

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: CLEARWATER RETAIL PTY LTD

OTHER PARTIES: JACKWARD PTY LTD (OBJECTOR)
WARDJACK PTY LTD (OBJECTOR)
KAPINKOFF NOMINEES PTY LTD (OBJECTOR)
COMMISSIONER OF POLICE (INTERVENOR)

PREMISES: CELLARBRATIONS WOODVALE

PREMISES ADDRESS: WOODVALE SHOPPING CENTRE, SHOP 2, 153 TRAPPERS DRIVE, WOODVALE

APPLICATION ID: A986794668

MATTER: APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF REASONS: 3 DECEMBER 2020

Introduction

- 1 On 12 October 2020, I issued a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising the parties that after consideration of the evidence and submissions, I had determined that the applicant had failed to discharge its onus under s 36B(4) of the Act and therefore the application was refused.
- 2 Pursuant to s 18AA(3), the applicant and the objectors have requested written reasons for the decision. These are those reasons.

Background

- 3 Clearwater Retail Pty Ltd (the applicant) lodged an application for the conditional grant of a liquor store licence for premises to be located in the Woodvale Shopping Centre, 153 Trappers Drive, Woodvale. The premises would be known as Cellarbrations Woodvale.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. Ryan & Durey Solicitors lodged an objection to the grant of the application on behalf of Jackward Pty Ltd, the licensee of the Woodvale Tavern & Reception Centre; Wardjack Pty Ltd, the licensee of the Kingsley Tavern; and Kapinkoff Nominees Pty Ltd, the lessor of the Woodvale Tavern & Reception Centre (the objectors). The Commissioner of Police (the Commissioner) lodged a notice of intervention.
- 5 The application was determined on the written submissions of the parties, as permitted under ss 13 and 16 of the Act. In addition, these written reasons have been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

Brief overview of the application

- 6 According to the applicant, the Woodvale SUPA IGA supermarket was recently sold and is now under the new management of the applicant. It is proposed to improve the supermarket offering and establish a liquor store next to the IGA.
- 7 The proposed liquor store will be approximately 182m² in size and operate as an independent store, with a stock range that will be purposefully designed to cater for the particular requirements of the people living in, working in and passing through Woodvale and neighbouring suburbs. The applicant submitted that a wide range of beer, wine and spirits will be available, together with ancillary services including one-stop shopping convenience, product information, in-store tastings and food matching information. It is intended that the wine range will be a feature of the business, and in particular Western Australian wines and their producers. Some products will be unique to the applicant or not otherwise readily available in the locality.
- 8 In respect of the proposed liquor offering at the liquor store, the applicant provided the following information in its Public Interest Assessment (PIA):
- a wide selection of white, red, fortified and sparkling wines (from around Australia and overseas), with a strong focus on Western Australian wines. The wine range will also include many premium wines;
 - a wide selection of light, mid and full-strength beers from Western Australia and also other parts of Australia and overseas, including mainstream, boutique and craft beer ranges, with a strong focus on craft beer including small batch products;
 - a wide selection of white and dark spirits, including a variety of gin products produced in Western Australia and elsewhere in Australia;
 - a good selection of liqueurs; and
 - a selection of pre-mix, ready to drink options.
- 9 The applicant advised that the liquor selection will roughly be as follows:
- beer – 165 lines: full-strength 100; imported 35; light/mid strength 30;
 - cider – 40 lines;
 - premix – 110 lines;
 - spirits – 220 lines; and
 - wine – 590 lines: red 280; white 160; sparkling 75; fortified 40; cask 35.

The applicant's submissions in respect of s 36B(4)

- 10 It was submitted by the applicant that the following key questions arise out of s 36B(4) of the Act:
- what are the “local packaged liquor requirements”?
 - what constitutes “reasonably” in terms of whether those “requirements cannot reasonably be met by existing packaged liquor premises”?

¹ S 16(7) of the Act.

- what evidence is needed to satisfy the licensing authority in order to answer those two previous questions in the affirmative?
- 11 Further, the applicant submitted that there is a similarity between s 36B(4) and the old, repealed s 38(2b)(a) of the preceding Liquor Licensing Act 1988 and therefore some of the historical case law is relevant. According to the applicant, in relation to s 38(2b)(a), the licensing authority determined that one-stop shopping was a legitimate basis for the grant of a liquor store licence because it was “....a reasonable requirement based on convenience for members of the public to purchase their liquor at the same time and the same place they do their shopping.”²
- 12 The applicant noted that the old s 38(2b)(a) included a reference to “related services” whereas the new s 36B(4) does not, however, the applicant submitted that “related services” as requirements of consumers, have since been included in the overarching s 5 primary objects provisions and the repeal of s 38(2b)(a) saw “related services” shifted, and even elevated, in the Act to s 5(1)(c) which came into effect in 2006. In accordance with s 5(2) of the Act, the licensing authority must have regard to s 5(1)(c) when considering the matter under s 36B(4).
- 13 On this basis, and given some of the case law around the repealed s 38(2b)(a), the applicant submitted that its evidence establishes that there are “local packaged liquor requirements” which are not being met by existing premises in the locality:
- the applicant’s proposed liquor range, including mainly products not readily available in the locality;
 - the related services including one-stop shopping and a wide range of non-liquor items including tastings, food and liquor matching, product information and other features; and
 - the convenience of the location at an established shopping centre with easy access to the parking and liquor store, in a suburb that currently offers no one-stop shopping.
- 14 The applicant submitted that the location of the liquor services together with groceries and other household necessities in terms of physical distance and ease of access to them are primary considerations in determining the weight to be afforded to the one-stop shopping argument. In regard to the current application, it was submitted that there is quite some distance from any other one-stop shopping facility such that customers of the Woodvale SUPA IGA cannot currently access one-stop shopping convenience at either the Woodvale Shopping Centre or nearby.
- 15 Consequently, the applicant submitted that in the present case, members of the public cannot access, or reasonably access, some liquor products and services at the Woodvale Shopping Centre or elsewhere in the locality and therefore, those people experience even greater unreasonableness and substantial difficulty or substantial inconvenience because it is currently a complete physical impossibility for them to do so.

² *Charlie Carter Pty Ltd v Streeter and Male* (1991) 4 WAR 1

- 16 The applicant noted the existing packaged liquor outlets in the locality and contends that its proposed premises will be very different to the existing outlets and the consumer evidence confirms that the existing outlets are inadequate.
- 17 The applicant stated that s 36B is intended to manage the number of packaged liquor outlets, which must be in accordance with s 5 and not restrict the number of outlets to the point of there being no or only very rare grants. Further, the applicant submitted that s 36B is intended to fulfil this management purpose where enough outlets already exist within a locality and in the present case, the evidence is that the existing outlets are insufficient.

The objectors' submissions in respect of s 36B(4)

- 18 It was submitted by the objectors that currently there are six liquor stores and three taverns in the locality surrounding the applicant's proposed liquor store, together with further packaged liquor outlets in the fringe of the locality. Consequently, it was submitted that the grant of the application would constitute an unnecessary duplication or proliferation of liquor services that already exist in the surrounding area.
- 19 The objectors noted that the onus falls upon the applicant under s 36B(4) to demonstrate that the existing packaged liquor outlets in the locality cannot reasonably meet the local packaged liquor requirements. It was submitted that the applicant had failed to demonstrate how the proposed liquor store will be any different to the existing packaged liquor outlets, including the Thirsty Camel outlet that is located within the same precinct as the proposed premises.
- 20 In respect of the one-stop shopping claims made by the applicant, the objectors submitted that:
- one-stop shopping already exists at the Woodvale Shopping Centre with the co-location of the IGA supermarket and the Thirsty Camel bottle shop at the Woodvale Tavern & Reception Centre; and
 - the Woodvale Shopping Centre is a small shopping village and not the main shopping centre in Woodvale, which is really the Woodvale Boulevard Shopping Centre located 2.5 kilometres from the proposed liquor store. The Woodvale Boulevard Shopping Centre has a large Woolworths supermarket and a Liquorland, which provides one-stop shopping convenience.
- 21 The objectors submitted that convenience, one-stop shopping and other services such as tastings and educational classes are not relevant to s 36B(4) and consequently, the applicant has focused on matters that are irrelevant.

The Commissioner's submissions in respect of s 36B(4)

- 22 The Commissioner submitted that the "test" that should be applied and considered in respect of s 36B(4) is:
- make findings as to what the local packaged liquor requirements are (e.g. brands and category – beer/wine/spirits) and hours of access to liquor;

- make findings as to what packaged liquor services are being provided by the existing packaged liquor premises in the locality; and
- determine whether the local packaged liquor requirements can reasonably be obtained from the existing stores (and if not, why not).

- 23 According to the Commissioner, the above approach reflects Government's desire to prevent the proliferation of packaged liquor outlets across the State.
- 24 In assessing the applicant's evidence, the Commissioner submitted that the grant of the application would only introduce a minor level of convenience to the applicant's customers and the vast majority of consumers can find the products and services they seek at the existing packaged liquor outlets in the locality.

Determination

- 25 The determination of this application turned on the interpretation of s 36B(4) of the Act. Consequently, it is appropriate to consider the statutory framework and its history, Parliament's intent and, what in my view, is the proper interpretation of the relevant provision.
- 26 Section 38 of the Act was repealed in 2007 and new provisions were inserted. The new provisions introduced the public interest test³ and provided that an applicant who makes an application to which the section applies must satisfy the licensing authority that the grant of the application is in the public interest. The public interest test replaced what was colloquially referred to as the "needs test" contained in the repealed provisions of section 38. The old "needs test" included a restraint on the granting of liquor store licences.⁴
- 27 It was envisaged that the introduction of the public interest test in the 2007 amendments to s 38 of the Act would provide a mechanism to control the proliferation of packaged liquor outlets and outlet density⁵, however this did not eventuate. Consequently, the introduction of s 36B into the Act was Parliament's response to decisions of the licensing authority and the Supreme Court relating to the grant of new packaged liquor licences. The Government has sought to create a direct restraint on the grant of new liquor licences authoring the sale of packaged liquor and to achieve this policy objective, s 36B was inserted into the Act.
- 28 Section 36B(4) of the Act states:

"The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot be reasonably met by existing packaged liquor premises in the locality in which the proposed licensed premises are, or are to be, situated."

³ See s 38(2)

⁴ Section 38(2b) of the repealed provisions.

⁵ refer *Parliamentary Debates, WA Parliament, vol 409, p 6342*

29 “Local packaged liquor requirements” is defined in s 36B(1) to mean *the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*. By virtue of s 36B(2), subsection (4) applies to an application for:

- (a) a hotel licence without restrictions;
- (b) a tavern licence;
- (c) a liquor store licence;
- (d) a special facility licence of a prescribed type.

30 Section 36B was inserted into the Act by s 18 of the *Liquor Control Amendment Act 2018 (WA)*. The related Explanatory Memorandum for the Bill relevantly provides:

As a strategy to minimise the adverse impact that packaged liquor outlets can have on the community, the Bill inserts new section 36B to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality. This will be complemented by additional amendments relating to large packaged liquor outlets being established in close proximity to an existing large packaged liquor outlet. (emphasis added.)

31 In the Second Reading Speech, the Minister for Racing and Gaming said:⁶

*... to prevent the further **proliferation of small and medium** packaged liquor outlets across the state, the act will be amended so that the licensing authority must not grant an application unless it is satisfied that existing premises in the locality cannot reasonably meet the requirements for packaged liquor. (emphasis added)*

32 While “local packaged liquor requirements” is defined in s 36B(1), the issue arises as to what does the word “requirements” in s 36B(4) mean.

33 The applicant submitted that given the similarity between s 36B(4) and the old, repealed s 38(2b)(a) of the Act, the approach to the meaning of the word “requirements” in s 36B(4) should be the same as the historical approach under the repealed s 38(2b)(a), and therefore one-stop shopping and convenience for members of the public are relevant considerations to the matters to be determined under s 36B(4).

34 I do not agree with that submission.

35 In my view, matters of convenience, one-stop shopping, and shopping preferences fall within the scope of s 38(2) and whether the grant of the application is in the public interest; whereas section 36B(4) is directed towards the requirement of consumers for packaged liquor itself and whether existing packaged liquor outlets in the locality can reasonably meet that requirement.

⁶ See Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018 p324-325

- 36 When assessing whether the grant of an application is in the public interest, the factual matters which the licensing authority is bound to take into account are those relevant to the objects of the Act, as set out in s 5.
- 37 One of the primary objects of the Act is to cater to the requirements of consumers for liquor and related services having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.⁷ In considering whether the grant of an application is in the public interest, the Supreme Court has held that one-stop shopping, shopper preferences and convenience are relevant matters under object 5(1)(c).⁸
- 38 Consequently, in my view, the word “requirement” in s 36B(4) must have a narrower construction than what has been applied to the word “requirement” in object 5(1)(c). I arrive at this conclusion for the following reasons.
- 39 First, the plain text in s 36B when considered in the context of the Act as a whole supports the narrow construction, particularly when compared to the text in object 5(1)(c). As I have noted, the Supreme Court has held that for the purposes of object 5(1)(c), and therefore the public interest test under s 38(2), one-stop shopping, convenience and shopping habits etc are relevant considerations, however, the definition of “local packaged liquor requirements” in s 36B is expressed differently to s 5(1)(c) in an important respect. The definition of “local packaged liquor requirements” in s 36B only refers to the “requirement of consumers for packaged liquor” unlike the broader requirement for “liquor and related services, having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in s 5(1)(c).
- 40 As noted by Bank-Smith J in ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** [2017] WASC 88, s 5(1)(c) requires regard be directed to the proper development of the relevant industries in considering the issue of catering to the requirements of consumers, and catering for consumer requirements is not to be considered in isolation. Adopting a narrow construction of s 36B gives some effect to the deliberate difference in the drafting provisions. This also reinforces the notion that the tests under s 36B(4) and s 38(2) are two separate and distinct tests, albeit there may be some evidentiary overlap. Parliament has specifically chosen to insert a new section into the Act, and not amend s 38. If the test under s 36B(4) and s 38(2) were essentially the same test, s 36B(4) would be otiose and not achieve its statutory purpose.
- 41 Secondly, such an approach is consistent with the clear policy objective of the provision, which is to prevent the proliferation of packaged liquor outlets, including small and medium size outlets, and enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality.⁹
- 42 In ***SZTAL v Minister for Immigration and Border Protection*** it was stated:¹⁰

⁷ Object 5(1)(c)

⁸ ***Woolworths Ltd v Director of Liquor Licensing*** [2013] WASCA 227

⁹ See the Explanatory Memorandum and Second Reading Speech referenced at [29] and [30]

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose.....Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

- 43 The Court of Appeal in **Mohammadi v Bethune**¹¹, having referenced **SZTAL**, observed that:

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.

- 44 A construction that promotes the purpose or object of the law is to be preferred to a construction that does not promote that purpose or object.¹² As noted recently by Gageler J in **Work Health Authority v Outback Ballooning Pty Ltd**:¹³

“one of the surest indexes of a mature and developed jurisprudence is to remember that statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. The responsibility of a court in performing its constitutionally mandated function of authoritatively attributing meaning to a legislated textis correspondingly to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.”

“.....the responsibility of the court, in making a constructional choice, is to adopt an authoritative construction of legislated text which accords with the imputed intention of the enacting legislature.”

- 45 Extrinsic materials can be considered to confirm the ordinary meaning conveyed by the test of the provision, or to determine the meaning of a provision where the provision is ambiguous or obscure, or where the ordinary meaning gives rise to a result that is manifestly absurd or unreasonable. The extrinsic materials to which regard may be had include second reading speeches in the Legislative Council and Legislative Assembly.¹⁴
- 46 Therefore, in order to achieve this statutory purpose, a narrow construction of the word “requirements” is necessary, otherwise, adopting a broader construction would allow

¹⁰ **SZTAL v Minister for Immigration and Boarder Protection** [2017] HCA 34

¹¹ **Mohammadi v Bethune** [2018] WASCA 98

¹² **Interpretation Act 1884** (WA)

¹³ **Work Health Authority v Outback Ballooning Pty Ltd** [2019] HCA 2

¹⁴ **Interpretation Act 1884** (WA)

applicants to mould their application to cater to the subjectiveness of convenience and shopping habits and thereby undermine the restriction in s 36B(4), when the intention of the proposed premises is to merely sell packaged liquor which is readily available within the locality.

- 47 Thirdly, the narrow construction is consistent with the balance of s 36B, namely s 36B(3).
- 48 Section 36B(3) provides a total prohibition on licences being granted for packaged liquor outlets which exceed a prescribed size within a prescribed distance of an existing outlet which is greater than the prescribed size. It is plain that this provision is concerned simply with liquor itself.
- 49 That is, there is no exception to the application of s 36B(3) even if an applicant can demonstrate that a new or different service, which is required by consumers, is to be offered which is not met by existing outlets in the locality. For example, even if the existing outlets do not offer one-stop shopping (as described by Buss J in ***Woolworths Ltd v Director of Liquor Licensing*** (2013) 45 WAR) and the proposed liquor store does offer one-stop shopping, there still is no capacity for the new licence to be granted. This clearly demonstrates that s 36B(3) is directed at merely liquor itself – by limiting the proliferation of outlets which sell packaged liquor, regardless of the broader services or experiences provided which might serve a consumer requirement in the broad sense.
- 50 There is nothing in the text to indicate that sub-ss 36B(4) and 36B(3) are directed at different ends. To the contrary, the second reading speech demonstrates that sub-ss 36B(4) and 36B(3) are directed to the same end – preventing the proliferation of packaged liquor outlets.
- 51 The way to give effect to this purpose (and limit the supply of liquor into the community) is to adopt a narrow construction which focusses on whether there is a requirement for liquor itself and not on particular nuances of one-stop shopping and convenience.
- 52 Fourthly, the adoption of a narrow construction is supported by the approach of Anderson J in ***Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd***¹⁵ (Austie) and King CJ in ***Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)***¹⁶ (Lincoln Bottle Shop).
- 53 In ***Austie***, Anderson J considered the meaning of the phrase “*requirements of the public for liquor and related services*” which was couched in the same terms in both s 38(1) and s 38(2b) of the repealed provisions of s 38. Section 38(2b) was inserted into the then Act to create a specific restraint on the grant of new liquor store licences. Anderson J held that in order to give effect to parliament’s intent, a narrower interpretation of the phrase “*requirements of the public for liquor and related services*” should be adopted for the purposes of s 38(2b) than for the same words in s 38(1). In section 38(2b) “*requirements of the public for liquor and related services*” meant the requirements of the public for liquor itself, whereas the same phrase in s 38(1) was concerned with the requirement of the

¹⁵ ***Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd*** (1999) 20 WAR 405

¹⁶ ***Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)*** (1981) 28 SASR 458

public as to matters of taste, convenience, shopping habits, shopper preferences and the like.

- 54 King CJ in ***Lincoln Bottle Shop*** took the same approach to similar provisions in the South Australian legislation.
- 55 Fifthly, the narrow construction was accepted by the Liquor Commission in the recent *ex tempore* decision in proceedings L30/01/506 by rejecting the applicant's argument that "local packaged liquor requirements" encompasses the concept of the convenience of one-stop shopping in the sense of being able to purchase Korean groceries at the same time as purchasing Korean liquor.
- 56 Consequently, in my view, in order to give intent to the obvious legislative policy of restricting the grant of certain licences in order to prevent the proliferation of packaged liquor outlets in the community, s 36B(4) relates to the requirements of consumers for packaged liquor itself, but does not include questions of convenience, one-stop shopping and shopper preferences which are linked to object 5(1)(c) and form part of the public interest considerations under s 38(2).
- 57 In making a value judgement as to whether the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality, consideration of issues such as the existing availability of packaged liquor in the locality, distribution of premises in the locality and ease of access to the existing premises are relevant factors. This is not an exhaustive list as ultimately the value judgement will be guided by the facts and circumstances of each case and the evidence presented by the applicant when discharging its onus under s 36B(4).
- 58 In this case, the evidence indicates that there are presently nine packaged liquor outlets (six liquor stores and three taverns) within a three-kilometre radius of the applicant's proposed premises. This includes a large destination outlet (Dan Murphy's Joondalup) which provides approximately 3,500 product lines and an outlet adjoining the car park of the Woodvale Shopping Centre, approximately 100 metres from the applicant's premises. In addition, there are multiple other packaged liquor outlets just outside a three kilometre radius of the applicant's premises which will also provide services to members of the public in the suburbs surrounding the applicant's premises.
- 59 In its PIA, the applicant submitted that it will provide a wide range of wine products together with a wide selection of light, mid and full-strength beers from Western Australia and also other parts of Australia and overseas, including mainstream, boutique and craft beer ranges. This will consist of 165 lines of beer; 40 lines of cider; 110 lines of premix; 220 lines of spirits; and 590 lines of wine.
- 60 Also, in its legal submissions, the applicant stated that the following "local packaged liquor requirements" are not being met by existing premises:
- Cellarbrations Woodvale's proposed liquor range, including mainly products not currently readily available in the locality;

- Cellarbrations Woodvale's related services including one-stop shopping and a wide range of non-liquor items including tastings, food and liquor matching, product information and other features; and
- the convenience of the location at an established shopping centre with easy access to and parking around the liquor store, in a suburb that currently offers no one-stop shopping.

61 In later submissions, the applicant's position shifted somewhat, and it submitted that "there are local packaged liquor requirements" for the following which are not being met by the existing premises:

- a wide range of specific liquor products, many of which will be exclusive to Cellarbrations Woodvale;
- a stock range that is tailor made to suit the local community requirements specifically;
- easy convenient walk-in access;
- walk-in browse shop with available knowledgeable staff;
- ability to make product requests/order particular items in; and
- educational sessions.

62 The applicant also lodged the "Cellarbrations Woodvale Unique Product List"¹⁷, which consisted of 10 beers, 28 spirits, 3 liqueurs, 10 sparkling wines and 63 wines. In addition, the applicant proposes to stock products from suppliers whose products are not available, or not readily available in the locality, such as Grape and Grain, Fermoy Estate, in Cantina and Sittella.¹⁸ This should be considered in the context of the total liquor offering referenced at [58].

63 Although the applicant proposes to sell some products which may not be available, or readily available, in the locality, it is apparent that it will also sell many mainstream liquor products that are most likely readily available from existing outlets in the locality. It is not uncommon for retailers to create a point of difference in the marketplace and offer some products (i.e. from different wineries and craft breweries) which its competitors may not provide or for larger retailers or buying groups to provide "home brand" or "private label" liquor products. Notwithstanding, most outlets will also provide a large range of popular or standard mainstream liquor products, simply because that is what the general public desire.

64 The applicant lodged various survey sheets and a bundle of questionnaires, together with declarations from individuals specifically referring to their packaged liquor requirements and letters of support. However, in my view, this material does little to address the matters to which s 36B(4) are directed in any meaningful way. Although the public questionnaire asks respondents whether their takeaway liquor requirements are being met by existing outlets in the locality, the responses are of little utility and the follow up question, and the information elicited, simply does not advance the applicant's case. The declarations are

¹⁷ LAW 2

¹⁸ LAW 5 - 8

also of little utility. Overall, little weight can be placed on this evidence in addressing s 36B(4) of the Act.

- 65 There will always be individuals who may have a desire for a specific product which is not readily available in a locality, however, whether this desire is objectively reasonable in the assessment of the local packaged liquor requirements and whether the existing packaged liquor outlets can reasonably meet those requirements is ultimately a value judgement to be made with regard to the evidence as a whole and the scheme of the Act.
- 66 In my view, the local community would appear to be well serviced with a range of packaged liquor outlets consisting of both drive-through and walk-in browse facilities. This includes a large destination outlet. Also, I note that Cellarbrations Pearsall, which is owned and operated by a related entity to the applicant, already provides a similar style of operation to what the applicant proposes.¹⁹ These existing packaged liquor outlets provide a wide variety of liquor products comprising of beer (including craft beer), wine and spirits from Western Australia, Australia and countries around the world.
- 67 This application would appear to be essentially predicated on providing one-stop shopping convenience to customers of the applicant's SUPA IGA. According to the applicant, the claim that none of the existing packaged liquor outlets provide this service is a critical factor in its application.²⁰
- 68 However, in respect of one-stop shopping, ancillary services and matters of convenience, for the reasons stated above, I am of the view that these are issues for consideration under the public interest test contained in s 38(2) of the Act, not for consideration under s 36B(4). Nonetheless, I would observe that, according to the objectors, one-stop shopping already exists in the locality at the Woodvale Boulevard Shopping Centre. Also, there is presently a packaged liquor outlet (the Woodvale Tavern) at the shopping centre in which the applicant proposes to locate its liquor store which can reasonably cater to the one-stop shopping requirements of customers of the SUPER IGA store. In **Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd**²¹, it was held that in view of an existing tavern adjoining the carpark to the shopping centre, the tavern was effectively part of the shopping centre and any subjective requirement on the part of the relevant section of the public for a liquor store to be located within or adjacent to the supermarket was not objectively reasonable. That application was subsequently refused.
- 69 The Act is essentially one of regulation, largely directed towards protecting the public.²² This was reinforced more recently by the Court of Appeal where it was stated by Buss J that "...it is apparent from the primary and secondary objects specified in s 5, in the context of the statute as a whole, and consistently with the long title, that the Act was enacted to *regulate* the sale, supply and consumption of liquor in Western Australia. The

¹⁹ PIA at 7.16

²⁰ PIA at 7.13

²¹ **Woolworths (WA) Ltd v Liquorland (Australia) Pty Ltd** unreported, FCt SCt of WA, 1994

²² **Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd** [2019] WASC 114

Act was not enacted to *promote* the sale, supply and consumption of liquor.”²³ Buss J went on to observe that:

- primary object 5(1)(a) is to regulate generally the way liquor is sold, supplied and consumed;
- primary object 5(1)(b) is to regulate specifically the sale, supply and consumption of liquor so as to minimise harm or ill-health caused to people or any group of people due to the use of liquor; and
- primary object 5(1)(c) is to regulate specifically the sale, supply and consumption of liquor so as to cater for the requirements of consumers for liquor and related services with regard to the proper development of the liquor, tourism and other hospitality industries. Object 5(1)(c) is formulated by reference to a stipulated nexus between the requirements of consumers for liquor and related services, on the one hand, and the proper development of the liquor, tourism and other hospitality industries, on the other.

70 In balancing these objects, Parliament has determined that there needs to be a restriction or limitation on the grant of licences for packaged liquor outlets. Most liquor sold in Western Australia is packaged liquor which is consumed in unregulated environments. Section 36B(4) reflects Parliament’s concerns about the negative impact that packaged liquor can have on the community and could be considered a pre-emptive harm minimisation strategy, consistent with the regulatory nature of the objects of the Act. This is to be achieved by creating a restraint on the grant of new packaged liquor outlets where existing packaged liquor outlets can already cater to the local packaged liquor requirements. Further, s 36B(4) recognises that the proliferation of packaged liquor outlets is contrary to the proper development of the liquor industry.

71 Section 36B(4) places the evidentiary burden on the applicant. Consequently, when I considered the evidence presented in this case, I was of the view that the applicant had failed to adduce sufficient probative evidence to satisfy me that the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the proposed liquor store is to be situated. As stated in **Charlie Carter**²⁴, “reasonable” means no more than sensible, not irrational or absurd.

72 The test in s 36B(4) is mandatory. Having concluded that the applicant failed to discharge its onus under s 36B(4), the application must be refused.

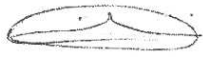
73 It was therefore not necessary for me to consider whether the applicant had demonstrated that the grant of the application was in the public interest, in accordance with s 38(2).

74 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.

²³ *Australian Leisure and hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157

²⁴ *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd* (1991) 4 WAR 1

75 This matter has been determined by me under delegation pursuant to s 15 of the Act.

A handwritten signature in black ink, appearing to read 'Peter Minchin', enclosed within a simple, hand-drawn oval border.

Peter Minchin

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING