

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

Applicant: Endeavour Group Limited
(represented by Mr Jesse Winton, Counsel and Ms Susan Nicholson of Cullen Macleod Lawyers)

Intervener: Director of Liquor Licensing
(Represented by Ms Karess Dias of the State Solicitor's Office)

First Objector: Ms Raylene Punch and Mr David Williams on behalf of the South Mandurah Uniting Church

Second Objector: Mr Adam Riley

Commission: Ms Emma Power (Deputy Chairperson)
Ms Pamela Hass (Member)
Ms Elanor Rowe (Member)

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

Premises: BWS – Beer Wine Spirits Falcon
Miami Plaza Shopping Centre
3 Olive Road, Falcon, Western Australia, 6210

Date of Hearing: 29 March 2022

Date of determination: 3 May 2023

Determination: The application is refused, and the decision of the Director of Liquor Licensing is confirmed. .

Authorities referred to in Determination

- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 01/2017)
- *O'Sullivan v Farrer* [1989] HCA 61
- *Liquorland (Australia) Pty Ltd -V- Director of Liquor Licensing* [2021] WASC 366
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 03/2022)
- *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern* (2000) 76 SASR 290
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

BACKGROUND

1. On 25 August 2020, Endeavour Group Limited (formerly known as Woolworths Group Limited) (“**Applicant**”) lodged an application (“**Application**”) for the conditional grant of a liquor store licence under sections 47 and 62 of the *Liquor Control Act 1988* (“**Act**”) for premises to be located at the Miami Plaza Shopping Centre, 3 Olive Road, Falcon (“**Premises**”), to be known as BWS – Beer Wine Spirits Falcon.
2. The Premises is presently a vacant tenancy located next to an existing Woolworths Supermarket (“**Supermarket**”).
3. A previous application by Woolworths Group Limited for the grant of a liquor store licence, at the same Premises in 2015, was refused by both the Director on 19 July 2016 and the Liquor Commission on 23 December 2016 on public interest grounds.
4. The proposed liquor store has been presented as a modern, browse-style liquor store, operated under the Applicant’s “*BWS – Beer Wine Spirits*” brand. It would have a focus on providing convenience retail packaged liquor services and facilities with a large, diverse and quality product range of approximately 1,671 products. The proposed liquor store will comprise a trading area of approximately 164m² (including a display trading floor area and a walk-in cool room of 38m²).
5. The Application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing (“**Director**”). The following notices of objection were lodged in response to the Application:

Raelyn Punch and David Williams on behalf of South Mandurah Uniting Church (First Objector)

- a. This party objected on the basis that:
 - i. under section 74(1)(a) of the Act, the grant of the Application would not be in the public interest; and
 - ii. under section 74(1)(b) of the Act, the grant of the Application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor.

Adam Riley (Second Objector)

- a. This party objected on the basis that:
 - i. under section 74(1)(a) of the Act, Falcon is a domestic violence hotspot;
 - ii. under section 74(1)(b) of the Act, there are members of the public who specifically frequent the Centre because there is no liquor store there;
 - iii. under section 74(1)(g)(i) of the Act, the grant of the Application would likely result in undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, due to the rise in shoplifting associated with the Applicant’s policy of not confronting shoplifters and allowing them to walk out of their stores; and

- iv. under section 74(1)(g)(ii) of the Act, the grant would lessen the amenity, quiet and good order of the locality in which the Premises are situated, given that homeless people already wait in front of other existing licensed premises for them to open. Falcon is already well known to have “*crime and alcohol-related problems*” and given the nature and number of existing licensed premises in the locality, the Premises is “*just not needed.*”
6. Pursuant to sections 16(1)(b) and 69 of the Act, a report was requested from the Chief Health Officer (“**CHO**”) and Commissioner of Police (“**Commissioner**”) on health and crime data for the locality. On 3 November 2020, the CHO provided a report on health data for the locality, a copy of which was provided to the Applicant. The Commissioner did not provide a report.
7. On 12 March 2021, the Director refused the Application. In summary, the Director refused the Application on the basis that the Applicant failed to discharge its separate onus under section 36B(4) and section 38(2) of the Act.
8. The Applicant seeks review of the Decision pursuant to section 25(1) of the Act.
9. The Commission heard this matter on 29 March 2022.

APPLICANT’S SUBMISSIONS

10. The Application is for the establishment of a liquor store to provide complimentary and ancillary services to the Applicant’s existing, well-established, full-scale Woolworths Supermarket within the Centre. Both the Centre and the Supermarket were substantially expanded in 2013, which led to a corresponding increase in visitor numbers to between 1 – 1.5 million annually.
11. The Supermarket currently serves 18,500 customers per week, drawn from the surrounding suburbs of Falcon, Wannanup, Dawesville, and Bouvard, which have been identified as, collectively, the probable trading area for the Premises (“**Main Trading Area**”).
12. The Main Trading Area has a substantial population (14,987 as at 2016), which is projected to grow significantly, to 23,384, by 2031. Despite this, the Main Trading Area does not currently have any liquor stores that enable consumers to purchase packaged liquor at the same time as they purchase their groceries from a full-scale supermarket; that is, there is presently no meaningful option for one-stop shopping in the Centre, nor in the Main Trading Area. That should be considered in light of the size of the population in the Main Trading Area and the significance of the Centre as a District Area Centre (“**DAC**”). The requirement for such facilities is reflected in the level of support for the Application, and the reasons given for that support, by consumers in the Main Trading Area.

Section 36B(4) of the Act – The “Requirements Test”

13. The Commission should be satisfied that:
 - a. there is a significant requirement for one-stop shopping within the 36B Locality (“**36B Locality**”), which is reflected in the high levels of support for the Application, as well as the reasons that were provided by consumers for that support;

- b. such requirement is consistent with the requirements and expectations of consumers in Western Australia and Australia-wide; and
 - c. such requirement cannot be reasonably met by existing packaged liquor premises in the 36B Locality, as there is no other premises in the 36B Locality that can provide one-stop shopping.
14. Accordingly, the Commission should be satisfied that the requirements test, pursuant to section 36B(4) of the Act, is met and does not preclude the grant of the Application.

What is the Locality?

15. The Applicant previously submitted before the Director that the appropriate 36B Locality was the Main Trading Area. However, in light of the subsequent decision in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 (“**Liquorland Decision**”), that submission was withdrawn.
16. The 36B Locality must be construed as denoting an area that surrounds, and is geographically close to, the location of the proposed premises. It is intended to connote the same concept of neighbourhood. The shape and size of the 36B Locality may be influenced by topographical features and the areas from which the proposed site could be accessed reasonably easily on foot or push-bike.
17. Other factors, such as barriers or impediments to movement (such as rivers, railway lines, roads), or the presence of institutions that “*knit people together in common activities*” (such as schools, churches, clubs, and concentrations of shops retailing to the general public), may also influence its size and shape.
18. In determining the 36B Locality, it is important to bear in mind that the purposes of section 36B of the Act is “*to ensure that there are not multiple premises in close proximity to one another selling packaged liquor*”.
19. Having regard to those principles, the Applicant submits that the 36B Locality is the suburb of Falcon, because:
- a. it is the area which closely surrounds, and is geographically close to, the Premises;
 - b. there are no significant barriers or impediments to movement between the Premises and the suburb of Falcon; and
 - c. the Premises are reasonably easily accessible on foot and by bike from that area.

Requirements of consumers

20. Once the 36B Locality is determined, the question then becomes whether the local packaged liquor requirements of consumers in the 36B Locality cannot reasonably be met by existing packaged liquor premises.
21. The phrase “*requirements of consumers*” bears the same meaning in section 36B as in section 5(1)(c) of the Act and involves consideration of the same types of matters. Accordingly, consideration should be given, not just to the requirement for packaged liquor itself, but to such matters as shopper convenience and preferences, including the convenience of one-stop shopping.

22. Whether the requirements of consumers cannot be met is not determined on the basis that it requires that they cannot without great or undue difficulty or inconvenience be met. Instead, the assessment is as to whether consumer requirements “*cannot sensibly or rationally be met*”.

The evidence of consumer requirements

23. In order to demonstrate that there were consumer requirements in the 36B Locality which were not being met, the Applicant commissioned market research of consumers using what it had determined, at that time, to be the 36B Locality; namely, the Main Trading Area. However, because the Applicant has now, consistent with the Liquorland Decision, taken the view that the appropriate 36B Locality is the suburb of Falcon, rather than the Main Trading Area, there is no longer a perfect correspondence between the area the subject of that research and the 36B Locality of Falcon.
24. As the Commission may have regard only to the material that was before the Director when making the decision, it is not now open to the Applicant to update this market research using the suburb of Falcon alone, or some smaller area, as the survey area. Nonetheless, the market research remains relevant to, and probative evidence of, the requirements of consumers in the 36B Locality, for two reasons.
25. First, a significant proportion of respondents to both the online survey (23%) and the intercept survey (20%) live within 1km of the Premises or in the suburb of Falcon, respectively.
26. Second, it can be safely inferred that the survey evidence is generally representative of the views held by consumers in Falcon. This is because the Main Trading Area comprises a small concentration of contiguous suburbs, whose demographic profile is relatively homogenous in terms of age, gender, birthplace, religion, language, household composition, family characteristics, and rates of unemployment.
27. Accordingly, there is no basis to suspect that the views of consumers in the Main Trading Area differ markedly from those in Falcon. Indeed, given the demographic homogeneity, it is more likely than not that the views of consumers are generally consistent across the Main Trading Area. Therefore, it can be safely inferred that the survey evidence is generally representative of consumer requirements in Falcon.

Requirements of consumers cannot reasonably be met in the 36B Locality

28. As it currently stands, the 36B Locality is serviced by a single packaged liquor premises. That is the First Choice store, which is approximately 170m to the north of the Supermarket and is physically isolated from it by both a large car park and a road. In this respect, it should be noted that, although the First Choice store is proximate to the Centre, it cannot be considered to offer “*one-stop shopping*”. This is because the essence of one-stop shopping is convenience, marked by the ability to easily visit multiple shops in close proximity, usually with the ability to use a single trolley. Although the First Choice is relatively close to the Centre, it does not properly meet any of those criteria.
29. The absence of one-stop shopping in the 36B Locality is unusual, given that the Premises sit within a DAC, as that term is used in State Planning Policy 4.2. It is a reasonable expectation for a DAC to contain a liquor store connected to a supermarket to enable single-trolley grocery and liquor purchases, which is a level of retail amenity commonly available to, and expected

by, consumers in the Greater Perth area. Those observations are supported by the findings of the market surveys of consumers in the 36B Locality conducted on behalf of the Applicant.

30. The results of the survey of consumers in the 36B Locality are consistent with research conducted by the Applicant across Australia, which reveals that approximately 46% of consumers like to purchase packaged liquor as part of their grocery shopping or other shopping trip.
31. The evidence of consumer requirements in this case tends to reinforce the Court of Appeal's observation, made nearly ten years ago, that it is a "*notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres.*"
32. That notorious fact is also reflected in the success of the BWS business model. As explained by the Applicant's business development manager, the core of that business model is convenience, which "*is provided through aspects such as location, e.g., being located in the local, neighbourhood shopping centre or next to a Woolworths Supermarket*".
33. The success of that model is best demonstrated by the fact that there are currently over 66 Woolworths supermarkets that are associated with a BWS store in Western Australia. The popularity of BWS, and its success in Western Australia, is a matter which must be taken into account in assessing whether there is a consumer requirement for the products and services that are to be provided from the Premises.

Section 38(2) of the Act – The "Public Interest Test"

The appropriate area for assessing the public interest

34. It is clear that the public interest test in section 38(2) is not confined to the "*locality*" as that word is construed in sections 36B(4) and 38(4)(b) of the Act. That is, consideration of the public interest is not confined solely to matters within the 36B Locality. Instead, the public interest is properly assessed with reference to the geographic area most likely to be affected by the grant of the Application. Ordinarily, the Policy prescribes an area by reference to a radius, which, in cases such as the present, would ordinarily be 3km, given that Falcon is outside the Metropolitan Region Scheme area.
35. However, in this case, the Applicant submits that the area most likely to be affected, and which is therefore the more appropriate area for the consideration of the public interest than the prescribed 3km radius, is the Main Trading Area, given that:
 - a. it is the area from which 80% of sales at the Centre (inclusive of the Supermarket) are derived;
 - b. the Premises forms part of the Centre;
 - c. the Premises are located adjacent to, and is specifically designed to provide complimentary and ancillary services to the Supermarket;

- d. the Centre services suburbs south of the Dawesville Channel because the next closest large-scale retail centre to the south is located in Eaton Fair, some 90km away, and to the north is Halls Head, some 5.8km away;
- e. the majority of the area is comprised of established residential areas, which will continue to experience new residential infill; and
- f. 98% of residents surveyed in the Main Trading Area do their grocery shopping at the Supermarket.

The relevance of the previous application

36. The Director, in assessing the public interest, proceeded on the basis that:

“...the starting point for any consideration of the public interest in the locality, in this matter, should have commenced with an acknowledgement that the licensing authority has already found that [it was not in public interest to grant the application in 2016] and a demonstration that the circumstances of the locality have materially changed since then.”

37. That approach was misconceived, for at least three reasons.

38. First, it effectively turns the public interest test on its head and requires the Applicant to rebut a presumption that the grant of the Application is not in the public interest. That approach finds no basis in the statutory scheme established by the Act and is contrary to the express terms of section 38(2) of the Act.

39. Second, it overlooks the fact that the decision made in the previous application was a discretionary one. It is trite that a discretionary decision is one in which no one consideration, and no combination of considerations, is necessarily determinative of the result. Rather, the decision-maker is allowed some latitude as to the choice of decision to be made. In the case of the Commission, it has a wide discretion in deciding what weight to give the competing objectives and relevant considerations.

40. Accordingly, it cannot be assumed, as the Director implicitly did, that the decision of the Commission that the grant of the application was not in the public interest was the only possible, or permissible, result, nor that the Commission, differently constituted, would inevitably reach the same conclusion. That is, the Director effectively assumed, without analysis, that the ultimate findings made were the only findings that were open and could simply be adopted.

41. This leads to the third reason, which is that, by adopting the findings made by another decision-maker, there is an inherent risk that there will be an actual or constructive failure to discharge the duty to assess the Application on its merits.

42. For those reasons, the Commission should not adopt the approach taken by the Director. Instead, the Commission should assess the merits of the Application, by reference to the evidence, and according to the public interest test.

Catering for consumer requirements

43. The Applicant has demonstrated that there is a consumer requirement for the facility of one-stop shopping within the 36B Locality. For the same reasons as articulated above, the evidence establishes that a significant consumer requirement for one-stop shopping exists within the Main Trading Area.
44. That requirement is not being met by existing licensed premises within the Main Trading Area, including by the Cellarbrations in Dawesville ("**Cellarbrations**"), which is located adjacent to a small IGA store. This is because the Cellarbrations is located in the Dawesville local area centre, which is removed from main arterial road connections and is designed to service a small residential catchment. Consequently, only 35% of consumers in the Main Trading Area have shopped at the IGA, only 1% consider IGA to be their preferred supermarket retailer, only 23% had shopped at the Cellarbrations in the past 12 months, and only 5% purchased "*most of*" their liquor there.
45. An important consideration in evaluating the weight to be given to that factor in assessing the public interest is the number of consumers within the Main Trading Area and projected population growth in the near future. That is, as the number of consumers whose requirements are not being met increases, the public interest in catering to those requirements assumes greater importance.
46. As at 2016, there were 14,987 people living in the Main Trading Area. By 2031, the population is projected to grow to 23,384. This growth will place greater future demand on retail facilities at the Falcon DAC, being the single higher order DAC planned to service residents in the Main Trading Area. Given that, the requirement of consumers for the facility that will be provided from the Premises should be accorded significant weight as a public interest consideration.
47. Moreover, the grant of the Application will result in the creation of Premises offering to those consumers a large and diverse range of approximately 1,671 products of beer, wine, spirits and associated sundry items, of which 600 are exclusive to the Applicant.
48. That range will be offered at competitive prices, with weekly specials and discounts available on bulk purchases. Customers will also have access to the Applicant's other services and facilities, such as online purchasing, gift card facilities, and delivery. The Premises will be modern, appealing, and well run by an experienced, responsible licensee, as has been recognised on many occasions by the Commission. In short, the grant of Application will have many beneficial impacts on the Main Trading Area, which ought to be given significant weight.

Proper development of the liquor industry

49. The grant of the Application is also consistent with the proper development of the liquor industry in the Main Trading Area. As noted above, it is a reasonable expectation for a DAC to contain a liquor store connected to a supermarket and it is a level of amenity that is common throughout DACs in Greater Perth.
50. The fact that the Premises is close to an established, large format destination store does not diminish those propositions. Indeed, the licensing authority has previously granted many similar applications, such as in Secret Harbour, Southern River, Kwinana Marketplace, and Livingston Marketplace. The grant of those applications reflects the fact that customers have different purchase needs and requirements and require a range of stores to meet these requirements.

Potential alcohol-related harm and ill-health

51. There is limited evidence before the Commission of the existing levels of harm and ill-health in the Main Trading Area. The Applicant's evidence has established that the Supermarket itself is categorised as low risk in terms of crime and antisocial behaviour. The Centre manager has given evidence that there are no issues with crime and that she is unaware of any alcohol-related issues at the Centre.
52. As to the Main Trading Area, the Applicant's investigations, using public sources, have revealed that offence numbers are significantly lower than the corresponding State rate for assaults, robberies, burglaries, car theft, and graffiti. Unfortunately, there is no public data as to alcohol-related offences for the Main Trading Area.
53. The Applicant also made inquiries, through its agent, of the local government and the local police as to the existing levels of crime and alcohol-related crime in the Main Trading Area. Unfortunately, no responses were received.
54. The Commissioner was then requested to provide a report on crime in the Main Trading Area by the Director. No report was provided. Nor has the Commissioner decided to intervene in these review proceedings.
55. From this evidence, the only possible conclusion that can be drawn is that crime is generally low in the Main Trading Area and is not at a level that is of concern, either to the local police or to the Commissioner. That is a factor that should be given significant weight in the assessment of the public interest.
56. As to alcohol-related harm and ill-health, a report was provided to the Director by the CHO. That report establishes that between January 2013 and September 2020, a period of some 7.5 years, there were 750 "treatment episodes" for people residing in the Main Trading Area. Regrettably, the "rolled up" nature of that statistic tends to obscure, rather than elucidate, the true extent of alcohol-related harm, as indicated by these treatment episodes. A "treatment episode" relates to a course of treatment for a single client, regardless of how many treatment sessions they receive. However, a new treatment episode may be created for a client who has relapsed and re-entered treatment.
57. Accordingly, there were, at most, approximately 100 people per year in the Main Trading Area seeking treatment from agencies receiving funding from the Mental Health Commission. Similarly, the total of 254 treatment episodes where alcohol was identified as the "primary drug of concern" equates to, at most, 33 people per year. Alcohol was "a drug of concern" in 413 cases, equating to, at most, 55 people per year.
58. Even broken down in this way, the evidence in respect of treatment episodes is equivocal. That is, it is difficult to assess whether the rate of treatment episodes in the Main Trading Area is at a level that is concerning or even unusual, because the CHO did not provide any information about corresponding rates in other places or in the State.
59. However, there are two compelling reasons to conclude that they are not either concerning or unusual.
60. First, the CHO did not identify the rates as being unusual or concerning in the report, despite comparative information being readily available. That can only be because they are neither unusual nor concerning. It is inconceivable that the CHO would have omitted that information from the report to the Director if they were.

61. Second, when the statistics are assessed in the context of the total population of the Main Trading Area, which was approximately 15,000 people in 2016, it becomes clear that the rates are statistically insignificant. For example, taken at its highest, clients attending treatment episodes each year where alcohol was the primary drug of concern constitutes 0.0022% of the total population.
62. The other information provided by the CHO in respect of prevalence of alcohol consumption and psychological distress were based on the Peel region as a whole. That region is enormous, consisting of the City of Mandurah, and the Shires of Boddington, Murray, Serpentine-Jarrahdale and Waroona. Accordingly, it is not possible to safely draw any inferences from this information about the existing levels of alcohol-related harm and ill-health in the Main Trading Area.
63. For those reasons, while it is open to the Commission to conclude that there is some existing level of alcohol-related harm and ill-health in the Main Trading Area, it cannot be concluded that it exists at levels which are unusual or concerning.
64. As to the likely degree of harm that may result if the Application is granted, the Commission should take into account the manner in which the Premises will be operated, as well as the Applicant's business model and experience as a licensee. In that respect, the Commission should note that the trading area of the Premises will only be 164m² in size and that prices will be competitive, but not the cheapest in the Main Trading Area, with over half the products being priced over \$20 and 65% being priced at \$15 or more.
65. Moreover, the Premises will be fully contained within the Centre, an established shopping centre, in a dedicated shopping precinct and extensive harm-minimisation strategies will be put in place by the Applicant, which is an experienced and reputable operator of licensed premises.
66. In light of the above, it should be concluded that the grant of the Application is unlikely to result in any significant increase in the level of alcohol-related harm and ill-health. Moreover, any potential increase cannot be seen as intolerable, given the fact the existing level of harm is unremarkable.

INTERVENER'S SUBMISSIONS

67. The Intervener's primary involvement in this matter surrounds the proper interpretation and application of section 36B(4) of the Act, in light of the Supreme Court Liquorland Decision. In respect of this Application, it is open to the Commission to conclude that the conclusion reached in respect of section 36B(4) of the Act, should be affirmed.
68. In the alternative, if the Commission finds that the Applicant has discharged its onus under section 36B(4), it is open to the Commission to refuse the Application on the basis that the Applicant has not demonstrated that the grant of the licence is in the public interest.

Section 36B of the Act

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

Scope of the definition of "local packaged liquor requirements" in section 36B(1) of the Act and whether they can be reasonably met.

70. The phrase "requirements of consumers for packaged liquor" in the definition of "local packaged liquor requirements" in section 36B(1) is not limited in its scope to the physical item or product of packaged liquor.
71. In the Liquorland Decision, Archer J held that the words "requirements of consumers" in section 36B(4) and section 5(1)(c) had the same meaning, and the surrounding words and context of the phrase did not suggest a different meaning was intended.
72. Further, Archer J noted that prior to the introduction of section 5(1)(c), the notion of "consumer requirements" had been interpreted to include convenience and one-stop shopping: *Charlie Carter Pty Ltd v Streeter & Male Pty Ltd* ("**Charlie Carter Case**"). Archer J also observed that whilst it was an object of the Act at the time to contribute to the proper development of the liquor, hospitality and related industries in the State, this object was not applicable in the context of consumer requirements.
73. The range of "requirements of consumers" is broad, however, it is still necessary for the licensing authority to have regard to the Act's objects, including in section 5(1)(c). The purpose of section 36B is not to "constrain the number of packaged liquor premises by sacrificing consumers' options to get liquor at a lower price and better quality", but rather to ensure that an additional licence would only be granted where consumer requirements are not already being reasonably met. The additional hurdle prevents "multiple premises in close proximity to one another selling packaged liquor".
74. While the range of matters relevant to ascertaining the requirements of consumers will arise in two contexts (that is, in the section 36B test and then the public interest test), the issues are not necessarily identical in each context. Section 36B requires consideration of whether consumer requirements cannot reasonably be met by the existing premises; an objective test. Whereas, the public interest test requires a discretionary value judgement, which "looks to, among other things, the risk that granting the application may have negative consequences, such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there". Matters such as convenience, product range, service and efficiency may be relevant to the consideration of both the public interest test and the section 36B test.
75. Further, prior to the introduction of section 5(1)(c), it had been accepted in cases such as *Charlie Carter* that evidence that the grant of a licence would provide a convenient service to a significant section of the public may in itself be sufficient to establish a reasonable requirement of the public, in the context of the former "needs test". Whilst the needs test was removed in 2006, the Act continues to utilise the word "requirements", which is an indicator that the word should be given a meaning which encompasses something "desired" as distinct from "essential" to consumers.
76. In assessing whether the local packaged liquor requirements "cannot reasonably be met", the licensing authority needs to determine whether those requirements "cannot sensibly or rationally be met", having regard to "contemporary standards and expectations for the requirements of packaged liquor". The test does not involve determining whether consumer requirements "cannot be provided for without occasioning substantial difficulty or substantial inconvenience". For example, if a requirement of consumers for competition was relied upon by the Applicant for a new liquor store licence, it would be necessary to prove that that requirement could not reasonably be met by the existing premises in the locality.

Locality

77. Archer J stated that:

- a. the plain meaning of the words of section 36B supported the proposition that "*locality*" connotes the same concept of "*neighbourhood*", being a geographical area surrounding the proposed site;
- b. the meaning of "*neighbourhood*" in the Macquarie dictionary, includes "*a district or locality*"; and
- c. a retail catchment area could be extremely large and of wildly irregular shape, which would not be consistent with the ordinary meaning of the word "*locality*".

78. Ultimately, her Honour stated that due to the variety of factual situations that may arise, it was 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. Archer J did not accept that the retail catchment area could never be relevant to the assessment of the locality, noting that at the very least, it could illuminate the impact of topographical features or the areas from which the proposed site is likely to be accessed on foot or push-bike.

79. The effect of Archer J's decision is that the retail catchment area can be a factor which is taken into account by a licensing authority in ascertaining the relevant locality in a given case. However, a licensing authority has to itself determine the locality based on all of the relevant factors, rather than confining itself to choosing between fixed alternatives put forward by the Applicant or suggested in a policy document.

80. Ultimately, the locality identified by the licensing authority should capture the geographical area surrounding, and relatively close to, the proposed site; that is, the neighbourhood of the site. The locality need not be a circular area within a particular radius of the proposed site. The range of factors may include:

- a. geographical and topographical features;
- b. the areas from which the proposed site could be accessed reasonably easily on foot or push-bike;
- c. if there is a community in the area of the proposed site, the geographical spread of that community; and
- d. in some cases, the retail catchment area of the proposed site.

81. Further, it should be noted that, whilst section 36B requires the licensing authority to have regard to whether the requirements of consumers can be met by existing packaged liquor premises in the locality in the which the proposed licensed premises are, or are to be, situated, Archer J observed that "*premises outside an identified locality remain relevant to the assessment under section 36B*".

Section 36B(4) and the Present Case

The local packaged liquor premises

82. The Applicant adopted an area for the locality that wholly or partly fell within four suburbs:
- a. Falcon;
 - b. Dawesville;
 - c. Wannanup; and
 - d. Bouvard.
83. The Applicant identified five liquor stores that sell packaged liquor within its adopted locality, being:
- a. Cobbler's Tavern – distance 250m;
 - b. First Choice Liquor Market – distance 210m;
 - c. Cellarbrations Port Bouvard – distance 2.5km;
 - d. Cellarbrations Dawesville – distance 7km; and
 - e. Thirsty Camel Bouvard – distance 10.9km.
84. The Applicant did not analyse Cobbler's Tavern on the basis that it did not have a dedicated retail packaged section and did not promote the sale of packaged liquor. However, the Applicant did not substantiate this with any evidence about the number of packaged liquor sales at the venue.

Whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises

Locality of the proposed store

85. The Applicant determined the locality with reference to "*the main customer catchment area of the Woolworths Supermarket*". MGA Town Planners ("MGA") in their report ("Report"), stated it is the area from which "*approximately 80% of sales at the district activity centre are derived*". However, the Applicant did not provide a breakdown of the suburbs using the Centre, which may for example, demonstrate a greater concentration of customers coming from suburbs closer to the Centre and therefore the potential arm of the proposed store being more concentrated in Falcon.
86. While Halls Head Central shopping complex was referred to in the Report, no substantive information was provided about why that complex would not meet at least some of the locality's local packaged liquor requirements. Halls Head Central includes a Coles, Aldi and nearby BWS.

87. This is relevant as Archer J in the Liquorland Decision observed that:

"...premises outside an identified locality remain relevant to the assessment under s 36B, despite its reference to ' existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated".

88. The Applicant's section 36B(4) submissions state that the Centre *"is the principal retail and grocery facility for residents of the Locality"*. However, there is no evidence provided for this proposition.

Local packaged liquor requirements

89. The MGA Report shows population data for the locality as 14,987 in 2016, with only estimations for the population after that. The 2020 estimate was 17,298.

90. The segregated population data for each suburb in the locality relies on the 2016 population. Also included is a 2031 forecast of the population, however this includes additional suburbs of Herron and Clifton, consequently, it is uncertain whether this data is specifically allowed for within the locality or whether it includes the entire suburb. If it does include the entire suburbs, the 75% growth cannot be correct as the 2016 data does not include those outside the locality, whereas the projection does.

91. The figures provided are inconsistent with the Applicant's section 36B submissions, which state:

"(b) Information from the Market Survey and MGA Report reveal that:

(i) 75% of the Locality's population is ages 20 years of age or older, which amounts to 293,633 people;

(ii) 3% off the adult resident population in the Locality do not purchase packaged liquor. This means 97% do, which equates to approximately 284,824 people."

92. The submissions suggest a much greater population in the locality than the population of 14,987 shown by the evidence provided.

93. The Applicant conducted a market survey, a community consultation with residents and visitors at the Centre. The methods used were a target area opt-in census online survey and a visitor intercept survey at the Centre.

94. The responses requested information regarding the responders' proximity to the Proposed Store. The survey answers appeared to only go up to 9km, whereas the southern distance of the locality is up to 11km from the Proposed Store.

95. In outlining the market survey research, the Applicant submitted that BWS was the second liquor brand/store of choice for respondents, however the questions were specific to BWS Halls Head, not BWS generally as a brand choice. Reasons for the preference could include factors specific to BWS Halls Head, for example convenience or the variety of shops already at Halls Head Central shopping complex.

96. The market survey results included that 35% of respondents purchased packaged liquor at the same time as doing their grocery shopping and 48% of respondents who said if available, they would prefer to purchase packaged liquor at the same time as grocery shopping. However, there was no indication of where they did their grocery shopping.

97. Further, survey results showed that of *"the Miami Plaza visitors intercepted, 1 in 5 had or planned to purchase takeaway liquor that day and 4 in 5 planned to purchase from First Choice Liquor."* This data is relevant in determining whether consumer requirements are being objectively met. The First Choice was being used by a majority of shoppers who were planning to purchase takeaway liquor at the time of being surveyed. This is despite the Applicant's evidence that the First Choice is approximately 150 metres away or *"a walk of 178 steps from the north entry to the Centre."*
98. No evidence was led by the Applicant, or analysis was directed towards, why the local packaged liquor requirements could not be reasonably met by the existing packaged liquor premises within the locality. For example, while 65% of residents agreed that the Proposed Store would better cater for their overall packaged liquor requirements, no evidence was produced about whether respondents were able to meet their packaged liquor requirements, in accordance with their requirements, from one of the existing premises within the locality, and if not, why not.
99. The Public Interest Assessment relies on characterisation of the DAC by the MGA Report, and about packaged liquor being a *"convenience good, and small – scale comparison shopping opportunity is intended at district activity centres."*
100. In outlining the services within the DAC, the Public Interest Assessment states *"Caporn Services reports that there are at least 61 businesses."* Included amongst these are Cobbler's Tavern and First Choice Liquor. Including these areas within the DAC demonstrate that there are two packaged liquor premises in the relevant area already. No evidence has been produced about why the First Choice does not meet the requirement for packaged liquor.
101. The evidentiary burden falls upon the Applicant to produce the evidence sufficient to satisfy the requirement under section 36B(4). If the Applicant fails, as it is open for the Commission to find that it has done here, to produce the evidence sufficient to establish the requirements of section 36B(4), the Application must be refused.
102. The Applicant's submissions state that there is no single packaged liquor outlet within the locality that meets all of the key requirements of consumers in the locality. Again, there is no evidence provided that the local packaged liquor requirements are not met by the existing packaged liquor premises within the locality. Further, the Applicant has narrowly characterised First Choice Liquor as not allowing a customer to grocery shop at the same time as purchase liquor from the store/in the same trip. The reason is that First Choice is a standalone store and is not adjacent to a supermarket.
103. In *Woolworths Ltd v Director of Liquor Licensing*, Buss JA observed that *"the Commission did not, anywhere in its reasons, refer to the notorious fact that, in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance"*. In that case, the Dan Murphy's proposed was outside of, but adjacent to, Melville Plaza. It is up to the Commission to determine whether the First Choice, which is approximately 150 metres from Miami Plaza and requires crossing Olive Road, is not sufficient to meet local packaged liquor requirements for one-stop shopping.
104. The Applicant submits that *"71% or (sic) respondents to the Resident Survey visit the Centre at least once a week with 97% of these for the purpose of doing their grocery or household shopping."* However, none of this is evidence that the existing local packaged liquor requirements are not being met by the First Choice.

105. The Applicant refers having a liquor store at the Centre as "*a key requirement of local packaged liquor consumers in the Locality*" and referring to the First Choice Liquor as requiring "*a separate trip and shopping transactions*".
106. Considering the shopping trip as a whole (from the person's place of residency to the Centre and back), the packaged liquor purchase is still made in the same shopping trip, despite needing to attend a second venue, further, the reference to "*separate shopping transactions*" fails to acknowledge that even with the Proposed Store, a second shopping transaction would be required.
107. The Applicant goes on to submit that:
- "[t]he simple fact that the First Choice Liquor Market store is not physically at the Centre means it does not meet the requirement for packaged liquor consumers for a packaged liquor outlet to be located there."*
108. This conclusion is simply based on the assumption that no liquor store outside of the Centre could meet the local packaged liquor requirements. The Applicant has provided no evidence support this vague proposition.
109. While the Applicant submits that convenience and one-stop shopping are the primary consumer requirements, they also mentioned competitive weekly specials. No evidence has been provided about why this consumer requirement is not met by existing packaged liquor premises.

Section 38(2) of the Act – The Public Interest Test

110. If the Applicant discharges its onus under section 36B(4), the Applicant then bears the onus of satisfying the Commission that the grant of the Application is in the public interest. That onus cannot be discharged by mere assertion. Any assertions or opinions must be supported by an appropriate level of evidence.
111. The following principles apply to the assessment of the public interest:
- a. In addition to the onus imposed by section 38(2), the Commission has an "*absolute discretion*" under section 33(1) of the Act to grant or refuse an application on any ground or for any reason it considers in the public interest. That discretion is only confined by the scope and purpose of the Act, read as a whole. Accordingly, the Commission may refuse an application, even if it meets all the statutory requirements, where granting the application is inconsistent with the Act's objects and purposes.
 - b. The expression "*in the public interest*", as used in both sections 38(2) and 33(1), imports a discretionary value judgment. If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of "the public interest" will ordinarily be confined only by the scope and purposes of the statute.
 - c. The factual matters which the Commission is bound to take into account in determining whether granting an application is "*in the public interest*" are those matters relevant to the objects and purposes of the Act, including the primary objects set out in section 5(1) and the secondary objects set out in section 5(2).

- d. In determining whether it is satisfied that the grant of the Application is “*in the public interest*”, to the extent that those matters arise on the evidence (including notorious facts) before the Commission, the Commission is:
 - i. bound to take into account those matters relevant to the objects of the Act; and
 - ii. entitled to take into account those matters set out in section 38(4) of the Act.
112. In considering the public interest, tension may arise between the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and other objects of the Act (including section 5(1)(c)). When such conflict arises, the Commission must undertake a weighing and balancing exercise. It is a matter for the Commission to decide what weight to give the competing considerations.
113. The decision in each case will depend on the particular circumstances, and the question is whether, having regard to all the circumstances and the legislative intention, the grant of the licence is justified.

Primary object of the Act – harm minimisation

114. Section 5(1)(b) of the Act provides that a primary object of the Act is to “*minimise*” harm or ill-health to people, or any group of people, due to the use of liquor. The word “*minimise*” does not mean to prevent harm or ill-health absolutely. Rather, it requires the Commission to weigh and balance all relevant considerations. It is a matter for the Commission to decide what weight to give the competing interests and other relevant considerations.
115. The harm contemplated by the Act is not confined to consumers of alcohol but extends to harm caused to the health and well-being of individuals, families and communities. The concept of “*harm*” also extends to social, cultural and economic harm. This includes, for example, harm that may occur through an increase in antisocial or injurious behaviour due to the use of liquor and is not limited to physical harm.
116. Where section 5(1)(b) of the Act is relevant, the licensing authority must follow the steps articulated in *Woolworths Ltd* and *Carnegies Realty Pty Ltd v Director of Liquor Licensing* (“**Carnegies**”). It must:
 - a. make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b. make findings about the likely degree of harm to result from the grant of the application;
 - c. assess the likely degree of harm that may result from the grant of the application against the existing degree of harm; and
 - d. weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the Commission that it is in the public interest to grant the application.
117. The enquiry under paragraph 116(a) above requires a consideration of, and findings made in accordance with, the evidence. The enquiry the Commission is required to undertake in relation to paragraphs 116(b)-(c) is prospective and directed to a predicted conclusion.

Paragraph 116(d) then requires a weighing and balancing exercise having regard to that predictive conclusion and the other objects of the Act.

Section 38(2) and the Present Case

Existing level of harm or ill-health in the Locality

118. The CHO stated that *"[u]sing a State ranking system, all of the suburbs in the Locality experience a greater level of disadvantage and a lack of advantage in general"*. The indexing was as follows:
- a. Falcon – 2;
 - b. Dawesville–4;
 - c. Wannanup – 5; and
 - d. Bouvard – 3.
119. In relation to the data, the CHO stated that *"[a] lower score indicates greater disadvantage relative to other scored. For example, a score of one indicates the highest level of disadvantage."*
120. It is notable, that Falcon, the suburb where the Proposed Store would be located, has a rating of 2.
121. Further, at the time of the 2016 ABS Census, the unemployment rates in these suburbs was above the State unemployment rate of 7.8%:
- a. Falcon is 11.6%;
 - b. Dawesville is 10.3%;
 - c. Wannanup is 8.8%; and
 - d. Bouvard is 12.1%.
122. Significantly, Falcon remains statistically disadvantaged on the SEIFA indices.
123. In relation to this data the Applicant has stated that *"[w]hen considering the SEIFA index findings, unemployment levels and low weekly incomes, an important consideration is the number of aged persons in the Locality."* However, the unemployment levels only account for individuals seeking full time or part time work. The figures do not increase based on the number of retirees.
124. The Applicant also states that *"income is the strongest indicator of both disadvantage and advantage for both indexes. It follows that where there are a large number of retirees (such as the Locality and in particular the suburbs of Falcon and Bouvard) who generally have more limited incomes, that the index results will be skewed by this factor alone"*. However, the Applicant has not provided any evidence of the income level by age or retirement status.
125. The CHO provided evidence of 750 treatment episodes for people residing in the locality and treatment services funded by the Mental Health Commission; 310 episodes (40.8%) of those were for people residing in Falcon.

126. The Applicant characterised this data as "*deficient and non-conclusive*", dismissing the higher level of risk that residents in Falcon experience.

Degree of harm likely to result if the application is granted

127. It is important for applicants to engage with key stakeholders and "*at risk*" groups within the local community affected by an application to understand and assist the Commission to assess the potential social and economic impacts of an application, including the potential for any increase in harm or ill-health.

128. An increase in the availability of packaged liquor may increase the risk of harm to vulnerable members of the community. Should the Application be granted, the physical availability of liquor in the locality will increase. The Proposed Store will be the sixth packaged liquor premises within the locality. It will also be the third packaged liquor premises in a 250 metre radius of the Centre.

129. The Proposed Store is to be located within a shopping centre. As such, it is relatively uncontroversial to suggest that the convenience and visual reminder of making alcohol available for purchase in the same location as ordinary food products significantly increases the risk of impulse purchasing, and hence increased consumption.

130. The Applicant relies on the evidence of Mr Anthony Smith, Business Development Manager, Endeavour Group Limited stating he is not aware of any evidence "*that establishes or indicates that the introduction of a BWS or Dan Murphy's liquor store anywhere in Australia has actually led to identifiable increases in liquor related harm, including domestic violence*".

131. Anecdotal evidence as to the estimated levels of harm or ill-health by general members of the public, in the absence of any contextual information, is of extremely minimal weight. Rather, the evidence of the CHO regarding the harm and ill-health associated with increasing the availability of packaged liquor should be given significant weight.

132. In any event, the onus is on the Applicant to investigate rather than relying on a long-standing employee to provide this evidence.

133. The Applicant goes on to state that "*when a new liquor store opens in an area where there are existing outlets...consumers adjust their buying habits rather than buy more.*" However, the evidence upon which this proposition is based is insufficient. There is no information about whether the New South Wales sample had similar population demographics or packed liquor retailers.

134. Greater convenience suggests that the liquor purchases will increase. It is reasonable to accept the proposition that the more supply and convenience, the greater the consumption. According to the CHO, the Proposed Store will:

- a. provide large numbers of the community the opportunity to purchase alcohol when they might not have otherwise; and
- b. frequently expose a large volume of the community who may not have otherwise been exposed to a liquor outlet or alcohol because of its relationship with the supermarket.

LEGAL AND STATUTORY FRAMEWORK

135. Section 16 of the Act prescribes that the Commission:

- a. may make its determination on the balance of probabilities [subsection (1)]; and
- b. is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
- c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].

136. The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* LC 01/2017).

137. For the purposes of the licence sought by the Applicant:

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

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

Section 36B(4) Test

139. Section 36B(4) prohibits the licensing authority to grant an application unless it is satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated.

140. For the purpose of section 36B(4), the licensing authority must be satisfied, based on the evidence provided, that:

- a. there are "*local packaged liquor requirements*" - being defined in section 36B(1) as "*the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*"; and
- b. such "*local packaged liquor requirements*" cannot reasonably be met by existing packaged liquor premises in the locality.

Public Interest Test

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

142. When determining whether an application is in the public interest the Commission **must** take into account:

- a. the primary objects of the Act set out in section 5(1):
 - i to regulate the sale, supply and consumption of liquor; and
 - ii to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State; and
- b. the secondary objects of the Act set out in section 5(2):
 - i to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - ii to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - iii to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

143. Section 38(4) provides that the matters the licensing authority **may** have regard to in determining whether granting an application is in the public interest include:

- a. the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor [subsection (a)];
- b. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated [subsection (b)];
- c. whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises [subsection (c)]; and
- d. any other prescribed matter [subsection (d)].

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

DETERMINATION

145. The matters in contention arising under the Application and at the Hearing are primarily concerned with:

- a. the relatively new section 36B of the Act and, in particular, the statutory interpretation of section 36B(4); and
- b. the public interest test to be satisfied in respect to section 38 and, in particular, the issue of the level of harm or ill-health that might be caused to people, or any group of people, due to the use of liquor.

146. The public interest test is well established and there is extensive legal precedent to assist the Commission in making a determination.
147. In this case section 36B(4) of the Act is mandatory and the test therein must also be satisfied.
148. The Commission considers that, and there appears to be no argument from the Applicant nor Intervener that, for the purposes of meeting the requirements of section 36B(4) of the Act the Commission must:
 - a. adopt an appropriate “locality” for the purposes of section 36B; and
 - b. be satisfied that there are “local packaged liquor requirements” – defined in section 36(4)(1) as being the requirements of consumers for packaged liquor in the locality the premises are to be situated; and
 - c. be satisfied that such “local packaged liquor requirements” cannot reasonably be met by existing packaged liquor premises in the locality.

Section 36B v Public Interest

149. In its initial application for review the Applicant asserted:

“The Decision Maker erred by assessing if the grant of the Application was in the public interest when it had already determined that the Application failed the threshold requirement under s 36B(4).”

150. This argument is misconceived.
151. Although a preliminary finding that an applicant has not satisfied the licensing authority as to the test in 36B results in a situation where the public interest test does not technically need to be further considered, a finding under section 36B does not *preclude* the licensing authority from making a determination of the public interest test under section 38.
152. The Act does not set any order to consideration of the two sections, each deal with separate considerations and neither is stated to be contingent upon the other.
153. Further, the outcome of making a finding under each section has a different outcome.
154. If an application is not granted due to the failure of the applicant to satisfy the licensing authority that granting the application is in the public interest, then section 38(5) will apply and the applicant is generally precluded from making an application for the grant or removal of a licence in respect of the same premises or land within three years after the licensing authority’s decision.
155. Not such prohibition applies when an applicant fails to meet the test in section 34B.
156. As such, it is open for the Director and the Commission to make a finding in respect to both of section 38 and section 36B.

Deciding a Locality under section 36B

157. In this case the Applicant initially, in its Section 36B(4) Submissions dated 1 March 2022 adopted the Main Trading Area of the Centre to be the locality for the purposes of both the “public interest test” and the 36B(4) test.
158. In the Applicant’s later Primary Submissions of 1 March 2022, the Applicant now asserts that the proper “locality” for the purposes of section 36B is limited to the suburb of Falcon.
159. This assertion is based upon factors that were referenced in the Liquorland Decision and, in particular as:
- a. it is the area which closely surrounds, and is geographically close to, the Premises;
 - b. there are no significant barriers or impediments to movement between the Premises and the suburb of Falcon; and
 - c. the Premises are reasonably easily accessible on foot and by bike from that area.
160. The Act does not include any definition as to “locality”.
161. In the Liquorland Decision, Archer J at [181] to [186] noted the following with respect to the word “locality” used in section 36B (emphasis added by the Commission):

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

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

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

.....

*This is not to say that the 'locality' will inevitably, or even usually, be a circular area within a particular radius of the proposed site. **The shape and size of the 'locality' may be influenced by topographical features (including man-made features such as roads) and the areas from which the proposed site could be accessed reasonably easily on foot or push-bike. If there is a community in the area of the proposed site, the geographical spread of that community may also influence the shape and size of the 'locality'**.*

Unfortunately, due to the variety of factual situations that may arise, it is impossible to prescribe a specific test to be applied or even an exhaustive list of the factors that will or may be relevant in the determination of the locality in any given case. As has been

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

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

162. The word “locality” is also used in section 38 of the Act and is primarily defined using the Director’s “Public interest assessment policy”. At the time of the Application, the Director’s Policy in respect to “locality” stated as follows:

“Locality

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

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

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

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

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

“Locality guide

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

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

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

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

163. It is noted that the relevant Policy does not include the suburb of Falcon in the Attachment 2 list of suburbs/areas that have either a 2km or 3km radius.
164. 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.
165. The Commission has considered the following, non-exhaustive factors in deciding the locality in this instance:
- a. the geographical area surrounding the site;
 - b. the topographical features of the area, including natural and man-made barriers;
 - c. the geographical spread of the community; and
 - d. the retail catchment areas.

The geographical area surrounding the site.

166. Although it is clear that the suburb of Falcon is “geographically close” to the Premises being the immediate suburb surrounding the Centre, equally the suburbs of Wannanup, Halls Head and Erskine (and to a lesser extent Dawesville) can be considered to be included in the geographical area surrounding the site.
167. 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.

Natural and Man-made and Topographical Features of the Area

168. The regional urban area that the Centre is located in is a narrow, elongated finger of land along Old Coast Road south of Mandurah, through the suburbs of Halls Head, Erskine, Falcon, Wannanup and down to Dawesville and Bouvard. The same has evolved due to the natural features of the area (i.e., the Indian Ocean to the West and the Peel-Harvey Estuarine System to the East).
169. The width of the land varies from less than 1km (near to the Centre) to 5km near the suburb of Bouvard, noting that there is also a large area of reserves and non-residential areas at that widest portion.
170. The entire length of the area is quite long with the bridge into Mandurah being approximately 8km north of the Centre and Bouvard being approximately 13km south of the Centre.

171. Due to the natural features of the area adopting a circular radius of any size will result in a significant amount of ocean or inlet being included in the “locality”.
172. 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 Act and the functions of the licensing authority which require consideration of the actual impacts of a proposed application.
173. Archer J in the Liquorland Decision (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 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.
174. In this case the Commission considers that the natural barriers of water along each side of the “island” of land on which the site is located create the major geographical barriers that defined the relevant neighbourhood and that such barrier naturally extends down south to the Dawesville Channel.
175. To the north the next natural water barrier is some 8km away, which the Commission considers to be slightly too far, at least in this instance, to be considered part of the immediate geographical area. The Commission reflects that reference to the geographical spread of the community and the retail catchment areas of both the Centre and nearby activity centres, there would be more appropriate considerations to decide the northern barrier of the locality.
176. When considering man-made barriers, such as roads, Old Coast Road is a busy “Primary Regional Road” however, the Commission considers its position through the middle of the finger of land to not create a barrier, but rather to be the main artery of access used by the community in the locality.
177. Also due to this artery, as well as the factors considered below as to community spread and retail catchment, although the Dawesville Channel to the south is a significant physical barrier, it does not define the southern limits of the relevant neighbourhood in this case.
178. The Commission considers that a more appropriate barrier is to the south of Dawesville where significant natural reserves (being regional open space) commence and the usage become more rural in nature.
179. In any event, it is not compelling that the suburb of Falcon alone should be considered the “locality” due to its topographical features. It is necessarily close to the proposed premises, but is not bounded (to the north and south) by any defining or limiting feature.

The geographical spread of the community

180. The geographical spread of the community being considered is urban expansion to the south of Mandurah that would be considered to be a part of “the City of Mandurah”. To the south of Dawesville and adjacent to Bouvard, there is a further natural boundary of rural and public purposes and regional open space.

181. Relevantly below this area there is a much sparser population, less residential and more rural space.
182. Although Archer J references access by “foot and push-bike”, the Commission considers this of less assistance where the locality comprises a non-metropolitan town and the larger community spread and common expectations may encompass a necessity to travel further distances to access community facilities or activity centres.
183. The MGA report at 6.6 further notes:

“Falcon DAC has been elongated along Old Coast Road, which does not result in sufficient density and scale to be a walkable, mixed use town centre but rather a collection of vehicle - based nodes. That is, the centre is not laid out in a pedestrian – oriented main – street format that is conducive to, or promotes walking between the commercial nodes.”

Retail Catchment Area

184. Archer J in the Liquorland Decision considered that to solely refer to a “retail catchment area” as the locality would not be correct, however, accepted that it is a relevant consideration (at [188]).
185. The Liquorland Decision is expressly distinguished from this case as the shopping centre then being contemplated was much larger (some 101,273m²) and the retail catchment area was significantly larger (including a primary trade area comprising a population of 246,860 and a total trade area population of 544,080).
186. The evidence put forward by the Applicant indicates that the Centre forms a part of the Falcon District Activity Centre. The MGA report found that approximately 80% of the sales at the District Activity Centre were derived from the Main Trading Area.
187. The Market Research undertaken in April 2020 further revealed that:
- a. in the Target Area Survey – 23% of respondents; and
 - b. in the Intercept Survey – 20% of respondents,
- lived within 1km away of the Centre (i.e., likely to be in Falcon).
188. Each of the above indicate that an area greater than Falcon alone is the relevant “neighbourhood”.
189. The MGA Report also notes that the southern extent of the Main Trading Area reflects the limited range of retail facilities and lack of any alternative district or higher order centres.
190. It is further noted that the Halls Head District Activity Centre is located some 5.8km to the north of the Centre (6.7 of the MGA Report) and this would indicate that the neighbourhood does not extend further than the northern barrier of the suburb of Falcon.
191. As such it appears from evidence put forward by the Applicant that the Main Trading Area is directly relevant when considering an appropriate locality and indicates an appropriate locality would be larger than the single suburb of Falcon.

Conclusion on Locality

192. In considering the above factors, the Commission does not accept that the “locality” in this case is limited to the suburb of Falcon.
193. The above factors indicate to the Commission that the relevant locality for the purposes of the Application and section 36B is the area comprising the suburbs of Falcon, Wannanup and Dawesville.
194. Further, the Commission would generally note that, where an applicant artificially limits a locality to 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 Act that every suburb requires a packaged liquor outlet.

Local Packaged Liquor Requirements

195. To properly contemplate the first limb of section 36B(4), the Commission must make a finding of fact as to the “*local packaged liquor requirements*” of consumers in the locality based on the evidence provided by the Applicant.
196. This requires consideration of the correct statutory interpretation of “requirements”.

Defining “Requirements”

Prior Legal Precedent

197. The Act does not provide any guidance as to how the word “*requirements*” is to be interpreted either in respect to the objects of the Act, or section 36B.
198. However, prior to the introduction of section 36B, the words “*requirements of consumers*” was contemplated in the context of the section 38 public interest test. Section 38 requires mandatory consideration of the primary and secondary objects of the Act.
199. Generally, the same is taken to mean what consumers demand or desire, as distinct from what they cannot manage without.
200. The term “*requirements*” is referred to in section 5(1)(c), which states that one of the primary objects of the Act is: “*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*”.
201. That primary object requires a broad consideration in the context of the expectations of consumers for liquor (and related services) across the State.
202. In the Liquorland Decision Archer J recently established that “*the words 'requirements of consumers' mean the same in s 36B(1) and s 5(1)(c) and, subject to the facts and issues of a particular case, may involve consideration of the same types of matters*” (at [89]) however, that ‘consumer requirements’ will arise in two contexts (i.e., the test under section 36B and the test under section 38 as to public interest).

203. Archer J further noted at [106] *“There is no reason why matters such as convenience, product range, service and efficiency would not, or should not, be relevant to both conditions.”*

204. In considering the requirements of consumers the Commission must have regard to the Acts' objects, including the object in section 5(1)(c).

The Application and Requirements for Packaged Liquor

205. The Applicant submitted that the key consumer requirements were for:

- a being able to purchase packaged liquor at the same time as doing their grocery shopping (i.e., one-stop shopping);
- b competitive prices and weekly specials;
- c a liquor store to be located at the Centre;
- d a variety and diversity of licences to be located close to each other; and
- e for the BWS brand to be located at the Centre.

206. Although the Commission has not set out every consumer answer or piece of evidence before the Commission (i.e., specific consumer comments as to parking, the other liquor stores frequented by consumers, etc.) the Commission has reviewed and considered the same.

One-Stop Shopping/Convenience

207. The Applicant submits generally that:

- a. It is a notorious fact that *“in contemporary Australian life, one stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres.”* (*Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 at [78] Buss JA);
- b. the absence of one-stop shopping at the Centre is unusual given its presence in a District Activity Centre; and
- c. a large scale packaged liquor outlet would not comprise a “one stop shopping” experience based on the findings of *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 03/2022), [171].

208. The Commission comments that:

- a. it is an established notorious fact that one-stop shopping is of importance to consumers;
- b. it is important to note that the District Activity Centre is not comprised simply by the Centre itself, but is an elongated shape which included various other retail and commercial outlets along Old Coast Road. Therefore, not having a packaged liquor store in the Centre does not equate to there not being one present in the District Activity Centre; and

- c. *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 03/2022), is not particularly relevant to this case. Importantly, that matter was not contemplating section 36B. Further, the relevant facts were significantly different in that case as the Dan Murphy's premises was co-located with a tavern, and located across a very busy major artery and entirely separately to a large shopping centre.
209. The Applicant further submitted evidence to support a consumer requirement for one-stop shopping as follows:
- a. 48% of respondents state that if it were available to them, they would prefer to purchase packaged liquor at the same time as they do their grocery shopping;
 - b. 85% of respondents state "convenience" as being the key reason they would purchase liquor from the Proposed Store if it were to open; and
 - c. the following were also confirmed as appealing features to many respondents of the Market Survey:
 - i "being located next to the Woolworths Supermarket where you can also do your supermarket shopping"; and
 - ii "being able to do grocery shopping at the same time / doing it all in the one trip".
210. The Commission considers that, in this case, satisfying a one-stop shopping requirement does not automatically necessitate consumers being able to:
- a. complete grocery and liquor shopping in one transaction;
 - b. complete grocery and liquor shopping using one trolley; and/or
 - c. complete grocery and liquor shopping under "one roof" of a shopping centre, but rather "one trip" shopping for convenience.
211. The Commission further holds that "one stop shopping":
- a. can include being able to undertake different aspects of grocery and packaged liquor (and possibly other) shopping by undertaking one trip from home;
 - b. may involve attending different "shops" contained in the same activity centre;
 - c. may require the use of more than one trolley; and/or
 - d. may involve a short walk or drive between shops and include the need to change parking places to conveniently get shopping to a vehicle.
212. This is in particular where, as in this case, the District Activity Centre is of a nature which is expanded or elongated or "*does not result in sufficient density and scale to be a walkable, mixed use town centre but rather a collection of vehicle - based nodes.*" (MGA report at 6.6), giving rise to a community expectation that they may not be able to attend one large shopping centre for all of their needs.

213. In addition, the Applicant submitted in its PIA that the Premises would provide convenience to customers who wish to purchase:

"...packaged liquor at the same time as they do their shopping at the Centre. Having the Supermarket, other tenancies and the Proposed Store under the same roof provides ease of access and convenience, which is particularly useful for customers when the weather is inclement, people are in a hurry, have mobility issues or are wheeling heavy shopping trolleys. Free and easily accessible on-site parking will add to this convenience."

214. It was not considered a particularly appealing factor for consumers to have "Access to shopping trolleys to carry your purchases in store". This was ranked last for Trade Area Survey respondents (9% ranked it in the top 3 and 2% ranked it as number 1) and for Intercept Survey respondents 20% ranked it in the top 3 and 10% ranked it as number 1).

215. Given the above, the Commission does not find that it is a consumer requirement (as considered as part of one-stop shopping) to be able to place grocery and liquor purchases in the same trolley while shopping.

216. Interestingly, the Market Survey reports that if *all options* were available to the respondents:

- a. 45% of Survey respondents preferred to buy packaged liquor in a *specific trip to a walk in and browse liquor store*; and
- b. 48% of Survey respondents indicated "*I'd buy my takeaway liquor when I do my grocery shopping / do it all in one trip*".

217. This indicates that a requirement for one-stop shopping exists, but not to the exclusion of trips solely to purchase liquor.

218. The Commission therefore considers that the evidence supports a "one stop shopping" consumer requirement that relates to predominately to convenience including:

- a. being able to make "one trip" for grocery and liquor shopping;
- b. being located next to the Woolworths Supermarket (where you can also do your supermarket shopping); and
- c. parking in a convenient car park.

Competition and Competitive prices and weekly specials.

219. Although no questions on the Market Survey go directly to the matter of general competition, the Commission is prepared to accept the notorious fact that, in at least in populated urban areas, there is a general consumer requirement for choice and competition between package liquor providers.

220. As further support the Market Survey also notes that "*competitive pricing weekly specials*" is in the top 3 most appealing features of the proposed store. In the Trade Area Survey 40% of respondents ranked the same in the top 3 with 15% ranking this as number 1, the Intercept Survey results show 36% of respondents ranking the same in the top 3 and 11% ranked as number 1.

221. The Commission therefore finds that competition, including competitive pricing and weekly specials, is a consumer requirement.

Requirement for a Liquor Store located at the Centre/Premises

222. The Applicant further submits that the Target Area Survey and Intercept Survey indicate a requirement for a liquor store to be located at the Premises.

223. The Commission does not accept that the evidence supports this.

224. From the Market Survey results 7 in 10 residents and over 2 in 5 (42%) of Centre visitors are in support of the proposed BWS. However, a mere indication of support does not establish consumer requirement.

225. Half (51%) of residents and one third of Centre visitors (34%) completely agree that the proposed BWS will better cater for their overall packaged liquor needs. Again, this indicates support, but does not specify the actual consumer requirements being satisfied.

226. 48% of respondents of the Market Surveys state that if it were available to them, they would prefer to purchase packaged liquor at the same time as they do their grocery shopping. However, this question was not specific to the Centre, but to “a shopping centre”. As such this goes to one-stop shopping generally.

227. The Market Survey further asks:

“Would you find it more or less convenient to be able to buy your takeaway liquor while doing your regular shopping if your grocery store had a takeaway liquor section within the store?”

228. With respect to the Applicant this query is insufficiently precise to draw an inference there is a requirement for a packaged liquor store in that Centre.

229. Firstly, the Application is not for a liquor store “*within a grocery store*”, it is for a liquor store adjacent to the grocery store (i.e., contained within the Centre). Secondly, the same only asks if it would be “*more convenient*”. Considering something as “more convenient” does not establish a consumer requirement.

230. The Market Survey does report a response to the query:

“To what extent do you agree or disagree that the three existing liquor stores in your local area, being Cellarbrations Dawsville, Cellarbrations Port Quays Wannanup and First Choice Liquor Falcon collectively meet your overall liquor purchasing needs in terms of being located inside a shopping centre?”

231. However, the Market Survey questions fail to first establish that a premises being located inside a shopping centre is an actual requirement.

232. The Commission concludes that there is insufficient evidence to support an assertion there is a consumer requirement for a packaged liquor outlet to be at this particular Centre.

Variety and Diversity of licences

233. The Applicant correctly notes that historically there were two retail packaged liquor outlets in the Centre and immediate surrounds. The Applicant asserts that the one at the Centre “*was removed from the Centre site to become the First Choice Liquor Market store and (the) one at Cobbler’s Tavern, which was redefined as part of redevelopment of the tavern.*”
234. It is important to note that both of these licences were relocated/redefined, not removed from the locality.
235. In any event the Commission does not consider the historical presence of a liquor premises to be evidence of a current consumer requirement for that manner of premises to be returned.
236. The Applicant also submits that the past actions of the licensing authority has demonstrated that:

“The Licensing Authority has demonstrated, through the granting of more than one retail packaged liquor outlet within shopping centres and shopping precincts across Western Australia, that a variety and diversity of licences is required by consumers and therefore, this is in the proper development of the liquor industry. In particular, that it is appropriate for convenience and large format liquor stores to be within close proximity of each other due to the diversity of consumer needs.”

237. The fact that different licences may be located near to each other in other parts of the State is simply not enough to amount to a consumer requirement that a convenience style store is required in this particular Centre.
238. The Commission finds that the evidence supplied does not support that there is a consumer requirement in this case for convenience and large format store to be located close to one another.

BWS Brand

239. The Applicant asserts that “*There is also a specific requirement for the BWS brand*” in the PIA.
240. With due respect to the Applicant, apart from the fact that a minor amount of Survey respondents:
- a. noted that brand loyalty would be a reason to purchase from the Premises (6% Target Area Survey and 3% Intercept Survey); and
 - b. mentioned the ability to use loyalty cards/rewards programs as appealing to them (in the Target Area Survey 25% ranked it in the top 3 and 5% ranked it as number 1 and in the Intercept Survey 19% ranked it in the top 3 and 6% ranked it as number 1),

the Commission cannot find any compelling evidence that it is particularly a BWS branded store that is a consumer requirement.

241. A further small amount of respondents also ranked as appealing factor “*The convenience of having a BWS store near to where you live*”. However, the Commission considers this question goes more to convenience, rather than necessarily the BWS brand.

242. The Commission does not find that there is a consumer requirement for a BWS branded store at the Premises.

Conclusion on consumer Requirements

243. Given the above the Commission finds that there is a consumer requirement for:

- a. One-stop shopping/convenience; and
- b. competition including competitive prices and weekly specials.

Can Packaged Liquor Requirements be Reasonably Met?

244. In contemplating the second limb of the test in section 36B(4), the Commission must make a finding as to whether the local packaged liquor requirements can be met in the locality.

245. This requires consideration of:

- a. the appropriate locality (as discussed above);
- b. the packaged liquor premises present in the locality; and
- c. whether the “local packaged liquor requirements” can be “reasonably” met at such existing premises

Locality

246. The issue of “locality” is considered above. For the purposes of this Application the Commission has found that the suburbs of Falcon, Wannanup and Dawesville, is the appropriate locality in which to consider the existing packaged liquor outlets.

Packaged Liquor Premises in the Locality

247. The Packaged Liquor outlets in the locality are as follows:

- a. First Choice Liquor Market:
 - i. located 170m from the proposed Premises (including indoor outdoor area);
 - ii. has a floor area of approximately 800m²; and
 - iii. adjoins the Cobblers Tavern.
- b. Cellarbrations Port Bouvard:
 - i. located on Port Quays approximately 2.5km from the Premises;
 - ii. co-located with grocery/delicatessen store with a 130m² area; and
 - iii. has a floor area, including coolroom of approximately 180m²;
- c. Cellarbrations Dawesville:
 - i. located on Dawesville Road approximately 4km south of the Dawesville Channel and 7km south of the Centre;
 - ii. floor area of approximately 195m² including the coolroom;

- iii. located in a small centre with a convenience IGA supermarket of over 700m² plus 5 specialty shops; and
- iv. the Liquor store adjoins the supermarket.

248. In the Liquorland Decision Archer J further contemplated that premises outside of the “locality” could be of relevance and quoted Doyle CJ in *Woolies Liquor Stores Pty Ltd v Seaford Rise Tavern (2000) 76 SASR 290* at [33] as follows:

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

- 249. Archer J expressed the same as a “tentative view” and the Commission believes that some caution must be used in adopting this position entirely.
- 250. *Seaford Rise* is a South Australia case and there are differences in the terminology, application and history of the relevant legislation.
- 251. The Commission further accepts that the “locality” should not be set solely by reference to the nearest packaged liquor store as this defeats the purpose of section 36B to consider what packaged liquor services already exist (or do not exist) in the “locality”.
- 252. In any event, in this Application the consideration of other premises outside the locality would appear largely unhelpful.

Whether Consumer requirements “cannot reasonably be met”

253. In the Liquorland Decision Archer J found that the phrase in section 34B “cannot reasonable be met” properly meant “cannot sensibly or rationally be met” (at [134]).

Consumer Requirement for One Stop Shopping/Convenience

- 254. The Consumer requirement for “one stop” shopping is largely related to convenience of shoppers.
- 255. Although the First Choice liquor store is not located within the Centre, it is accessible over a quiet single lane road (Olive Road) which:
 - a. is separated from the traffic travelling Old Coast Road;
 - b. directly adjoins the carpark of the Centre; and
 - c. is easily accessible by walking from the north entry of the Centre or the car park of the Centre.

256. The Commission considers that:

- a. a walk of 178 steps (PIA at 9.2(d)) from the Centre;
- b. the lack of protection from inclement weather; or
- c. the lack of a “designated” footpath designated crosswalk beyond the car park area,

does not result in a finding that the requirement of “one stop shopping” (in the context contemplate above) “*cannot sensibly or rationally be met*”.

257. The Commission further does not characterise the trip between the Centre and the First Choice to be “*potentially hazardous*” as submitted by the Applicant in the PIA (at 12.1(i)).

258. It is also relevant to note the nature of the relevant retail area may impact whether a consumer requirement can be reasonably met. As noted above the elongated shape of the DAC indicates that it is sensible and rational to expect to meet one stop shopping trip needs over a larger area than a single small size shopping centre.

259. In addition, the Commission also finds that one-stop shopping for groceries can be undertaken at the Cellarbrations Dawesville premises which has a co-located IGA of a large size.

Competition including competitive prices and weekly specials

260. The results of the Market Surveys state that:

“...two thirds of residents agree that the three existing liquor stores in their local area meet their overall liquor purchasing needs in terms of providing greater choice (68%) and competition (67%)”.

261. As such, the Commission is satisfied that consumer requirements as to choice and competition generally are satisfied by the current packaged liquor stores in the locality.

262. The Commission further notes that each of the packaged liquor premises in the locality are national brands with centrally prescribed prices and specials. As such, the consumers in the locality would easily be able to access alternative competitive pricing and weekly specials.

263. The Commission finds that that the consumer requirements as to competitive prices and weekly specials are already being reasonably met in the locality.

Conclusion as to Consumer Requirements

264. Due to the above, the Commission further finds that the Application cannot be granted as the Applicant has not discharged its onus under section 36B(4) of the Act.

Public Interest Test

265. As noted above in this Determination, although a finding that an Applicant has not satisfied the Commission as to the test in section 36B appears to result in a situation where the public interest test does not technically need to be considered, a finding under section 36B does not preclude the Commission from making a Determination on the question of the public interest test under section 38.

266. The two sections deal with separate considerations.
267. The Commission therefore intends to make a determination on the applicability of the public interest test under section 38 in this matter.
268. In summary, whilst the Commission is of the view that the Applicant has not discharged its onus under Section 36B (4), it intends to make a finding in respect of section 38 as well.
269. “Public Interest” is not defined in the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; 45 WAR 446, the court found that in assessing whether an application is in the public interest the licensing authority is bound to take into account the relevant factual matters and the primary and secondary objects of the Act.
270. Although the Commission has an “absolute discretion” to grant or refuse any application under the Act [section 33(1)] this discretion is not an arbitrary or unlimited power and must be exercised consistently with the objects and other provisions of the Act (*Woolworths v Director of Liquor Licensing* (2013) 45 WAR 446 [48]).
271. The primary and secondary objects of the Act are as follows:
- a. Primary objects:
 - i. to regulate the sale, supply and consumption of liquor; and
 - ii. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii. to cater to 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.
 - b. Secondary objects:
 - i. to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - ii. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - iii. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of [the] Act; and
 - iv. to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.
 - c. Each primary object is considered equal and in the event of any inconsistency between the primary and secondary objects, the primary objects take precedence.

- d. There are considerations in section 38(4) which the licensing authority may also take into account in determining whether granting an application is in the public interest. These factors are:
- i. the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor;
 - ii. the impact on the amenity, quiet or good order of the locality in which the licensed premises, or proposed licensed premises are to be situated;
 - iii. 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;
 - iv. any effect the granting of the application might have in relation to tourism, or community or cultural matters; and
 - v. any other prescribed matter.

272. In considering public interest, conflict or tension may arise between the primary object of minimising harm or ill-health and other objects including those on section 5(1)(c). It is a matter for the Commission to decide what weight to give to competing considerations.

273. The Applicant has, as stated, asserted that the proposal:

- a. will cater to a requirement for liquor and related services within the locality;
- b. will result in benefits to the locality and;
- c. will not result in a significant increase in the level of alcohol-related harm or ill-health in the locality.

274. The Commission has considered each of these assertions, having taken into account all the submissions, both oral and written of the parties.

Catering for Requirements of Consumers

275. The Applicant asserts that the evidence establishes there will be many beneficial impacts on the locality and Main Trading Area including:

- a. a significant consumer requirement for one-stop shopping in the locality and surrounds;
- b. a large and diverse range to those consumers;
- c. services and facilities of the Premises, such as online purchasing, gift card facilities, and delivery; and
- d. a modern appealing well-run premises.

276. In this context the Commission refers to its findings in paragraphs 213 and 216 of this Determination, namely that the evidence supports a “one-stop shopping” consumer requirement that relates mainly to convenience and that the Premises would meet such additional requirement.

277. The Commission accepts that the other issues noted, although they may not amount to being a consumer requirement, would also provide a minor benefit to the locality.

Development of the Liquor Industry

278. The Applicant also asserts that the Application is consistent with the proper development of the liquor industry in the Main Trading Area (being a larger area than the locality) particularly when taking into account the DAC and the “*reasonable expectation for a DAC to continue a liquor store connected to a supermarket and its level of amenity that is common throughout DACs in Greater Perth*”.

279. The decision in *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* (LC 06/2017) as to competing liquor stores contributing to the proper development of the liquor industry is noted. However, the Commission must consider the relevant facts.

280. In this case, the Centre is considerably smaller, and services a lesser population and the area is not likely to have any significant residential growth by way of new development.

281. Further, the large First Choice is situated across the car park (being within the relevant locality) and was initially constructed to expressly replace the then existing packaged liquor premises in the Centre.

282. Due to the Commission’s findings as to the proper locality, the Commission does not consider that the existence of the First Choice constitutes a monopoly in the area.

283. Despite the above the Commission finds that it is generally accepted and established by precedent that multiple competing liquor stores in the same locality may be considered to be conducive to the proper development of the liquor industry.

284. The Commission finds that the Applicant has discharged its onus to satisfy the Commission that the Application supports the proper development of the liquor industry in this case.

Harm and Ill-Health

285. The Applicant asserts that:

- a. it is open to the Commission to find that the grant of the Application is unlikely to result in any significant increase in the level of ill-health or harm related to alcohol;
- b. it is open to the Commission to conclude that the level of alcohol-related harm in the Main Trading Area is not unusual or ongoing; and
- c. there is not a significant risk in terms of crime or antisocial behavior at the Centre (being the Miami Plaza Shopping Centre).

286. The Intervener asserts that:

- a. as the proposed store will be the third packaged liquor premises in a 250 metre radius of the Centre, an increase in physical availability of packaged liquor may increase the risk of harm to vulnerable members of the community resulting from greater consumption of alcohol in the locality;

- b. a large number of community members will have the opportunity to purchase alcohol when they may not otherwise have done so especially because of its close relationship with the supermarket; and
- c. the CHO's report indicated that the suburb of Falcon where the Centre is located has a higher degree of disadvantaged persons, unemployment and low income (the latter also relevant to the large number of retirees in Falcon). These groups are considered "at risk".

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

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

Carnegies Test – Existing Level of Harm and Ill-Health

288. The CHO provided evidence of:

- a. 750 treatment episodes for people residing in the locality with 310 (40.8%) of those being for people residing in Falcon (CHO Report – 3/11/20).
- b. The self-reporting of alcohol consumption at risk levels for long and short term harm in the Peel region.

289. This indicates there is a certain level of alcohol-related harm in existence in the locality.

290. There is no evidence before the Commission about levels of crime in the locality being significantly higher than elsewhere in the State.

291. Further there is no significant population of "at risk" persons in the locality with the lower employment figures being indicative of the higher level of retired persons in the area.

292. The relative SEIFA Rankings do not indicate that there is any socio-economic disadvantage in the area that would indicate the existing levels of harm and ill-health are likely to be at higher than usual or concerning levels.

Carnegies Test – Likely Degree of Harm and Ill-health

293. The Intervener and Objectors refer to the high availability of low-cost alcohol if the Application were granted.

294. Reference is made to material that concludes that low priced alcohol increases alcohol consumption and that there is a correlation between susceptibility to increased alcohol consumption and lower socioeconomic factors.
295. The real issue in this Application is whether the availability of low cost alcohol will result in an unacceptable increase in harm and ill-health to those in the locality.
296. It should be noted that there are already packaged outlets in the locality. There is already low cost alcohol for persons who reside in or visit the locality as things currently stand.
297. The submissions of the Intervener and Objectors are that if there is more alcohol for sale at the lower cost, then there must be an increase in harm and ill-health arising from this. Further, at-risk persons are highly vulnerable and susceptible to alcohol-related harm and are acutely affected by fluctuations in alcohol prices.
298. It is always difficult to predict what may occur if a particular application is granted. It involves a prediction as to the likelihood that something may occur.
299. In respect to the harm occurring on or immediately around the Premises, the Commission finds that there may be a minor increase in harm and ill-health if the Application is granted due to the increased quantities of relatively cheap liquor in the area.
300. However, in the absence of further evidence, the Commission is not satisfied that opportunistic access by way of the additional liquor outlet the subject of this Application would add any further significant degree of harm and ill-health to a significant level in the locality.
301. Although the Commission has found that alcohol-related harm and ill-health exist within the locality, and that the degree of harm may increase due to the granting of the Application, the Commission considers that it would not be at a level as to make it inappropriate to grant the Application. While the Commission accepts that people with low socioeconomic status are most vulnerable or at risk to alcohol-related harm or ill-health, there is no significantly higher concentration of vulnerable or 'at-risk' parties compared to the State generally.
302. The Commission accepts that this is a case in which the existing harm is no greater than that which is commonly accepted in the community, and where a small risk of an increase in harm is within acceptable bounds.

Weighing of the Factors

303. To complete the Carnegies analysis, the Commission must weigh the likely degree of harm as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest.
304. In weighing the likelihood of alcohol-related harm and ill-health against the benefits to the locality of the grant of the Application, the Commission finds that such likelihood is not so unacceptable that it outweighs the benefits of granting the Application.

Impact on Amenity of the Area

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

Objections

306. Two Objections were provided:

- a. Mrs. Raelyn Punch, Chair of the Leadership Team South Mandurah Uniting Church (SMVC) and Mr. David Williams, Secretary of the Leadership Team of SMVC (First Objector); and
- b. Mr. Adam Riley (Second Objector).

307. The First Objector asserts that:

- a. the Application would not be in the public interest - section 74(1)(a); and
- b. it would cause harm or ill-health to people - section 74(1)(b).

308. By letter dated 20 September 2020, the First Objector states that:

- a. there are *“already too many liquor outlets in our community and there is no valid reason to increase that number”*;
- b. as the proposed liquor store will be owned by a large corporate entity namely Woolworths, there will be no local benefit to the community by way of profits being retained in the community;
- c. there will be increased competition between liquor outlets which will result in cheaper prices and increased consumption especially among youth;
- d. market domination by large corporate entities results in less independent local outlets; and
- e. there are negative consequences resulting from excessive alcohol consumption being domestic violence, car accidents, sports injuries, adverse health events, petty crime, homelessness and financial liability.

309. The Second Objector (Adam Riley) by Notice of Objection dated 23 September 2020 and attached letter of the same date referred to the following grounds:

- a. that Falcon has high rates of domestic violence and other crimes which are increasing in the area and which are directly related to alcohol and;
- b. that the grant of the Application would result in a lessening of the quiet and good order of the community and the proposed liquor outlet is *“just not needed”*.

310. On 8 January 2021 the Second Objector emailed the Director in response to the Applicant’s closing submissions and also emailed the Director and parties attaching a number of copies of a newspaper article from the *“Mandurah Mail”* dated 24 December 2020.

311. The Applicant’s closing submissions of 8 January 2021 responded to the Second Objector’s further material asserting:

- a. the items were lodged after the closing date for submissions and as such constituted new evidence which cannot be considered by the authorities;
- b. his claims are unsubstantiated by evidence and speculative; and
- c. his claims are coloured as the Applicant says Mr Riley is a licensee of two existing liquor retail outlets in the Mandurah area.

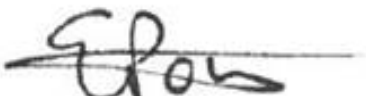
312. The Commission thanks the Objectors for their submissions and Mrs. Punch for her attendance at the hearing and submissions about the local geography. It is acknowledged that there is harm and ill-health existing in the locality and that there may be a possible increase in the degree of harm that may occur due to the granting of the Application.
313. As set out in previous paragraphs, the Commission has undertaken an extensive assessment of the merits of the Application by reference to all the evidence. The submissions of the Objectors have been considered.
314. The Objectors assertions however, whilst valid, have not been substantiated by probative evidence to establish their validity.
315. On balance, the Commission finds that none of the grounds of objection have been made out by the Objectors and as such, the burden of establishing the validity of the objections has not been discharged in accordance with the requirements of section 73(10) of the Act.

Conclusion on Public Interest

316. The Commission has found that the Applicant has discharged its onus and that the grant of the Application is in the public interest.

Conclusion

317. The Commission finds that the Applicant has not discharged its onus to satisfy the Commission that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor premises in the locality in which the Premises is proposed to be situated.
318. The Commission had found that the Applicant has satisfied the public interest test.
319. The Application is dismissed.



**EMMA PWER
DEPUTY CHAIRPERSON**



**PAMELA HASS
MEMBER**



**ELANOR ROWE
MEMBER**