

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: HIGH SOBRIETY PTY LTD
(REPRESENTED BY RYAN & DUREY SOLICITORS)

PREMISES: COMMUNE WINE STORE

PREMISES ADDRESS: 209 RAILWAY PARADE MAYLANDS

APPLICATION ID: A914869783

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

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 19 MAY 2020

DATE OF REASONS: 23 JUNE 2020

Introduction

- 1 On 19 May 2020, a notice was issued pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising the applicant, High Sobriety Pty Ltd, that after consideration of the evidence and submissions lodged in support of its application, I had determined that it 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 has requested written reasons for the decision. These are those reasons.

Background

- 3 An application was lodged for the conditional grant of a liquor store licence for premises to be located at 209 Railway Parade, Maylands and to be known as the Commune Wine Store.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. There were no objections or interventions to the grant of the application.
- 5 The application was determined on the written submissions of the applicant, as permitted under ss 13 and 16 of the Act. Further, 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

¹ S 16(7) of the Act.

Brief overview of the application

- 6 According to the Public Interest Assessment (PIA) lodged in support of the application, the applicant proposes to operate an independent, specialist boutique liquor store which will offer consumers quality wine from smaller, predominantly family owned wineries from Australia and overseas, as well as craft beer and artisan spirits.
- 7 It was submitted that the applicant seeks to offer customers a choice of products that are not currently available at the existing liquor outlets in Maylands and the range of products will be specifically selected for the locality of the premises. In addition to the provision of liquor, the applicant proposes to offer wine tasting events with wine makers present, as well as wine education classes for those that wish to learn more about where and how wine is made.
- 8 The retail space² at the proposed liquor store will be about 123m² and approximately 490 lines of liquor will be offered in the following categories:
- white wine – Australian 80
 - white wine – International 80
 - red wines – Australian 80
 - red wines – International 80
 - orange – Australian 15
 - orange – International 15
 - sparkling – Australian 10
 - sparkling – International 35
 - fortified 5
 - craft beer 50
 - cider 5
 - premixed 5
 - spirits & liqueurs 30

Section 36B(4) of the Act

- 9 On 2 November 2019, s 36B of the Act was proclaimed. Subsection (4) of section 36B provides that:

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

- 10 “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

² According to the plans submitted with the application and the report from the Premises Inspector the browse/display/cool room area is 54m² and there is a storeroom and staff area of 50m²

are, or are to be, situated. By virtue of s 36B(2), subsection (4) applies to an application for:

- a hotel licence without restrictions;
- a tavern licence;
- a liquor store licence; and
- a special facility licence of a prescribed type.

11 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.)

12 In the Second Reading Speech, the Minister for Racing and Gaming said:³

... 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.

13 From the plain language in s 36B, the following is apparent:

- the section applies to the grant of a liquor store licence;
- section 36B(4) imposes on the licensing authority a mandatory consideration by the use of the words “*must not*”. Consequently, unless the condition set out in s 36B(4) is met, the application must be refused;
- the condition within s 36B(4) is that the licensing authority must be satisfied that the “*local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in*” the relevant locality; and
- the evidential and persuasive onus falls upon the applicant for the grant of the licence to satisfy the licensing authority.

14 In order to be satisfied of such a condition, it is necessary for an applicant to adduce relevant probative evidence upon which the licensing authority can make findings of fact as to:

- what the local packaged liquor requirements are; and

³ See Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018 p324-325

- what packaged liquor services are currently provided by the existing packaged liquor premises in the locality.
- 15 Once the licensing authority has made findings as to those matters, the licensing authority is then required to make a value judgment as to whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises in the locality.
- 16 The word “reasonably” invokes a fairly low threshold. In **Charlie Carter Pty Ltd v Streeter and Male Pty Ltd**⁴, Malcolm CJ noted that:

“The word “reasonable” imports a degree of objectivity in that the word reasonable means “...sensible; ...not irrational, absurd or ridiculous; not going beyond the limit assigned by reason; not extravagant or excessive; moderate: Shorter Oxford Dictionary at 1667”

The test under s 36B(4)

- 17 In 2007, s 38 of the Act was repealed and new provisions were inserted. The new provisions introduced the public interest test⁵ 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 was in the public interest. The public interest test replaced what was colloquially referred to as the “needs test” contained in the repealed provisions of s 38. The old “needs test” included a restraint on the granting of liquor store licences.⁶
- 18 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 density⁷, 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 authorising the sale of packaged liquor and to achieve this policy objective, s 36B was inserted into the Act.
- 19 It was submitted by the applicant that the introduction of s 36B(4) of the Act effectively reintroduces the “needs test” that was found in s 38 of the Act until 2007. The applicant then submitted that in considering the case authorities regarding the (repealed) s 38(2b) and similar provisions in other jurisdictions, the following findings are noted:
- subjective requirements and mere convenience are relevant considerations;
 - the reasonable requirements of the public for liquor itself (or liquor of a particular type, such as bottled table wines) cannot be provided for in the affected area by licensed premises already existing in the area or cannot be provided for without occasioning substantial difficulty or substantial inconvenience to the relevant public;

⁴ (1991) 4 WAR 1

⁵ See s 38(2)

⁶ Section 38(2b) of the repealed provisions.

⁷ refer *Parliamentary Debates, WA Parliament, vol 409, p 6342*

- public demand for liquor consists of a desire by the public or a significant section of the public to purchase liquor or liquor of a certain type. If that demand is not sufficiently and reasonably met, there is a need for liquor;
- the public demand for liquor cannot be met by the existing facilities;
- the word “cannot” does not denote absolute physical impossibility, a demand for liquor within the locality which can only be met within the locality with extreme difficulty or hardship would be enough;
- mere convenience is not enough but if liquor of the type demanded by the public is not provided by the existing facilities in a way which makes it available, in a reasonable and realistic sense, to members of the public requiring it, it can properly be said that the public demand for that type of liquor ‘cannot be met’ by those facilities; and
- accessibility of the existing premises to the public in the locality (matters such as distance, forms of transport available, time taken to get to existing premises and so on); the availability at the existing premises of the range of liquor demanded by the public, the standard of the existing premises and of the service provided there, and the existing shopping patterns and habits of the public to the extent that they bear on the accessibility of the existing premises are relevant.

20 The applicant also submitted that in addition to the above matters, the following issues should be taken into account:

- consideration of existing packaged liquor premises in the locality; and
- the ability (or inability) of those existing premises to meet the local packaged liquor requirements.

21 I do not accept the applicant’s submission that s 36B(4) reintroduces the old “needs test” that operated under the repealed provisions of ss 38(1) and 38(2b). In my view, the old “needs test” is entirely different to the test under s 36B(4). In particular, the factors to be taken into consideration for the purposes of the “requirements of the public” under the “needs test” were specifically prescribed⁸, whereas s 36B(4) does not contain similar guidance. Consequently, the matters that might have been relevant under the old “needs test” are not directly relevant to the test under s 36B(4).

22 I generally accept the applicant’s analysis of the historical line of cases and the various findings in respect of the “needs test”, however, these findings have, to a large extent, turned on the interpretation of the word “requirement” in the repealed provisions of s 38. Given that the test under s 36B(4) is not the same as the old “needs test”, I do not agree with the submission that matters of convenience, one-stop shopping and shopping preferences are matters for consideration under s 36B(4). In my view, matters of convenience, one-stop shopping, and shopping preferences all 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

⁸ See for example s 38(2) of the repealed provisions

whether existing packaged liquor outlets in the locality can reasonably meet that requirement.

- 23 The factual matters which the licensing authority is bound to take into account when assessing whether the grant of an application is in the public interest, are those relevant to the objects of the Act, as set out in s 5. 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.⁹ 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).¹⁰
- 24 However, in my view, the word “requirement” in s 36B(4) should have a narrower interpretation than what has been applied to the word “requirement” in object 5(1)(c). I arrive at this conclusion for the following reasons.
- 25 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).
- 26 As noted by Bank-Smith J in ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police***¹¹, s 5(1)(c) requires regard be directed to the proper development of the relevant industries in considering the issue of catering to the requirement of consumers, and catering for consumer requirements is not to be considered in isolation. Adopting a narrow construction on 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. If the test under s 36B(4) and s 38(2) were essentially the same test, s 36B(4) would be rendered meaningless and would not achieve its statutory purpose.
- 27 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.¹²

⁹ Object 5(1)(c)

¹⁰ ***Woolworths Ltd v Director of Liquor Licensing*** [2013] WASCA 227

¹¹ [2017] WASC 88

¹² See the Explanatory Memorandum and Second Reading Speech referenced at [11] and [12]

28 In **SZTAL v Minister for Immigration and Border Protection**¹³ it was stated:

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.

29 The Court of Appeal in **Mohammadi v Bethune**¹⁴, 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.

30 In order to achieve this statutory purpose, a narrow construction of the word “requirements” is necessary, otherwise, adopting a broader construction would allow 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.

31 Thirdly, 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).

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

¹³ [2017] HCA 34

¹⁴ **Mohammadi v Bethune** [2018] WASCA 98

¹⁵ (1999) 20 WAR 405

¹⁶ (1981) 28 SASR 458

- 33 King CJ in *Lincoln Bottle Shop* took the same approach to similar provisions in the South Australian legislation.
- 34 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).
- 35 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 packaged liquor services 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 judgment 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).

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

- 36 In support of the application, the applicant submitted a PIA, the results of on-line and intercept surveys, eight witness statements and a statement from Christopher Ford (director of the applicant company).

The on-line survey and intercept surveys

- 37 According to Mr Ford, an on-line questionnaire was conducted in August and September 2019 via Survey Monkey, which returned 221 responses. It was submitted that the results provided overwhelming support for the application. The survey consisted of the following general questions:
1. Name?
 2. Suburb?
 3. How often do you frequent Maylands?
 4. Do you feel that there are enough providers within Maylands selling boutique, interesting wines or craft beer from independent wineries for consumption at home?
 5. If you live in Maylands, do you have to travel out of the suburb in order to purchase wine if you are looking for a special bottle?
 6. How often do you buy wine from a wine store or bottle shop?
 7. Would you come to a casual, free tastings/classes in order to learn more about wine?
 8. Do you feel it would be in the best interest of the public of Maylands and surrounding suburbs that a small, independent, locally owned and operated wine store open in Maylands?
 9. Do you feel an independent wine store will add to the emerging hospitality scene and help diversify offerings within Maylands?
 10. Would you support an application for an independent wine and craft beer store within Maylands?

- 38 It was submitted by the applicant that nearly 57% of respondents to the questionnaire buy packaged liquor at least weekly with an overwhelming 96% of respondents felt that there were not enough retailers selling boutique, interesting wines from independent wineries or craft beers in Maylands. Nearly 90% of respondents were interested in the applicant's tastings and education evenings, while 99% of respondents answered that it would be in the public interest for a small, independent locally owned and operated wine store to open in Maylands.
- 39 The intercept survey commenced with a general introduction of *"Hello, we would like to open a small, community focused, boutique wine store selling wine, craft beer and spirits from independent wineries and producers. We hope to open within Maylands (209 Railway Parade) and were hoping if you could help us out? Just jot down your answers below and let us know your thoughts. Thank you for your time."* The survey then asked the following questions:
1. Name?
 2. Suburb?
 3. Would you support a boutique wine store in Maylands?
 4. Do you feel it would add diversity to the current area?
 5. In your opinion, would this be a good thing for Maylands?
- 40 According to the applicant, all respondents to the intercept survey were supportive of a boutique wine store in Maylands, agreeing that it would be a good thing for Maylands.

The witness statements

- 41 The applicant submitted eight witness statements to support the application. It is appropriate to briefly consider the content of each statement:
- Kelly-Ann Hahn lives approximately 1.5km from the proposed store and states that she does not have a regular store but prefers to shop around. Ms Hahn likes to support independent outlets which she claims is getting harder given the chain stores are taking over most smaller retailers. Ms Hahn likes the concept of the proposed liquor store especially if she could buy a bespoke wine if there was a wine she liked. She also indicated that she likes to try new and different wines, which, according to Ms Hahn is difficult to do currently and the proposed store will focus on independent, artisan producers, which is a unique concept for Maylands. Ms Hahn is also interested in the education evenings and events.
 - Nadja Stewart lives in Bayswater and operates a café business on Whatley Crescent, Maylands. Ms Stewart states that she normally buys wine and would normally shop at premises that have a great selection and good knowledge, although these premises are limited and hard to find in Maylands and its surrounding suburbs, which means she normally needs to go out of her way to purchase her liquor. The proposed liquor store is the type of premises she would prefer to buy her liquor from, and she would prefer to support small local businesses rather than the big chain stores and the proposed store would be very convenient for her.

Ms Stewart likes to try new wines and it is her understanding that the proposed liquor store will sell wine that is not available at other liquor stores. The wine classes are also something that would interest Ms Stewart. According to Ms Stewart, Maylands only has big chain stores that do not have a great selection of wine and craft beers.

- Sarah Verreault lives in North Perth and works approximately 4km from the proposed liquor store. Ms Verreault states that she currently buys packaged liquor, usually wine or beer, directly from the producer because she can buy more unique and different products rather than the standard liquor available at most liquor stores. Ms Verreault likes the concept of the proposed liquor store with it being more local and selling high quality but decently priced wine and buying from a shop where she trusts the owners and workers to have the knowledge base to sell her the type of wine she is looking for. Ms Verreault would attend the proposed store to support local business and for the experience of being exposed to unique wines.

According to Ms Verreault the location of the premises is a feature given it is nearby and easy to get to with traffic. The tastings and educational sessions are also an attractive feature. Ms Verreault states that from her knowledge of Maylands, there are only larger chain liquor stores which don't interest her because they sell very mainstream wines and she would prefer to shop at a smaller producer.

- Dr Claire Tancabel lives near the proposed liquor store and presently buys wines from wineries or independent bottle shops. She prefers to buy wine from small producers and wineries because they usually have something different and unique to offer. Dr Tancabel understands that the proposed liquor store will sell bespoke wines from around the world and she would find it convenient and easy to walk into a local wine store with a curated range and buy a bottle of wine knowing it will be enjoyable. Dr Tancabel has attended premises operated by the director of the applicant company and tasted wine lists prepared by that director and enjoyed the wine.

According to Dr Tancabel, she would attend the proposed liquor store at least on a monthly basis and the location is very convenient for her and the proposed range of wine is unique and interesting. Dr Tancabel prefers to shop local and independent, especially when it comes to liquor, and she does not want to buy from liquor stores owned by large chains with parent companies involved in poker machines. Similarly, she is not interested in mass produced products owned by the parent companies at the exclusion of smaller producers. Also, she doesn't want to buy wine from smaller producers who have been forced to lower their margins unsustainably to compete with mass producers. According to Dr Tancabel, the liquor stores in Maylands are limited to large chains with inexperienced staff, which is not appealing to her.

- Adam Riley lives in Mt Lawley and is approximately 2km from the proposed liquor store. Mr Riley usually buys beer or wine once a week from Mane Liquor or the Re Store. Mr Riley typically buys wines from small independent wineries so a boutique liquor store is appealing to him and he would be a regular customer because the proposed store is within walking distance from his home, which is very convenient.

According to Mr Riley, supporting a local independent retailer is more likely to result in benefits to the community and the personalised service he receives from the smaller, independent retailers is important to him in deciding where he purchases his liquor. Mr Riley also likes the idea of tasting sessions and the educational classes that will be on offer at the proposed store.

Mr Riley states that the liquor outlets in Maylands are chain types which do not carry a good selection of independent wines and craft beer. To his knowledge there is not a store nearby which offers boutique wines whilst offering tastings and educational events. Mr Riley currently drives to the Mane Liquor and the Re Store but having a store with these offerings within walking distance would be ideal.

- Anisah Inayat-Hussain lives approximately five minutes by car from the proposed liquor store and currently buys packaged liquor, usually wine, from La Vigna in North Perth, King Somm in Bayswater and Wines of While in Northbridge. Ms Inayat-Hussain states that she is excited by the proposed liquor store because there isn't a boutique wine store in Maylands and she would attend the proposed store weekly because it is close to her home, the small and intimate nature of the proposed store, range of unique and interesting wine and artisan spirits and it is an independent retailer offering personalised service.

According to Ms Inayat-Hussain, the proposed premises will be unique to Maylands and the current outlets in Maylands all sell the same generic wine and staff are not well trained and do not provide targeted customer service or assistance. Ms Inayat-Hussain likes the idea of attending tastings and wine events and would prefer to purchase from an independent retailer because she believes it is important to support local businesses.

- Hayley Burgess lives in Perth, about 2.7km from the proposed liquor store. Ms Burgess states that she buys packaged liquor once or twice a week, being red/white wine, spirits and beer and normally buys her liquor from the Re Store, Wines of While, Main Liquor or Dan Murphy's Hyde Park. According to Ms Burgess, she enjoys exploring local and international wines and would like to purchase liquor from small producers and retailers. Ms Burgess prefers to shop at an independent retailer as she feels she gets a better personalised purchasing experience and currently she would not go to Maylands to purchase wine as there is not a good selection of liquor stores available. She does not like BWS on Eighth Avenue and the other venue is connected to a tavern that does not interest her. The proposed tasting/educational nights would be of interest to her because she enjoys learning about the different products that are available and it is a great way to meet some more people within the community, while learning about local and international products. The location of the premises is also appealing because it has easy access by bike, train or car.
- Dr Sherman Kwan lives in North Perth about 15 minutes by car from the proposed liquor store. Dr Kwan purchases packaged liquor once or twice a month, usually beer or wine, and currently gets his liquor from Dan Murphy's in North Perth, Liquorland,

Re Store and La Vigna. While he would like to buy liquor from smaller producers, it is not always easy or convenient for him to do so. Dr Kwan states that he likes the concept of the proposed liquor store because it is a bespoke, specialised concept from a passionate enthusiast and there should be more places which encourage a responsible and positive experience of alcohol by providing a social and relaxed environment to consume it. Dr Kwan is of the view that the proposal by the applicant satisfies this focus on quality, not quantity. According to Dr Kwan, if the proposed store was to open, he would attend every month or two because the premises will provide a sophisticated, social and intimate setting, which is unlike many of the traditional liquor store chains. Dr Kwan also likes the location in Maylands, which has a relaxed vibe, easy parking and proximity to a growing entertainment/hospitality scene.

Dr Kwan states that he is also interested in the range of different and interesting wines, craft international beers and artisan spirits. Dr Kwan likes the fact that the proposed liquor store will be independently and locally owned and operated by passionate and enthusiastic aficionados. Dr Kwan prefers to buy his liquor from an independent retailer who believes in the product they sell and most of the liquor stores currently in the area are larger generic chain stores that are non-personable.

The statement of Christopher Ford

- 42 Mr Ford states that the proposed liquor store will operate as an independent, specialist boutique liquor store that provides a diverse range of esoteric, alcohol and non-alcohol items to be consumed off the premises. The focus will be on quality wine from smaller predominantly family owned wineries from Australia and overseas and the premises will also offer a range of craft beer and artisan spirits that align with the wine offering. The proposed premises will offer wine tasting events and educational classes and the aim is to provide customers with a choice of products that are not currently available at the existing liquor retailers in Maylands. According to Mr Ford, it is proposed to stock liquor not commonly available at the national chain liquor stores that dominate the packaged liquor market in the locality.
- 43 Mr Ford attests to his background and experience and the qualifications he has attained, including a Court of Master Sommeliers and a three-level qualification with the Wine and Spirits Education Trust. Mr Ford also provides an overview of the liquor range that will be available at the proposed store.
- 44 In his statement, Mr Ford indicates that there are 15 existing packaged liquor outlets in the locality (2km radius) surrounding the proposed liquor store and he provided a very brief description of the liquor provided by those premises. For example:
- Sexton Cellars – operating under the Bottle-O brand, with a focus on keg-hire;
 - De Vine Cellars – focusses on mostly Australian wines from medium to large producers with international wines limited to generic wine regions such as Italy, France and Spain;

- Grand Cru – similar range to De Vine Cellars, with wines from generic wine regions such as Italy, France and Spain;
- Vintage Cellars – recently rebranded from Liquorland to Vintage Cellars and whilst focusses on fine wine, is limited in their stock range to brands sold under the Vintage Cellars banner; and
- Your Shout Liquor – focuses on Australian red wine and craft beer with limited international lines.

45 According to Mr Ford, none of the existing premises offer the same diverse range of options being proposed at the applicant's store and several outlets operate under a 'banner' and therefore offer a limited range and generally sell standard liquor products available at most brand outlets. Similarly, the other larger chain outlets are also restricted to certain brands and product lines, whereas being an independent operator the applicant will have more flexibility in catering to the requirements of consumers for packaged liquor in the locality. Mr Ford goes on to state that the key factors which will differentiate the proposed premises from the existing premises in the locality include service, unique range of liquor, nature of the premises (contemporary boutique browse) and operation (independent).

46 Mr Ford also provided information on the consultation undertaken by the applicant and the risk factors related to the application.

The Public Interest Assessment

47 The applicant lodged a PIA consistent with the policy of the Director of Liquor Licensing. The PIA provided information on the proposed operation of the premises; the demographic profile of the surrounding locality; the existing licensed premises; existing rates of alcohol-related harm in the area; and likely impact on the amenity of the surrounding community.

Additional information and submissions

48 It was acknowledged by the applicant that consideration of the existing packaged liquor outlets in the locality and the ability of those premises to meet the local packaged liquor requirement is a key consideration in determining the ultimate test under s 36B(4): *can the existing packaged liquor outlets reasonably meet the local packaged liquor requirements (or not)?* However, the applicant provided very limited information on the existing outlets in the locality (see the example at [43]), with cursory comments on each premises. Therefore, to address the deficiency in the applicant's evidence and assist the applicant in properly addressing this critical issue, inspectors from the Department contacted some of the premises referenced by the applicant to obtain a better understanding of the existing packaged liquor offerings at those premises and that information was provided to the

applicant, who was then afforded an opportunity to lodge further submissions to support its application.¹⁷

49 The following information was obtained by the inspectors:

Sexton Cellars - Premises independently owned

WINE		No Product Lines
	White - Australian	106
	White – International	18
	Red – Australian	113
	Red – International	21
	Sparkling - Australian	44
	Sparkling - International	16
BEER/CIDER		
	Craft – Australian	67
	Craft – International	8
	Ciders - Total	48
	Pre-mix RTDs - total	98
SPIRITS/LIQUEURS		
	Spirits/Liqueurs – Australian	134
	Spirits/Liqueurs - International	22

Percentage estimates:

- Wine origin percentage - Australian wines 83%, International wines 17%.
- Majority of Australian wine sourced from independent wineries (ie – not big brand wineries like Penfolds, Houghton's, Jacobs Creek etc).
- Beer type percentage - craft beer 69%, generic brands 31%.
- Product lines not carried instore can be ordered in.

De Vine Cellars - Premises independently owned

WINE		No Product Lines
	White	400
	Red	850
	Sparkling	180
	Fortified	50
BEER /CIDER		
	Beer – Australian	230
	Beer - International	180
	Cider	75
SPIRITS		Unsure of exact figures – claims to have one of the largest range of spirits in the Southern Hemisphere

¹⁷ Pursuant to s 16(1)(b)(i) the licensing authority may obtain information as to any question that arises for decision in such manner as it thinks fit.

- 80% of wines Australian, 20% international.
- Large wine country of origin range including – Italy, Spain, France, New Zealand, Cyprus, Portugal, Germany, USA, Argentina, Austria, Greece, Chile, Uruguay.
- Spirits sources from approx. 30 different countries.
- Beer sourced from 22 different countries.
- 80% of beer is craft.
- Product lines not carried can be ordered in.

Grand Cru Wineshop & Cellar - independently owned

WINE		No of Product Lines
	White – Australian	675
	White – International	730
	Red – Australian	1150
	Red – International	1410
	Sparkling – Australian	80
	Sparkling - International	50
	Fortified	30
BEER/CIDER		
	Craft Beer	100
	Cider	25
SPIRITS		
	Premixed	12
	Spirits and Liqueurs	200

- Of Australian Wines carry mainly mid to lower tier (boutique) producers (75% mid to lower, 25% big brands).
- Wine and Spirits sourced from all around the world.
- Carries significant quantities of vintage back stock and museum stock.

Vintage Cellars - part of Coles/Liquorland retail chain

WINE		No of Product Lines
	White	Approximately 700 lines, 80% Australian, 20% International
	Red	Approximately 700 lines, 90% Australian, 10% International
	Sparkling	Approximately 350 lines, 30% Australian, 70% International
BEER/CIDER		
	Craft Beer	Line numbers unknown, 70% Australian, 30% International
	Cider	30
SPIRITS/LIQUEURS		
	Premix RTD's	74
	Spirits/Liqueurs	Generic Liquorland range, 25% Australian, 75% International

- Generic Liquorland range of beer lines stocked.
- Click and collect option available from a much larger range of Vintage Cellars products.
- Premises will order in products for patrons on request.

Your Shout Liquor - independently owned

WINE		No Product Lines
	White – Australian	330
	White – International	70
	Red – Australian	1650
	Red – International	150
	Sparkling – Australian	80
	Sparkling – International	20
	Fortified – Australian	30-50 (seasonal)
	Fortified – International	10 (Spain and Portugal)
BEER/CIDER		
	Craft Beer	100
	Cider	40

- International wines sourced from around the world, however not many from France.
- Australian wines sourced from mainly boutique wineries.
- Will special order in top end international sparkling on request.
- Limited spirits carried. Approximately 2% of their business.

The applicant's responsive submissions

50 The applicant opined that the report from the inspectors was lacking in information and did not provide details of the brands and particular products at each store; what wine varieties were grown and whether any originated from biodynamic and organic vineyards; whether product lines were in store, in stock or potentially available if ordered; did not offer any guidance as to pricing comparisons at each store; and did not offer any guidance as to whether local customers were satisfied by the products in each store.¹⁸

51 Mr Ford provided a further statement with the following comments:

- the witness statements lodged with the PIA demonstrate the inability of existing premises in Maylands to meet local packaged liquor requirements, with a number of witnesses currently buying their packaged liquor outside the locality;
- he believes there are not enough retailers selling boutique, interesting wines or craft beers from independent wineries in Maylands;
- he visited Grand Cru and Your Shout Liquor and disputes the information provided by the licensees to the inspector, and in his view:
 - Grand Cru carry 1,100 red wines at most, not 2,560 as claimed;
 - Your Shout had 600 wines and not the 1,800 they claimed. They also stock approximately 50% less than the 100 craft beers and 40 ciders they claim;

¹⁸ In my view, it is the applicant's responsibility to address these issues.

- 90% of the red wines that are stocked within all of these shops are one of the following grapes or a blend thereof – Cabernet Sauvignon, Shiraz/Syrah, Merlot, Pinot Noir, Grenache, Nebbiolo;
- 90% of white wines that are stocked within these shops are one of the following grapes or blend thereof – Chardonnay, Sauvignon Blanc, Semillon, Riesling, Pinot Gris/Grigio;
- 99% of wines from Your Shout and 95% of wines from Grand Cru are made in conventional styles, using cultivated yeasts, aggressive use of sulphur, malic and tartaric acid and stabilisers and grown in conventionally farmed vineyards, which is the opposite to the philosophy behind the wines that Commune Wine Store will stock. Approximately 20% of the wine that Commune Wine Store will stock will be made this way, the remaining 80% will be made in biodynamic and organic vineyards, with no added sulphur, naturally occurring yeast with no acid or stabilisers added to the wine. There is a profound difference in taste of wine made this way and none of the existing bottle shops provide for this market.
- only about 15% of Commune Wine Store's opening red wine stock list will contain grape varieties mentioned above with the proposed store specialising in unusual wine varieties such as Gamay, Teroldego, Aglianico, Dolcetto, Primitivo etc; and
- only about 20% of Commune Wine Store's opening white wine list will contain the varieties mentioned above and the Commune Wine Store will contain varieties such as Vermentino, Muscat, Gewürztraminer, Pinot Blanc, Trebbiano etc.

52 Mr Ford attached to his statement information from three suppliers indicating that they do not supply liquor to the other retailers in the locality.

53 A statement was also lodged by Mr Heatley, a director of the applicant company. Mr Heatley visited Sexton Cellars and De Vine Cellars and provided the following information:

- the claim by De Vine Cellars that they have the biggest spirits selection in the southern hemisphere appears to be incorrect - they don't even have the biggest spirits selection in Perth with Cooper and Oak having over 1000 spirits. Irrespective, Commune Wine Store will be a specialised wine store and will only stock an extremely limited amount of high-end spirits (approximately 30);
- there is no visible stock on the shelves of De Vine Cellars from a number of the countries they claim to stock. The only international wines were from Italy, Spain and France;
- while the stock numbers of Sexton Cellars were reasonably accurate, the statement that the majority of their Australian wine is sourced from independent wineries and not big brand wineries is questionable;
- 90% of the red wines stocked at these stores are of the following grape varieties or blends thereof – Cabernet Sauvignon, Shiraz/Syrah, Merlot, Pinot Noir, Grenache;
- 80% of the white wines that are stocked within these shops are one of the following grapes or a blend thereof – Chardonnay, Sauvignon Blanc, Semillon, Riesling, Pinot Gris/Grigio;

- 99% of wines from Sexton Cellars and 95% of wines from De Vine Cellars are made in a conventional style unlike the wines that Commune Wine Store will stock; and
- the stock list for Commune Wines will have different and unusual grape varieties, which are not readily available at Sexton Cellars or De Vine Cellars.

Determination

- 54 The applicant seeks the grant of a liquor store licence for premises located in Railway Parade, Maylands to sell boutique wine, craft beer and spirits. The applicant also proposes to offer tastings and educational wine classes. The locality surrounding the proposed liquor store is a 2km radius which takes in all or part of the suburbs of Mount Lawley, Inglewood and Maylands. There are currently 16 packaged liquor outlets in the locality. Essentially, the applicant's evidence consists of two surveys, eight witness statements and statements from the directors of the applicant company.
- 55 There is no presumption in favour of the grant of an application for a liquor store licence. In fact, the opposite applies, where ss 36B(4) and 38(2) of the Act each impose a positive onus on an applicant.
- 56 In respect of s 36B(4), the onus falls upon the applicant to satisfy the licensing authority that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor outlets in the locality in which the premises are to be located. To give meaning to Parliament's intent, the "*requirement*" for packaged liquor in s 36B(4) relates to packaged liquor itself, and matters such as one-stop shopping, convenience and shopper preferences are matters for consideration under the public interest test contained in s 38(2) (and subsequently linked to object 5(1)(c) of the Act). The test under s 36B(4) is an additional, and separate, requirement to the test under s 38(2).
- 57 Consequently, matters of shopper preferences such as support for an independent liquor operator, or the desire for related services such as tastings and educational classes are not relevant to the test under s 36B(4).
- 58 Section 36B was introduced into the Act to provide a specific restraint on the grant of new packaged liquor licences. The use of the words '*must not*' in s 36B(4) means that it is a mandatory consideration and if the applicant fails to adduce sufficient evidence to discharge its onus, the application must be refused.
- 59 Also, the use of the word "*reasonably*" in s 36B(4) does not invoke a particularly high threshold and simply means sensible or not irrational, absurd or ridiculous.¹⁹
- 60 The applicant submitted the results of an on-line survey and intercept survey, to demonstrate the general level of support in the community for the application and that a unique packaged liquor facility such as the one proposed in the locality is in the public interest.

¹⁹ *Charlie Carter Pty Ltd v Streeter and Male Pty Ltd* (1991) 4 WAR 1

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- 61 An immediate observation in respect of the on-line survey is that it refers generally to the suburb of Maylands and does not reference the locality surrounding the proposed liquor store (2km radius), which includes parts of Mt Lawley and Inglewood. Consequently, respondents are likely to have framed their responses with only the suburb of Maylands in mind and not the broader locality. This may be particularly relevant in respect of question 5 for example, whereby respondents may travel to Mt Lawley or Inglewood for a special bottle of wine, which is part of the surrounding locality and only a relatively short distance away.
- 62 Further, neither survey provides any insight into what the actual liquor requirement of respondents is, but simply reflect general support for a boutique liquor store, and more importantly, the surveys provide no evidence as to why the existing packaged liquor outlets cannot reasonably meet the respondents' requirement. In my view, the surveys do little to address the critical issue under s 36B(4), but rather, go some way to addressing whether the grant of the application is in the public interest, which is the test to which s 38(2) of the Act is directed.
- 63 As submitted by the applicant, the following issues should be taken into account:
- consideration of the existing packaged liquor premises in the locality; and
 - the ability (or inability) of those existing premises to meet the local packaged liquor requirements.
- 64 Consequently, the applicant's evidence needs to be considered in the context of the existing packaged liquor outlets in the locality and the liquor services they provide.
- 65 The evidence indicates that there are presently 16 packaged liquor outlets within a two kilometre radius of the applicant's proposed store (the applicant stated 15 outlets in its PIA, however, through no fault of its own, there was no reference to an ALDI liquor store that was conditionally granted in March 2019). There are a variety of outlets in terms of liquor stores and hotels/taverns with browse and drive through facilities. The information obtained by the inspectors from the Department indicates that there are at least four independently operated liquor stores in reasonable proximity to the applicant's proposed premises (Grand Cru, De Vine Cellars, Your Shout Liquor and Sexton Cellars). All these liquor stores, together with Vintage Cellars, provide a far greater range of stock in terms of wine, craft beer and spirits than what the applicant proposes. Collectively, these premises provide a large selection of international wines, wines from lower to mid-tier producers and an extensive range of spirits, including spirits from around the world. This is not taking into consideration what liquor products may be available from the remaining premises in the locality, for which there is little information from the applicant.
- 66 In assessing the witness statements, it is also necessary to consider whether the subjective views expressed in the statements are objectively reasonable in the context of the evidence, and in particular the existing liquor services in the locality. Also, it should be borne in mind that the locality is a 2km radius of the site of the proposed liquor store, not the suburb of Maylands:

- Ms Hahn makes no criticism of the existing outlets in the locality and does not explain why buying new and different wines is currently difficult for her, particularly given the wide variety of liquor available in the locality; and she provides no insight into why those outlets, some of which are independently operated, cannot reasonably meet her packaged liquor requirements. There is nothing to indicate that Ms Hahn experiences substantial difficulty or inconvenience in obtaining her packaged liquor requirements. Supporting an independent outlet is a matter of shopper preference, and does not related to the matters under s 36B(4) of the Act.

I find that Ms Hahn's statement provides little assistance in determining the question under s 36B(4), and is more directed to whether the grant of the application is in the public interest under s 38(2).

- Ms Stewart does not indicate which premises she currently obtains her liquor from nor does she explain why Grand Cru, De Vine Cellars, Sexton Cellars, Your Shout Liquor and Vintage Cellars, for example, are hard to find and why these existing outlets, and the many other outlets in the locality, do not provide the wines that she prefers. Neither does Ms Stewart explain what "going out of her way" means and what level of inconvenience is involved in her purchasing packaged liquor. Ms Stewart states that Maylands only has chain stores but ignores the independent liquor stores that are in the surrounding locality (Mount Lawley and Inglewood).

I find that Ms Stewart's statement provides little assistance in determining the question under s 36B(4) and is more directed to whether the grant of the application is in the public interest under s 38(2).

- Ms Verreault lives and works outside the locality of the proposed liquor store and has no need to pass the store going to and from her residence and her place of work. Other than indicating that the proposed store would be easy to get to with traffic, and she would attend the tastings and educational classes, it is unclear why she would attend the proposed premises when other premises such as the Re Store, La Vigna (both referenced by other witnesses) or Grand Cru are much closer to her place of residence. Ms Verreault makes no reference or criticism of any of the many existing liquor stores or other packaged liquor outlets in the area. Ms Verreault does refer to a desire for more organic/natural wine but provides no details that these wines are lacking or not available more conveniently elsewhere.

I find that Ms Verreault's statement provides little assistance in determining the question under s 36B(4) and is more directed towards whether the grant of the application is in the public interest under s 38(2).

- Dr Tancabel says that she currently buys her wine from independent outlets and wineries, although she does not indicate which ones. Dr Tancabel's evidence mainly deals with matters of convenience and shopper preferences but does not indicate why the existing outlets in the locality cannot reasonably meet her requirements or that she cannot purchase her liquor requirements without occasioning substantial

difficulty or inconvenience. The fact that the applicant's premises may be more convenient is not the test under s 36B(4) of the Act.

I find that Dr Tancabel's statement does not address the matters relevant to the issues under s 36B(4) of the Act.

- Mr Riley does not explain why the many existing premises in the area cannot reasonably meet his requirement for boutique wines, particularly when many of the existing premises carry a large range of wines (including international wines) and wines from small to medium producers. Mere convenience and the provision of tastings and educational classes is not relevant to the test under s 36B(4).

I find that Mr Riley's evidence does not address the matters relevant to the issues under s 36B(4).

- Ms Inayat-Hussain states that Maylands does not have a boutique wine store, and the current outlets in Maylands all sell the same generic wine. However, Ms Inayat-Hussain ignores the other independently operated liquor outlets currently in the locality surrounding the proposed liquor store, which provide an extensive range of wine, craft beer and spirits, far greater than what the applicant proposes. She makes no criticism of those outlets and provides no explanation as to why the existing premises in the locality cannot reasonably meet her liquor requirements. Ms Inayat-Hussain lives five minutes from the proposed premises and supports the application because it would be close to her home. She likes the idea of tastings and educational classes but this is not relevant to the test under s 36B(4).

I find that Ms Inayat-Hussain's evidence does not address the matters relevant to the issues under s 36B(4).

- Ms Burgess lives outside the locality and states that she does not go to Maylands to buy wine. She prefers to shop at an independent retailer and likes exploring local and international wines. Other than a reference to the BWS outlet on Eighth Avenue, Ms Burgess makes no reference to the other independent liquor outlets currently in the locality, which provide a range of international wines and wines from local producers. She provides no detail on why these outlets cannot reasonably meet her packaged liquor requirements.

I find that Ms Burgess' evidence does not address the matters relevant to the issues under s 36B(4).

- Dr Kwan lives outside the locality (15 minutes away by car) and states that he likes the concept of the proposed liquor store and is interested in the range of interesting wines, craft international beers and artisan spirits. He states that most of the liquor stores in the area are larger generic chain stores. In my view, Dr Kwan's evidence does not accord with the facts of the existing liquor outlets in the locality. Dr Kwan provides no evidence as to why the existing outlets in the locality, or those outlets closer to his home, cannot reasonably meet his packaged liquor requirements.

I find that Dr Kwan's evidence does not address the matters relevant to the issues under s 36B(4).

- 67 Most witnesses attest that they like the concept of the proposed premises and would find the liquor offering interesting; they like to support an independent operator and are attracted to related services such as tastings and educational classes. Some reference the lack of facilities in Maylands, but ignore the fact that the locality surrounding the proposed liquor store incorporates parts of Mount Lawley and Inglewood, and there are many nearby outlets (including independent outlets) that provide a large range of wines (including international wines), craft beers and spirits (including a large range of international spirits). Support for an independent operator, added convenience and the provision for ancillary services are not relevant to the issue for determination under s 36B(4).
- 68 More importantly, however, none of these statements provide any insight as to why the existing packaged liquor outlets in the locality cannot reasonably meet the witnesses' requirements for packaged liquor, which is the critical issue under s 36B(4). There is no reference to, or specific criticism of, any of the existing outlets such as Grand Cru, De Vine Cellars, Your Shout Liquor, Sexton Cellars or Vintage Cellars, which all carry a large range of liquor products, including international wines, craft beer and spirits.
- 69 One further observation in respect of the witness statements is that it is unclear from these statements whether any of these witnesses personally know the directors of the applicant company, and if so, in what capacity. Statements from friends and acquaintances would carry less weight because of the potential bias of the person making the statement, however there is insufficient information to draw a conclusion either way, however it would have been helpful for the applicant to have addressed this issue.
- 70 Consequently, I am of the view that the witness statements, whilst relevant to the public interest test under s 38(2) of the Act, do not assist in determining whether the existing packaged liquor outlets in the locality cannot reasonably meet the local packaged liquor requirements, which is the critical question under s 36B(4).
- 71 Although Mr Ford and Mr Heatley, in their supplementary statements, are critical of the information obtained by the inspectors, in my view, even if their observations are to be accepted over the information provided by the individual licensee (or their representative), this criticism does not detract from the fact that both collectively and individually, the existing packaged liquor outlets in the locality provide a wide and diverse range of wine (including international wine), craft beer and spirits (including international spirits). Although the applicant submits that it will also provide a range of wines from less well-known grape varieties and artisan spirits, the locality surrounding the proposed liquor store would appear to be well catered for in respect to packaged liquor options and consumers have a wide variety of choice, including drive through facilities and walk-in browse style premises. There are a range of independent outlets and chain stores providing competition and a broad range of products, brands and styles. There is an

extensive range of international wines, wines from boutique producers, craft beer and spirits.

- 72 Further, there is no evidence that members of the community experience substantial difficulty or inconvenience in meeting their packaged liquor requirements.
- 73 Whilst there is support for the grant of the application, as evidenced by the surveys and witness statements, this does not in itself, justify the grant of the application under the Act, particularly in regards to the test under s 36B(4).
- 74 Section 36B is a new provision in the Act, and to date, there is no legal precedent from the Supreme Court on the interpretation of the section. In time this will come. Consequently, I can only apply the law taking into consideration the plain English meaning of the words, having regard to its context and purpose. Reference can also be had to extrinsic material such as the Second Reading Speech and Explanatory Memorandum.
- 75 The legislative intent of s 36B is to stop the proliferation of packaged liquor outlets in the community and the licensing authority must not grant an application unless satisfied that the condition set out in s 36B(4) is met.
- 76 The evidential and persuasive onus falls upon the applicant to satisfy the licensing authority that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor outlets in the locality.
- 77 As noted earlier in these reasons, the word "*reasonably*" means no more than sensible, not irrational, absurd or ridiculous.
- 78 When I considered the totality of the evidence before me, I was of the view that the applicant failed to satisfy me that the existing packaged liquor outlets in the locality could not reasonably meet the local packaged liquor requirements.
- 79 The condition within s 36B(4) is mandatory. Having found that the applicant failed to discharge its onus under s 36B(4), the application must be refused.
- 80 Consequently, it was 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). Therefore, I make no findings in this regard.
- 81 If the applicant is dissatisfied with the outcome it 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 applicant receives notice of this Decision.
- 82 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING