumer requirements are not trifling, or to use Liquorland's words, not insignificant or immaterial.

138 Finally, there are no authorities which bear directly on the issues raised by ground 2. Previous iterations of the Act required the applicant to satisfy the licensing authority that the licence is necessary in order to provide for the reasonable requirements of the public for liquor in the prescribed area.⁸² Liquorland in its submissions brought to my attention previous authorities where it had been held that evidence that the grant of the proposed licence would provide a convenient service to a *significant* section of the public may in itself be sufficient to establish a reasonable requirement.⁸³ However, given the Act does

⁸¹ *Woolworths* [53].

⁸² *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405, 407.

⁸³ *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* (1999) 4 WAR 1, 10 - 11; *Austie Nominees* (410).

not now require an applicant to establish there are 'reasonable requirements', I do not think the previous authorities are of assistance in resolving the issues of construction the subject of ground 2.

139 For the reasons set out above in relation to this ground, in my view it is clear that s 36B(4) does not mandate that the applicant for a packaged liquor licence must establish there are considerable requirements of consumers for packaged liquor in the locality. It follows that the Commission made an error of law in finding that Liquorland 'had failed to establish that there is a considerable requirement for one-stop shopping that includes liquor purchases at the Centre'. Liquorland was not required to establish there was a considerable requirement.

140 The consequence of how the Commission approached this aspect of its task is that when the Commission went on to consider the 'supply' question, the Commission had not defined the parameters of the 'demand' side of the comparison. As I have explained at [59] above, for the necessary comparative analysis to be undertaken, in most cases it is necessary to first identify the parameters of the relevant requirement. I would ordinarily expect this to include at least a broad approximation of the likely number of consumers for liquor in the relevant locality, and a broad assessment of the nature and scope of their likely requirements. The required comparative analysis in this case cannot be undertaken by presuming there is a consumer requirement for one stop shopping, without identifying the parameters of the requirement. The parameters of the requirement are necessary to undertake the required comparative analysis. In this case, the Commission presumed there was a requirement without identifying its parameters.⁸⁴

141 I therefore consider that the error made is material for two reasons. First, the Commission wrongly imposed a threshold that Liquorland must establish there was a considerable requirement. Second, as a consequence of having done so, the Commission did not undertake the analysis required by s 36B(4).

142 Finally on this ground, even if the Commission's reasons were meant to convey a finding that there was no requirement for one stop shopping convenience, whether directed to the Centre or to the locality, such a finding is incapable of arising on the evidence - see [118] above. It would therefore constitute an error of law.

⁸⁴ Commission's reasons [140] - [150].

143 For these reasons, in my view, ground 2 of the appeal is made out.

144 I turn now to ground 1.

Ground 1

145 Ground 1 is directed to how the Commission went about its task of assessing the evidence. Ground 1 comprises two parts.

146 Ground 1(a) contends that the Commission approached its task by considering the relevant categories of evidence separately, and not collectively. Thus, Liquorland says the Commission misconceived its function, both in respect of determining what the consumer requirements were, and in determining whether they were reasonably met by the existing stores in the locality.

147 Ground 1(b) contends the Commission misconstrued the concept of 'local packaged liquor requirements' by failing to consider evidence of likely future development and population growth.

148 Liquorland says that by reason of either or both of these grounds, the Commission constructively failed to exercise its jurisdiction.

149 I will deal first with ground 1(b).

Future development and population growth

150 This part of ground 1 raises an issue of construction regarding the phrase 'requirements of consumers for packaged liquor', as it appears in the definition of 'local packaged liquor requirements' in s 36B(1).

151 Liquorland asserts that the phrase 'requirements of consumers for packaged liquor' extends to include requirements emanating from likely future development and population growth. Liquorland led evidence of likely future development and future population growth.

152 In support of this ground, Liquorland emphasised the findings in *Liquorland Karrinyup* that the phrase 'requirements of consumers' has the same meaning in s 5(1)(c) and s 36B(4).⁸⁵ Liquorland submitted that the phrase in s 5(1)(c) is forward-looking when regard is had to the entirety of the words of that subsection, in particular the words 'with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State'. Liquorland

⁸⁵ *Liquorland Karrinyup* [89].

submits that 'consideration of likely future consumer requirements is entirely consistent with the objects of the Act including in particular the proper *development* of the industry (which is a forward looking concept)'.⁸⁶

153 Liquorland also submits that there is 'no conceptual difficulty with the evaluation of evidence about likely future circumstances or events'. Liquorland points out the assessment of possible future harm relevant to the public interest condition is assessed as a matter of prediction and probability.⁸⁷

154 The Director submits that the objects do not control the meaning of the provision; rather, the text, purpose and context controls the meaning.⁸⁸ The Director says the required comparison is a 'point in time' assessment undertaken at the time the application is heard and therefore does not take account of likely population growth.⁸⁹

155 The Director submits that to interpret the provisions as requiring a point in time assessment 'gives effect to the additional hurdle that s 36B(4) imposes, namely that an additional licence will only be granted where it is assessed that the local packaged liquor requirements, as found, cannot reasonably be met by existing premises'. Further, the Director submits that Liquorland's interpretation would have the effect of removing or diminishing the additional hurdle as invariably population growth supports an outcome where existing premises cannot reasonably meet the future requirements of a future population.⁹⁰

156 It is worthwhile to set out in full again the words of s 36B(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.

157 As I have explained earlier at [57], s 36B(4):

1. requires that there be a demand/supply type analysis, with the result that the application must not be granted unless the demand cannot reasonably be met by the supply;

⁸⁶ Liquorland's responsive submissions on the appeal, par 2(f).

⁸⁷ Liquorland's responsive submissions on the appeal, par 2(g).

⁸⁸ Appeal, ts 83.

⁸⁹ Director's written submissions on the appeal, par 26.

⁹⁰ Director's written submissions on the appeal, par 27.

2. envisages that one such comparison is made by reference to one locality.

158 In my view, the text of the legislation suggests that the required assessment is a 'point in time' analysis as the Director submits. The definition of local packaged liquor requirements speaks of 'the requirements of consumers for packaged liquor in the [relevant] locality'. This language reflects an assessment of the extant position at the time the application is heard and does not readily accommodate the concept of future population growth. The language speaks of 'the requirements of consumers', not the requirements of existing and possible future consumers.

159 In respect of Liquorland's reliance on *Liquorland Karrinyup*, her Honour was addressing the type of requirements encapsulated by the phrase 'requirements of consumers', not whether or to what extent that phrase might take account of prospective requirements. In my view, whether the phrase operates prospectively must be looked at with respect to the particular provision in which it is used.

160 Liquorland's construction does not recognise that population growth itself has the capacity to affect the assessment of what is the relevant locality. Also, population growth brings with it consequential change, in particular infrastructure improvements, which could also result in the locality changing as those improvements are implemented.

161 Liquorland's construction would require the licensing authority to assess whether and when population growth affects the composition of the locality and then assess the consumer bases at each point of change. This could potentially give rise to differing consumer bases over time, depending on whether the locality changes and the extent of the change. Section 36B envisages one comparison is undertaken. It is difficult to see how that can be carried out by reference to differing consumer bases over time.

162 Further, in my view locality itself is to be assessed against the extant population at the time of the application. If it were to be assessed by reference to existing and future population, this could result in the locality being different at different points in time. As explained earlier, s 36B(4) envisages the analysis is conducted by reference to one locality.

163 The Commission dealt with the effect of future population growth on locality in its reasons, stating:⁹¹

The possible future development and population of the area is of limited assistance to the Commission in this case. Such things may affect a locality in the future, but is not necessarily indicative of a current locality.

164 Broadly speaking, the Commission's finding accords with my view at [162]. Liquorland does not challenge this aspect of the Commission's reasons.

165 That locality is to be assessed by reference to the extant population is another factor that points against Liquorland's construction. The statutory language refers to the requirements of consumers in the locality. The requirements are referable to the locality. There would be a substantial disconnect within the statutory language if the 'requirements of consumers' took account of future population growth, but 'locality' did not.

166 Further, on Liquorland's construction, the demand/supply factors to be used in the necessary comparison under s 36B(4) would have different foundational bases. On Liquorland's construction, the demand side of the analysis encapsulates the possible requirements of a possible future population, whereas the supply side is referable only to existing packaged liquor premises in the relevant locality. The supply side of the analysis would not have regard to possible future development in the industry. There is no apparent legislative imperative that justifies such a result.

167 Liquorland emphasised the primary object in s 5(1)(c), namely the reference to the proper development of the liquor industry. However, *proper* development does not equate to development per se. The phrase 'proper development' does not warrant an interpretation of s 36B(4) that compares future possible demand against existing supply and ignores likely future development in the industry.

168 In my view, for these reasons, the preferred interpretation of s 36B(4) is that it accommodates a shift in the demand/supply analysis as that shift evolves, as opposed to accommodating anticipated future shifts in the demand/supply analysis. Such an outcome is consistent with a purpose of s 36B(4) being to ensure that there is not a

⁹¹ Commission's reasons [111].

proliferation of premises in close proximity to one another selling packaged liquor.

169 It may be that where population growth is sufficiently certain and proximate in time to the making of the application that it in effect forms part of the extant requirements. So, for example, if an apartment block of significant size was at or near completion, the requirements of the residents of those apartments is a matter that forms part of the extant requirements proximate to the hearing of the application. It may also affect the composition of the locality as those residents would likely be considered part of the extant population proximate to the hearing of the application. However, that is a far different scenario than having regard to future population growth in a general sense.

170 For these reasons overall, in my view, the phrase 'requirements of consumers' does not include likely consumer requirements arising from likely future population growth.

171 Furthermore, even if my view is not correct, the evidence before the Commission regarding future population growth and their likely requirements was at such a level of generality it would have been of little assistance to the Commission in predicting what the requirements of a future population might be.

172 The evidence spoke of population growth in a general sense and development in a general sense. The Commission addressed this in the reasons as follows:⁹²

The Centre is a new Neighbourhood Activity Centre (completed in August 2022) to service a particularly fast-growing community residing in new residential estates in the immediate vicinity of the Centre.

The suburb of Southern River is large and can be divided into Southern River East (south of Southern River Road) and Southern River West (south of Southern River Road). The forecast population of Southern River East is projected to grow by 687.2% between 2016 and 2031. This is one of the fastest growing areas in the City of Gosnells and Western Australia, being located in what is known as the south-east growth corridor. Between 2011 and 2016, the area experienced growth of nearly 20%, which is expected to have continued at a similar rate to 2022.

173 Further, the material Liquorland relied on in support of the application included a report from town planning consultants regarding

⁹² Commission's reasons [9] - [10].

likely population growth. The report indicated the existing and future population as being:⁹³

Southern River West

Population 2021: 11,482

Population 2031: 13,065

Southern River East

Population 2021: 2,990

Population 2031: 10,950

174 The relevant evidence as to the attitude of the future population was also general. It comprised a two-page letter from a statistician to Liquorland's solicitors.⁹⁴ It refers to surveys conducted in late 2020 of Southern River and its surrounds. The concluding paragraph of the report is in these terms:

The consistency of the results presented in the Report with studies in more developed localities strongly suggests that the findings of the Report will also apply to the residents yet to move into the Locality.

175 However, this passage is of such generality that, with respect, it could not have been of any material assistance to the Commission. It does not identify the extent of the new residents expected to move into the locality or when they might move into the locality. It does not address what their particular attitudes may be towards liquor use. It also does not address evolving community attitudes to the purchase and consumption of liquor generally. These might include a greater appreciation of the potential health concerns arising from the consumption of liquor and of the impact on children from being exposed to the consumption of liquor. The potential normalisation for children of the purchase of liquor as part of an everyday shopping experience may become of greater concern to the community, such that the purchase of liquor as part of a one stop/one trolley shopping experience may become less desirable. Also, the significant changes to the Act over time reflect that community attitudes to the consumption of liquor do not remain constant.

⁹³ Appeal book, pages 837 - 838.

⁹⁴ Appeal book, pages 773 - 774.

176 For the reasons set out at [171] - [175], even if s 36B(4) operates
in the way that Liquorland contends, in my view the evidence did not
provide a sufficient basis upon which the Commission could have
formed a view as to the possible requirements of a future expanded
population.

177 Accordingly, ground 1(b) is not made out.

178 I turn now to ground 1(a).

Ground 1(a)

179 Liquorland's principal complaint the subject of this ground is that
the Commission assessed particular topics of evidence separately, and
did not consider their collective effect.

180 Given my finding in relation to ground 2, I do not think it is
necessary to answer ground 1(a). The effect of my finding in relation
to ground 2 is that the Commission misconceived the question it was
required to answer in assessing consumer requirements under s 36B.
Given that finding, I do not think I should address whether the
Commission properly evaluated the evidence in answering what, in my
view, was the wrong question.

181 I think it is still beneficial to make some remarks directed to
inferential reasoning and to the fact finding task that the Commission
was required to undertake under s 36B(4).

182 When using inferential reasoning, facts are not considered on a
standalone or 'piecemeal' basis. Rather, in a circumstantial case, all of
the circumstances are to be considered and weighed in deciding
whether the relevant inference is made out.⁹⁵ In the criminal law,
inferential reasoning is often described as 'strands in a cable' as opposed
to 'links in a chain'.⁹⁶ That metaphor is apt to most processes of
inferential reasoning.

183 The task of assessing consumer requirements is one that invites
inferential reasoning. That is, it invites consideration of the collective
force of the evidence, rather than looking at each category separately.

⁹⁵ *BWS v ARV [No 2]* [2021] WASCA 62 [56].

⁹⁶ See for example *Shepherd v The Queen* [1990] HCA 56; 170 CLR 573, 579 (Dawson J).

The approach of drawing inferences in assessing the relevant consumer requirements was endorsed in *Woolworths*.⁹⁷

184 The Commission may also make findings and draw inferences from notorious facts.

185 There is nothing wrong with the Commission assessing a particular category of evidence and determining to what extent, if at all, it demonstrates a particular consumer requirement. This assists in determining what, if any, weight to give to this category of evidence.

186 However, the Commission still needs to have regard to the evidence as a whole, together with any notorious facts. As Buss JA described the task in *Woolworths*:⁹⁸

... the Commission was obliged, in dealing with the appellant's application, to apply itself to the real issues to be decided on the application. First, the Commission was bound to evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference. Also, the Commission's fact-finding task extended to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts.

187 Accordingly, it would be an error for the Commission to focus only on the respective force of each category of evidence, and not consider their collective force.

Ground 5

188 This ground raises a further matter of construction regarding s 36B(4).

189 It is directed to those parts of the Commission's reasons which address the overall demand/supply analysis.⁹⁹

190 In this part of the Commission's reasons, the Commission assessed the supply component against an assumed hypothesis for the demand side. The assumed hypothesis was that there were consumer requirements for one stop shopping and convenience in the locality.

191 Liquorland contends that the Commission was in error in framing the assumed hypothesis by reference to the locality. Liquorland says it

⁹⁷ *Woolworths* [70], [84] (Buss JA, with whom the other members of the court agreed).

⁹⁸ *Woolworths* [70].

⁹⁹ Commission's reasons [140] - [150].

should have been framed by reference to the Centre, being a place within the locality.

192 Liquorland submits that the consumer requirements can be directed to a particular part of the locality. Specifically, Liquorland contends that 'a "local packaged liquor requirement" may be some requirement generally within the locality, or some requirement at or in relation to a specific place within the locality'.¹⁰⁰ It follows, Liquorland says, that in this case the relevant consumer requirements that form the demand side of the comparison are the 'consumer requirements for one stop shopping *at a particular place within the locality*, namely, at the Centre'¹⁰¹ (emphasis in original).

193 Liquorland accepts that its interpretation results in additional words being read into the definition of local packaged liquor requirements. On Liquorland's interpretation, the phrase would read: 'the requirements of consumers for packaged liquor in the locality, or that part of the locality, in which the proposed licensed premises are, or are to be, situated'.

194 Accordingly, Liquorland's interpretation does not arise naturally from the words of the legislative provision. That Liquorland's interpretation requires words to be read into the provision ordinarily would point against such an interpretation.¹⁰²

195 Liquorland's approach seeks to focus in on a part of the locality, at least in so far as s 36B(4) is concerned. In my view, this focus does not sit well with the legislative focus on the locality overall.

196 The legislative provisions regarding packaged liquor stores focus on the needs in, and the impact on, the locality overall. Section 36B(4) refers to the existing stores in the locality, not part of it. Section 38(4)(b) refers to the amenity, quiet or good order of the locality, not part of it.

197 Also, as I have explained, the locality is understood to comprise a neighbourhood. One of the factors that points to there being a neighbourhood is the ease of movement in and around a particular area. So, in a sense, the scheme recognises that the existing packaged liquor premises in the defined locality are readily accessible to those in, or coming to, the locality as a whole.

¹⁰⁰ Liquorland's written submissions on the appeal, par 30.

¹⁰¹ Liquorland's written submissions on the appeal, par 32.

¹⁰² Pearce D, *Statutory Interpretation in Australia* (10th ed, 2024) [2.58] - [2.60].

198 Moreover, Liquorland's approach brings a significant degree of imbalance to the required comparison in s 36B(4). If the demand side is referable to consumer requirements for one stop shopping at a particular shopping centre, then the available supply from existing stores in the locality will be of little relevance, unless they are already situated within, or immediately proximate to, the particular centre. Thus, the consumer requirements condition in s 36B(4) may still be capable of being satisfied, even where the locality already has more than an adequate number of facilities that cater for the purchase of liquor as part of a one stop shopping experience. Such a result is not consistent with a purpose of the legislative scheme being to ensure that a locality does not have a proliferation of such stores. If anything, such a result has the capacity to significantly erode the protections sought to be put in place by s 36B(4).

199 For these reasons, I do not accept the interpretation put forward by Liquorland.

200 This is not to say that a particular feature destination such as a shopping centre or a stadium does not affect the assessment of the consumer requirements under s 36B(4). It may be a drawcard that increases the number of consumers who come to the locality and thus increases the consumer requirements in that way. It also may be of such prominence, or have such an impact on accessibility within the surrounding areas, that it influences the make-up of the relevant locality itself. Relevance in these ways arises because of the impact of such matters on the make-up of the locality and the demands for packaged liquor within that locality. The relevance does not arise because of a focus on demand within the feature destination itself, isolated from the remainder of the locality.

201 Ground 5 is not made out.

Grounds 3 and 4

202 Grounds 3 and 4 are directed to the Commission's finding as to the relevant locality. Consistently with the view that I have expressed at [55] and [56] above, the Commission determined the relevant locality first, before undertaking the comparative analysis required by s 36B(4).

203 Ground 3 is a broad ranging attack on the Commission's reasons regarding locality. Broadly speaking, ground 3 asserts it can be inferred from particular paragraphs of the reasons that the Commission either misconceived its function or misapplied the applicable test.

204 Ground 4 is directed to the Commission's finding as to the
northwestern boundary of the locality.

205 I will address ground 3 first.

Ground 3

206 This ground contains eight separate particulars. The formulation
of those particulars reflects the difficulty that can arise in endeavouring
to identify a legal error that will sustain an appeal.¹⁰³ Respectfully, for
the most part the particulars reflect a somewhat unrealistic reading of
the Commission's reasons in an attempt to bring to life a possible legal
error.

207 Given the breadth of the matters raised, it is necessary to set out in
some detail the Commission's reasons regarding locality. I will
commence with some introductory observations and then go into
greater detail when dealing with each ground.

Introductory observations on Commission's reasons regarding locality

208 In the reasons, the Commission referred to Liquorland's
formulation of the relevant locality. The Commission observed that
Liquorland contended the locality reflected the criteria identified in
Liquorland Karrinyup and was consistent with the policy criteria in
State Planning Policy 4.2.¹⁰⁴

209 The Commission noted that the Act does not include any
definition of the word 'locality'.¹⁰⁵

210 The Commission set out extracts from the decision in *Liquorland
Karrinyup* regarding locality,¹⁰⁶ emphasising particular parts by putting
them in bold as follows:

... 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.

...

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**

¹⁰³ See *Paridis* [53].

¹⁰⁴ Commission's reasons [87].

¹⁰⁵ Commission's reasons [88].

¹⁰⁶ Commission's reasons [89].

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'.

211 The Commission noted that the word 'locality' is also used in s 38 of the Act and stated that the word is primarily defined using the Director's public interest assessment policy. The Commission then set out parts of that policy and made observations on it.¹⁰⁷

212 The particular parts of the policy relevant to the disposition of this appeal are as follows:¹⁰⁸

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

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

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

...

Locality guide

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

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

¹⁰⁷ Commission's reasons [90] - [92].

¹⁰⁸ Commission's reasons, page 23.

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

213 The Commission explained that it had considered the following non-exhaustive factors in deciding locality:¹⁰⁹

- a. The geographical area surrounding the site.
- b. The topographical features of the area, including natural and manmade barriers; and
- c. The geographical spread of the community.

214 The Commission then addressed these three criteria under separate headings.¹¹⁰ These three criteria in effect are shorthand for the bolded parts from the *Liquorland Karrinyup* decision that are out at [210] above.

215 The Commission then addressed further matters under the heading of 'Retail Catchment Area'.¹¹¹

216 Ultimately, the Commission concluded that the relevant locality was the area outlined in red on the Plan annexed to the Commission's reasons.¹¹²

217 I turn now to the particulars, which I will deal with in the order they are set out in the Amended Notice of Appeal.

Ground 3(a)

218 This ground is that the Commission in effect:

at [92] approached the concept of locality as though that concept was at large and could be determined on any reasonable and ascertainable grounds, rather than consistently with, and giving effect to, the statutory concept of locality as elucidated by this Court; ...

219 I understand the phrase 'at large' to mean without regard to the applicable principles.

220 Paragraph [92] of the reasons needs to be read with [91].

¹⁰⁹ Commission's reasons [93].

¹¹⁰ Commission's reasons [94] - [96], [97] - [108], [109] - [111] respectively.

¹¹¹ Commission's reasons [112] - [115].

¹¹² Commission's reasons [116] - [118].

221 At [91] the Commission noted that the Director's public interest assessment policy includes the suburb of Southern River in attachment 2 to the policy which lists suburbs and areas that have a 3 km radius imposed.

222 The Commission then stated at [92]:

In any event, the factors which can be contemplated in deciding 'locality' must remain diverse and fluid and it is contemplated that the Director may impose different localities in respect to different applications, provided that, in the interests of natural justice, such decision is made on reasonable and ascertainable grounds.

223 Liquorland contends that the reasons approach the concept of locality as though it were 'at large' and could be determined on any reasonable and ascertainable grounds. However, in my view, that is not what the reasons do.

224 The Commission observed that the *Director* may impose different localities to those set out in the policy provided that such a decision is made on reasonable and ascertainable grounds. The phrase 'reasonable and ascertainable grounds' is directed to the *Director's* decision to impose a locality different to the policy. It is not directed to the *Commission's* decision making.

225 Moreover, the Commission identified that such grounds are required in the interests of natural justice, conveying that the Director may depart from the policy if the grounds upon which they decide to do so are reasonable and ascertainable. A decision can only be on 'reasonable grounds' if it has regard to the applicable criteria. Such a phrase does not even arguably convey that the decision can be made without reference to the applicable principles.

226 Accordingly, the Commission's reasons do not suggest that the Commission could approach the concept of locality in a manner inconsistent with the provisions of the Act.

227 Also, the review before the Commission is not directed to finding error in the Director's decision - see [8] above. The reasons did not suggest it was necessary to find any error. Accordingly, [92] of the Commission's reasons does not purport to suggest it was necessary for the Commission to find that the Director's decision under review could only be quashed if it was unreasonable.

228 Liquorland's written submissions presented ground 3(a) in a more expansive manner than the grounds of appeal. Specifically, Liquorland's submissions state:¹¹³

Whilst the Commission did consider some of the elements of 'locality' from *Liquorland Karrinyup*, it said at [90] of its reasons that locality is primarily defined using the Director's Public Interest Assessment Policy, and at [92] said that locality could be determined '*... on [any] reasonable and ascertainable grounds ...*' In so doing, the Commission in effect treated the concept of 'locality' in s 36B(4) as being at large (or as per the Director's policy) rather than as elucidated by this Court in *Liquorland Karrinyup*. (italics in original, underlining added)

229 The passage in parenthesis suggests that the Commission approached the concept of locality as per the Director's policy. That proposition does not fall within ground 3(a) and Liquorland did not seek to amend its grounds of appeal.¹¹⁴ That topic was the subject of written submissions. I will express my view on it, as I think it is important to explain the possible relevance of the policy to a review application before the Commission.

230 The Director's counsel submitted that the extract of the policy contained in the Commission's reasons does not define the term 'locality', but instead provides guidance to applicants as to how to address locality issues in the context of an application for a licence under the Act.¹¹⁵ That does seem to understate the position. The extract appears to provide an indicative position as to the area the Director will adopt as the relevant locality.

231 The Director submitted that the Commission did not treat the concept of locality as per the policy. The Director also submitted that on the Commission's reasons read as a whole, the Commission undertook the analysis in a manner consistent with *Liquorland Karrinyup*.¹¹⁶ I agree with that submission.

232 In my view, it is clear from the reasons that the Commission decided the question of locality upon the Commission's understanding of the relevant criteria identified in *Liquorland Karrinyup*, not as per the Director's policy. In this respect, as I have set out at [213] - [214] above, the Commission's reasons addressed those aspects of

¹¹³ Liquorland's written submissions on the appeal, par 23.

¹¹⁴ Appeal hearing, ts 55, ts 90.

¹¹⁵ Director's written submissions on the appeal, par 58.

¹¹⁶ Director's written submissions on the appeal, par 59.

Liquorland Karrinyup which the Commission considered relevant to the analysis it was undertaking.

233 In undertaking the analysis, the Commission did refer to the Director's policy at [96], however that is not a paragraph about which Liquorland complains in its particulars to ground 3. Notwithstanding that, in Liquorland's responsive submissions, Liquorland asserted that the Commission at [96] appeared to adopt at least one principle from the Director's policy.¹¹⁷ This proposition was not the subject of oral argument. It can be dealt with briefly. I do not accept it for two reasons.

234 First, the Commission's reasons do not suggest that the policy conveys an established principle. The first sentence of [96] sets out that the Director's policy '*indicates* a general position that it *may* be anticipated that non-metropolitan localities *may* be considered naturally geographically larger in size' (my emphasis). The italicised words in the first sentence reflect the Commission considers the policy speaks of possibilities, not defined principles.

235 Second, the Commission does not adopt the first sentence. Rather, the Commission states it would 'tend to apply this reasoning to Southern River as it is more than 15 km outside of the Perth CBD'. Accordingly, the Commission has made its own assessment as to whether the possibility spoken of applies to the application before it.

236 I will make some final observations on the policy. I can well understand why there is value in the Director putting out such a policy, subject to it being updated from time to time to address any changes in the applicable legal and regulatory environment. The policy will assist parties in formulating their applications to the licensing authority. The parties may well accept as appropriate any indicative position as to locality set out in the policy. However, there is a difference between the utility of a policy in that sense, and the policy being the subject of the Commission's reasons. The recitation of the policy in the Commission's reasons may provide background as to how matters are conducted before the Director. However, beyond that, it is not clear to me what particular relevance the policy has to a review by the Commission of the Director's decision. The Director does not assert that the policy has any force under the Act. Further, the Director's counsel emphasised that the Commission proceeded correctly by applying *Liquorland Karrinyup*.

¹¹⁷ Liquorland's written responsive submissions on the appeal, par 6.

237 If the Commission does refer to a particular policy in its reasons, I do think there would be benefit in the Commission briefly explaining what relevance the policy has to the task it is undertaking and what, if any, use the Commission has made of the policy in its reasoning process.

238 Ground 3(a) is not made out.

Ground 3(b)

239 This ground is that the Commission in effect:

at [94] and [118] applied, as a general rule, that any locality comprising an area less than a suburb (or alternatively, small suburb) was artificially limited; ...

240 Paragraph 94 of the reasons appears under the heading 'The geographical area surrounding the site'. It should not be read in isolation from the balance of that part of the reasons.

241 The entirety of that part of the reasons is as follows:

94. The Commission notes that the locality nominated by the Applicant approximately reaches 1 to 2 km outwards from the proposed premises. It is noted that the proposed locality does not encompass the entirety of the suburb of Southern River.

95. Although this is necessarily geographically close to the Premises, the Commission would argue that such an area is far too small to be considered a natural locality and that a larger area would still be considered to be 'close by'.

96. The Commission further notes that the Director's Policy as to locality, also indicates a general position that it may be anticipated that non-metropolitan localities may be considered naturally geographically larger in size. The Commission would tend to apply this reasoning to Southern River as it is more than 15km outside of the Perth CBD.

242 The use of the phrase 'the Commission would argue that' in [95] of the reasons has the potential to convey that the Commission has 'stepped into the arena', as opposed to being the arbiter of the issues before it. However, I read it to mean 'the Commission considers'.

243 Paragraph 94 is an observation that the locality put forward by Liquorland does not encompass the entirety of the suburb in which the proposed premises are to be situated. The key component of the

Commission's reasoning is that the locality put forward by Liquorland reaches approximately 1 to 2 km outwards from the proposed premises, which the Commission considered is far too small to be considered a natural locality. The Commission also took account of where Southern River is situated proximate to the Perth CBD.

244 The effect of the Commission's reasons is that an area that reaches 1 to 2 km outwards from a store located in an outer suburb does not constitute a natural locality. This reasoning is directed to the circumstances presented by Liquorland's application. It does not apply any general rule as Liquorland contends.

245 This ground is also directed to [118] of the reasons. Paragraph 118 appears under the heading 'Conclusion on Locality'. It appears after the Commission had addressed the factors it took into account in assessing the locality and had found that the relevant locality was that set out in the plan attached to the reasons.

246 The Commission's conclusion on locality was as follows:

116. In considering the above factors, the Commission does not accept that the 'locality' in this case is limited to the locality suggested by [Liquorland].

117. The above factors indicate to the Commission that the relevant locality for the purposes of the Application and s 38B is the area outlined in red on Plan 1 annexed to this decision.

118. Further, the Commission would generally note that, where an applicant artificially limits a locality to an area being less than [a] single suburb, the resulting implication is every small suburb in WA must have a packaged liquor store to meet consumer requirements (subject to the additional public interest test). However, as a matter of public interest, it is not in keeping with the objects of the LC Act, nor is it desirable, that every suburb has a packaged liquor outlet. (emphasis in original)

247 I am not satisfied that [118] is part of the Commission's findings in respect of the determination of the relevant locality. It appears after that finding is made and is a general observation. Paragraph 118 conveys two propositions. First, it is a criticism of Liquorland's approach to locality, the Commission in effect deciding that Liquorland's approach artificially narrowed the area of the locality. Second, it was a warning that even if such an approach had successfully achieved satisfaction of the consumer requirements condition, it would likely result in the application failing the public interest test.

Paragraph 118 was unnecessary. However, it does not convey, as Liquorland contends, that the Commission applied a general rule that an area less than a suburb could not constitute a locality.

248 Ground 3(b) is not made out.

Grounds 3(c) and (d)

249 Grounds 3(c) and (d) are also directed to [118]. They are that the Commission in effect:

- c. at [118], held that where a locality comprised an area that was less than a suburb (alternatively a small suburb) the resulting implication was that every small suburb must have a packaged liquor store to meet consumer requirements, thus conflating the determination of locality with issues relating to local packaged liquor requirements;
- d. at [118], treated public interest considerations as being relevant to the determination of locality when such considerations are not relevant;

250 For the reasons which I have given at [247] above, I am not satisfied that [118] of the reasons is part of the Commission's findings in respect of the determination of the relevant locality. Further, [118] does not conflate the determination of locality with issues of local packaged liquor requirements, or of public interest. Paragraph 118 warns that even if an artificial narrowing of the locality successfully achieved satisfaction of the consumer requirements condition, such an approach would likely result in the application failing the public interest test.

251 Grounds 3(c) and (d) are not made out.

Ground 3(e)

252 This ground is that the Commission in effect:

at [95], applied as the relevant test whether the locality contended for by [Liquorland] was a 'natural locality' when such test does not arise under the Act; ...

253 Liquorland's contention is that the Commission appears to have applied as the relevant test whether the locality that Liquorland put forward was a natural locality.¹¹⁸

254 The extract from the judgment in *Liquorland Karrinyup* that is set out in the Commission's reasons states that the word locality denotes an area that surrounds, and is geographically close to, the location of the proposed premises. Paragraph 95 of the reasons (set out at [241] above) is directed to ascertaining the area which is close to the proposed premises. In this respect, the phrase 'close by' at the end of [95] in effect picks up the analysis enunciated in *Liquorland Karrinyup*. While [95] could have been more clearly expressed, it does not have the effect contended for by Liquorland.

255 Ground 3(e) is not made out.

Ground 3(f)

256 This ground is that the Commission in effect:

at [99], held that, in assessing locality, it was relevant to consider the actual impacts of a proposed application, when that matter is not relevant to such assessment.

257 Paragraph 99 of the reasons needs to be read in the context of the immediately preceding paragraphs. Paragraphs 97 - 99 state:

97. The regional urban area that the Centre is located in, the suburb of Southern River, which is partially new housing and development and partially semi-rural in nature.

98. Any adopted locality of a 'radius' type would necessarily include a large proportion of rural area.

99. The imposition of a radius circle is not necessarily appropriate where such the same encompasses an artificial area. To adopt a patently artificial radius does not reflect the licensing authority's mandate to have regard to the primary objects of the LC Act and the functions of the licensing authority which require consideration of the actual impacts of a proposed application.

258 Liquorland's complaint is principally directed to the second sentence of [99]. Liquorland contends that the Commission appears to have held in effect, that in assessing locality, it was relevant to consider the actual impacts of a proposed application. Liquorland submits 'the

¹¹⁸ Liquorland's written submissions on the appeal, par 23(d).

impact of a new licence is a public interest consideration, and is not relevant to the assessment of locality'.¹¹⁹

259 In effect, the Commission found that a radius type approach would necessarily include a large proportion of rural land and thus have the capacity to give an artificial impression of the appropriate locality. That finding arises from [97] and [98]. In coming to that finding the Commission did not have regard to the impact of the licence, if granted.

260 Further, the second sentence of [99] is not directed to the public interest test at s 38. Rather, it is directed to the primary objects of the Act and the carrying out of the licensing authority's functions. One of the primary objects is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor: s 5(1)(b). That is an 'impact' type consideration. Further, s 5(2) relevantly provides that in carrying out its functions under the Act, the licensing authority shall have regard to the primary objects of the Act. The second sentence of [99] is in effect a shorthand way of picking up these references from s 5(1)(b) and s 5(2). As the Director points out, [99] reflects a caution by the Commission that the adoption of a patently artificial radius as the locality can result in an artificial discharge of the licensing authority's functions.¹²⁰ It does not constitute a finding by the Commission that the impacts of an application are a relevant consideration in determining the relevant locality.

261 Ground 3(f) is not made out.

Ground 3(g)

262 This ground is that the Commission in effect:

at [102], regarded topographical features as being relevant in establishing the boundaries of a locality only insofar as they might limit access, and failed to evaluate whether such features could be relevant to the determination of the boundaries of a locality because they created a separate sense of community or neighbourhood.

263 The implicit premise in this ground is that a topographical feature could create a separate sense of community or neighbourhood irrespective of the extent that it might limit access. That premise needs to be considered against the Commission's reasons as a whole and the evidence before the Commission.

¹¹⁹ Liquorland's written submissions on the appeal, par 23(c).

¹²⁰ Director's written submissions on the appeal, par 62.

264 Paragraph 102 needs to be read with [101]. They state:

101. A small waterway/river is located to the east of the suburb of Southern River. The same is a relative minor waterway. The river provides a natural barrier in some place, although there is access to the immediately neighbouring area of Gosnells over Southern River Road (on which road the Centre is located).
102. Given the lack of residential areas towards the Southern part of Southern River, and the easy access over Southern River Road, the Commission does not consider the river to be a topographical feature that unduly impeded the access of persons to the degree that any locality would necessarily stop at that point.

265 Paragraphs 101 and 102 are directed only to the Southern River; they are not directed to all topographical features. Further, [101] and [102] are in response to those parts of the MGA report which addressed the significance of the Southern River. While Liquorland's submissions on this ground referred to pars 2.5 and 2.6 of the MGA report, it is only par 2.5 that relates to Southern River.¹²¹ Paragraph 2.5 states:¹²²

The relevant natural features include a 'Private Recreation' reserve located immediately north - east of the subject land, at the northern side of Southern River Road. This includes Sutherland Park and Leopold Park, which contain community recreational facilities including the Gosnells Junior Football Club and Southern River Hockey Club. In addition, the presence of the Southern River Reserve limits access from the suburb of Gosnells to the east via Southern River Road only. In my opinion, these features serve to define boundaries to the locality. This is because they inhibit efficient vehicle movements from the suburbs of Huntingdale and Gosnells to the subject land. In addition, these natural barriers create a separate sense of community or neighbourhood for residents on either side. (my emphasis)

266 The MGA report regarded the Southern River as being of relevance because of its barrier type nature. The separate sense of community or neighbourhood referred to in the last sentence arose from the Southern River being a natural barrier; it did not arise from it just being a topographical feature. Accordingly, the implicit premise for this ground does not accord with the rationale set out in the MGA report.

267 Further, the Commission at [101] of the reasons recognised that the river provides a natural barrier in some places. The Commission's

¹²¹ Liquorland's written submissions on the appeal, par 23(e).

¹²² Appeal book, page 831, par 2.5.

finding at [102] is not only predicated on there being easy access over the river using Southern River Road. It is also predicated on the lack of residential areas towards the southern part of Southern River. Having regard to these two factors, the Commission in effect found that the river did not impede access to such an extent that the locality stopped at the river. This carries with it a rejection that the river created a separate sense of community or neighbourhood for residents on both sides.

268 In any event, Liquorland's complaint does not raise an error of law. At its highest, it might constitute an error of fact in the Commission not having regard to the entirety of the impacts of the river when determining the relevant locality.

269 Ground 3(g) is not made out.

Ground 3(h)

270 This ground is that the Commission in effect:

at [114] and [115], failed to evaluate whether the presence of other neighbourhood activity centres could be relevant to the determination of the boundaries of a locality because they created a separate sense of community or neighbourhood.

271 Liquorland submits that the Commission's erroneous approach to locality is evidenced as follows:¹²³

at [114], the Commission held, in effect, that more than one neighbourhood activity centre could be present in the one locality. Whilst that could perhaps be so, the presence of another neighbourhood activity centre could be relevant to the determination of the boundaries of a locality because it is an element of community infrastructure and may be evidence of a separate community or neighbourhood (MGA Supplementary Report at [2.7], [2.8] (Index of Documents - Document 32.1 - Index of Documents, page 833). The Commission failed to recognise that possibility, instead erroneously considering the evidence about neighbourhood activity centres only in the context of retail catchment area.

272 The effect of Liquorland's submission appears to be that the presence of another neighbourhood activity centre may be evidence of a separate community or neighbourhood, which is then relevant to determining the boundaries of the locality the subject of Liquorland's application.

¹²³ Liquorland's written submissions on the appeal, par 23(f).

273

The MGA report states:¹²⁴

2.7 Balfour Street forms what I consider to be the northern extent of the locality. Balfour Street is a significant east - west connection extending between Ranford Road and Huntingdale Road servicing residential estates to the north and south of it. It will, in my opinion, have a tendency to separate communities on either side in conjunction with the natural barriers adjoining it. *Residents at the northern side of Balfour Street are closer both in terms of distance and travel time to the alternative activity centres shown on Figure 1 than the Southern River Square activity centre. In my opinion, this means that those residents to the north of Balfour Street are more likely to be part of neighbourhoods surrounding the alternative activity centres.* It is for these reasons, that I am of the opinion that Balfour Street represents the northern extent of the locality in which the proposed store is located.

2.8 Existing and future residents at the southern extent of the locality form part of the neighbourhood surrounding the activity centre, given they are within a reasonably close distance (approximately 2km) and are likely to visit the activity centre regularly due to the greater distance from this area to alternative activity centres. Ranford Road and Tonkin Highway are barriers forming the south - western and southern boundaries of the locality respectively. There are no north - south crossings over Tonkin Highway leading to and from the locality, and there are no residential communities to the west of Ranford Road.

(my emphasis)

274

The italicised portion of par 2.7 of the MGA report refers to residents at the northern side of Balfour Street being more likely to be part of neighbourhoods surrounding activity centres that are closer to them than the Centre. The italicised portion of par 2.8 refers to residents at the southern extent of the locality being likely to visit the Centre, not some other activity centre, given its relative closeness to them.

275

This is consistent with how Liquorland presented its case to the Commission. In that respect, Liquorland's submissions to the Commission stated:¹²⁵

Balfour Street to the North is considered a locality boundary because it is a significant east-west connection extending between Ranford Road and Huntingdale Road servicing residential estates to the north and

¹²⁴ Appeal book, page 833.

¹²⁵ Liquorland's written submissions to the Commission, par 56(d) - (e).

south of it. It separates communities on either side in conjunction with the natural barriers adjoining it. *Residents at the northern side of Balfour Street are closer both in terms of distance and travel time to the alternative activity centres therefore residents to the north of Balfour Street are more likely to be part of neighbourhoods surrounding alternative activity centres.*

Ranford Road and Tonkin Highway are barriers forming the southwestern and southern boundaries of the locality respectively. There are no north-south crossings over Tonkin Highway leading to and from the locality, and there are no residential communities to the west of Ranford Road.

(my emphasis)

276 As can be seen from the italicised parts, Liquorland's submissions to the Commission only sought to rely on the other activity centres in support of the assessment of the northern boundary of the locality. Liquorland did not refer to other activity centres in respect of the southern boundary.

277 Accordingly, Liquorland's complaint on this ground can only be directed to whether the northern boundary is constituted by Balfour Street. Liquorland's primary complaint in relation to the Commission's reasoning in respect of Balfour Street is comprised in ground 4. As I explain below, in my view, ground 4 is made out. That being so, it is unnecessary to consider ground 3(h) and I decline to do so.

Final observation on ground 3

278 Before leaving ground 3, in oral submissions in reply, Liquorland made certain complaints about [93] of the reasons.¹²⁶ Those complaints are not found in the grounds of appeal. Broadly speaking, Liquorland complains that [93] is not an accurate recitation of Archer J's reasoning in *Liquorland Karrinyup*. However, the complaints in effect read [93] as a standalone part of the reasons. As I have explained at [213] and [214] above, [93] of the reasons is shorthand for the bolded parts of the *Liquorland Karrinyup* decision set out in the reasons. I therefore do not accept the complaints made regarding [93].

Ground 4

279 Ground 4 concerns the appropriate northwestern boundary of the locality. Ground 4 is specifically directed to the Commission's finding

¹²⁶ Appeal hearing, ts 136.

that Balfour Street was not the appropriate feature designating the northwestern boundary.

280 By way of background, according to the Commission's reasons, the effect of Balfour Street being adopted as the northwestern boundary was that there would be no existing packaged liquor stores in the relevant locality.

281 The grounds upon which Liquorland put forward Balfour Street as the northwestern boundary were set out in par 2.7 of the MGA report. Liquorland engaged MGA to provide the report. The planner who prepared the report was an experienced planner.¹²⁷

282 Given its significance to this ground, I will again set out par 2.7 from the MGA report:¹²⁸

Balfour Street forms what I consider to be the northern extent of the locality. Balfour Street is a significant east - west connection extending between Ranford Road and Huntingdale Road servicing residential estates to the north and south of it. It will, in my opinion, have a tendency to separate communities on either side in conjunction with the natural barriers adjoining it. Residents at the northern side of Balfour Street are closer both in terms of distance and travel time to the alternative activity centres shown on Figure 1 than the Southern River Square activity centre. In my opinion, this means that those residents to the north of Balfour Street are more likely to be part of neighbourhoods surrounding the alternative activity centres. It is for these reasons, that I am of the opinion that Balfour Street represents the northern extent of the locality in which the proposed store is located.

283 In summary, the MGA report identifies three grounds in support of Balfour Street being the northwestern boundary. First, Balfour Street is a significant connecting road that services residential estates to the north and south of it. Second, Balfour Street will have a tendency to separate communities on either side of it, together with the natural barriers that adjoin it. Third, residents on the northern side of Balfour Street are closer in terms of distance and travel to other activity centres, compared to the Centre.

284 The Commission's reasons set out the grounds upon which Liquorland contended Balfour Street was the appropriate northwestern

¹²⁷ Appeal book, page 128.

¹²⁸ Appeal book, page 833, par 2.7.

boundary,¹²⁹ which recitation substantially accorded with par 2.7 of the MGA report.

285 The Commission's reasons also set out the Director's submissions as to why Balfour Street should not be adopted as the northwestern boundary.¹³⁰ The Director's submissions addressed the nature of Balfour Street itself, the Director submitting that it was not a major or anterior road. The Director's submissions also suggested Warton Road was an appropriate northwestern boundary.

286 The Director's submissions concluded that there was no compelling reason to adopt Liquorland's northern boundary. The Director's submissions also stated 'Balfour Street is an unremarkable, arbitrary, artificial boundary designed to exclude four of the six liquor stores otherwise in the locality'.¹³¹

287 It would seem from the plan annexed to the Commission's reasons that the Commission adopted the Director's submission that Warton Road was the appropriate northwestern boundary.

288 The Commission dealt with the appropriate northwestern boundary in its reasons as follows:¹³²

103. The MGA Supplementary Report also refers to Tonkin Hwy to the southeast being a manmade barrier defining the locality. The Commission agrees with this characterisation of Tonkin Hwy.
104. The Commission would also assert that the other predominate manmade barriers or boundaries of the locality would be the major roads being Ranford to the Southern West, and Warton Road to the Northwest and Corfield Road to the Northeast.
105. The reasons in the MGA Supplementary Report provided for Balfour Road to be adopted as the North Western boundary of the proposed locality are not compelling. The Commission asserts that this road/boundary has been chosen with a view to exclude any existing packaged liquor stores from the locality.
106. Archer J in Liquorland (at 185) also references locality being influenced by the ability to access a proposed site by foot or push bike. The Commission considers that this reference is indeed to refer to an area that is simply 'close to' the relevant

¹²⁹ Commission's reasons [26(d)].

¹³⁰ Commission's reasons [37] - [39].

¹³¹ Commission's reasons [39].

¹³² Commission's reasons [103] - [108].

site. However, where there is evidence led that the consumers of the proposed premises require this kind of access, this may be more of a relevant consideration to the geographical spread of the community and neighbourhood.

107. In this case there does not appear to be ready access to bicycle routes in the area. The DAA Survey also notes that the supermarket is accessed predominately by car as there is currently little alternative (paragraph 39 DAA Report).

108. The Commission also comments that where the locality comprises a non-metropolitan area, a larger community spread and a lack of facilities to allow pedestrian or bicycle access, common expectations may encompass a necessity to travel further distances to access community facilities or activity centres.

289 This part of the Commission's reasons featured under the heading 'Natural and Manmade and Topographical Features of the Area'. It was not directly attributable to the issue of Balfour Street.

290 Paragraph 105 of the reasons uses language strikingly similar to the Director's submissions which I have set out at [286] above. Specifically, the conclusion that the reasons in the MGA report are not compelling and the assertion that Balfour Street has been chosen to exclude other stores, derive substantively from the Director's submissions.

291 The way the Commission expressed itself in this part of its reasons is somewhat ambiguous. The use of the words 'assert' in [104] of the reasons and 'asserts' in [105] of the reasons, like the phrase 'the Commission would argue' in [95], is capable of suggesting the Commission has 'stepped into the arena'. However, I think the preferred interpretation of that language is that it conveys the Commission 'considers' that to be the case.

292 In relation to the first sentence of [105], in my view when the reasons are read as a whole, the phrase 'not compelling' means that the Commission did not accept the reasons set out in the MGA report. In this respect, the MGA report provided the substantive reasons for Balfour Street constituting the northwestern boundary, and the Commission did not accept that contention.

293 The second sentence in [105] where the Commission refers to Balfour Street being chosen 'with a view to exclude any existing packaged liquor stores [from] the locality' is of real concern. In effect,

the sentence suggests MGA has tailored its expert opinion to assist Liquorland with its application. It is the principal focus of this ground.

294 As Liquorland's counsel submits, it is quite a significant thing to say that a particular expert has, in effect, tailored their opinion to suit their client's commercial objectives.¹³³ It may be open to make such a criticism if the expert's analysis is fundamentally flawed, however the Commission did not directly address the expert's reasoning. At its highest, the Commission has stated that the MGA reasons are not compelling, however, to use the words of Martin CJ in *Hancock*, 'that is the expression of a conclusion, and not the elucidation of a process of reasoning'.¹³⁴ Further, there is no suggestion that the expert did not have the expertise and experience to express the opinion which he did. Also, that a chosen boundary might be advantageous to the applicant for a liquor store licence does not mean the boundary is inappropriate.

295 The Director submits that [106] - [108] of the reasons reveal the Commission's reasoning to be that the locality was larger than contended for by Liquorland. Thus, the Director submits the Commission implicitly dealt with the Balfour Street issue. The Director also says that the second sentence of [105] is in effect a comment on the evidence as distinct from the finding of fact relevant to the evaluative task to be performed. The Director's counsel in oral submissions frankly accepted that portion of the Commission's reasons was unfortunate.¹³⁵ Further, the Director's counsel, quite properly in my view, did not seek to argue that the second sentence of [105] could be sustained by other aspects of the Commission's reasons.

296 The second sentence of [105] appears immediately after the Commission stated that the reasons in the MGA report are not compelling. In my view, the second sentence goes beyond mere comment. It is directly linked to the finding that the reasons are not compelling. Taken as a whole, [105] reflects a finding that the Commission gave less weight to MGA's opinion because it considered the opinion was tailored to advance Liquorland's application. The Commission's reasons do not articulate any proper basis upon which the Commission could so conclude.

297 Further, the issue of whether Balfour Street was the appropriate northwestern boundary was an issue of significance before the

¹³³ Appeal hearing, ts 147.

¹³⁴ *Hancock* [80].

¹³⁵ Appeal hearing, ts 98 - ts 99.

Commission. The reasons recognised this. They set out both MGA's rationale for the northwestern boundary to be constituted by Balfour Street and the Director's submissions in response.

298 As I have explained at [283] above, in summary, MGA's reasoning comprised three aspects. The Commission's finding at [105] that Warton Road is the predominate manmade barrier or boundary to the northwest might partly explain why the Commission preferred Warton Road over Balfour Street, however that still does not substantively address the matters raised by MGA.

299 In respect of the Director's submission that [106] - [108] demonstrate the Commission implicitly addressed the Balfour Street issue, the matters at those paragraphs are directed to the concept of locality more broadly and not to a specific boundary. On the hearing of the appeal, the Director's counsel accepted that [106] - [108] did not directly engage with the rationale put forward by MGA in relation to the northwestern boundary.¹³⁶

300 Further, given the Balfour Street finding is substantively similar to the Director's submissions, it appears that the Commission accepted the Director's submissions. However, in my view, without more, that is not sufficient. The Commission needed to express the reasons why it considered Balfour Street was not appropriate. It is not sufficient to merely use similar language to that used by one of the parties, without exposing the process of reasoning.¹³⁷

301 For these reasons, in my view:

1. the Commission impermissibly found MGA's opinion that Balfour Street was the appropriate northwestern boundary was tailored to assist Liquorland's prospects of succeeding with its application;
2. the Commission relied on that impermissible finding as a basis to give less weight to MGA's opinion that Balfour Street was the appropriate northwestern boundary; and
3. the Commission did not set out adequate reasons for not accepting MGA's opinion.

¹³⁶ Appeal hearing, ts 99 - ts 100.

¹³⁷ *Hancock* [80] - [81], [83].

302 In my view, these are substantive matters and constitute errors of
law. The first and second matters collectively demonstrate that the
Commission impermissibly gave less weight to MGA's opinion. The
third matter results in the parties and the court not being able to discern
the substantive reasons why the Commission rejected Balfour Street as
the northwestern boundary.

303 Further, in determining the relevant locality, boundaries must be
set - see [64] above. The northwestern boundary was a matter of
significance to Liquorland's application. The matters I have articulated
at [301] were material to the disposition of that issue. I am therefore
satisfied this ground is made out.

304 I will relatively briefly address another matter that was raised in
respect of this ground.

305 Liquorland submits the Commission's use of the expression 'not
compelling' reflects that the Commission was of the view that the MGA
reasons needed to be compelling before they could be accepted.
Liquorland therefore submits the Commission overstated the requisite
standard of proof, saying that the requisite standard is on the balance of
probabilities. This ground appears to pick up a similar line of reasoning
to that expressed in *Hancock*, where Martin CJ said 'the expression of
that view in terms that the Commission "was not convinced" suggests
that the Commission has applied a higher standard of proof than is
necessary or appropriate'.¹³⁸

306 Liquorland also contends the standard of the balance of
probabilities applied to the Balfour Street finding, it being a necessary
intermediate step in the process of determining the locality.¹³⁹

307 It is usually the case that a necessary (indispensable) intermediate
step in the reasoning process must be established to the standard
applicable to an overall determination.¹⁴⁰ However, what is an
indispensable step depends on the nature of the case.¹⁴¹ I will presume,
without deciding, that the Balfour Street finding was a necessary
intermediate step in respect of the ultimate finding as to locality.

¹³⁸ *Hancock* [81].

¹³⁹ Liquorland's responsive written submissions on the appeal, par 9(b).

¹⁴⁰ Heydon J, *Cross on Evidence* (14th ed, 2024) [9040].

¹⁴¹ See *Shepherd* (579).

308 In support of its contention that the applicable standard is the balance of probabilities, Liquorland points to s 16(1)(b)(ii) of the Act. The relevant portions of s 16(1) are as follows:

In any proceedings under this Act, the licensing authority, however constituted -

- (a) shall act without undue formality; and
- (b) may -
 - (i) obtain information as to any question that arises for decision in such manner as it thinks fit; and
 - (ii) make its determination on the balance of probabilities;

...

309 The Director submits that the Commission is not required to make findings on the balance of probabilities, but has a discretion to do so. The Director emphasised the use of the word 'may' at the start of s 16(1)(b)(ii). The Director also pointed to s 16(7) of the Act, which the Director summarised as follows:¹⁴²

Section 16(7) provides that the Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures. The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, and as speedily and with as little formality and technicality as possible.

310 The Director submitted that the Commission is required to act upon materials with rational probative force in positively determining the extent of the locality.¹⁴³

311 Ultimately, I have come to the view that it is not necessary to resolve the dispute raised as to the applicable standard of proof.

312 As I have explained at [292] above, in my view, by using the phrase 'not compelling', the Commission was in effect saying that it did not accept the reasons set out in the MGA report. The Commission was not saying that the reasons had to be compelling before they could be accepted. Accordingly, the premise for Liquorland's complaint does not arise.

¹⁴² Director's written submissions on the appeal, par 70.

¹⁴³ Director's written submissions on the appeal, par 71 - par 72.

313 Further, having read the Commission's reasons again following the
hearing of the appeal, I am not satisfied that the Commission imposed a
standard of proof higher than the balance of probabilities.

314 The Commission sets out that s 16 of the Act 'prescribes' that the
Commission may make its determination on the balance of
probabilities.¹⁴⁴ The Commission then stated:¹⁴⁵

65. For the purposes of the licence sought by Liquorland:

- (a) [Liquorland] must satisfy the licensing authority that granting the Application is in the public interest [s 38(2)]; and
- (b) the licensing authority must not grant the Application unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated [s 36B(4)].

66. The evidential and persuasive onus falls upon [Liquorland] for the grant of the licence to satisfy the licensing authority as to each of the above.

315 By using the phrase 'evidential and persuasive onus' shortly after noting that the Commission may make its determination on the balance of probabilities, the Commission could not be taken as imposing a standard of proof higher than the balance of probabilities.

316 This further complaint is therefore not made out, irrespective of whether the Commission was required to apply the standard of the balance of probabilities.

Conclusion

317 In conclusion:

1. It is not necessary for me to decide ground 1(a).
2. Ground 1(b) is not made out.
3. Ground 2 is made out.
4. Grounds 3(a) to (g) are not made out. It is not necessary for me to decide ground 3(h).

¹⁴⁴ Commission's reasons [63(a)].

¹⁴⁵ Commission's reasons [65] - [66].

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5. Ground 4 is made out.
6. Ground 5 is not made out.

318 At the hearing of the appeal, the parties agreed that the question of what orders should be made if Liquorland succeeds on any of its grounds should be deferred until after delivery of these reasons. Accordingly, I will hear further submissions as to what orders should now be made having regard to Liquorland's success on grounds 2 and 4.

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

AS
Associate to the Honourable Justice Lemonis

18 APRIL 2024