

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Australian Leisure and Hospitality Group Pty Ltd
(represented by Mr Henry Jackson under instructions from Ms Catriona Macleod of Cullen Babington Macleod Lawyers)
- First Intervener:** Commissioner of Police
(represented by Mr Warren Fitt of State Solicitor's Office)
- Second Intervener:** Director of Liquor Licensing
(represented by Mr Warren Fitt of State Solicitor's Office)
- Objectors:**
- Commissioner of Police
(represented by Mr Warren Fitt of State Solicitor's Office)
 - Mr Kevan James and Ms Maureen Annette McGill
(in attendance at the hearing)
 - Ms Angela Margaret Burke and Mr Gregory Charles Chidlow
 - Ms Louanne and Mr Rodney Wakefield
 - Ms Lisa and Mr Mathew Kenrick
 - Mr Thomas Haywood
 - Mr Ashley Palmer
 - Mr Peter Passera
 - Mr Laurence Walter and Ms Bernadette Anne Passmore
 - Ms Lucy Mary Stuart
 - Mr Beng Ding

Commission: Mr Jim Freemantle (Chairman)
Mr Eddie Watling (Member)
Mr Evan Shackleton (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the alteration, variation and redefinition of the Carine Glades Tavern.

Premises: Carine Glades Tavern, 493 Beach Road, Dunraig

Date of Hearing: 30 March 2015

Date of Determination: 27 July 2015

Determination: The application for the alteration, variation and redefinition of the Carine Glades Tavern is refused.

Authorities referred to in Determination:

- *Australian Leisure and Hospitality Group Pty v Director of Liquor Licensing* [2012] WASC 463
- *Woolworths Ltd v Commissioner of Police* (LC12/2013)
- *Palace Securities v Director of Liquor Licensing* ((1992) 7 WAR 241 per Malcolm (CJ))
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231; (2002) 25 WAR 511
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380
- *Busswater Pty Ltd v Mr KV House and Mr LV Verhoog* (LC 17/2010)
- *Element WA Pty Ltd v Director of Liquor Licensing* (LC32/2010)
- *Harold Thomas James Blakely v Director of Liquor Licensing* (LC 44/2010)
- *Shallcross Investments Pty Ltd v Director of Liquor Licensing* (LC 26/2010)
- *Woolworths Ltd v Director of Liquor Licensing* (LC 34/2011)
- *Executive Director of Health v Lily Creek International Pty Ltd* [2000] 22 WAR 510
- *Woolworths Limited v Commissioner of Police* (LC 12/2013)
- *Ventorin Pty Ltd v Director of Liquor Licensing* (LC04/2009)
- *Hancock v Director of Liquor Licensing* [2008] WASC 224

Background

- 1 On 24 October 2013, Australian Leisure Hospitality Group Pty Ltd (“the applicant”) lodged an application for approval of alteration/redefinition of licensed premises under sections 68 and 77 of the *Liquor Control Act 1988* (“the Act”).
- 2 Pursuant to section 67 of the Act, the application was advertised by way of a notice published in The West Australian newspaper on 12 December 2013, with a notice sent to residents and businesses located within a 200 meter radius of the premises. A general notice was also given to educational, health care and local and regional government institutions, as well as community and church groups, within the locality.
- 3 In early January 2014, a total of 10 objections to the application were lodged by local residents as well as an intervention and objection lodged by the Commissioner of Police (“the Police”) on 4 February 2014.
- 4 Submissions and responsive submissions were subsequently received from both the Police and the applicant.
- 5 On 30 September 2014, the delegate of the Director of Liquor Licensing (“the Director”) refused the application.
- 6 On 15 October 2014, the applicant lodged an application for review of the decision of the Director pursuant to section 25 of the Act citing the following grounds:
 - a) The decision maker did not adequately identify that the application was made pursuant to section 77 of the Act and that:
 - it is not an application for a new liquor store licence;
 - the application involved a significant upgrade and modernisation of outdated licensed hospitality premises; and
 - this required a detailed examination of the alteration, redefinition and variation of all sections of the Carine Glades Tavern licensed premises and not just the packaged liquor component of these premises.
 - b) Section 41(2) of the Act requires the holder of a tavern licence to sell packaged liquor. The extent of these facilities and services are defined by reference to the provisions of the Act. Large format packaged outlets, as an integral part of the tavern, are a fully compliant use and satisfy sections 5(1), (2), (3) of the provisions of the Act. The decision maker erred in failing to place the correct interpretation on the relevant section of the Act.
 - c) To determine the application, the decision maker, must weigh, evaluate and consider the entire body of evidence in order to consider and apply section 38(2) of the Act, with respect to the main issues upon which the licence

application turned. The decision maker did not consider large sections of the principal body of evidence in reaching his decision.

- d) In the alternative to sub-para (c), the decision maker failed to consider relevant matters which he was obliged by the Act to consider, namely the issues and the evidence relating to the issues whether there were consumer requirements in the Carine locality to upgrade the bar, restaurant, function facilities, the packaged liquor component, kitchens and other parts of the Carine Glades.
 - e) The decision maker failed to take into account the Carine Glades popularity in the locality, the material evidence of notorious facts, its primary catchment area of its patrons and the desire of the patrons in this area to have facilities and the Carine Glades' services upgraded, the popularity of the ALH Group business model elsewhere, the lack of adequate or proper tavern and hospitality facilities in the locality and the Carine Glades' customer catchment area.
 - f) The decision maker misconceived and wrongly held that the proposed upgrade was in essence the establishment of a new "Bottle Shop" being a Dan Murphy's Liquor Store at the Carine Glades, when there was no cogent evidence to support the finding.
 - g) The finding that the upgraded "Bottle Shop" would be a "destination liquor store" had no substantive evidence to support the reaching of such a finding and there was no evidence to indicate why the proximity of 2 large format liquor stores was not in the proper development of the liquor industry. The evidence is that the BWS at the Carine Glades is trading extremely well and needs upgrading to cope with its popular demand.
- 7 On 18 December 2014, the Director gave notice of an intention to intervene in this matter, pursuant to section 69(11) of the Act.
- 8 Submissions and responsive submissions were received from all parties in the period leading the hearing by the Liquor Commission ("the Commission").
- 9 A hearing of the application for review was held on 30 March 2015.

Submissions on behalf of the applicant

- 10 In his opening statement, the applicant's counsel observed that the following issues were to be considered:
- 1) the nature of the application;
 - 2) is the application in the public interest?;
 - 3) consumer requirement;
 - 4) outlet density;
 - 5) harm and ill-health; and

- 6) the potential to increase inconvenience due to impacts on the amenity of the locality.
- 11 It was pointed out that it is the Australian Leisure and Hospitality Group Pty Ltd (ALHG) that is being represented, not Dan Murphy's, and that the proposal does not relate to a stand-alone liquor store, but rather a multi-functional integration of the various aspects of the tavern as detailed in the application.
- 12 The integration of the various components is such that the requirements of section 77(5a) of the Act specifying that any alteration or redefinition of licensed premises must be contiguous with those premises have been fully addressed and conform with the findings of Hall J in "*Australian Leisure and Hospitality Group Pty v Director of Liquor Licensing [2012] WASC 463*".
- 13 It was further submitted that other examples of similar developments are not controversial e.g. Hyde Park Hotel and Bullcreek Tavern.
- 14 With regard to the proposal, the Public Interest Assessment ("PIA") submitted with the application is supported by a considerable amount of material including:
- 1) Plans of proposed upgrade including a site plan
 - 2) Analysis of Health, Crime and Socio-Economic Statistics
 - 3) Porter Consulting Traffic Impact Assessment Report
 - 4) Herring Storer Acoustic Report
 - 5) Review of Licensed Premises Report
 - 6) Caporn Services Public Interest Assessment Health and Environment Report
 - 7) MGA Town Planners Report
 - 8) 5 Witness Statements by Industry Professionals
 - 9) 22 Witness Statements by Community Members
 - 10) Macro Plan Dimasi Report
- 15 The applicant proposes to commit approximately \$2.5 million on the upgrade to bring broad changes to the premises which will include:
- 1) a further internal refurbishment;
 - 2) upgrading and consolidating the 2 separate kitchen areas to provide one purpose designed and much larger kitchen;
 - 3) designing new facilities and upgrading current facilities to service the new kitchen;

- 4) redesigning and upgrading the current BWS bottle shop which will have more display space, greater product range, and be re-branded as a Dan Murphy's;
 - 5) structural changes to the building to redesign the internal layout including adding a second floor; and
 - 6) broad changes to the exterior of the tavern including a new entrance, upgraded car-parking and landscaping throughout.
- 16 The proposed alterations to also include:
- 1) building a new rear entrance to the tavern, providing alternative access and better linking the tavern with the Carine Glades Shopping Centre;
 - 2) removing 2 of the 3 function rooms (currently underutilised) to be redesigned and provide a new large storage area for the bars and bottle shop;
 - 3) building a new loading dock to service the bars and bottle shop;
 - 4) building new staff and office facilities and relocating same onto a new second storey to relocate the administrative side of the tavern away from the operational side and free up space for the enlarged kitchen, preparation areas and storage areas;
 - 5) building new facilities to service the new kitchen including an internal coolroom/freezer, constructing new food preparation areas and a dry store;
 - 6) re-designing and upgrading the TAB facility to incorporate the first TAB service of its kind in Australia, which upgrade includes personalised drinks service and new furniture;
 - 7) the drive-through bottle shop which currently operates as a BWS liquor store will be closed and be replaced by a new browse-style of package outlet (in the same area but larger) to operate under one of the applicant's other brands of liquor outlets: Dan Murphy's, which will have the product range, design and service consistent with the Dan Murphy's brand;
 - 8) the hours of trade in the proposed Dan Murphy's will be less than currently operating at the BWS store; and
 - 9) a redesign of the exterior of the tavern, parking and garden areas to include landscaping, further lighting and better car parking areas.
- 17 It was submitted that the circumstances giving rise to the application are that:
- 1) the only other tavern in Duncraig, the Glengarry Tavern, closed down;
 - 2) the increase in the volume of local and itinerant patrons using the Carine (both from the Glengarry Tavern closure and a cosmetic upgrade carried out by the applicant);
 - 3) the lack of adequate or suitable hospitality facilities in the area;
 - 4) the ever growing popularity of the Tavern;

- 5) the need to modernise outdated licensed premises; and
 - 6) the applicant's need to meet ever changing consumer demand for contemporary and modern hospitality and liquor services and facilities.
- 18 It was further submitted that the applicant has a history, consistent with its business plan, of refurbishing and upgrading the hotels and taverns it purchases and has successfully applied this business model to many of its taverns and hotels in Western Australia, examples of which include the Greenwood Hotel, Brooklyn Tavern, Bullcreek Tavern, Hyde Park Hotel and the Highway Hotel, Bunbury.
- 19 The applicant does not agree with the approach taken by the Director who appears to have found that the approval of a "destination" liquor store in "close proximity" to another is contrary to the public interest and is sufficient per se to warrant the refusal of the application. It is considered that such an approach was wrong at law and also lacked a proper factual basis. In addition, by taking such an approach the Director failed to acknowledge and consider several benefits associated with the proposed Dan Murphy's liquor store.
- 20 It was submitted that the applicant has set out in considerable detail the multi-functional integration of the hotels and taverns operated by the applicant, however, the Director proceeded on the basis that the upgrade of the tavern and the development of the Dan Murphy's bottle shop were two separate aspects of the development. They are not and should not be considered separately.
- 21 The applicant proposes to not only integrate its on-site and packaged liquor products and services; it proposes to integrate these types of products and services, namely:
- 1) provide a wider range of liquor products for on-site consumption by permitting staff members to obtain the product from the Dan Murphy's liquor outlet for consumption in the bar areas of the tavern on request from patrons;
 - 2) patrons will be able to purchase packaged liquor from the Dan Murphy's outlet before or after utilising the restaurant or bar facilities of the tavern; and
 - 3) patrons will be able to take advantage of cross promotions between the Dan Murphy's outlet and the on-site facilities.
- 22 It was submitted that the public benefits of the proposal are significant, particularly when combined with the services and facilities of the adjacent Carine Glades Shopping Centre, so allowing for a single shopping journey by consumers. In particular, the applicant's proposal will replace a range of public benefits that have been lost through the closure of the Glengarry Tavern.

- 23 With regard to the application approval resulting in two destination liquor stores in close proximity, it was submitted that there is a considerable difference in the range and quality of products sold in Dan Murphy's stores compared to other outlets and the First Choice store located 1.2 kms away is more akin to a typical smaller packaged liquor store, such as a Liquorland, but only larger in footprint size.
- 24 There is no evidence that the large format liquor stores "crush" competition and in the circumstances of this application there are few liquor stores in the locality, therefore no such impact will result. The dearth of packaged liquor outlets within the area raises questions as to what outlets might be affected by the proposed Dan Murphy's, either in isolation or in a combination with others.
- 25 The question of undue inconvenience to neighbouring residents has been addressed by the applicant and in regard to noise, there is evidence before the Commission provided by expert acoustic engineers as well as traffic engineers and town planners evidencing that there is no basis to conclude that any increased impact on neighbouring residents as a result of the approval of the application will be "undue".
- 26 It was submitted that as to traffic, the applicant relies upon the Traffic Impact Assessment report of Porter Consulting, which concluded that "The change in land use from function rooms and drive in bottle shop to a retail liquor outlet will not generate significant additional traffic". The report also stated that "It is not expected that there will be significant change in pedestrian movement around the site".
- 27 With regard to harm and ill-health, it was submitted that the demographic evidence shows that the surrounding area lacks the presence of at-risk groups and other indicators which might cause concern.
- 28 In summary it was submitted that approval of the application will provide a wide range of benefits and will include the provision of services and facilities:
- 1) which are provided by an established market leader and a sound operator of licensed premises with a good track record;
 - 2) which will build on existing custom and community support;
 - 3) which will cater to contemporary consumer requirements;
 - 4) which are designed and configured to provide a safe and pleasant environment;
 - 5) within a neighbourhood shopping centre;
 - 6) which cater for an increased demand for:
 - a) a wider range of beverages for both on-site and off-site consumption;
 - b) bottled wine, especially fine wine and imported wine as well as other premium, boutique and craft products;

- c) one-stop shopping of liquor;
- d) an “offer” which is quite different from those otherwise provided in the locality and, indeed, further distant and thereby introduce choice and competition; and
- e) the proper development of the liquor industry.

Submissions on behalf of the Commissioner of Police and Director of Liquor Licensing

29 A notice of intervention and objection was lodged by the Police before the Director on the grounds that:

If the particular application was granted, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest in that;

1. *there is existing alcohol related harm in the locality, the approval of this application will further contribute to the alcohol related harm in the area;*
2. *there are ‘at risk’ groups and sub-communities identified by the Drug and Alcohol Interagency Framework for Western Australia 2011-2015 who are over represented in the community and the approval of this application will result in alcohol related harm to this group of people;*
3. *there are existing outlets in locality which cater for the requirements of consumers for liquor and services; and*
4. *Police submit the Director should consider section 38(2) of the Act in relation to this application.*

30 It was submitted that the Police have assessed the applicant’s PIA in its entirety and object to the expansion of the current BWS liquor store into a larger Dan Murphy’s superstore.

31 Whilst the PIA states that there is a low level of harm and ill-health in the locality, the fact is that there is existing alcohol related harm that the approval of this application will potentially further elevate.

32 While it is recognised by police that the existing level of crime is low in Duncraig, data provided demonstrates that a Dan Murphy’s will likely contribute to an increase in community harm. This data shows that once a liquor store is re-branded and significantly upgraded in size and services to a Dan Murphy’s, the area will be subject to an increase over time in the amount of alcohol and non-alcohol related offending which requires significant police intervention.

33 With regard to the ‘at-risk’ community it was submitted that regardless of how low the at-risk group proportion is to the Greater Perth and State average,

there are still 'at-risk' groups in the locality that need to be considered when assessing whether a liquor licence, be it new or altering an existing one, impacts on the objects of the Act.

- 34 It was submitted that the *Caporn Report* submitted in support of the PIA is very broad in terms of harm and 'at-risk' groups and appears to only have focussed on the immediate proximity of the premises. The risk associated with take away alcohol does not stop at the point of sale, however, goes beyond the store into homes and the broader community, a point not taken into consideration in the *Caporn Report*.
- 35 It is concerning to police that the applicant has not documented any specific harm minimisation strategies for these 'at-risk' groups, which are considered to have a higher element of risk in regards to licensed premises. It was submitted that liquor stores inherently, by the nature of their method of sale (off-site consumption) can and do have a negative effect on the community. Regardless of the management practices implemented by the licensees, these harms still stem from the use of alcohol in the community and by and large are uncontrollable once these stores are installed into a local shopping environment.
- 36 With regard to outlet density it was submitted that there are already two comparable package liquor stores in the locality; a Dan Murphy's in Balga which is considered a superstore and is approximately 3.5 kms from the applicant's premises and First Choice liquor branded superstore 1.2 kms away from the premises. Overall there are 25 existing liquor stores within 6.1 kms of the premises.
- 37 Whilst First Choice may not offer the exact same products and services as Dan Murphy's, particularly in relation to its wine selection, it is nevertheless an outlet which stocks over 2,000 product lines, including some 900 varieties of wine.
- 38 With regard to the amenity of the locality, it was submitted that the proposed alteration/redefinition would unduly inconvenience residents in the vicinity of the premises and there is evidence that there is an existing issue with noise emanating from the premises, particularly for those living behind the tavern in Juniper Way.
- 39 It was submitted by the Director that in the conclusion that those living in the vicinity of the premises would be unduly inconvenienced by noise is based on cogent evidence that:
- 1) the past noise from the premises had disturbed those living behind the premises in Juniper Way;
 - 2) excluding the bottle shop, the premises attract about 3,000 customers per week;

- 3) the inclusion of a Dan Murphy's outlet is likely to lead to an increase in the number of people resorting to the premises;
 - 4) the eastward extension of the tavern structure (to accommodate the proposed Dan Murphy's outlet) would result in a substantial loss of space between the easternmost wall of the tavern and the eastern perimeter of the property; and
 - 5) the eastern perimeter of the tavern shares a boundary wall with a number of residential properties.
- 40 The applicant's evidence was that converting an existing liquor outlet into a Dan Murphy's had led to a very substantial increase in weekly trade in those particular locations e.g. 385% in Balga, 149% in Mandurah, 38% in Midland and 86% in Kelmscott. There is also evidence that the tavern element of the premises attracts about 3,000 customers per week.
- 41 There was further material that shows that the alteration/redefinition would result in a loss of natural buffer between the tavern and near-by residences, which would exacerbate the noise to which they were exposed.
- 42 Under these circumstances it is open to conclude that the inclusion of a Dan Murphy's outlet would result in a substantial increase in the number of people resorting to the premises generally, and this would contribute to the already existing noise problem and cause undue inconvenience to residents in the vicinity.
- 43 It was submitted that the main issue is the increase in capacity of the liquor component of the proposal. There are no problems with the tavern upgrade. Whilst the liquor store area of 100sqm for the current BWS outlet is not considered a large enough area to effectively operate, there is no supporting material to justify an increase in size to 1,280sqm.
- 44 It is further considered that the one-stop shopping benefits are not significant in this location as the premises do not form part of a larger shopping centre. The premises are next to the Carine Glades Shopping Centre, which is classified as a 'neighbourhood centre' under the relevant planning instrument. A 'neighbourhood centre' is the lowest in the hierarchy of shopping centres.
- 45 It was submitted that simply taking the approach that a Dan Murphy's is good for consumers is not enough and a more thorough examination of consumer requirements is required. The applicant has relied on a petition which, according to its own analysis, contains 334 signatures in support of the proposed alteration/redefinition of the premises. However, the respondents were only asked to express their support for the proposed upgrade as a whole.
- 46 It was submitted that the Commission ought to give the applicant's petition little or no weight in determining whether there is a consumer requirement for Dan Murphy's products and services in the relevant location.

- 47 The Police submitted that the Commission cannot be satisfied that the proposed upgrade is in the public interest unless the Dan Murphy's element is demonstrated to be in the public interest. That approach does not involve ignoring the upgrade of the other tavern facilities. Rather, it acknowledges that, in the context of the bottle shop upgrade, the balance of the proposed upgrade is not a significant consideration. It is of such minimal weight as to be incapable of discharging the applicant's burden of persuading the Commission that its application is in the public interest.
- 48 It was further contended by the Director that it is open to the Commission on review to conclude that:
- 1) the upgrade of the other tavern facilities was of comparatively little significance in context of the bottle shop upgrade;
 - 2) the functional integration of the proposed Dan Murphy's outlet with the tavern was not demonstrated to be in the public interest – alternatively, any public interest in that integration was not enough to discharge the applicant's burden of proof with respect to the application;
 - 3) the reasoning of the Commission in the first Joondalup decision - *Woolworths Ltd v Commissioner of Police LC12/2013* - was sound and that reasoning was applicable to the present case;
 - 4) although the proposed Dan Murphy's outlet would be well managed etc., the positioning of such an outlet in close proximity of a First Choice store would not cater for any consumer requirement in a manner which contributes to the proper development of the industry.

Submissions on behalf of the residential objectors

- 49 The basis of the objections lodged by 10 residents in the locality of the premises was the potential for the proposed alteration/redefinition of the premises to cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity and that the amenity, quiet or good order of the locality would in some other manner be lessened – section 74 (1)(g) of the Act. In particular, the potential for:
- 1) traffic congestion;
 - 2) noise from delivery trucks;
 - 3) lack of adequate parking for shopping centre customers;
 - 4) entertainment noise from the tavern;
 - 5) changes to the character of a residential area; and
 - 6) exposure of young children to alcohol sales.

- 50 Residential objector Mr Kevan McGill attended the hearing and presented in support of his initial submission that:
- 1) the proposed rear entrance to the tavern on the northern wall will have much lower noise reduction efficacy than the current fixed wall and small windows. Noise has been a significant problem from the adjoining function area in the past;
 - 2) there must be traffic calming in the car park as it will be a race track for late hours burn outs, the current parking is not connected that would enable hooning behaviour;
 - 3) there will be loss of mature trees, which will not be replicated and the reduction in sound barrier from loss of bush.
- 51 The common theme of the residential objections was concern for the loss of amenity and general disturbance that was likely to occur from the expected increase in traffic as a consequence of the size of the proposed alterations/redefinition of the premises and the effect of the re-branding of the BWS bottle shop as a Dan Murphy's large format liquor store.

Determination

- 52 This is an application under sections 77(4) and 68 of the Act to upgrade existing licensed premises – the Carine Glades Tavern, Duncraig.
- 53 The plans for the upgrade include a general internal refurbishment, consolidation of the kitchen area, structural changes to the building and a redesign and upgrade of the current BWS bottle shop to be re-branded as a Dan Murphy's (refer paragraphs 15 and 16 above).
- 54 It has been submitted by the applicant that the proposal is a multi-functional integration of different components and therefore should be considered as a single proposal rather than have the different components viewed in isolation.
- 55 The Commission agrees. However to do this it must look at each of the various aspects of the proposal in order to assess the impact of the proposal as a whole. In this application a very significant aspect is the redesign of the complex with a major change in configuration, product mix and emphasis particularly the twelvefold increase (100m² floor area to 1280 m²) in the liquor store component in a relatively small local shopping centre. This particular aspect of the proposal is obviously a major consideration in assessing whether the proposal as a whole is in the public interest.
- 56 When considering the public interest, consideration of both section 5 and section 38 of the Act is relevant when making the decision - *Palace Securities v Director of Liquor Licensing ((1992) 7 WAR 241 per Malcolm (CJ))*.

- 57 The primary objects of the Act as set out in section 5 are:
- (a) *to regulate the sale, supply and consumption of liquor;*
 - (b) *to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
 - (c) *to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the state.*
- 58 Section 38(4) of the Act sets out the matters that the licensing authority may have regard to in determining whether granting an application is in the public interest:
- (a) *the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and*
 - (b) *the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and*
 - (c) *whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and*
 - (d) *any other prescribed matter.*
- 59 Pursuant to section 33(1) of the Act the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest, the discretion being confined only by the scope and purpose of the act (*Palace Securities supra*). In *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384* EM Heenan J described the term “absolute discretion” as:
- The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA356 [6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61;*

(1989) 168 CLR 210, 216 and *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380, 400.

60 *The Interpretation Act 1984* at section 19 also provides that regard may be had to intrinsic material, including a Second Reading Speech to a Bill, when considering the meaning and intent of the written law.

61 During the Second reading Speech which accompanied the introduction of the *Liquor and Gaming Legislation Amendment Act 2006* (see Parliamentary debates, WA Parliament, vol 409, p6342) the then Minister for racing and Gaming, the Hon Mr Mark McGowan MLA stated:

“A key reform is the creation of the public interest test ... Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community... it should be noted, however, that the government does not consider the proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test.”

62 In meeting the applicant’s obligations in respect of establishing the public interest and satisfying section 5(1)(c) of the Act, regard must be had to the requirements of consumers of liquor and related services. The applicant must present supporting, (objective where possible) evidence at an appropriate level to satisfy the Commission. The Commission has previously considered that it is not sufficient for an applicant merely to express opinions and make assertions about perceived benefits of the application. Such opinions and assertions must be supported by an appropriate level of evidence.

(Refer Busswater Pty Ltd v Mr KV House and Mr LV Verhoog {LC 17/2010} at [36], Element WA Pty Ltd v Director of Liquor Licensing {LC32/2010} at [23]. Harold Thomas James Blakely v Director of Liquor Licensing [LC 44/2010] at [39] and Shallcross Investments Pty Ltd v Director of Liquor Licensing {LC 26/2010} at [18].

63 Therefore, whilst section 38(4) of the Act is directed to the potential negative impact of an application, these are not the only matters for consideration. In considering the public interest under section 38, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of an application will have on the community. (Refer *Woolworths Ltd v Director of Liquor Licensing (LC 34/2011) at para 38*)

64 The Carine Glades Tavern is located within a neighbourhood shopping precinct, the locality being described in the Caporn Services Report as “... predominantly residential, recreational, retail business and public open space.” (page 21, Item 6.4(a)).

- 65 The MGA Town Planner Report description of the locality is similar and states *“The site on the corner of Beach and Davillia Road is a neighbourhood centre providing a mix of uses. It contains a shopping centre with a small supermarket with 22 specialty stores, offices, a leisure centre, a child care centre and a professional centre containing medical suites, offices and veterinary rooms.”* (page 12 Item 5.9).
- 66 Therefore, the proposed size and nature of operation of the bottle shop component becomes a very significant factor in determining the public interest. The Commission has no concerns with the proposed alteration or redefinition in regard to the other components of the premises and in fact would have no concerns with an upgrade of the bottle shop, including a size increase. However, the issue germane to the nature of this application is the extent of that size increase, with the proposal providing for an expansion from 100 m² to approximately 1280 m², together with a Dan Murphy’s rebranding. The following data provided by the applicant demonstrates that a Dan Murphy’s rebranding will generally result in a significant increase in customer numbers:

Store	Average Weekly Customers before Dan Murphy’s Branding	Average Weekly Customers after Dan Murphy’s Branding	% Variance
Balga	1943	9424	+385%
Mandurah	2541	6335	+149%
Midland	4018	5551	+ 38%
Kelmscott	3967	7383	+ 86%

- 67 It is interesting to note that the application and subsequent applicant submissions make little, if any, reference to the term “destination liquor store” which is the description generally applied to the large format liquor stores like Dan Murphy’s and First Choice and is a description that has been applied almost without exception in respect of previous licensing applications for liquor stores branded as Dan Murphy’s.
- 68 The Commission is of the view that to not regard the proposed Carine Dan Murphy’s as a destination store would be a totally inconsistent approach with the existing positioning and operation of what is a national brand that attracts customers from a much wider market catchment area than the more traditional “convenience” liquor store. This is further reaffirmed in the data provided in paragraph 66 indicating the market reach of a Dan Murphy’s.
- 69 It therefore follows that in weighing and balancing the benefits and harm arising out of this application, the Commission’s consideration of this application will be based on factors relevant to a Dan Murphy’s destination liquor store being a significant component of the proposed Carine Glades Tavern proposed alteration or redefinition.

- 70 Whilst the Commission has, on a number of occasions, acknowledged that Dan Murphy's liquor outlets are well managed and have adequate, well documented and entrenched harm minimisation policies, the Commission must none the less consider the public interest aspects of such a development in this particular location.
- 71 Accordingly, in weighing and balancing the merits of this application the Commission is required to address the public interest issues as they relate to the particular aspects of the locality as described in paragraphs 64 and 65 above and will incorporate an assessment of:
- 1) the harm and ill-health that might be caused – section 38(4)(a) of the Act
 - 2) impact on the amenity of the locality – section 38(4)(b);
 - 3) whether offence, annoyance, disturbance or inconvenience might be caused to people who might reside or work in the vicinity- section 38(4)(c);
 - 4) the extent to which the proposal will cater for the requirement of consumers for liquor and related services, with regard to the proper development of the liquor industry - section 5(1)(c).

Harm or Ill-health – section 38(4)(a)

- 72 The applicant has submitted that the demographic evidence shows that the surrounding area lacks the presence of at-risk groups and other indicators which might cause concern.
- 73 The Police, whilst accepting that the existing levels of crime in Dun Craig are relatively low, submitted that there is already some degree of alcohol related offending in the area, including alcohol-related domestic assaults, and it does not follow that there is no risk of increased alcohol related harm associated with this application.
- 74 The Police submitted that there are a substantial number of people belonging to 'at risk' groups in the suburbs closest to the premises where thousands of families with children live. There was already evidence before the Commission that an increase in the availability of cheap liquor tends to lead to an increase in alcohol consumption, particularly among young people.
- 75 Evidence before the Commission indicates that the existence of a First Choice destination liquor store within 2km of the Carine premises and a Dan Murphy's liquor store some 4 km away (by road) at Balga is also a major factor when considering the harm or ill-health aspects of the application, as an approval of this application will result in a substantial increase in the liquor retailing footprint within the locality, with the potential to negatively impact on the level of harm or ill-health through the consumption of alcohol.
- 76 In this context it is relevant to note the following observation by higher courts:

Executive Director of Health v Lily Creek International Pty Ltd [2000] 22 WAR 510 at 515. Ipp J held that:

“ it was necessary to undertake a weighing and balancing exercise with the various objects of the act. Whilst harm minimisation was a primary object it was significant that the object was to minimise harm or ill-health, not to prevent harm or ill-health absolutely. The word minimise is consistent with the need to weigh and balance all of the relevant considerations”.

- 77 The Commission in *Ventorin Pty Ltd v Director of Liquor Licensing (LC04/2009)* observed that:

“A matter often overlooked in arguments for these sorts of permits is that the Commission must look at the whole of the Act to gain an understanding of the intention of the legislature. In terms of s 5(1)(c) of the Act, the first primary object of the legislation is:

- *to regulate the sale, supply and consumption of liquor.*

There is an expectation in the Act that the Commission will regulate the supply of liquor subject to the various provisions of the Act weighed up against the particular merits of the each application. The disposition of the Act, read as a whole, is to regulate.”

- 78 More recently in *Woolworths Ltd v Director of Liquor Licensing*, supra [at 41] Heenan J made the following point which the Commission has particularly regard to:

“...the Act as a whole establishes a regime for the control and regulation of liquor outlets and a restriction of them to those applicants and places which can meet the criteria of the Act. The Act does not proceed on the basis that there is a presumption in favour of a grant of a licence, rather the reverse, than an applicant must demonstrate that it is in the public interest that an application should succeed. Just because an application may be for a bigger, more efficient or more popular liquor outlet and that such an outlet may involve the development of the liquor industry does not entitle such an application to proceed. Wider considerations involving the public interest must also be assessed and determined.”

- 79 The significant increase in the retail liquor footprint for alcohol products in this locality that would result from the grant of this application does raise harm and ill-health concerns consistent with the established view of the Commission that it is not in the public interest to have large format destination liquor stores in close proximity, in this case a First Choice liquor store within 1.5 km and a Dan Murphy's liquor store at Balga within 4 km. In *Woolworths Limited v Commissioner of Police (LC 12/2013)*, the Commission had noted, *“The Commission is of the view that establishing a Dan Murphy's style liquor store in this location is not consistent with the proper development of the liquor industry, given that there are indeed other large outlets providing a diverse range of product through Dan Murphy's Currambine and Woolworths Joondalup as well as a number of other convenience liquor store outlets in the locality.”*

Impact on the Amenity of the Locality – section 38(4)(b)

- 80 The introduction of a Dan Murphy's liquor store of approximately 1280 m² to this location will undoubtedly generate a significant increase in weekly customers visiting the store (as exemplified with other stores rebranded Dan Murphy's- refer paragraph 67 above).
- 81 In fact, the Commission finds it hard to envisage that the applicant would make a business decision to invest in what is, by its very nature, a "destination liquor store", without expecting a substantial increase in the level of patronage when compared to the existing BWS liquor store. The applicant's own evidence suggests there will be a substantial increase in patronage based on experience at other locations rebranded as Dan Murphy's. There is, however, little if any probative evidence to support the requirement for a tenfold expansion of the liquor retailing capacity of the premises to meet requirements of consumers.
- 82 The Commission therefore must consider the implications in respect to the impact on the amenity of the location from what would be expected to be a substantial increase in weekly customer visitation to the Dan Murphy's liquor store.
- 83 Objections lodged by residents are consistent in their claim that the proposal will have a significant adverse impact on the amenity of the locality and will cause offence, annoyance, disturbance or inconvenience to people who reside in the area. The objections have generally been focussed on the Dan Murphy's bottle shop component of the proposal and to a large degree relate to increased traffic, both customers and delivery vehicles, and the increased noise associated with these activities.
- 84 Outside of current entertainment noise issues emanating from the tavern, and the possibility of this continuing, the objectors did not express any opposition to the proposed upgrade/redefinition of the tavern component of the premises.
- 85 In considering the impact on the amenity of the locality, the Commission has looked closely at the independent reports from Porter Consulting Engineers (Porter Report), Caporn Services (Caporn Report) and MGA Town Planners (MGA Report), particularly in regard to the level of traffic increase that may be associated with an approval of this application.
- 86 The Porter Report concludes the "The change in land use from function rooms and drive in bottle shop to a retail liquor outlet will not generate significant additional traffic". However, in the absence of "significant" being quantified, the Commission considered the traffic flow data provided in the report:
- 1) Item 5.2 of the Porter Report states that the net difference in traffic activity per day at the site as a consequence of the development proposal will be a daily increase of 399 vehicles, or around 2,700 per week.

- 2) Item 6.1 of the Porter Report, in regard to roadway capacity, show the current existing Average Weekday Traffic (AWT) for Beach Road, Davillia Road and Okley Road (combined) as 37,311 with the expected AWT as a consequence of the development proposal being 37,613. This represents an expected AWT increase of 202 vehicles, or around 1,400 per week.
- 87 Whilst there is some inconsistency in the relationship of the two sets of figures above , the fact remains that on balance of probabilities, they do represent what might be regarded as a considerable increase in traffic on the adjacent roadways, and a potential increase of 1400 - 2,700 vehicles per week entering this particular site. This is not considered by the Commission to be insignificant.
- 88 The Porter report concludes that the existing roadways with some modifications are adequate to cope with the projected increase in traffic and the Commission accepts that the author of the report is an expert in the accepted sense of the word, however, the Commission does also note that the *RTA NSW Guide to Traffic Generating Development (2002)* on which the Porter Report trip generation is based, does not have a specific category for destination liquor stores and significantly the Guide has declared that there is no data within its Land Use Traffic Generation section for Drive-in Liquor Stores.
- 89 Counsel for the applicant submitted that if the Commission was not satisfied with the evidence contained in the Porter report concerning traffic impact ,the applicant would obtain and submit a fresh report on the traffic issues. The Commission rejects this submission out of hand as it quite apparently subverts the express wording and clear intent of sec 25 (2) (c) of the Act.
- 90 Martin CJ in *Hancock v Director of Liquor Licensing [2008] WASC 224* stated at paragraph 30 "*Section 25(2c) provides that when conducting a review, the Commission is to have regard only to the material that was before the Director when making th decision*" and most importantly Martin CJ commented at paragraph 53 "*There is nothing in the nature of an appeal by way of rehearing which necessitates the grant of a power to receive further evidence.... The fact that the Parliament has restricted the materials available to the Commission for the purposes of such a rehearing to those which were before the Director, can be explained by a desire to avoid a situation in which parties to proceedings before the Director 'keep their powder dry' and save their evidence and arguments for presentation to the Commission on review.*"
- 91 The Commission also holds the view that allowing the expert report to be substituted could not be constituted to be an expansion of the material already before the Director. Relevantly, the Commission in *Shallcross Invetsments Pty Ltd v Director of Liquor Licensing (LC26/2010)* stated "*Notwithstanding the various provisions of the Act which provide for an informal and flexible liquor licensing system, the licensing authority can not run an application, objection or intervention on behalf of the individual parties because to do so would place the licensing authority in an unsustainable position.*"

- 92 In endeavouring to quantify the traffic impact on the site of the proposed development, the Commission takes an additional approach and draws on the actual customer increases that have been provided by the application (refer paragraph 66 above) with the Dan Murphy's rebranded stores in Balga, Mandurah, Midland and Kelmscott showing an average weekly customer increase of 7,481, 3,794, 1,533 and 3,416 respectively. This is an average increase across the four stores of 4,131 customers per week as a result of introducing the Dan Murphy's liquor store model.
- 93 Taking the average increase of 4,131 and reducing that by 25% (on a conservative basis of two people in some vehicles) would result in weekly increase of 3,098 vehicles. Even using the smallest historic figure relating to the Midland Dan Murphy's liquor store and reducing that by 25% would project a weekly increase of 1,150 vehicles.
- 94 It is acknowledged that all of these figures (paragraphs 86, 87, 92 and 93 above) are based on market forecasts, however, it would not be expected that the applicant would commit to such an investment without expecting to achieve a similar customer response recorded from the other rebranded Dan Murphy's stores referred to in the application. In the absence of more clear data the Commission is not persuaded that the impact of the proposal will not add significantly to the site vehicular traffic.
- 95 Further, the Porter Report states the following onsite observation, "*The dominant access places were the full movement junctions on Beach Road (2) and Davallia Road (4)*" (as identified on the provided aerial site photo).
- 96 The Porter Report also recommended modifications to the access places off Beach Road and Davallia Road at (2) and (4), specifically the provision of left and right turn exit lanes and the inclusion of appropriate signs and markings. These suggested modifications have been described as minor, however, no planning details or specifications have been provided by the applicant, nor any endorsement by the Local Authority or the Main Roads Department.
- 97 The Davallia Road (4) access place in particular is critical to vehicle movements into and out of the site and it is of concern to the Commission that the applicant has appropriately addressed, in either a technical or practical manner, if and how the Porter Report recommendations are to be implemented.
- 98 In addressing the location and locality, both the Caporn Report and the MGA Report have adopted the "specification of locality" to be the area within a 2 kilometre radius of the premises, however the Commission has previously been recorded (*Woolworths v Commissioner of Police LC 12/2013 p 32*) (supra) as having the view that the concept of locality in the context of an application for a destination liquor store means a much wider geographic area from which the Carine Dan Murphy's store might be expected to draw custom.

- 99 The Caporn Report provided a number of photographs (under section 6) depicting roadways and the Beach Road frontage of the site, however, no photographs have been supplied of, and limited reference has been made to the Davallia Road entry point which will be a key access/egress gateway for the proposed development (refer paragraphs 98 and 99 above).
- 100 As observed in Plate 1 of the MGA Report, the internal roadway from the Davallia Road (4) access point provides for one vehicle in each direction with car-park bays on the northern side requiring vehicles having to reverse over the roadway either on entry or exit of the bay.
- 101 Figure 2 of the MGA Report provides an aerial photo of the site that shows the narrow nature of the northern internal roadway and potential limitations on any Davallia Road access (4) modifications due to the close proximity of commercial buildings and established car parking either side.
- 102 Overall, the evidence before the Commission leads it to the conclusion that the approval of the application would result in an adverse impact on the amenity of the locality.

Whether Offence, Annoyance, Disturbance or Inconvenience Might be Caused – section 38(4)(c)

- 103 As examined in the paragraphs 95 to 102 above, a substantial increase in vehicle numbers generated by a Dan Murphy's destination store, will have an impact on traffic congestion within the site and more particularly at the access ways at Davallia Road (4) and Beach Road (2). This will also impact on parking availability and potentially generate more noise to the detriment of the locality and the adjacent residents, a number of whom have listed these issues as grounds for their objection.
- 104 As a consequence the Commission is satisfied that a significant degree of offence, annoyance, disturbance or inconvenience would result from approval of the application.

Catering for the Requirements of Consumers (section 5(1)(c))

- 105 The applicant has strongly emphasised the multi-functional integration of the proposed alteration, variation and redefinition of the Carine Glades Tavern and the consumer benefits that will result.
- 106 In particular, it has been emphasised that with the closure of the nearby Glengarry Tavern there is an increased consumer demand for the facilities proposed under this application.
- 104 The Commission finds it hard to reconcile with the fact that the proposed alterations actually reduce the capacity of the Carine Glades Tavern (including the function areas) from 630 persons to 569, a reduction of 61 persons.–It is

therefore difficult to accept the argument that this development will result in greater consumer benefits in relation to catering for tavern patrons seeking an alternative for the Glengarry Tavern as arguably the packaged liquor requirements of consumers has already been addressed in this locality with a First Choice Liquor Store - a destination liquor store situated approximately 1.2 km from the Carine site.

107 The applicant has submitted that the range of product lines and services of a Dan Murphy's is more extensive than a First Choice liquor store and this is not disputed, however, it is not considered that the degree of difference is such that an additional liquor store of such a scale in such close proximity will be in public interest and cater for the requirements of consumers with regard to the proper development of the liquor industry.

108 The submission that the integration the liquor store will:

"Provide a wide range of liquor products for on-site consumption by permitting staff members to obtain the product from the Dan Murphy's liquor outlet for consumption in the bar areas of the tavern on request from patrons".

lacks information on the practicalities of how this service might function e.g. is the tavern to allow BYO; what pricing structures will be applied between the two areas and will this be acceptable to patrons?

109 The applicant has also listed as a consumer benefit, the fact that the Dan Murphy's liquor store is to be adjacent to the Carine Glades Shopping Centre, which will provide a one-stop, or at least a single trip, shopping opportunity. There are 22 consumer witness statements and a petition containing 334 signatures in support of the application. These have been considered by the Commission and form part of the weighing and balancing exercise in the evaluation of the application. The Commission notes that a very high percentage of the witness statements refer specifically to the positive aspects of the tavern operation and in regard to packaged liquor purchases, many already shop at Dan Murphy's liquor stores, primarily at Balga and Currambine.

110 Generally the witness statements and petition signatories are directed in support of the integrated development proposal and as a high percentage are listed as residing some distance away, are not aware of or concerned by the implications for the locality as a consequence of the introduction of a large destination store as a key component of the application.

111 Ultimately, the consumer benefits that might arise from the juxtaposition of these two components need to be weighed against the fact that they are separated by some distance (the tavern being in-between); this is a neighbourhood shopping centre, not a major shopping complex and the large regional Warwick Grove Shopping Centre being within 2 km of the site.

Summary

112 Given the evidence in respect of direct correlation between increased harm and establishment of large destination liquor stores (refer para 32) the Commission has concerns as to the impact of three destination liquor stores in such close proximity will have on the harm or ill-health in the region through the substantial increase in retail space devoted to packaged liquor retailing, a position enshrined in the primary object of harm minimisation (section 5(1)(b)) and also reflected in the Government's intentions that were expressed in the Second Reading Speech of the Minister for Racing and Gaming when introducing the Liquor and Gaming Legislation amendment Bill 2006:

"It should be noted, however, that the Government does not consider proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test"

113 The Commission also has concerns as to the potential adverse impact on the amenity of the locality and that additional offence, annoyance, disturbance or inconvenience will be caused to people who reside in the vicinity and to those who frequent the site for other purposes e.g. shopping and/or utilising the commercial services available on the site.

114 In particular the Commission has not been persuaded that the capacities of the internal traffic roadways and the access places for Davallia Road and Beach Road to adequately accommodate the expected traffic increase resulting from the establishment of a Dan Murphy's liquor store, have been appropriately addressed by the applicant. The Commission is concerned that the Porter Report is based on *the RTA NSW Guide to Traffic Generating Development (2002)* which does not have a specific category for destination/large liquor stores. Also the applicant's evidence of increased consumer traffic at outlets rebranded Dan Murphy's, even on the basis of the roads being adequate in an engineering sense, do not satisfy the Commission that the increased traffic will not impact negatively on residents and centre users.

115 With regard to this development catering for the requirement of consumers, the Commission is of the view that these benefits are far outweighed by the fact that there will be an actual reduction in the patron capacity of the tavern, there is an established First Choice destination liquor store approximately 1.2 km away and a Dan Murphy's destination liquor store 4 km away, and the one shopping trip benefits to consumers in this locality are very limited.

116 Whilst the Commission holds that the renovation and refurbishment of the tavern and liquor store complex, per se, is in the public interest, it remains unconvinced that an tenfold increase in the liquor retailing floor space, which is very much more than refurbishment and upgrade but a major change in the character and nature of the area, is in the public interest. It gives greater weight to the issues of lost amenity in what is essentially a small neighbourhood

shopping centre, and the potential harm which outweigh the virtues of the planned development in its proposed form.

117 The Commission has weighed and balanced between the competing objects of the Act and has reached the conclusion that it is not in the public interest to approve this application.

118 The application is therefore refused.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

**JIM FREEMANTLE
CHAIRPERSON**